



5-1-2008

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## Recommended Citation

Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 Notre Dame L. Rev. 1681 (2008).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol83/iss4/9>

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# THE PROCEDURAL SAFEGUARDS OF FEDERALISM

*Bradford R. Clark\**

## INTRODUCTION

In the article giving rise to this Symposium, I argued that the Supremacy Clause safeguards federalism by conditioning supremacy on adherence to precise lawmaking procedures prescribed elsewhere in the Constitution.<sup>1</sup> These procedures were designed to preserve the governance prerogatives of the states both by making federal law relatively difficult to adopt and by assigning lawmaking solely to actors subject to the political safeguards of federalism.<sup>2</sup> The Supremacy Clause recognizes only three sources of law as “the supreme Law of the Land”—the “Constitution,” “Laws,” and “Treaties” of the United States.<sup>3</sup> Not coincidentally, the Constitution prescribes precise procedures to govern the adoption of each of these sources of law, and all of these procedures specifically require the participation of the Senate or the states.<sup>4</sup> These procedural safeguards of federalism were central to the crucial compromise reached between the small and large states at the Convention concerning the structure of the new Constitution.

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

2 The “political safeguards of federalism” refer to the role of the states “in the composition and selection of the central government.” Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543–44 (1954).

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

4 See, e.g., *id.* art. I, § 7, cl. 2; *id.* art. II, § 2, cl. 2; *id.* art. V; *id.* art. VII.

The smaller states demanded and received equal suffrage in the Senate in exchange for their support of the Constitution.<sup>5</sup> Equal suffrage—in conjunction with the Supremacy Clause and federal lawmaking procedures—gave smaller states (acting through the Senate) disproportionate and perpetual power to block all forms of “the supreme Law of the Land” or to exact compromise as the price of agreement.<sup>6</sup>

This Essay primarily responds to several important questions raised by Peter Strauss and Carlos Vázquez. First, it addresses Professor Strauss’ suggestion that the phrase “Laws of the United States,” as used in the Supremacy Clause, should be interpreted to refer to federal common law. This Essay next responds to suggestions that upholding the procedural safeguards of federalism is no longer possible in light of developments since the Founding. Specifically, both Professors Strauss and Vázquez point to the rise of the administrative state as evidence that the procedural safeguards are now more or less obsolete. The Supreme Court’s failure to enforce the nondelegation doctrine supports this hypothesis. In such cases, the Court believes that it lacks institutional competence to distinguish between permissible and impermissible delegations. Even if such institutional concerns prevent the judiciary from enforcing the procedural safeguards in all respects, however, it does not follow that the safeguards should be abandoned entirely. To the contrary, in many areas, courts properly continue to limit or eschew federal lawmaking outside the Supremacy Clause. Permitting the federal government to circumvent the procedural safeguards of federalism freely would fundamentally alter the character of the Constitution and would be unfaithful to the crucial founding-era compromises built into the document.

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5 See Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1425–31 (2008).

6 I agree with Carlos Vázquez that, strictly speaking, federal lawmaking procedures safeguard the status quo by constraining both adoption and repeal of federal law. See Clark, *supra* note 1, at 1340 n.90; Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 NOTRE DAME L. REV. 1601, 1604–08 (2008). The important point, however, is that the small states’ insistence on equal suffrage in the Senate, and the Senate’s inclusion in all procedures governing the adoption of “the supreme Law of the Land,” give small states a disproportionate say in any proposed change in existing law. See Clark, *supra* note 1, at 1371 (“As the founders recognized, [the Constitution] guarantees small states—acting through their Senators—disproportionate and perpetual power to block proposed provisions of the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States.”).

## I. FEDERAL LAWMAKING AND THE SUPREMACY CLAUSE

In his characteristically thoughtful and insightful contribution to this Symposium, Professor Strauss challenges my reading of the Supremacy Clause and the central idea that the compromises built into the constitutional structure should inform the way we interpret and apply the Constitution today. For Professor Strauss, the compromise that gave rise to the constitutional structure is an interesting historical artifact, but not something that today's judges should follow rigorously when deciding cases.<sup>7</sup> The reason is that the underlying structural compromise is static and, in his view, courts should interpret the Constitution dynamically in a common law fashion.<sup>8</sup> For this reason, he suggests that courts should discount the negative implication of the Supremacy Clause and the absolute veto that it gives the Senate (and the states) over the adoption of all forms of "the supreme Law of the Land."<sup>9</sup> Upholding the compromise underlying the Clause, he believes, would be too constraining and undermine important aspects of modern government.<sup>10</sup> As I will suggest, however, respecting the constitutional structure need not be treated as an all-or-nothing proposition. Rather, in many areas, courts continue to limit judicial discretion in order to uphold the procedural safeguards of federalism. And properly so. Courts could not disregard the compromises written into the Constitution without also undermining the legitimacy of judicial review itself.

### A. "*The Laws of the United States*"

Before turning to Professor Strauss' case for structural dynamism, I briefly address his understanding of the original meaning of the Supremacy Clause compromise. He argues that the Supremacy Clause's use of the phrase, "the Laws of the United States," does not refer solely to "Laws" adopted in accordance with the procedures set forth in Article I, Section 7.<sup>11</sup> He acknowledges that all initial drafts of the Clause were clearly so limited, but points out that the text was

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7 See Peter L. Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. 1567, 1568 (2008) ("[I]n my judgment, we cannot afford to have contemporary constitutional understandings of [the constitutional] text governed by the particular theoretical understandings that may have animated the choice of those words.").

8 See *id.* at 1574–79.

9 See *id.* at 1588–92.

10 See, e.g., *id.* at 1590–91 (calling rulemaking by federal agencies "the predominant source of federal law today").

11 See *id.* at 1568–73.

changed during the Convention to its current form.<sup>12</sup> As originally proposed, the Clause referred to “the legislative acts of the United States made by virtue and in pursuance of the articles of Union.”<sup>13</sup> The Committee of Detail rephrased this as “[t]he Acts of the Legislature of the United States made in pursuance of this Constitution.”<sup>14</sup> Late in the Convention, John Rutledge of South Carolina, who chaired the Committee of Detail, proposed rephrasing the Clause to add “[t]his Constitution” to the list of “supreme Law,” and to change “[t]he Acts of the Legislature of the United States made in Pursuance of this Constitution” to “the laws of the U.S. made in pursuance thereof.”<sup>15</sup> The Convention unanimously approved this proposal without discussion or debate.<sup>16</sup>

Professor Strauss suggests that this change in language was more than stylistic. In his view, “[t]his ‘Laws’ might refer to *anything* with the status of law,” including “common law precedent or administrative regulations.”<sup>17</sup> In support, he observes that “when the Supremacy Clause later refers in the very same sentence to the ‘Laws of any State,’ this second use of ‘Laws’ embraces *state* common law.”<sup>18</sup> The implication is that if the phrase, “Laws of any State,” refers to *state* common law, then the phrase, “Laws of the United States,” must refer to *federal* common law. As he puts it: “As a matter of text-reading, it is hard to give differing meanings to the same word, endowed with the same number and the same capitalization in the same sentence of a single paragraph.”<sup>19</sup> Although Professor Strauss makes a nice textual argument about the potential meaning of the Clause, the historical context in which the words were used strongly suggests that those who drafted and ratified the Constitution would have understood “Laws of the United States” to refer solely to statutes adopted in accordance with Article I, Section 7’s requirement of bicameralism and presentment.

First, consider Professor Strauss’ suggestion that, as used in the Supremacy Clause, the phrase “Laws of any State” was meant to refer

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12 See *id.* at 1568.

13 Journal of the Constitutional Convention (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 22 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND’S RECORDS].

14 James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 13, at 177, 183.

15 James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), in 2 FARRAND’S RECORDS, *supra* note 13, at 384, 389.

16 *Id.* (reporting that the proposal “was agreed to, nem: contrad”).

17 Strauss, *supra* note 7, at 1568.

18 *Id.* (footnote omitted).

