

# Dormancy

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*This Article provides a new theoretical account of dormancy, one of the oldest and most controversial concepts in American constitutionalism. Despite familiar and repeated scholarly claims that the Dormant Commerce Clause, Dormant Admiralty Clause, and dormant foreign-affairs doctrines are unjustifiable, dormancy has been with us since the beginning and exists in several doctrinal instantiations today. Criticism of these dormancy doctrines—now nearly canonical—has proceeded, surprisingly, without a complete picture of its target. Conventional views tend to assume that each different dormancy doctrine has a distinct constitutional basis and that these doctrines are solely concerned with guaranteeing the unencumbered exercise of federal power or, in the case of the Dormant Commerce Clause, perhaps with guaranteeing the unencumbered functioning of market forces. Against these assumptions, this Article's thesis is that all dormancy doctrines may be viewed as implementing a single implied constitutional preclusion of state actions that interfere with the constitutional structure, and their differences are attributable to instrumental reasons for enforcing that preclusion with varying degrees of stringency in different contexts. This long-overdue examination of the general concept of dormancy sheds new light on an old, much-disparaged, misunderstood, yet enduring and important feature of our constitutional system. A unifying account of dormancy doctrines will enrich our general understanding of constitutional practice, demonstrate why conventional assumptions about dormancy are incorrect, and provide new leverage on some intractable theoretical debates about preemption, federalism, and federal common law. Against dormancy's critics, I establish the foundation of a new normative case for dormancy doctrines and demonstrate their importance to a robust and enduring constitutional structure.*

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## INTRODUCTION

The concept of dormancy in American constitutional practice is about the preclusion of state government action. Roughly, the idea is that sometimes, even when the national government does nothing—when it lies dormant—and no individual rights are violated, state governments nevertheless may be precluded from taking certain actions. The dormant foreign-affairs doctrine, for example, precludes state governments from imposing economic sanctions on foreign nations even if the national government has no particular diplomatic policy

toward them.<sup>1</sup> The Dormant Commerce Clause doctrine, dormant admiralty doctrine, and other dormancy rules implement similar preclusions in other contexts.<sup>2</sup> Despite the simplicity of the idea as I've just formulated it, dormancy has caused significant consternation among commentators and courts. Dormancy rules are so frequently criticized that their illegitimacy is fast becoming part of the conventional wisdom. In this Article, I provide the first systematic account of the *general* concept of dormancy by identifying the characteristics common to all dormancy doctrines. Viewing the different dormancy doctrines as essentially the same improves our descriptive account of constitutional practice, advances significant debates in constitutional theory, and lays the foundation for a new and stronger justificatory case for having dormancy doctrines in the first place.

Conventional views about dormancy are characterized by several common themes. First, dormancy rules are viewed as *illegitimate* more frequently and by a greater number of commentators than almost any other constitutional doctrine. Dormancy doctrines—particularly the Dormant Commerce Clause doctrine, which is dormancy's current standard-bearer—are almost universally criticized as atextual<sup>3</sup> or, worse, as thinly veiled *Lochnering* devices.<sup>4</sup> In the tone characteristic of dormancy criticism, the Dormant Commerce Clause has been called “a figment of the Supreme Court's imagination.”<sup>5</sup> It is puzzling, then, that courts continue to apply the dormant commerce and admiralty doctrines, doctrines of dormant foreign-affairs powers, and other constitutional dormancy rules today.<sup>6</sup>

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1. See, e.g., *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 53 (1st Cir. 1999) (rejecting the argument “that a sufficiently strong state interest could make lawful an otherwise impermissible intrusion into the federal government's foreign affairs power”), *aff'd on other grounds sub nom.* *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); see also *infra* section III.C (discussing dormancy in the foreign affairs context).

2. See *infra* sections III.A–B.

3. See, e.g., *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (calling the Dormant Commerce Clause an “unjustified judicial invention”); Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 532 n.128 (2008) (noting the “atextual[ity]” critique of Dormant Commerce Clause doctrine); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2009 & n.21 (2009) (arguing that the Dormant Commerce Clause is “atextual” and citing opinions by Justices Scalia and Thomas mounting similar criticisms).

4. Justice Souter's veiled reference in *C & A Carbone, Inc. v. Town of Clarkstown, New York* is a good example. See 511 U.S. 383, 424–25 (1994) (Souter, J., dissenting) (“[T]he bar to monopolies . . . arises from a statutory, not a constitutional, mandate. No more than the Fourteenth Amendment, the Commerce Clause ‘does not enact Mr. Herbert Spencer's Social Statics . . . [or] embody a particular economic theory, whether of paternalism . . . or of *laissez faire*.’” (alteration in original) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting))); see also *infra* notes 238–41 and accompanying text (discussing criticisms of the Dormant Commerce Clause doctrine); notes 284–86 and accompanying text (discussing criticisms of the dormant admiralty doctrine); notes 349–53 and accompanying text (discussing criticisms of the dormant foreign-affairs doctrines).

5. Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 617.

6. See, e.g., *United Haulers Ass'n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (applying Dormant Commerce Clause); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (applying dormant executive-foreign-affairs-power doctrine); *Barclays Bank PLC v. Franchise Tax Bd.*,

This poses an explanatory challenge for constitutional theory, but the tendency toward criticism in the literature makes for little in the way of dispassionate analysis of the dormancy rules; there certainly is no systematic account of the general concept of dormancy that identifies the shared characteristics that make the dormancy rules applied in different areas of constitutional adjudication all doctrines of *dormancy*. I provide an account here that both explains the doctrines courts apply and lays the foundation for a new normative defense of dormancy doctrines.

This new account of dormancy runs counter to two other, more specific themes in conventional constitutional scholarship. One is the assumption that the dormancy doctrines are *distinct* from each other—they have distinct bases in the constitutional text, distinct scopes, and distinct rules of application, and their continued application in the modern context of mostly overlapping national and state power is justified, if at all, by arguments that differ dramatically from one context to another.<sup>7</sup> The other is the assumption that dormancy doctrines are primarily or exclusively concerned with ensuring the unencumbered exercise of exclusively federal powers or, on some accounts of the Dormant Commerce Clause, the unencumbered operation of market forces. Against these assumptions, I argue that all dormancy doctrines may be understood as implementing a single, simple constitutional proposition that is derivable from familiar observations and modest assumptions.

Despite the many heated debates that characterize constitutional theory, we should be able to agree that the Constitution establishes certain ineliminable structural features—the division of the national government into three branches, the division of government power between the national and state governments, and so forth. Coupling this observation with the modest assumption that the constitutional structure should be durable through time and changed circumstances, we may infer that the components of the government—the national and state governments and their subparts—should be precluded from undermining the larger structure. Otherwise, the Constitution would be self-defeating. Thus, we may derive what I will call the State Preclusion Thesis (SPT):

State governments may not take actions that undermine the constitutionally established structure of government of which they are a part.

Recent work in constitutional theory on the conceptual distinction between

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512 U.S. 298 (1994) (applying Dormant Foreign Commerce Clause doctrine); *Zschoernig v. Miller*, 389 U.S. 429 (1968) (establishing dormant foreign-affairs-power doctrine, still on the books); *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (establishing dormant admiralty doctrine, still good law), *superseded by statute*, Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

7. *Cf. infra* notes 161–65, 201–09 and accompanying text (discussing the Dormant Commerce Clause doctrine); notes 245–50 and accompanying text (discussing the Dormant Admiralty Clause doctrine); notes 296–317 and accompanying text (discussing the dormant foreign-affairs doctrines).

constitutional meaning—which remains a question of interpretation and interpretive theory—and constitutional doctrine—the rules courts create to make the meaning of constitutional provisions or requirements applicable in concrete cases—suggests that the latter may be shaped primarily by noninterpretive considerations related to the pragmatics of day-to-day adjudication.<sup>8</sup> Hypothesizing that SPT is a basic constitutional norm in our system allows us to get past the interpretive questions that plague dormancy scholarship and explain all the existing dormancy doctrines as doctrinal rules designed to implement it. The differences between dormancy rules may be explained by instrumental reasons for courts to enforce the underlying norm with different degrees of stringency in different contexts. This SPT-based account shifts the focus of dormancy from protecting federal power (or market forces) to protecting the constitutional structure.

An account of dormancy predicated on SPT introduces a new perspective that clarifies and advances well-worn debates about dormancy rules. This basic structural proposition highlights the particular effect of dormancy holdings. When state action is invalidated on dormancy grounds, the conclusion is that the Constitution precludes states from taking the action—states are constitutionally disempowered, *ex ante*. This has important implications for current theoretical debates about preemption, federalism, and federal common lawmaking. The State Preclusion Thesis account clarifies the conceptual distinction between dormancy and preemption that is often obscured in modern cases and commentary. Dormancy holdings mean that state power to take the action is constitutionally precluded *ex ante*, while preemption holdings mean that action otherwise within states' constitutional power is *contingently* unconstitutional because of a conflict with federal law. This account also advances the debate between judicial and political federalism theories by showing that some quintessentially federalism-related questions of state power—dormancy questions—are fit for judicial rather than exclusively political resolution. Both accounts of federalism describe real features of the system. Finally, it provides a response to the claim that federal common law often illegitimately “preempts” state law even though the Supremacy Clause makes no mention of judge-made rules. When federal common law replaces state law that has been held inapplicable on dormancy grounds, it is the dormancy holding, not the subsequent federal common law rule, that renders state law inapplicable, and dormancy is not predicated on the Supremacy Clause.

The State Preclusion Thesis is simple and abstract for a reason. It seems to express a basic feature of any durable federalist constitutional system, and it should seem plausible under a variety of different theories of constitutional interpretation. Importantly, the success of the new account of dormancy presented here does not depend on whether SPT is a *correct* proposition of constitutional meaning. The goal is to explain the phenomena that we observe in

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8. See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

the world—judicial decisions applying so-called dormancy doctrines—to better understand what courts are doing. And that requires understanding what basic constitutional norms they appear to implement with those doctrines. One way to do that is to advance an explanatory hypothesis, to propose a plausible underlying norm and see how much doctrine it explains. Making an inference to the explanation that fares best on conventional criteria for theoretical success, I will argue that two centuries of dormancy decisions are most easily explained if we suppose that courts accept SPT or something similar to it.

Part I sets out an important theoretical distinction between judicial statements of interpreted constitutional meaning and doctrinal rules designed to implement that meaning in concrete cases. This relatively new but widely accepted distinction forms an important part of the account of dormancy that follows. In Part II, I derive and defend the State Preclusion Thesis, arguing that it may be inferred from obvious features of the constitutional structure and modest assumptions that avoid engaging controversies about constitutional interpretation. I give a preliminary normative case for SPT, but my primary aim here is to test the hypothesis that SPT, if accepted by courts as a valid norm, explains all the dormancy doctrines. To that end, I discuss criteria for success in constitutional theorizing and give reasons for choosing abstract hypothetical norms over more specific ones. In Part III, I argue that major existing dormancy doctrines—the Dormant Commerce Clause and dormant admiralty and foreign-affairs-powers doctrines—all may be characterized as implementing SPT with differing degrees of stringency based on concerns about the process of constitutional adjudication that vary from one context to another. I then explain how refocusing our thinking about dormancy on SPT advances theoretical debates about preemption, federal common lawmaking, and federalism. A brief conclusion follows.

## I. CONSTITUTIONAL DOCTRINE

Broadly, I will argue that the Constitution's structural provisions and the modest assumption that the structure should be durable permit the inference that state actions that destabilize the constitutional system are precluded.<sup>9</sup> This implied preclusion operates even where the national government's affirmative powers go unexercised—when it lies dormant—and is implemented by specific

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9. Cf. Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 36 (observing that the Constitution contains “several clauses with important federalism implications, but no central ‘Federalism Clause’”). The legitimacy of extracanonical constitutional norms has been defended ably elsewhere. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* (2006); LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004); LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* (2008); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707 (2009); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007) [hereinafter Young, *Constitution*].

dormancy doctrines. This Part provides theoretical foregrounding about constitutional adjudication that develops a conceptual framework for the defense of the new account of dormancy that follows.<sup>10</sup>

#### A. CATEGORIES OF DOCTRINE

To understand dormancy, we must understand constitutional doctrine *simpliciter*. To do that, we must distinguish the Constitution's basic norms from the rules, tests, and standards courts use to enforce those norms. The conventional model of constitutional adjudication consists of two steps: interpreting the applicable constitutional provision or provisions and then applying those provisions, as interpreted, to the facts of the case to generate a constitutional holding.<sup>11</sup> Recent work in constitutional theory shows that this is an oversimplification. We must first distinguish constitutional meaning from constitutional doctrine and then distinguish two categories of constitutional doctrine. The first distinction is intuitive; the second is less so. The distinction between categories of doctrine may be expressed as the "two-output thesis"—the "claim 'that there exists a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of constitutional adjudication,' namely judge-interpreted constitutional meaning and judge-crafted tests bearing an instrumental relationship to that meaning."<sup>12</sup> I intend to leave questions of interpretive method out of this discussion,<sup>13</sup> so I will call statements of judge-interpreted constitutional meaning "constitutional operative propositions," following Professor Berman's interpretively inert terms.<sup>14</sup> The judge-crafted tests are

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10. My account draws on the metadoctrinal constitutional theory literature. *See generally* Berman, *supra* note 8, at 4–6 (reviewing the history of "metadoctrinalism"). Berman divides the debate over the nature of constitutional doctrine making into camps, *see id.* at 43–50: "'Taxonomists' . . . advocate something like the 'complex' model of constitutional adjudication [while] 'Pragmatists' . . . insist that constitutional adjudication is instrumental 'all the way up.'" *Id.* at 50 (footnote omitted). Compare, e.g., Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997) (arguing that even uncontroversial constitutional meaning must be doctrinally implemented), Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (arguing that a "constitutional common law" of "rules drawing their inspiration and authority from, but not required by, various constitutional provisions" underlies much of the Court's constitutional interpretation), and Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (distinguishing between the scope of a constitutional norm and the scope of its judicial enforcement), with Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (critiquing the idea of "rights essentialism"), David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (arguing that prophylactic rules are integral and common to Supreme Court decision making), and Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173 (2006), <http://www.harvardlawreview.org/media/pdf/hills.pdf> (arguing that noninstrumental constitutional meaning does not exist).

11. *See* Berman, *supra* note 8, at 32–33.

12. Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 220–21 (2006), <http://hlr.rubystudio.com/media/pdf/berman.pdf> (footnote omitted) (quoting Berman, *supra* note 8, at 36).

13. *Cf. infra* section III.D.2 (discussing potential sources for constructing constitutional norms).

14. Berman, *supra* note 8, at 57–58 & n.192.

the “decision rules” by which courts determine whether conduct falls within the meaning of a constitutional prohibition or permission and are separate from the constitutional operative propositions themselves.<sup>15</sup> The instrumental relationship between the operative propositions and the decision rules is that the latter *implement* the former—they facilitate the application of broad propositions of constitutional meaning to resolve disputes in concrete cases. Some examples will illuminate the nature of the two outputs of constitutional adjudication and the relationship between them.

First, constitutional “[d]octrine is not the same as the Constitution.”<sup>16</sup> To illustrate, think of the Constitution’s requirement that senators must be at least thirty years old.<sup>17</sup> In a lawsuit challenging the seating of Senator Jones on the ground that Jones is too young, the constitutional requirement is clear: Jones may be seated if and only if she is at least thirty years old. But there is a factual question here—is Jones thirty years old, or not? If there is evidence on both sides, the court will face epistemic uncertainty:<sup>18</sup> It cannot know the truth about a disputed fact with absolute certainty; thus, it cannot apply even this clear constitutional provision in a direct, unmediated way to the controversy.<sup>19</sup> To resolve the case, the court needs a rule in addition to the constitutional age requirement—for example, a rule that courts should conclude that a putative senator has attained the constitutionally required minimum age if a preponderance of evidence shows that the putative senator was born thirty years or more ago. The preponderance standard functions as an instruction for how the court should determine whether the constitutional requirement is satisfied—a constitutional decision rule.<sup>20</sup> A decision rule is court created and thus is constitutional *doctrine*, but it is distinct from the meaning of the constitutional provision that is the basis for the decision.<sup>21</sup> Constitutional adjudication always requires a decision rule, no matter how simple, because courts face epistemic uncertainty in every case.<sup>22</sup> Courts could select decision rules case by case, but our system prefers structured and predictable adjudicative practices such that decision rules

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15. See *id.* at 32–36 (describing “implementation” of constitutional norms by constitutional rules). See generally RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 37–44 (2001) (arguing that the Supreme Court’s role is one of implementation and that the Court applies and, sometimes, creates doctrine to implement constitutional meaning).

16. Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1741 (2005).

17. U.S. CONST. art. I, § 3, cl. 3.

18. See Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1520–21 (2004).

19. Berman notes that “the very notion of unmediated application of constitutional meaning to the facts of a case is inapt.” *Id.* at 1520.

20. See Berman, *supra* note 8, at 57–58 (defining a decision rule as “the rule courts should apply when called upon to decide whether the [constitutional] meaning is complied with”); Berman, *supra* note 18, at 1521–22 (demonstrating the presence of decision rules in the adjudication of seemingly pure questions of constitutional meaning).

21. See Berman, *supra* note 18, at 1519–20.

22. See *id.* at 1520–21.

applicable in multiple cases are more desirable.<sup>23</sup> The preponderance standard is the default decision rule; we may assume it works invisibly where a court specifies no other rule.<sup>24</sup>

To see the distinction between constitutional meaning and constitutional doctrine, consider an example in which the meaning of the relevant constitutional provision is less straightforward. The Equal Protection Clause says that a state may not “deny to any person within its jurisdiction the equal protection of the laws.”<sup>25</sup> In an Equal Protection Clause challenge to a state law establishing a beneficial racial-classification program, it is not obvious what result the constitutional language requires.<sup>26</sup> It might be interpreted to bar racial classifications in law lacking an adequate justification.<sup>27</sup> Or it might be interpreted to bar legal requirements that harm racial minorities.<sup>28</sup> The court’s choice of interpretation, which likely will be informed by its choice of interpretive methodology, may impact the result—the state law has a better chance of surviving if the judge adopts the second interpretation. The product of this interpretive choice is a statement of “judge-interpreted constitutional meaning”—what Professor Berman calls a constitutional “operative proposition.”<sup>29</sup> Operative propositions are *doctrine*, like decision rules, because they are court announced; they are statements of what a majority of the court believes the correct proposition of constitutional law to be after interpretation.<sup>30</sup> They are distinct from constitutional meaning, if by this we mean correct, best, incontestable, or universally

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23. See Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1658 (2005) (“[D]ecision rules are unavoidable—and not just because general propositions do not decide concrete cases. A court must give structure to the adjudicatory process; it must determine and assign burdens of proof, production, and persuasion.”).

24. See Berman, *supra* note 12, at 221; see also *infra* notes 34–35 and accompanying text (discussing “nonstandard” decision rules).

25. U.S. CONST. amend. XIV, § 1.

26. See generally Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 436–43 (1997) (assessing the constitutional legitimacy of affirmative action programs); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1495–99 (2004) (canvassing interpretations of the Equal Protection Clause).

27. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–91, 307–15 (1978) (plurality opinion); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (citing *Bakke*, 438 U.S. at 289–90). See generally Siegel, *supra* note 26, at 1495–99 (explaining why the court adopted strict scrutiny for analyzing racial classifications in the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954)). For defenses of this interpretation, see, for example, Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 597–605 (1963); Herbert Wechsler, Harlan Fiske Stone Professor of Constitutional Law, Columbia Univ. Sch. of Law, *Toward Neutral Principles of Constitutional Law*, Oliver Wendell Holmes Lecture at the Harvard Law School (Apr. 7, 1959), in 73 HARV. L. REV. 1 (1959).

28. See generally Siegel, *supra* note 26, at 1491–95 (describing the critiques of Professor Wechsler’s response to *Brown*). For examples of this position, see, for example, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429–30 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 26–27 (1959).

29. See Berman, *supra* note 8, at 58 & n.192; Berman, *supra* note 18, at 1521.

30. See Berman, *supra* note 12, at 221; Berman, *supra* note 18, at 1519–20.

accepted meaning.<sup>31</sup> Regardless of which interpretation the judge accepts, there is room for debate—there is a plausible, though rejected, counterinterpretation hanging around. Judges may make mistakes in interpreting the Constitution, and we can make sense of claims that a court got an interpretive question wrong because the Constitution does not simply mean whatever a court says that it means.<sup>32</sup> Distinguishing constitutional meaning from constitutional doctrine serves an important legitimizing function—reinforcing the public’s understanding of the Constitution, whose meaning is subject to debate and refinement over time, as a source of authoritative norms separate from judicial decisions.<sup>33</sup>

B. INSTRUMENTAL DETERMINANTS OF DECISION RULES, UNDERENFORCEMENT, AND  
OVERENFORCEMENT

Two more theoretical observations are important—one about decision rules and one about the connection between decision rules and the operative propositions that they implement. The observation about decision rules is that many decision rules that differ from the preponderance standard and the considerations that justify these “nonstandard” rules’ variance from the default are instrumental—they are concerns about how different potential rules may improve constitutional adjudication.<sup>34</sup> The preponderance standard comes closest to direct application of the operative proposition case by case,<sup>35</sup> nonstandard decision rules depart to varying degrees from that close approximation of direct implementation. Many decision rules are nonstandard. Imagine that the judge in our hypothetical affirmative action case accepts the following as the correct constitutional operative proposition: Racial classifications are unconstitutional unless enacted for an adequate reason. She still needs a decision rule to resolve the case. The court might adopt the preponderance standard with a decision rule like this: Uphold a state law that incorporates a racial classification if you conclude that, more likely than not, the classification was enacted for an adequate reason. But this need not be the decision rule, and a variety of

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31. Berman, *supra* note 18, at 1519. Even metadoctrinal pragmatists, *see infra* note 49, “are not committed to denying the utility of distinguishing between constitutional meaning and judge-crafted doctrinal tests. We need such a distinction to be able to criticize judicial doctrine as based on a misunderstanding of constitutional meaning, and pragmatists need not think such criticisms unintelligible or pointless.” Berman, *supra* note 12, at 224.

32. *See* Berman, *supra* note 18, at 1519.

33. *See* Berman, *supra* note 12, at 228–29.

34. *See* Berman, *supra* note 8, at 61–78 (cataloguing nonstandard decision rules in Due Process Clause doctrine, federal tax-power doctrine, takings doctrine, the enrolled-bill doctrine, the nondelegation doctrine, and constitutional standing doctrine). Instrumental considerations may not be the only non-interpretive influences on the formulation of constitutional doctrine; in some cases, it seems as though structural norms influence doctrine even where they are not the objects of that doctrine—as when federalism considerations shape canons of construction. Understanding how constitutional norms may act as defeasible, rather than decisive, reasons for selecting one doctrinal rule over another is a large and interesting task, but one that is well beyond the scope of this Article.

35. Roosevelt, *supra* note 23, at 1658.

instrumental considerations may make different decision rules preferable.<sup>36</sup>

Perhaps our judge thinks that questions about which justifications are adequate and whether a proffered justification is the “real” one are more easily answered by legislatures than courts. The judge might care about this comparative-institutional-competence issue if she is concerned about the increased risk of adjudicatory error inherent in tackling questions beyond judicial competence,<sup>37</sup> the interbranch friction potentially generated by judicial encroachment into the legislative domain,<sup>38</sup> or both.<sup>39</sup> She also might realize that a judicial inquiry into the purposes of every enactment that classifies people would quickly overwhelm the courts, because a great many laws in a variety of contexts classify people in some way.<sup>40</sup> These concerns suggest a different decision rule that is more deferential to legislative decisions: Conclude that a state law incorporating a racial classification was enacted for an adequate reason unless persuaded that no “conceivable state of facts . . . could provide a rational basis for the classification.”<sup>41</sup> Requiring that the classification be merely rational rather than adequate leaves the question of adequacy to the legislature (assuming, minimally, that irrational bases cannot be adequate); requiring that the basis be merely imaginable rather than the actual basis for the enactment leaves the question of the “real” reason for the classification to the legislature. This is, of course, the familiar rational basis standard of review.<sup>42</sup>

But perhaps our judge thinks that, notwithstanding the weight of the comparative-institutional-capacity considerations, deference to legislative decision making is less justified in specific categories of cases. Certain cases may have common features that diminish the potential for judicial error—for example, if our judge knows “that certain kinds of classification frequently have been used for illegitimate reasons, and seldom for legitimate ones,” as is the case with racial classifications, she may choose a stricter decision rule because it “will invalidate many unconstitutional laws and very few legitimate ones.”<sup>43</sup> The presence of a racial classification, in other words, is a good proxy for a violation of the operative proposition.<sup>44</sup> Our judge may worry that the harm of upholding

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36. See Berman, *supra* note 18, at 1521–22.

