2010

Supremacy Clause Textualism

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Whatever its status in the statutory interpretation “wars,” originalism-driven textualism has assumed an increasingly prominent role in constitutional interpretation, at least within the academy. The focus of this Article is on one such form, namely, “Supremacy Clause textualism”; that is, recent textualist claims about the implications of the Supremacy Clause of Article VI. This Article addresses two such claims.

First, in important articles, Professor Bradford Clark argues that the clause is “at the epicenter of [our] constitutional structure” and it “recognizes only the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States as ‘the supreme Law of the Land.’” Displacement of otherwise governing state law can occur only through one of those enumerated modes and “Laws” refers only to Acts of Congress. The consequence is that federal common law—as that concept is now currently understood—and administrative lawmaking are illegitimate, at least when measured by the original understanding.

Second, this Article addresses the claims of true Supremacy Clause textualists. Pointing to “This Constitution” as the “supreme Law,” several prominent academics, including Professors Amar, Lawson, and Paulsen, advocate rejection of almost all judicial precedent inconsistent with an original understanding-driven textualism.

This Article examines at length the contestable historical claims of Supremacy Clause textualists, particularly assigning to the Clause a substantial state-protective role while discounting its nationalist foundations. It then turns to Supremacy Clause textualism’s internal problems, such as its inability to account for the administrative lawmaking and federal common law that now characterize our constitutional order. It next describes the intellectual world of the founding generation and its understanding of the nature of law, a world that has now disappeared. Finally, this Article challenges those Supremacy Clause textualists—true fundamentalists—who would deny the authoritative nature of precedent in our constitutional system. In the process, this Article doubts that any form of originalism/textualism, either theoretically or in practice, can remotely provide an adequate account of our practice of constitutional adjudication.
The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; . . . [t]ime only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.1

INTRODUCTION: THE ALLURE OF SUPREMACY CLAUSE TEXTUALISM

The guns in the statutory interpretation wars are now largely silent. The assaults waged by the textualists against the purposivist approach of the Legal Process School2 have largely abated.3 In retrospect, it is diff-


3. But they have not abated entirely. See, e.g., Spivey v. Vertrue, Inc., 528 F.3d 982, 984–85 (7th Cir. 2008) (“Legislative history may help disambiguate a cloudy text by showing how words work in context; it does not permit a judge to turn a clear text on its head.”). Contrary to judges writing for other circuits, Chief Judge Easterbrook held that a statute that provides for an appeal from an order denying removal “not less than seven
cult to tell what the intense fighting was all about, except perhaps at the margins.\(^4\) For example, reading John Manning, textualism's leading academic exponent, feels very much like reading Hart and Sacks.\(^5\) Textualists have made an important contribution by forcing statutory interpreters to take the enacted text seriously; but they have persuaded few, if any, trained in the old school that, as the directive force of the statutory text attenuates, one can dispense with a comprehensive consideration of legislative purpose in determining statutory meaning.\(^6\) Indeed, in some

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\(^4\) Like most academicians, I focus on the work of the federal courts and the academy. Abbe Gluck's fascinating and important new essay points out that there is a fierce—and enlightening—war going on in some state courts between textualists and purposivists, with an unanticipated and normatively attractive form of textualism emerging. See Abbe R. Gluck, Laboratories of Statutory Interpretation: Modified Textualism and Methodological Consensus in the States, 119 Yale L.J. (forthcoming Apr. 2010) (advancing theory of "modified textualism" that recognizes differences between "state and federal methodologies; namely, the state textualists' embrace of methodological stare decisis, their willingness to compromise over legislative history, and their creation of strictly tiered interpretive histories").


Modern textualists . . . are not literalists. In contrast to . . . the "plain meaning" school, they do not claim that interpretation can occur "within the four corners" of a statute, or that "the duty of interpretation does not arise" when a text is "plain." Rather, modern textualists acknowledge that language has meaning only in context . . . . [T]hey believe that statutory language, like all language, conveys meaning only because a linguistic community attaches common understandings to words and phrases, and relies on shared conventions for deciphering those words and phrases in particular contexts.


\(^6\) Nor, for that matter, do many textualists: "[W]hen modern textualists find a statutory text to be ambiguous, they believe that statutory purpose . . . is itself a relevant ingredient of statutory context." Manning, What Divides, supra note 5, at 75–76. At the end of the day, the central differences between the two schools are, first, the more restricted range of materials (e.g., the exclusion of legislative history) that textualists are willing to consider in decoding statutory meaning; and second, and of more importance, the willingness of the Legal Process School to constrain even "clear" texts through consideration of legislative purpose. For examples of the former, see Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1009 n.5 (2008) (Scalia, J.) ("[I]f one were to speculate upon congressional purposes, the best evidence for that would be found in the statute."); Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004) (stating presumption that "the ordinary meaning of [statutory] language accurately expresses the legislative purpose" (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985)))). Church of the Holy Trinity v. United States, on the other hand, is the leading example of the latter. 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be
areas, such as preemption, many textualist judges are willing to consider legislative purpose.\(^7\)

Matters stand quite differently, however, if we turn to the dispute over proper methods of constitutional interpretation. Here, textualism has assumed an increasingly prominent role, at least within the academy.\(^8\) Of course, textualist arguments can come in many shapes.\(^9\) The initial focus of this Article is on one such form, namely, "Supremacy Clause textualism"; that is, recent textualist claims about the Supremacy Clause of Article VI.\(^10\) A brief overview of the work of a few of textualism’s leading proponents in this area—Bradford Clark, Michael Ramsey, and others—will set the stage for an analysis of the faults and weaknesses of not only originalism-grounded Supremacy Clause textualism, but of any form of originalism as providing an adequate theory for constitutional adjudication.

A. Bradford Clark

In an important and ever-lengthening series of articles,\(^11\) Professor Bradford Clark argues that the Supremacy Clause is "the provision at the epicenter of the constitutional structure created by the Founders."\(^12\) His

within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

7. Meltzer, supra note 2, at 362–78 (describing textualists’ use of legislative purpose in preemption cases); see also Smith, Textualism, supra note 5, at 1925–31 (arguing textualists have approached broad jurisdictional grants in nontextualist manner in order to promote policy of judicial restraint).


10. U.S. Const. art. VI, cl. 2.

11. See, e.g., Anthony J. Bellia, Jr. & Bradford R. Clark, The Federal Common Law of Nations, 109 Colum. L. Rev. 1 (2009); see also Craig Green, Erie and Problems of Constitutional Structure, 96 Cal. L. Rev. 661, 661 n.1 (2008) (collecting numerous articles by Professor Clark). As one commentator observes, "Bradford Clark may have drawn more lessons from the Supremacy Clause than anyone in history." Id. at 661. Professor Green continues: "For Clark, these few dozen words govern more than federal preemption. They also influence his interpretation of dormant commerce power, executive agreements, certification, the Eighth Amendment, Marbury, Erie, federal common law, and a great deal else." Id.

argument is lean, elegant, and appealing. Recognizing that many constitutional provisions are the product of compromise and that the constitutional text’s apparent clarity is frequently an illusion, Clark nonetheless insists that the compromises that generated the Supremacy Clause resulted in “relatively clear and precise” language.\textsuperscript{13} He argues that “the Supremacy Clause recognizes only the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States as ‘the supreme Law of the Land,’”\textsuperscript{14} and displacement of what would be the otherwise governing state law can occur only through one of those enumerated modes.\textsuperscript{15} These categories, in turn, correspond to the three national lawmaking procedures elsewhere set out in the Constitution: adopting and amending “the Constitution”;\textsuperscript{16} enacting “Laws” under the bicameralism and presentment requirements of Article I, Section 7;\textsuperscript{17} and making “Treaties.”\textsuperscript{18}

Professor Clark frequently describes the constitutionally prescribed procedures governing national lawmaking as “finely wrought and exhaustively considered.”\textsuperscript{19} And Clark proffers an attractive originalism-based functionalism for his thesis: “By design,” he states, “all three sets of procedures require the participation and assent of the states or their representatives in the Senate.”\textsuperscript{20} Federal lawmaking was thus consciously held hostage to the “political safeguards of federalism,” to borrow Herbert Wechsler’s famous phrase.\textsuperscript{21} For Clark, the role of the Senate is central: “The Senate is the only federal institution that the Constitution requires to participate in the adoption of all three forms of federal law recognized by the Supremacy Clause. This was no accident. The Founders specifically designed the Senate to represent the states in the new federal government.”\textsuperscript{22}

\textsuperscript{13} Bradford R. Clark, Constitutional Compromise and the Supremacy Clause, 83 Notre Dame L. Rev. 1421, 1424–25 (2008) [hereinafter Clark, Constitutional Compromise].


\textsuperscript{15} Id. at 1338.

\textsuperscript{16} Article VII, of course, provides that the ratification of “this Constitution” by nine states sufficed for its establishment as the Constitution of the United States for the ratifying states. U.S. Const. art. VII. Article V provides the manner of proposing and ratifying amendments: They become “Part of this Constitution” when ratified by three quarters of the states. Id. art. V.

\textsuperscript{17} Id. art. I, § 7.

\textsuperscript{18} The Treaty Clause provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” Id. art. II, § 2, cl. 2.

\textsuperscript{19} See, e.g., Clark, Separation of Powers, supra note 14, at 1324 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

\textsuperscript{20} Clark, Role of Structure, supra note 12, at 700.

\textsuperscript{21} Id. at 701 (quoting 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, 543 (1954)).

\textsuperscript{22} Id. at 702–03.
More recently, Professor Clark has sought to strengthen his historical design claim by noting that the first appearance of the Supremacy Clause on the floor of the Constitutional Convention came only one day after the Great Compromise, through which the "small" (i.e., population poor) states secured equal representation in the Senate. For him, that juxtaposition further reinforces the idea that the Constitution meant to condition displacement of state law only upon state-protective political processes. Moreover, it also explicitly recognized "that small states would have disproportionate influence in adopting 'the supreme Law of the Land.'" In short, the constitutional design was to ensure "the entrenchment of the small states' influence."23

B. Michael Ramsey

Professor Michael Ramsey writes in a similar vein.24 In an impressive work in which he vigorously denies that the constitutional text is radically incomplete on foreign affairs,25 Ramsey submits that, at the founding, the concept of "executive Power"26 was well understood in America. It included not only the power to execute the law ("the 'dictionary' executive"), but also the "federative" (i.e., foreign affairs) power of the Crown.29 The latter power remained with the executive except to the extent that it was taken away and assigned to Congress or to the President and the Senate. These takeaways, Ramsey acknowledges, were quite significant; nonetheless, an important residuum of "executive Power" remained, including the general conduct of foreign affairs.30 For our purposes, what is of most interest is that Ramsey too emphasizes that, unless the Constitution or a treaty is involved, otherwise applicable state law can be displaced only by laws enacted pursuant to Article I, Section 7.31

A decision that has attracted the attention of both Professors Clark and Ramsey, American Insurance Ass'n v. Garamendi,32 provides an excel-

23. Clark, Constitutional Compromise, supra note 13, at 1422–23 (emphasis added).
28. See id. at 12–14 (discussing John Locke's taxonomy of executive powers).
30. Id.
31. Id. at 285. Professor Ramsey does, however, retreat somewhat from this position. See infra note 43 (noting Ramsey's belief that some constitutional provisions may authorize federal common lawmaking).
lent window through which we can see the attractiveness and the resolving power of Supremacy Clause textualism. There, the Supreme Court, five to four, invalidated California’s Holocaust Victim Insurance Relief Act, a burdensome disclosure statute enacted in response to widespread confiscation of or refusal to honor life insurance policies held by European Jews before and during the Second World War. The majority held that the statute was inconsistent with the policies expressed in the German Foundation Agreement, which President Clinton had signed in 2000, and in which Germany had agreed to establish a foundation to compensate victims of Nazi persecution. Although lacking any congressional authorization, the President had sought a global settlement of victims’ claims; pursuant to that goal, he had agreed to submit to any American court considering such claims a statement that “U.S. policy interests favor dismissal on any valid legal ground.” The majority’s conclusion that the President’s executive agreement was alone sufficient to displace the state law came as a shock to many (including this writer). The only apparently relevant constitutional provision, the grant of the “executive Power,” does not confer lawmaking authority. And presidential displacement of state statutory law is surely lawmaking.

Professors Clark and Ramsey both criticize the decision along Supremacy Clause grounds. “Significantly,” writes Professor Clark, “the Supreme Court made no real attempt in . . . Garamendi to explain how sole executive agreements attain the status of ‘the supreme Law of the

33. Id. at 401, 408–12.
34. Id. at 420.
36. See Medellín v. Texas, 128 S. Ct. 1346, 1369–70 (2008) (finding “exercise of Presidential authority” does not “transform[] an international obligation into domestic law”); Monaghan, Protective Power, supra note 27, at 12–32 (“[P]residential power . . . was not understood to include the power to prescribe rules for the regulation of the rights of American citizens.”). Medellín runs against the grain of Garamendi. In Medellín, the Court rejected the government’s argument that a presidential determination that a non-self-executing treaty—the Vienna Convention—should be enforced domestically was sufficient to override state procedural default rules. Medellín, 128 S. Ct. at 1368–70. These two decisions might be formally reconciled on the ground that, unlike in Garamendi, the Medellín Court believed that the President was acting contra legem in trying to enforce a non-self-executing treaty.
37. Perhaps presidential authority in Garamendi might have been subsumed under the “recognition power,” which may have some independent lawmaking component. Compare Dames & Moore v. Regan, 453 U.S. 654, 682–83 (1981), and Bradford R. Clark, Domesticating Sole Executive Agreements, 93 Va. L. Rev. 1573, 1652 (2007) [hereinafter Clark, Domesticating] (“To the extent that the President’s recognition power is conferred by the Constitution . . . the Supremacy Clause requires state and federal courts alike to apply the doctrine.”), with United States v. Belmont, 301 U.S. 324, 333–37 (1937) (Stone, J., concurring) (suggesting that “by mere executive action” President did not “intend[] to alter the laws and policy of any state”).
Land' under the Supremacy Clause." 38 I quote Professor Ramsey at
greater length to demonstrate the appeal of this form of textualism:

The approach suggested earlier . . . indicates the correct textual
answer. . . . The Court and the President were right that [in light
of the executive power] the President did not need congres-
sional authority to use diplomatic power to encourage the
Europeans to establish compensatory funds for Holocaust
victims. . . .

. . . Once we see the textual source of the President's power
in such matters, though, we also see its limitations. The
President’s power is executive, which means, above all else, that
it is not legislative. The President does not need authorization
to pursue policies with respect to Holocaust compensation, but
cannot make law in support of those policies. . . .

. . . It is important to see that giving the President preempt-
tive power is in effect granting executive lawmaking power . . . .

In this respect the case parallels the Steel Seizure case,
which we found [earlier] to be an unconstitutional example of
presidential lawmaking. . . .

. . . This reading of executive power fits with Article VI; . . .
First, it should be clear that Congress cannot, merely by adopt-
ing a policy—even on something squarely within its enumerated
powers, such as interstate commerce—preempt state law.
Article VI requires that Congress make law "in Pursuance" of the
Constitution (i.e., through Article I, Section 7), not that it
merely adopt policies. The Court's result gives the President a
greater preemptive power than Congress has—surely an odd
result.

. . . Second, Article VI makes clear that only treaties ap-
proved by the Senate (that is, made "on the Authority" of the
United States, which requires Senate approval) are part of su-
preme law. . . . If Presidents could preempt state law merely by
establishing policies, then (a) even unapproved treaties—that is,
one endorsed by the President but not yet approved by the
Senate—should be preemptive; and (b) including treaties in Ar-
ticle VI would be superfluous, because treaties would displace
state law by the preemptive force of the executive power to es-
tablish foreign policy. In sum, even on its face, Article VI's nega-
tive implication is powerful: it shows how preemption arises,
and it shows the only way preemption arises. 39

Professor Ramsey largely shares Professor Clark's views regarding the
Supremacy Clause. He sees Article VI as protecting the states "by requiring
that preemptive actions follow channels in which the states retain ma-
terial power." 40 By "negative implication," the Clause also specifies that

38. Clark, Domesticating, supra note 37, at 1617.
40. Id. at 294.
which is not binding on the states.\textsuperscript{41} In particular, Article I, Section 7’s enactment procedures ensured that the states would receive representation, which “was particularly true under the original Constitution, when states controlled appointments to the Senate. Even in the House, members—being from specific geographic districts—were likely to have local interests in mind to some extent.”\textsuperscript{42} Because of the primacy of Article I, Section 7, Ramsey concludes that no federal common law of foreign relations was intended:

Nothing in the history of eighteenth-century courts, or in the founding-era debates, suggests that anyone thought federal courts had free-floating power to displace state law. The antifederalists’ great worry that federal courts would use expansive readings of treaties and the Constitution to displace state law surely would have been a side issue if courts had a general common-law power of displacement.\textsuperscript{43}

C. Other Supremacy Clause Textualists

Finally, mention must be made of another group of Supremacy Clause textualists. Pointing to “This Constitution” as the “supreme Law,” several prominent academics, including Professors Amar, Lawson, and Paulsen, reject to varying degrees any judicial precedent inconsistent with an original understanding-driven textualism.\textsuperscript{44} Professor Lawson, for example, states that the Constitution “stands at the apex of our legal system as supreme law” and thus requires courts to “search for the true meaning of the Constitution.”\textsuperscript{45} Accordingly, in any conflict between the Constitution and a prior judicial decision, courts have an “obligation” to

\begin{itemize}
\item \textsuperscript{41} Id. at 290.
\item \textsuperscript{42} Id. at 286.
\item \textsuperscript{43} Id. at 339 (emphasis omitted). Nonetheless, departing somewhat from Clark, Ramsey offers what he considers the best argument in favor of a very limited federal judicial common lawmaking power. Ramsey believes that some constitutional provisions might authorize limited federal common lawmaking, such as the settlement of interstate disputes. Id.
\item \textsuperscript{45} Lawson, supra note 44, at 26–28.
\end{itemize}
choose the Constitution. In a similar vein, Professor Paulsen argues that by allowing precedents to dictate results, stare decisis "corrupts and undermines" any interpretive theory of the Constitution. These writers are the target of Part IV, the final section of this Article.

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Despite its attractiveness, I submit that Supremacy Clause textualism, grounded as it is in originalism, must be rejected if offered as an adequate basis for reasoning about our existing constitutional practices. To be sure, the reasons for so doing require careful elaboration, because, after all, we are all (or at least most of us) textualists. That is, in thinking about the process of constitutional interpretation, we take the text seriously. But many Supremacy Clause textualists do more: They are fundamentalists. For them, originalism provides a currently acceptable theory of constitutional adjudication, and they insist that the Supremacy Clause is a trump, a decisive factor in constitutional adjudication that (ordinarily) overrides every other consideration. Few, if any, apparently share my view that originalism cannot account for a considerable measure of the existing constitutional order.