19 *Id.* at 1568–69 (footnote omitted).

to *state* common law.<sup>20</sup> The premise underlying this suggestion lacks strong historical support. As John Ferejohn and Larry Kramer have explained, in the modern era “we think of the common law as a power.”<sup>21</sup> “The eighteenth-century view was different. Then, the common law was seen as a distinct *field* of law . . . .”<sup>22</sup> It followed from the eighteenth-century understanding that “a political society could choose to ‘receive’ the common law’s body of principles for itself, but doing so required an express positive political act in its constitution or by way of legislation.”<sup>23</sup> Accordingly, the Supremacy Clause does not refer to the “Laws of any State” in isolation. Rather, the full reference is to “any Thing in the *Constitution or* Laws of any State to the Contrary notwithstanding.”<sup>24</sup> Understood in historical context, this phrase did not refer to the common law directly, because such law was never thought to be intrinsically state law. Rather, the common law applied in the states only to the extent that it had been received by a state’s constitution or statutes—the very sources specified by the Supremacy Clause.<sup>25</sup>

In any event, even if one could interpret the phrase, “Laws of any State,” in isolation to refer to state common law, it would not follow that the distinct phrase, “Laws of the United States . . . made in Pursu-

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20 See *id.* at 1568.

21 John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1027 (2002).

22 *Id.*

23 *Id.*

24 U.S. CONST. art VI, cl. 2 (emphasis added).

25 As Professors Ferejohn and Kramer noted, “[U]pon declaring their independence, eleven of the original thirteen colonies immediately adopted ‘receiving statutes’ expressly incorporating the common law as state law.” Ferejohn & Kramer, *supra* note 21, at 1027 n.307; see also Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 798–99 (1951). The twelfth state, New Jersey, included a similar provision in its Constitution of 1776. See *id.* at 799. Only Connecticut is problematic because the common law was not adopted by positive law—the state had no receiving statute and did not adopt a written constitution until 1818. Even there, however, the unwritten constitution was understood to permit judicial incorporation of the common law only “so far as it corresponds with our circumstances and situation.” 1 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 1 (photo. reprint 1972) (1795); see *id.* (“A common law peculiar to ourselves, resulting from our local circumstances, has been established by the decision of our courts; but has never been committed to writing.”); see also Wilford v. Grant, 1 Kirby 114, 116–17 (Conn. Super. Ct. 1786) (“The common law of England we are to pay great deference to, as being a general system of improved reason, and a source from whence our principles of jurisprudence have been mostly drawn: The rules, however, which have not been made our own by adoption, we are to examine, and so far vary from them as they may appear contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice . . .”).

ance” of the Constitution,<sup>26</sup> should be read to encompass federal common law. The Constitution does not specify how states make “Laws,” and there is no federal constitutional requirement that states follow the Constitution’s model of separation of powers and checks and balances. That is why *Erie* declared that “whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”<sup>27</sup> By contrast, it *is* a matter of federal concern how the United States makes its “Laws.”<sup>28</sup> The Constitution prescribes precise procedures governing how federal “Laws” are to be adopted, and these procedures implement crucial compromises built into the constitutional structure. The Founders settled on these procedures only after serious debate and consideration of various alternatives. The procedures they established require bicameralism passage by the House and Senate as well as presentment to the President.<sup>29</sup> If these procedures were not meant to be exclusive and federal judges were free unilaterally to adopt “Laws” within the meaning of the Supremacy Clause, then the Founders’ bitter and protracted fight over the states’ equal suffrage in the Senate<sup>30</sup> would seem rather silly in retrospect.

Second, independent of whether “Laws of any State” refers to state common law, the particular phrasing of the Supremacy Clause appears to foreclose any suggestion that “Laws of the United States” was meant to refer to federal judge-made law. The Clause refers not merely to “Laws of the United States,” but to “Laws of the United States which shall be *made* in Pursuance” of “[t]his Constitution.”<sup>31</sup> At the time the Clause was written, lawyers understood the common law to be discovered rather than made by judges.<sup>32</sup> If the delegates had meant to include common law as “the supreme Law of the Land,” they would not have chosen the language they used. According to Blackstone, the common law existed independent of judicial decisions and was based on “natural justice” and “the established custom of the realm.”<sup>33</sup> Thus, although “‘the decisions of courts of justice are the

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

27 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

28 For example, few would suggest that federal common law could satisfy the constitutional requirement that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. CONST. art. I, § 9, cl. 7.

29 *See id.* art. I, § 7, cl. 2.

30 *See Clark, supra* note 5, at 1425–31.

31 U.S. CONST. art. VI, cl. 2 (emphasis added).

32 *See, e.g.,* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 4–9 (1977).

33 WILLIAM BLACKSTONE, *1 COMMENTARIES* \*70–71.

evidence of what is common law,'” Blackstone recognized that “the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law.”<sup>34</sup> When such “mistakes” are discovered, Blackstone explained, “the subsequent judges do not pretend to *make* a new law, but to vindicate the old one from misrepresentation.”<sup>35</sup> This conception of the common law persisted well into the nineteenth century until it was overthrown by the rise of legal positivism and legal realism.<sup>36</sup> In short, when the Supremacy Clause was adopted, the Founders would not have understood the phrase, “Laws of the United States which shall be made in Pursuance” of “[t]his Constitution,” to refer to common law. Unlike statutes, such law was understood at the time to be discovered rather than “made.”

Third, the historical context in which the Supremacy Clause was adopted counsels strongly against Professor Strauss’ reading. The small states fought vehemently at the Convention to secure equal suffrage in the Senate and to replace the congressional negative with the Supremacy Clause.<sup>37</sup> They sought these changes in order to provide themselves with a means of defense against federal overreaching.<sup>38</sup> They understood the Supremacy Clause to further that goal because it recognized only sources of law adopted with the participation and assent of the Senate. Professor Strauss’ contrary interpretation of the Clause would require us to conclude that these states suddenly had a change of heart and were willing to be bound by laws over which they had no say. We would have to conclude, in other words, that they were willing to permit the federal government to make unlimited quantities of supreme federal law without the assent of the Senate and outside the precise lawmaking procedures so carefully crafted by the Convention. And it requires us to believe that the Convention could have made such an important substantive shift without triggering a single word of protest from delegates who just weeks earlier had threatened to walk out of the Convention and form a separate confed-

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34 *Id.* at \*71 (emphases omitted).

35 *Id.* at \*70 (emphasis added).

36 For example, echoing Blackstone, Justice Story famously declared on behalf of the Court that the decisions of courts “are, at most, only evidence of what the laws are; and are not of themselves laws.” *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842). The Court’s subsequent recognition that state courts actually do make common law on behalf of their respective sovereigns undoubtedly contributed to the *Erie* Court’s conclusion that the *Swift* doctrine was unconstitutional. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1493–95 (1997).

37 See Clark, *supra* note 5, at 1425–35.

38 See *id.* at 1428–30, 1433.



eration if the small states were not given equal suffrage in the Senate as a means “of self-defence.”<sup>39</sup> Against this background, the Convention’s decision to replace “Acts of the Legislature of the United States” with “Laws of the United States” is best understood as merely a stylistic change.

Finally, contrary to Professor Strauss’ suggestion, Article III does not support—but tends to contradict—the conclusion that the phrase “Laws of the United States” was understood to include federal judge-made law. The language used by Article III to confer “arising under” jurisdiction is virtually identical to the language of the Supremacy Clause.<sup>40</sup> The Supremacy Clause establishes a rule of decision for courts resolving conflicts between state and federal law. The Clause declares that “[t]his 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.”<sup>41</sup> State judges take an oath to uphold the Constitution (including the Supremacy Clause),<sup>42</sup> but the Founders were not content to rely solely on the good faith of state judges to enforce the supremacy of federal law. Instead, in language closely tracking the Supremacy Clause, they gave federal courts jurisdiction to hear “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”<sup>43</sup> As James Liebman and William Ryan have observed, “[T]he parallel language of the ‘Arising Under’ and Supremacy Clauses was intentional and structurally cru-

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39 James Madison, Notes on the Constitutional Convention (June 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 13, at 461, 461; *see* Clark, *supra* note 5, at 1428.

40 *See* Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 103 (2003).

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

42 *See id.* art. VI, cl. 3.

