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Disputing Arbitration Clauses in International Insurance Agreements: Problems with the Self-Execution Framework

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DISPUTING ARBITRATION CLAUSES IN INTERNATIONAL INSURANCE AGREEMENTS: PROBLEMS WITH THE SELF-EXECUTION FRAMEWORK

Michael J. Ritter*

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* Briefing Attorney for Judge Michael Keasler on the Court of Criminal Appeals of Texas.

I. INTRODUCTION

The Federal Arbitration Act[1] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] guarantee the enforceability of domestic and international arbitration agreements.[3] As federal law, these guarantees presumably preempt any attempt by a state to prohibit arbitration agreements in insurance contracts.[4] However, Congress complicated preemption questions involving the state regulation of insurance by enacting the McCarran-Ferguson Act,[5] which shelters states' regulatory schemes from implied preemption by "Acts of Congress."[6] Although courts generally agree that McCarran-Ferguson shields state prohibitions of arbitration agreements in insurance contracts from preemption by the Federal Arbitration Act's guarantee of enforcement of domestic arbitration agreements, they disagree as to whether McCarran-Ferguson similarly protects state law from the New York Convention's guarantee of the enforceability of international arbitration agreements.

This Article argues that the self-execution framework that courts have adopted—and scholars have endorsed—in addressing whether McCarran-Ferguson enables states to reverse preempt the New York Convention is inadequate.[7] First, the

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[1] 9 U.S.C. §§ 1–16 (2006).

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

[3] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (holding that the Federal Arbitration Act provides a substantive rule that arbitration agreements are generally valid); *see also* 9 U.S.C. § 201 (2006) (applying this guarantee to agreements arising under the New York Convention).

[4] *See* U.S. CONST. art. VI, cl. 2 (providing that federal law is the supreme law of the land).

[5] 15 U.S.C. §§ 1011–1015 (2006).

[6] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 428 (2003). For a more in depth discussion of McCarran–Ferguson, *see infra* Part II and II.B.

[7] *See, e.g.*, Mariana Isabel Hernández-Gutiérrez, *The Remaining Hostility Towards Arbitration Shielded by the McCarran–Ferguson Act: How Far Should the Protection to Policyholders Go?*, 1 U. PUERTO RICO BUS. L.J. 35, 60-

Article addresses the interpretive question: what is an "Act of Congress" under McCarran-Ferguson? By examining whether a treaty is self or non-self-executing, courts discard proper methods of statutory interpretation. Second, the Article argues that courts have failed to satisfactorily transpose the self-execution doctrine—which has been relevant only in determining whether a treaty confers a legally enforceable right in the U.S.—into the context of the conflict between McCarran-Ferguson and the New York Convention. Finally, the Article argues that the treaty's self-executing or non-self-executing status is irrelevant because enforcing an international arbitration agreement under the New York Convention implicates Chapter 2 of the Federal Arbitration Act—which implemented the Convention—and McCarran-Ferguson permits a state law to reverse preempt an Act of Congress. Since the self-execution approach fails to answer the interpretive problem posed by McCarran-Ferguson, practitioners and courts should adopt an alternative approach that is more consistent with proper methods of statutory interpretation.

Part II of this Article sets up the framework in which the previously mentioned legal question arises. It reviews federal law governing the enforceability of arbitration agreements, including the Federal Arbitration Act, the New York Convention, and McCarran-Ferguson's reverse preemption scheme as it relates to federal arbitration law. Part III introduces the disagreement between federal courts as to whether McCarran-Ferguson permits states to reverse preempt the implementa-

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61 (2010); Timothy B. Parlin, *Arbitration Clauses in International Insurance Contracts Trump State Law Restrictions*, 199 N.J.L.J. 578, 578 (2010) (both endorsing the self-executing framework). "Reverse preemption" or "inverse preemption" means that a state law is not "invalidate[d], impair[ed], or supersede[d]," by a federal law. *See* Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 CONN. INS. L.J. 253, 272 n.72 (2005) (using both terms to refer to the effect of Section 2(b) of McCarran–Ferguson); 15 U.S.C. § 1012(b) (2006) (stating: "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."). These terms are somewhat misleading because for a state law to "inverse preempt" or "reverse preempt" a federal law under McCarran–Ferguson, the two laws do not need to conflict. *See infra* Part II.B (explaining that that McCarran–Ferguson is primarily a rule of construction).

tion of the New York Convention to the extent that it may be applied to the business of insurance. Part IV argues that the methodology of resolving this disagreement—which currently centers on whether or not the New York Convention is a self-executing treaty—inadequately addresses Congress's purpose in enacting McCarran-Ferguson. It further contends that regardless of the self-executing or non-self-executing status of the New York Convention, McCarran-Ferguson protects state law from preemption by the substantive guarantees of the New York Convention because an Act of Congress, Chapter 2 of the Federal Arbitration Act, provides the sole mechanism for the enforcement and recognition of international arbitration agreements under the Convention. Part V briefly concludes this Article.

II. THE INTERPRETIVE QUESTION OF MCCARRAN-FERGUSON: IS THE NEW YORK CONVENTION AN "ACT OF CONGRESS"?

McCarran-Ferguson provides that "[n]o 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 . . . unless such Act specifically relates to the business of insurance."[8] Although there is little doubt that legislation passed by Congress usually constitutes an "Act of Congress," courts have disagreed about whether a treaty that has been implemented by domestic legislation is also an "Act of Congress."

