Federal Lawmaking and the Role of Structure in Constitutional Interpretation

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INTRODUCTION

In a recent article published in this *Review*,[1] I argued that the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*[2] is best understood as resting on the Supremacy Clause and the associated political and procedural safeguards of federalism built into constitutionally prescribed lawmaking procedures. On this view, the Constitution requires federal courts to follow state law unless the "Constitution," "Laws," and "Treaties" of the United States supply a contrary rule of decision.[3] I wrote that piece to address the frequent contention that, notwithstanding the Court's repeated invocations of the Constitution, *Erie* does not actually rest on constitutional grounds.

In a pair of subsequent articles, Professor Craig Green renews this suggestion[4] and denies that the Supremacy Clause provides a basis for the decision in *Erie* or otherwise limits federal lawmaking.[5] Although he makes an important contribution to a growing body of *Erie*-related scholarship, Green gives insufficient weight to the fundamental role that the Supremacy Clause plays in our federal system. Properly understood, *Erie* implicates both separation of powers and federalism. The former concerns the extent to which

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1. See Bradford R. Clark, Erie*'s Constitutional Source*, 95 CALIF. L. REV. 1289 (2007) [hereinafter Clark, Erie*'s Constitutional Source*], published as part of a symposium examining the work of Professor Paul Mishkin, including his influential essay on *Erie*. *See* Paul J. Mishkin, *Some Further Last Words on* Erie*—The Thread*, 87 HARV. L. REV. 1682 (1974).

2. 304 U.S. 64 (1938).

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

4. *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595 (2008).

5. *See* Craig Green, Erie *and Problems of Constitutional Structure: A Response to Professor Clark*, 96 CALIF. L. REV. 661 (2008).

the Constitution permits federal courts to make federal law, whereas the latter concerns the extent to which the Constitution requires state law to yield to federal judge-made law. One cannot appreciate the complementary nature of these related features of the Constitution, however, without paying careful attention to specific constitutional provisions that reflect precise constitutional compromises and give rise to our unique constitutional structure.

Part I of this Essay summarizes the relationship between *Erie* and the Supremacy Clause, and suggests that *Erie* recognized an important constitutional principle: "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."[6] This principle does not mean that federal courts are disabled from performing ordinary judicial functions. It simply means that federal courts lack constitutional authority to exercise the kind of open-ended, policymaking discretion that characterized the reign of *Swift v. Tyson*.

Part II of this Essay reflects more broadly on the "method of inference from the structures and relationships created by the constitution" as a means of constitutional interpretation.[7] To be sure, structural inferences "unmoored from text are always vulnerable to being attacked as illegitimate."[8] The structural inference underlying *Erie*, however, arises from an unusually tight fit among several precise and interlocking provisions of the constitutional text. When the text supports an inference of this kind, there is little danger that courts are importing extra-constitutional values in the name of abstract conceptions of "the constitutional structure." Refusal to consider structural inferences under these circumstances would impoverish constitutional discourse and decision making.

I
THE SUPREMACY CLAUSE AND FEDERAL LAWMAKING

The constitutional basis for the Supreme Court's decision in *Erie* rests on the interaction of several specific constitutional provisions. The Supremacy Clause recognizes only the "Constitution," "Laws," and "Treaties" as "the supreme Law of the Land,"[9] and thus incorporates three distinct sets of federal lawmaking procedures spelled out in other provisions of the Constitution. By design, all three sets of procedures require the participation and assent of the states or their representatives in the Senate. Taken together, these provisions suggest that the lawmaking procedures set forth in the Constitution establish

6. *Erie*, 304 U.S. at 78.

7. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7-8 (1969).

8. Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 843 (2004).

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

the exclusive means of adopting "the supreme Law of the Land." The *Swift* doctrine ran afoul of this principle because it permitted federal courts to disregard state law on the basis of federal judge-made law adopted outside these procedures.

A. Erie and the Supremacy Clause

In *Erie*, the Supreme Court overruled the longstanding doctrine of *Swift v. Tyson*[10] because, according to the Court, "the unconstitutionality of the course pursued has now been made clear and compels us to do so."[11] The Court's general invocation of the Constitution in *Erie*, however, leaves an important question unanswered. Which specific provision or provisions of the Constitution did the *Swift* doctrine offend? The Court did not say, and commentators continue to debate this question. As I have argued elsewhere,[12] the most persuasive answer is the Supremacy Clause and the political and procedural safeguards of federalism it serves to implement.

The Supremacy Clause recognizes only three sources of law as "the supreme Law of the Land": "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 . . . ."[13] The effect of the Supremacy Clause is twofold. The direct effect of the Clause is that these three sources of law override contrary state law. The negative implication of the Clause is that state law continues to govern in the absence of these sources.

It is no coincidence that the Constitution prescribes distinct procedures to govern the adoption of each source of law recognized by the Supremacy Clause, and that all of these procedures assign responsibility for adopting such law exclusively to actors subject to the "political safeguards of federalism."[14] For example, the Constitution generally requires constitutional amendments to be approved by two-thirds of the House and the Senate and three-fourths of the states.[15] Similarly, the Constitution requires federal laws to be enacted by the

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10. 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. 64.

11. *Erie*, 304 U.S. at 77-78; *see also id.* at 79 (stating that the *Swift* doctrine was "'an unconstitutional assumption of powers by courts of the United States'") (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); *id.* at 80 ("[I]n applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States.").

12. *See* Clark, Erie*'s Constitutional Source*, *supra* note 1, at 1306-11.

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

14. Herbert Wechsler coined the phrase "political safeguards of federalism" to 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 (1954).

15. *See* U.S. CONST. art. V. In addition to authorizing Congress to propose amendments, Article V provides that "on the Application of the Legislatures of two thirds of the several States,

House and the Senate, and then presented to the President.[16] Finally, the Constitution calls for treaties to be approved by the President and two-thirds of the Senate.[17] Although the states' influence over the selection of these federal actors has waned over time,[18] federal lawmaking procedures continue to constrain federal lawmaking simply by establishing multiple "veto gates."[19] In effect, these procedural veto gates create a powerful supermajority requirement.[20] If any of the specified veto players withholds its consent, then no new supreme law is created and state law remains undisturbed.[21]

As I have previously explained at greater length, the text, history, and structure of the Constitution suggest that the procedures specified for adopting constitutional amendments, "Laws," and "Treaties" are the *exclusive* means of adopting "the supreme Law of the Land."[22] The Senate is the only federal

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[Congress] shall call a Convention for proposing Amendments . . . ." *Id.* This procedure has yet to be used.

16. *See* U.S. CONST. art. I, § 7. In passing, Green notes Peter Strauss' argument that "Laws of the United States" may not be restricted to federal statutes and may include federal common law. *See* Green, *supra* note 5, at 664 n.14 (citing Peter Strauss, *The Perils of Theory*, 83 NOTRE DAME L. REV. (forthcoming 2008)). For my response, *see* Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. (forthcoming 2008).

17. *See* U.S. CONST. art. II, § 2, cl. 2.

18. For example, the Seventeenth Amendment has reduced the states' influence in the Senate by replacing appointment of Senators by state legislatures with election by popular vote. *See* U.S. CONST. amend. XVII. Changes in constitutional law have also limited the states' ability to influence the House of Representatives through control over voter qualifications and districting. *See* U.S. CONST. amend. XV (prohibiting voting restrictions based on race); U.S. CONST. amend. XIX (prohibiting voting restrictions based on sex); U.S. CONST. amend. XXIV (prohibiting poll taxes); U.S. CONST. amend. XXVI (prohibiting voting restrictions based on age for voters over eighteen). Finally, the states' modern practice of appointing presidential electors on the basis of winner-take-all popular elections has reduced the role of state legislatures in selecting the President, and all but eliminated the possibility that the President will be selected by the House of Representatives voting by states.

19. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 & n.5 (1992) (the author "McNollgast" is actually a hybrid pseudonym for Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast).

20. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–75 (2001) (discussing the supermajority requirement inherent in American bicameralism); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 956 (same); Michael B. Rappaport, *Amending the Constitution to Establish Fiscal Supermajority Rules*, 13 J.L. & POL. 705, 712 (1997) (noting that the presidential veto, in addition to bicameralism, also establishes an effective supermajority).

21. *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1792 (2005) ("A national government that can act only with difficulty, after all, will tend to leave considerable scope for state autonomy.").

22. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1328-72 (2001) [hereinafter Clark, *Separation of Powers*]; *see also* INS v. Chadha, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); *see also infra* notes 145-149 and accompanying text.

institution that the Constitution requires to participate in the adoption of *all* three forms of federal law recognized by the Supremacy Clause.[23] This was no accident. The Founders specifically designed the Senate to represent the states in the new federal government. Indeed, the basis for representation in the Senate was one of the most contested issues at the Constitutional Convention. The large states preferred proportional representation based on population,[24] whereas the small states insisted upon equal suffrage.[25] After a protracted and often heated debate, the Convention voted to give the states equal suffrage in the Senate.[26] Indeed, the Founders further entrenched this feature of the Constitution by exempting it from amendment by ordinary means. Under Article V, "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."[27]

The Convention adopted the Supremacy Clause the day after it granted the states equal suffrage in the Senate,[28] and after it approved procedures requiring the Senate to participate in adopting "Laws" and "Treaties." Taken together, the Convention's actions effectively gave the Senate (structured to represent the states) the ability to veto all proposals to adopt "the supreme Law of the Land."[29] The fight over equal suffrage in the Senate was so bitter precisely because both sides knew what was at stake. If federal courts were free to displace state law outside of the procedures prescribed by the Constitution, they could deprive the states' representatives in the Senate of their essential gate-keeping role under the constitutional structure.[30] The *Swift* doctrine allowed just this kind of circumvention.[31]

Although not a model of clarity, the Supreme Court's opinion in *Erie* is very much in keeping with the Founders' expectation that the Supremacy Clause establishes the exclusive basis for disregarding state law. The Court sets

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23. The only potential exception is the possibility that the states themselves will trigger a convention for proposing constitutional amendments under Article V, thus relieving the House and Senate of this responsibility. *See supra* note 15.