37. See Roosevelt, *supra* note 23, at 1659–60; see also *infra* sections III.A, C (discussing comparative-institutional-competence deficits and the attendant enhanced risk of adjudicatory error courts face in dealing with complex economic and foreign-relations questions).

38. See Berman, *supra* note 18, at 1523.

39. See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (analyzing the idea of judicially manageable standards as an output of constitutional adjudication).

40. See Roosevelt, *supra* note 23, at 1663.

41. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); see Berman, *supra* note 18, at 1523.

42. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67 (2001); *Heller v. Doe*, 509 U.S. 312, 320–21 (1993).

43. Roosevelt, *supra* note 23, at 1663–64.

44. See, e.g., *Johnson v. California*, 543 U.S. 499, 505 (2005) (“Racial classifications raise special fears that they are motivated by an invidious purpose.”). The best rationale for strict scrutiny, and its status as a decision rule, is debatable. See Berman, *supra* note 8, at 80–83 & n.253.

some illegitimate race classifications—the inevitable result of a deferential decision rule like rational basis review—outweighs the harm of striking down some race classifications that are actually legitimate according to the best understanding of what outcome the underlying constitutional norm would generate if applied case by case, as likely would occur under a stricter decision rule.<sup>45</sup> These considerations suggest yet a different decision rule: Conclude that a law containing a racial classification is unconstitutional unless you are convinced that it is a “narrowly tailored measure[] that further[s] compelling governmental interests.”<sup>46</sup> This is strict scrutiny.<sup>47</sup> Requiring that the reason for the classification be compelling rather than merely adequate takes the question of adequacy away from the legislature; requiring that the law be narrowly tailored calls on the legislature to demonstrate that its proffered reason is the real reason for enacting the classification. Other instrumental concerns support nonstandard decision rules in other contexts.<sup>48</sup>

There is debate about whether operative propositions are or must be formulated without reference to instrumental considerations.<sup>49</sup> Here, however, I am concerned only with the distinction between judicial statements of constitutional meaning on the one hand and the application of adjudicative rules on the other, regardless of whether both are, ultimately, determined by instrumental considerations.<sup>50</sup> The two-output thesis, understood this way, is widely ac-

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45. See Berman, *supra* note 18, at 1522 (stressing that error costs are an important consideration in formulating decision rules); Roosevelt, *supra* note 23, at 1661–63 (same).

46. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

47. The phrase “strict scrutiny” first appears in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A canonical formulation is in *In re Griffiths*, 413 U.S. 717, 721–22 (1973).

48. For example, concerns about fair representation in the legislative process might commend a nondeferential decision rule. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 9, at 151–53; Roosevelt, *supra* note 23, at 1664–65. Burdensome inquiries into legislative purposes might suggest a rule directing courts to presume the absence or presence of the constitutionally proscribed purpose where certain circumstances (proxies) are present. See Berman, *supra* note 8, at 67; Roosevelt, *supra* note 23, at 1665–66. If others need judicial guidance, then clear, formalistic rules are preferable to multifactored standards. See Berman, *supra* note 18, at 1522; Roosevelt, *supra* note 23, at 1666–67.

49. See Berman, *supra* note 8, at 45, 50 (noting that pragmatists claim that interpretation is never blind to instrumental considerations, such that distinguishing interpretive from functional outputs is valueless); see also, Levinson, *supra* note 10, at 873 (“[C]onstitutional rights are inevitably shaped by, and incorporate, remedial concerns.”); Strauss, *supra* note 10, at 207 (“[I]n deciding constitutional cases, the courts constantly consider institutional capacities . . . .”); Hills, *supra* note 10, at 173 (arguing that the claim that there is a gap between meaning and implementation is misleading but that the distinction is nevertheless useful as an analytical tool). Recognizing the distinction between operative propositions and decision rules, however, requires no commitment to a theory of interpretation that excludes pragmatic concerns as irrelevant. See Berman, *supra* note 8, at 12–15.

50. Against the pragmatists, proponents of the two-output thesis must demonstrate the utility of distinguishing among categories of doctrine even if all doctrine is shaped by instrumental factors. I hope to contribute to that ongoing project here. For efforts in other areas, see generally Berman, *supra* note 8 (applying the two-output thesis to criminal procedure and the Section Five power); Berman, *supra* note 18 (exploring the difference between constitutional meaning and constitutional doctrine as applied to the Commerce Clause); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005) (developing a model for partisan-gerrymandering jurisprudence that separately develops the

cepted.<sup>51</sup> It enhances our capacity to observe and assess the reasons why courts adopt particular doctrines, and that is valuable regardless of the proper weighing of instrumental considerations in constitutional adjudication.

Now, let me offer an observation about the connection between decision rules and operative propositions. Because constitutional decision rules need not resemble the operative propositions that they implement,<sup>52</sup> there is a strategic space in which the decision rule may legitimately be influenced by instrumental concerns.<sup>53</sup> This often results in rules that prohibit more or less conduct than actually is prohibited by the underlying constitutional operative propositions or the “correct” constitutional norm in principle—that is, if the operative proposition or norm could be applied in an unmediated fashion case by case. Thus, this strategic space between norm and rule makes judicial overenforcement and underenforcement of constitutional norms possible.<sup>54</sup>

Return to the affirmative action example. Assume now that the challenged state statute institutes a system of race-based preferences in the admissions process at state-funded colleges<sup>55</sup> and that the state legislature defends the program as a remedy for the lingering harms of past racial discrimination in state public institutions generally.<sup>56</sup> If the judge adopts the rational basis decision rule, the statute will survive: a desire to remedy harms caused by past detrimental discrimination is a rational basis for the legislation, and the decision rule requires no more.<sup>57</sup> Unless we have reason to doubt the legislature’s sincerity, the statute also satisfies the constitutional operative proposition—racial classifications in law lacking an adequate justification are prohibited—on a common-sense understanding of “adequate” as rational and sincerely held. But if the legislature were not sincere, our decision rule might validate a statute that violates the operative proposition. Now tweak the hypothetical: A state university refuses to install the necessary equipment to make its classrooms

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operative constitutional principle and the appropriate doctrinal approach); Roosevelt, *supra* note 23 (analyzing the decision rules applied to criminal procedure, the Commerce Clause, the Equal Protection Clause, the Section Five power, and the Free Exercise Clause); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983 (2006) (developing the operative-proposition–decision-rule distinction in the due process context).

51. See Berman, *supra* note 12, at 221.

52. See *supra* notes 34–35 and accompanying text; cf. Berman, *supra* note 8, at 12 (noting that the variety of decision rules available “is limited only by judicial imagination”).

53. See Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 962–63, 976 (1985).

54. See generally Monaghan, *supra* note 10 (describing “a constitutional common law” that the Court enforces beyond what is required by the Constitution); Sager, *supra* note 10 (exploring situations in which the Court has underenforced constitutional provisions due to institutional concerns).

55. Envision a system like the Michigan law-school-admissions policy at issue in *Grutter v. Bollinger*, 539 U.S. 306, 312–16 (2003), although that was a university policy rather than a government program.

56. This is one of the arguments advanced in support of the University of California affirmative action program at issue in *Bakke* and the Richmond minority-contractor-preference program at issue in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989).

57. See *supra* notes 41–42 and accompanying text.

accessible to disabled people, citing prohibitive cost. Disability is not a suspect class in current equal protection doctrine; thus, discrimination against the disabled draws only rational basis review.<sup>58</sup> If the university actually acted solely out of animus, it violates the operative proposition because animus is the quintessential *inadequate* reason for discrimination. But the action would survive rational basis review, which does not ask after the real reasons. This is underenforcement—the use of a decision rule that results in upholding actions that in fact violate the operative proposition.<sup>59</sup> Rational basis review represents an extreme; it is so deferential that it “predictably upholds violations but strikes down almost no valid acts.”<sup>60</sup>

If the judge in our hypothetical affirmative action case instead adopts strict scrutiny as the decision rule, the outcome may change. While remedying the negative effects of past discrimination has been recognized as a compelling state interest, narrow tailoring, under current doctrine, requires evidence that the legislature observed and intended to remedy lingering discriminatory impacts within the particular institution affected by the remedial measure.<sup>61</sup> A recognition that past racism has a lingering negative effect in society at large, or even in state institutions at large, will not suffice; thus, the state law likely would be invalidated. It would be invalidated even though an honest legislative intention to remedy the harms of past discrimination might be an adequate reason for enacting a racial classification in law, on a straightforward understanding of “adequate.” This is overenforcement—the use of a constitutional decision rule that invalidates more laws than actually violate the operative proposition. Again, strict scrutiny is an extreme example; it “predictably strikes down valid laws but upholds almost no violations.”<sup>62</sup>

Underenforcement emphasizes that courts are not the sole forums in which constitutional obligations are enforced. Where judicial decision rules underenforce constitutional operative propositions, Congress, state governments, and other actors still must comply with the full scope of their constitutional obligations.<sup>63</sup> If state legislators know that any conceivable rational basis will vindicate their discriminatory statute in court, they are nevertheless constitutionally obligated to pass the statute only if they believe it discriminates for an adequate

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58. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366–67 (2001); *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

59. See Sager, *supra* note 10, at 1214–16; see also Berman, *supra* note 8, at 35–36 & n.125 (reviewing the scholarship on underenforcement); James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 *FORDHAM L. REV.* 1377, 1379 (2005) (discussing the import of judicial underenforcement for popular constitutionalism); Roosevelt, *supra* note 23, at 1661 (presenting underenforcement as an example of judicial attempts to minimize the cost of error).

60. Roosevelt, *supra* note 23, at 1661.

61. See, e.g., *Croson*, 488 U.S. at 498–99; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).

62. Roosevelt, *supra* note 23, at 1661.

63. See Sager, *supra* note 10, at 1221.

reason.<sup>64</sup> This idea is familiar, relatively uncontroversial, and thoroughly treated elsewhere.<sup>65</sup>

Overenforcement, by contrast, highlights a problem of the legitimacy of decision rules. How, after all, can it be legitimate for a court to invalidate legislation that does not actually violate the Constitution but only violates the decision rule the court has, for instrumental reasons, derived to implement the Constitution?<sup>66</sup> While the present task requires only that we hypothesize a set of dormancy decision rules and assess how well they fit the cases regardless of their legitimacy, an aspect of the account of decision rules' legitimacy is worth mentioning here. Broad claims that courts cannot legitimately craft decision rules or that they cannot craft decision rules that are nonidentical to the preponderance standard cannot be right: Epistemic uncertainty requires some decision rules, and even if the concern to minimize adjudicatory errors is the only legitimate reason for formulating a decision rule, the preponderance standard will not always be the most-error-minimizing rule.<sup>67</sup> The legitimacy of decision rules turns on the reasons for adopting them. Even if courts only consider how best to minimize adjudicatory errors, the best strategy will vary with the operative proposition to be implemented and with the surrounding circumstances. Distinguishing operative propositions from decision rules and assessing the instrumental reasons supporting particular decision rules thus clarifies the grounds for disagreement about the legitimacy of judicial doctrine. Overenforcement by application of strict scrutiny to race classifications across the board may be justified, for example, by a legitimate distrust of professedly benign legislative purposes, by a desire for doctrinal uniformity, or by other reasons. It may be wholly unjustified.<sup>68</sup> But the point is that strict scrutiny's propriety as applied to affirmative action is a question about the legitimacy of a decision rule. The answer involves not constitutional meaning but the instrumental concerns as they cash out under the relevant circumstances.

We will see that both the distinction between constitutional operative proposi-

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64. This is not to say that legislators necessarily are obligated to comply only with their own interpretive conclusions about what the Constitution requires. Instead, they may be obligated to comply with current judicially derived operative propositions. One's position here depends on one's view of judicial supremacy. See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27–30 (1988) (comparing position that constitutional interpretation is nonhierarchical with position that “the Supreme Court is the dispenser of ultimate interpretation”); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing that the courts should not have the final word on what the Constitution means); Berman, *supra* note 8, at 85–88 & nn.263–72 (describing limits of judicial supremacy in terms of the operative-proposition–decision-rule distinction); Fleming, *supra* note 59, at 1378–80 (describing five sorts of popular constitutionalism with varying commitments to judicial supremacy); Garrick B. Pursley, *Preemption in Congress*, 71 *OHIO ST. L.J.* 511 (2010) (proposing that an understanding of the constitutionality of preemption should come from congressional views rather than judicial interpretation).

65. See Berman, *supra* note 8, at 87–88; Sager, *supra* note 10, at 1221–27.

66. See Berman, *supra* note 8, at 88–92.

67. See *id.* at 93.

68. For example, the operative-proposition–decision-rule distinction enables Professor Roosevelt's novel critique of current equal protection doctrine. See Roosevelt, *supra* note 23, at 1700–07.

tions and decision rules and the relationship between them are important to the project of uncovering the general concept of constitutional dormancy that grounds the various dormancy doctrines. I begin that project in the next Part.

## II. THE STATE PRECLUSION THESIS

As a matter of basic constitutional architecture, the notion of dormancy should be familiar. Two principal functions of the Constitution are to structure the government<sup>69</sup> and to entrench that structure against easy change.<sup>70</sup> To carry out its structuring function, the Constitution allocates powers among the branches of the federal government and between the federal and state governments and precludes those governments or their component branches from taking certain actions, through the mechanisms of enumeration, implication, and reservation. Powers are expressly delegated to the federal government through enumeration.<sup>71</sup> Additional powers—paradigmatically those necessary and proper to the execution of enumerated powers—are impliedly delegated to the federal government by the express power enumerations and the modest premise that powers are delegated so that they may be effectively exercised.<sup>72</sup> The Constitution also expressly precludes certain federal or state government actions—for example, the national government is expressly precluded from issuing bills of attainder, passing *ex post facto* laws, and granting titles of nobility, among other things;<sup>73</sup> the state governments are expressly precluded from entering into treaties, coining money, and laying imposts, among other things.<sup>74</sup> So, too, there may be implied preclusions of federal or state government action—a paradigmatic example here is the implied separation of powers norm that precludes any branch of the national government from exercising power constitutionally vested in another.<sup>75</sup> These and other government actions that interfere with the

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69. See Frank I. Michelman, *Constitutional Authorship*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64, 65 (Larry Alexander ed., 1998); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra*, at 152, 153–54; Young, *Constitution*, *supra* note 9, at 415–16.

70. See Michael J. Perry, *What Is “the Constitution”?* (and Other Fundamental Questions), in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, *supra* note 69, at 99, 103.

71. *E.g.*, U.S. CONST. art. I, § 8.

72. This idea is thought to be redundantly expressed in the Necessary and Proper Clause. See U.S. CONST. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (noting that the Constitution grants Congress “discretion, with respect to the means by which the powers it confers are to be carried into execution”).

73. U.S. CONST. art. I, § 9, cls. 3, 8.

74. U.S. CONST. art. I, § 10, cls. 1, 2.

75. See *INS v. Chadha*, 462 U.S. 919, 945–46 (1983); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). Specific doctrines also implement this implied preclusion: the nondelegation doctrine prohibits executive or judicial exercises of legislative power, *see, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 380–84 (1989); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935), the finality doctrine precludes congressional exercise of judicial power, *see, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 223–26 (1995), and the unitary-executive doctrine precludes congressional interference with the executive power, *see, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 693–96 (1988); *Bowsher v. Synar*, 478 U.S. 714, 721–27 (1986).

constitutional structure are impliedly precluded by the operation of the Constitution's government-structuring provisions and the modest premise that the structure established by those provisions should be durable.<sup>76</sup>

Enumerated and implied constitutional delegations of power to the national government—call these delegated powers—may be exclusive or nonexclusive. Nonexclusive powers are delegated to the national government but are not simultaneously denied to state or local governments—the different levels of government may exercise these powers concurrently.<sup>77</sup> Exclusive powers, as the name implies, are delegated exclusively to the national government and thus are denied to state and local governments. Reservation is the mechanism by which the Constitution preserves powers of subnational governments that are neither expressly nor impliedly precluded nor delegated exclusively to the national government. This is reflected in the “truism” of the Tenth Amendment.<sup>78</sup> The text makes reservation relative to enumeration and implication. The domain of reservation is defined simply as “[all] powers not delegated to the [national government]”;<sup>79</sup> ascertaining what is reserved requires careful inquiry into both what national powers are granted by enumeration—what the Constitution's power-enumerating provisions mean—and what additional national powers are delegated by implication.<sup>80</sup> As I have said, the structure of government established by the Constitution—the allocations of power and preclusions of action established by enumeration, implication, and reservation—is meant to be durable. Textual evidence for this point is Article V, which requires notoriously difficult action outside the normal processes of governance to change the Constitution.<sup>81</sup> This is not to deny that there may be mechanisms of constitutional change other than the Article V process—many scholars believe that informal constitutional changes may and have occurred.<sup>82</sup> I doubt, though, that

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76. See *McCulloch*, 17 U.S. (4 Wheat.) at 415 (noting that the structure of government “is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs”).

77. That is so only if there are not other constitutional obstacles external to the grant, such as the specific restrictions on national and state action in Articles I and IV, the restrictions in the Bill of Rights, and the Supremacy Clause requirement that state laws must yield when they conflict with federal law.

78. U.S. CONST. amend. X; see *United States v. Darby*, 312 U.S. 100, 124 (1941) (observing that the Tenth Amendment “states but a truism that all is retained which has not been surrendered”).

79. U.S. CONST. amend. X.

80. See, e.g., *New York v. United States*, 505 U.S. 144, 156 (1992) (“If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”).

81. U.S. CONST. art. V. Professor Levinson, for example, bemoans the “functional impossibility of amending the Constitution with regard to anything truly significant.” See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 20, 165, 167 (2006).

82. For a sample of the vast literature on informal constitutional change, see generally ACKERMAN, *supra* note 9 (discussing informal constitutional change in terms of “constitutional moments”); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (discussing Reconstruction and the New Deal Era as periods of transformative constitutional change); NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC*

they would say any mechanism of constitutional change is easy—that is, that informal constitutional change requires equal or less effort than passing an ordinary statute.<sup>83</sup> And the only point here is that, for the sake of systemic durability, changing the constitutional structure is and should be hard.

#### A. STRUCTURAL INFERENCES

These characteristics of the way that the Constitution structures the government permit some modest inferences. Focus for a moment on exclusive delegations of national power. If exclusivity means anything at all, it must mean that state and local governments are constitutionally precluded from exercising powers exclusively delegated to the federal government even when the national government is not exercising the power itself. The exclusivity of a national power would seem to entail two preclusions of state action. First, logically, state governments cannot actually exercise an exclusively federal power.<sup>84</sup> Second, if we assume with Justice Marshall that “the powers given to the government imply the ordinary means of execution”<sup>85</sup>—that is, that the constitutional structure has the modest purpose of facilitating the effective exercise of the powers of government on the terms in which they are conferred—we may infer an implied preclusion of state actions that undermine the national government’s ability to exercise such a power exclusively, even if the state action does not purport to be a direct exercise of the exclusively national power. Think here of a state law, enacted under police power, that provides financial incentives for private counterfeiters. Though not straightforwardly an exercise of Congress’s coinage power, the law surely interferes with Congress’s ability to coin money exclusively and should be impliedly precluded.<sup>86</sup>

These observations give us an implied constitutional preclusion of state action that we might formulate as an Exclusivity Thesis (ET):

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CONSTITUTION (2004) (arguing that constitutional law is and should be shaped by both judicial forces and the larger political culture of elected officials and citizens); ESKRIDGE & FEREJOHN, *supra* note 9 (arguing that statutes, executive orders, and agency rules can give rise to norms that have more power over private actors than formal constitutional norms); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) (discussing the effect of politics on constitutional meaning); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (arguing that a confluence of events, including a controversial presidential election and several conservative judicial decisions, has led to “constitutional revolution”); Young, *Constitution*, *supra* note 9 (discussing noncanonical constitutional order and the opportunity it presents for informal constitutional change).

83. Informal constitutional change in this literature means more than “living constitutionalism.” In this context, “change” means a major shift in government structure or rights, exemplified by the *Brown* decision or the growth of the administrative state after the New Deal. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See generally Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 DRAKE L. REV. 925, 934–37 (2007) (canvassing this literature).

84. On the problem with thinking in terms of “powers,” see *infra* notes 90–112 and accompanying text.

85. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819).

86. See U.S. CONST. art. I, § 8, cl. 5 (coinage power); *id.* § 10, cl. 1 (state coinage preclusion).

Where a state government purports to exercise a power exclusively delegated to the national government, or takes action that otherwise undermines the exclusivity of that delegation, the state acts unconstitutionally in virtue of the exclusivity of the delegation of power to the national government.

Some view dormancy doctrines as implementing versions of something like ET that are specific to particular federal powers.<sup>87</sup> Accordingly, we should pause for a moment to examine the most plausible formulation of this exclusivity idea as a possible constitutional basis for dormancy doctrines, before considering what I will argue is the better explanatory account.

While it seems fairly inferred, ET as presently formulated is not a useful constitutional operative proposition. We have little textual guidance, beyond the specific provisions disempowering the states, as to which national powers are exclusive or how to go about distinguishing them from those that are nonexclusive. We can reject the idea that all enumerated national powers are exclusive—if that were the case, there would be no need for the language of the Supremacy Clause ensuring that federal statutes trump conflicting state laws.<sup>88</sup> Perhaps we can distill something more manageable from Supreme Court pronouncements. In 1819, Justice Marshall wrote for the Court that

it has never been supposed, that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. . . . Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it.<sup>89</sup>

We can express this as a refined Exclusivity Thesis (ET2):

Where a state government purports to take action on a matter subject to a power that is delegated to the national government and that it is necessary for the national government to exercise exclusively, the state government's actions are unconstitutional in virtue of the exclusivity of the delegation of that power to the national government.

ET2 also seems to be a plausible implied preclusion of state action. Nevertheless, it is problematic as a constitutional operative proposition. A court designing decision rules to implement ET2 will have to deal with difficult interpretive questions about the scope of national exclusivity, the matters fairly character-

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87. See, e.g., Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 975–76 (2004); Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1262 (2001).

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

89. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

ized as subject to exclusive national power, and so forth.

This cannot be the Constitution's only implied preclusion of state action. There are two problems with thinking that it is. First, there is what we might call a "power-matching problem" that complicates any attempt to analyze the permissibility of state action by reference to national powers.<sup>90</sup> A court should not attempt to implement ET2 with decision rules that make permissibility dependent upon the nature of the power the state exercised in taking the challenged action. To be sure, the Constitution precludes states from, say, exercising the exclusive portion of Congress's power to regulate interstate commerce—the preclusion is so obvious that no rational state government would openly claim to be doing that.<sup>91</sup> State governments' affirmative powers are rarely mentioned, much less clearly enumerated, in the Constitution.<sup>92</sup> The provisions that implicate state power, including the examples just discussed, do so indirectly by precluding certain kinds of state *actions*.<sup>93</sup> States, according to the Tenth Amendment, possess a mass of undifferentiated reserved power—often called police power—that authorizes all different sorts of actions.<sup>94</sup> This means that it seldom will be clear that state action constitutes an impermissible exercise of a power the Constitution confers on the national government exclusively. More often, state actions will be taken under this blanket police power.

