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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

# When “Yes” Means “No”: McCarran–Ferguson, the New York Convention, and the Limits of Congressional Assent

Aaron L. Wells\*

## I. INTRODUCTION

In recent years, the use of arbitration as a means of international commercial dispute resolution has multiplied,<sup>1</sup> and it is now estimated that 90% of cross-border contracts include agreements to arbitrate in the event of a conflict.<sup>2</sup> In particular, arbitration clauses are frequently being included in insurance agreements.<sup>3</sup> Arbitration is an enormously significant right when a contract provides for it—it offers the guarantee of neutrality and control, and assures parties to arbitration agreements they will not find themselves dragged into an unsympathetic foreign court.<sup>4</sup>

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\* Aaron L. Wells received his J.D. in 2012 from Washington and Lee University School of Law. The author is indebted to Patrick Barthle for listening to a lot of mindless babble and a few coherent thoughts, to Billie for waiting up, to the Volume 68 Editorial Board of the *Washington and Lee Law Review* for their guidance, to my loved ones for their patience, and particularly to the *Pepperdine Dispute Resolution Law Journal* for their tireless and superlative work.

1. Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 (2006) (“Between 1993 and 2003, the number of international arbitration proceedings administered by leading institutions almost doubled.”).

2. *Id.* (“Estimates are that 90% of international contracts include an arbitration clause.”).

3. Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 253 (2004–2005) (“[A]rbitration provisions are appearing with increasing frequency in all types of insurance policies . . .”).

4. MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 1 (2008) (“Arbitration . . . gives the parties substantial autonomy and control over the process . . . This is particularly important in international commercial arbitration because parties do not want to be subject to the jurisdiction of the other party’s court system. Each party fears the other party’s ‘home court advantage.’”).

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>5</sup> (New York Convention or Convention) is the Magna Carta of international arbitration.<sup>6</sup> With 145 nations that are parties to the New York Convention,<sup>7</sup> it serves to guarantee the enforcement of arbitration agreements worldwide,<sup>8</sup> and is largely responsible for the growth and success of arbitration in international commercial agreements.<sup>9</sup> The United States is a party to the treaty,<sup>10</sup> and has implemented the treaty through federal legislation.<sup>11</sup> However, in the context of international insurance agreements with arbitration provisions, the New York Convention is routinely rendered impotent by the McCarran–Ferguson Act,<sup>12</sup> a federal statute that is often deemed to preempt the New York Convention.<sup>13</sup>

The McCarran–Ferguson Act was enacted in 1945 to prevent federal legislation of general applicability from interfering with the states’ authority to regulate the insurance industry.<sup>14</sup> It was enacted in response to a shocking about-face on the part of the U.S. Supreme Court, deeming the insurance industry a part of interstate commerce after seventy-five years of holding the opposite.<sup>15</sup> Congress, not eager to either intrude on the insurance industry and the states or to take on a gargantuan American industry overnight, enacted the McCarran–Ferguson Act with the express purpose of turning back the clock and reversing the U.S. Supreme Court’s decision.<sup>16</sup> The McCarran–Ferguson Act is unique in its operation: It “reverse preempts”

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5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3; 21 U.S.T. 2517 [hereinafter New York Convention] (establishing a mechanism through which arbitral agreements and awards may be universally enforced).

6. See *infra* notes 118–120 and accompanying text (stating that commentators have deemed the New York Convention the most important development in international commercial arbitration).

7. See *infra* note 134 and accompanying text (explaining that there are 145 nations that are party to the New York Convention).

8. See *infra* notes 131–132 and accompanying text (stating that the Convention ensures the enforcement of arbitration agreements).

9. See *infra* text accompanying note 121 (“[T]he New York Convention is credited with being chiefly responsible for the rapid increase in the employment and effectiveness of arbitration agreements in the years since its inception.”).

10. See *infra* note 128 and accompanying text (stating that the United States has ratified the New York Convention).

11. See *infra* note 139 and accompanying text (stating that the United States has implemented the New York Convention).

12. McCarran–Ferguson Act, 15 U.S.C. §§ 1011–1015 (2006) (reverse preempting federal law of general applicability in favor of state law regulating the insurance industry).

13. See *infra* Part III.B.1 (describing a case in which the New York Convention was preempted by the McCarran–Ferguson Act).

14. See *infra* Part II.A.3 (describing the McCarran–Ferguson Act’s enactment and operation).

15. See *infra* Part II.A.2–3 (recounting the case that the McCarran–Ferguson Act reversed).

16. See *infra* Part II.A.2 (describing the history behind the McCarran–Ferguson Act).

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federal legislation of general applicability in favor of state legislation governing the insurance industry.<sup>17</sup>

The New York Convention and McCarran–Ferguson Act clash in a single setting. Twenty states have enacted legislation declaring arbitration clauses void in international insurance agreements.<sup>18</sup> When the question arises in courts as to whether the McCarran–Ferguson Act can reverse the New York Convention in favor of the arbitration-averse state legislation, a host of legal issues arise.<sup>19</sup>

While this question is posed to lower courts with some frequency and with a startling variety of results, most of these decisions are unpublished and lack precedential value.<sup>20</sup> These lower court decisions can almost never be appealed.<sup>21</sup> Therefore, the question has only been posed to the U.S. courts of appeals twice, and has created a circuit split.<sup>22</sup> A workable framework that can consistently be applied is sorely needed. This Article provides such a framework.<sup>23</sup>

This Article begins in Part II.A–B by describing the history and operation of the McCarran–Ferguson Act and the New York Convention. Part II.C analyzes the current jurisprudence on the distinction between self-executing and non-self-executing treaties, and concludes that the New York Convention is non-self-executing. Part II.D delineates the U.S. Supreme Court’s jurisprudence on the Foreign Commerce Clause, and describes how the Foreign Commerce Clause actually prohibits preemption of the New

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17. *See infra* notes 92–95 and accompanying text (relating in detail the operation of McCarran–Ferguson).

18. Peter M. Flanagan & Jason M. Adler, *The Enforceability of State Anti-Arbitration Statutes*, in REINSURANCE LAW REPORT 11, 11 (2009), available at <http://www.sidley.com/files/News/34c2903f-51e3-437a-8958-4ce663822f27/Presentation/NewsAttachment/17336d71-1845-4bab-93b9-55f524ff523b/2009-RLR-COLOR-4-30-09.pdf> (“At least twenty states and two U.S. territories prohibit the arbitration of insurance disputes.”).

19. *See infra* Part IV (going through the legal issues that must be dealt with over the course of resolving the issue of whether the McCarran–Ferguson Act preempts the New York Convention).

20. *See infra* Part IV.A (describing several outcomes in lower courts and explaining that they are largely unpublished and lack precedential value).

21. *See* Brief for Petitioner at 25, *La. Safety Ass’n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd’s, London*, 131 S. Ct. 65 (2010) (No. 09-945) (stating that the decisions of the lower court are almost never subject to appeal).

22. *See infra* Part III.B (describing the two opinions of the U.S. Circuit Courts of Appeals and the split they have created).

23. *See infra* Part IV (proposing a systematic analysis courts should employ when dealing with this issue).

York Convention by the McCarran–Ferguson Act. Part II.E recounts the history of the treaty power, and concludes that Congress could not have intended for the McCarran–Ferguson Act to preempt the New York Convention. Part II.F briefly describes the U.S. Supreme Court’s enunciation of a federal policy favoring arbitration of international disputes.

In Part III, this Article describes the case law that has arisen from the clash between the McCarran–Ferguson Act and the New York Convention. Part III.A describes the difficulty of application of the law in the lower courts. Part III.B walks through the opinions of the Second and Fifth Circuits on this issue. Part III.C explains why the case law up to this point has been insufficient and has skipped the stronger and more fundamental arguments in favor of problematic and erroneous ones.

Part IV offers a framework that courts should utilize when encountering this issue in the future. Part IV goes step-by-step through the analysis a court should employ when facing this issue, and shows how the law described in Part II can be used to resolve the issue in favor of compelling arbitration. Part V concludes this Article.

## II. BACKGROUND

This Part delineates the law that serves as a backdrop for the issues that arise when a court is faced with deciding whether the McCarran–Ferguson Act can reverse preempt the New York Convention.

### A. *The McCarran–Ferguson Act*

The McCarran–Ferguson Act’s history dates back to over seventy-five years before its enactment.<sup>24</sup> Because the McCarran–Ferguson Act effectively turned back time when it was enacted,<sup>25</sup> it is vital to understand its history in order to understand the operation of the Act. Sections 1 and 2 of this subpart describe that history. Section 3 describes the act itself, its effect, and the decisions of the U.S. Supreme Court that have determined how it functions.

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24. *See infra* notes 46–54 and accompanying text (delineating the roots of the McCarran–Ferguson Act, beginning in the mid-1800s).

25. *See infra* Part II.A.3 (describing how the McCarran–Ferguson Act reversed a decision of the U.S. Supreme Court in order to restore the regulation of insurance to earlier conditions).

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### 1. Paul v. Virginia<sup>26</sup>

Throughout the first half of the nineteenth century, state regulation of the insurance industry was becoming increasingly restrictive.<sup>27</sup> A fire insurance “industry committee” reported in 1850 that the industry as a whole had sustained such great losses from 1831 to 1850 that there was a net loss for “the entire period from 1791 to 1850.”<sup>28</sup> Insurance companies wished to turn to the federal government for relief, expecting more forgiving legislation from Congress.<sup>29</sup> First, however, the insurance companies needed a favorable ruling from the U.S. Supreme Court holding that the state legislation was unconstitutional.<sup>30</sup> Among the offending pieces of state

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26. Paul v. Virginia, 75 U.S. 168 (1868) (deciding that insurance does not constitute interstate commerce).

27. See Raymond A. Guenter, *Rediscovering the McCarran–Ferguson Act’s Commerce Clause Limitation*, 6 CONN. INS. L.J. 253, 258 (2000) (describing state insurance laws as “aggressive”); Peter R. Nehemkis, Jr., *Paul v. Virginia: The Need for Re-Examination*, 27 GEO. L.J. 519, 523–25 (1939) (recounting how between the 1820s and the 1860s, numerous states had enacted laws that aggressively restricted and taxed the insurance industry). Nehemkis provides a fascinating and comprehensive account of the history leading up to *Paul v. Virginia*, which this Article more briefly addresses. See *id.* at 519–28 (describing the historical context of *Paul v. Virginia*). Other sources focus on the protectionist nature of the offending state legislation. See David J. Howard, *Uncle Sam Versus the Insurance Commissioners: A Multi-Level Approach to Defining the ‘Business of Insurance’ Under the McCarran–Ferguson Act*, 25 WILLAMETTE L. REV. 1, 20 (1989) (“With respect to taxation and licensure, foreign companies were discriminated against for the dual purpose of protecting local policyholders and increasing state revenues.”); LEE R. RUSS ET AL., *COUCH ON INSURANCE* § 2:4 (3d ed. 2006) (describing the state legislation as discriminatory “in favor of domestic insurers”).

28. Spencer L. Kimball & Ronald N. Boyce, *The Adequacy of State Insurance Rate Regulation: The McCarran–Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545, 548 (1958) (“An industry committee reporting in 1850 alleged that . . . during the years from 1831 to 1850 the entire business was carried on at a great loss of capital. The committee said there was a loss for the entire period from 1791 to 1850.”). Kimball & Boyce are not certain of the accuracy of these statistics, but the information is nonetheless valuable as evidence of the insurance industry’s perception. *Id.* (“Whether these statements were accurate or not, they represented industry belief, and explain the insurance fraternity’s attitude . . .”). Kimball & Boyce describe the legal and economic status of the insurance industry during the nineteenth century and the first half of the twentieth century in great detail. See generally *id.*

29. See Guenter, *supra* note 27, at 258 (“The insurance companies had in mind legislation modeled after the National Bank Act that would offer them the sanctuary of a federal charter.”); Nehemkis, *supra* note 27, at 525 (“The passage of the National banking Act of 1864 had suggested to the insurance companies the possibility of extending federal control to the insurance business. And in the next year the companies addressed a Memorial to Congress asking for relief from the burdens of excessive supervision and legislation.”).

30. See Nehemkis, *supra* note 27, at 525–26 (stating that in 1868, the Committee on Legislation and Taxation of the National Board of Fire Underwriters called for a test case in order to

legislation was an 1866 Virginia statute that required all non-Virginia insurers and their local agents to post a \$30,000–\$50,000 bond before engaging in business within the state.<sup>31</sup> This legislation would provide the basis for a test case brought by the insurers to challenge the constitutionality of state regulation of the insurance industry.<sup>32</sup>

To manufacture the basis for the case, a Virginia resident named Samuel B. Paul was made an agent of the Germania Fire Insurance Company, Hanover Fire Insurance Company, Niagara Fire Insurance Company, and Republic Insurance Company, all of which were New York corporations.<sup>33</sup> Paul applied for a license to act as an agent in Virginia,<sup>34</sup> but refused to post the required bond, ostensibly based on instructions from his employers.<sup>35</sup> His license was then denied,<sup>36</sup> but he nonetheless issued policies in Virginia,

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secure a ruling of the U.S. Supreme Court that restrictive state insurance legislation was unconstitutional).

31. See Guenter, *supra* note 27, at 258 (describing the “Virginia statutory scheme” as requiring “out-of-state insurance companies to obtain a license” which depended upon “the out-of-state insurer depositing bonds,” and making it a “violation of the law to act as an agent for an unlicensed out-of-state” insurer); Howard, *supra* note 27, at 21 (“A Virginia statute provided that no foreign insurer or its local agent could transact business in Virginia unless the insurer posted a bond in an amount ranging from \$30,000 to \$50,000.”); Spencer L. Kimball & Barbara P. Heaney, *Emasculation of the McCarran–Ferguson Act: A Study in Judicial Activism*, 1985 UTAH L. REV. 1, 3 (1985) (“In 1866 the Virginia legislature enacted two related statutes . . . . One prohibited a foreign (non-Virginia) insurance company from doing insurance business in Virginia unless it first acquired a license, for which it needed to deposit bonds . . . . The second forbade an agent to act for a foreign insurance company unless licensed as an agent.”); Nehemkis, *supra* note 27, at 526 (“Virginia was among the states which had exacted a deposit of the state’s bonds as a condition precedent to the right to do business within the State.”).

32. See Guenter, *supra* note 27, at 258 (describing how *Paul v. Virginia* was a test case based on an intentional violation of the Virginia legislation); Kimball & Heaney, *supra* note 31, at 3–4 (explaining that the Virginia legislation was violated in order to create the underlying controversy in *Paul v. Virginia*); Nehemkis, *supra* note 27, at 526 (“[T]he Virginia statute had been selected [by the insurance companies] for constitutional determination . . . .”).

33. Nehemkis, *supra* note 27, at 527 (“In May, 1866, Paul, a resident of Virginia, was appointed agent to carry on the general business of fire insurance for Germania Fire Insurance Company, Hanover Fire Insurance Company, Niagara Fire Insurance Company, and the Republic Insurance Company, all incorporated in the State of New York.”).

34. Kimball & Heaney, *supra* note 31, at 4 (“Paul applied for a license to represent unadmitted New York insurance companies as agent . . . .”); Nehemkis, *supra* note 27, at 527 (“[Paul] applied to the proper officer of the district for a license to act as such agent within the State . . . .”).

35. Nehemkis, *supra* note 27, at 527 (“[Paul] declined (it may be presumed upon instructions from his home offices) to comply with the provisions requiring a deposit of bonds with the treasurer of the State.”); Kimball & Heaney, *supra* note 31, at 4 (“Paul . . . offer[ed] to comply with all the state’s requirements except the deposit of the required securities.”).

36. Nehemkis, *supra* note 27, at 527 (“His license was refused.”); Kimball & Heaney, *supra* note 31, at 4 (“The license was refused.”).

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for which he was convicted and fined.<sup>37</sup> The Supreme Court of Virginia affirmed Paul's conviction,<sup>38</sup> and the case proceeded to the U.S. Supreme Court.<sup>39</sup> Thanks to the support of the National Board of Fire Underwriters,<sup>40</sup> Paul was represented by, "perhaps, the two most distinguished members of the bar of the day"<sup>41</sup>: Benjamin Curtis,<sup>42</sup> a former Associate Justice of the U.S. Supreme Court,<sup>43</sup> and James Mandeville Carlisle,<sup>44</sup> who argued more cases before the U.S. Supreme Court and the Court of Claims than any other attorney from 1863–1873.<sup>45</sup>

Despite the competence of Paul's counsel, *Paul v. Virginia* was a stunning failure as a test case for the insurance industry. In order to cure the insurers of the offending state legislation, the U.S. Supreme Court would have had to determine that "the states were without power to regulate with

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37. Kimball & Heaney, *supra* note 31, at 4 ("Paul nevertheless issued a policy as agent for one of the New York companies; he was indicted, convicted and fined fifty dollars."); Nehemkis, *supra* note 27, at 527 ("So that the issue might be clearly framed, Paul issued a policy of insurance to a citizen of Virginia without the required license. He was promptly indicted and convicted in the Circuit Court of the city of Petersburg, and was sentenced to pay a fine of \$50.").

38. JOHN G. DAY, *ECONOMIC REGULATION OF INSURANCE IN THE UNITED STATES* 14 (1970) ("[T]he Virginia Supreme Court had affirmed the conviction . . ."); Nehemkis, *supra* note 27, at 527 ("On error to the Supreme Court of Appeals of Virginia the judgment below was affirmed . . .").

39. Howard, *supra* note 27, at 21 ("After his conviction was affirmed by the Supreme Court of Virginia, Paul appealed to the United States Supreme Court . . ."); Nehemkis, *supra* note 27, at 527 ("[T]he case was brought on to the Supreme Court . . .").

40. See DAY, *supra* note 38, at 14 (stating that the National Board of Fire Underwriters had undertaken to provide moral and material support for Paul); Nehemkis, *supra* note 27, at 526–27 (stating that the National Board of Fire Underwriters had been advised of the case after it had advanced from the Supreme Court of Virginia, and had undertaken to provide support and secure counsel for Paul).

41. Nehemkis, *supra* note 27, at 527.

42. See *id.* at 527–28 (stating that Curtis was appointed Paul's legal counsel).

43. See *id.* at 527–28 (stating that "Benjamin R. Curtis . . . had resigned as Associate Justice of the Supreme Court in March, 1857"). Curtis had resigned from the U.S. Supreme Court because his pay was insufficient to maintain his and his family's lifestyle and because of the makeup of the Court. See *id.* at 528 n.38 (recounting a letter from Curtis to President Fillmore in which he cited the inadequacy of his pay and the state of the Court as his reasons for resigning). "Curtis soon became the principal legal spokesman for the 'vested interests' and, in particular, the insurance companies." *Id.*

44. See *id.* at 527–28 (stating that James Mandeville Carlisle was also Paul's counsel in *Paul v. Virginia*).

45. See *id.* at 528 n.39 ("On the reorganization of the Supreme Court of the District of Columbia in 1863 [Carlisle] . . . confined his practice to the Supreme Court of the United States and the Court of Claims where for the next ten years he held a larger number of briefs than any other practitioner.").

respect to the activities of foreign insurance companies.”<sup>46</sup> *Paul* advanced the argument that because the Virginia statute governed commerce between Virginia and other states, it violated Congress’s constitutionally delegated Commerce Clause authority.<sup>47</sup>

Justice Field, writing for a unanimous Court,<sup>48</sup> rejected this argument. He squarely rejected the idea that the Commerce Clause would govern this case, deciding that the issuance of an insurance policy is simply not commerce.<sup>49</sup> Instead, Justice Field explained, they are simply personal contracts that do not involve the shipment of goods across borders,<sup>50</sup> but are executed in one state, despite the fact that the two parties may be domiciled in different states.<sup>51</sup> Hence, Justice Field decided, a contract for a policy of insurance, even when it involves out-of-state insurers, is not interstate commerce “any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.”<sup>52</sup> Though Justice Field’s decision may have “seemed almost as unrealistic in 1869 as it does today,”<sup>53</sup> it was nevertheless

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46. *Id.* at 528 (“[I]n granting relief the Court must so determine the issues as to make possible . . . the program debated in the halls of the insurance conventions . . . . This meant, in effect, that the Court must determine that the states were without power to regulate with respect to the activities of foreign insurance companies.”).

47. *See id.* at 528–29 (“Counsel for Paul in substance advanced [the argument that] . . . as the statute in question was an attempt to regulate commerce between Virginia and other states of the Union, it encroached upon a subject which was exclusively within the province of Congress: it was not a subject, therefore, upon which the states could legislate in the absence of legislation by Congress.”); U.S. CONST. art. I, § 8, cl. 3 provides that Congress shall have the power “[t]o regulate commerce with foreign Nations, and among the several States.”)

