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TRANSCENDING CONVENTIONAL SUPREMACY: A RECONSTRUCTION OF THE SUPREMACY CLAUSE

*S. Candice Hoke**

Judging from the numbers alone, the Supremacy Clause¹ has become a primary battlefield for demarcating the boundaries of the federal regulatory state. Over the past four Terms, for example, the United States Supreme Court explicitly invoked the Clause in two dozen majority opinions where the validity of a state law was questioned.² While

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1. U.S. CONST. art. VI, cl. 2. For the text of the Supremacy Clause, see *infra* note 24.

2. During the 1987-1990 Terms, where state law was challenged, the Supreme Court invoked the Supremacy Clause in a majority opinion in the following cases: *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2481-82 (1991); *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399-2400 (1991); *Dennis v. Higgins*, 111 S. Ct. 865, 872 (1991); *Howlett v. Rose*, 110 S. Ct. 2430, 2440-45 (1990); *English v. General Elec. Co.*, 110 S. Ct. 2270, 2275 (1990); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2246 (1990); *North Dakota v. United States*, 495 U.S. 423, 434-39 (1990); *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 367 (1989); *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 170 (1989); *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 819 (1989); *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 473 n.4 (1989); *Bonito Boats, Inc. v. Thunder Craft Boats*, 489 U.S. 141, 145, 168 (1989); *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 366, 369-77 (1988); *Felder v. Casey*, 487 U.S. 131, 150 (1988); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 176, 178, 180-82, 186 (1988); *City of New York v. FCC*, 486 U.S. 57, 63 (1988); *South Carolina v. Baker*, 485 U.S. 505, 581 n.11 (1988); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 499 (1988); *Bennett v. Arkansas*, 485 U.S. 395, 396 (1988) (per curiam). The Court also invoked the Supremacy Clause in three majority opinions concerning primarily jurisdictional issues. See *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (holding that state courts possess concurrent jurisdiction over Title VII claims); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (ruling that state courts have concurrent jurisdiction over civil RICO claims); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 198 (1988) (holding that a district court's

some of these cases presented federal preemption claims,³ many others arose under one of the other theories of recovery currently recognized as Supremacy Clause claims.⁴ This heightened usage of the Clause is part of a larger trend; each decade after World War II has presented a sharp rise in cases invoking the Clause.⁵ With this expanded deploy-

decision on the merits of an action constituted a "final decision" for appeals purposes).

3. See, e.g., *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991); *English v. General Elec. Co.*, 110 S. Ct. 2270 (1990); *City of New York v. FCC*, 486 U.S. 57 (1988). The term "federal preemption" expresses the conclusion that state or local law must be disabled from operation because it conflicts with some aspect of a federal legislative scheme. In this strict sense, then, federal statutes and their implementing regulations constitute the potentially preemptive law. Other sources of federal law, including constitutional law, treaties, and federal common law, may also disable and displace state and local law, but those inquiries proceed under divergent legal principles.

4. Under current doctrine, three theories of recovery other than preemption are currently tethered to the Clause. Spawned by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), these claims are classified loosely as intergovernmental immunities. See *infra* notes 111-119 and accompanying text. The Court has decided some questions that could be considered a species of intergovernmental immunity pursuant to other statutory or constitutional provisions. See, e.g., *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) (rejecting a claim of preemption of a state constitutional provision mandating judicial retirement at age 70 under the Federal Age Discrimination in Employment Act; the majority opinion can be interpreted as an elaborate construction of a type of intergovernmental immunity); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (ruling that the Tenth Amendment did not operate to bar the application of certain federal employment laws to state employees; explicitly decided as a Tenth Amendment claim and not as a Supremacy Clause intergovernmental immunity claim).

5. The Court has invoked the Supremacy Clause at a dramatic rate of increase during the post-World War II era. The table below includes cases where the Clause was cited in either a majority and concurring opinion, but excludes cases where the Clause was cited in only a dissenting opinion.

Period	Number of Cases	
	Invoking the Clause	Average/Year
1980-89	83	8.3
1970-79	57	5.7
1960-69	40	4
1950-59	17	1.7
1946-49	5	1.25

This statistical survey of cases is on file with the *Connecticut Law Review*. Interestingly, even at the height of the civil rights movement (1956-1968), when states were widely viewed to be disputing the supremacy of federal law, the Court did not invoke the Clause half as often as it did during the 1980s.

Occasionally, the Court has explicitly referred to preemption claims as "Supremacy Clause cases." See, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 579 (1979) (holding that certain federal benefits are not subject to division by a state as community property); *Perez v. Campbell*, 402 U.S. 637, 651 (1971) (holding that a state cannot deny a driver's license based on nonpayment of a judgment when the judgment is discharged pursuant to the Federal Bankruptcy Act); *Swift & Co. v. Wickham*, 382 U.S. 111, 122 (1965) (holding that three-judge courts are not required in Supremacy Clause cases where only federal-state statutory conflicts are involved). While discussing other legal issues, some Justices have recently referred to the Court's "Supremacy Clause

ment of the Clause, one might have expected greater clarity from the Court on the legal parameters and standards governing Supremacy Clause claims; one might also have surmised that there would be a commensurate interest from scholars. Unfortunately, neither has been the case. Although certain applications of the Court's Supremacy Clause jurisprudence have received recent attention,⁶ no attempt has been made to assemble the larger segments of the doctrine and evaluate whether they distort or facilitate the larger constitutional structure.⁷

It may well be that the Court's efforts to delineate and apply the Clause are widely viewed as unproblematic. Thus, from this perspective, the paucity of scholarship is to be expected. This Article does not acquiesce to that view, but instead seeks to identify and reconstruct the frayed fabric of Supremacy Clause doctrine, exposing its logical inconsistencies and the interpretive threads that have greatly enhanced the movement toward nationalization of regulatory power. Congress has long been accorded the power to protect the federal government from interference or discrimination by the states,⁸ and to exclude states from regulatory fields.⁹ But, assertedly, that power is rarely exercised explic-

cases." See *Payne v. Tennessee*, 111 S. Ct. 2597, 2618 n.3 (1991) (Souter, J., concurring) (quoting *Swift & Co.*, 382 U.S. at 122); *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2454 (1991) (O'Connor, J., dissenting).

6. Federal preemption topics have sparked particular attention. See, e.g., William Funk, *Federal and State Superfunds: Cooperative Federalism or Federal Preemption?*, 16 ENVTL. L. 1 (1985); Donald C. Langevoort, *The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America*, 101 HARV. L. REV. 96 (1987); Mary Ann K. Bosack, Note, *Cigarette Act Preemption—Refining the Analysis*, 66 NYU L. REV. 756 (1991); James G. Kreissman, Note, *Administrative Preemption in Consumer Banking Law*, 73 VA. L. REV. 911 (1987); Ellen L. Theroff, Note, *Preemption of Airbag Litigation: Just a Lot of Hot Air?*, 76 VA. L. REV. 577 (1990).

7. Because I focus on the role played by the Supremacy Clause in achieving a functioning federalist government, I do not examine the Clause's role in justifying federal judicial review for the unconstitutionality of congressional and executive action. This latter issue, of course, has been and remains the subject of considerable academic commentary. See *infra* note 66. By contrast, few constitutional scholars have paid any sustained attention to the Supremacy Clause's other facets. Prominent exceptions include Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981), and Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

8. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (ruling, *inter alia*, that a state cannot regulate a congressionally-created federal instrumentality).

9. ERISA's express preemption provision, 29 U.S.C. § 1144(a) (1988), has engendered extensive litigation. See, e.g., *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (holding that a state statute mandating severance benefits in the event of a plant closing is not a welfare benefit plan and thus is not preempted); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (invalidating as preempted a state statute that prohibited offsetting worker's compensation payments

itly. Instead, and analogous to its efforts under the dormant Commerce Clause,¹⁰ the federal judiciary has constructed an elaborate legal default, subsumed as intergovernmental immunities and implied federal preemption. Doctrinally appended to the Clause, these judicially fashioned doctrines fortify the centripetal, nationalizing pressures.¹¹ In addition to effecting greater centralization of power, a portion of the Court's Supremacy Clause doctrine is founded upon antagonistic theoretical conceptions of the Clause. More specifically, the Court's frequent labeling of federal preemption claims as "Supremacy Clause cases"¹² contradicts other doctrines denying constitutional status to these claims, and obscures the purpose the Clause serves in the larger constitutional structure.

Perhaps because the predominant strands of contemporary Supremacy Clause jurisprudence originate in two of the most venerable cases in the Court's history, the Court and academics alike have side-stepped some of their problematic pronouncements. In Part I, this Article questions the legacy of *McCulloch v. Maryland*¹³ and *Gibbons v. Ogden*,¹⁴ finding their Supremacy Clause principles unacceptably nationalistic and hence unfaithful to the balance of the Constitution. While their centralizing tendencies may have been understandable dur-

against pension benefits).

10. See Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

11. Scholarly and popular dissent from the established trend toward ever greater centralization of political and regulatory power spans left-wing, right-wing, and centrist political philosophies. See, e.g., GAR ALPEROVITZ & JEFF FAUX, *REBUILDING AMERICA* 79-80 (1984) (recommending an economic strategy that is consistent with and accountable to decentralized political power); JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 278-89 (1983) (arguing citizens can best come to understand their interests and realize the values of community in small democracies); James M. Buchanan, *Markets, States, and the Extent of Morals*, 68 AM. ECON. ASS'N J. 364 (1978) (calling for a "constitutional revolution" that would produce a dramatic devolution of power; contends the need arises from diminishing moral sensibility that can be partially traced to loss of community and local political power); cf. SAUL D. ALINSKY, *RULES FOR RADICALS* (1971) (advocating grassroots urban activism to improve lives of ordinary people); SI KAHN, *ORGANIZING: A GUIDE FOR GRASSROOTS LEADERS* (1982) (elaborating means by which average people can become politically powerful for progressive causes at local levels of government). Prominent legal theorists who also advocate decentralization of power include Gerald Frug, Kathryn Abrams, Paul Brest, and Frank Michelman. See GERALD FRUG, *LOCAL GOVERNMENT LAW* at xv (1988); Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591 (1988); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988); Gerald Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

12. See *supra* note 5.

13. 17 U.S. (4 Wheat.) 316 (1819).

14. 22 U.S. (9 Wheat.) 1 (1824).

ing the nation's infancy, their *raison d'être* has evaporated; the pendulum of state versus national regulatory power on matters other than individual liberties has swung too far. My objective is not to argue that all intergovernmental immunities are unjustified, or that federal preemption of state law is unauthorized. Rather, my focus throughout centers on whether these substantive claims are properly conceptualized as flowing from the Supremacy Clause. Part I also seeks to expose certain other analytic and textual difficulties that pervade the Court's Supremacy Clause cases.

Part II examines the Constitutional Convention records to assist in formulating the Clause's proper function in the larger plan and in elaborating any limitations that deserve recognition. It concludes that the historical records support a narrow but important function for the Clause. Contrary to the Court's jurisprudence, the Clause's process-based regulative purpose is distorted by appending original claims to it. It cannot be properly read to confer additional national powers irrespective of the substantive provisions and limitations articulated in the balance of the Constitution.

Despite the current Court's professed solicitude for the fate of federalism, it has thus far not attended to the fray of threads that constitute Supremacy Clause jurisprudence. Part III extricates the sound doctrinal strands and weaves them with the historical understanding into a new theory of the Supremacy Clause that is driven by republican federalism. The Clause must be recognized to be inherently process-oriented¹⁵ rather than substantive. The Clause is foremost a federal rule of decision for federal claims, a thread that the Court has occasionally acknowledged to be a portion of the Clause's role. As such, it supports of its own accord no substantive claims; those currently tethered to the Clause must be reconceptualized under substantive constitutional provisions or structural principles, such as federalism, or abandoned as issues of constitutional dimension. As a rule of decision,

15. Arguing that one portion of the Constitution, the Supremacy Clause, is process-oriented does not require the adoption of the comprehensive process-based constitutional theories formulated in, for example, JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) and JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980). See also Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition & Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For a critical review of these theories, see, for example, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Professor Frank Michelman has described republicanism as a process-based constitutional theory but differentiates it from the genre typified by Wechsler and Choper. See Michelman, *supra* note 11, at 1525-26.

the Clause enforces all valid federal law without adding the substantive value of nationalism¹⁶ as a tacit, unqualified good.

This Article focuses its argument at the level of macro-constitutional doctrine. While the level of analysis may at times seem quite abstract, the underlying concerns are practical and concrete. Although we type our nation a democratic republic, precious few citizens actually participate in choosing and shaping our governmental policies.¹⁷ We must appreciate that if we continue to accept lax legal standards under which the survival of state and local law is determined, we are eroding the possibilities for meaningful self-government and retarding the opportunities for creative public policy resolution at the state and local levels.¹⁸

The Supremacy Clause, as presently construed, plays a pivotal role in this drama. In order to design a stable system of self-government that citizens would ratify, the Framers were motivated to fashion a federal government of divided and concurrent powers rather than a centralized national government. Yet the states and localities are increasingly becoming mere instruments of national policy and are losing the qualities of government. Adoption of the theoretical reformations of Supremacy Clause jurisprudence discussed here will not make a clean sweep of the practical legal quandaries precipitated by multiple legal sovereigns.¹⁹ But the theoretical restructuring is a necessary predicate to those tasks.

The Court's Supremacy Clause jurisprudence constitutes a primary means by which federalism, as a constitutional structure, value, and practice, has been debased. The direction of constitutional decision-making toward ever greater nationalization of power cannot be

16. As used in this Article, the term "nationalism" denotes a bias in favor of locating primary political and regulatory power at a central national level as opposed to favoring decentralization and devolution of that power. Cf. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (contrasting nationalist and federalist models of federal court authority).

17. Benjamin Barber has incisively summarized the current democratic theory and practice to be "politics as zoo keeping." BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 25 (1984).

18. This position does not entail embracing the substantive positions taken within state and local laws as the normatively best choices. Instead it recognizes that a multiplicity of decision-making units will yield a multiplicity of policy positions, some of which will assist in resolving public problems more effectively than does a unitary national policy.

19. In an earlier article that elaborated both the political costs of preempting state law and a proposed doctrinal reformation of federal preemption standards, I attempted to resolve some of these more practical questions. See S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991).

corrected without reforming the Clause's legal import. This long-overdue legal project must be completed if a lively federalism²⁰ and, in particular, broad citizen participation in governmental affairs are to be secured and protected.

I. PERSISTENT PROBLEMS IN SUPREMACY CLAUSE JURISPRUDENCE

A. *The Marshall Legacy*

The veneration Chief Justice John Marshall enjoys can be traced primarily to two foundational contributions to our nation's institutional structure.²¹ First, under Marshall's leadership, the Court established itself as a co-equal branch of the federal government, rather than as a mere subordinate of the legislative and executive branches.²² Second,

20. In *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), Justice O'Connor summarized the ends and values of federalism:

Th[e] federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . .

Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Id. at 2399-2400 (citations omitted).

21. Marshall has not, of course, received universal acclaim for his accomplishments. For instance, see the newspaper essays authored by Spencer Roane, Chief Justice of the Virginia Supreme Court, responding to *McCulloch* as well as *Martin v. Hunter's Lessee* and *Cohens v. Virginia*, gathered in JOHN MARSHALL'S DEFENSE OF McCULLOCH V. MARYLAND 106-54 (Gerald Gunther ed., 1969) [hereinafter JOHN MARSHALL'S DEFENSE]. Thomas Jefferson, in retirement at Monticello, condemned *McCulloch* and the Marshall Court in general. See R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 160-61 (1985); CALEB PERRY PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 70, 77 (1953) (Jefferson criticized Marshall's expansive jurisprudential method, evidenced in *McCulloch*, and also his nationalistic bias; he viewed Marshall and the Court as abusing the power of judicial review); see also R. Kent Newmyer, *John Marshall and the Southern Constitutional Tradition*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 105, 108-20 (Kermit L. Hall & James W. Ely, Jr. eds., 1989) (*McCulloch*'s elaboration and vindication of extensive implied national powers assaulted Southern sensibilities about the relationship between nation and states, and also threatened Southern economic interests because the northern and midwestern states held a majority of congressional votes and could pass protectionist legislation that injured Southern interests).

One of Marshall's contributions not mentioned in the text is his methodological approach, which would currently be classified as noninterpretivism. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Thomas C. Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

22. This elevation in status was achieved most notably by *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the Court ruled that it was empowered to review congressional acts

and more important for this inquiry, the Marshall Court systematically established the national government as the political and legal superior to the state governments.²³ This latter achievement was realized principally by Marshall's expansive interpretation of the Supremacy Clause²⁴ in *McCulloch v. Maryland*,²⁵ and by the standard for federal preemption of state law he enunciated in *Gibbons v. Ogden*.²⁶

It is neither bold nor controversial to describe Marshall as a nationalist and cite the *McCulloch* opinion as conclusive evidence. But in our laudable enthusiasm for federal initiatives marching under the banner of the New Deal and broader civil rights, where *McCulloch* has been repeatedly cited,²⁷ we seem to have lost sight of the methodologi-

for constitutional sufficiency, *id.* at 177-80, and could compel the executive, here the Secretary of State, to conform to law via mandamus, *id.* at 162-73. Both rulings bear continuing importance for separation of powers principles. One of the most sophisticated critical reviews of *Marbury* and the methodological jurisprudence of its author can be found in DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 66-74 (1985).

23. The celebrated cases by which this latter achievement was realized include: *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that a federal instrumentality is not subject to regulation or taxation by a state); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (ruling that the Supreme Court possessed the power and responsibility to review state court decisions that denied federal rights to a private party); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (holding that the *Martin* principle applies to require compliance with federal law, even where a state is the defendant); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (ruling that a federal act regulating commerce ousts inconsistent state law and licenses granted thereunder); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (holding state officers can be held accountable for violations of federal law in federal courts). For a profound study of the federal commerce power elaborated in several of these cases, see FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, & WAITE* (1937).

24. See, e.g., *McCulloch*, 17 U.S. (4 Wheat.) at 403-06; *Gibbons*, 22 U.S. (9 Wheat.) at 215-22. The Supremacy Clause states:

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.

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

25. 17 U.S. (4 Wheat.) 316 (1819).

26. 22 U.S. (9 Wheat.) 1 (1824).

27. The Supreme Court invoked *McCulloch v. Maryland* to support a range of landmark decisions regarding the New Deal. See, e.g., *Yakus v. United States*, 321 U.S. 414, 426 (1944) (ruling Congress is not confined to the smallest possible delegation of discretion to administrative officers); *United States v. Darby*, 312 U.S. 100, 118 (1941) (Congress' power to regulate commerce not confined to regulation of interstate commerce); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 326 (1936) (forbidding Congress from using the Commerce Clause as a pretext to enact law not properly within the scope of power granted to the federal government). Its use of *McCulloch* in major civil rights cases includes *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968) (citing *McCulloch's* proposition that if the end is legitimate, any means necessary are appropriate); *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966) (same); *Heart of Atlanta Motel*,

cal and normative predicate driving *McCulloch's* ringing pronouncements. The objective of my discussion of *McCulloch* is limited to tracing that predicate—Marshall's creation of a supra-constitutional value through which the Constitution's text is refracted to yield both its ultimate and applied meaning.²⁸

The *McCulloch* facts are well known. The second Bank of the United States aroused strong opposition in the states, where the Bank competed for business with local concerns.²⁹ Newspaper reports that Bank officers had committed fraud and embezzlement exacerbated an already volatile situation. The Maryland legislature chose to respond by imposing a tax on any corporation not chartered by the state. The only corporation that fit this description was the Bank.³⁰ When the Bank refused to pay the tax, process was issued against a Bank officer who had been exposed as a speculator and an embezzler.³¹ The Maryland Court of Appeals upheld the state's power to collect the tax.