A. Law Governing Arbitration Agreements in the United States

Many states were initially hostile to agreements to submit private disputes to arbitration.[9] State courts were hostile be-

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[8] McCarran-Ferguson Act, ch. 20, 59 Stat. 33, § 2(b) (1945) (codified as amended at 15 U.S.C. § 1012(b) (2009)).

[9] Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 593 (2008); LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW 433 (3d ed. 1972).

cause they were disfavored at common law.[10] When judges were paid per case they handled, they had financial incentives to expand, rather than minimize, their jurisdiction and increase the number of cases on their dockets.[11] This hostility toward arbitration continued at common law in the United States because judges continued to be skeptical of arbitration agreements that "ousted courts of their jurisdiction" to hear disputes.[12] The opposition also stemmed from concerns "that arbitrators were ill-equipped 'to administer justice'"[13] and that arbitrators' decisions were unreviewable.[14]

1. The Federal Arbitration Act

In 1925, Congress ended most states' hostility toward arbitration by enacting the Federal Arbitration Act, which provided for the general validity of arbitration agreements.[15] Under section 2 of Chapter 1, an arbitration agreement is valid if two conditions are met.[16] First, the arbitration agreement must be included in a written contract involving interstate commerce or implicating maritime law.[17] Second, the arbitration clause must not be revocable for reasons that exist at law or equity.[18] Such grounds for revocation include subject-neutral[19] contractual defenses that demonstrate the invalidity of a contract at

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[10] Patrick M. Birney, *Reawakening Section 1334: Resolving the Conflict Between Bankruptcy and Arbitration Through Abstention Analysis*, 16 AM. BANKR. INST. L. REV. 619, 626–27 (2008).

[11] ALAN SCOTT RAU ET AL., ARBITRATION 64 (3d ed. 2006) (explaining: "[s]omewhat more cynically, one might also suppose that it originated in considerations of competition for business, at a time when judge's salaries still depended on fees paid by litigants.").

[12] FULLER & EISENBERG, *supra* note 9, at 432–34.

[13] Donald E. Johnson, *Has* Allied-Bruce Teminix Cos. v. Dobsons *Exterminated Alabama's Anti-Arbitration Rule?*, 47 ALA. L. REV. 577, 580 (1996).

[14] *See* Rogers v. Dep't of Def. Dependents Sch., 814 F.2d 1549, 1553–54 (Fed. Cir. 1987) (explaining that arbitrators' decisions are "virtually unreviewable on appeal").

[15] 9 U.S.C. § 2 (2006).

[16] *See* Southland Corp. v. Keating, 465 U.S. 1, 10–11 (1984).

[17] *Id.* at 11.

[18] *Id.*

[19] *See id.* at 16 (explaining that "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements").

the outset the agreement[20] such as mutual mistake, fraud, duress,[21] and unconscionability.[22]

By enacting the Federal Arbitration Act, Congress established a federal policy favoring the enforcement of arbitration agreements.[23] This policy was supported by the oft-cited benefits of arbitration. Arbitration can be a quicker and cheaper alternative to litigation because it reduces courts' case loads.[24] It can also encourage parties to settle their disputes more cooperatively by removing the dispute to a relatively informal, confidential setting.[25] Arbitration can even provide parties with increased flexibility by permitting them to choose arbitrators who have "expert knowledge of the subject matter in dispute."[26]

At the time Congress enacted the Federal Arbitration Act, it was generally understood that the Act established procedures by which federal courts would enforce arbitration agreements.[27] In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*,[28] however, the Supreme Court held that Section 2 created a federal substantive right[29] rooted in Congress's power under the Commerce Clause.[30] Section 2 thereby preempted most state laws that prohibited the enforcement of such agreements by guaranteeing the substantive right in state courts.[31] The Court in *Moses H. Cone Memorial Hospital* effec-

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[20] *See* County of Middlesex v. Gevyn Constr. Corp., 450 F.2d 53, 56 (1971).

[21] *Id.*

[22] Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFFALO L. REV. 185, 189–220 (2004).

[23] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

[24] RAU ET AL., *supra* note 11, at 4.

[25] *Id.* at 5.

[26] *Id.*

[27] *See* Southland Corp. v. Keating, 465 U.S. 1, 25–29 (1984) (O'Connor, J., dissenting).

[28] *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25.

[29] *See id.*

[30] *See id.*

[31] *See Southland*, 465 U.S. at 10, 16.

tively ended any residual state hostility toward arbitration.[32]

2. The New York Convention

In 1958, forty-five countries convened in New York to negotiate and draft a treaty to promote the international enforcement and recognition of international arbitration agreements and foreign arbitral awards.[33] The conference was called in response to the increasing popularity and success of international arbitration.[34] Although the United States was present at the conference, its role in the drafting and negotiating the treaty was limited.[35] The United States hesitated to involve itself in the negotiations due to its concerns that an arbitration treaty would conflict with domestic law.[36] At the close of the conference, the United States withheld its signature from the Convention.[37]

Over the next decade, the United States began to acknowledge the benefits of joining the New York Convention.[38] In 1968, Under Secretary Nicholas deBelleville Katzenbach sent to President Lyndon B. Johnson a Letter of Transmittal recommending the President's submission of the New York Convention to Congress for its advice and consent.[39] Under Secretary Katzenbach urged President Johnson to recommend that Congress pass domestic legislation to conform U.S. law to the Convention's requirements.[40] Taking his advice, President

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[32] *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510–11 (1974).