48. Howard, *supra* note 27, at 21 (“Justice Field, writing for a unanimous court, affirmed Paul’s conviction . . . .”); Nehemkis, *supra* note 27, at 529 (“Mr. Justice Field, speaking for a unanimous Court . . . .”).

49. Nehemkis, *supra* note 27, at 532 (“The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce.”).

50. *Id.* (“They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of consideration.”).

51. *Id.* at 533 (“Such contracts are not inter-state transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia.”).

52. *Paul v. Virginia*, 75 U.S. 168, 183 (1868).

53. Howard, *supra* note 27, at 21. *See also* Nehemkis, *supra* note 27, at 533 (“However unrealistic was Field’s conception of the nature of insurance—as unrealistic then as now—his classic commentary is understandable in the light of the practical exigencies of government.”). Nehemkis goes on to explain that Field probably adopted such an “unrealistic” position because no federal regulation had been passed. *See id.* Thus, Nehemkis suggests, Justice Field was likely concerned about the possibility of the entire insurance industry going unregulated while Congress scrambled to pass legislation. *See id.* (“It must be remembered that the Court was not construing an act of

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controlling law for the intervening seventy-five years, withstanding at least twelve attempts to have it overruled in the U.S. Supreme Court.<sup>54</sup>

## 2. United States v. South-Eastern Underwriters Ass'n<sup>55</sup>

In 1944, three-quarters of a century of undiminished certainty that insurance was not interstate commerce suddenly ended when the U.S.

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Congress; it had before it a state statute. Therefore, a determination that insurance was a business in interstate commerce would have been tantamount to creating a governmental vacuum . . . .”)

54. See *Colgate v. Harvey*, 296 U.S. 404, 432 (1935) (“But insurance is not commerce; and the right of a citizen to take out a policy in one state, insuring property in another where he resides, cannot be protected under the commerce clause.”); *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 276–77 (1927) (“A contract of insurance, although made with a corporation having its office in a state other than that in which the insured resides and in which the interest insured is located, is not interstate commerce . . . .”); *Nat’l Union Fire Ins. Co. v. Wanberg*, 260 U.S. 71, 75 (1922) (citing *Paul v. Virginia* for the proposition that “the business of such insurance companies is purely intrastate . . . [and] the state has power to require them to accept conditions different from those imposed on domestic corporations”); *Nw. Mut. Life Ins. Co. v. Wisconsin*, 247 U.S. 132, 138 (1918) (“That the tax upon the life insurance business, which is the subject-matter of the license tax here involved, is not a tax upon interstate commerce is established . . . .”); *N.Y. Life Ins. Co. v. Deer Lodge Cnty.*, 231 U.S. 495, 507–08 (1913) (extending *Paul v. Virginia* to life insurance); *N.Y. Life Ins. Co. v. Cravens*, 178 U.S. 389, 401 (1900) (“That the business of fire insurance is not interstate commerce is decided in *Paul v. Virginia* . . . .”); *Hooper v. California*, 155 U.S. 648, 653 (1895) (“That the business of insurance does not generically appertain to [the Commerce Clause] has been well settled since the case of *Paul v. Virginia*.”); *Fire Ass’n of Phila. v. New York*, 119 U.S. 110, 117–20 (1886) (declining to overturn *Paul v. Virginia*); *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727, 732 (1885) (“The right of the people of a state to prescribe generally by its constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state, has been settled by [*Paul v. Virginia*].”); *Doyle v. Cont’l Ins. Co.*, 94 U.S. 535, 539 (1876) (declining to distinguish *Paul v. Virginia*); *Liverpool Ins. Co. v. Massachusetts*, 77 U.S. 566, 573–76 (1870) (extending *Paul v. Virginia* to cover foreign insurers); *Ducat v. Chicago*, 77 U.S. 410, 415 (1870) (“[T]he decision in [*Paul v. Virginia*] . . . has already disposed of all the principal questions involved.”). See also Guenter, *supra* note 27, at 529 (“Between 1869 and 1927, the Supreme Court rendered ten decisions determining that various types of insurance or insurance-related activities were not interstate commerce, upholding in each case a form of state taxation or regulation that presumably not have passed constitutional muster if applied to a business that did not constitute interstate commerce.”); Howard, *supra* note 27, at 21 (“[*Paul v. Virginia*] controlled application of the Commerce Clause to the insurance industry for the next seventy-five years despite repeated efforts to have it overruled.”). *Paul v. Virginia*’s ruling that corporations were not citizens for purposes of the Commerce Clause has never been overturned. See George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351, 352 (1988) (stating that the Commerce Clause “never has been held applicable to corporations”). Carpinello gives a detailed analysis of why *Paul v. Virginia* remains law in this regard to this day. See generally *id.*

55. *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533 (1944) (deciding that insurance is interstate commerce).

Supreme Court decided *United States v. South-Eastern Underwriters Ass'n (SEUA)*.<sup>56</sup> The underlying issue in *SEUA* arose from the existence of federal antitrust legislation, which numerous insurance companies had violated—but only if the antitrust legislation in fact governed insurers.<sup>57</sup>

Such were the circumstances in 1942 when approximately 200 insurance companies were charged with violating federal antitrust legislation by a federal grand jury in Atlanta, Georgia.<sup>58</sup> Since *Paul v. Virginia* and its progeny were still controlling case law, the “lower Federal Court, acting upon the line of United States Supreme Court decisions holding that insurance is not commerce, declined to hear the case on its merits and as a result the question whether insurance was or was not commerce was directly presented to the United States Supreme Court.”<sup>59</sup> In a decision that made “insurance men [think] the end of the world was come,”<sup>60</sup> the Court held that insurance *was* interstate commerce, and reversed the lower court’s dismissal of the indictments.<sup>61</sup> The *SEUA* Court’s rationale was exceedingly simple: Every other commercial activity that takes place in interstate commerce had been held within Congress’s power to legislate, and there was no reason to except insurance from that rule.<sup>62</sup>

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56. Howard, *supra* note 27, at 23 (“The long era of *Paul v. Virginia* came to an abrupt end in 1944 when the Supreme Court decided *United States v. South-Eastern Underwriters Association . . .*”). See also Guenter, *supra* note 27, at 286 (“*SEUA* is one of the Supreme Court’s most celebrated reversals of an established precedent.”).

57. See Howard, *supra* note 27, at 23 (“Following the decision in *Paul v. Virginia*, Congress had passed antitrust legislation . . . . Thus, while *Paul* dealt with the question of whether there should be state regulation or no regulation over insurance, the issue in *SEUA* was whether federal antitrust laws, rather than state insurance laws, should govern monopolistic behavior . . . .”). To make the issue more problematic, the nature of insurance companies to conduct their business across multiple states, combined with the jurisdictional confines of state regulation, rendered the states unable to effectively regulate anticompetitive practices. See DAY, *supra* note 38, at 22–23 (“The interstate character of most insurers’ business and jurisdictional limits on individual state regulator’s authority compounded the problem. [State Attorneys General were] [r]educed to impotence by these circumstances . . . .”).

58. Howard, *supra* note 27, at 23 (“In 1942, a federal grand jury in Atlanta, Georgia indicted nearly 200 insurance companies, charging them with . . . conspiring to fix and maintain arbitrary and non-competitive rates on fire insurance policies . . . and . . . conspiring to monopolize trade and commerce in the fire insurance sold . . . .”).

59. Joseph B. Beach, *The South-Eastern Underwriters’ Decision and Its Effect*, 1947 WIS. L. REV. 321, 322 (1947).

60. Kimball & Boyce, *supra* note 28, at 554. See also Charles D. Weller, *The McCarran–Ferguson Act’s Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 590 (1978) (“The Court’s ruling generated a flood of often torrid commentary.”).

61. See *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 553, 562 (holding that insurance was interstate commerce and reversing the lower court).

62. *Id.* at 553 (“No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance.”). See also Beach, *supra* note

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The *SEUA* decision alarmed the state commissioners of insurance as well as the insurance industry.<sup>63</sup> Not only did the opinion “threaten[] to wreak havoc on the insurance industry”<sup>64</sup> itself, but it also threatened to put state insurance commissioners out of a job and deny the states of substantial tax revenue.<sup>65</sup> With these concerns in mind, the insurance industry and state actors began to pressure Congress to enact legislation that would preserve the states’ power to regulate insurance.<sup>66</sup>

Congress recognized the knotty position in which *SEUA* had left the insurance industry and insurance industry regulators, and was receptive to suggestions.<sup>67</sup> The state insurance commissioners, under the auspices of the National Association of Insurance Commissioners (NAIC), proposed a bill that preserved the states’ authority to regulate and tax the insurance industry, while preserving some measure of applicability of federal antitrust legislation to insurance companies.<sup>68</sup> In the third session of Congress

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59, at 322 (“The decision is very clear on the point that insurance is commerce and, insofar as transactions which cross state lines are concerned, interstate commerce.”).

63. Beach, *supra* note 59, at 322 (“The South-Eastern Underwriters decision created consternation both in the business of insurance and among the state commissioners of insurance.”). *See also* Weller, *supra* note 60, at 590 (“The first contention was that of [some] in the fire insurance industry who felt the threat of criminal prosecution most immediately. . . . Second, there was serious concern that state tax and regulatory schemes would now be found unconstitutional under the commerce clause.”). *But see* Kimball & Boyce, *supra* note 28, at 554 (“[The fear of danger to state insurance regulation] was exaggerated, as the subsequent [cases] demonstrated.”).

64. Kimball & Heaney, *supra* note 31, at 9.

65. *See id.* (“It threatened to put state regulators of insurance out of business. It also threatened to withdraw from the states considerable revenues from franchise taxes.”).

66. *Id.* (“The insurance industry and the state regulators importuned Congress to act to alleviate those threats.”). *See also* Beach, *supra* note 59, at 323 (“At this point the insurance industry and the state commissioners of insurance began to work together to plan measures to cope with the situation.”).

67. Beach, *supra* note 59, at 323 (“Congress also realized that the business of insurance and the regulation of that business by the states had been placed under a severe handicap by the South-Eastern Underwriters decision and was ready and willing to entertain reasonable proposals.”).

68. Guenter, *supra* note 27, at 291 (“The NAIC’s primary interest was to restore to the states the right to regulate the day-to-day activities of the insurance industry and to tax its interstate operations as they had prior to the *SEUA* case . . . . [However,] it favored the application of the [federal antitrust legislation] . . . .”).

following *SEUA*,<sup>69</sup> on March 9, 1945,<sup>70</sup> a revised version of the NAIC proposal was enacted as the McCarran–Ferguson Act.<sup>71</sup>

### 3. The Act and Its Contours

The McCarran–Ferguson Act provides, in pertinent part:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .<sup>72</sup>

The only issue on which commentators and courts agree regarding the McCarran–Ferguson Act is that it was intended to reverse *SEUA*.<sup>73</sup> McCarran–Ferguson instantly became the subject of a great deal of litigation; the first challenge under the McCarran–Ferguson Act to make it to the U.S. Supreme Court—less than a year after the Act was passed—was, unsurprisingly, an attack on the constitutionality of the Act itself.<sup>74</sup>

In *Prudential Insurance Co. of America v. Benjamin*,<sup>75</sup> the U.S. Supreme Court held that the Act did not violate the Commerce Clause, and Congress could constitutionally allow the states to regulate interstate commercial insurance transactions.<sup>76</sup> *Prudential* involved a strikingly similar factual

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69. *Id.* at 290 (“Legislation dealing with the issues raised by the *SEUA* litigation was considered in three sessions of Congress before the Act became law.”).

70. Beach, *supra* note 59, at 323 (“[T]he McCarran Act . . . was adopted by Congress on March 9, 1945.”).

71. See Kimball & Heaney, *supra* note 31, at 9 (“The National Association of Insurance Commissioners (or “NAIC”) draft bill, with only modest changes, became the McCarran–Ferguson Act.”). See also Guenter, *supra* note 27, at 292 (“[T]he provisions of the act, other than those that relate to the applicability of the federal antitrust laws to insurance, are almost identical to legislation proposed by the NAIC.”); Weller, *supra* note 60, at 598 (“The NAIC origins of the McCarran–Ferguson Act are unmistakable . . .”).

72. 15 U.S.C. § 1012(b) (2006).

73. Guenter, *supra* note 27, at 295 (“Perhaps the only matter about which decisions interpreting the Act and commentators are unanimous is that the Act was an attempt to undo the result of *SEUA* . . .”).

74. See *infra* notes 75–88 and accompanying text (describing the 1946 U.S. Supreme Court case that rejected an attack on the constitutionality of the McCarran–Ferguson Act).

75. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (upholding the McCarran–Ferguson Act against a Commerce Clause challenge).

76. Howard, *supra* note 27, at 34 (“The Court held that the Commerce Clause did not prevent Congress from allowing the states to control interstate insurance transactions in areas where Congress had not spoken, and even in areas where it had spoken but its words did not specifically relate to the business of insurance.”).

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scenario to that in *Paul v. Virginia*.<sup>77</sup> An insurance company was challenging a state tax on out-of-state insurers as unconstitutional under the Commerce Clause.<sup>78</sup> *Prudential*'s constitutional attack on McCarran-Ferguson was, in effect, that Congress could not allow any burden on interstate commerce through its acquiescence to the states' power to regulate that would be an unconstitutional burden under the Commerce Clause if Congress had not legislated at all.<sup>79</sup> The Court completely rejected this argument.<sup>80</sup> The Court explained that its most relevant precedents were those in which Congress's silence on a particular matter had been interpreted as invalidating state action, but Congress had subsequently reversed the invalidation through legislation.<sup>81</sup> In none of those cases had the Court struck down such legislation.<sup>82</sup> While the Court conceded that "rationalizations [had] differed concerning those decisions,"<sup>83</sup> it nonetheless concluded that "the results have been lasting and are at least as important, for the direction given to the process of accommodating federal and state authority, as the reasons stated for reaching them."<sup>84</sup> *Prudential* offers some revealing guidance as to Congress's assent to the states' authority over the insurance industry: "Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in

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77. *Prudential*, 328 U.S. at 410 ("In cycle reminiscent conversely of views advanced . . . in *Paul v. Virginia*, claims are put forward on the basis of the South-eastern decision to sustain immunity from state taxation . . ." (internal citations omitted)).

78. *See id.* ("The specific effect asserted in this case is that South Carolina no longer can collect taxes from Prudential, a New Jersey corporation . . . . The tax is laid on foreign insurance companies and must be paid annually as a condition of . . . carry[ing] on the business of insurance within the state.").

79. *See id.* at 422 ("[Prudential's argument is] that neither Congress acting affirmatively nor Congress and the states thus acting coordinately can validly impose any regulation which the Court has found or would find to be forbidden by the commerce clause, if laid only by state action taken while Congress' power lies dormant.").

80. *See id.* ("Merely to state the position in this way compels its rejection.").

81. *See id.* at 423-24 (stating that "the cases most important for the decision in this cause" are those "where the silence of Congress or the dormancy of its power has been taken judicially . . . as forbidding state action, only to have Congress later disclaim the prohibition or undertake to nullify it").

82. *Id.* at 424 ("Not yet has this Court held such a disclaimer invalid or that state action supported by it could not stand. On the contrary in each instance it has given effect to the Congressional judgment contradicting its own previous one.").

83. *Id.*

84. *Id.*

reference to the business of insurance, by the national public interest, except in the specific respects otherwise expressly provided for.”<sup>85</sup>

Naturally, the Court observed, Congress was aware of the existence of state regulations and taxes on the insurance industry,<sup>86</sup> and that those regulations and taxes were different from state to state and different from regulations and taxes on other industries.<sup>87</sup> Thus, “Congress[’s] . . . purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations.”<sup>88</sup>

Subsequent to the *Prudential* decision, the U.S. Supreme Court gave further clarification as to the contours of McCarran–Ferguson reverse preemption. In *State Board of Insurance v. Todd Shipyards Corp.*,<sup>89</sup> the Court stated, after reviewing the legislative history of the McCarran–Ferguson Act,<sup>90</sup> that the Act could not reverse the effect of prior non-Commerce Clause U.S. Supreme Court decisions, whether rightly or wrongly decided.<sup>91</sup> The *Todd Shipyards* opinion was extended by *Western & Southern Life Insurance Co. v. State Board of Equalization of California*,<sup>92</sup> which relied on the proposition that while states could impede Commerce Clause restrictions by virtue of the McCarran–Ferguson Act, states could not impede Equal Protection restrictions.<sup>93</sup> This line of decisions was extended once again by the U.S. Supreme Court in *Metropolitan Life Insurance Co. v. Ward*,<sup>94</sup> and much more boldly. The *Ward* Court stated that “as we noted in *Western & Southern*, the legislative history of the McCarran–Ferguson Act reveals that the Act was Congress’ response only to [SEUA], and that Congress did not intend thereby to give the States any power to tax or regulate the insurance industry other than

85. *Id.* at 431.

86. *See id.* at 430 (“Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation . . .”).

87. *See id.* (“Congress must have had full knowledge . . . of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and . . . that many . . . include features which, to some extent, have not been applied generally to other interstate business.”).

88. *Id.*

89. *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962) (ruling that the McCarran–Ferguson Act could not reverse the effect of non-Commerce Clause pre-*SEUA* decisions).

90. *See id.* at 455–56 (reviewing the legislative history of the McCarran–Ferguson Act).

91. *See id.* at 456 (deciding that several Due Process U.S. Supreme Court cases remained good law in restricting the business of insurance).

92. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648 (1981).

93. *See id.* at 656 (“This case assumes an unusual posture, however, because the Commerce Clause is inapplicable to the business of insurance [by virtue of the McCarran–Ferguson Act] . . . and the Privileges and Immunities Clause is inapplicable to corporations . . . . Only the Equal Protection Clause remains as a possible ground for invalidation of the California tax.”).

94. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

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what they had previously possessed.”<sup>95</sup> It would therefore appear that the Court has demonstrated its reading of McCarran–Ferguson as impeding only Commerce Clause limitations on state regulation of the insurance industry.

As the text of the McCarran–Ferguson Act and a long line of U.S. Supreme Court precedent indicates, there are three prerequisites for a state statute to reverse preempt federal law under the Act.<sup>96</sup> First, there must be a federal statute of general applicability, meaning one that does not specifically concern the insurance industry.<sup>97</sup> Second, there must be a “state law ‘enacted . . . for the purpose of regulating the business of insurance.’”<sup>98</sup> Third, McCarran–Ferguson can only preempt the federal law if the “federal measure . . . would ‘invalidate, impair, or supersede’ the State’s law.”<sup>99</sup> One question this framework has raised that has attracted a great amount of attention is how to define “business of insurance.” The most recent and clear case on this issue, *Union Labor Life Insurance Co. v. Pireno*,<sup>100</sup> gave a framework for determining what falls under the definition of “business of insurance” as it is used in another part of the McCarran–Ferguson Act.<sup>101</sup> *Pireno*’s framework, a partial restatement of U.S. Supreme Court precedent,<sup>102</sup> employs three factors for identifying what activity is the “business of insurance”: “[F]irst, whether the practice has the effect of transferring or spreading a policyholder’s risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the

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95. *Id.* at 880 n.8 (internal citations omitted).

96. *See* RUSS ET AL., *supra* note 27, at § 4:7 (“Three conditions must be present before the McCarran–Ferguson Act precludes the application of federal law . . .”).

97. *See, e.g.,* *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (“The McCarran–Ferguson Act thus precludes application of a federal statute . . . if the federal measure does not ‘specifically relat[e] to the business of insurance’ . . .”). *See also* RUSS ET AL., *supra* note 27, at § 4:7 (“(1) the federal statute at issue must be a ‘general’ statute that does not specifically relate to the ‘business of insurance’ . . .”).

98. *Forsyth*, 525 U.S. at 307. *See also* RUSS ET AL., *supra* note 27, at § 4:7 (“(2) the state statute at issue was enacted for the purpose of regulating the ‘business of insurance’ . . .”).

99. *Forsyth*, 525 U.S. at 307. *See also* RUSS ET AL., *supra* note 27, at 4:7 (“(3) application of the federal statute would ‘invalidate, impair or supercede’ the state statute.”).

100. *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982).

101. *See id.* at 124–25 (describing this case as involving an antitrust issue and delineating the framework for the part of the McCarran–Ferguson Act that deals with antitrust legislation).

