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THE PERILS OF THEORY

*Peter L. Strauss**

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.

—Oliver Wendell Holmes¹

INTRODUCTION

As I recall, Professor Clark had more sense than to be my student at Columbia, but I heard a lot about him from admiring colleagues. Clearly he has fulfilled the promise they saw, and this remarkable Symposium is only one indicator of that. The article to which our attention is properly drawn, more than two and a quarter centuries into our nation's history, has an originalist base, tightly and persuasively focused on original understandings of the Supremacy Clause.² Professor Clark lays out a cogent account of the Clause's politics and the centrality of its language to the most fundamental of constitutional compromises, that between the large states and the smaller states fearing domination in a world of simple democracy. It was not only, he argues, that the smaller states won Senate representation by state, not population, that could never be changed by amendment; it was also, and perhaps more importantly, that their own capacity to govern their

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* Betts Professor of Law, Columbia University. Thanks to my colleagues Michael Dorf, Philip Hamburger, and Gillian Metzger; to the participants in this Symposium, for supportive readings and suggestions; and to Robert Weinstock for thoughtful and effective research assistance. Any errors are mine alone.

1 Oliver Wendell Holmes, *Law and the Court*, Speech at a Dinner of the Harvard Law School Association of New York (Feb. 15, 1913), in *COLLECTED LEGAL PAPERS* 295–96 (Dover Publ'ns 2007) (1920).

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

populations, their obligations to place federal law above their own, could be affected only by measures in which the Senate participated—constitutional amendments, statutes, and treaties.³ Their equality in the Senate, then, had real bite. If the Senate did not participate in the measure, the Supremacy Clause would impose no obligation.

The main point of the analysis presented here is captured by my title: "The Perils of Theory." We'll start with the text. The words of the Constitution command us all, as the supreme legal document of our polity. But in my judgment, we cannot afford to have contemporary constitutional understandings of that text governed by the particular theoretical understandings that may have animated the choice of those words. So, after addressing the text, we will turn to other matters.

I. A TEXTUAL PRELUDE

Let us start then, with the text. For a contemporary reader, its words do not require Professor Clark's outcome, and indeed in my judgment there are reasons to prefer a different reading. The primary issue here is whether, in referring to "Laws," the Supremacy Clause is necessarily referring to statutes and not, for example, to common law precedent or administrative regulations. Early drafts of the Supremacy Clause were clear about this, supporting Professor Clark's view. As he reports, they referred to "'Acts of the U. States in Congs.,'"⁴ "'legislative acts of the United States,'"⁵ and "'[t]his Constitution & the laws of the U.S. made in pursuance thereof.'"⁶ But this was then changed to the present, more ambiguous form, "[t]his Constitution, and the Laws of the United States . . . made in Pursuance thereof."⁷ This "Laws" might refer to *anything* with the status of law; and we know that when the Supremacy Clause later refers in the very same sentence to the "Laws of any State,"⁸ this second use of "Laws" embraces *state* common law. As a matter of text-reading, it is hard to give differing meanings to the same word, endowed with the same

3 *Id.* at 1366–67.

4 *Id.* at 1351 (quoting James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 241, 245 (Max Farrand ed., 1966) [hereinafter FARRAND'S RECORDS]).

5 *Id.* at 1353 (quoting Journal of the Constitutional Convention (July 17, 1787), in 2 FARRAND'S RECORDS, *supra* note 4, at 21, 22).

6 *Id.* at 1354 (quoting James Madison, Notes on the Constitutional Convention (Aug. 23, 1787), in 2 FARRAND'S RECORDS, *supra* note 4, at 384, 389).

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

8 *Id.*

number⁹ and the same capitalization in the same sentence of a single paragraph.¹⁰

How we understand "Laws" can also be tied to a third appearance of the word, to our President's constitutional obligation to "take Care that the Laws be faithfully executed."¹¹ We have an important stake in the understanding that this usage includes established Supreme Court precedent, whether about the Constitution's meaning, statutory meaning, regulations in force, or, for that matter, the law of admiralty. The President's realm as chief executive reaches all federal law, not just statutes. For him, and so one may argue also for the states, all federal law commands his obedience, as it does the rest of us.¹² If we once tolerated presidential assertions that a President is not obliged to enforce Supreme Court interpretations with which he disagrees (the result if "Laws" equals "duly enacted statutes"),¹³ that is surely not the contemporary understanding.¹⁴ Present concerns about the extent of presidential authority under the Constitution would be enormously magnified if it were.

Article III as well clearly imagines "Law" that is made without Senate participation. The grants to the Supreme Court of original jurisdiction over the states and to federal courts generally of jurisdiction in admiralty presuppose judge-made law that will have purchase without the Senate ever having a participatory chance.¹⁵ As Article III's reference to "Law" as synonymous with common law confirms, the Foun-

9 To be sure, where the Constitution uses the singular "Law," rather than the plural "Laws," its inclusion of the source of the "law" being spoken of generally shows that it is referring to legislative acts, whether of state or federal provenance. Take for example, the Ex Post Facto Clause's statement that "[n]o State shall . . . pass," U.S. CONST. art. I, § 10, cl. 1, or Article III's reference to "such Place or Places as the Congress may by Law have directed," *id.* art. III, § 2, cl. 3. Even the singular "Law" comprises the common law, however, in Article III's reference to "Cases, in Law and Equity." *Id.* art. III, § 2, cl. 1.

10 See, e.g., *INS v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987).

11 U.S. CONST. art. II, §3.

12 See, e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265–67 (1954); *Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973).

13 As when President Jackson reportedly denied the proposition that his obligation to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, extended to an objectionable-to-him Supreme Court judgment about Indian rights, see KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 25 (16th ed. 2007).

14 For example, the Court's condemnation of school segregation supported presidential use of the National Guard to effect integration in the South in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954). See, e.g., J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE* 90–91 (1979).

15 U.S. CONST. art. III, § 2, cls. 1–2.

ders understood that in creating courts, they were creating bodies capable of acting in ways that would impose obligations on parties properly brought before them.¹⁶

Nor does the Supremacy Clause phrase “which shall be made in Pursuance thereof” itself require the conclusion that supremacy is tied to compliance with federal lawmaking procedures. While Professor Clark’s article suggests that “supremacy is tied to compliance with federal lawmaking procedures,”¹⁷ his more recent scholarship finds strong support in this phrase for the sometimes contested power of federal courts to declare *federal* statutes unconstitutional.¹⁸ That the Clause’s effect on state law is limited to “the Laws of the United States *which shall be made in Pursuance thereof*,”¹⁹ he rather persuasively argues, is a direct textual invitation to the federal courts to consider the substantive consistency of federal law with the Constitution.²⁰ Only then can it displace state law. He found unpersuasive the arguments of Alexander Bickel and others, that the reference to “Pursuance” is merely an invocation of the *procedural* specifications of Article I.

Note, though, the consequence of accepting (as I do) this argument that “Pursuance” embodies the expectation of constitutional review, the substantive and not merely the procedural sufficiency of “the Laws of the United States.” Doing so immediately weakens the argument that “Pursuance” is limited to the Congress and its actions. Only a strictly procedural interpretation of “Pursuance” could require distinguishing “Laws of the United States” from the “Laws of any State” in the very same sentence-paragraph. If “Pursuance” properly has a substantive reference, then one readily may interpret it to refer embracingly to *any* action that may be regarded as “law.” For constitutional precedent, for common law precedent (developing federal policy under a common law statute like the Sherman Antitrust Act, say), and for regulations, just as for statutes, the power of the action to command state obedience depends on its having been made in pursuance of—that is to say, under the substantive authority conferred on

16 Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284, 294–95 (1969); cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”). If the “judicial Power of the United States” is understood as the adjudication of “Cases” and “Controversies,” it is a truism to assert that courts have the capacity to perform such adjudication.

17 Clark, *supra* note 2, at 1334.

18 See, e.g., Bradford R. Clark, *Unitary Judicial Review*, 72 GEO. WASH. L. REV. 319, 323–24 (2003).

19 See Bradford R. Clark, *The Supremacy Clause as a Constraint on Federal Power*, 71 GEO. WASH. L. REV. 91, 100 (2003) (emphasis in original).