24. *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 437 (Max Farrand ed., 1911) [hereinafter CONVENTION RECORDS] (James Madison, June 27, 1787) (statement of Luther Martin).

25. *See id.* at 444-45 (James Madison, June 28, 1787) (statement of Luther Martin).

26. 2 CONVENTION RECORDS, *supra* note 24, at 15 (James Madison, July 16, 1787).

27. U.S. CONST. art. V.

28. 2 CONVENTION RECORDS, *supra* note 24, at 22 (Secretary's Journal, July 17, 1787).

29. *See* 1 CONVENTION RECORDS, *supra* note 24, at 155-56 (James Madison, June 7, 1787) (statement of George Mason: "The State Legislatures . . . ought to have some means of defending themselves [against] encroachments of the Natl. Govt. . . . And what better means can we provide than the giving them some share in, or rather to make them a constituent part of, the Natl. Establishment.").

30. The Founders recognized that the procedural safeguards of federalism would make it more difficult to adopt "the supreme Law of the Land," but thought that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

31. *See* Clark, Erie*'s Constitutional Source*, *supra* note 1, at 1291-94.

forth its constitutional rationale in the third part of its opinion:

> 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. And 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. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[32]

Apart from the dictum suggesting a lack of congressional power,[33] this passage essentially paraphrases the effects of the Supremacy Clause.

Like the Supremacy Clause, the *Erie* Court's rationale presupposes that federal courts have no independent lawmaking authority to displace state law. Rather, they may do so only when acting pursuant to applicable provisions of "the Federal Constitution," "Acts of Congress," and, presumably, "Treaties."[34] Under the Constitution, each source of supreme federal law recognized by *Erie* (and the Supremacy Clause) must be adopted pursuant to the "finely wrought and exhaustively considered"[35] procedures set forth in the Constitution.[36] As

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32. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). As Professor Ely points out, the *Erie* opinion "has been faulted for failing to indicate precisely what constitutional provision *Swift v. Tyson*'s interpretation of the Rules of Decision Act violated." John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 702 (1974).

33. By 1938, or soon thereafter, the Court would likely have recognized Congress's power to prescribe the duty of care that interstate railroads owe to pedestrians. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (interpreting the Commerce Clause to permit Congress to regulate farmers' consumption of home-grown wheat); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36-39 (1937) (stating that Congress's power to regulate commerce is "plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it" (citations and internal quotations omitted)). In any event, "even if the *Erie* Court meant to endorse a narrow[] view of congressional power, that view . . . was arguably dictum . . . because Congress had not enacted an applicable federal statute." Clark, Erie*'s Constitutional Source*, *supra* note 1, at 1298-99.

34. Of course, the Supremacy Clause refers not only to the "Constitution" and "Laws," but also to "Treaties." *See* U.S. CONST. art. VI, cl. 2. Perhaps the *Erie* Court overlooked treaties because, by comparison, they provide a relatively infrequent basis for displacing state law.

35. INS v. Chadha, 462 U.S. 919, 951 (1983).

36. Of course, there are potential counterexamples. For example, federal administrative agencies sometimes promulgate rules that preempt state law. *See infra* notes 108–122 and accompanying text. Increasingly, however, commentators have argued that federal courts should not defer to agency determinations that state law is preempted absent clear language in the statute preempting state law. *See, e.g.*, William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 NOTRE DAME L. REV. (forthcoming 2008); Amanda Frost, *Judicial Review of FDA Preemption Determinations*, 54 FOOD & DRUG L.J. 367 (1999); Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004). The Supreme Court has suggested that preemption turns on congressional authorization. *See* La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it."); Clark, *Separation of Powers*, *supra* note 22, at 1430-38. Another potential counterexample is the rise of sole executive

discussed, these procedures assign federal lawmaking exclusively to a set of carefully chosen institutions including, in each case, the Senate. The federal judiciary, by contrast, has no explicit role under these precisely drawn institutional arrangements. *Erie* arguably invoked this omission when it proclaimed both that "[t]here is no federal general common law,"[37] and that "no clause in the Constitution purports to confer . . . power upon the federal courts"[38] "to declare substantive rules of common law applicable in a State."[39] In other words, *Erie* has less to do with the limits of federal power generally, and more to do with the procedural limitations on how such power may be exercised.[40]

From this perspective, the *Swift* doctrine ran afoul of the Constitution by permitting federal courts to disregard state law outside the Supremacy Clause and substitute their own body of judge-made law in its place. Whatever its original justification, the *Swift* doctrine eventually degenerated into a transparent excuse for federal courts to make their own body of law in diversity

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agreements—i.e., international agreements made by the President alone without the participation or assent of either house of Congress. The Court has recently stated that such agreements are generally "fit to preempt state law, just as treaties are." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416 (2003). For a critique of this position, *see* Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007). A complete examination of these doctrines is beyond the scope of this Essay.

37. *Erie*, 304 U.S. at 78. Modern federal common law arguably contradicts this understanding of *Erie*. Yet even in this context, however, the Supreme Court has rejected open-ended federal common lawmaking and confined judicial lawmaking to specific enclaves. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1250 (1996) [hereinafter Clark, *Federal Common Law*]; *infra* notes 72-78 and accompanying text.

38. *Erie*, 304 U.S. at 78.

39. *Id.*

40. Although not invoking the Supremacy Clause, several influential commentators have essentially read *Erie* this way. *See* Alfred Hill, *The* Erie *Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 441 (1958) ("[E]ven if a particular area is one in which the federal government has power to make independent law, it does not follow that a federal court also has power to do so, for the power of the federal courts does not correspond in all respects with the power of the federal government as a whole."); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 431 (1995) (explaining that the *Swift* doctrine raised both federalism and separation of powers concerns because it "seemed both as if *federal* courts were exercising the power of *state* legislatures, and as if federal *courts* were exercising the power of state *legislatures*"); Mishkin, *supra* note 1, at 1683 (challenging the notion that "the courts would have the same range of lawmaking power as Congress—that any time Congress could validly displace state law, the federal courts are constitutionally equally empowered to do so" (citation omitted)); Henry P. Monaghan, Book Review, 87 HARV. L. REV. 889, 892 (1974) (reviewing PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973)) ("*Erie* is, fundamentally, a limitation on the federal court's power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of article III nor the jurisdictional statute provides."); *see also* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975) [hereinafter Monaghan, *Constitutional Common Law*] ("[*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." (citations omitted)).

cases. As Justice Field stressed, the "general law" applied by federal courts under the *Swift* doctrine was "little less than what the judge advancing the doctrine [thought] at the time should be the general law on a particular subject."[41] Judicial lawmaking on this scale circumvented the political and procedural safeguards built into the Supremacy Clause, and in this sense "invaded rights . . . reserved by the Constitution to the several States."[42] Under these circumstances, it is not surprising that the *Erie* Court felt compelled to abandon the *Swift* doctrine[43] and declare it "'an unconstitutional assumption of powers by courts of the United States . . . .'"[44]

B. Potential Objections

Professor Green raises three potential objections to this account of *Erie*, but none of these objections seriously undermines the constitutional basis of the decision. First, he argues that the Supremacy Clause cannot be the basis of the *Erie* decision because *Swift*'s general common law was neither supreme nor binding in state court. Second, he suggests that traditional definitions of federal common law are unsatisfactory and that federal common lawmaking is practically indistinguishable from other judicial activities. Third, he maintains that recognizing the Supremacy Clause as a constraint on federal lawmaking places the administrative state at risk. In addition, he argues that *INS v. Chadha*[45] does not limit "the power of federal courts, the executive, or even private participants to create supreme federal law outside Article I's 'single, finely wrought' procedures for enacting statutes."[46] Upon analysis, none of

41. Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting). *See* Lessig, *supra* note 40, at 431 (explaining that by the time *Erie* was decided, changing conceptions of state law revealed the "fundamental[] political reality" that "what a judge was doing when he decided an open question of common law was making law rather than finding law").

42. *Erie*, 304 U.S. at 80. *See also* Clark, *Separation of Powers*, *supra* note 22, at 1414 ("Careful analysis reveals that *Erie*'s constitutional holding is best understood as an attempt to enforce federal lawmaking procedures and the political safeguards of federalism they incorporate."). Green emphatically denies that *Erie* rests on constitutional grounds. He "would set aside *Erie* and the Supremacy Clause as irrelevant," Green, *supra* note 5, at 669 n.44, and replace them with "a better way to identify" the proper role of federal judges in diversity cases. *Id.* This position seems unduly dismissive of the contrary conclusion—reached after years of experience applying the *Swift* doctrine—by such renowned Justices as Holmes and Brandeis, who explicitly found the doctrine to be "unconstitutional."

43. *Erie*, 304 U.S. at 77-78 ("[T]he unconstitutionality of the course pursued . . . compels us to [abandon the *Swift* doctrine.]").