43 *Id.* art. III, § 2, cl. 1. As I have previously explained, the difference between the language of Article III and the Supremacy Clause is small, but instructive. *See* Clark, *supra* note 40, at 103–04. Both provisions refer to “the Laws of the United States,” but only the Supremacy Clause adds the qualification “made in Pursuance” of this Constitution. This difference reflects the distinct functions that the two provisions were meant to perform. Article III establishes the jurisdiction of federal courts to hear cases arising under “the Laws of the United States.” Jurisdiction is not dependent on whether such “Laws” were “made in Pursuance” of the Constitution. Rather, any federal “Law”—even if unconstitutional—can trigger arising under jurisdiction. The Supremacy Clause performs the distinct function of establishing a rule of decision to be applied by courts once jurisdiction is established. *See id.* at 104.

cial”<sup>44</sup> because it “add[s] a yet stronger (because independent, final, and effectual) external check on state judges.”<sup>45</sup>

If Professor Strauss were correct that the Supremacy Clause’s reference to “the Laws of the United States” was meant to encompass judge-made law, then Article III’s identical reference to “the Laws of the United States” would have been understood from the beginning to confer jurisdiction over cases arising under judge-made law. In fact, the founding generation did not share this view, and the Supreme Court did not endorse such jurisdiction until the well into the twentieth century.<sup>46</sup> At several points, Professor Strauss also invokes admiralty law to support his interpretation.<sup>47</sup> The Court’s traditional understanding of such law, however, cuts decidedly the other way. Although the Court has long applied general maritime law (“the law merchant”) in admiralty cases, it did not regard such law either as giving rise to federal question jurisdiction under Article III or as binding in state court under the Supremacy Clause for most of our constitutional history.

For example, in 1828, Chief Justice Marshall considered on behalf of the Court whether a case arising under “the law, admiralty and maritime, as it has existed for ages [and] applied by our Courts” is a case arising “under the Constitution or laws of the United States.”<sup>48</sup> After quoting the language of Article III conferring jurisdiction over these two categories of cases, Marshall explained:

The Constitution certainly contemplates these as . . . distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States.<sup>49</sup>

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44 James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 708 (1998).

45 *Id.* at 771–72; see also Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 292–317 (2007) (explaining that, in light of the Constitution’s framing and ratification history, Article III “arising under” jurisdiction is best understood as providing an important, if limited, means of ensuring the supremacy of federal law).

46 See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 98–100 (1972).

47 See Strauss, *supra* note 7, at 1569, 1579, 1586–87.

48 *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545–46 (1828).

49 *Id.* at 545.

In other words, the Marshall Court did not consider general maritime law to be part of “the Laws of the United States” within the meaning of Article III.<sup>50</sup>

Nor did the Supreme Court historically regard general maritime law as part of “the Laws of the United States” within the meaning of the Supremacy Clause. The Court finally took this step during the *Lochner* era in *Southern Pacific Co. v. Jensen*,<sup>51</sup> but the Court was closely divided and the decision was controversial even at that time.<sup>52</sup> Justice McReynolds wrote the majority opinion and declared that no state law is valid if it “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>53</sup> Justice Holmes dissented and issued his famous rebuke: “The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . . It always is the law of some State . . . .”<sup>54</sup> Although longstanding, the Court’s modern approach has not gone unchallenged.<sup>55</sup> As recently as 1994, Justice Stevens protested that “*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* would be in a case under the Due Process Clause.”<sup>56</sup>

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50 *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), decided four years earlier, also implied that principles of general law were not “Laws of the United States” within the meaning of Article III. *Osborn* addressed whether a case brought by the Bank of the United States arose under the act of Congress establishing the Bank and defining its capacities when the outcome of the case turned on general principles of equity. *See id.* at 819–23. The Court held that so long as a federal law “forms an ingredient” of the original cause, “it is in the power of Congress to give [inferior federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it.” *Id.* at 823. This holding confirms that the Marshall Court did not consider general law to be part of the laws of the United States; otherwise, there would have been no need for the extended discussion of whether the case arose under the statute establishing the Bank. *See Bellia, supra* note 45, at 332–40.

51 244 U.S. 205 (1917).

52 *See* Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1384–87 (1999) (describing *Jensen* as “infamous” and “much maligned”).

53 *Jensen*, 244 U.S. at 216.

54 *Id.* at 222 (Holmes, J., dissenting).

55 *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1354–60 (1996) (arguing that many modern rules governing private maritime cases are difficult to square with the constitutional structure); *see also* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999) (explaining that the Court’s approach since *Jensen* is inconsistent with *Erie* and the constitutional structure).

56 *Am. Dredging Co. v. Miller*, 510 U.S. 443, 458 (1994) (Stevens, J., concurring) (citation omitted).

These developments confirm that the Founders did not anticipate preemptive federal common law of the kind that Professor Strauss has in mind. That is because federal common law is a modern phenomenon. Thus, there is no basis for concluding that the Founders understood the Supremacy Clause to encompass federal judge-made law. Rather, taken in historical context, “the Laws of the United States . . . made in Pursuance of” the Constitution referred solely to federal statutes adopted in accordance with the procedures set forth in Article I, Section 7.

### B. *Historical Practice*

Apart from his textual argument, Professor Strauss maintains that by the middle of the nineteenth century, one can find several instances of judicial “lawmaking in a Supremacy Clause context.”<sup>57</sup> As examples, he cites common lawmaking in admiralty and under the dormant Commerce Clause.<sup>58</sup> In addition, he discounts the significance of the Supreme Court’s repudiation of both federal common law crimes and the *Swift* doctrine.<sup>59</sup> Upon examination, however, these examples tend to confirm, rather than disprove, the Founders’ understanding that the Supremacy Clause did not encompass federal judge-made law.

#### 1. Federal Common Law Crimes

After the Constitution was ratified, federal judges initially embraced federal common law crimes.<sup>60</sup> Indeed, during the Washington and Adams administrations, almost all Supreme Court Justices endorsed the practice while sitting on the circuit courts.<sup>61</sup> Only Justice Chase questioned “[w]hether the Courts of the United States can punish a man for an act, before it is declared by a law of the United States to be criminal.”<sup>62</sup> Ironically, the practice came under greater scrutiny after Congress enacted the Sedition Act of 1798,<sup>63</sup> which

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57 Strauss, *supra* note 7, at 1579.

58 *See id.*

59 *See id.* at 1581–82.

60 *See* Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1171–74 (2006).

61 *See id.*

62 *United States v. Worrall*, 2 U.S. (2 Dall.) 384, 394 (Chase, Circuit Justice, C.C.D. Pa. 1798) (emphasis omitted). He concluded that it is “as essential, that Congress should define the offences to be tried, and apportion the punishments to be inflicted, as that they should erect Courts to try the criminal, or to pronounce a sentence on conviction.” *Id.*

63 Ch. 74, 1 Stat. 596 (expired 1801).

made it a federal crime to “write, print, utter or publish . . . any false, scandalous and malicious” words about Congress or the President.<sup>64</sup> Thomas Jefferson and his supporters saw the Act as an attempt to silence political opposition and initially attacked the statute both as beyond Congress’ enumerated powers and as a violation of the First Amendment.<sup>65</sup> Federalists countered that the Act posed no constitutional difficulty because the federal courts already had power to punish seditious libel as a common law offense.<sup>66</sup> In fact, they argued, the Act was more protective of individual liberty than the common law because it allowed truth as a defense.<sup>67</sup>

This defense sparked a national debate over the legitimacy of federal common law, and the issue figured prominently in the presidential election of 1800 between John Adams and Thomas Jefferson.<sup>68</sup> Jefferson rejected the Federalist position on both federalism and separation of powers grounds:

Of all the doctrines which have ever been broached by the federal government, the novel one, of the common law being in force & cognizable as an existing law in their courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The bank law, the treaty doctrine, the sedition act, alien act, the undertaking to change the state laws of evidence in the state courts by certain parts of the stamp act, &c., &c., have been solitary, un consequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the [United States], without the adoption of their legislature, and so infinitely beyond their power to adopt.<sup>69</sup>

A few months later, James Madison made the same two points in a report issued by the Virginia legislature. First, Madison rejected any suggestion that “the common law [is] adopted or recognised by the Constitution.”<sup>70</sup> A contrary conclusion, he explained, would mean that the authority of Congress would no longer be limited to the powers marked out in the Constitution but would be “co-extensive with

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64 *Id.* § 2, 1 Stat. at 596.

65 See Clark, *supra* note 60, at 1175.

66 See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC* 149 (1995).

67 See Clark, *supra* note 60, at 1175–76.

68 See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1712 (1991).

69 Letter from Thomas Jefferson to Edmund Randolph (Aug. 18, 1799), in 7 *THE WRITINGS OF THOMAS JEFFERSON 1795–1801*, at 383, 383–84 (Paul Leicester Ford ed., N.Y., G.P. Putnam’s Sons 1896).