20 See *id.* at 116–19.

federal officers by—the Constitution. So the Constitution’s words do not require Professor Clark’s understanding.

Staying with the text for the moment: perhaps the last remark provokes the question, didn’t *Erie Railroad Co. v. Tompkins*²¹ settle the question of whether there was any general federal common law?²² *Erie*, recall, was a diversity case, and what it teaches is that federal courts cannot independently make common law where Congress cannot legislate—that “made in Pursuance [of the Constitution]” constrains the courts as well as the Congress.²³ It involved a common law question that, as put, was not within Congress’ easy reach—whether the user of a notorious path on private property that paralleled rather than crossed a public way was a trespasser (implying a low duty of care) or a user of the public way (implying a high duty of care).²⁴ Although Congress presumably could have legislated a special rule to govern interstate railroads, that was not the issue in *Erie*. The Court was being invited to consider the *general* rule, not a special rule for interstate entities. That the generality of what it was being asked to do was dominant in the Court’s thinking is powerfully shown by this famous passage:

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.²⁵

To be sure, the first two sentences of this paragraph point in the direction frequently claimed. But recall that they were uttered in the context of a diversity action, one *lacking* a federal question. Now consider the work of the adjective “general” in the third sentence; and, in particular, consider the implications of the fourth and fifth sentences. It is inconceivable that, in denying “Congress . . . power to declare substantive rules of common law applicable in a State,” Justice Brandeis was impugning statutes such as section 8 of the Federal Railway Safety

21 304 U.S. 64 (1938).

22 *See id.* at 78.

23 *See* Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 914 (2002).

24 *See Erie*, 304 U.S. at 69–70.

25 *Id.* at 78 (emphasis added).

Appliances Act of 1893²⁶ or the Federal Employers' Liability Act (FELA),²⁷ each of which had explicitly modified the tort defenses otherwise available to railroads under state common law for the benefit of railroad employees in interstate commerce.²⁸ Indeed, in the wake of *Erie*, both state and federal courts easily recognized this important distinction. Consider, for example, this passage from a 1949 FELA action in the Supreme Court, *Urie v. Thompson*²⁹:

[FELA itself] does not define negligence, leaving that question to be determined, *as the Missouri Supreme Court said*, "by the common law principles as established and applied in the federal courts." *Erie R. Co. v. Tompkins* has no application. *What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes.* Federal decisional law formulating and applying the concept governs.³⁰

Cases decided a few years earlier, during World War II, had reached the same conclusion for contract law, where the government was a party to the contract. These were not diversity cases but federal question cases; federal common law was unhesitatingly argued for by the government, and unhesitatingly generated by the Court.³¹ This evi-

26 Ch. 196, § 8, 27 Stat. 531, 532 (repealed 1994).

27 Ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (2000)).

28 See, e.g., *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U.S. 1, 11–13 (1907) (holding that Pennsylvania courts were required to administer state common law in a manner consistent with section 8 of the Federal Railway Safety Appliances Act of 1893).

29 337 U.S. 163 (1949); cf. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543–44 (1994) (treating the question of FELA liability as an issue of the *federal* common law of negligence); Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 432–35 (offering a summary and analysis of the Supreme Court's decision in *Gottshall*).

30 *Urie*, 337 U.S. at 174 (emphases added) (citations omitted) (quoting *Urie v. Thompson*, 176 S.W.2d 471, 474 (Mo. 1943)); see also *Bailey v. Cent. Vt. Ry., Inc.*, 319 U.S. 350, 352 (1943) (holding the same); *Chesapeake & Ohio Ry. Co., v. Kuhn*, 284 U.S. 44, 46–47 (1931) (same); *St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter*, 229 U.S. 265, 277 (1913) (same); *Second Employers' Liab. Cases*, 223 U.S. 1, 54–55, 57–58 (1912) (same); *Schlemmer*, 205 U.S. at 11–13 (same).

31 See *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); Nicholas Parrillo, "The Government at the Mercy of Its Contractors": *How the New Deal Lawyers Reshaped the Common Law to Challenge the Defense Industry in World War II*, 57 HASTINGS L.J. 93, 98 n.19 (2005) (recounting earlier Supreme Court litigation in which it was unnecessary to decide the point, including *United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942), where the proposition appeared so obvious to the attorneys arguing the case that

dence of *Erie's* meaning, in the hands of those who had witnessed its birth, is not readily ignored.³²

Erie, then, appears precisely as is suggested by that opinion's telling contrast between Congress' legislative power and the broader common law authority that had been asserted by the Brewer Court. It is a proposition for the decision only of *diversity* cases, and not for those in which federal questions are properly raised. It reflects no judgment that federal courts lack the common law authority held generally by courts in the Anglo-American legal system. It is fully satisfied if taken as a repudiation of the late nineteenth-century Court's remarkable proposition that it could create common law in diversity cases on questions about which it would not permit Congress to legislate.³³ Federal question common law presents different issues that the language of the Supremacy Clause does not clearly settle, and that in the immediate wake of *Erie*, the Court unhesitatingly understood as subjecting state courts to Supremacy Clause constraints.

II. ON THE PERILS OF THEORY

While the Constitution's use of "Law" and "Laws" is thus more problematic for me than for Professor Clark, let us now accept the ideal with which he starts—that the theory of the Supremacy Clause was precisely as he has argued, and for just his federalist reasons. He certainly makes that argument in exquisite detail, and with careful attention to a wide range of available materials. Rather, I want to move to the question whether the Court should properly act on this basis today. You will perhaps already have surmised that my answer to that question is in the negative. The meaning of "our federalism" has changed dramatically in the ensuing twenty-two decades, and Professor Clark's analysis could be thought insufficiently to credit the principal engines of that change. It is not just that the Seventeenth Amendment altered the means by which senators are selected and in doing so greatly weakened senators' representation of their states' interests, as distinct from their states' citizens' interests. Far more important, in my judgment, were the Civil War (with its resulting constitutional amendments) and the development of a truly national economy. Each had the practical effect of enormously expanding federal authority in relation to state authority, of greatly increasing the

"neither party mentioned *Erie* in its [Supreme Court] brief," and "[t]he contractor cited only federal and English cases").

32 Cf. *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

33 See EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 55, 58 (2000).

extent to which state law must exist in the shadow of federal law. These factors, to which Professor Clark gives less attention, could give acceptance of his proposed understanding as a basis for action genuinely startling and regrettable effects. Whatever the drafters' theoretical expectations may have been, that is, the passage of time has overcome them.

The following paragraphs set out a range of critical commentary on Professor Clark's article expanding on these thoughts, all in the service of support for a dynamic approach to constitutional interpretation—one that sees as the judicial task understanding and enforcing constitutional text in a manner that, embodied with its general spirit, finds that meaning best suited both to continuity with established understandings and to the exigencies of the present. The Constitution must, necessarily, be interpreted by federal judges in a way that amounts to the development of common law, and this must be binding on the states and their judges; so also for "federal question" common law, however limited its scope, and for the regulations of agencies acting under appropriately delegated authority.

Subpart A frames the contrast between dynamic and originalist approaches to constitutional meaning in terms suggested by *Freytag v. Commissioner*,³⁴ an earlier Court effort to return to the Convention's particular understanding of another issue strongly associated with the Framers' theoretical understandings and purposes. Professor Clark opens his article with a suggestion that the phenomena he is interested in are of relatively recent origin, "[d]uring the last century,"³⁵ and subpart B explores events of the nineteenth century suggesting otherwise. Subpart C considers more generally both the breadth of what are currently undoubted elements of federal law that would be compromised if the understanding of the Supremacy Clause he proposes were now adopted, and the difficulties of his efforts to minimize the discontinuities that would occur should that understanding be adopted. Subpart D returns to the issues of dynamic constitutional interpretation, asking whether Professor Clark's reading of the text of the Supremacy Clause text is one appropriate for the present, as the best meaning we should be giving the Constitution today. The Article then concludes.