The parties presented two questions to the Supreme Court: first, did Congress possess the power to incorporate the Bank, given that this power was not specifically enumerated in Article I; and, second, assuming creation of the Bank was a proper exercise of Congress' power, was it susceptible to the Maryland tax. Marshall elaborated the Supremacy

Inc. v. United States, 379 U.S. 241, 258 (1964) (ruling that the power of Congress extends beyond the regulation of interstate commerce). *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (articulating a rational relation test for equal protection cases but acknowledging exceptions to that approach for certain types of issues, and also citing *McCulloch*).

28. To some readers this discussion will seem unfair to the Chief Justice, for it does not elaborate the lasting contributions to both social and legal history that are traceable to *McCulloch*. Others have discussed the opinion in far greater detail and with a broader range of analytic facets than I will here. *See, e.g.,* CURRIE, *supra* note 22, at 66-74; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 54-71 (2d ed. 1991); GERALD GUNTHER, CONSTITUTIONAL LAW 72-94 (11th ed. 1985). It is not that I reject the use of prisms, or special lenses, when interpreting the Constitution in favor of employing a purportedly "objective" or a purely textualist approach. *See infra* note 47 and accompanying text. But in seeking to revive a republican federalism in constitutional law, we must understand and renounce any further use of Marshall's prism of national supremacy that operates as an independent, superintending constitutional value.

29. The second Bank had been chartered and operated under administrations headed by the earlier Bank's opponents, the Jeffersonian Republicans. Thus, while their support for the Bank contradicted their general precepts of strictly construing the powers the Constitution granted to the national government, the second Bank encountered no significant ideological opposition at the national level. *See JOHN MARSHALL'S DEFENSE, supra* note 21, at 3-7.

30. This recognition suggests that had the legal test been formulated to proscribe discriminatory treatment of federal instrumentalities, the opinion would have been narrower and more defensible. Exploration of alternative theories for sustaining Congress' power to create the Bank and its immunity from state tax are not germane to my broader project here.

31. *See G. EDWARD WHITE, THE MARSHALL COURT & CULTURAL CHANGE, 1813-35, at 543* (1988).

Clause's import in answering both questions, mentioning "supremacy" or "supreme" no fewer than twenty-four times,³² and quoting portions of the Clause at least five times.³³ Even though the Court's resolution of each question could have been explained without reference to the Clause, Marshall chose to circle back to it repeatedly.

Marshall tipped his hand early in his discussion of whether Congress was constitutionally empowered to incorporate the Bank. That question raised other questions by inference,³⁴ most of which Marshall sought to answer in synthesizing a coherent framework of national power. He noted that "the *conflicting* powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled."³⁵ His decision to describe the powers of the two governments as "conflicting" is suggestive of necessary a priori knowledge about the inherent interrelation of state and nation. This position not only tends to prejudge the result in the case, but also anticipates the mode of analysis adopted. Mere difference in powers need not result in Marshall's chosen term, that of "conflict," which connotes opposition and even hostility.³⁶ This assumption that the powers themselves were *inherently* in conflict foreclosed a more limited inquiry into the actual effects of state regulation on the federal entity, and whether the state's *exercise* of its powers

32. *E.g.*, 17 U.S. (4 Wheat.) 316, 402, 405 (1819).

33. *See, e.g., id.* at 405, 432.

34. *See id.* at 399-416 (discussing whether the Constitution proceeded from the people or from "sovereign and independent states"; deciding whether powers not expressly enumerated fall within the constitutional grant of congressional power).

35. *Id.* at 405 (emphasis added).

36. Marshall uses precisely these terms. *See id.* at 400-01 (the question before the Court must be decided "or [there will] remain a source of hostile legislation, perhaps of hostility of a still more serious nature"); *id.* at 405, 436 (opposition). *See also id.* at 419 (Maryland's approach would "almost *annihilate*" Congress' ability to select its means). Marshall went on to say that "[the] great principle is that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the . . . States and cannot be *controlled* by them." *Id.* at 426 (emphasis added).

While one feature of supremacy discernible from the Clause is the ability of federal law to trump or displace state law, in fashioning this "axiom," Marshall again revealed his view of supremacy as a zero-sum game between two inherently hostile powers. This becomes clearer in the "corollaries" to the axiom:

1st. That a power to create implies a power to preserve.

2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and preserve.

3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

Id. at 426.

was, in this instance, proscribed.

Exhibiting the rationalism of his time, Marshall turned first to reason and only second to the constitutional text for support. That the Union was "supreme within its sphere of action"³⁷ would seem to "result necessarily from its *nature*."³⁸ Here we discover another rhetorical and methodological presupposition Marshall pervasively employs: a supreme government has an essence that can be clearly defined.³⁹ Textual limits, and even implied structural principles such as federalism, need not be consulted. Rather, Marshall delineates the properties and characteristics that must belong to a supreme government as though they are immutable, universal, and knowable through the powers of reason. While Marshall does not explicitly remark that the Framers must have meant precisely the properties he selects to be the defining essence of a supreme national government, he intimates that as rational beings they, like he, knew the essence of national supremacy.⁴⁰

These strains are intoned more vigorously and explicitly in resolving the second question presented, Maryland's power to tax the Bank. To generate the constitutional limits on state taxation, Marshall invoked as his prime scripture the Supremacy Clause's recognition of federal law as the "supreme" law.⁴¹ He fashioned the concept of a "supreme government" whose essence he was charged to distill:⁴²

37. *McCulloch*, 17 U.S. (4 Wheat.) at 405.

38. *Id.*

39. I am indebted to Tom Ross for his penetrating studies of rhetorical structures in the Court's contemporary jurisprudence. See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990). My purpose is analogous to Ross'; his is to "shake this comfortable sense of assurance about our historical standing and thus encourage us to rethink our choices about race." *Id.* at 1. Mine is to rethink the same types of deeply embedded choices about the contours of national supremacy.

40. See *McCulloch*, 17 U.S. (4 Wheat.) at 405-07. The unstated jurisprudential premise that law forms a portion of universal reason is only foreshadowed in *McCulloch*; its fullest expression would await Justice Story's opinion in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842).

41. *McCulloch*, 17 U.S. (4 Wheat.) at 426. In developing his argument here, Marshall explicitly conceded that the Constitution conferred the taxation power on both the nation and the states concurrently. *Id.* at 425. But he noted that Article I also imposed specific limitations on certain types of state taxation, which he construed to "concede[]," *id.*, that state taxation is subordinate to and is thus "controlled by the constitution." *Id.* at 427. Interestingly, then, instead of finding Article I's rather precise textual provision to authorize only the express limitations on state taxation, Marshall transformed the Constitution's identification of some narrow textual proscriptions into a more general principle: because state taxation was subject to constitutional limits, and interpretation of the Constitution was avowedly a responsibility of the Court, the Court could infer and apply other constitutional limits on state taxation.

42. *Id.* at 427 *passim*.

It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operation from their own influence. This effect need not be stated in terms. It is . . . so *necessarily* implied in it, that the expression of it could not make it more certain. We must, therefore, *keep it in view while construing the constitution*.⁴³

The charge, "to remove all obstacles to its action within its own sphere," contains prescriptive and not merely descriptive aspect; it has embedded within it a particular project for the national government.⁴⁴ The image on the vista is of an impervious, nonnegotiating, and utterly separate hegemony. To protect its supremacy the national government must be allowed "to modify *every* power vested in subordinate governments, [so] as to exempt its own operation from their own *influence*."⁴⁵ No infection of democratic republicanism operating at the state levels would affect the emerging national sovereignty.

In *McCulloch*, Marshall did not restrict his normative prescriptions of the essential meaning of national governmental supremacy to a certain set of legal issues. Rather, in a portion of the opinion elaborating the essence of a supreme government, he states "[w]e must . . . keep [the requirements of national supremacy] in view while construing the constitution."⁴⁶ Whether read independently or in conjunction with the entire opinion, Marshall's comment reveals his creation of national supremacy as a supra-constitutional value, the prism through which the balance of the Constitution, including structural federalism principles and any asserted limits on federal power, would be refracted.⁴⁷ So piv-

43. *McCulloch*, 17 U.S. (4 Wheat.) at 427 (emphasis added). Note that Marshall's use of "necessar[y]" accords quite well with the meaning Maryland urged in the construction of the "necessary and proper" clause. *See id.* at 412-15.

44. Indeed, before the Court decided *McCulloch*, the nationalists in Congress had become dispirited and had ceased most attempts to enlarge and fortify the scope of federal activities. They viewed *McCulloch* to delineate a nationalistic vision and to provide direct encouragement for enhancing national power. *See* JOHN MARSHALL'S DEFENSE, *supra* note 21, at 6.

45. *McCulloch*, 17 U.S. (4 Wheat.) at 427 (emphasis added). By contrast, in dicta in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 206 (1824), Marshall's tone became much more conciliatory. In discussing the states' exercise of their police powers, Marshall anticipated that some state laws might "interfere with and be affected by" Congress' laws pursuant to the Commerce Clause. "Congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other," assisted in the enforcement of some state laws and "adapted its own legislation" to help achieve the states' goals. 22 U.S. (9 Wheat.) at 206.

46. *McCulloch*, 17 U.S. (4 Wheat.) at 427.

47. Marshall was no democrat and his contempt for Jeffersonian republicanism is well-docu-

total is the supremacy aspect and project of the Constitution that in construing the Constitution, “no principle *not declared*, can be admissable [sic] which would defeat the legitimate operations of a supreme government.”⁴⁸

Marshall was much more muted rhetorically in *Gibbons v. Ogden*,⁴⁹ but nevertheless built upon the foundation laid in *McCulloch*. In *Gibbons*, the contours of the Commerce Clause power were at issue, and in particular, the preemptive effect of a federal law on a state-granted steamboat license. In *McCulloch*, Marshall had announced the broad principle that “States have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress”⁵⁰ In *Gibbons*, his gloss on the Supremacy Clause’s directive to set aside “contrary” state laws was condensed in the ruling that state laws that “*interfer[e] with, [or are] contrary to*” federal law must be displaced by federal law.⁵¹ The gloss neatly summed up *McCulloch*’s broad inventory of prohibited state law effects on federal law. Yet Marshall failed to justify his standard in terms of the Clause’s narrow specificity as to the type of interference that would require displacement, that of being “contrary” to the federal law.

The Supreme Court continues to invoke both the rhetoric of

mented. *See, e.g.*, LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 195-96, 207-08, 283-84 (1974). Marshall’s methodological prism for enhancement of national power ought to be perceived as dangerous to the people and not simply to the states *qua* states; the prism was not limited to nation-versus-state conflicts, but could just as easily be deployed in the battles of nation versus individual. Marshall at one point attempted to justify his holding by maintaining that he was striking down a law promulgated by only a portion of the people that attempted to modify a law that all of the people had wrought. *See McCulloch*, 17 U.S. (4 Wheat.) at 410. Yet his invocation of “the people” functions as a rhetorical abstraction only. Marshall focused on protecting the power of the national government, not that of the people themselves.

48. 17 U.S. (4 Wheat.) at 427 (emphasis added). In this one stroke, Marshall reverses the principle Maryland sought. Instead of requiring the national government to justify any exercise of authority under the enumerated powers or under a narrow reading of the Necessary and Proper Clause, Marshall mandates that any purported limitations on national power be expressly stated. By this move the precept that the national sovereignty was vested with limited powers and the states retained the balance was transformed into a presumption of unlimited national power *vis-à-vis* the states (and individuals), absent affirmative disabilities placed upon it. The “defeat” of governmental operations might be construed to be a strict criterion, but in light of Marshall’s subsequent broad standard that states have no power to “retard, impede, burden, or in any manner control” national governmental operations, *id.* at 436, it is better interpreted to connote any state intrusion as a zero-sum game. Further, given Marshall’s casual handling of the text as though it is merely an occasion for theorizing, his call for a clear statement of any principles negating or undermining the supreme government appears disingenuous.

49. 22 U.S. (9 Wheat.) 1 (1824).

50. 17 U.S. (4 Wheat.) at 436.

51. 22 U.S. (9 Wheat.) at 210.

McCulloch and the *Gibbons* preemption standard.⁵² Bernard Schwartz has argued that Marshall's enduring legacy here may be summarized in two postulates:⁵³ "the States may not interfere *in any manner* with the functioning of the Federal Government,"⁵⁴ and "federal *action* (whether in the form of a statute, treaty, court decision, or administrative act), if itself constitutional, *must prevail* over state action *inconsistent* therewith."⁵⁵

Despite the Court's frequent indulgence of these principles as though they embody and exhaust the Supremacy Clause's meaning,⁵⁶ they do not withstand scrutiny. However comfortable the legal community has become with these representations of the Clause's "essential"⁵⁷ meaning, they do not have unequivocal doctrinal support as formulated.⁵⁸ For instance, states may "interfere" with federal government instrumentalities in certain circumstances,⁵⁹ and simply because a state statute or policy differs from, or technically is "inconsistent" with, a federal statute does not mean the state statute must be struck down.⁶⁰

52. Cases that invoke *McCulloch* include *North Dakota v. United States*, 495 U.S. 423, 434, 438 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 187 (1988) (White, J., dissenting) (the dissent opined that the states may not "retard, impede, [or] burden" federal law); *Hancock v. Train*, 426 U.S. 167, 178 (1976). These cases demonstrate *McCulloch's* continuing rhetorical import for discerning the boundaries of federal and state regulatory power, regarding both the types of claims recognized and the standards for evaluating the permissibility of state regulation. Cases that invoke *Gibbons's* preemption standard that proscribes state laws that "interfere with, or are contrary" to federal law include *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2481 (1991); *Hillsborough County v. Automated Medical Lab.*, 471 U.S. 707, 712 (1985); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

53. Schwartz's adulatory introductory passage is instructive: "In terms so clear that they have never been questioned, the great Chief Justice construed the Supremacy Clause as the bulwark of national power it has since remained." 1 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 38 (1963).

54. *Id.* (emphasis added) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

55. *Id.* (emphasis added) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

56. *See e.g.*, *Mayo v. United States*, 319 U.S. 441, 445 (1943) (discussing intergovernmental immunities postulate); *Hamm v. City of Rock Hill*, 379 U.S. 306, 315 (1964).

57. *See* SCHWARTZ, *supra* note 53, at 39.

58. Moreover, neither the text of the Clause nor the history of the founding necessarily support these views, as the balance of this Article will demonstrate.

59. *See e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (holding that Ohio workers' compensation law applied to federal instrumentality).

60. *See e.g.*, *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991) (ruling that a federal statute did not preempt a municipality's sign-posting and permit requirements); *English v. General Elec. Co.*, 496 U.S. 72 (1990) (declining to preempt employee's state law tort claim for alleged inconsistency with federal whistleblower statute); *California v. ARC America*, 490 U.S. 93 (1989) (ruling that a federal statute's delineation of rights, remedies, and policies constitutes the federal decision on those questions and does not by implication prevent the states from deciding the questions differently).

Moreover, because of the positivistic form in which they are now presented, the supposed postulates fail to recognize and accommodate the federalist compromises that undergird our Constitution. As framed, they are not faithful to the constitutional plan of divided and shared powers,⁶¹ and tend to fortify the seemingly inherent press for centralization of regulatory power in the national government.

B. *Limitations of a Purely Textualist Interpretation*

The purported Supremacy Clause axioms are not only misleading presentations of law, but their habitual invocation obscures the complex interpretive task required by the Supremacy Clause and conceals the analytic morass pervading decisions in which the Clause is invoked.

1. Textual Gleanings

Some provisions of the Constitution are more precisely formulated than others. The bar to state coinage of money,⁶² and the mandate that the presidential election occur on the same date throughout the nation,⁶³ for example, apparently produce little confusion and tend to suggest that at least for these clauses a purely textualist approach is sufficient to ascertain the Constitution's meaning.⁶⁴ In some invocations, the Court has handled the Supremacy Clause as though it, too, has a self-evident and unproblematic meaning.⁶⁵ Yet, as to whether the

61. The legal literature reassessing American federalism from a variety of ideological stances has grown markedly during the last decade. Important contributions include ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM POLICY, PROCESS, IMPACT AND REFORM (1984); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, in COMPARATIVE CONSTITUTIONAL LAW 77 (Mark Tushnet ed., 1990); Harry N. Scheiber, *Federalism and Legal Process*, 14 LAW & SOC'Y REV. 663 (1980); Richard B. Stewart, *Federalism & Rights*, 19 GA. L. REV. 917 (1985); Mark Tushnet, *Federalism & the Traditions of American Political Theory*, 19 GA. L. REV. 981 (1985); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)).

62. U.S. CONST. art. I, § 10, cl. 1.

63. U.S. CONST. art. II, § 1, cl. 4.

64. See, e.g., Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 25-38 (1982) (delineating textualism as a specific mode of constitutional analysis); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (highlighting the flaws in contemporary textualism). But see Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-aged President*, 84 NW. U. L. REV. 250 (1989) and Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1174 (1985) (even the seemingly precise constitutional requirement that the President have attained the age of 35 is susceptible to a multitude of interpretations).

65. E.g., *Missouri v. Jenkins*, 495 U.S. 33, 56-57 (1990).

Clause contemplates federal judicial review of congressional legislation to determine its constitutionality, a strictly textualist accounting will strive in vain.⁶⁶ Even apart from questions regarding federal judicial review,⁶⁷ the Clause's import for the interplay of state and federal law is as problematic as the more celebrated open-textured provisions of the Constitution, such as the Equal Protection, Due Process, and Privileges and Immunities Clauses.⁶⁸ Moreover, errant interpretations of the Clause injures the polity in ways that are neither trivial nor infrequent. Rather, the effects generated are pernicious to the constitutional structure and to a genuinely republican polity.⁶⁹

The Supremacy Clause is located in the second clause of Article VI.⁷⁰ While the balance of the Constitution allocates certain powers to the nation and others to the states, and forbids certain types of activity, it does not explicitly articulate a normative hierarchy as part of the federalist system until Article VI.⁷¹ Exclusive of Article VI, one plausible reading of the document is that the state and national governments are charged with fulfilling disparate functions and responsibilities, and may exercise some powers concurrently, but that neither government is

66. Leading constitutional theorists have also failed to produce a conclusive explanation for judicial review, resulting in disagreements, for instance, between Charles Black and Alexander Bickel. Compare CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 72-76 (1965) with ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 12-14 (1962).

67. See *infra* notes 264-67 and accompanying text for a brief discussion of federal judicial review as a principle inferable from the interaction of Articles III and VI.

68. See U.S. CONST. amend. XIV, § 1.

69. The legal literature seeking to delineate and advocate a renewed republicanism originated with the work of leading constitutional law scholars. See Brest, *supra* note 11; Michelman, *supra* note 11; Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539 (1988). See also Abrams, *supra* note 11 (arguing a renewed republicanism requires reconsideration and enhancement of local governments); Hoke, *supra* note 19, at 710-14 (arguing that republican federalism requires radical decentralization of regulatory power and empowerment of average citizens).