The aggregate way in which state power is addressed in the Constitution makes it difficult for courts to hold particular state actions invalid on the ground that the Constitution denies states the *power* to take the action. It simply is not clear what particular *powers* the Constitution grants or denies the states. This problem is what doomed the Court's pre-New Deal approach to vertical power-allocation questions—the attempt to define and separate distinct "spheres" of national and state power<sup>95</sup>—and it would beset, in principle, most doctrines utilizing "labels keyed to tangential attributes of state action . . . such as form (e.g., taxes vs. safety standards), the regulated field (social vs. economic, civil

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90. I am grateful to Mitch Berman for this point.

91. See *supra* notes 84–86 and accompanying text.

92. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 508–10 (2008) (noting the Constitution's "spare" discussion of affirmative state-government power).

93. See *infra* notes 139–55 and accompanying text.

94. See U.S. CONST. amend. X; see also *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring in the judgment) (discussing the "basic principle that the powers reserved to the States consist of the whole, *undefined residuum* of power remaining after taking account of powers granted to the National Government" and the idea that "the powers reserved to the States are *so broad that they remain undefined*" (emphases added)); Erbsen, *supra* note 92, at 509 ("The Constitution . . . confirms that states in the aggregate possess a bundle of powers—such as police power, taxing power, and adjudicative power . . .").

95. See Young, *supra* note 16, at 1781–82, 1786; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 104–06 (2004).

vs. criminal, tort vs. contract, etc.), . . . identity of the regulator,” and so on.<sup>96</sup> Avoiding this problem is the reason why I have been talking about constitutional preclusion of state “actions” and not “powers.”<sup>97</sup>

The power-matching problem may be avoided by focusing on state actions that interfere with the ability of the national government to exercise its exclusive national powers *effectively*. Assume that we could identify with specificity those national powers that the Constitution makes exclusive. While it is not yet clear how state actions might interfere with the exclusivity of national powers, or how much interference renders an action unconstitutional, the form of inquiry is familiar and does not require any identification, or invalidation, of state powers. But a second problem with ET and ET2 is that their premises are too narrow. We derived ET and ET2 by observing, first, that some constitutional delegations of power to the national government are exclusive and, second, that we should assume that the government structure established by the Constitution—its delegations and reservations of government power and preclusions of government action—is to be durable through time and changing circumstances. One way that state governments may contravene the durability of the constitutional structure is by interfering with exclusively national powers. Call this vertical interference—states interfere “upward” with the national part of the constitutional structure.<sup>98</sup> The national government may interfere vertically, too, if it undermines states’ functionality as governments. The Constitution clearly contemplates that the state governments will continue to exist and function; states are part of the structure that is supposed to endure.<sup>99</sup> Thus, the national government may interfere vertically by interfering with authority constitutionally reserved to state governments.<sup>100</sup> The Supreme Court has repeatedly emphasized the proposition that the Constitution impliedly precludes such interference by the national government.<sup>101</sup>

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96. Erbsen, *supra* note 92, at 513. Professor Erbsen explains that “[t]hese factors can obscure connections between types of state action that raise similar theoretical problems but transcend formal boundaries.” *Id.*

97. *See supra* text accompanying notes 90–93.

98. *See infra* notes 200–04 and accompanying text.

99. Excluding the amendments, the Constitution mentions state governments in fifty-seven provisions. *See, e.g.*, U.S. CONST. art. I, § 2, cls. 1–4; *id.* art. I, § 3, cls. 2–3; *id.* art. I, § 4, cl. 1; *id.* art. I, § 8, cls. 3, 16–17; *id.* art. I, § 9, cls. 1, 5–6; *id.* art. I, § 10, cls. 1–3; *id.* art. II, § 1, cls. 2–3; *id.* art. II, § 2, cl. 1; *id.* art. III, § 2, cls. 1–3; *id.* art. IV, § 1; *id.* art. IV, § 2 cls. 1–3; *id.* art. IV, § 3, cls. 1–2; *id.* art. IV, § 4; *id.* art. VI, cls. 2–3.

100. *See id.* amend. X; *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710, 2720 (2009) (analyzing the extent of the National Bank Act’s “incursion . . . upon traditional state powers”); *Printz v. United States*, 521 U.S. 898, 936 (1997) (O’Connor, J., concurring) (noting that laws “directly compel[ling] state officials to administer a federal regulatory program[] utterly fail to adhere to the design and structure of our constitutional scheme”).

101. *See Manning, supra* note 3, at 2020–36; *see also Alden v. Maine*, 527 U.S. 706, 730–31 (1999) (holding that Congress, with narrow exceptions, is precluded from authorizing suits for damages against state governments in state court); *Printz*, 521 U.S. at 925–28 (holding that Congress cannot commandeer state governments); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down the Gun-Free School Zones Act as beyond the Commerce Clause power); *New York v. United States*, 505

There may be horizontal interference with the constitutional structure as well. The Constitution establishes a federal structure of government: It enumerates national powers and reserves the undifferentiated mass of police power to all states equally.<sup>102</sup> Any state action that interferes with another state's ability to exercise the police power, for example, interferes with the constitutional structure and may be impliedly precluded.<sup>103</sup> Put differently, the fact that the Constitution establishes a government comprised of multiple coequal states plus the modest assumption about the structure's intended durability permits the inference of some constitutional "limits on state authority that flow from the multi-state structure of the Union."<sup>104</sup> Many of the dormancy doctrines are designed to preclude just this sort of state-against-state interference.

Judicial recognition of implied preclusions of state action that horizontally interferes with the constitutional structure seems analogous to the national-level separation of powers doctrines that preclude national government institutions from interfering horizontally with each other.<sup>105</sup> The Constitution expressly vests the national government's legislative, executive, and judicial powers in Congress, the Executive, and the Judiciary respectively;<sup>106</sup> assuming these investitures are partially exclusive and, again, that the constitutional structure should be durable, courts have inferred the general operative proposition that no branch of the national government may fully assume, or overly interfere with, the essential functions of another.<sup>107</sup> The proposition may be formulated as one that addresses the kinds of *powers* that the national branches may legitimately exercise; one way a branch might violate it on this formulation is by exercising the *powers* of another. Administrative courts may be illegitimate congressional attempts to exercise the judicial power;<sup>108</sup> federal statutes that place administra-

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U.S. 144, 162 (1992) (stating that the Constitution does not authorize Congress "to require the States to govern according to Congress' instructions"); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (holding that a clear statement of congressional intent is required to "alter the 'usual constitutional balance between the States and the Federal Government'" (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989))).

102. *See* *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (holding that the Constitution places the states on "equal footing" and makes them "equal in power, dignity, and authority"); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

103. *Cf.* *Erbsen*, *supra* note 92 (discussing "horizontal federalism" problems).

104. *Id.* at 503.

105. *See supra* note 75.

106. U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1.

107. *See, e.g., INS v. Chadha*, 462 U.S. 919, 962-63 (1983) (Powell, J., concurring in the judgment) ("[W]here one branch has impaired or sought to assume a power central to another branch, the Court has not hesitated to enforce the [preclusive separation of powers] doctrine."); *cf. Buckley v. Valeo*, 424 U.S. 1, 120-21 (1976) ("The [Framers] . . . viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity").

108. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (discussing a separation of powers challenge to legislative courts); *Crowell v. Benson*, 285 U.S. 22 (1932) (same).

tive officials under congressional control may be illegitimate attempts by Congress to usurp the executive power, and so forth.<sup>109</sup> A power-focused formulation of the separation-of-powers operative proposition also raises a power-matching problem.<sup>110</sup> To avoid it, courts accept a formulation of the separation-of-powers preclusion that centers not on powers but on *actions* and *functions*.<sup>111</sup> The nondelegation doctrine barring executive agencies from undertaking basic legislative functions, the rule barring executive or congressional reopening of judicial judgments, and unitary-executive doctrines, for example, may be characterized as subsidiary decision rules implementing this basic preclusion.<sup>112</sup> These may be derived by inference from the basic separation-of-powers proposition, additional textual provisions and, among other considerations, the intended durability of the structure.

#### B. GENERALIZING IMPLIED PRECLUSIONS

Does the Constitution permit us to infer a *general* implied preclusion of all these categories of government action that interfere, vertically and horizontally, with the constitutional structure?<sup>113</sup> If a general preclusion is fairly inferred from the Constitution, then it would provide a unifying account on which we might characterize a variety of doctrines as decision rules implementing that basic implied preclusion. But the idea seems, at first blush, too clever by half. We must make inferences based solely on the constitutional text and the most uncontestable additional assumptions.

The examples I've discussed suggest that courts do accept implied constitutional preclusions of both national and state government actions that undermine the constitutional structure. We've seen preclusion of both vertical and horizontal interference by the national government, which we might combine into a National Preclusion Thesis (NPT):

Where a national government institution takes an action that would undermine the constitutional structure of government if permitted, it acts unconstitutionally in virtue of the Constitution's general preclusion of national government action that undermines the constitutional structure.

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109. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986) (involving a separation of powers challenge to congressional control of executive officials).

110. *See supra* notes 90–97 and accompanying text.

111. *Compare, e.g.*, *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment) (explaining that the separation of powers preclusion is violated in principle “where one branch has impaired or sought to assume *a power* central to another branch” (emphasis added)), *with id.* at 963 (“*Functionally*, the doctrine may be violated in two ways. One branch may interfere impermissibly with the other’s performance of its constitutionally assigned *function*. Alternatively, the doctrine may be violated when one branch assumes a *function* that more properly is entrusted to another.” (emphases added) (citations omitted)).

112. *See supra* note 75 and accompanying text.

113. I want to make only modest inferences. A single, abstract preclusion seems a more modest inference than several substance-specific preclusions. *See infra* notes 172–80 and accompanying text.

It seems reasonable to think that our courts accept NPT as a constitutional operative proposition. But if that is contested, it is fair to respond that assuming that courts accept NPT is promising for the task of explaining constitutional doctrine: The various federalism and separation-of-powers doctrines precluding national action seem readily characterized as decision rules implementing NPT. The only differences between an NPT-based account and a more conventional account of the separation of powers doctrines are the abstractness of the operative proposition and the fact that the specific rules are based on the same implied operative proposition in all cases rather than on several different, narrower operative propositions, some inferred and some derived by (often strained) interpretation of textual provisions like the vesting clauses. I address the value of theorizing doctrine with a more abstract, encompassing operative proposition as the starting point in section D, below.

There appears to be no reason to think that the constitutional preclusion of *state* government action that undermines the constitutional structure should be any laxer. The premises are the same regardless of which level of government's actions are at issue: The Constitution contains provisions that establish a governmental structure, and that structure should be durable. These premises are *general*—they support the inference that no part of the constitutionally structured government should be permitted to undermine the structure (except through the formal Article V amendment process). And there is no evidence that state governments were or should be considered, in principle, less *capable* of undermining the constitutional structure than the national government such that inferring a lesser preclusion of state action would be sensible. Indeed, in the time leading up to the 1787 Convention, state governments were (and were perceived to be) significantly more powerful than the national government.<sup>114</sup> Though the Constitution strengthened the central government, Madison maintained after ratification that “the balance is much more likely to be disturbed by the preponderancy of the [state governments] than of the [national government].”<sup>115</sup> The balance of power has continued to shift in favor of the national government over time, to be sure, but state governments retain significant power today.<sup>116</sup> Thus, even if a different degree of structural dangerousness could

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114. This was a principal motivation for strengthening the national government. Madison argued that the Constitution should enable national suppression of the states' proclivity “to harass each other with rival and spiteful measures dictated by mistaken views of interest.” Letter from James Madison to George Washington (Apr. 16, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 250, 250 (Philip B. Kurland & Ralph Lerner eds., 1987); *see* Young, *supra* note 16, at 1777, 1788 (collecting historical evidence); *see also* THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).

115. THE FEDERALIST NO. 45, *supra* note 114.

116. *See* Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265–71 (2009) (arguing that even where state autonomy is constricted by preemption and federal takeover of regulatory subject areas, states retain a muscular form of voice with which they wield “the power of the servant” in the increasingly integrated system of joint, interactive federal–state regulation); Young, *supra* note 16, at 1789–95.

justify inferring an implied constitutional preclusion of state government action different from the one applicable to national action, the evidence does not support the factual premise—any difference in the risk of interference with the constitutional structure posed by the national and state governments seems negligible. And we have examples of both vertical and horizontal interference by state governments.

Indeed, what is striking about this brief survey of implied constitutional preclusions is their symmetry—each preclusion of national action seems to have a counterpart at the state level and vice versa. This suggests that we might further generalize the constitutional operative proposition as a General Preclusion Thesis (GPT):

Where a governmental institution takes an action that would undermine the constitutional structure of government if permitted, it acts unconstitutionally in virtue of the Constitution's general preclusion of any government action that undermines the constitutional structure.

Stated this way, the operative proposition seems so obviously part of our constitutional practice that I doubt many would deny it. And GPT entails the state-level counterpart of NPT, the State Preclusion Thesis (SPT), which I defend here as a single norm that may unify the seemingly disparate dormancy doctrines:

Where a *state* government takes an action that would undermine the constitutional structure of government if permitted, the state government's action is unconstitutional in virtue of the Constitution's general preclusion of any government action that undermines the constitutional structure.

Justice Marshall's famous opinion in *McCulloch v. Maryland*<sup>117</sup> suggests that courts have accepted something like these preclusion theses almost since the founding era. The state-action question from *McCulloch* is familiar: Maryland tried to tax a national bank branch.<sup>118</sup> Marshall conceded that states retained the general power to tax but observed that the Constitution expressly precludes some state exercises of that power, such as the imposition of import or export duties.<sup>119</sup> In other words, state governments' retention of a power under the Constitution does not mean that a state may permissibly take every conceivable action fairly characterized as an exercise of the power. From this idea, Marshall reasoned that additional, implied constitutional preclusions of state action may exist (and came close to announcing SPT outright):

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117. 17 U.S. (4 Wheat.) 316 (1819).

118. *Id.* at 317–18.

119. *Id.* at 425.

[T]he same paramount character [of the Constitution] would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union

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That the power of taxing [the national bank] by the States may be exercised so as to destroy it, is too obvious to be denied[.]<sup>120</sup>

and the Court had already held that the national government could permissibly create a national bank.<sup>121</sup> Thus, the state tax was “incompatible with, and repugnant to,” the constitutional structure<sup>122</sup>—it would have allowed Maryland, in essence, to impede (even, to adopt Marshall’s mild hyperbole, to “control” or “destroy”)<sup>123</sup> the functioning of an important instrumentality of the national government.

Importantly, Marshall also highlighted the horizontal interference wrought by Maryland’s action:

Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests?<sup>124</sup>

Thus, although there is no express preclusion of state taxation of national banks in the constitutional text, the Court held that the tax was precluded by implication because the tax interfered with the constitutional structure. The holding, that the Maryland tax was constitutionally precluded *ex ante*, seems to straightforwardly implement something like SPT.<sup>125</sup>

The State Preclusion Thesis nicely captures the concept of dormancy: State governments may not take certain actions even when affirmative constitutional delegations of power go unexercised by the national government—that is, when the national government lies dormant—insofar as they undermine the constitu-

120. *Id.* at 425–27.

121. *Id.* at 406–25.

122. *Id.* at 425.

123. *Id.* at 426.

124. *Id.* at 431; *see also* Erbsen, *supra* note 92, at 527–28 (characterizing, as one form of horizontal interference with federalism, “overreaching” as “efforts to extend the effective reach of state authority beyond a state’s borders”).

125. *McCulloch*, 17 U.S. (4 Wheat.) at 430 (“We find . . . a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. *The right never existed, and the question whether it has been surrendered, cannot arise.*” (emphases added)).

tional structure. Dormancy, then, is simply shorthand for the straightforward idea that the Constitution invalidates, *ex ante*, certain state government actions. The State Preclusion Thesis is formulated to encompass within the scope of its preclusion both the vertical interference captured by ET and ET2 and the horizontal interference that makes ET and ET2 too narrow.<sup>126</sup> I will argue that the dormancy doctrines may be explained as decision rules that implement SPT with varying degrees of stringency based on some combination of the kinds of instrumental reasons relevant to the formulation of constitutional decision rules. In the next two sections, I demonstrate the plausibility of the hypothesis that courts accept SPT by arguing that SPT itself is plausible as a constitutional operative proposition for several reasons and by explaining why positing abstract constitutional norms like SPT is a promising approach for explaining doctrine.

### C. THE PROVISIONAL CASE FOR THE STATE PRECLUSION THESIS

The State Preclusion Thesis does not strike me as controversial. But my purpose here requires only that SPT be plausible enough to support the hypothesis that courts might accept it as an operative proposition; thus, I need not—and will not attempt to—establish beyond peradventure that it is, indeed, a constitutional norm in our system. I intend only to establish that it plausibly could be such a norm. A variety of arguments support that conclusion. Perhaps most obviously, the exclusivity of some national government powers seems logically entailed—for example, the power to enact national legislation seems by definition to exclude state governments from its exercise. Any state action amounting to an attempt to exercise an exclusively national power is, of course, vertical interference with the constitutional structure. Thus, the Exclusivity Thesis describes an uncontroversial subset of the larger category of state actions precluded by SPT.

The notions of exclusive national power and preclusion of state power are not textually foreign, either: as I noted above, the Constitution makes explicit the exclusivity of some delegations of national power and some preclusions of state action. For example, the powers to coin money and grant letters of marque and reprisal are expressly conferred on Congress and are expressly denied to state governments.<sup>127</sup> So, too, the Constitution expressly confers on the President and the Senate the power to enter into treaties and precludes state governments from doing so.<sup>128</sup> The powers to engage in wars and to enact imposts or duties on exports are expressly granted to Congress and expressly forbidden to state governments absent congressional consent or exigent circumstances and, thus, are contingently exclusive by clear textual mandate.<sup>129</sup>

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126. *See supra* notes 87–94 and accompanying text.

127. U.S. CONST. art. I, § 8, cls. 5, 11; *id.* § 10, cl. 1.

128. *Id.* art. I, § 10, cl. 1; *id.* art. II, § 2, cl. 2.

129. *Id.* art. I, § 8, cls. 1, 11; *id.* § 10, cls. 2–3.

Some enumerated delegations of power to the national government are exclusive in their terms, despite the absence of a provision removing the power from the states—Congress’s powers to make exceptions to Supreme Court jurisdiction, to establish lower federal courts, and to punish treason all seem exclusive on a straightforward reading because the text specifies Congress alone.<sup>130</sup> But the Constitution’s preclusions of state action do more than prohibit states from exercising powers delegated to the national government. There are also stand-alone prohibitions in Article IV, for example, the provision that state governments may not hold fleeing criminals notwithstanding the charging state’s demand for their return.<sup>131</sup> The Reconstruction Amendments are additional stand-alone prohibitions on state-government action.<sup>132</sup>

The Tenth Amendment also may support the existence of implicit constitutional preclusions of state action in addition to the explicit ones. It reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>133</sup> First, this language suggests that more national-government powers are exclusive than those expressly made exclusive in the ways just discussed. If exclusivity were limited to grants with a concurrent clause removing the power from the states, the Tenth Amendment would be both redundant and overbroad. Worse, if there is in fact no distinction between constitutional delegation of power to the national government and retention of power by states—that is, if all delegated national powers not expressly stripped from the states were, in fact, reserved to the states as concurrent with those of the national government—the language of the Tenth Amendment would be incoherent. There would be nothing “delegated” but not “reserved”—all delegated powers would be concurrently exercisable by state governments. This runs counter to both the familiar canon that we ought not to interpret parts of the constitutional text in a way that makes other parts unintelligible if we can avoid it<sup>134</sup> and the Supreme Court’s own, more natural reading of the Tenth Amendment, which supports the inference of a broader set of exclusively delegated national powers:

In . . . case[s] . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.<sup>135</sup>

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130. *See id.* art. III, § 1; *id.* § 3, cl. 2.

131. *Id.* art. IV, § 2, cl. 2.

132. *See, e.g., id.* amend. XIV, § 1.

133. *Id.* amend. X.

134. *See* Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 682–83 (1999) (discussing this interpretive canon).

135. *New York v. United States*, 505 U.S. 144, 156 (1992).

So, too, the language suggests that the Constitution's preclusions of state-government action number more than those expressly listed in the Constitution—it says states lack power to take actions “prohibited by [the Constitution] to the States” rather than “expressly prohibited by [the Constitution] to the States.”<sup>136</sup> Just as many read the substitution of “delegated” for “expressly delegated” in the first clause of the Tenth Amendment to support the existence of implied national powers,<sup>137</sup> the omission of “expressly” from the clause of the Amendment addressing constitutional prohibitions on state action, *mutatis mutandis*, may support the existence of implied preclusions of state action.<sup>138</sup>

Although it draws its most direct support from the text, logic, and observation of modern judicial practice, for those who rely on historical data in constitutional interpretation there is historical evidence to suggest that the State Preclusion Thesis approximates framing-era understandings of the Constitution's allocation of national and state power. The Constitution was designed to strengthen a national government that was ineffectual under the Articles of Confederation.<sup>139</sup> One problem was state interference with national power; thus, the Constitution made certain national powers exclusive either expressly or, as seems to have been contemplated, by implication.<sup>140</sup> While there was serious debate about the *scope* of implied preclusions of state power—particularly preclusions predicated on the exclusivity of enumerated national powers lacking corresponding state-disempowering provisions<sup>141</sup>—the framing-era consensus

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136. U.S. CONST. amend. X.

137. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–07 (1819); see also Paul E. McGreal, *Unconstitutional Politics*, 76 NOTRE DAME L. REV. 519, 567–68 (2001) (comparing the text of the Articles of Confederation to that of the Constitution to argue that the Tenth Amendment supports implied national powers).

138. See U.S. CONST. amend. X. Justice Marshall explained that the omission of “expressly” from the language of the Tenth Amendment was intentional and “leav[es] the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.” *McCulloch*, 17 U.S. at 406.

139. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 28–53 (2005); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 2–12 (1913); THE FEDERALIST NO. 40, *supra* note 114, at 247–48 (James Madison).

140. See THE FEDERALIST NO. 32, *supra* note 114, at 198 (Alexander Hamilton) (national powers are impliedly exclusive where “a similar authority in the States would be absolutely and totally contradictory and repugnant” (emphases omitted)); *supra* notes 127–30 and accompanying text. See generally Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 471–75 (1941) (noting the framing-era understanding of exclusivity by implication and arguing that national exclusivity was viewed as a remedy to weaknesses of the Articles).

141. See Abel, *supra* note 140, at 470–73 (“[Ratifiers] assumed that adoption of the constitution would terminate the conflicting and prejudicial fiscal burdens imposed by the several states on each other's commerce . . . .”); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 486 (2008) (“[The Commerce Clause] was understood to limit states separate and apart from the specific restrictions in Article I, Section 10[, although] the Framers [may not have] had a good idea of what form those limits took . . . .” (footnote omitted)); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy*

seems to have been that *some* implied preclusions were, in fact, generated.<sup>142</sup> The Supremacy Clause was included so that the Constitution and national laws would govern even where state law was “to the Contrary.”<sup>143</sup> The framing era also recognized and tried to solve for horizontal interference among states.<sup>144</sup> Two problems were salient. First, there was the risk that factions of states might “capture” the national government and use it at the expense of the other states.<sup>145</sup> Solutions included dividing Congress into two houses, one of which would represent all states equally;<sup>146</sup> requiring that “Duties, Imposts and Excises shall be uniform throughout the United States”<sup>147</sup> in order “to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests”;<sup>148</sup> and requiring supermajority approval of treaties<sup>149</sup> “to ensure that the new national government could not readily sacrifice any sectional interests” through treaty making.<sup>150</sup> Second, there was

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*Federalism*, 75 NOTRE DAME L. REV. 341, 392 (1999) (“[T]he Court thought the negative implication of the grant of military power to the federal government removed that power from the states.”).