44. *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). Even after *Erie*, federal courts risk usurping state authority by "predicting" how the state's highest court would rule when state law is unclear. *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1495-1517 (1997) [hereinafter Clark, *Ascertaining the Laws*]. Federal courts can avoid this risk by certifying unsettled questions of state law to the state's highest court when certification is available. *See id.* at 1544-56.

45. 462 U.S. 919 (1983).

46. Green, *supra* note 5, at 679 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

these arguments provides a persuasive basis for disregarding the constitutional constraints on federal lawmaking imposed by the Supremacy Clause and associated lawmaking procedures.

1. The Swift Doctrine and the Supremacy Clause

Professor Green argues that "the Supremacy Clause cannot be *Erie*'s constitutional source"[47] because *Swift*'s general federal common law "never claimed preemptive 'supremacy' and never bound state courts."[48] In his view, "the clause by its terms is irrelevant."[49] Green's assessment, however, overlooks both the residual nature of state law under the Constitution and the constraints imposed on federal lawmaking by the Supremacy Clause.

An essential predicate to *Erie*'s constitutional analysis was the Court's explicit rejection of "the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'"[50] Contrary to this "fallacy," the Court recognized that "'law in the sense in which courts speak of it today does not exist without some definite authority behind it.'"[51] This observation draws on notions of legal positivism,[52] but it also recognizes both the residual nature of state law and the interstitial nature of federal law under the Constitution.[53]

Two primary levels of government operate in the United States: the states and the federal government. A state can make law in any manner permitted by its constitution, subject only to the constraints of the Guarantee Clause[54] (which the Court regards as nonjusticiable).[55] Generally speaking, therefore, it "is not a matter of federal concern" "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision."[56] The federal government, by contrast, can make supreme federal law only in the ways established by constitutionally-prescribed lawmaking procedures. When the federal government is unwilling or unable to make such law, "'the authority and only authority is the State . . . .'"[57]

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47. *Id.* at 666.
48. *Id.* at 665.
49. *Id.* at 666.
50. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 534 (1928) (Holmes, J., dissenting)).
51. *Id.* (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).
52. *See* Clark, *Ascertaining the Laws*, *supra* note 44, at 1479-81.
53. *See* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 498 (1954) ("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.").
54. U.S. CONST. art. IV, §4.
55. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849).
56. *Erie*, 304 U.S. at 78.
57. *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 535 (Holmes, J., dissenting)).

In the absence of supreme federal law, a federal court sitting in diversity has no authority to disregard state law.[58] The Constitution does not recognize a category of non-supreme federal law that federal courts are free to make on their own initiative. In *Swift*, Justice Story made clear that the Court felt free to ascertain and apply general (rather than local) law because that is what New York courts would do in deciding whether one who releases a preexisting debt in exchange for a note qualifies as a bona fide holder.[59] So long as state courts saw themselves as ascertaining and applying a general body of law reflected by the decisions of multiple jurisdictions, federal courts sitting in diversity were free to do the same. It was only after states abandoned this approach in favor of state-specific rules that the federal courts' persistence in applying general commercial law in diversity cases triggered serious constitutional concerns. In addition, federal courts improperly expanded the *Swift* doctrine over time to cover questions of local law (such as torts) that state courts never regarded as general and that fell far outside Justice Story's original conception in *Swift*. These two developments undermined the constitutional legitimacy of the *Swift* doctrine and led to its demise in *Erie*.

When federal courts invoked the *Swift* doctrine to disregard state law on a question of local law with no warrant for doing so in the "Constitution," "Laws," or "Treaties," they effectively appropriated the lawmaking function for themselves, raising the previously discussed separation of powers and federalism concerns. To be sure, judicial lawmaking under *Swift* was limited to diversity cases and did not purport to establish rules of decision binding in state court. The constitutional violation triggered by the *Swift* doctrine, however, arose not from the federal courts' attempt to bind state courts in future cases, but from their disregard of state law in the very cases they were adjudicating. As discussed, the Constitution's designation of only three sources of supreme law, viewed in light of the Constitution's precise and careful elaboration of corresponding lawmaking procedures, confirms that the Supremacy Clause was meant to establish the *exclusive* basis for disregarding state law. The *Swift* doctrine ran afoul of this principle by permitting federal courts sitting in

58. *See id.* at 78.

59. *Swift* made this point explicitly: "It is observable that the courts of New York do not found their decisions upon this [issue,] upon any local statute, or positive, fixed, or ancient local usage: but they deduce the doctrine from the general principles of commercial law." Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842). On questions of this kind, the Court stressed that "the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case." *Id.* at 19. For this reason, as I have previously explained, *Swift*'s application of the law merchant was arguably defensible when decided in 1842. *See* Clark, *Federal Common Law*, *supra* note 37, at 1276-92. Green finds this idea "[s]trange[]" and "confused." Green, *supra* note 5, at 664 n.17. My assessment of *Swift*, however, should come as no real surprise to anyone familiar with the history and conception of general law during the *Swift* era. *See, e.g.*, William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

diversity to develop and apply their own body of law in preference to state law.

If Green were correct that the Supremacy Clause is inapplicable in diversity cases, then federal courts would be free to apply federal judge-made law not only in preference to state common law, but also in preference to state statutes. The Court has never embraced such a sweeping vision of federal judicial power, and with good reason. Even during the *Swift* era, federal courts felt obligated to follow applicable state statutes. By the time *Erie* was decided, however, it was conceptually clear that a state's common law was no less an exercise of sovereign authority than a state statute.[60] From this perspective, the *Swift* doctrine necessarily permitted federal judges to disregard an important subset of state law in favor of their own body of judge-made law. *Erie* put an end to this kind of federal lawmaking by recognizing the primacy of all forms of state law—whether written or unwritten—in the absence of an applicable provision of "the Federal Constitution," "Acts of Congress," and presumably "Treaties."[61]

2. Defining Federal Common Law

Professor Green doubts the utility of defining "federal common law" as a "rule of decision 'whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command.'"[62] He questions whether—using any definition of federal common law—one can "reliably separate disfavored common lawmaking from other judicial activities[.]"[63] Taken to its logical conclusion, however, Green's point would deny the existence of *any* constitutional limits on lawmaking by federal courts. In our constitutional tradition, that would be a novel proposition indeed.

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60. *See* Clark, *Ascertaining the Laws*, *supra* note 44, at 1479-81.

61. *See Erie*, 304 U.S. at 78. Thus, *Erie*'s assertion that "[t]here is no federal general common law," *id.*, was simply a way of paraphrasing the Supremacy Clause's negative implication that there is no body of non-supreme federal law capable of displacing state law in diversity cases. Green finds this reading of *Erie* "surprising[]" and "substantially nontextual." Green, *supra* note 5, at 666 n.28. He suggests that if *Erie* prohibits federal courts from applying non-supreme general law in diversity cases, then it must also prevent Congress and the Executive Branch from promulgating non-supreme internal, intra-branch rules by means other than bicameralism and presentment. *See id.* at 666-67. Green's position overlooks a crucial distinction. *Erie* considered the constitutionality of displacing the rights and duties of private litigants *under state law* in favor of federal judge-made rules. Such displacement is not simply a matter of "federal courts' internal operations," *id.* at 667 n.32, but the core question under the Supremacy Clause—that is, whether an applicable provision of "the supreme Law of the Land" requires otherwise applicable state law to yield. By contrast, state law does not purport to govern the internal operations of Congress or the Executive Branch, so their intra-branch rules do not even implicate the Supremacy Clause.

62. Green, *supra* note 5, at 671 (quoting Clark, *Federal Common Law*, *supra* note 37, at 1247 (quoting PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d ed. 1988))).

63. *Id.* at 671. Similarly, Green questions whether one can persuasively distinguish between permissible and impermissible "enclaves" of federal common law. *See id.* at 672.

Although Green believes it is impossible to define the phrase "federal common law," federal courts scholars have long defined it "to refer to federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands."[64] Courts and commentators self-consciously define federal common law in opposition to interpretation in order to distinguish between two conceptually distinct kinds of judicial activity. This distinction is necessary to uphold the widely-shared assumption that a Constitution that establishes a republican form of government and elaborate lawmaking procedures would not give unelected, life-tenured judges unchecked power to make federal law at will.[65]

To be sure, the line between interpretation and lawmaking is often difficult to draw,[66] and this practical impediment has arguably rendered vigorous enforcement of the nondelegation doctrine judicially unmanageable.[67] Federal courts, however, have never considered themselves incapable of basing their own decisions on interpretation of positive federal law rather than on open-ended judicial lawmaking. No one doubts that judges exercise some degree of discretion when interpreting and applying federal law,[68] but the very

64. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003). In my prior work, I quoted the same definition from an earlier edition of the Hart & Wechsler casebook. *See* Clark, *Federal Common Law*, *supra* note 37, at 1247 (quoting PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d ed. 1988)). Other scholars have used similar definitions. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986) (stating that federal common law refers to "any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional" (citations omitted)); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (defining federal common law as "*any* federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense").

65. In discussing the distinction between federal common lawmaking and interpretation, Green erroneously suggests that I would not accept a court's citation of a statute or the Constitution as the basis for its decision. *See* Green, *supra* note 5, at 671. According to Green, "[Clark] would dig deeper, to detect whether a court is truly making law, rather than interpreting it." *Id.* Green is incorrect. When a court grounds its decision in a federal statutory or constitutional provision, it is not making federal common law. Of course, a misconstruction of positive federal law is open to criticism as an erroneous interpretation, but such an error does not transform the decision into federal common law.

