

THE SEPARATION OF POWERS AS A SAFEGUARD OF NATIONALISM

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INTRODUCTION

In his important article *Separation of Powers as a Safeguard of Federalism*,¹ Bradford Clark argues that the procedures set forth in the Constitution for creating supreme federal law were designed to, and do, protect the interests of the states. I argue here that Clark tells only half the story. The procedures set forth in the Constitution also operate, and were designed to operate, to safeguard nationalism. This fact does not require a rejection of Clark's claim that the Constitution's enumeration of specified procedures for federal lawmaking rules out procedures less protective of state interests.² Thus, it turns out that Clark's principal doctrinal claim is quite independent of his claim about federalism. But Clark's doctrinal story is also incomplete. It is equally true that the Constitution rules out the judiciary's imposition of additional obstacles to federal lawmaking. Moreover, recognition that the Founders' specification of procedures for federal lawmaking reflects a careful balance between federalism and nationalism calls into question a number of Clark's subsidiary doctrinal claims.

Clark argues that the Constitution's specification of three particular mechanisms for the creation of supreme federal law—enactment of statutes through the procedures of bicameralism and presentment, conclusion of treaties by the President with the consent of two-thirds

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1 Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

2 See *id.* at 1328–31.

of the Senate (and another country), and amendment of the Constitution through specified procedures—operates to protect the states from having their laws displaced by federal law.³ He argues that the Founders had the interests of the states in mind when they adopted these mechanisms.⁴ He notes, in particular, that each mechanism gives a prominent role to the Senate, which was regarded by the Founders as the chamber of the legislature that would be most solicitous of state interests.⁵ Because the Supremacy Clause lists these and only these mechanisms for enacting preemptive federal law, and because permitting other methods of displacing state law would circumvent the process the Founders carefully designed to protect the states, he concludes that the three procedures specified in the Constitution for creating supreme federal law are exclusive.⁶

Clark's argument rests on the idea that the procedures established by the Constitution for creating federal law are onerous. Rather than just requiring approval by the majority of a single representative body, the Constitution requires, for statutes, majorities in two differently constituted chambers, plus the approval of yet another differently constituted entity (the President), or a two-thirds majority in the two chambers without the third entity.⁷ Treaties require the approval of the President plus two-thirds of one of the chambers of the legislature.⁸ By making the running of this gauntlet⁹ a require-

3 See *id.* at 1331–46.

4 See *id.* at 1328–29 (“The Founders designed ‘the interior structure of the government’ not only to empower the political branches to check each other, but also to ensure that they would consider state prerogatives in performing their functions.”).

5 See *id.* at 1342–43 (“Federal lawmaking procedures . . . maximized state influence by singling out the Senate—the federal institution in which the states had the greatest influence—to participate in *all* forms of federal lawmaking.”).

6 See *id.* at 1338–39. Clark does not agree with Professors Wechsler and Choper that the Constitution entirely relegates state interests to the political safeguards of federalism. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–76 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954). Clark clearly does not maintain that the courts should decline to exercise judicial review of federal legislation to enforce the limits of congressional power. See Clark, *supra* note 1, at 1368; *cf.* CHOPER, *supra*, at 175–76 (noting that “the constitutional issue of whether federal action is beyond the authority of the central government and thus violates ‘states’ rights’ should be treated as nonjusticiable”). But he does maintain that the procedural requirements for enacting supreme federal law were among the Constitution’s mechanisms for protecting state interests. See Clark, *supra* note 1, at 1375.

7 See U.S. CONST. art. I, § 7, cl. 2.

8 See *id.* art. II, § 2, cl. 2.

ment of creating supreme federal law, the Constitution protects the states, whose laws would otherwise govern by default.¹⁰

Clark may be right that the procedures established by the Constitution for enacting supreme federal law were designed by the Founders to privilege states. It is also undoubtedly true that, in the beginning, the consequence of a failure to run this gauntlet successfully was that state law would continue to govern. (I put to one side for the moment the possibility that the Founders viewed the powers enumerated in the Constitution as belonging exclusively to the federal government so that state law would be preempted even without conflicting federal law.) Nevertheless, Clark's claim seems mistaken in at least two respects. First, the gauntlet he describes does not invariably operate to protect states from having their laws displaced. Instead it sometimes hinders the devolution of legislative power to the states. Rather than protect state interests, it privileges the legal status quo—whether that status quo be state law or federal. Presumably, Clark's argument regarding the exclusivity of the procedures specified in the Constitution for creating supreme federal law would not vary depending on whether the gauntlet operated to protect state law from displacement or hinder the devolution of power to the states. It follows that Clark's argument does not really rest on the point that he makes in the title of his article. The specified procedures for creating federal law are exclusive whether or not they operate as a safeguard of federalism.

Second, the gauntlet operates to privilege the status quo only insofar as it is indeed onerous. Yet, in an important respect, the salient point about the procedures established by the Constitution for creating supreme federal law is not that they are hard, but that they are easy. Of course, whether the procedures are easy or hard depends on the procedures one is comparing them to. While one might imagine alternative procedures that would have made creation of supreme federal law easier, a more pertinent point of comparison would be the system the Constitution replaced. Under the Articles of Confederation, it was quite difficult to displace state law.¹¹ That was indeed one of the key problems with those Articles. The procedures set up by the Constitution for creating supreme federal law were adopted to make it *easier* to displace state law.

9 I borrow that gauntlet metaphor from Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 25.

10 See Clark, *supra* note 1, at 1339.

11 See *infra* notes 24–34 and accompanying text.

Of course, the Founders set up a system for creating supreme federal law that they regarded as neither too easy nor too hard. They struck a balance between federalism and nationalism. Thus, while one might agree with Clark that the enumeration of a particular set of procedures for creating supreme federal law makes it illegitimate to permit the creation of supreme federal law through less onerous procedures, it is equally true that the enumeration of certain procedures makes it illegitimate to engraft additional requirements for the creation of such law or to subtract from the preemptive force of federal law once made. Accepting easier procedures circumvents requirements imposed to protect the status quo; engrafting additional requirements defeats the intent not to make the enactment of supreme federal law too difficult. Though the proposition seems unexceptional, the Supreme Court appears to have overlooked it in its recent decision in *Medellín v. Texas*.¹²

More broadly, the insight that the constitutionally specified procedures reflect a balance between federalism and nationalism (or continuity and change) calls into question some of the doctrinal implications that Clark draws from the constitutional structure. From the idea that the requirements of bicameralism and presentment were adopted to protect states from having their laws displaced, Clark derives rules for construing legislation that has successfully run the supreme law gauntlet. He argues that, unless the two houses of Congress and the President clearly manifested their decision to displace state law, federal law should be construed to leave state law standing.¹³ On this basis, he maintains that the constitutional structure supports the presumption against preemption.¹⁴ I argue in Part II that, if the constitutional structure reflects a careful balance between federalism and nationalism, that structure does not support always resolving ambiguities in favor of the states.

I. THE "SUPREME LAW" GAUNTLET SOMETIMES SAFEGUARDS NATIONALISM

Although the gauntlet that proposed legislation must run before it becomes supreme federal law may have operated initially to protect state law from being displaced, it does not always operate that way. Assume that a bill establishing a federal contract law successfully runs

12 128 S. Ct. 1346 (2008).

13 See Clark, *supra* note 1, at 1331.

14 See *id.* at 1338.

that gauntlet and becomes law.¹⁵ Because the process for repealing a federal law is the same as for creating it in the first place, the requirements of bicameralism and presentment now make it difficult to restore legislative power over contracts to the states. Whether the gauntlet at any given moment operates primarily as a safeguard of federalism or of nationalism depends on the extent to which federal law has already come to predominate over state law, and whether the federal lawmakers are inclined to federalize further or instead to devolve power to the states. We may already be at the point where federal law has come to predominate.¹⁶ In any event, once a federal law has been enacted, the gauntlet operates to protect the continued operation of that law, not to safeguard the continued application of state law.

Clark argues that the role given to the Senate in making supreme federal law shows a solicitude for state interests, since the Senate was regarded as the protector of state interests.¹⁷ But enactment of a statute also requires the approval of the House of Representatives and the President (or two-thirds of both houses without the President).¹⁸ The *repeal* of a federal statute thus requires the approval of the chamber *less* solicitous of state interests, contradicting any claim that the constitutional structure consistently operates in favor of the states.

The claim that the supreme law gauntlet safeguards federalism might have been plausible had our Constitution made it easier to repeal a federal law than to enact one. With respect to statutes, however, that is clearly not the case. With respect to treaties, the issue is less settled. When Senator Goldwater challenged President Carter's termination of a treaty with Taiwan without the consent of the Senate, he argued, based on an analogy to statutes, that termination of treaties requires the approval of the same entities that make treaties.¹⁹ The Supreme Court dismissed without a majority rationale. A plural-

15 Assume also that such a law would not otherwise exceed legislative power under the Constitution. Clark's structural protection for federalism serves to supplement, not replace, judicial review for conformity with Article I, Section 8. In any event, a federal contract law would pass muster under *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Gonzales v. Raich*, 545 U.S. 1 (2005), as it would regulate commercial activity.

16 See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 495 (5th ed. 2003) [hereinafter HART & WECHSLER] (“[A]t present federal law appears to be more primary than interstitial in numerous areas.”).

17 See Clark, *supra* note 1, at 1344.

18 U.S. CONST. art. I, § 7, cl. 2.

19 See *Goldwater v. Carter*, 481 F. Supp. 949, 950 (D.D.C. 1979) (“Plaintiffs seek to have this Court declare that the termination of the 1954 Treaty cannot be legally accomplished . . . without the advice and consent of the United States Senate or the

ity regarded the issue as a political question.²⁰ If the question is indeed political, then the question remains open, and the courts will not give us an answer. More recent presidential treaty terminations, however, have gone unchallenged.²¹ Thus, it may be that our Constitution effectively permits the President to terminate a treaty without the consent of the Senate.