102. *Id.* at 126 (“In [a prior case], this Court had occasion to reexamine the scope of the express antitrust exemption provided for the ‘business of insurance’ by § 2(b) of the McCarran–Ferguson Act. We hold that decision of the question before us is controlled by [that decision].”).

insurance industry.”<sup>103</sup> The Court carefully noted, however, that “[n]one of these criteria is necessarily determinative in itself.”<sup>104</sup>

There is an additional twist in analyzing the “business of insurance” under the part of the McCarran–Ferguson Act, however. In *United States Department of Treasury v. Fabe*,<sup>105</sup> the Court stated that the first clause of § 2(b) of the McCarran–Ferguson Act, which is relevant to this Article, encompasses a broader swath when it uses the term “business of insurance” than does the antitrust clause, because “[t]he broad category of laws enacted ‘for the purpose of regulating the business of insurance’ consists of laws that possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the ‘business of insurance.’”<sup>106</sup> *Fabe*’s “clarification” of the *Pireno* framework’s application to the first clause of § 2(b) of the McCarran–Ferguson Act has resulted in a great deal of confusion.<sup>107</sup> Lower courts have not agreed on how the *Pireno* test should be used in this context.<sup>108</sup> One commentator has suggested using the *Pireno* test as a starting point, but not as a complete test.<sup>109</sup> While consensus on this issue seems fleeting, what remains certain is that a first clause inquiry under *Fabe* will be *at least* as inclusive as the *Pireno* test.<sup>110</sup>

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103. *Id.* at 129.

104. *Id.*

105. U.S. Dep’t of Treasury v. Fabe, 508 U.S. 491 (1993).

106. *Id.* at 505 (internal citations omitted).

107. Peter B. Steffen, Comment, *After Fabe: Applying the Pireno Definition of “Business of Insurance” in First-Clause McCarran–Ferguson Act Cases*, 2000 U. CHI. LEGAL F. 447, 463 (“Despite the Supreme Court’s efforts, Fabe did not put an end to confusion over the definition of ‘business of insurance.’”).

108. Compare, e.g., *Colonial Life & Accident Ins. Co. v. Am. Family Life Assurance Co. of Columbus*, 846 F. Supp. 454, 459 (D.S.C. 1994) (“Initially, the Court notes that neither *National Casualty* nor the *Pireno* criteria are controlling. . . . In *Fabe*, the Supreme Court recognized the distinction between cases which involve the scope of the antitrust exemption in the second clause of Section 2(b), and cases which fall within the first clause . . .”), with *Merchs. Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1490 n.2 (9th Cir. 1995) (“In *Fabe*, the Supreme Court actually applied the three [*Pireno*] factors . . . . On the other hand, . . . the Court held the business of insurance was to be defined more broadly. . . . This is a matter of degree, however, rather than a wholesale change in the inquiry.”). See also Steffen, *supra* note 107, at 463 (“The question troubling lower courts in the wake of Fabe is whether they should completely disregard the *Pireno* test in first-clause cases.”).

109. Steffen, *supra* note 107, at 471 (“Courts should recognize that *Pireno* can be helpful in first-clause non-antitrust cases, but that it is only a starting point. . . . The *Pireno* test should not be definitive in first-clause cases.”).

110. *Id.* at 463 (“Those lower courts that apply *Pireno* in first-clause cases must also decide whether a broader application of ‘business of insurance’ is necessary outside of the antitrust context. . . . Courts that reject the *Pireno* test in first-clause cases effectively choose a more inclusive approach.”).

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Courts charged with deciding whether the McCarran–Ferguson Act reverse preempts the New York Convention in favor of state legislation that declares arbitration agreements in insurance contracts unenforceable have almost all determined that the state statutes do regulate the “business of insurance.”<sup>111</sup> As the law currently stands, this conclusion is almost certainly correct. A statute declaring international arbitration agreements in insurance contracts unenforceable is, by definition, regulating a “practice limited to entities within the insurance industry.”<sup>112</sup> Moreover, international arbitration agreements are, to a great extent, “an integral part of the policy relationship between the insurer and the insured,”<sup>113</sup> because such agreements necessarily determine how conflicts within that relationship will be resolved. This is, perhaps, *the* defining factor in the contractual policy relationship, because the contractual guarantees are only as certain as a tribunal deems them to be under the governing law.<sup>114</sup> Therefore, even under the *Pireno* test alone, such statutes govern the “business of

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111. *Nat'l Home Ins. Co. v. King*, 291 F. Supp. 2d 518, 530 (E.D. Ky. 2003) (“[B]oth federal and state courts have held that state statutes that invalidate arbitration clauses *specifically as to insurance contracts* are indeed ‘enacted for the purpose of regulating the business of insurance’ . . . . [B]ased upon the above authorities, the McCarran–Ferguson Act does ‘reverse preempt’ . . . .”); *Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd’s of London*, No. 96–4173–CV–C–2, 1996 WL 938126, at \*2 (W.D. Mo. June 10, 1996) (“In addition, the court finds that [the statute] was enacted for the purpose of regulating the business of insurance in that the statute is ‘aimed at protecting or regulating the performance of an insurance contract.’ (quoting *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 505 (1993))). Only two courts have determined that such statutes are not statutes regulating the “business of insurance.” *Acosta v. Master Maint. & Constr., Inc.*, 52 F. Supp. 2d 699, 706 n.20 (M.D. La. 1999) (“While the McCarran–Ferguson Act prohibits preemption of a state’s insurance regulation, a dispute between an insurer and its insured regarding terms of their contract is not ‘the business of insurance.’”); *Triton Lines, Inc. v. S.S. Mut. Underwriting Ass’n*, 707 F. Supp. 277, 279 (S.D. Tex. 1989) (“A disputed claim is not the business of insurance. The business of regulating the insurance industry focuses on the underwriting and spreading of the policyholder’s risk.”).

112. *See supra* notes 101–103 and accompanying text (stating that the third factor in deciding whether a statute regulates “the business of insurance” is whether the statute institutes a “practice limited to entities within the insurance industry”).

113. *See supra* notes 101–103 and accompanying text (stating that the second factor in deciding whether a statute regulates “the business of insurance” is whether the statute deals with “an integral part of the policy relationship between the insurer and insured”).

114. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

insurance.”<sup>115</sup> With the broader net that *Fabe* casts,<sup>116</sup> and with the certainty that statutes prohibiting the enforcement of international arbitration agreements in insurance contracts *at least* “possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance,”<sup>117</sup> such statutes clearly regulate the “business of insurance.”

### B. *The New York Convention*

The New York Convention, hailed as the “most important international treaty relating to international commercial arbitration”<sup>118</sup> and the “centerpiece of the legal regime governing international arbitration agreements,”<sup>119</sup> embodied a change in the tides among the nations and courts of the world from a prejudice against the enforcement of arbitration agreements to a prejudice in favor of the enforcement of arbitration agreements.<sup>120</sup> Indeed, the New York Convention is credited with being chiefly responsible for the rapid increase in the employment and effectiveness of arbitration agreements in the years since its inception.<sup>121</sup> This subpart describes the New York Convention and its implementing legislation. Section 1 describes the history and effect of the New York

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115. See *supra* notes 101–103 and accompanying text (delineating the *Pireno* test and establishing that test as the first iteration of the U.S. Supreme Court’s formula for defining the “business of insurance”).

116. See *supra* notes 105–10 and accompanying text (describing the broader *Fabe* test).

117. See *supra* notes 105–107 and accompanying text (stating that regulations “enacted ‘for the purpose of regulating the business of insurance’ consists of laws that possess the ‘end, intention, or aim’ of adjusting, managing, or controlling the business of insurance” are included within the *Fabe* test).

118. ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 81 (4th ed. 2004).

119. GARY B. BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 123 (3d. ed. 2010).

120. See Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 *YALE L.J.* 1049, 1049 (1961) (describing how “[f]rom the days of the early English ‘piepowder’ courts, where merchants with the dust of the market still on their feet stepped into a tribunal of merchants for swift resolution of their disputes,” courts and law were hostile to arbitration agreements); MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 3 (2008) (“The New York Convention is considered to have a pro-enforcement bias, and most courts will interpret the permissible grounds for non-enforcement quite narrowly, leading to the enforcement of the vast majority of awards.”).

121. BORN, *supra* note 119, at 123 (“[The New York Convention] is widely regarded as having contributed to the significant increase in the use and efficacy of international commercial arbitration in recent decades.”); REDFERN & HUNTER, *supra* note 118, at 81 (“Indeed, [the New York Convention] may be regarded as a major factor in the development of arbitration as a means of resolving international trade disputes.”).

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Convention. Section 2 delineates the New York Convention's domestic implementing legislation and its operation.

### 1. The Convention

Within a short time after the establishment of the United Nations, international actors sought to create a mechanism for enforcing foreign arbitral awards under the auspices of the transnational body.<sup>122</sup> In 1953, the International Chamber of Commerce requested that the United Nations Economic and Social Council organize a convention to address this issue.<sup>123</sup> After five years of proposals, considerations, and comments, a conference was assembled in 1958 for the purpose of drafting a treaty, with delegations from forty-five nations in attendance.<sup>124</sup> In the midst of the conference, Sweden proposed that in addition to promoting the enforcement of arbitral awards, the treaty should contain a provision promoting the enforcement of arbitration agreements.<sup>125</sup> After some debate about whether the conference was even authorized to address the issue of arbitration agreements, the delegates were persuaded that without a provision addressing the recognition of arbitration agreements, the entire issue of the enforcement of arbitral awards could be circumvented by hostile courts.<sup>126</sup>

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122. Quigley, *supra* note 120, at 1059 (“Soon after the establishment of the United Nations after World War II, attempts were made to work out a multilateral solution to the problem of enforcing foreign arbitral awards.”).

123. See Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1, 3 (1971) (“In 1953, the International Chamber of Commerce, anxious to promote a solution to the problem of enforcing foreign arbitral awards, requested the United Nations Economic and Social Council to convene an international convention on the subject . . .”).

124. See Quigley, *supra* note 120, at 1059–60 (describing the steps leading up to the conference, and the nations and organizations in attendance at the conference).

125. *Id.* at 1063 (explaining that Sweden proposed a provision that would promote the recognition of arbitration agreements).

126. *Id.* (“The Conference debated whether the Economic and Social Council Resolution calling the Conference authorized it to deal at all with agreements, and was finally convinced by the United Kingdom delegate that a Convention on awards with no provision recognizing the underlying arbitral agreement would be too easily nullified.”). Originally, the conference had no intention of addressing arbitration agreements, preferring to deal with that issue in a separate treaty. See Pieter Sanders, *The Making of the Convention*, in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 3, 3–4 (1999) (“[T]he Conference, initially, preferred not to deal in the Convention with the arbitration agreement, as the Dutch proposal did. Preference was first given to a separate Protocol . . .”). Pieter Sanders, an author of the New York

On the last day of the conference, the New York Convention was officially adopted and signed by twenty-five of the forty-five nations in attendance, but not the United States.<sup>127</sup> On June 10, 1968, ten years to the day after the conference adopted the New York Convention, President Lyndon B. Johnson sent the Convention to the U.S. Senate for its “advice and consent.”<sup>128</sup> The Convention was ratified by the United States in 1970.<sup>129</sup>

The portion of the New York Convention that warrants attention in this Article is the abovementioned provision regarding the enforcement of arbitration agreements, Article II:<sup>130</sup>

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

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Convention, wrote the proposed provision that addressed the enforcement of arbitration agreements in his father-in-law’s garden during the first weekend of the conference. *Id.* at 3 (“[The proposal] was conceived during the first weekend of the Conference. I spent that weekend at the house of my father-in-law . . . I can still see myself sitting in the garden with my small portable typewriter . . . It was there, sitting in the sun, that the [proposal] was conceived.”).

127. Aksent, *supra* note 123, at 4 (“[T]he formal adoption was made on the last day of the meeting . . . It was originally signed by 25 of the participants . . . [T]he members of the U.S. delegation to the U.N. recommended against signature of the Convention.”).

128. *Id.* at 6 (“On June 10, 1968, President Johnson transmitted to the United States Senate for its ‘advice and consent’ the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted at the United Nations Conference exactly ten years earlier.”). Much had changed in the preceding decade that precipitated the New York Convention’s ratification:

What appeared to be needed was a threefold development in American law: 1) either revision or judicial interpretation of the Federal Arbitration Act of 1925 so that it would constitute full exercise by the federal government of its constitutional authority in the field of arbitration; 2) enactment by a majority of American states of modern arbitration statutes that overruled the common law rule of revocability of arbitration agreements; and 3) the development of a more ample jurisprudence on the enforcement of foreign awards either through judicial or legislative efforts. In the ten year span following the initial promulgation of the U.N. Convention, all three developments occurred.

Aksent, *supra* note 123, at 4–5.

129. Robert J. Gruendel, *Domestic Law and International Conventions, the Imperfect Overlay: The FAA as a Case Study*, 75 TUL. L. REV. 1489, 1493 (2001) (“In 1970, the United States ratified the New York Convention . . .”).

130. New York Convention, *supra* note 5, art. II.

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3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>131</sup>

As Article II makes clear, arbitration agreements falling under the New York Convention are presumptively valid, and it is incumbent on the party *resisting* arbitration to meet its burden of showing that the agreement should not be enforced.<sup>132</sup> The mandatory nature with which the New York Convention imbues courts' enforcement of arbitration agreements and the difficulty of overcoming the presumption in favor of their validity is what has made the Convention so successful—the Convention gives international commercial arbitration credibility and consistency.<sup>133</sup> With 145 national parties to the New York Convention at present,<sup>134</sup> the New York Convention is not threatened by a lack of widespread acceptance and enforcement.<sup>135</sup> In a worldwide empirical study on the reasons why parties choose arbitration, “the two most significant reasons were (1) the neutrality of the forum . . . and (2) the likelihood of obtaining enforcement, by virtue of the New York Convention.”<sup>136</sup> Rather, the main impediment to the efficacy of the New York Convention is the tendency of some nations to question the supremacy of the Convention over domestic law, and to use domestic law in interpreting the Convention.<sup>137</sup> The United States is not entirely without responsibility for this problem.<sup>138</sup>

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131. *Id.*

132. Gruendel, *supra* note 129, at 1495 (“[T]he Convention shifted the burden of proof. The Convention . . . presumes the validity of an agreement . . . . Under the Convention, a party petitioning for enforcement needs only to supply a certified copy of the agreement . . . , whereas the resisting party must raise and prove the defenses against enforcement . . . .”).

133. BORN, *supra* note 119, at 123–24 (“[T]he Convention requires national courts to . . . recognize and enforce international arbitration agreements . . . . [A]greements and awards are typically subject to an avowedly pro-enforcement international legal regime. . . . [T]his specialized regime materially increases the likelihood that international arbitration agreements will be given effect in the courts of contracting states.”).

134. *See Status 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Apr. 17, 2012) (showing the 146 national parties to the New York Convention).

135. *See* MOSES, *supra* note 120, at 219 (“Overall, the New York Convention has been one of the most successful international treaties.”).

136. *Id.* at 3.

137. *See id.* at 22 (“State courts have not always viewed the Convention as superseding their domestic law. Moreover, even when a court applies the New York Convention, its interpretation may be influenced by its national law.”). *See also* REDFERN & HUNTER, *supra* note 118, at 81

## 2. The Convention's Implementation

The New York Convention was implemented in the United States in 1970 as “Chapter II” of the Federal Arbitration Act (FAA).<sup>139</sup> The entirety of the New York Convention is implemented by FAA, Chapter II (the New York Convention Act), with slight modifications.<sup>140</sup> One such modification is in § 206,<sup>141</sup> which provides: “A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.”<sup>142</sup> The difference between the legislative enactment of the New York Convention in § 206 and the original text of the Convention is the use of the word “may” in “may direct that arbitration be held” in the FAA as opposed to “shall” in “shall, at the request of one of the parties, refer the parties to arbitration,” the former having the appearance of permissive language and the latter having the appearance of mandatory language. This is inconsequential for two reasons. First, the reason for the permissive language was provided by the House Report accompanying Chapter II, which states that the permissive language does not diminish the directive to the courts to enforce arbitration agreements, but merely allows courts to direct arbitration to be conducted in a domestic setting rather than abroad

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(“[T]he operation of the Convention has not been without practical difficulties. This is not only because there has not been a uniform approach on the interpretation of the Convention by the courts of various contracting states, but also because the Convention itself is now beginning to show its age.” (internal citations omitted)).

138. See Gruendel, *supra* note 129, at 1495 (“[The New York Convention’s] juxtaposition against the Domestic Legislation has, at times, confounded courts and counsel.”).

139. See Pub. L. No. 91–368, 84 Stat. 692 (1970) (codified as amended at 9 U.S.C. §§ 201–208 (2010)); Aksen, *supra* note 123, at 16 (“The new legislation is added to the federal law as ‘Chapter II’ of the Act and has as its sole function the responsibility of implementing the Convention that had previously been approved by the U.S. Senate on October 4, 1968.”). The decision to implement the New York Convention as Chapter II of the FAA was a practical one. See *id.* (“Congress has . . . enacted the implementing legislation in an eminently sensible manner.”). When President Johnson sent the Convention to the Senate for advice and consent, he noted that “[c]hanges in Title 9 (Arbitration) of the United States Code will be required before the United States becomes a party to the Convention.” *Id.* at 15. Rather than actually altering the FAA, Congress elected to label the existing legislation under the FAA “Chapter I” and the New York Convention’s implementing legislation “Chapter II.” See *id.* at 16 (“Instead of redrafting and amending the existing language contained in the U.S. Arbitration Act, a sounder approach was taken by the simple exigency of labeling it as ‘Chapter I,’ thus leaving it completely intact. . . . The new legislation is added to the federal law as ‘Chapter II’ . . .”). That way, the case law on Chapter I of the FAA could retain as much of its value as possible. See *id.* (“Chapter I has had 45 years of history and has been the subject of a significant amount of judicial interpretation.”).

140. See 9 U.S.C. §§ 201–208 (implementing the New York Convention).

141. *Id.* § 206.

142. *Id.*

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when appropriate.<sup>143</sup> Second, courts do not rely exclusively on § 206 in directing courts to enforce arbitration agreements. Courts may go directly to the New York Convention via § 201 of the New York Convention Act,<sup>144</sup> which provides: “The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”<sup>145</sup> Courts may also use provisions of Chapter I of the FAA by virtue of Chapter II, § 208, which applies all of Chapter I’s provisions to Chapter II if they do not conflict with the New York Convention or Chapter II.<sup>146</sup> The U.S. Supreme Court has ruled that both of these approaches are sound.<sup>147</sup>

*C. The Distinction Between Self-Executing and Non-Self-Executing Treaties*

The U.S. Constitution deals with treaties twice. One instance is in the Treaty Clause, which provides as follows: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur . . . .”<sup>148</sup> The other is in the 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.<sup>149</sup>

Taken together, these two clauses seem to stand for the proposition that a treaty, signed by the President with the advice and consent and a two-

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143. See H.R. REP. NO. 91-1181, at 3 (1970), reprinted in 1970 U.S.C.C.A.N. 3601, 3604 (“Section 106 permits a court to direct that arbitration be held at the place provided for in the arbitration agreement. Since there may be circumstances in which it would be highly desirable to direct arbitration within the district in which the action is brought and inappropriate to direct arbitration abroad, Section 206 is permissive rather than mandatory.”).

144. 9 U.S.C. § 201.

145. *Id.*

146. *Id.* § 208 (“Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.”).

147. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 618–19 (1985) (“Mitsubishi sought an order, pursuant to 9 U.S.C. §§ 4 and 201, to compel arbitration . . .”).

148. U.S. CONST. art. II, § 2, cl. 2.

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

thirds vote of the Senate, becomes actionable law in the courts of the United States. However, this is emphatically not the case, due to the differentiation between self-executing and non-self-executing treaties.<sup>150</sup> Multiple federal courts have termed the distinction between self-executing and non-self-executing treaties—an issue that has caused a great deal of debate among scholars and courts alike<sup>151</sup>—the “most confounding”<sup>152</sup> in United States treaty law.<sup>153</sup> The effect of the distinction is significant and has recently been summed up by the U.S. Supreme Court succinctly:

The label “self-executing” has on occasion been used to convey different meanings. What we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.<sup>154</sup>

Therefore, in the context of the New York Convention and the New York Convention Act, this distinction is critical to deciding whether the Convention itself, or merely its implementing legislation, is enforceable federal law. However, whether a given treaty, such as the New York Convention, is self-executing or not is a very difficult call to make given the U.S. Supreme Court’s perplexing jurisprudence on the issue.<sup>155</sup> This subpart explores the distinction between self-executing and non-self-executing treaties. Section 1 outlines the historical background regarding treaties. Section 2 delineates the early jurisprudence in which the distinction first appeared. Section 3 describes the U.S. Supreme Court’s most recent decision regarding the distinction and the controversy surrounding that decision. Finally, section 4 discusses the implications of the distinction for the New York Convention.