Focusing upon Professor Clark's arguments, particularly with respect to federal common law, I submit, demonstrates the limits of Supremacy Clause textualism (and, more generally, originalism) as a mode of constitutional understanding. This Article advances three main arguments.

First—Clark believes that the Supremacy Clause should be read to bar the creation of federal common law because its reference to "Laws" meant only Acts of Congress. While I agree that, as an historical matter,
“Laws . . . made in pursuance thereof” referred only to Acts of Congress. I reach that conclusion for reasons quite different from Clark’s. My emphasis is on the word “made” (which also appears in connection with treaties). “General law,” particularly the law merchant and the law of nations, would not have been thought by the founding generation to have been “made.” It was, instead, “discovered.” It is quite implausible to think that the Supremacy Clause addressed this body of law at all, a transcendental body of law that both state and federal courts alike applied when it was applicable to cases within their jurisdiction. Courts applied that law not because it was the product of a sovereign command, but because it was understood at the time as simply what judges did. But federal declarations of general law were not “supreme.” The state courts were entirely free to take a different view of the content of the relevant general law. The modern conception of federal common law—judge-made law that binds both federal and state courts—simply did not exist circa 1788. There was no “compromise” that made federal statutory law obligatory, but not federal common law. The Supremacy Clause simply did not deal with the latter.

Clark writes in the post-positivist reality, where our conception of “law” requires that it be attached to some sovereign; but we cannot force a new concept (federal common law) into a vessel (the Supremacy Clause) that was created when that concept did not exist. This problem, I believe, illustrates the broader difficulty with originalism in general: Far too infrequently will one find a problem that the Founders actually contemplated and resolved. This means that in the modern world, a great deal of constitutional law is a product of construction, not excavation.

Second—Supremacy Clause textualists cannot explain much of the existing constitutional order. Clark, for example, cannot adequately account for the rise of the administrative state, which is characterized by large quantities of administrative (not Article I, Section 7) lawmaking. Nor, as I hope to show herein, can Clark provide a satisfactory account of federal common law; indeed, he seems to believe that all federal common law, as we understand the term, is, in fact, really just interpretation of “This Constitution.”

51. U.S. Const. art. VI, cl. 2 (emphasis added).
52. See, e.g., Clark, Role of Structure, supra note 12, at 701–03; Clark, Separation of Powers, supra note 14, at 1332.
53. See infra Part III.
55. U.S. Const. art. VI, cl. 2.
Third—After examining some interpretive problems inherent in Supremacy Clause textualism, I argue that important aspects of the intellectual world of the Founders have wholly vanished, rendering greatly problematic any originalist understanding of the Supremacy Clause. Moreover, even if the clear weight of the historical evidence supported it, Supremacy Clause textualism could not supply a satisfying theory of our contemporary constitutional order because it is inconsistent with deeply entrenched practices and thus would destabilize far too much settled doctrine.

The foregoing reasons lead me to the more specific conclusion that at least for constitutional lawyers, the word “Laws” in the Supremacy Clause must now be taken to include more than Acts of Congress; it must encompass the commands of any authorized national lawmaker. That is to say, “Laws” ought to include the commands of any institution whose lawmaking authority has been recognized over time.

This Article proceeds in four parts. Part I describes the shaky historical claims of Supremacy Clause textualists, particularly in assigning to the Supremacy Clause an intentionally state-protective role while ignoring its nationalist foundations. Part II describes Supremacy Clause textualism’s internal problems, such as its inability to account for administrative lawmaking and federal common law. Part III describes the lost world of the founding generation and their understanding of the nature of “Laws,” and it demonstrates that the general common law would not have been understood by the Founders as having been “made.” Finally, Part IV moves to a different and more general matter. It challenges those Supremacy Clause textualists who would deny the authoritative nature of precedent in our constitutional system. In the process, it doubts that any form of originalism, either theoretically or in practice, can provide an adequate account of our practice of constitutional adjudication.

I. Textualism and the Complications of History

It may well be that the Framers did not specify with precision the boundaries between national and state power, leaving room for future contest. Wherever the lines are ultimately drawn, however, Clark insists that the word “Laws” in the Supremacy Clause meant only an act of...
Congress. Clark's functional explanation for that conclusion is, in turn, grounded in history. Putting aside, temporarily, the question of the Founders' understanding of the meaning of "Laws," as used in the Supremacy Clause, I submit that Clark's broader historical account is unsound.

Professor Clark is surely right to underpin his account by emphasizing the state-centered dimensions of the original constitutional landscape. I would nonetheless give a sharply different account of the relevant Supremacy Clause history and of the role of the Senate in our early constitutional order. In particular, I wish to show that (a) Clark's newly discovered emphasis on the constitutional protection provided to the small states through equal representation in the Senate is misplaced; (b) the Supremacy Clause was intended as a nationalizing, not a state-protective, clause; and (c) Clark's account of the Senate's importance in the new constitutional order is thus quite incomplete. Shorn of these underpinnings, the appeal of Clark's Senate-oriented Supremacy Clause textualism is, I believe, considerably weakened.

A. Large States/Small States

Professor Clark rightly emphasizes the Constitutional Convention's concern with the role of the Senate as protector of individual state interests. Madison observed that "the Senate represented the States alone." The expectation seems to have been that the Senate would represent the states in their "corporate" capacities, as distinctive polities in the new constitutional order. Professor Rakove writes that "[a]fter July 16 [the day of the vote guaranteeing the small states equal representation in the Senate], no one could deny that the Senate was intended to embody the equal sovereignty of the states and to protect their rights of government against national encroachment."

But Clark's recent attraction to the Constitutional Convention's resolution of the big state/small state divide as support for Supremacy Clause textualism cannot bear much weight. To be sure, that division played a central role in the deliberations of the Convention, at which the funda-

58. See infra Part III.
59. See Monaghan, Stare Decisis, supra note 50, at 729 & n.38, 731 ("Circa 1789, the internal orientation of the American people was state centered to a degree completely lost to modern constitutional law scholars."); see also Jack N. Rakove, Original Meanings 162-68, 201-02 (1996) (discussing Framers' conception of federal versus state power). The pull of state-centered federalism clearly limited the possibilities for change even after the Civil War. See Bernard Bailyn et al., The Great Republic 735-41 (1977) (discussing possible options for Reconstruction).
61. Rakove, supra note 59, at 170. Thus, the "people" of the several states were not the direct beneficiaries of state representation in the Senate.
62. Id.
mental question was how the new national government was to be organized. Two competing modes quickly emerged: proportional representation based upon state population, and state equality. Unsurprisingly, the small states adamantly refused to see their role in the new national government swallowed up by the population-rich states.\textsuperscript{63} The Great Compromise ultimately resolved the issue by guaranteeing state equality in the Senate. In his classic study, \textit{The Framing of the Constitution of the United States}, Professor Farrand writes:

This is the great compromise of the convention and of the constitution. None other is to be placed quite in comparison with it. There have been many misunderstandings of it . . . . The important feature of the compromise was that in the upper house of the legislature each state should have an equal vote. The principle of proportional representation in the lower house was not a part of the compromise, although the details for carrying out that principle were involved.\textsuperscript{64}

Senate equality assured, the small states became “warmer and warmer advocates of a strong national government.”\textsuperscript{65}

By the end of the Constitutional Convention, however, many delegates recognized that the dangerous fault line was not between the large and small states, but was sectional, with each region seeking security against domination by other regions capable of capturing the national government. Professor Farrand writes:

[I]n the first stages of the discussion of proportional representation the conflicting interests of east and west were more important than those of slave and free states. In colonial times, as population increased and settlement extended into the back

\textsuperscript{63} The Delaware delegates were instructed that state equality was non-negotiable; those instructions caused consternation among the large state delegates. Max Farrand, \textit{The Framing of the Constitution of the United States} 56 (1913) [hereinafter Farrand, Framing]. As the Convention wore on, tension between the population-rich and population-poor states increased. Id. at 84, 92–95, 119; see also Edward A. Purcell, Jr., \textit{Originalism, Federalism, and the American Constitutional Enterprise} 25 (2007) (“Hamilton dismissed the position of the small states on [equal] representation [in the Senate] as a simple ‘contest for power . . . .’

\textsuperscript{64} Farrand, Framing, supra note 63, at 105. Professor Farrand goes on to speak about direct election of the Senate by the state legislators:

It cannot be too strongly insisted that whatever opinions were expressed in debate, and whatever arguments were advanced for or against the election of the members of the upper house by the state legislatures—and all sorts of proposals of other methods were made and all sorts of opinions were expressed—they should be interpreted with reference to the one question at issue, that of proportional representation.

Id. at 112.

\textsuperscript{65} Id. at 119; see also Thornton Anderson, \textit{Creating the Constitution} 73 & n.36 (1993) (noting impact of Great Compromise on attitude of small state delegates toward strong national government). Unsurprisingly, the small states were also inclined to strengthen the Senate’s role. See Farrand, Framing, supra note 63, at 119 (considering Appointments Clause).
country, the conservative moneyed interests of the coast insisted upon retaining the control of government in their own hands and refused to grant to the interior counties the share in government to which their numbers of population entitled them. . . . And this inequality was maintained in the state governments that were formed after the outbreak of the Revolution. . . . As it had worked well there for the older portions of the state to keep the power in their own hands, so now in the United States, it was insisted, new states ought not to be admitted on an equal footing with the old states. 66

Farrand himself perhaps understates the extent of North-South sectionalism at the time of the framing. He views that sectional clash entirely in terms of slavery, which, he argues, was not an important issue at the Convention. 67 Even so, important sectional economic cleavages were

66. Farrand, Framing, supra note 63, at 108–09. Professor Farrand adds:
Gouverneur Morris was the champion of the commercial and propertied interests, and when the great compromise was under discussion he declared in favor of considering property as well as the number of inhabitants in apportioning representatives. In explanation of his position he stated that he had in mind the "range of new States which would soon be formed in the west," and "he thought the rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the National Councils."

Id. at 109.

67. See id. at 110 ("In 1787, slavery was not the important question, it might be said that it was not the moral question that it later became. The proceedings of the federal convention did not become known until the slavery question had grown into the paramount issue of the day."). Writing nearly a century later, Professor Howe agrees that "the line between 'free' and 'slave' states was not yet sharply drawn [even by] 1815." Daniel W. Howe, What Hath God Wrought 54 (2007). He adds: "Had short staple cotton not emerged in the years after 1815 as an extremely profitable employment for slave labor, finding a peaceful, acceptable resolution to the problem of emancipation might not have been so difficult." Id. at 56. But the emerging cotton economy changed everything: "The apologetic attitude toward slavery, common around 1815, soon began to be challenged by a new justification for slavery: planter paternalism." Id. at 58; see also id. at 128 (discussing boom of cotton industry in South). "During the immediate postwar years of 1816 to 1820, cotton constituted 39 percent of U.S. exports; twenty years later the proportion had increased to 59 percent . . . ." Id. at 131. Thus, "[m]uch of Atlantic civilization in the nineteenth century was built on the back of the enslaved field hand." Id. at 132. Professor David Waldstreicher's brief study of slavery and the origins of the Constitution does not alter this analysis. See David Waldstreicher, Slavery's Constitution: From Revolution to Ratification (2009). He agrees that disturbance of slavery was not on the Convention agenda, but the existence of slavery was an issue that had to be negotiated around. Professor Waldstreicher describes how both slave and nonslave states tried to leverage the issue of slavery to their advantage in creating a plan for representation and taxation. Id. at 72–79, 89–90. He frames the Convention as an economic battle between large and small states, in which slavery was frequently used by both sides to enhance their bargaining positions. Thus, "[t]he business of slavery had not been left unfinished so much as it had been leveraged." Id. at 103. All this said, however, the new Constitution contained several provisions favorable to slavery. Paul Finkelman, The Constitution, the Supreme Court, and History, 88 Tex. L. Rev. 353, 378–81 (2009) (book review).
already apparent, as the conflict over such matters as navigation acts and the taxation of imports and exports demonstrated.\textsuperscript{68}

The Convention's concern with the distinction between large and small states was stillborn by the time the Constitution emerged for ratification. Perhaps this is because the Convention had dealt with the issue so adequately. Interestingly, however, \textit{The Federalist No. 62} categorically denied that to the extent one could identify distinctive small state interests, state equality in the Senate protected those interests.\textsuperscript{69} In the end, it does not matter. The sectional divisions that emerged during the Convention deliberations became a focal point in the ratification debates. In \textit{The Federalist No. 5}, Jay expressed fears that "the people of America [will] divide themselves into three or four nations," and he decried those who advocated "for three or four confederacies."\textsuperscript{70} In \textit{The Federalist No. 6}, \textit{Concerning Dangers from War Between the States}, Hamilton went even further in expressing fears of sectional conflict.\textsuperscript{71} By 1800, any straightforward

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\item \textsuperscript{68} Indeed, Farrand himself recognized this fact when he addressed the resolution of commerce-related matters: "New England and the middle states were the commercial and shipping sections of the country . . . [T]he south was a producing section." Farrand, Framing, supra note 63, at 147-48. Describing the adjustments made by the Convention, for importation of slaves and the proposed restrictions on navigation acts, he describes the result as "one of the conspicuous and important compromises of the convention." Id. at 151.

\item \textsuperscript{69} \textit{The Federalist No. 62} exhibits hostility to equal representation in the Senate, treating it not as a matter to be justified "by the standard of theory" but as a matter of "amicity" and "mutual deference and concession which the peculiarity of our political situation rendered indispensable." The Federalist No. 62 (James Madison), supra note 1, at 342-43. To the extent that equality "is at once a constitutional recognition of that portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty," that interest was equally shared by the large states. Id. at 343. Winding down this discussion, Madison wrote:

It must be acknowledged that this complicated check on legislation may, in some instances, be injurious as well as beneficial; and that the peculiar defense which it involves in favour of the smaller states, would be more rational, if any interests common to them, and distinct from those of other states, would otherwise be exposed to peculiar danger. But . . . the larger states will always be able, by their power over the supplies, to defeat the unreasonable exertions of this prerogative of the lesser states . . .

Id. But Madison concluded on a more cheerful note: "[A]s the facility and excess of law-making seem to be the diseases to which our governments are most liable, it is not impossible that this part of the constitution may be more convenient in practice, than it appears to many in contemplation." Id.

\item \textsuperscript{70} The Federalist No. 5 (John Jay), supra note 1, at 26.

\item \textsuperscript{71} The Federalist No. 6 (Alexander Hamilton), supra note 1, at 34 ("From this summary of what has taken place in other countries, whose situations have borne the nearest resemblance to our own, what reason can we have to confide in those reveries, which would seduce us into the expectation of peace and cordiality between the members of the present confederacy . . . ?"). Consider, in light of the history of the Constitutional Convention and the ratification debates, Professor Amar's astonishing claim that the small states simultaneously agreed to a document that permitted the Constitution to be amended by fifty percent plus one of a national "We the People." Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L.
concern with a divide between large and small states had vanished from the constitutional landscape. Neither Professors Elkins and McKitrick in their *The Age of Federalism* nor Professor Wood in his recently published *The Empire of Liberty* even mentions the topic. But sharp sectional economic conflicts between North and South surfaced. The proper role of the tariff, for example, quickly became a sectional issue, as did internal improvements.

The constitutional text itself reflects sectionalism concerns. Article V’s amendment process was designed to ensure that the states—or, far more accurately, regions—could be compelled to fuse no closer together than the original document provided unless the rigors of Article V were satisfied. In his *Discourse*, Calhoun expressed confidence that Article V

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73. Interestingly, the tariff of 1816, enacted during the surge of nationalism after the War of 1812, was strongly protective and was supported by many southern stalwarts, including Madison and Calhoun. Howe, supra note 67, at 84–85. Further, “[t]he landmark tariff . . . enacted on April 27, 1816 was candidly protectionist in its features.” Id. at 84. But as Caleb Nelson reminds us:

In the 1820s . . . protective tariffs became a source of enormous sectional strife.

As Joseph Story wrote in 1833, the controversy over protective tariffs “agitates all America, and marks the divisions of party by the strongest lines, both geographical and political, which have ever been seen since the establishment of the national government.”


74. Howe, supra note 67, at 87–89; Wood, Empire, supra note 72, at 164–73.

75. One also ought to note the Convention’s concern with strategically positioned individual port states. See U.S. Const. Art. 1, § 8, cl. 2 (mandating that “all Duties, Imposts, and Excises shall be uniform throughout the United States”). In United States v. Ptasynski, 462 U.S. 74 (1983), the Court reviewed the history behind the Uniformity Clause. Its purpose

was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors.

Id. at 81 (quoting 1 Joseph Story, *Commentaries on the Constitution of the United States* 683 (Boston, Little, Brown, & Co. 4th ed. 1873)).

76. Monaghan, We the People, supra note 71, at 143–45 ("Article V was thus a compromise between two competing policies—the Constitution must possess a sensible mechanism for change, but the terms of the union among the states were not to be readily altered.").
would protect the South from northern domination, and if it did not, he elaborated, secession was the next step.\(^77\)

Regional considerations were also reflected in the Treaty Clause. Its supermajority requirement was designed to ensure that the new national government could not readily sacrifice any sectional interests.\(^78\) This was no idle concern. Western interests already feared that a potential treaty with Spain would close the port of New Orleans to gain advantage for northern commercial interests in their dealings with Spain.\(^79\) (Interestingly, use of the Treaty Clause to displace otherwise applicable state—and federal—law has now fallen into disfavor especially among political conservatives, because some see the process as suffering from severe legitimacy defects.\(^80\)) It was sectionalism, then, more so than the large/small state divide, that animated the debates at the time of the Convention and ratification.