Still, the termination of a treaty could conceivably leave in place a federal statute, or even another treaty, rather than state law. If the Constitution were structured to safeguard the operation of state law, then it would make repeal of a federal statute or treaty easier when it resulted in devolution of power to the states than when it did not. No one claims that our Constitution establishes such a rule.

The Constitution might also plausibly be understood to protect state interests if all federal laws were operative only for a limited period of time. Such a regime would require the federal government to run the gauntlet successively in order to retain a preemptive federal law. But, although federal laws may include sunset provisions, there is nothing in the Constitution that requires them.

In sum, to the extent that the constitutional requirements for law-making make it difficult to enact a federal law, they safeguard the status quo, not federalism. At the start of our history, to safeguard the

approval of both houses of Congress.”), *rev'd*, 617 F.2d 697 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979).

20 *Goldwater*, 444 U.S. at 1002–05 (Rehnquist, J., concurring). In a concurring opinion, Justice Powell described the issue as not ripe for judicial review because Congress had not confronted the President regarding the termination. “The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.” *Id.* at 997 (Powell, J., concurring). Justice Blackmun, joined by Justice White, dissented in part. He agreed to grant the petition for certiorari but would have also set the case for oral argument and given the issues plenary consideration. *See id.* at 1006 (Blackmun, J., dissenting in part). Justice Brennan argued that the President had power to terminate the treaty at issue. Noting that “the power to recognize, and withdraw recognition from, foreign regimes” is committed to the President alone, Justice Brennan viewed the treaty termination as a “necessary incident” to the executive’s recognition of the People’s Republic of China. *See id.* at 1007 (Brennan, J., dissenting). The treaty was based on the “now-abandoned view” that the Taiwan government was China’s only legitimate regime. *See id.*

21 President Bush’s recent termination of the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, which agreed to the compulsory jurisdiction of the International Court of Justice over VCCR disputes, *id.* art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488, appears to have generated little constitutional controversy. The United States withdrew from the protocol on March 7, 2005. *See Philip V. Tisne, The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in U.S. Courts*, 29 FORDHAM INT’L L.J. 865, 865 n.3 (2006).

status quo was to safeguard federalism. But the two goals are not invariably coextensive. If the Founders did believe, as Clark argues, that the rules they were adopting would operate to protect state prerogatives, they were only partly right. If we were to deduce the Constitution's structure and purpose from its bare terms, we would have to conclude that, insofar as they are onerous, the procedures for enacting supreme federal law operate to safeguard the status quo rather than federalism.

Clark does not argue that, in light of the Founders' intent to protect federalism, the Constitution should be read to make it easier to repeal federal laws than to enact them in the first place. Indeed, I suspect that Clark would not revise his claim about the exclusivity of the Constitution's lawmaking procedures in the slightest in response to the reality that those procedures sometimes operate to entrench federal law and hinder a devolution of power to the states. Thus, if he is right about the Founders' reasons for adopting those procedures, then those reasons ultimately do not drive his doctrinal conclusions. His conclusions would be the same had the Founders adopted these procedures to safeguard the status quo instead. His structural analysis is based on the Constitution's text rather than the Founders' purposes in adopting that text.

In my view, Clark would be right to reject constitutional analysis based on the Founders' purposes in designing the Constitution's structure, as distinguished from the actual structure of the document they adopted as revealed in its text. An originalism that relies on purposes shorn from text suffers from the same problems as an originalism that relies on the Founders' expected applications of the provisions they adopted.²² The Founders (those who spoke up, anyway) might well have believed that the bicameralism and presentment requirements would operate to safeguard federalism. If so, their belief was correct for much of our history. They were mistaken, however, if they believed those requirements would always operate to safeguard federalism. Today they will often have the opposite effect.

The Founders' mistaken expectation that Article I, Section 7 would protect federalism, as distinguished from the status quo, should carry no doctrinal weight. It provides no support, for example, for "insist[ing] upon a 'clear statement' before . . . constru[ing] a federal

22 For a critique of this approach, see Jack M. Balkin, *Abortion and Original Meaning* 24 CONST. COMMENT. 291, 295–303 (2007); see also Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)* 384 (Univ. of Tex. Sch. of Law, Pub. Law & Legal Theory Research Paper No. 117, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=957630 (asserting that almost nobody embraces the original expected application approach).

statute to interfere with state governmental functions.”²³ On the other hand, recognition that the difficulty of making federal law sometimes operates to safeguard nationalism does not, by itself, require rejection of Clark’s claim about the exclusivity of those procedures. The critiques in Part II have broader implications.

II. THE CONSTITUTION FACILITATES THE DISPLACEMENT OF STATE LAW

Part I established that, to the extent the Constitution makes the enactment of federal law difficult, it safeguards the status quo, not necessarily federalism. Part II shows that the Constitution was not just designed to make the enactment of supreme federal law difficult. In an important sense, it was also designed to make the enactment of federal law easy. The Constitution makes federal lawmaking more difficult than it would have been under other conceivable schemes, such as parliamentary systems like Britain’s. But it also makes federal lawmaking *easier* than it would have been under other conceivable schemes. Most relevantly, the Constitution makes displacement of state law easier than it was under the regime it replaced.

Under the Articles of Confederation, the legislative power of Congress extended to far fewer matters than under Article I, Section 8 of the Constitution.²⁴ In addition, Congress had the power to requisition from the states the funds necessary to conduct the business of the Confederation, according to a set formula,²⁵ and to conclude treaties,

23 Clark, *supra* note 1, at 1425 (describing the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452, 464–70 (1991)).

24 The legislative powers of Congress consisted of the power of “establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated[, and] granting letters of marque and reprisal in times of peace” as well as

regulating the alloy and value of coin struck by their own authority, or by that of the respective States—fixing the standards of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office . . . making rules for the government and regulation of the said land and naval forces, and directing their operations.

ARTICLES OF CONFEDERATION art. IX (U.S. 1781).

25 *See id.*

subject to certain limits.²⁶ Congressional action on treaties and most other “legislative” matters specified in the Articles required the agreement of nine of the thirteen states.²⁷ Congressional action on matters falling outside Congress’ enumerated powers would have required amendment of the Articles, which required the consent of all thirteen states.²⁸ Moreover, acts of Congress operated on the states as corporate bodies rather than the individuals within the states.²⁹ Thus, displacement of state law also required an act of the state legislatures.

The weakness of the national government under the Articles was, of course, the principal animating cause of the Founders’ decision to write a new Constitution.³⁰ The Founders’ main purpose was to strengthen the national government. Perhaps their most important decision was to empower the national government to act directly upon individuals, giving the federal legislature a true legislative power for the first time. With respect to matters within Congress’ enumerated powers, legislative action became easier insofar as the Constitution required a simple majority, as opposed to the supermajority required by the Articles for congressional action on most enumerated mat-

26 *See id.* (providing that “no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever”).

27 *See id.*

28 *See id.* art. XIII.

29 *See id.* (providing that “[e]very State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them”); *see also* *New York v. United States*, 505 U.S. 144, 163 (1992) (“Under the Articles of Confederation, Congress lacked the authority in most respects to govern the people directly. In practice, Congress ‘could not directly tax or legislate upon individuals; it had no explicit legislative or governmental power to make binding law enforceable as such.’” (quoting Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1447 (1987))).

30 *See* James McHenry, Notes on the Constitutional Convention (May 29, 1787), in 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 24, 24–27 (Max Farrand ed., rev. ed. 1937) [hereinafter *FARRAND’S RECORDS*] (enumerating the problems of the Articles of Confederation that the Constitutional Convention aimed to correct, including the ability of state governments to encroach on national power); *see also* James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 *FARRAND’S RECORDS*, *supra*, at 25, 27 (“The necessity of a general Govt. proceeds from the propensity of the States to pursue their particular interests in opposition to the general interest. This propensity will continue to disturb the system, unless effectually controuled.”); James Madison, Notes on the Constitutional Convention (June 8, 1787), in *FARRAND’S RECORDS*, *supra*, at 164, 167 (“To correct [the Articles of Confederation’s] vices is the business of this convention. One of its vices is the want of an effectual controul in the whole over its parts.”).

ters.³¹ The Constitution did add to the formal requirements for legislation on enumerated matters by establishing a bicameral legislature and requiring the approval of the President.³² But Congress' single chamber under the Articles was structured like the Senate, as originally established by the Constitution, with legislators chosen by the state legislatures.³³ The single legislative chamber under the Articles thus resembled the house of Congress designed to be most solicitous of state interests. In the light of other differences, it is indisputable that the Constitution made displacement of state law easier overall than under the Articles. First, the expansion of the proper subjects of federal legislation meant that, for many of Congress' most important powers under the Constitution (such as the power to regulate commerce), Article I, Section 7 replaced an effective requirement of unanimity.³⁴ Second, the power of Congress to make its legislation operative directly on individuals dispensed with the need for action by the state legislatures. Finally, by creating a judicial mechanism for enforcing such legislation, the Constitution significantly increased the efficacy of any federal decision to displace state law.

Of course, the Founders did not want to make it too easy to displace state law. But neither did they want to make it too hard. The Founders sought to strike a balance. They selected a set of procedures that they regarded as making it neither too easy nor too hard to do so. For example, although they viewed the Senate as, to some extent, a protector of state interests, they also rejected proposals that would have tied the Senate too directly to state legislatures.³⁵

31 Compare ARTICLES OF CONFEDERATION art. IX (U.S. 1781) ("The United States assembled in Congress shall never [exercise most enumerated powers] unless nine States assent to the same"), with U.S. CONST. art. I, § 8 (enumerating the powers of Congress without imposing a supermajority voting requirement).

32 The Articles established a unicameral Congress, see ARTICLES OF CONFEDERATION art. V (U.S. 1781), and no separate executive branch.