66. *See, e.g.*, FALLON ET AL., *supra* note 64, at 685 ("As specific evidence of legislative purpose with respect to the issue at hand attenuates, interpretation shades into judicial lawmaking."); Clark, *Federal Common Law*, *supra* note 37, at 1248 n.7 ("In practice, of course, the distinction between federal common lawmaking and statutory (or constitutional) interpretation is often difficult to discern."); Monaghan, *Constitutional Common Law*, *supra* note 40, at 31 ("Plainly, any distinction between constitutional exegesis and common law cannot be analytically precise, representing, as it does, differences of degree.").

67. *See infra* notes 116-122 and accompanying text.

68. *See* THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 1961) ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.").

process of justifying decisions as the result of interpretation rather than lawmaking serves to discipline the judiciary.[69] Of course, one could argue that Article III itself provides a sufficient and constitutionally-derived source of judicial lawmaking authority.[70] But this argument proves too much. Here too, the Supremacy Clause should inform our understanding of Article III and the judicial power to say what the law is. It would make little sense for the Constitution to specify elaborate, finely-wrought lawmaking procedures and at the same time to sanction freestanding, unstructured lawmaking wholly outside these procedures.[71]

It is not surprising, therefore, that the Supreme Court traditionally regards federal common law as exceptional and limits it to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[72] As I have argued elsewhere, many of the "federal common law" rules that fall within these enclaves do not actually constitute "federal judge-made law" because they consist of background principles derived from the law of nations that are necessary to implement basic aspects of the constitutional scheme.[73] Examples of such rules include the act of state doctrine,[74] diplomatic immunity,[75] rules upholding the constitutional equality of the states,[76] certain admiralty rules,[77] and rules recognizing federal immunity from state interference.[78]

Green doubts it is possible to "identify[] certain 'enclaves' of post-*Erie* federal common law that are nonetheless legitimate."[79] Specifically, he suggests that my distinction between admiralty and rules governing disputes between states "raises . . . line-drawing issues"[80] and, more generally, "risk[s]

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69. *Cf.* S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.").

70. *See* Green, *supra* note 5, at 689-90.

71. *See* Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1160-82 (2006) [hereinafter Clark, *Structure, Discretion, and the Eighth Amendment*] (arguing that the text, history, and structure of the Constitution counsel against unlimited judicial discretion to make federal law).

72. Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (footnotes omitted).

73. *See* Clark, *Federal Common Law*, *supra* note 37, at 1251. It is an established method of interpretation to understand legal texts and structures in light of background customs and principles. *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2465-76 (2003) (discussing various examples of modern textualists' willingness to use background legal conventions to interpret statutes).

74. *See* Clark, *Federal Common Law*, *supra* note 37, at 1292-1306.

75. *See id.* at 1316-21.

76. *See id.* at 1322-31.

77. *See id.* at 1334-40.

78. *See id.* at 1368-75.

79. Green, *supra* note 5, at 670.

80. *Id.* at 673.

opportunistic application."[81] Because Green's claim that it is impossible to distinguish between legitimate and illegitimate enclaves of federal common law is so central to his critique, it is useful to sketch the principal historical and structural arguments for distinguishing modern rules of admiralty from rules governing disputes between states.[82] These historical and structural observations not only refute Green's claim, but also serve to underscore the constitutional difficulties raised by unbounded federal common lawmaking.

The rules applied by federal courts exercising jurisdiction over admiralty and maritime cases originally raised no serious constitutional concerns. The Founders gave federal courts jurisdiction to hear such cases because they dealt primarily with matters beyond the legislative competence of the states and of vital importance to the peace and security of the Union. As Alexander Hamilton explained:

> The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the law of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace.[83]

One must recall the nature of prize and instance cases to understand Hamilton's remarks in context.

As the Supreme Court explained, "In its ordinary jurisdiction, the admiralty takes cognizance of mere questions . . . arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself performed through the agency of his officers or subjects."[84] Hamilton regarded prize jurisdiction as the "most important part" of the federal courts' admiralty and maritime jurisdiction[85] because prize jurisdiction "was necessary to enable the United States to carry out its obligations under the law of nations, and thus was 'a necessary appendage to the power of war, and negotiation with foreign nations.'"[86] Thus, it is not surprising that the Founders gave federal courts exclusive jurisdiction over such cases, and that prize courts faithfully applied the law of nations. Although prize cases predated both *Swift* and *Erie*, I have previously suggested that the Court's approach was defensible because state law was inapplicable under the Constitution's division of powers and because the separation of powers

81. *Id.* at 674.

82. For an earlier, more complete discussion of the legitimacy of these enclaves, see Clark, *Federal Common Law*, *supra* note 37, at 1322-60.

83. THE FEDERALIST NO. 80, at 477 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

84. Rose v. Himely, 8 U.S. (4 Cranch) 241, 282 (1808).

85. THE FEDERALIST NO. 80, *supra* note 83, at 477.

86. Clark, *Federal Common Law*, *supra* note 37, at 1336 (citations omitted) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 866 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833)).

arguably required federal courts to apply rules supplied by the law of nations.[87]

At least initially, instance cases also raised few constitutional concerns. As Justice Story explained, in 1789, admiralty jurisdiction over private claims in England was "confined to contracts and things exclusively made and done upon the high seas, and to be executed upon the high seas."[88] Such claims were generally governed by the law of nations because they involved matters that took place outside the territorial jurisdiction of any state or nation. By the mid-nineteenth century, however, the Supreme Court substantially expanded the reach of admiralty jurisdiction. In 1870, the Court embraced the "more enlarged view" of admiralty and maritime jurisdiction espoused by Justice Story on the circuit court to hold that a policy of insurance was a maritime contract.[89] More significantly, in 1851, the Court abandoned the longstanding tidewater doctrine, which prohibited federal courts from exercising admiralty jurisdiction over suits arising on the inland waterways beyond "the ebb and flow of the tide."[90] This meant that admiralty jurisdiction now extended to all "public navigable water, including lakes and rivers in which there is no tide."[91]

The combined effect of these decisions was to extend admiralty jurisdiction to many cases traditionally adjudicated in state court. If state courts ever applied the general maritime law to such cases, they no longer did so by the beginning of the twentieth century. This meant that the law applied in maritime cases—like the law applied in diversity cases during the *Swift* era—differed depending on whether the case was heard in state or federal court.

Twenty-one years before it overruled *Swift*, the Supreme Court exacerbated this problem by federalizing judge-made admiralty law. In *Southern Pacific Co. v. Jensen*,[92] the Court declared that "in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."[93] At least as applied to matters within the legislative competence of the states, *Jensen* raises all of the constitutional difficulties associated with the *Swift* doctrine (and more) because it made federal common law in admiralty binding in both state and federal courts. These defects have not gone unnoticed. In 1994, Justice Stevens concluded that "*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation . . . without any firm grounding in constitutional text or principle."[94]

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87. *See id.* at 1338.

88. DeLovio v. Boit, 7 F. Cas. 418, 426 (C.C.D. Mass. 1815) (No. 3,776).

89. Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 25, 35 (1870) (affirming Justice Story's holding in *DeLovio*, 7 F. Cas. 418).

90. *See* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

91. *Id.* at 457.

92. 244 U.S. 205 (1917).

93. *Id.* at 215 (citations omitted).

94. Am. Dredging Co. v. Miller, 510 U.S. 443, 459 (1994) (Stevens, J., concurring in part

"Federal common law" rules governing disputes between states do not typically raise these concerns. In such disputes, "[n]either State can legislate for or impose its own policy upon the other."[95] In addition, by ratifying the Constitution, the states gave up the "traditional methods available to a sovereign for the settlement of such disputes"—diplomacy and war.[96] In their place, the Constitution established two mechanisms. First, states may enter into interstate compacts to resolve disputes, but only with "the Consent of Congress."[97] Second, if the first mechanism fails, states may seek resolution of their disputes in the Supreme Court.[98] In such cases, the Court must decide which law to apply. In the modern era, the Court has characterized the law it applies as "federal common law."[99]

This characterization, however, may be something of a misnomer. As the Court has explained, "[T]he fact that this court must decide [interstate controversies] does not mean, of course, that it takes the place of a legislature."[100] Rather, the Court generally confines itself to adopting rules that respect and implement the constitutional equality of the states.[101] For example, in boundary disputes, the Court often borrows doctrines from international law (like the *Thalweg*) predicated on the absolute equality of sovereigns.[102] Even in cases concerning the allocation of water from an interstate stream, the Court resolves such disputes "on the basis of equality of right."[103] This means that the Court will adopt "an equitable apportionment," "having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system.'"[104]

Professor Green thinks that my skepticism of federal common law in admiralty and my embrace of such law in interstate disputes requires an "unconventionally narrow view of 'common law'" and a broad view of constitutional law.[105] Yet even a casual review of the historical materials in

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and concurring in the judgment); *see also id.* at 458 ("In my view, *Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York*, 198 U.S. 45 (1905), would be in a case under the Due Process Clause."). Commentators have echoed Justice Stevens' concerns. *See* Clark, *Federal Common Law*, *supra* note 37, at 1354-60 (explaining that many modern rules governing private maritime cases cannot be reconciled with the constitutional structure); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999) (same).

95. Kansas v. Colorado, 206 U.S. 46, 95 (1907).

96. Georgia v. Pa. R.R. Co., 324 U.S. 439, 450 (1945); *see also* U.S. CONST. art. I, § 10.

97. U.S. CONST. art. I, § 10, cl. 3.

98. *See* U.S. CONST. art. III, § 2, cl. 1.