70. Article VI's other two clauses are concerned with declaring the continued validity of debts incurred by the national government under the Articles of Confederation as against the national government after ratification (art. VI, cl. 1), and requiring all officers of the national and state governments, including the judiciaries, to make an oath or affirmation "to support this Constitution" (art. VI, cl. 3). The first clause obviously does not impair any notion of co-equal, shared government, but the third clause's asymmetry implies the hierarchical relation; national officers are not required to take an oath of office to support the state governments, even if only to the degree that these governments act consistently with the national Constitution.

71. This is true except for the explicit sovereignty of the people over the entire structure per the Preamble's "We, the People. . ." phrasing, and their direct and diffused structural control over the governmental system. Although Congress may be deemed normatively superior to the other branches of the national government, the point is not germane to the federal relation.

normatively “better” or more powerful than the other.⁷² The Supremacy Clause, however, fundamentally changes any such perception,⁷³ which is one reason the antifederalists vehemently attacked the Constitution during the ratification process.⁷⁴

The Supremacy Clause states:

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.⁷⁵

The Clause thus creates a favored class of law, that which is denominated “supreme Law.” By its terms, the only government that has the opportunity to convert its legal norms into “supreme Law” is the national government,⁷⁶ and the Clause mandates that the judges “in every State” are bound by this national law. To guard against any misconceptions as to the meaning of “supreme Law,” the paragraph details that state law “Contrary” to the Constitution shall not stand.⁷⁷ The one threshold that national law must traverse on the way to obtaining the brass ring of supremacy is that the law⁷⁸ in question must be “in Pursuance” of, or consistent with, the Constitution.⁷⁹

According to this unvarnished interpretation of the text, the Supremacy Clause mandates that courts must apply federal law⁸⁰ as

72. As feminist theorists have demonstrated, difference need not connote superiority. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION & AMERICAN LAW* 50 (1990).

73. See CURRIE, *supra* note 22, at 167 (observing “the supremacy clause is a one-way street”); SCHWARTZ, *supra* note 53, at 39 (noting the Supremacy Clause prevents equality between the states and the federal government because “federal and state powers do not stand upon equal elevation”).

74. See *infra* notes 208-09 and accompanying text.

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

76. One might refer to it as a “federal” government. Cf. Fallon, *supra* note 16, at 1246.

77. Arguably, then, the Supremacy Clause explicitly authorizes judicial review of state law for its fidelity to the national Constitution. It does not specify which system of courts—state or national—is to have this responsibility or final authority over such questions. Nor does the Clause expressly authorize federal judicial review of federal statutes for their constitutionality. See U.S. CONST. art. VI, cl. 2.

78. For the moment, I am bypassing treaties, which are a special and rare case of federal lawmaking. See *infra* note 99.

79. See RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* 98-99 (1987).

80. Treaty provisions must also be applied. See U.S. CONST. art. VI, cl. 2. Arguably, federal

the governing rules of decision for federal questions. As the Supreme Court recently reminded the states in *Howlett v. Rose*,⁸¹ if a party denies that a mandatory federal decisional rule must be applied and enforced in adjudicating a federal claim, and covertly disputes the ultimate authority and compulsion of otherwise constitutional federal rules, then the Supremacy Clause is properly invoked to enlighten the parties, or the lower court, as the case may be.⁸² In *Howlett*, a Florida appeals court had ruled that the state's sovereign immunity, a creature of state statutory law, could properly be interposed as a defense, thereby defeating the plaintiff's federal civil rights claim.⁸³ Although the United States Supreme Court had previously ruled on that specific issue,⁸⁴ the Florida court held that it was bound by its state decisional law, not federal law.⁸⁵ The unanimous *Howlett* opinion directly refuted the state court's supposed primary allegiance to state law to the derogation of federal law, repeatedly citing the Supremacy Clause as the source of the governing principles.⁸⁶ Rarely does a court need to cite

common law, administrative rules, and executive orders should also be acknowledged as federal rules of decision entitled to supremacy status. These types of federal "law" are more problematic than commonly recognized in light of, *inter alia*, the Supremacy Clause's text. *See infra* text accompanying notes 91-99.

81. 110 S. Ct. 2430 (1990). *See also* *Martinez v. California*, 444 U.S. 277, 277 (1980); *Mondov v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1943); *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

82. 110 S. Ct. 2430 *passim*.

83. *See* *Howlett v. Rose*, 537 So. 2d 706, 707 (Fla. Dist. Ct. App. 1989).

84. On whether a state law sovereign immunity defense could be applied to § 1983 actions, the Court admonished:

A construction of a federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the Supremacy Clause of the Constitution insures that the proper construction may be enforced. . . . The immunity defense claim raises a question of federal law.

Martinez v. California, 444 U.S. 277, 284 n.8 (1980) (quoting *Hampton v. Chicago*, 484 F.2d 602, 607 (7th Cir. 1973)).

85. In dicta, the U.S. Supreme Court stated that the Florida precedent that the state's intermediate appeals court purported to apply (*viz.* *Hill v. Dep't of Corrections*, 513 So. 2d 129 (Fla. 1987), *cert. denied*, 484 U.S. 1064 (1988)) was itself consistent with the Court's Eleventh Amendment jurisprudence. *See Howlett*, 110 S. Ct. 2430, 2436-37 (1990). The Florida appeals decision in *Howlett*, however, extended the principles beyond the permissible boundaries. *Id.* at 2437.

86. *Howlett*, 110 S. Ct. 2430 *passim*. The *Howlett* opinion, despite being unanimous (or perhaps because it was unanimous, *see* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 247), reads as though it were a law clerk's bench memorandum hastily revised for issuance as the Court opinion. Instead of narrowly confining itself to *Martinez*—the Court's direct authority on the issue—the opinion purports to elaborate all of the Supremacy Clause jurisprudence in one neatly coherent whole and seeks to refute, in particular, arguments raised by an amicus (the Washington Legal Foundation; the Court names the foundation and answers its arguments five times in the opinion) that were not

the Clause explicitly as its authority for applying federal law as the governing rule of decision for federal questions, and appropriately so: the Clause functions as a meta-constitutional provision whose primary role is at once pervasive and normally invisible.

It would be a mistake, however, to presume that the text of the Supremacy Clause could be understood and applied this straightforwardly. More subtle analysis of the Clause reveals the limitations of a purely textualist account; the Clause's text does not provide unequivocal support for some of the conclusions that function almost axiomatically in our law. Invocation of the Clause may well mask a number of constitutional interrelationships that are not only complex but controversial. For instance, the Court often refers to Congress' "power under the Supremacy Clause . . . to preempt state law,"⁸⁷ or to divest state courts of their "presumptively concurrent jurisdiction."⁸⁸ Yet Congress' constitutional powers are conferred by Article I, not by the Supremacy Clause.⁸⁹ This shorthand actually conceals several contestable legal inferences⁹⁰ and continues to impede recognition of the larger theoretical

pressed by any party. See 110 S. Ct. 2430 *passim*. In so doing, the two objectives of the decision are undermined: resolution of the case before the Court seems almost an afterthought, and the attempt to articulate Supremacy Clause principles is distorted.

87. See, e.g., *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989); see also *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 271 (1985) ("The attempt of the South Dakota legislation to limit the manner in which counties spend federal [dollars] obstructs this congressional purpose and runs afoul of the Supremacy Clause.").

88. See, e.g., *Yellow Freight Sys. v. Donnelly*, 494 U.S. 820, 821-23 (1990) (unanimous); *Taffin v. Levitt*, 493 U.S. 455 (1990).

89. See U.S. CONST. art I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States"

90. For example, when the Court refers to Congress' "power under the Supremacy Clause . . . to preempt state law," the phrasing suggests that Congress' powers to preempt are plenary, and not properly subject to limits imposed by the Ninth or Tenth Amendments, or by the Guarantee Clause, all of which are contestable propositions. For a discussion of Tenth Amendment limitations on the power of Congress to regulate the states and supersede state law, compare the majority and dissenting opinions in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). For a pathbreaking discussion of the Guarantee Clause, see Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

Congress' power to control the jurisdiction of state courts over all federal claims is also contestable. For instance, Congress has no power to eliminate state court jurisdiction of federal constitutional claims. Henry Hart's justly renowned Dialogue demonstrated that Congress can validly limit the jurisdiction of the lower federal courts but cannot constrain state courts from hearing and vindicating a federal constitutional right. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). See also Bator, *supra* note 7, at 627-29 (arguing for renewed attention to and enhancement of the role of state courts in adjudicating federal constitutional rights, to promote inter alia greater protection against tyrannical national government). These questions must also be resolved by inferences drawn from the interaction of Article I, Article III (because it concerns the constitu-

inconsistencies.

An additional example of textual ambiguity can be found in the language providing that the "Laws of the United States" are supreme over the state law. What federal actions should we understand to be the "laws" thus granted supremacy? Arguably, the Clause incorporates by reference only congressional acts owing to Article I's vesting of "[a]ll legislative powers" in that body.⁹¹ Yet, more generally, the post-New Deal Court recognizes lawmaking power in a variety of sources other than Congress: federal agencies, which issue administrative law pursuant to the Administrative Procedure Act⁹² and the particular enabling statutes; the President, who promulgates Executive Orders⁹³ and executive agreements;⁹⁴ and the federal judiciary,⁹⁵ which pronounces federal

tional scope of the Supreme Court's appellate jurisdiction), and structural federalism principles, rather than the Supremacy Clause *per se*.

91. U.S. CONST. art. I, § 1. This view would also accord with the Constitutional Convention's resolution that formed the basis of the Supremacy Clause, prior to its stylistic changes. *See infra* note 169 and accompanying text. But the restrictive interpretive approach would fail to encompass common law principles, which formed a significant portion of the governing law of the period and were arguably denoted by the term "Laws of the United States."

92. 5 U.S.C. §§ 551-576 (1988). The Court confers supremacy status on administrative rules, including preemptive administrative rules. *See, e.g.,* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 582-86 (1987); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-700 (1984).

93. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended* in 42 U.S.C. § 2000e (1967), which forbids employment discrimination by federal contractors and provides an administrative remedy that may include barring the contractor from present and future grants, has been credited as being more successful than Title VII, 42 U.S.C. §§ 2000e-1 to -17, at providing equal employment opportunities for minorities and women. *See generally* BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 347-55 (2d ed. Supp. 1989). Because it reaches to subcontractors and sub-subcontractors (i.e., to those who have a subcontract with the government to provide goods or services worth \$2500 or more), the Order has affected the hiring and promotion practices of thousands of businesses. *Id.* at 356-59.

94. The Court illuminates the President's power to enter into binding executive agreements with foreign countries in *Dames & Moore v. Regan*, 453 U.S. 654 *passim* (1981). There the Court upheld the constitutional validity of the executive agreement with Iran to obtain the release of American hostages. This agreement required "nullification" of prejudgment attachments of Iranian assets and "suspension" of any and all American judicial proceedings concerning claims against Iran pending their transfer to a binding arbitration panel. Professor Jules Lobel deplored this decision, for it "undermined the thrust of [Congress'] reform effort," which was designed to reign in and provide democratic supervision of the President's emergency powers in foreign affairs. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1412-18 (1989). For generally more positive reviews of the decision, see *Symposium: Dames & Moore v. Regan*, 29 UCLA L. REV. 977 (1982). *Dames & Moore v. Regan* can be viewed as constricting the principles stated in *United States v. Pink*, 315 U.S. 203, 230 (1942) (despite their lacking Senate ratification, for Supremacy Clause purposes, international compacts and agreements have a "similar dignity" to treaties).

95. While I have referred in the text only to federal courts' lawmaking powers under federal

common law of both the constitutional⁹⁸ and nonconstitutional genre.⁹⁷ It is not self-evident textually from the Supremacy Clause or other constitutional provisions that the rules that issue from these three sources other than Congress⁹⁸ should be encompassed by the term "Laws of the United States" and entitled to supremacy status.⁹⁹

law, it is important to recall that state courts also possess the power and the responsibility to rule on federal claims. See Bator, *supra* note 7, at 623-37; BICKEL, *supra* note 66, at 9-13.

96. The classic article on the topic is Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). But see Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (arguing that Monaghan overlooks meaningful differences between constitutional interpretation and common law adjudication).

97. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), provides a recent example of the vitality, if not the excessive indulgence, of the Court's common law powers. There the Court fashioned a novel common law rule to protect federal defense contractors from state product liability suits brought by military personnel (or their survivors) who were injured by the product. The Court concluded that even though explicit federal legislation did not exist to protect federal contractors, state tort law could be preempted in order to immunize the contractors and protect the federal government's interests, which were putatively impaired by the tort suits. *Id.* at 506-13.

98. Administrative agencies are the delegates of Congress, and some supposed limits constrain the range of discretionary authority they may exercise, per the nondelegation doctrine. See *American Textile Mfg. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *Field v. Clark*, 143 U.S. 649 (1892). For a discussion of the doctrine and its problems, see Richard B. Stewart, *Beyond the Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987). The literature on executive orders remains slim. One study, Joel L. Fleishman & Arthur H. Aufes, *Law and Order: The Problem of Presidential Legislation*, 40 LAW & CONTEMP. PROBS. 1 (1976), considers orders promoting civil rights in government activities and contracts, and orders that attempt to achieve economic stabilization, and draws more general conclusions about appropriate statutory bases for their constitutional validity. See also *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979) (considering validity of order 12,092 permitting debarment of companies from government contracts above \$5 million that fail or refuse to comply with voluntary wage and price standards); L. Harold Levinson, *Presidential Self-Regulation through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers*, 9 VAND. J. TRANSNAT'L L. 695 (1976). Martha Field delineates the federal common law power in *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986). See also the spirited exchange between Professors Martin Redish and Louise Weinberg; Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process*, 83 NW U. L. REV. 761 (1989), and *Federal Common Law and American Political Theory*, *id.* at 853; Louise Weinberg, *Federal Common Law* 83 NW U. L. REV. 805 (1989) [hereinafter Weinberg, *Federal Common Law*], and *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, *id.* at 860.

99. By contrast, consider the special treatment the Clause affords to another type of nonstatutory law—treaties. Treaties are expressly included as a part of "the Laws" that possess legal supremacy. Yet controversy remains. Some scholars have argued that because the Clause qualifies the treaty power simply as "under the Authority of the United States," rather than "in Pursuance" of the Constitution, U.S. CONST. art VI, cl. 2, a treaty can override the constitutional restrictions on the powers of the national government. See GUNTHER, *supra* note 28, at 226-27

These examples illustrate the limitations of any purely textualist account of the Supremacy Clause's role in resolving the relationships between state and federal law. Even more critical for our purposes, however, are two other questions that a textualist reading of the Clause cannot adequately resolve: when is state law "to the Contrary" of federal law, and whether the Clause itself can provide the basis for substantive legal claims.

2. When Is State Law "to the Contrary"?

The pivotal portion of the Supremacy Clause vis-à-vis the states is its final clause. Here it states that "the Judges in every State shall be bound [by the Supreme Law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." While various aspects of this language are problematic,¹⁰⁰ the most critical are its last four

(discussion of the battle surrounding the proposed "Bricker Amendment" to the Constitution, which would have explicitly circumscribed the treaty power within the balance of the constitutional framework). This concern was allayed only in 1957, when the Supreme Court responded that "[t]he obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion). It would seem that the constitutional aspects of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), would compel this conclusion. In practice, of course, the treaty power is rarely invoked, for Presidents continue to prefer executive agreements, which, when within their constitutional parameters, may be negotiated and concluded unilaterally. See Ronald A. Brand, *The Status of the General Agreement on Tariffs & Trade in U.S. Domestic Law*, 26 STAN. J. INT'L L. 479, 493-508 (1990) (reviewing the legal status of executive agreements). In an informal conversation with me, Professor Brand estimated that perhaps 90% of all agreements with foreign countries are pursued as executive agreements.

100. Note first that the District of Columbia is technically not a state. For instance, it lacks voting senators and a member of Congress, and the Twenty-third Amendment provides a mechanism for the District to participate in presidential elections by voting for electors, despite its lacking the constitutional status of a state. Forrest McDonald contends that the Convention inadvertently failed to revise the Clause's language binding judges "in every State" once it later decided to create the District of Columbia. See FORREST McDONALD, *NOVUS ORDO SECLORUM: AN INTELLECTUAL HISTORY OF THE CONSTITUTION* 255-56 (1985). Once the Convention designated the newly created District as the seat of national government, it intended to locate there the Supreme Court as well as the legislative and executive units. Literally, then, the Supreme Court was beyond the command of the Supremacy Clause. Note also that the Clause explicitly binds only one group of institutional actors—judges. Nevertheless, the Court has repeatedly referred to the obligations of state and locally elected officials under the Supremacy Clause. See, e.g., *Missouri v. Jenkins*, 495 U.S. 33, 56-57 (1990). Interestingly, former U.S. Attorney General Thornburgh justified one of his administrative actions as compelled by the Supremacy Clause. See Jerry E. Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203, 205-06 (1991).

The third clause of Article VI helps to remedy these anomalous conclusions by requiring an oath or affirmation of support for the Constitution from all state legislators and "all executive and judicial Officers, both of the United States and the several States." U.S. CONST. art. VI, cl. 3. Yet,

words: "to the Contrary notwithstanding." It might be argued that not only this portion of the text, but the whole Clause as well is superfluous because it merely asserts a truism that any purported law arising from politically inferior units that is inconsistent with the larger unit's law cannot stand.¹⁰¹

But the meaning of the phrase, "to the Contrary notwithstanding," is transparent only from the most formalistic interpretive stance. The problematic nature of the phrase becomes most apparent in the preemption context.¹⁰² The Supremacy Clause, on which preemption claims are currently based, expressly approves the displacement of state law when it is "to the Contrary" of an applicable federal rule. The Court has adumbrated a variable set of reasons that sanction the displacement of otherwise valid state law.¹⁰³ The recognized reasons for preemption have been generated and applied with little attention to either the constitutional text that empowers the supersession of state law

is the oath requirement merely formal, or does it reassert with independent authority a substantive responsibility incumbent upon all public officials to enforce the Constitution and valid federal law? Under what circumstances does this affirmation come into play, and what duties does it impose? While these are salient queries, they are beyond the scope of this Article.

Importantly, by using the preposition "in" rather than "of" or "from" in the phrase "in every State," the Framers bound all judges (save for those in the District), whether their authority lay within the national court system or within the states and localities. This accords well with the prior language directing that the national law's supremacy extends to "the Land," rather than naming a particular type of political unit (states or nation).

101. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1831-1833 (1833) ("[w]hat other inference could have been drawn, than of [its] supremacy, if the Constitution had been totally silent?").

102. In its strict sense, the term "federal preemption" designates a legal determination that state or local law is invalid and cannot be enforced because of inconsistency with some aspect of governing federal legislative or regulatory law. See *supra* note 3.

103. The types of preemption the Court currently recognizes include express preemption (where Congress states in the statutory text an intention to preempt state law) and implied preemption (inferred from a particular statutory provision or the scheme taken as a whole). The Court recognizes two subtypes of implied preemption: (1) federal occupation of a regulatory field, and (2) conflict with a federal law, which is composed of two sub-subtypes: (a) impossibility of compliance with both the federal and state law, and (b) where the state law stands as an obstacle to the full accomplishment and execution of the congressional objectives. See, e.g., *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). For proof of the variability of the Court's typology, compare *Northwest Central with Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986) (listing six distinct species of preemption) and *Chicago & N.W. Transport. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 317 (1981) (listing three bases of preemption).