A. *The Cautionary Lesson of Freytag v. Commissioner*

This subpart frames Professor Clark's argument in terms of the difference between static and dynamic interpretation of the Constitu-

³⁴ 501 U.S. 868, 888–90 (1991).

³⁵ Clark, *supra* note 2, at 1323.

tion's text. Justice White once encapsulated my argument in his separate opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,³⁶ reacting to his colleagues' invocation of constitutional limits on the authority Congress could give federal bankruptcy judges with the unsettling remark that "[w]hether fortunate or unfortunate, at this point in the history of constitutional law [the question before us] can no longer be answered by looking only to the constitutional text. This Court's cases construing that text must also be considered."³⁷ But with Justice Scalia among us,³⁸ the better reference may be to Justice Blackmun's strange and strained opinion in *Freitag*, a case that involved the Tax Court rather than the Bankruptcy Court, and the Appointments Clause rather than Article III. The question was whether a special judge of the Tax Court had been properly appointed, when named to his office (as Congress had authorized) by the Chief Judge of that Court.³⁹ The Appointments Clause, as you may recall, permits Congress to confer the authority to name inferior officers of the United States "in the President alone, in the Courts of Law, or in the Heads of Departments."⁴⁰ The Court quickly, unanimously, and properly resolved the question whether this special judge held a post of such dignity as to be an inferior officer of the United States, whose appointment must therefore be made pursuant to that Clause. He did and it must.⁴¹ But could the Chief Judge of the Tax Court be regarded as the head of a department, in the constitutional sense?

Here Justice Blackmun, not unlike Professor Clark, took us to the Convention floor and the Convention's theory. Here is the argument, as my coauthors and I try to capture it in our casebook on administrative law:

"The 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power, because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.' Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. Although the debate on the Appointments

36 458 U.S. 50 (1982).

37 *Id.* at 94 (White, J., dissenting).

38 Those privileged to attend the Symposium, where an oral version of these remarks was delivered, heard Justice Scalia characterize *Freitag* as perhaps the most poorly reasoned Supreme Court decision of his tenure.

39 See *Freitag*, 501 U.S. at 873.

40 U.S. CONST. art. II, § 2, cl. 2.

41 See *Freitag*, 501 U.S. at 880–82.

Clause was brief, the sparse record indicates the Framers' determination to limit the distribution of the power of appointment. The Constitutional Convention rejected Madison's complaint that the Appointments Clause did 'not go far enough if it be necessary at all': Madison argued that 'Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.' The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches. Even with respect to 'inferior Officers,' the Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law"⁴²

Having concluded that "[t]he Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government,"⁴³ Justice Blackmun (for the five-member majority) held that "Department" refers to only Cabinet-level departments, which are "limited in number and easily identified. Their heads are subject to the exercise of political oversight and share the President's accountability to the people."⁴⁴

We cannot accept the Commissioner's assumption that every part of the Executive Branch is a department, the head of which is eligible to receive the appointment power. The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. . . . Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. So do we.⁴⁵

While it might seem like the special judge's appointment was about to be traduced, the majority concluded, *deus ex machina*, that the Tax Court was one of the "Courts of Law" for purposes of the

42 PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 149–50 (10th ed. 2003) (citations omitted) (quoting *Freytag*, 501 U.S. at 883–84).

43 *Freytag*, 501 U.S. at 885.

44 *Id.* at 886.

45 *Id.* at 885 (citing GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 79–80 (1969)).

Appointments Clause and thus the appointment was valid.⁴⁶ Nonetheless, this former General Counsel of the United States Nuclear Regulatory Commission, appointed by the Commission and *only* the Commission—having had at least as much authority as that special judge—was stunned to think that he had never validly held his post. It was not reassuring to read Justice Blackmun’s recognition, in a footnote, of this possible difficulty:

We do not address here any question involving an appointment of an inferior officer by the head of one of the principal agencies, such as the Federal Trade Commission, the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Central Intelligence Agency, and the Federal Reserve Bank of St. Louis.⁴⁷

Well, he might say so. Yet his text had declared, “[A] holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint. The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. So do we.”⁴⁸ None of the actors named in the footnote is a cabinet department, and it was to the heads of cabinet departments that, as Justice Blackmun had quite persuasively shown, the Founders for good reason intended to limit appointment authority. So the footnote was a sign of trouble ahead. Perhaps it was a reservation that he included in order to get a concurrence he needed to make his opinion one “of the Court.”⁴⁹ Whatever its origin, the footnote states a proposition not easily reconciled with the theory the opinion advances in its text.

Justice Scalia wrote an opinion for four Justices concurring only in the judgment.⁵⁰ I imagine he will agree, as it seems to me his opinion concedes that as a matter of original understandings and motivations Justice Blackmun’s opinion was theoretically impeccable. Justice Blackmun persuades us, as I’m prepared to concede Professor Clark’s argument does, that his reading is linked to the central political premises and purposes of the drafters. This was not an incidental point, but one of those that went to the heart of the enterprise, to the political arrangements that Americans of the time were prepared to accept. But here we were, two centuries later, with a great deal having hap-

46 See *id.* at 888–92.

47 *Id.* at 887 n.4.

48 See *supra* note 45 and accompanying text.

49 *Id.* at 870.

50 *Id.* at 892 (Scalia, J., concurring) (Justices O’Connor, Kennedy, and Souter joined the opinion).

pened in the interim. As Justice Scalia would argue, the Tax Court, lacking Article III protections, could not properly be regarded as one of the "Courts of Law"; rather, its status was that of "a free-standing, self-contained entity in the Executive Branch, whose [head] is removable by the President (and, save impeachment, no one else)."⁵¹ Justice Scalia concluded his opinion with these words:

I must confess that in the case of the Tax Court, as with some other independent establishments (notably, the so-called "independent regulatory agencies" such as the FCC and the Federal Trade Commission) permitting appointment of inferior officers by the agency head may not ensure the high degree of insulation from congressional control that was the purpose of the appointments scheme elaborated in the Constitution. That is a consequence of our decision in *Humphrey's Executor v. United States* Depending upon how broadly one reads the President's power to dismiss "for cause," it may be that he has no control over the appointment of inferior officers in such agencies; and if those agencies are publicly regarded as beyond his control—a "headless Fourth Branch"—he may have less incentive to care about such appointments. . . . That is a reasonable position—though I tend to the view that adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor.⁵²

Of course the Justice has taken the position, and here we agree on the general proposition if not all its details, that the exercise of executive authority by *any* agency, "independent" or not, entails *some* measure of presidential control, including *some* extent of presidential removal authority. The cases, fairly read, have established this proposition, if not with quite the same force as he might prefer.⁵³ But one cannot

51 *Id.* at 915.

52 *Id.* at 920–21 (citation omitted).

53 In particular, *Morrison v. Olson*, 487 U.S. 654 (1987), which affirmed the constitutional necessity that the Independent Prosecutor be subject to a degree of control by the President (through the Attorney General) that included the possibility of dismissal "for cause," while finding it constitutionally unnecessary that such an officer serve at will, dismissible by the President for any reason at any time. *Id.* at 691–93. Justice Scalia rejected the proposition that a court could determine the degree of control constitutionally requisite to preserving necessary presidential authority, but not the proposition that the Independent Prosecutor served in the Executive Branch. *See id.* at 706–15 (Scalia, J., dissenting). In my judgment, the same proposition applies to the "independent" Federal Trade Commission; the statutory recognition that the President may dismiss a Commission "for cause," which would include insubordination, is constitutionally compelled. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 615–16 (1984) [hereinafter Strauss, *Fourth Branch*]. What may divide us, then, is whether Congress may constitutionally require that the President have reasons for some action he takes

return to the theoretical cleanliness of 1787 after all that has passed over the dam and under the bridge in intervening years.