B. The Supremacy Clause

The history of “Our Federalism”\(^81\) from 1789 to 1865 (and beyond) is the history of the impact of the centrifugal effects of sectionalism on the emerging American national polity.\(^82\) While the substitution of sectionalism for Clark’s large state/small state emphasis reorients the historical focus, it does not dispose of his central claim: Regions, after all, are

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77. Id. at 161 (citing John C. Calhoun, A Discourse on the Constitution and Government of the United States, in A Disquisition on Government and a Discourse on the Constitution and Government of the United States 111, 158 (Richard K. Cralle ed., 1968)).
79. Id. at 1282-83.
80. For an excellent critical survey, see Laura Morancheck Hussain, Note, Enforcing the Treaty Rights of Aliens, 117 Yale L.J. 680, 700 (2008) (“[T]he treaty power today tends to provoke anxieties about the role of the House . . . in lawmaking, the nation’s commitment to constitutional language as the sole exposition of fundamental individual rights, the appropriate roles of the states . . . within our constitutional system, and the judiciary’s proper role in foreign affairs.”). In part, objections to giving immediate domestic effect reflect more fundamental misgivings about giving domestic effect to any not wholly “American”-generated legal principles. For a recent review of that controversy, see Catherine Powell, Tinkering with Torture in the Aftermath of Hamdan: Testing the Relationship Between Internationalism and Constitutionalism, 40 N.Y.U. J. Int’l L. & Pol. 723, 732-44, 754-91 (2009). For an extended argument, on functional grounds, that the treaty process has outlived its historical justifications and should be replaced by congressional-executive agreements, see Hathaway, Treaties End, supra note 78. In Oona A. Hathaway, Presidential Power over International Law: Restoring the Balance, 119 Yale L.J. 140 (2009), Professor Hathaway proposes statutory reforms to curb the President’s dominance of the process of international lawmaking agreements.
82. For recent historical studies portraying the divisive nature of sectionalism in the United States before the Civil War, see 1 William W. Freehling, The Road to Disunion (1990); 2 William W. Freehling, The Road to Disunion (2007); Howe, supra note 67, at 367-73. For a splendid earlier account, see David M. Potter, The Impending Crisis: 1848-1861 (1976).
composed of states, and regional protection thus found institutional expression in the Senate. And the three-fifths rule of Article I, Section 2, which distorted southern representation in both the Electoral College and the House of Representatives, provided (temporarily at least) additional vital protection for the South.83

Recently, Clark has emphasized that the Supremacy Clause was added but a day after the Great Compromise.84 His suggestion that the Clause was designed to protect state sovereignty is, however, quite unconvincing.85 Though surely state-centered in important regards, the Constitution was, after all, intended to create an effective national government, and the Supremacy Clause was central to that endeavor. Resolution 14 of the Virginia Plan, which after considerable revamping formed the basis of the Constitution, contained a weak form of the Supremacy Clause.86 No doubt this was because the Virginia Plan also granted the national legislature a power to “negative” all state legislation “contravening in the opinion of the National legislature the articles of Union.”87 (Madison was very strongly attached to the negative, which he viewed as “perhaps the central pillar in his vision of a new national government”; indeed, he supported a “universal” negative on all state laws.88) Resolution 6 of the New Jersey plan, however, advanced by the small states at the height of the large state/small state tension, contained a Supremacy Clause bearing a strong family resemblance to the present Clause.89

83. The representation distortion worked by the three-fifths rule resulted in southern control of the presidency for a large part of the first half of the nineteenth century. Howe, supra note 67, at 61, 69, 150, 208, 282; see also id. at 352 (describing importance of slave state representation in passing Indian Removal Bill). Eventually, however, the South fell further and further behind the North in terms of population, and “looked to preserve sectional equality in the Senate, where each state had two members regardless of population.” Id. at 150; see also id. at 767–78 (describing Senate’s blocking of Wilmot Proviso, which would have prohibited slavery in territories acquired in Mexican War).


85. Clark writes:

The Supremacy Clause magnifies the significance of the Senate to the federal-state balance by conferring the status of the supreme Law of the Land only on sources of law adopted with the participation and assent of the Senate or the states themselves—that is, the Constitution, Laws, and Treaties of the United States.

Clark, Constitutional Compromise, supra note 13, at 1432 (internal quotation marks omitted).

86. It read: “Resd. that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.” 1 Farrand, Records, supra note 60, at 22.

87. Id. at 21 (discussing Resolution 6).


89. It read:
Once state equality in the Senate was achieved, the states rebelled at giving Congress a general veto over state laws.\textsuperscript{90} A different mechanism was necessary to ensure national, not state, sovereignty in the areas of authority committed to the national government; that mechanism was the Supremacy Clause. That the Clause was designed to ensure lawful national supremacy is quite apparent from the text itself. It provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\textsuperscript{91}

History confirms what the text makes plain. Luther Martin introduced a version of the Supremacy Clause nearly identical to Resolution 6 on the same day that another of Madison’s efforts to give Congress a negative over state laws failed.\textsuperscript{92} The Clause was intended to make clear that courts (not Congress) would ensure that valid federal law would prevail over contrary state law: “[I]t was [now] evident that the authority of the national government would depend on judicial enforcement.”\textsuperscript{93} “Quietly and uncontroversially,” writes Professor Rakove, “a clause which was origi-
nally offered as a weak alternative to the negative on state laws had been transformed into a potentially powerful basis for national supremacy. 94

The Supremacy Clause was not a product of compromise in favor of state interests. Professor Birkby notes that no evidence exists that replacing the congressional negative with the Supremacy Clause was one of the concessions given to the small states. He writes:

If this is the case, it is one of the best kept secrets of the Convention. There is no indication in the debates or in letters written then or later by key delegates that abandonment of the legislative negative was a part of the price exacted by the small states. It is unreasonable to assume that the delegates agreed that this one compromise should be shrouded in secrecy and never revealed. 95

During the ratification debates, the Supremacy Clause was seen by friend and foe alike as an instrument of national authority. Professor Drahozal writes:

The Supremacy Clause was prominent in the state debates on ratification, in newspapers and pamphlets as well as in the state ratifying conventions themselves. According to Alexander Hamilton in Federalist No. 33, the Supremacy Clause (along with the Necessary and Proper Clause) were “the sources of much virulent invective and petulant declamation against the proposed Constitution.” 96

He adds that “[t]he Anti-Federalists’ fundamental criticism of the Supremacy Clause was that it made the national government too powerful and thus was too great an infringement on state sovereignty.” 97 Professor Drahozal groups the general objections as the destruction of state autonomy, interference with the rights secured by states’ bills of rights, and the capacity of treaties to override even state constitutions. 98 Writing in a similar vein, Professor Birkby states:

When the proposed Constitution was debated in the state ratifying conventions, however, serious questions were raised concerning the Supremacy Clause. Most of the objections centered on the contention that the clause would prove to be the instrument for the absorption of the states by the central government. The danger was thought to come from the combined operation of the supremacy clause and the tax power, or the necessary and proper clause, or the jurisdiction of the federal courts. 99

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94. Rakove, supra note 59, at 174.
95. Birkby, supra note 84, at 134.
96. Drahozal, supra note 84, at 25 (quoting Mary J. Davis, Unmasking the Presumption in Favor of Preemption, 53 S. Car. L. Rev. 967, 969 n.9 (2002)).
97. Id.
98. Id. at 25–26.
From the standpoint of logic, it could of course be argued that the Supremacy Clause was surplusage, as Hamilton insisted. The grants of power to Congress in Article I and the restrictions imposed therein on the states necessarily implied that these provisions were the “supreme Law of the Land.” But here, as elsewhere, “a page of history is worth a volume of logic.” The problematic status of the Articles of Confederation as “law” was real. The purpose of the Supremacy Clause was to make clear the legal authority of the new national government. Professor Philip Hamburger’s splendid new work, Law and Judicial Duty, puts the matter clearly:

It is well known that the Articles of Confederation left Congress without some essential powers.

The problem, however, was not merely one of inadequate powers but more basically a question of whether the Articles of Confederation or any congressional enactment amounted to the law of the land. Rather than a constitution with authority from the people of the American states, the Articles were a “league of friendship” among the states, and although the states “delegated” some of their power to Congress through the Articles, it was far from obvious that they thereby made the Articles a law. Nor was it apparent that the states gave Congress a lawmaking power. Congress had no authority from the people, and from the states it only had authority to make “determinations.” This was less than a lawmaking power, and Congress therefore promulgated its law-like determinations under the rubric of “ordinances”—the traditional label for acts without the legitimacy of the law of the land.

In fact, instead of imposing any legal obligation, Article XIII of the Articles of Confederation only required a contractual commitment from the states: “Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them.

100. Hamilton insisted that the Clause was “only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.” The Federalist No. 33 (Alexander Hamilton), supra note 1, at 172. This is true except insofar as the Supremacy Clause protected treaties entered into during the Articles of Confederation.

101. See Bob Eckhardt & Charles L. Black, Jr., The Tides of Power 5 (1976). As Representative Eckhardt notes:

Even the Article VI “[S]upremacy C]lause,” of which so much is made, is plainly unnecessary, because nobody in his right mind could read Article I and come to any conclusion other than that federal law is to be supreme. There is language in Article I which says that the States can’t do this, that, or the other—language that could not possibly occur in an instrument whose underlying assumption was not the supremacy of national law. But even if these particular passages weren’t there, it would be rather preposterous to think that a state law could take precedence over a power, such as the commerce power, granted to and exercised by the national Congress.

And the Articles of this confederation shall be inviolably observed by every state.” Just how different this was from the obligation of law became evident when the delegates to Congress closed the Articles with the fulsome declaration that “we do further solemnly plight and engage the faith of our respective constituents” that “they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them,” and that “the Articles thereof shall be inviolably observed by the States we respectively represent.” The Articles and the determinations of the United States in Congress had to be plighted as a matter of faith precisely because they lacked the obligation of law.103

That the Supremacy Clause was designed to protect national, not state, interests is particularly evident with respect to treaties. States’ failure to honor treaties, particularly the 1783 Treaty of Paris, was one of the animating causes of the Constitutional Convention,104 and it was expected that treaties made by the new national government would be wholly self-executing. That is to say that, upon ratification, they would immediately operate as internal law.105

C. Overstating the Senate’s Protective Role

Furthermore, Professor Clark overstates the protective role of the Senate in the constitutional structure that emerged from the Convention. Professor Riker long ago observed that the states, qua states, had never been able to affirmatively direct national policy through the Senate. He


Many of the states took offense at the suggestion that the Treaty was binding as law. Southerners recalled that treaties had not previously been binding as law; they also generally opposed any return of Tory lands and any suggestion that Americans had to repay British perfidy with cash. Southern states therefore typically barred British subjects from recovering their property or collecting their debts, and although the most dramatic southern departures from the Treaty were legislative, the most persistent were judicial. The North Carolina judges, for example, regularly denied that the Treaty was part of the law of the land. The sole exception was when they banished the Tories Brice and McNeil and to this end “declared that the treaty of peace was the law of the land.” Otherwise, the North Carolina judges, like many other southern judges, refused to acknowledge that the Treaty was legally binding. The British responded to such discrimination by refusing to relinquish the posts they held along the Canadian border, thus hinting that America might lose the territories it had secured through the Treaty of Paris.

Hamburger, supra note 103, at 591–92 (citations omitted).

attributes this in significant part to the important structural differences between the Articles of Confederation and the Constitution. The Articles of Confederation permitted recall of state representatives at any time, and thus state legislatures could effectively issue binding instructions. Not surprisingly, a sharp dispute immediately arose over whether such instructions were binding under the new Constitution. Many senators ignored them, preferring to face the political consequences of a future election by the state legislature, and by the end of the Jacksonian era, instructions ceased to be a matter of importance. I believe that the central reason why the pre-Civil War Senate could not affirmatively direct national policy was because the states were fractured along sectional lines. As a result of this fracture, the Senate played an essentially negative role in the early American constitutional order: protecting regional interests.

While the Senate’s state-protective role was important in our early constitutional history, the states had other means by which to secure themselves against national oppression. The Federalist No. 62, for example, argued that state security against national oppression was to be secured through other mechanisms: in the states themselves through their ability to compete for the affections of the people, and in every state’s ability to raise a hue and cry against national excesses. Moreover, the Senate’s state-protective function was institutionally compromised at the very outset by allowing senators to vote as individuals, not as states. The members of the Convention did not see it that way, however, no doubt because of the senators’ electoral dependence on the state legislatures. Nonetheless, the consequences of the Convention’s decision quickly appeared. Professor Hathaway tells us that the Jay Treaty, which

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107. Id. at 457. On occasion, the device of a “forced” resignation of the disobeying senators was unsuccessful. Id. at 458–60.
108. See id. at 460–61 ("Jackson’s use of instructions was . . . the beginning of their obsolescence.").
109. See Note, Defending Federalism: Realizing Publius’s Vision, 122 Harv. L. Rev. 745, 746 (2008) (“[T]he states would keep the national government honest by outcompeting it for the affections of ‘the people.’”).
110. Id.; see also The Federalist No. 17 (Alexander Hamilton), supra note 1, at 92–93 (discussing affection of people for their states); The Federalist No. 26 (Alexander Hamilton), supra note 1, at 143 (discussing state vigilance); supra note 69 (discussing The Federalist No. 62).
111. See Rakove, supra note 59, at 170 ("If the Senate represented states in their corporate capacity, it was hardly consistent to allow senators to vote as individuals rather than as a delegation."). Luther Martin objected on that ground. Id. at 171. “Equally revealing,” Rakove states, “was the treatment of the payment of senatorial salaries. . . . Oliver Ellsworth . . . proposed restoring national payment. . . . A chorus of delegates . . . echoed his position, while again only Martin protested.” Id. Professor Rakove concludes that “[t]he Senate itself would embody the mixed character of the Constitution: It would be ‘federal’ in origin but ‘national’ in orientation, somehow protecting state sovereignty and the national interest simultaneously.” Id.
112. Farrand, Framing, supra note 63, at 121–22.
the Senate approved twenty to ten, would have failed had voting occurred on a state-by-state basis.\textsuperscript{113} Finally, of course, the Senate's protective role was further eroded by the rise of movements toward the popular election of senators through the "public canvass" and other such mechanisms, all of which ultimately culminated in the Seventeenth Amendment.\textsuperscript{114} Any adequate theory of constitutional adjudication must make sense of this development.

D. The Constitutional Text and the Present

Clark's historical design account of the Supremacy Clause\textsuperscript{115} seems to me largely unconvincing, but one must acknowledge the constitutional text itself. Surely, on first reading, Clark's understanding of the Supremacy Clause is intuitively appealing, despite my criticisms. One can imagine, at the founding, some or many members of the populace concluding in essence that, "I, of course, don't know exactly what went on at the Convention. However, the Constitution certainly strengthens the national government's authority against the states, but only in the instances specified in Article VI." Thus, even a nation-centered Supremacy Clause that can be seen as indirectly protecting state interests could draw additional support from the manner in which proponents of both the Constitution and the Bill of Rights presented those documents to the ratifiers. The states were, after all, intended and expected to play a significant role in the new legal order. Moreover, acknowledging a state-protective gloss on the Supremacy Clause, both presentations emphasized the limited nature of the powers given to the new national government.\textsuperscript{116}

Against this background, one can understand the current appeal of Supremacy Clause textualism (particularly in reading "Laws" as referring only to Acts of Congress) and of the notion of the constitutional text as withstanding intervening developments such as judicial precedent. These understandings, however, encounter sharp difficulties, apart from the historical inadequacies I have just addressed. The next Part examines some of the problems facing Supremacy Clause textualists, especially the status of federal common law. As we shall see, these problems, particularly the necessity of explaining the current status of federal common lawmaking, ultimately force Clark to recast federal common law as constitutional interpretation.

\textsuperscript{113} Hathaway, Treaties End, supra note 78, at 1284 n.121.
\textsuperscript{114} Riker, supra note 106, at 463-69.
\textsuperscript{115} See supra notes 11-23 and accompanying text.
\textsuperscript{116} For a recent and elaborate demonstration of this point, see Kurt T. Lash, The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty and "Expressly" Delegated Power, 83 Notre Dame L. Rev. 1889, 1895 (2008) (noting early concerns that "the Constitution delegated unchecked authority into the hands of the federal government" and "response . . . that Congress would have only expressly enumerated powers"). Such an interpretation might be reinforced by the text of the First Amendment ("Congress shall make no law . . . "), which suggests that Congress alone can enact law. See U.S. Const. amend. I.
Examined up close, Supremacy Clause textualism encounters numerous difficulties, some large, some small. These difficulties arise when Supremacy Clause textualists attempt to account for the rise of administrative lawmaking in the modern state, the current status of federal common law, and the operation of other constitutional texts, such as the Treaty Clause and the Take Care Clause. I address each of these problems in turn.

A. The Problem of Administrative Lawmaking

More striking than the transformation in “Our Federalism” is the extent to which the 1789 version of separation of powers gave way to the necessities of the new administrative and bureaucratic order. The best-known casualty here is the Lockean axiom that the grant of legislative power is only to make laws, not to make other legislators, and thus Congress cannot delegate legislative power.117

Professor Clark’s reading of the Supremacy Clause cannot be reconciled with the rise of the modern administrative state, the dominant characteristic of which is administrative—not Article I, Section 7—lawmaking. Clark confronts that reality, rather than, as some do, denying that agencies exercise legislative power.118 His only response is that the nondelegation doctrine cannot be enforced, except at the margins.119 Massive delegations must be sustained, he says, because no principled line exists between agency interpretation (which is permissible) and agency lawmak-


118. Although agency lawmaking is quite indistinguishable from congressional lawmaking so far as the citizen is concerned, Professors Posner and Vermeule argue that it is not part of Article I’s “legislative Powers.” Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1723 (2002). That language, they assert, refers only to the power to enact statutes. Id. Professor Thomas Merrill rightly criticizes that view as an “idiosyncratic[ally]” narrow definition of “legislative” power, observing that “[t]here is no support in decisional law” for such a restricted definition, and further observing that “[t]he possibility seems to never have occurred to anyone in a context in which it would have decisional significance.” Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2108-09, 2125 (2004) [hereinafter Merrill, Rethinking]; see also id. at 2165 (arguing “the nondelegation doctrine . . . should be rejected” and Article I, Section 1 does not preclude delegation of legislative authority).

119. Clark cites two decisions in which he claims that the nondelegation principle was enforced. See Clark, Procedural Safeguards, supra note 54, at 1702 (citing Clinton v. City of New York, 524 U.S. 417 (1998), and INS v. Chada, 462 U.S. 919 (1983)).
ING (which is not). There surely is force to this argument. Still, clear ("I know it when I see it") cases of agency "lawmaking" currently exist in the multitude of "do what you think best" delegations. Yet, while piously avowing that legislative power cannot be delegated, the Supreme Court invariably upholds such "delegations" under the flaccid "intelligible principle" doctrine. 

The recent congressional efforts to end the financial crisis show how empty the nondelegation "prohibition" is.

120. See id. ("[T]here is no bright line, judicially administrable test for distinguishing (permissible) law execution from (impermissible) lawmaking."). By contrast, both Professor Merrill and Professor Cass Sunstein believe that the text of Article I, Section 1 simply does not preclude delegation of legislative power. Merrill, Rethinking, supra note 118, at 2165; Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000). This argument, however, ignores important background assumptions governing the original meaning of the constitutional text. See supra note 117 and accompanying text (noting Lockean "axiom" that legislators could not make other legislators by delegating power). Early decisions reflect the nondelegation principle. See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43–46 (1825) ("The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions . . ."). Thomas Cooley's influential nineteenth-century work states that "[o]ne of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 163 (Victor H. Lane ed., 7th ed. 1903) (1868).

