TAKING CARE WITH TEXT: "THE LAWS" OF THE TAKE CARE CLAUSE DO NOT INCLUDE THE CONSTITUTION, AND THERE IS NO AUTONOMOUS PRESIDENTIAL POWER OF CONSTITUTIONAL INTERPRETATION

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ABSTRACT

"Departmentalism" posits that each branch of the federal government has an independent power of constitutional interpretation—all branches share the power and need not defer to one another in the exercise of their interpretive powers. As regards the Executive Branch, the textual basis for this interpretive autonomy is that the Take Care Clause requires the President to "take Care that the Laws be faithfully executed" and the Supremacy Clause includes the Constitution in "the supreme Law of the Land." Therefore, the President is to execute the Constitution as a law. Or so the common argument goes. The presidential oath to "execute the Office of President" and "to the best of [the President's] Ability, preserve, protect and defend the Constitution" is frequently enlisted in support of the argument and sometimes offered as a separate basis for the President's power of autonomous constitutional interpretation.

This Article offers a textual analysis of not only the Take Care Clause and the Supremacy Clause, but also the presidential oath and other clauses relevant to the textual argument for an autonomous presidential power of constitutional interpretation. The textual analysis has the following results. First, "the Laws" in the Take Care Clause do not include the Constitution, contrary to widely held assumption. Second, the presidential oath alone cannot support a textual argument for an autonomous presidential power of constitutional interpretation. Those two results collapse the textual argument for departmentalism. Third, the constitutional text as a whole and most prominently the Constitution's use of nearly identical language to define "the supreme Law of the Land" (Article VI) and to express the extent of judicial power (Article III) strongly indicates judicial interpretations are supreme over conflicting executive interpretations.

As often seems the case when the text of the Constitution is analyzed carefully, there are rewarding secondary insights gained along the way. In this instance, working through the intratextual links among various clauses sheds light on the rarely discussed congressional power "[t]o provide for calling forth the Militia to execute the Laws of the Union." There is textual

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evidence that "the Laws" of the Take Care Clause and "the Laws of the Union" mean the same thing: federal statutes and treaties, but not the Constitution.

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INTRODUCTION

The central feature of this Article is a textual analysis of the meaning of "the Laws" in the Take Care Clause.[1] The analysis concludes that the Constitution is not among the laws referred to in the Take Care Clause. This conclusion undermines a key element of the textual argument for the departmentalist view that the Executive Branch has independent authority to interpret the Constitution, even when its interpretation conflicts with an interpretation by the Supreme Court.

Let us begin with a definition of departmentalism and a summary of the textual argument commonly relied upon to support it:

> [D]epartmentalism [is] the . . . idea that each branch of government has an equal authority and responsibility to interpret the Constitution when performing its own duties. Conceptually and historically, departmentalism has been the primary alternative to judicial supremacy. For the departmentalist, . . . the Court has no special institutional authority to say what the Constitution means . . . . [T]he other branches of government have no responsibility to take the Court's reading of the Constitution as being the same as the Constitution itself.[2]

The opposing view, judicial supremacy, is well stated by the Supreme Court in *United States v. Nixon*,[3] where the Court declared its role as "ultimate interpreter of the Constitution," and noted more particularly it was the Court's responsibility to decide "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed."[4] That is, any authority the other branches have to interpret the Constitution and any deference due such an interpretation is for the Court to determine. The Court noted this judicial power exists despite, and is tempered by, the fact that "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."[5]

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1. U.S. CONST. art. II, § 3.
2. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY xi (2007).
3. 418 U.S. 683 (1974).
4. *Id.* at 704 (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).
5. *Id.* at 703. Indeed, Supreme Court jurisprudence has doctrines of avoidance, deference, and even nonjusticiability that allow the other branches to resolve questions regarding particular types of constitutional issues. For a short description of the formal and informal ways the Supreme Court shares constitutional authority with the other branches, including doctrines regarding standing, political questions, and foreign policy questions, see MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 121–27 (2013).

Some proponents of departmentalism argue that even if the Judicial Branch chooses to cede certain areas of interpretive autonomy to the other branches, if those cessions are made with binding authority, then no sphere of autonomy actually exists for those branches; the Judicial Branch can change the boundaries in another binding statement. *See, e.g.*, Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 83, 99–109 (1993). As a logical deduction, that seems correct.

This Article is focused on the departmentalist description regarding the relationship between the Judicial and Executive Branches. Professor Daniel Farber has offered a helpful hierarchy of judicial supremacy contextualized for that relationship.[6] Note how in the description below the autonomy of executive officials decreases as the level of judicial supremacy rises:

> Decisional supremacy involves the power to issue coercive orders to state and federal officers, thereby overriding the constitutional judgments of those officers in particular cases . . . . [A]nticipatory supremacy . . . require[s] government officers to comply in advance with settled judicial doctrines rather than forcing the injured party to obtain a court order against them. The broadest form of supremacy applies in situations where coercive judicial relief is not a possibility. Precedential supremacy means that government officials should treat settled judicial doctrine as binding precedent even when their actions are not subject to judicial review.[7]

The strongest views regarding the independence of a president's power of constitutional interpretation deny even decisional supremacy of the Court. Professor Michael Stokes Paulsen has provided a clear description of this strong form of departmentalism, describing what he calls the President's "formidable power to interpret the laws he is charged with executing."[8] Formidable, indeed:

> The Supreme Court's interpretations of treaties, federal statutes, or the Constitution do not bind the President . . . . He may decline to execute acts of Congress on constitutional grounds, even if . . . those grounds have been rejected by the courts. In executing a statute he determines is constitutionally valid, he may use his own interpretation of the statute, even if it is contrary to the interpretation placed on it by the courts. And he may exercise such powers of legal review even in the specific case where courts have ruled against his position; that is, he may refuse to execute (or, where directed specifically to him, refuse to obey) judicial decrees that he concludes are contrary to law.[9]

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6. Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 359–60 (2003).

7. *Id.* This article is not meant to address the normative question of what is the "correct" level of judicial supremacy, but I offer here a paragraph of candor on the topic. My own view is something akin to Professor Daniel Farber's anticipatory supremacy. In the absence of court-provided answers to the myriad of constitutional questions the Executive Branch encounters as it goes about its duties, it should use its own understanding of the Constitution. For instance, with no court precedent as to the constitutionality of a statute, the President must make an initial decision as to whether and how to execute the statute. And given the (in my mind correct) current hands-off approach courts have taken regarding core presidential powers like vetoes and pardons, the President's decisions in exercising those powers are final. I do not think it would be advisable or correct for the Supreme Court to make any major, judiciary-empowering changes in its deference or justiciability doctrines regarding constitutional questions.

8. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 220 (1994).

9. *Id.* at 221–22.

This Article addresses the issue of whether the constitutional text supports the usual textual arguments that purport to demonstrate an autonomous presidential power of constitutional interpretation. I conclude that the text does not support those arguments, and that the best interpretation of the Constitution shows the Supreme Court has supreme authority in matters of constitutional interpretation.

I emphasize that I address only the textual aspect of the argument for departmentalism. Departmentalism also derives support from a combination of constitutional theory and the separation of powers structure of the Constitution.[10] Some may feel the loss of a textual argument is beside the point—that departmentalism is a metaconstitutional understanding and not dependent on text. I disagree. It seems to me any theory about who has power to interpret the Constitution authoritatively must reckon with the Constitution's text and any commitment of interpretive power that text may make. I therefore consider the result significant.

Whether brought about by departmentalism's strong reliance on theoretical and structural support or some other reason, there exists a paucity of careful analysis in the common, even rote, textual arguments supporting an autonomous power of constitutional interpretation by the President. They boil down to variations or subparts of the following argument:

Premises Based in Constitutional Text

(1) The Take Care Clause states the President "shall take Care that the Laws be faithfully executed."[11]
(2) The Supremacy Clause states the Constitution—along with treaties and "the Laws of the United States which shall be made in Pursuance [of the Constitution]"—is "the supreme Law of the Land."[12]
(3) The President takes the following oath: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[13]

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10. For example, in one of the most thorough and clearest explications of departmentalism, Professor Michael Stokes Paulsen develops his argument for a Marbury-analogical form of "executive review" from what he dubs "the postulate of coordinacy" of the legislative, judicial, and executive departments of the federal government. *Id.* at 228. The "power to say what the law is, . . . is a shared power, divided among branches that exercise it, each in its own province, independently of the views of the others." *Id.* at 235. "[A]s a consequence of our constitutional system of separation of powers, the executive's power to interpret the law may, and should, be exercised *independently* of the interpretations of the other branches." *Id.* at 221.
The arguments also routinely point to historical examples of presidents acting on their constitutional interpretations contrary to court opinions on the matters—Presidents Jefferson, Jackson, Lincoln, and Andrew Johnson are the main examples. For the relevant historical content, see for example, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 69–71, 98–112, 166–69 (2008); HAROLD H. BRUFF, UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION 63–66, 90, 97–98, 136 (2015); DANIEL FARBER, LINCOLN'S CONSTITUTION 180–95 (2003).

11. U.S. CONST. art. II, § 3.

12. *Id.* art. VI, cl. 2.

13. *Id.* art. II, § 1, cl. 8.

Conclusions Derived from the Above Premises

> (4) Because the Constitution is law as stated in the Supremacy Clause, (premise 1) the President has a duty under the Take Care Clause (premise 2) to faithfully execute the Constitution. This presidential duty to act in accordance with the Constitution requires the President to interpret the Constitution autonomously.
> (5) The President's promise to faithfully execute the Office of President under the presidential oath (premise 3) requires faithful execution of statutes pursuant to the Take Care Clause; and that execution must comport with the President's personal understanding of what will preserve, protect, and defend the Constitution.

Premises (1)–(3) are true, but I will attempt to demonstrate that neither of the conclusions follow from those premises.

Many scholars and government officials accept without significant analysis the link assumed in conclusion (4)—that the Constitution is a law within the meaning of the Take Care Clause.[14] But the constitutional text simply does not support the idea that the Constitution is among the laws referenced in the Take Care Clause.[15] "Law of the Land" in the Supremacy Clause is not the same as "the Laws" in the Take Care Clause.

As to conclusion (5), without conclusion (4)'s argument that the "laws" of the Take Care Clause include the Constitution, the only remaining textual support for an independent presidential power of constitutional interpretation is the President's promise to attempt to "preserve, protect, and defend" the Constitution, untied to any specific power or duty of the office.[16] To claim this gives the President an autonomous power of constitutional interpretation requires one or both of these inferential flaws: the taking of an oath to support the Constitution by itself confers interpretive autonomy or the wording of the presidential oath confers interpretive autonomy.[17]

At this point, let me substantiate my claim that for decades the supposed textual link I have described between the Constitution and the Take Care Clause has been uncritically accepted by prominent scholars and government officers.

Several memoranda from the Office of Legal Counsel contain this view. For instance, in 1990, then-Assistant Attorney General William Barr advised President George H. W. Bush in a memorandum opinion:

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14. *See infra* notes 18–26 and accompanying text. The disconnect in this syllogism has not often been clearly noted. *But see* Matthew Steilen, *Judicial Review and Non-Enforcement at the Founding*, 17 U. PA. J. CONST. L. 479, 532–33 (2014) (recognizing the question of whether, despite the Constitution being "law," "the Laws" of the Take Care Clause include the Constitution; and distinguishing the Constitution as "a fundamental law" which might not be enforceable via the same procedures and institutions as ordinary law).

15. *See infra* Parts I, II.

16. U.S. CONST. art. II, § 1, cl. 8.

17. *See infra* Part III.

> The President's authority to refuse to enforce a law that he believes is unconstitutional derives from his duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3 and the obligation to "preserve, protect and defend the Constitution of the United States" contained in the President's oath of office. U.S. Const. art. II, § 1. *The Constitution is the supreme law that the President has a duty to take care to faithfully execute.* Where a statute enacted by Congress conflicts with the Constitution, the President is placed in the position of having the duty to execute two conflicting "laws": a constitutional provision and contrary statutory requirement. The resolution to this conflict is clear: the President must heed the Constitution—the supreme law of our Nation.[18]

Many of the scholars most involved in promoting an independent power of constitutional interpretation on the part of the President also have set out the shorthand textual argument.[19] Professor Saikrishna Prakash, for example, has argued:

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18. Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 46–47 (1990) (emphasis added, footnote omitted) (memorandum from Assistant Attorney General William P. Barr). In the omitted footnote (at the end of the first sentence of the quote), Barr states "[i]t is generally agreed that the Constitution is a law within the meaning of the Take Care Clause." *Id.* at 46 n.11.
Similarly, in 1992, Acting Assistant Attorney General Timothy Flanigan wrote in a memorandum opinion for the Counsel to the President:

> Both the President's obligation to "take Care that the Laws be faithfully executed," and the President's oath to "preserve, protect, and defend the Constitution of the United States," vest the President with the responsibility to decline to enforce laws that conflict with the highest law, the Constitution. . . . Among the laws that the President must "take care" to faithfully execute is the Constitution. This proposition seems obvious since the Constitution is "the supreme *Law* of the Land."

Issues Raised by Provisions Directing Issuance of Off. or Diplomatic Passports, 16 Op. O.L.C. 18, 31 (1992) (citations omitted) (memorandum from Acting Assistant Attorney General Timothy Flanigan); *see also* Constitutionality of Congress' Disapproval of Agency Reguls. by Resols. Not Presented to the President, 4A Op. O.L.C. 21, 29 (1980) (memorandum from Attorney General Benjamin Civiletti) ("[T]he Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other.").
Assistant Attorney General Walter Dellinger took a somewhat different tack in a 1994 memorandum for the Counsel to the President, discussing the President's constitutional authority to decline to execute unconstitutional statutes. Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C 199, 199 (1994) (memorandum from Assistant Attorney General Walter Dellinger). Dellinger notes that "the President can and should exercise his independent judgment to determine whether the statute is constitutional," but "[a]s a general matter, *if the President believes that the [Supreme] Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue*." *Id.* at 200 (emphasis added). Where the President both considers the provision unconstitutional and thinks the Supreme Court will agree, the President should consider, among other things, whether compliance or noncompliance will allow for a justiciable question; "[t]hat is, the President may base his decision to comply (or decline to comply) in part on a desire to afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch." *Id.* at 200–01.