B. Nineteenth-Century Supremacy

"During the last century,"⁵⁴ the first four words of Professor Clark's Article, frame his argument as if federal lawmaking outside senatorial participation was a relatively recent and surprising twentieth-century innovation. While certainly understandings about the nature of the common law and common law judging have varied over time—in itself a dynamic process requiring our attention and respect—the judges of the early nineteenth century, Grant Gilmore's "Age of Discovery,"⁵⁵ well understood that they were occasionally making law, and not merely finding it.⁵⁶ There is a process of continuous development—given impulse to be sure by the federalizing (and underacknowledged) Fourteenth Amendment and the accompanying development of a truly national economy, but nonetheless a process of continuity and not departure. By the middle of the nineteenth century, as the paragraphs following will illustrate, one can find such lawmaking in a Supremacy Clause context, both in ordinary common law (including here the law of admiralty textually committed to federal judicial development), and in constitutional contexts beckoning the Court beyond the plain words of the Constitution's text—the dormant Commerce Clause for example, but also such issues as the right to travel and the meaning of "due process."

In his contrary argument, as he has developed it over the years,⁵⁷ Professor Clark has relied on readings of *United States v. Hudson & Goodwin*⁵⁸ in relation to the common law authority of federal courts, and *Erie* in relation to *Swift v. Tyson*,⁵⁹ that in my judgment are somewhat overdrawn.

in overseeing the discrete elements of government Congress has created. See Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 712 (2007) [hereinafter Strauss, *Decider*].

54 Clark, *supra* note 2, at 1323.

55 See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 19–40 (1977).

56 See e.g., *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49, 52 (1842); *Priestly v. Fowler*, (1837) 3 M. & W. 1, 5, 150 Eng. Rep. 1030, 1032 (Exch.).

57 Most recently in the pages of *this* journal. See Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149 (2006).

58 11 U.S. (7 Cranch) 32 (1812).

59 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Hudson & Goodwin, recall, involved an effort to prosecute two Federalist editors for common law seditious libel in the wake of the expiration of the Sedition Act,⁶⁰ an Act which had widely been regarded by Republicans (who were bringing this prosecution) as unconstitutional.⁶¹ Against what was then the general English practice of permitting the prosecution of common law crimes in English courts⁶² were arrayed (1) the hateful history of English use of “seditious libel,” in particular, as an offense;⁶³ (2) the two specific constitutional provisions that would presumably have prevented Congress from defining the challenged behavior as a crime;⁶⁴ (3) Article III’s explicit indication that the jurisdiction of any inferior federal courts Congress chose to create would depend on legislative grants;⁶⁵ and (4) Congress’ clear general choice to avoid the creation of any general federal question jurisdiction in those courts at this time.⁶⁶ It thus seems right to find in the case a specific early instance of the proposition that federal courts must observe the same substantive limits as Congress is constitutionally bound to observe—the same proposition as would ultimately defeat what the Brewer Court had made of *Swift*. And one also easily understands the decision by the attorneys on both sides to decline to argue the case. *Hudson & Goodwin*’s words stand only for the Article III proposition that the jurisdiction of lower federal courts must be legislatively conferred. It would have been flying in the face of Congress at a delicate time to assert an authority that Congress had not provided for, that indeed one could believe it had quite deliberately denied.

It is perilous to take the case, in its time, as having decided more than this. In its opening sentence, the Court is careful to describe its holding in jurisdictional terms: “The only question which this case presents is, whether the Circuit Courts of the United States can exer-

60 Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

61 See David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 817 (1985) (book review).

62 This practice was abandoned by English courts in *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 (H.L.).

63 See Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 693–714 (1985).

64 For example, the First Amendment, denying Congress legislative power to abridge the freedom of speech, see U.S. CONST. amend I; and the Ex Post Facto Clause, withholding legislative power to criminalize conduct that had already occurred, see *id.* art. I, § 9, cl. 3.

65 *United States v. Hudson* (*Hudson & Goodwin*), 11 U.S. (7 Cranch) 32, 33 (1812).

66 See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 826–27 (5th ed. 2003).

cise a common law jurisdiction in criminal cases.”⁶⁷ That more recent times have found support in the opinion for a more general proposition associated with principles of legality seems an artifact of more contemporary sensibilities. In a later passage the Court takes care to preserve “inherent” authority not so directly implicated in the constitutional and legislative judgments that had actually been made about federal court jurisdiction: “To fine for contempt—imprison for contumacy—inforce the observance of order, & c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others and so far our Courts no doubt possess powers not immediately derived from statute”⁶⁸ And to find in the case particular sensibility to the *general* Supremacy Clause concerns Professor Clark develops, to make the case into one that “relates to the powers reserved by the Constitution to the states,”⁶⁹ is to place far greater weight on its slim foundation than it will bear. The relevant command of the Constitution is that of Article III: the Congress is in charge of the jurisdiction of inferior federal courts.

The weight Professor Clark would place on *Erie*’s overruling of *Swift* is, for me, equally unpersuasive. Earlier passages have noted the significance of *Erie*’s diversity aspect, and of the Brewer Court’s pretense that federal courts could make common law where Congress could not legislate. What seems important to note here is that *Swift* did not entail that pretense, but rather can be connected to propositions of *national* judicial lawmaking authority that have persisted into the present day. Indeed, Professor Clark sees clearly enough that, in its time, *Swift* addressed a genuinely national, if not international, legal question of significant importance to interstate and foreign commerce, and was accepted as such.⁷⁰ And this perspective has often resurfaced in Court opinions, one as recently as three years ago. In *Norfolk Southern Railway Co. v. Kirby*,⁷¹ Justice O’Connor wrote for a unanimous Court in an admiralty context that a uniform national rule must govern the interpretation of a contract for the international carriage of goods, absent “local” concerns.⁷² Or, as Justice Story had put it, “The law respecting negotiable instruments may be truly

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

68 *Id.* at 34.

69 Clark, *supra* note 57, at 1182.

70 *See id.* at 1183–86.

71 543 U.S. 14 (2004).

72 *See id.* at 22. The case involved contracts for the carriage of goods initially by sea from Australia to Savannah, Georgia, and then by rail to a destination in Alabama; the goods were damaged by an accident during the rail portion of the trip. *Id.* at 21. Explaining its decision to require application of uniform federal law to interpretation

declared . . . to be in a great measure, not the law of a single country only, but of the commercial world."⁷³

Justice Story, to be sure, could be thought to have been waging the same fight for expansive federal judicial authority as was reflected in his expressions of dissatisfaction with *Hudson & Goodwin* when the same question returned to the Court in a case lacking its political overtones (and again was not argued by counsel),⁷⁴ and in his striking opinion in *Martin v. Hunter's Lessee*.⁷⁵ Yet counsel *did* appear before the Court to argue *Swift*, and one can read their arguments as having put before the Court three choices, not two: (1) a ruling that would create a genuinely binding national decision, federal law *with Supremacy Clause effect*; (2) a ruling that would treat the issue as having to be decided, in a diversity case, under the common law of the conflict-of-laws-relevant state; and (3) a ruling that would independently assess the common law question presented, but without claiming precedential value as against state court assessments of the same question.⁷⁶ Attorney Fessenden, arguing for *Swift*, rather clearly sought the first of these; he invoked the embarrassment for the Court and the nation if the Supreme Court were seen to be trapped into the varying

of the bill of lading—whether in federal district court or Alabama courts—Justice O'Connor wrote, likely in unselfconscious imitation of the *Swift* opinion,

Article III's grant of admiralty jurisdiction "must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Id. at 28 (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994)). Suppose, now, that the initial leg of the journey, Australia to Savannah, had been by air freight, not by ship; and then on the same bill of lading the goods had traveled by truck toward Alabama, with an accident damaging them. Might not the same reasoning be applied, finding a federal question requiring uniform national outcomes in a transaction at the core of Congress' undoubted authority over commerce?

73 *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

74 *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416–17 (1816) (noting the differing views, but declining to revisit *Hudson & Goodwin* in the absence of counsel willing to argue the case).

75 14 U.S. (1 Wheat.) 304 (1816). This case, decided in the same term as *Coolidge*, concerned Supreme Court jurisdiction, not the authority of inferior federal courts, and Story's expansive view of the only general federal question jurisdiction then statutorily provided—that of the Supreme Court over the judgments of state courts on federal issues—included hints that this provision was *mandatory*, and raised political storms that do not appear to trouble either Professor Clark or me. *Id.* at 337–42.

