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Erie and Problems of Constitutional Structure

Craig Green  

Bradford Clark may have drawn more lessons from the Supremacy Clause than anyone in history. For Clark, these few dozen words govern more than federal preemption. They also influence his interpretation of dormant commerce power, executive agreements, certification, the Eighth Amendment, Marbury, Erie, federal common law, and a great deal else.  

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Except for a few clarifying footnotes, the special agreements and procedures governing this piece precluded any expansive response to Bradford R. Clark, Federal Lawmaking and the Role of Structure in Constitutional Interpretation, 96 CALIF. L. REV. 699 (2008).

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661
impressive quality and breadth of Clark's work, this Essay disputes his view that the Supremacy Clause is a constitutional basis for *Erie*, and that those two invalidate most (or all) federal common law. Clark's work fits this pattern. Like other new-myth scholars, Clark offers a categorical and constitutional critique of "federal common law," but he does not provide a workable understanding of that term separate from other types of judicial activity. This failing allows jurists to use the epithet "common law" to condemn judicial decisions that are disfavored on other grounds, rendering ever-widening fields of judicial activity vulnerable to attack.

A unique feature of Clark's analysis is his argument that the Supremacy Clause, *Erie*, *INS v. Chadha*, and the "constitutional structure" form interrelated limits on federal judicial power. In response, I claim that the first three cannot support his conclusions. Clark's reliance on structure needs more detailed attention. The term "structure" has multiple meanings in constitutional law, and Clark's scholarship exemplifies general strengths and weaknesses of structural interpretation, which remains a popular and important mode of constitutional discourse.

Part I of this Essay outlines Clark's argument for *Erie*'s new myth and challenges his view of the Supremacy Clause as *Erie*'s constitutional source. Part I also considers the risk that Clark's arguments could affect not only federal judges, but also executive lawmaking in the administrative state. Part II explores Clark's vision of the constitutional structure and illustrates how such interpretive methods can incorporate unstated assumptions about how the Constitution should operate. I suggest that Clark's claims about federal common law may depend more on undefended assumptions about

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2. Clark, Federal Common Law, supra note 1, at 1264-72 (arguing that federal common law, even in traditionally recognized enclaves, may be "constitutionally suspect").
5. Green, supra note 3 at 619-21.
7. Id. at 1302.
constitutional function than on the document's text or history, and that Clark's concerns about judicial discretion rely, somewhat paradoxically, on a type of constitutional argument that itself embodies great interpretive flexibility. Although this Essay concludes that arguments about constitutional structure can be important, such claims merit scrutiny similar to other assertions about constitutional "penumbras" and "ordered liberty."  

I

THE SUPREMACY CLAUSE AND FEDERAL LAWMAKING

The Supremacy Clause lists three types of "supreme" federal law that state judges must follow: "[t]his Constitution," "Laws of the United States," and "Treaties . . . under the Authority of the United States." I will call these the Supreme Three. Clark believes that they are the Constitution's exclusive mechanisms for producing supreme federal law, and that each places necessary limits on federal government in order to safeguard separation of powers and federalism.

With respect to separation of powers, Clark invokes Framing-era history and Chadha's statement that Article I, Section 7 is a "single, finely wrought and exhaustively considered" framework for lawmaking. According to Clark, the Supremacy Clause confines the federal government's supreme lawmaking to specified procedures, each of which requires the interaction of different governmental components, often including the President and Senate. These lawmaking procedures in turn limit the three branches to their proper spheres.

With respect to federalism, Clark claims that the Supreme Three's rigorous procedures make federal lawmaking difficult, slow down the central government, and maintain space for state regulation. Some readers might doubt whether sapping the federal government's strength is always good for states, but Clark notes that each of the Supreme Three involves the states in the lawmaking process, at least indirectly. "By design, all of these procedures


9. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").


11. Id. at 1308.


13. See Clark, Erie's Constitutional Source, supra note 1, at 1304-06 ("By requiring the participation and assent of the Senate in all forms of federal lawmaking, the Founders effectively gave the states (through their representatives in the Senate) the ability to veto all attempts to adopt 'the supreme Law of the Land.'").
safeguard federalism by requiring the participation and assent of the states or their representatives in the Senate.\textsuperscript{14} Thus, Clark sees the difficulty of Supreme Three lawmaking as proof of the states’ required participation.

Clark’s analysis of the Supremacy Clause is the basis for his arguments about 	extit{Erie}. The doctrinal decision to abolish 	extit{Swift v. Tyson}’s federal general common law is today widely accepted,\textsuperscript{15} but 	extit{Erie}’s claim that 	extit{Swift} was unconstitutional has spurred lasting debate.\textsuperscript{16} Clark would resolve such controversies once and for all. He contends that 	extit{Swift}’s federal general common law was unconstitutional because such lawmaking is not on the Supremacy Clause’s list.\textsuperscript{17} “If agents of the federal government—and more specifically, federal courts—were free to adopt supreme law outside of the [three] lawmaking procedures prescribed by the Constitution, they could deprive the states’ representatives in the Senate of their essential gatekeeping role under the constitutional structure.”\textsuperscript{18} 	extit{Erie} was constitutionally necessary, says Clark, to

\begin{enumerate}
\item\textsuperscript{14} Id. at 1290. A necessary predicate of Clark’s analysis is his belief that “Laws of the United States” means federal statutes, not federal common law. See id. at 1303-04. Peter Strauss has presented a strong critique of that conclusion, Peter Strauss, \textit{The Perils of Theory}, 83 \textit{Notre Dame L. Rev.} (forthcoming 2008) (manuscript at 1-2, on file with author), but in order to explore other legal issues, this Essay proceeds as though Clark’s textual analysis were correct on this point. Cf. id. at 3 (making similar assumptions for a similar purpose).
\item\textsuperscript{15} See Green, supra note 3, at 596-96.
\item\textsuperscript{16} See, e.g., 19 Charles Alan Wright et al., \textit{Federal Practice \& Procedure} § 4505 (2d ed. 1996) (endorsing 	extit{Erie}’s constitutional holding, despite its being “remarkably abbreviated” and “puzzling”); Green, supra note 3, at 596 at nn.4-5 (collecting sources).
\item\textsuperscript{17} Clark has also argued that 	extit{Swift} was not wrongly decided in 1842 as an original matter, but that the Court’s holding somehow became unconstitutional as (i) the doctrine spread to different areas of substantive law, and (ii) legal theories changed about common-law adjudication itself. See Clark, \textit{Separation of Powers}, supra note 1, at 1413-14. This argument seems confused. The fact that 	extit{Swift}-era lawmaking happened on a small or large scale cannot be important under the Supremacy Clause. Indeed, Clark’s textual analysis would seem to render any federal common lawmaking unconstitutional.

Clark cannot be correct that federal courts “were free to” apply 	extit{Swift}’s federal general common law “[s]o long as state courts saw themselves as ... applying a general body of law reflected in the body of multiple jurisdictions,” and that “it was only after states abandoned this approach in favor of state-specific rules that ... [federal general common law] triggered serious constitutional concerns.” Bradford R. Clark, \textit{Federal Lawmaking and the Role of Structure in Constitutional Interpretation}, 96 Calif. L. Rev. 699, 708 (2008) [hereinafter Clark, \textit{Federal Lawmaking}] (emphasis added). It would be absurd to think that 	extit{Swift}’s constitutional status turned on state judges’ understanding of their own work.

Finally, Clark has claimed that 	extit{Swift}’s original holding was constitutionally valid because it concerned customary international law, which he characterizes as “not federal common law,” and which some other scholars view as a permissible “enclave” of federal common law. Clark’s notion that federal courts should apply customary international law more freely than federal common law is controversial; but even if he is right that federal judicial decisions concerning customary international law are “not federal common law,” that cannot be because customary international law involves “[r]estrained judicial lawmaking” under “an identifiable body of rules and customs developed and refined by a variety of nations over hundreds ... of years.” See Clark, \textit{Separation of Powers}, supra note 1, at 1413 n.576 (internal quotation omitted). Otherwise, federal courts would remain free to apply domestic common-law rules, if the latter offered a long pedigree and sprang from “identifiable” precedent—as some 	extit{Swift}-era decisions certainly did.
\item\textsuperscript{18} Clark, \textit{Erie’s Constitutional Source}, supra note 1, at 1306.
\end{enumerate}
restore limits on federal lawmaking and to protect states from unwarranted intrusion. \(^{19}\) He thus views *Swift* as unlawful because it slipped the Supremacy Clause’s constitutional constraints.

Despite my admiration for Clark’s work, I cannot agree with his analysis of *Erie*. This Part raises three concerns: (a) whether the Supremacy Clause could have invalidated *Swift*’s “federal general common law” even though the latter was never “supreme” law, (b) whether attacks on “federal common law” risk incoherence because the term itself is irretrievably vague, and (c) whether Supremacy-based resistance to federal common law is consistent with agency lawmaking in the modern administrative state.

### A. Supremacy and Non-Supreme Law

As a technical matter, I am puzzled by Clark’s claim that the Supremacy Clause supports *Erie* and contradicts *Swift*. As Clark admits, no Justice in *Erie* mentioned the Supremacy Clause, \(^{20}\) and this omission seems apt. The Supremacy Clause concerns only preemptive federal law: “supreme” law that state judges must follow. \(^{21}\) This preemptive power to “displace” state law and “bind” state judges is what locates supreme federal law atop our national legal hierarchy. \(^{22}\)

By contrast, *Swift*’s system of federal general common law was never preemptive or “supreme.” Throughout *Swift*’s ninety-six-year reign, state courts routinely ignored federal precedents involving contracts, torts, and the like. \(^{23}\) Although federal courts followed *Swift*-era common law as a matter of precedent, state courts never had to comply with federal general common law in any jurisdiction. \(^{24}\) Simply put, the Supremacy Clause has nothing to do with “federal general common law” because the latter never claimed preemptive “supremacy” and never bound state courts.

Clark contends that the Supremacy Clause, by negative implication, forbids all preemptive lawmaking other than the Supreme Three. \(^{25}\) Yet an

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19. *See id.* at 1309-10.
20. *Id.* at 1308.
22. As a terminological matter, Clark sometimes refers to “displacing” state law and “binding” state judges, rather than “preempting” state law. In this context, however, all three seem equivalent to each other. *See generally* James E. Pfander, *States as Laboratories for Social Change*, 17 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2008) (describing in detail the process by which state law becomes “binding”).
25. *See* Clark, *Erie’s Constitutional Source*, supra note 1, at 1305 (“the exclusive means of
equally valid inference might suggest that supreme preemptive federal law
must satisfy different constitutional standards than non-supreme federal law
like Swift. Even if Clark is right that the Supremacy Three limit the
government's ability to promulgate supreme federal law, the constitutional
text places no restrictions on non-supreme federal law like Swift that did not
bind state judges. From this viewpoint, the Supremacy Clause cannot be Erie's
constitutional source; the clause by its terms is irrelevant.

Clark has recently confirmed (as my critique suggests) that the Supremacy
Clause limits only supreme preemptive law and does not affect non-supreme
federal lawmaking. But let us consider another possibility: What if someone
outflanked Clark by arguing that the Supremacy Clause implicitly limits all
forms of federal lawmaking, regardless of preemptive effect? "Our federal
system of enumerated powers does not contain a Non-Supremacy Clause
authorizing the creation of non-supreme federal law; thus, perhaps the national
government cannot craft any sort of law except through the Supreme Three.'
This argument, if true, might well support Erie and render Swift
unconstitutional.