70 James Madison, Report on the Virginia Resolutions, in 6 *THE WRITINGS OF JAMES MADISON* 341, 382 (Gaillard Hunt ed., 1906).

the objects of common law.”<sup>71</sup> Second, Madison pointed out that federal incorporation of the common law “would confer on the judicial department a discretion little short of a legislative power” because federal courts would have to decide what parts of the common law to apply.<sup>72</sup> Giving federal judges this degree of discretion “over the law would, in fact, erect them into legislators.”<sup>73</sup>

Jefferson won a close presidential election (based partly on this issue), in what he later described as “the revolution of 1800.”<sup>74</sup> With his election, the question of federal common law receded into the background. In 1806, however, a United States Attorney (presumably without Jefferson’s approval) brought a federal prosecution against two Federalist editors, Hudson and Goodwin, for common law seditious libel.<sup>75</sup> When the case reached the Supreme Court, it held in a brief opinion that federal courts cannot “exercise a common law jurisdiction in criminal cases.”<sup>76</sup> With obvious reference to the Sedition Act controversy, the Court noted that “[a]lthough this question is brought up now for the first time to be decided by this Court, we consider it as having been long since settled in public opinion.”<sup>77</sup> Accordingly, the Court concluded that “[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”<sup>78</sup>

Professor Strauss argues against reading *Hudson & Goodwin* as a broad repudiation of federal common lawmaking power. In his view, the decision “stand[s] only for the Article III proposition that the jurisdiction of lower federal courts must be legislatively conferred.”<sup>79</sup> It is true that the Court’s opinion often speaks in terms of jurisdiction, but it also contains the broader language quoted above.<sup>80</sup> Reading the entire opinion in historical context, moreover, suggests that Professor Strauss’ interpretation is too narrow. The question raised during the Sedition Act controversy and “long since settled in public

71 *Id.* at 380.

72 *See id.*

73 *Id.* at 381.

74 Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 12 THE WORKS OF THOMAS JEFFERSON 135, 136 (Paul Leicester Ford ed., 1905).

75 *See* Clark, *supra* note 60, at 1177.

76 *United States v. Hudson (Hudson & Goodwin)*, 11 U.S. (7 Cranch) 32, 32 (1812).

77 *Id.*

78 *Id.* at 34.

79 Strauss, *supra* note 7, at 1580.

80 *See supra* text accompanying notes 76–78.

opinion<sup>81</sup> was not a technical question of statutory jurisdiction; it was the constitutionality of federal common law crimes generally.

In any event, the scope of the decision in *Hudson & Goodwin* was soon tested and the Court's disposition of the case confirms that it had decided more than a question of statutory jurisdiction. In *United States v. Coolidge*,<sup>82</sup> Justice Story (sitting as a Circuit Justice) upheld a federal common law prosecution for forcibly rescuing a prize.<sup>83</sup> Story began by establishing the court's statutory jurisdiction. He stressed that section 11 of the Judiciary Act of 1789 expressly provided "that the circuit court 'shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States.'"<sup>84</sup> In Story's view, this jurisdiction could not "have been given in more broad and comprehensive terms,"<sup>85</sup> and was not limited to "all crimes and offences specifically created and defined by statute."<sup>86</sup> In addition, he pointed out that the offense in this case—forcibly rescuing a prize—was one in admiralty, and that "all offences within the admiralty jurisdiction are cognizable by the circuit court."<sup>87</sup> Thus, in Story's view, the circuit court unquestionably had jurisdiction in this case.

Justice Story next sought to challenge the broader holding of *Hudson & Goodwin* by arguing that the exercise of the court's jurisdiction "must, in the absence of positive law, be governed exclusively by the common law."<sup>88</sup> Justice Story "considered the point, as one open to be discussed, notwithstanding the decision in *U.S. v. Hudson*," because that decision was "made without argument, and by a majority only of the court."<sup>89</sup> Responding to constitutional objections raised during the Sedition Act crisis, Story denied that permitting federal

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81 *Hudson & Goodwin*, 11 U.S. (7 Cranch) at 32.

82 25 F. Cas. 619 (Story, Circuit Justice, C.C.D. Mass. 1813) (No. 14,857), *rev'd*, 14 U.S. (1 Wheat.) 415 (1816).

83 *See id.* at 621–22.

84 *Id.* at 619 (quoting Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78).

85 *Id.* at 620.

86 *Id.* at 619. The Supreme Court did not cite or discuss section 11 of the Judiciary Act in *Hudson & Goodwin*, even though that provision appeared to confer broad criminal jurisdiction on the circuit courts. This omission suggests that the Court used the term "jurisdiction" in a broader, nontechnical sense in its opinion dismissing the prosecution—a suggestion confirmed by the Court's subsequent decision in *Coolidge*. *See infra* notes 92–95 and accompanying text.

87 *Coolidge*, 25 F. Cas. at 622.

88 *Id.* at 620.

89 *Id.* at 621. Justice Story also pointed out that *Hudson & Goodwin*, "however broad in its language," did not settle "the question now before the court, so far as it respects offences of admiralty and maritime jurisdiction." *Id.*

courts to recognize federal common law crimes would give them unconstrained discretion or exceed federal power. Rather, he argued that the “crimes and offences against the United States” could be determined by reference to “the principles of the common law, taken in connexion with the constitution.”<sup>90</sup> Applying this approach, Story identified several of the crimes he had in mind. “Without pretending to enumerate them in detail, I will venture to assert generally, that all offences against the sovereignty, the public rights, the public justice, the public peace, the public trade and the public police of the United States, are crimes and offences against the United States.”<sup>91</sup> In Story’s view, the crime of forcibly rescuing a prize fell squarely within these categories.

When *Coolidge* reached the Supreme Court, the Attorney General declined to argue the case in part because he had examined the opinion in *Hudson & Goodwin* and considered “the point as decided in that case.”<sup>92</sup> No counsel appeared for the defendant, but the Court nonetheless instructed the circuit court to dismiss the indictment on the authority of *Hudson & Goodwin*.<sup>93</sup> Although several Justices (including Story) expressed their willingness to reconsider that precedent,<sup>94</sup> the Court simply declared that in the absence of argument “the court would not choose to review their former decision in the case of the *United States v. Hudson and Goodwin*, or draw it into doubt.”<sup>95</sup> Taken together, the Court’s decisions in *Hudson & Goodwin* and *Coolidge* establish that the judiciary lacks constitutional power to recognize and enforce federal common law crimes. Moreover, these decisions provide important early evidence that judicial recognition of federal common law crimes, at least, could not be squared with the constitutional structure.

## 2. General Common Law

Professor Strauss points to the law of admiralty as an example of nineteenth-century federal common lawmaking “in a Supremacy Clause context.”<sup>96</sup> In support, he quotes a passage from *The Lot-tawanna*,<sup>97</sup> which includes the statement that in extending the judicial power of the United States to all cases of admiralty and maritime juris-

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90 *Id.* at 620.

91 *Id.*

92 *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 415–16 (1816).

93 *See id.* at 416–17.

94 *See id.* at 416.

95 *Id.*

96 Strauss, *supra* note 7, at 1579.

97 88 U.S. 558 (1875).



diction, it is “unquestionable” that “the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country.”<sup>98</sup> He fails to mention, however, that the Court went on to deny judicial power to make or alter that preexisting system of maritime law, and actually upheld the application of state law to the question before the Court. On the first point, the Court stated:

But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.<sup>99</sup>

On the second point, the Court reaffirmed the longstanding rule of *The General Smith*<sup>100</sup> that, “so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each State by State regulation.”<sup>101</sup> Thus, properly understood, *The Lottowanna* does not establish—but tends to refute—the proposition that federal courts had broad federal common lawmaking power in admiralty cases to displace state law.

As discussed, the equation of admiralty law with federal common lawmaking had to await the Supreme Court’s decision in *Jensen* in 1917.<sup>102</sup> Prior to that time, the general maritime law in cases of admiralty and maritime jurisdiction operated much like the general law applied by federal courts in diversity cases during the *Swift* era.<sup>103</sup> It applied in federal court (as an incident of jurisdiction), but was not binding in state court as “the supreme Law of the Land.”<sup>104</sup> In *Jensen*, the Court established the first true example of federal common law by declaring that admiralty law preempts contrary state law.<sup>105</sup> Two decades later, however, the Court’s approach to general law in diver-

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98 *Id.* at 575.

99 *Id.* at 576–77.

100 17 U.S. (4 Wheat.) 438 (1819).

101 *The Lottowanna*, 88 U.S. at 580; *see also id.* at 581 (“It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.”).

102 *See supra* text accompanying notes 51–54.

103 *See Clark, supra* note 55, at 1347–48.