121. See Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1275 (2006). Professor Fallon's "permissible disparity thesis" recognizes that "it is sometimes acceptable for courts to allow a gap to open between the Constitution's meaning and the doctrines through which judges implement constitutional guarantees." Id. at 1278–79 (internal quotation marks omitted). But on occasion, judge-made doctrine cannot or should not be fashioned. See id. at 1322–31 (suggesting framework for analyzing when courts can and should allow gap between Constitution's meaning and judicial application).

122. For example, the Court has upheld statutes that instruct agencies to regulate on the basis of "public interest, convenience, or necessity," Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (internal quotation marks omitted), to set "fair and equitable" prices, Yakus v. United States, 321 U.S. 414, 427 (1944), or to set ambient air quality standards that are "requisite to protect the public health," Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473 (2001) (citation omitted) (internal quotation marks omitted).

123. Speaking of Article I, Section 1, the Whitman Court wrote: "This text permits no delegation of those powers." 531 U.S. at 472 (citation omitted); see also, e.g., Touby v. United States, 500 U.S. 160, 165 (1991) ("Congress may not constitutionally delegate its legislative power to another branch of Government.").

124. Whitman, 531 U.S. at 472–75.

125. Id. at 474–75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

126. See John Schwartz, Some Ask if Bailout Is Unconstitutional, N.Y. Times, Jan. 16, 2009, at A16 (considering constitutionality of congressional delegation). A caveat is in order here: On the whole, the TARP and other federal interventions do not sharply
This Article focuses on Clark’s views of the Supremacy Clause as providing an adequate theory of constitutional adjudication. Even if one were to fully accept Clark’s point as to the limits of the judicial process, we are left in an uncomfortable position: For a very long time, then, Congress and the President have been acting illegitimately in sanctioning such delegations.

B. The Problem of Federal Common Law

Clark’s thesis faces another formidable issue, one that I believe also demonstrates Supremacy Clause textualism’s inadequacy as a premise for constitutional adjudication. Although Hart and Wechsler state that “[n]o one today would seriously dispute that the body of federal law includes judge-made law,”127 Clark’s textualist reading of Article I, Section 7 and the Supremacy Clause seemingly requires rejection of any federal common law, unless congressionally authorized. Yet he and other Supremacy Clause textualists shy away from explicitly avowing any such sweeping conclusion.128

There is, of course, considerable disagreement over the appropriate sphere for judicially fashioned federal common law absent statutory delegation. The relatively freewheeling era of federal judicial lawmaking (akin to that of a state common law court129) to “fill in the gaps” in a federal statutory regime, sanctioned by such eminent figures as Justice Jackson and Judge Friendly,130 is long gone.131 Most writers now posit a

implicate “private rights,” the protection of which might be seen as the central concern of the nondelegation doctrine.


128. See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1250–51 (1996) [hereinafter Clark, Federal Common Law] (declining to embrace view that federal common lawmaking is wholly limitless or wholly illegitimate, instead offering “reconceptualization” based on constitutional preemption and separation of powers); see also Bellia & Clark, supra note 11, at 9 (carefully avoiding overt rejection of all federal common law, recognizing “[i]t is tempting simply to characterize the Court’s practice as applying ‘federal common law’ . . . [but] [t]his characterization . . . is both anachronistic and too simplistic. Rather than devising its own rules of decision out of whole cloth in cases like Sabbatino, the Court has applied constitutionally derived rules of decision”).


130. D’Oench, Duhne & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (“Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law . . . .” (citation omitted)); Henry J. Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 422 (1964). I confess that I would align myself with these judges.

131. In Danforth v. Minnesota, the Court wrote in passing: “[T]here are federal interests that occasionally justify this Court’s development of common-law rules of federal law . . . .” 128 S. Ct. 1029, 1046 (2008) (citation omitted). The Court cited Boyle v. United
narrower sphere for judge-made common law. An influential work, written long ago by Professor Alfred Hill, argued that federal common lawmaking is rightly restricted to particular federal "enclaves," in which state lawmaking has been constitutionally preempted: interstate controversies, admiralty, the proprietary transactions of the United States, and international relations. Following, modifying, and deepening Hill's thesis, Clark advances a fundamentally similar claim. Other positions exist, of course. Most prominent is the claim in judicial opinions and academic commentary that courts may fashion a federal common law rule if federal statutory law preempts state law.


132. See, e.g., Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 887 (1986) (stating Court must "point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule"). Professor Weinberg, however, is a notable exception. She holds a view even more expansive than that of Justice Jackson and Judge Friendly. According to Weinberg, "judicial process is sufficiently similar in all cases to make unnecessary . . . a separate category for 'constitutional interpretation.' " Louise Weinberg, Federal Common Law, 83 Nw. U. L. Rev. 805, 807 (1989). This would make the judicial power to displace state law coextensive with the legislative power to do so and would thus contravene the current understanding of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). See infra notes 141–143 and accompanying text.


134. See Clark, Federal Common Law, supra note 128; see also Hart and Wechsler, Fifth Edition, supra note 133, at 697 n.3 (linking Clark's views to those of Professor Hill).

135. See Boyle, 487 U.S. at 504 (noting existence of areas "so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts"); Ernest A. Young, Preemption and Federal Common Law, 83 Notre Dame L. Rev. 1639, 1660, 1664–65 (2008) ("The power to make federal common law comes, if it exists at all, from the existence of a conflict between state law and some preexisting federal policy, and the resulting imperative that state law must give way under the Supremacy Clause."). Professor Merrill, for example, believes that federal common law is appropriate when "either . . . Congress has delegated lawmaking power to courts, or . . . it is necessary to replace state law with federal law in order to preserve a provision of enacted law." Thomas W. Merrill, The Judicial Prerogative, 12 Pace L. Rev. 327, 330–31 (1992). Merrill, in contrast to Hill, believes that judicial lawmaking in admiralty and in interstate disputes results from a judicial conclusion that the statutory jurisdictional grants would be undermined if state law were applied. Id. at 347–48.

By contrast, other writers believe that state law is displaced because of the structure and relationships that are established by the Constitution or federal statutes, rather than from jurisdictional grants, whether constitutional or statutory. See Hart and Wechsler, Sixth Edition, supra note 5, at 741, 743–44 (criticizing reliance on jurisdictional statutes). And, of course, there are numerous disputes as to whether the enclave preemption theory, particularly in maritime law, is an appropriate source for displacing state law. Id. at 647.
My purpose here is not to wade into these thorny disputes. (I would, however, note as an aside that far more federal common law exists than the currently restrictive theories can account for; ERISA, for example, is soaked in a background federal common law of trusts.3 For me, what is noteworthy is that, Clark aside, none of the writers (so far as I am aware), or (more importantly) the Court’s decisions, focus upon the text of Article I, Section 7 or the Supremacy Clause in addressing the propriety of federal common lawmaking. Questions of legitimacy are invariably framed in more general separation of powers and federalism terms.3

Consider Swift v. Tyson.198 For reasons to be discussed in Part III, federal courts enforced their understanding of the law merchant as “general law” without anyone objecting that Article I, Section 7 or the Supremacy Clause had been transgressed.199 Extension of Swift to ordinary contract and tort law,140 however, meant that from our perspective the federal judicial power to “displace” state substantive law was clearly greater than congressional power to do so.141 At least under current understandings, no sound doctrine of separation of powers could countenance such a result.142 When congressional legislative power took on a


137. See, e.g., Cannon v. Univ. of Chi., 441 U.S. 677, 743 (1979) (Powell, J., dissenting) (noting judicial creation of private right of action “allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch”); see also Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001) (“Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.”).


139. For further discussion of this point, see infra Part III.

140. See, e.g., Chicago City v. Robbins, 67 U.S. (2 Black) 418, 419 (1862) (“[W]here private rights are to be determined by the application of common law rules alone, this Court, although entertaining for State tribunals the highest respect, does not feel bound by their decisions.”); Lane v. Vick, 44 U.S. (3 How.) 464, 476 (1845) (“[T]he mere construction of a will by a state court does not . . . constitute a rule of decision for the courts of the United States.”).

141. I emphasize here the word “our.” For reasons discussed below, judges and lawyers in the pre-Erie era would not have viewed the application of “federal general law,” such as the law merchant or the law of nations, as the “displacement” of state law. See infra Part III. Professor Green, writing within the modern understanding, objects to the “displacement” rationale on quite different grounds. He states that no state law “displacement” has occurred because state courts need not follow the federal rule of decision in the future. Green, supra note 11, at 667 n.33. But otherwise applicable state law was displaced in the very case before the Court, and in any future case in which the litigants had access to the federal court. Swift, 41 U.S. (16 Pet.) at 19.

142. Our current conceptions have ancient roots, however. See The Federalist No. 80 (Alexander Hamilton), supra note 1, at 441-42 (emphasizing limited nature of judicial power); The Federalist No. 81 (Alexander Hamilton), supra note 1, at 453 (same); see also Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 817-18 (1824) (noting “the legislative,
more expansive reach, *Swift* was understood to rest upon the erroneous belief that judicial power to displace state law was coextensive with the unexercised power of Congress to do so.\textsuperscript{149} Separation of powers thus provides a federalism safeguard. Clark agrees. On Clark’s view, however, the objection to *Swift* can be stated more simply: The only federal “Laws” capable of displacing otherwise governing state law are those enacted pursuant to Article I, Section 7.\textsuperscript{144}

C. The Problem of Federal Common Law As Constitutional Interpretation

Of far greater moment, however, are the implications of Clark’s thesis for constitutional preemption of state law—in such areas as interstate disputes and admiralty—as well as ordinary statutory preemption. In both areas, we are accustomed to seeing judge-made federal common law follow a judicial determination that state law has been displaced.\textsuperscript{145} No Supremacy Clause concern would thus exist for Clark, of course, because no otherwise applicable state law has been displaced. But any resulting judge-made federal law would nonetheless be a “Law” without having passed through the Article I, Section 7 barriers. What gives the Court, rather than Congress acting under Article I, Section 7, the authority to fashion the regulating rule?\textsuperscript{146} The identical question, of course, arises even in cases of conflict between federal and state statutes. In *Boyle v. United Technologies Corp.*, for example, after concluding that state law was preempted, Justice Scalia went on to fashion a federal rule, choosing in

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\textsuperscript{143} Henry P. Monaghan, Hart and Wechsler’s *The Federal Courts and the Federal System*, 87 Harv. L. Rev. 889, 892 (1974) (book review) (arguing it should be made clear “to students at the outset that *Erie* is, fundamentally, a limitation on the federal court’s power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of [A]rticle III nor the jurisdictional statute provides”); see also Paul J. Mishkin, Some Further Last Words on *Erie*—The Thread, 87 Harv. L. Rev. 1682, 1683–86 (1974) (“That Congress may have constitutional power to make federal law displacing state substantive policy does not imply an equal range of power for federal judges.”).


\textsuperscript{145} See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (engaging in federal common lawmaking following determination of “significant conflict” between state law and federal policy).

\textsuperscript{146} As Professor Hill, relying on general separation of powers principles, wrote half a century ago:

> [E]ven if a particular area is one in which the federal government has power to make independent law, it does not follow that a federal court has power to do so, for the power of the federal courts does not correspond in all respects with the power of the federal government as a whole.

the manner of a common law judge an alternative over the rule proposed by the government. Clark's view, was the source of the Court's authority to do more than simply announce that the particular state rule had been displaced?

Clark clearly struggles with this type of question. He asserts, for example, that Boyle is a case of constitutional interpretation—of state law interference with the constitutional prerogatives of the national government, even though no member of the Court treated it as such. His struggles become even more apparent in his most recent work, "The Federal Common Law of Nations." Clark and his coauthor, Professor Anthony Bellia, posit a middle ground between those who view customary international law as directly applicable federal common law, and those who insist that it has no applicability unless adopted by an organ of federal or state government. The authors view the Court's early law of nations decisions in separation of power terms: ready-made, off-the-rack background rules used to reinforce the supremacy of the political branches in the conduct of our foreign policy. Consistent with Supremacy Clause textualism, however, the authors deny that early references to the law of nations as part of "the law of the land" were meant to include that law as part of "the supreme law of the land under the Supremacy Clause." What is of interest about this comprehensive article is that it reads like the work of an author looking over his shoulder. How does the federal common law of nations bind the states, since it is not enacted pursuant to Article I, Section 7? Bellia and Clark frequently emphasize that the early case law seldom faced the issue of preemption of

147. 487 U.S. at 512–13.
148. Clark explains: "Restricting federal immunity to contractors who satisfy the various requirements of the defense does not constitute improper judicial lawmaking. Rather, these requirements appear necessary to implement an essential feature of the constitutional scheme—namely, the division of authority between the federal government and the states over military procurement matters." Clark, Federal Common Law, supra note 128, at 1368–75.
149. Bellia & Clark, supra note 11.
150. Id. at 90–93.
151. Id. at 74–75.
152. Id. at 10–11. Rather, they assert, these references merely acknowledge that in England the common law incorporated the law of nations. After the Constitution was ratified, judges initially gave little thought to whether the United States as a whole had adopted the common law or, by extension, the law of nations. Following the Sedition Act controversy and the Supreme Court's rejection of federal common law crimes in 1812, the Marshall Court began to recast the application of sovereignty-respecting rules derived from the law of nations as a consequence of the domestic separation of powers. Id. at 54–55, 63–74. The authors argue that Sabbatino essentially adopts this rationale by holding that, in the absence of contrary instructions from the political branches, federal and state courts alike must apply the act of state doctrine—a sovereignty-respecting rule—and not an alleged rule of international law prohibiting uncompensated takings—a sovereignty-limiting rule. Id. at 84–90.
state law. In the end, however, the authors acknowledge that their separation of powers-based international law would preempt state law. Why? Because the source of preemption is derived from Articles I and II, not from any independent judicial authority to fashion federal common law.

What does all this tell us? Clark, if I understand him correctly, believes that all federal common law, as we understand the term, is illegitimate. For him, when federal judges fashion common law, they are, despite the titles of Clark's various articles, engaged in some form of constitutional interpretation based upon freestanding conceptions of federalism or separation of powers. Clark writes, for example:

As I have argued elsewhere, many of the "federal common law" rules that fall within these enclaves do not actually constitute "federal judge-made law" because they consist of background principles derived from the law of nations that are necessary to implement basic aspects of the constitutional scheme. Examples of such rules include the act of state doctrine, diplomatic immunity, rules upholding the constitutional equality of the states, certain admiralty rules, and rules recognizing federal immunity from state interference.

153. Id. at 55–56 (noting that "[i]n the nation's first decades" federal courts did not treat the law merchant or the law maritime "as either state law or preemptive federal law; they simply applied the law without attributing it to any particular sovereign"); id. at 75 ("None of these [early cases involving the law of nations] expressly involved preemption of state law; in each, the federal court exercised exclusive jurisdiction, and state law did not purport to provide a conflicting rule of decision.").

154. Id. at 75 ("The Constitution preempts conflicting state law, and presumably would have governed as the rule of decision had these cases originally been brought in state court or had they involved conflicting state law."); id. at 93 ("[S]ome aspects of the law of nations . . . have functioned as preemptive federal law because of the Constitution's allocation of foreign relations powers in Articles I and II.").

155. Bellia and Clark argue:

[T]he Court's application of these rules does not rest on an interpretation of any lawmaking powers it purportedly enjoys under Article III, but on its interpretation of Congress's and the President's exclusive powers under Articles I and II . . . [I]t follows that states must adhere to these rules not because they are supreme in and of themselves, but because [such adherence] uphold[s] the Constitution's assignment of foreign affairs powers to the federal political branches and its corresponding denial of such powers to the states.

Id. at 76.

156. Clark acknowledges that courts could fashion federal common law pursuant to a delegation, but argues that claims of congressional delegation must be scrutinized carefully. Clark, Constitutional Source, supra note 144, at 1309 n.141.

157. See, e.g., Bellia & Clark, supra note 11; Clark, Federal Common Law, supra note 128.

158. Clark, Role of Structure, supra note 12, at 711 (citations omitted). This Article does not explore here the argument that rules derived from the law of nations are properly understood as the "background principles" for constitutional interpretation. For me, what is important is the fact that the fundamental process is one of constitutional interpretation.
These are apparently all "constitutionally derived rules of decision."\[159\] In that vein, Clark also explains the federal common law governing interstate disputes as constitutional interpretation, as a structural inference from the constitutionally rooted principle that new states are admitted on an "equal footing" with the original states.\[160\]

I am aware of no situation in which Clark posits valid federal common law as we have traditionally understood the term. He treats even statutory preemption cases as exercises in constitutional interpretation, as in Boyle. This is why, incidentally, Clark seeks to preclude any federal judge-made maritime law; unlike prize litigation, maritime law cannot easily be seen as implementing separation of powers or national federalism interests.\[161\]

Quite plainly, Clark radically shifts settled understanding by recharacterizing federal common law as, at bottom, simple constitutional interpretation. And what is the nature of this constitutional interpretation? As of yet, Clark avoids any claim that Congress could not displace such judicially fashioned rules.\[162\] If Congress can do so, however, how is

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159. Bellia & Clark, supra note 11, at 9; see also supra note 128 and accompanying text (discussing Clark’s "reconceptualization" of federal common law).

160. Clark, Federal Common Law, supra note 128, at 1322–31. For Professor Clark, the equal footing doctrine permitted the Court to draw upon extant law of nations principles that implemented the corresponding principle of "perfect equality" of sovereigns and offered a criterion for further reasoning in cases in which international law principles supplied no answer. My own view is different:

Some tribunal must exist for settling interstate controversies; but it is a basic presumption of the Constitution that the state courts may be too parochial to administer fairly disputes in which important state interests are at issue. Nor does it seem appropriate to restrict the choice of controlling substantive law to that of one of the contending states. . . . Thus the authority to create federal common law springs of necessity from the structure of the Constitution, from its basic division of authority between the national government and the states.


161. See, e.g., Clark, Federal Common Law, supra note 128, at 1341–60 (describing evolution of admiralty jurisdiction and federal common law); Clark, Procedural Safeguards, supra note 54, at 1689–90 ("Although the Court has long applied general maritime law ('the law merchant') in admiralty cases, it did not regard such law either as giving rise to federal question jurisdiction . . . or as binding in state court under the Supremacy Clause for most of our constitutional history."). The Supreme Court, however, has no doubt of its extensive power to fashion federal common law in this area, and has noted that most such law is judge-made. See, e.g., Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1979) ("Admiralty law is judge-made law to a great extent."); see also Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008) ("Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court’s jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."). The Court proceeded to act with the same freedom as a common law court in fashioning the appropriate measure of punitive damages.