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150. See *infra* notes 156–214 and accompanying text (describing the distinction between self-executing and non-self-executing treaties).

151. See Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT’L L. 540, 540 (2008) (“Despite its pedigree, both the theory behind the self-execution doctrine and its mechanics have long befuddled courts and commentators.”).

152. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 695 (1995) [hereinafter Vázquez, *Four Doctrines*].

153. *Id.* (stating that courts and scholars have found the distinction the “most confounding” in United States treaty law).

154. *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008).

155. Bradley, *supra* note 151, at 540 (“There is significant uncertainty . . . concerning the materials that are relevant to the self-execution analysis, whose intent should count in determining self-executing status, the proper presumption that should be applied with respect to self-execution, and the domestic legal status of a non-self-executing treaty.”).

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When the Framers crafted the Constitution, they had their experience in the British foreign affairs context in mind.<sup>156</sup> In Great Britain, all treaties were and are essentially non-self-executing;<sup>157</sup> to have domestic legal effect, both Parliament and municipal statutes must implement a treaty.<sup>158</sup> A more immediate concern of the Framers was the status of treaties during Colonial and Revolutionary America, in which states consistently violated treaties ratified by the Continental Congress, and viewed them as unenforceable in the courts of the states.<sup>159</sup> This hindered the young nation.<sup>160</sup> The Supremacy Clause was thus an answer to this problem,<sup>161</sup> as the Framers were eager to avoid making the same mistakes that the British and early Americans made,<sup>162</sup> particularly when it came to aggravating formidable

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156. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1986–87 (1999) (“[A]s former members of the British Empire, those who wrote and ratified the Constitution would have understood the new frame of government by comparing it to their experience under the British system.”).

157. Vázquez, *Four Doctrines*, *supra* note 152, at 697 (“[U]nder the fundamental law of Great Britain, all treaties are ‘non-self-executing.’”). The British monarchy and Parliament struggled for centuries over control of foreign affairs and the treaty-making power. See Yoo, *supra* note 156, at 1997–2004 (describing the history of British treaty-making and the centuries-long strife between Parliament and the Crown over foreign affairs).

158. Vázquez, *Four Doctrines*, *supra* note 152, at 697 (“If a treaty contemplates that individuals will be treated in certain ways or their rights and liabilities governed by particular rules, the treaty must be ‘implemented’ by Parliament and the required norms incorporated into municipal law by statute.”).

159. *Id.* at 698 (“Among the problems of the period of the Articles of Confederation were the repeated violations by the states of the Treaty of Peace with Great Britain. The problem was aggravated by the widespread understanding during this period that the treaties concluded by the Continental Congress were not enforceable as law in the courts of the states in the face of conflicting state legislation.” (internal citations omitted)).

160. Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 617 (2008) [hereinafter Vázquez, *Treaties as Law*] (“Congress had concluded . . . treaties, . . . but the states violated them, causing significant problems for the fledgling nation . . . . [T]he Treaty of Peace gave British creditors specific rights against their America debtors, but the states had passed laws making it difficult or impossible for the British to recover in court.” (internal citations omitted)).

161. *Id.* at 619 (“[In drafting the Supremacy Clause], the founders recognized the limited effect, and limited efficacy, of treaties *under international law*. To achieve certain purposes they regarded as important to the nation, they gave the treaties concluded by the nation additional force *as a matter of domestic constitutional law*.”).

162. *Id.* at 615, 617 (“The clause thus represented a clear break from the British approach. . . . The Supremacy Clause was [also] the Founders’ solution to one of the principal ‘vices’ or ‘evils’ of the Articles of Confederation.”).

foreign nations.<sup>163</sup> However, scholars are in sharp disagreement as to whether the Framers' familiarity with the weaknesses in the prior systems evidences an intent to be rid of the notion of non-self-executing treaties or, on the contrary, an awareness that the non-self-executing treaty distinction would endure to some degree in their new nation.<sup>164</sup> Whichever view is correct, it is beyond doubt that the non-self-executing treaty distinction has survived with force in the decisions of the U.S. Supreme Court.

### 1. Early Jurisprudence

The distinction between self-executing and non-self-executing treaties was "introduced into U.S. jurisprudence"<sup>165</sup> in 1829 by the U.S. Supreme Court in *Foster v. Neilson*.<sup>166</sup> *Foster* dealt with a land dispute that hinged on a treaty by which Spain ceded land to the United States, but provided that

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163. *Id.* at 617 ("There was general agreement at the Constitutional Convention that the new Constitution had to empower the federal government to enforce treaties. The Founders were anxious to avoid treaty violations because such violations threatened to provoke wars and otherwise complicate relations with more powerful nations.").

164. Compare, e.g., Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2120 (1999) ("The imperative need to make treaties legally binding on both the states and their citizens was widely recognized by 1787. The major consequence . . . was the ready adoption of the supremacy clause, which gave treaties the status of law and made them judicially enforceable through the federal courts."); Vázquez, *Four Doctrines*, *supra* note 152, at 698 ("Ultimately, the Framers adopted the Supremacy Clause. The clause addressed the treaty violation problem by altering the British rule: it declared treaties to be 'the supreme Law of the Land' and directed the courts to give them effect without awaiting action by the legislatures of either the states or the federal government."); D.A. Jeremy Telman, *Medellín and Originalism*, 68 MD. L. REV. 377, 413 (2009) ("The purpose of the Supremacy Clause was to prevent U.S. treaty violations by empowering the courts to enforce treaties at the behest of affected individuals without awaiting authorization from state or federal legislatures." (internal quotations omitted)); Vázquez, *Treaties as Law*, *supra* note 160, at 605 ("In order to avoid the foreign relations difficulties that would result from treaty violations, and to capture the benefits of a reputation for treaty compliance, the Founders gave treaties the force of domestic law enforceable in domestic courts."); Ernest A. Young, *Treaties as "Part of Our Law,"* 88 TEX. L. REV. 91, 112 (2009) ("[The Supremacy C]ause explicitly incorporates treaties into domestic law, and the relevant history strongly suggests that this language was a deliberate attempt to depart from the British rule, which held that a treaty could not alter domestic law without action by Parliament."), with David H. Moore, *Law(Makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32, 33 (2009) ("The [Supremacy] Clause was not designed to address the scope of the federal treatymakers' authority to control the domestic implementation of treaty duties."); Yoo, *supra* note 156, at 2072 ("When the ratification is viewed comprehensively, particularly with attention to the three most significant state conventions, the evidence indicates that the Constitution's supporters understood the treaty power to be an executive power that was distinct from, and could not supplant, Congress's power to legislate.").

165. Vázquez, *Four Doctrines*, *supra* note 152, at 700.

166. *Foster v. Neilson*, 27 U.S. 253 (1829).

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prior land grants by Spain would be preserved.<sup>167</sup> The Court examined the Spain–United States treaty for its domestic effect.<sup>168</sup> The *Foster* Court focused on the words “shall be ratified and confirmed,”<sup>169</sup> which the Court saw as aspirational language, raising doubts as to whether the treaty was self-executing.<sup>170</sup> The Court recognized that a treaty was viewed by most countries as “in its nature a contract between two nations, not a legislative act”<sup>171</sup> that “does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by the sovereign power of the respective parties to the instrument.”<sup>172</sup> But according to the U.S. Supreme Court, the United States dealt with treaties differently.<sup>173</sup> Because a treaty in the United States is “the law of the land,”<sup>174</sup> it must “be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.”<sup>175</sup> However, when a treaty takes the form of “a contract,”<sup>176</sup> it “addresses itself to the political . . . department, and the legislature must execute the contract.”<sup>177</sup> In *Foster*, as a matter of construction, the treaty in question was non-self-executing: If the relevant provision had read “shall be valid,”<sup>178</sup> rather than “shall be ratified and confirmed,”<sup>179</sup> then “it would have acted directly on the subject, and would have repealed those acts of congress which were

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167. *See id.* at 299–308 (describing a dispute over a tract of land that depended on the construction of a treaty that ceded land to the United States, but attempted to preserve prior land grants by Spain).

168. *Id.* (recognizing the need to analyze the treaty to determine whether it had domestic effect).

169. *Id.* at 314.

170. *See id.* (“Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?”).

171. *Id.*

172. *Id.*

173. *See id.* (“In the United States a different principle is established.”).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

repugnant to it.”<sup>180</sup> It bears noting that this was one of two holdings, and scholars have debated whether it was therefore dicta.<sup>181</sup>

Four years later, the U.S. Supreme Court decided that the same treaty dealt with in *Foster* was self-executing in *United States v. Percheman*.<sup>182</sup> In that case, the original, Spanish version of the treaty had been brought to the Court’s attention,<sup>183</sup> and was translated to say that the land “grants ‘shall remain ratified and confirmed to the person in possession of them.’”<sup>184</sup> The Court determined that the English version’s seemingly non-self-executing language was not *necessarily* non-self-executing,<sup>185</sup> and could be read to “import that they ‘shall be ratified and confirmed,’ by force of the instrument itself.”<sup>186</sup> The Court found this to be the better reading of the treaty,<sup>187</sup> because if the English and Spanish versions of the treaty could be read to agree,<sup>188</sup> that would indicate the understanding of the United States in ratifying the treaty.<sup>189</sup> In sum, the Court had changed its mind and decided the language was self-executing, after determining that the branches that ratified the treaty had understood it as self-executing. Such was the U.S. Supreme Court’s jurisprudence on the distinction between self-executing and non-self-executing treaties when the Court decided *Medellín v. Texas*.<sup>190</sup>

180. *Id.* at 314–15.

181. *See* Yoo, *supra* note 156, at 2088 (“The Court could have concluded [after holding that it was bound to defer to the legislature] . . . , because a finding that Spain never possessed the land in question removed the basis for the plaintiffs’ claims. . . . Foster’s further discussion of self-executing treaties constituted only an alternative holding, and was dicta.”). *But see* Vázquez, *Four Doctrines*, *supra* note 152, at 702 n.35 (“[T]he ‘self-execution’ holding in *Foster* was one of two independent grounds for denying relief. . . . Before holding that it was not self-executing, the Court held (by a divided vote) that the 1819 treaty between Spain and the United States was inapplicable.”).

182. *United States v. Percheman*, 32 U.S. 51, 89 (1833) (“[The wording of the treaty] may import that [the Spanish land grants] ‘shall be ratified and confirmed,’ by force of the instrument itself. . . . [W]e think the construction proper, if not unavoidable.”).

183. *See id.* at 88 (“The treaty was drawn up in the Spanish as well as in the English language; both are originals, and were unquestionably intended by the parties to be identical. The Spanish has been translated. . . .”).

184. *Id.*

185. *Id.* at 89 (“Although the words ‘shall be ratified and confirmed,’ are properly the words of contract, stipulating for some future legislative act; they are not necessarily so.”).

186. *Id.*

187. *See id.* (“[W]e think the construction proper, if not unavoidable.”).

188. *See id.* (“If the English and Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail.”).

189. *See id.* at 88–89 (“[I]f this security would have been complete without the article, the United States could have no motive for insisting on the interposition of government in order to give validity to the titles which, according to the usages of the civilized world, were already valid.”).

190. *Medellín v. Texas*, 552 U.S. 491 (2008).

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in 2008,<sup>191</sup> the Court's "first decision ever to deny relief solely on non-self-execution grounds."<sup>192</sup>

## 2. Medellín

The *Medellín* Court found itself tasked with the interpretation of an ambiguous treaty, and looked first to its text.<sup>193</sup> Because the relevant provision of the treaty at issue provided that the United States "*undertakes to comply*"<sup>194</sup> with its treaty obligation, the Court construed the provision "not [to be] a directive to domestic courts."<sup>195</sup> The text of the treaty did not "indicate that the Senate that ratified the [treaty] intended [it would have] . . . immediate legal effect in domestic courts."<sup>196</sup> The Court then examined other provisions in the treaty and determined that the language of those provisions also indicated non-self-execution,<sup>197</sup> and that the President's and Senate's awareness of those provisions indicated their understanding upon ratification of the treaty that it would be non-self-executing.<sup>198</sup> The majority continued by bolstering its conclusion with a smattering of other factors: (1) that the effect of deeming the treaty self-executing would undermine a separate provision of the treaty;<sup>199</sup> (2) that the treaty's self-execution might intrude on the discretion of the executive and legislative branches;<sup>200</sup> (3) that other signatory nations have not given the treaty binding

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191. See Vázquez, *Treaties as Law*, *supra* note 160, at 646 ("[T]he Court hewed closely to the analysis of *Foster*, characterizing *Percheman* (not altogether accurately) as having overruled *Foster* . . .").

192. See *id.* at 646.

193. *Medellín*, 552 U.S. at 506 ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

194. *Id.* at 508.

195. *Id.*

196. *Id.*

197. See *id.* at 509 (examining other provisions of the treaty and finding that they suggest that the treaty was non-self-executing).

198. See *id.* at 509–10 ("[T]he President and Senate were undoubtedly aware [of the provision] . . . This was the understanding of the Executive Branch when the President agreed to [the treaty] . . .").

199. See *id.* at 510–11 (stating that if the treaty was deemed self-executing, another clause would be rendered useless, and that "there is no reason to believe that the President and Senate signed up for such a result").

200. See *id.* at 511 (stating that this treaty's self-execution might restrict the foreign relations powers reserved to the political departments).

effect in domestic courts;<sup>201</sup> and (4) that the “Executive Branch has unfailingly adhered to its view that the relevant treaties do not create domestically enforceable federal law,”<sup>202</sup> a significant factor since “[i]t is . . . well settled that the United States’ interpretation of a treaty ‘is entitled to great weight.’”<sup>203</sup> Hence, the Court found the treaty at issue to be non-self-executing.<sup>204</sup>

The *Medellín* decision has generally been seen as confusing.<sup>205</sup> The Court took into account a significant number of factors in the course of its decision that the treaty at issue was non-self-executing,<sup>206</sup> and the Court’s decision could be read in many ways.<sup>207</sup> Nonetheless, given that the Court stated repeatedly that it was looking to the intent of the Executive Branch and the Senate,<sup>208</sup> and summed up its argument by stating that “[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended” the treaty to be self-executing, one clear rule from the case is that the intent of the political departments who ratified the treaty determines whether a treaty is self-executing.<sup>209</sup> One scholar challenges this reading of *Medellín*,<sup>210</sup> arguing that “[i]n each case but one, the majority referred to the intent of the

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201. *See id.* at 516 (“Our conclusion . . . is confirmed by the ‘postratification understanding’ of signatory nations.” (internal citations omitted)).

202. *Id.*

203. *Id.* (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982)).

204. *Id.* (ruling that the treaty was non-self-executing).

205. *See, e.g.,* Vázquez, *Treaties as Law*, *supra* note 160, at 647 (“The [*Medellín*] opinion is not a model of clarity.”). *See also* Bradley, *supra* note 151, at 540 (“The Court . . . appears to have concluded that it is the intent of the U.S. treaty makers that should be determinative of self-execution, although the Court was somewhat unclear on this point.”).

206. *See supra* notes 193–203 and accompanying text (delineating the various components of the majority’s analysis in concluding that the treaty it was interpreting was non-self-executing).

207. *See generally* Vázquez, *Treaties as Law*, *supra* note 160.

208. *See, e.g., Medellín*, 552 U.S. at 519 (“[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”); *id.* at 521 (“Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”); *id.* at 523 (“Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of [self-execution] . . .”).

209. *Id.* *Accord* Bradley, *supra* note 151, at 544 (“On balance, . . . the Court’s decision is best interpreted as endorsing an intent-of-the-U.S. approach.”). *But see* Vázquez, *Treaties as Law*, *supra* note 160, at 658 (“[S]ome commentators have read *Medellín* to [say that] . . . the intent of the U.S. treatymakers is determinative. . . . [T]he majority opinion cannot be read to have embraced [that] . . . approach.”).

210. *See* Vázquez, *Treaties as Law*, *supra* note 160, at 658–59 (challenging the proposition that *Medellín* determined self-execution based on the intent of the Executive and the Senate).

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Senate *as reflected in the terms of the treaty.*<sup>211</sup> This view appears to reverse the Court's reasoning; however, the *Medellín* Court stated that it thought "it rather important to look at the treaty language to see what it has to say about the issue [of self-execution]"<sup>212</sup> *because* "[t]hat is after all what the Senate looks to in deciding whether to approve the treaty."<sup>213</sup> This reading also accords with a recent decision of the U.S. Supreme Court stating that when the Senate ratifies a treaty, with an accompanying declaration that it is non-self-executing, the declaration is definitive proof that the treaty *is* non-self-executing.<sup>214</sup>

### 3. The New York Convention is Non-Self-Executing

Based on the U.S. Supreme Court's relatively few decisions on the distinction between self-executing and non-self-executing treaties, the New York Convention should be seen as non-self-executing. While the language of the provision directing enforcement of arbitration agreements is mandatory,<sup>215</sup> the U.S. Supreme Court's enduring focus on the intention and understanding of the political branches that ratified the treaty strongly indicates non-self-execution.<sup>216</sup> President Johnson, upon submitting the treaty to the Senate for its advice and consent, stated that "[c]hanges in title 9 (arbitration) of the United States Code will be required before the United States becomes a party to the convention. The United States instrument of accession to the convention will be executed only after the necessary legislation is enacted."<sup>217</sup> The Senate, in turn, reported in giving its advice and consent that "[c]hanges in the Federal Arbitration Act (title 9 of the

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211. *Id.*

212. *Medellín*, 552 U.S. at 514.

213. *Id.*

214. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) ("[T]he United States ratified the Covenant on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts. . . . Accordingly, [the Covenant is not] . . . the relevant and applicable rule of international law.").

215. *See supra* notes 130–131 and accompanying text (stating that the New York Convention directs that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration").

216. *See supra* notes 165–189, 192–214 and accompanying text (describing the U.S. Supreme Court's repeated emphasis on the understanding and intent of the political branches that ratified a treaty).

217. 114 CONG. REC. S10,488 (1968) (message of President Johnson).

United States Code) will be required before the United States becomes a party to the convention.”<sup>218</sup> Therefore, because both *Foster* and *Medellín* repeatedly asserted that the intent and understanding of the political branches that ratified a treaty are the prime indicator of self-execution—or non-self-execution, as in this case—,<sup>219</sup> it would be fallacious to defy the understanding of President Johnson and the Senate that the New York Convention would not have domestic legal effect except by virtue of the FAA. Moreover, since the U.S. Supreme Court has ruled that a declaration by the United States that a treaty is non-self-executing decisively means that the treaty is non-self-executing,<sup>220</sup> an explicit statement by the Executive Branch and the Senate that a treaty will only have domestic legal effect by virtue of its implementing legislation should dictate the same outcome.

This conclusion is supported by an additional portion of the *Medellín* opinion that warrants particular attention. The New York Convention Act is cited to support the proposition that “Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes.”<sup>221</sup> This statement was concededly dictum, but still must be regarded as a strong indication of the Court’s understanding.

Taken as a whole, these statements by the U.S. Supreme Court persuasively promote the viewpoint that the New York Convention is non-self-executing. Even without this evidence of the New York Convention’s non-self-executing status, given the confusion surrounding *Medellín*,<sup>222</sup> it would be unwise for a court to proceed on the assumption that the New York Convention is self-executing absent clarification by the U.S. Supreme Court—and this is likely the reason that the only judge ever to decide the New York Convention *was* self-executing was Judge Clement, concurring in *Safety National*.<sup>223</sup>

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218. S. EXEC. REP. NO. 90-10, at 2 (Sept. 27, 1968).

219. See *supra* notes 165–189, 192–214 and accompanying text (highlighting the *Medellín* and *Foster* Courts’ repeated emphasis on the understanding and intent of the political branches that ratified a treaty in determining its status as self-executing or non-self-executing).

220. See *supra* note 214 and accompanying text (recounting a U.S. Supreme Court decision that regarded a declaration by the United States that a treaty was non-self-executing as definitive proof that the treaty was, indeed, non-self-executing).

221. *Medellín v. Texas*, 552 U.S. 491, 521 (2008) (“See, e.g., . . . 9 U.S.C. §§ 201–208 . . . . Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result.”).

222. See *supra* notes 205–214 and accompanying text (stating that *Medellín* has caused confusion among scholars and courts).