76 See *Swift*, 41 U.S. (16 Pet.) at 3–14.

laws of subordinate units of the nation on matters that plainly required a definitive national uniformity.⁷⁷ Attorney Dana, for Tyson, argued as if the choice were between the second and third; if the Court asserted a capacity to decide the matter independently of state court judgments, that would create a field for inconsistency in judgment between two courts sitting in the same place with predictably untoward consequences.⁷⁸

We now know that Dana's perspective prevailed, aggravated by the Court's later willingness to decide questions in common law diversity cases free of state law, when it would not permit Congress to enact federal statutes on those same questions. Although Dana's perspective mapped better onto the ways in which the nature of the common law was understood at the time, however, it was not foreordained it would prevail. Justice Story's opinion feints in the direction of Fessenden's argument with the observation that Justice O'Connor so recently echoed in *Kirby*⁷⁹: that the question before the Court was one demanding an answer in conformity with the uniform laws of international commerce.⁸⁰ Yet in a diversity case Justice Story had no occasion to address the question whether New York courts would now be *required* to follow the path that he had charted. Given the reaction, *inter alia*, to his opinion in *Martin* and the difficulties then over such issues as intercession, ultimately to be settled only by the Civil War, he was doubtless wise in failing to do so.

The 1850s saw cases (including one that had come from *state* courts) involving conflicts between state law and judge-declared federal law, and thus having a Supremacy Clause twist to them that might have clarified the choice *Swift* had no occasion to make. Two in particular warrant attention.

The first is *Cooley v. Board of Wardens*.⁸¹ The Taney Court had been at sixes and sevens about the impact of the Commerce Clause on state legislative authority, able to reach judgments but not to produce opinions.⁸² In *Cooley*, the Court faced a local statute unmistakably regulating commerce (pilotage in the Port of Philadelphia) that had been passed years after the first Congress enacted a statute authoriz-

77 *See id.* at 8–9.

78 *Id.* at 9–14.

79 *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 28–29 (2004).

80 *See Swift*, 41 U.S. (16 Pet.) at 19–20.

81 53 U.S. (12 How.) 299 (1852).

82 *See, e.g.*, *The License Cases*, 46 U.S. (5 How.) 504, 572–73 (1847), *overruled in part by* *Leisy v. Hardin*, 135 U.S. 100 (1890); *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 143 (1837).

ing local regulation of pilotage until it should provide otherwise.⁸³ Was the Constitution's grant of authority to Congress to regulate interstate and foreign commerce exclusive of state authority? Always, or only sometimes? The answer to this question, note, could only be judge-declared federal law. The Constitution's text does not address it, conferring authority on Congress that Congress need not exercise, and saying nothing (beyond the Supremacy Clause) about the impact of this conferral on state authority. But, as in *Swift*, what had been locally done was unmistakably within Congress' constitutional power. And the *Cooley* Court announced a formula strongly evoking Fessenden's *Swift* argument and Story's *Swift* rhetoric:

Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; *some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port*, and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.⁸⁴

Again, this was dictum, since the operative conclusion was that Philadelphia's regulation, given its strongly local character and justifications, would survive. But the distinction drawn by this dictum animated dormant Commerce Clause decisionmaking for years; it situates the question, as *Swift* did, in the heart of conceded federal legislative authority; it is the same distinction between general and local action as *Swift* drew then and *Kirby* would draw nearly a century-and-a-half later; and it places state lawmaking at the Supremacy Clause peril of judicial conclusions that the Senate will not have participated in. The "local"/ "general" distinction has survived *Erie*, in a context (admiralty) of undoubted federal juris-generative authority operative *without* Senate participation.⁸⁵

The second case is *Watson v. Tarpley*,⁸⁶ a diversity action from Mississippi argued in the Supreme Court only for the petitioner (i.e., for the party protesting state law in arguable conflict with national law) as the Civil War loomed. The case involved an effort to collect from the drawer of a negotiable instrument that had been dishonored by its drawee (i.e., the drawee had assured the plaintiff that it would not be paid, disclaiming all connection with the instrument) in interstate

83 See *Cooley*, 53 U.S. (12 How.) at 311-14.

84 *Id.* at 319 (emphasis added).

85 See *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22-23 (2004).

86 59 U.S. (18 How.) 517 (1856).

commerce, prior to its maturity.⁸⁷ A Mississippi statute precluded the bringing of any legal claim derived from a bill of exchange, until that bill matured.⁸⁸ This Mississippi statute conflicted with a settled common law precept (“too familiar to require the citation of authorities or to admit of question”⁸⁹) that an action may be maintained at any point after dishonor.⁹⁰ The Court’s reasoning reflected the same national/local distinction as had been employed in *Swift* and in *Cooley*, decided four years earlier; commercial law was “general,” not predicated upon local conditions. It reiterated *Swift*’s observation that “‘the law respecting negotiable instruments may be truly declared . . . to be in great measure not the law of a single country only, but of the commercial world.’”⁹¹ The Constitution confers a right to have such rights adjudicated through litigation. The Mississippi statute thus abridged this constitutional right by preventing litigation over one’s property rights. In the Court’s words:

The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the constitution and laws of the United States having conferred upon the citizens of the several States, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation, the effect of which would be to impair the rights thus secured, or to divest the federal courts of cognizance thereof, in their fullest acceptation under the commercial law, must be nugatory and unavailing.⁹²

While the Mississippi statute was thus unavailing in a diversity action, however—indeed was *unconstitutional*—here the Court signaled a clear choice between the alternatives immanent in *Swift*. On the one hand,

[state] laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and constitution.⁹³

87 See *id.* at 517.

88 See *id.* at 519.

89 *Id.*

90 See *id.*

91 *Id.* at 520 (quoting *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842)).

92 *Id.* at 521.

93 *Id.* at 520.

On the other, however, “the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction”;⁹⁴ state courts would be bound by their legislature’s enactments even when considering the general common law. Thus was cemented a separate standard for state and federal courts in administering the general common law. By later in the nineteenth century, the Court had extended the field of “general common law,” within which federal courts could rule in diversity cases without regard to state laws, well beyond the legislative competence it had concluded the Constitution permitted to Congress.⁹⁵ Thus were the seeds of *Erie* sown.

The proposition *Kirby* unanimously reaffirmed—that federal courts could generate what were effectively common law resolutions that *dominated* state law—that had Supremacy Clause effect was early established in respect of that arm of interstate and foreign commerce that the Constitution explicitly commits to the federal courts, admiralty.⁹⁶ In 1862, the Taney Court, in *The Steamer St. Lawrence*,⁹⁷ characterized the constitutional grant of admiralty powers to the judiciary in a manner seeming to place it beyond the competence even of Congress to diminish.

[C]ertainly no State law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal Government.⁹⁸

Like *Hudson & Goodwin*, this was a case about jurisdictional limits and not, as such, the common law authority of federal courts to displace state common law on federal questions. Yet the “purpose[] for which admiralty . . . was granted to the Federal Government”⁹⁹ was, transparently, to assure uniformity in maritime law throughout the Union, determined as a matter of federal law by federal courts, and within a few years that shoe unmistakably dropped.

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of mari-

94 *Id.*

95 *See* PURCELL, *supra* note 33, at 54–56.

96 *See* *The Lottawanna*, 88 U.S. 558, 566 (1875); *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 524–25 (1862).

97 66 U.S. (1 Black) 522.

98 *Id.* at 527.

99 *Id.*

time law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary. It assumes that the meaning of the phrase "admiralty and maritime jurisdiction" is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of "cases in law and equity," or of "suits at common law," without defining those terms, assuming them to be known and understood.

One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.¹⁰⁰

Here was Fessenden's argument in *Swift*, if not Story's, later to be unanimously reasserted in *Kirby*.

In *Welton v. Missouri*,¹⁰¹ decided the very year that the Court thus understood in Supremacy Clause terms the constitutional commitment to it of admiralty jurisdiction, the Court invalidated a Missouri licensing law targeting out-of-state peddlers.¹⁰² Here admiralty was not involved, yet the state law was unmistakably concerned with regulation of interstate commerce—like the legal issue in *Swift* but unlike the legal issue in *Erie*. Even in the absence of congressional action in a particular field of commerce, the Court now held that if the field is "national in its character, or of such a nature as to admit of uniformity of regulation, [Congress' Commerce Clause] power is exclusive of all State authority."¹⁰³ Where *Cooley* had admitted "that the states may

100 *The Lottawanna*, 88 U.S. at 574–75.