162. See, e.g., Clark, Federal Common Law, supra note 128, at 1271–75. Congress has, of course, frequently done so, and its actions have been sustained. See, e.g., 22 U.S.C.
that result to be reconciled with Marbury v. Madison?\textsuperscript{163} If Congress can indeed revise the judge-made rule, Clark's analysis, grounded as it is in federalism and separation of powers, sounds very much (dare I say it) like my old constitutional common law.\textsuperscript{164}

D. Additional Problems for Supremacy Clause Textualists

1. The Treaty Clause. — The Treaty Clause also presents particular difficulties for Supremacy Clause textualists. Rejecting the English practice, Article VI declares treaties to be part of the "supreme Law of the Land" without any further need for an implementing Act of Congress.\textsuperscript{165} Early on, however, the Court recognized that some treaties are not immediately enforceable as domestic law (i.e., are non-self-executing\textsuperscript{166}), a conclusion that continues to trouble numerous commentators.\textsuperscript{167} Rather adroitly, Professor Carlos Manuel Vázquez would have it that no literal violation of the Supremacy Clause occurs under such circumstances because treaties are laws "addressed to" Congress.\textsuperscript{168} Discussing an aspect of the common practice of Senate RUDs (reservations, understandings, and declarations), however, Professor Vázquez can find no such verbal refuge and apparently simply bows to that now entrenched practice. Recognizing that a non-self-executing declaration might be thought to be a nullity because (a) it is not part of the treaty and (b) it was not enacted in accordance with Article I, Section 7, Professor Vázquez argues that such declarations should nonetheless be viewed as having legally effective do-

\textsuperscript{163} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{164} See Monaghan, Constitutional Common Law, supra note 160. One difference is that Clark likely would not, as I attempted to, extend constitutional common law reasoning into the area of civil liberties.


\textsuperscript{166} Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) (defining when treaty must be executed by Congress). Professor Vázquez observes that the conception of non-self-execution has been loosely applied to also include such matters as no private right of action and the lack of judicially manageable standards. As a distinct doctrine, however, non-self-execution is a determination by political actors as to the treaty's status under domestic law. See Vázquez, supra note 165, at 629–32 (discussing four categories of non-self-execution).

\textsuperscript{167} See, e.g., Jordan J. Paust, Self-Executing Treaties, 82 Am. J. Int'l L. 760, 782–83 (1988) (arguing only narrow set of treaties should be considered non-self-executing); see also Vázquez, supra note 165, at 684 (describing formalist argument regarding enforceability of non-self-executing treaties).

\textsuperscript{168} Vázquez, supra note 165, at 606–07. The Framers, of course, understood that the Constitution was addressed to Congress. But Professor Vázquez cites no support for an understanding of treaties as "Laws" addressed to Congress. Cf. Foster, 27 U.S. (2 Pet.) at 314 (describing congressional treaty obligations as contractual in nature).
domic law consequences.\textsuperscript{169} He recognizes, however, that his analysis "may not persuade an uncompromising formalist" (i.e., a Supremacy Clause textualist).\textsuperscript{170} For me, the explanation is different: Treaties simply have not been accorded the status, in practice, that the text of the Supremacy Clause apparently mandates.\textsuperscript{171}

2. The Take Care Clause. — And then there is the matter of the Take Care Clause.\textsuperscript{172} Does the President's responsibility to "take Care that the Laws be faithfully executed" include treaties?\textsuperscript{173} While acknowledging that "the question is not free from doubt,"\textsuperscript{174} Professor Edward Swaine presents a formidable case for their inclusion, including citation of Supreme Court decisions that so assume.\textsuperscript{175} Hamilton went even further: He believed that the Take Care Clause extends to "the laws of Nations as well as the Municipal law, which recognizes and adopts those laws."\textsuperscript{176}

\begin{thebibliography}{99}
\bibitem{169}Vázquez, supra note 165, at 672–75.
\bibitem{170}Id. at 684. Even those writers most strongly committed to self-execution seem consigned to asserting that there is a "strong presumption" of self-execution. Ernest A. Young, Treaties as "Part of Our Law," 88 Tex. L. Rev. 91, 94 & n.22 (2009) [hereinafter Young, Treaties] (collecting sources). "The problem is that Article VI's categorical language does not speak in terms of presumptions—even strong ones." Id. at 122. Professor Young, no friend of the self-execution doctrine, would treat treaties as though they were statutes for domestic law purposes.
\bibitem{171}Vázquez, supra note 165, at 681–85. Whether, particularly in light of modern conditions, that is a good or bad development is a matter I need not consider here. See Hathaway, Treaties End, supra note 78, at 1307–38 (arguing congressional-executive agreements should wholly replace treaty process as mechanism for regulating foreign and domestic consequences of our international engagements). In a recent essay written from an avowedly nonoriginalist perspective hostile to self-executing treaties, Professor Bradley denies that either the language or background history of the Supremacy Clause impels a conclusion that treaties must be directly enforceable in courts. Curtis A. Bradley, Self Execution and Treaty Duality, 2008 Sup. Ct. Rev. 131, 140–48. Bracketing for the purpose of this Article his historical analysis, Bradley's textual claim seems to rest on his belief that proponents of self-execution necessarily assert that judicial enforcement must occur irrespective of independent doctrines that would limit judicial access, such as Article III, standing, or implied rights of action. I am not one who holds such a position. Bradley also ignores the fact that a treaty, even if not affirmatively enforceable, might constitute a defense in an enforcement proceeding. Young, Treaties, supra note 170, at 109.
\bibitem{172}U.S. Const. art. II, § 3.
\bibitem{173}Edward T. Swaine, Taking Care of Treaties, 108 Colum. L. Rev. 331, 335 (2008) (noting uncertainty surrounding scope of Take Care Clause). Professor Swaine notes that some commentators have sought to locate presidential authority in the President's foreign affairs powers. Id. at 382–93.
\bibitem{174}Id. at 343.
\bibitem{175}Id. at 342–53; see also Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. c (1987) ("That international law and agreements of the United States are law of the United States means also that the President has the obligation and the necessary authority to take care that they be faithfully executed."). Professor Swaine argues that the President can enforce some non-self-executing treaties. See Swaine, supra note 173, at 353–59. This is a position now apparently foreclosed by Medellín v. Texas, 128 S. Ct. 1346, 1357 (2008) (holding non-self-executing treaties require implementing statutes).
\end{thebibliography}
3. The Supremacy Clause Itself. — And finally, of course, there is the embarrassment of the text of the Supremacy Clause itself. The Clause mentions the word “Laws” twice. The second part of the Supremacy Clause (the “notwithstanding clause”) reads: “[A]nd the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”177 If “Laws” means only statutes, does federal statutory law of any kind preempt state common law? Peter Strauss observes that “[a]s a matter of text-reading, it is hard to give differing meanings to the same word, endowed with the same number and the same capitalization in the same sentence of a single paragraph.”178 Professor Clark, of course, acknowledges preemption.179 In a terse response, he reminds us that the common law was understood in 1789 as a distinct body of law, that it became effective only through reception statutes,180 and that thus state common law is “Law” for purposes of the Supremacy Clause.181 That response, however, simply will not work. I am aware of no context in which anyone understood, in 1789 or thereafter, that common law was, in fact, a form of statutory law. Swift v. Tyson surely did not, holding that the word “laws” in the Rules of Decision Act meant primarily statutes, but that it could include some common law rules of decision.182 Moreover, had the Court understood that state common

177. U.S. Const. art. VI, cl. 2 (emphasis added).
178. Strauss, Perils of Theory, supra note 54, at 1568–69 (citation omitted). To push the matter further, one might ask whether any federal enactment, save a constitutional amendment, could preempt state equity doctrines. Recall that Article III extends the constitutional reach of federal courts “to all Cases, in Law and Equity.” U.S. Const. art. III, § 2.
179. Clark, Procedural Safeguards, supra note 54, at 1685. The Supreme Court, of course, has no doubt that federal statutes can preempt state common law. That was, for example, the shared premise of every Justice in Wyeth v. Levine, 129 S. Ct. 1187, 1194–95 (2009), and the decisions they discuss.
180. Clark, Procedural Safeguards, supra note 54, at 1685. Of the original thirteen states, this was not true of Connecticut, as Clark recognizes. Id. at 1685 n.25. Moreover, the common law was administered by courts well prior to the extreme of reception statutes. See Mary K. Bonsteel Tachau, Federal Courts in the Early Republic: Kentucky 1789–1816, at 78 (1978). There is a rich literature on reception statutes, which absorbed both the common law and English statutes. See Seminole Tribe v. Florida, 517 U.S. 44, 132–37 (1996) (Souter, J., dissenting) (citing John Marshall source on reception of statutes and common law). See generally Ford W. Hall, The Common Law: An Account of Its Reception in the United States, 4 Vand. L. Rev. 791 (1951) (describing history and types of reception statutes). Hall points out that colonial charters often separately referred to “laws” and “statutes,” and where they referred to “laws” alone, it was understood to include the common law. Id. at 792. The antipathy of the common law lawyers to statutory law was an important feature of nineteenth century American law. See Noga Morag-Levine, Common Law, Civil Law, and the Administrative State: From Coke to Lochner, 24 Const. Comment. 601, 606–07 (2007) (discussing nineteenth century glorification of common law against rigidity of civil law).
181. Clark, Procedural Safeguards, supra note 54, at 1685.
182. 41 U.S. (16 Pet.) 1, 18–19 (1842). The Court also recognized that “laws” included some common law decisions. Id. Sometimes, of course, the process of statutory interpretation takes the shape of common law reasoning, however. See Henry Paul
law was a form of statutory law, the state common "law" rule would have been binding.\textsuperscript{183} And long before \textit{Swift}, the distinguished commentator St. George Tucker understood that the common law was a law quite distinct from acts of the legislature.\textsuperscript{184}

### III. "Laws" and the Lost World of the Founders

Some of the objections just described implicitly assume that the word "Law[s]" has an invariant meaning throughout its appearance in the Constitution. This is not, however, the case. As Professor Swaine observes, "[m]ost of the Constitution's references to 'the law,' 'law,' or 'Laws' relate to congressional statutes. But occasionally, even within Article I, 'law' encompasses federal or state law, state law only, the law of nations, or an ambiguous class."\textsuperscript{185} Supremacy Clause textualists, however, need be concerned only with the meaning of "Laws" as it appears in the Supremacy Clause.

The question remains: Shall we conclude that the original understanding was that "Laws" in the Supremacy Clause meant \textit{only} Acts of Congress? Reflection convinces me that the answer is yes; but it is for reasons quite different from Clark's political and structural account. History also demonstrates, I believe, that our conception of federal common law—judge-made law that would bind both federal \textit{and} state courts—was simply \textit{not} a part of the Founders' intellectual landscape.

\textsuperscript{183} Monaghan, Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases, 103 Colum. L. Rev. 1919, 1983–84 & n.317 (2003) [hereinafter Monaghan, Supreme Court Review].

\textsuperscript{184} See St. George Tucker, Of the Unwritten, or Common Law of England; and Its Introduction into, and Authority Within the United American States, in View of the Constitution of the United States with Selected Writings 313, 313–70 (Liberty Fund 1999) (1803) (rejecting argument that adoption of Constitution also entailed adoption of general common law of United States to be administered by new federal courts).

\textsuperscript{185} Swaine, supra note 173, at 342–43 (citations omitted). Professor Swaine continues:

Sometimes the text is more precise. For example, care is taken elsewhere in Article II to specify when the "law" concerned is one enacted by Congress. Article III and the Supremacy Clause also distinguish between "the laws of the United States" and "Treaties." If those provisions had referred only to "the laws of the United States," would treaties have been excluded? More to the point, does the fact that the Take Care Clause refers only to "the Laws" mean that treaties are outside its ambit?

Id. at 343 (citations omitted). The point is that the same word in the Constitution can carry different meanings, especially so for different persons. Madison understood that clearly: "[N]o language," he said, "is so copious as to supply words and phrases for every complex idea, or so correct as not to include many, equivocally denoting different ideas." The Federalist No. 37 (James Madison), supra note 1, at 198.
A. "Laws" and the Supremacy Clause

Understanding the nature of "Laws" as used in the Supremacy Clause requires examination of the debates surrounding the meaning of Article III, which permitted jurisdiction in the new federal courts in "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Throughout the first two decades of our national existence, intense debate occurred over the relationship between the new national courts and an "American" common law. Did the adoption of the Constitution somehow authorize those courts to administer such a common law just as each state administered its own version? Fears were expressed, applicable in both the criminal and civil context, that pursuant to this provision (a) the federal courts would administer a substantive common law as part of the "Constitution or Laws of the United States," and that (b) the Constitution itself conferred jurisdiction on the federal courts to do so. Some argued (or feared) that if the Constitution itself somehow made the common law applicable in federal court, then even Congress could not alter it. Others believed that the common law was part of the "Constitution or Laws" mentioned in Article III.

Subject matter jurisdiction presented another set of difficulties. While, as I discussed, some believed that the Constitution itself authorized federal courts to administer the new American common law, others believed that implementing statutory authority was necessary. In a well

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187. The claim was that proponents of a federal court-administered common law intended that the entire British system be taken over to America. Opponents of a federally administered "American" common law, however, often exaggerated the claims of proponents. See Stewart Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231, 1254 (1985) [hereinafter Jay, Origins, Part II] ("Republicans of the Hudson era rallied against a proposition that no serious rival was advancing. It would have been untenable to maintain that the body of British common law had been adopted by the Constitution, or that the federal judiciary possessed a jurisdiction equivalent to the . . . courts in England."). "[L]aws would have been taken to include rules emanating from judicial decisions" but "article III could not have been meant to accomplish a general reception of British common law." Id. at 1255.
190. See Jay, Origins, Part I, supra note 188, at 1082 (noting comments by Representative Otis in support of this concept).
191. With respect to common law offenses against the United States, Justice Story concluded in United States v. Coolidge, 25 F. Cas. 619, 619–20 (Story, Circuit Justice,
known letter to the prominent conservative constitutional theorist St. George Tucker, future Chief Justice Marshall apparently acknowledged that the common law itself was not a source of jurisdictional authority, but he stated that if such jurisdictional authority had been statutorily conferred, "I do not understand you as questioning the propriety of thus applying the common law, not of England, but of our own country."192

A staggering variety of writing on these topics emerged. The arguments opposing a federal common law (i.e., a federal general law, not, however, federal common law as we understand the term) were varied. Conspiracy theories abounded, especially among Republicans, by whom "unelected, unaccountable and yet thoroughly partisan [federal judges], were seen as using common-law jurisdiction to transfer the political authority of the states to Federalist conspirators."193 Particularly with respect to common law offenses against the United States, this fear was, in fact, no chimera. For example, during the 1790s every single Justice, except Justice Chase, apparently believed in the existence of a body of common law crimes against the United States that could be prosecuted in the federal courts.194


193. Jay, Origins, Part I, supra note 187, at 1326–27; see also, e.g., Peter S. Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 99 (Philadelphia, Abraham Small 1824) ("It appears to me also that by the words 'the laws of the United States,' the framers of the Constitution only meant the statutes which should be enacted by the national Legislature."). But Du Ponceau goes on to write that:

[o]n the whole, therefore, I think I may venture to assert that when the federal Courts are sitting in or for the States, they can, it is true, derive no jurisdiction from the common law, because the people of the United States, in framing their Constitution, have thought proper to restrict them within certain limits; but that whenever by the Constitution or the laws made in pursuance of it, jurisdiction is given to them either over the person or subject matter, they are bound to take the common law as their rule of decision whenever other laws, national or local, are not applicable.

Id. at 101.

194. Id. at 1016–17, 1067–78; see also 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 623–24 (1971) [hereinafter Goebel, Antecedents and Beginnings] (describing position of Justice Jay that "the law of nations was a part of the law of the United States and that prosecutions for violations were maintainable whether or not Congress had exercised its powers to provide for their punishment"); Kathryn Preyer, Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic, 4 L. & Hist. Rev. 223, 226–30 (1986) (noting division of judicial opinion but also noting infrequency of nonstatutory criminal prosecutions).
While the specific danger of a federal common law of crimes against the United States receded with the decision in United States v. Hudson & Goodwin, denying such authority, the vigorous debate it generated over the relationship of the common law and the new national government is illuminating. This debate, to be sure, was colored by underlying divisions about the nature of the new government established by the Constitution. Debates over the common law "were but the surface manifestations of essential tensions in a society that was defining itself in the midst of what was literally a revolutionary era." Reflecting the Federalist view, Professor William Crosskey long ago claimed that "the Laws of the United States" was meant to encompass the body of common law inherited from the English tradition. In a subsequent and exhaustive study, Professor Jay concluded that a "survey of jurisdictional theory from the Hudson period" shows a general awareness that "federal courts had what we would term significant common-law powers." After reviewing the scholarship on federal common law, a student Note argued further that "ample evidence" existed to support an understanding that "laws" in Article III included decisional law:

In the latter part of the eighteenth century, "everyone understood decisional principles to be ‘laws,’" and early congressional legislation reflected this understanding. In section 25 of the

195. Hudson & Goodwin, 11 U.S. (7 Cranch) at 34. Notably, the Court did not cite the Supremacy Clause. See also United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816) (noting Attorney General’s decision not to argue case in light of Hudson & Goodwin and declining to revisit issue); Jay, Origins, Part I, supra note 188, at 1012–19 (discussing decision in Hudson & Goodwin); Jay, Origins, Part II, supra note 187, at 1241 (placing decision in context of "partisan struggles of the 1790’s"). Professor Jay also maintains that "Hudson was decided in a peculiar setting of partisan disturbance, and grew out of a fear that . . . there was a scheme afoot to install a consolidated national government through incorporation of the British common law." Id. at 1232.

196. Professor Goebel, however, disparages the debates as producing a less than "searching inquiry on a professional level into what was the constitutional variant for judicial dependence upon the common law." 1 Goebel, Antecedents and Beginnings, supra note 194, at 654. I believe that this criticism is largely unfounded.


198. See William Winslow Crosskey, Politics and the Constitution in the History of the United States 621–25 (1953) ("Americans generally regarded the Common Law, including its British statutory amendments, as the general basic customary law of all the American colonies."). Professor Eskridge’s study of the judicial role at the time of ratification also supports a broad view of the judicial power. He concludes that "judges interpreting statutes" were thought to be both "agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of ‘We the People.’" William N. Eskridge, Jr., All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806, 101 Colum. L. Rev. 990, 992 (2001).