142. See Abel, *supra* note 140, at 475; Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 81–85 (2005); Ramsey, *supra* note 141, at 392, 396. Additionally, as Justice Powell noted, “[m]uch of the initial opposition to the Constitution was rooted in the fear that the National Government . . . would eliminate the States as viable political entities.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting). These claims likely would have been less shrill if the Constitution were understood to preclude state power *only* as expressly stated. See *supra* notes 127–31 and accompanying text; see also Young, *supra* note 16, at 1767–68 & nn.115, 117–18 (quoting antifederalist rhetoric).

143. See U.S. CONST. art. VI, cl. 2. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001) (discussing the effect of federal lawmaking processes on preemption and federalism); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994) (arguing that preemption doctrine is not entirely justified by the Supremacy Clause).

144. See, e.g., Letter from James Madison to J.C. Cabell (Feb. 13, 1829), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478, 478 (Max Farrand ed., 1911) (noting that the national commerce power was “intended as a negative and preventive provision against injustice among the States themselves”). For examples of horizontal conflicts salient at the time of the Framing, see Erbsen, *supra* note 92, at 533. See also, e.g., FARRAND, *supra* note 139, at 56, 103, 108–09, 147–51 (discussing conflicts over slavery and commerce and between large and small and eastern and western states); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 121–24 (2001) (illustrating horizontal interference with the fugitive-slave policies under the Articles of Confederation); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 743–46 & n.67 (2010) (discussing conflicts over slavery and between small and large states); Norman R. Williams, *The Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 427 (2008) (discussing commercial retaliation among states at the time of the Founding).

145. Baker & Young, *supra* note 144, at 118–20; see Monaghan, *supra* note 144, at 744–45.

146. See U.S. CONST. art. I, § 2, cl. 1; *id.* § 3, cl. 1 (amended 1913); FARRAND, *supra* note 139, at 105; Monaghan, *supra* note 144, at 744.

147. See U.S. CONST. art. I, § 8, cl. 1.

148. *United States v. Ptasynski*, 462 U.S. 74, 81 (1983) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 954 (Fred B. Rothman & Co. 1991) (1833)).

149. U.S. CONST. art. II, § 2, cl. 2.

150. Monaghan, *supra* note 144, at 748.

the risk of direct interference by states with other states.<sup>151</sup> Thus, the new Constitution precluded states from taxing interstate imports or exports “except what may be absolutely necessary for executing its inspection Laws” without congressional consent;<sup>152</sup> required congressional consent before states could form interstate compacts that might burden other states;<sup>153</sup> and flatly precluded any “Treaty, Alliance, or Confederation” among states or between states and foreign powers that might burden other states.<sup>154</sup> Concerns about interstate friction also motivated the inclusion of the Full Faith and Credit Clause, the prohibition on state coinage, and the preclusion of states’ power to arrest congressional representatives going to or from legislative sessions, among other provisions.<sup>155</sup>

Although the constitutional system has reached a state of relative stability, vertical and horizontal interference still generates structural tension, and break-downs remain a threat. Arizona’s recent effort to regulate immigration provides a current example. Arizona’s Senate Bill 1070, enacted in mid-2010, requires that Arizona police officers try to determine a suspect’s immigration status anytime officers have a lawful basis for stopping the suspect and “reasonable suspicion exists that the person is an [unlawful] alien.”<sup>156</sup> The vertical tension created by the Arizona statute is straightforward: the national government has long been considered to have exclusive power to regulate immigration.<sup>157</sup> Arizona’s statute has created horizontal tension as well—several cities have

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151. See, e.g., THE FEDERALIST NO. 5, *supra* note 114, at 51 (John Jay) (worrying that “the people” will “divide themselves into three or four nations” or “confederacies”); THE FEDERALIST NO. 6, *supra* note 114, at 59 (Alexander Hamilton) (“[W]hat . . . would seduce us into an expectation of peace and cordiality between the members of the present confederacy . . . ?”).

152. U.S. CONST. art. I, § 10, cl. 2.

153. See *id.* § 10, cl. 3; Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 761 (2010); cf. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283–84 (1976) (“Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States.”); James Madison, *Preface to Debates in the Convention of 1787*, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 144, at 539, 542 (discussing the tendency of states with ports to impose burdensome taxes on states dependent on those ports).

154. U.S. CONST. art. I, § 10, cl. 1; see also, e.g., Benjamin Franklin, *Papers Relating to a Plan of Union of the Colonies*, in 3 THE WRITINGS OF BENJAMIN FRANKLIN 197, 208–11, 217 (Albert Henry Smyth ed., 1905) (worrying that, under the Articles, “one colony might make peace with a nation that another was justly engaged in war with . . . to their own private advantage in trade, by supplying the common enemy”).

155. On the Full Faith and Credit Clause, see U.S. CONST. art. IV, § 1; Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1493–98 (2007). On state coinage, see U.S. CONST. art. I, § 10, cl. 1; Metzger, *supra*, at 1499–1501 & n.117. On the congressional arrest preclusion, see U.S. CONST. art. I, § 6, cl. 1; Erbsen, *supra* note 92, at 505.

156. ARIZ. REV. STAT. ANN. § 11-1051 (Supp. 2011).

157. See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101(a)(1), 100 Stat. 3359, 3360–74 (codified as amended at 8 U.S.C. § 1324a (2006)), *as recognized in* *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1974–75 (2011). Some think the Arizona law is unconstitutional on that ground alone. See John Schwartz & Randal C. Archibold, *A Law Facing a Tough Road Through the Courts*, N.Y. TIMES, Apr. 27, 2010, <http://www.nytimes.com/2010/04/28/us/28legal.html> (reporting academic criticism).

protested it with resolutions condemning the law or boycotting Arizona businesses;<sup>158</sup> other cities have protested or boycotted the Arizona boycotters.<sup>159</sup>

I am not pressing the claim that SPT is true as a matter of “correct” or “best” constitutional interpretation, and I have a bit more to say about interpretive questions in the next section. But it seems plausible to think that SPT captures a basic feature of our constitutional structure. Even those who do not view historical or textual evidence as decisive in constitutional interpretation should be able to imagine situations in which implied preclusions of state action would be desirable on whatever interpretive criteria they accept.<sup>160</sup> If one’s method of interpretation incorporates consideration of effects on the functioning of the political process, one might want to recognize an implied constitutional preclusion against state laws that enhance the political influence of the wealthy and diminish that of the poor. It would be surprising if anyone seriously claimed that the only constitutional restrictions on action are the express preclusions in Article I, Article IV, and the Bill of Rights. SPT avoids much interpretive controversy because it is so abstract and reflective of fundamental constitutional commitments that it should be acceptable to advocates of most interpretive theories. In the next section, I discuss this and other reasons why a constitutional operative proposition as abstract as SPT is desirable in explaining constitutional doctrine.

#### D. ABSTRACTION AND CONSTITUTIONAL NORMS

Consider these two constitutional operative propositions posited to explain the Court’s Dormant Commerce Clause doctrine:

- 1) “The Constitution restricts states’ abilities to tax or otherwise regulate interstate commerce in ways that tend to undermine the political union established by the Constitution by adopting measures likely to provoke retaliation by other states.”<sup>161</sup>

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158. See, e.g., Martin Finucane & Stephanie Ebbert, *Council Calls for a Boycott of Arizona*, BOS. GLOBE, May 6, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/05/06/council\\_calls\\_for\\_a\\_boycott\\_of\\_arizona/](http://www.boston.com/news/local/massachusetts/articles/2010/05/06/council_calls_for_a_boycott_of_arizona/); Katie Honan, *City Council Initiates Arizona Boycott*, NBC N.Y. (May 13, 2010), <http://www.nbcnewyork.com/news/local/City-Council-Initiates-Arizona-Boycott-93681064.html>; Garrett Therolf & Howard Blume, *L.A. County Votes To Boycott Arizona over Immigration Law*, L.A. TIMES, June 2, 2010, <http://articles.latimes.com/2010/jun/02/local/la-me-0602-arizona-boycott-20100602>.

159. See, e.g., *68% Oppose Boycotts of Arizona over New Immigration Law*, RASMUSSEN REP. (May 20, 2010), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/68\\_oppose\\_boycotts\\_of\\_arizona\\_over\\_new\\_immigration\\_law](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/68_oppose_boycotts_of_arizona_over_new_immigration_law); Dave Wedge, *Boston Beaned for Arizona Boycott*, BOS. HERALD, May 7, 2010, <http://www.bostonherald.com/news/politics/view.bg?articleid=1253067>.

160. See generally Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24–25 & n.52 (2009) (discussing nonoriginalist and nontextualist methods of constitutional interpretation).

161. Denning, *supra* note 141, at 484–85.

2) “[T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States.”<sup>162</sup>

Note that both constitute preclusions of state action that undermine the constitutional structure. The difference is in the kind of structural interference precluded—the two propositions assume different purposes: The first emphasizes the enforcement of interstate commercial harmony;<sup>163</sup> the second emphasizes removing impediments to free and efficient interstate markets.<sup>164</sup> These formulations track the debate over the proper formulation of the underlying constitutional norm in Dormant Commerce Clause literature.<sup>165</sup> I want to focus here on a common feature of these operative propositions that distinguishes them from SPT.

Both of these Dormant Commerce Clause operative propositions look like context-specific versions of SPT. SPT is more general. As I will argue, that makes SPT a starting point for a descriptive account of all dormancy doctrines, including the Dormant Commerce Clause doctrine, as decision rules designed to implement SPT with varying degrees of stringency based on instrumental concerns that vary from one context to another. These narrower operative propositions only explain the Dormant Commerce Clause doctrine; we would have to posit separate constitutional operative propositions for the Dormant Admiralty Clause doctrine, dormant foreign-affairs doctrine, and other dormancy rules. Where one or more lines of judicial doctrine, reflected in a series of decisions over time, may be explained as implementing more than one constitutional operative proposition, we need to know how to decide which

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162. *Bos. Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 328 (1977) (quoting *Freeman v. Hewit*, 329 U.S. 249, 252 (1946), *abrogated by Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992)).

163. See Denning, *supra* note 141, at 481.

164. See *Bos. Stock Exch.*, 429 U.S. at 329.

165. See generally Norman R. Williams, *Why Congress May Not “Overrule” the Dormant Commerce Clause*, 53 UCLA L. REV. 153, 160–65 (2005) (canvassing this debate). For accounts advocating the free-market view, see, for example, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 26.3 (3d ed. 1986); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 429–35 (1982). For accounts advocating the interstate harmony view, see, for example, Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 63–64 (1988); Denning, *supra* note 141, at 479–81. Everyone who accepts *some* form of Dormant Commerce Clause doctrine could accept SPT. See *infra* section II.D.2. And judges who disagree about the textual basis for the doctrine or its preclusive breadth may still agree on an abstract grounding norm like SPT—they might agree on SPT-based results in particular cases even if they have different reasons for accepting SPT as part of our law. Cf. Young, *supra* note 16, at 1761 (“[T]he Court’s Commerce Clause decisions have proceeded much more cautiously, refusing to articulate a comprehensive rule and leaving the ultimate boundary between state and national authority to be extrapolated from the series of data points marked by the Court’s results.”). See generally Cass R. Sunstein, *Commentary, Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (discussing judges’ reluctance to decide cases based upon high-generality, theoretical grounds).

candidate is more likely the operative proposition that our courts accept. I suggest that, usually, the higher generality operative proposition will more likely be the one that courts accept; in this section I provide additional support for that supposition.

### 1. Explanatory Power

Operative propositions must be “sensibly implement[ed]” by decision rules.<sup>166</sup> That requirement leaves substantial room for decision rules to vary from the operative propositions; thus, decision rules by themselves may tell us little about the content of the underlying operative propositions.<sup>167</sup> This, and the fact that courts do not always state operative propositions clearly, makes the task of distinguishing operative propositions from decision rules potentially difficult.<sup>168</sup> Operative propositions may be stated canonically, but they may be inchoate.<sup>169</sup> Even if stated canonically, they may have been set out a century or more ago.<sup>170</sup> Later cases may not restate the operative propositions, making the bases for decision rules more difficult to determine. Over time, doctrine may become elaborate, and attempts to explain it in terms of an operative proposition may yield more than one plausible choice (with differences flowing from differences in interpretive theory or differing views about the noninterpretive considerations courts have brought to bear in crafting decision rules).<sup>171</sup> So, how do we identify, as a descriptive matter, the constitutional operative propositions that we have in our legal system? They are the ones that courts accept.<sup>172</sup> But how should we determine which constitutional operative propositions our courts accept when judicial decisions do not clearly disclose them? I offer some methodological thoughts here.

I have purposefully pitched SPT at a high level of abstraction. Part of the justification for that has to do with reasons for choosing one explanatory theory over another, assuming all choices give us some degree of understanding of the phenomena they seek to explain. Remember that the purpose of this project is primarily explanatory. The utility of selecting one operative proposition over another, including selecting an abstract rather than specific one, should be measured by how far it advances the explanatory endeavor (along with whether we think it is a proposition courts might accept).

Where courts do not clearly articulate an operative proposition, we need to run a hypothesis. Here, the explanatory hypothesis is that judicial acceptance of

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166. See Berman, *supra* note 18, at 1528–29.

167. See *supra* notes 35–51 and accompanying text.

168. See Berman, *supra* note 8, at 57.

169. See Berman, *supra* note 12, at 222.

170. *E.g.*, *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

171. See generally Roosevelt, *supra* note 23 (calling similar problems “[c]onstitutional [c]alcification”).

172. Cf. Berman, *supra* note 18, at 1513 (arguing that an explanation of Commerce Clause doctrine depends on “what [Justices] believed, not what they should have believed” (footnote omitted)).

SPT explains the existence of all the dormancy doctrines. How do we evaluate the hypothesis? Let me propose some guiding criteria.<sup>173</sup> First, we should prefer simple explanations to more complex ones. Second, we should prefer the explanation that makes sense of the largest volume of the phenomena we are trying to explain. Third, we should choose an explanation that leaves most of our other well-settled views about the world intact over one that does not. Call these considerations of “simplicity,” “consilience,” and “conservatism,” respectively, and bear in mind that a theory’s success along any one of these dimensions may be offset by overly sacrificing another.<sup>174</sup>

If SPT is plausible and explains most or all dormancy doctrines, then drawing the operative proposition at this level of generality seems more attractive, on all three dimensions, than alternative approaches: One could posit a different operative proposition for each line of dormancy doctrine, but that would sacrifice simplicity and consilience. One could deny that courts create dormancy doctrines to implement SPT and attempt to explain them as products of something else—judicial activism on behalf of free-market ideology, perhaps.<sup>175</sup> Because of their different policy effects, however, the domestic Dormant Commerce Clause and the dormant executive foreign-affairs power doctrines would seem to require distinct accounts of the “real” judicial motivations. Thus, this move sacrifices simplicity and consilience. It also sacrifices conservatism. Among other problems, this view requires rejecting either (1) the persuasiveness of the (concededly not decisive) case for thinking that SPT states an actual constitutional requirement—that is, the argument that SPT can’t possibly explain dormancy doctrine because no reasonable court would accept SPT—or (2) the commonsense belief that, given generally accepted ideas about judicial power and the judicial role in our system, even a results-driven judge would choose to cloak results-driven decision making with plausible constitutional rationales where they are available—that is, the argument that, regardless of the plausibility of basing dormancy decisions on SPT, courts for whatever reason simply refuse to do so.

A hypothetical constitutional operative proposition is useful to the extent that it helps to explain existing constitutional decisions and displays simplicity, consilience, and conservatism.<sup>176</sup> Consider this example: Professor Roosevelt, to explain equal protection doctrine as a collection of decision rules, assumes that the relevant operative proposition is that “the government may not treat

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173. See Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1239–40 (2009) (citing W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* 64–82 (2d ed. 1978); Paul R. Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76 (1978)).

174. See *id.*

175. See, e.g., sources cited *supra* note 165.

176. See Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193 (2006), [http://www.law.upenn.edu/cf/faculty/krooseve/workingpapers/119HarvLRevF193\(2006\).pdf](http://www.law.upenn.edu/cf/faculty/krooseve/workingpapers/119HarvLRevF193(2006).pdf). See generally Roosevelt, *supra* note 23 (discussing motivations behind judicial decisions).

some people worse than others without adequate justification.”<sup>177</sup> This is more abstract than both the two versions of the equal protection norm I used above<sup>178</sup> and most competing interpretations in the literature.<sup>179</sup> Roosevelt’s carving of equal protection doctrine is “novel” primarily because casting the operative proposition in abstract terms allows him to characterize more doctrine as decision rules implementing it and thereby to expose for analysis the instrumental concerns shaping most equal protection doctrine.<sup>180</sup> The State Preclusion Thesis will be similarly preferable if it explains more doctrine than do alternative propositions.

The State Preclusion Thesis also displays simplicity: It potentially grounds, in one short proposition, a variety of constitutional doctrines that are often explained as implementing a number of more specific constitutional norms. Indeed, SPT’s abstraction is a virtue. The scope of the actual constitutional preclusion may be narrower than the range of state actions plausibly characterized as interfering with the constitutional structure because not all “interference” necessarily “undermines” the structure.<sup>181</sup> The State Preclusion Thesis’s abstraction serves conservatism because it allows us to accept SPT without denying broad state authority or that much national and state authority is concurrent (as we might if we relied on one of the Exclusivity Theses to explain the dormancy doctrines). Thus, SPT offers a way to explain a variety of confusing areas of constitutional doctrine without unseating central federalism-related propositions that courts consistently recognize and that modern federalism scholars would surely insist upon. The more doctrinal rules SPT plausibly explains, the greater its consilience. Demonstrating that consilience is the project I take up in Part III by arguing that all dormancy doctrines can be characterized as decision rules implementing SPT with different degrees of stringency based on the instrumental considerations relevant in each context. The content of the dormancy doctrines that courts have developed in particular areas, however, is deeply controversial. Those controversies will not be dissolved by viewing dormancy doctrines as decision rules designed to implement SPT in particular cases and understanding that the closeness with which those rules track SPT rightly varies according to relevant instrumental considerations. But it will clarify that those debates are, in fact, about the instrumental case for the rules and thus have lower stakes than some dormancy critics suggest.

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177. Roosevelt, *supra* note 23, at 1657.

178. See *supra* notes 25–28 and accompanying text.

179. See generally Siegel, *supra* note 26 (canvassing interpretations of the Equal Protection Clause).

180. See Roosevelt, *supra* note 23, at 1676–80; cf. Berman, *supra* note 18, at 1528–29 (“[D]octrine-making should be constrained by [both] . . . [t]he ‘test of consequences’—the idea that, whatever else the Commerce Clause might mean, though the Court does not know for certain, it cannot mean that Congress can do anything—and] the ‘test of fidelity’—that the doctrine must sensibly implement the Court’s understanding of constitutional meaning.”).

181. Cf. Erbsen, *supra* note 92, at 513–14 (“[There are] sources of interstate friction that raise potential threats to constitutional values, but that would not necessarily fail constitutional scrutiny.” (emphasis omitted)).

## 2. Interpretive Controversies

The content of SPT might spark interpretive debate. Why believe that only state actions that undermine some aspect of the constitutional structure are precluded? No one likely denies the existence of *some* implied constitutional preclusions of state action, but some might deny that state actions are precluded where they undermine the constitutional structure. One might think that state action is impliedly precluded where and only where the framers intended it, full stop. Or, one might think that preclusion exists only where “absolutely necessary,” or where the challenged state action undermines “basic” or “essential” government functions. And so on. Nevertheless, the fact that nearly everyone would agree that some government actions are implicitly precluded narrows and clarifies the debate. Our debates will be about how courts should determine which actions are precluded, or if actions are precluded only under certain conditions, what those conditions are, etc. The fact that interpretive debate remains is no reason to reject SPT: An important reason to distinguish operative propositions from “true” or “correct” constitutional meaning is to facilitate interpretive debate by clarifying that it is possible even where there is decisional law on point.<sup>182</sup> Nothing turns on whether SPT is a correct statement of what the Constitution means, properly interpreted. The task for understanding doctrine is to understand what courts are doing. That requires understanding what operative proposition they accept and purport to implement with the doctrines under consideration. The language in *McCulloch* and two hundred years of judicial application of various dormancy doctrines suggest that courts accept SPT or something similar to it.<sup>183</sup>

The arguments in this Part have shown that SPT might be affirmed on a variety of theories of constitutional interpretation—the historical evidence is for the originalists; the textual points are for the textualists; the simplicity and modesty of SPT is for the minimalists; the assumption of intended constitutional durability is for the purposivists, and the discussion of the current benefits of SPT, along with all the rest, is for the various nonoriginalists. I intend to avoid further engagement with interpretive debate. But there is one interpretive matter that I will mention, because it demonstrates another sense in which it is valuable to hypothesize an operative proposition that is more abstract than competing candidates: It may make it possible for constitutional theory to move forward despite disagreement over the proper method of constitutional interpretation.

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182. See Berman, *supra* note 18, at 1519; *supra* notes 25–33 and accompanying text; *infra* note 192 and accompanying text.

183. See *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (applying dormant foreign-affairs doctrine); *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (applying dormant admiralty doctrine), *superseded by statute*, Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251–65 (codified as amended at 33 U.S.C. §§ 901–950 (2006)); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 83, 85–87 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

One interpretive theory, however, might provoke a strong general denial of SPT—so-called strict textualism. Textualism is a theory of interpretation rooted in modern views about the way that multimember bodies enact laws.<sup>184</sup> An initial coalition within such a body may have a unified purpose in proposing a measure, but “enacted laws, by and large, represent the end-product of compromises which may not fully capture the background purpose that motivated the enactment.”<sup>185</sup> Because the valid law is the law enacted by the body, not the law that an initial coalition of members supporting the measure would have enacted if given free reign, textualism cautions courts to choose a result that is most consistent with the language of the enacted provision even if that result is at odds with the measure’s discernable purposes.<sup>186</sup> Everyone knows that legislation passes in Congress through a series of compromises, logrolls, and so forth; thus, it is inappropriate to assume much about a unified congressional purpose in enacting statutes.<sup>187</sup> So, too, one might think, for the Constitution, which was also drafted and ratified by multimember bodies whose members likely had different reasons for voting “yes.”<sup>188</sup> Put simply, textualism privileges text over purpose based on doubts that any attribution of purpose to specific enacted measures will be accurate.<sup>189</sup>

The State Preclusion Thesis is a hypothetical constitutional norm that is inferred from the Constitution’s structural provisions and the modest assumption that the structure was meant to be durable. But it is inferred—it is not written down in the text of the Constitution. In that sense, then, the claims that it is atextual are true. And a textualist might deny the propriety of the modest assumption that the Constitution was intended to create a durable government structure. While I think that the assumption is modest (and supported by the text of Article V),<sup>190</sup> I concede that it attributes a purpose to the body that generates authoritative constitutional laws in our legal system, be that the drafters, the ratifiers, or some consensus-level segment of current legal officials or of the citizenry. A textualist might deny that any such attribution of purpose can be

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184. See Manning, *supra* note 3, at 2013–20.

185. *Id.* at 2014.

186. *Id.* at 2010 (“Textualists . . . maintain that the interpreters must pay attention to the details that emerge from the legislative process, even if doing so does not fully serve, or even disserves, the statute’s apparent general purpose.”).

187. See, e.g., *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (“[T]he text . . . may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted.”); *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (“Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.”).

188. See Manning, *supra* note 3, at 2040–45.

189. I do not share this view but will not refute it here. Professor Berman notes, common-sensically, that we have “just too much experience imagining and describing the purposes of [multimember] bodies—corporations, social organizations, faculties, faculty committees, all in addition to legislatures—to take seriously the skeptical claim” that “the very notion of purposes held by multimember bodies like Congress is incoherent.” Berman, *supra* note 18, at 1516–17.

190. See U.S. CONST. art. V; *supra* notes 81–83 and accompanying text.

made with sufficient certainty to carry weight in legal decision making; thus, a textualist might simply deny that SPT could possibly be a valid proposition of constitutional law. The State Preclusion Thesis's generality does not refute the textualist criticism. But I think it does blunt some of its force.