[33] Letter from Nicholas deBelleville Katzenbach, Under Sec'y, to Lyndon B. Johnson, President (Apr. 13, 1968), *in* NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 5–7 (Am. Arbitration Ass'n ed., 1971) [hereinafter Katzenbach Letter].

[34] See *id.*

[35] James van R. Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *in* NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 25–26 (Am. Arbitration Ass'n ed., 1971).

[36] John P. McMahon, *Implementation of the UN Convention on Foreign Arbitral Awards in the U.S.*, *in* NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES 75, 77 (Am. Arbitration Ass'n ed., 1971).

[37] *Id.*

[38] Katzenbach Letter, *supra* note 33, at 5-6.

[39] *Id.*

[40] *Id.*

Johnson submitted the treaty to Congress for its advice and consent, insisting that Congress resolve any conflicts between the Federal Arbitration Act and the New York Convention.[41] Congress unanimously approved the Convention[42] and subsequently amended the Federal Arbitration Act to implement the New York Convention.[43]

The United States committed to recognizing and enforcing international arbitration agreements when it finally acceded to the New York Convention in 1970.[44] Article II of the New York Convention provides for the enforcement of international arbitration agreements.[45] It states, "Contracting State[s] 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 rise between them . . . concerning a subject matter capable of arbitration."[46] It clarifies that an "agreement in writing" includes an arbitration clause in a contract or a separate arbitration agreement that is either signed by the parties or is "contained in an exchange of letters or telegrams."[47] It further directs a court of a Contracting State to refer a matter to arbitration upon a party's showing of a written arbitration agreement unless the court finds the agreement to be "null and void, inoperative, or incapable of being performed."[48] Article V provides that the recognition and enforcement of an arbitral award may be refused if the award is made pursuant to an Article II "agreement [that] is not valid under the law to which the parties have subjected it or . . . under the

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[41] 114 CONG. REC. 10,488 (1968).

[42] 114 CONG. REC. 29,605 (1968).

[43] Act of July 31, 1970, Pub. L. 91-368, 84 Stat. 692 (1970).

[44] *See* Kevin T. Jacobs & Matthew G. Paulson, *The Convergence of Renewed Nationalization, Rising Commodities, and "Americanization" in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses*, 43 TEX. INT'L L.J. 359, 362 n.16 (2008) (explaining that the United States ratified the Convention in 1970).

[45] New York Convention, *supra* note 2, art. II.

[46] *Id.* art. II(1).

[47] *Id.* art II(2).

[48] *Id.* art. II(3).

law of the country in which the award was made."[49]

As per President Johnson's insistence, Congress added a second chapter to the Federal Arbitration Act to implement the Convention.[50] The first section of Chapter 2 provides that the "[New York] Convention shall be enforced in United States courts in accordance with this chapter."[51] The second section stipulates which agreements shall be deemed to fall under the Convention. In particular, it deems all arbitration agreements arising out of legal commercial relationships to "fall[] under the Convention" unless the agreement is entirely between U.S. citizens or businesses that are either incorporated or have their principal place of business in the United States and their legal relationship has no "reasonable relation with one or more foreign states."[52] The third section deems "[a]n action or proceeding falling under the Convention [to] arise under the laws and treaties of the United States" and provides U.S. district courts with original jurisdiction "over such an action or proceeding."[53]

Other sections provide broad rules for venue and removal of an action or proceeding falling under the Convention.[54] Chapter 2 also grants a district court that has jurisdiction under its provisions the power to compel arbitration and appoint arbitrators in accordance with an agreement.[55] It requires a district court to confirm an arbitration award that a party seeks to confirm unless the party seeks the confirmation more than three years after winning the award or if the recognition or enforcement of the award may be refused on grounds specified in the Convention.[56] Chapter 2's concluding section provides that Chapter 1 applies to arbitration agreements falling under the Convention to the extent that Chapter 1 does not conflict with Chapter 2 or the Convention.[57]

The United States has several foreign policy interests at stake in the consistent enforcement of international arbitration

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[49] *Id*. art. V.
[50] 9 U.S.C. § 208 (2006).
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *See generally* 9 U.S.C. §§ 204, 205 (2006).
[55] *Id.* at § 106.
[56] *Id.* § 207.
[57] *Id*. § 208.

agreements. First, refusals to enforce valid international arbitration agreements may undermine the United States's position as a "trusted trading partner in multilateral endeavors."[58] Second, consistent enforcement of agreements in U.S. courts, "even assuming that a contrary result would be forthcoming in a domestic context," ensures the predictable enforcement of international arbitration agreements.[59] Finally, because the Convention promotes reciprocity among signatories that enforce the Convention, failures to enforce international arbitration agreements might decrease domestic companies' access to foreign markets by encouraging "unseemly and mutually destructive jockeying . . . to secure tactical litigation advantages."[60] These foreign policy interests have led the Supreme Court of the United States to announce an especially strong policy favoring the validity of international agreements to arbitrate.[61]

B. Reverse Preemption Under McCarran-Ferguson

The states traditionally have regulated domestic insurance industries.[62] They initially regulated insurers to guarantee the solvency of these companies.[63] These initial regulations compelled insurance companies to demonstrate their financial ability to pay out insurance claims to policyholders[64] and to show the long-term sustainability of their plans to cover insured risks.[65] Over time, states developed a complex system of regulations that controlled additional aspects of the sale of insur-

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[58] *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995).