For a highly critical review of the preemption methodology, see Hoke, *supra* note 19, *passim*, arguing for a logical reorganization of the doctrinal categories of preemption and subsumation of all types as species of conflict.

or the structural relationships we denominate federalism.¹⁰⁴ Somewhat surprisingly, given the detailed doctrinal inventory of types of preemption that the Court has a tendency to recite in preemption cases,¹⁰⁵ the Court has not confronted some of the most subtle, and ultimately critical, questions that arise in determining whether preemption of a particular state law should occur.

If a primary condition precedent to displacement of state law is that it must be determined to be "to the Contrary" of a governing federal principle, we must attend to the possible meanings of the phrase. Dictionaries from the period of the founding and from the present day both recognize "opposite" as a primary meaning of "contrary,"¹⁰⁶ which seems to imply that not just any type of difference or conflict between two laws will suffice. As additional synonyms, the dictionaries list "repugnant" and "conversely," and specify that the comparison resulting in the proper use of the word "contrary" may be as to purpose or effect.¹⁰⁷ Applied to the preemption arena, two statutes that seek opposite objectives, as in a federal nondiscrimination statute and a state racial segregation statute, should be interpreted as inspired by opposite purposes, and also likely to result in opposite effects, thus warranting displacement of the state law.

The lexicological sources also suggest a tonal nuance to the type of differences that are properly deemed "contrary." The *Oxford English Dictionary* expresses this point by explaining that with regard to persons and their actions, to be contrary means to be "antagonistic," "actively opposed . . . hostile."¹⁰⁸ More generally, a contrary is "diametrically different, extremely unlike."¹⁰⁹ In light of the tonal nuances, we

104. The rote recitation at the outset of many preemption decisions that the Court will presume "Congress did not intend to preempt state law" is insufficient. The Court often recites the presumption without any effort to employ it and has yet to elaborate how the presumption should operate within traditional preemption analysis.

105. See *supra* note 103.

106. See 3 OXFORD ENGLISH DICTIONARY 844-45 (1989); SAMUEL JOHNSON, A DICTIONARY OF ENGLISH LANGUAGE (1760) (under "contrary"; pages are not numbered).

107. See 3 OXFORD ENGLISH DICTIONARY 844-45 (1989); SAMUEL JOHNSON, A DICTIONARY OF ENGLISH LANGUAGE (1760) (under "contrary"; pages are not numbered). The distinction between purpose and effect continues to play a vibrant role in the Court's preemption jurisprudence. See *English v. General Elec. Co.*, 496 U.S. 72 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

108. 3 OXFORD ENGLISH DICTIONARY 844 (1989).

109. *Id.* A logician would define contrary in a narrower manner, without the hostility or antagonistic aspects of the lexicologist. In logic, the relationship of a contrary is represented by the two propositions "All X is Y" and "No X is Y." Precisely the same terms are at issue and the property asserted in each statement is diametrically opposed—a complete and perfect opposite of

might conclude that for a state law to be held contrary to federal law, the state law must evince a hostility toward or antagonistic effects on the federal goals. Implementation of this approach would constrain the types of differences that produce supplantation of state law. Only if the federal legislation sought to achieve national uniformity and exclusivity, or complete deregulation of an industry or market, would state law be ousted simply for regulating in the area.

But these total exclusions of state regulatory power, whether express or implied, are relatively rare. Most federal preemption questions do not present a situation of logical contraries, where the feds say “not A” and a state responds “A!” Rather, the types of conflicts presented for adjudication are more subtle. The Supremacy Clause does not expressly answer when differences, although not constituting logical contraries, are sufficient to displace state law. It does not speak to whether the relative importance to a state of its challenged law may be permissible in analyzing the law for proscribed conflict. It is silent on whether the judicial duty should be described as one of harmonizing the two sovereigns’ statutes or whether the task is to construe and compare the statutes with no presumptions favoring preservation of state law. More generally, then, whether the Clause should be read—as Chief Justice Marshall read it—to bar any state law “*interfering with or contrary to*” federal law,¹¹⁰ is a question of values rather than one of neutral textual explication. Answers to these subtle questions posed by the Clause must seek illumination beyond the text alone.

3. Substantive “Supremacy Clause” Claims

Can a textualist interpretation of the Clause clarify whether any substantive claims are properly founded on the Supremacy Clause? Under decisional law, two sets of Supremacy Clause “claims” have been recognized. The first set, founded upon the theory and pronouncements of *McCulloch v. Maryland*,¹¹¹ forbids the states from interfering with or impeding, or in any fashion attempting to regulate, the conduct of the federal government.¹¹² As we have seen,¹¹³ the justification Chief

the other. “Two propositions are said to be *contraries* if they cannot both be true, though they might both be false.” IRVING M. COPI, INTRODUCTION TO LOGIC 156 (4th ed. 1972).

110. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210 (1824) (emphasis added). See *supra* notes 49-55 and accompanying text.

111. 17 U.S. (4 Wheat.) 316 (1819).

112. See *id.* at 436; see *supra* notes 49-51 and accompanying text.

113. See *supra* text accompanying notes 37-45.

Justice Marshall proffers in *McCulloch* is not textualist but essentialist; he inquires as to what properties and powers are essential incidents of a supreme national government, thereby generating the federal government's immunity theoretically from virtually any state action.

Under the first set of Supremacy Clause claims, at least three substantive claims¹¹⁴ have been recognized pursuant to *McCulloch's* elaboration of the Supremacy Clause's central meaning. Held to be "Supremacy Clause violations" are the following: first, attempts by a state to regulate directly a federal entity or instrumentality;¹¹⁵ second, attempts by a state to discriminate against the national government, including those it employs or with whom it does business;¹¹⁶ and third, efforts by a state to discriminate against people asserting rights arising under federal law.¹¹⁷ Yet however reasonable these proscriptions of state action appear, it must be questioned whether they are properly tethered to the Supremacy Clause. Certainly the text of the Clause does not explicitly support Marshall's embroidery. Moreover, his essentialist jurisprudential method, by which the constitutional text becomes merely an occasion for generating new constitutional proscriptions against state regulatory power on the basis of what powers a nationally supreme government ought to have,¹¹⁸ cannot be justified in terms of the particular text or the federalist principles undergirding the larger document. If Marshall's method and the principles thereby achieved must be rejected, these three substantive claims can no longer be grounded constitutionally absent some other rationale.¹¹⁹

The second set of substantive claims denominated "Supremacy Clause claims"¹²⁰ provide a remedy for improper state law interference with governing "laws of the United States." These claims, whose most

114. "Claims" is used here in an original sense, as in a cause of action that is pleaded and if established will justify judicial relief.

115. See, e.g., *North Dakota v. United States*, 495 U.S. 423 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963).

116. See *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

117. See *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934).

118. See *supra* notes 37-45 and accompanying text.

119. See *infra* part III.A for a different textual foundation for these claims.

120. The Court employs interchangeably for preemption claims the terms "Supremacy Clause cases," see *supra* note 5, and "Supremacy Clause claims," see, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989); *Blum v. Bacon*, 457 U.S. 132 (1982); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); *Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

explicit doctrinal root is *Gibbons v. Ogden*,¹²¹ hold that the federal law that may preempt inconsistent state law may be found in treaties,¹²² statutes,¹²³ federal common law,¹²⁴ and administrative regulations.¹²⁵ Preemption claims enjoy a somewhat more secure textual warrant than do *McCulloch*-based theories because the Clause specifically states that federal law shall be the “supreme Law of the Land,” a state’s law “to the Contrary notwithstanding.” But is the Clause itself properly the source of the claim, or is preemption better understood as a claim arising under and secured to the particular body of federal substantive law that is urged to be preemptive? Could it be that instead of serving as a primary source of generative constitutional principles, the Clause is empty of any substantive content that can give rise to substantive claims for relief? That it functions primarily as a rule of decision, rather than as a source of substantive claims? These ideas suggest a theory of the Supremacy Clause that contrasts sharply with the vision of the great Chief Justice. Yet such a theory may be both more coherent and more faithful to the constitutional structure, including the values of citizen dialogue and political participation requisite to a self-governing polity, which are best achieved at the state and local government levels.¹²⁶ Further support for an alternative theory of the Supremacy Clause can be gleaned from the historical records of the founding. But as we shall see, that authority, like the text itself, ultimately leaves several critical questions unanswered.

121. 22 U.S. (9 Wheat.) 1 (1824).

122. See, e.g., *Hauenstein v. Lynham*, 100 U.S. 483 (1880) (treaty provision concerning aliens’ inheritance rights prevails over inconsistent state law disqualifying aliens from inheriting); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (Treaty of Peace between U.S. and Britain displaces state law concerning confiscation of British subjects’ property).

123. See, e.g., *English v. General Elec. Corp.*, 496 U.S. 72 (1990); *Pacific Gas & Elec. Co. v. State Energy Resources & Dev. Comm’n*, 461 U.S. 190 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Cippollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987).

124. See *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), reh’g denied, 489 U.S. 1047 (1989).

125. See, e.g., *City of New York v. FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta*, 485 U.S. 141 (1982).

126. See Michelman, *supra* note 11, at 1531. Professor Michelman argues that citizen participation in discussing and resolving the public issues of the community perhaps exerts greater influence for political change than formal political structures.

II. HISTORICAL ORIGINS OF THE SUPREMACY CLAUSE

Under the Articles of Confederation, the states ceded to the national government certain expressly stated powers and reserved the balance.¹²⁷ The document described the relationship as a "league of friendship,"¹²⁸ which well depicted the union's type of influence: it depended upon comity and forbearance to achieve compliance with its policies and possessed no police power or system of courts separate from those of the states to enforce its law. Hence, the young nation rather predictably ran into some significant difficulties,¹²⁹ often suggested to be attributable to a lack of sufficient central power.¹³⁰ The nation's finances were unsteady, resulting in frightening dependence upon European loans, and some state legislatures had overtly rejected Treaty of Paris¹³¹ terms that renounced all claims to damages resulting from the war.¹³² By 1787, even antifederalist republicans conceded the

127. Article II of the Articles of Confederation expressly limited national power: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." ARTICLES OF CONFEDERATION art. II (1781).

128. ARTICLES OF CONFEDERATION art. III (1781); see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 355 (1969).

129. For example, Jefferson and Adams found it difficult to negotiate commercial treaties because European nations generally considered the former colonies' government, such as it was, to be unstable. See MERRILL D. PETERSON, *THOMAS JEFFERSON AND THE NEW NATION* 306-07 (1970). Under the Articles of Confederation, the states lacked a common currency and permitted several currencies from foreign nations, plus coins and unbacked paper monies from various states, to constitute legal tender. The unstable monetary structure impaired both interstate and intrastate commercial activities. Further, congressional attempts to grapple with public exigencies via powers not expressly conferred were easily and frequently blocked, for the Articles required unanimous approval of such measures. See ARTICLES OF CONFEDERATION art. XIII (1781). The central government also lacked power to tax the people directly, which necessitated dependence upon the states to satisfy the requisitions ordered by Congress. See *id.* Requisitions for money, soldiers, and supplies often went unheeded by the states. See ALLAN NEVINS, *THE AMERICAN STATES DURING & AFTER THE REVOLUTION, 1775-1789*, at 626 (1969).

130. Max Farrand discovered that the earliest and most frequent criticism of the Articles that appeared in extant correspondence was "lack of power" in Congress. As he noted, this is an imprecise complaint. We do not know whether any commentator who expressed his concern this globally was motivated by a specific congressional deficit, as in a lack of financial power or certain forms of military power, or the inability to compel the states to comply with the laws of the United States including treaties, or yet other disabilities. See Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532, 535-37 (Nov. 1907-Nov. 1908). In light of the document that emerged from the Convention, we can surmise that all of these points were raised, but we cannot ascertain the intensity or breadth of concern among average citizens.

131. Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80-83 [hereinafter Treaty of Paris].

132. See WOOD, *supra* note 128, at 457-58; NEVINS, *supra* note 129, at 644-52.

intolerable “weakness of the Confederation,”¹³³ thus removing the last obstacle blocking Congress’ call for a national convention that would propose amendments to the Articles. Instead of acting pursuant to this limited directive, however, the gathering chose to read its mandate broadly and begin anew, ultimately becoming a constitutional convention.

Though many knowledgeable citizens apparently agreed that some amendment of the existing charter of government was imperative, they did not concur on either the diagnosis of the confederation’s structural problems or the proper treatment of those problems. Antifederalists “were not poured out of one democratic mold, any more than the Federalists represented a unitary point of view about how to strengthen the central government.”¹³⁴ While all Convention delegates, and indeed most citizens of the day, fashioned themselves “republicans,” wide variations in defining the specific content of that political concept and its favored governmental structures undermined early attempts at achieving consensus.¹³⁵ Even close friends and political compatriots like Thomas Jefferson and James Madison agreed some amendments to the Articles were warranted, but disagreed over the pivotal danger posed by the fundamental question of central governmental power and hence over the degree of power to be vested in the national government. While Jefferson’s watchword was “power tends to corrupt,” Madison perceived jeopardy for the central government to lie in “an insufficiency of power.”¹³⁶

133. As one New York antifederalist opponent of the Constitution stated during the ratification battle in that state, “It is on all hands acknowledged that the federal government is not adequate to the purposes of the Union.” See WOOD, *supra* note 128, at 471. Max Farrand concluded that the American people’s “experience . . . of poor government, amounting practically to misgovernment, under the Articles of Confederation” led to the Constitution. See Farrand, *supra* note 130, at 544.

134. Richard B. Morris, *The Confederation Period and the American Historian*, 13 WM. & MARY Q. 139, 155 (1956) (citation omitted). And indeed, in 1787, republicanism and democracy were not congenial political theories. See Arnold A. Rogow, *The Federal Convention: Madison and Yates*, 60 AM. HIST. REV. 323, 335 (1955); see also Linda K. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1668-69 (1988) (arguing that patriarchy and slavery coexisted comfortably with republicanism in the American Revolutionary War period).

135. Forrest McDonald has distinguished several strands of republicanism that existed during the decade preceding the Constitutional Convention. See McDONALD, *supra* note 100, at 70-77 (nonideological and ideological republicanism, the latter divisible into agrarian and puritanical strains). But see generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 96, 99 (1992) (arguing that republicanism “stood for something other than a set of political institutions based on popular election.” It cohered around a consistent set of values and was “a form of life” (quoting Franco Venturi)).

136. See Rogow, *supra* note 134, at 334. Madison apprised Jefferson of the Constitutional

In preparation for the Philadelphia Convention, which commenced its deliberations in May 1787,¹³⁷ James Madison studied histories of political confederations, both ancient and modern, and formulated an initial proposal that contained some features that were consistent with the Articles, but that unquestionably sought a greatly strengthened national government.¹³⁸ Although a rudimentary federalism lay at its base, with state boundaries and some state governmental authority intact, the new national government would enjoy the authority to operate directly upon individuals, in taxation and in other matters, rather than simply upon state governments.¹³⁹ Madison sought to construct a na-

Convention's deliberations and decisions through frequent correspondence to Paris, where Jefferson was serving as Minister to France. Jefferson eventually approved of the Convention's final product but his first reaction was less than positive. He confessed to John Adams that the Constitution contained "things . . . which stagger all my dispositions." Letter from Thomas Jefferson to John Adams (Nov. 13, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 350-51 (Julian P. Boyd ed., 1955). Jefferson believed that the confederacy needed to be strengthened but that this objective was best achieved in "three or four new articles to be added to the good, old, and venerable fabrick"—the Articles of Confederation. 12 *id.* In particular, he would have added a federal power over commerce, some ability to tax, and a separate executive and judiciary. See PETERSON, *supra* note 129, at 359. Thus, he initially viewed the proposed Constitution to envisage a central government that was far too powerful.

Madison generally placed greater emphasis than Jefferson on authority and property rights, and less emphasis on majority liberty. In light of these rather fundamental philosophical differences, and in recognition of the wide veneration of Jefferson's intellectual abilities and integrity during the Revolutionary War period, it is intriguing to speculate about the type of document that might have emerged had Jefferson been present at the Convention rather than engaged in foreign service. As a member of the Continental Congress, Jefferson was present during the drafting of the Articles of Confederation but only in the most marginal sense. While capable of being a one-man "legislative drafting bureau," *id.* at 112 (quoting Julian Boyd), Jefferson primarily took notes of the drafting and debate proceedings rather than participating in them more directly. See *id.* at 97; see also DUMAS MALONE, JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN 243-44 (1948). His inactivity owed to his sense that because independence from English rule had been declared, the fundamental governmental project lay in the creation of the states' constitutions, not that of the loose union. *Id.* at 244-48. Thus, Jefferson was deeply disappointed to have been sent to Congress in 1777, and his primary attention while there was drawn not to the national issues at hand but to the drafting of proposed articles for the new constitution of Virginia. Despite the grueling schedule of congressional committee meetings late into the evenings, Jefferson used his remaining wakeful time drafting and corresponding with his legislative colleagues back in Williamsburg about the state constitutional project. See PETERSON, *supra* note 129, at 97-100.

137. A previous, abortive attempt at amendment was held in Annapolis in the early spring of 1787. With only 5 of the 13 states present, the delegates declined to initiate substantive discussions on amendments. Alexander Hamilton proposed to those attending that a second meeting be called for Philadelphia and that requests for attendance be sent to all absent states. At the latter meeting, all states except Rhode Island sent delegates. See 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 557-59 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

138. See 3 *id.* at 20-23 (Madison notes).

139. See 3 *id.* at 538-39.

tional government that was unquestionably the constitutional superior to the states, but also one that could effectively maintain in practice a sovereign position over the states without recourse to force.¹⁴⁰

Although Madison considered various strategies, he ultimately favored vanquishing state power by conferring upon Congress an express, unrestricted power to veto state laws. He identified the federal government's inability to nullify "contradictory" state legislation as one of the central failures of the Articles.¹⁴¹ As Madison informed both Jefferson and Washington in correspondence prior to the convention, he advocated assigning to the President or Congress—he had not yet chosen to vest the proposed veto in Congress alone—a "negative" on state legislation "*in all cases whatsoever*."¹⁴² His conclusion, however, did not proceed simply from the proposition that the national government must be able "to guard national rights and interests against invasion."¹⁴³ Madison promoted dichotomous legal treatment of the two policy areas in which the new government would act. The first area comprised certain topics upon which national uniformity was essential, including "regulation of trade [and] fixing the terms and forms of naturalization."¹⁴⁴ Over these subjects that require uniformity, the central government would rightfully possess "positive and compleat authority,"¹⁴⁵ and the states would have no concurrent powers of any type. But over the other policy areas, those that might be deemed rather remote from national needs and thus properly committed to the state governments, Madison believed it was "absolutely necessary" for the national govern-

140. In a letter to George Washington dated April 16, 1787, Madison described his quest:

Conceiving that an individual independence of the States is utterly irreconcilable with their aggregate sovereignty; and that a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable, I have sought for some middle ground, which may at once support a due supremacy of the national authority, and not exclude the local authorities wherever they can be *subordinately useful*.

Letter from James Madison to George Washington (Apr. 16, 1787), in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 32 (Ralph Ketcham ed., 1986) (emphasis added) [hereinafter *THE ANTI-FEDERALIST PAPERS*]. See also Rogow, *supra* note 134, at 332.

141. See Rogow, *supra* note 134, at 329 (quoting Madison).

142. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in *2 WRITINGS OF JAMES MADISON* 326 (Gaillard Hunt ed., 1902) [hereinafter *WRITINGS OF JAMES MADISON*]. See also Letter from James Madison to George Washington (Apr. 16, 1787), in *2 WRITINGS OF JAMES MADISON*, *supra*, at 346.