223. See *infra* notes 377–83 and accompanying text (describing Judge Clement’s concurrence and its reading of the New York Convention as self-executing).

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#### D. *The Foreign Commerce Clause*

The Commerce Clause states that Congress shall have power “[t]o regulate Commerce with foreign Nations, and among the several States.”<sup>224</sup> While the wording of the clause might appear to put Congress’s power to regulate foreign commerce and interstate commerce on parity, the U.S. Supreme Court has held the Foreign Commerce Clause to have different justifications, and to be a broader delegation of authority to Congress.<sup>225</sup> This subpart examines the Foreign Commerce Clause jurisprudence in section 1, and analyzes its effect on congressional assent in sections 2 and 3.

##### 1. The Foreign Commerce Clause Jurisprudence and Its Significance

The case law on the subject of the Foreign Commerce Clause mainly regards what is known as the “dormant” Foreign Commerce Clause.<sup>226</sup> To put this case law in perspective, it is worthwhile to note that dormant Commerce Clause analysis involves the limitations on state regulation of areas in which Congress *could* legislate under the Commerce Clause, but has not.<sup>227</sup> The leading case on the use of the Foreign Commerce Clause is

224. U.S. CONST. art. I, § 8, cl. 3.

225. *Japan Line, Ltd. v. L.A. Cnty.*, 441 U.S. 434, 448 (1979) (“Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce ‘with foreign Nations’ and ‘among the several States’ in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater.”).

226. Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 966 (2010) (“The scope of the Foreign Commerce Clause vis-à-vis the states has arisen more recently in the context of the ‘dormant Foreign Commerce Clause.’”).

227. James L. Buchwalter, Annotation, *Construction and Application of Dormant Commerce Clause*, U.S. CONST. ART. I, § 8, CL. 3—*Supreme Court Cases*, 41 A.L.R. FED. 2d 1 (2009) (“The United States Supreme Court has consistently construed the Commerce Clause to imply a further command, known as the negative or ‘dormant’ Commerce Clause, prohibiting certain state regulation even when Congress has failed to legislate on the subject.”). Buchwalter provides a concise summary of the U.S. Supreme Court’s dormant Interstate Commerce Clause jurisprudence:

The Court has understood this interpretation as promoting the Commerce Clause’s purpose of preventing a state from retreating into economic isolation or jeopardizing the welfare of the nation as a whole as would occur if the states were free to impose burdens on the flow of commerce across its borders that commerce wholly within those borders would not endure.

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*Japan Line, Ltd. v. County of Los Angeles*,<sup>228</sup> the first case to utilize and fully explicate the dormant Foreign Commerce Clause.<sup>229</sup>

*Japan Line* dealt with a Los Angeles property tax on shipping containers of six Japanese companies which were temporarily present in a port in Los Angeles.<sup>230</sup> The Japanese companies challenged the tax as unconstitutional.<sup>231</sup> The Court was willing to assume that based on the instrumentalities of interstate commerce test, under Interstate Commerce Clause jurisprudence, the tax would be constitutional.<sup>232</sup> Significantly, however, the Court stated that Commerce Clause analysis with respect to foreign and interstate commerce is not coequal,<sup>233</sup> and “a more extensive constitutional inquiry is required.”<sup>234</sup>

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The Commerce Clause operates as an implicit restraint on state authority, even in the absence of conflicting federal statute. In a dormant Commerce Clause analysis, the court must inquire whether the challenged law discriminates against interstate commerce, in which case the law is virtually per se invalid, and survives only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Absent discrimination against interstate commerce, the law is upheld unless the burden imposed on interstate commerce is clearly excessive in relation to putative local benefits. . . . Through the application of this balancing test, however, even nondiscriminatory burdens on commerce may be struck down under the dormant aspect of the Commerce Clause on a showing that they clearly outweigh the benefits of a state or local practice.

*Id.*

228. *Japan Line*, 441 U.S. 434.

229. Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 754 (2007) (“*Japan Line, Ltd. v. County of Los Angeles* was the first case decided using the dormant Foreign Commerce Clause.”).

230. See *Japan Line*, 441 U.S. at 436–37 (“[Six Japanese shipping companies’] containers, in the course of their international journeys, pass through appellees’ jurisdictions intermittently. . . . Property present in California on March 1 . . . of any year is subject to ad valorem property tax. . . . [Los Angeles] levied property taxes . . . on the assessed value of the containers present . . .”).

231. *Id.* at 440 (“Appellants squarely challenged the constitutionality of the tax . . .”).

232. *Id.* at 445 (“We may assume that, if the containers at issue here were instrumentalities of purely interstate commerce, *Complete Auto* would apply and be satisfied, and our Commerce Clause inquiry would be at an end.”).

234. See *id.* at 446 (“The premise of appellees’ argument is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise, we have concluded, must be rejected. When construing Congress’s power to ‘regulate Commerce with foreign Nations,’ a more extensive constitutional inquiry is required.”).

234. See *id.* at 446 (“The premise of appellees’ argument is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise, we have concluded, must be rejected. When construing Congress’s power to ‘regulate Commerce with foreign Nations,’ a more extensive constitutional inquiry is required.”).

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Beginning its Foreign Commerce Clause analysis, the Court expressed a pragmatic concern about the risk of multiple taxation,<sup>235</sup> that is, foreign companies would be taxed in full by their home country, and then taxed again by the United States.<sup>236</sup> The second problem posed by the Los Angeles tax was its threat to “uniformity in an area where federal uniformity is essential.”<sup>237</sup>

Foreign commerce is pre-eminently a matter of national concern. “In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.” Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce “with foreign Nations” and “among the several States” in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.<sup>238</sup>

According to the Court, “federal uniformity”<sup>239</sup> could be threatened in at least two ways. First, if the taxes levied by a state or states disproportionately hurt foreign domiciliaries, foreign nations could retaliate against United States domiciliaries<sup>240</sup>—not only those in the offending state or states, but across the country.<sup>241</sup> Second, if multiple states engaged in offending taxation, the variety of taxing regimes would “plainly prevent this Nation from ‘speaking with one voice’ in regulating foreign commerce.”<sup>242</sup>

Applying these concerns to the facts of the case, the Court held the tax unconstitutional as applied.<sup>243</sup> The Court found first that multiple taxation

235. *See id.* (“[A]dditional considerations, beyond those articulated in *Complete Auto*, come into play. The first is the enhanced risk of multiple taxation.”).

236. *See id.* at 446–47 (“In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value.”).

237. *Id.* at 448.

238. *Id.* at 448–49 (internal citations omitted).

239. *Id.* at 449.

240. *See id.* (“If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions.”).

241. *See id.* (“Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer.”).

242. *Id.* at 450–51.

243. *Id.* at 453 (“California’s ad valorem tax, as applied to appellants’ containers . . . is inconsistent with Congress’ power to ‘regulate Commerce with foreign Nations.’ We hold the tax, as applied unconstitutional under the Commerce Clause.”).

would follow from the Los Angeles tax.<sup>244</sup> Furthermore, the Court found that the tax would prevent national uniformity in foreign commerce,<sup>245</sup> partly because of the variety of tax regimes that would follow when other states also taxed foreign domiciliaries.<sup>246</sup> The Court devoted the most focus and emphasis, however, to the fact that, under the Customs Convention on Containers (of which both the United States and Japan are signatories), a policy was articulated “to remove impediments to the use of containers”<sup>247</sup> in foreign commerce.<sup>248</sup> The Court explained that, because violation of this policy would constitute a breach of an international obligation, the Convention reflected the very real possibility of retaliation by Japan *and* other signatories.<sup>249</sup> Therefore, the Los Angeles tax was unconstitutional.<sup>250</sup>

The outer boundaries of the *Japan Line* decision were unclear for a time after the decision was handed down.<sup>251</sup> Four years later, in *Container Corp. of America v. Franchise Tax Board*, the U.S. Supreme Court provided some clarification.<sup>252</sup> The Court created a distinction between state action that “merely has foreign resonances, but does not implicate foreign affairs,”<sup>253</sup> and that which does “implicate foreign affairs.”<sup>254</sup> While the former is violative of the Foreign Commerce Clause if it contravenes a “clear federal directive,”<sup>255</sup> the latter is violative of the Foreign Commerce Clause even in Congress’s silence.<sup>256</sup> The Court also deemphasized the implications of

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244. *See id.* at 451–52 (finding that the Los Angeles and Japanese taxes would overlap).

245. *Id.* at 452 (“California’s tax prevents this Nation from ‘speaking with one voice’ in regulating foreign trade.”).

246. *Id.* at 453 (“If other States follow California’s example . . . , foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make ‘speaking with one voice’ impossible.”).

247. *Id.* at 453.

248. *See id.* at 452–53 (stating that both the United States and Japan signed the Customs Convention on Containers, and that the Convention reflects a national policy in favor of removing impediments).

249. *Id.* at 453 (“California’s tax thus creates an asymmetry in international maritime taxation operating to Japan’s disadvantage. The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole.”); *id.* at 453 n.18 (“Retaliation by some nations could be automatic.”).

250. *Id.* at 454 (“We hold the tax, as applied, unconstitutional under the Commerce Clause.”).

251. *See Wilson, supra* note 229, at 756 (“The Japan Line analysis—that state laws impairing either national uniformity with respect to foreign commerce or the ability of the nation to speak with one voice in foreign affairs are invalid—lacked obvious limits.”).

252. *See generally* *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

253. *Id.* at 194.

254. *Id.*

255. *Id.*

256. *See id.* (“[A] state tax at variance with federal policy will violate the ‘one voice’ standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive.”).

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double taxation, focusing more on the national uniformity issue in foreign commerce.<sup>257</sup> The Court singled out one indicator for whether a state regulation implicates foreign policy.<sup>258</sup> “[T]he threat it might pose of offending our foreign trading partners and leading them to retaliate against the nation as a whole.”<sup>259</sup> The Court found no such “threat” in *Container Corp.*,<sup>260</sup> and the Court found that no foreign policy implication was present.<sup>261</sup> *Japan Line* and *Container Corp.* represent the entirety of relevant Foreign Commerce Clause analysis, as the U.S. Supreme Court has since avoided Foreign Commerce Clause issues.<sup>262</sup>

One significant principle emerges from the U.S. Supreme Court’s Foreign Commerce Clause jurisprudence: The justifications underlying the Foreign Commerce Clause and the Interstate Commerce Clause are distinct,

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257. *See id.* (“[A]n absolute rule is no more appropriate here than it was in *Japan Line* itself, where we relied on much more than the mere fact of double taxation to strike down the state tax at issue.”).

258. *See id.* (“The most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the nation as a whole.”).

259. *Id.*

260. *See id.* at 195 (finding no threat of retaliation for the tax at issue).

261. *See id.* at 195–96 (“[W]hen combined with all the other considerations we have discussed, it does suggest that the foreign policy of the United States—whose nuances, we must emphasize again, are much more the province of the Executive Branch and Congress than of this Court—is not seriously threatened . . .”).

262. *See Wilson, supra* note 229, at 766 (“The Court did not address the dormant Foreign Commerce Clause in . . . recent decision[s]—and consequently the doctrine could . . . emerge unscathed.”). While the U.S. Supreme Court has decided one more recent decision on Commerce Clause grounds, that decision lacked majority with respect to the Foreign Commerce Clause issue. *See generally Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994). One recent U.S. Supreme Court case dealt with the Foreign Affairs power of the Executive and overturned both a state statute and the McCarran–Ferguson Act because they were preempted by an Executive Agreement. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003) (“The principal argument for preemption made by petitioners and the United States as *amicus curiae* is that HVIRA interferes with foreign policy of the Executive Branch . . .”); *id.* at 414 (“[T]he historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s [Foreign Affairs power] . . .”); *id.* at 428 (“[A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.”); *id.* at 420 (“[W]e think petitioners and the government have demonstrated a sufficiently clear conflict to require finding preemption here.”). However, the Foreign Affairs power is not applicable to the New York Convention, which, if deemed non-self-executing, cannot be made self-executing by the President. *See Medellín v. Texas*, 552 U.S. 491, 525 (2008) (“The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.”).

and the law of one is not equivalent to the law of the other.<sup>263</sup> Following this reasoning, some lower courts have resolved the issue of whether the New York Convention can be reverse preempted by the McCarran–Ferguson Act by interpreting the legislative intent of McCarran–Ferguson as only lifting the *Interstate* Commerce Clause restrictions on state regulation and not the *Foreign* Commerce Clause restrictions.<sup>264</sup> The problem with this rationale is that, while the U.S. Supreme Court has ruled that McCarran–Ferguson was only intended to set back the clock to pre-*SEUA* conditions,<sup>265</sup> thereby reversing only the Commerce Clause restrictions on state regulation, the differentiation between the reach of the Interstate Commerce Clause and that of the Foreign Commerce Clause was not articulated by the Court until 1978,<sup>266</sup> a full thirty-three years after the passage of the McCarran–Ferguson Act.<sup>267</sup> Therefore, Congress could not have had the distinction between foreign and interstate commerce in mind; however, the Foreign Commerce Clause cases are nonetheless significant. In the line of cases differentiating the Foreign Commerce Clause from the Interstate Commerce Clause, the U.S. Supreme Court has never addressed the issue of whether Congress is able to acquiesce to state regulation of matters that would properly be considered foreign commerce.<sup>268</sup>

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263. See *supra* notes 224–62 and accompanying text (describing the U.S. Supreme Court’s jurisprudence on the Foreign Commerce Clause, with the justifications of apportionment and national uniformity, as distinct from the Interstate Commerce Clause, which is justified as protecting Congress’s prerogative to control interstate commerce and the national welfare generally).

264. See, e.g., *Antillean Marine Shipping Corp. v. Through Transp. Mut. Ins., Ltd.*, 2003 A.M.C. 251, 254 (S.D. Fla. 2002) (“[T]he Court finds that reverse preemption under the McCarran–Ferguson Act . . . does not apply here . . . . The McCarran–Ferguson Act . . . was intended to apply only to interstate commerce, and not foreign commerce.”); *Cont’l Ins. Co. v. Jantran*, 906 F. Supp. 362, 366 (1995) (finding that the McCarran–Ferguson Act applies to interstate, but not to foreign, commerce); *Arbitration Between W. of Eng. Ship Owners Mut. Ins. Ass’n v. Am. Marine Corp.*, 1993 A.M.C. 1351, 1355 (E.D. La. 1992) (“The McCarran–Ferguson Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not to foreign commerce.”).

265. See *supra* notes 89–93 and accompanying text (showing how a line of U.S. Supreme Court cases established that the McCarran–Ferguson Act was meant to reverse *SEUA* and therefore lifted only preexisting Commerce Clause restrictions).

266. See *supra* note 94 and accompanying text (recounting how the U.S. Supreme Court first established a separate line of Foreign Commerce Clause jurisprudence with *Japan Line* in 1978).

267. See *supra* note 70 and accompanying text (stating that the McCarran–Ferguson Act was passed in 1945).

268. See *supra* notes 229–62 and accompanying text (describing modern Foreign Commerce Clause jurisprudence, which never addresses congressional assent).

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### 3. When Congress Cannot Assent: Admiralty

Importantly, one line of decisions altogether forecloses the possibility of Congress's assent to state regulation in an area in which Congress has been delegated authority by the Constitution: Admiralty law.<sup>269</sup> The U.S. Supreme Court has held that states cannot apply workers' compensation laws to dockworkers because it would be a violation of Congress's dormant Admiralty power.<sup>270</sup> Congress responded with legislation granting authority to the states to do just that.<sup>271</sup> In *Knickerbocker Ice Co. v. Stewart*,<sup>272</sup> the U.S. Supreme Court struck down this legislation.<sup>273</sup> Significantly, the Court cited the need for uniformity as its sole rationale, stating that the motivation underlying the Constitution's grant of Admiralty power to Congress was "to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."<sup>274</sup> The Court reasoned that the need for uniform regulation militated against allowing any enactment or modification to the law of admiralty "except by legislation which embodies both the will and deliberate judgment of Congress."<sup>275</sup> If the states were allowed to legislate where Congress was granted that authority, it "would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established—it would

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269. See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 402 (1983) ("Only one line of Supreme Court cases has ever prevented Congress from authorizing the states to exercise regulatory power that the Constitution assigns exclusively to the federal government."). See also David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 2 (1997) ("[There is] the existence of a non-delegable, constitutional core of admiralty law that not even Congress can make non-uniform . . .").

270. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 218 (1917) ("Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts . . . . The remedy which the Compensation Statute attempts to give is . . . not saved to suitors from the grant of exclusive jurisdiction.")

271. See Bederman, *supra* note 269, at 19 (stating that "Congress had fashioned a legislative response" that was "masterfully simple," applying state workers' compensation laws to "accidents occurring on the navigable waters of the United States").

272. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

273. *Id.* at 163 ("[S]o construed, we think the enactment is beyond the power of Congress.")

274. *Id.* at 164.

275. *Id.*

defeat the very purpose of the grant.<sup>276</sup> This ruling was affirmed by the U.S. Supreme Court four years later in *Washington v. W.C. Dawson & Co.*,<sup>277</sup> and has never been overruled.<sup>278</sup>

### 3. Congress Cannot Assent to Abrogation of Its Foreign Commerce Clause Power

Since the authority granted to Congress under the Foreign Commerce Clause—unlike the Interstate Commerce Clause—has national uniformity as its sole rationale,<sup>279</sup> there is no readily apparent reason why Foreign Commerce Clause authority should be treated any differently than Congress's Admiralty power. Consequently, not only has the U.S. Supreme Court *never* ruled that Congress may authorize the states to regulate foreign commerce, U.S. Supreme Court jurisprudence actually dictates *against* such an authorization.

There can be no doubt that the enforcement of international arbitration agreements implicates foreign commerce and foreign policy. International arbitration agreements, by their very definition, arise exclusively out of international commercial transactions.<sup>280</sup> Because the U.S. Supreme Court has twice singled out the risk of retaliation as the single greatest, definitive factor in determining when an international commercial legal issue implicates foreign policy,<sup>281</sup> the fact that failure to honor international arbitration agreements in insurance contracts would violate the New York Convention and expose the United States to a very real risk of retaliation

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276. *Id.* at 164. *See also* Cohen, *supra* note 269, at 402 (“[The Court] discovered an unbending constitutional requirement of national uniformity that could not yield to contrary congressional judgment. Indeed, the uniformity requirement was so inflexible that Congress could not even *adopt* existing nonuniform state laws.”).

277. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 222 (1924) (“The judgments below must be affirmed; the doctrine of *Knickerbocker Ice Co. v. Stewart*, to which we adhere, permits no other conclusion.”).

278. *See* Bederman, *supra* note 269, at 24 (“*Knickerbocker Ice* and *Dawson* have never been expressly overruled . . .”).

279. *Japan Line, Ltd. v. L.A. Cnty.*, 441 U.S. 434, 444 (1979) (stating that “[t]he need for federal uniformity” derives from “the Framers’ overriding concern that ‘the Federal government must speak with one voice when regulating commercial relations with foreign governments’” (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976))).

280. *See* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 24 (2002) (defining international arbitration agreements as choice of forum and law clauses in international commercial agreements).

281. *See supra* notes 247–49, 258–59 (describing how the U.S. Supreme Court has twice identified the risk of retaliation as the primary indicator of foreign policy implications).

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undeniably makes this an issue of foreign policy.<sup>282</sup> Therefore, U.S. Supreme Court precedent reveals that congressional acquiescence to state regulation of international arbitration agreements in insurance contracts is an unconstitutional forfeiture of power vested *exclusively* in Congress.

### E. *The Treaty Power*

Completely aside from any question of congressional assent to state regulation or the Commerce Clause, Congress had an independent source of constitutionally delegated authority through which it implemented the New York Convention: Congress's Treaty power. *Missouri v. Holland*<sup>283</sup> is the U.S. Supreme Court's formative case on Congress's Treaty power.<sup>284</sup> Section 1 of this subpart describes the U.S. Supreme Court's ruling in *Holland*, and section 2 analyzes its implications with respect to Congress's intent in enacting McCarran-Ferguson.

#### 1. *Missouri v. Holland*

In *Holland*, the U.S. Supreme Court heard a challenge to the implementing legislation of a treaty dealing with migratory birds.<sup>285</sup> The complication in the case was that legislation attempting to enact the same domestic law had been struck down several years earlier as outside Congress's power to regulate under the Constitution.<sup>286</sup> Thus, the issue in *Holland* was "whether the treaty and [implementing] statute [were] void as an interference with the rights reserved to the States."<sup>287</sup> The Court upheld

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282. Cf. *Japan Line*, 441 U.S. at 453 ("California's tax thus creates an asymmetry in international maritime taxation operating to Japan's disadvantage. The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole.").