101 91 U.S. 275 (1876).

102 *See id.* at 282.

103 *Welton*, 91 U.S. at 280.

legislate in the absence of congressional regulations,"¹⁰⁴ *Welton* reserved the right to scrutinize such state legislation for the Court even after finding that Congress had not regulated the commercial issue in question. If a commercial issue is "national in character," or "admit[s] of uniformity or regulation," then the judiciary could find the states precluded from acting upon it.¹⁰⁵ The Court thus found federal judicial authority to countermand state laws in a constitutional text that merely empowers Congress affirmatively to legislate for interstate and foreign commerce.

C. *Supremacy Clause Stakes*

The uses of the Supremacy Clause in dormant Commerce Clause and admiralty cases are, of course, only two examples of judicial embroidery based on constitutional text, setting state obligations without the need for senatorial participation. This is what might be described as constitutional common law: the effect on state law of constitutional interpretations by the Court that surpass the explicit commands of the Constitution's text. For the nation's first century, when we lacked lower federal courts with general federal question jurisdiction, it was a setting for which the Supremacy Clause held particular importance. That Clause embodied the command imposing obedience to federal law on state tribunals. For most purposes, only in state tribunals would federal questions be determined. In these times, so sensitive to states' rights, might one not have expected resistance to any proposition about federal law that the Senate had not directly ratified? And of course constitutional interpretations that are not textually driven, as well as statutory interpretations beyond the realm of "plain meaning," have just this character.

Consider the range of issues to which the Constitution does not directly speak, beyond the dormant Commerce Clause or admiralty ideas, on which state actions are Supremacy Clause-constrained without the need for Senate definition. Attention to the Constitution-based decisions on rights like these, largely as against the states, constitute well over fifty percent of the pages of contemporary Constitutional Law teaching materials:

104 *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1852).

105 As a formal matter, the Court attributed the judgment to Congress by attributing the preemption of state regulation to an implicit congressional intent that the field remain unregulated expressed through legislative inaction. See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 71-72 (1994). This fictional intent surely could not satisfy Professor Clark's condition of positive senatorial assent (with the House and President also agreeing).

- the right to travel and other textually undefined “privileges and immunities” of national citizens;¹⁰⁶
- the specific content of procedural rights as against state courts and state administrative tribunals protected by the Fourteenth Amendment’s Due Process Clause;¹⁰⁷
- defendants’ procedural rights in criminal actions protected by the same Clause, whether viewed (as originally) as an element of “the very essence of ordered liberty,”¹⁰⁸ a category whose content was determined by judges, or as one of those specific procedural protections of the Bill of Rights incorporated against the states by the Due Process Clause viewed in a somewhat different light;¹⁰⁹
- substantive elements of the Bill of Rights, notably freedom of the press and freedom of religion, also found implicit in the Fourteenth Amendment’s due process guarantee;¹¹⁰ and
- pretty much the whole of Equal Protection Clause jurisprudence, from *Brown v. Board of Education*¹¹¹ to discrimination on the basis of gender¹¹² to compulsory sterilization¹¹³ to voting rights.¹¹⁴

It is difficult to justify these departures from Professor Clark’s theory by asserting that the Senate played its necessary role in the adoption of the Fourteenth Amendment. There is no sense in which these outcomes were foreseen, nor can they be corrected by Senate action. The concurrence of the House of Representatives and the President—populist, not small-state, vetogates—would be required for correction

106 See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 41–42 (1868).

107 *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 275–77 (1855), early established the essential common law character of due process reasoning, perhaps to be informed by statute but in no sense dependent upon it. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985); *Arnett v. Kennedy*, 416 U.S. 134, 159–60 (1974) (six Justices rejecting statutory definition as sufficient).

108 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

109 See *Duncan v. Louisiana*, 391 U.S. 145, 147–50 (1968).

110 *Baker v. Carr*, 369 U.S. 186, 208–09 (1962).

111 347 U.S. 483 (1954).

112 *Reed v. Reed*, 404 U.S. 71, 74–75 (1971).

113 *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

114 In relation to Professor Clark’s argument, it is irrelevant whether these protections against state intrusion are brought home by “due process” or “privileges and immunities”; in either case, the specification of *just which* protections may, and which may not, be claimed as against state authorities is accomplished by judicial decision without legislative participation—and, indeed, beyond the possibility of legislative correction other than by constitutional amendment.

of "errors" in the admiralty and dormant Commerce Clause contexts; in other settings, the even higher hurdle of securing a constitutional amendment must be met.

The Senate has a greater opportunity to correct, but it remains fictional to suggest that it directly participates in either judicial improvisation on statutes or administrative rulemaking. In the statutory context, judicial decisions command Supremacy Clause adherence in at least three ways beyond the effect of ordinary interpretation: most strongly, when the statute (like the Sherman Antitrust Act) is understood as a framework statute essentially delegating lawmaking authority to the courts; second, when federal statutes are understood to create private causes of action they do not in terms provide for; and third, when questions arise about preemption of state law that are not directly addressed, or are imperfectly addressed, in statutory terms. Of course even ordinary interpretation, in itself, frequently involves propositions about the law that the Senate can only constructively be thought to have anticipated. Unless we take Professor Clark's argument to be one for the constitutional necessity of something like the plain meaning rule for any interpretive setting that could impact state law, judicial decisionmaking has Supremacy Clause effect without senatorial participation. If they are not to be regarded as unconstitutional—which would be a stunning proposition indeed—specific delegations to the courts of what is in effect common law authority, as in the Sherman Act or FELA, drive this point home. While the practice of inferring private remedies in support of public actions has come under shadow in recent years,¹¹⁵ the Fuller Court unanimously recognized, even when sharply disagreeing about the proper extent of federal law's impact on state law, that state courts *must* recognize violation of a federal safety standard as "negligence per se" under state common law.¹¹⁶ And preemption claims, too—

115 The cases are animated to some degree by the overreading of *Erie* discussed above, *see supra* notes 69–73 and accompanying text; in the modern context, however, a second rationale—that Congress chooses its remedies carefully in the contemporary context of complex administrative schemes, so that adding a private remedy can be destructive of an intended balance—is often persuasive. Note that grounding the rationale in a constructive congressional choice, properly understood, should be taken as preclusive of *state* implication of a private cause of action as well as federal. Either state or federal implication of a remedy unprovided for would *equally* disturb what Congress had provided for. Here, then, the Supremacy Clause would operate to reinforce the conclusion that a private cause of action is not to be inferred, rather than leave to state authority an initiative denied to federal authority in the absence of Senate participation.

116 *See Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U.S. 1, 11–13 (1907).

direct applications of the Supremacy Clause's commands—often have turned on legislative language that is far from explicit whether a legislative choice in the matter has been made.¹¹⁷

In numeric terms, at least, the predominant source of federal law today is federal agency rulemaking.¹¹⁸ While statutes, judicial decisions, and executive guidance all reflect concern to avoid excessive preemptive effect in these measures, none suggest doubt that it properly occurs. Indeed, statutes like the Unfunded Mandates Reform Act of 1995,¹¹⁹ requiring special attention to the impact of federal regulations on state entities,¹²⁰ can only be understood as direct confirmations of this understanding. Congress' practices in delegating authority to agencies over the years, and the Court's inability or disinclination to control its doing so, undercut any suggestion that, in conferring rulemaking authority, the Senate has effectively ratified whatever rules may subsequently emerge. While subsequent legislative repudiation is possible, and to some extent facilitated by, the Congressional Review Act,¹²¹ that still requires full legislative action with presidential participation (or a veto override);¹²² the prohibition on legislative vetoes prevents the Senate from effectively using post-event controls. Had the Supremacy Clause the meaning Professor Clark argues for, it would be necessary to abandon the delegation doctrine as we know it in any context impacting state law. The only substantive test of a regulation's validity is its compliance with such loose standards as the delegation doctrine permits. Yet on Professor Clark's understanding, the Supremacy Clause was intended to operationalize the one element of the Constitution safeguarding state authority that is protected from change even by constitutional amendment.¹²³ How can that strong protection be undone by an open-ended statute empowering an agency to adopt rules that, if valid, have Supremacy Clause force as against state law?