143. Letter from James Madison to Thomas Jefferson (Mar. 19, 1787), in *2 WRITINGS OF JAMES MADISON*, *supra* note 142, at 326-27.

144. Letter from James Madison to George Washington (Apr. 16, 1787), in *2 WRITINGS OF JAMES MADISON*, *supra* note 142, at 345-46.

145. *Id.*

ment to have a negative, or veto, power.¹⁴⁶ He likened the veto to that previously “exercised by the Kingly prerogative,”¹⁴⁷ and considered it “the *least* possible encroachment” on state power that would protect the nation.¹⁴⁸

In his letter to Washington, Madison offered three reasons to justify a national veto power over state laws.¹⁴⁹ In each set of relations—vis-à-vis the nation, other states, and its own citizens—state powers merited restraint. First, the positive powers granted to the national government would be “evaded & defeated” without granting it a “defensive power” that permitted it to protect its province from the states.¹⁵⁰ Second, without some mechanism of central control, the states would continue on their present path of “harass[ing] each other with rival and spiteful measures dictated by mistaken views of interest.”¹⁵¹ Finally, states had evidenced an astonishing propensity for trampling the rights of minorities and individuals, and for promulgating unwise policies. Thus, the national government, being “sufficiently disinterested,” could serve as the needed “dispassionate umpire” to protect republicanism and promote wise local policy.¹⁵² From Madison’s perspective, evidence abounded that none of these were merely abstract or hypothetical fears.¹⁵³

While Madison’s proposed congressional veto is correctly understood as the initial Convention model for the Supremacy Clause, it was not a novel approach for the time. Aspects of this proposal had been advanced and accepted previously in other forums. During the period

146. *Id.* at 346.

147. *Id.*

148. *Id.* (emphasis added).

149. These views were extended and corroborated by his essay written in April 1787, *Vices of the Political System of the United States*, in 2 WRITINGS OF JAMES MADISON, *supra* note 142, at 361-69.

150. Letter from James Madison to George Washington (Apr. 16, 1787), in 2 WRITINGS OF JAMES MADISON, *supra* note 142, at 346.

151. *Id.* In his letter to Jefferson, Madison urged that a method must be devised to “restrain the States from thwarting and molesting each other.” Letter from James Madison to Thomas Jefferson (Mar. 19 [18], 1787), in 2 WRITINGS OF JAMES MADISON, *supra* note 142, at 327.

152. Letter from James Madison to George Washington (Apr. 16, 1787), in 2 WRITINGS OF JAMES MADISON, *supra* note 142, at 346-47.

153. Other delegates endorsed Madison’s perception that the practice of floating numerous issues of unsupported paper currencies was an attempt to satisfy the unpropertied majority at the expense of the wealthier minority. This predictable excess of democracy was to be restrained via central power, whose control would be structurally vested in the propertied classes. State-to-state conflicts during the Articles’ tenure included battles over boundary lines and commercial trade. 2 WRITINGS OF JAMES MADISON, *supra* note 142, at 361-69; *see also* CURRIE, *supra* note 22, at 175-76.

between the signing of the peace treaty with the British and the Convention, a number of state legislatures had interposed state law obstacles against the treaty's full implementation.¹⁵⁴ In particular, British creditors continued to find their debt collection efforts impeded and Tories faced renewed seizures and confiscations of their property.¹⁵⁵ Because the young nation lacked courts of its own, any relief had to be pursued in and conferred by the state courts. But would the state courts recognize as legal injuries violations of the United States' treaty with England to the derogation of their state law? The states, after all, generally had either legislatively authorized the putatively wrongful confiscations, or had not adopted the treaty's terms as part of their domestic laws. Thus, one might conclude that the law applicable to Tory confiscations did not conceive of the activity as a legal wrong with a remedy.

But in 1784, Alexander Hamilton, a talented nationalist lawyer, mapped a path out of the state law labyrinth. In defending a Tory charged with trespass, Hamilton reached out to the treaty, the law of nations¹⁵⁶ mandating its respect, and to the Articles of Confederation to supply the appropriate decisional rules. He acknowledged that state law normally governed citizens, but contended that when dealing with matters concerning foreigners—whether in legislation or adjudication—“each state must adopt the laws of Congress . . . [which] must prevail.”¹⁵⁷ And where treaty provisions arguably govern a matter, the state judges “must of necessity be judges of [the] United States.”¹⁵⁸ Hamilton asserted that he offered the only approach that guaranteed that the legislature of any one state could not repeal a law of the

154. See NEVINS, *supra* note 129, at 644-52.

155. See WOOD, *supra* note 128, at 457-58. The states' legislative obstructions were allegedly violations of Articles IV and VI of the Treaty of Paris. But the American negotiators, knowing they were not empowered to agree to terms that impaired the states' sovereign legislative powers, only agreed to *attempt* to gain the states' agreement on certain matters. See Treaty of Paris, *supra* note 131, at art. V. (“It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective States, to” provide, *inter alia*, restitution to certain British subjects). By contrast, Article VI of the Treaty mandated no future prosecutions or confiscations of property held by British subjects. See *id.* at art. VI.

156. Notably, at this time the law of nations governed only the relations between the governments proper, and not the relations between private parties of nations, except to the degree such intercourse was made a subject of a treaty. Thus, Hamilton's argument was indeed creative. For Hamilton's notes for argument in *Rutgers v. Waddington* (N.Y. Sup. Ct. 1785), see 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 353-60 (Julius Goebel, Jr. ed., 1964) [hereinafter LAW PRACTICE].

157. LAW PRACTICE, *supra* note 156, at 351.

158. *Id.*

United States.¹⁵⁹

In Hamilton's argument, we see conjoined the ideas of national legal supremacy on matters of national interest and the obligation of judges, through the power of judicial review of state legislative acts, to set aside any contrary state law when ruling on these national subjects. The Congress had thus far not been presented with, nor taken a position on, the technical legal question of what law governed the resolution of private party disputes arguably within the scope of the Treaty of Paris of 1783. Thus, when Hamilton urged these principles upon the state court, he characterized them as a matter of logical and legal necessity.

In 1786, however, Secretary of Foreign Affairs John Jay sought to remedy the lack of an explicit rule concerning the authority of federal legislation. He requested Congress to ratify through express legislation the propositions Hamilton had advanced. Jay reasoned that the "thirteen independent sovereign states" had expressly delegated

a general though limited Sovereignty for the general and national purposes specified in the Confederation. In this Sovereignty they cannot severally participate (except by their Delegates) nor with it have concurrent Jurisdiction. . . . When therefore a treaty is constitutionally made, . . . it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention, consent, or fiat of state legislatures.¹⁶⁰

The rules of decision to be applied in such cases, even in disputes between two private parties, were the "rules and maxims established by the laws of nations for the interpretation of treaties."¹⁶¹

To protect the keen national interests, Jay advised a formal enactment that would explicitly disavow as *ultra vires* state legislative attempts to construe the meaning of treaties, and their purported authority over any aspect of treaty operation.¹⁶² Further, he recommended that Congress declare that states should repeal all statutes currently in

159. See *id.* at 351-52.

160. 4 U.S. CONTINENTAL CONGRESS, SECRET JOURNALS OF THE ACTS AND PROCEEDINGS OF CONGRESS 330-31 (1820) [hereinafter SECRET JOURNALS].

161. 4 *id.*

162. See Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meaning of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 531 (1925).

force that purport to exercise this authority.¹⁶³ Finally, Jay submitted that the state acts of repeal should imply, if not expressly command, that the state courts should seek the intent of the treaty when its meaning was drawn into question, "anything in the said [state] acts or parts of acts . . . to the contrary . . . notwithstanding."¹⁶⁴ This language, of course, foreshadows quite closely that of the Supremacy Clause. Congress did not disappoint its foreign affairs secretary; only a few months after he presented his report, it passed resolutions endorsing all of Jay's positions concerning treaty interpretation and enforcement under state law. Congress disseminated its resolutions to the state legislatures before the Constitutional Convention gathered in late May 1787.¹⁶⁵

As a representative to Congress under the Articles, Madison was directly confronted with the concrete political and diplomatic difficulties that had arisen because separate state and federal sovereignties attempted to exercise control over the same legal matters. He had also been exposed to arguments favoring implied national legal exclusivity over those subjects committed to the national government. While these were essential points to be maintained in a new union structure, from Madison's point of view they were ultimately not sufficient; the restriction of national legal power solely to national subjects failed to redress the entire range of state governmental excesses and poor judgment.¹⁶⁶

163. *Id.*

164. See 4 SECRET JOURNALS, *supra* note 160, at 336 (emphasis added). Professor Edward Corwin apparently was the first to discuss the legal significance for state and local law of Hamilton's and Jay's separate arguments concerning treaties. He provides a more detailed discussion of these and the other arguments that led eventually to certain foundational principles of the Constitution. See Corwin, *supra* note 162, at 529-32.

165. As Secretary of State, Thomas Jefferson wrote Foreign Secretary Hammond to elaborate the nation's compliance with Congress' instructions. See Letter from Thomas Jefferson to George Hammond (May 29, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON 551-60 (Charles T. Cullen ed., 1990). Jefferson reported that almost all states had complied promptly and completely. For example, in one significant opinion, the North Carolina court held "the confederation of all the States . . . is to be taken as a part of the law of the land, unrepealable by any act of the General Assembly." *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787). In correspondence contemporaneous with the case, James Iredell, plaintiff's attorney in *Bayard* and later a Justice of the United States Supreme Court, clarified his argument. It was not that he believed judges had a general power to overturn state legislation. Rather, it was merely a question of applying the proper rules of decision. Where a case presented a conflict between the national constitution—"the *fundamental, unrepealable* law"—and a state act that is "founded on an authority not given by the people, and to which, therefore, the people owe no obedience," the judicial duty is clear: judges simply determine which law is superior and apply it. Iredell believed this power to be inherent in the nature of judging, an exercise of power that is "unavoidable." Wood, *supra* note 128, at 461 (quoting Iredell).

166. See *supra* notes 141-53 and accompanying text.

During this period, Madison reposed his trust in a national Congress to decide what other errors in state policy merited reversal.¹⁶⁷

Madison preferred to vest Congress with an unrestricted veto power over state laws, and would have swept within its purview policies that were core concerns of the states, such as defining the rights of property holders. Although many of Madison's proposals were advanced by the Virginia delegates, his position here was not endorsed and advocated in the Virginia Plan.¹⁶⁸ The delegation's language restricted the congressional "negative" to those state laws "contravening" the Constitution.¹⁶⁹ Shortly after Governor Randolph presented their proposal, the Convention approved in principle the congressional negative, as amended to include treaties as a part of the authoritative national law.¹⁷⁰ Somewhat surprisingly, it passed with virtually no debate.¹⁷¹

167. See ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 34-39 (1950). Madison did not espouse these nationalistic preferences for long; he and Jefferson became promoters of "states' rights" and democratic republicanism. See *id.* at 198-207; see also Rogow, *supra* note 134, at 332.

168. The Virginia Plan was presented and elaborated by Governor Edmund Randolph in a speech on May 29, 1787. In describing the character and properties the national government should possess, he stated the government ought "to be able to defend itself against incroachment . . . and to be paramount to the state constitutions." 1 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 137, at 18 (Madison's notes).

169. Randolph formally proposed the congressional veto as a portion of the sixth resolution advanced by the Virginia delegation. It stated:

[T]he National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union.

1 *id.* at 21 (emphasis added). In Robert Yates' version of the day, Randolph "candidly confessed that [the resolutions] were not intended for a federal government—he meant a strong *consolidated* union, in which the idea of states should be nearly annihilated." 1 *id.* at 24.

170. The resolution was approved on May 31, 1787. 1 *id.* at 47. The amendment to include treaties was authored by Benjamin Franklin, who moved that the negative be permitted not only where state laws contravened the *articles* of Union, but also "any Treaties subsisting under the authority of the union." 1 *id.* Franklin, of course, was one of the three Americans who had negotiated the Treaty of 1783 with England, which had been frequently denied the status of binding law in the various states. See *supra* note 132 and accompanying text.

171. Delegates continued to arrive, sometimes with momentous importance. For instance, on June 2, 1787, three delegates arrived from three different states. 1 *RECORDS OF THE FEDERAL CONVENTION*, *supra* note 137, at 76. One of the new arrivals, John Lansing, transformed New York's delegation into active stewards of states' rights republicanism. Prior to this date, New York was represented by Alexander Hamilton and Robert Yates, who parted company on many issues, which occasionally rendered the state unable to cast a vote. See 1 *id.* at 32 (equally divided vote recorded). Modifications in states' votes on particular issues such as the congressional veto of

Perhaps because of the ease with which the resolution passed, one week later Charles Pinckney moved to reconsider the earlier restrictive resolution. In its place, he moved that the national legislature should have the power "to negative all [state] laws which to them shall appear improper."¹⁷² Madison likely had felt himself honor-bound not to initiate amendments to the Virginia Plan that had issued pursuant to a joint agreement of the Virginia delegates, even on a point he so earnestly believed essential. But he could second another delegate's amendment, and did so, offering an extensive set of reasons justifying the broad power. He also utilized evocative astronomical imagery to presage the imminent destruction of the country if the amendment was not passed. The veto would create one unlimited supreme power which "is the great pervading principle that must controul the centrifugal tendency of the States; . . . without it, [they] will continually fly out of their proper orbits and destroy the order and harmony of the political system."¹⁷³ Madison also raised the specter of military force being repeatedly required to bring the states back into harmony should the unrestricted veto be denied.¹⁷⁴

It had been difficult for committed states' rights advocates to permit the veto of state laws even for the narrow reason of constitutional contravention—but this they had accepted as the price of union and as part of the appropriate powers of a central government. But allocating to Congress a state-law veto that could be exercised for any reason—or by implication, for no reason—was anathema. Those delegates who tended to be solicitous of state power correctly understood the proposal to be motivated by a desire to strip the state legislatures of all remaining sovereign power. They responded to Madison's imagery concretely, stating arguments familiar to contemporary students of federalism. These delegates feared the resulting order (or rather, disorder) if the states lacked an internal police power and control over the state militia, and believed the broad veto would enhance the already overweening power of the large and populous states.¹⁷⁵ Moreover, they contended,

state law is likely attributable to the debates, as well as to shifting representation. *See also* 1 *id.* at 21-22 (quoting PA. J. & WKLY. ADVERTISER, May 19, 1787, listing the delegates whom had been named by each state and noting which had arrived); 1 *id.* at 22-23 (quoting a letter from George Mason detailing that only five states were fully represented as of May 20, 1787, and that "the members drop in slowly").

172. 1 *id.* at 162.

173. 1 *id.* at 165 (Madison's notes); *see also* 1 *id.* at 169 (Yates' notes).

174. *See* 1 *id.* at 165 (Madison's notes).

175. 1 *id.* at 165-68 (Madison's notes).

no new territories would join the union if all independent power were lost upon statehood.¹⁷⁶ In sum, they expressed the view that a national legislature with such a power would enslave the states.¹⁷⁷ Given the raw nerve he had exposed, Madison should not have been surprised when the Convention rejected the proposal by a decisive margin of better than two to one.¹⁷⁸

In light of the seemingly resolute opposition to vesting the national legislature with plenary power over state law, the subsequent events of July 17, 1787, are nothing less than astonishing. After approving general principles on which national legislation should proceed,¹⁷⁹ the Convention resumed its reconsideration of the sixth resolution, of which the veto formed only a part. The veto provision had not been modified since being approved on June 8; it permitted the national legislature to “negative” all state laws that, in its opinion, “contravened” the Constitution or treaties thereunder. Yet, at this third discussion, new opposition surfaced.¹⁸⁰ Madison’s responsive discourse on the importance of reposing a defensive power in the Congress may have quelled some fears but it

176. See 1 *id.* at 166. Mr. Gerry also suggested that new states formed from the territories might arise to control the original states via the unrestricted congressional veto. 1 *id.* at 173 (Hamilton’s notes).

177. 1 *id.* at 165 (Madison’s notes on Elbridge Gerry’s speech).

178. See 1 *id.* at 163 (official journal). Only Virginia, Pennsylvania, and Massachusetts voted in favor of the amendment—the three wealthiest states and each the most powerful in their respective geographical regions. South Carolina’s delegation declined to support Mr. Pinckney, yielding the final tally of seven against, three in favor, and one state divided. 1 *id.* Each state was granted one vote, which accorded with the principle governing the Continental Congress (see ARTICLES OF CONFEDERATION art. V, cl. 4) per decision of the Convention at the outset. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 8 & 15 (official journal), 17 (Madison’s notes reaffirming prior rule).

179. The Convention agreed that Congress should be authorized “to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.” 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 21 (official journal). The Convention had previously rejected placing a restriction upon Congress’ power to interfere with the states’ police power, see 2 *id.*, with Governor Morris identifying specifically states’ currency practices as a power that merited infringement. See 2 *id.* at 26 (Madison’s notes).

180. Three prominent delegates voiced concerns. Gouverneur Morris of Pennsylvania predicted that states would find the present language offensive and believed the potential problems would be resolved if positive legislative authority were conferred upon Congress. Roger Sherman of Connecticut thought the resolution conferred power that was already implied and therefore was superfluous: “the Courts of the States would not consider as valid any law contravening the Authority of the Union.” Luther Martin of Maryland was opposed in principle and because of the resolution’s impracticality. He viewed the power sought for the Congress to be “improper and inadmissible [sic]” and queried, “Shall all of the laws of the States be sent up to the Gen’l legislature before they shall be permitted to operate?” See 2 *id.* at 27 (Madison’s notes).

fomented new criticisms of the veto: “[A] law that ought to be negated” was properly the province of the judiciary, not the Congress. Should “that security fail,” the improper state law could be implicitly “repealed” by enacting a national law on the subject.¹⁸¹ Moreover, the congressional veto was predicated upon the “wrong principle, to wit, that a law of a state contrary to the articles of the Union, would if not negated, be valid & operative.”¹⁸² The resolution failed, garnering approval of only three states.

Presumably, at this juncture the states’ rights advocates should have been relieved and self-satisfied, and become dormant. Yet the next extant entry records the proposal of one of their leaders, Luther Martin, who was attorney general of Maryland and an eventual nonsigner of the Constitution:

that the Legislative acts of the U.S. made by virtue & in pursuance of the articles of Union, and all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants—& that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.¹⁸³

The resolution passed unanimously.¹⁸⁴ Unfortunately, Madison was

181. 2 *id.* at 28 (Gov. Morris’ comments) (Madison’s notes). This comment would seem to suggest that the delegate considered the matter resolved with no recourse to the judiciary necessary once Congress enacted legislation that implicitly “repealed” the offensive state legislation. The delegate failed to foresee the subtlety of the preemption questions that would arise, or the need for an authoritative interpretation of the federal law’s impact on state and local law.

182. 2 *id.* (Sherman) (Madison’s notes).

183. 2 *id.* at 28-29.