33 See *id.*

34 Compare ARTICLES OF CONFEDERATION art. IX (U.S. 1781) (enumerating limited congressional powers, see *supra* note 24), and *id.* art. XIII ("[N]or shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State"), with U.S. CONST. art. I, § 8 (enumerating the powers of Congress under the Constitution, including the power to "to regulate Commerce" and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

35 On June 26, 1787, delegates to the Constitutional Convention dismissed proposals that would have tied senators more directly to the states they represented. Oliver Ellsworth proposed that states, rather than the nation, should pay their senators. See James Madison, Notes on the Constitutional Convention (June 26, 1787), in 1

If the Constitution reflects a careful balance of federalism and nationalism, then, just as it would be illegitimate for courts to recognize a category of federal law created through procedures less onerous than those contemplated by the Constitution, it would also be illegitimate for the courts to impose obstacles to federal lawmaking not contemplated in the Constitution. Although the proposition seems straightforward, the case law does not always accord with it. In Part II.A, I discuss one recent Supreme Court decision that appears to violate the principle that courts may not add to the Constitution's requirements for making supreme federal law, or subtract from the preemptive force of such law once made. In Part II.B, I consider how some of Clark's doctrinal claims fare when account is taken of the idea that the Constitution's lawmaking provisions reflect a balance between federalist and nationalist objectives.

A. *Non-Self-Execution of Treaties as Illegitimate Imposition of Additional Obstacles to Supreme Federal Lawmaking*

If the constitutional requirements for creating supreme federal law reflect a balance between federalism and nationalism, then it is just as illegitimate for the courts to impose additional obstacles to federal lawmaking, or to subtract from the preemptive force of supreme federal law once made, as it is for them to make it easier to create such law or to add to its preemptive force. Yet, with respect to treaties, the Supreme Court appears to have imposed obstacles to supreme federal lawmaking not found in the Constitution. Despite the Supremacy Clause's declaration that "all Treaties" are the "supreme Law of the Land,"³⁶ the Court's recent decision in *Medellín* maintains that only some treaties have that status.³⁷ Moreover, the majority in *Medellín* appears to have endorsed an approach under which very few

FARRAND'S RECORDS, *supra* note 30, at 421, 427. James Madison argued against the proposal, noting that it would make the Senate "the mere Agents & Advocates of State interests & views, instead of being the impartial umpires & Guardians of justice and general Good." *Id.* at 428. Madison's vision of impartial, national senators prevailed in this regard when Ellsworth's motion failed. *See id.* Similarly, General Charles Pinckney argued that senators should serve only four year terms, so that they would not "settle in the State where they exercised their functions; and would in a little time be rather the representatives of that than of the State appoint'g them." *Id.* at 421. For an analysis holding that the rejection of these proposals meant "[t]he Senate itself would embody the mixed character of the Constitution," see JACK N. RAKOVE, ORIGINAL MEANINGS 170–71 (1996).

36 U.S. CONST. art. VI., cl. 2.

37 *Medellín v. Texas*, 128 S. Ct. 1346, 1356–57 n.2 (2008).

treaties will have the force of domestic law, let alone supreme federal law.³⁸

Treaties are contracts between nations imposing obligations that are binding on nations as a matter of international law.³⁹ General international law does not dictate the status of treaties under the domestic law of any given state.⁴⁰ To say that a treaty has the force of law in a nation is to assign the responsibility for achieving compliance with the treaty among various types of officials of the nation—legislative, executive, and judicial.⁴¹ Because different nations assign the responsibilities for law enforcement differently among different sorts of officials, if international law did specify that a treaty should have the force of domestic law the consequence would be to assign responsibilities to different sorts of officials in different nations.⁴² For this reason, international law generally insists only that states comply with their international law obligations (including those having their source in a treaty).⁴³ It generally leaves it to the domestic law of each nation to determine the status as domestic law of the nation's obligations under international law.⁴⁴ This is the meaning of the idea that international law is generally concerned with ends and not means.⁴⁵

In some countries, treaties never have the force of domestic law until implemented by the legislature. This is the case in the United Kingdom.⁴⁶ Under the (unwritten) constitution of that country, trea-

38 See *id.* at 1356–67.

39 See 1 OPPENHEIM'S INTERNATIONAL LAW § 582, at 1199–203 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

40 See *id.* § 21, at 82.

41 See *id.* at 82–86.

42 See *id.*

43 See *id.* at 83.

44 See *id.*

45 See, e.g., IAN BROWNLIE, STATE RESPONSIBILITY: PART I, at 241 (1983); 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 39, § 21, at 82–83 (“From the standpoint of international law states are generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations; the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means of giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices.”); Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371, 375–82 (1999).

46 See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Presumption of Self Execution*, 122 HARV. L. REV. (forthcoming 2008) (manuscript at 15–16), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118063.

ties are made by the Crown, but the making of domestic law requires the assent of Parliament.⁴⁷ That is the rule that the United States would have inherited had the Founders not adopted a different one.⁴⁸ But the Founders did adopt a different rule, which they enshrined in the Supremacy Clause's declaration that "all Treaties" are the "supreme Law of the Land."⁴⁹ The Constitution takes the international obligations created by our treaties and gives them the force of domestic law, thus implicitly directing all law-applying officials to apply them as they do other forms of law. This includes executive officials, who are obligated to "take Care that the Laws be faithfully executed,"⁵⁰ and judges, whose job is to decide cases in accordance with the law and, in the process, to "say what the law is."⁵¹ With respect to state judges, the Supremacy Clause does not leave the matter to implication. It expressly directs them to apply treaties, notwithstanding anything in the constitutions or laws of the states.⁵²

Over the years a distinction has developed between treaties that are self-executing and treaties that are not. Non-self-executing treaties are not enforceable in the courts without prior legislative implementation.⁵³ Because such treaties appear to lack the usual attributes of supreme federal law, some courts and commentators have suggested that such treaties lack the force of domestic law. That view, however, is contradicted by the plain text of the Supremacy Clause. In past work, I have attempted to reconcile the concept of a non-self-executing treaty with the Supremacy Clause's declaration that "all Treaties" are the "supreme Law of the Land."⁵⁴ I have argued that the term non-self-executing has been used to describe treaties that are not enforceable in court for a variety of reasons compatible (to varying degrees) with the Supremacy Clause's designation of treaties as supreme federal law.⁵⁵

Some non-self-executing treaties are not judicially enforceable because they purport to accomplish what, under our constitutional

47 *See id.*

48 *See id.* (manuscript at 16–19).

49 U.S. CONST. art. VI, cl. 2. For a discussion of the Framers' reasons for taking this step and the ramifications of this decision, see Vázquez, *supra* note 46 (manuscript at 19–28).

50 U.S. CONST. art. II, § 3.

51 *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

52 U.S. CONST. art. VI, cl. 2.

53 *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995).

54 U.S. CONST. art. VI, cl. 2.

55 *See* Vázquez, *supra* note 53, at 722–23.

system, can be accomplished only by statute.⁵⁶ Examples include the appropriation of money⁵⁷ and the criminalization of conduct.⁵⁸ To the extent that they purport to accomplish what may only be done by statute, they are unconstitutional. They are non-self-executing by operation of the Constitution because they impose international obligations that, under our Constitution, may be fulfilled only through legislation.

Other non-self-executing treaties are not judicially enforceable because they raise nonjusticiable questions.⁵⁹ Like statutes and constitutional provisions that raise political questions, these treaties impose obligations requiring judgments clearly for nonjudicial discretion. Treaties falling into this category include those that call on the parties to use their best efforts to accomplish certain ends,⁶⁰ or those that are otherwise too vague for judicial enforcement.⁶¹ Treaties in this cate-

56 See *id.* at 718–19.

57 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (1987). But see Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 775, 778, 780–81 (1988).

58 See *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) (“Treaty regulations that penalize individuals . . . are generally considered to require domestic legislation before they are given any effect.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. i (1987); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 676 n.239 (1986). But see Paust, *supra* note 57, at 775, 780. In *The Over the Top*, 5 F.2d 838 (D. Conn. 1925), the court said that “[i]t is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing.” *Id.* at 845.

59 See Vázquez, *supra* note 53, at 710–18.

60 See *INS v. Stevic*, 467 U.S. 407, 428–29 n.22 (1984) (describing Article 34 of the Refugee Convention as “precatory and not self-executing”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (“Articles 1 and 2 [of the United Nations Charter] contain general ‘purposes and principles,’ some of which state mere aspirations and none of which can sensibly be thought to have been intended to be judicially enforceable at the behest of individuals.”); *Sei Fujii v. State*, 242 P.2d 617, 619 n.2 (Cal. 1952) (en banc) (holding that a United Nations Charter provision requiring states to “promot[e] and encourag[e] respect for human rights” was not self-executing).