Non-supreme federal lawmaking does happen outside the Supreme
Three's channels, however. For example, although Article I, Section 7 requires
bicameralism and presentment for "[e]very Order, Resolution, or Vote to which
the Concurrence of the Senate and House of Representatives may be
necessary," those requirements do not cover all legislative power under
Article I, Section 8. Legislative rules regulating Congress itself are not
embodied in statutes. Likewise, the Executive branch often exercises its

26. Cf infra Part I.C (questioning whether preemptive federal administrative law coheres
with Clark's analysis).
27. See Clark, Domesticating, supra note 1, at 1597-98 (noting that the President may make
sole executive agreements, despite their absence from the Supremacy Clause, so long as such
agreements do not alter preexisting state law). Clark is not always clear on this point, however.
See id. at 1654 ("[U]nilateral presidential authority to make sole executive agreements with the
force of federal law would circumvent the Constitution's carefully crafted safeguards and the
exclusivity of federal lawmaking procedures.") (emphasis added).
28. Clark's reply has surprisingly adopted this argument, without acknowledging his prior
contrary position. See Clark, Federal Lawmaking, supra note 17, at 708. This creates significant
problems. For example, the unprecedented idea that the Supremacy Clause concerns more than
just "supreme" federal law seems substantially nontextual. Although Clark believes that the
Supremacy Clause places procedural limits on the promulgation of supreme federal law, he now
claims that the exact same procedural limits apply to non-supreme federal law, just because the
Constitution—in Articles I, II, and V—does not explicitly authorize a procedure for enacting
"non-supreme law." This position risks rendering the pro-state component of Clark's Supremacy
Clause analysis superfluous. The silence of Articles I, II, and V would impose Supreme Three
lawmaking procedures on all federal lawmaking, regardless of its status as "supreme" law under
Article VI.
30. See INS v. Chadha, 462 U.S. 919, 956 n.21 (1983) ("Each House has the power to act

adopting "the Supreme Three"); see also Clark, Structure, Discretion, and the Eighth Amendment,
supra note 1, at 1164-65.
lawmaking power through mechanisms outside the Supreme Three, and many internal executive rules are exempt from the Supremacy Clause’s strictures because they do not create supreme preemptive law.

Though they are not commonly viewed as such, Swift and Erie operate much like other internal rules of the federal government. The Constitution and federal statutes grant “judicial Power” and jurisdiction over diversity cases, and these provisions raise inevitable questions about how federal courts should decide the consequent contract, tort, and other cases that are brought before

alone in determining specified internal matters.”); see also Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 N.Y.U. L. REV. 563, 608-09 (1991) (noting decisions that affirm Congress’s criminal contempt power as a necessary incident of Congress’s legislative function, even though that power is unsupported by constitutional or common law and was, until 1988, unsupported by statute); cf 2 U.S.C. § 192 (2000) (codifying Congress’s contempt power).

31. See Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (holding that the President can make executive agreements with other countries without Congressional approval or Senate ratification); see also Dames & Moore v. Regan, 453 U.S. 654 (upholding a sole executive agreement to resolve the Iranian hostage crisis). But cf. Clark, Domesticating, supra note 1, at 1652-54, 1656 (arguing that Garamendi was wrongly decided and offering an unconventional interpretation of Dames & Moore).

32. See, e.g., Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 COLUM. L. REV. 1260, 1264 (2006) (discussing the Office of Information and Regulatory Affairs’s central role in regulatory planning, which includes annual review of regulatory plans of all administrative agencies); Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 ADMIN. L. REV. 1303, 1305 (2000) (recognizing that determinations made by the Office of Legal Counsel concerning proposed executive actions are usually “conclusive and binding within the executive branch”); Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 MICH. L. REV. 676, 710-11 (2005) (describing the Office of Legal Counsel’s “core work” as rendering legal opinions that are binding within the executive branch).

33. Sometimes Clark implies that Swift’s federal general common law “displaced” state law, and that Erie stopped such displacement. This characterization seems inapt, however, because state law cannot of its own force bind federal courts with respect to their federal duty to exercise diversity jurisdiction. Neither Swift nor Erie had anything to do with “displacing” state law in this context, because state law cannot extend to federal courts’ choice-of-law rules.

An absurd hypothetical may illustrate this point: Imagine a state statute that imposed negligence liability for certain tort actions in state court, but imposed a lower (or higher) standard of liability for similar diversity actions in that state’s federal courts. Regardless of whether such substantive differences would help, hurt, or be indifferent to federal plaintiffs, the hypothetical state statute cannot itself govern a federal court. Erie requires federal courts to follow state substantive law, not because some state prefers that result, nor because federal courts lack authority to displace state mandates. The reason lies in the common law of federal choice of law. Cf. Judith Resnik, Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Points of Entry, 115 YALE L.J. 1564, 1622 (2006) (“Erie itself may not be a constitutional decision but rather a rule of self-restraint, making the proposition that federal courts have no power to make common law itself an example of federal common lawmaking.”). State law cannot—residually or otherwise—control federal courts’ internal operations, any more than it controls the activities of Congress or the President. As should be clear, the choice-of-law rules prescribed by Erie and Swift represent lawmaking of the intra-federal sort because they do not directly regulate any state court, state law, or exercise of state authority.

them. Such issues are crucial to litigants, but they ultimately involve little more than intra-judicial rules about federal courts' choice of law. Like other examples of non-supreme law, such guiding principles are necessary for federal officers to perform their constitutionally and statutorily designated function.

To be specific, although Swift's federal general common law was never "supreme" law that bound state courts, Swift-era federal courts held that they were free to ignore state precedents where the latter seemed unfair or ineffective. Absent congressional instruction, federal judges thus believed that they should decide cases using their own best judgment, regardless of contrary state case law.

Erie overturned Swift and forced federal courts to follow state substantive law in diversity cases, but that simply changed choice-of-law rules about how federal courts decide certain federal cases. Swift may have reached the wrong result, but Swift and Erie are the same type of intra-judicial law, designed by federal judges to address peculiar problems that arise in their statutorily ordained, constitutionally authorized job.

Clark sees Erie not as a common law principle of comity or prudence, but as a constitutional border that federal power cannot pass. For Clark, Erie instructed federal courts to follow state law because there is no constitutional authority to do otherwise. If the Supremacy Clause were to limit non-supreme law that governs only federal courts themselves the odd result might be to constitutionally bar federal courts from following Erie itself as a common-law rule of self-governance.

As this Subpart ends, some readers may wonder whether anyone should care about Erie's constitutional foundation. After all, this year marks the seventieth anniversary of one of the most popular, well-known, iconic cases in

35. See Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 206-07 (1863) ("We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.").

36. When Erie was decided, Congress's Rules of Decision Act read: "[t]he 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." Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (current version at 28 U.S.C. § 1652 (2000)). Swift held that "the laws of the several states" did not include judicial decisions; if that conclusion were wrong, then Erie could have been decided on statutory grounds, not constitutional ones. Green, supra note 3, at 601-02 (noting that Justice Reed endorsed this non-constitutional rationale).

37. Incidentally, Erie's decision to require state substantive law in diversity cases seems to me entirely proper, as a matter of common-law decision-making if nothing else. See Green, supra note 3, at 614 (emphasizing that the Erie doctrine should be retained even though it lacks constitutional support).

38. See supra note 33.

39. See Clark, Ascertaining the Laws, supra note 1, at 1461 (arguing that constitutional concerns should bar federal courts in diversity cases from predicting state courts' common-law rulings).
United States history. With Erie's doctrinal future secure, can anyone still muster energy to debate whether the decision has a valid constitutional basis?

Clark and I are not alone in answering yes, and Erie's high status explains why. A generation ago, Henry Friendly, John Hart Ely, and Paul Mishkin discussed Erie in articles that will remain vital a generation from now. Modern Justices have also used Erie in proposing to limit constitutional remedies, restrict statutory causes of action, restructure legal education, and narrow judicial enforcement of customary international law. Such varied applications of Erie, with no clear link to the decision's original context, rest on its iconic cultural status and alleged constitutional basis.

If the movement to cast Erie as constitutionally constraining federal courts is Erie's new myth, Clark is one of its strongest proponents. His arguments about the Supremacy Clause are not just a new twist on eighteenth-century text; Clark consistently proffers Erie's landmark ruling as a vindication of his view of federalism and separation of powers.

I seriously doubt that Erie belongs in constitutional conversations about separation of powers, but that does not disprove Clark's substantive conclusions about what federal courts should do. At present, I merely hope to place such arguments in a different light. Modern opposition to federal judicial power has surprisingly shallow roots, and Erie's pre-Warren-Court ruling should not be conscripted into current battles over judicial power. To displace

40. See, e.g., CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 355 (6th ed. 2002) ("It is impossible to overstate the importance of the Erie decision.").
43. See Green, supra note 3, at 596.
44. Id.
45. Clark's reply seems to associate my analysis with overbroad judicial freedom that lacks any constitutional limits. Clark, Federal Lawmaking, supra note 17, at 709 (emphasis original). My position, however, has no effect on justiciability, due process, or other constitutional limits on federal adjudication. Also, there is nothing in my analysis that would encourage federal courts to discard state law in classic Erie cases. In fact, I have proposed a framework for evaluating federal common law that would set aside Erie and the Supremacy Clause as irrelevant, but would respond directly to Clark's concerns about republication government and judicial willfulness. See Green supra note 3, at 665-60. To reject Clark's approach does not imply disrespect for the limited role of federal judges; it just requires a better way to identify such limits than Erie's new myth and analysis of the Supremacy Clause.
Erie from these debates would reveal the recent vintage of many arguments against judicial power, and would allow modern debates about judicial role to proceed uninhibited by this icon's overdrawn shadow.47

B. Identifying "Common Law" and "Enclaves"

Although Clark's Supremacy-based argument for Erie's new myth is distinctive, there are two conceptual problems that affect every version of the new myth: (i) identifying what qualifies as condemnable "common law," and (ii) identifying certain "enclaves" of post-Erie federal common law that are nonetheless legitimate.48 This Subpart applies these identification problems to Clark's reasoning.

The new myth's core axiom is that federal common law deserves categorical suspicion. Yet that conclusion's persuasiveness and coherence depend on a workable understanding of what "common law" is. The problem of identifying permissible common-law "enclaves" is also vital because most jurists think that at least some fields of post-Erie federal common law remain valid. Traditional examples include admiralty and the law governing interstate disputes.49

47. Consider a few technical questions that might arise if Clark's constitutional argument were true. Would the Supremacy Clause let federal courts decide diversity cases without following a state's system of choice of law? Or would the creation of federal choice-of-law rules be invalid lawmaking? Could federal courts impose equitable remedies different from those in state courts? Could federal courts create a federal common law of preclusion? Could federal courts disregard state rules about the use of juries or appellate review? Which if any of these would violate Clark's view of the Supremacy Clause, even if the resultant law were not directly applicable to, or supremely binding on, state courts?