Professor Clark's treatment of this issue reflects the difficulty anyone would face in attempting to reconcile the historical ideal of the Supremacy Clause as he propounds it with contemporary realities. In pages dealing with the delegation doctrine he remarks astutely on its

117 See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871–72 (2000) (noting that Congress had provided in one place that federal standards were to control state law, and in another that state common law remedies were to be preserved).

118 Approximately ten rules are adopted annually for each statute enacted.

119 2 U.S.C. §§ 1501–1572 (2000).

120 See, e.g., *id.* § 1501.

121 5 U.S.C. §§ 801–808 (2000 & Supp. V 2005).

122 *Id.* § 801.

123 U.S. CONST. art. I, § 3, cl. 1.

quasi-survival,¹²⁴ in such forms as Justice Scalia's colorful declaration that the Court will not find elephants in mouseholes.¹²⁵ But in acknowledging that the effect of the doctrine, even as thus somewhat contained, is to transfer lawmaking authority to the executive branch that may be exercised without Senate concurrence, he does not directly confront the tension created with his theory of the Supremacy Clause.¹²⁶ Moreover, these quasi-delegation constraints are not special to questions involving possible conflict with state law; they are about the exercise of congressional power simpliciter, as valid and important in relation to direct federal authority over individuals as to any issue of federalism.

Later in the piece Professor Clark returns to rulemaking as an example of "Unconventional Federal Lawmaking."¹²⁷ Here his suggestion is that "the underlying statute, rather than the regulation itself, establishes the rule of law and preempts contrary state law."¹²⁸ But a court will find that rancher Grimaud has violated the Department of Agriculture's regulations governing the grazing of sheep in national forests, not the statute that has authorized its Secretary to adopt regulations for their protection "against destruction by fire and depredations."¹²⁹ To find a misdemeanor in such open-ended statutory language would be at odds with the Court's position on common law crimes that Professor Clark celebrates, established a century earlier in *Hudson & Goodwin*. Beyond this, if the idea of the Supremacy Clause is indeed that it protects the small states' irreducible voice in decisions about "law" affecting their obligations, this argument respects only the form and abandons the function. One could analogize it to the properly failing argument in respect of the legislative veto, that since the President had an opportunity to veto or sign the legislation creating the legislative veto, his necessary participation in that legislation had been preserved and the legislative veto mechanism should be upheld.

D. A Proper Understanding for the Present Day?

In arguing that what may have been the original theory underlying the Founders' choice of our Constitution's text is not a persuasive

124 See Clark, *supra* note 2, at 1373-78.

125 See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

126 See Clark, *supra* note 2, at 1373-74.

127 See *id.* at 1430-57.

128 *Id.* at 1431.

129 *United States v. Grimaud*, 220 U.S. 506, 509 (1911) (quoting Act of June 4, 1897, ch. 2, 30 Stat. 35).

basis for interpretation of that text today, I am not arguing that the interpretation Professor Clark seeks to advance is unavailable or impermissible. It is a possible reading of the text, even if a textualist should conclude both that the double use of "Laws" in the sentence makes it an unlikely one, and that its reappearance in the Take Care Clause makes it a particularly hazardous one.¹³⁰ Conceivably, one could make the case that contemporary circumstances make this the right reading for today, however inappropriate it would have been for the era when, as the great Holmes pithily put it, "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."¹³¹

If one is not simultaneously attempting to cut back on the sweep of Congress' authority under the Commerce Clause, then the dormant Commerce Clause, while hardly unimportant, has nothing like the union-essential role it played when Congress was a sleepy institution legislating infrequently and within a somewhat constrained universe of "interstate commerce." Today's profusion of federal statutes, too, both diminishes the importance of federal courts' independent (common-)law-generating role—a role both needed and legitimately played in the nineteenth century—and strengthens arguments that *today* one needs to find effective counterweights to federal authority.

Of course, these are arguments about the best meaning we should be giving the Constitution today, and my sense is that these arguments are quite different from the ones Professor Clark intends to be making. Were they to be successful, they would involve an assertion of authority by the Court that, however welcome it might be to the States, could not have met his test of having the approval of the United States Senate. And, as I find implicit in his efforts to reconcile current understandings that he cannot imagine displacing with his theory, the contemporary reading would need to find ways to preserve elements that cannot readily be understood in Founder-theoretic terms. Federal courts generate uncommanded interpretations of constitutional and statutory text—as well as rulings in admiralty—varying over time, that are unmistakably part of the "Laws of the United States" for Supremacy Clause purposes; this bypasses the Senate but must be preserved. Federal agencies adopt regulations that, if valid, command state as well as federal obedience, under delegations of authority so broad as to refute any pretense that they concern merely the filling-in of trivial details; this federal "Law" made without Senate

130 See *supra* Part I.

131 HOLMES, *supra* note 1, at 295–96.

participation must also be preserved. To make the argument in contemporary terms would be difficult indeed, then; but that seems to me a discussion for another day. That our Constitution is a dynamic text, inviting contemporary understanding in terms of contemporary needs, would be good to have as common ground.

Justice Scalia and his more conservative colleagues perhaps surprisingly reinforced arguments for the propriety of accommodating spacious texts to contemporary circumstances, seeing them develop over time, on the last day of the 2006 Term. I am referring to the Court's closely divided 5–4 decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹³² This was an opinion reinterpreting the Sherman Antitrust Act, overruling a precedent of almost a century's standing on the basis of contemporary economic understandings about anti-trust policy.¹³³ I could be sharply critical of the particular result in that case; it seems to me to ignore the best indicators of the contemporary Congress' judgments about the Act, since Congress' most recent enactment looked in precisely the opposite direction from the one the Court chose.¹³⁴ The Court's judgment ultimately rested on a particular economic view whose controversiality, in my judgment, made it no more appropriate for judicial selection as a basis for decision in the face of that congressional choice than Herbert Spencer's *Social Statics* had been in the infamous *Lochner v. New York*.¹³⁵ And as Justice Breyer pointed out in his stinging dissent, virtually all the conventional indicators about the appropriateness of overruling long-standing precedent counseled against, rather than for, overruling in this particular case.¹³⁶

But my disagreement with the majority's particular judgment is not disagreement with its basic technique. If, in my judgment, the Court majority did a poor job on the merits, its fundamental orientation was exactly right—even if a bit surprising for the five Justices most consistently called “conservative” in the literature. The Sherman Act, like other spacious statutes,¹³⁷ invites judicial accommodation over

132 127 S. Ct. 2705 (2007).

133 See *id.* at 2714–20.

134 See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (codified at 15 U.S.C. § 1 (2000)).

135 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s *Social Statics*.”).

136 See *Leegin*, 127 S. Ct. at 2726–37 (Breyer, J., dissenting).

137 See generally Peter L. Strauss, *Statutes That Are Not Static—The Case of the APA*, 14 J. CONTEMP. LEGAL ISSUES 767, 785 (2005) (arguing that the Administrative Procedure Act of 1946 and the Freedom of Information Act of 1966 illustrate the proposition that the evolution of law subsequent to a statute’s enactment is an appropriate element for consideration in interpreting it); see also Frank H. Easterbrook, *Statutes’*

time and invites alteration using the conventional tools of common law judges. And these interpretations, revisions really, of a federal statute command state obedience under the Supremacy Clause, irrespective of the Senate's nonparticipation in them. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,¹³⁸ the precedent *Leegin* overruled, required federal statutes to authorize states to legislate permission for their citizens to depart from it; its overruling equally constrains state law.¹³⁹

The situation for us is no different than it has been for interpreters of the French Civil Code, that most accommodating of statutory formulations. To be sure, the text governs; but it is a text that invites thoughtful and reasoned attention to developing social circumstances and expectations, and in that sense is a text that must be free of the particular theories and perspectives that may have attended its birth. When Portalis and his contemporaries¹⁴⁰ wrote the few brief sections

Domains, 50 U. CHI. L. REV. 533, 544 (1983) (arguing that some statutes, "plainly hand[] courts the power to create and revise a form of common law," and that in such circumstances, Congress expects that the courts will apply a statute to fact situations that Congress did not anticipate).