61 See *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (holding a Security Council Resolution not self-executing because it “does not provide specific standards”); *Saipan v. U.S. Dep’t of Interior*, 502 F.2d 90, 99 (9th Cir. 1974) (asking whether the Trusteeship Agreement over the Pacific Islands was “too vague for judicial enforcement”); *Greenpeace USA v. Stone*, 748 F. Supp. 749, 767 (D. Haw. 1990) (citing the lack of “standards or procedures to judicially enforce the treaty”); *Am. Baptist Churches in the U.S.A. v. Meese*, 712 F. Supp. 756, 770 (S.D. Cal. 1989) (holding that Article 1 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War was not self-executing because “[t]he language used does not impose any specific obligations on the signatory nations,” and therefore did not provide “any intelligible guidelines for judicial enforcement”).

gory are the law of the land, but they are not judicially enforceable because of a constitutional disability of the courts. In this respect, they do not differ from statutory and constitutional provisions raising nonjusticiable questions.⁶²

Still other treaties have been described as non-self-executing because they do not confer a private right of action.⁶³ Such treaties are not, for that reason, entirely unenforceable in court.⁶⁴ They may be enforceable defensively or through rights of action having their basis in other laws.⁶⁵ In the absence of another basis for the right of action, a party seeking affirmative relief on the basis of a treaty that is non-self-executing in this sense may find himself unable to prevail.⁶⁶ Still, a treaty that is non-self-executing in this sense is the supreme law of the land, just as a statute that does not confer a private right of action is.⁶⁷

The fourth category of non-self-executing treaty is the most difficult to reconcile with the constitutional text. Treaties in this category are non-self-executing because of what the treaty itself has to say about the need for legislative implementation. The Supreme Court recognized this category in *Foster v. Neilson*,⁶⁸ which involved a treaty with Spain providing that the United States “shall ratify and confirm” certain grants of land that the Spanish crown had made to its subjects before ceding sovereignty to the United States.⁶⁹ The Court read this language to contemplate future acts of legislation ratifying and confirming the grants. It said that the treaty would have been self-executing if it had provided that the grants “shall be valid” or that they were “hereby” confirmed.⁷⁰ Because the treaty said instead that the grants “shall be ratified and confirmed,” it was “addresse[d]” to the political branches and had to be executed by those branches before it could be given effect by the courts.⁷¹

Because treaties that are non-self-executing in this sense lack most of the usual attributes of law, it has been said that such treaties impose international obligations that do not have the force of domes-

62 See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

63 See Vázquez, *supra* note 53, at 719–22.

64 See *id.* at 719.

65 See *id.* at 719–20.

66 See *id.* at 720.

67 See *id.*

68 27 U.S. (2 Pet.) 253, 314 (1829).

69 See *id.* at 253–54; Carlos M. Vázquez, *Foster v. Neilson and United States v. Percheman: Judicial Enforcement of Treaties*, in *INTERNATIONAL LAW STORIES* 151, 152–58 (John E. Noyes et al. eds., 2007).

70 *Foster*, 27 U.S. (2 Pet.) at 314.

71 *Id.* at 314–15.

tic law.⁷² This idea appears to be based on a negative inference from the Supreme Court's dictum in *Foster* that treaties are the equivalent of an act of the legislature if they are self-executing.⁷³ However, the claim that non-self-executing treaties impose international obligations that lack the force of domestic law is directly contradicted by the text of the Supremacy Clause, which establishes that "all Treaties" are the "supreme Law of the Land."⁷⁴

Although in tension with the Supremacy Clause, the *Foster* category of non-self-executing treaties might have been reconciled with that Clause on the ground that such treaties are by their terms "addressed to" Congress. Treaties that are unconstitutional or nonjusticiable are addressed to Congress by virtue of the Constitution. *Foster*-type non-self-executing treaties are "addressed to" Congress by virtue of the treaty itself.⁷⁵ *Foster*, on this view, recognizes that the parties to a treaty can render it non-self-executing by formulating the obligation as one addressed to the legislature. Such treaties are analogous to statutes that instruct an executive agency to enact regulations on a

72 The statement that non-self-executing treaties lack the force of domestic law has been repeated (without analysis) in lower-court cases, articles, and books. For a small sampling, see *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 162 n.21 (2d Cir. 2007) ("Non-self-executing treaties do not become effective as domestic law until implementing legislation is enacted."); *Payne-Barahona v. Gonzáles*, 474 F.3d 1, 3 (1st Cir. 2007) ("The treaties . . . have been held to be non-self executing They thus do not have the force of domestic law."); *Fund for Animals, Inc., v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring) ("Like statutes, self-executing treaties automatically become part of domestic American law. By contrast, non-self-executing treaties have no effect or force as a matter of domestic law (though Congress may choose to incorporate parts of non-self-executing treaties into domestic law by enacting implementing statutes)."); *Renkel v. United States*, 456 F.3d 640, 643 (6th Cir. 2006) ("'[N]on-self-executing' treaties do require domestic legislation to have the force of law."); SUE DAVIS, CORWIN AND PELTASON'S UNDERSTANDING THE CONSTITUTION 198 (17th ed. 2008); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 198–209 (2d ed. 1996); Alona E. Evans, *Some Aspects of the Problem of Self-Executing Treaties*, 45 PROC. AM. SOC'Y INT'L L. 66, 68 (1951); Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 831 (1994). Compare *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (concluding that because "the [Warsaw] Convention is a self-executing treaty," "no domestic legislation is required to give [it] the force of law in the United States"), with *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) (suggesting that a treaty's self-executing character and its having "the force of law" are separate questions).

73 See *Foster*, 27 U.S. (2 Pet.) at 314; cf. *Medellín v. Texas*, 128 S. Ct. 1346, 1356, 1362–63 (2008) (citing *Foster* for the proposition that non-self-executing treaties lack the force of domestic law).

74 U.S. CONST. art. VI, cl. 2.

75 For elaboration of this thesis, see Vázquez, *supra* note 46 (manuscript at 38–39).

given subject according to specified guidelines. Until the agency enacts the regulations, the contemplated beneficiaries of the regulations would not be able to maintain a suit based on the contemplated regulations. The statute is “addressed to” the executive branch, and thus the executive must execute it before individuals may rely on it in court. (The difference between a statute addressed to the executive and a treaty addressed to Congress—and the reason the latter is somewhat more difficult to square with the Supremacy Clause—is that, in the former case, it may be possible for an individual to come into court to require the executive to pass the regulations,⁷⁶ or to challenge the regulations as contrary to the statute.⁷⁷ In the case of a treaty “addressed to” the legislature, there is no possibility of maintaining an action in court to force Congress to enact the required legislation, or to challenge an implementing statute as contrary to the treaty.⁷⁸)

If *Foster*-type non-self-execution is to be reconciled with the Supremacy Clause on the ground that the treaty itself contemplates implementing legislation, there obviously must be evidence in the treaty itself that the parties contemplated the enactment of implementing legislation. In the absence of such evidence, the Supremacy Clause by its terms would obligate judges to give effect to the treaty. (When a court gives effect to a treaty because it is instructed to do so by a statute, it is applying the statute, not the treaty.) On this basis, I have argued that the Supremacy Clause should be understood to establish a presumption that treaties are self-executing.⁷⁹

In its recent decision in *Medellín*, the Supreme Court obviated any attempt to reconcile the concept of a non-self-executing treaty with the constitutional text by, for the first time, endorsing the view

76 See Government in the Sunshine Act, 5 U.S.C. § 552b(g) (2000) (“Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein.”); *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1038–39 (1985) (challenging the Council of Economic Advisers for not promulgating regulations under the Sunshine Act).

77 See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

78 Except, perhaps, if implementation of the treaty is the sole constitutional basis for the statute and the claim is that the statute goes beyond what the treaty authorizes. Cf. *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920) (holding that statutes implementing treaties may be valid even if they would not otherwise fall within the federal legislative power under Article I).

79 See Vázquez, *supra* note 46.

that a non-self-executing treaty simply lacks the force of domestic law.⁸⁰ In so doing, the Court has placed an entire category of treaties of the United States—treaties that are valid and in force and impose obligations as a matter of international law—beyond the scope of the Supremacy Clause, directly contradicting that Clause’s text, which gives domestic legal force to all treaties. Treaties in this category will have the preemptive force of federal law only if they run through two of the three gauntlets specified in the Constitution for creating supreme federal law, rather than the usual one.

Requiring treaties to run through two gauntlets might be defensible if there were affirmative evidence that the parties intended that the obligations established by the treaty would be subject to legislative implementation. But the self-execution test applied by the majority appears to presume that a treaty is not self-executing unless there is affirmative evidence that the parties intended that the treaty have domestic legal force.⁸¹ According to the Supreme Court, a treaty is self-executing only if “the treaty itself conveys an intention that it be

80 *Medellín v. Texas*, 128 S. Ct. 1346, 1356 n.2 (2008).

81 At a number of points in the opinion, the Court focuses on the intent of the President and/or the Senate, *see id.* at 1358–60, 1362, 1364, 1366–67, suggesting that the relevant intent is that of the United States treaty-makers. On the other hand, the majority’s focus on the text of the treaty (and its criticism of the dissent for failing to focus on the text) indicates that the relevant intent is that of the parties to the treaty. *See id.* at 1362 (referring to “our obligation to *interpret treaty provisions* to determine whether they are self-executing” (emphasis added)). Indeed, even when it refers to the intent of the President and/or the Senate, the majority focuses on their intent as reflected in the treaty’s text. *See id.* at 1364 (“[W]e have held treaties to be self-executing when *the textual provisions* indicate that the President and Senate intended for the agreement to have domestic effect.” (emphasis added)); *id.* at 1366 (“Our cases simply require courts to decide whether *a treaty’s terms* reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.” (emphasis added)). *But cf. id.* at 1367 (referring to the intent of the President and Senate as reflected in “the text, background, negotiating and drafting history, or practice among signatory nations”). Whether a statement that a treaty is self-executing would satisfy the majority’s test if it appeared in the executive branch documents submitting the treaty to the Senate, or in the Senate Report consenting to the treaty, or in a declaration attached to the instruments of ratification, remains to be seen. *Cf. Vázquez, supra* note 46 (manuscript at 48–69) (concluding that a declaration attached to instruments of ratification declaring an otherwise self-executing treaty to be non-self-executing would be valid and effective). Giving legal effect to an “intent” by the President and/or the Senate on an issue not addressed by the treaty itself would appear to violate the constitutional structure as understood by Clark, as it would give the effect of federal law to something that is not a statute, treaty, or constitutional amendment. *See id.* (manuscript at 68–69).