19. *See infra* notes 20–26 and accompanying text; *see also* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 621 n.349 (1994) ("[A]lthough the President must 'take care' to execute the laws, the Constitution is itself a law . . . and because the Constitution supersedes statutes, the presidential 'take care' requirement applies to the Constitution first and foremost."); Henry L. Chambers Jr., *Presidential Constitutional Interpretation, Signing Statements, Executive Power, and Zivotofsky*, 87 U. COLO. L. REV. 1183, 1185 (2016) ("The faithful execution duty requires that the President enforce the Constitution and federal statutory law,

> [P]er the Faithful Execution Clause, the President must take care to faithfully execute the laws. The Supremacy Clause famously makes clear that the Constitution is "the supreme Law of the Land." Taken together, these two Clauses prohibit the President from taking actions that violate the Supreme Law that he is obliged to faithfully execute.[20]

And Professor Akhil Amar, in a short discussion of the President's "independent authority to construe and defend the Constitution"[21] notes the President's "general pledge to 'faithfully execute [the] Office' entailed a specific obligation to 'take Care that the Laws be faithfully executed.' In America, however, 'the Laws' included not just the congressional enactments, but also the Constitution itself."[22]

Professor Paulsen has a particularly strong attachment to a structural, inferential approach to departmentalism, but his textual argument is clearly rooted in a belief that "the Laws" of the Take Care Clause include the Constitution: "[The Constitution] commands the President to 'take Care that the laws be faithfully executed.' The laws of the nation include its Constitution, which is listed first in Article VI's description of the 'supreme law of the Land.'"[23]

Other scholars, investigating the functioning of departmentalism rather than its supportability, have routinely accepted the textual link between the Constitution and the Take Care Clause. In discussing how the Executive Branch could most productively act when confronted with a statute it considers constitutionally objectionable, Professor Dawn Johnsen appears to have accepted the link between the Supremacy Clause and the Take Care Clause.[24] Referencing an Office of Legal Counsel Memorandum on the topic,[25] Johnsen wrote, "The . . . [m]emorandum conceded, as it must, that the Take Care Clause requires the President to ensure the faithful execution of the laws, but emphasized *what also clearly is true*—that the Constitution is among 'the Laws' the President must faithfully execute."[26]

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as both are the supreme law of the land."); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1287, n.94 (1996) (stating the President must interpret a law to execute it, and as the Constitution is "supreme positive law," faithful execution of laws obligates the President to interpret "and to prefer the Constitution to any other source of law with which it may conflict"); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1193 (2012) ("[T]he [P]resident must . . . take care to enforce the Constitution, which, of course, trumps conflicting statutes.").

20. Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1617 (2008).

21. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 179 (2005).

22. *Id.* at 178.

23. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2725 (2003) (citing U.S. CONST. art. II § 3).

24. *See, e.g.*, Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 L. & CONTEMP. PROBS. 7, 27 (2000).

25. *See* Provisions Directing Issuance, *supra* note 18, at 31.

26. Johnsen, *supra* note 24, at 16 (emphasis added); *see also* Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV.

In Part I of this Article, I first provide a basic textual analysis challenging the common argument that the Supremacy Clause's "Law of the Land" equates to "the Laws" of the Take Care Clause. I show that the "Law of the land" is far more closely associated with the Judicial Power Clause than the Take Care Clause. I follow that with a more systematic intratextual analysis, seeking any supportable interpretation of "the Laws" in the Take Care Clause that might include the Constitution. A new candidate emerges as a basis for including the Constitution among "the Laws" of the Take Care Clause—the "Laws of the Union" in Article I's Calling Forth Clause.[27]

In Part II, I examine the drafting history of the relevant provisions during the Constitution's creation at the 1787 Constitutional Convention, paying special attention to the intratextual clues provided by the various drafts of the Constitution in the final weeks of the convention. For those open to arguments based in the drafting history (as opposed to the debate history) at the convention, my analysis has the following results: (1) the evidence from the Constitutional Convention is overwhelming that the Take Care Clause does not refer to Constitution; (2) the "Laws of the Union" in the Calling Forth Clause do not appear to include the Constitution,[28] which prevents that clause from serving as a conduit for the Constitution to be a "law" within the meaning of the Take Care Clause; and (3) the manner in which the Judicial Power Clause was developed makes the textual argument for judicial supremacy even more persuasive.

I examine in Part III the oath-based argument for a presidential power of independent constitutional interpretation. Assuming Parts I and II demonstrate the Constitution is not among the laws referenced in the Take Care Clause, the promise in the oath to "faithfully execute the Office of President"[29] does not implicate constitutional interpretation. The portion of the oath requiring the President to "preserve, protect and defend the Constitution" to "the best of [the President's] Ability"[30] does not, on its own, support a presidential power to independently construe the Constitution. And given that the 1787 Constitutional Convention considered, adopted, and then removed wording requiring the President to use "the best of [the President's] judgment and power" rather than the best of the President's "ability," the wording of the oath is an underwhelming font of interpretive autonomy.[31]

395, 412 (2008) (noting that the President has an "obligation to 'preserve, protect and defend' the Constitution as supreme law and to 'take Care' that the executive branch faithfully upholds it").

27. U.S. CONST. art. I, § 8, cl. 15.

28. *See* discussion *infra* Section II.B (discussing the inclusion of treaties).

29. U.S. CONST. art. II, § 1, cl. 8.

30. *Id.*

31. *See infra* notes 215–21 and accompanying text.

I. The Text of the Constitution Does Not Support the Constitution Being Among "the Laws" of the Take Care Clause; the Text is Far More Supportive of the Textual Argument for Judicial Supremacy

The Supremacy Clause declares that the Constitution is part of the "Law of the Land," and from that statement arises the common inference that the Constitution is among "the Laws" of the Take Care Clause.[32] That inference requires that "the Laws" of the Take Care Clause either (1) equate to the "Law of the Land" or (2) consist of some other collection of laws that includes the Constitution.

But when one analyzes the Take Care Clause, the Supremacy Clause, and their relationship to one another, and makes use of the context provided by other informing constitutional provisions, one can see clearly that the Supremacy Clause's "Law of the Land" is not equivalent to "the Laws" of the Take Care Clause. Indeed, the Constitution ties constitutional interpretation far more directly to the judicial power than to the executive power by using the same language in Articles III and VI, making the judicial power[33] coextensive with the "supreme Law of the Land."[34]

If one searches the Constitution for other provisions that might provide a textual link between the Take Care Clause's "Laws" and the Constitution, there is only one candidate—Article I's Calling Forth Clause. And that link is far more inferential than the clear textual link between judicial interpretive power and the Constitution.

A. *Textual Analysis of the Assumed Relationship Between the Take Care Clause and the Supremacy Clause*

Let us begin by setting out the two provisions of interest.

Supremacy Clause:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.[35]

Take Care Clause:

> [The President] shall take Care that the Laws be faithfully executed.[36]

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32. *See supra* notes 11–26 and accompanying text.
33. U.S. CONST. art. III, § 2, cl. 1.
34. *Id.* art. VI, cl. 2.
35. *Id.*
36. *Id.* art. II, § 3.

There is no obvious reason to think the purpose of the Supremacy Clause is to equate the "Law of the Land" to "the Laws" of the Take Care Clause. Rather, its declaration that the Constitution, laws of the United States, and treaties are to be the "supreme Law of the Land" is directed at the state judiciaries.[37] The purposes of the Supremacy Clause, clear from its text, are to declare federal law superior to state law and to enlist judicial enforcement to keep federal law supreme. There is no indication that the clause defines the laws the President is to execute. At the state level, courts are to do the work of judging whether state legislation and state executive actions violate the Constitution, even when those actions accord with state law. That is, the Supremacy Clause clearly expects state judicial review. The Supremacy Clause's binding of the state judges indicates an understanding that the courts will be engaged in enforcing the supremacy of the Constitution, treaties, and laws of the United States.

Further, the wording of the Supremacy Clause makes it a poor fit to define "the Laws" of the Take Care Clause. While not wholly incompatible, the two provisions have mismatched phrasing and terminology. The Supremacy Clause itself, as noted earlier, distinguishes the Constitution from the "Laws of the United States."[38] It is poor, unclear writing to make that distinction and then use the general and nebulous term "laws" as a repository for *both* the laws of the United States *and* the Constitution. That is not the end of the prose difficulties created when we read the two clauses together. The "Law of the Land" refers to a singular body of law. "[T]he Laws" refers to a collection of individual laws. Yes, the "Law of the Land" is itself a collection of laws, but it is odd to equate the "Law of the Land" with "the Laws" across the singular/plural difference.

If the two clauses were meant to refer to the same set of laws, there was a simple way to do it—with matching words. The clauses would meld if the Take Care Clause, in place of the ambiguous "laws," used "Law of the Land" or repeated the Supremacy Clause's tripartite listing of relevant law: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States . . . ."[39] The Article III description of the extent of judicial power uses almost exactly the same wording as the Supremacy Clause: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."[40] To refer to the same set of laws as both the "Law of the Land" and as "the Laws" is possible, but when the definition of "Law of the Land" is fully repeated elsewhere, despite being somewhat lengthy, the

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37. *Id.* art. VI, cl. 2.

38. *Id.* (distinguishing both between the Constitution and "Laws of the United States" and between state constitutions and state laws).

39. *Id.* art. VI, cl. 2.

40. *Id.* art. III, § 2, cl. 1.

better answer is to conclude that the short, ambiguous term "laws" does not mean "Law of the Land."

The phrasing difficulties noted above arise because the Constitution is using "law" both as a general term for a body of law ("Law of the Land") and as a term for an individual piece of that body of law. While the double use is necessary in the Supremacy Clause (defining a body of law in terms of individual laws), the text of the Constitution repeatedly distinguishes the Constitution from other laws that are hierarchically inferior to the Constitution. Just two sentences before the Take Care Clause, Article II distinguishes ordinary "[l]aw[s]" from the Constitution.[41] Section 2 of Article II provides that the President has power to make appointments "not herein [(the Constitution)][42] otherwise provided for, and which shall be established *by Law*: but the Congress may *by Law* vest" various appointments in the President, courts, or heads of departments.[43] If the term "the Laws" means "Law of the Land," it flattens all law into one category and does not account for this hierarchy in the way the tripartite definition of "the supreme Law" does.

This distinction between the Constitution and congressional enactments exists not only in Articles II, III, and VI, but in Article I as well. The Necessary and Proper Clause declares Congress's power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[44] Not only does this phrasing yet again distinguish the Constitution from ordinary laws, it also declares Congress makes laws for *carrying into execution* presidential powers like those attached to the Take Care Clause's duty of *faithful execution* of the laws. Professor H. Jefferson Powell, in addressing the idea that the Take Care Clause supports a presidential power to not enforce statutes the President considers unconstitutional, has remarked that the Take Care Clause's "echo of the language empowering *Congress* to enact the laws 'necessary and proper for carrying into Execution' all federal powers[] would be an awkward way at best of indicating the president may sometimes disregard the laws that he is supposed to be faithfully executing."[45] I agree.

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41. *Id.* art. II, § 3.

42. That "herein" refers to the Constitution (or perhaps that particular clause of the Constitution) is obvious from the text, but there is further evidence. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 420, 599 (Max Farrand ed., 1911) [hereinafter 2 Farrand] (indicating that during the last few weeks of the Constitutional Convention "[N]ot herein otherwise provided for" was substituted for "in all cases not otherwise provided for by this [C]onstitution").

43. U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

44. *Id.* art. I, § 8, cl. 18.

45. H. JEFFERSON POWELL, THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION 178 n.47 (2014) (quoting U.S. CONST. art. I, § 8, cl. 18). It is worth noting that several amendments likewise offer power for Congress to say how the amendments' provisions can be enforced. *See, e.g.*, U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation[]."); *id.* amend. XIV, § 5; *id.* amend. XV, § 2; *id.* amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

Article I, Section 7 adds to the argument that the Take Care Clause's laws are statutes. That section describes the process by which a bill becomes "a Law."[46] In those instances, "a Law" is a discrete legislative act, the plural of which would be "laws." In fact, the *only* instances in which the Constitution uses the singular term "a law" are in Article I, Section 7 in describing the processes of bicameralism, presentment, veto, and congressional override of vetoes.[47] The two-word term "a law" in the Constitution means "a statute." Thus, if the term "the laws" in the Take Care Clause is simply a plural for a collection of things, each of which the Constitution calls "a law," then "the laws" are statutes and statutes only. The evidence from both Section 7 and Section 8 of Article I is that the Take Care Clause is about statutes.

Lastly, as noted above,[48] the parallel wording of the Supremacy Clause's "Law of the Land" and Article III's provision describing the extent of the judicial power provides an intimate link between the Constitution and the exercise of the judiciary's declared powers, which demonstrates a power to interpret the Constitution. The Judicial Power Clause clearly states the Judicial Branch's power to adjudicate cases arising under all three components of the "supreme Law of the Land." There is no such link between the Supremacy Clause and the Take Care Clause. The text of the Constitution thus more strongly supports Judicial Branch primacy in construing the Constitution than it supports an independent presidential power of constitutional interpretation.

"The Laws" of the Take Care Clause are not equivalent to the "Law of the Land" from the Supremacy Clause. Unless there is another way to understand the Constitution as being part of the Take Care Clause's "laws," the textual argument for departmentalism fails.