104 *See id.*

105 *See S. Pac. Co. v. Jensen*, 244 U.S. 205, 217–18 (1917).

sity cases was very different. Instead of federalizing such law, the *Erie* Court denied the existence of “federal general common law” and declared that “the course pursued” by federal courts during the *Swift* era had been unconstitutional.<sup>106</sup>

Professor Strauss finds my reliance on *Erie* unpersuasive because he reads the opinion to stand only for the relatively narrow proposition that “federal courts cannot independently make common law where Congress cannot legislate.”<sup>107</sup> He acknowledges that “Congress . . . could have legislated a special rule to govern interstate railroads” and that such a rule would have sufficed to resolve cases like the one before the Court.<sup>108</sup> He stresses, however, that “[t]he Court was being invited to consider the *general* rule, not a special rule for interstate entities.”<sup>109</sup> In other words, because (and only because) Congress lacked constitutional power to adopt such a general rule, federal courts were also without power to do so.

For several reasons, this reading cannot account for *Erie*. First, if Congress could have legislated a special rule for cases like the one at bar, then it would follow under Professor Strauss’ approach that the Court could have adopted a special (as opposed to general) rule for such cases as well. Yet the Court did not do so. Rather, it remanded the case for the application of *state* law.<sup>110</sup> And recall that the Court took this action even though it meant that the injured plaintiff would be governed by state law (which appeared to impose only a minimal duty of care),<sup>111</sup> as opposed to federal judge-made law (which imposed an ordinary duty of care).<sup>112</sup> One suspects that if the Court had believed that it had the option of adopting a special duty of care for interstate railroads, then it would have done so.

Second, Professor Strauss’ focus on a single sentence in the Court’s opinion suggesting a lack of congressional power<sup>113</sup> discounts

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106 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

107 Strauss, *supra* note 7, at 1571.

108 *Id.*

109 *Id.*

110 See *Erie*, 304 U.S. at 80.

111 See *id.* at 70 (recounting the Railroad’s argument that under Pennsylvania law, “the railroad is not liable for injuries to undiscovered trespassers resulting from its negligence, unless it be wanton or wilful”). The Court did note that the parties disputed the duty of care under Pennsylvania law and left this question to be decided on remand. See *id.* at 80.

112 See *id.* at 70 (recounting the court of appeals’ application of an ordinary duty of care under general law).

113 Professor Strauss highlights a sentence from the Court’s opinion that does indeed focus on the limits of congressional power: “Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their

other more salient portions of the opinion.<sup>114</sup> As he acknowledges, the Court began its constitutional analysis by declaring that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State.”<sup>115</sup> As I have argued elsewhere, this sentence essentially paraphrases the effect of the Supremacy Clause and presupposes that federal courts have no independent lawmaking authority to displace state law.<sup>116</sup> In addition, throughout its opinion, the Court stressed that the Constitution requires the application of state law in this case—whether such law was “declared by its Legislature in a statute or by its highest court in a decision.”<sup>117</sup> Under Professor Strauss’ contrary approach, the Court could have displaced state law unilaterally so long as Congress had power to do so (whether or not it used such power). Given the Court’s recent Commerce Clause jurisprudence, Congress undoubtedly had such power.<sup>118</sup> Nonetheless, the *Erie* Court held emphatically that the Constitution required federal courts to follow state law.

Third, Professor Strauss’ reading of *Erie* would raise the very federalism and separation of powers problems identified by Madison in connection with the Sedition Act controversy.<sup>119</sup> Allowing courts to adopt federal common law whenever Congress has power to legislate would mean either that federal courts could preempt state law in all such cases—an incredible proposition given the modern scope of the commerce power<sup>120</sup>—or that they would have discretion to pick and choose when to do so. As Madison pointed out, however, giving fed-

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nature or ‘general,’ be they commercial law or part of the law of torts.” *Id.* at 78; see Strauss, *supra* note 7, at 1571. As I have argued elsewhere, however, this sentence is at best dictum (because no federal statute was at issue), and at worst simply wrong (given the expansion of the commerce power already well underway). See Bradford R. Clark, *Erie’s Constitutional Source*, 95 CAL. L. REV. 1289, 1298–99 (2007).

114 The very next sentence, for example, indicates that the Court was at least as concerned with separation of powers as federalism: “And no clause in the Constitution purports to confer such a power upon the federal courts.” *Erie*, 304 U.S. at 78.

115 *Id.*

116 See Clark, *supra* note 113, at 1308.

117 *Erie*, 304 U.S. at 78; see also *id.* at 79 (stating that the “fallacy underlying the rule declared in *Swift v. Tyson*” is “that federal courts have the power to use their judgment as to what the rules of common law are”); *id.* (“[T]he authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.” (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting))).

118 See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36–37 (1937).

119 Madison, *supra* note 70, at 381.

120 See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (upholding a federal statute criminalizing *intrastate* possession of medical marijuana).

eral courts this degree of discretion “over the law would, in fact, erect them into legislators.”<sup>121</sup> There is no indication that *Erie* endorsed this result. To the contrary, a fair reading of the opinion confirms Henry Monaghan’s assessment that *Erie* “recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.”<sup>122</sup>

### 3. The Dormant Commerce Clause

Professor Strauss also invokes the dormant Commerce Clause as an example of nineteenth-century federal common lawmaking.<sup>123</sup> It is worth noting at the outset that if the Commerce Clause itself overrides state law even in the absence of congressional regulation, then giving effect to the Clause is not only consistent with, but required by, the Supremacy Clause.<sup>124</sup> The Clause recognizes not only “the Laws of the United States,” but also “[t]his Constitution” as “the supreme Law of the Land.”<sup>125</sup> More fundamentally, even if one regards judicial enforcement of the dormant Commerce Clause as a form of judicial lawmaking, the doctrine tells us little about the original constitutional structure. The Supreme Court did not begin striking down state laws solely on the basis of the dormant Commerce Clause until the latter half of the nineteenth century.<sup>126</sup> In addition, then as now, many regarded the doctrine as improper judicial activism.<sup>127</sup> Indeed, the

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121 Madison, *supra* note 70, at 381.

122 Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975).

123 See Strauss, *supra* note 7, at 1583–84.

124 Professor Strauss regards the dormant Commerce Clause as judicial lawmaking in a constitutional context “beckoning the Court beyond the plain words of the Constitution’s text.” *Id.* at 1579. If the Constitution’s text and structure do not authorize judicial lawmaking in this context, then such lawmaking is inconsistent with the Supremacy Clause. See Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161, 1180–87 (1998). On the other hand, if one concludes that the Commerce Clause in fact authorizes judicial invalidation of state law, then by definition such action is consistent with the Supremacy Clause.

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

126 See, e.g., *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 588–90 (1886).

127 Compare *The License Cases*, 46 U.S. (5 How.) 504, 579 (1847) (opinion of Taney, C.J.) (maintaining that “the mere grant of power to the general government cannot . . . be construed to be an absolute prohibition” of state regulation, and that a state may “make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress”), with *Tyler Pipe Indus. v. Wash. State Dep’t of Revenue*, 483 U.S. 232, 263

rise of the dormant Commerce Clause roughly corresponded with the rise of economic substantive due process. Thus, it should come as no surprise that within the span of just a few months the New Deal Court decided to overrule *Swift*,<sup>128</sup> abandon economic substantive due process,<sup>129</sup> and rein in the dormant Commerce Clause.<sup>130</sup> All three doctrines, the Court came to realize, allowed federal courts to disregard state law with no clear warrant in the Constitution, Laws, or Treaties of the United States.

## II. THE CONTEMPORARY SIGNIFICANCE OF THE CONSTITUTIONAL STRUCTURE

Professors Strauss and Vázquez suggest that the procedural safeguards of federalism spelled out in the Constitution have limited, if any, significance today. In their view, the rise of the modern administrative state not only makes it impossible to enforce the procedural safeguards in that context, but also counsels disregarding such safeguards more broadly as a kind of compensating adjustment. Although it may no longer be possible to enforce the procedural safeguards of federalism fully in all contexts, they continue to play a significant role in constraining the means by which the federal government may make “the supreme Law of the Land.” Because these safeguards are so carefully spelled out in the Constitution and were so central to its adoption, courts could not read them out of the document and still remain faithful to their oath to uphold “this Constitution.”<sup>131</sup>

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(1987) (Scalia, J., concurring in part and dissenting in part) (“The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce.”). For further discussion, see Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 572 (“Our federal constitutional democracy prohibits the unrepresentative federal judiciary from invalidating decisions of the state legislatures except when authorized by some provision or combination of provisions of the Constitution, or when clearly contrary to congressional action. Absent textual foundation the dormant [commerce] clause cannot stand, regardless of whatever valuable social economic or political policies the concept might be thought to foster.” (footnote omitted)).