99. *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).

100. Missouri v. Illinois, 200 U.S. 496, 519 (1906).

101. *See* Clark, *Federal Common Law*, *supra* note 37, at 1328-31.

102. *See* New Jersey v. Delaware, 291 U.S. 361, 383 (1934). The *Thalweg* respects the equality of states and protects their rights of navigation by dividing "the river boundaries between states by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks." *Id.* at 379 (citations omitted).

103. Connecticut v. Massachusetts, 282 U.S. 660, 670 (1931).

104. *Id.* at 670-71 (quoting Wyoming v. Colorado, 259 U.S. 419, 465, 470 (1922)).

105. Green, *supra* note 5, at 673. Green also suggests that my criticism of the Supreme

these areas suggests that the Court's adoption and expansion of federal common law in admiralty raises much greater constitutional concerns than the Court's resolution of disputes between states. Courts now routinely use federal common law in admiralty to exercise lawmaking authority assigned to both Congress and the states. Rules governing disputes between states do not trigger the same concerns both because Congress and the states frequently lack authority to legislate rules of decision for such cases,[106] and because the Constitution expressly enlists the Supreme Court to fill the gap.[107] In short, one need not take a particularly narrow view of "common law," nor a particularly broad view of "constitutional law," to distinguish these enclaves. While the Supreme Court's resolution of disputes between states remains consistent with the constitutional structure, modern federal common law in admiralty is in substantial tension with the structure.

3. The Status of Administrative Lawmaking

Professor Green argues that my federalism and separation of powers critique of federal common law places "the modern administrative state at risk."[108] Specifically, he sees no constitutional reason that agencies, but not courts, should "get a pass for nonstatutory lawmaking."[109] As he puts it, if the

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Court's approach in a recent Eighth Amendment decision relies on "a relatively broad view of 'common law.'" *Id.* at 673. Here again, Green misapprehends my critique. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989), and adopted a novel methodology to invalidate the juvenile death penalty. Both cases purported to apply the Court's modern Eighth Amendment framework first articulated in *Trop v. Dulles*, 356 U.S. 86 (1958). In *Trop*, a plurality of the Court announced that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *id.* at 101, but cautioned against "reliance upon personal preferences." *Id.* at 103. In *Stanford*, the Court applied this test to uphold the death penalty for sixteen and seventeen year old offenders, and explained that "[i]n determining what standards have 'evolved,' . . . we have looked not to our own conceptions of decency," 492 U.S. at 369, but to objective indicia such as "statutes passed by society's elected representatives." *Id.* at 370. In *Roper*, by contrast, the Court specifically refused to be bound by "objective indicia of consensus." 543 U.S. at 564. Instead, the Court declared that the Justices must ultimately "determine, in the exercise of [their] own independent judgment, whether the death penalty is a disproportionate punishment for juveniles." *Id.* Significantly, the *Roper* majority did not attempt to ground its novel approach "either in the constitutional text or in the specific understanding of the text . . . at any subsequent point prior to *Trop*." Clark, *Structure, Discretion, and the Eighth Amendment*, *supra* note 71, at 1156. Accordingly, I took "the Court's underlying [Eighth Amendment] framework as my starting point," and sought "only to examine the consistency of the competing approaches [employed in *Stanford* and *Roper*] with broader implications of the constitutional structure." *Id.* Based on my review of the constitutional structure, I concluded that the Eighth Amendment should not "be understood, without specific historical warrant, to *delegate* to the *judiciary* the authority to render independent penological judgments capable of displacing the contrary penological judgments of the state legislatures." *Id.* at 1160. These quotations are not offered as a "revision or clarification" of my analysis of *Roper*, Green, *supra* note 5, at 673 n.64, but merely to highlight my original analysis.

106. *See* Clark, *Federal Common Law*, *supra* note 37, at 1323 & n.367, 1325 & n.376.

107. *See id.* at 1325-26; *see also* U.S. CONST. art. III, § 2.

108. Green, *supra* note 5, at 675.

109. *Id.* at 678.

procedures established for adopting the Constitution, Laws, and Treaties "are the only possible mechanisms for making preemptive federal law, the clause by its terms would seem to bar supreme lawmaking by courts and agencies alike."[110] In his view, the non-delegation doctrine cannot supply an answer because at best it provides only "loose constraints" on agency lawmaking.[111] Finally, Green argues that *Chadha* does not restrict, but rather "grants important protection for executive and judicial lawmaking."[112] I address these points in turn.

Green is correct that the emergence of broad preemptive lawmaking by administrative agencies pursuant to broad delegations is in substantial tension with the political and procedural safeguards built into the Supremacy Clause. Contrary to Green's suggestion, however, this observation poses no real threat to the administrative state because courts lack competence to enforce the Supremacy Clause's safeguards vigorously in this context.

In any event, institutional limitations on the judiciary's ability to enforce the non-delegation doctrine are not present when the judiciary simply declines to make federal common law. When Congress authorizes agency action, courts find it difficult to ascertain and enforce the line between (permissible) execution of the statute and (impermissible) lawmaking.[113] By contrast, courts seeking to refrain from federal common lawmaking do not face the same difficulties because, by hypothesis, such lawmaking occurs in the *absence* of statutory authorization. This distinction explains why the Supreme Court almost never invalidates broad statutory delegations to administrative agencies,[114] but routinely declines to recognize new federal common law.[115]

In principle, the Supreme Court maintains that "Congress cannot delegate legislative power to the President," and that this rule is "universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."[116] In practice, however, the Court applies a test that effectively upholds broad delegations. According to the Court, so long as "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[117] The reason the Court has not enforced a more vigorous non-delegation doctrine is that it has

110. *Id.*

111. *Id.* at 677.

112. *Id.* at 675.

113. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001).

114. *See, e.g., id.*; Touby v. United States, 500 U.S. 160 (1991).

115. *See, e.g.*, Atherton v. FDIC, 519 U.S. 213 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

116. Field v. Clark, 143 U.S. 649, 692 (1892); *see also Whitman*, 531 U.S. at 472 (stating that Article I "permits no delegation of [legislative] powers"); *Touby*, 500 U.S. at 165 ("Congress may not constitutionally delegate its legislative power to another branch of Government.").

117. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

"'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.'"[118]

The judiciary feels constrained in this context because, as Professor Cass Sunstein observes, "[t]he distinction between 'executive' and 'legislative' power cannot depend on anything qualitative; the issue is a quantitative one."[119] When an agency interprets and applies a statute, it necessarily exercises some degree of discretion as an inherent part of executing the law. Although such discretion is not unlimited, drawing the line between permissible execution and impermissible lawmaking "is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[120] Moreover, aggressive judicial enforcement of the non-delegation doctrine would likely "produce ad hoc, highly discretionary rulings" that would "suffer from the appearance, and perhaps the reality, of judicial hostility to the particular program at issue."[121] For these reasons, courts almost never invalidate agency action as an improper exercise of "legislative power."[122] Contrary to Green's suggestion, however, the absence of aggressive judicial enforcement of the non-delegation doctrine does not imply constitutional acquiescence.[123]

Finally, Professor Green denies that *INS v. Chadha* supports the exclusivity of federal lawmaking procedures. He acknowledges that one might draw such support from the Court's "grand statement" that "'the legislative power of the Federal Government [must] be exercised in accord with a single,

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118. *Whitman*, 531 U.S. at 474-75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

119. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 326 (2000).

120. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

121. Sunstein, *supra* note 119, at 327.

122. In the course of discussing lawmaking by agencies and courts, Green misconstrues my reference to bicameralism and presentment. He quotes my earlier "claim that 'open-ended lawmaking by courts raises constitutional concerns because it bears a troublesome resemblance to the exercise of legislative power—power apparently reserved by the Constitution to *the political branches*.'" Green, *supra* note 5, at 678 (quoting Clark, *Federal Common Law*, *supra* note 37, at 1248-49 (emphasis added)). Green comments that "[a]s a formal matter, these last three words seem odd, as neither the Supremacy Clause nor Article I assigns 'legislative power' to a 'political branch[]' other than Congress." *Id.* at 678-79. Of course, Article I, Section 7 provides that Congress may exercise the legislative power of turning a "Bill" into a "Law" only with the participation of the President. U.S. CONST. art. I, § 7, cl. 2.

123. *Cf.* Baker v. Carr, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable standards for resolving it . . . ."). The Court's disinclination to enforce the non-delegation doctrine does not mean that it has abandoned all efforts to enforce constitutionally prescribed lawmaking procedures. As Professor Sunstein points out, the Court employs certain canons of construction that "actually constitute a coherent and flourishing doctrine, amounting to the contemporary nondelegation doctrine." Sunstein, *supra* note 119, at 316-17; *see also* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1409 (2000) ("The Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine.").

finely wrought and exhaustively considered, procedure.'"[124] He argues, however, that *Chadha* "imposed restraints on Congress, but not on the power of federal courts, the executive, or even private participants to create supreme federal law outside Article I's 'single, finely wrought' procedures for enacting statutes."[125] In support, he points out that the Court invalidated Congress's use of a legislative veto, but permitted Congress to delegate authority to the Attorney General to make deportation decisions. In his view, *Chadha* "grants important [constitutional] protection for executive and judicial lawmaking."[126]

Here again, institutional factors explain why the *Chadha* Court invalidated the legislative veto, but distinguished Congress's delegation of authority to the Attorney General. Responding to the charge that its ruling sanctioned lawmaking by the Attorney General, the Court explained that rulemaking by executive agencies "may resemble 'lawmaking,'" but is "presumptively" executive action in constitutional terms.[127] In other words, "[t]he constitutionality of the Attorney General's execution of the authority delegated to him . . . involves only a question of delegation doctrine."[128] Contrary to Green's account,[129] the fact that courts cannot detect and invalidate all improper delegations of legislative power does not establish the propriety of such delegations. Rather, it merely illustrates the limits of judicial competence.