B. *Searching for Possibilities to Save the Textual Argument for Departmentalism*

The term "the Laws" as used in the Take Care Clause is a vexingly general and ambiguous term.[49] It has a capacity to mean almost any grouping of multiple discrete pieces of federal law mentioned elsewhere in the Constitution.[50] Having argued that the "Law of the Land" defined in the Supremacy Clause does not accord with "the Laws" of the Take Care Clause, I look elsewhere in the Constitution for uses of "law" or "laws"

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46. U.S. CONST. art. I, § 7, cl. 2.
47. *See id.* art. I, § 7.
48. *See supra* notes 39–40 and accompanying text.
49. *See infra* Section II.A for a discussion of the historical reason that general term is present in the Take Care Clause. Here, my focus is on a textual argument that interprets the term as it appears in the Constitution without referring to the evolution of the clause in the drafting process.
50. "Multiple discrete pieces" because of the plural "laws," and "mentioned elsewhere in the Constitution" because the term includes a definite article, indicating a known reference.

(collectively "law(s)")[51] that provide evidence for the meaning of the Clause.[52]

"Law(s)" appears thirty-four times in the original Constitution, and eighteen more times in the amendments.[53] As we have seen, one of those instances is in the Take Care Clause. What might we learn of the meaning of "the Laws" in the Take Care Clause by carefully examining the other fifty-one occurrences of the word?[54]

My method is as follows. I attempt to categorize[55] the use of "law(s)" in the Constitution, moving from instances in which "law(s)" has a clear meaning to instances in which the meaning is less clear. Where I cannot quickly and clearly show the meaning of the term, I settle for an efficient argument that the term either does not include the Constitution or cannot be part of "the Laws" in the Take Care Clause. I move on to the murkier instances, clearing the brush until I am left with only the instances most likely to be of interest in discerning whether "the Laws" of the Take Care Clause include the Constitution. The dense footnotes of the next few pages offer readers a full examination of the text so they may feel satisfied those clauses that make it through my analytical sieve really are the only candidates to link the Constitution with "the Laws" of the Take Care Clause.

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51. Throughout the remainder of this Article, in the interest of brevity, I will use "law(s)" to mean "the word 'law' or 'laws.'" Where I reference only the word "law" or only "laws," I typically mean only that respective word.

52. I use what Professor Akhil Amar called "the classic but underappreciated technique of intratextualism." Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 749 (1999); *see also id.* at 791–95 (describing types of intratextualism). I am aware of the warnings Professor Amar provides regarding using this method "with a vengeance" but "with dubious constitutional judgment." *Id.* at 784 (describing an attempt to gain understanding of the constitutional meaning of "United States" from the dozens of uses of that term in the Constitution). Some may argue I am doomed to repeat that error with "law(s)," given the similar frequent appearance of the word. I am hopeful I will be found sufficiently sensitive to context that my winnowing of the relevant terms will truly inform the meaning of "laws" in the Take Care Clause.

53. I give less weight, generally, to the appearances of "law(s)" in the amendments. I am interested in the meaning of "the Laws" as that term appears in the Take Care Clause of the original Constitution. It seems unlikely that an appearance of "law(s)" in later amendments, none of which are directly aimed at the Take Care Clause, would change that clause's meaning by redefining "the Laws." Still, in the interest of completeness, and to offer a holistic textual argument, I include the amendments in my "brush clearing" categorization of the uses of "law(s)" in the Constitution.

54. I am not aware of anyone looking as carefully as I do in this Article at the meaning of every occurrence of "law" and "laws" in the Constitution. There are some authors who more briefly list and summarize many instances of the words. *See, e.g.*, Lawson & Moore, *supra* note 19, at 1315 n.225 (listing perhaps every occurrence of the terms in the original Constitution and summarizing that in all but two cases, the terms appear to refer to statutes); *see also*, Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331 (2008). Professor Edward Swaine's project is to investigate whether treaties are "laws" the President must take care be faithfully executed. He notes "[m]ost of the Constitution's references to "the law," "law," or "laws" relate to congressional statutes." *Id.* at 342. He runs through the instances of these terms in Article I, categorizing them into federal statutes, federal or state law, state law only, law of nations, or "an ambiguous class." *Id.* at 342–343. He then discusses the use of "law" and "laws" in the other articles of the original Constitution. *Id.* at 343–44. As to my results regarding treaties being laws within the meaning of that term in the Take Care Clause, see discussion *infra* Section II.B.2.

55. Some instances of "law(s)" fit more than one category. I place each instance in only one category for purposes of keeping a clear count.

First, there are several instances in which it is clear "law(s)" means congressional legislation and nothing else. The word "Law" appears four times in the Article I, Section 7 description of the process by which a bill becomes "a Law."[56] In those instances, "a Law" is a discrete legislative Act.[57] "Law(s)" appears thirteen other times in the original Constitution in situations where it is tied to Congress in such a way as to make clear the word indicates statutes.[58] The amendments add ten more instances.[59] These

56. U.S. CONST. art. I, § 7, cl. 2. Joint resolutions can become laws, too, but for that to happen, they must follow the same process bills follow in becoming laws. *See id.* art. I, § 7, cl. 3 ("[B]efore [a joint resolution] shall take Effect" it must be approved by the President, or the President's veto must be overridden by a 2/3 majority of each house "according to the Rules and Limitations prescribed in the Case of a Bill.").

57. Note that Article I, Section 7, Clause 2 provides the only instances in which the singular term, "a Law," is used in the Constitution. If "the Laws" is simply a plural for a collection of things the Constitution calls "a law," then the legislative acts discussed in this clause are a natural match for the Take Care Clause and "the Laws" means federal statutes. We will see *infra* at notes 113–25 and accompanying text that there is good reason to believe this is the meaning intended by the Constitutional Convention, but for our purposes at this point, we have four instances of "law(s)" that clearly refer to federal statutes.

58. U.S. CONST. art. I, § 2, cl. 3 (Congress "shall by Law direct" the manner of taking a decennial census); *id.* art. I, § 4, cl. 1 ("Congress may at any time by Law make or alter" state regulations as to times, places, and manner of holding elections for Congress); *id.* art. I, § 4, cl. 2 (unless Congress "shall by Law appoint a different Day," Congress shall assemble on the first Monday in December); *id.* art. I, § 8, cl. 4 (Congress has power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States); *id.* art. I, § 8, cl. 18 (Congress has power "[t]o make all Laws . . . necessary and proper for carrying into Execution the foregoing Powers"); *id.* art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed"; here, the word "passed" indicates a congressional Act); *id.* art. II, § 1, cl. 6 ("Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President . . . until the Disability be removed, or a President shall be elected"); *id.* art II, § 2, cl. 2 (the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment" in the President alone, the courts, of heads of departments); *id.* art. III, § 2, cl. 3 ("Congress may by Law" direct the place of trial for crimes committed elsewhere than in a state); *id.* art. IV, § 1 ("Congress may by general Laws prescribe the Manner in which" the public acts, records, and judicial proceedings of one state shall be proved in another state, and the effect of that proof). These are eleven of the thirteen instances.
Let's take the last two instances together: Article I, Section 9, Clause 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law") and Article I, Section 6, Clause 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."). As to Article I, Section 9, Clause 7, as Congress is the only body with power to appropriate funds, the law by which appropriations are made must be a congressional action. In Article I, Section 6, Clause 1, the phrase "ascertained by Law" does not, on its face, require reference to a statute or congressional resolution. But as any payment to members of Congress from the treasury must result from an appropriation made by (congressional) law under Article I, Section 9, Clause 7, the payment must be by congressional action, so it is Congress who writes the law according to which compensation is "ascertained." And so it has been since the First Congress. *See* 1 Stat. 70–72 (Sept. 22, 1789) ("An Act for allowing Compensation to the Members of the Senate and House of Representatives of the United States, and to the Officers of both Houses.").

59. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."); *id.* amend. XIV, § 4 ("The validity of the public debt of the United States, authorized by law, . . . shall not be questioned."); *id.* art. I, § 8, cl. 2 (the Constitution's only means of borrowing money is a congressional power, this refers statutes); *id.* amend. XX, § 2 ("unless they [Congress, previously referenced in the provision] shall by law appoint a different day"); *id.* amend. XX, § 3 ("Congress may by law provide"); *id.* amend. XX, § 4 ("*Congress* may by law provide"); *id.* amend. XXV, §4 ("Congress may by law provide"). These are seven of the instances.

twenty-seven occurrences account for over half of the times the Constitution mentions “law(s),” and each unambiguously means a federal statute. Further, they show that frequently the phrase “by law” is evidence the law is created by congressional action.[60]

Next are nineteen instances in which “law(s)” is not linking the Constitution to “the Laws” of the Take Care Clause because the term either (1) is not referring to the Constitution, (2) is not referring to the “Laws” of the Take Care Clause, or (3) is not referring to either. “Law(s)” is used nine times in legal terms of art (“common law,” “courts of law,” “law of nations,” “law and fact,” “due process of law,” “law and equity”).[61] In the

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The Twenty-seventh Amendment (“No law varying the compensation” of members of Congress is to take effect until after the next election for the House of Representatives), for reasons similar to those recited *supra* in note 58 regarding the related provision addressing compensation for members of Congress in U.S. CONST. art. I, § 6, cl.1, refers to statutes or resolutions of Congress.

The Third and Sixth Amendments both use the phrase “by law,” without a designation of the creator of the relevant law. In the original Constitution, written and ratified in the two years before the writing of these two amendments, all nine instances of the phrase “by law” were tied to Congress. *See supra* note 58 (in which all nine such instances are listed). So, it would appear the general “by law” denotes federal legislation.

In addition, as to the Third Amendment, it certainly appears the relevant “law” is to be statutory. The Third Amendment states soldiers may be quartered in a house during a time of war only “in a manner to be prescribed by law.” There is little chance the framing generation, so careful to avoid a powerful standing army, would allow a power other than Congress to “prescribe[]” the manner in which soldiers should be quartered in the houses of the populace.

The Sixth Amendment states any criminal prosecution shall take place in the “[s]tate and district wherein the crime shall have been committed, [and that district is to be] ascertained by law.” Note that Article III, Section 2, Clause 3 had already stated that trials of crimes committed in a state shall be held in that state, and trials of crimes not committed within any state shall be held in places “Congress may by Law have directed.” The “by law” in the Sixth Amendment appears to allow the location of crimes to be further refined to districts within states, in a manner similar to the preexisting provision in Article III of the original Constitution, and it seems that detailing is also to be accomplished by laws passed by Congress.

Indeed, when amendments were originally proposed in the First Congress, they were drafted with the expectation that they would be placed into the text of the Constitution at appropriate places to supplement or replace the original provisions. The early version of what became the Sixth Amendment was to replace Article III, Section 2, Clause 3. CREATING THE BILL OF RIGHTS: THE. DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 32 (Helen E. Veit, Kenneth R. Bowling, & Charlene Bangs Bickford, eds., 1991). In Edward Hartnett, *A “Uniform and Entire” Constitution; or, What If Madison Had Won?*, 15 CONST. COMMENT. 251, 252–253 (1998), the author considers the debate in the First Congress regarding whether amendments to the Constitution should be incorporated into the text of the original document, or placed at the end of the original Constitution as supplements (the eventual outcome). Hartnett describes where Madison had planned to place his original proposals and imagines where the resulting Bill of Rights amendments, and all later amendments, should be placed in an incorporated document. Hartnett notes Madison had in mind to place the trial-location portion of the Sixth Amendment in Article III, Section 2. Hartnett*, supra*, at 259–60. In Hartnett’s rearrangement of the Constitution, with Amendments incorporated, he places the relevant language from the Sixth Amendment into Article III, Section 2, Clause 3. *Id.* at 296.

60. By my count, when all nineteen instances of something being done “by law” in the Constitution are considered, twelve directly reference Congress and for all the others there are strong arguments that Congress originates the relevant law.

61. U.S. CONST. art. I, § 8, cl. 10 (“Law of Nations”); *id.* art. II, § 2, cl. 2 (“Courts of Law”); *id.* art. III, § 2, cl. 1 (“Law and Equity”); *id.* art. III, § 2, cl. 2 (“Law and Fact”); *id.* amend. V (“due process of law”); *id.* amend. VII (“common law”); *id.* amend. XI (“suit in law or equity”); *id.* amend. XIV, § 1 (“due process of law”).

remaining ten instances, the reference is to state law and, therefore, not to the laws of the Take Care Clause.[62]

The constitutional text twice refers to "Laws of the United States" in juxtaposition to the Constitution, making it clear that the Constitution is not one of those "laws" in that instance.[63]

We have now covered forty-eight of the fifty-two instances of "law(s)" in the Constitution; the forty-ninth, Article I, Section 3, Clause 7, merits its own short discussion. The Clause states: "Judgment in Cases of Impeachment [is limited to] removal from Office, and disqualification [from holding other federal office,]" but the party convicted "shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."[64]

Under Article II, Section 4, impeachment may be based on treason.[65] And, although Congress has "[p]ower to declare the Punishment of Treason,"[66] the definition of treason and an evidentiary requirement for conviction are spelled out in the Constitution.[67] Thus, someone impeached for treason is tried "according to law," as required by Article I, Section 3, Clause 7, with that law ostensibly being, at least in part, the Constitution. In that one instance, it might seem the President, in taking care to execute the law prohibiting treason, would be executing the Constitution directly. But this is not the case. The Constitution defines treason, to be sure, and it makes treason grounds for impeachment. But it is federal statutory law

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62. *Id.* art. I, § 10, cl. 1 ("[n]o State shall . . . pass any . . . ex post facto Law, or Law impairing the Obligation of Contracts."); *id.* art. I, § 10, cl. 2 (state "inspection Laws," and "all such Laws") (referring to state-created "Imposts or Duties"); *id.* art. IV, § 2, cl. 3 ("Laws thereof [one state]," and "Law or Regulation therein [another state]"); *id.* art. VI, cl. 2 ("[A]ny Thing in the Constitution or Laws of any State."); *id.* amend XXI, § 2 ("The transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."). These are eight of the instances.
The other two instances occur in the Fourteenth Amendment, § 1. *Id.* amend. XIV, § 1. First, the admonition that "[n]o State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States," which clearly speaks of state law. *Id.* Second, no state shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.* Here, the word "laws" may include federal law, but it also certainly includes state laws. *See id.*

63. *Id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . "); *id.* art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . ."). These juxtapositions are, of themselves, relevant to the idea that "laws" in the Take Care Clause do not include the Constitution. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1855 (2016).