In fact, the Court has answered all of these questions, sometimes requiring federal courts to follow state law, sometimes not. See, e.g., Semtek, 531 U.S. 497 (preclusion); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432-36 (1996) (appellate review and juries); Byrd v. Blue Ridge Rural Elec. Cooper, Inc., 356 U.S. 525, 538-40 (1958) (juries); Guar. Trust Co. v. York, 326 U.S. 99, 105-06 (1945) (citing Sprague v. Ticonic Bank, 307 U.S. 161, 164-65 (1939)) (equitable remedies); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941) (choice of law). In applying Erie, however, these decisions do not invoke deep constitutional principles, and their results do not form a constitutional border beyond which federal lawmaking runs out. On the contrary, each decision—right or wrong—stems from practical concerns about our dual system of adjudication. And I would suggest that, whichever way a federal court were to resolve such issues, the results would not involve any constitutionally invalid species of law.

48. See Green, supra note 3, at 618-22.

49. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) ("[T]here are enclaves of federal judge-made law which bind the States."). By way of background, Article III, Section 2 outlines categories of cases and controversies that lie within federal courts' "judicial Power," including admiralty and diversity jurisdiction, as well as cases where a state is a party. None of these categories is exclusive as a matter of constitutional law, though several are so under longstanding statutory provisions. See Ames v. Kansas, 111 U.S. 449, 463-65, 469 (1884); 28 U.S.C.A. § 1251 (West 2006) & historical and statutory notes. Some grants of jurisdiction, like admiralty and interstate disputes, have been thought to imply a power of judicial lawmaking; others, like diversity, have been construed not to do so; and some have been matters of dispute. See Nw. Airlines v. Transp. Workers Union, 451 U.S. 77, 95-96 (1981); see also Sosa v. Alvarez-Machain, 542 U.S. 692, 742 (2004) (Scalia, J., concurring in part and concurring in the judgment).
For Clark, "common law" means "judge-made law," which is any rule of decision "whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command." This view of common law may be fine for colloquial purposes. But the definition of "common law" has grand significance for Clark and the new myth; it separates ordinary judicial action from categorically suspicious activity, and that line needs scrutiny. Clark admits that "the distinction between federal common lawmaking and statutory (or constitutional) interpretation is often difficult to discern." Yet he cannot accept that such definitional problems render debates over "federal common law" epiphenomenal, causing vital issues about judicial role to be recast as unsolvable semantic tussles over what deserves the stigmatic label "common law."

Clark's application of "common law" blends form and function. As a formal matter, common law by nature cannot be statutory law or constitutional law. Yet as a functional matter, Clark disfavors some decisions interpreting statutes or the Constitution as nonetheless common law. Clark explains that federal judges often "seek a statutory rationalization for judge-made law" and that such "reliance on 'the penumbra of express statutory mandates' or 'the policy of the legislation, ... tends to obfuscate [courts'] lawmaking function." Here, it is the court's lawmaking function, not a ruling's formal origin, that earns Clark's suspicion and reproach.

Thus starts the dilemma. How can one reliably separate disfavored common-lawmaking from other judicial activities? It is not enough for Clark that a court cites a statute or the Constitution. He would dig deeper, to detect whether a court is truly making law rather than interpreting it. Clark gives little guidance on the persistent dichotomy between interpreting and making law.

Compare Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 563-66 (1851) (applying the "public law of nuisance" to a case involving State-party jurisdiction), with id. at 579-83 (Taney, C.J., dissenting) (denying the legitimacy of such judicial lawmaking).


51. Id. at 1248 n.7. As the foregoing text shows, I do not claim that it is "impossible" to define common law. Clark, Federal Lawmaking, supra note 17, at 710, 712. Given longstanding confusion over such definitions, and the term's absence from the Constitution's original text, I am simply unconvincd that the new myth's typologies of "common-law" and "non-common-law" answer any deep questions about republican government or judicial role. Clark's proffered definitions, and his discussion of admiralty and interstate disputes, only heighten these concerns.

52. See Green, supra note 3, at 622 ("[Erie's] new myth's unstable concepts are categorical distractions from more contextual assessments of judicial power.")

53. Clark, Federal Common Law, supra note 1, at 1248 n.7.

54. The functional interpretation of common law described supra would not accept a court's mere citation of a statute or the Constitution, but would instead ask whether the court's results are substantively grounded in such authorities. It seems obvious that Clark would reject a judge's effort to conceal common-lawmaking under a statutory or constitutional mask. Clark also rejects judicial characterizations of decisions as "common law" when he thinks they are "not
Instead, he defines illegitimate common law to involve any ruling whose content does not follow from statutes or the Constitution using "traditional methods of interpretation." But is "traditional" just a stand-in for "acceptable," and if so, acceptable to whom? Analysis of "traditional methods" often tracks the grooves of one's own preferred results. And if results are ultimately decisive, then to focus on "common law" and "traditional" interpretive methods seems beside the point.

Clark's scholarship heightens the foregoing concerns, as he applies the term "common law" with remarkable flexibility. Consider admiralty and interstate disputes—the most conventional examples of legitimate federal common law. Clark thinks that the federal common law of admiralty is in large part unconstitutional. For interstate disputes, Clark claims that such federal decisions apply not "judge-made law," but "rules designed to implement the constitutional structure." This is a puzzle. Federal judges have continuously decided interstate disputes as a category of federal common law, scholars have continuously analyzed such decisions as federal common law, yet Clark would now "reconceptualiz[e]" such decisions as an unnoticed, unwitting field of constitutional law.

Clark may be eager to explain why federal courts may resolve interstate disputes without undermining his proposal to bar judge-made law. But if the substantive rules governing such cases are not "common law," are they truly "constitutional law"? Such a conclusion would require a remarkably broad sense of the latter term. For example, Clark explains that principled equality among states guides the Court's decisions in this area, and he roots such equality in constitutional provisions that have nothing to do with interstate litigation. The overlap between these two equalities—one in judicial decisions, the other in unrelated constitutional provisions—is a slim basis for converting self-described common-law decisions about interstate equality into decisions about the Constitution. Indeed, although Clark explicitly argues that

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55. Clark, Erie's Constitutional Source, supra note 1, at 1309 n.141.
56. Clark, Federal Common Law, supra note 1, at 1248 n.7. Clark explains this problem as follows: "In the end, of course, one's conception of the scope of federal common lawmaking depends in large part on one's approach to statutory (and constitutional) interpretation." Id. If this is correct, then jurists will differ on definitions of "common law" so long as they differ on methodologies of statutory and constitutional interpretation.
58. Clark, Federal Common Law, supra note 1, at 1254.
59. See id. at 1328 (finding that constitutional structure validates rules applied in interstate disputes).
60. See id. at 1322-31 (reconceptualizing federal common law used to decide interstate disputes as "rules of decision necessary to implement and maintain the constitutional equality of the states").
61. For example, Clark relies on the Constitution's requirement of two Senators for each state. Clark, Federal Common Law, supra note 1, at 1328.
interstate-dispute cases are *not* federal common law, his analysis is notably similar to other jurists’ efforts to identify “enclaves” of permissible federal common law.\(^6\)

Clark’s theory of the Supremacy Clause may be more rhetorically compatible with eliminating the notion of “enclaves,” opting instead for a complex definition of “common law” to serve similar ends.\(^6\) But Clark’s ingenious conclusion that federal common law is not federal common law raises the same line-drawing issues as other new-myth scholarship. In particular, I wish to challenge Clark’s effort to stretch the term “traditional methods of [constitutional] interpretation” to validate the substantive law governing interstate disputes.\(^6\) It is only through Clark’s unconventionally narrow view of “common law” that the law of interstate disputes does not qualify thereunder.

By contrast, Clark has only harsh words for recent Eighth Amendment jurisprudence, where he adopts a relatively broad view of “common law.”\(^6\) Clark believes that recent Supreme Court cases applying “evolving standards of decency” under the Eighth Amendment, have not simply erred in their constitutional analysis. For Clark, the Court has adopted an illegitimate lawmaking role, which locates these Eighth Amendment decisions beyond the limits of constitutional law, making them effectively identical to *Swift* and other unconstitutional applications of federal common law.\(^6\)

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63. See Clark, *Federal Common Law*, supra note 1, at 1254, 1271-75 (explaining the convoluted process by which federal common law is “reconceptualized” as rules designed to implement the constitutional structure).

64. See id. at 1331 (noting that rules applied in interstate dispute cases further the constitutional structure); Clark, *Separation of Powers*, supra note 1, at 1452-53 (recognizing that reconceptualized federal common law used to resolve interstate disputes is based in the Constitution); see also Clark, *Federal Common Law*, supra note 1, at 1247 (quoting PAUL M. BATOR ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 863 (3d ed. 1988)).

65. See Clark, *Structure, Discretion, and the Eighth Amendment*, supra note 1, at 1193 (explaining that the recent Eighth Amendment cases, *Swift* v. *Tyson*, and federal common law crimes raise “many of the same concerns under the constitutional structure”); id. at 1198 (arguing that the Eighth Amendment cases are not “logically distinguishable” from other applications of federal common law); see also id. at 1193 (noting that the Supreme Court now “claims the right to set aside traditional state law punishments” without attempting to rely on the text or history of the Constitution). Clark, *Federal Lawmaking*, supra note 17, at 714-15 n.105. Clark now claims that his Eighth Amendment analysis had no deep link to *Swift*, *Erie*, or the Supremacy Clause. Regardless of whether this is revision or clarification, I agree.

66. See id. at 1193 (objecting that the Supreme Court, in exercising policymaking discretion in its Eighth Amendment jurisprudence, has failed to base its discretion in either the text or history of the Constitution); see also id. at 1202 (concluding that the Supreme Court’s current approach to Eighth Amendment jurisprudence “represents ‘an unconstitutional assumption of powers by courts of the United States’”) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (condemning *Swift*).
Though Clark is not entirely clear in saying that modern Eighth Amendment case law represents preemptive lawmaking outside the Supreme Three, Clark seems quite willing to reconceptualize such decisions as condemnable common law. And Clark's narrow view of what counts as constitutional law in Eighth Amendment jurisprudence seems anomalous given his broader view of constitutional law in interstate-dispute cases.

My point is not to quibble over details or claim that the foregoing tensions are irresolvable. But Clark's work illustrates that the new myth's identification problems cause trouble even for thoughtful exponents. Such profound difficulties in defining "common law" and permissible "enclaves" raise at least some questions about whether the new myth's game is worth its candle. For example, although there are plenty of arguments for and against modern Eighth Amendment cases, little is gained by rooting such disputes in new-myth preoccupations with common law. The new myth seeks to limit federal common-lawmaking based on broad transsubstantive principles, but the theory's vague concepts risk opportunistic application and unanalyzed conceptual growth. At the very least, the new myth's general indictment of federal common-lawmaking distracts from the context-sensitive assessments that ultimately determine what makes good constitutional or statutory interpretation. These questions are not answered by Erie-based opposition to common law, nor by Clark's analysis of the Supremacy Clause.

C. Supremacy and the Administrative State

Although Clark's scholarship has mainly focused on the Supremacy Clause and federal common law, his reasoning has even greater consequences for administrative law. Federal agencies arguably make more law than federal courts. Yet agency lawmaking is not listed among the Supreme Three, and it

67. See id. at 1193, 1202 (arguing that the Supreme Court's exercise of its "independent judgment" raises constitutional concerns).