'self-executing' and is ratified on these terms."⁸² Since the Court has defined a non-self-executing treaty as one that lacks the force of domestic law,⁸³ the majority seems to be saying that a treaty does not have the force of domestic law unless "the treaty itself" discloses an intent that the treaty have the force of domestic law.⁸⁴ Thus, the majority indicates later in the opinion that a treaty is non-self-executing if it "is ratified without provisions clearly according it domestic effect."⁸⁵

If this is the test, then very few, if any, treaties will pass it. As noted above, under the constitutional rule of some nations, treaties never have the force of domestic law.⁸⁶ They always require implementation by statute. Treaties between the United States and such nations will therefore never reflect a mutual intent that the treaty be effective as domestic law. For the same reason, multilateral treaties will rarely, if ever, include language reflecting an intent that the treaty be directly effective as domestic law. Multilateral treaties are negotiated by numerous states and are written in language that would be suitable for all. Because of the diversity of constitutional rules on the domestic effect of treaties, nations negotiating treaties generally do not address the issue of domestic legal force in the treaties they negotiate. They leave the question to the domestic law of the states' parties.⁸⁷ Our domestic law is the Supremacy Clause, which specifies that treaties have the force of domestic law and instructs judges to give them effect. If the *Medellín* Court has interpreted the Clause to give domestic force only to treaties that affirmatively convey an intent that the treaty have the force of domestic law, then, through a sort of interpretive *renvoi*, it has read treaties out of the Supremacy Clause.

It is true that a treaty need not impose parallel obligations on all parties. Thus, there could conceivably be a bilateral treaty that speci-

82 *Medellín*, 128 S. Ct. at 1356 (internal quotation marks and citation omitted) ("In sum, while treaties 'may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'" (alteration in original) (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc))).

83 *Id.* at 1356 n.2.

84 *See id.* at 1362.

85 *Id.* at 1369; *see also id.* at 1364 ("[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect."); *id.* at 1366 ("Our cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.").

86 *See supra* notes 46–47 and accompanying text.

87 *See* 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 39, at 1199–203.

fies that the United States' obligation shall have direct effect as domestic law, even if the obligations of the other parties do not. With respect to multilateral treaties, however, this option is effectively unavailable. Multilateral treaties would consequently never have the force of domestic law under the test the Court appears to have endorsed. Bilateral treaties would have the effect of domestic law, under this test, only if the parties took the unusual step of deciding to address the issue of the treaty's domestic legal force.

In any event, this approach would require the treaty parties to include language in the treaty itself to do the work that the Supremacy Clause purports to do. If this is what the majority has in mind, it has rewritten the Supremacy Clause as giving treatymakers *the power* to give treaties the force of domestic law.⁸⁸ But the Clause is not written that way. The Constitution gives the President the power to make treaties, with the advice and consent of the Senate,⁸⁹ but the Supremacy Clause gives the force of domestic law to "all" the treaties they make.⁹⁰

The Court may have believed that such a rewriting of the Clause was justified on the theory that the greater power not to conclude the treaty at all includes the lesser power to conclude the treaty but deny it the force of domestic law. By analogy, it might be argued, Congress' greater power to enact laws (or not) includes the lesser power to pass nonbinding resolutions and the like.⁹¹ But non-self-executing treaties are not analogous to nonbinding resolutions. Congress' power to pass the latter would be analogous to the President's power to sign non-binding United Nations declarations or resolutions (which no one claims have the force of domestic law). But treaties that are thought to be non-self-executing under *Foster* are unquestionably binding under international law. That was true of the treaty provision involved in *Medellín*, pursuant to which the United States "under[took] to comply with" the judgments of the International Court of Justice (ICJ) in cases in which it was a party.⁹² The Supreme Court in *Medellín* recognized that this provision was binding under international law,⁹³ yet it

88 See Carlos Manuel Vázquez, *The "Self-Executing" Character of the Refugee Protocol's Nonrefoulement Obligation*, 7 GEO. IMMIGR. L.J. 39, 46 (1993).

89 See U.S. CONST. art. II, § 2, cl. 2.

90 *Id.* art. VI, § 2.

91 Nick Rosenkranz, Assoc. Professor of Law, Georgetown Univ. Law Ctr., Comments from the Federalist Society Online Debate of *Medellín v. Texas*, Part I: Self-Execution (Mar. 28, 2008), <http://www.fed-soc.org/debates/dbtid.17/default.asp>.

92 *Medellín v. Texas*, 128 S. Ct. 1346, 1354 (2008) (internal quotation marks and citation omitted).

93 *Id.* at 1356.

held that the provision lacked the force of domestic law. That holding cannot be squared with the constitutional text.

There is, moreover, an important difference between treaties and statutes. Statutes create obligations only under United States law. They derive whatever force they have as law exclusively from the Supremacy Clause's declaration that they are the supreme law of the land.⁹⁴ Treaties, by contrast, also exist on the international plane. Even when they lack the force of domestic law, they impose obligations on the nation that are binding under international law. Their violation can have severe consequences for the nation on the international plane. The Founders were very concerned about those consequences. It was to avert those consequences that they gave treaties the force of domestic law and instructed judges to give them effect.⁹⁵ The Supremacy Clause takes those binding international obligations and gives them the force of domestic law. The greater power not to conclude the treaty at all does not include the power to conclude the treaty and deny it the force of domestic law. The Founders may well have preferred no treaty at all to a treaty that was more likely to be violated and thus to embroil the nation in international controversy.⁹⁶

Recognizing the clear purport of the Supremacy Clause's text, the Supreme Court has often enforced treaties as domestic law "without provisions clearly according [them] domestic effect." Indeed, the Court's very first important treaty case is flatly inconsistent with the test suggested by the parts of the *Medellin* opinion quoted above. *Ware v. Hylton*⁹⁷ involved a provision of the Treaty of Peace with Great Britain to the effect that "[i]t is agreed that creditors, on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted."⁹⁸ As Justice Iredell recognized, that provision would not have been effective as domestic law in Great Britain because of that nation's constitutional rule requiring implementing legislation for all treaties.⁹⁹ There could accordingly have been no mutual intent to give this mutual obli-

94 See U.S. CONST. art. VI, § 2.

95 See Vázquez, *supra* note 46 (manuscript at 19–21); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097–114 (1992) [hereinafter Vázquez, *Treaty-Based Rights*].

96 Cf. James Madison, Notes on the Federal Convention (Aug. 23, 1787), in 2 FARRAND'S RECORDS, *supra* note 30, at 384, 393 (noting that "Gouverneur Morris was 'not solicitous to multiply & facilitate Treaties' as '[t]he more difficulty in making treaties, the more value will be set on them'").

97 3 U.S. (3 Dall.) 199 (1796).

98 *Id.* at 239 (opinion of Chase, J.) (emphases omitted) (quoting the Definitive Treaty of Peace, art. 4, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, 82).

99 See *id.* at 276–77 (opinion of Iredell, J.).

gation the force of domestic law. Indeed, as Justice Iredell further recognized, at the time the United States entered into this treaty, it followed the British rule concerning the domestic effect of treaties.¹⁰⁰ Thus, even if the identical provision of a treaty could be read to reflect an intent to establish a domestically effective obligation for one party but not the other, this particular provision could not have reflected an intent that the provision have the force of domestic law for the United States. It was not until the Constitution was adopted, well after the conclusion of the Treaty of Peace, that it became possible for the United States to conclude treaties having the force of domestic law.¹⁰¹ The *Medellín* Court's suggestion that a treaty has the force of domestic law only if its terms disclose an intent that it be directly effective as domestic law is inconsistent not just with *Ware*, but also with the many Supreme Court cases applying multilateral treaties as domestic law even though the United Kingdom and other states following the British approach to treaties were parties.¹⁰² Such treaties could not have been intended by the parties to be directly effective as domestic law.

Foster gives United States treaty-makers a mechanism for entering into a treaty "addressed to" the legislature. They can do so, with the agreement of the other parties, by formulating the treaty as an obligation subject to legislative implementation.¹⁰³ If the treaty was so framed, it might plausibly be regarded as a treaty that is "addressed to" the legislature by virtue of the treaty itself. As such, the treaty would be the "law of the land," but it would be a law addressed to Congress, which the courts may not enforce because the courts lack the power to order Congress to legislate.¹⁰⁴ It would be an odd sort of law in our constitutional system—a "law" addressed to the lawmaker.¹⁰⁵ Still, if limited to treaties that affirmatively reflect the parties' intent that the treaty's obligations are subject to legislative implementation, the *Foster* concept of a non-self-executing treaty could be reconciled with the Supremacy Clause.

The Court in *Medellín* made no attempt at such a reconciliation. It instead decreed that non-self-executing treaties lack the force of

100 *See id.*

101 *See id.* at 272 ("The present Constitution of the *United States*, affords the first instance of any government [saying] treaties should be the *Supreme law of the land* . . .").

102 *See Vázquez, supra* note 46 (manuscript at 40 n.191).

103 For elaboration, see *id.* (manuscript at 43–48).

104 *Cf. Printz v. United States*, 521 U.S. 898, 975 (1997) (Souter, J., dissenting) ("[T]he essence of legislative power, within the limits of legislative jurisdiction, is a discretion not subject to command.").

105 *See Vázquez, supra* note 46 (manuscript at 39).

domestic law.¹⁰⁶ Apparently, the Clause does not extend to such treaties, notwithstanding its all-encompassing language. Because the domestic legal force of the treaty is virtually never a subject that the parties address in the treaty itself, the test the Court appears to have endorsed in *Medellín* virtually reads the reference to treaties out of the Supremacy Clause, at least with respect to existing treaties. With respect to future treaties, this approach illegitimately adds to the requirements for supreme federal lawmaking to the extent it recognizes such force only if the United States treaty-makers succeed in obtaining the parties' agreement to language reflecting an intent to give the treaty domestic legal force,¹⁰⁷ something that is a practicable option only for treaties with few parties.