[59] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985).

[60] *See* Scherk v. Alerbto-Culver Co., 417 U.S. 506, 516–17 (1974).

[61] *Id.*

[62] Ann Hilton Fisher, *Small Employers and the Health Insurance Needs of Employees with High Health Care Costs: A Need for Better Models*, 8 EMP. RTS. & EMPL. POL'Y J. 53, 63 (2004).

[63] *Id.*

[64] *Id.*

[65] *Id.*

ance such as rate setting,[66] licensing of insurance brokers,[67] commercial advertising,[68] and impermissible discrimination.[69]

The evolving intricacy of state regulation of insurance resulted from insurance's status as not "commerce" regulable by Congress—even when out-of-state providers sold insurance policies to citizens of another state.[70] In its 1869 decision, *Paul v. Virginia*, the Supreme Court of the United States held that insurance was not interstate commerce.[71] In *Paul*, Samuel Paul, an agent of several New York insurance companies, was convicted in Virginia of selling fire insurance without a license.[72] The Court affirmed Paul's conviction on appeal,[73] rejecting his argument that the application of Virginia's licensing requirement to an out-of-state insurance company substantially interfered with interstate commerce.[74] It reasoned that the sale of an insurance policy is a local contractual transaction governed by state law rather than a transaction involving articles or subjects of interstate trade or commerce.[75]

Seventy-five years later, the Court overruled *Paul* in

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[66] *See generally* Charles W. Havens III & Rita M. Theisen, *The Application of United States and EEC Antitrust Laws to Reinsurance and Insurance Pooling Agreements*, 54 ANTITRUST L.J. 1299 (1985) (discussing a particular state regulation of rate setting in the context of McCarran-Ferguson).

[67] *See* Raymond A. Guenter, *Rediscovering the McCarran-Ferguson Act's Commerce Clause Limitation*, 6 CONN. INS. L.J. 253, 282 (2000) ("The core elements of early state insurance regulation were the licensing of the insurance companies, insurance agents and brokers . . . .").

[68] *See generally* Fed. Trade Comm'n v. Nat'l Cas. Co., 357 U.S. 560 (1958).

[69] William Goddard, *Swimming in the Wake of* Dehoyos*: When Federal Courts Sail into Disparate Impact Waters, Will State Regulation of Insurance Remain Above the Waves?*, 10 CONN. INS. L.J. 369, 371 (2004).

[70] *See* Paul v. Virginia, 75 U.S. 168, 177, 183-85 (1868), *overruled in part by* United States v. S.-E. Underwriters Ass'n, 322 U.S. 533 (1944), *as recognized in* Humana Inc. v. Forsyth, 525 U.S. 299 (1999); *see also* U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 499 (1993) (explaining that prior to *South-Eastern*, the states' domain over insurance regulation was "virtually exclusive").

[71] *Paul*, 75 U.S. at 183.

[72] Gene Matthew Eckel, *The New Standard Applicable to State Taxation of a Nonresident — An Analysis of the Supreme Court's Treatment of the Privileges and Immunities Clause in* Lunding v. New York Tax Appeals Tribunal, 32 CREIGHTON L. REV. 1311, 1319 (1999).

[73] *Id.*

[74] *See Paul*, 75 U.S. at 182–83.

[75] *Id.* at 183.

South-Eastern Underwriters Association v. United States, holding for the first time that Congress had the power to regulate insurance pursuant to the Commerce Clause.[76] In *South-Eastern*, South-Eastern Underwriters Association ("SEUA") was indicted for conspiring with other insurance companies to restrain interstate trade in violation of the Sherman Act.[77] SEUA relied on *Paul* to challenge the application of the Sherman Act to the sale of insurance as an unconstitutional exercise of federal power.[78] The Court rejected SEUA's contention,[79] relying on its Commerce Clause jurisprudence that had broadened the understanding of "commerce" following the New Deal.[80]

The potential implications of *South-Eastern* provoked concern among the states about the constitutional validity of their entire insurance regulation schemes.[81] The decision effectively applied all federal commerce legislation to insurance companies and thereby jeopardized any conflicting state insurance regulation.[82] Moreover, states were concerned that even if future legislation adopted by Congress was not intended to apply specifically to insurance industries, the legislation would preempt conflicting state regulation.[83] They also feared that any state regulation that substantially burdened the interstate sale of insurance was constitutionally suspect under the

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[76] United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 553 (1944), *superseded by statute*, McCarran-Ferguson Act, Pub. L. No. 79-15, ch. 20, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011–1015 (2006)), *as recognized in* Barnett Bank, N.A. v. Nelson, 517 U.S. 25 (1996).