68. See generally Elizabeth F. Emens, Aggravating Youth: Roper v. Simmons and Age Discrimination, 2005 Sup. Ct. Rev. 51 (2005) (supporting the decision in Roper v. Simmons and arguing that the Eighth Amendment prevents minors from being executed) and Curtis A. Bradley, The Juvenile Death Penalty and International Law, 52 Duke L.J. 485 (2002) (arguing that international law does not forbid the United States from executing juvenile defendants). Compare Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 917 (1986) (stating that the Supreme Court has power to create law in admiralty cases and dismiss state law) with Young, supra note 57 (arguing that federal court-created maritime law should not be preemptive).

69. Another example of this point is customary international law, which I have discussed elsewhere. See Green, supra note 3, at 623. Some new-myth scholars have strenuously urged that customary international law should be barred as illegitimate federal common law; Clark asserts the opposite. In my view, the new myth lacks sufficient conceptual clarity to resolve such disagreements.

70. Strauss, supra note 14, at 17-18 ("In numeric terms, at least, the predominant source of federal law today is federal agency rulemaking."); see Ballerina Pen Co. v. Kunzig, 433 F.2d 1204, 1208 (D.C. Cir. 1970) ("[A]s the 'fourth branch of government,' the administrative agencies
PROBLEMS OF STRUCTURE

does not involve the Senate or states. Thus, one must wonder whether Clark's analysis of the Supremacy Clause and federal common law would place the modern administrative state at risk.

In this Subpart, I first consider whether Clark's constitutional analysis is consistent with the extensive lawmaking that federal administrative agencies perform. Second, I analyze Clark's use of INS v. Chadha and explain that, despite the case's nominal exuberance for statutory lawmaking, it also grants important protection for executive and judicial lawmaking, and thus does not easily support concerns about federal common law.

1. Agencies and the Supreme Three?

Consider a typical administrative law scenario: Congress announces some broad policy goal—like regulating corporate practices, labor unions, or workplace safety—and by statute grants an agency authority to achieve that goal by enacting regulations and deciding administrative cases. The resultant regulations and administrative precedents are supreme federal law binding upon state courts. Thus, if a federal agency requires or forbids a particular action, that rule controls even if state law says the opposite.

Does this comport with Clark's view of the Supremacy Clause? Agency regulations and adjudications are not themselves statutes, the Constitution, or treaties. Although some agency actions codify statutory standards or fill statutory gaps, perhaps thereby resembling the "interstitial" or "traditional" judicial interpretation that Clark accepts, many agency decisions are lawmaking, plain and simple. These decisions enforce substantive standards that Congress has never approved and regulate private conduct based on the agency's own judgment of what is best.

may well have a more far-reaching effect on the daily lives of all citizens than do the combined actions of the executive, legislative and judicial branches . . . ."); see also Stephen G. Breyer et al., Administrative Law and Regulatory Policy 1 (6th ed. 2006) ("Modern government is administrative government."); William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 527 (1992) (noting "[t]he advent of the administrative state, in which much 'lawmaking' is accomplished by agencies dominated by the President"); Daniel J. Solove, The Darkest Domain: Deference, Judicial Review, and the Bill of Rights, 84 Iowa L. Rev. 941, 959 (1999) ("One of this century's most profound developments in the American social and political structure was the rise of the bureaucratic state.").
Such problems are currently analyzed under the non-delegation doctrine, which requires Congress to state some "intelligible principle" that will guide agency activities.\(^{75}\) In practice, however, non-delegation's constitutional requirements are very loose. For example, if Congress simply tells environmental administrators to make rules and decide cases in a way that "protect[s] the public health with an adequate margin of safety," the non-delegation doctrine is satisfied.\(^{76}\) Under current doctrine, any agency action plausibly connected to such standards will be constitutionally valid.

When Clark discussed administrative law a few years ago, he seemed quite comfortable with modern non-delegation jurisprudence,\(^{77}\) but one might fairly wonder why.\(^{78}\) Of course, it is correct that all agency action is ultimately that agency rulemaking authority is "legislative power."\(^{75}\) If one followed that formalist path with respect to agency action, however, it should also apply to federal judges. Thus, even adjudication that concerns deep issues of policy and sets a quasi-legislative precedent for the future should perhaps qualify as "adjudication," rather than legislation. In any event, the issue at stake is how to constrain lawmaking undertaken by a branch other than Congress. Thus, formal labels suggesting that whatever the executive does is "executing," or that judges by nature "adjudicate," cannot be entirely satisfactory.

\(^{75}\) J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
\(^{76}\) Whitman, 531 U.S. at 476. As the Court explained:

We have . . . upheld . . . the Public Utility Holding Company Act of 1935, which gave the Securities and Exchange Commission authority to modify the structure of holding company systems so as to ensure that they are not "unduly or unnecessarily complicate[d]" and do not "unfairly or inequitably distribute voting power among security holders." We have approved the wartime conferral of agency power to fix the prices of commodities at a level that "will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act." And we have found an "intelligible principle" in various statutes authorizing regulation in the "public interest." In short, we have "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."

\(^{77}\) See Clark, Separation of Powers, supra note 1, at 1377.
\(^{78}\) Cf. Strauss, supra note 14, at 18 (presenting a forceful critique of Clark's work along similar lines). Clark has now confirmed that his analysis of the Supremacy Clause contradicts a great swath of modern administrative law, yet he suggests that readers should not worry because courts lack competence to enforce the Supremacy Clause vigorously in administrative contexts. Clark, Federal Lawmaking, supra note 17, at 131. This surprising argument has several problems. First, the President and members of Congress also swear oaths to "preserve, protect and defend the Constitution" and to "support" the Constitution. U.S. Const. art. II, § 1, art. VI, cl. 3. If the administrative state were indeed unconstitutional, that would be an extraordinarily serious flaw in modern American government, regardless of whether courts were (temporarily) coaxed toward the sidelines. Second, on the merits of judicial non-interference, Clark's analysis and authorities assume current non-delegation doctrine, not Clark's view of the Supremacy Clause. Under conventional doctrine, it is indeed difficult to determine when agencies unconstitutionally legislate. By contrast, under Clark's theory of federal common law, the unconstitutionality of much administrative action is unmistakably clear. See infra notes 81-87 and accompanying text. If judges agreed with Clark about the Supremacy Clause, their willingness to invalidate administrative action might increase to levels unprecedented in the post-Lochner era. Third, Clark's analysis yet again reveals (but does not justify) disparities in his treatment of administrative and judicial lawmaking. For example, Clark endorses judicial inaction with respect to the Supremacy Clause and administrative lawmaking—because it is hard to separate legislative action from executive action—yet he endorses vigorous use of the Supremacy Clause against
traceable to an original statutory grant of authority, and an agency's substantive lawmaking must be linked to an intelligible principle. But that does not render agency lawmaking "interstitial." Nor does it mean that an agency's preemptive precedents or regulations are themselves statutory law, as Clark's Supremacy analysis might require. On the contrary, statutes in administrative law are often licenses for agency policymaking. The agency pours legal content into an empty vessel that Congress has made, but the substance and the levels of regulation are set by the agency, not by Congress.

Consider a brief analogy to federal courts. Clark would almost certainly object if federal courts could make law under the loose constraints that govern federal agencies. Imagine, for example, that Congress enacted federal diversity jurisdiction with the explicit purpose that federal courts should encourage interstate commerce and avoid the misguided, biased rulings of state courts. In administrative parlance, the latter would certainly constitute an "intelligible principle" for non-delegation purposes. Now imagine that federal courts used this hypothetical jurisdiction to create supreme federal common law. (This would be *Swift v. Tyson* with preemptive teeth.) Under such circumstances, Clark would surely object on Supremacy Clause grounds, and Congress's vague "intelligible principle" would be no help at all.

In many administrative contexts, the above hypothesis is reality. Consider the "Excelsior rule" in federal labor law. The National Labor Relations Act (NLRA) grants employees certain rights to organize in labor unions, and the National Labor Relations Board has statutory authority both to adjudicate individual cases alleging "unfair labor practices," and "to make . . . rules and regulations" implementing the Act. In *Excelsior*, the Board reversed its prior precedents and required employers to give unions address lists of voting-eligible employees. The Board's adjudication thus created a new substantive rule, with, at best, indirect links to any underlying statutory rights. Indeed, the relevant statutory provisions were so vague that the Board had reached the opposite result in prior cases.

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80. Though it is often dangerous to use metaphors, what I mean here by the "vessel" is no more than the legislative creation of administrative jurisdiction, the agency itself, enforcement powers, and the like.
81. Note that this hypothetical, like the real diversity statute, is ambiguous about whether federal courts should make their own substantive law.
85. *Excelsior*, 156 N.L.R.B. at 1239-40. The Supreme Court case of *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), was made complex only because the Board gave its ruling in *Excelsior* exclusively prospective effect. That detail, of course, is irrelevant to Clark's argument and to the Board's general power to make law through adjudication.
It is unclear how Clark might evaluate the constitutionality of such agency lawmaking, but it is at least clear that *Excelsior* is not a "law of the United States" under the Supremacy Clause, no matter how that phrase is defined. The *Excelsior* rule was of course authorized by a federal statute—just as federal adjudication is authorized by jurisdictional statutes or federal legislation by Article I. But statutory authorization cannot change the fact that the rule is not itself statutory law.

Why should agencies get a pass for non-statutory lawmaking, but not courts? The Supremacy Clause does not support such a distinction. If the Supreme Three 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.

The question of what counts as agency "lawmaking" tracks the foregoing discussion of what constitutes "common law." Where does lawmaking start and stop? On one extreme, almost any judicial or administrative decision could be seen as making law and thereby flunking the Supremacy Clause's requirements, but that would eviscerate judicial and executive flexibility in applying federal law. An opposite extreme might validate all judicial or administrative actions, no matter how independent and policy-driven, so long as there is some link to congressional action—including perhaps the bare grant of jurisdiction. The latter result would fit modern non-delegation case law, but would contradict Clark's use of federal common law. Without clear guidance on these questions, Clark's approach again risks either unsettling vast swathes of public law, or engaging in opportunistic ad-hocery that picks and chooses which examples of common-lawmaking are barred by the Supremacy Clause.

Consider Clark's 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." As a formal matter, these last three words seem odd, as neither the Supremacy Clause nor Article I assigns "legislative power"

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87. Although it may be unnecessary, one might also note that the *Excelsior* rule is ultimately authorized by powers delegated under the Constitution, but that obviously does not make the Board's ruling "constitutional law."

88. See Clark, *Separation of Powers*, supra note 1, at 1430 (noting that the Supremacy Clause does not address administrative rules).

89. See supra Part I.B (exploring the definition of illegitimate common law).

90. Cf. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (Jackson, J., concurring) ("Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself"); Strauss, supra note 14, at 18 ("Had the Supremacy Clause the meaning Professor Clark argues for, it would be necessary to abandon the delegation doctrine as we know it . . . .").

to a “political branch[]” other than Congress. Yet as a functional matter, the term “legislating” represents a complex process that implicates all three branches in different ways and contexts. Clark’s scholarship has thus far left his interpretation of lawmaking unfortunately vague.