In response to arguments by the dissent, the majority denied that its test would result in no treaties being self-executing.¹⁰⁸ Presumably, the recognition that the portions of the opinion quoted above would conflict with Supreme Court decisions stretching back to *Ware*, and with its own denial that it meant to deny all treaties domestic legal force, will dissuade the Court from following the implications of its analysis. The quoted language appears to have been unnecessary to the majority's conclusions, given its reliance elsewhere in the opinion on narrower grounds for concluding that Article 94 was not self-executing.¹⁰⁹ One hopes that the majority will clarify that it did not intend such a dramatic departure from constitutional text, structure, and doctrine. (It is noteworthy that the decision's early defenders have not read it to create a presumption against self-execution.)¹¹⁰ Still, the casualness with which the majority was willing to adopt a view so directly contrary to the Supremacy Clause's text indicates that the Court has yet to internalize the illegitimacy of adding to the procedures set forth in the Constitution for making supreme federal law, or

106 See *Medellín v. Texas*, 128 S. Ct. 1346, 1367 n.2 (2008).

107 See *id.* at 1357–61.

108 See *id.* at 1365.

109 See, e.g., *id.* at 1360 (relying on the fact that Mr. Medellín was not a party to the ICJ's judgment); *id.* at 1372–74 (Stevens, J., concurring in the judgment).

110 See Posting of Julian Ku to Opinio Juris, <http://www.opiniojuris.org/posts/1206464651.shtml> (Mar. 25, 2008, 13:04); Rosenkranz, *supra* note 91; Posting of Paul Stephan to Opinio Juris, <http://www.opiniojuris.org/posts/1206470637.shtml> (Mar. 25, 2008, 14:43); Posting of Mark Weisburd to Opinio Juris, <http://www.opiniojuris.org/posts/1206547402.shtml> (Mar. 26, 2008, 12:03); Posting of Ernie Young to Opinio Juris, <http://www.opiniojuris.org/posts/1206477292.shtml> (Mar. 25, 2008, 16:36). *But cf.* Posting of Mike Dorf to Dorf on Law, <http://michaeldorf.org/2008/03/more-medellin-musings.html> (Mar. 26, 2008 13:33) (referring to “the majority’s presumption that, absent language to the contrary, a treaty should be deemed non-self-executing”).

subtracting from the preemptive force of supreme federal law once made.

B. Broader Doctrinal Implications of Adding a Nationalist Perspective

Recognition that the constitutional structure reflects a balance between federalism and nationalism also calls into question some doctrinal prescriptions that Clark has drawn from the constitutional structure. Most of those prescriptions are based on the following line of reasoning: the Constitution protects federalism by making it difficult to enact federal law; the procedures set up by the Constitution seek to ensure that state law is not displaced unless a majority of both houses plus the President (or two-thirds of both houses without the President) affirmatively agree to such displacement; therefore, federal enactments should be construed not to displace state law unless they clearly reflect the lawmakers' intent to do so. This reasoning is the basis, for example, for Clark's argument that the presumption against preemption is required by the constitutional structure.¹¹¹ Unless there is clear, affirmative evidence that both houses and the President intended to preempt state law, federal law should be interpreted to leave state law in place. Clark makes a similar argument in defense of the Court's current restrictive approach to the implication of private rights of action under federal statutes.¹¹²

In short, Clark reads the Constitution to make application of state law the default and to require specific and affirmative evidence in the federal enactment of an intent to replace the default rule. Clark thus argues that the Constitution's structure not only requires an enactment under Article I, Section 7 or a treaty under Article II, but also has implications for how such enactments should be interpreted. Because the Founders imposed these requirements in order to protect state interests, Clark argues, in effect, that all ambiguities in such enactments should be interpreted in favor of the continued application of state law.

In Part I, I noted that the supreme law gauntlet favors the status quo, not necessarily the continued application of state law. Clark could respond by broadening his doctrinal prescription to maintain that federal statutes should be read not to alter the status quo in the absence of clear evidence of an intent to change the status quo. Alternatively, he might limit his doctrinal prescriptions to situations in which protecting the status quo also protects federalism. In this subpart, I argue that neither the narrower nor the broader doctrinal pre-

111 See Clark, *supra* note 1, at 1427–30.

112 See *id.* at 1423–24.

scriptions are required by the Constitution's specification of mechanisms for creating supreme federal law, or the Founders' reasons for adopting those mechanisms.

Specifically, as discussed above, the Founders did not just want to make federal lawmaking difficult, they also wanted to make it easier.¹¹³ They did not want to make it too easy to alter the status quo, but neither did they want to make it too difficult. Insofar as the status quo was state law, they created procedural obstacles to displacing such law, but they removed other, more formidable obstacles. The resulting scheme thus reflects a balance between federalism (or the status quo) and nationalism (or change).

It follows that the constitutional structure does not support doctrinal rules that reflexively favor the status quo in the event of textual ambiguity. Resolution of such ambiguities requires resort to a theory for interpreting the output of the Constitution's process for creating supreme federal law. The constitutional structure, as such, cannot supply the content of such interpretive rules. The structure tells us that the legal status quo remains unaffected if a federal statute or treaty, interpreted pursuant to the proper approach to statute or treaty interpretation, does not alter the legal status quo. Because the constitutional structure reflects a balance between the status quo and change, it does not support the conclusion that ambiguities in the text must be resolved against change.

Again, the clearest example concerns treaties. Treaties are instruments of international law, and there is a well-developed international law of treaty interpretation.¹¹⁴ Presumably, the Founders expected that treaties would be interpreted in accordance with those rules. In any event, the federal courts apply these rules in interpreting United States treaties.¹¹⁵ Whatever else we might say about these rules, it is

113 See *supra* notes 24–35 and accompanying text.

114 The basic rules are now codified in Articles 29–32 of the Vienna Convention on the Law of Treaties. See Vienna Convention on the Law of Treaties arts. 29–32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 339–40. Although the United States is not a party to the Convention, it regards most of its provisions as reflective of customary international law. See Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 314 (2007); David S. Jonas, *The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U. J. INT'L L. & POL. 1007, 1031–32 (2007).

115 See *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“[I]n their construction words [in a treaty] are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended.”). The reference to the public law of nations “seems to be a reminder that terms of art are to be construed in view of international usages and customary international law, not domestic constructions.”

clear that they do not turn in the slightest on the United States Constitution's original structure with respect to the making of treaties or other forms of supreme federal law. Some scholars argue that these rules leave no gaps—in other words, that the international law of treaty interpretation tells us exactly how to interpret ambiguities left by the treaty's text.¹¹⁶ If so, then there is clearly no room for an interpretive presumption based on the Constitution's specification of only three mechanisms for preempting state law.

If the international law rules of treaty interpretation do leave gaps, then the United States would be free to develop rules of interpretation for filling in such gaps. Our interpretive gap-filling rules could take into account our constitutional structure. In the past, the courts have filled these gaps by interpreting treaties generously in favor of those claiming rights under them,¹¹⁷ an approach that accords with one of the purposes for giving treaties the status of supreme federal law—the avoidance of international friction that would be caused by treaty violations.¹¹⁸ The courts have also sometimes filled the gaps by deferring to the executive branch's interpretation,¹¹⁹ an approach that might be consistent with other aspects of our constitutional structure, as originally understood, or with normative considerations, such as the executive's greater expertise or sensitivity to international relations. We might also favor the interpretation that accords with the one given the treaty by our treaty partners.¹²⁰ Among the approaches that might be used to close whatever gap might be left by international law rules of treaty interpretation, a rule favoring the continued application of state law would have to vie

David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 967 (1994).

116 See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 200 (1996) (suggesting “it is not clear in light of [the Vienna] Convention whether or how a panel could ever reach the conclusion that provisions of an agreement admit of more than one interpretation” because the Convention provides rules for resolving ambiguities in the text of an international agreement). *But cf.* Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL'Y INT'L BUS. 109, 175–79 (2002) (questioning whether the Vienna Convention provides rules to resolve all ambiguities in treaty text).

117 See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259–61 (1984); *United States v. Rauscher*, 119 U.S. 407, 417–18 (1886); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 284–85 (1796).

118 See Vázquez, *Treaty-Based Rights*, *supra* note 95, at 1102–03, 1162.

119 See *Medellín v. Texas*, 128 S. Ct. 1346, 1361 (2008).

120 *Cf.* *Olympic Airways v. Husain*, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting) (“[I]t is reasonable to impute to the parties [to a treaty] an intent that their respective courts strive to interpret the treaty consistently.”).

against these alternative rules also supported by the constitutional structure. In any event, because the constitutionally specified procedures for making federal law reflect a balance of nationalism and federalism (or continuity and change), the particular aspect of the constitutional structure on which Clark relies (the specification of only three ways to create supreme federal law) does not support a rule reflexively favoring one over the other.

With respect to federal statutes, the point is less obvious but equally true. In contrast to the rules of treaty interpretation, the rules of statutory interpretation are not external to our legal system. It is therefore more difficult to point to a “correct” approach to statutory interpretation that bears no relation to the original understanding of the structure created by the Constitution for the creation of supreme federal law. But, just as the constitutional structure provides no basis for a rule that ambiguities in treaties be resolved in favor of the states or the status quo, it provides no basis for that conclusion with respect to statutes.

To determine how to interpret statutes, we need a theory of statutory interpretation. What the best or “correct” theory is for interpreting statutes in general, or federal statutes in particular, is highly contested. This is not the place to engage that debate. My point is that the original understanding of the constitutional structure does not support a rule under which ambiguities are always resolved in favor of state law or the status quo. Such a rule might be defensible, but its defenders would have to rely on something other than the Constitution’s specification of only three methods of creating federal law. That state law applies by default, and can be displaced only in the constitutionally specified ways, means that state law remains applicable when the rules of statutory interpretation have been applied and have not yielded an interpretation that displaces state law. But the constitutional structure as such is unhelpful in determining the content of the rules of statutory interpretation.