64. U.S. CONST. art. I, § 3, cl. 7.

65. *Id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason . . . .").

66. *Id.* art. III, § 3, cl. 2.

67. *Id.* art. III, § 3, cl. 1 ("Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

that criminalizes treason, using the constitutionally required definition.[68] Therefore, treason is no different than any other criminal statute vis-à-vis the Take Care Clause.[69]

The four preceding paragraphs have cleared the brush; some of the forty-nine provisions so far discussed may bear on arguments regarding the proper interpretation of the Take Care Clause, but none of them insinuate the Constitution into "the Laws" of the Take Care Clause. There are only two constitutional provisions remaining (apart from the Take Care Clause) in which the "law(s)" mentioned might both include the Constitution and be among "the Laws" referenced in the Take Care Clause.

One of these is the "Law of the Land" in the Supremacy Clause,[70] the text appealed to in the standard argument made by departmentalists. Clearly, the Constitution is part of the "Law of the Land." That is not the issue. Rather, as I have already argued in Section I.A, the problem is that the "Law of the Land" is not equivalent to "the Laws" in the Take Care Clause, and therefore the Supremacy Clause provides no textual link between the Take Care Clause and the Constitution. Our canvass of "law(s)" in the Constitution strengthens that result. First, we have seen how rarely unadorned "laws" include the Constitution. We also have seen that "a law," the singular version of "the laws," occurs only when statutes are described in Section 7 of Article I.

The only remaining constitutional provision that might link the Constitution to the laws of the Take Care Clause is the Calling Forth Clause in Article I, which gives Congress power "[t]o provide for calling forth the Militia to execute the *Laws of the Union*, suppress Insurrections and repel

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68. In 1790, the First Congress enacted the first statute criminalizing treason: An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112 (Apr. 30, 1790). Chapter IX, Section 1 of the Act states:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.

Id.

The current statute, 18 U.S.C. § 2381, conforms the definition of the crime of treason to the Constitution's definition, omitting the evidentiary requirement and declaring it punishable by death or imprisonment "not less than five years and [a fine of] not less than $10,000," along with incapacity to hold federal office. The evidentiary requirement still exists in the Constitution, of course, but is not part of the statute. *See, e.g.*, United States v. Haupt, 136 F.2d 661, 664–65 (7th Cir. 1943).

69. Other scholars I have previously noted who address the meaning of "law(s)" throughout the Constitution without mentioning the possible issue regarding a prosecution for treason have reached similar results, so perhaps my special care of this clause is unnecessary. *See* Swaine, *supra* note 54, at 342. Lawson and Moore addressed Article I, Section 3, Clause 7, in this way: "[i]f all crimes must be statutory, then this is a clear reference to statutory 'Law.' If, however, there can be federal common law of crimes, one can argue that this reference includes judicial decisions." Lawson & Moore, *supra* note 19, at 1315 n.225. Professor Swaine places this clause in his "federal or state law" category. Swaine*, supra* note 54, at 342–43, n.65.

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

Invasions . . . ."[71] This provision has not, to my knowledge, been used as a significant textual hook in an argument for departmentalism.[72] Whereas the Supremacy Clause clearly references the Constitution, but is not tied to the Take Care Clause,[73] the Calling Forth Clause is far better linked to "the Laws" in the Take Care Clause but lacks clear inclusion of the Constitution.

The Calling Forth Clause is the last chance of a viable textual basis for the departmentalist argument. "Laws of the Union" links well to "the Laws" of the Take Care Clause for two reasons.[74] First, the term fits well with the plural "laws" of the Take Care Clause. The additional phrase "of the Union" can be seen as merely clarifying that the militia, called forth from the states, is to be executing the "Laws of the Union," rather than any state's law.[75]

Second, the "Laws of the Union," like those referenced in the Take Care Clause, are to be "execute[d]," and the Calling Forth Clause reaches not only toward the Take Care Clause, but also to another provision in Article II—that "[t]he President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States . . . ."[76] Thus, a situation could exist in which the President, as Commander in Chief, under the duty to "take Care that the Laws be faithfully executed" and under an oath to "execute the Office of the Presi-

71. *Id.* art. I, § 8, cl. 15 (emphasis added). Professor Swaine places the Calling Forth Clause in his "ambiguous class"; of the roughly two dozen clauses he categorizes, the Calling Forth Clause is the only clause in his "ambiguous class." Swaine, *supra* note 54, at 342–43, n.68.

72. The only significant discussion of the Calling Forth Clause I found in my research is by Professors Steven Calabresi and Saikrishna Prakash in a pair of paragraphs in their textual argument for a unitary Executive. Calabresi & Prakash, *supra* note 19, at 585–86. A President's power of constitutional interpretation is not the subject in their article, but Professors Calabresi and Prakash argue that the Calling Forth Clause and the Take Care Clause bolster their argument for a unitary Executive. *Id.* at 582–86. I note their relevant statements more particularly below. *See infra* note 77 and accompanying text.

73. *See supra* Section I.A.

74. *See infra* notes 75–78 and accompanying text.

75. Outside the Calling Forth Clause, "Union" distinguishes the states as a collective from the states as individual entities. *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union . . . ."); *id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union . . . ."); *id.* art. II, § 3 ("He shall from time to time give to the Congress Information of the State of the Union . . . ."); *id.* art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); *id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

I should note here that the Calling Forth Clause simply refers to "the Militia"—not specifically stating "militia of the states"—but the militia was in fact the militia of the states as is seen quite clearly from two other provisions. *See* U.S. CONST. art. I, § 8, cl. 15. First, the Commander in Chief provision: "The President shall be Commander in Chief . . . of the Militia of the several States, when called into the actual Service of the United States . . . ." *Id.* art. II, § 2, cl. 1. Second, the congressional power "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, *reserving to the States respectively* . . . " the appointment of officers and authority of training. *Id.* art. I, § 8, cl. 16 (emphasis added).

76. U.S. CONST. art. II, § 2, cl. 1.

dent of the United States," would command the militia called into the service of the United States to "execute the Laws of the Union."[77] There is a certain harmony in the triple use of "execut[ion]," which aids the argument that the Calling Forth Provision's "Laws of the Union" are "the Laws" of the Take Care Clause.[78]

That said, it is important to note that nothing above ties the Constitution to the Calling Forth Clause. "Laws of the Union" has the ring of a term that might include the Constitution, and because it appears in the Constitution only once, it is less constrained in the meanings it can take.[79] But all that merely means it is possible for the term to include the Constitution. There is no evidence indicating it is probable the term includes the Constitution. Without any such evidence, the term, linked as it appears to be to the Take Care Clause, cannot pull the meaning toward including the Constitution. To this point, even if we assume "Laws of the Union" is exactly the same as "laws" in the Take Care Clause, there is no evidence that "Laws of the Union" pulls the meaning of those terms toward including the Constitution.

And even if the Constitution is part of the "Laws of the Union," the clause itself may deny the President any power to interpret the Constitution. The Calling Forth Clause is a declaration of a legislative power to provide for calling forth the militia. The Executive commands the militia, but the power "[t]o provide for calling forth the Militia to execute the Laws of the Union" belongs to Congress.[80] The Constitution gives Congress the power to say how it will be decided if or when the Laws of the Union are not being executed. In the 1792 act that first provided for the calling forth of the militia, the President was permitted to call out the militia only after a federal judge certified that federal marshals were unable to enforce the law.[81] The Calling Forth Clause does not empower the President to determine whether the Constitution is being violated. For the President to wait

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77. Professors Calabresi and Prakash clearly recognize the possible relevance of the Calling Forth Clause to understanding the Take Care Clause. *See* Calabresi & Prakash, *supra* note 19, at 585–86. They note the Calling Forth Clause must be "read in conjunction with the . . . designation of the President as Commander in Chief of any 'federalized' state militias," which "plainly contemplates presidential supervision of law execution during times of crisis." *Id.* at 585. They go on: "But that, in turn, makes it even clearer that the President is in charge of law execution during times of peace as well." *Id.*

78. There may even be a tie to the presidential oath here. The other instances in which the militia may be called into service of the United States, to "suppress Insurrections and repel Invasions," are situations in which it is possible to suppose that the President would be "protect[ing] and defend[ing] the Constitution" as required by the presidential oath. *See* U.S. CONST. art. I, § 8, cl. 15; *id.* art. II, § 1, cl. 8. In such a situation, the picture would be nicely completed if the President's duty to execute the laws of the Union included the Constitution.

79. *See* U.S. CONST. art. I, § 8, cl. 15.

80. *Id.*

81. *See* 1 Stat. 264 (1792); *see also*, DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801, 160–62 (1997) (summarizing the House debate on the 1792 Act). The wording of the provision, that Congress is to have power "[t]o provide for calling forth the Militia to execute the Laws of the Union," may even be read to empower Congress to put constraints on the manner in which the execution of laws is to be carried out. *See* CURRIE, *supra*.

for a federal judge to determine if the Constitution is being violated does not speak to an independent presidential power to interpret the Constitution.

The common textual argument for an independent presidential power of constitutional interpretation—that "the Laws" of the Take Care Clause are or include the "Law of the Land" from the Supremacy Clause—is unconvincing. The argument for judicial supremacy, based in the language shared by the Supremacy Clause and the Judicial Power Clause, is stronger than the common textual argument for independent presidential interpretive powers. A possible new textual basis for the departmentalist argument is the Calling Forth Clause; the "Laws of the Union" in that clause may include the Constitution, and the clause appears well tied to the Take Care Clause.

II. THE DRAFTING HISTORY OF THE CONSTITUTION DOES NOT SUPPORT THE CONSTITUTION BEING AMONG "THE LAWS" OF THE TAKE CARE CLAUSE, AND THAT SAME HISTORY IS FAR MORE SUPPORTIVE OF THE TEXTUAL ARGUMENT FOR JUDICIAL SUPREMACY

This Part examines the 1787 Constitutional Convention's drafting history of the four constitutional provisions relevant to the question of whether the Constitution is among "the Laws" of the Take Care Clause: (1) the Take Care Clause itself, (2) the Supremacy Clause's "Law of the Land," (3) the Calling Forth Clause and its "Laws of the Union" phrase, and (4) the Judicial Power Clause's duplication of the three elements of that "Law of the Land." The related development of these clauses in August of 1787 supports the following conclusions:

- At no point in the convention did the Take Care Clause include the Constitution among "the Laws" to be executed by the President;

- The Calling Forth Clause may indicate that treaties, but not the Constitution, are among "the Laws" of the Take Care Clause; and

- The Judicial Power Clause's textual similarity to the Supremacy Clause was purposefully created by the convention, and therefore offers a strong argument that judicial supremacy is a more correct understanding of the constitutional text than is departmentalism.

Some readers may have concerns regarding use of convention records and some of James Madison's notes from the secret drafting history of the Constitution. There are reasons for caution, to be sure,[82] but my use of

A revised statute in 1795 allowed the President to make the determination that execution of the laws was being "obstructed . . . by combinations too powerful to be suppressed by the ordinary course of judicial proceedings"; but that presidential prerogative is a statutory, not constitutional, creation. *See* 1 Stat. 424 (1795).

82. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 2, 4 (2015). Professor Sarah Bilder's seminal work catalogs and describes the various limitations of Madison's notes on the convention and the alterations Madison made to his contemporaneous notes over several years and decades. *Id.*

those sources is only to follow the textual changes made and voted on under the rules of the convention.[83] I am uninterested, for the most part, in who argued what, and I am quite skeptical that the "what" was perfectly transcribed; rather, I care about text creation and alteration by the convention under convention rules.[84] The provisions I track have already been shown by standard intratextual means to be relevant to one another and the issues of this Article. Tracking their development and interrelatedness allows for a more robust and coherent interpretation of those provisions.

A brief chronological outline of the 1787 Constitutional Convention will be helpful for what follows. Delegates first gathered at the state house in Philadelphia on May 14, but it was not until May 25 that a majority of states were present and the convention could rightly begin.[85] On May 29, after a few days setting the rules for the convention,[86] Edmund Randolph of Virginia proposed the so-called Virginia Plan for union.[87] The plan contained fifteen resolutions.[88] Over the next two weeks, the delegates, acting as a Committee of the Whole, worked steadily through the resolutions, amending and supplementing them.[89] On June 13, the committee reported the resulting nineteen resolutions.[90] On June 15, William Paterson of New Jersey submitted to the convention a competing plan favored by many delegates of the small states, consisting of nine resolutions (the New Jersey Plan).[91] Both this plan and the reported Virginia Plan were sent to the

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83. Much of what I use can be found in the convention journal and printed copies of committee reports; though on a few occasions I mention specifically what Madison put in his notes. Regarding the reliability of the convention journal see Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620 (2012). Professor Bilder also writes about the use of Madison's notes and what the delegates said. *Id.* at 1621; *see also* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1191–92 (2003). Kesavan and Paulsen, writing several years before Professor Bilder's work, are somewhat more sanguine in their approval of the use of Madison's notes regarding the actual statements of convention delegates.

84. *Cf.* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012). Professor Nourse's proposed decision theory offers five principles for making the use of legislative history more objective. *Id.* at 76–77, 92–134. The methodology I use in Part II to analyze the Constitution's drafting history arose organically as I worked through the analysis, but I have become aware that my analytical approach to the drafting of the convention is in some ways similar to Professor Nourse's sound principles for analyzing congressional actions in the process of construing statutes. I am currently working out an explanation of my principles for intratextual analysis of the drafts of the Constitution (and the amending of those drafts) and the relationship between those principles and Professor Nourse's decision theory for an article on fair and best use of the convention records in constitutional interpretation.

85. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 1, 3 (Max Farrand ed., 1911) [hereinafter 1 Farrand]. In this Article's citations to Max Farrand's RECORDS OF THE FEDERAL CONVENTION OF 1787, there are often two pages (or spans of pages) given. The first is a citation to Farrand's reproduction of an official journal (either of the convention or of the Committee of the Whole), and the second citation is to Madison's notes.

86. *Id.* at 4, 7–17.

87. *Id.* at 16, 18–28.

88. *Id.* at 20–21.

89. *Id.* at 29, 222.

90. *Id.* at 228–37.

91. *Id.* at 241–45; *see also*, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 611–16 (Max Farrand ed., 1911) [hereinafter 3 Farrand].

Committee of the Whole for further consideration.[92] On June 19, the Committee of the Whole voted to proceed with the modified Virginia Plan, postponing consideration of the New Jersey Plan.[93]

The convention then spent about four weeks working through and revising the nineteen resolutions, being repeatedly bogged down by the question of whether the Senate would have proportional representation or equal voting for each state.[94] On July 16, the convention famously resolved that issue in favor of equal representation.[95] On July 24, the convention formed a Committee of Detail "to report a Constitution conformable to the Resolutions passed by the Convention" through July 23.[96] The Committee of Detail was also provided with the New Jersey Plan (discharged from the Committee of the Whole, where it had lingered as a postponed proposal for over a month) and a set of proposals submitted to the convention by Charles Pinckney in late May.[97] The convention continued for two more days, attempting to iron out a resolution on the Executive; on July 26, the convention added those proceedings to the materials given to the Committee of Detail.[98] The convention then adjourned until August 6 to allow the committee to do its work.[99]

The Committee of Detail report is a key stage in the drafting history of the Constitution. It is true that some constitutional provisions are easily identified in the resolutions submitted to the committee,[100] but many of the specifics we know from the Constitution were first set down in the Committee of Detail's report.[101] The report is really the first complete draft of the Constitution.[102] It is a breathing point in the convention, separating the proto-Constitution's creation out of nothing in June and July from the ed-

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92. 1 Farrand, *supra* note 85, at 241.
93. *Id.* at 312–13, 322.
94. *Id.* at 322, 606; 2 Farrand, *supra* note 42, at 1–12.
95. 2 Farrand, *supra* note 42, at 13–15.
96. *Id.* at 106.
97. *Id.* at 97–98, 106. For the introduction of Pinckney's plan and its referral to the Committee of the Whole on May 29, see 1 Farrand, *supra* note 85, at 16, 23–24.
98. 2 Farrand, *supra* note 42, at 117, 128.
99. *Id.* at 118, 128.
100. For instance, the veto: "the national Executive shall have a Right to negative any legislative Act, which shall not be afterwards passed, unless by two third Parts of each Branch of the national Legislative." *Id.* at 132.
101. *See* William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197, 201 (2012) (declaring the Committee of Detail's ten-day creation of its report "was arguably the most creative period of constitutional drafting of the entire summer."). For instance, the entirety of what became the legislative powers in Article I, Section 8 of the Constitution was given to the Committee of Detail as:

> [T]he Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.

2 Farrand, *supra* note 42, at 131–32.
102. *See* Ewald, *supra* note 101, at 209–12, 279.

iting of a substantive, full draft in August. The small size of the committee—five delegates[103]—allowed the creation of a reasonably cohering product in which one can intratextually analyze the text through the consistency and inconsistency of wording, and also see how the delegates reacted to that wording. The report is a point of stability and coherence that allows us to infer meaning from the convention's actions following the committee report.

The Committee of Detail report on August 6 contained a preamble and twenty-three articles.[104] The convention discussed and amended those articles more or less in order and reached the last article on August 31.[105] Then came several days of working out a set of remaining issues,[106] followed by commitment of the twenty-three reworked articles to a Committee of Style "to revise the style of and arrange the articles agreed to by the House . . . ."[107] On September 12 and 13, the Committee of Style reported its draft of the Constitution in the seven-article form we recognize today.[108] There were still several revisions over the next five days, divided between substantive changes and polishing, before the document was signed on September 17.[109]

A. The Drafting of the Take Care Clause Indicates That at No Point in the Convention Did the Clause Refer to the Constitution

The incipient Take Care Clause was introduced on May 29 as part of the seventh resolution of the Virginia Plan; the Executive was to have "a general authority to execute the National laws . . . ."[110] This was altered on June 1 to say the Executive was to have "power to carry into execution the national laws."[111] The Committee of Detail received that version in late July.[112] The August 6 report from the Committee of Detail reworded this provision to say: "[H]e shall take care that the laws of the United States be duly and faithfully executed . . . ."[113]

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103. 2 Farrand, *supra* note 42, at 97, 106. The members were Edmund Randolph of Virginia, John Rutledge of South Carolina, James Wilson of Pennsylvania, Oliver Elsworth of Connecticut, and Nathaniel Gorham of Massachusetts. *Id.* (Rutledge and Elsworth are spelled differently by the delegates).

104. *Id.* at 177–89.

105. *Id.* at 193–482.

106. *Id.* at 483–564.

107. *Id.* at 547. The members were James Madison of Virginia, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, William Johnson of Connecticut, and Rufus King of Massachusetts. *Id.* at 554. It should be noted that "style" here is not in the sense of a decorative arrangement of words, but rather the official formal presentation of the work. *See* Bilder, *supra* note 83, at 1648 n.221. Professor Bilder suggests a better name for the committee would be that used by the official journal: "Committee of revision." *Id.* at 1648; 2 Farrand, *supra* note 42, at 556. Maryland delegate James McHenry in his notes characterized the committee as having the task to "revise and place the several parts under their proper heads." 2 Farrand, *supra* note 42, at 554.

108. *Id.* at 590–604.

109. *Id.* at 605–65.

110. 1 Farrand, *supra* note 85, at 21.

111. *Id.* at 63, 67.

112. 2 Farrand, *supra* note 42, at 116, 121, 132 (with varying capitalization and abbreviation).

113. *Id.* at 177, 185.

The only other provision in the Committee of Detail's report to use the term "laws of the United States" was the provision declaring "[t]he enacting stile of the laws of the United States shall be, 'Be it enacted by the Senate and Representatives in Congress assembled.'"[114] The terminology shared by only those two clauses, and unique to them in the Committee of Detail's August 6 report, means the delegate–readers saw "the laws of the United States" were "enacted by . . . Congress" and also were to be "duly and faithfully executed" by the President.[115] "The Laws of the United States" were statutes.

After a month of consideration and amendment, the articles of the next draft of the Constitution were referred to the Committee of Style on September 10, one week before the close of the convention.[116] At that point, "the laws of the United States" appeared in four places: (1) the provision addressing the style of enacted laws;[117] (2) the Take Care Clause, which still read, "he shall take care that the laws of the United States be duly and faithfully executed";[118] (3) the Supremacy Clause, which read, "[t]his Constitution and the Laws of the United states which shall be made in pursuance thereof";[119] and (4) the Judicial Power Clause which stated, "The Judicial Power shall extend to all cases . . . arising under this Constitution and the laws of the United States."[120] The first of these tells us "laws of the United States" are congressional enactments.[121] The third and fourth, each separately listing the "laws of the United States" and the Constitution, thereby flatly confirm those terms describe separate parts of federal law. The Take Care Clause, therefore, regarded statutes, not the Constitution.

If, on September 10, the Take Care Clause so clearly included statutes but not the Constitution, how did we end up with the Take Care Clause containing the cryptic reference to "the laws"? First, the Committee of Style cut "of the United States" from both the Take Care clause and the enacting-style provision.[122] The Committee of Style's report still had an

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114. *Id.* at 180–81, n.4.

115. *See id.* at 180, 185. The report from the Committee of Detail includes a few other terms that clearly mean "statutes" (e.g., "[t]he [a]cts of the Legislature of the United States" in what became the Supremacy clause, and "laws passed by the Legislature of the United States," in what became Article III's statement of court jurisdiction). *Id.* at 183, 186. But those variations in language do not alter the terminology shared by the enacting-style provision and the Take Care Clause. *See id.* at 568, 574. As of August 6, the Take Care Clause referred to statutes. *See id.* at 574. And, in any event, during August, the convention changed the wording of the legislation references in the Supremacy Clause and the Judicial Power Clause to conform to the language of the Take Care Clause and the enacting-style provision, indicating each of those terms referred to statutes. *See infra* notes 116–21 and accompanying text.

116. *See* 2 Farrand, *supra* note 42, at 555–57, 564–65.

117. *Id.* at 568.

118. *Id.* at 574.

119. *Id.* at 572.

120. *Id.* at 576.

121. *Id.* at 568.

122. *Compare id.* (enacting-style provision entering the Committee of Style), *with id.* at 593 (enacting-style provision coming out of the committee). *Compare id.* at 574 (showing the Take Care

enacting provision, which necessarily addressed statutes, and still used the same term as the Take Care Clause, though now that term was "the laws" rather than "the laws of the United States."[123] Then, in the last few days of the convention, the enacting-style provision was removed from the Constitution.[124] It is enlightening to learn the Take Care Clause, so difficult to understand because of its uniqueness, had, for over a month and until the last days of the convention, a paired provision also containing "the Laws," which was understood to address statutes only.[125]

We now must reckon with the interpretive ramifications of the changes by the Committee of Style and the later removal of the enacting-style provision. First, what is the result of shortening the Take Care Clause and the enacting-style provision to refer to "the Laws" while allowing the Supremacy Clause and the Judicial Power Clause to keep "the laws of the United States"? There are no ramifications for the meaning of the Take Care Clause. The enacting-style provision certainly refers to statutes. Because the enacting-style provision and the Take Care Clause both changed to "laws," the Take Care Clause kept its textual link to statutes and statutes alone. Any change in meaning would be in the Supremacy Clause and Judicial Power Clause, where the terminology "Laws of the United States," was unchanged, but arguably could take on new meaning because the unadorned "laws" means statutes in the Committee of Style draft.

There are good reasons, both pragmatic and textual, to reject any such resultant change in meaning of "Laws of the United States." The pragmatic reason is that the alternative is for the Committee of Style to have fundamentally changed the meaning of the court jurisdiction and the supreme federal law by eliminating "of the United States" from two other provisions. Going into the Committee of Style, "the Laws of the United States"

Clause going into the Committee of Style), *with id.* at 600 (showing the Take Care Clause coming out of Committee of Style).

123. *Id.* at 568, 574, 593, 600. Professor John Harrison, in the course of examining whether customary international law is "Law of the United States" within the meaning of the Supremacy Clause and the Article III jurisdiction of the Supreme Court, arrived at a story of the development of the Take Care Clause substantially equivalent to the one I have presented. John Harrison, *The Constitution and the Law of Nations*, 106 GEO. L. J. 1659, 1671–72 (2018). He notes:

> After the Committee of Style's parallel changes to the parallel language of [the enacting-style and Take Care clauses], they both referred to "the laws" and not "the laws of the United States." Once again, the enacting-style clause referred exclusively to statutes. The continued use of the same words suggests that the Committee of Style understood them to have the same meaning in its own draft.

Id. at 1677.

124. 2 Farrand, *supra* note 42, at 633 n.15 (explaining the enacting-style provision's removal was not noted in the convention journal but was evident from alterations found in various delegates' copies of the Committee of Style's reported draft from September 12).

125. *Id.* at 574. It is something like an evolutionary biologist who has been wondering at the function of a vestigial organ and learning that the organ worked in tandem with another organ that has not even a vestigial presence anymore. That information can inform the understanding of the vestigial organ. Or, as put more clearly and conventionally by Professor Harrison: "[the deletion of the enacting-style provision] changed the context of the Constitution's Take Care Clause . . . : the document had lost an indicator, provided by the presumption of consistent usage, of a limited meaning of the Take Care Clause." Harrison, *supra* note 123, at 1678–79.

meant statutes.[126] If that term came out of the Committee meaning something else, there is no recorded mention of that change by the delegates. The textual reason is that coming out of the Committee of Style, "laws" meant federal statutes, so "Laws of the United States" literally meant "federal statutes of the United States." That may be a cumbersome, belt-and-suspenders approach to saying "this term means federal statutes," but it is an odd way of saying anything else.

And it would have been reasonable for the Committee of Style to determine that while extra care was needed in stating the "supreme Law" and declaring the extent of federal judicial power, there was no need for such an approach to the enacting-style provision and the Take Care Clause. In the Committee of Style's report, the enacting-style provision stood at the head of Article I, Section 7, and read: "The enacting stile of the laws shall be, 'Be it enacted by the senators and representatives in Congress assembled.'"[127] Section 7 then went on to describe the bicameralism and presentment by which laws are made, using "a law" four times in that description.[128] "[T]he laws" are statutes enacted by Congress—there was no need to say the laws are "of the United States." Perhaps the delegates likewise considered it obvious from the past month (and maybe even the beginning of the summer)[129] that the laws the President was to execute were statutes "of the United States."[130]

We must also deal with the possible ramifications of the removal of the enacting-style provision altogether. I agree with Professor John Harrison, who considers it a "perfectly adequate explanation of the Convention's decision" that the provision was removed as "mere clutter."[131] This seems likely. The proceedings referred to the Committee of Style[132] contained two "stile" provisions in addition to the enacting-style provision: in

126. *See* 2 Farrand, *supra* note 42, at 568, 574.

127. *Id.* at 590, 593.

128. *Id.* at 593–94.

129. *See supra* notes 118–20 and accompanying text.

130. *See* Harrison, *supra* note 123, at 1677. Professor Harrison's understanding of the truncated "laws" in the enactment-style provision and Take Care Clause accord with this view.

> The Committee [of Style] also had reason to think that the same meaning should appear in both: just as the legislature of the United States enacts laws of the United States, so the President of the United States executes the laws of the United States. The Committee's members, and the other Convention delegates who were following the text's modifications, thus may well have thought that the Committee of Style's take-care provision referred exclusively to federal statutes.

Id.