[77] *See S.-E Underwriters Ass'n.*, 322 U.S. at 534.

[78] *See id.* at 545.

[79] *See id.*

[80] *See id.* at 545–53.

[81] *Id.*

[82] *See* Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 40 (1996).

[83] *See* U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 499–500 (1993) (explaining that states feared the threat that *South-Eastern* posed to their virtually exclusive regulation of insurance and that Congress responded by providing that federal legislation would not, by mere implication, preempt state law).

Dormant Commerce Clause doctrine.[84]

To quell states' concerns,[85] Congress swiftly passed a bill that limited *South-Eastern*'s effect on state law.[86] The bill, introduced by Senators Patrick McCarran and Homer Ferguson,[87] sparked debate that centered on the *South-Eastern* decision.[88] The legislation, known as the McCarran-Ferguson Act, expressly declared Congress's position "that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[89] To achieve this goal, section 2(b) further provided that state laws enacted to regulate the business of insurance reverse preempt federal laws that did not specifically relate to the business of insurance.[90] Section 2(b), however, expressly excluded the National Labor Relations Act, the Fair Labor Standards Act, and the Merchant Marine Act from federal laws that may be reverse preempted.[91]

The language of section 2(b) demonstrates that McCarran-Ferguson is primarily a rule of construction that federal and state courts must follow.[92] If a party shows the three constitutive elements of section 2(b), then that federal law "shall not be

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[84] *Cf.* Dep't of Revenue of Ky. v. Davis, 128 S. Ct. 1801, 1808–10 (2008) (articulating that courts applying the dormant Commerce Clause doctrine will not uphold state laws that unduly burden interstate commerce); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, 10 (1928) (applying the dormant Commerce Clause principle prior to *South-Eastern*).

[85] *See* FTC v. Travelers Health Ass'n, 362 U.S. 293, 299 (1960).

[86] *See Fabe*, 508 U.S. at 500 (explaining how "Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation . . . [by] enact[ing] the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters*.").

[87] *See* St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 547 n.20 (1978).

[88] *See* 91 CONG. REC. 1,478 (1945) (quoting Senator Claude Pepper as introducing the bill as a response to the *South-Eastern* decision and arguing that the adoption of the bill would "emasculat[e] the . . . decision . . . .").

[89] McCarran Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified as 15 U.S.C. § 1011 (2009)).

[90] 15 U.S.C. § 1012(b).

[91] *Id.* § 1014.

[92] *Id.* § 1012(b) ("No Act of Congress *shall be construed* to invalidate, impair, or supersede any law of any state.") (emphasis added).

construed" to preempt state law.[93] First, the federal law must not specifically relate to the "business of insurance."[94] Second, the state law must have been "enacted for the purpose of regulating the business of insurance."[95] And third, the federal law must be an "Act of Congress."[96] Upon establishing these three elements, McCarran-Ferguson directs courts to reject a party's preemption defense.[97] If one or more of the three elements is not established, then the ordinary rules of preemption apply.[98]

Quite simply, a federal law "specifically relates to the business of insurance" when the word "insurance" appears in the text of the law.[99] The Supreme Court explained in *Barnett Bank, N.A. v. Nelson* that the ordinary rules of preemption applied to a federal bank statute because it referred to "insurance," thus failing to meet section 2(b)'s requirement that the federal law not specifically relate to insurance.[100] The Court emphasized the federal bank statute's explicit use of the word "insurance" when it permitted national banks to "act as the agent for any fire, life, or other insurance company," and to "solicit[] and sell[] insurance."[101] But determining whether a state law was "enacted for the purpose of regulating the business of insurance" is a factor-based inquiry.[102] The three relevant factors are whether the activity regulated by state law (1) transfers or spreads the insured risk; (2) is integral to the insurer–policyholder relationship; and (3) is specific to the insurance industry.[103] Although none of these factors is dispositive, the more that are present, [104] the more likely a court is to hold that

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[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 37-38 (1996).
[99] 15 U.S.C. § 1012(b) (2009).
[100] *Nelson*, 517 U.S. at 38–41.
[101] *Id.* at 39 (citation and internal quotes omitted).
[102] 15 U.S.C. § 1012(b).
[103] Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982) (citing Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979)).
[104] *See Pireno*, 458 U.S. at 129.

this second element of Section 2(b) has been met.[105]

C. Reverse Preemption of Chapter 1 of the Federal Arbitration Act

Despite the preemptive effect of the Federal Arbitration Act's substantive guarantee regarding the validity and enforceability of arbitration agreements, several states have relied upon McCarran-Ferguson's reverse preemption rule to continue regulating and even prohibit arbitration agreements in insurance contracts.[106] Consequently, states have not hesitated to continue regulating private parties' decisions to arbitrate insurance disputes.[107]

In response to the increasing prevalence of arbitration agreements in insurance contracts,[108] states enacted regulations that included outright bans on the agreements;[109] requirements on the wording, size, or location of the text of arbitration provisions in a contract;[110] and mandatory approval of

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[105] *See id.* (explaining that these three factors aid a court's determination of whether a state law was enacted for the purpose of regulating the business of insurance). Another aspect that may be relevant to this inquiry is whether the "state law" at hand is a state statute, administrative regulation, or common law rule. *See generally* Randall, *supra* note 7 (arguing that courts' decisional rules might not be state laws protected by McCarran–Ferguson because they were not "enacted").