128 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77–78 (1938).

129 See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–400 (1937). On the relationship between economic substantive due process and general common law under *Swift*, see Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1299–320 (2000).

130 See *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 189 (1938) (stating that “so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states”).

131 See Clark, *supra* note 5, at 1431–35.

### A. *The Administrative State*

Professor Strauss suggests that treating the Supremacy Clause as the exclusive source of the supreme law of the land “would unhinge too much of our constitutional tradition and understanding.”<sup>132</sup> In particular, he fears that administrative preemption of state law pursuant to vague statutory commands might not survive close Supremacy Clause scrutiny.<sup>133</sup> Broad agency preemption, however, is a relatively recent phenomenon. The practice has become increasingly controversial, moreover, precisely because of the growing sense that fundamental policy decisions about health, safety, and the environment are being made by unelected officials without adequate safeguards.<sup>134</sup> Accordingly, as Bill Eskridge explained at this Symposium, broad *Chevron* deference—which greatly facilitates agency preemption—may not be appropriate where Congress has not clearly delegated preemptive authority to the agency.<sup>135</sup> Reassessing how the *Chevron* doctrine applies in this context might slow or alter agency preemption in some cases, but it would not fundamentally alter the administrative state.

Professor Strauss also suggests that my understanding of the Supremacy Clause would necessitate abandoning “the delegation doctrine as we know it in any context impacting state law.”<sup>136</sup> To be sure, the Supremacy Clause and the exclusivity of federal lawmaking procedures counsel in favor of the Court’s traditional stance that Article I “permits no delegation of [legislative] powers.”<sup>137</sup> In practice, however, the Court enforces only a weak version of the nondelegation doctrine because of its limited institutional competence. The reason the Court has not enforced a more vigorous nondelegation doctrine is that it has “‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”<sup>138</sup> The judiciary feels con-

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132 Strauss, *supra* note 7, at 1598.

133 See *id.* at 1589–91.

134 See Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 759–78 (2004); Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. (forthcoming 2008) (manuscript at 13–30), available at <http://ssrn.com/abstract=1030626>; Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 251–58 (2007).

135 See William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2008).

136 Strauss, *supra* note 7, at 1591.

137 *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); see also *Touby v. United States*, 500 U.S. 160, 165 (1991) (stating that “Congress may not constitutionally delegate its legislative power to another branch of Government”).

138 *Whitman*, 531 U.S. at 474–75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)); see Bradford R. Clark, *Federal Lawmaking and the*

strained in this context because, generally speaking, there is no bright line, judicially administrable test for distinguishing (permissible) law execution from (impermissible) lawmaking.<sup>139</sup>

The absence of aggressive judicial enforcement of the nondelegation doctrine, however, should not be confused with constitutional acquiescence.<sup>140</sup> As Cass Sunstein points out, courts employ certain canons of construction that “actually constitute a coherent and flourishing doctrine, amounting to the contemporary nondelegation doctrine.”<sup>141</sup> In addition, when the Court can determine with confidence that Congress has authorized the executive branch to engage in lawmaking rather than law execution, it has not hesitated to invalidate delegations of lawmaking power to the President. For example, in *Clinton v. City of New York*,<sup>142</sup> the Court struck down the Line Item Veto Act<sup>143</sup> on the ground that it gave “the President the unilateral power to change the text of duly enacted statutes.”<sup>144</sup> In most nondelegation cases, the Court’s limited institutional competence leads it to err on the side of viewing executive action taken pursuant to congressional authorization as permissible execution of the law. Several unusual features of the Line Item Veto Act, however, allowed the Court to conclude that the cancellation provisions gave the President lawmaking power in violation of “Article I, § 7, of the Constitution.”<sup>145</sup> Accordingly, as in *INS v. Chadha*,<sup>146</sup> the Court concluded

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*Role of Structure in Constitutional Interpretation*, 96 CAL. L. REV. 699, 716–17 (2008); John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1544 (2008).

139 See Clark, *supra* note 1, at 1373–78.

140 But see Vázquez, *supra* note 6, at 1636 (suggesting that because “constitutional limits on such delegations are not judicially enforceable,” the “Court today acquiesces in supreme federal lawmaking by a single agency”).

141 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000); see also Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1409 (2000) (observing that “[t]he Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine”).

142 524 U.S. 417 (1998).

143 Pub. L. No. 104-130, 110 Stat. 1200 (1996).

144 *Clinton*, 524 U.S. at 446–47.

145 *Id.* at 448. As I have recently explained:

The Act gave the President only a single opportunity to cancel eligible items within five days of their enactment, and cancellation was permanent. Ordinarily, when Congress assigns broad discretion to the executive branch, it remains free to act at any time during the life of the statute to reverse course concerning the best way to execute the statute. By making the President’s cancellation irreversible, the Act authorized a change in the law as opposed to a mere change in the implementation of the law. In addition,

that Article I, Section 7 establishes the *exclusive* means of enacting, amending, and repealing federal statutes.<sup>147</sup>

### B. *Interpretive Method*

Professor Vázquez nonetheless suggests that “the combination of doctrinal change through *stare decisis* and the need for doctrinal coherence may properly lead to a broader rejection of” adherence to constitutionally prescribed lawmaking procedures.<sup>148</sup> Given the Supreme Court’s inability to enforce the nondelegation doctrine, he argues that “faithfulness to the original design may require additional departures from the original structure.”<sup>149</sup> In his view, “compensating changes” are needed to prevent us from moving “further from the Founders’ goals.”<sup>150</sup> One such adjustment “may require that acceptance of broad delegations to the executive be matched by acceptance of some forms of legislative vetoes.”<sup>151</sup> More broadly, Vázquez suggests that “we must look at th[e original] structure at a high level of generality, and we will need to adjust the original features of that structure in a way that best accomplishes the Founders’ broad goals in the light of entrenched changes in the legal landscape since the Founding.”<sup>152</sup>

In this context, such translation raises several concerns. Encouraging courts to uphold otherwise unconstitutional statutes in order to recreate some theoretical founding balance may itself be inconsistent with the distinct founding balance concerning the respective roles of the judiciary and the political branches.<sup>153</sup> As Larry Lessig, upon whose work Vázquez relies, has acknowledged, sometimes “[t]he Court gives up one practice (translation), which aims at preserving a

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permanent cancellation authority overrides a clear legislative outcome rather than implementing a compromise that leaves ambiguity.

Clark, *supra* note 138, at 719 (footnote omitted); see *Clinton*, 524 U.S. at 438 (concluding that the Act permitted the President to amend “two Acts of Congress by repealing a portion of each”); Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659, 1662 (1997) (noting that the Act’s conferral of a “negation” power made it “perhaps the only case that is an easy case under the non-delegation doctrine”).

146 462 U.S. 919 (1983).

147 See *Clinton*, 524 U.S. at 438–40; *Chadha*, 462 U.S. 945–51.

148 Vázquez, *supra* note 6, at 1636.

149 *Id.*

150 *Id.*

151 *Id.*

152 See *id.* at 1636–37 (citing Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 213).

153 See Clark, *supra* note 124, at 1164.



particular aspect of the Constitution's original meaning, because it holds onto another aspect of the Constitution's original meaning—namely, an aspect defining its institutional role.”<sup>154</sup>

More fundamentally, whatever may be said for pursuing “the Founders’ broad goals” “at a high level of generality” in other contexts, this approach seems singularly inappropriate in this context. The constitutionally prescribed procedures governing the adoption of all forms of “the supreme Law of the Land” are among the most precise and detailed provisions in the original Constitution. Such precision alone suggests that courts should not use abstract purposes or principles to override specific procedures spelled out in the text.<sup>155</sup> In addition, the precise provisions governing supremacy, the Senate, and federal lawmaking procedures were the very means of implementing the central founding-era compromise between the small and large states—a compromise without which the Constitution would not have been proposed or ratified.<sup>156</sup> These “features of the constitutional structure are spelled out so carefully . . . and were so central to the creation of the federal system that they cannot be read out of the [Constitution] without fundamentally altering its character.”<sup>157</sup>

Professor Strauss’ prescription for preemptive federal lawmaking outside the carefully crafted procedures specified in the Constitution raises similar concerns. He proposes “a dynamic approach to constitutional interpretation—one that sees as the judicial task understanding and enforcing constitutional text in a manner that, embodied with its general spirit, finds that meaning best suited both to continuity with established understandings and to the exigencies of the present.”<sup>158</sup> He uses *Freytag v. Commissioner*<sup>159</sup> to illustrate the difference between his approach and mine. Specifically, he compares my approach to Justice Blackmun’s “effort to return to the Convention’s particular understanding” and his approach to Justice Scalia’s effort to resist this approach.<sup>160</sup> With all due respect, I think he has things backwards.