The Committee of Style also removed "of the United States" in several other locations. *See, e.g.*, 2 Farrand, *supra* note 42, at 572, 592, 597. Many of these were replacements of "Legislature of the United States" by "Congress," or rewordings that did away with the need for a modifier. *See, e.g.*, *id.* at 575, 600. But the committee also: reduced "Senate of the United States" in Article IX, *id.* at 572, to "Senate" in Article I, Section 3, Clause (e) of the report, *id.* at 590–92; reduced "Executive power of the United States," in Section 1 of Article X, *id.* at 572, to "executive power" in Article II, Section 1 of the report, *id.* at 597; and reduced "officer of the United States" in Section 1 of Article X, *id.* at 572–73, to "officer" in Article II, Section 1, Clause (e), *id.* at 597–99.

131. Harrison, *supra* note 123, at 1679 n.98.

132. 2 Farrand, *supra* note 42, at 565–80.

Article I, the official name of the government,[133] and in Article X, the official title for the President.[134] The Committee of Style dropped these two provisions.[135] It would then seem reasonable for the convention to finish the tidying by dropping the remaining style provision.[136]

If the reason for elimination of the enacting-style provision was mere clutter removal, the meaning of "the Laws" of the Take Care Clause would be unaffected by the removal and still, after the report of the Committee of Style, have referred to federal statutes. If, on the other hand, one sees the removal of the enacting-style provision as cutting "the Laws" of the Take Care Clause adrift, a singleton free to take on a new meaning, a possible landing spot is the similar term, "the Laws of the Union," in the Calling Forth Clause.

This drafting history of the Take Care Clause offers a strong argument for the view that "the Laws" in the Take Care Clause do not include the Constitution: the Take Care Clause, at no point from its inception in May to the final version in September of 1787, in any clear way referenced the Constitution as a law to be executed. To the contrary, the evidence is that from beginning to end the clause referred to federal statutes, though it is possible that after the removal of the enacting-style provision it was free to align textually with the "Laws of the Union" in the Calling Forth Clause.

B. The Drafting of the Supremacy Clause and the Calling Forth Clause[137]

That the Constitution and federal statutes should be supreme over laws of the states, and that there must be some way to enforce that supremacy, were ideas already present in the original proposals of the Virginia Plan introduced by Edmund Randolph in the early days of the convention. One can see nascent forms of both ideas in the sixth resolution:

> Resolved that . . . the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; *to negative all*

133. *Id.* at 565 ("The stile of this Government shall be, 'The United States of America.'").

134. *Id.* at 572 ("His [the President's] stile shall be, 'The President of the United States of America.'").

135. *Compare id.* at 565–80 (referring to the proceedings before the Committee of Style), *with id.* at 590–603 (referring to the report from the Committee of Style).

136. Harrison, *supra* note 123, at 1679 n.98. Professor Harrison also offers a "more complex hypothesis"—that the delegates realized the provision's influence on the way other provisions would be understood (for instance, that "the Laws" of the Take Care Clause was limited to statutes), and therefore eliminated that influence. *Id.* He considers this an "inferior solution" to the issue. *Id.* I agree. If the enacting-style provision was not clutter, but was influencing the meaning of other provisions by its use of "laws," there are several other suitable replacement terms that could have been substituted—"Acts of Congress," for example. *See id.* at 1677.

137. The Supremacy and Calling Forth Clauses have related drafting histories, at least for several weeks of the convention. To avoid repetition, I have combined their origins (up to the Committee of Detail) here. Their histories after the Committee of Detail are separated below.

> *laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.*[138]

Here, we see the broad beginnings of the Article I, Section 8 list of federal legislative powers, followed by (in my italics) a plan for the federal Constitution to be supreme over state legislation, with enforcement provisions that did not survive to the eventual Constitution. The resolutions in the Virginia Plan contain no other statements of supremacy of the federal Constitution nor any other reference to enforcement of such supremacy against defiant or recalcitrant states.[139]

On May 31, the Committee of the Whole extended the national legislature's "negative" over state laws to include those state laws that would contravene "[t]reaties subsisting under the authority of the [U]nion."[140] So, less than a week into the convention, the delegates had already adopted a resolution to make federal treaties supreme law over the states.

Immediately after this addition of treaties to the basis upon which the national legislature could negative state laws, the delegates postponed the last provision of the sixth resolution—that the national legislature was to have power "to call forth the force of the [U]nion against any member of the [U]nion, failing to fulfill it's [sic] duty under the articles thereof."[141] It does not appear the enforcement provision in the original sixth resolution of the Virginia Plan was discussed again.[142]

That, however, did not mean the issue went away. One of William Paterson's resolutions (also the sixth, as it happens) introduced as part of the New Jersey Plan, was:

> Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent ye. carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may

138. 1 Farrand, *supra* note 85, at 21 (emphasis added); *see also* 3 Farrand, *supra* note 91, at 593–94. Another part of the eventual Article VI, the general Oath Clause, U.S. CONST. art. VI, cl.3, appears in the fourteenth resolution of the Virginia Plan. *See* 1 Farrand, *supra* note 85, at 22 (requiring "that the Legislative[,] Executive [,] & Judiciary powers within the several States" take an oath to support the new constitution).

139. *See* 3 Farrand, *supra* note 91, at 593–94.

140. 1 Farrand, *supra* note 85, at 45, 47, 54.

141. *Id.* at 47.

142. The provision was not in the resolutions agreed to by July 26, which were submitted to the Committee of Detail. 2 Farrand, *supra* note 42, at 85, 95, 98, 106, 117, 128, 129–34.

> be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.[143]

Paterson's sixth resolution contains something very like the Supremacy Clause of the eventual Constitution, even including the binding of the state judiciaries. That, after a mid-paragraph semicolon, is followed by something that foreshadows the eventual Calling Forth Clause in the Constitution.[144] Note that neither the portion forming a proto-Supremacy Clause, nor the portion forming a proto-Calling Forth Clause mentions the Constitution. As is described below, both parts of Paterson's proposal would eventually reach the Committee of Detail, though they would get there by different routes.[145]

On July 17, the convention voted down the portion of Randolph's sixth resolution giving the national legislature a negative on state laws.[146] Maryland delegate Luther Martin offered as a replacement a slightly reworded version of the first half of Paterson's sixth proposal, quoted above; that language was approved without opposition[147] and thus became a convention resolution. As a result, the following was among the resolutions of the convention sent to the Committee of Detail in late July:

> [T]he legislative Acts of the United States made by Virtue and in Pursuance of the Articles of Union, and all Treaties made and ratified under the Authority of the United States shall be the supreme Law of the respective States so far as those Acts or Treaties shall relate to the said States, or their Citizens and Inhabitants; and that the Judicatures of the several States shall be bound thereby in their Decisions, any thing in the respective Laws of the individual States to the contrary notwithstanding.[148]

Nothing like the eventual Calling Forth Clause was present in the resolutions the convention sent to the Committee of Detail, but the New Jersey Plan, despite its previous postponement on June 19, was referred to the Committee of Detail.[149] On August 6, the Committee of Detail's report

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143. 1 Farrand, *supra* note 85, at 245.

144. Also note this second half (1) recognizes federal statutes and treaties as the supreme law of the states ("*such* acts or treaties"), and (2) includes people as well as states in the provision that those who oppose execution of such treaties or acts (in addition to any states in which such opposition occurs) are subject to forced obedience. *See id.*

145. *See id.*

146. 2 Farrand, *supra* note 42, at 21–22, 28.

147. *Id.* at 22, 28–29.

148. *Id.* at 132.

> History confirms what the text makes plain. Luther Martin introduced a version of the Supremacy Clause nearly identical to Resolution 6 [of the New Jersey Plan] on the same day that another of Madison's efforts to give Congress a negative over state laws failed. The Clause was intended to make clear that courts (not Congress) would ensure that valid federal law would prevail over contrary state law: "[I]t was [now] evident that the authority of the national government would depend on judicial enforcement."

Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 750 (2010) (quoting JACK RAKOVE, ORIGINAL MEANINGS 173 (1996)).

149. 1 Farrand, *supra* note 85, at 312–13, 322.

included, in its seventh article,[150] what appears to be a modified version of Paterson's "calling forth" provision:[151] "The Legislature of the United States shall have the power . . . [t]o call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasion . . . ."[152]

This language almost exactly matches the provision in the eventual Constitution.[153] It is unclear whether the Constitution was part of the "Laws of the Union" at that point but recall Paterson's sixth proposal mentioned only statutes and treaties.

1. The Drafting of the Supremacy Clause Confirms "the Laws" of the Take Care Clause Are Not Equivalent to the "Law of the Land."

For ease of reference in what follows, here, side by side, are the Supremacy Clause as it was reported out of the Committee of Detail on August 6 and the eventual constitutional provision with strikethrough text indicating removal and underlined text indicating addition:

150. A misnumbering of the printed copy of the report of the Committee of Detail resulted in two articles numbered "VI." 2 Farrand, *supra* note 42, at 181 n.5. The seventh article (containing what would become the list of congressional powers in Article I, Section 8 of the Constitution) was, therefore, labeled "VI", but it followed a preceding "VI."

151. Among the documentary record of the Committee of Detail is an extract of those portions of the New Jersey Plan that committee member James Wilson (the extract being in his handwriting) apparently thought relevant to the Committee of Detail's work. *See id.* at 157–58, n.15. An early draft of the eventual "calling forth" provision in the committee report gave Congress power "to . . . make Laws for calling forth the Aid of the militia . . . to execute the Laws of the Union to repel Invasion to inforce Treaties suppress internal Com[binatio]ns." *See id.* at 144 (brackets omitted).
It is possible the eventual report from the Committee of Detail was also influenced by South Carolina delegate Charles Pinckney's plan, which was submitted (along with the New Jersey Plan) to the committee on July 24. *See id.* at 97–98, 106. The same document containing Wilson's excerpt from the New Jersey Plan also contains notes taken from Pinckney's plan. *See id.* at 158–59. In those notes, Wilson wrote "The Legislature of the U.S. shall possess the exclusive Right of . . . ordering the Militia of any State to any Place within the U.S." *See id.* at 159. In comparison, Paterson's resolution does not directly mention the militia (using instead "[the] power of the confederated states"), and authorized the Executive, rather than Congress to call forth that power. 1 Farrand, *supra* note 85, at 245.

152. 2 Farrand, *supra* note 42, at 181–82.

153. *See infra* notes 166–69 and accompanying text (regarding the convention's removal of "enforce treaties" from the Calling Forth Clause (as being redundant)).

Committee of Detail Report	Eventual Constitutional Provision
~~The Acts of the Legislature~~ of the United States made in pursuance ~~of this Constitution,~~ and all treaties made under the authority of the United States shall be the supreme law of ~~the several States, and of their Citizens and Inhabitants~~; and the Judges in ~~the several~~ States shall be bound thereby ~~in their decisions;~~ anything in the Constitution~~s~~ or laws of ~~the several~~ State~~s~~ to the contrary notwithstanding.[154]	This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[155]

Some of the changes are merely more efficient wording. The substantive alterations include: (1) adding the Constitution to the supreme law and (2) clarifying verb tenses regarding when laws and treaties (respectively) must be "made" if they are to be part of the supreme law.[156] The Committee of Style changed "supreme law of the respective States" to "supreme Law of the Land" in what does not appear to be a substantive alteration.[157]

The key alteration for our purposes came on August 23 when, on South Carolina delegate John Rutledge's motion, the convention added the Constitution to the Supremacy Clause, changed "Acts of the Legislature of the United States" to "laws of the United States," and reworded the end of the provision."[158] The alteration was agreed to without objection.[159]

These alterations to the Supremacy Clause tells us that as of August 23, the "laws" of the Take Care Clause did not contain the Constitution.[160] At the time of Rutledge's amendment, two other provisions, the enacting-style provision and the Take Care Clause, referred to "Laws of the United States."[161] So, because the enacting-style provision can refer to

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154. 2 Farrand, *supra* note 42, at 183.

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

156. *See* 2 Farrand, *supra* note 42, at 409, 417 ("or which shall be made" added to clarify that treaties pre-existing the Constitution were still in force). By comparison the only "laws of the United States" that were to be supreme were those "which shall be made in Pursuance" of "this Constitution." Regarding temporality analysis for both treaties and "laws of the United States," *see* James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1295–96 n.116 (1998). As to the implications of the word "made" in reference to whether "laws of the United States" includes common law, see Monaghan, *supra* note 148, at 740–41.

157. In arranging the twenty-three articles approved by the convention into the seven articles we find in the original Constitution, choices of structure and wording certainly can have substantive consequences, which the delegates reviewed and considered. *See* 2 Farrand, *supra* note 42, at 605 (stating the report of the Committee of Style was compared paragraph by paragraph with the twenty-three articles previously agreed to by the convention). The change here, by the Committee of Style was to replace "the several States, and of their citizens and inhabitants" with "the Land." *Compare id.* at 572 (the version in the proceedings of the convention referred to the Committee of Style) *with id.* at 603 (the version in the report from the Committee of Style).

158. *Id.* at 381–82, 389.

159. *Id.* at 389.

160. *See supra* notes 158–59 and accompanying text.

161. *See supra* notes 110–15 and accompanying text.

only statutes, "Laws of the United States" in the Supremacy Clause meant statutes too. But even if we did not know what "Laws of the United States" meant, we would know the term did not include the Constitution because (1) the Constitution is listed separately from "Laws of the United States" as distinct parts of the "supreme Law" and (2) "Laws of the United States" are "made in Pursuance" of the Constitution. Metaphorically, the "Laws of the United States" filled the Take Care Clause's bucket. There was no room for the Constitution to fit as well. For the Constitution to be something the President was to take care to execute, it would have to be added to that clause after August 23.