184. Despite having initiated this critical compromise, Luther Martin sidestepped discussion of both the substance of the provision and his midwifery at its birth when he gave his extended report on the Constitution and the Convention to the Maryland legislature. See 2 *id.* at 172-232 (reprinting Martin’s speech). Given that the Supremacy Clause is Martin’s only contribution to formulating the specific textual language of the Constitution, his refusal to claim credit for the provision tends to confirm the magnitude of popular dissent over approval of the Clause. Indeed, Martin concluded his legislative presentation by claiming disingenuously that “I gave [the proposed Constitution] every possible opposition, in every stage of its progression. I opposed the system there with the same explicit frankness with which I have here . . .” 2 *id.* at 231. Martin’s misrepresentations, including his origination of the Supremacy Clause, were publicly revealed by a fellow delegate. See 2 *id.* at 273. Martin’s weak attempts to explain and excuse his involvement were also published, and are reprinted in 2 *id.* at 287. Interestingly, Martin later defended Maryland’s legislation aimed at taxing the second Bank of the United States when *McCulloch* reached the U.S. Supreme Court. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 371 (1819).

both the only notetaker of the debates this day, and, undoubtedly, also actively engaged in defending the foundational principle he had first advocated. His notes suffer from the dual commitment, recording only the substance of Martin's proposal and none of the delegates' discussion.

Despite this void in the historical record, monumental differences between the Martin substitute and the previously endorsed Virginia Plan resolution are discernible. First and most obviously, Martin's proposal shifted from the legislative branch to the judiciary the responsibility for ascertaining and securing state fidelity to national law. Second, the new resolution explicitly cloaked only federal treaty and statutory law within national supremacy.¹⁸⁵ Under the new language, whether by oversight or intention, judges were not authorized to nullify the operation of a state law that failed to comply with the federal Constitution itself.¹⁸⁶

Even excluding the omission of unconstitutionality, which was later corrected without opposition,¹⁸⁷ the importance of these changes cannot be overstated. When the Convention approved Martin's resolution, it did not simply substitute a different institution to perform the same function. Rather, the shift concomitantly transformed the nature of the question: a state's fidelity to federal law was no longer destined to be a discretionary legislative decision but rather a judicial one. Owing to certain features of the judicial power, the Convention's shifting of this responsibility to the courts¹⁸⁸ implicitly conveyed many important assurances to the states. States were guaranteed that, first, they would have a forum in which to defend their laws; second, where a state law was set aside, reasoned explanation for the decision would be required; third, the acceptable reasons for displacement would be cir-

185. Note that Martin's substitute accorded "legislative acts" supremacy over contrary state law. Given the preeminent importance of common law in 1787, the resolution's omission of the more inclusive terminology of "laws" is striking, for its author was a prominent attorney and state attorney general. That phrasing was a later development. See *infra* note 193 and accompanying text.

186. See *supra* text accompanying note 183. Hence, Forrest McDonald has erred in stating that Martin's substitute resolution included the Constitution within the sources of law entitled to national supremacy. See McDONALD, *supra* note 100, at 255.

187. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 381-82, 389 (official journal and Madison's notes).

188. At this time a separate federal court system had not yet been approved, though the Virginia Plan proposed a federal judiciary in its ninth resolution. See 2 *id.* at 21. The resolution (redesignated number 11) was discussed and approved in principle on July 18. See 2 *id.* at 37 (official journal).

cumscribed; fourth, the federal legislative acts empowered to displace state law would themselves be consistent with the legislative power conferred by the Constitution;¹⁸⁹ and fifth, review of an unfavorable initial decision would be available.

Both the Martin substitute and the Virginia Plan's recommendation were less nationalistic than the Madison-Pinckney proposal. Madison's approach did not require reasons to be offered for rejecting the state law, and rejection could even have rested upon an objective that was otherwise unconstitutional.¹⁹⁰ Neither the Virginia Plan nor Madison's proposal required any sort of external verification of a state law's unconstitutionality according to impartial norms; the veto could be exercised on the basis of arbitrary judgment or disagreement with a state's policy choices,¹⁹¹ and could have been motivated by unconstitutional reasons or effected obviously unconstitutional outcomes. When they earlier approved the Virginia Plan's approach to the veto, the delegates apparently did not apprehend its elasticity that in practice would have led to the broad scope permitted by Madison's formula.¹⁹²

Between Martin's substitution for the Virginia Plan's veto and the current Supremacy Clause lay a number of small but highly significant steps. The Committee of Detail, which fashioned the first Convention draft of the Constitution from the approved resolutions, detected the glaring omission of unconstitutionality as a reason to displace state law. Its initial solution was to draft a separate provision vesting the Supreme Court with sole power to decide such questions.¹⁹³ The Commit-

189. As noted above, initially these reasons were limited to inconsistency with a congressional act or a treaty; constitutional inconsistency was added later. *See supra* text accompanying note 187.

190. For instance, a state's law governing the conduct of elections might have been vetoed strategically, just in time to eliminate the state's electors from participating in choosing the President, so as to secure the election of a President congenial to Congress. As this tactic would eviscerate the people's exercise of their sovereignty by electing their own representatives, it could be said to negate the federal government's guarantee of a "Republican form of Government." *See* U.S. CONST. art. IV, § 4. *See generally* Merritt, *supra* note 90 (examining the Guarantee Clause as a restraint on federal power to interfere with state autonomy).

191. Recall that the resolution's language stated the congressional negative of state laws to be available when, "in [its] opinion," the state law contravened the national Constitution. *See* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 47 (official journal).

192. Contemporaneous materials do not suggest that judicial review of Congress' opinion on unconstitutionality of state legislation would be available. Given the express language reposing discretion in the legislative body ("in [its] opinion"), it is difficult to argue that judicial review was contemplated.

193. "All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon, which shall be vested in the supreme judiciary, all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle." 2 RECORDS

tee, however, eventually chose not to include this new provision in its final draft document. Instead, after the Committee had reported the document to the full Convention, one of the Committee members recommended that the Martin language formerly approved be amended to include unconstitutionality.¹⁹⁴ The lack of opposition to adding the Constitution as part of the supreme law suggests that its prior omission was an oversight.

With the judicial negative of state laws firmly established, the faithful friends of the congressional veto raised their proposal one last time, observing that its language and the protections it offered to states differed from their last version.¹⁹⁵ They now queried whether a legislative supplement to the judicial remedy should be authorized, and second, as one supporter viewed it, whether a remedy should be available at the central government level rather than only in the offending state via its judiciary.¹⁹⁶ While the latter point in particular raised an issue critical to the effective functioning of federal law,¹⁹⁷ the concern might have been allayed by mentioning Supreme Court appellate review, and hence supervision of, the state court decisions. But the extant notes do not record any suggestion that the delegates mentioned federal appellate review over state decisions as the mechanism by which ultimate federal control would be asserted. Nevertheless, given the Committee of Detail's earlier scuttled provision, it is clear that at least some delegates believed that via the Supreme Court, the national government would be involved in these decisions, whether as an original matter or by appellate review. Madison's question of whether effective national

OF THE FEDERAL CONVENTION, *supra* note 137, at 144 (Committee of Detail, draft no. 4, in Edmund Randolph's handwriting).

194. 2 *id.* at 381-82 (official journal). The Committee proposed this substitute language:

This *Constitution and the Laws of the United States* made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme Law of the several States, and of their citizens and inhabitants; and the *Judges in* the several States shall be bound thereby in their decisions, any thing in the constitutions or laws of the several States to the contrary notwithstanding.

2 *id.* (emphasis added). See *infra* text accompanying notes 199-202 for a discussion of the Committee's other textual changes.

195. The text of this proposal differed somewhat from prior efforts. It provided an additional power to be vested in the Congress to: "negative all laws passed by the several states interfering, in the opinion of the Legislature, with the general interests and harmony of the Union—provided that two thirds of the Members of each House assent to the same." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 382 (official journal).

196. 2 *id.* at 391 (comment by James Wilson) (Madison's notes).

197. Where available, central government review of some sort would facilitate uniformity of law and assist in ensuring compliance with governing federal law.

control could be asserted over allegedly unconstitutional state laws remained either unanswered or unrecorded,¹⁹⁸ and his final attempt to insert a congressional veto failed.

Four other textual changes preceded the final Supremacy Clause wording. The Committee of Detail initiated an important emendation, again unclear whether wittingly or not, modifying the phrase “Judiciaries of the . . . States shall be bound” to “Judges in the several States shall be bound.”¹⁹⁹ This subtle change could have evidenced an intention to bind all judges, whether state or national, by the principle of national legal supremacy.²⁰⁰ But the putative change in scope evidently was never raised for Convention discussion, and it could easily have been merely a transcription error in the midst of the Committee’s multiple drafts. The Committee’s substitute language included a second subtle but significant revision. “Legislative acts” became the more expansive “Laws of the United States,”²⁰¹ perhaps signifying that com-

198. Was this a strategic silence, so as not to endanger the implicit grounding of Supreme Court review over state court decisions on fidelity issues? Was it understood that the jurisdictional grant extended to these questions as part of the “arising under” grant, depending upon the decision of the first Congress on whether to vest the jurisdiction? Unfortunately, the answers to these questions are not available. But we do have other evidence that at least Alexander Hamilton was aware of the elasticity of the national powers. Hamilton’s plan was to “squeeze out by interpretation whatever power was necessary to achieve an adequately energetic [national] government.” Hamilton stated shortly after signing the Constitution: “A good administration will conciliate the confidence and affection of the people, and perhaps enable the Government to acquire more consistency than the proposed Constitution seems to promise . . . It may triumph altogether over the state Governments, and reduce them to an entire subordination, dividing the larger states into smaller districts.” Alpheus Thomas Mason, *The Federalist—A Split Personality*, 57 AM. HIST. REV. 625, 643 (1952) (quoting from ALEXANDER HAMILTON, *THE WORKS OF ALEXANDER HAMILTON* 423 (1904)). With proper interpretation, the states would be “annihilated.” 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 297 (Yates’ Notes). Given that the vote here was very close (six to five), the best performance for the congressional veto, it is possible that the delegates generally did not anticipate that national involvement on these questions, via appellate review, would be available. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 382 (official journal). Although little debate on this issue was recorded, what there is lacks discussion of any concerns about permitting the validity of state law to be determined by political tides, rather than by judicial standards.

199. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 183 (Madison’s notes) (emphasis added); see also *supra* note 183.

200. Forrest McDonald contends that the change in nomenclature from “Judiciaries” to “Judges” excluded juries from any responsibility to be faithful to national law. See MCDONALD, *supra* note 100, at 255. This position cannot be sustained as a legal matter because the jury function is executed pursuant to constraints imposed by law, law that is interpreted and applied by judges who are bound by the Supremacy Clause. The Clause expressly binds the pivotal players—the judges—and has no need to bind juries. The jury’s province, moreover, does not encompass legal determinations—which are manifestly governed by the Clause—but only those of fact.

201. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 381.

mon law principles as well as statutory law would be subject to national supremacy. Again, no records of any discussion exist. The third revision amplified the temporal scope of the Clause; treaties approved under the Articles of Confederation were expressly grandfathered, but prior federal statutory and constitutional laws were not.²⁰²

The final changes were initiated by the Committee on Style and Alteration.²⁰³ It eliminated an introductory article originally proposed by the Committee of Detail that might have become an independent basis for generating principles of national supremacy and could have undercut the explicit grants and implied proscriptions of power.²⁰⁴ The Committee also condensed the verbose phrase "supreme law of the several states, and of their citizens and inhabitants" to "supreme Law of the Land."²⁰⁵ This was more than a mere stylistic change, for the new language swept within its scope the national government, including its courts, which previously were not included. Regardless of their state or federal identity, all courts would function under the same obligation to enforce national law. Again, the records are mute on whether the Committee on Style's draft revision of the Clause provoked discussion at the time the reorganized version of the document was reported or thereafter. This final Committee draft also gathered together into one article the oath requirement for all governmental officials, whether state or federal, and the Supremacy Clause, thereby creating most of Article VI.²⁰⁶ The changes cumulatively produced the final wording and placement of this centrally important clause.²⁰⁷

202. 2 *id.* at 382.

203. Both James Madison and Alexander Hamilton were elected to serve on this Committee. See 2 *id.* at 547 (official journal).

204. The Committee of Detail's draft of Article III stated: "The Government shall consist of *supreme* legislative, executive, and judicial powers." 2 *id.* at 177 (emphasis added) (Madison's notes). By contrast, the final draft proposed by the Committee of Style mentions supremacy only in Article VI. See 2 *id.* at 590-603.

205. 2 *id.* at 603.

206. See U.S. CONST. art. VI. The first clause grandfathers debts incurred by the Continental Congress as against the new central government.

207. Although the Convention produced a dramatically more powerful national government, Madison and Hamilton were disappointed by the final Constitution's retention of significant state powers. Madison wrote Jefferson in 1787 that the Constitution "will neither effectually answer its *national object*," nor "prevent the local *mischiefs* which everywhere *excite disgusts* against the State Governments." WOOD, *supra* note 128, at 525. "Madison's 'middle ground' [between state and national governments in] 1787 was not the federalism of 1788, but meant rather 'a duc supremacy of the national authority' with 'the local authorities' left to exist only 'so far as they can be subordinately useful.'" *Id.* Hamilton was also disheartened by the Convention's output. See JOHN C. MILLER, ALEXANDER HAMILTON: PORTRAIT IN PARADOX 182 (1959) ("Few members present found the plan of government further removed from their own ideas regarding the

During the ratification process, those eventually known as antifederalists highlighted the Supremacy Clause as proof of the drafters' hostile attitudes toward the state governments.²⁰⁸ They found it difficult to conceive how the federal system structured by the proposed Constitution could safeguard significant state power and simultaneously preserve national supremacy, and thus assailed the Clause's import globally.²⁰⁹ It seemed that creation of a national government concomitantly required that the state governments be abolished; the Supremacy Clause, in their view, secured that end.²¹⁰ Consistent with the level of

kind of government the country needed than did Hamilton."); see also *id.* at 162 (delineating Hamilton's plan of making the states administrative districts of the central government).

208. See, e.g., 4 THE FOUNDERS' CONSTITUTION 601 (Philip Kurland & Ralph Lerner eds., 1987) (Mr. Bloodworth of the North Carolina Ratifying Convention said the Clause appears to "sweep off all the constitutions of the states. It is a total repeal of every act and constitution of the states . . . It will produce an abolition of the state governments."); THE ANTI-FEDERALIST PAPERS, *supra* note 140, at 243 (the Pennsylvania Ratifying Convention minority said the Constitution seeks to achieve "one consolidated government, founded upon the destruction of the several governments of the states"); *id.* at 244 (the Clause "may be exercised to the absolute destruction of the state governments, without any violation . . . of the constitution"); *id.* at 268 (quoting letters in *The Federal Farmer* opining that if proposed Constitution were not modified, "the state governments must be annihilated or continue to exist for no purpose").

209. See, e.g., THE ANTI-FEDERALIST PAPERS, *supra* note 140, at 308 ("Brutus" argued the proposed Constitution "was calculated to abolish entirely the state governments, and to melt down the states into one entire government"); see also 4 THE FOUNDERS' CONSTITUTION, *supra* note 208, at 600 (Impartial Examiner No. 1 disputed the possibility that states can continue to operate as governments if the Constitution is adopted, for "two sovereignties existing within the same community is a perfect solecism").

210. In fact, Alexander Hamilton, among others, had espoused a principle drawn from Blackstone. He contended that it was impossible to have two legislatures in the same state "without falling into that solecism in politics of *imperium in imperio*." See WOOD, *supra* note 128, at 352; McDONALD, *supra* note 100, at 277. Although Hamilton later articulated a theoretical approach that seemed to transcend Blackstone's critique, see THE FEDERALIST NO 34, at 206-07 (Alexander Hamilton) (Clinton Rossiter ed., 1961), others remained unconvinced. Hamilton's reputed role as a Framers of the Constitution merits brief comment. While he was elected a New York delegate to the Constitutional Convention, his influence there can only be described as minimal. The overly nationalistic tones of an early Hamilton speech only created more hostility to his cause, and he subsequently left the Convention at the end of June, disillusioned with the prospects of achieving an appropriately empowered national government. See generally MILLER, *supra* note 207, at 161-63, 171-73, 176; see also 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 137, at 282-311 (extant notes of Hamilton's speech advocating vastly augmented national powers). At Washington's behest, Hamilton returned to Philadelphia but, even then, he was in the city only infrequently. To some degree, Hamilton proved influential in formulating the method of ratification and its theoretical explanation, justifying the breach of the Articles' requirements for amendment. See 1 *id.* at 560-61 (Madison's notes). And he, like Madison, was elected a member of the Committee of Style and Alteration, which reorganized the work product into the Constitution we have today. See 1 *id.* at 547.

Hamilton's role should instead be understood and appreciated as that of a primary advocate of the Constitution during the critical ratification process. The pseudonymously published *Feder-*

discussion generated at the Convention, the extant comments during the ratification process do not attempt to parse the Clause's legal meaning or to suggest, other than in the global critique, its likely legal import. None of the extant materials evidence that the Constitution's opponents or advocates—even the Constitution's Framers—possessed a rudimentary sense that determining when state law is “to the contrary” of federal law might be problematic. The antifederalists' critical commentary does not recognize that differences between national and state law might be complementary and even beneficial, yet nonetheless result in the displacement of state law. There is no suggestion, for instance, that either the Framers ultimately intended, or that the antifederalists feared, that concurrent legislative jurisdiction would constitute a legal impossibility.²¹¹ If lawyers and jurists of the period engaged in sophisticated legal analysis of the Supremacy Clause, anticipating the interpretive problems the Clause would generate, traces of these discussions have thus far not been discovered.

Despite its ultimate inadequacy in answering contemporary interpretive quandaries, the historical record is not moribund. At a minimum, the Framers overtly rejected the proposition that state law could be rejected for any reason, and narrowed the forbidden interaction to that of being “contrary.”²¹² Notably, even in the Virginia Plan's original proposal, particular state law must “contravene[]” federal law to warrant its displacement. At no time did the Framers endorse a weaker interaction, such as “interfere with” or “impinge upon” federal law. Consistently, the Convention expected a more egregious, if not hostile, stance from a state as the predicate for displacing its law. Given this exceptionally narrow reason for superseding state law, Chief Justice

alist Papers, first printed as New York newspaper articles, are justly prized as a distinctively American contribution to political theory. Hamilton organized and largely authored these essays; other essays were contributed by Madison and John Jay. But these essays' actual political influence extended only to the ratification process in New York and, to some extent, Virginia, where copies of the essays in their original newspaper form were available. See *THE FEDERALIST PAPERS*, *supra*, at xi. Although New York was a critically important state geographically and politically, the Constitution was ratified by nine states prior to New York's action. Thus, these essays played no significant role in the initial adoption of the new charter, for it became effective regardless of New York's decision. See John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 AM. POL. SCI. REV. 799, 814, 816 (1961).

211. During the first part of the twentieth century, the mere existence of federal law on a subject was considered sufficient to expel the states from that legislative arena. See, e.g., *Charleston & W. Car. Ry. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) (Holmes, J.) (“When Congress has taken the particular subject-matter in hand, [state law] coincidence is as ineffective as [state law] opposition . . .”).

212. See *supra* text accompanying notes 169, 172-78.

Marshall's attempt to tease out of the Supremacy Clause an unremitting nationalism as the touchstone for constitutional interpretation²¹³ seems strained and unwarranted. The conditions governing legitimate exercise of national power and preeminence cannot be found in the Supremacy Clause itself but must be located in the balance of the Constitution.

III. REFORMULATING THE LEGAL IMPORT OF THE SUPREMACY CLAUSE

Charles Black has observed that "[w]hen one proposes a new theoretical approach to a problem, one must face the fact the one's hearers are likely to feel somewhat at sea."²¹⁴ The recommendation here, that we rethink several constitutional principles that seem established and workable, may initially seem to rock the constitutional boat unnecessarily. I intend to establish that current Supremacy Clause jurisprudence is conflicting and demands theoretical restructuring to attain logical and practical constitutional coherence, and to enhance the republican self-governing activities generally found, if found at all, at the state and local levels.