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154 Lawrence Lessig, *Understanding Federalism’s Text*, 66 GEO. WASH. L. REV. 1218, 1222 (1998).

155 See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1701–20 (2004) (examining the procedures for adopting and amending the Constitution and urging courts to follow precise constitutional texts rather than contrary purpose or intent).

156 See Clark, *supra* note 5, at 1424–35.

157 *Id.* at 1439.

158 Strauss, *supra* note 7, at 1574.

159 501 U.S. 868 (1991).

160 Strauss, *supra* note 7, at 1574–79.

*Freytag* considered whether the Chief Judge of the Tax Court is one of the “Heads of Departments” in whom the Appointments Clause permits Congress to vest the appointment of inferior officers.<sup>161</sup> Justice Blackmun’s opinion for the Court invoked the *purpose* of the Clause to confine “Departments” to cabinet-level departments in light of changed circumstances.<sup>162</sup> According to Justice Blackmun, the Appointments Clause “reflects our Framers’ conclusion that widely distributed appointment power subverts democratic government.”<sup>163</sup> “Treating the Tax Court as a ‘Department’ and its Chief Judge as its ‘Hea[d]’ would defy the purpose of the Appointments Clause,”<sup>164</sup> he argued, because the modern proliferation of executive departments “would multiply indefinitely the number of actors eligible to appoint.”<sup>165</sup> By contrast, “[c]onfining the term ‘Heads of Departments’ in the Appointments Clause to executive divisions like the Cabinet-level departments constrains the distribution of the appointment power.”<sup>166</sup>

Not surprisingly, Justice Scalia disagreed. He pointed out that the “term ‘Cabinet’ does not appear in the Constitution,”<sup>167</sup> and he saw no textual or historical basis for a “distinction between Cabinet and non-Cabinet agencies.”<sup>168</sup> Rather, in his view, text, history, and precedent all “support the proposition that ‘Heads of Departments’ includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch.”<sup>169</sup> Because the Chief Judge of the Tax Court fit this description, Congress could vest him with power to appoint inferior officers.<sup>170</sup>

Unlike Justice Blackmun, I do not advocate relying on the Constitution’s general background purpose to (re)interpret the document in light of changed circumstances. Rather, like Justice Scalia in *Freytag*, I am simply suggesting that we continue to respect the relatively precise provisions of the constitutional text—in this case, the Supremacy Clause, constitutionally prescribed lawmaking procedures, and the states’ equal suffrage in the Senate—even in the face of changed circumstances. Professor Strauss, by contrast, seems to favor

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161 See U.S. CONST. art. II, § 2, cl. 2; *Freytag*, 501 U.S. at 882–88.

162 *Freytag*, 501 U.S. at 886–87.

163 *Id.* at 885.

164 *Id.* at 888.

165 *Id.* at 885.

166 *Id.* at 886.

167 *Id.* at 916 (Scalia, J., concurring).

168 *Id.* at 918.

169 *Id.*

170 See *id.* at 901, 920–22.

elevating the “general spirit” of the Constitution over its precise terms in order to accommodate changed circumstances.<sup>171</sup> This approach more closely resembles Justice Blackmun’s approach in *Freytag* than Justice Scalia’s. Thus, like Professor Vázquez’s prescription, Professor Strauss’ interpretive method would read the small states’ disproportionate power in the lawmaking process out of the Constitution.

### C. Doctrinal Implications

Professor Vázquez suggests that the procedural safeguards of federalism “should carry no doctrinal weight.”<sup>172</sup> Specifically, he maintains that “the constitutional structure does not support doctrinal rules that reflexively favor the status quo in the event of textual ambiguity.”<sup>173</sup> Examples of such rules include the presumption against preemption,<sup>174</sup> clear statement rules,<sup>175</sup> and “the Court’s current restrictive approach to the implication of private rights of action.”<sup>176</sup> Vázquez argues that “[b]ecause the constitutional structure reflects a balance between the status quo and change, it does not support the conclusion that ambiguities in the text must be resolved against change.”<sup>177</sup> While I agree that it would “be illegitimate for the courts to impose obstacles to federal lawmaking not contemplated in the Constitution,”<sup>178</sup> Vázquez is too quick to conclude that the constitutional structure provides courts with no interpretive guidance.<sup>179</sup>

The Constitution is not indifferent between state and federal law. State law is background law.<sup>180</sup> It applies unless—by operation of the Supremacy Clause—it is displaced by the “Constitution,” “Laws,” or “Treaties” of the United States.<sup>181</sup> As Henry Hart explained, state courts of general jurisdiction have authority “over all persons and matters within the state’s power,” and “have . . . at their command a theoretically complete set of answers for every claim of breach of private

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171 See Strauss, *supra* note 7, at 1574.

172 Vázquez, *supra* note 6, at 1607.

173 *Id.* at 1625.

174 See *id.* at 1627–28.

175 See *id.* at 1607–08.

176 *Id.* at 1624.

177 *Id.* at 1625.

178 *Id.* at 1611.

179 See *id.* at 1625 (“The constitutional structure, as such, cannot supply the content of . . . interpretive rules.”).

180 See Wechsler, *supra* note 2, at 543 (explaining that the Founders “preserved the states as separate sources of authority and organs of administration” rather than abolish them in favor of a consolidated central government).

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

duty that might be brought before them.”<sup>182</sup> Federal law, by contrast, is interstitial in nature.<sup>183</sup> The federal government has limited powers and may adopt “the supreme Law of the Land” only by employing precise, constitutionally prescribed procedures. As discussed, all of these procedures require the participation of the Senate or the states, and thus give small states disproportionate power in the lawmaking process.<sup>184</sup> As a general rule, therefore, federal courts must follow state law unless and until the federal government is able to adopt contrary law using such procedures. This is what the *Erie* Court meant when it declared: “Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.”<sup>185</sup>

If state law is background law and the federal government can make “the supreme Law of the Land” only by employing procedures that favor small states, then courts are right to apply doctrines that guard against over-preemption of state law. The traditional presumption against preemption<sup>186</sup> performs this function by ensuring compliance with constitutionally prescribed lawmaking procedures. If a federal statute does not expressly preempt state law, then a judicial decision to preempt risks circumventing the procedural safeguards of federalism built into the Constitution. The Court’s restrictive approach to implied private rights of action is defensible on similar grounds. As Professor Vázquez recognizes, “legislation is never unidimensional, but rather is always the product of compromise.”<sup>187</sup> Thus, a statute’s failure to include a private right of action may reflect compromise and the constraints of the legislative process. Were courts to recognize implied rights of action freely, they might produce

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182 Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 492 (1954).

183 See *id.* at 498 (“The federal law which governs the exercise of state authority is obviously interstitial law, assuming the existence of, and depending for its impact upon, the underlying bodies of state law.”).

184 See *supra* notes 1–6 and accompanying text.

185 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see Clark, *supra* note 138, at 701–06.

186 See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that when Congress legislates “in a field which the States have traditionally occupied,” courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”).

187 Vázquez, *supra* note 6, at 1629.

statutes that could not have been enacted with the assent of all necessary veto players.<sup>188</sup>

On the other hand, I agree with Professor Vázquez that it is “illegitimate to engraft additional requirements for the creation of [supreme federal] law or to subtract from the preemptive force of federal law once made.”<sup>189</sup> Properly conceived, however, the assorted interpretive presumptions that implement the procedural safeguards of federalism merely seek to ensure that the decision to preempt—and the scope of the preemption—fairly reflect a *congressional* choice rather than an exercise of lawmaking discretion by an actor not subject to the specified safeguards. To be sure, that line may not always be an easy one to draw.<sup>190</sup> But it is worth noting that many staples of interpretive doctrine outside the federalism context rest squarely on the presupposition that a meaningful—and meaningfully identifiable—line exists between a statute that speaks directly to a question and one whose vagueness or ambiguity on a point leaves a decision to Congress. That idea is, of course, a central premise of the *Chevron* doctrine.<sup>191</sup> It is also reflected in the well-settled doctrine that courts

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188 Professor Vázquez suggests that at the time of the Founding, “rights of action for statutes not explicitly addressing the question would have been supplied by the common law,” and that “the common law was thought to have a separate existence” from state law at the time. *Id.* at 1631. He suggests, therefore, that federal courts engaged in federal common lawmaking when they interpreted the common law to provide a private right of action. *See id.* As discussed, however, the common law applied in the United States *was* state law at the time of the Founding and only applied by virtue of the states’ reception of such law. *See supra* notes 20–25 and accompanying text.