2. The Drafting of the Calling Forth Clause Does Not Indicate the Constitution is Among "the Laws" of the Take Care Clause

In August, the convention went through the Committee of Detail's articles in order, subject to some provisions being postponed or referred to committees.[162] The Calling Forth Clause was postponed once,[163] but was finally taken up the same day as—and very shortly after—the convention amended the Supremacy Clause to include the Constitution and to change "Acts of the Legislature of the United States" to "Laws of the United States."[164] At that point, the Calling Forth Clause read: "The Legislature of the United States shall have the power . . . [t]o call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions . . . ."[165]

Gouverneur Morris moved to strike from the Calling Forth Clause "'enforce treaties' as being superfluous since [under the Supremacy Clause] treaties were to be 'laws.'"[166] This was passed without disagreement.[167] Morris then moved, and the convention approved, a rewording of the beginning of the Calling Forth Clause."[168] The result is the clause we know from the Constitution: "The Congress shall have power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[169]

In Part I, I noted there was a question as to whether the term "Laws of the Union" includes the Constitution. At the moment of Morris's

162. *See generally* 2 Farrand, *supra* note 42, at 193–482.

163. *Id.* at 337, 344. On Monday, August 20, the provision came up for discussion; it was postponed "till report should be made as to the power over the Militia referred" to a committee the previous Saturday. *Id.* at 337, 344. This previous referral was on August 18 and regarded two versions of what would become Article I, Section 8, Clause 16 (a clause regarding the congressional power over the structure of the militia). *Id.* at 330–33.

164. *See id.* at 381–82, 389–90; *see also supra* notes 166–67 and accompanying text; *supra* Section II.B.1. By "very shortly after," I mean that Madison's notes record only one motion between Rutledge and Morris's motions, and the separation of Rutledge's motion and Morris's motion is about one-fourth of one of the ten pages in Madison's notes for that day. *See* 2 Farrand, *supra* note 42, at 389–90.

165. 2 Farrand, *supra* note 42, at 181–82.

166. *Id.* at 382, 389–90.

167. *Id.* at 382, 390.

168. *Id.*

169. U.S. CONST. art. I, § 8, cl. 15.

amendment, the Constitution had just been added to the "supreme law of the several States and their inhabitants."[170] That the Constitution was not also added to "Laws of the Union" at this ripe moment indicates either: (1) the Constitution was not part of the "Laws of the Union," and the convention did not desire to add it; or (2) there was no need to add the Constitution to "Laws of the Union" because, unlike treaties, it was already understood to be part of the term.

It is likely that "Laws of the Union" in the Committee of Detail's report did not include the Constitution. The version of the Supremacy Clause sent to the Committee of Detail via Luther Martin's July 17 motion[171] referenced federal statutes and treaties, but not the Constitution, and the Committee of Detail's Supremacy Clause included "[a]cts of the Legislature of the United States" and treaties, but not the Constitution.[172] The Committee of Detail's formulation of the Calling Forth Clause referenced "Laws of the Union" and treaties, but not the Constitution.[173] The unique terminology—"Laws of the Union"—likely was chosen (as argued earlier, in Part I) because it made clear the clause invoked a federal power to call forth state militia to execute federal law.[174] There is no evidence in the records of the convention that any delegates, including those on the Committee of Detail, thought the "Laws of the Union" included the Constitution.[175]

There is one more result of interest, though it does not weigh on the specific topic of this Article. It is possible that Morris's motion exhibited or caused a general understanding in the convention that treaties had, through the Supremacy Clause, become "laws" wherever in the Constitution "law(s)" would bear that meaning. In that case, just as "Laws of the Union" includes treaties, so too might "the Laws" of the Take Care Clause. The combination of the Committee of Style reducing the reference in the Take Care Clause from "Laws of the United States" to just "Laws," and the convention removing the enacting-style provision altogether, allows the meaning of "the Laws" in the Take Care Clause to slide from statutes to statutes plus treaties. The result is the possible identification of the "Laws of the Union" in the Calling Forth Clause with "the Laws" of the Take Care Clause; a reasonable interpretation of the Take Care Clause is that it includes treaties but not the Constitution.

The drafting history of the Supremacy Clause solidifies the previous inferences in Part I that (1) "Law of the Land" does not equate to "the

170. *See supra* notes 162–64 and accompanying text.

171. *See supra* notes 147–48 and accompanying text.

172. "Acts of the Legislature of the United States" had just been changed to "Laws of the United States," but in either case meant statutes. *Compare* 2 Farrand, *supra* note 42, at 183, *with* U.S. CONST. art. VI, cl. 2.

173. *See supra* notes 150–52, 165–66 and accompanying text.

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

175. *See, e.g.*, 2 Farrand, *supra* note 42, at 144 (noting the Committee of Detail's use of the term "Laws of the Union" as distinct from "Treaties" but not mentioning the Constitution).

Laws" of the Take Care Clause, (2) the Constitution is not among "the Laws" of the Take Care Clause through other means, and (3) "the Laws" of the Take Care Clause are likely statutes. Part I concluded that although the "Laws of the Union" in the Calling Forth Clause may be related to the unadorned "Laws" of the Take Care Clause, there is no textual evidence that "Laws of the Union" includes the Constitution. Neither is there evidence in the drafting history of the Calling Forth Clause to link the Constitution to the "Laws of the Union." It is clear that in late August of the 1787 Convention, the clause was amended to include treaties in that term.[176] It is possible that by the end of the Convention, "the Laws of the Union" and "the Laws" in the Take Care Clause meant the same thing. But no evidence points to that common meaning including the Constitution.

C. The Drafting of the Judicial Power Clause Supports the Textual Argument for Judicial Supremacy over Textual Arguments for Independent Constitutional Interpretation by the President

As previously noted, a strong textual argument for the special competence of the courts to interpret the Constitution is the parallel structure of the Supremacy Clause and the provision describing the extent of the judicial power in Article III. The Constitution grants the Judicial Branch the power to adjudicate cases arising under all three components of the "supreme Law," including the Constitution: "The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."[177] The manner in which the Judicial Power Clause arrived at this final form only strengthens this textual argument.

On August 27, 1787, when the Judicial Power Clause came before the convention, it was unchanged from the Committee of Detail report, and read: "The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States . . . ."[178] Delegate William Johnson moved to insert "this Constitution" before "laws."[179] Then Rutledge moved that the words "passed by the Legislature" be removed, and the words "and treaties made or which shall be made under their authority" be added.[180] Madison's notes report this was done "conformably to a preceding amendment in another place."[181] We do not know if Rutledge said that or if Madison merely recognized it to be the case; regardless, the inference that the goal was to make the Judicial Power Clause conformable to the Supremacy Clause is made stronger by it having been Rutledge, who four days earlier had moved parallel alterations to

176. *See supra* notes 165–69 and accompanying text.

177. U.S. CONST. art. III, § 2, cl. 1; *id.* art. VI, cl. 2 (being the only location in the Constitution to use the term "supreme Law" and defining such as the "Constitution," "Laws of the United States," and "Treaties made . . . under the Authority of the United States").

178. 2 Farrand, *supra* note 42, at 186.

179. *Id.* at 423, 430.

180. *Id.* at 423–24, 431.

181. *Id.* at 431.

the Supremacy Clause, moving for this change, too. And no matter who suggested the change, this motion conformed the jurisdiction of the Supreme Court to cover all cases arising under the three elements of the "supreme Law": the "Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."[182]

The delegates to the Constitutional Convention amended the jurisdiction of the Supreme Court to be coextensive with the supreme law in the Supremacy Clause. No similar provision exists for the Executive Branch.[183] The power of the judiciary to hear cases and its corresponding duty to interpret the Constitution are bound up with the declaration that the Constitution is supreme law. There is no similar textual tie between the Constitution and the President's duty to execute the laws. The delegates could have put similar language into the Take Care Clause, requiring the Executive to execute the Constitution, the Laws of the United States, and the treaties, but they did not.

The drafting history of the Constitution shows the Take Care Clause refers to statutes unless at the end of the Convention "the Laws" of the Take Care Clause became equivalent to the Laws of the Union. In that case, the statutes were joined by treaties as "laws" the President is to take care are faithfully executed. The Calling Forth Clause's "Laws of the Union" appear to have been statutes but, without question, near the end of the convention came to include treaties. There is no evidence the term ever included the Constitution. The Supremacy Clause's final formulation of the "supreme Law of the Land" matched the body of law over which the Constitution granted the Supreme Court jurisdiction. The convention appears to have intentionally chosen that result. That the textual harmony is both obvious on its face and intentionally arranged provides a strong argument for judicial supremacy in constitutional interpretation.

III. THE PRESIDENTIAL OATH, ALONE, IS TEXTUALLY INSUFFICIENT TO SUPPORT INDEPENDENT CONSTITUTIONAL INTERPRETATION BY THE PRESIDENT

This Part assumes that "the Laws" in the Take Care Clause do not include the Constitution. Without the Take Care Clause serving as a basis for the argument that the President executes the Constitution, the departmentalist textual argument teeters; all that is left to the textual argument is an appeal to the presidential oath as a stand-alone basis for a presidential power of constitutional interpretation. That argument fails and with it the textual argument for departmentalism.

The presidential oath of office is: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States,

182. U.S. CONST. art. III, § 2, cl. 1; *id.* art. VI, cl. 2 (defining the term "supreme Law").
183. *See id.* art. II.

and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[184] This is plainly two promises, each beginning with "will": (1) "I will faithfully execute the Office of President of the United States,"[185] and (2) "[I] will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[186] As is shown below, these are two different promises to do two different things according to two different standards.[187]

The first promise is to execute the office of the President. That certainly includes compliance with the Take Care Clause, so this first promise includes seeing to it "the Laws" of the Take Care Clause are faithfully executed. But if "the Laws" do not include the Constitution, then there is no direct link between the faithful execution of those laws and the execution of the Constitution.

In their excellent article, *Faithful Execution and Article II*, Professors Andrew Kent, Ethan Leib, and Jed Handelsman Shugerman present a historical reading of the two constitutional clauses requiring faithful execution by the President—the Take Care Clause and the presidential oath.[188] They find significant evidence that "oaths in general—and the faithful execution command in particular—[have historically] tended to limit rather than enlarge an official's power and discretion . . . ."[189] They note that resolving definitively the issue of whether a President is oath- and duty-bound to execute a federal statute (despite a personal interpretation that the statute is unconstitutional) "require[s] knowing whether the Constitution is part of 'the Laws' that must be faithfully executed . . . ."[190] That of course is the issue I have attempted to put to rest in Parts I and II. If "the Laws" do not include the Constitution, the oath provides no specific, textual link between the Take Care Clause and the Constitution. In that instance, it appears "the President . . . needs to follow the commands of Congress at the same time as he diligently ensures that the entire apparatus of the office and the executive branch is properly oriented in a steadfast and

184. *Id.* art. II, § 1, cl. 8.
185. *Id.*
186. *Id.*
187. Several authors have noted the bifurcation of the oath. *See, e.g.*, Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2137 (2019) (noting that "[t]he faithful execution aspect of the oath is conjoined with" a second promise); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 801 (2013) ("[T]he phrase 'to the best of my Ability' qualifies only the duty to preserve, protect, and defend the Constitution; the duty to 'faithfully execute' the Presidential Office, like the duty to take care that the laws are faithfully executed, is unqualified."); David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 87 (2009) (noting that the limitation "to the best of my Ability" does not apply to first part of oath).
188. Kent et al., *supra* note 187, at 2134–40.
189. *Id.* at 2186.
190. *Id.* at 2186–87. For Kent, Leib, and Shugerman's brief summary of the meaning of "the Laws" in the Take Care Clause, see *id.* at 2136–37.

steady manner."[191] Therefore the faithfulness owed by the President under the Take Care Clause cannot be a faithfulness to the President's own interpretation of the Constitution.

The second promise states: "to the best of my Ability, [I will] preserve, protect and defend the Constitution."[192] Unlike the first promise, this promise directly relates to the Constitution, and departmentalists sometimes claim this promise is sufficient to support a power of independent constitutional interpretation.[193] For instance:

> [T]he President's duty to disregard unconstitutional laws arises from his unique constitutionally prescribed oath: he must "preserve, protect and defend" the Constitution. He does none of those things when he executes an unconstitutional statute. To the contrary, he violates his constitutional oath when he enforces a law he regards as unconstitutional.[194]

Note the assumptions in this argument. First, there is an assumption that the oath preempts, or directs, the duty to execute the laws.[195] That is, the oath is somehow a meta duty informing how to perform other duties (or at least the Take Care duty). Second, note the final sentence assumes the President promises to follow the President's own determination as to the constitutionality of the statute.[196] That assumes away the question of who authoritatively determines the constitutionality of statutes—the very question we are trying to resolve. It is not a logical necessity of the oath that it be the President who determines what violates the Constitution.[197] It is possible for oaths to bind people to behave in a manner that goes

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191. *See id.* at 2191; *see also id.* ("[The President must] pursue with diligence what Congress wants executed," but at the same time does have "authority to fill in incomplete legislative schemes to promote the best interests of the people . . . whose interests are usually mediated through their representatives.").

192. U.S. CONST. art. II, § 1, cl. 8.

193. *See, e.g.*, Prakash, *supra* note 20, at 1616–17.

194. *Id.* (internal footnote omitted).

195. *See id.*

196. *See id.*

197. The historical example one sees over and over in the scholarship is President Andrew Jackson's veto message of July 10, 1832, which offers Jackson's reasons for vetoing a bill renewing the charter of the Bank of the United States.

> Each public officer who takes an oath to support the Constitution *swears that he will support it as he understands it, and not as it is understood by others*. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.

President Andrew Jackson, *Veto Message* (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF PRESIDENTS, 1139, 1144–45 (James D. Richardson ed., 1925) (emphasis added).

The presidential oath does not, of course, say the President will preserve, protect, or defend the Constitution "as the President understands it."

against their own determination of what is correct.[198] It is, in fact, an odd sort of oath that binds one to do whatever one thinks is correct in the moment.[199] And how much odder if that very oath is a meta rule providing the *power* to do whatever one thinks is correct?[200] What is, at that point, the need or use of an oath?