283. *Missouri v. Holland*, 252 U.S. 416 (1920).

284. See Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 318 (2009) ("The most important case to address the power of Congress to domesticate treaties free of federalism limitations is *Missouri v. Holland*.").

285. See *Holland*, 252 U.S. at 430-31 ("This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act . . .").

286. See *id.* at 432 ("An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court.").

287. *Id.* at 432.

the statute.<sup>288</sup> The *Holland* Court found that Congress had the power under the Necessary and Proper Clause and the Supremacy Clause to implement a treaty validly made under the Treaty Clause.<sup>289</sup> Therefore, the Court rejected the argument that “what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.”<sup>290</sup> Rather, the Court found that what federal legislation could not do “unaided,” a treaty followed by implementing legislation *could* do.<sup>291</sup> *Holland*’s rule has never been limited,<sup>292</sup> and the U.S. Supreme Court has consistently reaffirmed it throughout the ninety-one years since it was decided.<sup>293</sup>

## 2. Congress Did Not Assent to Abrogation of Its Treaty Power

*Holland* is vitally relevant to this Article for two reasons. First, *Holland* expressly establishes that the Treaty power is an independent, constitutionally delegated source of authority through which treaties such as the New York Convention can be implemented.<sup>294</sup> Second, *Holland* was decided in 1920,<sup>295</sup> twenty-four years before *SEUA* was decided.<sup>296</sup> The U.S. Supreme Court has ruled that the McCarran–Ferguson Act was intended only to rescind *Commerce Clause* restrictions on state regulation of the insurance industry.<sup>297</sup> Thus, where Congress has passed a law that could have been enacted solely under its *Treaty power*, like the New York Convention Act, McCarran–Ferguson does not logically reverse preempt that legislation in favor of state legislation. This conclusion is bolstered by the fact that because of *Holland*’s twenty-four year history at the time of the

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288. *Id.* at 435 (“We are of the opinion that the treaty and statute must be upheld.”).

289. *See id.* at 432 (“[B]y Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made . . . are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8 . . .”).

290. *Id.* at 432.

291. *See id.* at 433–35 (ruling that an act that would be unconstitutional by itself is constitutional when committed pursuant to a treaty).

292. *See* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 415 (2003) (“This holding has never since been limited.”).

293. *See, e.g.,* *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (“The treaty-making power of the United States is not limited by any express provision of the Constitution, and . . . extend[s] to all proper subjects of negotiation between our government and other nations.”).

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

295. *See supra* note 283 and accompanying text (showing that *Holland* was decided in 1920).

296. *See supra* note 56 and accompanying text (stating that the *SEUA* was decided in 1945).

297. *See supra* notes 89–93 and accompanying text (explaining how a line of U.S. Supreme Court cases established that the McCarran–Ferguson Act was meant to reverse *SEUA* and therefore lifted only preexisting Commerce Clause restrictions).

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*SEUA* decision,<sup>298</sup> Congress must have been aware of the fact that, even before *SEUA*, a federal law enacted pursuant to Congress's treaty power would have preempted state law regulating the insurance industry by virtue of the Supremacy Clause. Furthermore, because the U.S. Supreme Court has consistently ruled that McCarran-Ferguson only gives back the power the states had to regulate prior to *SEUA*,<sup>299</sup> Congress could not have intended to acquiesce to abrogation of its own constitutionally delegated power to implement treaties.

*F. The Policy Favoring Arbitration*

The U.S. Supreme Court has enunciated a general policy in favor of arbitration, particularly in the international context. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>300</sup> the U.S. Supreme Court faced the issue of "whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction."<sup>301</sup> Declaring that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution,"<sup>302</sup> the Court rejected the idea that a public policy against arbitrating United States statutory issues was dispositive.<sup>303</sup> On the contrary, the Court determined that interests in "international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."<sup>304</sup> The Court recognized that judicial branches worldwide would need to rid themselves of opposition to

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298. See *supra* note 295–96 and accompanying text (observing that *Holland* was decided twenty-four years before *SEUA*).

299. See *supra* notes 90–95 and accompanying text (explaining that the Court declared that McCarran-Ferguson only grants states regulatory power over the insurance industry they enjoyed before *SEUA*).

300. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

301. *Id.* at 624.

302. *Id.* at 626–27.

303. *Id.* at 629 (disregarding the lower court's finding that a public policy against allowing an arbitrator to decide issues under United States antitrust law rendered the arbitration clause unenforceable).

304. *Id.* at 629.

arbitration in order to allow the mechanism to take hold.<sup>305</sup> Citing the New York Convention as evidence of a federal policy in favor of arbitration, the Court concluded that while “[t]here is no reason to distort the process of contract interpretation . . . in order to ferret out the inappropriate,”<sup>306</sup> it is the “congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act . . . .”<sup>307</sup>

There can be little doubt that *Mitsubishi* was a broad endorsement for a policy in favor of enforcing arbitration agreements.<sup>308</sup> It is important to keep in mind, however, that the presumption in favor of arbitration enunciated in *Mitsubishi* was created in the face of a countervailing policy, not a countervailing statute.<sup>309</sup> While a policy and presumption in favor of arbitration may be sufficient to overcome significant opposing policy justifications, the same cannot be said of a conflict with a statutory directive.

### III. WHY THE CASE LAW HAS MISSED THE MARK

The case law resolving the issue of whether the McCarran–Ferguson Act reverse preempts the New York Convention in favor of state law is both insufficient and largely unavailable.<sup>310</sup> Subpart A of this Part describes the state of lower court decisions on the issue, and subpart B describes the current circuit split regarding its resolution.

#### A. *The Lower Courts*

Decisions of state courts and federal district courts that have ruled on the issue of whether the McCarran–Ferguson Act reverse preempts the New York Convention in favor of state law are almost entirely unavailable, as such rulings are made as nonfinal orders on motions to compel arbitration,

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305. *See id.* at 638 (stating that because both international commercial transactions and the use of international arbitration had risen substantially, and judicial antagonism toward arbitration would need to end in order to allow this trend to continue).

306. *Id.* at 627.

307. *Id.*

308. *See, e.g.,* Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1039–40 (1998) (“The Court announced an ‘emphatic federal policy in favor of arbitral dispute resolution’ and has proceeded in furtherance of that federal policy to embrace contractually based arbitration as a solution to a myriad of ills from overcrowded dockets to international sensitivities.” (quoting *Mitsubishi*, 437 U.S. at 631)).

309. *Id.* (stating that the policy enunciated in *Mitsubishi* was favored against a countervailing policy).

310. *See infra* Part III.A–B (describing the insufficiency and lack of availability of the existing case law).

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which are almost never published or reported.<sup>311</sup> For this reason, such decisions are not searchable and are not available in public databases.<sup>312</sup> Nevertheless, the issue arises constantly in lower courts.<sup>313</sup> The few lower court opinions that *can* be found, show several ways in which this issue has been resolved. Some courts do not recognize any significance in the fact that the New York Convention is a treaty and simply decide that neither the New York Convention nor the New York Convention Act regulate the “business of insurance” under McCarran–Ferguson.<sup>314</sup> Others have decided that the New York Convention Act impliedly preempts any previously enacted statute and thus preempts the McCarran–Ferguson Act.<sup>315</sup> Still others have decided that the federal policy favoring arbitration of international disputes is dispositive by itself.<sup>316</sup> Not only have these decisions “given rise to division and confusion,”<sup>317</sup> but in most jurisdictions, they do not have precedential effect.<sup>318</sup> The confused results<sup>319</sup> and cursory

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311. See Reply Brief for Petitioner at 8, *La. Safety Ass’n of Timbermen-Self Insurers Fund v. Certain Underwriters at Lloyd’s, London*, 131 S. Ct. 65 (2010) (No. 09-945) (“[T]he issue typically arises in the context of nonfinal decisions on motions to compel arbitration, virtually none of which are decided in reported opinions.”).

312. See *id.* (observing that unreported orders are not “available in searchable public databases like Lexis and Westlaw”).

313. See Petition for Writ of Certiorari at 25, *La. Safety Ass’n*, 131 S. Ct. 65 (No. 09-945) (“[T]he question arises frequently in the lower courts . . . . The issue presented in this case arises frequently in district courts, where it has given rise to division and confusion.”).

314. See, e.g., *Transit Cas. Co. in Receivership v. Certain Underwriters at Lloyd’s of London*, No. 96-4173-CV-C-2, 1996 WL 938126, at \*2 (W.D. Mo. June 10, 1996) (stating that the New York Convention Act cannot preempt a Missouri statute voiding arbitration clauses in insurance agreements because “neither the Convention nor the Federal Arbitration Act specifically relate to the business of insurance”).

315. See, e.g., *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co.*, 466 F. Supp. 2d 1293, 1306 (N.D. Ga. 2006) (“[T]he McCarran–Ferguson Act’s preservation of state insurance law defenses does not apply in the context of international arbitration because the text of the Convention is supreme.”); *Murphy Oil USA, Inc. v. SR Int’l Bus. Ins. Co.*, No. 07-CV-1071, 2007 WL 2752366, at \*3 (W.D. Ark. Sept. 20, 2007) (“[T]he New York Convention must be enforced according to its terms over all prior inconsistent rules of law.”).

316. See *Certain Underwriters at Lloyd’s, London v. Simon*, No. 1:07-cv-0899-LJM-WTL, 2007 WL 3047128, at \*7 (S.D. Ind. Oct. 18, 2007) (“[T]here is a strong preference, as articulated by the Supreme Court, for recognition of international agreements to properly promote interests of comity and predictability in the enforcement of such agreements. Therefore, this Court finds that the FAA, as it implements the Convention, governs the Arbitration Clause.”).

317. Petition for Writ of Certiorari, *supra* note 313, at 25.

318. See Jason B. Binimow, Annotation, *Precedential Effect of Unpublished Opinions*, 105 A.L.R.5th 499 (2003) (“The rules and holdings of many state and federal courts provide that unpublished opinions cannot be considered to have precedential effect.”).

nature<sup>320</sup> of these lower court decisions, as well as the lack of weight given to them, only add to the importance of the two U.S. Courts of Appeals cases that have decided this issue.<sup>321</sup>

### B. *The Circuit Split*

Only the Second and Fifth Circuits have heard the issue of whether the McCarran–Ferguson Act reverse preempts the New York Convention in favor of state legislation prohibiting the enforcement of international arbitration clauses in insurance contracts.<sup>322</sup> Section 1 of this subpart describes the Second Circuit’s opinion, and section 2 describes the Fifth Circuit’s opinion.

#### 1. *Stephens v. American International Insurance Co.*

The issue of whether the New York Convention is preempted by state legislation under the McCarran–Ferguson Act was first heard by a U.S. Court of Appeals when the Second Circuit decided *Stephens v. American International Insurance Co.* in 1995.<sup>323</sup> In *Stephens*, a reinsurance company, Delta America Re Insurance Company (Delta), was insolvent.<sup>324</sup> Delta’s

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319. See *supra* text accompanying note 317 (describing the lower court opinions as divided and confusing).

320. See *supra* notes 311–16 and accompanying text (providing descriptions of several lower court opinions and showing the conclusory nature of their reasoning).

321. See *infra* Part III.B.1–2 (providing a summary of the two U.S. Courts of Appeals opinions that deal with this issue).

322. See *infra* Part III.B (describing the two cases decided by the U.S. Courts of Appeals).

323. *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

324. See *id.* at 42 (“In 1985, the Franklin Circuit Court of Kentucky found Delta to be insolvent.”). The New Jersey Supreme Court provides a helpful explanation of reinsurance in *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981):

324. See *id.* at 42 (“In 1985, the Franklin Circuit Court of Kentucky found Delta to be insolvent.”). The New Jersey Supreme Court provides a helpful explanation of reinsurance in *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981):

Reinsurance involves a contract under which one insurer agrees to indemnify another for loss sustained under the latter’s policy of insurance. Insurance companies that insure against losses arising out of fire or other casualty seek at times to minimize their exposure by sharing risks with other insurance companies. Thus, when the face amount of a policy is comparatively large, the company may enlist one or more insurers to participate in that risk. Similarly, an insurance company’s loss potential and overall exposure may be reduced by reinsuring a part of an entire class of policies (e. g., 25% of all of its fire insurance policies). The selling insurance company is known as a ceding company. The entity that assumes the obligation is designated as the reinsurer.

*Id.* at 817.

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liquidator was suing a number of insurance companies who had ceded risk to Delta for premiums in the District Court for the Southern District of New York, and a dispute arose as to that claim.<sup>325</sup> Delta's reinsurance contracts with all of the insurance companies contained comprehensive arbitration provisions.<sup>326</sup> One of the defendant insurance companies, British Aviation Insurance Company, Ltd., moved to compel arbitration under the New York Convention Act.<sup>327</sup> Delta's liquidator defended against the motion to compel arbitration, arguing that section 304.33-010(6) of the Kentucky Liquidation Act<sup>328</sup> prohibited compelling arbitration. British Aviation argued that the Kentucky legislation was preempted by the New York Convention Act.<sup>329</sup> Delta's liquidator responded, stating that the McCarran–Ferguson Act reverse preempted the New York Convention Act.<sup>330</sup> The district court compelled arbitration, holding that the Kentucky Liquidation Act was not meant to protect policyholders and therefore was not enacted “for the purpose of regulating the business of insurance” under the McCarran–Ferguson Act and could not reverse preempt federal legislation.<sup>331</sup> Delta's

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325. See *Stephens*, 66 F.3d at 42–43 (“[T]he Liquidator filed suit . . . against various companies who had ceded risk to Delta . . . seeking . . . recovery of premiums . . . . The Cedents have refused to pay the premiums because they claim that they are entitled . . . to set off the premiums . . .”).

326. See *id.* at 43 (“All of the reinsurance contracts at issue contain broad arbitration clauses.”).

327. See *id.* (“British Aviation Insurance Company, Ltd. . . . moved to compel arbitration abroad, pursuant to [the New York Convention Act].”).

328. KY. REV. STAT. ANN. § 304.33-010(6) (West 2010). Section 304.33-010(6) provides, in relevant part:

328. KY. REV. STAT. ANN. § 304.33-010(6) (West 2010). Section 304.33-010(6) provides, in relevant part:

If there is a delinquency proceeding under this subtitle, the provisions of this subtitle shall govern those proceedings, and all conflicting contractual provisions contained in any contract between the insurer which is subject to the delinquency proceeding and any third party shall be deemed subordinated to the provisions of this subtitle.

*Id.*

329. *Stephens*, 66 F.3d at 43 (“The Cedents, however, asserted that the [New York Convention Act] preempts this section of the Kentucky Liquidation Act.”).

330. *Id.* (“The Liquidator maintained that the [New York Convention Act] does not apply because the McCarran–Ferguson Act . . . preserved the Kentucky Liquidation Act from preemption . . .”).

331. See *id.* (stating that the district court held that the Kentucky legislation was not meant to protect policyholders and “granted Cedents’ motions to compel arbitration”).

liquidator moved for permission to appeal the district court's order, and the Second Circuit granted the motion.<sup>332</sup>

The Second Circuit found that the Kentucky Liquidation Act was enacted “for the purpose of regulating the business of insurance” under the McCarran–Ferguson Act, and that the New York Convention Act was therefore vulnerable to reverse preemption by the Kentucky legislation.<sup>333</sup> However, British Aviation argued that, despite the fact that the New York Convention Act is reverse preempted by the Kentucky Liquidation Act, the Convention itself compelled arbitration.<sup>334</sup> The Second Circuit stated, without analysis, that the Convention is non-self-executing and depends on federal legislation for its implementation.<sup>335</sup> The court therefore concluded that the New York Convention—as opposed to the New York Convention Act—was irrelevant to its analysis and overturned the order to compel arbitration.<sup>336</sup>

## 2. Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London

No other circuit court confronted the issue again until 2009, when the Fifth Circuit decided *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London*.<sup>337</sup> In *Safety National*, an English reinsurer—Certain Underwriters at Lloyd's, London (CULL)—and an American reinsurer—Safety National Casualty Corporation (SNCC)—were in a dispute over whether an insurance company—the Louisiana Safety Association of Timbermen-Self Insurers Fund (LSAT)—could assign its rights under its reinsurance agreement with CULL to SNCC.<sup>338</sup> Both reinsurance agreements included arbitration provisions.<sup>339</sup> SNCC sued

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332. *Id.* (“This Court granted the Liquidator’s motion for permission to appeal Judge Martin’s interlocutory order compelling arbitration, and this appeal followed.”).

333. *See id.* at 43–45 (examining the Kentucky Liquidation Act and determining that it was enacted “for the purpose of regulating the business of insurance”).

334. *Id.* at 45 (“British Aviation . . . argue[s] that, as [a] foreign corporation[], even if the Kentucky Liquidation Act is not preempted by the [New York Convention Act], the Convention would still require arbitration of [its] claims.”).

335. *See id.* (“This argument fails because the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation.”).

336. *See id.* at 45–46 (“The Convention itself is simply inapplicable in this instance. . . . Thus, . . . the Liquidator cannot be compelled to arbitrate and the District Court’s order compelling the Liquidator to arbitrate is hereby reversed.”).

337. *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714 (2009).

338. *See id.* at 717 (“LSAT assigned its rights under the reinsurance agreements with the Underwriters to Safety National. The Underwriters refused to recognize the assignment . . .”).

339. *Id.* (“Each reinsurance agreement contained an arbitration provision.”).

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CULL in district court, and CULL successfully moved to stay the proceedings and compel arbitration.<sup>340</sup> In the course of the arbitration, CULL moved to lift the stay so that LSAT could be joined as a party in the district court, and then to once again compel arbitration.<sup>341</sup> LSAT then moved to lift the stay but quash arbitration, arguing that the arbitration clauses were “unenforceable under Louisiana law.”<sup>342</sup>

The district court granted LSAT’s motion, deciding that while the New York Convention would typically require arbitration, the New York Convention was reverse preempted by Louisiana law under the McCarran–Ferguson Act.<sup>343</sup> The district court then “certified that the order embodying its rulings involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal.”<sup>344</sup> A panel of the Fifth Circuit reversed, but a “[r]ehearing en banc was granted, thereby vacating the panel opinion.”<sup>345</sup>

A thirteen judge majority of the Fifth Circuit, sitting en banc, focused the entirety of its analysis on one question: “[W]hether . . . the Convention is an ‘Act of Congress’ within the meaning of the McCarran–Ferguson Act . . . .”<sup>346</sup> The relevant portion of the Louisiana statute is as follows:

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340. *See id.* (“Safety National sued the Underwriters in federal district court. The Underwriters filed an unopposed motion to stay proceedings and compel arbitration. The district court initially granted the motion.”).

341. *Id.* (“The Underwriters then filed a motion to lift the stay in order to join LSAT as a party in the district court and to compel arbitration . . .”).

342. *Id.* (“In response, LSAT moved to intervene, lift the stay, and quash arbitration. LSAT asserted that the arbitration agreements were unenforceable under Louisiana law.”).

343. *See id.* at 717–18 (“The district court . . . granted LSAT’s motion to quash arbitration. The district court concluded that although the Convention would otherwise require arbitration, a Louisiana statute . . . reverse preempted the Convention because of the McCarran–Ferguson Act.”).

344. *Id.* at 718.

345. *Id.*

346. *See id.* (“The Underwriters raise three issues . . . . Because our resolution of the first issue [(whether the Convention is an ‘Act of Congress’ under the McCarran–Ferguson Act)] resolves the question presented in this interlocutory appeal, we do not reach the other issues pressed by the Underwriters.”).

A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall contain any condition, stipulation, or agreement either:

. . . .

(2) Depriving the courts of this state of the jurisdiction of action against the insurer.

. . . .

C. Any such condition, stipulation, or agreement in violation of this Section shall be void . . . .<sup>347</sup>

The court noted that Louisiana courts have held arbitration agreements void as a result of this statute.<sup>348</sup> Because the “Convention contemplates enforcement in a signatory nation’s courts,”<sup>349</sup> the majority recognized that there was a conflict between the Louisiana statute and the New York Convention.<sup>350</sup> LSAT argued that the Convention was non-self-executing and could thus only be applied in United States courts through its enabling legislation.<sup>351</sup> For this reason, LSAT argued, the New York Convention Act is an “Act of Congress” under the McCarran–Ferguson Act, the New York Convention has no application, and the New York Convention Act must therefore be reverse preempted by the Louisiana statute under the McCarran–Ferguson Act.<sup>352</sup> CULL argued that even if the treaty is non-self-executing, it is still a treaty rather than an “Act of Congress” under the McCarran–Ferguson Act.<sup>353</sup> Though the court briefly examined the distinction between self-executing and non-self-executing treaties, it declined to decide whether the New York Convention was self-executing,

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347. LA. REV. STAT. ANN. § 22:868 (2009).