2. Chadha and the Supreme Three?

Clark has come closest to defining “lawmaking” in his analysis of INS v. Chadha, which he groups alongside Erie and the Supremacy Clause as a primary basis for opposing federal common law. In particular, Clark quotes the Court’s grand statement that “the legislative power of the Federal Government [must] be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”

Read in isolation, this passage might seem to undermine federal common law and administrative lawmaking. Indeed, if the federal government could truly make law through only one procedure (or Three), that would exclude federal common-lawmaking altogether. And if judicial lawmaking impermissibly departs from constitutional procedures, agency lawmaking might seem equally unacceptable. Neither judicial nor agency lawmaking follows any single constitutional process for making federal law.

In context, however, Chadha’s language cannot support limits on lawmaking by federal agencies or courts. Chadha’s restrictions on “legislative power” used that phrase as a term of art, referring only to a particular form of congressional lawmaking; the Court explicitly refused to restrict other branches’ lawmaking powers. As Justice White’s dissent makes clear, the Court 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.

Chadha analyzed the “legislative veto,” a statutory device under which Congress authorized certain administrative actions but required a report to Congress before they could take effect. If either house of Congress issued a resolution of disapproval, the agency was barred from taking the reported action.

92. See U.S. CONST. art. I; U.S. CONST. art. VI, cl. 2.
94. Id. at 951.
95. One can imagine an argument that at least the agency’s actions are “statutory,” but that is no less true for courts. See supra note 74 (discussing difficulties in simply applying the label “legislation” to actions performed outside Congress). Both agencies and courts are authorized by Congress to decide cases, but in a significant range of cases, neither entity has much statutory guidance on exactly how to do so.
96. See Chadha, 462 U.S. at 953 n.16.
97. Id. at 951.
98. Id. at 944 (noting that the legislative veto was first applied in 1932); id. at 1003-13 (appendix to White, J., dissenting) (citing 56 statutes containing legislative vetoes).
Chadha concerned a suspension of deportation.99 The Immigration and Nationality Act (INA) allowed the Attorney General to temporarily suspend deportations based on “extreme hardship,” and required him to report such suspensions to Congress.100 If both chambers of Congress stood silent, the INA stated that deportation proceedings would be canceled and the alien would receive lawful permanent resident status.101 But if either chamber disapproved by resolution the Attorney General’s suspension order, the alien would be deported.102 In Chadha’s case, the Attorney General suspended his deportation, the House disapproved, and Chadha filed a constitutional challenge.103 The Supreme Court struck down the INA’s legislative veto provision because it allowed Congress to legislate without satisfying Article I’s requirements of bicameralism and presentment.104 In effect, the Court held that resolutions to disapprove suspensions were “bills” that Congress must formally enact into “law” just like any other statute.105

White filed a lengthy dissent, which clarified that Chadha limited only Congress to Article I’s “single, finely wrought procedure” of lawmaking; the decision did not restrict federal agencies or courts. This aspect of Chadha, while sometimes unnoticed, categorically removes the decision from critiques of federal judicial and administrative lawmaking.

White viewed Chadha not as a case of nonstatutory expansion of legislative power, but as one of statutory limits on executive power.106 All of the government’s duties and powers, like Chadha’s legal rights, were creatures of statute subject to the INA’s conditions and requirements. Congress gave the Attorney General authority only to suspend deportation proceedings, not to cancel them or to grant resident status; nor did the Attorney General’s factual findings entitle Chadha to that result.107 Through the INA’s explicit terms, Congress had made all final decisions about immigration status contingent on congressional acquiescence,108 such that nothing significant could happen unless both houses of Congress allowed it to happen.

Accordingly, the House resolution of disapproval did not “change” Chadha’s immigration status, nor did it “overrule” the Attorney General’s temporary suspension.109 Congress had simply imposed, through the INA, certain conditions on the cancellation of deportations, and one of those

99. Id. at 923-24 (majority opinion).
100. See Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a)(1), (b), 66 Stat. 163, 214-16 (1952).
101. Id. at § 244(b), (d), 66 Stat. at 216-17.
102. Id. at § 244(b), 66 Stat. at 216.
104. Id. at 954-55.
107. Id. at 989.
108. Id. at 994.
109. Id. at 927 n.3, 952.
conditions (acquiescence) was unmet. According to White, the House resolution in *Chadha* did not purport to be a statute, it did not follow statutory procedures for enactment, and it did not alter any statute. Instead, the resolution was a plainly nonstatutory step that was statutorily required for the operation of a congressionally designed framework.

White explained that nonstatutory preconditions were constitutionally valid in almost every other administrative context. For example, Congress could have required assent from some administrative agent other than the Attorney General before canceling deportation proceedings; or Congress could have authorized judges to second-guess the Attorney General’s decision to suspend deportation. Indeed, the Court has even upheld administrative frameworks where private actors are required to assent before regulatory actions take effect. In one case, a favorable vote of private farmers was required for agricultural regulations; in another, commodity producers could veto a federal administrator’s orders. As White explained, *Chadha* “suggests that Congress may place a ‘veto’ power over suspensions of deportation in private hands or in the hands of an independent agency,” or a judge, “but is forbidden to reserve such authority for itself.” Administrative vetoes, judicial vetoes, and even private vetoes are acceptable under *Chadha*; only a legislative veto is not.

Regardless of whether one agrees with other parts of White’s analysis, it is undeniable that the Constitution does not require a statute for every decision determining an alien’s deportability. For example, the Attorney General’s finding of “extreme hardship” was clearly nonstatutory, yet the *Chadha* majority did not question its validity. Only Congress must use the procedures of Article I, Section 7 to decide immigration issues arising under the INA, and by the Court’s admission, that says nothing about other entities’ capacity to make decisions that “may resemble ‘lawmaking’” or be “‘quasi-legislative’ in character.” Thus, *Chadha* offers no support for Clark’s critique of judicial lawmaking. *Chadha*’s constitutional limits bind only Congress itself, and this is true despite the Court’s observation that the elected members of Congress (unlike courts, agencies, or private actors) arguably protect state interests.

If *Chadha* was rightly decided, its constitutional basis cannot hinge on protecting “statutes” as instruments of governmental lawmaking. Recall that the entire deportation process, including the invalidated legislative veto, was created by statute. The decision’s operative result is constitutional protection.

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111. Id. (citing United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 577 (1939)).
112. Id.
113. Id. at 953 n.16 (majority opinion) (citing Humphrey’s Executor v. United States, 295 U.S. 602, 628 (1935)).
114. Cf. Clark, Erie’s Constitutional Source, supra note 1, at 1290 (noting the Senate’s structural link to state sovereignty).
for executive lawmakers.\textsuperscript{115} Chadha segregates post-statutory interpretation and application from legislation, making the former a particular field of substantive policymaking from which Congress is categorically excluded. Such exclusion is hardly a celebration of statutes or the Supremacy Clause.\textsuperscript{116} Chadha is about limiting Congress—despite that institution’s coincident protections for states—while also effectively empowering non-congressional lawmakers.

\textbf{D. Questions and Implications}

Before Part II’s broader discussion of constitutional method, I should summarize a few specific points that separate my analysis from Clark’s. Our principal disagreements surround \textit{Erie} and federal common law. I have claimed elsewhere that \textit{Erie} lacks any adequate constitutional basis,\textsuperscript{117} and this Essay offers two concerns about Clark’s use of the Supremacy Clause. First, I cannot see how the Supremacy Clause could invalidate \textit{Swift v. Tyson} when the latter was never supreme law. Second, Clark’s claim that the Supremacy Clause bars federal common law presents inherent problems in defining what counts as “common law.” Such definitional questions are not technicalities to be finessed; indeed, they are quite crucial to Clark’s doctrinal conclusions.

My disagreements with Clark do not refute his view that federal courts should have limited power. For me, however, questions about federal common law constitute an indistinct subset of issues concerning judicial authority in general. I cannot here address how courts should handle admiralty or the Eighth Amendment, much less how to analyze issues of the judicial role. Nevertheless, if this Essay can divert discussion of judicial power away from debates over what is common law, and what \textit{post-Erie} enclaves are legitimate, I believe that should count as progress.

With respect to administrative law, my goal is not to dispute Clark’s conclusions, but to explore potential consequences of his constitutional argument.\textsuperscript{118} Clark’s requirement that all preemptive law follow Supreme Three procedures might seriously threaten the administrative state. Agencies often make preemptive federal law, and they sometimes do so by deciding individual cases, which only sharpens analogies to judicial decision-making.\textsuperscript{119} If judicial

\textsuperscript{115.} The particular result in \textit{Chadha} operated for the benefit of “executive lawmakers,” and that will often be the case. On the other hand, Congress could also choose to place judges or private parties as the veto-holder. \textit{See supra} notes 110-112 and accompanying text.

\textsuperscript{116.} Indeed, how could it be, when \textit{Chadha} left deportation decisions in the Attorney General’s nonstatutory hands?

\textsuperscript{117.} \textit{See} \textit{Green}, \textit{supra} note 3.

\textsuperscript{118.} Clark has offered an impressive amount of thoughtful and detailed Supremacy Clause scholarship. For example, his idea of the Clause as a “double-edged sword” protecting federal authority (through preemption) and state interests (through the Supreme Three) has drawn warranted attention, and critique, from prominent legal scholars. \textit{See Symposium, Separation of Powers as a Safeguard of Federalism}, \textit{83 Notre Dame L. Rev.} (forthcoming 2008).

\textsuperscript{119.} \textit{See} Excelsior Underwear Inc., \textit{156 N.L.R.B.} 1236 (1966).
lawmaking crosses some indefinite line under the Supremacy Clause by straying too far from statutory or constitutional direction, one wonders whether agency lawmaking faces different limits, and if so, why. With negligible exceptions, Congress determines the jurisdiction of agencies and federal courts, and such entities migrate between interpretation and lawmaking with immeasurable frequency, regardless of how those terms are defined. The abundant similarities between administrative and judicial lawmaking thus require from Clark a more detailed explanation of why he seems to differentiate between the two on Supremacy Clause grounds.120

II

FEDERAL COMMON LAW AND CONSTITUTIONAL STRUCTURE

Part I explored three of Clark’s four bases for restricting federal common law: the Supremacy Clause, Erie, and Chadha. The last and most interesting element of Clark’s position is reliance on what he calls “the constitutional structure.”121 Not only do Clark’s structural arguments underwrite his use of the Supremacy Clause and Chadha; such arguments also illustrate the power and risks of structural arguments more generally.

This Part first discusses what the term “constitutional structure” means, and identifies two types of arguments embedded in Clark’s analysis of federal courts.122 I then challenge Clark’s analysis by developing alternate interpretations of the constitutional structure. My aim is not to persuade readers that Clark is wrong, but rather to uncover certain assumptions that need more detailed analysis and defense.