There is another problem with the argument that a personal oath imparts interpretive autonomy; it proves too much.[201] This argument would be available to at least tens of thousands of government officials who, under the Article VI oath provision,[202] bind themselves to support the Constitution. But all those officials cannot have independent power to act on personal interpretations of the Constitution that vary from Supreme Court holdings.[203] So the result must be limited, at least in the Executive Branch, to the President.

With the understanding that the nature of an oath itself does not grant interpretive autonomy, we have reduced the issue to a simpler question: Does the text of the second promise of the presidential oath—"I will to the best of my Ability, preserve, protect and defend the Constitution of the United States"—create an independent presidential power to interpret the Constitution? I offer two arguments: (1) the location of the presidential oath, Section 1 of Article II, is an unlikely place for a grant of power, even

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198. *See* David S. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 121 (1993) ("The Constitution might impose a requirement that an official defer to another official's interpretation of the Constitution. It is perfectly plausible to say that the Constitution sometimes requires the President to enforce a law that he considers, on balance, to be unconstitutional."); *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1361 (1997) ("An important aspect of the Constitution, as of all law, is its authority, and intrinsic to the concept of authority is that it provides content-independent reasons for action. Accordingly, an authoritative constitution has normative force even for an agent who believes its directives to be mistaken. . . . [T]he same argument applies to authoritative interpreters of the Constitution . . . . Just as it is often right for officials to obey constitutional provisions they believe wrong, so too is it often right for officials to obey judicial interpretations they believe wrong.").

199. *See* SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS 133–34 (2020) (describing the presidential oath in current times as a "beguiling promise" because these days Presidents can (so Prakash argues) change the Constitution unilaterally through a host of practices and informal operations, and concluding that "when the oath taker may unilaterally amend the law that she is pledged to honor and execute, the oath is a farce.").

200. This Section of this Article assumes, because previous Sections have eliminated other possibilities, that the oath is necessary to the textual argument for an autonomous presidential power of constitutional interpretation. In that case, the argument must be not only that the oath requires the President to use his or her own understanding, but that the President would not have the power to use his or her own understanding without the oath.

201. *See* Meltzer, *supra* note 19, at 1195 ("Article VI requires all executive officers to swear to support the Constitution, yet all of them are surely not obliged to apply their personal views of the Constitution, regardless of the views of their department head, or the Justice Department, or even of the president.") (internal footnotes omitted).

202. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all the executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.").

203. *See* Strauss, *supra* note 198, at 122 ("Millions of government officials and employees, at all levels of government, take oaths to uphold the Constitution. No one suggests that all of them are free to act on interpretations of the Constitution that differ from those of the Supreme Court. *It follows that there is nothing in the nature of the oath that entails autonomy*.") (emphasis added).

a power incident to a duty undertaken in the oath; and (2) the wording of the oath itself, and its drafting history at the convention, significantly weaken any argument that the oath provides presidential autonomy in constitutional interpretation.

First, consider the placement of the oath. Articles I, II, and III of the Constitution, which organize and vest the three branches of the federal government with their powers, have similar structures.[204] Each starts out with a clause vesting the relevant power, then proceeds to set out the basic rules: a provision for how the member(s) of that branch are to be chosen, the term of office, a statement regarding compensation for service, and other odds and ends that do not pertain to powers.[205] Next come powers, the processes for exercising those powers (where the Constitution states them), and the limitations on powers.[206] Last come the leftovers: for Congress, limitations on state actions and laws; for the Executive Branch, removal by impeachment; for the Judicial Branch, definitions and trial requirements related to treason, and a list of prohibited sentences.[207]

In more detail, here is the Article II arrangement. Sections 2 and 3 declare what the President is to be, what the President is to do, and what powers the President is to have.[208] Section 4 addresses removal from office.[209] In comparison, Section 1 begins with the vesting of the executive power in the President, then notes the four-year term of office.[210] The next

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204. *Compare* U.S. CONST. art. I, *with id.* art. II, *and id.* art. III. The structure of Article I, with the subdivision of the Legislative Branch into two chambers is, as would be expected, a little more complex than the structures of Articles II and III.

205. *Id.* art. I, §§ 1–6; *id.* art. II, §1; *id.* art. III, § 1.

206. *Id.* art. I, §§ 7–9; *id.* art. II, §§ 2–3; *id.* art. III, § 2.

207. *Id.* art. I, § 10; *id.* art. II, §4; *id.* art. III, § 3.

208. Section 2 of Article II announces discretionary powers of the President. U.S. CONST. art. II, § 2. The first clause of Section 2 declares "[t]he President shall *be* Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ." U.S. CONST. art. II, § 2, cl. 1 (emphasis added). Commander-in-chief status (a power, to be sure) is integral to the office, part of what the President "shall be." *Id.* Next, the President *may require* written opinions from the heads of executive departments. *Id.* (emphasis added). That the President "may require" such opinions indicates both the President's discretion to receive them or not ("may"), and that if the President wishes such opinions, it is mandatory they be given ("require"). *Id.* The President also "shall have Power" to grant reprieves and pardons. *Id.*
The second and third clauses of Section 2 both begin by declaring the President "shall have Power." *Id.* art. II, § 2, cls. 2, 3. In the second clause, the President has the powers to make treaties and appoint judges and various officers (all to be completed only with the advice and consent of the Senate). *Id.* § 2, cl. 2. The third clause is an exception to the second: the full power to make temporary appointments when the Senate is in recess. *Id.* art. II, § 2, cl. 3.
Section 3 is mostly a list of duties rather than powers (though duties do give rise to the power necessary to accomplish those duties). *Id.* art. II, § 3. Section 3 of Article II does not use the word "power" at all. The President is to inform Congress on the State of the Union and recommend legislation and is to receive Ambassadors and other public Ministers. *Id.* Finally, the President "shall take Care that the Laws be faithfully executed," and commission all United States officers. *Id.* Amidst all this is what seems to be a discretionary power, though it is not labeled as such: the President may call Congress into session and, if the two houses of Congress disagree as to a date of adjournment, name a time of adjournment. *Id.*

209. The President, among others, "shall be removed from Office" upon impeachment and conviction. *Id.* art. II, § 4.

210. *Id.* art. II, § 1, cl.1.

three clauses set up the original version of the presidential electoral process (later modified by the Twelfth Amendment).[211] The fifth and sixth clauses state who is eligible for the presidency and vice presidency and handle the possibility of vacancy in the office of the President (later modified by the Twenty-Fifth Amendment).[212] Then comes a guarantee of compensation for the President.[213] The closing provision is the presidential oath.[214] At no point does Section 1 specify any powers of the presidency, though one might argue that the Vesting Clause evinces a nebulous power to be the executive power, whatever that may entail. If Article II were a job posting, Section 1 would be a list of minimum qualifications, a list of benefits, and a sworn statement that the applicant will faithfully do the job and try to keep the company functioning. At no point does it address what the employee is to do or how. The presidential oath's placement in Section 1 weakens the argument that it gives rise to a power or duty of constitutional interpretation. If it were meant to do that, one would expect it to be in Section 2 or 3.

Second, consider the wording of the oath: "[I] will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[215] "[P]reserve, protect and defend the Constitution"[216] is language that, were it in a list of powers, offer a basis for a power of constitutional interpretation. "[T]o the best of my Ability,"[217] though, cuts the other way; it does not speak to power. We might consider what this oath would look like if a goal of it had been to provide strong support for a power of independent constitutional interpretation. It might have used the word "power" itself. And what about "judgment"? Consider that phrase: "[T]o the best of my judgment and power." That speaks to interpretation (judgment) and autonomy (power).

"[T]o the best of my judgment and power" is exactly what the presidential oath required a few days before the close of the Constitutional Convention. The Committee of Detail had, on August 6, reported out a draft of the Constitution containing an oath that required the President to swear or affirm that he would "faithfully execute the office of President . . . ."[218] On August 27, the delegates added the second promise to this oath; the President now also promised, "[T]o the best of my *judgment and power*

211. *Id.* art. II, § 1, cls. 2–4, *amended by* U.S. CONST. amend. XII.
212. *Id.* art. II, § 1, cls. 5–6, *amended by* U.S. CONST. amend. XXV.
213. *Id.* art. II, § 1, cl. 7.
214. *Id.* art. II, § 1, cl. 8.
215. *Id.*
216. *Id.*
217. *Id.*
218. 2 Farrand, *supra* note 42, at 185. The Virginia Plan introduced in late May of 1787, contained a resolution "that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union." 1 Farrand, *supra* note 85, at 22. In July, the convention adopted a proposal to have members of the national Legislative, Judicial, and Executive Branches also swear an oath to support the articles. 2 Farrand, *supra* note 42, at 84. That was the version received by the Committee of Detail. *Id.* at 133.

preserve protect and defend the Constitution of the [United States]."[219] The oath remained unchanged through the final report of the Committee of Style on September 12. Over the final three working days of the convention, the delegates removed the words "judgment and power" from the oath and instead inserted "Abilities."[220]

To do something to the best of one's judgment and power bespeaks a broad discretion to determine both the actions one should take (judgment) and the limits to which one might push one's view (power). The convention thought to include such discretion and forcefulness, did include it for a time, and then removed it. The open-ended term "judgment and power" was replaced by "Abilities," which conveys efficiency, effort, and personal capacity. This alteration made the second half of the presidential oath far less powerful.[221]

The presidential oath is located in the housekeeping portion of Article II, and it requires the President to provide a promise to preserve, protect and defend the Constitution. The wording does not speak to judgment—though that was considered, added to the oath, and then removed. In comparison, the Supreme Court Justices take an oath which, under Article VI, binds the Justices to support the Constitution.[222] Both oaths tie the Constitution to the oath taker. But in addition, the Court has an explicit textual commitment in the Constitution to make decisions about the meaning of the Constitution.[223] The Court's power "extend[s] to all Cases . . . arising under [the] Constitution, the Laws of the United States, and Treaties made . . . under [United States] Authority."[224] To argue that the presidential oath gives rise to a power of constitutional interpretation equivalent to the textual commitment accorded the Supreme Court devalues, or simply abandons, the comparison of textual commitments across the branches. At that point, departmentalism becomes solely a structural argument.[225]

The presidential oath of office simply is not capable, on its own, of supporting a presidential power, equal to that of the judiciary, to independently and authoritatively construe the Constitution. The first half of the presidential oath is a promise to execute the office of the President. It adds no textual link to the Constitution, so it cannot provide a power of

219. 2 Farrand, *supra* note 42, at 427 (emphasis added).

220. The substitution of "abilities" for "judgment" is reported in 2 Farrand, *supra* note 42, at 621. There is no specific mention as to when in the final three days the words "and power" were removed from the oath, nor does Farrand note the change from "abilities" to "ability."

221. Agreement with this view is found in Kent, Lieb, & Shugerman. Kent et al., *supra* note 187, at 2127 (concluding this change seems "to eliminate some discretion by removing the words 'judgment' and 'power' and emphasizing instead a need for diligence and effort.").

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

223. *Id.* art. III, § 2, cl. 1.

224. *Id.*

225. *See* Strauss, *supra* note 198, at 122 (observing that, without a viable argument for interpretive autonomy based on the presidential oath, "[t]he executive autonomy view therefore depends on the structural argument about the coordinate character of the branches").

constitutional interpretation. The second half of the oath requires the President to preserve, protect, and defend the Constitution to the best of the President's ability. The oath does not, simply by its nature as an oath, support interpretive autonomy, and the text of the oath along with its drafting history and the oath's location in Section 1 of Article II fail to provide a viable argument for a presidential power of autonomous constitutional interpretation.

CONCLUSION

I have presented in this Article a textual analysis of the Take Care Clause and various other constitutional provisions that play a role in the textual argument for an autonomous presidential power of constitutional interpretation, referred to as departmentalism. By "autonomous," I mean the President can maintain an interpretive position even in the face of a contrary Supreme Court interpretation.

The common textual argument provided by departmentalists for this independent presidential power equates "the Laws" of the Take Care Clause with the "Law of the Land" in the Supremacy Clause. That equation places the Constitution among the Take Care Clause's "laws." Through a careful textual analysis, I demonstrate by intratextual means that these terms do not express the same set of laws. The textual argument for the autonomous presidential power of interpretation could be saved if "the Laws" of the Take Care Clause included the Constitution through some other provision, but a careful analysis of every instance of "law" and "laws" in the Constitution shows that the Constitution is not among "the Laws" referenced in the Take Care Clause.

In that textual analysis, a few relevant provisions come to the surface. In addition to the Take Care Clause, and in some ways paired with it, is the Calling Forth Clause from Article I, Section 8. These provisions appear to address the same set of laws, though it is not perfectly clear what those laws are. Another pair of provisions, the Supremacy Clause and the Article III clause announcing the Supreme Court's jurisdiction, provide a strong argument for judicial supremacy based on their shared language: the subject matter jurisdiction of the Supreme Court is exactly the "Law of the Land" from the Supremacy Clause.

A careful review of the drafting history of those four provisions at the 1787 Constitutional Convention solidifies the major results of my textual analysis, showing with even greater certainty that "the Laws" in the Take Care Clause do not include the Constitution, and the argument for judicial supremacy is stronger than the departmentalist argument for independent Executive Branch power to interpret the Constitution. I also arrive at a better understanding of the Calling Forth Clause's "Laws of the Union": that term (and therefore, perhaps the Take Care Clause) includes both statutes and treaties, but not the Constitution.

These results reduce the departmentalist textual argument to one provision—the presidential oath to "preserve, protect and defend the Constitution of the United States"—serving as a freestanding font of autonomous presidential power to interpret the Constitution. Again, engaging in both textual analysis and a look at the drafting history at the Convention, I demonstrate the oath simply cannot, on its own, support such a presidential power.

The loss of its textual argument may not doom the departmentalist theory in the eyes of its more ardent supporters. The theory has never contained a strong textual argument, perhaps because it has relied heavily on the structural theory of coordinate branches, a history of invocations of the theory, and pragmatic observations. But sticking to the theory will require a shift to a completely extratextual approach because the Constitution's text does not support the departmentalist arrangement of interpretive authority.