138 220 U.S. 373 (1911), *overruled by Leegin*, 127 S. Ct. 2705.

139 See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386-87 (1951) (interpreting the Miller-Tydings Act not to be such a statute).

140 Portalis, Tronchet, Bigot-Préameneu & Maleville, *Discours Préliminaire*, in 1 J. LOCRÉ, LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE 251, 255-72 (1827).

We have equally avoided the dangerous ambition to desire to regulate and foresee everything. Is it not strange that those to whom a code always appears too large imperiously give the legislator the terrible task of leaving nothing to the decision of the judge?

Regardless of what one does, positive laws will never be able to replace entirely the use of natural reason in the affairs of life. The needs of society are so varied, the intercourse among humans so active, their interests so multiple, and their relationships so extensive that it is impossible for the legislator to foresee everything.

Even in the matters upon which he fixes his particular attention there are a host of details that escape his attention or are too disputed or too rapidly changing to become the object of a text of law.

Moreover, how can one hold back the action of time? How can the course of events be opposed, or the gradual improvement of mores? How can one know and calculate in advance what only experience can reveal to us? Can foresight ever extend to those objects which thought cannot reach?

A code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge. Because the laws, once written, remain as they were written. Man, on the contrary, never remains the same, he changes constantly; and this change, which never stops, and the effects of which are so diversely modified by circum-

of the Code dealing with what we call tort, French theories of social duty were underlain by the sense that personal fault lay at their foundation, just as ours were. As the Industrial Revolution brought people to see many kinds of accident in a different light—as an inevitable element of the cost of bridge building, not properly placed on the shoulders of the individual workmen and their families who happened most directly have borne their brunt¹⁴¹—judicial appreciation for the appropriate basis for responsibility moved from “fault” to other perspectives. Encouraged by Francois Geny’s spirit of “*libre recherché scientifique*” (“free scientific research”),¹⁴² French courts reinterpreted the Code’s language to achieve principles of enterprise liability in unselfconscious parallel with the changes American common law courts were working;¹⁴³ legislative changes that were not Code amendments pointed to the same end. The French courts replaced fault—originally and undoubtedly the theoretical basis of the text, but not required by its words—with considerations of least-cost accident avoidance, and appropriate accident cost allocation, just as our courts did under the common law. “Interpretation,” as a colleague thoughtfully captured for me in reflecting back to me my argument, “necessarily involves discretion and lawmaking, and thus the

stances, produces at every instant some new combination, some new fact, some new result.

A great many things are necessarily left to be determined by custom (*usage*), to the discussion of informed men, to the decision (*arbitrage*) of the judges.

The function of the law (*loi*) is to fix, in broad outline, the general maxims of justice (*droit*), to establish principles rich in suggestiveness (*conséquences*), and not to descend into the details of the questions that can arise in each subject.

It is for the judge and for the lawyer, embodied with the general spirit of the laws, to direct their application.

ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 54 (2d ed. 1977) (translating and quoting Portalis et al., *supra*).

141 The story of the transition, and its difficulties, is brilliantly told in JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC* (2004).

142 FRANÇOIS GENY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* (Jaro Mayde trans., 2d ed. 1963).

143 E.g., *Jand'heur v. Les Galeries Belfortaises*, Cour de Cassation [Cass. Ch. Réuns.] [Court of Cassation], Feb. 21, 1927, D. 1927, I. 97 (note Ripert), *translated in* VON MEHREN & GORDLEY, *supra* note 140, at 622; *Guissez, Cousin et Oriolle v. Tef-faine*, Cour de Cassation [Cass. Civ.] [Court of Cassation], June 16, 1896, D. 1897, I. 433 (note Saleilles), *translated in* VON MEHREN & GORDLEY, *supra* note 140, at 608.

very nature of interpretation undermines Professor Clark's view and perhaps that of the founders."¹⁴⁴

And the Constitution, of course, is precisely this kind of text—spacious, and the recipient of shifting understandings over the years as changing social circumstances have demanded them. We could not have the national economy we have without the dormant Commerce Clause; we could not have our contemporary democracy without *Reynolds v. Sims*;¹⁴⁵ we could not have our hopes for racial justice without *Brown v. Board of Education*. I hardly mean to say that the Court will always get it right, or that acknowledging its power, indeed its mandate, to depart from original intent carries no risks of unwonted adventurism. This is not the place to try to resolve the deeply divisive debates over the claims that the Constitution protects the integrity of individual adult decisions about such issues as gender, sex, marriage, and pregnancy against state law interference.¹⁴⁶ But the use of originalism carries its own risks of unwonted judicial adventurism and, like Justice Blackmun's use of it in *Freitag*, Professor Clark's analysis strikes me as an invitation to them. The contemporary understanding

144 E-mail from Philip Hamburger, Professor of Law, Columbia University, to Peter L. Strauss, Professor of Law, Columbia University (Sept. 24, 2007 23:38 EST) (on file with author).

145 377 U.S. 533 (1964).

146 As many have observed, there is an irony in the debt these developments owe to the pen of perhaps the most conservative Justice of the early twentieth century, Justice McReynolds.

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (alteration in original) (citations omitted).

of the Supremacy Clause, which he invites us to abandon, is backed by the whole universe of changes occurring since the Foundation—the realignments effected by the Civil War; the development of a highly integrated national economy with, in appropriate consequence, considerably expanded understandings of the reach of national legislative power; and decades of congressional—that is to say, senatorial—creation of an administrative state authorized, often with explicit thoughtful exceptions,¹⁴⁷ to displace state law by the adoption of measures that Congress has in no sense approved, and lacks the power to disapprove without the full formality of statutory enactment.

CONCLUSION

In *Freytag*, as it seems to me Justice Scalia's concurrence acknowledges, Congress' repeated judgments about the way in which the institutions of the administrative state should be built—judgments essentially entrusted to it by the Necessary and Proper Clause and broadly accepted by the Court over the years—had displaced the original theory of the Appointments Clause.¹⁴⁸ To be sure, the integrity of the constitutional text requires finding an appropriate role for the President as our unitary executive. But that need not be—should not be, in today's far more complex world—the role of unitary decisionmaker; the oversight function necessarily entailed by the text need not carry with it the authority of a Tsar.¹⁴⁹ The Appointments Clause, as the rest of Article II, must be understood against the framework of government that Congress has gradually and uncontroversially built over the years.

So here, in relation to the Supremacy Clause. Professor Clark's original understanding, like Justice Blackmun's, would unhinge too much of our constitutional tradition and understanding. While he

147 See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 864–65 (2000) (grappling with the preemptive force of a particular safety regulation issued to execute a statute that included an express congressional preservation of state common law remedies). The question was whether a federal regulation specifying a particular timetable for the introduction of airbags as required automotive safety technology preempted a verdict under state common law that a particular automobile manufacturer had sold a defectively designed car, when it did not yet contain such a device. See *id.* at 865. Strikingly, the case illustrated the need for federal judgment on this issue; “[a]ll of the Federal Circuit Courts that have considered the question . . . have found pre-emption,” but “[s]everal state courts have held to the contrary.” *Id.* at 866; see Strauss, *supra* note 23, at 921.

148 Cf. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (“[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.”).

149 See Strauss, *Decider*, *supra* note 53; Strauss, *Fourth Branch*, *supra* note 53.

works to keep his argument within moderate bounds, for me his reassurances about his argument's limits do not respect its strength or impulse in relationship to federal-state relations; and the implications of this reading of "Laws" for *presidential* authority and responsibility would loosen a crucial rule-of-law constraint on presidential power. Like Justice Scalia in *Freytag*, I would look for other ways of addressing contemporary constitutional issues, that do not threaten so dramatically to disrupt our ongoing enterprise.