Say we agree with the textualist that specific technical provisions of law are not best viewed as implementing broad legislative—or constitution-maker—purposes. We might nevertheless deny that all claims attributing purposes to such bodies are unintelligible. SPT's breadth diminishes the “scale” problem of conforming narrow provisions to broad purposes. We might think that attributing the purpose of ensuring the durability of the constitutional structure is permissible because it is sufficiently close to the body's indisputably held purpose of creating a constitution; constitutions, by definition, are (at least aspirationally) durable. Article V suggests that our Constitution and its structures, at least, were meant to endure. A purpose so closely intertwined with the constitution-making enterprise does not raise the same concerns about lack of consensus and inevitable compromises that motivate the textualist critique of attributions of legislative purpose. Even if they couldn't agree on much, the constitution makers clearly agreed on enacting a constitution, and thus, it seems reasonable to think that they agreed on durability.

This purpose of ensuring constitutional durability, if conceded, permits us to infer SPT. Denying that attribution of this minimal purpose would entail denying the attribution of most any other purpose to the constitution makers. That in turn entails denying the validity of other purpose-backed constitutional norms derived by structural inference that are widely accepted in our practice, including the nondelegation doctrine (inferred from the Constitution's vesting clauses and other provisions),<sup>191</sup> the incorporation doctrine (applying the Bill of Rights to states through a good deal of “doctrinal legerdemain”),<sup>192</sup> and the doctrine of judicial review itself (which is famously not directly derivable from the text).<sup>193</sup> It is not clear that SPT should be more controversial than these

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191. See, e.g., *Loving v. United States*, 517 U.S. 748, 758 (1996); *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). See generally Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) (arguing that the nondelegation doctrine cannot be inferred from the Constitution's Vesting Clause and therefore does not exist); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (arguing that the nondelegation doctrine has been replaced by a set of “nondelegation canons” which limit the decision-making power of executive agencies).

192. See Kermit Roosevelt III, *The Indivisible Constitution*, 25 CONST. COMMENT. 321, 326 (2008) (reviewing TRIBE, *supra* note 9). See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (providing citations to cases in which prohibitions from the Bill of Rights were applied to states through the Fourteenth Amendment); Felix Frankfurter, *Memorandum on “Incorporation” of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965) (discussing cases that rejected a claim that the Fourteenth Amendment incorporated the Bill of Rights).

193. See *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 178 (1803); see also William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (analyzing the impact of the historical context of *Marbury v. Madison* on the concept of judicial review).

other inferred structural norms. Federalism and the separation of powers are subjects of intense debate, but their basic validity as constitutional norms is not often subject to the flat-out dismissal that is sometimes seen in the literature with respect to dormancy doctrines. Professor Tribe produced an entire book on unwritten constitutional norms,<sup>194</sup> demonstrating what we may grasp intuitively from observing constitutional practice: “[T]he claim, ‘The Constitution doesn’t say that,’ should never end an argument.”<sup>195</sup>

I am not advancing any of the following strong refutations of the textualist critique: (1) Originalism is the correct interpretive theory; originalist interpretation entails SPT; thus, SPT is correct; (2) SPT is entailed by unambiguous constitutional text—that is, the claim that SPT is entailed by every plausible theory of interpretation; (3) Originalism and textualism are incorrect interpretive theories; nonoriginalism is the correct interpretive theory; SPT is entailed by nonoriginalist interpretation; thus, SPT is correct; or (4) Strict textualism is an incorrect interpretive theory; purposivism is the correct interpretive theory; purposivist interpretation entails SPT; thus, SPT is correct. My modest claim is that, despite differences in interpretive theory (barring the most extreme)<sup>196</sup>—it is plausible to suppose that courts accept SPT and have crafted dormancy doctrines to implement it in different contexts. The Supreme Court regularly attributes at least minimal purposes to the constitution makers.<sup>197</sup> Strict textualists may argue that courts are incorrect to accept SPT because it requires attributing a purpose to the constitution makers. But textualism is a theory of interpretation, not of legal validity; thus, the textualist is powerless to deny that courts may accept and thereby validate norms derived by contestable interpretive methods. The textualist may deny that the interpretive derivation of the operative proposition is correct, but if there is evidence of judicial acceptance, he may not deny that the derivation was carried out.

Constitutional operative propositions are interpretive by definition.<sup>198</sup> So long as there are competing theories of constitutional interpretation, there will be debates about the correct formulation of constitutional operative propositions. Indeed, whether there is one correct formulation of a contested operative proposition may turn on whether the underlying clash of interpretive theories is resolvable. Those are large issues—perhaps insoluble, certainly beyond the

194. TRIBE, *supra* note 9.

195. Roosevelt, *supra* note 192, at 328. One might argue that courts simply may not enforce implied constitutional norms against other government actors. Cf. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–17 (1962) (arguing that judicial review is an inherently “counter-majoritarian force” in our government). One cannot claim, however, that courts do not enforce unwritten constitutional norms in practice.

196. “Perhaps Antonin Scalia, at his most hyperbolic, embraces an entirely uncompromising textualism, but even he knows when to let it go. (See, for instance, *Printz v. United States*.)” Roosevelt, *supra* note 192, at 329 (footnote omitted).

197. See Manning, *supra* note 3, at 2025–36 (accusing the Supreme Court’s federalism decisions of multiclausal “purposivism”).

198. See Berman, *supra* note 8, at 9.

scope of this paper. Interpretive questions about SPT's content—questions about what and how much state action is precluded—remain. My project is not to give the best answer to such questions, but instead to explain how the courts have resolved them in crafting decision rules to implement SPT. Showing that an operative proposition was clearly part of the Constitution would be a decisive reason to accept it. But where that is not possible, the truth about what the “real” constitutional operative propositions should be as a matter of proper constitutional interpretation may turn out to be the simple truth about what they are—that is, what operative propositions are accepted by courts and the polity. Whether acceptance is the best or most determinate normative criterion available, too, is beyond the scope of this discussion.

Even if interpretive controversies are not completely resolved, the grounds of disagreement are clarified. If the constitution makers' durability-ensuring purpose is denied, so must be many other central norms of constitutional practice. If it is conceded, the interpretive debate is about the scope of preclusion required to preserve the constitutional structure. In either case, the textualist must concede that it is plausible that courts accept something like SPT as the basis for the dormancy doctrines. If the evidence shows that courts *do* accept SPT, it is a valid constitutional requirement even if the textualist would dissent. I turn to survey the evidence for judicial acceptance of SPT in the next Part.

### III. DORMANCY'S MODERN ENCLAVES

My hypothesis is that the State Preclusion Thesis is accepted by courts and underwrites the dormancy doctrines. The previous Part demonstrated that the structure of the Constitution, its text, the historical record, interpretive considerations, and theoretical desiderata offer support for SPT that should appeal to observers with different interpretive theories, save perhaps strict textualism. If it is supported, then the hypothesis is sufficient to reframe and fruitfully advance several important debates in constitutional theory. Or so I shall argue. Any court implementing SPT in a particular case will need decision rules. In this Part, I identify the decision rules applied in dormancy cases and suggest instrumental reasons that might support the choice of those rules to implement SPT in each context. Understanding the instrumental considerations shaping decision rules in a particular area makes doctrine easier to evaluate. It should also make decision rules more palatable to skeptics and enrich our account of doctrinal development and change.<sup>199</sup> I end with preliminary thoughts about the implications of this new account of dormancy for constitutional theory.

The three primary subject-matter areas in which constitutional dormancy operates—interstate commerce, admiralty, and foreign affairs—are vast, encompassing large swaths of regulatory subject matter, and different in important ways. Dormancy doctrines differ in their supposed textual bases, in the volume

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199. See Roosevelt, *supra* note 23, at 1667–68.

and type of state action that they preclude, and in the justifications courts tend to cite for precluding state action in each area. Nevertheless, SPT may explain them all. The goal here is to look past these doctrines' differences, identify their possible common reliance on SPT, and then explain their differences as reflecting instrumental reasons for implementing SPT with differing degrees of stringency in the different contexts.

#### A. INTERSTATE COMMERCE

Early courts formulating the Dormant Commerce Clause doctrine read the Commerce Clause's delegation of legislative power to Congress as exclusive, such that state regulation of commerce among the several states was impliedly precluded, even absent congressional action, by the exclusivity of the delegation of that power to Congress.<sup>200</sup> States retained the police power and could regulate intrastate affairs even if in so doing they indirectly affected interstate commerce.<sup>201</sup> The decisive question in these cases was whether a state was directly regulating interstate commerce or interfering with Congress's exclusive power to regulate interstate commerce.<sup>202</sup> Thus, these early courts might be characterized as accepting something like the Exclusivity Thesis (ET2) as the relevant constitutional operative proposition.<sup>203</sup> Recall that ET2—which is narrower than but encompassed by SPT—precludes a subset of structural interference, namely, state actions that interfere vertically with national powers.<sup>204</sup> Accordingly, had the Dormant Commerce Clause doctrine remained a fairly close implementation of ET2, it would also be easily characterized as implementing SPT.

But the Dormant Commerce Clause today is somewhat different.<sup>205</sup> The modern doctrine “denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”<sup>206</sup> There are two Dormant Commerce Clause decision rules. First, state action that discriminates against interstate commerce—typically by favoring local over out-of-state com-

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200. See, e.g., *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 447–49 (1827); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824). The exclusivity of the Commerce Clause's delegation remains, however, a subject of interpretive debate. See *Gibbons*, 22 U.S. (9 Wheat.) at 209; Denning, *supra* note 141, at 429–30.

201. See *Gibbons*, 22 U.S. (9 Wheat.) at 203; DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 174 (1985).

202. See *Brown*, 25 U.S. (12 Wheat.) at 447–49 (holding that states' reserved powers may not “be used so as to obstruct the free course of a power given to Congress”); *Gibbons*, 22 U.S. (9 Wheat.) at 209.

203. See Denning, *supra* note 141, at 431 (“[T]he constitutional operative proposition, as Marshall conceived it, was that the Constitution prohibited state laws attempting to regulate interstate commerce as commerce—even when Congress had not acted . . .” (emphasis omitted)); Williams, *supra* note 165, at 161; *supra* text accompanying notes 88–89.

204. See *supra* text accompanying notes 116–26.

205. See Denning, *supra* note 141, at 431–48 (describing the evolution of the doctrine from *Gibbons* to the modern rules); Williams, *supra* note 165, at 160–61 (same).

206. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994).

mercial actors<sup>207</sup>—is subject to strict scrutiny that amounts “to a ‘virtually *per se* rule of invalidity.’”<sup>208</sup> Second, nondiscriminatory state action is invalid if it imposes burdens on interstate commerce that are “clearly excessive in relation to the putative local benefits.”<sup>209</sup> This second rule—the “*Pike* balancing” test—is rarely enforced.<sup>210</sup>

If these familiar rules implement SPT, then they appear to *underenforce* it.<sup>211</sup> Both national economic regulatory authority and the health of the national economy itself relate directly to the vitality and viability of the constitutional structure. Accordingly, state governments may undermine the structure by overly interfering with the economic authority of the national government or other states or, perhaps, by significantly damaging the economy directly. It seems, then, that a variety of state actions may constitute some degree of economic interference with the constitutional structure aside from the intentional economic protectionism and disproportionately burdensome actions precluded by existing Dormant Commerce Clause rules.<sup>212</sup> For example, states generally possess the authority to impose safety requirements on products sold within their borders.<sup>213</sup> If one state establishes stricter standards than all others and if it is cost-effective for nationwide sellers to make, for sale at a higher price in every state, a single product that complies with the strictest state’s standards (rather than sell different products in different states), the strict state may effectively raise prices for consumers in every state.<sup>214</sup> The inflated price may reflect a cost–benefit tradeoff that citizens in other states were unwilling to make. While the strict state’s action may not impose an *undue* burden on

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207. *See id.* at 99.

208. *United Haulers Ass’n v. Oneida–Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338–39 (2007) (quoting *City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978)). State action triggers strict scrutiny if it discriminates “on its face or in practical effect.” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). To survive strict scrutiny, the state must demonstrate that it had no less discriminatory means to advance a legitimate local purpose. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

209. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

210. *See Denning*, *supra* note 141, at 456, 493 (observing that “[a] majority of the Court has not struck down a state or local law using *Pike* balancing in over twenty-five years” and citing, as the most recent instance, *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)); *see also* Young, *supra* note 16, at 1784 n.201 (“[T]he balancing test has not been applied very rigorously in recent years.”).

211. *See supra* notes 52–68 and accompanying text.

212. *Cf. Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) (criticizing existing Dormant Commerce Clause rules as too “mechanical” and “remote from actualities” and proposing that courts “consider[] . . . all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce”), *overruled in part by California v. Thompson*, 313 U.S. 109 (1941).

213. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 112–13 (1994) (Rehnquist, C.J., dissenting). *See generally* THOMAS O. MCGARITY, *THE PREEMPTION WAR 54–75* (2008) (discussing preemption in relation to the respective roles of federal and state safety regulations for the transportation sector).

214. *See Erbsen*, *supra* note 92, at 520 (referring to this as the problem of state “exclusions”). Subsidies might fail *Pike* balancing if the burden on interstate commerce becomes disproportionately high, but so far that has only happened in the interstate-transportation context, which is a special case. *See id.* at 520 n.85.

interstate commerce relative to the safety benefits, it is, nonetheless, a form of horizontal interference with other states' economies and regulatory authority. Tax and regulatory subsidies provide another example: "[S]tates can attempt to poach each other's tax base and engines of employment and growth by offering relocation incentives to businesses or individuals, or by diluting public welfare regulations to make themselves more hospitable to regulated entities."<sup>215</sup> So long as these actions are nondiscriminatory, they are unlikely to be invalidated by the current Dormant Commerce Clause rules.<sup>216</sup> But they, too, may interfere with the constitutional structure by interfering with state economies and by souring interstate relations.<sup>217</sup>

Characterizing existing Dormant Commerce Clause doctrine as implementing SPT requires an account of the instrumental considerations that shape the rules. Decision rules that depart from near-direct implementation of their underlying operative proposition—for example, by underenforcing it—typically do so for instrumental reasons.<sup>218</sup> The content of modern Dormant Commerce Clause decision rules may be explained by several instrumental considerations. First, there are concerns about comparative institutional competence: Courts are poorly suited to make nuanced assessments of the effects of state economic actions to determine whether they in fact violate SPT or, in cases where the SPT violation is clear, whether they should be barred by the implementing decision rule. The long-standing consensus is that they are comparatively worse than other governmental institutions at resolving the sort of complex economic and social questions involved in determining what actions effect economic stability and, thus, the optimal level of SPT enforcement in the commercial field.<sup>219</sup> That, in turn, heightens concerns about the risk and rate of adjudicatory errors,

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215. *Id.* at 525–26 (footnotes omitted). On tax subsidies, see generally Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 382–405 (1996) (discussing the causes and effects of the proliferation of state business tax incentives). On regulatory “races to the bottom” among states, see generally Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 916–31 (2011) (canvassing such arguments); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1211–12 (1977) (describing the tension between environmental quality and economic growth in state environmental regulation).

216. See Denning, *supra* note 141, at 462–63; Edward A. Zelinsky, *Restoring Politics to the Commerce Clause: The Case for Abandoning the Dormant Commerce Clause Prohibition on Discriminatory Taxation*, 29 OHIO N.U. L. REV. 29, 30–31 (2002).

217. The State Preclusion Thesis is abstract enough, perhaps, to be read to preclude only the most serious structural interference; one might therefore view the Dormant Commerce Clause as a set of *overenforcing* rules. See *infra* section III.D.1. I don't think that is the most natural reading, but nothing here turns on the answer.

218. See *supra* notes 52–68 and accompanying text.

219. See William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 143–44 (2001); Denning, *supra* note 141, at 494; Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1251–52 (2006); Strauss, *supra* note 10, at 205; cf. *Oregon v. Mitchell*, 400 U.S. 112, 247–48 (1970) (“The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication.”), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI.

which are typical instrumental justifications for adopting deferential, underenforcing decision rules. The Dormant Commerce Clause doctrine became less and less restrictive of state action as the national economy integrated and the distinction between interstate and intrastate commercial matters became increasingly blurry.<sup>220</sup> As factual questions become more complex and technical, the risk of judicial errors rises,<sup>221</sup> as does the practical value of deferring to executive or legislative institutions with relatively greater fact-finding capabilities and economic expertise.<sup>222</sup>

Underenforcement generally reduces the number of state laws invalidated; in the interstate commerce context it may disproportionately reduce the risk of incorrect judicial invalidation of state action that does not in fact violate SPT.<sup>223</sup> The antidiscrimination rule picks out one set of state actions that, empirically, “have been used for illegitimate reasons, and seldom for legitimate ones”; thus, it will “invalidate many unconstitutional laws and very few legitimate ones.”<sup>224</sup> Discrimination against out of staters, in other words, is a good proxy for unconstitutional action: It typically is motivated by the desire to gain economic advantages at the expense of other states; action based on those motivations, if permitted, would lead to copying by other enterprising states, retaliation by harmed states, and other destabilizing consequences.<sup>225</sup> But the antidiscrimination rule likely underenforces because it entirely excludes nondiscriminatory state actions that may violate SPT.<sup>226</sup> Such actions are evaluated with the *Pike* balancing approach, which compensates for courts’ relative incapacity on complex economic questions in two ways. First, the relative infrequency of *Pike* cases suggests that courts are less willing to seriously entertain Dormant Commerce Clause challenges to nondiscriminatory state laws.<sup>227</sup> Second, when *Pike* is applied, the judicial approach is deferential to state lawmakers on the nature and importance of the local interests served by the challenged measure.<sup>228</sup>

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220. See, e.g., Young, *supra* note 16, at 1784.

221. Cf. Berman, *supra* note 18, at 1522 (discussing how courts adopt various decision rules “to minimize total adjudicatory errors”).

222. See sources cited *supra* note 219.

223. See *supra* note 60 and accompanying text.

224. Roosevelt, *supra* note 23, at 1663–64.

225. On using doctrinal proxies to minimize adjudicatory error, see *supra* notes 43–44 and accompanying text. Courts stress that state discrimination in the role of commercial actor is less likely illegitimately motivated and is not destabilizing because states, presumably, know that commercial markets are competitive. Thus, the “market participant” exception exempts such actions from invalidation under dormant commerce rules. See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685–86 (1999).

226. Cf. Young, *supra* note 16, at 1784 (arguing that the adverse effects of economic integration on formalistic judicial categories caused the doctrine to “morph[] into a quite different rule that simply barred the states from discriminating against out-of-staters” (emphasis omitted)).

227. See *supra* note 210 and accompanying text.

228. See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959); *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 190–91 (1938); see also William Lee Biddle, Comment, *State Regulation of the Internet: Where Does the Balance of Federalist Power Lie?*, 37 CAL. W. L. REV. 161,

Another instrumental consideration supporting underenforcement of SPT in the interstate-commerce context is the relatively low cost of judicial errors.<sup>229</sup> One form of disutility generated by adjudicatory errors in implementing SPT is what we might call friction within the constitutional structure.<sup>230</sup> Intentional discrimination against out-of-state interests is likely to cause destabilizing friction among states. “A law treating in-state and out-of-state commerce alike,” by contrast, “poses little or no risk of triggering a round of retaliatory lawmaking in other states.”<sup>231</sup> Luckily, intentional discrimination is easy to identify and thus is subject to a restrictive Dormant Commerce Clause rule.

Two additional factors lower the cost of adjudicatory errors in this context. First, the Supreme Court’s expansive reading of Congress’s affirmative power to legislate under the Commerce Clause<sup>232</sup> and deferential posture on federal preemption of state law<sup>233</sup> mean that Congress can preempt nearly any state commercial measure by affirmative legislation. That includes any state commercial action that violates SPT but is not captured by judicial doctrine. The possibility of congressional implementation of SPT, then, helps to minimize the cost of the judicial doctrine’s failure to catch all violations. Second, the “congressional authorization exception” to the Dormant Commerce Clause minimizes the cost of adjudicatory errors of the opposite kind—that is, incorrect judicial invalidation of state action that does not actually violate SPT. Congress may, with a clear expression of intent, permit states to take actions that would otherwise be invalid under the Dormant Commerce Clause doctrine.<sup>234</sup> The same instrumental concerns—worries about judicial errors, comparative institutional advantages of legislatures on complex economic questions, and the costs of adjudicatory error—explain this feature of the doctrine. Viewing the congressional authorization exception as yet another instrumentally determined decision rule helps rebut the critique that it contravenes *Marbury* by allowing Congress to override judicial conclusions about constitutional *meaning*.<sup>235</sup> That concern is not implicated where the exception is understood as doctrine designed to leverage Congress’s greater expertise and decision-making capacity

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177 (2000) (“Nearly every [*Pike* balancing] opinion has stressed the special deference that should be accorded to a state acting in a non-discriminatory way to improve the health and safety of its citizens.”).

229. See Berman, *supra* note 18, at 1522–23; see also *supra* note 45 and accompanying text (discussing equal protection doctrine in terms of the cost of judicial errors).

230. On interstate-friction and horizontal-federalism issues generally, see *supra* notes 102–04 and accompanying text.

231. Denning, *supra* note 141, at 493.

232. See *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (holding commerce power permits prohibiting cultivation of marijuana for home use); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (permitting congressional regulation of wheat grown for home consumption as within the commerce power); Young, *supra* note 16, at 1785–86.

233. See sources cited *supra* note 143.

234. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429–31 (1946).

235. See generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803) (describing the congressional and judicial roles under the Constitution); Williams, *supra* note 165 (arguing that Congress should not be permitted to “overrule” the Court on Dormant Commerce Clause questions).

on economic matters to prevent or correct adjudicatory errors in *implementing* (not deriving) a constitutional operative proposition.<sup>236</sup> On this view, Congress does not authorize state action that violates the Constitution—to the contrary, Congress preserves constitutionally permissible state actions that were, or likely will be, erroneously invalidated by courts applying decision rules that imprecisely implement the actual underlying constitutional prohibition.<sup>237</sup>

These considerations commend a scheme of decision rules like the modern Dormant Commerce Clause doctrine. A firm, formalistic rule bars state discrimination against out-of-state interests, which is easily identifiable by proxy and is highly likely to violate SPT and potentially destabilize the structure by generating significant interstate friction. A more flexible, deferential standard applies to nondiscriminatory state actions, many of which may violate SPT but which are difficult for courts to identify as violations and less likely to cause destabilizing friction if allowed to stand. The commerce context involves complex questions of economic fact that courts are ill-equipped to handle; thus, the congressional-authorization exception allows a relatively better suited institution to rectify incorrect judicial invalidations of state actions that are in fact permissible, and Congress's broad preemption authority allows a relatively better situated institution to rectify judicial errors that leave intact state actions that are in fact impermissible.

Other operative propositions, of course, could be posited to explain the Dormant Commerce Clause doctrines.<sup>238</sup> Proposals based on the text of the Commerce Clause are problematic because the text reads as a grant of power, not a preclusion of state action, and because the modern Dormant Commerce Clause doctrine seems more concerned with preventing states from interfering with each other than with preventing states from interfering with Congress.<sup>239</sup> SPT, however, readily accounts for the features of the doctrine. Moreover, explanations of the Dormant Commerce Clause doctrine that posit commerce-specific constitutional norms are hotly disputed on interpretive<sup>240</sup> and normative

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236. See generally Berman, *supra* note 8, at 101–05 (noting that recognizing the instrumental determinants of constitutional decision rules may lead to a more robust congressional role in constitutional implementation because it is an open “question whether the resulting judge-made decision rules should stand in the face of contrary factual or evaluative judgments made by Congress”).

237. Cf. *infra* notes 287–94 and accompanying text (discussing why a similar rationale should not apply in the admiralty context).