Judiciary Act of 1789 reference is made in the first clause to "statutes" of the United States, in the second to "a Statute of any State" and to "laws" of the United States, and in the third to "statutes" of the United States. If the framers of section 25 had considered "laws" and "statutes" to be synonymous, they would surely have used either the term "laws" or "statutes" consistently throughout the section. And in section 34 of the same act, the phrase "laws of the several states" was apparently intended to comprehend both statutes and common law. Additional support for an interpretation of "laws" as including federal common law is found in the history of the drafting of Article III. The "arising under" clause originally read, "arising under laws passed by the legislature of the United States," but the phrase "passed by the legislature" was omitted when Article III was adopted.\footnote{Note, Federal Common Law and Article III: A Jurisdictional Approach to Errie, 74 Yale L.J. 325, 331–32 (1964) [hereinafter Note, Federal Common Law] (citations omitted); see also Jay, Origins, Part II, supra note 187, at 1255 ("[T]o an eighteenth-century lawyer (which is what a majority of the Framers were) 'laws' would have been taken to include rules emanating from decisions . . . . "). But see Henry M. Hart & Herbert Wechsler, The Federal Courts and the Federal System 19 (1953) (arguing change in Article III from "laws passed by the legislature of the United States" to "laws of the United States" was only change in wording).}

But other writers opposed the view that "laws" encompassed common law as well as statutes, at least in the newly established federal courts.\footnote{Tucker, supra note 184, at 360–64 (opposing existence of general common law authority in federal courts).} Many of the historical arguments offered in support of this view echo Professor Ramsey's earlier remarks: They focus on the extensive debates at the time of the Founding regarding the extent of congressional power. The Founders could not have conceived of an ability of the federal judiciary to impose a common law; otherwise, why would the debates surrounding ratification have focused almost exclusively on the potential for congressional overreaching, without mentioning the even more expansive law-declaring authority of the judiciary?\footnote{See supra notes 24–43 and accompanying text.} Still others pointed out that if the federal courts could administer an American common law, their power to regulate private activity would exceed the powers conferred on Congress by Article I, Section 8.\footnote{See Note, Federal Common Law, supra note 200, at 334 (noting Randolph, "an active participant in the drafting of Article III," was "not aware . . . [it] would give federal courts jurisdiction over all general common law cases"). Moreover, the argument that "laws" includes the English common law seems to assume that the English common law was observed uniformly throughout the colonies and thus could easily be incorporated as one body of national common law. In fact, each of the thirteen colonies had developed its own variation on the English common law prior to ratification. See infra note 213 and accompanying text (noting Justice Chase's classic exposition of variations in state common law).}

\footnote{200. Note, Federal Common Law and Article III: A Jurisdictional Approach to Errie, 74 Yale L.J. 325, 331–32 (1964) [hereinafter Note, Federal Common Law] (citations omitted); see also Jay, Origins, Part II, supra note 187, at 1255 ("[T]o an eighteenth-century lawyer (which is what a majority of the Framers were) 'laws' would have been taken to include rules emanating from decisions . . . . "). But see Henry M. Hart & Herbert Wechsler, The Federal Courts and the Federal System 19 (1953) (arguing change in Article III from "laws passed by the legislature of the United States" to "laws of the United States" was only change in wording).}

\footnote{201. Tucker, supra note 184, at 360–64 (opposing existence of general common law authority in federal courts).}

\footnote{202. See supra notes 24–43 and accompanying text.}

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\footnote{204. Madison's Report, supra note 189, at 566; Jay, Origins, Part I, supra note 188, at 1080–81. Other writers, however, stated that recognition of the common law also

\footnote{205. Madison's Report, supra note 189, at 566; Jay, Origins, Part I, supra note 188, at 1080–81. Other writers, however, stated that recognition of the common law also...}
The most penetrating criticism was by St. George Tucker. In an extended essay, Tucker analyzed the relationship between the common law and the new national government. After examining the status of the common law within the colonies and the several states, he addressed the national government. He asked: "How far that portion of the common law and statutes of England, which has been retained by the several states, respectively, has been engrafted upon, or made a part of the constitution of the United States?"

Tucker turned first to the constitutionally enumerated powers of Congress and concluded that none warranted wholesale adoption of a national common law for the United States. That conclusion was even clearer with respect to the grants of power to the executive. Then Tucker addressed the specific jurisdictional grants in Article III. He acknowledged that, in appropriate cases, the federal courts would apply the common law, just as they would apply French or Belgian law based upon ordinary principles of conflict of laws. But he found no general grant of common law jurisdiction in the Constitution, and he denied that the Constitution contained such a grant by implication. More specifically, he argued that any such contention, if accepted, would obliterate the conception of the national government as being one of limited powers. He wrote:

If it were admitted, that the federal government, by implication, possesses general jurisdiction over all cases at common law; this construction could not be carried into practice, without annihilating the states, and repealing, and annulling, their several constitutions, bills of rights, and legislative codes: as a few instances will demonstrate.

increased national legislative power, on the premise that legislative power was at least coextensive with judicial power. See Jay, Origins, Part II, supra note 187, at 1241–42 (noting "[a]n accepted axiom of era "was that judicial power had to be 'co-extensive' with legislative authority"); Tucker, supra note 184, at 315 ("For, if it be true that the common law of England, has been adopted by the United States . . . the jurisdiction of the federal courts must be co-extensive with it; . . . so also, must be the jurisdiction, and authority of the other branches of the federal government; . . . ").

205. Tucker, supra note 184, at 313–70. The essay was entitled "Of the Unwritten, or Common Law of England; And Its Introduction into, and Authority Within the United American States." Id.
206. Id. at 316–19.
207. Id. at 345.
208. Id. at 346–49.
209. Id. at 350.
210. Id. at 351–55.
211. Id. at 353, 361; see also supra note 187 (discussing debates over reception of English common law).
212. Tucker, supra note 184, at 356; see also Lucas A. Powe, Jr., The Supreme Court and the American Elite, 1789–2008, at 37–39 (2009) (noting observation of St. George Tucker that "the common law had unlimited reach; [and] this meant that the powers of the federal government, too, would be unlimited").
There is an aspect of these intriguing debates that has special pertinence to our inquiry. Americans understood that the common law varied from state to state, and Republicans in particular thought that there was no room for a national common law, particularly as the instrumental (rather than the declaratory) nature of the common law increasingly began to take hold in legal thinking. Nonetheless, Swift v. Tyson's distinction between "general" and "local" law had been familiar for decades. And those portions of the common law known as the law of nations and the law merchant were perhaps universally held to be part of the "general law." As Lord Mansfield, for example, said of the law merchant: "The mercantile law...is the same all over the world." As such, these bodies of law were conceived of as "declaratory" in nature, part of a universal law, which in turn was rooted in the natural law.

213. For a classic exposition, see the opinion of Justice Chase in United States v. Worrall, 28 F. Cas. 774, 779 (Chase, Circuit Justice, C.C.D. Pa. 1798) (No. 16,766) (stressing variations in common law of several states); see also Julius Goebel, Jr., Ex Parte Clio, 54 Colum. L. Rev. 450, 464 (1954) (book review) [hereinafter Goebel, Ex Parte Clio] (same).

214. Morton J. Horowitz, The Transformation of American Law 1780-1860, at 1-30 (1977). Professor Horowitz has been widely criticized on his dating as well as the speed of the attitudinal shift he describes. See, e.g., Jay, Origins, Part II, supra note 187, at 1251 ("[B]y removing his analysis almost totally from the political struggles of the period, Horowitz fails to perceive the principal reasons for anxiety over judicial activity.").

215. See Tony Freyer, Harmony and Dissonance: The Swift and Erie Cases in American Federalism 26–40 (1981) [hereinafter Freyer, Harmony and Dissonance] ("The distinction between general and local law...was worked out gradually from the 1790s to 1842 in the federal courts."); see also William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513, 1514 (1984) (noting in context of Section 34 of Judiciary Act of 1789 "[t]here was a 'local' state law, to which the section applied, and a 'general' law, to which it did not"); Jay, Origins, Part II, supra note 187, at 1265 ("Long before Swift v. Tyson was decided, federal courts recognized the division between general and local law... ").

216. Felly v. Governor of the Royal Exch. Assurance, (1757) 97 Eng. Rep. 342, 342, 346 (K.B.); see also Freyer, Harmony and Dissonance, supra note 215, at 34–35 (collecting sources). For the purposes of this Article, I need not pursue here what it meant to say that the law merchant or the law of nations was "part" of the common law. See Jay, Origins, Part II, supra note 187, at 1279.

217. Goebel, Ex Parte Clio, supra note 213, at 456. Professor Goebel denies, however, that Mansfield believed that the law merchant had natural law underpinnings. Id. at 456–57. Strangely, he ignores Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), in which Justice Story's opinion quotes Lord Mansfield's invocation of Cicero's declamation on material law in a case involving the law merchant. See infra note 228 and accompanying text. Whether natural law did more than provide an "authority independent of human creation" for the rights created in "British Constitutional and positive law" is a separate issue. See John Reid, The Authority of Rights at the American Founding, in The Nature of Rights at the American Founding and Beyond 67, 93 (Barry Alan Shain ed., 2007).


219. Id. Thus, federal/state differences on the content of the general law were not viewed as infringements on state sovereignty. Id. at 1270.
In the jurisprudential thinking of the decades following 1788, federal "general" law would not have been conceived of as "displacing" state law, but as simply attempting to achieve a more accurate and consistent version of the "true" general law. For that reason, in *Swift*, Justice Story could speak of judicial decisions as only "evidence" of what the true law was.220

General law, which included the law of nations and the law merchant, had important practical significance. As Professor Freyer makes clear, the founding generation, whatever their other differences, was united in a conviction that uniformity was desirable with respect to commercial rules of decision, and that the federal courts were in a position to achieve that goal.221 What the Constitution and jurisdictional grants did was to ensure that to the extent that this law had a trans-state or a transnational dimension, parties could have access to the federal courts.222

But, as I said, that did not mean that the state law was thereby preempted by a federal common law, as we understand the term. *Swift* reflected the idea that state judges were free to take their own views as to the general commercial law, a position endorsed by members of the Court sensitive to any expansion of national power at the expense of the states. Unsurprisingly, the Supreme Court consistently refused to review, for want of jurisdiction, state court decisions on the meaning of the "general" law. To the *Swift* generation and its predecessor, "[i]t seems apparent—Justice Brandeis and *Erie* to the contrary notwithstanding—that federal-state relations were implicit and probably only secondary factors in the case." Rather, it was a commercial law case "grounded in the behavior of the mercantile world."223

It was not until the late 1880s that the Court began, particularly in cases involving interstate disputes, to conclude that its decisions were binding as federal common law; that is, binding in both the state and the federal courts.224 But in 1788, no such conception of federal common law existed.

221. Freyer, Harmony and Dissonance, supra note 215, at 18–26, 34–35.
222. Professor Jay notes:
A wealth of evidence is available to demonstrate an original understanding that certain recognized bodies of law should be developed uniformly, and that interference by the states would have negative ramifications at home and abroad. But historically these areas were not "federalized" in the way implicated by the current invocation of federal common law. Uniformity was instead to be achieved by providing access to federal courts, sometimes exclusive of state courts. Jay, Origins, Part II, supra note 187, at 1321.
224. Prior to the 1880s, the Supreme Court viewed itself as unable, on direct review of state court judgments, to fashion judge-made rules that were binding on the states. See
This background drawn from Article III has important implications for an understanding of the Supremacy Clause. It may be, as Professor Jay writes, that it "is likely that we will never know with assurance what was meant by the deliberate use of 'laws' in [Article III]." But for me, the probabilities point strongly in one direction, at least as to the meaning of "Laws" in the Supremacy Clause. Look again at the wording:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 638 (1874) ("The claim of right here set up is one to be determined by the general principles of equity jurisprudence, and is unaffected by anything found in the Constitution, laws, or treaties of the United States. Whether decided well or otherwise by the State court, we have no authority to inquire."); Delmas v. Ins. Co., 81 U.S. (14 Wall.) 661, 666 (1871) ("When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review."); Freyer, Harmony and Dissonance, supra note 215, at 99-40 (stating that in 1842, "no one imagined that federal judges possessed authority over state courts"); Jay, Origins, Part I, supra note 188, at 1010 ("There was no coherent concept in the early nineteenth century of 'federal common law' as we now make use of that expression."); cf. Monaghan, Supreme Court Review, supra note 182, at 1947-55, 1968-71 (describing Supreme Court jurisdiction to review state court determinations of state law). By the end of the nineteenth century, however, the Court openly fashioned judge-made law that bound state courts, although the grounds for the claimed authority were often varied and unclear. See S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) (holding maritime law is governed by rules of federal common law); Kansas v. Colorado, 206 U.S. 46, 95-98 (1906) (claiming authority to fashion federal common law rule to resolve interstate water disputes even though Congress lacks such power); W. Union Tel. Co. v. Call Publ'g Co., 181 U.S. 92, 102 (1901) ("[T]he principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."); Smith v. Alabama, 124 U.S. 465, 478-79 (1888) (stating a "code of constitutional and statutory construction . . . gradually formed by the judgments of [the] court . . . constitutes a common law resting on national authority"); Freyer, Harmony and Dissonance, supra note 215, at 71-72 (describing 1893 decision as "turning point" because dissenting Justice "explicitly stated that federal judges possessed the authority to apply an independent judgment as to rules of decision" in some circumstances); Robert von Moschzisker, The Common Law and Our Federal Jurisprudence (Concluded.), 74 U. Pa. L. Rev. 367, 368-86 (1926) (collecting cases from late nineteenth and early twentieth centuries to demonstrate that federal courts recognized and applied body of federal common law).

225. Jay, Origins, Part II, supra note 187, at 1255; see also Hill, Constitutional Preemption, supra note 133, at 1029 n.30 (collecting cases where "a particular legislative scheme effects a federal occupation of a field, negating state competence, and devolving upon the federal courts the duty of fashioning rules of decision"); von Moschzisker, supra note 224, at 380 ("[W]hen there is no congressional statute prescribing the law to be administered in matters over which the national legislature has exclusive control . . . [the Court] applied such common-law principles as [it] . . . considered appropriate and just . . . .").

226. U.S. Const. art. VI, cl. 2 (emphasis added).
Focus should be trained on the word "made," not "Laws." The latter term could and frequently did include common law. But in 1788, no one would have used the word "made" in reference to the law of nations or the law merchant. These bodies of law were discovered, not enacted. Indeed, as late as Swift v. Tyson, which involved an ordinary commercial transaction, Justice Story cited as authority for a legal proposition the immense authority of Lord Mansfield, who, in turn, cited Cicero's famous declamation on natural law. Referring to the "ordinary use of language," Justice Story wrote that "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." Indeed, most would not have used the term "made" to describe even the local common law of the states, which they believed to be largely rooted in custom and reason. This was in accordance with the Blackstonian tradition.

B. The Road Not Taken

Professor Clark's conception of the state-protective focus of the Constitutional Convention does not require him to read the Supremacy Clause in the manner in which he ultimately chooses. There exists a road not taken by Clark and other Supremacy Clause textualists. Professor

227. Jay, Origins, Part II, supra note 187, at 1275. "Moreover," Jay adds, "it would have made no sense" for the Supremacy Clause to refer to the unwritten law. Id. General common law was already binding in the states by the very nature of its transnational character; local common law was entirely the affair of a particular jurisdiction. Michael Conant emphasizes the "discovered" nature of those branches of the common law such as the law merchant and the maritime law. Michael Conant, The Constitution and the Economy 133--54 (1991) ("The law merchant had become part of the common-law system, but it was an independent branch, as were equity and maritime law."). Clark himself makes this point. See Clark, Procedural Safeguards, supra note 54, at 1686 ("At the time the [Supremacy] Clause was written, lawyers understood the common law to be discovered rather than made by judges." (footnote omitted)).


229. Swift, 41 U.S. (16 Pet.) at 18. This explains why the southern Justices, though zealously on guard against the expansion of national power against the states, joined the Swift opinion. See Freyer, Harmony and Dissonance, supra note 215, at 26 ("The distinction between general and local law . . . provide[s] a more complete basis for explaining the unanimity of the Court and the reasons why Jacksonian judges could readily distinguish certain commercial issues from the sensitive question of federal jurisdiction over the common law.").

230. This conception of the common law "found many adherents throughout the 1800's." Jay, Origins, Part II, supra note 187, at 1252.

231. For Blackstone, judges were "the living oracles," 1 William Blackstone, Commentaries *69, of a legal order based on natural law and immemorial custom. Id. at *64--*70.
William Casto captures an important aspect of the intellectual climate as it existed at the founding:

In the Founding Era, appointment to the Supreme Court was not nearly as coveted as it is today. This comparative lack of prestige was due in part to the fact that no one believed that the justices of that court or any other court exercised legislative authority to make laws. Americans of the Founding Era were natural lawyers—not legal positivists.\(^2\)

It thus might have been possible for Clark to develop a theory that Article I, Section 7 was designed to prevent political intrusions on the states by the national government, but that the “found” law of nations, the law merchant (as seen in *Swift v. Tyson*), and perhaps other aspects of the common law would not have been understood to have had such a character. While these bodies of law provided rules of decision for many cases, the rules themselves were not “attached to any particular sovereign.”\(^3\) I submit that this description far more accurately captures the intellectual terrain circa 1789 than that presented to us by Supremacy Clause textualists.

But this is a road not taken. Why not? Because the real underpinning of Clark’s work is *not* the Supremacy Clause, but rather the three lawmaking mechanisms he has specified. Would Clark or any other Supremacy Clause textualist argue that “This Constitution” and the “Laws . . . made in Pursuance thereof” would not be the “supreme Law of the Land” if no Supremacy Clause existed?\(^2\)\(^3\)\(^4\) I greatly doubt it. To my mind, the driving force of Clark’s work is not the Supremacy Clause at all; rather, he views that Clause as simply a textual embodiment of deeper underlying conceptions of federalism and separation of powers. Thus, if one of the three national mechanisms for the displacement of state law is not implicated, the states are, as a substantive constitutional matter, free to apply their own law. As Professor Young observes, it is Clark’s conception of American separation of powers, not the law of nations, that does all the real work.\(^2\)\(^3\)\(^5\)

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\(^3\) Fletcher, supra note 215, at 1517. This, of course, helps explain why southern Justices found no reason to object to decisions such as *Swift*. See supra note 229 and accompanying text.

\(^4\) Following the English practice, treaties might have required implementing legislation. See supra Part II.D.1.

\(^5\) Professor Young writes:
C. A Lost World

The intellectual universe of the founding generation—a universe in which much law was discovered, not made—is irretrievably lost. Nevertheless, as Professor Tushnet wrote many years ago:

When interpretivists presume that they can detach the meanings that the framers gave to the words they used from the entire complex of meanings that the framers gave to their political vocabulary as a whole and from the larger political, economic, and intellectual world in which they lived, interpretivists slip into the error of thinking that they can grasp historical parts without embracing the historical whole.\textsuperscript{236}

These remarks apply with full force to Supremacy Clause textualists. At the time of the founding, judicial decisions were more than evidence of a “deeper” or “truer” law; in an age in which statutes were few, decisional law was often “law” as that term was understood during the founding generation, and well before. But the conception of an unmoored “general law” has all but disappeared from our thinking. For our purposes, two nineteenth century developments are particularly noteworthy in bringing about that result. These developments are well known and need be only briefly recounted here. The first I have already mentioned: the increasing recognition during the nineteenth century that the law pronounced by judges had an instrumental or “legislative” character to it, that judicially declared law was often judicially “made” law.\textsuperscript{237}

The second development was the rise of legal positivism. While the founding generation could entertain a conception of a nation-state enforcing grounding rules of decision unattached to any sovereign, after


\textsuperscript{237} I need not here engage the controversy over the pace of that development. See supra note 214.
Austin, we cannot. Positivism has thoroughly eroded the founding generation’s conception of a general law existing independently of any territorial sovereign. In his famous dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, Justice Holmes wrote:

> [L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State . . .