With some reservations, I ultimately endorse structural arguments as an interpretive tool, especially given the Constitution’s persistently vague text. Thus, although I may doubt Clark’s results, I accept his analytical method. Structural arguments carry clear risks of uncertainty and dissent, but I believe that they—unlike new-myth debates over common law and enclaves—focus attention on issues that should be decisive in a constitutional democracy. Structural arguments cannot stop constitutional interpreters from disagreeing, but Charles Black seems correct that “at least they would be differing on exactly the right thing, and that is no small gain in law.”123

120. Indeed, if one were to compare the historical legitimacy of judicial and agency lawmakers, at least the Framers had experience with judges; modern administrative lawmaking would surely seem bewildering.
121. Clark, Erie’s Constitutional Source, supra note 1, at 1290.
A. Two Structures

The term "constitutional structure" has several meanings, which are often confused with one another. For example, many constitutional law classes contain a "rights" section about liberty and equality, and a "structure" section about federalism and separation of powers. This Part will set aside this substantive sense of structure in order to focus on structural modes of interpretation. Although structural arguments are extremely popular in the legal academy, the precise meaning of "structural interpretation" remains vague. What is constitutional structure? Is structural interpretation just an eclectic blend of history, text, and tradition, or is it something else entirely? In analyzing such questions, Michael Dorf has distinguished two forms of structural argument.

One type of structural argument, which Dorf calls "interpretive holism," views the Constitution's textual and organizational features as a unified document. For example, the Supreme Court in McCulloch v. Maryland declined to read the Necessary and Proper Clause as limiting Congress's authority because, as a matter of documentary organization, the Clause appears in Article I, Section 8 alongside other grants of congressional power. In this regard, constitutional text deeply influences structure-as-holism, but structuralism differs from other forms of textualism in its sensitivity to small signals and its willingness to draw strong inferences from documentary features that might otherwise escape attention.

Clark's view of the Supremacy Clause relies in part on this type of holistic view of the Constitution as a unified written document. For example, Clark notes that the Supreme Three appear in Article VI after the constitutional provisions that specify procedures for enacting each type of supreme law. In Clark's view, this detail of documentary organization highlights that the Supreme Three all involve multiple layers of government, and that they all require either states or the state-oriented Senate to participate in supreme federal lawmaking.

124. See, e.g., Dorf, supra note 122, at 835 n.10 (collecting sources). To see the broad range of scholarship that could be characterized as some form of structuralism, compare Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 798 (1999) ("When extended beyond paragraphism to encompass the entire document, holistic textualism has an obvious virtue: it invites readers to ponder connections between noncontiguous clauses that have no textual overlap, yet nevertheless cross-illuminate."), with Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029 (2004) (arguing that nontextual constitutional structures must be used during emergency periods to both protect civil liberties and avoid governmental paralysis).

125. See Dorf, supra note 122, at 835.


127. This sensitivity and inferential tendency sometimes spurs criticism of holists as over-interpretive and clever. See Michael Abramowicz, Constitutional Circularity, 49 UCLA L. Rev. 1, 81 n.335 (2001) (discussing the risk, which Amar acknowledges and seeks to avoid, that holistic methods such as "intratextualism may lead to readings that are too clever").

128. See Clark, Separation of Powers, supra note 1, at 1331.
Dorf attributes a second type of structural interpretation to Charles Black, who famously characterized the Constitution as a working charter of government. Black’s form of structural interpretation is less preoccupied with the Constitution’s textual or organizational details as a document. Instead, Black directs attention toward various structures and relationships created under the Constitution to ensure that the Republic continues to function.\footnote{129. See Black, supra note 123, at 40 (proposing that a state statute should be invalid because it “interfere[s] with a transaction which is a part of the working of the federal government” (emphasis added)).}

The classic example of Black’s structural argument is McCulloch’s famous insistence, “we must never forget, that it is a constitution we are expounding.”\footnote{130. McCulloch, 17 U.S. at 407; cf supra notes 126-127 and accompanying text (discussing McCulloch’s reliance on structural holism).} Constitutions, the Court explained, must not “partake of the prolixity of a legal code.”\footnote{131. Id.} Instead, “only its great outlines should be marked, its important objects designated, and the minor ingredients . . . deduced from the nature of the objects themselves.”\footnote{132. Id.} The process of deducing details from the Constitution’s “great outlines” and the “nature of [its] objects” is the essence of Black’s structural analysis.\footnote{133. Id.}

Clark uses this sort of argument, which I will call “operative structuralism,” to articulate a vision of constitutional structure wherein respect for federalism and separation of powers transcends preoccupation with constitutional text.\footnote{134. See Clark, Federal Common Law, supra note 1, at 1251, 1270; Clark, Separation of Powers, supra note 1, at 1338; Clark, Translating Federalism, supra note 1, at 1161. Clark’s reply seeks to distance his arguments from Black’s analysis of operative structure. See Clark, Federal Lawmaking, supra note 17, at 727-29. It was not always so, however. See, e.g., Clark, Translating Federalism, supra note 1, at 1161 (explaining that “it would be ‘intellectually satisfying’ but ‘not true’ to say that, for constitutional law, our legal culture ‘always purports to move on the basis of the interpretation of particular constitutional texts,’” and that constitutional “interpreters should at least consult [Black’s structural] method of interpretation in attempting to answer constitutional questions” (quoting Black, supra note 123, at 7-8)). There is not space to engage the merits of Clark’s newly heightened commitment to interpretive fundamentalism. Suffice it to say that constitutional interpreters often consider structural arguments when the Constitution’s text and context are unclear. Thus, if I agreed with Clark that the Supremacy Clause offered specific, explicit, or precise instructions about federal common law’s constitutionality, I would not proffer structural arguments as a trump.}
fails to address the precise questions that courts must decide.\textsuperscript{135}

With respect to values like federalism, Clark admits that “the constitutional text may provide less than complete guidance.”\textsuperscript{136} For example, Clark defends modern anti-commandeering case law despite its lack of textual support.\textsuperscript{137} Such cases have held that enumerated congressional powers cannot be used to regulate states or state officials in their sovereign capacity.\textsuperscript{138} The Court has conceded that there is no precise text to support its result in these cases,\textsuperscript{139} and Clark admits that the Tenth Amendment (which at best addresses commandeering imprecisely) “does not resolve whether Congress . . . possesses constitutional power to commandeer the states.”\textsuperscript{140}

In part, Clark supports the anti-commandeering cases using mixed evidence from the Federalist papers,\textsuperscript{141} but mostly he relies on “inference[s] from the structures and relationships created by the constitution,”\textsuperscript{142} which aim to demonstrate that the anti-commandeering rule “is simply one of the prophylactic devices that the Constitution presupposes in order to implement a structure of government with sufficient checks and balances.”\textsuperscript{143}

There is something attractive about structural arguments. They raise the line of discussion toward greater abstraction, and this draws attention to basic constitutional values. The particular mechanisms of abstraction vary depending on the type of structural argument at issue. For holism, the effort is to connect small patterns of language with larger values, whereas for operative structural arguments, the goal is to find constitutional values within a working government, even absent support in the constitutional text. Under either approach, the generality of structural argument is an invitation to consensus, in the hope that jurists who dispute particular issues might agree on fundamental principles.

**B. Whose Structure?**

Alongside such potential to inspire consensus, however, structural arguments’ abstraction also yields interpretive flexibility. For example, if a constitutional text doesn’t quite say what is needed to address a particular argument or question, perhaps a generic principle of constitutional structure can

\textsuperscript{135} See Clark, \textit{Translating Federalism}, supra note 1, at 1162 (suggesting that, as a general matter, “[f]idelity to the constitutional text . . . must be considered a fundamental judicial duty in a system of separated powers established by a written constitution”); \textit{id.} at 1188 (noting that the Constitution does not address the “precise question” of judicial review).

\textsuperscript{136} \textit{id.} at 1161.

\textsuperscript{137} \textit{id.} at 1187-97.


\textsuperscript{139} \textit{Printz}, 521 U.S. at 905.

\textsuperscript{140} Clark, \textit{Translating Federalism}, supra note 1, at 1189.

\textsuperscript{141} See \textit{id.} at 1190-91 nn.221-225.

\textsuperscript{142} \textit{BLACK}, supra note 123, at 7.

\textsuperscript{143} Clark, \textit{Translating Federalism}, supra note 1, at 1196.
fill the gap. Likewise, if history or precedent is relevant but not decisive, structure can give rhetorical shelter. Because the whole category of structural interpretation is often unexamined, a broad range of arguments might claim that popular mantle.

This Part explores structural arguments’ elasticity with Clark’s work as an example. In Clark’s account, there are two dominant pillars of the constitutional structure: respect for states and limits on federal judges. Yet similar techniques also support contrasting views of constitutional structure. I will discuss one alternative interpretation, not to prove Clark wrong, but to excavate contested assumptions that underlie his structural arguments. Clark’s attack on federal common law applies a vision of the Constitution that may or may not be attractive when compared with other accounts. But in either event, the process of such comparison highlights questions about federal common law, and about constitutional interpretation more broadly.

1. Holistic Structure

Like many constitutional scholars, Clark would prefer his arguments to be as textualist as possible, and therein lies the allure of interpretive holism. Dorf has written that “[i]n our legal culture . . . interpretive arguments unmoored from text are always vulnerable to being attacked as illegitimate.”144 Thus, Dorf sees structural arguments without constitutional text as “dangerously open-ended—at least when . . . used by judges performing . . . judicial review.”145 Clark has likewise stated that “[f]idelity to the constitutional text—however interpreted—must be considered a fundamental judicial duty in a system of separated powers established by a written constitution.”146

My first goal is to characterize Clark’s structural analysis as an example of interpretive holism, and to develop an equally holistic counter-narrative. Although Clark might not subdivide his arguments to match Dorf’s taxonomy, this Subpart illustrates why Clark must step beyond interpretive holism toward a more methodologically flexible and less textual argument concerning the Constitution’s operative structure. Clark sometimes implies that the Supremacy Clause alone is sufficient to justify resistance to federal common law.147 However, even if the Supremacy Clause does not in isolation delegitimize federal common law, Clark might combine the text with other documentary

144. Dorf, supra note 122, at 843.
145. Id. at 844.
146. Clark, Translating Federalism, supra note 1, at 1162. But cf. id. at 1161 (noting that, with respect to federalism at least, “the constitutional text may provide less than complete guidance”); id. at 1177 (arguing that interpretation of the Constitution’s text should change to protect federalism when altered circumstances threaten the allocation of power between the federal government and the states).
147. Clark, Erie’s Constitutional Source, supra note 1, at 1308 (“[T]he Supremacy Clause provides an express constitutional basis for the Supreme Court’s decision in Erie to abandon the Swift doctrine.”).
features of the Constitution as proof of a holistic commitment to federalism and separation of powers that could, in turn, support Clark's conclusions about federal common law.

As a matter of holistic structure, Clark might support general federalism principles by citing any number of constitutional provisions—none of which addresses common law. In addition to the Supremacy Clause, the (truistic and tautological) Tenth Amendment,\textsuperscript{148} and other provisions "presuppos[ing] the continued existence of the states,"\textsuperscript{149} Clark could also invoke the Constitution's explicit processes for federal lawmaking, which require input from states and from federal officials whom state-prescribed electorates have chosen.\textsuperscript{150}

With respect to separation of powers, Clark might cite the three branches' appearance in separate articles, and might further claim that the Constitution's detailed election requirements would be diluted if unelected federal judges made national policy.\textsuperscript{151} Clark might pepper this assortment of textual provisions with framing-era history that catalogues eighteenth-century fears about usurpative national government—and significantly less fear about usurpative federal judges.\textsuperscript{152}

One could of course dispute the foregoing authorities on their merits, questioning whether they conjointly address federal common law though none of them does so alone. Instead, let us consider how holistic methods can build a different view of constitutional structure, which would incorporate a lesser role for states and greater power for federal courts.