Three broad aspects of current Supremacy Clause doctrine suggest that this portion of the constitutional puzzle has been forced into position. First are the plethora of Court decisions that recognize and refer to "Supremacy Clause claims."²¹⁵ According to this view, the Clause has a substantive dimension to which specific constitutional claims may be tethered. As developed earlier, this category is composed of two analytically distinct sets of claims: those loosely based upon *McCulloch* pronouncements, and those that allege federal preemption of state law.²¹⁶ The three *McCulloch*-based theories recognized for striking down state law are: a state may not attempt to regulate the federal government directly;²¹⁷ nor may it discriminate against the national government, including those it employs or with whom it does busi-

213. See *supra* text accompanying notes 21-61.

214. BLACK, *supra* note 66, at 48. This is an apt metaphor for one such as Black who has devoted a portion of his scholarly life to admiralty law.

215. See *supra* notes 2-4, 111-26. Sometimes the terminology the Court uses is "Supremacy Clause cases." See *supra* note 4.

216. See *supra* text accompanying notes 111-26.

217. See, e.g., *North Dakota v. United States*, 110 S. Ct. 1986 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988); *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963).

ness;²¹⁸ nor may it discriminate against persons asserting rights arising under federal law.²¹⁹ According to one formulation, the governing principle for preemption cases forbids state law from conflicting “with an affirmative command of Congress.”²²⁰

In contrast, a second piece of the doctrinal puzzle emerges from those cases where the Court rejects that “Supremacy Clause claims” present direct constitutional challenges, and instead holds that these claims are statutory in nature. For example, in *Swift & Co. v. Wickham*,²²¹ the Court identified a fundamental difference between preemption claims and those based upon “substantive provisions” of the Constitution. It is true, the Court held, that ultimately a preemption claim is “grounded in” the Supremacy Clause in the sense that “if a state measure conflicts with a federal requirement, the state provision must give way.”²²² However, because the “basic question involved in these cases . . . is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes,”²²³ the preemption claim must be considered basically statutory.²²⁴ The underlying germinal theory—that some claims are “truly” constitutional and others, specifically preemption claims, are not—categorizes preemption claims as nonconstitutional according to the criterion it specifies; interpreting and applying a particular constitutional heading is not part of the legal operation.²²⁵ Unfortunately, the subsequent statutory constriction of three-judge district courts to a narrow set of circumstances,²²⁶ which

218. See, e.g., *Davis v. Department of Treasury*, 485 U.S. 803 (1985) (resolving question of intergovernmental tax immunity).

219. See, e.g., *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *McKnett v. St. Louis & S. Ry.*, 292 U.S. 230 (1934).

220. See, e.g., *North Dakota v. United States*, 495 U.S. 423, 433 (1990); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). See also *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985). This formulation typifies the imprecision integral to preemption doctrine. For example, preemption under a federal common law rule cannot be said to conflict with “an affirmative command of Congress.” See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Implied preemption also fails to satisfy the precept.

221. 382 U.S. 111, 120 (1965).

222. *Id.*

223. *Id.*

224. To be sure, this holding was limited to determining the propriety of convening a three-judge district court, see *id.*, but I believe the insight can be plucked from the case to inspire a different Supremacy Clause jurisprudence.

225. This is not to say that the constitutional text is irrelevant to preemption determinations. Rather, I argue that greater attention to the textual limitations embedded in the Supremacy Clause is warranted in constructing the preemption decisional matrix, see *infra* text accompanying notes 273-79, and will ultimately enhance the space available for participatory political activities.

226. The major burden on the Court—the direct appeal—was concomitantly reduced. The

occasioned the *Swift & Co.* opinion, seems to have led the Court also to believe that its insight about the nature of preemption claims was no longer functional. This, we will see, proved to be a wrong turn.

The divergent conceptions and treatments of the various "Supremacy Clause claims" remain apparent in some of the Court's opinions, and have led to rather conflicting statements from the Court. For instance, in a recent preemption case, the Court stated that, "It is . . . axiomatic that 'for the purposes of the Supremacy Clause, the *constitutionality* of local ordinances is analyzed in the same way as that of statewide laws.'"²²⁷ Yet in a jurisdictional ruling in a different preemption case, the Court observed that "appellant never challenged the [federal] constitutionality of the [state law]; rather it merely argued that the [state's action] would violate the Supremacy Clause."²²⁸ Thus, while the Court uniformly characterizes preemption claims as grounded in the Supremacy Clause—assertedly a constitutional provision—and denominates them "Supremacy Clause claims,"²²⁹ sometimes these claims are considered "constitutional" in nature and other times not.²³⁰

multifarious burdens the former three-judge district court provision placed on the Court were conclusively exposed in a seminal article by Professor David Currie. See David Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

227. Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2482 (1991) (deciding that a local regulation requiring a permit for the use of certain pesticides was not preempted by FIFRA) (quoting Hillsborough v. Automated Medical Labs., Inc., 471 U.S. 707, 713 (1985)).

228. Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354, 369 n.10 (1988). The Court ruled that the case "was not the type of express challenge to the constitutionality of the state statute required for this Court's exercise of jurisdiction under § 1257(2)." *Id.* Thus understood, the Court dismissed the appeal and granted *certiorari* instead. *Id.*

229. The Court does not always explicitly invoke the Supremacy Clause in its preemption cases. See Hoke, *supra* note 19, at 726-30. When it does, however, it types preemption as arising under the Supremacy Clause.

230. Some readers might contend that the distinction between the two quotes accompanying notes 227 and 228 evidences a view that preemption claims are properly classified as constitutional when the complaint mounts a direct challenge to the state law, but are not when, as in *Mississippi Power*, only a state's action pursuant to state authority is contested. This differentiation may assist in curtailing the Court's appellate jurisdiction but is a hypertechnical and not particularly well grounded distinction on which to construct a theory of the Supremacy Clause's mode of operation. Accord Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209 n.11 (1959).

Hypothesizing from the *Mississippi Power* comments, if a state's action is not ultra vires, and is specifically directed by a state statute or regulation, it would seem that two options remain for classifying the question. First, the Court's distinction could be employed and (so long as the pleadings did not attack the portion of the state statute that directed the action) the issue could be considered a mere challenge to the state's action and not a direct challenge to its law. On the other hand, the pleadings could instead attack the state statute or regulation itself for directing that a state regulatory agency should engage in, for example, prudence reviews for utility company plans for construction of nuclear power plants, and request that the statute's purported inclu-

To add to the complexities here, *McCulloch*-based claims²³¹ under the Supremacy Clause are generally styled as constitutional challenges.²³²

A third piece of the doctrinal puzzle adds yet another layer of complexity into this analysis of the "substantive" character of the Clause. The earlier textual and historical analyses of the Clause,²³³ along with the evaluation of its practical operation, lead to the apparent conclusion that the Clause functions as a rule of decision for courts deciding federal, or federalized,²³⁴ questions in both state and federal courts. When, for example, the Constitutional Convention rejected the proposed congressional veto and instead lodged responsibility for ensuring state fidelity to federal law with the courts, the implicit consequence was that the courts would use federal law as the rule of decision where it applied.²³⁵ The alternative, quite simply, would have been to convert the Constitution and federal statutory law into a nullity as law, into mere precatory instructions. While I do not want to belabor an obvious point, federal law cannot be supreme except by its conversion into substantive rules of decision.

Is it possible to sort out in some coherent fashion these divergent doctrinal conceptions of the Supremacy Clause? The issue is not one merely of the logic of the Clause in isolation, but of its larger functional and structural fit within the balance of the Constitution as well. Some might argue that it is possible to understand the Clause as functioning both as a rule of decision and as the source of substantive claims or fundamental values. Indeed, the Clause has operated in both ways for almost 200 years. I believe, however, that this view is both

sion of FERC-regulated utilities be struck as a violation of the Supremacy Clause. A characterization of the claim in this latter fashion would have greater and clearer prospective effects should the proponents of federal preemption win their cause, and thus would be a better litigation strategy. But the mere distinction in pleading should not act to change our ultimate characterization of the claim. Transported beyond the jurisdictional realm, the purported distinction is as murky and unattainable as the long-sought definitive demarcation of "substance" and "procedure" for *Erie* questions. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Elec. Cooperative, Inc.*, 356 U.S. 525 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

Interestingly, the Court has not employed the "action" versus "law" distinction when the validity of federal "actions" (e.g., rulings by administrative agencies) is disputed. One might argue that the distinction appropriately leads to a more narrow view of what constitutes "laws of the United States." See *supra* text accompanying notes 91-99.

231. See *supra* text accompanying notes 111-13.

232. See *supra* text accompanying notes 111-19.

233. See *supra* text accompanying notes 127-213.

234. See Weinberg, *Federal Common Law*, *supra* note 98, at 805, 836.

235. And whether federal law applies itself constitutes a federal question. See *Howlett v. Rose*, 110 S. Ct. 2430 (1990).

internally inconsistent and mistaken. The fundamental role the Supremacy Clause plays in the larger constitutional plan is procedural, not substantive. In the remainder of this Article, I develop and argue for this more restrictive, process-based approach to the Clause.

A. *A Rule of Decision, Not a Source of Substantive Rights or Claims*

The Supremacy Clause may be said to have two distinct aspects. The first delineates those categories of law that are entitled to supremacy status.²³⁶ While this portion does not articulate specific legal content, it does refer to and incorporate by reference all valid federal law denoted by “[t]his Constitution and the Laws of the United States.”²³⁷ The second aspect explicitly instructs judges to apply the supreme law as the operative rules of decision, and to set aside any contrary state law. It thus incorporates by reference the former delineation of the supreme law.²³⁸ Thus parsed, the purpose of the Clause is revealed to be precisely a rule of decision for federal and federalized questions.

But where does this limitation bring us? Am I simply advocating that the Clause be reduced to nothing more than another ultimately meaningless constitutional truism?²³⁹ Quite the contrary. My conception of the Clause is that it functions exclusively as a type of switch: as to federal and federalized claims, the switch unquestionably operates to require application of federal law, whether the claims are adjudicated

236. “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” U.S. CONST. art. VI, cl. 2.

237. Excepting, of course, any federal law that is inconsistent with the Constitution. *See id.* (“Laws of the United States which shall be made in pursuance thereof”). For stylistic ease, I omitted this condition from the first analytic step. As a practical matter, few federal statutes have been held unconstitutional. Some notable recent exceptions are: *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding Balanced Budget and Emergency Deficit Control Act of 1985 unconstitutional for violating separation-of-powers principles); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), *judgment stayed*, 459 U.S. 813 (1982) (holding jurisdictional grant to bankruptcy judges unconstitutional as inconsistent with Article III requirements).

238. “[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.” U.S. CONST. art. VI, cl. 2.

239. The Tenth Amendment was reduced to a truism in *United States v. Darby*, 312 U.S. 100, 124 (1941); *see also* Weinberg, *Federal Common Law*, *supra* note 98, at 815 n.55; Martha Field, Garcia v. SAMTA: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). Other scholars have reduced the Supremacy Clause to an equivalent status. *See, e.g.*, GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 196-205 (1989).

in state or federal court.²⁴⁰ Analogously, pursuant to the federal Rules of Decision Act,²⁴¹ state statutory or common law governs an unfederalized claim regardless of whether the action is adjudicated in federal or state court.²⁴² Of special import are those cases where the decisional rule necessitated by a federal legislative act and that of a state both seek to govern a given factual set of circumstances. If, according to whatever criteria are authorized,²⁴³ the two are held in conflict, the switch—the Supremacy Clause—requires that the federal rule of decision govern the question.

The benefits of this simplified conception of the Clause's impact on state law are in part aesthetic—an attempt to bring clarity, order, and coherence to a confused area of doctrine. Restricted to use as a switch only, the Clause operates to enforce all federal constitutional and statutory law according to whatever interpretive precepts and precedents have been determined appropriate for those questions. More importantly, it thereby enforces the Constitution's "multiplicity of various sorts of values, many in tension with each other: process values as well as substantive values, structural and institutional values as well as those embodying individual rights."²⁴⁴ In applying the Supremacy Clause, the entire Constitution and all constitutionally valid federal law are entitled to the same dignity.²⁴⁵ The Clause does not function as a source for generating additional qualifications for determining what is the law of the United States,²⁴⁶ nor does it superimpose a separate set of criteria for determining the internal relations among the competing

240. See *Howlett v. Rose*, 110 S. Ct. 2430, 2436 (1990). This principle includes the Rules of Decision Act, 28 U.S.C. § 1652 (1988), which at times requires application of a state rule. The operation of the Act remains disputed, especially in relation to federal common law. See, for example, the extended debate between Professors Martin Redish and Louise Weinberg. See articles cited *supra* note 98.

241. 28 U.S.C. § 1652 (1988).

242. This decisional governance is, of course, not monolithic; some cases present an admixture of state and federal law. For instance, a substantive federal right to free expression can be joined with a state statutory theory of recovery. See, e.g., *Abramowitz v. Trustees of Boston Univ.*, No. 86-0201-CV (Mass. App. Ct. May 9, 1986).

243. See *infra* text accompanying notes 285-88. One might ask whether the courts are under any general duty to harmonize the two systems' statutes, or to seek "direct and positive conflict" or look for a "clear statement" as to Congress' intent to preempt.

244. Bator, *supra* note 9, at 633.

245. Of course, in order to function as a rule of decision, the Clause requires that the federal law be consistent with the Constitution.

246. The substantive and procedural provisions of the Constitution, and statutory and decisional law, provide the sources for determining this question.

values and principles of the Constitution.²⁴⁷ Rather, excepting only preemption,²⁴⁸ the Clause looks to the balance of the Constitution and federal law to supply, integral to themselves, the rules of decision for federal and federalized questions.

Under this conception, the Supremacy Clause does not provide the basis for any substantive constitutional claims. The Court has virtually granted this, most recently in *Golden State Transit Corp. v. City of Los Angeles (Golden State Transit II)*, where it held that the Supremacy Clause, of its own force, does not create rights enforceable under § 1983.²⁴⁹ It held that the Supremacy Clause is not a source of any federal rights, but secures federal rights by according them priority whenever they come into conflict with state law.²⁵⁰ As support for its ruling, the Court cited *Chapman v. Houston Welfare Rights Organization*,²⁵¹ where it held that the jurisdictional statute's reference to constitutional claims "did not include *rights secured solely by the*

247. For example, the supposed Supremacy Clause principle that state law may not attempt to regulate the national government supersedes congressional silence as to the import of state law on the federal agency or instrumentality. This "constitutional" principle renders inoperable the Rules of Decision Act, although it otherwise would be applicable. It can result in regulatory vacuums because the state law is displaced and the federal law is silent on the question. See Susan Foote, *Regulatory Vacuums: Federalism, Deregulation, and Judicial Review*, 19 UC DAVIS L REV 113 (1985).

248. Under my approach, federal preemption of state law becomes simply a matter of which substantive rule—state or federal—will be used to govern a given question. The Supremacy Clause requires the predicate ruling that the state rule is "to the Contrary" of the federal in order to displace state law and apply the federal rule. I argue that the criteria employed to determine whether state law must be preempted are properly generated in part from the Supremacy Clause, see *infra* text accompanying notes 270-86. This does not mean, however, that the claims should be characterized as Supremacy Clause claims. See *infra* text accompanying notes 276-86.

249. 493 U.S. 103, 107 n.4 (1989). See also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979); *Swift & Co. v. Wickham*, 382 U.S. 124, 126-27 (1965). *Chapman* interpreted 28 U.S.C. § 1343(a)(3), the jurisdictional counterpart to § 1983, which provides jurisdiction over civil actions "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 493 U.S. at 107 n.4. In *Golden State Transit II*, the Court observed "that if the first prepositional phrase, referring to constitutional claims, included rights secured solely by the Supremacy Clause, the additional language, providing for claims based on Acts of Congress providing for equal rights of citizens would have been superfluous." *Id.* (citing *Chapman*, 441 U.S. at 615). The Court concluded that "[t]he same is true with respect to § 1983. If the Supremacy Clause itself were understood to secure constitutional rights, the reference to 'and laws' would have been wholly unnecessary. It follows that a Supremacy Clause claim based on a statutory violation is enforceable under § 1983 only when the statute creates 'rights, privileges, or immunities' in a particular plaintiff." *Id.*

250. See *Golden State Transit II*, 493 U.S. at 107.

251. 441 U.S. 600 (1979).

Supremacy Clause.²⁵² Unfortunately, however, the Court did not discern the utter inconsistency between the *Chapman* and *Golden State Transit II* approaches. The Court must recognize that the Supremacy Clause simultaneously secures *all* federal rights and creates *no* substantive federal right—none, that is, as an original matter. Rather, the Clause constitutes the means by which all federal rights become enforceable law and assume priority over any contrary state law.

To actualize *Golden State Transit II*'s insight into the purpose and function of the Clause, each of the *McCulloch*-inspired claims must be recharacterized as springing from some substantive aspect of the Constitution, if they arise at all.²⁵³ The Court has already, albeit erratically, led the way with one theory—the intergovernmental tax immunity doctrine. While *McCulloch* positioned the doctrine squarely on the shoulders of the Supremacy Clause, the Court has completely reconceptualized the claim. In *Cotton Petroleum Corp. v. New Mexico*,²⁵⁴ the Court recounted its theoretical shift that occurred in cases spanning the latter New Deal period to the present, noting that the *McCulloch*-based doctrine “has now been ‘thoroughly repudiated.’”²⁵⁵ The Court specifically noted that “[w]hether such immunity shall be granted is thus a question that ‘is essentially legislative in character.’”²⁵⁶ Thus intergovernmental tax immunity has become a question of statutory preemption rather than a “constitutional” claim. Challenges to allegedly burdensome state taxation may still be challenged under the Interstate and Indian Commerce Clauses²⁵⁷ but not under the Supremacy Clause itself. While the Court has still not detached claims of discriminatory taxation from the Supremacy Clause,²⁵⁸ *Cotton Petroleum* traces the type of theoretical shift I advocate for each of the intergovernmental immunity claims.²⁵⁹ By withdrawing Supremacy Clause

252. *Golden State Transit II*, 493 U.S. at 107 n.4 (emphasis added) (citing *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 615 (1979)). The particular jurisdictional statute at issue in *Chapman* is quoted *supra* note 250.

253. I am assuming, *arguendo*, that the *McCulloch*-based “Supremacy Clause claims” warrant continued recognition, though I contend they must be recast in terms of the substantive provisions of the Constitution.

254. 490 U.S. 163 (1989).

255. *Id.* at 174 (quoting *South Carolina v. Baker*, 485 U.S. 505, 520 (1988)).

256. *Id.* at 175. (emphasis added) (quoting *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 365-66 (1949)).

257. *See id.* at 176, 187-88, 191-92.

258. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989).

259. Indeed, we might view *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), as another example, for the question for decision is analyzed in light of the substantive

grounding, the claims must be justified under the substantive provisions of the Constitution, including structural principles and values. The current theory's implicit pressure to look first to the national government's interest—as though it were coextensive with and representative of the people's interests²⁶⁰—would be stymied. New constitutional avenues would be opened for rethinking the proper interrelation and boundaries of the national and state governments.²⁶¹

That the Supremacy Clause functions as a rule of decision rather than as the source of substantive claims may not, at first blush, seem the most exciting of insights.²⁶² But what is at stake is precisely the balance of the Constitution as it speaks to federalism. If, like Chief Justice Marshall in *McCulloch*, we take the Supremacy Clause as conclusive evidence of the Constitution's determined nationalism, a grudging view of state regulatory power will ensue.²⁶³ Further, if the Clause is permitted to function as the textual basis of a superintending value and objective of national preeminence, the interpretation of every other federal constitutional power vis-à-vis the states will be vulnerable to infection and distortion. Only if we reassess this nationalistic preference currently fastened to the Supremacy Clause can we both return the Clause to the function that is discernible from the text and struc-

provisions of the Constitution, rather than conceiving of the case as presenting a "Supremacy Clause claim."