These ideas were in wide circulation. Thus, the well known law reformer David Dudley Field wrote: “The notion that common law is something floating in the atmosphere, visible only to the initiated, is one of those mythical phantasms which serve to amuse and deceive indolent credulity. Where, then, is this common law to be found? In the decisions of the judges, and there only.”

In Holmes’s writings, of course, these developments famously came together, and thereafter the instrumental or legislative character of judge-made law took firm hold. The founding generation would not have understood our conception of a federal common law binding on the state courts, or its consciously “legislative” character. Nor would they have understood Professor Clark’s conception: applying or not applying rules of decision based upon freestanding judicial conceptions of the implications of federalism and separation of powers.

It thus appears that federal common law, as we understand the term, cannot find a home in originalism, at least not in the intellectual world of originalism as understood by the founding generation. But is this a case where it has taken time, a considerable time to be sure, for us to “liquidate” or “fix” the meaning of the Constitution? At the end of the day, can

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243. For a description of these developments, see Brian Z. Tamanaha, Law as a Means to an End (2006).

244. See supra Part II.C.
a body of federal common law be justified, as Clark proposes, on the basis of inferences drawn from the constitutional structure, particularly its federalism and separation of power components? (This issue, of course, now most saliently presses in the intense debate over the status of customary international law.\textsuperscript{245}) Something along this line is, of course, what I suggested many years ago in "Constitutional Common Law."\textsuperscript{246} If this is plausible, can we truly say that it provides an originalist foundation for federal common law, even if it is one not readily apparent to members of the founding generation?\textsuperscript{247}

IV. Originalism/Textualism's Limits

While this Article is not intended to be an extended exegesis on constitutional interpretation,\textsuperscript{248} I do wish to conclude briefly with two general observations on the interpretive limits of originalism-driven textualism. First, all forms of originalism seem to me to assume much greater clarity about the original understanding than in fact existed. Different understandings of the text, rather than a single cohesive understanding, frequently and simultaneously existed. Second, originalism in any form cannot account for the significant, embedded, and quite irreversible departures from original understanding of the text that have taken hold throughout our constitutional history. Originalism-driven textualism, therefore, cannot provide a satisfactory theory of our current practice of constitutional adjudication.

\textsuperscript{245} See Hart and Wechsler, Sixth Edition, supra note 5, at 675–79 (collecting sources).

\textsuperscript{246} See Monaghan, Constitutional Common Law, supra note 160.

\textsuperscript{247} Such an analysis should be especially congenial to those "originalists" who are comfortable with "finding" new, previously hidden legal meanings in the constitutional text, which nonetheless mysteriously "still constrains us." Steven D. Smith, Higher Law Questions: A Prelude to the Symposium, 36 Pepp. L. Rev. 463, 468–69 (2009). In a recent article, Professor Manning denies that inferences from a freestanding conception of federalism provide an appropriate basis for constitutional interpretation, because they ignore the compromises that went into the original document. Manning, Federalism, supra note 8, at 2008–09. But see Horne v. Flores, 129 S. Ct. 2579 (2009), in which a majority of the Court, in an opinion by Justice Scalia, drew upon freestanding conceptions of federalism to require dissolution of a federal court injunction governing state spending. This Article is not the occasion to examine these issues. For a critical initial reaction, however, see Gillian E. Metzger, The Constitutional Legitimacy of Freestanding Federalism, 122 Harv. L. Rev. 98 (2009), at http://www.harvardlawreview.org/forum/issues/122/june09/metzger.pdf (on file with the Columbia Law Review).

\textsuperscript{248} For a recent and illuminating discussion of this general topic, see Vicki C. Jackson, Multi-Valanced Constitutional Interpretation and Constitutional Comparisons: An Essay in Honor of Mark Tushnet, 26 Quinnipiac L. Rev. 599 (2008).
A. Originalism/Textualism’s Interpretive Limits

Textualism, in theory, can be separated from originalism. A textualist, for example, could espouse a theory of current or evolving meaning. I need not consider such possibilities here, since the Supremacy Clause textualists I confront all purport to be originalists, circa 1788. While their views may differ in important ways, these textualists undertake a common approach to the constitutional text that seeks to discover or decode its ascertainable original “public understanding,” an understanding fixed at (or near) the time of ratification. Decoding may,
of course, entail the use of dictionaries, and perhaps other selected texts.254

I put to the side the question of just how devoted the founding generation itself was to textualism, as opposed to other approaches, as the controlling interpretive technique.255 But they were all originalists. Page after page of David Currie’s monumental studies of the Constitution in the Supreme Court and then in Congress demonstrates the powerful grip of originalism on the Founders and successive generations.256 Equally, however, page after page of his work shows that from the very beginning sharp and continuous controversy existed over what the Constitution meant. This is not surprising of a document that, in Farrand’s words, was a “bundle of compromises.”257 Those compromises generated multiple understandings among both their Framers and their ratifiers.258 Professor Forrest McDonald, for example, writes:

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254. The extent to which originalists may properly consult other historical materials besides dictionaries is open to debate. Professor Manning has a particularly restrictive view of those materials that may properly be consulted. See John F. Manning, Textualism and the Role of The Federalist in Constitutional Adjudication, 66 Geo. Wash. L. Rev. 1337, 1365 (1998) (“Given the historical status of The Federalist, a textualist judge must treat [it] as a source of highly informed persuasion—to be evaluated critically on the merits, but never to be taken at face value as an authoritative exposition of constitutional meaning.”). Professor Manning explains:

    [Textualists] are skeptical of the use of background intent or purpose to contradict the clear import of an otherwise precise statutory text. When textualists do not feel the pinch of a precise text, they think it appropriate for judges to try to make related texts coherent with one another. . . .

    . . . When used properly, such analysis does not depend on background purpose to contradict a precise text, but rather reads an ambiguous provision in light of other parts of the same text.

Manning, Precise Texts, supra note 8, at 1707 n.160 (citations omitted).


257. Farrand, Framing, supra note 63, at 201. In the same vein, Jack Rakove characterizes the Constitutional Convention as “a cumulative process of bargaining and compromise” rather than an “advanced seminar in constitutional theory.” Rakove, supra note 59, at 15.

258. One must be careful not to overstate the matter, however. Much was also settled by the Constitution, such as the unitary President, two senators from each state, and one “supreme Court.” See U.S. Const. art. II, § 1; id. art. I, § 3; id. art. III, § 1.
Because the United States had not one body of lawgivers but thirteen, and because the thirteen states had thirteen different histories, cultures, heritages—sometimes widely different, as between New Englanders and South Carolinians or between Rhode Islanders and other Yankees, sometimes subtly different, as between the denizens of Massachusetts and those of Connecticut—it follows that what those lawgivers understood they were doing varied from state to state. . . . All the states ratified the same Constitution, but each read it and understood it in its own way.  

Writers who are historians frequently frame such claims at the macro level. For me, the indeterminacy problem is readily apparent throughout the document. What, for example, was the original understanding of the meaning of a civil trial by jury?

The Constitution's perceived indeterminacies necessarily create considerable interpretive problems. In his Commentaries on the Constitution, Story insisted that the Constitution must "have a fixed, uniform, permanent" meaning, and so far as "human infirmity will allow . . . [it should be] the same yesterday, to-day, and forever." And led by Justice Scalia, modern textualists tell us that we must focus on the original public understanding. Yes, but what then? Our whole constitutional history

259. Forrest McDonald, Foreword to M.E. Bradford, Original Intentions, at ix, x (1993).

260. Parenthetically, I note that a close reading of their work often shows a belief that much of importance was indeed settled at the time of the ratification. Bradford's Original Intentions, for example, vigorously argues that the Founders were united in their (and apparently Bradford's) opposition to democracy and equality. See id. at 32 ("It is impossible to understand what the Framers attempted with the Constitution of the United States without first recognizing why most of them dreaded pure democracy . . . ."). This is a point also emphasized by Gordon Wood. See Gordon Wood, The Radicalism of the American Revolution 231-33 (Vintage Books 1993) (1991) ("In embracing the idea of civic equality, however, the revolutionaries had not intended to level their society.").

261. Properly understood, for example, does the original understanding of the Seventh Amendment disallow "bellwether trials?" See generally Alexandra D. Lahav, Bellwether Trials, 76 Geo. Wash. L. Rev. 576, 589–92 (2008) (discussing bellwether trials in mass tort cases in light of original understanding of civil trial jury right).

262. 1 Joseph Story, Commentaries on the Constitution of the United States 520 (Boston, Hillard, Gray & Co. 1833).

shows that in many instances several “public understandings” existed, which, as I have explained, becomes graphically apparent in reading the late David Currie’s works.\textsuperscript{264} Moreover, circa 1788, many Founders in fact believed that they had not yet established a fixed meaning for many parts of the Constitution. Hamilton and Madison certainly believed as much. As Caleb Nelson demonstrates in a splendid essay, Hamilton’s view that over the course of time subsequent interpretations would “fix” the meaning of contested language was a widely shared premise in contemporary thought:

To be sure, James Madison and other prominent founders did not consider the Constitution’s meaning to be fully settled at the moment it was written. They recognized that it contained ambiguities and that subsequent interpreters would help “fix” its meaning on disputed points. Contrary to the suggestion of some critics, though, they did not envision a perpetually evolving meaning on each of these points. Once practice had settled upon one of the possible interpretations of a disputed provision, they expected that interpretation to persist. Their talk of “fixing” the Constitution’s meaning makes this expectation clear; as we shall see, it resonates with discussions of language change that were at the forefront of eighteenth-century lexicography. For the founding generation’s men of letters, the concept of “fixing” meaning connoted permanence and immutability.\textsuperscript{265}

One could, of course, argue that the subsequent “fixing” or “liquidation” of the document simply excavated the “true” original understanding of 1788.\textsuperscript{266} But as a realistic premise for sustained reasoning about the process of constitutional interpretation, that seems to me quite fanciful. When an issue is presented for resolution matters a great deal as to how it will be resolved—or, if you prefer, how the original understanding of the relevant text will be understood.\textsuperscript{267} Since some (much?) original

\textsuperscript{264} Some textualists presuppose a sophisticated interpreter, “intelligent and informed people of the time.” Scalia, Matter of Interpretation, supra note 263, at 38; see also Kay, supra note 263, at 722 (“[W]e are interested in people who were fluent in language, conversant with the historical and constitutional discourse of the time, and fully familiar with the issues at stake in any particular act of constitution-making . . . .”). This is despite an illiteracy rate of between twenty and thirty-five percent. Id. at 706 n.12. Others are less demanding—less elitist, if you will—requiring only a “reasonable reader or author.” McGinnis & Rappaport, Original Methods, supra note 253, at 761 n.29.

\textsuperscript{265} Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 521 (2003) [hereinafter Nelson, Originalism].

\textsuperscript{266} The founding generation seems to have viewed this as a delegation to future “liquidators,” a view Madison seems to have held. See The Federalist No. 37 (James Madison), supra note 1, at 198 (“All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained . . . .”).

\textsuperscript{267} Consider, for example, the issue of affirmative action. What result if presented in sharp relief in 1955? 1980? 2010? See Ricci v. DeStefano, 129 S. Ct. 2658, 2681–83
meaning was not "fixed" in 1788, the possibility of "liquidating" the "true" 1788 understanding of that text recedes significantly.268

Acknowledging that some constitutional provisions would require future liquidation, many prominent originalists, however, would accept only those liquidating precedents that arose close in time to the founding.269 Such liquidations, it is argued, were part of the Constitution, and thus did not "evolve."270 But to my eyes, liquidation could, presumably, take a very long time, in part because of the vagaries as to when issues are litigated.271 Consider, for example, the current controversy over "the unitary executive," which concerns the President's control over the ad-

(2009) (Scalia, J., concurring) (arguing Court's decision merely delays future decision on whether disparate impact provisions of Title VII violate Equal Protection Clause).

268. I put aside here the additional problem of the reliability of sources of original understanding, particularly the ratification debates. See generally James H. Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Tex. L. Rev. 1 (1986). Moreover, I recognize that important disagreement existed from the beginning about which interpretive canons should be used to flesh out the text's meaning. There seems to be widespread agreement that terms referring to the common law should assume their common law meaning. But even here, difficulties are apparent, since the common law itself would be taken over only to the extent that it was "adapted" to our uses. In any event, apart from common law references, should the Constitution be viewed as a contract? A super statute? A treaty? Should the rules of the common law be used in interpreting the Constitution? See Nelson, Originalism, supra note 265, at 560-78 (discussing use of various rules of interpretation to determine original meaning). For a recent sally into this area, reviewing much of the current writing on the topic, see McGinnis & Rappaport, Original Methods, supra note 253. Does the answer vary according to the specific provision at issue?

In a Constitution assumed to make these subsequent "liquidations" binding on future generations, such interpretive uncertainties fueled the inevitable disagreements over the document's meaning. See Nelson, Originalism, supra note 265, at 577-78 ("Because of the Constitution's novelty . . . the range of [interpreive] conventions that might apply was broad."). Several interpretive possibilities would emerge and one would ultimately achieve enough stability to "fix" or "liquidate" the meaning of the constitutional provision. Nonetheless, this area of uncertainty over interpretive canons seems never to have assumed overriding importance, since interpretation of the Constitution fell quickly into the hands of "We the Lawyers," not "We the People." See McGinnis & Rappaport, Original Methods, supra note 253, at 770-72 (arguing drafting of Constitution in name of "We the People" did not necessarily convey intention to use ordinary—as opposed to legal—methods of interpretation).

269. See, e.g., Barnett, Trumping Precedent, supra note 44, at 267-69 (noting Madison's understanding that some constitutional language would require liquidation, but "once 'fixed,' this meaning cannot then be trumped by later judicial decision").

270. See Nelson, Originalism, supra note 265, at 535 ("Madison believed in the inevitability of linguistic change, [but] did not think that this change should affect the meaning of laws or constitutions."); see also Powell, Original Understanding, supra note 263, at 939-41 (describing Madison's view that constitutional meaning could be fixed by governmental practice). Professor Powell himself believes that constitutional meaning can evolve over time. See infra note 299 and accompanying text.

271. See Hart and Wechsler, Sixth Edition, supra note 5, at 96 ("Isn't it predictable that it would sometimes—perhaps often—take the institutions responsible for implementing the Constitution a long period of time to come to rest on how to understand certain elements of a highly complex constitutional structure?").
ministration of law. "Strong Unitarians" insist that the President must have ultimate control of all decisionmaking in the administration of federal law.\footnote{272} We are, of course, in a sense, all unitary executivists. The real question is, what does that mean? Surely, it could have meant what the Strong Unitarians believe that it meant; but our traditions have thus far reached a different understanding, one consistent with curbing the President's control over initial decisionmaking, as well as the President's ability to remove officials.\footnote{273} This reflects the way in which a good deal of our constitutional doctrine has developed: a recognition that many constitutional provisions require time (in this case a lot of time), and the choice of one interpretive pattern over another (here, settled governmental practice), in order to "fix" or "liquidate" their meaning.\footnote{274}

To my mind, original understanding circa 1789 will certainly rule out some interpretations, and on some occasions it can definitively fix meaning. But in a significant number of instances, original understanding will do no more than establish a permissible range of original "understandings." While he does not challenge this general proposition, Professor Clark asks us to believe that the Supremacy Clause was a "precise" compromise, the meaning of which was, at least in a very significant regard, clearly and indisputably understood in 1789.\footnote{275} As this Article makes plain, I believe close inspection demonstrates that the relevant historical past is far more complex than Clark acknowledges. More generally, those who seek to find the "true" Constitution in the past, particularly a past

\footnote{272. Many such writers now concede, reluctantly, that the President may be able to exercise that "control" only through the removal process, rather than by legally dictating the subordinate's initial decision. See, e.g., John F. Manning, The Independent Counsel Statute: Reading "Good Cause" in Light of Article II, 83 Minn. L. Rev. 1285 (1999) (arguing President can often be limited to good cause discharges, but such discharges must include policy disagreements with executive and administrative officials).


\footnote{274. Compare Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive (2008) (arguing for strong, unitary executive), with Peter L. Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696 (2007) (arguing President's role is that of "overseer," not "decider"). For an important recent contribution, see Stephen Skowronek, The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive, 122 Harv. L. Rev. 2071, 2095 (2009) ("The new construction [by modern unitary theorists] does not seek to roll back presidential powers as they have developed over time; it seeks, rather, to press forward the case for presidential government without reference to latter-day [i.e. non-originalist] elaboration of its foundations.").

\footnote{275. In a similar vein, John Manning believes that the text of the Eleventh Amendment is a precise compromise that must be respected. See supra note 8. But see Steven Menashi, Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity, 84 Notre Dame L. Rev. 1135, 1177–88 (2009) (criticizing Manning).}
clearly fixed as of 1789, all too often seek more of “the” past than it can deliver.

B. Originalism/Textualism and Current Practice

There is, for me, another and even more decisive objection to originalism-based textualism as a theory of constitutional adjudication: It cannot account for a good deal of the contemporary constitutional order; an order, I believe, that embodies massive departures from any original understanding of the text. These departures range from paper money, to the rise of the modern national and welfare regulatory state, to the transformation of the presidency, and to the content of much of our civil liberties law. This new order has been received by the one “supreme Court” and other law-applying officials; there is, quite clearly, no going back. Virtually all the important originalist issues related to the current order are now off the table, wholly beyond recall. As Professor Fallon observes:

[It] is virtually unimaginable that the Justices could ever renounce long-settled precedents around which public support and entrenched expectations have developed. A Supreme Court that held that paper money and Social Security were unconstitutional, that Brown v. Board of Education was wrongly decided, or that states need not adhere to one-person, one-vote principles would be rightly denounced by the public as committing grave constitutional errors—even if the Court could demonstrate compellingly that its rulings reflected the original understanding in every case. The gravamen of the complaint against the Court would be that the Constitution that is the fundamental law of the United States is not an exclusively originalist Constitution.

Justice Scalia and Judge Bork recognize that reality. Speaking of paper money, which was first introduced during the Civil War and ini-

tially held unconstitutional, Judge Bork wrote: “Whatever might have been the proper ruling shortly after the Civil War, if a judge today were to decide that paper money is unconstitutional, we would think he ought to be accompanied not by a law clerk but by a guardian.” And Justice Scalia has acknowledged that originalism without any allowances for precedent would be “medicine... too strong to swallow.” Some second generation academic originalists, such as Professors Lawson, Amar, and Paulsen, however, apparently do not agree. This is Supremacy Clause textualism with a vengeance!