With respect to federalism, although the Constitution clearly presupposes states' continued existence, the text fails to mention their sovereignty or to explicitly preserve their policymaking prerogatives.\textsuperscript{153} Even the Supremacy


\textsuperscript{149} Clark, Translating Federalism, supra note 1, at 1192. Among these provisions are the requirement of two Senators from each state, the power of states to select their presidential electors, and state control over who may elect members of the House. See U.S. Const. art. I, §§ 2, 3; U.S. Const. art. II, § 1.

\textsuperscript{150} See U.S. Const. art. I, § 2, cl. 1; U.S. Const. art. I, § 3, cl. 1.

\textsuperscript{151} See Clark, Translating Federalism, supra note 1, at 1168 ("The political safeguards of federalism refer to the states' ability to influence the selection of Congress and the President, and therefore the content of the federal law they adopt.")

\textsuperscript{152} See 1 Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 97 (1971) ("For all the anxieties to make explicit the fundamentals proper to a constitution, the judicial generally came off with little more than an honorable mention because these anxieties were . . . spent upon making less of the executive and more of the legislative branch."); id. at 290 ("[T]he bulk of the criticism of the Constitution had to do with matters about which the average voter could be more deeply troubled than . . . courts and litigation—representation, . . . taxation, the militia, the necessary and proper clause, the executive."). See generally id. at 295-97 (noting concerns of George Mason and others that the federal judiciary might not adequately secure to the people "the benefit of the common law").

\textsuperscript{153} See Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 The Collected Works of Abraham Lincoln 421, 434 (Roy P. Basler ed., 1953) ("Much is said about the 'sovereignty' of the States; but the word, even, is not in the national Constitution . . . ").
Clause only indirectly protects states in federal lawmaking. Such modest protections send mixed signals about whether other safeguards for states should be implied or foresworn.

Clark's view of national and judicial power might be further weakened by tracking the Constitution's evolution over time. Clark has focused tightly on the Constitution as it was ratified in 1788, and he cites commentary on that version of the document. A nearly unbroken string of constitutional amendments, however, suggests that states-rights federalism hit its apex over 200 years ago. Fifteen amendments have been ratified since 1800, and only one even conceivably boosted state power (the end of prohibition). By contrast, at least eight constitutional amendments have increased federal power; seven of those granted Congress power to enforce them by statute; and two other amendments have tended to reduce state power. Whatever the "structure" of federalism might have required in the eighteenth century, the constitutional text and its holistic meaning have dramatically changed.

Indeed, mere numbers may understate the degree to which post-Framing textual developments altered the Constitution's character. The nineteenth and twentieth centuries have seen the birth of many important individual rights, which are enforced against the states through a combination of congressional and judicial action. These rights have made many state and "local" issues federal, and have radically pruned states' claims to constitutionally protected sovereignty and respect.

None of these provisions or events speaks directly to questions of the validity of federal common law. But as a matter of holistic interpretation, they significantly supplement Clark's reference to eighteenth-century federalism. Even if Clark's proposed inferences were persuasive 200 years ago, there are substantial reasons—based on the Constitution's text and holistic structure—to question their force today.

With respect to separation of powers, Clark is undoubtedly right that courts lack the powers of Congress or the President. Yet there is also no doubt that courts make policy when they confront statutory or constitutional

154. I am grateful to my dean, Bob Reinstein, for helping me appreciate this point. See generally Robert J. Reinstein, On the Judicial Safeguards of Federalism, 17 TEMPLE. POL. CIV. R. L. REV. (forthcoming 2008) (suggesting that changes to the Constitution's text and structure, supplemented by altered realities concerning American democracy and citizenship, undermine judges' role in imposing constitutional limits on federal legislative power). For a parallel critique of Clark using techniques of constitutional dynamism, see Strauss, supra note 14, at 3 ("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.").

155. Clark, Erie's Constitutional Source, supra note 1 at 1305-06.

156. U.S. CONST. amend. XXI.

157. U.S. CONST. amends. XIII, XIV, XV, XVI, XVIII, XIX, XXIV, XXVI.

158. U.S. CONST. amends. XIII, XIV, XV, XVIII, XIX, XXIV, XXVI.

159. U.S. CONST. amends. XVII, XXIII.
vagueness. Such judicial policymaking is not just a fact of governmental life; it is arguably implied by several constitutional provisions. For example, insofar as the Framers contemplated judicial review, they must have understood that to establish Article III courts in a system of vague constitutional language would give federal judges great power. Rather than making any effort to cabin judicial discretion, the Constitution gives federal courts sweeping authority to decide "all Cases, in Law and Equity, arising under the Constitution." The implications of this jurisdictional grant for judicial policymaking are subtle but undeniable—which is precisely what places them within the tradition of interpretive holism.

The Framers also surely understood that judicial policymaking would arise with respect to statutory law, in correlation with legislative vagueness. Given the frictions of federal statute-making, and the guaranteed representation of varied states' interests, the constitutional structure was always likely to produce vague statutes. Indeed, it quickly did so, with judicial policymaking as a predictable result. Again, Article III's jurisdictional grant concerning "all Cases . . . arising under . . . the Laws of the United States" endorses this possibility without a hint of textual reservation.

The strongest constitutional indication of judicial policymaking, however, may be the constitutional process for selecting judges and maintaining them in office. Like ambassadors, public ministers, and other officers of the United States, federal judges are nominated by the President and the Senate confirms them. This rigorous selection procedure, which involves the nation's highest officer and the states' staunchest federal representatives, invites a comparison between judges' importance and that of other policymakers. Furthermore, federal judges' life tenure and guaranteed salary are unmatched by any federal official.

None of these provisions proves that the Constitution grants federal judges

160. See generally Clark, Unitary Judicial Review, supra note 1, at 325-331 (collecting historical sources).
161. See Strauss, supra note 14, at 2 ("[T]he founders understood that in creating courts they were creating bodies capable of acting in ways that would impose obligations on parties properly brought before them."); id. ("[T]he grants . . . of original jurisdiction over the states and to federal courts generally of jurisdiction in admiralty (not to mention the practical necessity of federal common law in the Northwest Territory and other territories not yet participating in statehood) foretell judge-made law that will have purchase without the Senate ever having a participatory change."). Note that, although the Anti-Federalists favored states' rights, they also endorsed vague constitutional language in the Bill of Rights. See, e.g., Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1137-38 (1991); Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 HARV. L. REV. 1175, 1188 n.51 (1996).
163. See, e.g., Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (alien tort statute); id. at § 11, 1 Stat. at 78 (diversity jurisdiction); id. at § 34, 1 Stat. at 92 (rules of decision).
power to make common law, but they clearly evidence great judicial power with respect to statutes and the Constitution. As a matter of interpretive holism, one might wonder why the Constitution would safeguard judges' authority over statutes and the Constitution, yet determinedly resist the lesser, ill-defined "danger" of common-lawmaking. In terms of finality and counter-majoritarian potential, interpreting the Constitution is clearly the greatest exercise of judicial power, and statutory interpretation is also a significant, nearly inevitable aspect of federal judicial authority. Against this constellation of federal judicial power, there was never any specific reason to fear federal common-lawmaking—especially because a "Federal Anti-Common Law Act" could eliminate such judicial activity altogether, if Congress ever chose to enact such an absurdity.

The tension between Clark's and my own proposed views of holistic structure perhaps illustrates Richard Fallon's suggestion that there is no adequate choice under the Constitution between structural models that categorically prefer state authority over federal authority, or vice versa. Fallon endorsed moving past unduly simplified structural models toward a balanced recognition of national supremacy and state sovereignty. Just as federalism requires interlocked respect and concern for federal lawmaking as a whole, a proper view of separated powers implies a need both to empower and to restrain judges. It is not enough to note that federal powers and the federal judiciary are limited, any more than it is acceptable to imply that they are not. Neither judicial power nor federal authority is inherently suspect under the

167. As a matter of eighteenth-century history, there was apparent disagreement about whether federal courts would apply state law in diversity cases. Cf. Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 79, 97 (1993) (quoting Federalist John Marshall who stated that federal courts would "be governed by the laws of the state where the contract was made"); Henry J. Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483, 490 (1928) (quoting Anti-Federalist James Winthrop who argued at the Virginia ratifying convention that "[federal court] is not bound to try it [a case] according to the local law where the controversies happen; for in that case it may as well be tried in the state court"). There is, however, no evidence of any constitutional doubt that federal courts had the power to apply federal common law where appropriate. Borchers, supra, at 97-98.

168. The text's hypothetical statute is barely imaginable for at least three reasons. First, the idea of banning common law from federal courts would have seemed entirely at odds with the Framers' flexible ideas of judging. Second, as has been discussed, the category of "common law" would seem immensely hard to reduce to statutory text. And third, common law's indistinctness and harmlessness makes it difficult to imagine any reason that Congress would choose to oppose this entire category of judicial action.

169. See Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1224-25 (1988). Fallon contrasts a "Federalist Model" that resists nationalization and federal interference in state functions with a "Nationalist Model" that encourages the federal judiciary to ensure national supremacy. Id. at 1151-64.

170. "A large number of judicial opinions reflect the rhetorical excesses of the Federalist and Nationalist models. It is the law's embrace of incompatible Federalist and Nationalist rhetoric, more even than its pattern of results, that supports the charge that federal courts laws is internally contradictory and therefore inherently unstable." Id. at 1226-27.
Constitution. There is no constitutional requirement that all federal powers be express, nor are all national policies set by elected politicians. Constitutional stories of federal and judicial power often have at least two sides, and any holistic view of "structural" values must reflect both.

Let me be quite clear: I am not using interpretive holism to endorse broad federal common law. This Essay makes no affirmative argument about the scope of judicial power. I simply aim 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. For me, the opposite seems closer to the truth. The predominant virtue of constitutional holism can also be its vice. By increasing one's sensitivity to otherwise hidden connections and inferences, holism raises the possibility of competing interpretations. Thus, holism may not support Clark's conclusions regarding federal common law any more than does the Supremacy Clause, Erie, or Chadha.

2. Black's Structure

Clark's final argument against federal common law is perhaps his most important. Clark espouses a theory that does not simply concern what the Constitution says, but also what it means. Charles Black introduced this sort of argument in his book, Structure and Relationship in Constitutional Law. Black distinguished such structural methodology from simply "searching . . . the written text for its meaning"—even a holistic meaning—and applying it to particular cases. Instead, Black's structuralism focuses on operative relationships among governmental entities, citizens, and the Constitution.

Consider McCulloch's decision to uphold the Bank of the United States, for example. The Court's decision might be supportable as a matter of interpretive holism if one believed that the Necessary and Proper Clause combined with other grants of power in Article I, Section 8 to textually imply a federal banking authority. An argument concerning operative structure might run differently, however, justifying the decision on the basis of three principles: (i) the Republic needed a bank to operate effectively, (ii) the Constitution's

171. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819) ("[T]here is no phrase in the [Constitution] which, like the articles of confederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described.").
172. See, e.g., supra Part I.C (describing lawmaking functions of administrative agencies).
173. BLACK, supra note 123, at 5.
174. See id. at 23-28, 50-66.
175. Cf McCulloch, 17 U.S. at 407 (citing Congress's power to collect taxes, to borrow money, to regulate commerce, to declare war, and to support armies and navies); id. at 413 (discussing the Necessary and Proper Clause); David P. Currie, The Constitution in the Supreme Court: State and Congressional Powers, 1801-1835, 49 U. CHi. L. REV. 887, 930-38 (1982) (discussing McCulloch's possible source in these provisions of Article I).
grant of significant congressional powers represented a monumental act of popular democracy, which aimed to create a limited but workable government, and (iii) one should where possible construe the Constitution as a functioning charter for government, without the need for unsettlingly frequent amendments. None of these principles appears in the Constitution’s text directly. Yet an operative structuralist might view such principles as inherent in the structure and nature of our constitutional republic.