Consider the presumption against preemption. Clark argues that the original understanding of the constitutional structure requires the presumption because the Constitution reflects a desire not to displace state law in the absence of an affirmative decision to do so by both houses plus the President.¹²¹ On this view, obstacle preemption would be inconsistent with the constitutional structure, as would implied preemption of any kind. Field preemption would be proper only if there were evidence that both houses and the President intended to preempt the field. In the absence of a direct conflict

121 See Clark, *supra* note 1, at 1429.

between state and federal law or clear affirmative evidence of the lawmakers' intent to displace state law, state law would continue to govern.¹²²

But Article I, Section 7 tells us only that state law cannot be displaced by statute unless a majority of both houses votes in favor of the statute and the President does not veto it. It does not tell us how the statute is to be interpreted. Because the structure reflects a balance between continuity and change, it does not support a rule that reflexively favors continuity. Most contemporary scholarship on statutory interpretation is based on frankly normative arguments.¹²³ An originalist might prefer an approach based on the Founders' expectations about how statutes should be interpreted.¹²⁴ If there were direct evidence that the Founders intended that federal statutes be interpreted not to displace state (or prior federal) law, then such evidence might support a presumption against preemption (depending on one's approach to originalism). That the founding generation did not hold such a view is suggested by Chief Justice Marshall's approach to preemption in *McCulloch v. Maryland*,¹²⁵ which appears to be an early version of obstacle preemption.¹²⁶

With respect to statutory interpretation more generally, an originalist might be persuaded by evidence that the prevailing approach to interpreting statutes at the time of the Founding was to interpret them as narrowly as possible. The maxim that statutes in derogation of the common law are to be construed narrowly may provide some support for such a view. But the maxim would not appear to apply when a federal statute alters state statutes, as opposed to the

122 See *id.* at 1435 (“Under the Supremacy Clause . . . the relevant inquiry is whether *Congress* intended to displace state law.”). Clark observes that state law should be displaced only when the federal statute requires a court to do so. See *id.* at 1433.

123 See, e.g., William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629 (2001); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631 (2007); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

124 Or she might not. Cf. Berman, *supra* note 22, at 385–89 (asserting that almost nobody embraces original expected application approach).

125 17 U.S. (4 Wheat.) 316, 425–37 (1819).

126 See Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 567–68 (1997) (noting that *McCulloch* established “a broad proscription [that] would allow courts to strike down vast numbers of state laws”); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 715 (1991) (noting that, under *McCulloch*, “merely ‘interfering’ with federal law justifies nullification of state law” (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824); *McCulloch*, 17 U.S. (4 Wheat.) at 430)).

common law. A broader rule requiring that statutes be interpreted narrowly would apply equally to statutes repealing prior federal laws, thus hindering the devolution of power to the states. In any event, any such “originalist” approach to preemption or statutory interpretation would be driven by independent evidence of the Founders’ intent on those topics, not by the constitutional structure as such.

In short, to establish the correct approach to preemption, one needs a separate theory of statutory interpretation and/or judicial decisionmaking. A departure from the correct theory of statutory interpretation *in either direction* would be illegitimate. If the correct approach is originalism and obstacle preemption were correct on originalist grounds, then to articulate and enforce a presumption against preemption would be to add to the requirements for federal lawmaking, in violation of the Founders’ attempt to adopt a mechanism balancing federalism and nationalism. Of course, the correct approach to statutory interpretation is endlessly contestable. But constitutional structure alone does not help resolve the contest.

Consider next Clark’s structural defense of the Court’s current restrictive approach to the implication of private rights of action under federal statutes.¹²⁷ The Supreme Court has in recent years self-consciously adopted a more demanding approach to this question. At one time, the courts generally inferred a right of action for damages from a statute not addressing private remedies on the theory that rights of action would make the statute more effective.¹²⁸ Interestingly, the turn to a more restrictive approach was based in part on an insight very similar to my main point in Part II of this Article with respect to the Constitution—that legislation is never unidimensional, but rather is always the product of compromise.¹²⁹ A statute that includes substantive provisions but does not create a private right of action for enforcing the substantive provisions might simply reflect a legislative compromise. Congress may have wanted to go so far and no further. Congress, in other words, may not have wanted a more effective statute.

127 See Clark, *supra* note 1, at 1423–24.

128 See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964).

129 See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 740 (1979) (Powell, J., dissenting) (“Determining whether a private action would be consistent with the ‘underlying purposes’ of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced.”); RICHARD A. POSNER, *THE FEDERAL COURTS* 271–72 (1985) (discussing the effect of “a clash of interest groups” on the legislative process). My point in Part II is that the constitutional structure was not designed solely to safeguard federalism or the status quo, but reflects a compromise between federalism and nationalism or between continuity and change.

Clark argues that the judicial refusal to infer a private right of action also derives support from the Constitution's structure—in particular, its enumeration of only three methods of creating supreme federal law.¹³⁰ To create a federal right of action where the statute does not explicitly contain one would be to recognize federal lawmaking through procedures not meeting the constitutional requirements for making federal law.¹³¹ The constitutional default is the continued application of state law. If Congress enacted a substantive law unaccompanied by an express federal right of action, then one must look to state law to determine the available rights of action.¹³²

Recognition that the Constitution reflects a balance of federalism and nationalism poses some of the same problems for this line of analysis as for the presumption against preemption. If the statute does not contain an express right of action, then a right of action did not successfully run the supreme law gauntlet. But the statute containing the substantive provision did successfully run the gauntlet, and the question remains whether the substantive law should be interpreted to confer a federal right of action. If the constitutional structure reflects a balance of continuity and change, or federalism and nationalism, then it does not support a reflexive preference for state law. To answer the question, we need a theory of statutory interpretation, and, for the reasons indicated, the constitutional structure does not tell us what the right theory is.

For an originalist, the answer may turn on how the right-of-action issue would have been resolved at the time of the Founding. At that

130 See Clark, *supra* note 1, at 1424.

131 See *id.* at 1423 (arguing that such actions by the Court undercut the Constitution's separation of powers and federal lawmaking procedures); see also *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) (evaluating whether a statutory cause of action exists consistently with the restrictive approach by stating the question is one of "statutory construction" (citing *Cannon*, 441 U.S. at 688)); George D. Brown, *Of Activism and Erie—The Implication Doctrine's Implications for the Nature and Role of the Federal Courts*, 69 IOWA L. REV. 617, 644–49 (1984) (defending Justice Powell's position in *Cannon* denying the implication of private rights of action except in cases of compelling congressional intent); Richard W. Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973, 995 (1983) (explaining that the congressional intent approach safeguards federalism because the states are represented in the Senate). But see Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 903–04 (1996) (arguing that implication decisions should not be based on congressional intent alone; rather, the decision to imply a private right of action should weigh several other factors).

132 See, e.g., Brown, *supra* note 131, at 645 (noting that in the absence of private rights of action, "state common-law remedies may well be available, at least if the area of law is not one of exclusive federal jurisdiction").

time, rights of action for statutes not explicitly addressing the question would have been supplied by the common law.¹³³ Since today we regard the common law as the law of the states, one might conclude that the originalist approach to rights of action is in accord with the recent restrictive approach to the issue. If so, the originalist answer would track Clark's structural answer, but the answer would be driven by direct evidence of the Founders' intent, not by the constitutional structure as such.

But the originalist answer is not so clear. At the time of the Founding, the common law was thought to have a separate existence, and state and federal courts were regarded as equally capable of ascertaining it.¹³⁴ In cases involving federal statutes, it would most often have fallen to a federal court (the Supreme Court on review from the state courts) ultimately to decide the content of that common law. Today, we do not believe that the common law has a separate existence.¹³⁵ This shift in our understanding of the common law would appear to require a translation of prior practices to accord with modern understandings, the sort of translation the majority undertook in *Sosa v. Alvarez-Machain*¹³⁶ with respect to the Alien Tort Statute.¹³⁷ The result of such a translation might well be an approach that approximates the prior, more receptive approach, more than the current restrictive approach. In any event, whether or not one takes an originalist approach, the structural considerations Clark points to do not help resolve the question.

133 See Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020, 1062 (2006) (noting that “[t]he Constitution . . . was written against a backdrop of . . . traditional common law interests”).

134 See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (“In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.”), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1393 (1997) (characterizing “premodern” jurisprudence as “retain[ing] a faith in natural law principles as the foundation of the common law system and the ultimate source of legal knowledge”).

135 See *Erie*, 304 U.S. at 78–79 (rejecting the premise that there is a “‘transcendental body’” of common law that federal courts may ascertain independently of the states because “‘law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law . . . is not the common law generally but the law of that State existing by the authority of that State’” (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

136 542 U.S. 692 (2004).

137 See *id.* at 729.

While the presumption against preemption and the restrictive approach to inferring rights of action from federal statutes might be criticized as illegitimately adding to the obstacles to federal lawmaking or illegitimately subtracting from the force of supreme federal law, the stakes might be regarded as small. The Court is, after all, simply articulating background rules of interpretation to aid in the ascertainment of legislative intent. Certainly the stakes are reduced by the fact that Congress can legislate around them. (The same could, of course, be said about the contrary interpretive rules, so this is not a defense the rules selected. It is merely a comment about their (relative) unimportance.) Since Congress creates the substantive right, it seems proper to leave the question of preemptive effect and remedies ultimately to Congress' judgment. The presumptions articulated by the Court, even if lacking a proper constitutional foundation, can be legislated around, and, once articulated, have some legitimate claim to continued application because of the doctrine of *stare decisis*.

Of greater concern is the Court's current approach to constitutional remedies. The Court appears to view the availability of remedies for constitutional violations to be analogous to the question of remedies for violation of statutes that do not directly address private remedies.¹³⁸ Some recent cases assume that the primary responsibility for articulating the availability of remedies for constitutional violations resides in Congress and suggest that judicial recognition of such rights of action is problematic.¹³⁹ But the originalist case sketched above for a more receptive approach to inferring remedies for statutory violations applies equally to the question of remedies for constitutional violations.¹⁴⁰ In addition, the Supremacy Clause provides a textual basis for a federal constitutional law of constitutional remedies.¹⁴¹ The Founders distinguished law from admonition on the ground that the

138 See *Carlson v. Green*, 446 U.S. 14, 19 (1980) (recognizing a damages remedy for violation of the Eighth Amendment's prohibition on cruel and unusual punishment); *Davis v. Passman*, 442 U.S. 228, 244 (1979) (recognizing implied rights of action for damages under the Fifth Amendment's Due Process Clause); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 (1971) (holding that the Fourth Amendment provides a cause of action for damages against federal officers).