If this historical claim about the existence of substantial, judicially sanctioned departures from original understanding is correct, then originalists face a problem of central importance: significant irrelevance. In the contemporary practice of constitutional adjudication, “the text,” as David Strauss puts it, “matters most for the least important questions,” or indeed matters not at all. That has been the reality for some time. That constitutional “law” involves far more than the text is captured in the large body of writing, beginning with Christopher Tiedeman more than a century ago, that refers to our “unwritten” Constitution.

(stating stare decisis “is a pragmatic exception” to his originalist philosophy). But neither judge has articulated any principle for determining when stare decisis will be applied. Fallon, Constitutional Precedent, supra note 278, at 1123–24.


281. Bork, supra note 279, at 155.


283. See, e.g., Lawson, supra note 44, at 29 (“[A]rguments from prudence go nowhere unless they are tied to the interpretation of some provision of the constitutional text.”). Professor Barnett does not go quite so far. See Barnett, Trumping Precedent, supra note 44, at 263–69 (explaining “why the originalist rejection of precedent is not so radical as it at first appears”); see also Amar, Legal Reasoning, supra note 44; Paulsen, Corrupting Influence, supra note 44. Professor Fallon writes, and I agree, that these writers, taken seriously, “are advocates of radical legal change, who should have to bear a heavy burden of normative justification.” Fallon, Constitutional Precedent, supra note 278, at 1125. For a recent effort by two originalists to find space for the role of precedent, see John O. McGinnis & Michael B. Rappaport, Reconciling Originalism and Precedent, 103 Nw. U. L. Rev. 803 (2009). Applying a cost/benefit analysis, they would, if I am not mistaken, retain stare decisis for most significant modern precedents on the grounds that either they have become too deeply entrenched into our constitutional order or overruling them would prove too destabilizing. Id. at 806.


285. See, e.g., Jack Goldsmith & Daryl Levinson, Law For States: International Law, Constitutional Law, Public Law, 122 Harv. L. Rev. 1791, 1808–09 (2009) (“[T]he constitutional text has contributed little to resolving the vast areas of ambiguity and disagreement that have arisen. . . .”). Professors Goldsmith and Levinson point out that a “great[ ] number of constitutional issues will never be heard by any court,” and that it is “easy to exaggerate the amount of constitutional settlement that judicial review provides.” Id. at 1813–14.

286. See Christopher G. Tiedeman, The Unwritten Constitution of the United States (New York, G.P. Putnam’s Sons 1890); see also William Bennet Munro, The Makers of the
Is our current practice of nonoriginalist constitutional adjudication "unconstitutional" or "illegitimate"? For me, that conclusion is far too destabilizing to contemplate. The true lesson of our constitutional history, I submit, is the failure of a perhaps widely shared vision of the founding generation: that the written Constitution, unless modified through Article V, would unalterably constrain future generations. 287

Any acceptable theory of constitutional adjudication should, I believe, have two qualities: (1) It must be normatively acceptable and (2) It must be able to account for most (though not necessarily every last bit) of the current constitutional order. On the first requirement, I understand the strong, immediate, intuitive pull of an originalism-based textualism, especially since such arguments were the dominant mode of analysis throughout much of our constitutional history. 288 Perhaps, more accurately, I should say "originalisms," since there were so many original understandings. Nonetheless, I suspect that many "average Americans" would assert that the Court must apply "the" true (as in the only) original understanding of a given constitutional provision. 289 Moreover, original

Unwritten Constitution (1930); Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975); Todd E. Pettys, The Myth of the Written Constitution, 84 Notre Dame L. Rev. 991 (2009). Even writers sympathetic to originalism sometimes recognize the need for courts to go beyond constitutional "interpretation" and engage in a restrained constitutional "construction." See, e.g., Keith E. Whittington, Constitutional Construction 5 (1999) ("The jurisprudential model needs to be supplemented with a more explicitly political one that describes a distinct effort to understand and rework the meaning of a received constitutional text. That more political model is one of constitutional construction."); Barnett, Restoring, supra note 253, at 121 ("[O]riginal meaning of the text ... may still not provide enough guidance ... When this occurs, it becomes necessary to adopt a construction of the text that is consistent with its original meaning but not deductible from it.").


288. Modern day originalists such as Justice Scalia invoke originalism because it responds to "the main danger in judicial interpretation of the Constitution[,] . . . that the judges will mistake their own predilections for the law." Scalia, Lesser Evil, supra note 49, at 863–64. Professors Manning and Clark, by contrast, defend originalism on the ground that it is most respectful of the Constitution's compromise.

289. They would, I suspect, also believe that the original document was fundamentally perfect, which is to say that it reflects their own value judgments. And they would surely simultaneously reject any conception that the current constitutional order is illegitimate, to the extent they understood the question. And all the while they would suffer no cognitive dissonance. See Jamal Greene, Selling Originalism, 97 Geo. L.J. 657, 659, 695–96
understanding theory retains a strong hold on the academic community.290

I need not pursue this line of inquiry further, however, because for me originalism fails on the second ground. "The first [problem with originalism in any form] . . . involves the gap between the framers' world and that which we inhabit."291 This is a world in which the courts have repeatedly sanctioned transformative and irreversible departures from original understanding.292 But the resulting order has not resulted in any significant challenge to the "legitimacy" of our current nonoriginalist practice of constitutional adjudication.

Concerns over "legitimacy" generally focus on the conduct of law-applying officials, particularly judges and other public officials. Here, I, of course, like many others, follow Hart and look at law from an "internal" point of view.293 That law is what officials accept and apply as law is not a new insight: "The binding authority of law," wrote the astute Christopher J. Tiedeman at the end of the nineteenth century, "does not rest upon any edict of the people in the past; it rests upon the present will of those who possess the political power."294 More broadly, legitimacy concerns could include a larger "interpretive community," encompassing practicing lawyers, law professors, and other students of the Court's work.295 (I should be inclined to say interpretive communities, but that point is not important here.) Simply put, "This Constitution['s] status as the 'supreme Law of the Land' is entirely a function of its current accept-

(2009) (describing statistics showing that "a substantial portion of the American public reports an affinity for originalism"). Professor Greene attributes the popular appeal of originalism to three attributes: its simplicity, populism, and nativism. Id. at 708-14. I would add that originalism plays well to the filiopietism of the American people.

290. See, e.g., materials cited supra notes 8–13; see also Johnathan O'Neill, Originalism in American Law and Politics (2005), and the essays by historians and political scientists in Ourselves and Our Posterity (Bradley C.S. Watson ed., 2009), as well as the essays by prominent judges and legal scholars in Originalism: A Quarter Century of Debate (Steven G. Calabresi ed., 2007).


292. Monaghan, Stare Decisis, supra note 50, at 727-29.


294. Tiedeman, supra note 286, at 122.

295. Ordinary citizens do not seem to count in current legitimacy theories, except perhaps at the margins in setting outer boundaries for judicial conduct. See Fallon, Constitutional Precedent, supra note 278, at 1138–39 ("Supreme Court Justices who want to maintain the long-term efficacy of their own rulings must recognize dominant public sentiment . . . as a constraint on this authority to shape constitutional law, at least with respect to matters of high public salience."). Henry Hart referred to "first-rate" lawyers. Henry M. Hart, Jr., The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 101 (1959).
And, as Paul Brest long ago observed: 

"[I]t is only through a history of continuing assent or acquiescence that the document could become law. Our constitutional tradition, however, has not focused on the document alone, but on the decisions and practices of courts and other institutions. And this tradition has included major elements of nonoriginalism."  

Accordingly, "[w]hat counts as constitutional law at any given time will depend on . . . which parts of the text of the Constitution, which interpretive methods, and which first-order constitutional interpretations are recognized as authoritative by the relevant recognitional community." As H. Jefferson Powell puts it, "[c]onstitutional law is an historically extended tradition of argument," which draws upon various sources in addition to the text. At the end of the day, our current practices "should perhaps be understood not as a theory of interpretive meaning, but rather as a theory, or a partial theory, of the legitimacy of various forms of interpretive argument in constitutional law."  

Constitutional law adjudication is a practice. Current practice still recognizes originalism-based textual arguments as "legitimate" legal arguments. District of Columbia v. Helley is, of course, the most recent example of the prominence of originalism-based arguments, and it does not stand alone. But originalism is by no means the only such form of  

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296. [T]he legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questionable) legality of its formal ratification." Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1792 (2005). This is a widely shared premise of contemporary constitutional thinking. See Christopher R. Green, "This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 Notre Dame L. Rev. 1607, 1669 n.199 (2009) (collecting authorities); see also Rule of Recognition, supra note 293.  


298. Goldsmith & Levinson, supra note 285, at 1811 (footnotes omitted); see also Jackson, supra note 248, at 637 (explaining constitutional interpretation "requires judicial self-discipline, located within a particular community's interpretative traditions").  


300. Jackson, supra note 248, at 661. Professor Jackson makes a strong normative case for our current practices, id. at 654–60, and argues that this practice leaves ample room for disagreement within our legal culture. Id. at 660–70.  

301. 128 S. Ct. 2783 (2008).  

constitutional interpretation that is broadly accepted today.\textsuperscript{303} Arguments from precedent, in fact, play a far more salient role. Since the early nineteenth century, "the Supreme Court has invoked stare decisis with great frequency, seldom if ever apologetically."\textsuperscript{304} The constitutional text itself often plays only a subordinate role. Examining the Court's opinions at the end of the 1981 Term, for example, Professor Harry Jones captured the reality nicely. The "methodological phenomenon[on]" that struck him the most was that "two-thirds or more of the discussion in the opinions" was "about [what] past Supreme Court cases . . . arguably 'held'" and about their reasoning.\textsuperscript{305} Speaking of the text itself, he wrote:

The constitutional text is down there somewhere under this massive overlay of case law development and refinement, but the usual contest between advocates in the Supreme Court, and more often than not between or among the Justices, is the kind of contest that has characterized the common law judicial process at least since the days of Sir Edward Coke, a battle over cases and what they should be taken to stand for.\textsuperscript{306}

More recently, Professor David Strauss has emphasized how much of the content of constitutional law rests not on the text but emerges from the common law process of adjudication.\textsuperscript{307} He writes:

[W]hen people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years. In fact, in the day-to-day practice of constitutional interpretation, in the courts and in general public discourse, the specific words of the text play at most a small role, compared to evolving understandings of what the Constitution requires. . . . [T]he common law approach, not the approach that connects law to an authoritative text, or an authoritative decision by the Framers or by "we the people," . . . best explains, and best justifies, American constitutional law today.\textsuperscript{308}

\textsuperscript{303} See Philip Bobbitt, Constitutional Fate (1982). Professor Bobbitt lists arguments based on text, history, structure, prudence, and the values peculiar to the Constitution (ethos) as appropriate considerations. For a recent, more elaborate description of the various interpretive techniques that have been used by the Court, see Lackland H. Bloom, Jr., Methods of Interpretation (2009).

\textsuperscript{304} Fallon, Constitutional Precedent, supra note 278, at 1129. An abbreviated version of that article appears as Richard Fallon, Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition, in Rule of Recognition, supra note 293, at 47.

\textsuperscript{305} Harry W. Jones, Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law, 4 Pace L. Rev. 11, 12 (1983).

\textsuperscript{306} Id. at 13.

\textsuperscript{307} See Strauss, Common Law, supra note 284, at 883–84 (noting dominant role of doctrine over text in constitutional law).

\textsuperscript{308} Id. at 877, 879; see also Scalia, Lesser Evil, supra note 49, at 852. Justice Scalia notes:
Unless we are prepared to condemn our existing constitutional practice as illegitimate, the propriety of other modes of argument besides originalism, particularly those based upon precedent, must be acknowledged. Their "validation is [their] pedigree," to borrow from Justice Scalia, or, more accurately, is in their long and widespread acceptance.

I have never been persuaded that an airtight case can be made for the priority of the text over the case law. I recognize that we do not have a tradition that formally acknowledges the case law as possessing a status "equal" to the constitutional text itself. Moreover, as David Strauss points out, "it is no part of our [constitutional] practice ever to 'overrule' a textual provision." Constitutional law without the written Constitution is "unthinkable."

Unthinkable? Perhaps. Candor, however, requires recognition of a deep problem inherent in any theory of constitutional adjudication that places substantial reliance on current practice: The role of a written constitution in constitutional adjudication cannot be specified with any real clarity. In such a system, the document, rather than occupying the position of fundamental law, can become little more than a background discursive framework or a weak gravitational field in which the process of constitutional adjudication is carried on. David Strauss's recent article, "The

It would be hard to count on the fingers of both hands and the toes of both feet... the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean.

Id.

I quite agree with Professor Greene that "[t]he theoretical failing of originalism is that it lacks an account of how legitimate constitutional change occurs outside the Constitution's text or original understanding." Greene, supra note 289, at 701. This is true of the originalists I consider in this Article. It is not true, however, of the versions of originalism espoused by Professors Amar and Balkin.


Kent Greenawalt, The Rule of Recognition and the Constitution, 85 Mich. L. Rev. 621, 654 (1987) ("[T]he force of precedent... is an aspect of our law because of acceptance."). That article is reprinted in Rule of Recognition, supra note 293, at 1, along with Professor Greenawalt's further reflections. See Kent Greenawalt, How to Understand the Rule of Recognition and the American Constitution, reprinted in Rule of Recognition, supra note 293, at 145–73. The latter article focuses on the importance of the fact that officials often defer to the determinations of other officials as to what is to count as law.

Monaghan, Stare Decisis, supra note 50, at 770–72.

Id. at 757 ("The view that a judicial precedent is the equivalent of a legislative act has never existed in American law, and no one has proposed that it should." (citation omitted)). A fortiori, as to the Constitution. See Jackson, supra note 248, at 632–36 (arguing constitutional text is distinguished from case law both because text is more binding and because of difficulty of changing it).

Strauss, Common Law, supra note 284, at 899.

Monaghan, Stare Decisis, supra note 50, at 773 (quoting Richard S. Kay, The Illegality of the Constitution, 4 Const. Comment. 57, 57 (1987)); see also Monaghan, Perfect Constitution, supra note 251, at 383 ("The authoritative status of the written constitution is... an incontestable first principle for theorizing about American constitutional law.").
Modernizing Mission of Judicial Review,”316 is illustrative. By and large, he defends a conception of judicial review in which “[t]he governing idea of the modernization view is that statutes are unconstitutional just because, and to the extent that, they do not reflect true popular sentiment.”317 The focus of constitutional adjudication “more or less consciously, looks to the future, not the past; [and] tries to bring laws up to date, rather than deferring to tradition; and ... anticipates and accommodates, rather than limits, developments in popular opinion.”318 The defense proffered for this proposition is, so far as I can see, grounded entirely in historical practice.

This is not the occasion to attempt to formulate a comprehensive theory of constitutional adjudication.319 “One can say, however, that no incontrovertible showing can be made that the Court must always adhere to the original understanding of the constitutional text.”320 More particularly, one can say that the resolving power of precedent in constitutional adjudication is considerable, even with respect to constitutional issues of lesser magnitude. Consider, for example, Justice Stevens’s opinion for the Court in Taylor v. Illinois:

The State’s argument is supported by the plain language of the [Compulsory Process] Clause, . . . by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law, by some scholarly comment, and by a brief excerpt from the legislative history of the Clause. We have, however, consistently given the Clause the broader reading reflected in contemporaneous state constitutional provisions.321

Or consider, for example, Chief Justice Roberts’s recent one paragraph concurring opinion (joined by Justice Scalia) in Rothgery v. Gillespie County.322 The case addressed the question of when the right to counsel attaches. In dissent, Justice Thomas argued that English and American authorities established that the right attached only when formal process had issued against the defendant.323 The Chief Justice responded that “Justice Thomas’s analysis of the present issue is compelling, but I believe

317. Id. at 898.
318. Id. at 860.
319. There is precedent for this. Me! I have run away from this task before. See Monaghan, Stare Decisis, supra note 50, at 773. But the problem is a deep and insistent one: The first premise of reasoning is that “a constitution establishes the supreme law that prevails in collision with all other law.” Fallon, Implementing, supra note 291, at 113.
320. Monaghan, Stare Decisis, supra note 50, at 773.
323. Rothgery, 128 S. Ct. at 2595–605 (Thomas, J., dissenting).
that the result here is controlled by [two prior decisions of the Court]. A sufficient case has not been made for revisiting those precedents, and accordingly I join the Court's opinion.\textsuperscript{324} And just this last Term the Court relied upon its precedents, as against text-based arguments, in construing the tonnage and confrontation clauses.\textsuperscript{325}

This is not the occasion to consider whether one can or should "prioritize" the various kinds of arguments now advanced as a matter of our constitutional practice.\textsuperscript{326} My specific concern is with the role of precedent. Professor Fallon, following the Court, views adherence to precedent as a matter of policy, and more importantly, apparently as an open-ended matter of policy at that.\textsuperscript{327} My own view, in short, is that nonadherence to precedent requires special justification, because adherence to precedent fosters the central goals of the Constitution: establishing stability and continuity in the governmental order.\textsuperscript{328}

**CONCLUSION**

The Supremacy Clause textualists I have discussed in this Article invite us to rethink the meaning of the word "Laws," and even more importantly, the role of precedent in constitutional adjudication. Even if I were convinced that their analysis reflected "the" original understanding of the text, I would not now pick up their invitation. One must be convinced that important gains of some kind are to be achieved by overthrowing entrenched practice. To my mind, no such case has been made.

\textsuperscript{324} Id. at 2592 (Roberts, C.J., concurring).


\textsuperscript{326} Professor Fallon believes such a prioritization is both possible and desirable. See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1193–94 (1987). Professor Bobbitt, on the other hand, denies the feasibility of any such project. Bobbitt, supra note 303, at 181; see also Jackson, supra note 248, at 660 ("[O]ne of the advantages of this interpretive approach is its recognition of the possibilities for reasonable disagreement on the weight of and interaction among the different, legitimate sources of interpretation.").

\textsuperscript{327} Fallon, Constitutional Precedent, supra note 278, at 1124.

\textsuperscript{328} Monaghan, Stare Decisis, supra note 50, at 748–55; see also Thomas Merrill, Originalism, Stare Decisis, and the Promotion of Judicial Restraint, 22 Const. Comment. 271, 273 (2005) (arguing in favor of "a strong theory of precedent on grounds of judicial restraint"). Sometimes the demand for special justification seems to receive only token respect. See Justice Scalia’s opinion for a five person majority in Montejo v. Louisiana, 129 S. Ct. 2079, 2088 (2009), overruling Michigan v. Jackson, 475 U.S. 625 (1986) ("We do not think that stare decisis requires us to expand significantly the holding of a prior decision—fundamentally revisiting its theoretical basis in the process—in order to cure its practical deficiencies.").