Black repeatedly tried to clarify that his structural methodology was not anti-textualist, though it is often viewed that way. He protested against any implication that structural arguments would cause “precision [to] be supplanted by wide-open speculation,” or would represent “the total abandonment of . . . particular-text interpretation.” “[O]n the contrary,” Black insisted, “so long as we continue to look on our Constitution as a part of the law applicable in court, . . . the work of sheer textual interpretation will be a great part . . . [of]

176. Indirect evidence of such an argument appears throughout the Court’s opinion. See *McCulloch*, 17 U.S. at 408 (“The exigencies of the nation may require that the treasure raised in the north should be transported to the south . . . . Can we adopt that construction, (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means?”); id. at 415 (“The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution.” (emphasis added)); id. at 417-18 (“The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws.” (emphasis added)); id. at 404-05 (“The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”); id. at 415 (noting that federal powers are provided “in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs”); id. (“It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for [via judicial interpretation] as they occur.”).

177. This analysis of *McCulloch* parallels Black’s argument that free speech, and the rights of petition and assembly, could be derived from constitutional “structure” even if the First Amendment had never been ratified. The basis for that conclusion is that such “rights [are] founded on the very nature of a national government running on public opinion.” *Black*, supra note 123, at 41; *see also* id. at 42 (“Is it conceivable that a state, entirely aside from the Fourteenth for that matter the First Amendment, could permissibly forbid public discussion of the merits of candidates for Congress, or of issues which have been raised in the congressional campaign . . . ?”); id. at 44 (“[I]f you admit the validity of this form of inference at all, then I cannot see any ground for hesitation in going along with it a good way.”). For other examples, see id. at 8-11 (defending the result in *Carrington v. Rash*, 380 U.S. 89 (1965), on structural grounds rather than on the Equal Protection Clause), and id. at 15-17 (defending the result in *Crandall v. Nevada*, 6 73 U.S. (6 Wall.) 35 (1867), on structural grounds rather than on dormant commerce grounds).


180. *Id.* at 31.
constitutional law.\textsuperscript{181}

For Black, the reason to use structural interpretative methods has less to do with the role of constitutional text and more to do with its content, at least in important cases. "The question," Black explained, "is not whether the text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity which marks so many crucial constitutional texts."\textsuperscript{182} Such vagueness is on full display, for example, in constitutional texts concerning due process, equal protection, executive authority, commerce among the states, and free speech.\textsuperscript{183} No matter how strong one's ardor might be for textual analysis, these are words that simply cannot yield full answers.

The inherent functionalism of structural constitutional arguments is what attracted Black most.\textsuperscript{184} Indeed, in circumstances with little textual guidance and "utterances, contemporary with the text, of persons who did not really face the question we are asking," operative structural arguments seek constitutional meaning within a principled view of the "nature" of nationhood, citizenship, and constitutional democracy.\textsuperscript{185} Black wrote that every structural argument "contains within itself [a] guarantee that it will make sense," and this link to constitutional values and function (not subconstitutional prudence or policy) is the kind of "sense" he meant.\textsuperscript{186}

Clark has sought to contrast his work, a "formal excavation[] of the Constitution's text, history, and structure," with the "sound intuitions" that guided past legal scholarship.\textsuperscript{187} Yet Clark's declared methodological austerity concerning the Supremacy Clause's text and eighteenth-century history must be tempered by his more general, methodologically flexible conclusions about state power and judicial weakness.\textsuperscript{188} The latter seem analogous to Black's

\begin{thebibliography}{99}
\bibitem{181} Id.
\bibitem{182} Id. at 30 (emphasis added); see also id. at 29 ("The precision of textual explication is nothing but specious in the areas that matter.").
\bibitem{183} See, e.g., U.S. Const. art. I, § 8; U.S. Const. art. II, § 2; U.S. Const. amends. I, V, XIV.
\bibitem{184} See Black, supra note 123, at 22 ("I think well of it, above all, because to succeed it has to make sense—current, practical sense."). Of course, one might fairly question the degree to which structural arguments must make "current, practical" sense as opposed to original, historical sense. The former assumes that a constitution must be construed not only in a way that adequately functioned in the past, but functions adequately at present, and will continue to do so in the future. Although this modernist view surely has some appeal, its most extreme extension might make all constitutional amendments unnecessary. Thus, if any principle or rule were necessary to the Constitution's functioning, one might argue that it already exists in the "structure" of the Constitution. Cf. Voltaire, Candide or Optimism 2 (Burton Raffel trans., Yale Univ. Press 2005) (1759) ("[I]n this best of all possible worlds ... everything is for the best."). In my view, this would risk taking Black's functionalism and McCulloch too far.
\bibitem{185} Black, supra note 123, at 22-23.
\bibitem{186} Id. at 22.
\bibitem{187} Clark, Erie's Constitutional Source, supra note 1, at 1302.
\bibitem{188} In earlier articles, Clark himself has endorsed Black's style of structuralism. See, e.g., Clark, Federal Common Law, supra note 1, at 1251, 1270; Clark, Separation of Powers, supra
structural arguments.

Viewed in this light, the "constitutional structure" that Clark invokes is fundamentally a system of governmental organization and electoral democracy. Clark prioritizes the preservation of state prerogatives and nonjudicial politics, couched in terms of federalism and separation of powers, which in turn explain his two-fold opposition to federal common law. At a high level of generality, the Constitution "works" for Clark if it preserves these organizational features of government, and fails if it does not.

Admittedly, Clark's vision of the constitutional structure finds some degree of support in eighteenth-century history. In the beginning, a great many issues confronting the Framers concerned how the new government should be organized, how new federal offices and institutions should be established, and how to deal with preexisting systems of governance by state and local authorities. Indeed, the Framers expressed even their concern for individual liberties first and chiefly through constitutional provisions concerning structure and organization.

Yet a different view of constitutional structure and function is at least coequal with Clark's. If the original Constitution predominantly concerned governmental organization charts and subdivided spheres of political action, that function changed after the Civil War, the post-War amendments, and the Second Reconstruction's efforts to transform racial politics.

Liberty and equality are hallmarks of these newer principles of constitutional structure. They have solid textual and historical roots in the incorporation of individual rights against the states and the Fourteenth Amendment's guarantee of equal protection. But an operative structuralist might claim, independent of such textual provisions, that liberty and equality are fundamental to any modern view of our constitutional democracy. As Black reasoned: "The concept of interference with national governmental function shades off into the concept of interference with rights created and protected by the national government." Thus, although national rights have unquestionably expanded as a matter of constitutional text, Black explained that the federal government's function is also linked to enforcing federal rights "by the fact that the creation and protection of individual rights is the highest function of any government."

Substantive differences between Clark's and Black's visions of constitutional function carry serious consequences for debates over

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note 1, at 1338; Clark, Translating Federalism, supra note 1, at 1161.
190. See, e.g., Clark, Unitary Judicial Review, supra note 1, at 337-47 (discussing the debate over the necessity of the Bill of Rights).
192. BLACK, supra note 123, at 25.
193. Id.
constitutional structure, and for federal courts as well. Someone with Clark's view of constitutional function might view the federal courts’ role as ensuring that the branches stay within their proper spheres, that the federal government shows due respect for states, and that judges exercise minimal policymaking authority—except where necessary to enforce federalism or separation of powers.

By contrast, Black's constitutional structure functions only if individuals’ liberty and equality are secure. The Second Reconstruction suggests that courts, alongside the political branches, may have an important and dynamic role to play in protecting individual rights. These normative commitments underwrote the Warren Era's contested ideals of judicial behavior. If Black sought to support the judicial enforcement of individual rights using Constitutional text, he might say that the “judicial power” in Article III has always provided authority for courts to serve the nation's constitutional needs, and those needs have grown significantly as the constitutional structure has evolved. But Article III’s text would play the same limited role in that argument as “Legislative power” in McCulloch, or the Tenth Amendment for anti-commandeering cases: expressive, but not decisive.

As is obvious, this Essay cannot survey assorted theories of judicial role and constitutional function, much less make any contribution to such debates. For some readers, Clark's focus on the Constitution's eighteenth-century function will seem outdated; for others, it will seem uncommonly correct. Opinions about constitutional equality and liberty are similarly varied. One can imagine alternate views of the constitutional structure that mediate between Clark and Black, parallel them, or are altogether different. My point is simply that arguments about constitutional structure often risk adopting a natural or singular character that is undeserved. Conflicting accounts of constitutional structure and function embody the deepest schisms in American legal culture. And although such divergence does not eliminate the value of Clark's arguments, his underexplained constitutional vision may appeal primarily to those who already share it.

Despite inherent risks of contention and uncertainty, “structural” theories like Clark’s and Black’s remain powerful tools of constitutional interpretation. At least in circumstances where textual arguments run dry, structural analysis may yield helpful results; and even if consensus fails, that may owe simply to some constitutional problems' deep complexity. In any event, any disputes that persist under structural analysis will at least surround vital discussions of constitutional nature and function. For many questions, including the scope of federal common law and judicial role, such well-focused substantive disagreement may represent the best available outcome.

A recent review of Black’s work began as follows: “This is a book that I love, and that I do not love any less just because I think that it is . . . incorrect.” Likewise, even where I doubt the force of Clark’s conclusions, his reasoning is constantly provocative, thoughtful, and educating. Let me end with two examples.

First, Clark’s use of *Erie* and the Supremacy Clause to impose constitutional limits on judicial power is vitally important even if my critique is correct. Federal courts’ authority to promulgate common law may seem like a benign issue of mild consequence, but Clark has persuasively shown that such questions are central to the federal government’s organization and power. If *Erie* or the Supremacy Clause limits federal courts as Clark has proposed, that conclusion may set the terms for evaluating judicial activity in a wide range of areas. Along with other new-myth scholars, Clark offers a deep and broad constitutional basis for limiting federal courts, and debates over such limits’ propriety raise some of the deepest questions in our democracy.

Second, Clark’s use of constitutional structure in this project is similarly important. Clark’s work illustrates different methods of structural interpretation, along with their strengths and weaknesses. From one perspective, Clark not only calls upon readers to reassess their understandings of federalism and judicial power; he also sets forth a methodological example of how one should generally answer such constitutional questions. Again, whether Clark is right or wrong, he has consistently focused on some of our most fundamental constitutional issues. Through this Essay, it is by retracing his footsteps that I have tried to do the same.

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196. Clark might reject this intended compliment, as his reply suggests that he only meant to endorse “weak intratextualism.” Clark, *Federal Lawmaking*, supra note 17, at 722-29. Even if this is so, I remain impressed by the methodological nuance that seemed to appear in Clark’s earlier work.