Green's gloss on *Chadha* is also undercut by the Supreme Court's subsequent decision in *Clinton v. City of New York*.[130] There, the Court invalidated the Line Item Veto Act, which authorized the President "to 'cancel in whole' three types of provisions that have been signed into law: '(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.'"[131] Under the Act, "cancellation prevents the item 'from having legal force or effect.'"[132] The Court found the Act unconstitutional because it permitted the President unilaterally to amend "two Acts of Congress by repealing a portion of each."[133] According to the Court, "'Repeal of statutes, no less than enactment, must conform with Art. I.'"[134] As in *Chadha*, the Court concluded that Article I, Section 7 establishes the *exclusive* means of enacting (and repealing) federal statutes.[135] Because the Act's cancellation provisions authorized the President to circumvent these procedures, the Court held that the cancellation provisions "violate Article I,

124. Green, *supra* note 5, at 679 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).
125. *Id.* at.679.
126. *Id.* at.675.
127. *Chadha*, 462 U.S. at 953 n.16.
128. *Id.*
129. Green, *supra* note 5, at 681-82.
130. 524 U.S. 417 (1998).
131. *Id.* at 436 (quoting 2 U.S.C. § 691(a) (1994 & Supp. II 1997)).
132. *Id.* at 437 (quoting 2 U.S.C. § 691e(4)(B)-(C) (1994 & Supp. II 1997)).
133. *Id.* at 438.
134. *Id.* (quoting INS v. Chadha, 462 U.S. 919, 954 (1983)).
135. *See id.* at 439-40.

§ 7, of the Constitution."[136]

Clinton v. City of New York demonstrates the continuing vitality of the non-delegation doctrine, at least when the Court can determine with confidence that Congress has authorized the executive branch to engage in lawmaking rather than law execution. In most non-delegation 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. The unusual features of the Line Item Veto Act, however, allowed the Court to conclude that presidential cancellation under the Act constituted improper lawmaking.

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.[137] 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, permanent cancellation authority overrides a clear legislative outcome rather than implementing a compromise that leaves ambiguity.[138] These differences between the Line Item Veto Act and traditional "delegations" convinced the Court that the former—unlike "all of its predecessors"—gave "the President the unilateral power to change the text of duly enacted statutes."[139] Because this power circumvented the procedures set forth in Article I, Section 7, the Court found the statute to be unconstitutional.

In sum, Green's objections do not seriously detract from the conclusions that the Supremacy Clause establishes the exclusive basis for disregarding state law and that constitutionally-prescribed lawmaking procedures establish the exclusive means of adopting "the supreme Law of the Land." *Erie* reflects and implements these conclusions.

II
THE ROLE OF STRUCTURE IN CONSTITUTIONAL INTERPRETATION

Differing opinions on *Erie*'s constitutional source turn, in part, on broader views about the proper method of interpreting the Constitution. *Erie* implicates the two most basic aspects of the constitutional structure: separation of powers

136. *Clinton*, 524 U.S. at 448.

137. *Cf.* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (deferring to an agency's decision to change its interpretation of an ambiguous federal statute).

138. *See* Clark, *Separation of Powers*, *supra* note 22, at 1389-90; Lawrence Lessig, *Lessons From a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659, 1662 (1997) (arguing that because it authorizes "negation," the Line Item Veto Act presents "perhaps the only case that is an easy case under the non-delegation doctrine").

139. *Clinton*, 524 U.S. at 446-47.

and federalism. Professor Green believes that structural arguments "raise the line of discussion toward greater abstraction," affording interpreters great flexibility.[140] The constitutional structure, however, does not exist independent of the constitutional text. Rather, the text creates the structure, and standard rules of interpretation apply here as in other contexts. Thus, in analyzing a decision that implicates the constitutional structure, one must pay close attention to the constitutional text and its surrounding context. This context includes the structure created by the text, but interpretation ultimately seeks the meaning of the enacted text. *Erie* illustrates these points.

A. Erie and the Constitutional Structure

One cannot understand the constitutional rationale of *Erie* without an appreciation of how several basic features of the constitutional structure work together. The Court set forth its core constitutional rationale in one sentence: "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."[141] This means that federal courts—unlike their state counterparts—have no lawmaking power independent of interpreting and applying the Constitution and Acts of Congress.[142] To the *Erie* Court, this proposition seemed to be self-evident. To modern readers, this proposition may require further explanation.

When the people of the several states made the fundamental decision to establish a federal government that would operate simultaneously with their own governments, they took two distinct steps to limit the authority of the new government—one substantive and the other procedural. First, the Founders limited the substantive powers of the federal government to certain enumerated objects. Second, they carefully limited the means by which the new federal government could exercise its powers. Such procedural safeguards arguably have a "larger influence upon the working balance of our federalism" than their substantive counterparts[143] because they frequently render the federal government incapable of exercising even its undisputed powers.[144]

The procedural safeguards of federalism consist of the lawmaking procedures spelled out in the Constitution to govern the adoption of the Constitution, Laws, and Treaties of the United States. These are among the most specific provisions set forth in a Constitution otherwise full of broadly-worded commands,[145] and each set of procedures imposes several checks and

140. Green, *supra* note 5, at 686.

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

142. *See* Clark, *Ascertaining the Laws*, *supra* note 44, at 1481-87.

143. Wechsler, *supra* note 14, at 544.

144. *See* Clark, *Federal Common Law*, *supra* note 37, at 1261 ("The Constitution thus reserves substantive lawmaking power to the states and the people *both* by limiting the powers assigned to the federal government *and* by rendering that government frequently incapable of exercising them.").

145. Indeed, Article I, Section 7, Clause 2—specifying the procedures for adopting Laws—

balances to guard against excessive or unwise federal lawmaking. These procedures do not specify that they are exclusive, but several indicia strongly favor this conclusion.

First, both the specificity of the lawmaking procedures set forth in the Constitution and the purposeful variations among these procedures suggest exclusivity.[146] The evident care and compromise that it took to craft these procedures would have been for naught if, for example, Congress and the President could amend the Constitution using bicameralism and presentment. Traditional canons of interpretation also support exclusivity.[147] As Professor Laurence Tribe has explained, "[T]he most plausible way of reading the Constitution as a legal text, in light of the historical background against which it was adopted . . . would be to read as exclusive those provisions that specify how elements of the supreme law of the land are to be adopted."[148]

Second, as I have explained elsewhere, the interlocking nature and design of the Supremacy Clause and federal lawmaking procedures favor the conclusion that "the supreme Law of the Land" may be adopted only with the participation and assent of the Senate, and only in accord with the precise lawmaking procedures established by the Constitution.[149] The unusually tight fit among these provisions strengthens the ordinary inference of exclusivity that arises from the specification of a particular mode of exercising a given power. Because the *Swift* doctrine allowed federal courts to adopt and apply law of their own choosing in preference to contrary state law, the doctrine ran afoul of these features of the constitutional structure and was properly repudiated in *Erie*.[150]

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is the single longest provision of the original Constitution still in force.

146. *See* Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."); *see also* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1737 (2004) ("[A]lthough Congress has broad and general authority to compose the institutions of government pursuant to the Necessary and Proper Clause, it cannot give itself authority to pass laws in a manner that deviates from Article I, Section 7's specific requirements of bicameralism and presentment.").

147. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803) ("Affirmative words are often, in their operation, negative of other objects than those affirmed . . . ."); HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS § 72, at 221 (2d ed. 1911) ("Particularly when a statute gives . . . a new power, and provides a specific, full, and adequate mode of executing the power . . . the fact that a special mode is prescribed will be regarded as excluding, by implication, the right to resort to any other mode of executing the power . . . ."); Manning, *supra* note 146, at 1737 ("[W]hen an adopted text establishes a new power and takes care to specify the mode of its exercise, our tradition is to treat such a specification as presumptively exclusive.").

148. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1244 (1995).

149. *See* Clark, *Separation of Powers*, *supra* note 22, at 1328-67.

150. *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938) (concluding that "in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States").

B. Structure Skepticism

These textual, structural, and historical observations do not persuade Professor Green that *Erie* correctly interpreted the Constitution to prohibit "federal general common law." He is particularly skeptical of arguments based on "the constitutional structure." His position seems to be that there are competing visions of the constitutional structure—both in terms of its precise features and in terms of the proper methodology for determining its content—and that these competing visions pull in different directions. Although Green says that he accepts my analytical method, he seeks "to uncover certain assumptions that need more detailed analysis and defense."[151] Ironically, Green's critique relies on much broader, questionable methods of structural analysis than those underlying my conclusions about the Supremacy Clause. In the end, his observations do not undercut the structural, textual, and historical case for recognizing the Supremacy Clause as *Erie*'s constitutional source.

Borrowing Professor Michael Dorf's dichotomy,[152] Green distinguishes between two methods of structural interpretation: the method of "interpretive holism," recently advanced by Akhil Amar,[153] and "the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part," famously championed by Charles Black.[154] Interpretive holism urges interpreters not to "read each clause in isolation," but to "see the document as a whole" and to "understand how its various provisions fit together."[155] Professor Black, by contrast, urges interpreters to draw "inferences from the structures of government rather than from the structure of the constitutional text."[156] I will consider both methods in turn.