139 In *Bush v. Lucas*, 462 U.S. 367 (1983), and *Schweiker v. Chilicky*, 487 U.S. 412, (1988), the Court held a new judicial remedy should not be created in light of the existing elaborate remedial schemes constructed by Congress. See *id.* at 428–29; *Lucas*, 462 U.S. at 389–90.

140 See *supra* notes 133–37 and accompanying text.

141 See Carlos M. Vázquez, *The Constitution as Law of the Land: The Supremacy Clause and Judicial Review* 30–57 (Apr. 18, 2008) (unpublished manuscript, on file with author).

former is attended with a judicial sanction for its violation.¹⁴² The Constitution's designation of the Constitution as law could thus be understood as an instruction to the courts to enforce a constitutional law of sanctions for constitutional violations, a law grounded in the common law but adjusted by the courts to ensure the efficacy of constitution limitations. One well-established sanction for constitutional violations is the nullity of nonconforming legislative acts.¹⁴³ Thus, the Supremacy Clause provides a textual basis for judicial review of legislation.¹⁴⁴ But, in my view, the Supremacy Clause also contemplates the articulation and enforcement of a federal law of affirmative sanctions for constitutional violations. If so, then it is improper for the Court to assume that sanctions exist only to the extent that Congress creates them. Erroneously leaving constitutional remedies to Congress is of greater concern than erroneously requiring express congressional creation of remedies for statutory violations because most constitutional norms are limits on Congress itself or similarly majoritarian institutions.

Cases recognizing federal remedies for constitutional violations are sometimes described as exercises in federal common lawmaking.¹⁴⁵ The problematizing of federal common lawmaking is perhaps the clearest implication of Clark's structural argument. If defined as the judicial articulation of federal law not reasonably traceable to the three forms of law specified in the Supremacy Clause,¹⁴⁶ federal common lawmaking necessarily violates Clark's claim that those three

142 See, e.g., THE FEDERALIST NO. 15, at 72–73 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

143 See Vázquez, *supra* note 141.

144 In this respect, my argument parallels the textual defense of judicial review in Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91 (2003). However, whereas Clark relies on the Supremacy Clause's denial of legal status to statutes not passed "in Pursuance" of the Constitution, *see id.* at 99–105, I rely on the Clause's designation of the Constitution as "Law."

145 See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."); *Carlson v. Green*, 446 U.S. 14, 39 (1980) (Rehnquist, J., dissenting) ("The determination by federal courts of the scope of such a remedy [for constitutional violations] involves the creation of a body of common law analogous to that repudiated in *Erie* . . ."). But see Ryan D. Newman, Note, *From Bivens to Malesko and Beyond: Implied Constitutional Remedies and the Separation of Powers*, 85 TEX. L. REV. 471, 476 (2006) (arguing that cases recognizing implied constitutional remedies do not violate the separation of powers).

146 See HART & WECHSLER, *supra* note 16, at 685 (defining federal common law as "federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands").

forms of federal lawmaking are exclusive.¹⁴⁷ As Clark recognizes, much that is described as (illegitimate) federal common law can be defended as (legitimate) constitutional or statutory interpretation.¹⁴⁸ The argument just sketched concerning constitutional remedies is a claim that the existence of such remedies should be regarded as a matter of (legitimate) constitutional interpretation. Still, the Court does sometimes engage in federal common lawmaking that cannot be justified as statutory or constitutional interpretation.¹⁴⁹ If Clark's exclusivity thesis has a doctrinal payoff, it would seem to be to delegitimize federal common lawmaking of this sort. When the courts engage in such lawmaking, they are displacing state law in circumstances where the procedural requirements of federal lawmaking have not been met. To permit such lawmaking is to allow the courts to circumvent the Constitution's carefully wrought procedures for displacing state law.¹⁵⁰ Or so it would seem.

Yet even here, the answer is not so clear. Clark's argument may suggest that courts should not engage in any *additional* displacement of state law through federal common lawmaking. Where the courts have already displaced state law in this fashion, however, another well-recognized principle calls into question the propriety of changing course. I refer here to the doctrine of *stare decisis*, which even originalist judges concede may trump original intent.¹⁵¹ Indeed, the doctrine of *stare decisis*, by its nature, must trump otherwise correct legal interpretations, which, for an originalist, would include the answer provided by the constitutional structure as originally understood. Since there is evidence that the Founders contemplated *stare decisis*,¹⁵² there is some originalist pedigree for this departure from otherwise correct originalist results. The Court applies a particularly strong form of *stare decisis* to questions of statutory interpretation on

147 See Clark, *supra* note 1, at 1330–31.

148 See *id.* at 1453–55.

149 See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–07 (1988); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

150 This critique of federal common lawmaking is also developed in Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 349–52 (1992).

151 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989).

152 See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 142, at 407 (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them”); see also Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 8 (2006) (“[T]he Founders expected judges to be constrained . . . by prior cases . . .”).

the theory that Congress can correct any judicial error.¹⁵³ For the same reason, the stronger form of *stare decisis* would seem to be applicable as well to questions of federal common law.¹⁵⁴ If so, then the Court should adhere to prior judicial decisions recognizing federal common law in a given area, even if Clark is right in concluding that those decisions were in conflict with the constitutional structure when rendered.¹⁵⁵

Moreover, once doctrinal change has been accomplished through judicial decisionmaking, combined with the doctrine of *stare decisis*, it may be highly problematic for courts to continue to decide cases on other issues according to the original understanding. A concern for doctrinal coherence could legitimately lead a court to depart from the “correct” approach (from an originalist perspective) on issues collateral to those decided erroneously (from an originalist perspective) in earlier cases. A different approach would result in a legal landscape full of *ad hoc* exceptions. Fairness and rule of law values, not unlike those that underlie *stare decisis*, demand that like cases be treated alike and that exceptions to general principles be justified. It would not be surprising if the Founders believed in these values as well and would have concurred in subordinating otherwise “correct” results, from an originalist standpoint, to such concerns. If so, then there would be an originalist pedigree for this further departure from correct originalist results.

Indeed, the combination of doctrinal change through *stare decisis* and the need for doctrinal coherence may properly lead to a

153 See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (“[T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.”); *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (“[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”). See generally William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 *GEO. L.J.* 1361 (1988) (examining the Court’s “super-strong presumption against overruling statutory precedents”).

154 Like statutory decisions, decisions regarding federal common law are subject to congressional revision.

155 For the same reason, it would be inappropriate for the Court to overrule its dormant Commerce Clause and dormant foreign affairs cases, even if one agreed with critics of these doctrines that these cases were erroneous when rendered. See Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 *VILL. L. REV.* 1259, 1308 (2001). It is well recognized that dormant Commerce Clause decisions are subject to congressional revision, see *Itel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 75–76 (1993), and the same is presumably true of dormant foreign affairs decisions.

broader rejection of Clark's central claim. Among the doctrinal changes that have occurred since the Founding is an enormously important one that is itself in conflict with Article I, Section 7. I refer to the acceptance of broad, largely unguided delegations of lawmaking power to the executive branch. Although the Court at one time insisted that Congress could not delegate its lawmaking power,¹⁵⁶ the Court today acknowledges that any constitutional limits on such delegations are not judicially enforceable.¹⁵⁷ Thus, the Court today acquiesces in supreme federal lawmaking by a single agency. In light of this departure from the constitutional structure, as originally understood, insisting on adherence to bicameralism and presentment may have the result of distorting the constitutional structure, as it was originally intended to operate. In other words, given the acceptance of this one significant departure from the original structure, faithfulness to the original design may require additional departures from the original structure. Without compensating changes in other areas, the acceptance of broad delegations to the executive may leave us further from the Founders' goals in adopting the structure they adopted. For example, as Abner Greene, William Eskridge, and John Ferejohn have persuasively argued, faithfulness to the original structure may require that acceptance of broad delegations to the executive be matched by acceptance of some forms of legislative vetoes.¹⁵⁸

Given this and other changes in our legal doctrine since the Founding, there may be very little remaining room for strict adherence to any particular feature of the constitutional structure as originally understood. This is not to say that the original structure is irrelevant to judicial decisionmaking today. But, if faithfulness to the original structure is the goal, we must look at that structure at a high level of generality, and we will need to adjust the original features of that structure in a way that best accomplishes the Founders' broad goals in the light of entrenched changes in the legal landscape since the Founding.¹⁵⁹ Given the acceptance of broad delegations of legislative power to the executive, it may be that the best way to be faithful

156 See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–42 (1935).

157 See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76 (2001).

158 See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540–43 (1992); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 179–95 (1994).

159 See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 213; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 439–42 (1995).

to the structure of the Constitution, as originally understood, is to depart from bicameralism and presentment in some contexts.

CONCLUSION

Bradford Clark has made an important contribution to the literature on both separation of power and federalism by explaining how the Constitution's provisions for making federal law often operate to safeguard the interests of the states and reminding us that departures from the constitutionally prescribed ways of creating federal law are problematic and require justification. He deserves great credit for focusing our attention on these enormously important issues. This Article attempts to complete Clark's story by pointing out that the constitutionally specified procedures for creating federal law reflect a balance of federalism and nationalism, or continuity and change. It follows that judicial decisions that add obstacles to supreme federal lawmaking are as problematic as those that subtract from the constitutionally specified procedures. It also follows that the Constitution's specification of only three methods of creating federal law does not support rules for construing the output of the federal legislative process in a way that would reflexively favor federalism (or the status quo) over nationalism (or change). Indeed, given the wide acceptance of significant departures from the original scheme—and the legitimacy (even from an originalist perspective) of adhering to such departures—faithfulness to the original structure may sometimes require departing from particular features of the original scheme, including the requirements of bicameralism and presentment on which Clark bases much of his analysis.