[106] *See* Am. Bankers Ins. Co. of Florida v. Inman, 436 F.3d 490, 494 (5th Cir. 2006); Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277, 1279–81 (10th Cir. 1998); Allen v. Pacheco, 71 P.3d 375, 384 (Colo. 2003). After *South-Eastern*, the Federal Arbitration Act applied to insurance contracts by virtue of their status as "commerce." *Cf.* 9 U.S.C. § 2 (2006) (providing for the enforceability of arbitration clauses in contracts "evidencing a transaction involving commerce"); United States v. S.-E. Underwriters Ass'n, 322 U.S. 533, 553 (1944) (holding that insurance contracts are part of interstate commerce). Thus, the reverse preemption of the Federal Arbitration Act by state laws regulating domestic insurance contracts follows from both McCarran–Ferguson's historical context and legislative history.

[107] *See, e.g.*, ARK. CODE ANN. § 16-108-201(b)(1)–(2) (2009); CAL. HEALTH & SAFETY CODE § 1363.1 (West 2008); COLO. REV. STAT. § 13-64-403 (2009); GA. CODE ANN. § 9-9-2 (2010); KAN. STAT. ANN. § 5-401 (2008); KY. REV. STAT. ANN. § 417.050 (LexisNexis 2010); MO. REV. STAT. § 435.350 (2009); N.Y. INS. LAW § 7417 (Consol. 2011).

[108] Randall, *supra* note 7, at 253.

[109] *See, e.g.*, GA. CODE ANN. § 9-9-2 (2010) (excepting "[a]ny contract of insurance" from its general provision that arbitration agreements shall be enforced).

[110] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1363.1 (West 2008) (providing

the agreements by state officials.[111] These state laws generally aim to protect consumers and policyholders in insurance agreements, as evidenced by the mandates of these laws.[112] For example, California and Louisiana regulate arbitration clauses in contracts for health insurance for the purported purpose of protecting consumers by highlighting the presence and scope of arbitration agreements.[113]

Courts addressing whether McCarran-Ferguson permits these state laws to reverse preempt the Federal Arbitration Act's general guarantee of the enforceability of domestic arbitration agreements have answered the question in the affirmative.[114] For example, the U.S. Courts of Appeals for the Fifth and Tenth Circuit as well as the Supreme Court of Colorado have all addressed the issue of whether McCarran-Ferguson applies to the Federal Arbitration Act.[115] All have held that state laws regulating the business of insurance reverse preempt Chapter 1 of the Federal Arbitration pursuant to McCarran-Ferguson.[116]

III. WHETHER MCCARRAN-FERGUSON PERMITS STATE LAW TO REVERSE PREEMPT THE NEW YORK CONVENTION

In cases in which parties have relied upon the substantive guarantees of the New York Convention to uphold the validity of an arbitration agreement, courts have split on whether

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that any contract clause restricting the right to a jury trial in health care insurance plans must be "prominently displayed" in a "separate article" immediately before the signature line on an enrollment form).

[111] *See, e.g.*, WIS. STAT. §§ 631.20, 631.85 (2009) (requiring arbitration clauses to be approved by the state insurance commissioner).

[112] Johnson, *supra* note 13, at 582–83.

[113] CAL. HEALTH & SAFETY CODE § 1363.1 (2009); LA. REV. STAT. § 22:868 (2009).

[114] *See* Am. Bankers Ins. Co. v. Inman, 436 F.3d 490 (5th Cir. 2006); Davister Corp. v. United Republic Life Ins. Co., 152 F.3d 1277 (10th Cir. 1998); Allen v. Pacheco, 71 P.3d 375 (Colo. 2003).

[115] *Am. Bankers Ins. Co.*, 436 F.3d at 494; *Davister Corp.*, 152 F.3d at 1279–81; *Allen*, 71 P.3d at 384.

[116] *Am. Bankers Ins. Co.*, 436 F.3d at 494; *Davister Corp.*, 152 F.3d at 1279–81; *Allen*, 71 P.3d at 384.

McCarran-Ferguson permits state law to reverse preempt the New York Convention, as implemented through Chapter 2 of the Federal Arbitration Act.[117] Both the U.S. Courts of Appeals for the Second and Fifth Circuits have addressed this issue and reached contrary conclusions after considering whether the New York Convention is a self-executing or a non-self-executing treaty.[118]

Self-execution stands for the principle that a treaty has an independent force of law in U.S. courts and does not need to be implemented by domestic legislation.[119] In resolving the reverse preemption question, the self-execution framework begins by asking whether the New York Convention is a self-executing treaty that has the force of law in U.S. courts.[120] If so, then the Convention operates independently of Chapter 2 of the Federal Arbitration Act.[121] As such, the Convention would not rely on an "Act of Congress" and McCarran-Ferguson would not apply to the Convention. If it is a non-self-executing treaty, then the Convention has no preemptive effect of federal law[122] unless it relies on Chapter 2 of the Federal Arbitration Act, which made the Convention applicable in U.S. courts (i.e., executed the Convention).[123] The implication of this conclusion is that the Convention would necessarily rely on Chapter 2, which would presumably be an "Act of Congress" that "shall [not] be construed" to preempt a State law as per McCarran-Ferguson.