1. Akhil Amar's Holistic Intratextualism

Professor Amar defines "intratextualism" as a holistic process of "read[ing] a contested word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase."[157] Specifically, he identifies three types of intratextualism. "Dictionary" intratextualism uses the Constitution as a dictionary to tell us what a word or word cluster can mean, with examples drawn from how similar words or word clusters are used in the constitution.[158] "Concordance" intratextualism uses the Constitution as a concordance "to show what the

151. Green, *supra* note 5, at 683.
152. *See* Dorf, *supra* note 8.
153. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).
154. BLACK, *supra* note 7, at 7.
155. Dorf, *supra* note 8, at 835.
156. *Id.* at 838.
157. Amar, *supra* note 153, at 748.
158. *Id.* at 791.

document as a whole is best read as meaning."[159] "Rulebook" intratextualism uses the Constitution as a rulebook to require us "to construe parallel [constitutional] commands in parallel fashion" unless there exist sound constitutional reasons not to do so.[160]

To evaluate Amar's approach, Adrian Vermeule and Ernest Young distinguish between *weak intratextualism*, "a canon of interpretation suggesting that, all else equal, similar provisions should be read similarly," and *strong intratextualism*, "an approach that uses inferences drawn from parallel provisions to trump localized arguments based on text, history, and precedent."[161] Weak intratextualism appears to be merely a form of sophisticated textualism, and thus raises relatively few concerns.[162]

On the other hand, strong intratextualism is subject to several serious objections. Different parts of the Constitution were adopted at different times to address different problems. For example, those who drafted and ratified the original Constitution sought to create a novel union of states. By contrast, those who drafted and ratified the Thirteenth, Fourteenth, and Fifteenth Amendments sought to deal with the aftermath of the Civil War. Treating the original Constitution and all subsequent Amendments as part of a coherent whole seems "inconsistent with the character of the Constitution's various provisions as concrete political enactments that represent historically contingent, and not always wholly coherent, compromises in a document that was made in stages, incrementally, over a period of two centuries."[163] In addition, as Professors Vermeule and Young have noted, "When the parallel provisions featured by intratextualist analysis are found in parts of the document enacted at different times, the originalist evidentiary value of the comparison drops off sharply."[164] Thus, "there is little reason to think that the Fourteenth Amendment's framers and ratifiers had any special insight into the Fifth Amendment's original meaning."[165]

Green suggests that my structural critique of federal common law is a form of interpretive holism.[166] In support, he cites my argument that the terms "Constitution," "Laws," and "Treaties" "appear in Article VI after the constitutional provisions that specify procedures for enacting each type of supreme law."[167] Properly understood, however, my understanding of *Erie*

159. *Id.* at 792.

160. *Id.* at 794-95.

161. Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with* Intratextualism, 113 HARV. L. REV. 730, 731-32 (2000).

162. *See* Dorf, *supra* note 8, at 835. Construing legal texts in light of their context is a traditional method of interpretation. Weak intratextualism appears to follow in this tradition.

163. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 24 (1991).

164. Vermeule & Young, *supra* note 161, at 765.

165. *Id.*

166. *See* Green, *supra* note 5, at 684.

167. *Id.*

merely involves a weak form of intratextualism. It urges the reader to focus on the Supremacy Clause—the provision at the epicenter of the constitutional structure created by the Founders—and to interpret the text of the Supremacy Clause in light of its surrounding context. This context necessarily includes several interlocking constitutional provisions adopted at the same time as—and designed to work with—the Supremacy Clause.[168] These provisions establish precise procedures for adopting each form of "the supreme Law of the Land" and all of them require the participation and assent of the Senate. Contrary to Green's suggestions, reading these provisions in light of one another neither relies on a holistic view of the Constitution as a unified written document, nor entails "a vision of constitutional structure wherein respect for federalism and separation of powers transcends preoccupation with constitutional text."[169] My approach merely looks to context—a traditional method of interpretation—to understand how several provisions of the original Constitution fit together.

The Supremacy Clause, like all provisions of the Constitution, must be interpreted in context.[170] Treating the provision of a precise procedure as establishing the exclusive means of exercising a particular power "has deep roots in our constitutional tradition."[171] For example, as John Manning has explained, "[D]espite its general powers under the Necessary and Proper Clause, Congress . . . cannot prescribe a method of appointing 'Officers of the United States' different from the specific methods laid out in the carefully drawn terms of the Appointments Clause."[172] Similarly, Article III, Section 2 provides that "[t]he judicial Power shall extend" to nine carefully defined categories of cases and controversies.[173] Although it does not say that these categories are exclusive, Article III has been interpreted since its adoption to mean that federal courts lack subject matter jurisdiction to hear cases beyond those enumerated in the text.[174] The specification implies exclusivity.

So too with the Supremacy Clause and related lawmaking procedures. The Supremacy Clause is the mechanism that the Founders chose to resolve conflicts between federal and state law. It is fundamentally about federalism. At the same time, the Founders designed the Senate to represent the states in

168. *See* U.S. CONST. art. I, § 7, cl. 2 (establishing procedures for enacting Laws); U.S. CONST. art. II, § 2, cl. 2 (establishing procedures for making Treaties); U.S. CONST. art. V (establishing procedures for amending the Constitution); *id.* (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

169. Green, *supra* note 5, at 685.

170. *See* Dorf, *supra* note 8, at 835 ("It is, after all, a conventional principle of textual construction that words are to be interpreted in accordance with their context."); *see also* Tribe, *supra* note 148, at 1272 ("[P]eripheral vision seems essential for coherent structural argument in constitutional law . . . .").

171. Manning, *supra* note 146, at 1737; *see supra* notes 146-148 and accompanying text.

172. Manning, *supra* note 146, at 1737-38; *see also* Buckley v. Valeo, 424 U.S. 1, 109-43 (1976).

173. U.S. CONST. art. III, § 2, cl. 1.

174. *See* Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804).

the new federal government. State legislatures originally appointed Senators, and all states (regardless of size or population) are entitled to equal suffrage in the Senate. It was no accident that the Founders gave the Senate a role in adopting all forms of the supreme Law of the Land. The Founders were self-consciously trying to ensure that the states (especially small states) would "have some means of defending themselves [against] encroachments of the [National Government]."[175]

Permitting federal courts to adopt supreme federal law outside federal lawmaking procedures would override the compromises built into the original Constitution and deprive the small states of their hard-won bargain. Under these circumstances, it would be odd to insist that in considering the meaning of "Laws" and "Treaties" in the Supremacy Clause, one could not consult companion provisions prescribing precise procedures to govern the adoption of "Laws" and "Treaties." Indeed, in this instance, the "use of weak intratextualism may even be obligatory"[176] because of the unusually tight and coherent fit among several related features of the original Constitution.

Green seeks "to unseat any impression that holism requires a single conception of federalism and separation of powers, or that interpretive holistic analysis commends a determinate position regarding federal common law."[177] He attempts to do so by "develop[ing] an equally holistic counter-narrative"[178] which "would incorporate a lesser role for states and greater power for federal courts."[179] This counter-narrative relies on the Constitution's failure "to mention [states'] sovereignty or to explicitly preserve their policymaking prerogatives"[180] and on a series of amendments that represent a two hundred year shift away from state sovereignty and toward greater federal power.[181] According to Green, "Whatever the 'structure' of federalism might have required in the eighteenth century, the constitutional text and its holistic meaning have dramatically changed."[182] Although Green acknowledges that these changes do not speak "directly to questions of the validity of federal common law," he concludes that subsequent constitutional developments call "eighteenth-century federalism" into question.[183]

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175. 1 CONVENTION RECORDS, *supra* note 24, at 155-56 (James Madison, June 7, 1787) (statement of George Mason).

176. Vermeule & Young, *supra* note 161, at 736 n.33.

177. Green, *supra* note 5, at 692.

178. *Id.* at 687.

179. *Id.* at 688

180. *Id.*

181. *See id.* at 689.

182. *Id.*

183. *Id.* Green also suggests that, as "a matter of interpretive holism," the decision to give federal judges power to interpret statutes and the Constitution might lead one to doubt that the Constitution somehow resists "the lesser, ill-defined 'danger' of common-lawmaking." *Id.* at 691. Green has things backwards. Federal common lawmaking necessarily permits more discretion than interpretation because the former, by definition, is not limited to implementing an

Green's holistic counter-narrative is a clear example of strong intratextualism and is subject to all of the objections previously mentioned. He would (re)interpret several provisions of the original Constitution—the Supremacy Clause, federal lawmaking procedures, and the role of the Senate—in light of the Constitution's evolution over time.[184] It is certainly true, as Green points out, that "at least eight constitutional amendments have increased federal power; [and] seven of those granted Congress power to 'enforce' them by statute."[185] But none of these amendments purports either to designate new sources of "the supreme Law of the Land" or to alter the procedures that the federal government must use to adopt such law. While Congress undoubtedly has gained new powers since the Founding, it still must exercise those powers the old-fashioned way. The only amendment that even relates to federal lawmaking procedures is the Seventeenth Amendment, which establishes direct, popular election of senators in lieu of appointment by state legislatures. A change in the method of selecting senators, however, should not be confused with a change in the constitutional duties assigned to the Senate. Although the Amendment undoubtedly reduced the influence of the states in the Senate, it has not altered either the small states' disproportionate influence in the Senate or the Senate's unique role in adopting all forms of "the supreme Law of the

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authoritative text. Contrary to Green's suggestion, the Constitution does not give judges similarly broad discretion to interpret the Constitution. During the ratification debates, Anti-federalists charged that federal judges "will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution." Brutus, *Essay No. XI*, N.Y. JOURNAL, Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 420 (Herbert J. Storing ed., 1981). Hamilton responded that courts will not have "arbitrary discretion" because they will have "neither FORCE nor WILL but merely judgment." THE FEDERALIST NO. 78, at 464, 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In Hamilton's view, it would be an abuse of power for judges to "substitute their own pleasure to the constitutional intentions of the legislature." *Id.* at 468. Chief Justice Marshall agreed. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) ("Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law."). For similar reasons, Article III should not be construed to give federal courts free reign when interpreting statutes. *See* Manning, *supra* note 20.