348. See *Safety Nat’l*, 587 F.3d at 719 (“Although it is not clear from this provision’s text that arbitration agreements are voided, Louisiana courts have held that such agreements are unenforceable because of this statute.”).

349. *Id.*

350. *Id.* (“The Louisiana statute, as so interpreted, conflicts with the United States’s commitments under the Convention.”).

351. *Id.* at 721 (“LSAT contends that the Convention was not self-executing and could only have effect in the courts of this country when Congress passed enabling legislation.”).

352. *Id.* (“LSAT argues that the Convention’s enabling legislation is an ‘Act of Congress’ within . . . the McCarran–Ferguson Act[] . . . . LSAT reasons that the Convention has no effect independent of legislation enabling it and that the McCarran–Ferguson Act requires us to construe the Convention’s enabling legislation as reverse-preempted by the Louisiana statute.”).

353. *Id.* (“[CULL] addressed whether the Convention is self-executing only in briefs to the panel and not in any depth, instead maintaining primarily that even if the Convention were not self-executing, once implemented, it remains a treaty and is not an ‘Act of Congress’ within the meaning of the McCarran–Ferguson Act.”).

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and proceeded under the assumption that the New York Convention—at least, in relevant part—was non-self-executing.<sup>354</sup>

Nonetheless, the court accepted CULL’s argument that the New York Convention was not an “Act of Congress” under the McCarran–Ferguson Act and thus was not reverse preempted by the Louisiana legislation.<sup>355</sup> First, the court observed that the plain meaning of the phrase “Act of Congress” dictates such a reading,<sup>356</sup> and that the differentiation between self-executing and non-self-executing treaties in this context is a distinction without a difference—the court could think of no reason why Congress would choose to distinguish between treaty provisions that are self-executing and non-self-executing.<sup>357</sup>

Emphasizing the use of the word “construed” in the phrase “the McCarran–Ferguson Act’s provision that ‘no Act of Congress’ shall be construed to supersede state law,”<sup>358</sup> the court clarified that it was the New York Convention itself, and not the New York Convention Act, that the court “construed” to preempt Louisiana law.<sup>359</sup> The majority reasoned that the New York Convention Act operates by reference to the New York Convention, and the New York Convention must therefore be “construed.”<sup>360</sup> Consequently, the court determined that “the McCarran–Ferguson Act’s provision that ‘no Act of Congress’ shall be construed to

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354. *Id.* at 721–22 (“It is unclear to us whether the Convention is self-executing. . . . However, the Supreme Court indicated . . . that [some] provisions of the Convention . . . are not . . . . This . . . could . . . imply that the Convention in its entirety is not self-executing, although such a conclusion cannot be drawn with any certainty . . . .”).

355. *Id.* (“Even if the Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an ‘Act of Congress’ as that phrase is used in the McCarran–Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation.”).

356. *Id.* at 723 (“The commonly understood meaning of an ‘Act of Congress’ does not include a ‘treaty,’ even if the treaty required implementing legislation.”).

357. *Id.* (“Yet there is no apparent reason—and LSAT has provided no rationale—why Congress would have chosen to distinguish in the McCarran–Ferguson Act between treaty provisions that are self-executing and those that are not self-executing but have been implemented.”).

358. *Id.* at 725.

359. *Id.* at 724 (“Equally important in the present case, it is a treaty (the Convention), not an act of Congress (the Convention Act), that we construe to supersede Louisiana law.”).

360. *Id.* at 724–25 (stating that the New York Convention Act “does not in this case operate without reference to the contents of the Convention,” and that it is the New York Convention itself that the New York Convention Act deems contracts to be governed by and uses as the jurisdiction-providing authority, among other references).

supersede state law regulating the business of insurance is inapplicable.”<sup>361</sup> Significantly, the court stated that it “need not and d[oes] not undertake to determine the precise or technical contours of how or whether implemented non-self-executing treaty provisions become the ‘Law of the Land’ under the Supremacy Clause.”<sup>362</sup> The court explained that its task was merely to determine whether “Congress intended for state law to reverse preempt federal law that has, as its source an implemented non-self-executing treaty.”<sup>363</sup>

The majority concluded that this was not Congress’s intent, basing its conclusion on the U.S. Supreme Court’s decision in *Missouri v. Holland*.<sup>364</sup> The *Safety National* court reasoned that because the U.S. Supreme Court determined in *Holland* that the constitutionality of a federal statute implementing a non-self-executing treaty hinged on the constitutionality of the treaty itself,<sup>365</sup> *Holland* supported the proposition that an implemented non-self-executing treaty is wholly distinct from an “Act of Congress,” and determined that when Congress enacted the McCarran–Ferguson Act over twenty years later—and the New York Convention Act over fifty years later—it was aware of this inferred distinction.<sup>366</sup> Thus, the majority decided it was “unlikely that when Congress crafted the McCarran–Ferguson Act, it intended any future treaty implemented by an Act of Congress to be abrogated.”<sup>367</sup>

The Fifth Circuit further stated that its conclusion was supported by the federal policy favoring arbitration of international commercial contracts.<sup>368</sup>

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361. *Id.* at 725.

362. *Id.* at 727.

363. *Id.*

364. *Id.* at 727–28 (“There is precedent that at the time of the McCarran–Ferguson Act’s enactment, courts analyzed treaties, even when implemented by an Act of Congress, as treaties. The Supreme Court’s decision . . . reflects that a treaty followed by implementing legislation remains a treaty . . . distinct from an Act of Congress.”).

365. *See id.* at 728 (stating that the U.S. Supreme Court saw a distinction between “acts of Congress under the Commerce Clause” and an act enacted under the Necessary and Proper Clause to implement a non-self-executing treaty, and decided that the “validity of the implementing legislation” depended on the constitutionality of the treaty (citing *Missouri v. Holland*, 252 U.S. 416, 433 (1920))).

366. *See id.* at 728–29 (“[W]hen Congress passed the McCarran–Ferguson Act two decades later (and the Convention Act half a century later), it was well aware that a treaty, even if requiring implementation, was distinct from an Act of Congress and could serve as the source of authority to ‘override [a state’s] power.’” (quoting *Holland*, 252 U.S. at 434)).

367. *Id.* at 729.

368. *Id.* at 730 (“Our conclusion that referral to arbitration is proper in this case is bolstered by the congressionally sanctioned national policy favoring arbitration of international commercial agreements.”).

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The court cited *Mitsubishi*<sup>369</sup> as establishing that courts must “subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”<sup>370</sup> The majority recognized that the McCarran–Ferguson Act evinces a policy in favor of state regulation of the insurance industry, but found that any apprehensions about that policy being ignored in the course of arbitration are insufficient to allow a court to refuse to let arbitration proceed.<sup>371</sup>

The majority noted the split it had created with the Second Circuit.<sup>372</sup> While the court agreed with the Second Circuit that non-self-executing treaty provisions may not be judicially enforced without implementing legislation,<sup>373</sup> the Fifth Circuit stated that “this does not answer the question of what Congress intended when it used the terms ‘[n]o Act of Congress’ and ‘such Act’ in the McCarran–Ferguson Act or why Congress would have addressed only treaties that required implementation by Congress.”<sup>374</sup> Rather, the majority said that the plain meanings of those terms suggest that they were not meant to encompass an implemented, non-self-executing treaty,<sup>375</sup> and that the text of the McCarran–Ferguson Act does not denote an intention by Congress to distinguish between self-executing and non-self-executing treaties.<sup>376</sup>

The judgment of the majority was joined by Judge Clement, who authored a concurring opinion.<sup>377</sup> The concurring opinion took the view that Article II of the New York Convention is self-executing and thus preempts

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369. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

370. *Safety Nat'l*, 587 F.3d at 730 (quoting *Mitsubishi*, 473 U.S. at 638–39).

371. *Id.* (“Although the McCarran–Ferguson Act embodies a strong policy that the states have an interest in the regulation of the business . . . , concerns that a state’s regulatory policies . . . may not be recognized in an international arbitration . . . are not a basis for refusing to require that an arbitration go forward.”).

372. *Id.* at 731 (“We are aware that our decision conflicts with that of the Second Circuit in *Stephens v. American International Insurance Co.*”).

373. *Id.* (“We agree, of course, that when provisions of a treaty are not self-executing, they cannot be enforced in a court in this country unless and until those provisions are implemented by Congress.”).

374. *Id.*

375. *Id.* (“Because we give the phrases . . . their usual, commonly understood meaning, we conclude that implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran–Ferguson Act.”).

376. *Id.* (“We find no indication from the text of the McCarran–Ferguson Act that Congress intended to signal a distinction between self-executing and non-self-executing-but-implemented treaties in the McCarran–Ferguson’s reverse-preemption clause.”).

377. *Id.* at 730 (Clement, J., concurring).

the Louisiana statute under the Supremacy Clause.<sup>378</sup> Judge Clement explained that not only would such a holding be in keeping with U.S. Supreme Court precedent,<sup>379</sup> but that this was a better conclusion because it avoids the constitutional question of whether an implemented non-self-executing treaty should be regarded as having preemptive effect under the Supremacy Clause.<sup>380</sup> The concurring opinion first cited *Medellín v. Texas*, stating that the *Medellín* Court delineated a structure for establishing whether a treaty is self-executing or non-self-executing.<sup>381</sup> The concurring opinion went on to explain the basis for its conclusion that the relevant provision of the New York Convention is self-executing under the *Medellín* framework, noting the use of the word “shall” in section 3 of Article II of the New York Convention.<sup>382</sup> While the concurring opinion noted the “growing judicial consensus that multilateral treaties are presumptively non-self-executing,”<sup>383</sup> it nevertheless determined that, per the guidance of the U.S. Supreme Court, the relevant provision of the New York Convention is self-executing.<sup>384</sup>

The Fifth Circuit’s majority opinion was also met by a “scathing dissent.”<sup>385</sup> In an opinion joined by two other judges, Judge Elrod began this dissent by declaring that the majority “conclude[d] that an Act of Congress is not really an Act of Congress.”<sup>386</sup> Judge Elrod found the majority opinion fundamentally problematic because it looked beyond the New York Convention Act to the New York Convention<sup>387</sup> and determined that this

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378. *Id.* at 732 (“I would hold that the relevant treaty provision, Article II of the Convention, is self-executing and that it therefore preempts [the Louisiana statute] by virtue of the Supremacy Clause.”).

379. *Id.* (“This result is dictated by the decisions of the Supreme Court . . . differentiating self-executing from non-self-executing treaty provisions.”).

380. *See id.* at 732–33 (“The conclusion that Article II is self-executing possesses the added benefit of avoiding a difficult constitutional question, namely what preemptive effect (if any) non-self-executing but implemented treaty provisions have under the Supremacy Clause.”).

381. *See id.* at 734 (“*Medellín* provides lower courts with a framework for determining whether treaty provisions are self-executing.”).

382. *See supra* notes 130–31 and accompanying text (explaining that the language in the New York Convention directing courts to enforce arbitration agreements appears mandatory).

383. *Safety Nat’l*, 587 F.3d at 737 (Clement, J., concurring).

384. *Id.* (“[M]y conclusion that Article II of the Convention is self-executing is compelled by a straightforward application of binding Supreme Court precedent. . . . Because Article II of the Convention mandates enforcement of arbitration agreements, it conflicts with and therefore preempts Louisiana law.”).

385. Timothy B. Parlin, *Arbitration Clauses in International Insurance Contracts Trump State Law Restrictions*, 199 N.J. L.J. 578, 579 (2010).

386. *Safety Nat’l*, 587 F.3d at 737 (Elrod, J., dissenting).

387. *See id.* at 737–38 (“The court errs today in . . . garden variety statutory interpretation: instead of answering the question of whether the legislation implementing the Convention . . . is an

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error led the majority to a severely flawed conclusion.<sup>388</sup> The dissent labeled the majority's holding "a doctrinal novelty of our circuit's own creation, as there is no precedent holding that a non-self-executing treaty, in and of itself, has the power to preempt state law."<sup>389</sup> Judge Elrod also chastised the majority for its "trail-blazing holding" because it "create[d] a circuit split with the Second Circuit and [went] against other circuits that have concluded that a non-self-executing treaty, even if implemented by statute, may not be applied directly in U.S. courts."<sup>390</sup>

Judge Elrod advocated for a systematic analysis.<sup>391</sup> He stated that the majority should have noted that, under the Supremacy Clause, Louisiana law would apply unless a federal statute preempted it.<sup>392</sup> Thus, if the New York Convention Act is the source of preemptive law, the McCarran–Ferguson Act would apply.<sup>393</sup> One can assume this would be the end of such an analysis. If the source of preemptive law is the New York Convention, however, the McCarran–Ferguson Act would not apply.<sup>394</sup> Therefore, the dissent determined that the Louisiana law cannot be preempted unless the New York Convention is preemptive of Louisiana law under Supremacy Clause analysis, which, the dissent concluded, is not the case.<sup>395</sup> Citing U.S. Supreme Court precedent, Judge Elrod asserted that "only self-executing treaties operate by their own force to provide a rule of decision in the courts."<sup>396</sup> Thus, the opinion reasoned, only self-executing treaties can have

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'Act of Congress' . . . , the court frames its approach as an inquiry into whether the Convention itself is an Act of Congress.').

388. *See id.* at 738 ("However, the court's failure to ask the right question at the outset inevitably leads to its incorrect conclusion—that *the Convention itself*, a non-self-executing treaty, preempts the Louisiana statute.').

389. *Id.*

390. *Id.*

391. *Id.* (stating that the majority should have used an ordered analysis).

392. *Id.* ("From the perspective of the Supremacy Clause, [Louisiana law] applies unless [CULL] carr[ies] the burden to show that some specific source of federal law preempts it.').

393. *Id.* at 738–39 ("If the proposed preemptive law is a statute like the Convention Act, then the McCarran–Ferguson Act applies.').

394. *Id.* at 739 ("If the proposed law is the Convention itself, then the court is correct that McCarran–Ferguson does not apply.').

395. *See id.* ("But there is still no preemption—and the district court must be affirmed—unless the Convention is actually capable of superseding [Louisiana law] as a matter of Supremacy Clause law. It is not.').

396. *Id.*

preemptive effect.<sup>397</sup> Because the majority cited no case law specifically in support of its position,<sup>398</sup> and because “[a]s a source of law, the implementing legislation is the alpha and omega of what may constitute a rule of decision in U.S. courts,”<sup>399</sup> the dissent concluded that when it comes to non-self-executing treaties, any preemptive effect originates in the implementing legislation, not in the treaty.

The dissent further criticized the majority’s use of *Missouri v. Holland*—observing that it was the only decision of the U.S. Supreme Court that the majority cited to support its preemption analysis<sup>400</sup>—and dismissed *Holland* as “irrelevant to the Supremacy Clause question before this court.”<sup>401</sup> The true significance of the holding in *Missouri v. Holland*, Judge Elrod stated, is that the analysis in that case is of the implementing legislation, not the treaty at issue.<sup>402</sup> Thus, *Missouri v. Holland* did not appear to the dissent to be supportive of the majority’s conclusion.<sup>403</sup>

Conceding that the majority did not intend to create new Supremacy Clause jurisprudence, Judge Elrod nevertheless stated unequivocally that this is what the majority did.<sup>404</sup> Otherwise, the majority would have employed “a sort of legal alchemy, in which the court bestows on the Convention Act the beneficial properties of a statute . . . but not its drawbacks.”<sup>405</sup> The dissent found this approach untenable, stating simply that because a non-self-executing treaty cannot preempt state law, its implementing legislation

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397. *See id.* at 740 (“Therefore, treaties come in two separate and distinct types: self-executing treaties, which can undoubtedly preempt state law in a case like this, and non-self-executing treaties, which cannot.”).

398. *Id.* (“The court points to no case holding that a non-self-executing treaty can supersede state law.”).

399. *Id.* at 740–41.

400. *See id.* (“*Missouri v. Holland* . . . is the only Supreme Court holding upon which the court purports to ground its conclusion that the non-self-executing Convention is capable of preemption, and that courts should look to the treaty, rather than to the implementing legislation, to see if it is an ‘Act of Congress.’”).

401. *Id.*

402. *See id.* (“What is relevant to this case is not the holding of *Holland*, but the manner in which it frames the conflict between an implemented treaty and state law prerogatives embodied in a Missouri statute. It is clear from the first sentence of *Holland* that the implementing act—not the treaty—is considered the source of the conflict.”).

403. *Id.* (“There is no contention or holding in *Missouri v. Holland* that a court could apply a non-self-executing treaty, implemented or not, to supersede state law.”).

404. *See id.* at 745 (“Perhaps the court today does not really mean to cut a new path through Supremacy Clause territory to endow non-self-executing treaties with heretofore undiscovered preemptive powers. But that is what it must do in order to justify framing its approach as an inquiry into whether the Convention itself is an ‘Act of Congress.’”).

405. *Id.*

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is the only source of law a court may consult in the course of a McCarran–Ferguson reverse preemption analysis.<sup>406</sup>

The dissent observed that the majority had bolstered its decision to see the New York Convention rather than the New York Convention Act as preemptive because the Act incorporates the Convention largely by reference.<sup>407</sup> This, said the dissent, was merely a “play on words,”<sup>408</sup> taking the word “construe” from the McCarran–Ferguson Act language, “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law,”<sup>409</sup> and applying it to “Act of Congress” rather than “invalidate, impair, or supersede,” at which it is directed.<sup>410</sup> The majority’s reading in this respect, Judge Elrod maintained, was novel: “None have suggested that the Convention Act’s failure to cut-and-paste the language of the treaty into the statute somehow prevents the statute from being an ‘Act of Congress,’ capable of being ‘construed.’”<sup>411</sup>

Thus, the dissent regarded the majority as having “muddied the waters of our statutory interpretation jurisprudence, by reasoning [what Congress likely intended] on an ad hoc basis”<sup>412</sup> and “appl[ying] a non-self-executing treaty as domestic, preemptive law in an unprecedented manner,”<sup>413</sup> deeming the case to be left in “Supremacy Clause purgatory.”<sup>414</sup>

### *C. The Case Law Is Insufficient and Problematic*

Neither the lower court opinions nor the two appellate court opinions that have attempted to resolve the issue of whether McCarran–Ferguson can reverse preempt the New York Convention have satisfactorily answered the

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406. *Id.* (“Because a non-self-executing treaty cannot preempt state law, the court cannot analyze the ineffectual treaty rather than the implementing legislation to determine the reverse-preemptive effects of the McCarran–Ferguson Act.”).

407. *See id.* at 747 (“The court justifies its decision to look to the Convention rather than the Convention Act on the ground that the Convention Act implements the Convention largely by reference, as opposed to setting out the Convention provisions within the text of the Act.”).

408. *See id.*

409. 15 U.S.C. § 1012(b) (2010).

410. *See Safety Nat’l*, 587 F.3d at 747 (Elrod, J., dissenting) (“The argument is essentially a play on words, which wrenches the word ‘construe’ from the verb phrase in which it appears in the statute . . . . Thus, ‘construe’ does not merely mean to refer to the text for content.”).

411. *Id.* at 748.

412. *Id.* at 752.

413. *Id.*

414. *Id.*

most pertinent questions. The lower court opinions, in the few circumstances where they are available,<sup>415</sup> lack precedential effect and lead to varied, unsupported conclusions.<sup>416</sup> The two U.S. Courts of Appeals that have heard the issue have come to opposing conclusions,<sup>417</sup> each with tenuous reasoning. The Second Circuit's opinion provides very little analysis,<sup>418</sup> simply concluding that as a non-self-executing treaty, the New York Convention bore no consideration, so the New York Convention Act was reverse preempted by McCarran–Ferguson.<sup>419</sup>

The Fifth Circuit's opinion, which provided the most comprehensive analysis of this issue,<sup>420</sup> was founded on problematic reasoning and overly imaginative interpretations of precedent. The Fifth Circuit's opinion essentially relied on four propositions: (1) that the phrase "Act of Congress" does not plainly encompass a non-self-executing treaty;<sup>421</sup> (2) that the majority could not find a reason why Congress would choose to differentiate between self-executing and non-self-executing treaties;<sup>422</sup> (3) that the New York Convention Act incorporated the New York Convention by reference, and that the majority was therefore "construing" the Convention rather than the Convention Act;<sup>423</sup> and (4) that *Holland*'s ruling that treaty-implementing legislation's constitutionality is based on the constitutionality of the treaty supports the view that non-self-executing treaties are not "Acts of Congress."<sup>424</sup> All of these conclusions are wholly rebutted by Judge Elrod's point that LSAT was invoking the New York Convention Act, rather than the New York Convention.<sup>425</sup>

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415. See *supra* notes 311–13 and accompanying text (explaining that lower court opinions on this issue are almost never published).