The Second Circuit, in *Stephens v. American International Insurance Company*, held that McCarran-Ferguson permits state law to reverse preempt the New York Convention as im-

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[117] *Am. Bankers Ins. Co.*, 436 F.3d at 494; *Davister Corp.*, 152 F.3d at 1279–81; *Allen*, 71 P.3d at 384.

[118] *Am. Bankers Ins. Co.* 436 F.3d at 494; *Davister Corp.*, 152 F.3d at 1279–81; *Allen*, 71 P.3d at 384.

[119] *See generally* Foster v. Neilson, 27 U.S. 253 (1829), *overruled in part by* United States v. Percheman, 32 U.S. 51 (1833).

[120] *Cf.* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995) (explaining that"[t]his argument fails because the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation").

[121] *Id.*

[122] *See Foster*, 27 U.S. at 314–17.

[123] *See generally* 9 U.S.C. § 1 (titled Enforcement of the Convention).

plemented through Chapter 2 of the Federal Arbitration Act.[124] The *Stephens* court concluded that a Kentucky law reverse preempted the New York Convention because the Convention was a non-self-executing treaty that required domestic legislation to have effect in U.S. courts.[125] In *Stephens*, a Kentucky reinsurance company sold insurance policies to several insurance companies, two of which were based in Britain.[126] After a Kentucky court found the Kentucky reinsurance company to be insolvent, the court appointed the Commissioner of Insurance to oversee the company's liquidation.[127] The Commissioner sought to recover insurance premiums from the two British companies, one of which moved to compel arbitration pursuant to the New York Convention and Chapter 2 of the Federal Arbitration Act.[128] The Commissioner argued that Kentucky law prohibited arbitration agreements and that McCarran-Ferguson saved this prohibition from preemption.[129]

The Second Circuit agreed with the Commissioner of Insurance, holding that "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation."[130] As the sole basis for its reasoning, the court quoted the Supreme Court's opinion in *Foster v. Neilson*:

> It is, consequently, to 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. But when the terms of the stipulation import a contract-when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.[131]

Thus, the Second Circuit concluded that the Commissioner

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[124] *See Stephens*, 66 F.3d at 45.
[125] *Id.*
[126] *Id.* at 42.
[127] *Id.*
[128] *See id.* at 42–43.
[129] *See id.* at 43–44.
[130] *Stephens*, 66 F.3d at 45.
[131] *Id.* at 45 (quoting *Foster v. Neilson*, 27 U.S. 253, 313-14 (1829)).

could not be compelled to arbitrate.[132]

Conversely, the Fifth Circuit, in *Safety National Casualty Corporation v. Certain Underwriters at Lloyd's, London*,[133] held that McCarran-Ferguson did not permit state law to reverse preempt the New York Convention and Chapter 2 of the Federal Arbitration Act.[134] In *Safety National*, a Louisiana insurance fund assigned its rights under an insurance contract with Certain Underwriters at Lloyd's, London to Safety National Casualty Insurance Corporation.[135] Despite Louisiana law prohibiting arbitration agreements in insurance contracts, the Louisiana insurance fund's insurance agreement contained an arbitration clause.[136] Safety National sued Underwriters in federal court and Underwriters moved to compel arbitration pursuant to the arbitration agreement.[137] Underwriters argued that McCarran-Ferguson permitted Louisiana's law to reverse preempt the New York Convention because Chapter 2 of the Federal Arbitration Act, which implemented the treaty, was an "Act of Congress."[138]

Although the majority in *Safety National* concluded that the self-executing nature of the Convention was "unclear,"[139] the concurring and dissenting opinions diverged based on a disagreement about the self-execution status of the New York Convention.[140] Judge Owen, writing for the majority, gave a four-fold rationale for the court's conclusion that the New York Convention preempted the Louisiana law even if it is a non-self-executing treaty.[141] The court's first rationale was that be-

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[132] *See id* at 46.

[133] *Cf.* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009) (en banc).

[134] See *id.* at 732; *see also* Kevin D. Oles, Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London*, 587 F.3d 714 (5th Cir. 2010)*, 25 OHIO ST. J. ON DISP. RESOL. 1095, 1107-08 (2010) (recognizing the conflict between *Safety National* and *Stephens*).

[135] *Safety Nat'l Cas. Corp.*, 587 F.3d at 746 (Elrod, J., dissenting).

[136] *See id.* at 746–47.

[137] *See id.* at 746.

[138] *Id.* at 748–49.

[139] *Id.* at 721–22 (en banc).

[140] *See id.* at 733 (Clement, J., concurring) ("[T]he plain text of Article II of the Convention compels a finding of self-execution."); *id.* at 737 (Elrod, J., dissenting).