Green also argues that "a 'Federal Anti-Common Law Act' could eliminate [federal common lawmaking] altogether, if Congress ever chose to enact such an absurdity." Green, *supra* note 5, at 691. Green finds such a "hypothetical statute" to be "barely imaginable" because "the idea of banning common law from federal courts would have seemed entirely at odds with the Framers' flexible ideas of judging." *Id.* at 691 n.167. The first Congress, however, appears to have enacted just such a statute—Section 34 of the Judiciary Act of 1789 (sometimes known as the Rules of Decision Act)—to govern civil cases. *See* Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (2000)) ("The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."). In addition, when the question of federal common law crimes came before the Supreme Court, it rejected such a flexible idea of judging as unconstitutional. *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

184. *See* Green, *supra* note 5, at 689.

185. *Id.* (citation omitted).

Land."[186]

2. Charles Black's Operative Structuralism

Green also compares my invocation of the constitutional structure to the interpretive flexibility of operative structural arguments made famous by Charles Black.[187] According to Green, "Black's structuralism focuses on operative relationships among governmental entities, citizens, and the Constitution."[188] However, as Professor Dorf points out, "[I]t would be a mistake to read Black's [work] as principally addressed to the structure of the Constitution and the relationship among its various provisions."[189] Rather, Black insists that parts of constitutional law "emerge out of the institutions the Constitution creates or recognizes, rather than directly from the text."[190] For example, Black argues that structure and relationship would protect the freedom of speech against infringement by the states even in the absence of the Fourteenth Amendment.[191] His thesis is "that the nature of the federal government, and of the states' relations to it, compels the inference of some federal constitutional protection for free speech, and gives to a wide protection an inferential support quite as strong as the textual support" traditionally associated with free speech.[192] In his view, the original Constitution forbids states to infringe upon free speech because such infringement would interfere with citizens' relationship with the federal government, which includes the right to petition government for redress of grievances and the right to vote.[193]

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186. *See* Clark, *Separation of Powers*, *supra* note 22, at 1371.

187. *See* Green, *supra* note 5, at 692-95. As an example, Green looks not to my discussion of the Supremacy Clause but to an earlier, unrelated discussion of the Supreme Court's anti-commandeering cases. *See id.* at 686 (citing Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161 (1998) [hereinafter Clark, *Translating Federalism*]). Notwithstanding Green's selective account, my observations were closely focused on the text, history, and structure of the Constitution. I began by acknowledging that the Constitution does not contain precise text either authorizing or prohibiting commandeering. I then observed that this circumstance should not be taken to mean that Congress has power to commandeer states because "[b]oth the constitutional structure and the only relevant constitutional text [the Tenth Amendment] suggest just the opposite." Clark, *Translating Federalism*, *supra*, at 1189. I specifically noted, moreover, that "[t]hroughout its text, the Constitution presupposes the continued existence of the states." *Id.* at 1192. After reviewing the relevant history, I concluded that "the Supreme Court interpreted the text of the Commerce Clause and the Necessary and Proper Clause—in light of the Constitution's history and structure—not to authorize federal commandeering of the states." *Id.* at 1196. Whether one agrees with my conclusions or not, it is simply inaccurate to say that my analysis "articulate[s] a vision of constitutional structure" that, like Black's structural methodology, "transcends preoccupation with constitutional text." Green, *supra* note 5, at 685.

188. Green, *supra* note 5, at 692; *see also* Dorf, *supra* note 8, at 836.

189. Dorf, *supra* note 8, at 835.

190. *Id.* at 836.

191. *See* BLACK, *supra* note 7, at 35.

192. *Id.* at 39.

193. *See id.* at 39-44.

Green sees elements of Black's approach in my work because he claims that I "espouse[] a theory that does not simply concern what the Constitution says, but also what it means," and thereby goes beyond the Constitution's explicit terms.[194] Whatever the merits of Black's approach,[195] however, one need not employ it to conclude that *Erie* rests on the Supremacy Clause. Black's approach is not limited to ascertaining the meaning of the constitutional text. Rather, in his view, the relationships created by the text take on a life of their own. Arguments about judicial lawmaking and the Supremacy Clause, by contrast, turn on the meaning of specific constitutional provisions.

In a federal system, some mechanism is necessary to mediate between federal and state law. The Founders adopted the Supremacy Clause to perform this function. Accordingly, federal and state courts must identify "the supreme Law" with precision in order to apply the Supremacy Clause.[196] The Constitution prescribes precise procedures to govern the adoption of each source of law recognized by the Supremacy Clause, and it would be odd if courts could not consult these procedures when applying the Supremacy Clause. My reading of these provisions is that federal lawmaking procedures supply the exclusive means of adopting "the supreme Law of the Land." One may agree or disagree, but Black's version of structural interpretation has little to do with this conclusion.

By contrast, Black's method seems to animate Green's attempts to paint "a different view of constitutional structure and function" based on more recent principles of "[l]iberty and equality."[197] Green points out that these principles "have solid textual and historical roots" in the Fourteenth Amendment,[198] and he observes that "an operative structuralist might claim, independent of such textual provisions, that liberty and equality are fundamental to any modern

194. Green, *supra* note 5, at 692.

195. Professor Dorf has recently written that Black's approach "appears to be too open-ended a methodology," may be "especially susceptible of abuse," and is "vulnerable to being attacked as illegitimate." Dorf, *supra* note 8, at 838, 840, 843. *See also* John Harrison, *Review of* Structure and Relationship in Constitutional Law, 89 VA. L. REV. 1779 (2003) (questioning Black's methodology and some of his conclusions). Green suggests that I attempt "to distance [my] arguments from Black's analysis of operative structure," and that this attempt is inconsistent with my reliance on Black's approach on a previous occasion. Green, *supra* note 5, at 685 n.133 (citing Clark, *Translating Federalism*, *supra* note 187, at 1161). Green reads too much into my prior invocation of Professor Black. The discussion he cites was limited to a single, introductory paragraph quoting Black's work essentially for the proposition that structure should not be overlooked in constitutional interpretation. I did not discuss, let alone endorse, Black's particular use of structure or his particular conclusions. Rather, I proceeded to discuss, in my own terms, the relationship between several features of the constitutional structure and the Supreme Court's recent federalism decisions. *See* Clark, *Translating Federalism*, *supra* note 187, at 1161-97.

196. Arguably, the union could not function without this tool. *Cf.* OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295 (1920) ("I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.").

197. Green, *supra* note 5, at 695.

198. *Id.*

view of our constitutional democracy."[199] Green suggests that if one took this approach, then courts "may have an important and dynamic role to play in protecting individual rights" beyond that permitted by the negative implication of the Supremacy Clause.[200]

Green regards this alternative "view of constitutional structure and function" as "at least coequal" with mine.[201] As discussed, however, my conclusion that federal lawmaking procedures are the exclusive means of adopting "the supreme Law of the Land" has little to do with Black's method. Instead, my understanding rests primarily on the uncommonly tight fit between the Supremacy Clause and related federal lawmaking procedures, and the specificity of these provisions. Green's alternative vision (employing Black's approach) contradicts these precise constitutional provisions. The Civil War Amendments, while transformative in many respects, did not alter or repeal federal lawmaking procedures. Thus, although the Thirteenth, Fourteenth, and Fifteenth Amendments all give Congress "power to enforce" their provisions, the Amendments did not free Congress from the constraints of bicameralism and presentment. In short, precise constitutionally-prescribed lawmaking procedures would seem to trump any abstract principles that Green might derive from the constitutional structure using an approach that some regard as "dangerously open-ended."[202]

CONCLUSION

The Supremacy Clause and the constitutionally-prescribed lawmaking procedures that it incorporates provide explicit constitutional support for *Erie*'s insistence 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."[203] On this view, the Constitution does not permit federal courts to disregard state law in favor of their own body of "federal general common law." This understanding does not rely on either strong intratextualism or operative structuralism—methods of interpretation that draw implications from the constitutional structure detached from the constitutional text. Rather, *Erie*'s rejection of judicial lawmaking follows from several express constitutional provisions that accomplish three interrelated goals: (1) to recognize the "Constitution," "Laws," and "Treaties" as "the supreme Law of the Land"; (2) to prescribe detailed procedures involving the Senate for the adoption of each of these sources of law; and (3) to guarantee the states equal suffrage in the Senate. The precision and interlocking nature of these provisions suggest that the carefully drawn lawmaking procedures established by the Constitution are

199. *Id.*
200. *Id.* at 696.
201. *Id.* at 695.
202. Dorf, *supra* note 8, at 844.
203. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

the exclusive means of adopting "the supreme Law of the Land," and that *Erie* correctly found the *Swift* doctrine to be unconstitutional.