260. See Richard Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990). But see Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1986) (defending virtual representation at the national level).

261. One of the avenues open for discussion is whether the claims should actually continue to be conceived of as having constitutional dimensions, or whether, instead, other lower-level means can vindicate the interests at stake. For instance, as to whether a state's worker-safety regulations apply to a government defense contractor, if Congress has not spoken to the question would it not suffice to presume—as a statutory matter—a congressional intent that federal entities operate immune to state law? A rebuttable presumption, or a canon of construction incorporating the established principle, would achieve the same end. Where Congress has spoken, construction of the statutory text and congressional intent becomes the judicial task. Here, too, the Court could fashion a rule of construction that doubts are to be resolved in favor of federal immunity. I am not suggesting that I agree that we must continue to recognize intergovernmental immunities. After all, they do operate as *federal* governmental immunities, rather than mutual *intergovernmental* immunities. See *Garcia*, 469 U.S. at 553-54.

262. See BLACK, *supra* note 66, at 45 ("Nothing, it may be, is drier than the discussion of alternative grounds for holdings already reached.").

263. States have been pioneering many of the most promising regulatory efforts in the nation during the past 12 years, encompassing, for example, civil rights, health insurance, consumer protection, and environmental issues. See, e.g., Robb London, *Gay Groups Turn to State Courts to Win Rights*, N.Y. TIMES, Dec. 21, 1990, at B6; M.H. Freudenheim, *States Try to Cut Cost of Insurance for Medical Care*, N.Y. TIMES, Dec. 9, 1990, at A1; *TransWorld Airlines v. Mattox*, 897 F.2d 773 (5th Cir. 1990) (detailing state efforts to arrest deceptive airline fare advertising).

ture—that of a switch—and take the supremacist thumb off the scales when weighing state versus national power.

B. *Legal Principles Inferred*

While the Supremacy Clause is not properly the source of any “claims” or of constitutional values,²⁶⁴ it gives rise to an array of legal principles. It is not my purpose to justify these principles, some of which continue to inspire controversy, but rather to demonstrate that the Supremacy Clause is not rendered sterile or nugatory under the theory I have advanced.

My theory contemplates that when the federal and state regulatory regimes are headed toward imminent collision, the Clause functions as a switch to permit the federal regime to proceed and to arrest the state regulatory rule, thereby avoiding the collision. The switching function is essential in any nation with a federal, as opposed to centralized, system of government.²⁶⁵ Yet the Clause’s legal import is not exhausted as a switch. The absence of substantive claims flowing from the Clause does not mean that it cannot provide a source of legal principles that apply once claims are properly predicated upon other substantive legal provisions. From the Clause itself, we can extract the principle that state courts are vested with the responsibility for determining state law compliance with the federal Constitution and with otherwise valid federal law.²⁶⁶ We can also discern authority for state court review of the constitutionality of federal statutory and regulatory law; the Clause directs that to be valid, the federal rules of decision must be “in pursuance” of the Constitution.²⁶⁷

264. As I have stated earlier, the Clause incorporates by reference and enforces the values contained in the balance of the Constitution, but it does not supply any additional or independent values. Otherwise, the nationalism said to be represented in the Supremacy Clause would demean vertical separation-of-powers principles, generally known as structural federalism, and the objectives federalism seeks to achieve. See *supra* text accompanying note 16.

265. Consider, by contrast, France, whose government structure abjures federalism in favor of a highly centralized hierarchy. See DANIEL J. ELAZAR, *THE ENDS OF FEDERALISM: NOTES TOWARD A THEORY OF FEDERAL POLITICAL ARRANGEMENTS* 6, 13 (1976).

266. “[T]he Judges in every State shall be bound [by the Constitution and constitutionally valid federal law], any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art VI, cl. 2.

267. For additional legal principles that flow from the Supremacy Clause’s recognition of federal law as constituting the “Law of the Land,” and thus, part of the law of a state, see *Howlett v. Rose*, 110 S. Ct. 2430 (1990). There the court specifically recognized “three corollaries” to this principle. First, a state court may not deny a federal right, when the parties and the controversy are properly before it, in the absence of a “valid excuse.” *Id.* at 2439. Second, an excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state

When read in tandem with other constitutional provisions, additional legal principles can be inferred, including some that are central to the functioning of the national government. When joined with Article III, for instance, the Supremacy Clause can lead to the postulates that state courts possess concurrent jurisdiction over federal claims,²⁶⁸ and that the Supreme Court properly may exercise appellate review of state decisions on the federal constitutionality of state law. These principles are all regulative of federal power, and thus are process-based rather than supportive of claims for relief; they come into play only after some other nonfrivolous substantive claim has been pleaded to gain entrance to judicial process.²⁶⁹

C. *Preemption Is Not a Claim that Arises Under the Supremacy Clause*

Even if other “Supremacy Clause claims” are properly recast as arising under substantive provisions of the Constitution, it may seem that the claim of federal preemption of state law must remain tethered to the Supremacy Clause. After all, the Clause is the only explicit constitutional source of direction to judges to set aside any contrary state law and apply federal law instead. As I will explain below, I agree that preemption claims ultimately must retain a linkage to the Supremacy Clause.²⁷⁰ But the argument that this linkage transforms preemption claims into “Supremacy Clause claims” proves too much. The Supremacy Clause is also at work in the background whenever any substantive federal constitutional challenge is lodged against a state law or action. Where a state has engaged in a warrantless seizure inside a residence, we would not conceive of a Fourth Amendment challenge, either to the conduct itself or to a state law authorizing such

courts to dissociate themselves from federal law because they disagree with its content or because of a refusal to recognize the superiority of its source. *Id.* at 2440. Third, when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts, the Supreme Court will act with utmost caution before deciding that it is obligated to entertain the claim. *Id.*

268. See, e.g., *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990); *Taffin v. Levitt*, 493 U.S. 455 (1990).

269. While I have outlined some of the precepts that have been derived from the interrelation of the Supremacy Clause and Article III, the Clause yields other legal principles via that interaction. For instance, when read with Article I, an oft-stated principle emerges, that “Congress has the power to preempt state law.” See, e.g., *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2481-82 (1991); *English v. General Elec. Co.*, 110 S. Ct. 2270, 2275 (1990); *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493, 509 (1989).

270. See *infra* text accompanying notes 277-83.

conduct, as a Supremacy Clause challenge. When we add the *Swift & Co. v. Wickham*²⁷¹ recognition that preemption cases do not require a court to construe and apply a substantive heading of the federal Constitution,²⁷² and thus in actuality cannot properly be considered constitutional cases, we are forced to concede the necessity for reconceptualizing preemption claims.

The reconceptualization I advance employs the *Swift & Co.* insight. The gravamen of a federal preemption question is an alleged conflict between a federal statutory²⁷³ or regulatory principle and a state law²⁷⁴ or action.²⁷⁵ Some nonconstitutional provision of federal law constitutes the initial focus of the effort to determine whether a state law provision is contrary to, or in conflict with, federal law;²⁷⁶ the proponent must identify the specific federal law alleged to be preemptive of a specific state law. Minimally, then, judicial construction of the two sovereigns' rules of law must be a part of the legal inquiry designed to determine whether a state law conflicts with the federal rules and must be displaced.

271. 382 U.S. 111 (1965).

272. *See id.* at 122-23.

273. A treaty that has been approved by two-thirds of the Senators present and ratified by the President must "be regarded in courts of justice as equivalent to an act of the legislature . . ." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). *But see* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 163 (1972) ("As an original matter, the equality as law of treaties and federal statutes seems hardly inevitable."). Treaties thus can be tentatively classified as occupying a status equivalent to statutes. The preemption complexities of treaties and various types of agreements flowing from the foreign affairs powers are beyond the scope of this Article.

274. The potential targets of a federal preemption challenge may be found in state constitutional, statutory, regulatory, or common law rules. *See Hoke, supra* note 19, at 691.

275. *See, e.g.,* *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) (invalidating as preempted a state attempt to undertake a "prudence review" of a utility's decision to build, and its conduct during construction of a nuclear power facility); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (invalidating state attempt to restructure utility rates in a manner that would impair FERC's allocation). For stylistic ease, I refer henceforth only to "state law" as a term inclusive of a state action or course of conduct not expressly directed by a state statute or regulation. Textually, of course, the Supremacy Clause authorizes only the displacement of a state's *law*, not action.

276. Even "occupation of the field" preemption is better conceptualized as a species of conflict between state law and governing federal law. When a federal act has expressly or impliedly ousted all state regulation from a particular subject, a state law that seeks to regulate those subjects conflicts with the federal law that demarcates the field. *See Hoke, supra* note 19, at 735-37. The Court's demarcation of "actual conflict," *see* *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912) (dictum)), as merely one particular type of preemption, rather than as the essential issue to be proved under any preemption category—including field preemption—constitutes one reason its decisional apparatus for resolving preemption questions simply cannot function.

A federal preemption claim, therefore, need not be conceived as arising under the Supremacy Clause. Rather, it arises under the specific federal law alleged to be preemptive of a state law. As such, it is not a "Supremacy Clause claim," but a claim under other federal law. This understanding is currently utilized, albeit unwittingly, under some of the complex statutory schemes that seem endlessly to breed preemption cases. Under ERISA,²⁷⁷ for instance, the Court does not intone that a "Supremacy Clause claim" is presented.²⁷⁸ Nor does it characterize as "Supremacy Clause claims" the ubiquitous cases that allege theories of labor preemption.²⁷⁹ While the Court tends to omit any mention of the Supremacy Clause where an express statutory or common law principle is alleged to preempt the challenged state law, no normative reason exists for not generalizing a statutory approach to all preemption cases.

It might seem that embedded in this theory is a recommendation that we jettison explicit references to the Supremacy Clause in preemption decisions, and understand the Clause to function merely as a background power enforcing federal law rather than as bearing any other influence over preemption doctrine and methodology. This would entail the abandonment of the Court's erratically applied preemption decisional methodology²⁸⁰ in favor of what might be conceived as pure statutory construction.²⁸¹ But without some larger principles to guide pre-

277. 29 U.S.C. §§ 1001-1461 (1988).

278. See, e.g., *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987); *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990). Nor does it employ the preemption categories and typology enunciated and applied in such ERISA preemption cases as *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). In *McClendon*, the Court did not mention the Clause even though it employed the traditional preemption categories.

279. These three theories are derived from the federal common law of labor relations and various federal statutory schemes, such as the Labor Management Relations Act, 28 U.S.C. § 185 (1988). See, e.g., *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (28 U.S.C. § 301 preemption); *Lodge 76, International Assoc. of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*Machinists* preemption); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (*Garmon* preemption).

280. See Hoke, *supra* note 19, 722-30 *passim* (criticizing this methodology). Others have commented upon the Court's erratic doctrinal approach to preemption. See, e.g., William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624 (1975) (Supreme Court preemption decisions "take on an ad hoc, unprincipled quality, seemingly bereft of any consistent doctrinal basis").

281. By this term I mean the process by which judges construe statutes outside the preemption context. Applied to preemption, a judge would construe each statute and scheme independently, and then compare their terms to discern any differences. Justice Frankfurter delineated part of the preemption analytic project according to these norms. See *Kesler v. Department of Pub. Safety*, 369 U.S. 153 (1962), *overruled by Swift & Co. v. Wickham*, 382 U.S. 111 (1965) (ruling *Kes-*

emption decision making, courts would likely interpret any differences between the state and federal statutes as constituting forbidden "conflict," thus necessitating the displacement of state law.²⁸² Though the relative ease of application may have appeal, the centralizing, nationalistic prospects of this methodology should be deeply troubling.²⁸³

A straightforward statutory construction approach should not be embraced as the panacea to the present chaos. It is not the required implication of the earlier analysis that drew upon *Swift & Co.* and rejected preemption as a mode of authentically constitutional decision making.²⁸⁴ Only a hybrid approach, one recognizing that federal preemption claims possess both constitutional and statutory dimensions,²⁸⁵ will accurately capture the quality of the preemption inquiry. Under this understanding, the limitations expressed in the Supremacy Clause's text governing displacement of state law—chiefly, that the state's law must be "contrary" to federal law—should be recognized as a principal interpretive focus for generating the criteria and standards

ler's purported distinction between constitutional and statutory modes of preemption analysis was ephemeral and ultimately unworkable).

282. See, e.g., *Massachusetts v. Morash*, 490 U.S. 107 (1989); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986). But see *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (holding as not preempted for conflicting with federal law a state statute that accorded more favorable treatment to employees who utilized pregnancy leave than Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act).

283. The approach admits objections both because of its nationalistic potential and claimed ease of application. On the former, note that continued centralization of regulatory power will act to eliminate the remaining vestiges of the states as law-making sources, and concomitantly undermine opportunities for meaningful democratic self-government. As for ease of application, the monolithic approach to preemption conflict is too superficial. It fails to recognize that questions of conflict between state and federal law may arise in at least four ways. The first situation occurs when federal and state schemes have basically identical (or basically opposed) purposes and provisions. For example, a state law mandating racially segregated public schools versus Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1964). Second, the federal and state schemes have similar purposes but different provisions to address these purposes, as in the state acts providing standards for the education of disabled children, which parallel the federal Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1990). Third, the state and federal schemes have divergent, but not opposed, purposes. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Fourth, the federal and state schemes are concerned with completely different purposes and generally have no interrelation except for intersection at some specific point or points. See, e.g., *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (intersection of state community property and federal military pay laws). Only in the first is assessment of "conflict" relatively unambiguous.

284. See *supra* text accompanying notes 271-72.

285. Preemption has a constitutional *dimension* only because of the Supremacy Clause's relevance to the *process* of a preemption inquiry. A preemption challenge does not constitute a constitutional "claim," for it does not require construction and application of a constitutional provision, but rather concerns federal legislation. See *supra* text accompanying notes 221-26.

under which state law will be displaced. Judicial disregard of the limitation ultimately promotes a unitary governmental and legal system rather than a federal system, and retards the attainment of federalist objectives.²⁸⁶ In place of the superficial incantation that preemption decisions are “Supremacy Clause cases,” respect for the text, context—including structural federalism principles—and purpose of the Clause should drive the decisional apparatus governing preemption decisions.

Under my theory, then, preemption analysis should be understood to have two parts. First, a preemption claim should be conceptualized as a type of statutory claim that arises not under the Supremacy Clause but under the particular federal act urged to be preemptive. The conclusion as to whether a given state law is preempted depends on a substantive evaluation of its “conflict” with the federal law.²⁸⁷ Second, determination of what counts as a “conflict” is something that cannot be resolved merely through ordinary statutory construction. Here the inquiry must remain ultimately tethered to the Supremacy Clause. Only a lens based on our understanding of the text, context, and purpose of the Clause, and a pragmatic understanding of what is at stake politically, allows us to define what counts as a conflict between state and federal law.²⁸⁸

The lenses I advance for determining whether a state law provision

286. See *supra* note 16.

287. The conclusion that the state law is or is not preempted should therefore be expressed in statutory rather than Supremacy Clause terms. In other words, a court should not hold “The Supremacy Clause preempts . . . ,” but rather that “[t]he federal Arbitration Act preempts the Virginia consumer protection/fair notice statute from application to” *E.g.*, *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 727 (4th Cir. 1990) (“the Virginia . . . Act is preempted by the Federal Arbitration Act”); *Associated Industries of Mass. v. Snow*, 898 F.2d 274, 283-84 (1st Cir. 1990) (Bownes, J.) (“[T]he Massachusetts [regulatory scheme is] not preempted by the OSH Act and the OSH Standards.”).

288. Under the Supremacy Clause, then, federal law may displace state law only when the latter is in conflict with, or “to the Contrary” of, federal law. U.S. CONST. art. VI, cl. 2. Absent conflict with governing federal law, the state law is empowered to operate and be enforced as valid law because it issues from a governmental sovereign. I have elsewhere attempted to draw out the implications of this principle for preemption analysis. Contrary to the Supreme Court’s current jurisprudence in the area, I argue that all types of preemption claims should be reconceptualized as species of conflict. I divide the analytic preemption typology into three groups: impossibility of dual compliance, incursion into an exclusively federal field, and significant impairment of explicit federal objectives. See *Hoke*, *supra* note 19, at 735-37. In contrast, the Court currently conceives of conflict as only one of the possible types of reasons for displacing state law, including in its general inventory the following types of preemption: express vs. implied, occupation of the field vs. actual conflict, physical impossibility, etc. See, *e.g.*, *Northwest Cent. Pipeline Corp. v. State Corp. Comm’n*, 489 U.S. 493 (1989).

must be displaced do not include Chief Justice Marshall's gloss that mere interference with federal law sufficiently warrants preemption. Identification of some interference with federal law only alerts us that a preemption question has been raised; it does not and cannot suffice as an analytic inquiry. Rather, in the absence of congressional purpose to create at the national level a uniform regulatory scheme, whose boundaries should be interpreted to effectuate the express regulatory goals, the courts should be directed to channel their interpretive energies toward harmonizing the law of the two sovereigns into a functional scheme. Only if the allegedly conflicting law cannot be blended into the "single system of law" of which Henry Hart spoke²⁸⁹ should a court displace state law. And in that latter step, it must identify precisely what state law cannot be harmonized, seeking at all times to preserve maximum state regulatory authority unless Congress has specifically directed courts to develop and to protect an exclusively federal scheme. This approach has embedded in its structure a healthy respect for the creative judicial function and maintains fidelity to the constitutional values underlying federal allocation of power.

IV. CONCLUSION

For most of this nation's history, legal scholars and judges have accepted the Supremacy Clause as having both determinate meaning and axiomatic constitutional import. During the recent past, efforts to lift the curtain sheltering the national goliath placed one in the camp of white supremacists who clung to the coded demand of "States' rights!" Rightly, as between federal supremacy and white supremacy, no serious question could be entertained. The importance of the issue, however, inhibited scrutiny of the legal norms by which national preeminence was asserted.

We may now be at a point in our nation's history where the importance of issues of federalism may again be raised. Even in the area of civil rights, it is no longer apparent that federal law will afford individuals more protection than the laws of their states. More generally, the nation and its political structure of power have undergone radical transformation in the past thirty years. The sheer remoteness of the national government to any substantive reality of self-government would seem to require that we reassess the manner of determining and enforcing national legal supremacy. Yet, endorsement of this republi-

289. Hart, *supra* note 7, at 489.

can political critique is not an essential predicate for legitimating a renewed inquiry into the Court's Supremacy Clause jurisprudence. Its principles, encrusted with notions and precepts of supremacy drawn from the nation's infancy, are inappropriate to revitalizing the federalism at the base of the Constitution. Moreover, the principles and claims appended to the Clause have not been reevaluated in light of the Clause's primary function as a rule of decision. As presently conceived, they are not faithful to the limitations imposed by the Constitutional Convention that sought to preserve federal sharing of power. It is time to unleash ourselves from the axiomatic premise that the Supremacy Clause's meaning is self-evident and nonproblematic, and to revise its interpretation to achieve both intellectual coherence and a self-governing polity.