238. See, e.g., *supra* notes 161–62 and accompanying text.

239. See Young, *supra* note 16, at 1785 (“[T]he [Dormant Commerce Clause] doctrine no longer bears any recognizable relationship to the text. . . . Certainly the Clause says nothing about discrimination . . . . Thus, it is better to understand the modern dormant Commerce Clause as a doctrinal construction meant to facilitate the structural needs of the federal system as a whole.” (footnote omitted)); see also Erbsen, *supra* note 92, at 547–49, 559–60 (arguing that the Dormant Commerce Clause primarily functions to prevent friction among the states).

240. See *supra* note 165 and accompanying text. See generally Brannon P. Denning, *Justice Thomas, The Import–Export Clause, and Camps Newfound/Owatonna v. Harrison*, 70 U. COLO. L. REV. 155, 156 & nn.2–3 (1999) (canvassing positions in the debate about the Dormant Commerce Clause’s textual basis).

grounds.<sup>241</sup> Another reason to prefer the SPT-based account is that it clarifies and narrows the terms of the relevant debate about constitutional interpretation to acceptance, rejection, and possibly refinement of one relatively simple proposition.<sup>242</sup> This view does not refute criticisms that current doctrine incorrectly divides economic functions between the levels of government, grants too much economic authority to one level or another, and so forth. But because it demonstrates that these are debates about instrumentally determined decision rules, the SPT-based account clarifies the stakes. One need not think the Court has misinterpreted the Constitution to think that the Dormant Commerce Clause decision rules are wrong; one need only think the Court has incorrectly weighed the instrumental concerns relevant to implementing SPT. That means, among other things, that reform proposals need only a stronger instrumental case to commend them, not necessarily a new interpretation of the Commerce Clause or other constitutional provisions.

An account of the Dormant Commerce Clause doctrine as implementing SPT is preferable for another, broader reason: SPT also explains other dormancy doctrines. Assimilating these doctrines to a single constitutional operative proposition enhances the simplicity, consilience, and conservatism of our general account of modern constitutional practice.<sup>243</sup> I discuss dormancy rules in admiralty and foreign affairs in the next two sections.

#### B. ADMIRALTY

Admiralty is another modern enclave of dormancy and bears some similarity to the interstate-commerce context. In the framing era, oceans and interstate waterways were viewed as indispensable channels of commerce and crucial to foreign relations.<sup>244</sup> These waterways are mentioned several times in the Constitution, but the provision most relevant to what I will call the dormant admiralty doctrine is Article III's extension of the "judicial Power of the United States . . .

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241. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting) (characterizing the Dormant Commerce Clause doctrine as animated by "a messianic insistence on a grim sink-or-swim policy of laissez-faire economics"); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; *supra* note 165 and accompanying text.

242. See *supra* notes 182–93 and accompanying text.

243. See *supra* notes 173–76 and accompanying text.

244. See generally 3 STORY, *supra* note 148, §§ 1664, 1666 (discussing the connection between admiralty jurisdiction and foreign affairs); William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 122–32 (1993) (describing the exercise of admiralty jurisdiction during the Revolutionary War, in the early state courts, and under the Articles of Confederation and Constitution); Jonathan M. Guttoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto*, 30 J. MAR. L. & COM. 361, 390–99 (1999) (discussing the rationales underlying federal exercise of admiralty jurisdiction); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 471 (2004) ("The federal admiralty jurisdiction was originally justified primarily by the relation of maritime matters to foreign affairs . . .").

to all Cases of admiralty and maritime Jurisdiction.”<sup>245</sup> Cases falling within the admiralty jurisdiction, from the founding through the late nineteenth century, were governed by “general maritime law”—“a body of largely customary principles that existed as a form of private international law and that was considered neither state nor federal in nature.”<sup>246</sup> The Supreme Court announced a rule precluding state action that would alter the default regime of substantive general maritime law—the dormant admiralty doctrine—in *Southern Pacific Co. v. Jensen*.<sup>247</sup> It held that “no [state] legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>248</sup> Although *Jensen* was followed by fifty years of judicial wrangling over doctrinal contours,<sup>249</sup> the basic rule that some state actions touching on admiralty and maritime matters are constitutionally precluded remains.<sup>250</sup>

The State Preclusion Thesis immediately seems relevant. The nominal textual basis for the dormant admiralty doctrine is the Constitution’s Admiralty Jurisdiction Clause; thus, most state actions that the doctrine potentially invalidates are applications of state law to cases that fall within admiralty jurisdiction. There are several reasons why this might be viewed as interference with the constitutional structure. First, admiralty jurisdiction encompasses cases that by definition impact, in one way or another, maritime channels of interstate and foreign commerce. Thus, in one sense the dormant admiralty doctrine relates to the idea of state interference with the constitutional structure for the same reasons that the Dormant Commerce Clause doctrine does: because economic stability is a prerequisite for government stability, state action interferes with the stability of the constitutional structure to the extent that it undermines either maritime commerce itself or the proper allocation of governmental authority to regulate maritime commerce.<sup>251</sup>

And here, too, states may interfere both *vertically* with the national government’s maritime authority<sup>252</sup> and, because state police power authorizes some state regulation of maritime matters, *horizontally* with other states’ maritime

245. U.S. CONST. art. III, §§ 1–2.

246. Young, *supra* note 244, at 482.

247. 244 U.S. 205 (1917).

248. *Id.* at 216.

249. *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 741–42 (1961) (holding that state law could not govern oral agreements between mariners and their employers, which are “maritime” contracts); Romero v. Int’l Terminal Operating Co., 358 U.S. 354, 373–74 (1959) (discussing “wide scope” of areas where state laws have been upheld); W. Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921) (holding that state law was permissible because “maritime and local in character”). *See generally* David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 7–14 (1997) (discussing cases refining the *Jensen* doctrine).

250. *See* Am. Dredging Co. v. Miller, 510 U.S. 443, 446–47 (1994); Bederman, *supra* note 249, at 15–17.

251. *See supra* notes 211–12 and accompanying text.

252. *See supra* notes 200–04 and accompanying text.

authority.<sup>253</sup> Recall that many states share borders following interstate waterways, and imagine two neighboring states each asserting territorial jurisdiction over a newly discovered resource located in the middle of their bordering waterway. Without a constitutional default rule to resolve the conflict—or perhaps a constitutional delegation of authority to the national government to decide the outcome—significant interstate friction might ensue.<sup>254</sup> Along with economic implications, courts have long recognized that admiralty matters have important consequences for national security and foreign affairs.<sup>255</sup>

Direct judicial application of SPT in the admiralty context would require a case-by-case assessment of whether applying state law to each dispute within the admiralty jurisdiction would interfere with the constitutional structure. If SPT precludes the application of state law, the court's next step may be controversial. It must still decide the case, but now it lacks a rule of decision. Several outcomes are possible: The court could dismiss the case on justiciability grounds; it could determine that a substantive rule from a source other than state law legitimately applies to the case and apply it, or it could create a new rule and decide the case accordingly. In admiralty, courts most often choose to apply general maritime law rules established in prior federal court decisions or to derive a rule by reasoning from federal maritime law precedent.<sup>256</sup> The upshot, either way, tends to be application of a federal, judge-made rule, and that provokes strong criticisms.<sup>257</sup>

The only connection between the inquiry into whether state law may govern an admiralty dispute and the inquiry into which alternative resolution should be chosen if state law cannot govern is that a negative answer to the first question forces the second, while an affirmative answer to the first question forestalls the second. Otherwise, the two inquiries are conceptually distinct.<sup>258</sup> Nevertheless, they often run together in admiralty cases and commentary. Courts have long spoken as though the Constitution addresses threats to structural stability in the admiralty context by precluding state interference with the uniformity of a

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253. See *supra* notes 213–14 and accompanying text. For example, Congress has expressly provided that state courts may hear admiralty cases since the first Judiciary Act. Judiciary Act of 1789, § 9, 1 Stat. 73, 77; 28 U.S.C. § 1333(1) (2006) (modern equivalent).

254. See Erbsen, *supra* note 92, at 542.

255. Cf. *Am. Dredging*, 510 U.S. at 452 n.3 (rejecting the view that the Court's admiralty jurisprudence only concerns states' attempts to "impair maritime commerce"); *In re The Lottawanna*, 88 U.S. (21 Wall.) 558, 574–75 (1874) (discussing the breadth of the Constitution's meaning of "admiralty and maritime jurisdiction"); see also THE FEDERALIST NO. 80, *supra* note 114, at 478 (Alexander Hamilton) (arguing that maritime and admiralty cases are one of five major categories of cases appropriate for the federal judiciary).

256. See, e.g., Young, *supra* note 244.

257. See, e.g., *id.*

258. See *infra* notes 393–403 and accompanying text. A constitution might both preclude applying state law in admiralty cases where it would interfere with the structure of government and expressly provide that *only* state law may apply in admiralty cases. This arrangement is not internally contradictory; we might instead infer a rule that admiralty cases in which state law may not be applied under the first requirement must be dismissed under the second.

single body of substantive “maritime” law that applies to disputes within admiralty jurisdiction.<sup>259</sup> As the Supreme Court explained in 1874,

[T]he Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the [Framers’] intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.<sup>260</sup>

The Court’s recent *American Dredging* opinion reemphasized this uniformity rationale.<sup>261</sup> These kinds of statements confuse the question of whether state law may apply with the second, separate question of what other substantive law applies if state law cannot. They make it seem, instead, as though some constitutional principle of mandatory uniformity in admiralty cases requires that state law may never (or nearly never) apply, and that federal maritime common law must always (or nearly always) apply instead.

*Jensen*, however, establishes neither that federal law occupies the field of maritime matters nor that, because national uniformity is required for all maritime matters, state governments simply cannot regulate maritime subjects.<sup>262</sup> The Court has emphasized that such a reading of *Jensen* is a “destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce.”<sup>263</sup> Uniformity in maritime law is not an end in itself; it is, instead, instrumentally valuable to the extent that it decreases state interference with the constitutional structure. Requiring absolute uniformity in admiralty would cut too far the other way, invalidating otherwise unobjectionable police power actions that happen to have effects on interstate waters. The *Jensen* Court specifically rejected the idea that the dormant admiralty doctrine could be that broad<sup>264</sup>—the Constitution does not, in other words, simply *require* that admiralty cases be governed by a single, uniform body of law.<sup>265</sup> “Uniformity” in admiralty decisions appears to be a

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259. See sources cited *infra* note 284.

260. *In re The Lottawanna*, 88 U.S. (21 Wall.) at 575.

261. See *Am. Dredging*, 510 U.S. at 451.

262. See *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917), *superseded by statute*, Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. §§ 901–950 (2006)); *infra* notes 284–86 and accompanying text.

263. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 373 (1959); see also *Am. Dredging*, 510 U.S. at 451 (“The requirement of uniformity is not . . . absolute.”).

264. See *Jensen*, 244 U.S. at 216 (“[I]t would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied.”).

265. The case for this operative proposition is contestable. See sources cited *infra* note 284. *Jensen* and subsequent decisions repudiate the idea that absolute uniformity is required. See *supra* notes 263–64 and accompanying text.

stand-in term for something like “the blend of uniformity and permissible state law variation consistent with preserving the constitutional structure.”

The uniformity inquiry may be better characterized as the dormant admiralty doctrine *decision rule*. As a threshold matter, the possibility of a different decision rule for implementing SPT in the admiralty context is attributable to differences in the factual and legal landscape. The kinds of structural interference that SPT-based doctrine ought to target, and the kinds of state actions that might constitute that interference, will differ from the commerce context. That suggests different decision rules, but concerns about judicial manageability may cut the other way.<sup>266</sup> Having several different rules increases error risks if the distinction between the categories of cases in which the different rules apply is not sharp. But admiralty has a physical proxy—the waterline—to demarcate the cases in which structural concerns peculiar to admiralty may arise.

The *Jensen* rule may implement SPT by substituting the simple uniformity question for the more nuanced inquiry that would be required to directly implement SPT. It is more difficult here to say whether the decision rule underenforces, overenforces, or fairly closely enforces SPT, but it seems clear that the *Jensen* rule is *less* underenforcing than Dormant Commerce Clause doctrine.<sup>267</sup> Barring application of state law that “works material prejudice to the characteristic features” or “interferes with the proper harmony and uniformity”<sup>268</sup> of maritime law sweeps in a large subset of the state actions that potentially interfere with the constitutional structure in this context. The field of state action prohibited by the *Jensen* rule may be nearly coextensive with what would be prohibited by direct application of SPT. Nevertheless, the two approaches are distinct.<sup>269</sup> A dormant admiralty decision rule more directly tailored to SPT would look different from *Jensen*:

Conclude that a state-law rule of decision may not apply in an admiralty case if you conclude that its application, more likely than not, would undermine the constitutional structure.

Here, too, the *Jensen* rule’s departure from SPT may be explained by instrumental concerns bearing on the implementation of SPT in the admiralty context.

Several instrumental considerations may justify *Jensen*’s dormant admiralty rule as a reasonable way to implement SPT in this context. An important consideration in crafting decision rules is reducing adjudicatory error. The

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266. See *Am. Dredging*, 510 U.S. at 458–62 (Stevens, J., concurring in part and concurring in the judgment); cf. Young, *supra* note 244 (arguing that *Erie* should govern choice of law in admiralty).

267. Cf. *Am. Dredging*, 510 U.S. at 461–62 (Stevens, J., concurring in part and concurring in the judgment) (arguing that the dormant admiralty doctrine should collapse into the Dormant Commerce Clause); Bederman, *supra* note 249, at 16–17 (characterizing the majority’s position in *American Dredging* as a narrowing of *Jensen*).

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

269. See *supra* notes 16–24 and accompanying text.

existence of a long-standing body of general maritime common law may help courts avoid mistakes in this context. The *Jensen* rule invites inquiry into the general maritime law rules implicated by the dispute; that inquiry is a proxy for the difficult underlying question about whether deciding the case under state law would be structurally disruptive.<sup>270</sup> Past judicial application of general maritime law rather than state law provides a reliable signal that applying state law in a similar case impermissibly interferes. The prior decisions represent thoughtful resolutions on which later courts applying the *Jensen* rule should be able to rely. Reasoning by analogy is a more efficient use of judicial resources than starting from scratch in each case. Moreover, maritime law was, for centuries, common law, crafted and refined by courts. Thus, although statutes and regulations increasingly regulate maritime matters, courts still possess some relative advantage in assessing the effects of applying different kinds of law in admiralty cases.<sup>271</sup> This differs from the interstate-commerce context, where the circumstances commend judicial deference to other institutions.<sup>272</sup>

The error costs also cut slightly differently in the admiralty context.<sup>273</sup> Judicial failures to invalidate state actions that violate SPT in admiralty have both economic and foreign-policy consequences. They are thus potentially more costly in principle than the primarily economic costs of similar errors in the interstate-commerce context.<sup>274</sup> The economic and diplomatic importance of maritime transportation has diminished as new, cost-competitive forms of transportation and communication have developed.<sup>275</sup> Increases in the sophistication and multijurisdictional presence of commercial actors and the growth of multi-modal transportation diminish the extent to which any commercial sector may be insulated from exposure to multiple regulatory regimes.<sup>276</sup> Underenforcement errors in admiralty still may be costlier than similar errors in interstate

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270. Cf. *supra* notes 43–44, 224–25 and accompanying text (discussing proxies in the equal protection and interstate-commerce contexts).

271. See Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996) (framing disparate contemporary legal movements in terms of their shared focus on institutions); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (advocating a focus on institutional capacities in developing a theory of interpretation); cf. *supra* notes 37–42, 218–23 and accompanying text (describing institutional-competency concerns). See generally sources cited *supra* note 219 (discussing the relative institutional competencies of courts and legislatures).

272. See *supra* notes 220–23.

273. Cf. Berman, *supra* note 18, at 1522–23 (discussing why concerns about “false positives and false negatives” might lead a court to depart from the preponderance-of-the-evidence standard); *supra* notes 45–46 and accompanying text (describing error costs in general).

274. See *supra* notes 229–37.

275. See William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1078 (1983); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 343–44 (1999); sources cited *supra* note 244.

276. See Young, *supra* note 275, at 343; Jose Angelo Estrella Faria, *Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules*, 44 TEX. INT’L L.J. 277, 303–04 (2009).

commerce because diplomatic consequences may arise where foreign-owned vessels are involved.<sup>277</sup> Endowment effects from the long-standing uniformity of maritime law also may add to error costs. Maritime stakeholders have enjoyed a relatively uniform maritime law for centuries and, in American jurisdictions, a relatively stable dormant admiralty doctrine for nearly a century.<sup>278</sup> They know the general set of rules governing their transactions, can predict when state law variation will be permitted, and know the latter will be the exception rather than the rule. Judicial decisions incorrectly or unpredictably permitting state-law variation from the default regime, accordingly, may chill transactions, raise compliance costs, and generate friction with institutions in which affected parties wield influence.<sup>279</sup> By contrast, overenforcement errors—decisions precluding state action that does not violate SPT—seem low-cost. The default regime has been general maritime law, not state law, for centuries.<sup>280</sup> Occasionally denying states the opportunity to expand already exceptional regulatory authority does not seem to fatally undermine federalism values.<sup>281</sup>

This combination of a reliable proxy for state interference, a relative competence advantage for courts, and an error-cost calculation favoring overenforcement suggests that courts reasonably might adopt decision rules that enforce SPT more stringently in admiralty than in interstate commerce. Characterizing the dormant admiralty doctrine as implementing SPT, in turn, ties it conceptually to the Dormant Commerce Clause and to dormancy doctrines applied in the foreign-affairs context. A unifying explanation for those doctrines enhances the

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277. Courts may share this view. *See* *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 n.3 (1994) (noting that more is at stake in admiralty cases than state governments' "impair[ing] maritime commerce").

278. *See* Young, *supra* note 244, at 482.

279. Congress has legislative power in maritime matters. *See* *Pan. R.R. Co. v. Johnson*, 264 U.S. 375, 386–88 (1924). That suggests, as in the dormant commerce context, that these error costs are further reduced by the possibility of legislative preemption of state actions that violate SPT but are erroneously left intact by the dormant admiralty doctrine. *See supra* notes 232–33 and accompanying text. Federal legislation faces a hurdle in admiralty that is absent in the interstate commerce context and that makes preemption less comforting—Supreme Court decisions suggest that *Congress* may also be barred from disrupting the uniformity of maritime law. *See* *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 162–64 (1920); *infra* notes 287–94 and accompanying text.

280. State courts exercise admiralty jurisdiction, *see supra* note 253, and maritime law often overlaps with conventional state areas like tort, workers' compensation, and pollution, *see* Ernest A. Young, *Essay, Preemption and Federal Common Law*, 83 *NOTRE DAME L. REV.* 1639, 1661 (2008). But states have long been on notice that they may not enforce their own substantive law in many admiralty cases, even ones in which they could enforce such rules but for admiralty jurisdiction. *See In re The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

281. *Cf.* Young, *supra* note 95, at 130–31 (noting that preemption questions implicate core federalism principles). Young argues that "the subspecies of 'dormant' preemption . . . ought to be anathema" to a federalism doctrine focused on maximizing the extent to which decisions about displacing state authority are made by the state-representative national political process. *See id.* at 132. That presumes a slightly different concept of dormancy than the one I advance. Concerns about displacing state law do not arise where states lack authority by constitutional command. *See infra* section III.C. However, Young's work emphasizes a significant comparative-institutional-choice concern. Even if there are, in principle, *ex ante* constitutional preclusions of state power, we ought to worry which institution is best situated to administer those limitations.

simplicity, consilience, and conservatism of our account of constitutional practice.<sup>282</sup> Moreover, an SPT-based explanation of the dormant admiralty doctrine clarifies and lowers the stakes of interpretive debates.<sup>283</sup> Admiralty Clause-based operative propositions have been posited to explain the dormant admiralty doctrine; these provoke less pervasive but equally earnest academic debate.<sup>284</sup> Defenders of existing dormant admiralty doctrine—the *Jensen* rule—argue that the Clause is “a grant of substantive lawmaking authority [to federal courts] to create a uniform, federal common law of admiralty.”<sup>285</sup> There is debate about the proper interpretation of the Clause;<sup>286</sup> shifting the constitutional basis for the *Jensen* rule to SPT thus may beneficially decrease the extent to which these ongoing interpretive controversies undermine the legitimacy of the rule.

Another benefit of an SPT-based account of the dormant admiralty doctrine relates to a peculiar corollary rule. In 1920, the Court in *Knickerbocker Ice Co. v. Stewart* announced a constitutional preclusion of actions disturbing the uniformity of maritime law running against *Congress* rather than the states.<sup>287</sup> The federal statute authorized state governments to enforce their workers’ compensation statutes, which varied from each other *and* from the maritime compensation rules, in admiralty cases.<sup>288</sup> It was, in other words, analogous to congressional authorization of state discrimination against interstate commerce in the Dormant Commerce Clause context.<sup>289</sup> But the *Knickerbocker* Court invalidated the statute as “beyond the power of Congress.”<sup>290</sup> Congress possesses unquestioned authority to legislate *substantive* rules of maritime law, the Court held, but it cannot authorize states to do so if application of state law is precluded by *Jensen*.<sup>291</sup> This result is difficult to explain as a requirement of the Admiralty Clause, but the SPT-related rationale is straightforward. In the interstate commerce context, instrumental considerations warrant allowing Congress, with its greater institutional competence and expertise on complex economic questions, to correct judicial errors in applying SPT.<sup>292</sup> The admiralty

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282. See *supra* notes 173–76 and accompanying text.

283. See *supra* notes 176–93 and accompanying text.

284. See, e.g., Bederman, *supra* note 249; Jonathan M. Guttoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367 (2000); Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 528 n.14 (2004); Young, *supra* note 275, at 273.

285. Young, *supra* note 244, at 481.

286. See *id.* at 481–85; see also Casto, *supra* note 244 (discussing the state of admiralty law at the time of the founding as an aspect of public law); Guttoff, *supra* note 244, at 363 (responding to Casto’s account and arguing that “the public law paradigm cannot provide an accurate . . . account of the admiralty jurisdiction”).

287. 253 U.S. 149, 162–64 (1920).

288. See *id.* at 161–64; Bederman, *supra* note 249, at 19.

289. See *supra* notes 234–37 and accompanying text.

290. *Knickerbocker Ice*, 253 U.S. at 164.

291. See *id.* at 163–64.

292. See *supra* notes 219–23, 234–37 and accompanying text.

context, by contrast, does not suggest a similar error-correcting role for Congress. Courts have the institutional advantage here; involving Congress in implementing SPT may increase the risk of error.<sup>293</sup> Moreover, state maritime authority is neither as difficult to demarcate in relation to federal authority nor as closely tied to the basic viability of the state governments as is states' general economic regulatory authority. Thus, errors of overenforcement—the kind of errors that statutes like the one invalidated in *Knickerbocker Ice* would be designed to correct—are perhaps not costly enough to justify the increase in error risk that congressional involvement would create.<sup>294</sup>

### C. FOREIGN AFFAIRS

Dormancy rules operating in the foreign-affairs context may be the most controversial. They also are perhaps the easiest to characterize as rules designed to implement the State Preclusion Thesis. There are several foreign-affairs dormancy rules that sometimes run together.<sup>295</sup> I will not exhaustively catalogue them; instead, I will focus on the primary and clearly delineable dormant foreign-affairs rules.

The broadest rule is the general dormant foreign-affairs doctrine established in *Zschernig v. Miller*.<sup>296</sup> The Court invalidated an Oregon probate statute that prohibited state judges from awarding estate funds to beneficiaries residing in foreign countries with governments that might confiscate the award—in essence, the law invited state judges to critically assess foreign governments.<sup>297</sup> Despite the federal government's contention that the state law did not interfere with national foreign-relations authority,<sup>298</sup> the Court held that “state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government—is . . . forbidden.”<sup>299</sup>

The Dormant Foreign Commerce Clause doctrine,<sup>300</sup> a second rule, targets state actions that effect international commerce in a way that potentially pro-

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293. See *supra* note 271 and accompanying text.