189 Vázquez, *supra* note 6, at 1604; *see* Bradford R. Clark, *Process-Based Preemption*, in *PREEMPTION CHOICE* (William W. Buzbee ed., forthcoming Oct. 2008).

190 For an extended discussion of this concern, *see* Manning, *supra* note 138.

191 *See* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court held that a reviewing court must first ask whether Congress “has directly spoken to the precise question at issue.” *Id.* at 842. As the Court added, “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842–43. Conversely, if the statute is vague or ambiguous on the interpretive point in question, then the reviewing court must accept the agency’s interpretation as long as it is “permissible” or “reasonable.” *See id.* at 843–44. The commonly accepted reason for this distinction is that in the latter case, the interpretation reflects the product of the agency’s policymaking discretion—an exercise over which the agency has a claim of greater legitimacy and relative institutional competence. *See, e.g.*, Richard J. Pierce, Jr., *CHEVRON and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 *VAND. L. REV.* 301, 307–08 (1988) (laying out the now-standard account of *Chevron*). This framework, of course, presupposes a meaningful distinction between clear congressional choice and ambiguity that gives rise to agency lawmaking discretion.

will not typically resort to legislative history when a statute is clear.<sup>192</sup> And it is the cornerstone of perhaps the most venerable canon of construction—the rule of lenity.<sup>193</sup> In other words, courts must and do sort between clear and ambiguous statutes, between congressional choice and interpreter discretion, all the time.

My only point is that many of the doctrines that have survived the advent of the modern administrative state attempt to push lawmaking upward into processes that are subject to the political safeguards of federalism. That impulse, I submit, fits comfortably with—and may be compelled by—the clear structural implications of the Supremacy Clause and the lawmaking procedures that it embraces. Thus, properly conceived, the relevant presumptions and clear statement rules merely operate to “ensure[] the efficacy of the procedural political safeguards.”<sup>194</sup>

Finally, Professor Strauss seems to suggest that the rise of the modern administrative state has rendered structural features like the Supremacy Clause and federal lawmaking procedures largely irrelevant. To be sure, constitutional interpretation is a complex process. At any given time, particular judicial interpretations will conform more or less to the constitutional structure. Some combination of *stare decisis*, historical practice, and the limits of judicial competence may dissuade the Court from fully implementing particular aspects of the constitutional structure in a particular context. For example, as discussed, the procedural safeguards of federalism argue in favor of greater judicial enforcement of the nondelegation doctrine.<sup>195</sup> The judiciary’s limited institutional competence, however, makes that course highly unlikely.<sup>196</sup>

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192 See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear”); *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (“[A]ppeals to statutory history are well taken only to resolve ‘statutory ambiguity.’” (quoting *Toibb v. Radloff*, 501 U.S. 157, 162 (1991))).

193 See, e.g., *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (emphasizing that lenity requires that “ambiguous criminal statute[s] . . . be construed in favor of the accused”); *United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that lenity promotes the ideal that “legislatures and not courts should define criminal activity”).

194 LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 5-11, at 877 (3d ed. 2000). Thus, as Caleb Nelson has noted, it would be improper for courts to apply an “artificial presumption against preemption” to constrain “federal statutory provisions that plainly *do* manifest an inten[t] to supplant state law.” Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232, 291 (2000) (alteration in original) (internal quotation marks omitted).

195 See *supra* notes 136–37 and accompanying text.

196 See *supra* notes 138–47 and accompanying text. This does not mean, however, that courts should abandon judicial review under the nondelegation doctrine. To the

The constitutional structure, however, remains relevant to other questions because it provides a valuable source of constitutional meaning. Thus, when the Court confronts a novel or unsettled question, it properly takes the structure into account.<sup>197</sup> As I tried to show in my original article, many of the Court's most famous constitutional decisions can only be fully understood in light of the structural implications of the Supremacy Clause.<sup>198</sup> For example, the procedural safeguards of federalism may illuminate the Court's seemingly inconsistent approaches in separation of powers cases. As Professor Strauss has previously observed:

The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.<sup>199</sup>

This apparent inconsistency has led some scholars to conclude that "the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle."<sup>200</sup> Recognizing the relationship between separation of powers and federalism, however, helps to reconcile the Court's seemingly inconsistent approaches.<sup>201</sup>

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contrary, judicial review of agency action may be "part of the price of legitimating broad delegations of power." John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 913 (2004); see also LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965) ("The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.").

197 See Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639 (2008) (suggesting ways to make federal common law more consistent with the Supremacy Clause and the procedural safeguards of federalism).

198 See Clark, *supra* note 1, at 1372–93 (discussing congressional compliance with federal lawmaking procedures); *id.* at 1393–403 (discussing executive compliance with federal lawmaking procedures); *id.* at 1403–30 (discussing judicial compliance with federal lawmaking procedures).

199 Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) (footnote omitted).

200 Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1517 (1991); see also Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 450 (1991) (stating that "[i]n the separation of powers area . . . the modern Court has evinced something of a split personality, seemingly wavering [between formalism and functionalism]").

201 See Clark, *supra* note 1, at 1391–93.

Many of the Supreme Court's leading formalist decisions can be understood as upholding the Constitution's carefully crafted procedures for adopting "the supreme Law of the Land."<sup>202</sup> Examples include *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>203</sup> *INS v. Chadha*,<sup>204</sup> and *Clinton v. City of New York*.<sup>205</sup> In these cases, the Court used a rather formal approach to invalidate attempts by Congress and the President to circumvent the requirements of bicameralism and presentment.<sup>206</sup> Many of the Court's famous functionalist decisions—such as *Nixon v. Administrator of General Services*,<sup>207</sup> *Commodity Futures Trading Commission v. Schor*,<sup>208</sup> and *Morrison v. Olson*<sup>209</sup>—did not involve circumvention of federal lawmaking procedures. Rather, they considered the distinct question whether Congress had unduly interfered with the functions of a coordinate branch.<sup>210</sup> Recognizing that strict adherence to the formal lawmaking procedures prescribed by the Constitution is necessary to preserve the Senate's veto over "the supreme Law of the Land" (and the small states' disproportionate power in the lawmaking process) lends greater coherence to the Court's disparate approaches in separation of powers cases. In other words, formalism sometimes functions to uphold the exclusivity of federal lawmaking procedures and the procedural safeguards of federalism.

#### CONCLUSION

The Constitution preserves the governance prerogatives of the states not only by limiting the substantive lawmaking powers of the federal government, but also by prescribing precise lawmaking procedures that frequently render the federal government incapable of exercising its powers. By including the Senate, these procedures give small states disproportionate power in the lawmaking process to block or alter federal proposals. The Supremacy Clause reinforces these procedural safeguards by recognizing only three sources of law—the

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

203 (*Steel Seizure*), 343 U.S. 579, 588–89 (1952) (invalidating President Truman's attempt to seize steel mills during the Korean conflict).

204 462 U.S. 919, 951–59 (1983) (invalidating the legislative veto).

205 524 U.S. 417, 447–49 (1998) (invalidating the Line Item Veto Act).

206 See Clark, *supra* note 1, at 1391–92 (discussing *Chadha* and *Clinton* as examples of formalism).

207 433 U.S. 425, 429–30, 483–84 (1977) (upholding statutory restrictions on former President Nixon's access to presidential papers and effects).

208 478 U.S. 833, 847–58 (1986) (upholding the Commodities Futures Trading Act).

209 487 U.S. 654, 685–97 (1988) (upholding the Independent Counsel Act).

210 See Clark, *supra* note 1, at 1391–92.



“Constitution,” “Laws,” and “Treaties”—as “the supreme Law of the Land.” Not coincidentally, constitutionally prescribed lawmaking procedures require the participation and assent of the states or their representatives in the Senate in order to adopt each of these sources of law. Article V further entrenches the small states’ advantage in the lawmaking process by providing that no state shall be deprived of its equal suffrage in the Senate without its consent. Taken together, these procedural safeguards of federalism were the price that the small states exacted at the Constitutional Convention in exchange for their support of the new Constitution. Stare decisis, historical practice, and the limits of judicial competence may prevent courts from upholding these safeguards in every instance. Fidelity to both the Constitution and the compromises it reflects, however, precludes courts from reading the precise provisions governing federal lawmaking and supremacy out of the document.