416. See *supra* Part III.A (explaining that lower court opinions have come to different, conclusory results and do not have weight as precedent).

417. See *supra* Part III.B (describing the two opinions and their opposing results).

418. See *supra* Part III.B.1 (describing the Second Circuit's opinion and its short analysis).

419. See *supra* notes 335–36 and accompanying text (delineating the conclusion of the Second Circuit's opinion, which deemed the New York Convention Act reverse preempted).

420. See generally *supra* Part III.

421. See *supra* note 356 and accompanying text (providing the majority's argument that the plain meaning of "Act of Congress" does not include non-self-executing treaties).

422. See *supra* note 357 and accompanying text (stating that the majority could see no reason why Congress would choose to differentiate between self-executing and non-self-executing treaties).

423. See *supra* notes 358–61 and accompanying text (explaining that the majority read the word "construe" to imply that a statute incorporating a treaty by reference is "construed" by reference to the treaty it implements).

424. See *supra* notes 364–66 (stating that the majority cited *Holland* as supportive of the proposition that non-self-executing treaties are not "Acts of Congress").

425. See *supra* notes 395–98 (explaining Judge Elrod's position that the majority ignored the fact that the New York Convention Act, not the New York Convention, was effective law in the court).

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It would have been possible for the majority to make an argument under the Supremacy Clause that the New York Convention, as implemented by the New York Convention Act, operates as a treaty rather than an Act of Congress. After all, the Supremacy Clause declares “Treaties” and “Laws of the United States” to be the “supreme Law of the Land” separately.<sup>426</sup> Moreover, the Framers’ intent in declaring *treaties* the “supreme Law of the Land” had its own independent justification—the breach of treaties on the part of the British and early Americans.<sup>427</sup> The Framers specifically declared treaties the “supreme Law of the Land” in order to avoid discord in the way treaty obligations are honored.<sup>428</sup> The U.S. Supreme Court has had no occasion to rule on the issue of whether implemented, non-self-executing treaties preempt state law as “Treaties” or as “Laws of the United States” because under longstanding U.S. Supreme Court jurisprudence, they each have preemptive effect.<sup>429</sup> However, a court could reasonably conclude, from the text of the Constitution and the original intent of the Framers, that treaties are “supreme” as treaties, regardless of their status as self-executing or non-self-executing.<sup>430</sup> This argument would even accord with the Senate Foreign Relations Committee’s recently enunciated understanding that “all treaties—whether self-executing or not—are the supreme law of the land.”<sup>431</sup> However, the Fifth Circuit explicitly disclaimed any reading of its opinion as utilizing the Supremacy Clause.<sup>432</sup>

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426. See *supra* note 149 and accompanying text (explaining that the Supremacy Clause says that “the Laws of the United States . . . and all Treaties made . . . shall be the supreme Law of the Land”).

427. See *supra* notes 156–160 and accompanying text (recounting how the Framers kept their experiences with Britain and early Americans in mind while crafting the Supremacy Clause, seeking to avoid the problems that arise when federal and state governments defy treaties).

428. See *supra* notes 161–163 and accompanying text (stating that the Supremacy Clause was drafted with the idea that the state and the federal governments’ abilities to breach treaty obligations would be limited).

429. See *Breard v. Greene*, 523 U.S. 371, 376 (1998) (“We have held that an Act of Congress is on a full parity with a treaty . . .”); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“By the Constitution a treaty is placed on the same footing . . . with an act of legislation. Both are declared by that instrument to be the supreme law of the land.”).

430. See *supra* notes 426–28 and accompanying text (describing how the text of the Supremacy Clause and the Framers’ intent in enacting it do not indicate that there was any attempt to distinguish between self-executing and non-self-executing treaties).

431. S. EXEC. REP. NO. 110–12, at 9–10 (2008).

432. See *supra* note 362 and accompanying text (noting that the majority expressly stated that its analysis was divorced from the law of the Supremacy Clause).

The majority relied instead on Congress's understanding that non-self-executing treaties would not be seen as different from self-executing treaties, as evidenced by the language of McCarran–Ferguson and the majority's inability to see a reason why Congress would want to distinguish between the two.<sup>433</sup> This reasoning overlooks the fact that this distinction, which leaves non-self-executing treaties without the force of domestic law, had been settled law for more than 100 years when McCarran–Ferguson was enacted.<sup>434</sup> As Judge Elrod observed, *Holland* did not change this fact,<sup>435</sup> but instead gave independent constitutional authority for treaty-implementing legislation, leaving that legislation as the sole source of domestic legal effect.<sup>436</sup> Additionally, the majority's assertion that it was "construing" the New York Convention was, as Judge Elrod pointed out, a misreading of the word "construe"<sup>437</sup> that would also have the bizarre effect of interpreting Congress's intent in enacting McCarran–Ferguson to allow reverse preemption of treaty-implementing legislation that copies the text of the treaty within the statute, but not of treaty-implementing legislation that only incorporates a treaty by reference.<sup>438</sup>

The Fifth Circuit's opinion is problematic both in its own right and in its contribution to the confusion related to this issue, resulting in a continuing trend of varied lower court decisions regarding this problem.<sup>439</sup> However, the Fifth Circuit need not have employed such reasoning to come to its conclusion. Part IV lays out a framework through which courts may effectively resolve the issue of whether the McCarran–Ferguson Act may reverse preempt the New York Convention under areas of the law that are well settled but which have not been utilized in analyzing this perplexing issue.<sup>440</sup>

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433. See *supra* Part III.B.2 (explaining the Fifth Circuit's rationale).

434. See *supra* Part II.C (describing the distinction between self-executing and non-self-executing treaties and tracing the lineage of this to the early nineteenth century).

435. See *supra* notes 400–03 (noting the dissent's point that *Holland* has no bearing on the status of non-self-executing treaties themselves).

436. See *supra* Part II.D (delineating the *Holland* decision, which deemed treaty-implementing legislation constitutionally sanctioned but did not suggest that non-self-executing treaties could have domestic legal effect).

437. See *supra* notes 407–11 and accompanying text (stating that the dissent termed the majority's use of the word "construe" as a "play on words").

438. See *supra* note 411 and accompanying text (recounting Judge Elrod's statement that "[n]one have suggested that the Convention Act's failure to cut-and-paste the language of the treaty into the statute somehow prevents the statute from being an 'Act of Congress,' capable of being 'construed'").

439. See *supra* notes 313–21 and accompanying text (describing the confusing and contradictory opinions that continue to come out of the lower courts).

440. See *infra* Part IV (providing the analysis courts should use in deciding this issue).

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#### IV. SOLUTION

This Part provides the analysis a court should use when it encounters a conflict regarding whether the McCarran–Ferguson Act can reverse preempt the New York Convention in favor of a state law prohibiting the enforcement of arbitration agreements in insurance contracts. The appropriate framework specifies that the court should first determine whether the conditions for McCarran–Ferguson reverse preemption are present.<sup>441</sup> Next, it should establish whether the New York Convention is non-self-executing.<sup>442</sup> The court should then proceed to analyze the issue under Supremacy Clause jurisprudence.<sup>443</sup> Ultimately, the court would be obligated to conclude that the McCarran–Ferguson Act cannot reverse preempt the New York Convention under the Treaty power and the Foreign Commerce Clause.<sup>444</sup>

The court should begin by deciding whether the three prerequisites for McCarran–Ferguson reverse preemption are met.<sup>445</sup> The New York Convention Act must be considered a federal statute of general applicability—in other words, a statute that does not specifically regulate the business of insurance.<sup>446</sup> The court would conclude that the New York Convention Act is unquestionably such a statute, as it applies broadly to all international arbitration agreements.<sup>447</sup> Second, the state law must have been intended to regulate “the business of insurance.”<sup>448</sup> Based on U.S.

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441. See *infra* notes 445–52 and accompanying text (laying out the analysis to follow in deciding whether McCarran–Ferguson reverse preemption may take place).

442. See *infra* notes 453–57 and accompanying text (describing the framework for determining whether the New York Convention is a self-executing treaty).

443. See *infra* notes 458–60 and accompanying text (providing an argument for preemption by the New York Convention under the Supremacy Clause).

444. See *infra* notes 461–73 and accompanying text (explaining why the treaty power and Foreign Commerce Clause dictate the conclusion that the McCarran–Ferguson Act is unable to reverse preempt the New York Convention).

445. See *supra* note 96 and accompanying text (stating that there are three conditions that must be satisfied before McCarran–Ferguson reverse preemption may take place).

446. See *supra* note 97 and accompanying text (explaining that the first prerequisite to McCarran–Ferguson reverse preemption is the existence of a federal statute of general applicability).

447. See 9 U.S.C. § 202 (2010) (“An arbitration agreement or arbitral award arising out of a legal relationship . . . falls under the Convention.”).

448. See *supra* note 98 and accompanying text (explaining that the second prerequisite to McCarran–Ferguson reverse preemption is the existence of a state law enacted in order to regulate “the business of insurance”).

Supreme Court jurisprudence,<sup>449</sup> the court must rule that such a state law does regulate “the business of insurance” because the law affects only those involved in the insurance industry,<sup>450</sup> arbitration agreements are an important aspect of the insurance policy relationship,<sup>451</sup> and the state law is certainly intended to govern the “business of insurance.”<sup>452</sup>

Having determined that the McCarran–Ferguson Act’s reverse preemption prerequisites are met, the court should then determine whether it is legally sound for the McCarran–Ferguson Act to reverse preempt the New York Convention. The court will be faced with the question of whether the New York Convention is an “Act of Congress,” which requires a determination as to whether the New York Convention is self-executing or non-self-executing, because if the New York Convention is self-executing, it has domestic legal effect of its own and cannot be an “Act of Congress.”<sup>453</sup> Despite the New York Convention’s mandatory language,<sup>454</sup> the court would be obligated to deem the New York Convention non-self-executing because the explicit intent and understanding of the Executive Branch and the Senate that ratified the treaty was that the New York Convention is non-self-executing,<sup>455</sup> and the U.S. Supreme Court has repeatedly regarded that to be the definitive indicator of whether a treaty is self-executing or not.<sup>456</sup> Furthermore, the U.S. Supreme Court has indicated in dictum its own understanding that the New York Convention is non-self-executing.<sup>457</sup>

The court could then advance the argument that despite the New York Convention’s non-self-executing status, the Convention is still a treaty under

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449. *See supra* notes 96–110 (delineating the U.S. Supreme Court’s tests for determining what statutes regulate “the business of insurance”).

450. *See supra* note 112 and accompanying text (explaining that statutes declaring international arbitration agreements in insurance contracts unenforceable affects only entities in the insurance industry).

451. *See supra* note 113 and accompanying text (explaining that arbitration agreements are a fundamental part of the insurance policy relationship).

452. *See supra* note 117 and accompanying text (describing the U.S. Supreme Court’s more expansive test for statutes that regulate the “business of insurance”).

453. *See supra* note 154 and accompanying text (stating that self-executing treaties have automatic domestic legal force).

454. *See supra* note 215 and accompanying text (explaining that the New York Convention’s language is mandatory).

455. *See supra* notes 217–218 and accompanying text (explaining how President Johnson and the 1968 Senate understood the New York Convention to be non-self-executing and intended it to be so).

456. *See supra* notes 216, 219–220 (describing the U.S. Supreme Court opinions that have deemed the intent of the Executive Branch and the Senate to be the determinative indicator of whether a treaty is self-executing or not).

457. *See supra* note 221 and accompanying text (recounting that the U.S. Supreme Court observed in dictum that the New York Convention is non-self-executing).

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the Supremacy Clause and is therefore not an “Act of Congress.” Under this analysis, the court would reason that, based on the text of the Constitution and the intent of the Framers in drafting the Supremacy Clause, even non-self-executing treaties are preemptive as treaties, not as federal law.<sup>458</sup> However, some courts would be reticent to advance such a proposition, as Judge Elrod was in *Safety National*,<sup>459</sup> because the U.S. Supreme Court has provided no basis for the idea that an implemented, non-self-executing treaty ever operates as anything other than the federal law that implements it—and has no reason to in any other context.<sup>460</sup> Regardless, the court need not entertain that argument at all, since by virtue of the Treaty power and the Foreign Commerce Clause, McCarran–Ferguson cannot reverse preempt the New York Convention anyhow.

Under its Treaty power, Congress has constitutionally delegated authority to pass legislation implementing non-self-executing treaties without regard to whether it would have the power to enact the same legislation in the absence of such a treaty.<sup>461</sup> The Treaty power thus constitutes an independent source of authority under which Congress implemented the New York Convention through the New York Convention Act.<sup>462</sup> Because the U.S. Supreme Court has also ruled that the McCarran–Ferguson Act only lifts Commerce Clause restrictions on the states’ ability to regulate the insurance industry,<sup>463</sup> the McCarran–Ferguson Act cannot reverse preempt legislation that was implemented under Congress’s Treaty

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458. *See supra* notes 426–28 and accompanying text (noting that a historical and textual reading of the Supremacy Clause indicates that implemented, non-self-executing treaties are preemptive as treaties rather than federal law).

459. *See supra* notes 394, 404–06 and accompanying text (describing Judge Elrod’s contempt for the idea of creating new Supremacy Clause jurisprudence on the issue of the preemptive effect of implemented, non-self-executing treaties, where no case law previously existed).

460. *See supra* note 429 and accompanying text (stating that the U.S. Supreme Court has never had occasion to rule on the issue of whether a non-self-executing treaty is preemptive as a treaty or a federal law because in any other context it would not matter).

461. *See supra* note 294 and accompanying text (explaining the U.S. Supreme Court’s ruling that Congress’s Treaty power enables it to enact legislation that it would not have the constitutional authority to enact in the absence of a treaty).

462. *See supra* Part II.D (explaining that Congress’s treaty power represents an independent grant of power to Congress through which it implemented the New York Convention).

463. *See supra* note 215 and accompanying text (describing the U.S. Supreme Court’s ruling that the McCarran–Ferguson Act only represented Congress’s acquiescence to abrogation of its *Commerce Clause* power).

power.<sup>464</sup> Additionally, the U.S. Supreme Court has held that McCarran–Ferguson only reverses the Court’s *SEUA* decision.<sup>465</sup> *SEUA* came after the U.S. Supreme Court established the Treaty power, so Congress could not have intended for McCarran–Ferguson to abrogate its Treaty power because the states could not have done so before *SEUA*.<sup>466</sup> The court must therefore hold that McCarran–Ferguson cannot reverse preempt the New York Convention.

There is an additional reason why a court hearing this issue would be compelled to hold McCarran–Ferguson incapable of reverse preempting the New York Convention. While the U.S. Supreme Court has upheld Congress’s acquiescence to state regulation of the insurance industry under the McCarran–Ferguson Act as a constitutional exercise of Congress’s *Interstate Commerce Clause* power,<sup>467</sup> the Court has never upheld Congress’s acquiescence to state regulation of any matter as a constitutional exercise of Congress’s *Foreign Commerce Power*.<sup>468</sup> The U.S. Supreme Court’s decision that Congress could assent to state regulation of interstate commerce was premised primarily on the interests of accommodating federalism and deferring to Congress’s prerogative to control interstate commerce as it sees fit.<sup>469</sup> Additionally, U.S. Supreme Court jurisprudence regarding the *Foreign Commerce Clause*, in contrast, has established that the underlying reason for the *Foreign Commerce Clause* is ensuring national uniformity.<sup>470</sup> The U.S. Supreme Court has also ruled that the Constitution’s grant of *Admiralty power* to Congress is justified by a need for national

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464. See *supra* text accompanying note 297 (reasoning that the McCarran–Ferguson Act does not reverse preempt legislation that was implemented under the Treaty power).

465. See *supra* note 297 and accompanying text (explaining that McCarran–Ferguson reverses *SEUA*).

466. See *supra* note 299 and accompanying text (explaining that McCarran–Ferguson merely reversed *SEUA* and that because the states could not have abrogated Congress’s Treaty power pre-*SEUA*, the states could not do so after McCarran–Ferguson either).

467. See *supra* notes 80–82 and accompanying text (describing the U.S. Supreme Court’s decision to uphold Congress’s assent to state regulation of the insurance industry under McCarran–Ferguson as a constitutional exercise of its *Interstate Commerce Clause* power).

468. See *supra* Part II.E (describing the U.S. Supreme Court’s entire line of *Foreign Commerce Clause* cases, none of which examined an attempt by Congress to assent to state regulation of foreign commerce).

469. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423–24, 430–31 (1946) (describing the U.S. Supreme Court’s decision upholding Congress’s acquiescence to state regulation of interstate commerce, and explaining that it was based on interests in federalism and deference to Congress’s judgment regarding interstate commerce).

470. See *supra* note 279 and accompanying text (describing the U.S. Supreme Court’s statement that the rationale for the Constitution’s grant of *Foreign Commerce power* to Congress is national uniformity).

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uniformity,<sup>471</sup> and that Congress is unable to acquiesce to state regulation of matters falling under Congress's Admiralty power because granting that power to the states would eradicate the national harmony of law that Congress is meant to maintain.<sup>472</sup> Because the Admiralty power and the Foreign Commerce Clause share the same rationale, national uniformity, U.S. Supreme Court precedent militates the conclusion that Congress may not constitutionally abrogate its Foreign Commerce Clause power by acquiescing to state regulation of foreign commerce anymore than it can abrogate its Admiralty Power—that is, not at all. Under the U.S. Supreme Court's Foreign Commerce Clause framework, the enforcement of arbitration agreements in international commercial transactions under the New York Convention is completely and unquestionably within the purview of Congress's power under the Foreign Commerce Clause.<sup>473</sup> Hence, the court must hold that under the Foreign Commerce Clause, Congress may not assent to state regulation of international arbitration agreements in insurance contracts.

A court charged with resolving the issue of whether the McCarran–Ferguson Act may reverse preempt the New York Convention in favor of state legislation prohibiting the enforcement of arbitration agreements in international insurance contracts must rule in favor of the New York Convention. The Treaty power and the Foreign Commerce Clause necessarily prohibit any other result.<sup>474</sup> This outcome also accords with canons of interpretation that direct courts to resolve ambiguities in statutory interpretation in favor of compliance with international law,<sup>475</sup> as well as the

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471. See *supra* notes 273–74 and accompanying text (describing the U.S. Supreme Court's decision that the need for national uniformity is the sole rationale underlying Congress's Admiralty power).

472. See *supra* notes 274–77 and accompanying text (recounting the U.S. Supreme Court's ruling that Congress may not assent to state regulation of issues falling under the Admiralty power and the justifications for that ruling).

473. See *supra* notes 297–81 and accompanying text (describing the U.S. Supreme Court's Foreign Commerce Clause jurisprudence and explaining why the enforcement of international arbitration agreements implicates the Foreign Commerce Clause to the highest degree).

474. See *supra* notes 461–73 and accompanying text (describing how the Treaty power and the Foreign Commerce Clause prohibit the McCarran–Ferguson Act from reverse preempting the New York Convention).

475. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 117 (1804) (“It has . . . been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

U.S. Supreme Court's enunciated federal policy favoring arbitration in international agreements.<sup>476</sup>

## V. CONCLUSION

Parties seeking to enforce arbitration agreements are attempting to exercise their bargained-for rights. In many cases, these parties have given up value and bargaining power in order to be entitled to the benefits of neutrality, autonomy, and control. Moreover, these parties have relied on the benefit of having their disputes resolved outside of potentially hostile, foreign courts. When courts deem the McCarran-Ferguson Act to reverse preempt the New York Convention in favor of arbitration-averse state legislation, those courts are not only denying a party its entitlements, but are also contravening well-settled law. In cases where the McCarran-Ferguson Act and the New York Convention clash, the Foreign Commerce Clause and the Treaty power stand for the proposition that Congress *cannot* and *has not* assented to state legislation that prohibits the enforcement of arbitration clauses in international insurance agreements. Courts should not only rule in favor of enforcing arbitration agreements under these circumstances, but they should abide by the settled principles that the Foreign Commerce Clause and the Treaty power establish, so that consistent, just results become the norm when this issue arises.

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<sup>476</sup> See *supra* Part II.F (describing the U.S. Supreme Court's articulation of a federal policy favoring arbitration in international agreements).