294. See *supra* notes 280–81 and accompanying text.

295. Professor Swaine proposes a dormant treaty-power doctrine. See Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1162–1236 (2000). If dormancy doctrines implement SPT, then states' treaty-related actions should be precluded only when they encroach on national authority enough to interfere with the constitutional structure by somehow interfering with the treaty power's exercise. An SPT-based rule likely would be narrower and more sensitive to the substance of particular state actions than Swaine's proposed rule. But full analysis of this interesting view is beyond the scope of this Article.

296. 389 U.S. 429, 441 (1968).

297. See *id.* at 433–40.

298. See *id.* at 434.

299. *Id.* at 436.

300. See generally *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (holding that a state may tax foreign corporations on the percentage of their income derived from in-state operations); *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1 (1986) (holding that a state tax on jet fuel, which even foreign-owned airlines must pay, does not violate the Dormant Foreign Commerce Clause); *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434 (1979) (holding that a state may not tax instrumentalities of commerce that are owned abroad and used exclusively in foreign commerce).

vokes retaliation or that “prevents the Federal Government from ‘speaking with one voice when regulating commercial relations with foreign governments.’”<sup>301</sup> State actions that facially discriminate against foreign commerce are precluded.<sup>302</sup> This mirrors the virtually per se rule in the domestic context,<sup>303</sup> but the national–international distinction broadens the foreign-commerce rule to preclude discrimination against foreign commercial actors “even if the State’s own economy is not a direct beneficiary.”<sup>304</sup> However, the one-voice inquiry is distinct from the Dormant Commerce Clause’s *Pike* balancing test.<sup>305</sup> Rather than balancing a state action’s local benefits against its impact on interstate commerce, state action is precluded “if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive.”<sup>306</sup> This rule might be applied to broadly invalidate state actions that relate to international affairs; courts, however, try to determine whether the challenged state action interferes with the national government’s ability to pursue a unified national agenda in foreign affairs. This approach permits much state action that the broader formulation might invalidate. But under current doctrine, courts defer to signals from the political branches as to state actions’ permissibility; indeed, Congress may “passively indicate that certain state practices do *not* ‘impair federal uniformity in an area where federal uniformity is essential,’”<sup>307</sup> and “it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce.”<sup>308</sup> The Court has suggested that even national *inaction* may sometimes sufficiently indicate that state action is permissible.<sup>309</sup>

A third dormant foreign-affairs rule was announced in *American Insurance Ass’n v. Garamendi*.<sup>310</sup> California’s Holocaust Victim Insurance Relief Act required insurance companies to disclose whether they wrote insurance policies that may have either paid benefits to Nazis or failed to pay benefits to survivors of Holocaust victims.<sup>311</sup> The Court invalidated the state statute as inconsistent with the Presidency’s diplomatic approach over the course of several decades in negotiating the settlement of Holocaust-related insurance claims, which in-

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301. *Japan Line*, 441 U.S. at 451; see *Wardair*, 477 U.S. at 8; Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1655 (2008).

302. See *Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue & Fin.*, 505 U.S. 71, 81 (1992).

303. See *Wardair*, 477 U.S. at 8; see also *supra* notes 206–08 and accompanying text (describing per se nature of domestic rule).

304. *Kraft*, 505 U.S. at 79.

305. See *supra* notes 209–10, 227–28 and accompanying text.

306. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

307. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 323 (1994) (quoting *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 448 (1979)).

308. *Id.*

309. See *id.* at 324–26.

310. 539 U.S. 396, 421 (2003).

311. See CAL. INS. CODE §§ 13800–07 (Deering 2009) (“Holocaust Victim Insurance Relief Act of 1999”), preempted by *Garamendi*, 539 U.S. 396; *Garamendi*, 539 U.S. at 409–10.

cluded signing several international agreements.<sup>312</sup> The Court was vague on whether the California statute was preempted by these agreements or, instead, was invalid on dormancy grounds.<sup>313</sup> Some commentators characterize *Garamendi* as a preemption decision<sup>314</sup> and question whether a sole executive agreement can be supreme federal law within the meaning of the Supremacy Clause.<sup>315</sup> But *Garamendi* may be better characterized as adopting a dormancy decision rule targeting state interference with the President's foreign-affairs activities. The Court did not specify whether its ground for decision was dormancy or preemption,<sup>316</sup> but it said that

at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.<sup>317</sup>

Viewing *Garamendi* as a dormant foreign-affairs rule designed to protect presidential foreign-affairs authority is consistent with the majority's reasoning.<sup>318</sup> The Court discussed *Zschernig* at length.<sup>319</sup> In determining the effect of the agreements on state action, the Court explained, haltingly, that "[w]here . . . a State has acted within . . . its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."<sup>320</sup> That makes sense: conflict or inconsistency with

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312. See *Garamendi*, 539 U.S. at 401–08.

313. Compare *id.* at 401 ("The issue here is whether HVIRA *interferes* with the National Government's conduct of foreign relations. We hold that it does, with the consequence that the state statute is *preempted*." (emphases added)), and *id.* at 416–17 ("Generally, then, valid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward."), with *id.* at 423–24 (noting that HVIRA "employs 'a different, state system of economic pressure' [that] undercuts the President's diplomatic discretion . . . [and] thus 'compromise[s] the very capacity of the President to speak for the Nation with one voice'" (final alteration in original) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376, 381 (2000))).

314. See Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 123–24 (2009); Michael Stokes Paulsen, Essay, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1790–91 (2009); Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 876–79 & n.47 (2008).

315. See Paulsen, *supra* note 314; Young, *supra* note 314.

316. See *Garamendi*, 539 U.S. at 419–20.

317. *Id.* at 413 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

318. Some read the decision this way. See, e.g., Erwin Chemerinsky et al., *California, Climate Change, and the Constitution*, 37 ENVTL. L. REP. 10653, 10662 (2007); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 332–33 (2009).

319. See *Garamendi*, 539 U.S. at 417–20.

320. *Id.* at 419 n.11 (citation omitted) (quoting *Zschernig v. Miller*, 389 U.S. 429, 459 (1968)).

presidential efforts probably is a good proxy for state structural interference.<sup>321</sup> In addition, the dormancy view avoids what Professor Paulsen calls “the truly antitextual conclusion that the President may enact federal law on his own, by his foreign policy actions or pronouncements,” which would be required to ground the decision on preemption under the Supremacy Clause.<sup>322</sup> Put differently, viewing *Garamendi* as a dormancy decision rather than a preemption decision promotes conservatism in our descriptive account of constitutional practice—if it is a straightforward dormancy decision rule, we need not abandon the idea that preemption doctrine is relatively settled because we need not accept that the *Garamendi* Court bent the interpretation of the Supremacy Clause underwriting the conventional preemption inquiry to fit the desired result in the executive foreign-affairs power context.<sup>323</sup>

The connection between foreign affairs and the constitutional structure, and thus the relevance of SPT to the dormancy doctrines courts have developed in this context, seems clear enough. The capacity to conduct international relations effectively is crucial to the durability of the constitutional order. A nation’s diplomatic capacity to avoid destructive warfare, for example, is essential to its survival through time. The Constitution expressly delegates some foreign-affairs authority to each branch of the national government, but those delegations are scattered in a variety of constitutional provisions. For the national Executive Branch the Constitution provides that “[t]he President shall be the Commander in Chief of the Army and Navy of the United States, . . . have Power, by and with the Advice and Consent of the Senate, to make Treaties”; “nominate . . . Ambassadors [and] other public Ministers and Consuls”; and “receive Ambassadors and other public Ministers.”<sup>324</sup> Congress has a greater number of expressly delegated foreign-affairs powers, including powers to “regulate Commerce with foreign Nations”; “establish an uniform Rule of Naturalization”; “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”; “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”; raise and regulate the Army and Navy; and call up and regulate state militias to “repel Invasions.”<sup>325</sup> But these delegations alone do not confer all the foreign-relations authority a nation-state needs to survive and function effectively in global affairs. Thus, the Supreme Court has long accepted that the Constitution impliedly delegates all other powers that a nation requires to function in the

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321. *Cf. supra* notes 43–44 and accompanying text (discussing effective proxies in the equal protection context).

322. Paulsen, *supra* note 314, at 1791 (emphasis omitted).

323. *Cf. supra* notes 173–76 and accompanying text (discussing general reasons for choosing one constitutional operative proposition over another).

324. U.S. CONST. art. II, § 2, cls. 1–2; *id.* art. II § 3. See generally Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 31–32 & n.143 (2009) (describing the President’s foreign-affairs powers).

325. U.S. CONST. art. I, § 8, cls. 3–4, 10–16.

international community.<sup>326</sup>

The Constitution expressly precludes state governments from taking some specific actions—for example, entering into treaties—that would interfere with national foreign-affairs efforts.<sup>327</sup> The text contains no general preclusion of state action in the international arena, but given the stakes in this context, a reasonable intuition would be that state action with *any* effect on foreign affairs is impliedly precluded. It is perhaps surprising then that courts do *not* accept such a broad constitutional preclusion. States are not wholly precluded from taking actions that potentially impact foreign affairs, nor do they voluntarily refrain from all such actions.<sup>328</sup> Constitutional foreign-affairs doctrine is nuanced and involves more than enforcing a formalistic distinction between the domestic and foreign spheres. SPT may explain this approach—it requires distinguishing state actions based on their potential to undermine the constitutional structure. It does not demand a categorical rule.

The dormant foreign-affairs doctrines may be characterized as a third, distinct set of rules implementing SPT. Again, different rules may be justified where factual and legal differences alter the nature and weight of the instrumental concerns relevant to implementing a constitutional requirement in different contexts.<sup>329</sup> Instrumental considerations specific to judicial involvement with foreign-relations issues, varying only slightly among subfields, may explain dormant foreign-affairs rules.

First, the risk of adjudicatory error is highest in foreign-affairs cases because the typical tools of judicial decisionmaking are lacking. Express constitutional provision of foreign-affairs authority leaves out some necessary powers.<sup>330</sup> Economic and political globalization has rendered formalistic doctrinal proxies—for example, distinctions between the foreign and domestic spheres, or between international and local subjects—increasingly problematic.<sup>331</sup> Additionally, courts face perhaps their largest institutional-capacity disadvantage relative to Con-

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326. See *United States v. Curtiss–Wright Exp. Corp.*, 299 U.S. 304, 318 (1936); see also LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 2–3 (1990) (discussing contemporary problems arising from uncertainty in the constitutional structure); Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 94–96 (2009) (arguing that constitutional uncertainty regarding foreign affairs is generally resolved in favor of the president through a functional approach by courts to separation of powers questions).

327. See, e.g., U.S. CONST. art. I, § 10, cl. 1 (State Treaty Preclusion Clause); see also *supra* notes 128–29, 151–54 and accompanying text (discussing the state-treaty prohibition in terms of its attempt to forestall both vertical and horizontal interference).

328. See, e.g., Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 75–76 (noting that states regularly “arrest and try foreign nationals, decide whether to apply foreign law and enforce foreign judgments”); Hollis, *supra* note 153, at 744 (noting that there are “over 340 [foreign–state agreements] concluded by forty-one U.S. states since 1955”).

329. Cf. *supra* notes 262–66 and accompanying text (discussing instrumental considerations in the context of the dormant admiralty doctrine).

330. See *supra* notes 324–26 and accompanying text.

331. On globalization’s effects, see generally Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 992–95 (2004) (describing the risk for judicial error in the foreign-affairs sphere); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69

gress and the President in foreign-affairs cases and have compensated by crafting deferential rules on executive foreign-affairs actions, treaty interpretation, and the justiciability of foreign-relations matters.<sup>332</sup> Courts lack the experience, expertise, and internal resources required to deal with complex military or diplomatic questions and have “little competence in determining precisely when foreign nations will be offended by particular acts.”<sup>333</sup> This creates substantial error risks anytime a court must determine whether an action furthers the United States’ foreign-relations interests, which requires predicting foreign-government responses.

The net adjudicatory-error-cost calculation magnifies these institutional concerns.<sup>334</sup> Errors likely will be costlier in foreign-relations cases than in domestic analogs because of their subject matter. Foreign governments may react unpredictably to judicial decisions affecting their interests.<sup>335</sup> But even if they do not offend the international community, errors in foreign-relations cases carry more significant institutional costs for the judiciary than comparable errors in other contexts. For example, Professor Chesney explains that national-security cases “are more likely than most to involve claims of special, or even exclusive, executive branch authority. They are more likely than most to involve a perception—on the part of the public, the government, or judges themselves—of unusually high stakes.”<sup>336</sup> These factors make adjudicatory errors in national-security cases more likely to “harm the institutional interests of the judiciary, either by undermining its prestige and authority or perhaps even by triggering some form of concrete political response.”<sup>337</sup> Similar factors make incorrect decisions in other foreign-relations cases similarly costly.

In this area, the costs of erroneously allowing state action that violates the SPT to stand seem to outweigh the costs of erroneously invalidating state actions that are permissible under SPT. Indeed, underenforcing SPT in foreign-affairs cases creates the largest error costs we’ve encountered. Most would agree that the national government should exercise primary authority in foreign relations. The constitutional structure was designed so that the United States

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GEO. WASH. L. REV. 139, 178–88 (2001) (describing the effect of globalization on the boundaries between foreign and domestic spheres).

332. See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346–47 (2006); *Dep’t of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988); *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981); *Baker v. Carr*, 369 U.S. 186, 217 (1962); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320–22 (1936). Commentary supports this perception. See, e.g., Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1404–19 (2009); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100–02 (2008); Knowles, *supra* note 326, at 101–04. On the relevance of institutional capacity to doctrinal formulation, see Berman, *supra* note 8, at 101–05; Strauss, *supra* note 10, at 207–09; *supra* notes 218–23, 263–71 and accompanying text.

333. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

334. See Berman, *supra* note 18, at 1522–23; *supra* notes 45–46, 229–37, 270–81.

335. See Nzelibe, *supra* note 331, at 992–95.

336. Chesney, *supra* note 332, at 1428.

337. *Id.*

would function as a nation-state in the international community and “speak with one voice” on international matters.<sup>338</sup> State interventions disrupt this default feature of the system and may have severe economic or military consequences. The costs of erroneously invalidating state foreign-affairs actions that do not violate SPT are small by comparison. Because foreign affairs has long been considered a subject of national authority, invalidating state action touching on foreign affairs seems unlikely to trigger political responses from Congress or state governments, undermine state investment in governmental infrastructure, undermine states’ core autonomy, or violate state citizen preferences.<sup>339</sup>

High net error costs, added to courts’ relative inability to address complex diplomatic and military questions, commend a formalistic decision rule broadly overenforcing SPT in foreign affairs:

Conclude that state action is impermissible if convinced that, more likely than not, the state action will have any effect on United States foreign relations.

But that is not the rule that our courts accept—doctrine lets stand some state actions that touch on foreign affairs.<sup>340</sup> Additional considerations must be involved. One factor distinct from the costs of erroneously invalidating any particular state action is the long-term consequences of choosing such a broad, formalistic rule rather than a more nuanced alternative. Globalization is blurring factual distinctions between domestic and international matters.<sup>341</sup> The effect of domestic economic integration on the instrumental considerations relevant to formulating Dormant Commerce Clause decision rules is instructive: As it grew difficult for courts to distinguish intrastate from interstate commerce, it became apparent that a broad Dormant Commerce Clause rule invalidating all state actions effecting interstate commerce would cut too far into state authority and thus raise federalism concerns, threaten the judiciary’s institutional capital, and have other negative consequences.<sup>342</sup> The same is true with foreign affairs. While doctrine that leaves intact some state actions touching on foreign affairs thus is sensible, the high cost of underenforcing SPT in the foreign-affairs context suggests that dormant foreign-affairs rules still should invalidate more state actions than do dormancy rules in other contexts.<sup>343</sup>

This is, in fact, what we observe: Dormancy doctrines in this area are more nuanced than a flat preclusion of state action touching on foreign affairs, but

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338. See *supra* notes 324–26 and accompanying text.

339. Cf. *United States v. Locke*, 529 U.S. 89, 107–08 (2000) (holding that the presumption against preemption does *not* apply “in an area where there has been a history of significant federal presence”); *supra* notes 280–81 and accompanying text (discussing error costs of overenforcing SPT in the context of the dormant admiralty doctrine).

340. See Bradley, *supra* note 328, at 75.

341. Young, *supra* note 331, at 167, 177–82.

342. See *id.* at 177–85.

343. Cf. *id.* at 184 (acknowledging the particular consequences of state interference with foreign relations).

they also constitute more of “a straightjacket for states” than their domestic analogs.<sup>344</sup> Their nuance is reflected in the Dormant Foreign Commerce Clause and *Garamendi* rules’ incorporation of both reasonable formal proxies for significant state interference and deference to institutions with relatively greater expertise on the permissibility of state action where those proxies are not present.<sup>345</sup> The rules’ comparative stringency is reflected by the existence of *multiple* preclusive doctrines; the default presumption that state action effecting foreign relations is invalid (opposite the presumption in interstate commerce);<sup>346</sup> and the long, ever-changing list of national foreign-policy actions that may constitute proxies for state interference, which expands the field of state laws potentially subject to invalidation.<sup>347</sup> Moreover, the *Zschernig* rule, the broad formulation of which precludes most state interference with foreign affairs, sensibly remains on the books as a backstop. The Dormant Foreign Commerce Clause, *Garamendi* rule, and with positive federal law, preemption doctrines are narrower grounds for invalidating state action; one of these, where applicable, is preferable to *Zschernig* according to the canon favoring narrow grounds for judicial decisions and the specific concerns in the foreign-affairs context about adjudicatory errors and courts’ relative institutional competence.<sup>348</sup> But *Zschernig* issues still may arise: Certain congressional foreign-relations functions (regulating the armed forces, for example) are so disconnected from commerce that state interference with them might not trigger the Dormant Foreign Commerce Clause rule. Retaining *Zschernig* also answers the high cost of underenforcing SPT in foreign affairs: Courts cannot foresee all forms of destabilizing state action; narrow rules will be under inclusive; thus, given the stakes in foreign affairs, retaining a broad “catchall” rule seems reasonable.

The SPT account also has side benefits in foreign affairs. First, it clarifies and advances interpretive debates. As with interstate commerce and admiralty, one might posit constitutional operative propositions derived from foreign-affairs-

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344. Kysar & Meyler, *supra* note 301, at 1655; *see id.* at 1654–56 (discussing the comparative stringency of dormant foreign-affairs doctrines).

345. *See supra* notes 300–17 and accompanying text.

346. This places the burden of persuasion on the proponent of state action. *See supra* notes 306–09 and accompanying text. In interstate commerce, by contrast, state health and safety regulations—core exercises of police power—are presumed valid, placing the burden on the challenger. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959).

347. *See supra* notes 300–17 and accompanying text. The dormant admiralty doctrine is more predictable because it is limited to state actions interfering with established maritime law. *See S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917), *superseded by statute*, Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

348. *See Reinstein, supra* note 318, at 332–33 (noting that *Zschernig* is rarely applied); Young, *supra* note 331, at 169 (same). In *Crosby*, the First Circuit invalidated the Massachusetts Burma statute on *Zschernig*, Dormant Foreign Commerce Clause, and preemption grounds. *See Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), *aff’d sub nom. Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000). The Supreme Court affirmed on preemption grounds without addressing *Zschernig*. *See Crosby*, 530 U.S. at 374 n.8; *see also* sources cited *infra* note 362 (discussing displacement of otherwise valid state authority).

related textual provisions to explain these dormancy rules. The intensity of interpretive disagreement, however, tends to increase with the specificity of a proposed norm. That is one reason why constitutional foreign-relations doctrine is a hot topic recently.<sup>349</sup> Deriving broad implied preclusions of state action from the Constitution's foreign-affairs provisions, some argue, impermissibly renders redundant the text's *express* preclusions of state involvement in foreign affairs.<sup>350</sup> Again, SPT's abstraction is a theoretical advantage. While it might be counterintuitive to read the Constitution, with its express preclusions of state treaty making, war fighting, and so forth, also to impliedly preclude all state actions affecting foreign affairs, it seems less problematic to read the Constitution, with its various express preclusions of state action, to also embody an implied preclusion of other state actions that undermine the constitutional structure. The latter is a claim about how the Constitution structures the government; while this claim is broader, it is defensible on more modest assumptions and reconciles a greater number of confusions and ambiguities in doctrine than does positing specific preclusions based on various foreign-affairs provisions of the Constitution.<sup>351</sup>

Second, the SPT account generates new responses to critiques of "foreign affairs exceptionalism"—"the view that 'federal regulation of foreign affairs is subject to a different, and generally more relaxed, set of constitutional restraints than federal regulation of domestic affairs'"<sup>352</sup>—in judicial development of foreign-relations doctrine. The strongest form of critique, put simply, is that courts interpret the Constitution differently in foreign-affairs cases than they do in domestic cases and that is unjustifiable. But distinguishing operative propositions from decision rules demonstrates that the Court's *interpretation* of the Constitution is not necessarily different; instead, the Court may adopt different *decision rules* to implement the same constitutional operative propositions in different contexts. The differences between domestic and foreign affairs alter the instrumental considerations relevant to formulating decision rules. Variation in the doctrine between the domestic and foreign contexts, accordingly, is unsurprising and perhaps praiseworthy. More modest exceptionalism critiques might challenge the legitimacy of having multiple rules to implement a single proposition of constitutional meaning or the validity of particular foreign-affairs rules that courts have adopted. The general legitimacy of crafting decision rules

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349. For interpretive debates in this area, see generally Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104–07 (1999) (noting a shift away from "foreign affairs exceptionalism"); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1630–31 (1997) (arguing that the decisions in *Sabbatino* and *Zschernig* are examples of federal common lawmaking); Ramsey, *supra* note 141 (advancing an originalist critique of broad invalidations of state actions in foreign affairs); Young, *supra* note 331, at 88 (critiquing current foreign-affairs doctrine as an outmoded example of dual federalism).

350. See, e.g., Paulsen, *supra* note 314, at 1791.

351. See *supra* notes 127–38 and accompanying text.

352. Young, *supra* note 331, at 140 (quoting Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 391 (1998)).

is defended elsewhere,<sup>353</sup> and I hope this section has shown that current dormant foreign-affairs rules are at least reasonably suited to implementing SPT in the light of the relevant instrumental concerns.

#### D. IMPLICATIONS FOR THEORETICAL CONTROVERSIES

Conceptualizing dormancy around SPT has benefits beyond elucidating and perhaps justifying confusing or controversial areas of constitutional doctrine. Full exploration of these is a large task, but I will briefly preview three possibilities here. The SPT-based account advances academic debates about both preemption and federalism by sharpening the currently fuzzy distinction between dormancy and preemption. It also advances the theoretical debate about the legitimacy of federal common lawmaking by showing that it does not necessarily entail the controversial conclusion that federal judge-made law *preempts* otherwise applicable state law under the Supremacy Clause. Where state authority is precluded *ex ante* by SPT, there simply is no otherwise applicable state law for federal common law to preempt.

##### 1. Dormancy and Preemption

The preemption doctrine invalidates state actions that conflict with federal enactments and sometimes, controversially, federal policy objectives.<sup>354</sup> Its ostensible purpose is to implement the Supremacy Clause's prohibition on state law that stands "Contrary" to federal law.<sup>355</sup> Dormancy's practical effect often is to preclude state governments from acting on subjects that the national government has constitutional authority to, and does, regulate. When courts compare state actions challenged on dormancy grounds with national enactments—as with admiralty and foreign-affairs rules that use conflict with federal law as a proxy—there is a strong superficial resemblance between dormancy and preemption.

A dormancy holding, however, stands for the distinct proposition that an action is beyond a state's constitutional authority *ex ante*, regardless of federal government action. Preemption is *contingent* on the existence of a conflicting national enactment; dormancy is not. In a world with no positive national law, all state actions not *ex ante* prohibited by the Constitution are permissible. There may be dormant preclusion, but there can be no preemption. Only when

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353. For these defenses, see generally Berman, *supra* note 18, at 1518–33 (describing the relationship between doctrine and meaning in the context of the Commerce Clause); Roosevelt, *supra* note 23 (defending an alternative model to the "fallacy of perfect enforcement"); sources cited *supra* note 10 (exploring the relationship between doctrine and meaning).

354. For background on preemption, see generally Gardbaum, *supra* note 143, at 785–807 (recounting the constitutional history of preemption); Pursley, *supra* note 64, at 520–34 (describing a gap in judicial application of the Supremacy Clause in preemption cases); Young, *supra* note 95, at 130–34 (discussing preemption in the context of dual federalism).

355. See U.S. CONST. art. VI, cl. 2. I say "ostensible" because it is not clear that the Supremacy Clause grounds all forms of preemption. See Pursley, *supra* note 64, at 523–29.

the national government acts in a manner that conflicts with state action does the state action become unconstitutional under the Supremacy Clause.<sup>356</sup> Preemption holdings do not deny that the state acted within the scope of its constitutional power *ceteris paribus*; they mean, instead, that the state's *otherwise permissible* action is nullified because of conflicting national action. Preempted state laws are unconstitutional under the Supremacy Clause, but that is *contingent*, not *ex ante*, unconstitutionality.<sup>357</sup> The *ex ante* permissibility of preempted state actions—their hypothetical permissibility absent the preemptive national law—is rarely addressed in preemption decisions.

Despite the simplicity of this distinction, dormancy and preemption are often conflated. Applications of the dormant admiralty doctrine, for example, have been characterized as implied preemption holdings.<sup>358</sup> The *Jensen* rule requires determining whether the potentially applicable state rule conflicts with a maritime law rule. It looks like a preemption inquiry. But the difference from preemption becomes clear once we characterize the *Jensen* rule as a decision rule that uses conflicts with general maritime-law rules as a proxy for whether applying state law would violate SPT.<sup>359</sup> Dormant foreign-affairs rules have been similarly conflated with preemption,<sup>360</sup> but viewing the search for tension between state action and federal foreign policy, again, is a *proxy* for SPT violations—the decision rule.<sup>361</sup> Preemption's inquiry into conflicts between federal and state action is the core constitutional question under the Supremacy Clause; dormancy's core question is about state action's interference with the constitutional structure *regardless* of federal enactments. Viewing the conflict inquiries embedded in certain dormancy doctrines as proxies for structural interference keeps this conceptual distinction in view.

This distinction also makes clear that the question of state action's *ex ante* permissibility is the logical antecedent of the preemption question, and the two need not overlap: State actions may violate SPT even though they conflict with no federal enactment. State actions that conflict with federal law do not necessar-

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

357. On contingency in executive power jurisprudence, compare MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 249–50 (1990) (describing the effect of congressional approval, disapproval, or silence on the President's constitutional authority). On criminal procedure rights that are contingent on state action, compare Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143 (2009) (describing how state and local laws may affect the reach of constitutional protections in the criminal context).

358. See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 443–45 (1994); *Petition for Writ of Certiorari at 10, Norfolk Dredging Co. v. Misener Marine Constr.*, 130 S. Ct. 3505 (2010) (No. 09-1164), 2010 WL 1220964, at \*10 & n.13; see also Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 916 (2007) (characterizing dormancy rules as “forms of ‘preemption’”). *But see Pursley, supra*, at 916 n.26 (“[I]t may be better to consider the dormancy doctrines not to be preemption doctrines at all.”).

359. See *supra* notes 268–69 and accompanying text.

360. See, e.g., Bradley, *supra* note 328, at 78–80 (describing the holding in *Zschernig* as based on “dormant foreign relations preemption”); Kysar & Meyler, *supra* note 301, at 1653 (same); *supra* notes 310–15 and accompanying text.

361. See *supra* notes 301–23 and accompanying text.

ily violate SPT. State actions that violate SPT may *also* conflict with federal law; in such cases, preemption can be an alternate ground for decision if the court assumes *arguendo* that the state action is *ex ante* permissible. State actions that are *ex ante* impermissible, however, are simply void—they cannot stand in a relationship of conflict (or any other relationship) with federal law—and may be considered “otherwise permissible” state actions subject to preemption only as a stipulative matter.<sup>362</sup> This may be a desirable stipulation, though, because preemption is often treated as a nonconstitutional ground for decision.<sup>363</sup> Accordingly, even if a dormancy challenge is raised, canons of constitutional avoidance may require courts to decide on preemption grounds, if possible, to avoid the dormancy issue.<sup>364</sup> There is instrumental and historical support for this approach. Preemption doctrine is more stable and determinate than dormancy rules, and courts have used preemption to avoid dormancy questions since *Gibbons*.<sup>365</sup>

Recognizing that dormancy questions often lurk in the background of preemption cases sheds needed light on controversial aspects of preemption doctrine. For example, some have criticized the Court’s cryptic refusal to apply the presumption against preemption in several recent cases involving areas with “a history of significant federal” regulation.<sup>366</sup> The presumption directs courts to find no preemption where federal preemptive intent is unclear; it is justified as doctrinal reinforcement for “process federalism” safeguards—that is, states’ opportunities to protect their interests in the national lawmaking process.<sup>367</sup>

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362. Preemption cases where dormancy is *not* an analytically prior question—that is, where states clearly have concurrent authority and there is little structural interference—are troubling. State action may be preempted, but the broader holding that preexisting state *authority* to take the action is *displaced* seems unjustified. On displacement, see Gardbaum, *supra* note 143, at 770–71; Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727, 730–31 (2008).

363. See *Blum v. Bacon*, 457 U.S. 132, 137–38 (1982) (holding preemption was a statutory ground permitting avoidance of constitutional issues); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 272 (1977) (same).

364. On avoidance rules, see generally *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (detailing the Court’s rules for avoiding constitutional questions); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994) (discussing the Court’s “last resort rule”); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (discussing constitutional avoidance in the context of AEDPA and IIRIRA).

365. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 212–20 (1824); see also *supra* note 348 (discussing *Crosby*).

366. *United States v. Locke*, 529 U.S. 89, 108 (2000); see *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000); Young, *supra* note 331, at 168–70 (criticizing *Crosby* and *Locke*); cf. Mary J. Davis, *The “New” Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1219 (2010) (noting that discussion of the presumption has sometimes been omitted for no clear reason).

367. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (establishing the presumption); Young, *supra* note 16, at 1834–35, 1849–50 (discussing the presumption’s federalism rationale); cf. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985) (acknowledging federalism’s political safeguards). See generally sources cited *infra* note 377 (discussing how structural elements at the federal level vindicate federalism concerns by protecting state institutions).

Preemption's impact on state authority<sup>368</sup> motivates process federalism theorists to suggest that the presumption—which forces preemption proponents to navigate the state-protective congressional gauntlet—should apply in every preemption case.<sup>369</sup> Recent decisions suggest that the Court agrees.<sup>370</sup> But a more nuanced approach to the presumption's applicability may be defensible if it constitutes the adoption of a *different* rule applicable in particular contexts for instrumental reasons rather than ad hoc deviation from settled doctrine. In areas with both a clear constitutional grant of national regulatory power and significant national regulation pursuant to that grant, conflicting state regulation might undermine the efficacy of the constitutional grant. Thus, there may be reliable signals in certain preemption cases that the challenged state action likely violates SPT. In those circumstances, the concern to avoid dormancy by deciding on preemption grounds may motivate courts to modify decision rules to more strongly favor preemption—for example, by instructing courts to disregard the presumption against preemption<sup>371</sup> or reducing the burden of proof required to rebut the presumption.<sup>372</sup> Viewed this way, the moves are not misapplications of standing doctrine but modifications of decision rules the legitimacy of which should be judged by the strength of the instrumental case for them.

This idea that preemption rules may be modified to help courts avoid dormancy issues also may explain the “obstacle”-preemption rule, under which state action may be preempted if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>373</sup> Some argue that this doctrine is illegitimate because “purposes and objectives” are not “Law” within the meaning of the Supremacy Clause.<sup>374</sup> But if certain congressional purposes and objectives—for example, a goal of creating an exclusive regulatory scheme—also signal that state action likely violates SPT, then ob-

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368. See, e.g., Baker & Young, *supra* note 144, at 139 (implying that preemption diminishes state policy experimentation because federalism allows citizens to choose between different regulatory regimes); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467–69 (1995) (same); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1368–73 (2001) (arguing that preemption shrinks state capacity to check national expansion).

369. See Davis, *supra* note 366, at 1223; Young, *supra* note 95, at 130–34.

370. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1195 n.3 (2009); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

371. See *Locke*, 529 U.S. at 108.

372. This may be what the Court was doing in *Crosby*. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–76 & n.8 (2000); Young, *supra* note 331, at 170.

373. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). For obstacle-preemption holdings, see, for example, *Locke*, 529 U.S. at 109; *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156–57 (1982).

374. See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265–66 (2000). Other critiques of obstacle preemption remain—for example, that imperfect judicial knowledge of national objectives leads to errors, see *Wyeth*, 129 S. Ct. at 1211–12, 1216–17 (Thomas, J., concurring in the judgment), and may generate results-oriented judging, see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting); McGARITY, *supra* note 213, at 265.

stacle preemption may be another modified rule designed to help courts avoid dormancy questions. This conception of obstacle preemption does not directly refute the textual critique, but it may show that it is misdirected: Obstacle preemption may not actually be a rule implementing the Supremacy Clause; instead, it may be a form of dormancy rule.

## 2. Process Federalism

The distinction between dormancy and preemption also helps to deflate critiques of dormancy doctrines based on process federalism theories.<sup>375</sup> Process federalism's core theses are that state and national regulatory authority are presumptively concurrent<sup>376</sup> and that the national legislative process—with its built-in avenues for states to press their interests and shape national enactments—is the best forum for determining which government should regulate.<sup>377</sup> These theses suggest process-reinforcing preemption rules like the requirement of clear preemptive intent to signal that preemption has been vetted through federalism's process safeguards.<sup>378</sup> Judicial determination of the boundaries of national and state power, by contrast, is undesirable because the judiciary lacks similar built-in federalism safeguards.<sup>379</sup> Obstacle preemption, dormancy, and similar substantive doctrinal limitations on state authority are viewed as vestiges of the discredited “dual federalism” approach,<sup>380</sup> according to which the Constitution created distinct spheres of national and state power whose boundaries were subject to judicial enforcement.<sup>381</sup> Process federalism's concurrent-power thesis denies the existence of separate spheres. But dormancy's restriction on the ex ante permissibility of state action cuts into the generality of the concurrent-power thesis. By identifying state actions that are constitutionally precluded ex ante—instances where states may not act even if the national government may take a functionally equivalent action—SPT, if correct, means that the presumption of concurrent state authority is false in some cases.

A strong process federalism objection to dormancy might run as follows: “Aside from express provisions and restrictions, constitutional norms allocating power between the national and state governments consist only in those norms

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375. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (canonically identifying political federalism safeguards); Young, *supra* note 368 (discussing this view).

376. Young, *supra* note 95, at 131.

377. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985); Clark, *supra* note 143, at 1324–25; Pursley, *supra* note 64, at 570–71; Wechsler, *supra* note 375, at 546; Young, *supra* note 95, at 115–16; Young, *supra* note 368, at 1355–60.

378. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); Pursley, *supra* note 358, at 936–40; Young, *supra* note 16, at 1849–50 (noting that preemption doctrine “enhance[s] [federalism's] political and procedural safeguards”).

379. See generally Wechsler, *supra* note 375 (arguing for primarily political resolution). But see generally Young, *supra* note 16 (advocating some judicial intervention on federalism).

380. See Young, *supra* note 280, at 1660–62; Young, *supra* note 95, at 132.

381. See Young, *supra* note 331, at 177–78. See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (discussing this view and its abandonment).

that entrench states' roles in the national political and legislative processes, and no others."<sup>382</sup> This denies both that SPT is a constitutional norm and that judicial determination of power-allocation questions is permissible generally; thus, it leaves no room for dormancy doctrines. But it is too strong for most process federalism advocates,<sup>383</sup> likely because there is little textual support for process safeguards' being the exclusive constitutional protections for federalism.<sup>384</sup> In any event, the preliminary case for SPT, above, rebuts the strong claim as one about *clear* constitutional meaning.<sup>385</sup> The SPT account is also preferable for its greater explanatory power: Courts have continued enforcing dormancy rules even after the Supreme Court acknowledged process safeguards in *Garcia*, and that phenomenon is more difficult to explain on the strong process federalism reading of the Constitution than on a reading that includes SPT.<sup>386</sup> One goal here is explanatory, and courts act as though the Constitution creates federalism norms with both concurrent and dual aspects.

Without the strong claim, there is no argument that the national legislative process is made the exclusive forum for allocating authority between the national and state governments by constitutional mandate. Courts may legitimately address some such questions. A more modest process-federalism claim might leverage insight about the comparative competence of courts and legislatures to argue that Congress, with its greater expertise and state-protective processes, is generally better suited to resolve federalism's power-allocation questions.<sup>387</sup> On this view, there may be implicit substantive constitutional limitations on state authority (for example, SPT), but implementation of those limitations by any institution other than Congress risks errors that overly diminish state power. Observing that courts tend to underenforce SPT in most contexts is no rebuttal here: Even greater underenforcement might strike a better balance between structural risk and the harms of state disempowerment, and Congress might discern and adopt the better level of enforcement if tasked with implementing SPT on its own.

This line suggests that dormancy rules should incorporate greater deference to congressional decisions or, perhaps, that dormancy issues should be treated

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382. Cf. Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1471 (2001) (noting arguments that the political safeguards for federalism are exclusive); Young, *supra* note 368, at 1367 & nn.80–81 (same).

383. See, e.g., Clark, *supra* note 143, at 1325 (recognizing a secondary role for the Court limited to policing the outer boundaries of doctrines implicating federalism); Wechsler, *supra* note 375, at 559 (embracing a limited judicial role in federalism); Young, *supra* note 368, at 1367–68 (“[I]t may be that the vitality of political and institutional checks ultimately depends on the enforcement of certain substantive constraints on federal power.”).

384. See Prakash & Yoo, *supra* note 382, at 1472.

385. See *supra* notes 127–60 and accompanying text.

386. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–54 (1985).

387. See generally *Baker v. Carr*, 369 U.S. 186, 208–37 (1962) (reciting modern political-question rules).

as political questions.<sup>388</sup> If those modifications are not constitutionally mandatory, however, the process federalism objection becomes a claim about the instrumental determinants of doctrine. Once again, moving to this familiar terrain clarifies the debate and lowers its stakes. Dormancy's question of a state action's interference with the constitutional structure is distinct from federalism questions about whether the action is within states' reserved power and whether precluding it overly diminishes state authority. The former seems more judicially manageable than the latter; indeed, it resembles national separation of powers inquiries courts regularly conduct.

Concerns about effects on state authority are, however, relevant to the formulation of dormancy rules. The State Preclusion Thesis is a stabilizer for the constitutional structure; it would become self-defeating if enforced in a manner that diminishes state authority enough to destabilize the federalist aspect of the system. The modest process federalism claim bites here because assessing structural interference often will entail complex policy analysis for which Congress is better suited than courts, including determining the extent to which dormancy's negative effect on state power cuts against its structural benefits. These considerations are part of the instrumental case for deferential Dormant Commerce Clause rules.<sup>389</sup> Deferring to congressional decisions that permit state economic discrimination, for example, seems directly to reinforce the states' ability to seek dispensations in Congress—and nondeferential rules may be criticized as undervaluing process federalism concerns.<sup>390</sup> Indeed, recognition of Congress's greater capacity on difficult power-allocation questions likely is one reason why dormancy doctrines exist today only in a few limited areas despite the generality of SPT. Having no doctrine is an effective means for courts to defer dormancy questions to Congress, which may implement SPT in its own way, perhaps by preemption.<sup>391</sup>

Despite their importance, federalism concerns are only a subset of the instrumental concerns that bear on constitutional adjudication. As with other *ex ante* constitutional restrictions on state power—for example, due process and equal protection requirements—courts must initially decide the scope of SPT's preclusion and formulate doctrinal rules that reflect, as far as possible, an appropriate balancing of *all* relevant instrumental considerations.<sup>392</sup> I hope to

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388. See, e.g., Young, *supra* note 16, at 1823–27 (lodging this sort of claim concerning federalism questions generally).

389. See *supra* notes 219–22 and accompanying text.

390. See generally Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213–28 (1998) (contrasting deferential and nondeferential federalism doctrines).

391. So far, there is no full account of the constitutional norm or norms that authorize all currently accepted forms of preemption. See Pursley, *supra* note 64, at 530–34.

392. I do not mean to suggest that federalism is not a constitutional issue. I call it “instrumental” here as shorthand, to suggest that—like truly instrumental considerations of comparative institutional competence, adjudicatory error rates, and so on—in some instances federalism bears upon, but is not the direct object of, judicial efforts to implement SPT. Federalism functions in this same manner in a

have shown that there is at least an instrumental case, even if contestable, for the balance struck by existing dormancy rules.

### 3. Federal Common Law

The SPT account also may help reframe debates about the legitimacy of federal common lawmaking.<sup>393</sup>

Rules of federal common law may govern cases in which state law cannot apply as a result of dormancy or other constitutional restrictions. Distinguishing SPT from dormancy decision rules highlights something important about applications of federal common law where state law is precluded by dormancy. Holdings that state law cannot apply under dormancy rules are sometimes characterized as implied preemption holdings<sup>394</sup> because they often involve the application of federal common law rules in place of the displaced state law. It looks, in other words, as though federal common law has “preempted” state law. That is problematic, critics contend, because federal common law rules are not obviously “Laws of the United States” within the meaning of the Supremacy Clause.<sup>395</sup> Dormancy doctrines, on this view, are condemnable because they generate *preemptive* federal common lawmaking.<sup>396</sup> But, again, dormancy is conceptually distinct from preemption. Some dormancy rules do use conflict with federal common law as a *proxy* for SPT violations. The *Jensen* rule, for example, displaces state law where it “works material prejudice to the characteristic features of the general maritime law,” inviting judicial determination of whether state law conflicts with federal maritime common law.<sup>397</sup> This conflict inquiry, however, is just the *decision rule*—for certain instrumental reasons, it underenforces SPT by allowing some state laws to stand that might be invalidated by full enforcement of SPT.<sup>398</sup> Once state law is held inapplicable on dormancy grounds, a court still must determine what law to apply to resolve the case. Separating the question of state law’s applicability under dormancy rules

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variety of other contexts, including in the formulation of implementing rules for rights-bearing provisions like the Equal Protection Clause. See Sager, *supra* note 10, at 1218 (identifying comparative-institutional-capacity and federalism concerns as “claims which address the question of to what limits the federal judiciary should reach in interpreting and enforcing” the Equal Protection Clause); see also *supra* note 34 and accompanying text. The conceptual status of structural norms in this kind of functional role is a significant open question that I intend to tackle in future work.

393. For an overview, see Monaghan, *supra* note 144, at 758–65.

394. See, e.g., *Am. Dredging Co. v. Miller*, 510 U.S. 443, 445–46 (1994); *Petition for Writ of Certiorari*, *supra* note 358.

395. See U.S. CONST. art. VI, cl. 2; Clark, *supra* note 143, at 1452; Young, *supra* note 280, at 1655–57.

396. See Young, *supra* note 280, at 1656; cf. Clark, *supra* note 143, at 1339–42 (describing the constitutionally mandated procedures for passing bills through Congress and constitutional amendments).

397. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917), *superseded by statute*, Longshoremen’s and Harbor Workers’ Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. §§ 901–950 (2006)).

398. See *supra* notes 268–69 and accompanying text.

from the question of what law may apply if state law cannot show that federal common law isn't "preempting" anything.

There is a broader point to consider. In the admiralty context, for example, conventional justifications for *Jensen* draw criticism based on *Erie Railroad Co. v. Tompkins*, where the Court held that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general common law."<sup>399</sup> Some argue that

[t]he core of *Erie's* holding was that a mere jurisdictional grant—such as the grant of diversity jurisdiction that brought "common law" cases into the federal courts—does not empower the federal courts to make law on their own. If there is no federal statute or constitutional provision to interpret and apply, then federal courts must apply state law.<sup>400</sup>

Thus, the argument runs, *Erie* entails that the *Jensen* rule, and all federal maritime law rules fashioned pursuant to its application, are illegitimate because they are predicated on the "mere" grant of admiralty jurisdiction in Article III. Moreover, critics argue, federal common lawmaking transgresses federalism norms because courts, lacking built-in federalism safeguards, may fashion federal common law without sufficient attention to state interests.<sup>401</sup> It follows that applying federal common law in foreign-affairs cases after concluding that the application of state law is precluded by dormant foreign-affairs doctrines is illegitimate for similar reasons.<sup>402</sup>

Grounding dormancy rules like *Jensen* on an implied structural norm denies the first premise of the *Erie* critique; they are no longer based on "mere" jurisdictional grants (or still thinner textual support for dormant foreign-affairs rules). More importantly, understanding SPT's limited effect—preclusion of state action and no more—distinguishes two stages of the judicial decision-making process in dormancy cases. Call the court's conclusion that state law cannot apply in the case the preclusion step. That is the effect of the dormancy rule. Call the court's decision about what law to apply in place of state law the choice-of-law step. As positive federal law expands, it covers more and more of these disputes that might, but for dormancy, be governed by state law. Because preemption is a narrower ground for decision than dormancy, where a federal statute or regulation applies, courts are more likely to hold state law preempted than precluded by dormancy. Thus, if a modern court reaches the dormancy

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399. 304 U.S. 64, 78 (1938).

400. Young, *supra* note 244, at 474.

401. Young, *supra* note 280, at 1656–57; *cf.* Clark, *supra* note 143, at 1339–42 (explaining that states' federalism interests are satisfied during the legislative process).

402. *See, e.g.,* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964) (fashioning the "act of state" doctrine); *see also* Young, *supra* note 280, at 1675–78 (discussing the "constitutional preemption" theory cited to justify federal foreign-affairs common law).

question and finds application of state law precluded, the only available answer to the choice of law question may be federal common law. This choice-of-law step is where the *Erie* critique bites—on a broad reading of *Erie*, federal common law is an inappropriate substitute for state law where courts lack legitimate lawmaking authority. The SPT account of dormancy shows that the decision to apply federal common law is a conceptually distinct step—taken for separate reasons and requiring separate justification—from the decision that the application of state law is constitutionally precluded. This suggests that there may be no tension between dormancy rules and *Erie*.<sup>403</sup> Dormancy rules may use conflict with federal common law as a proxy for whether SPT renders state law inapplicable, and the invalidation of state law by dormancy rules may raise a choice-of-law question. But the force of the *Erie* critique is to suggest that something other than federal common law—perhaps international law or no law at all—should be chosen where state law cannot apply. That suggests reforming choice of law rules, not dormancy rules.

#### CONCLUSION

Some think dormancy is nonsense. I have tried to give a unifying description of the concept of dormancy that enhances our general account of constitutional decision making. Clarifying our concepts yields better understanding of our constitutional practice, an important end in itself. But this view of dormancy also has broader implications for important methodological and substantive debates in modern constitutional theory. Recognizing the role of instrumental considerations in the formulation of doctrine allows us to view constitutional practice as characterized, not by persistent disagreement over basic questions of constitutional *meaning* but by disagreement over how best to *implement* constitutional requirements, which may be the subjects of widespread, durable consensus. The difference between the judicial approach in admiralty and foreign-affairs cases, which are dominated by dormancy, and commercial-regulation cases, which are dominated by preemption and the presumption of concurrent state authority, is not necessarily evidence of judicial vacillation on constitutional meaning. It may instead be calculated doctrinal adjustment to the differing instrumental problems of constitutional implementation presented by different contexts.

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403. For criticisms of dormancy on *Erie* grounds, see, for example, Clark, *supra* note 143; Young, *supra* note 280.