[141] *Safety Nat'l Cas. Corp.*, 587 F.3d at 717-732.

cause Chapter 2 of the New York Convention did not modify or conflict with the New York Convention, Chapter 2 did not "replace or displace" the Convention as the operative source of law in U.S. courts.[142] The Convention was still a treaty that operated as "an international agreement or contract negotiated by the Executive Branch and ratified by the Senate, not Congress."[143]

The majority's second rationale was that it would make little sense for Congress to have intended the words "Act of Congress" in McCarran-Ferguson not to apply to self-executing treaties, but to apply to non-self-executing treaties that had been implemented through federal legislation.[144] Its third rationale was that the text of section 203 of Chapter 2 provides that "an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."[145] The court explained that this language demonstrated Congress's intent for the Convention to operate independent of implementing legislation.[146] The court's fourth justification was that because McCarran-Ferguson forbids judicial "construction" of a federal law to preempt certain state laws, a court would necessarily need to "construe" the provisions of the New York Convention rather than Chapter 2 of the Federal Arbitration Act.[147]

Judge Clement's concurrence concluded that the New York Convention preempted the Louisiana law because the Convention was self-executing.[148] Under the Supreme Court's test in *Medellín v. Texas*, a provision of a treaty is self-executing if the provision is directed to the courts of the United States and if the provision uses mandatory language—such as "shall" or "must"—in directing U.S. courts to take a certain ac-

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[142] *Id.* at 722–23.
[143] *Id.*
[144] *Id.* at 723.
[145] *Id.* (quoting 9 U.S.C. § 203 (2006)).
[146] *Id.* at 724.
[147] *Safety Nat'l Cas. Corp.*, 587 F.3d at 724.
[148] *Id.* at 733 (Clement, J., concurring).

tion.[149] Because the third paragraph of Article II of the Convention provides that "the Court" of Contracting States "shall" refer the parties to arbitration, Judge Clement would have held the provision to be self-executing.[150] Judge Clement would have upheld the arbitration provision because the self-executing nature of the treaty permitted the treaty to operate independent of any Act of Congress, which would be subject to reverse preemption under McCarran-Ferguson.[151]

In her dissenting opinion, Judge Elrod argued that McCarran-Ferguson saved the Louisiana law from preemption because the Convention was a non-self-executing treaty and therefore relied on Chapter 2 of the Federal Arbitration Act to have the force and effect of law in U.S. courts.[152] With regard to the issue of whether the New York Convention was an "Act of Congress" under McCarran–Ferguson, Judge Elrod first criticized the court's "failure to ask the right question at the outset."[153] After referring to the Second Circuit's decision in *Stephens*, she justified her conclusion that the treaty was non-self-executing because the treaty had been implemented through domestic legislation.[154] Judge Elrod criticized the majority's failure to provide any support for its proposition that a non-self-executing treaty could have any preemptive effect with regard to state law.[155] She also rebutted the majority's analysis that a court construing the substantive guarantees of the Convention must refer to and construe the textual provisions of the Convention itself.[156] She argued that this contradicted the principle that, once implemented, non-self-executing treaties only have the force of law via the implementing legislation.[157]

IV. PROBLEMS WITH THE SELF-EXECUTION FRAMEWORK

The self-execution doctrine fails to adequately answer the

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[149] *See id.*
[150] *See id.* at 734.
[151] *Id.* 732-737.
[152] *Id.* at 735 (Elrod, J., dissenting).
[153] *See Safety Nat'l Cas. Corp.*, 587 F.3d at 735 (Elrod, J., dissenting).
[154] *Id.* at 742–43.
[155] *Id.* at 740.
[156] *Id.* at 741–42.
[157] *See id.*

question of whether McCarran-Ferguson permits a state to reverse preempt the New York Convention because it ignores accepted methods of statutory interpretation, is irrelevant outside the context of establishing the existence of a legal right under a treaty, and fails to answer the particular legal question posed by the clash between McCarran-Ferguson and the New York Convention.

Because the majority, concurrence, and dissent in *Safety National* as well as the Second Circuit in *Stephens* approached the issue assuming some relevance of the self-execution question, none reached a conclusion in a satisfactory manner. Contrary to Judge Elrod's allegation that the *Safety National* majority asked the wrong question as to whether the Convention, as domestically implemented, was an "Act of Congress,"[158] this question was precisely the correct one. Asking whether the Convention is or is not self-executing, as did Judge Elrod's dissent and Judge Clement's concurrence, is the wrong question because it fails to consider adequately the purposes animating McCarran-Ferguson. It presupposes that Chapter 2 of the Federal Arbitration Act is an Act of Congress under McCarran-Ferguson and that the New York Convention is not. The right question—and the best way to understand the issue—is: what was Congress's purpose in enacting McCarran-Ferguson?

Although the *Safety National* majority was the closest to the mark by giving some credence to the purposes motivating McCarran-Ferguson, it merely paid lip service to Congressional intent. It pointed out that Judge Elrod's position would require the application of McCarran-Ferguson to a self-executing treaty, but not to non-self-executing treaties that are domestically implemented, which Congress was "unlikely" to have intended.[159] The majority reasoned that if this was Congress's intent, then it would have added the words "or any treaty requiring congressional implementation" after the words "Act of Congress."[160] The majority had thereby reframed the question as

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[158] *Id.* at 738.
[159] *Safety Nat'l Cas. Corp.*, 587 F.3d at 724.
[160] *Id.*

follows: if the United States signed a treaty recognizing individuals' private agreements to arbitrate disputes, how or why would Congress's subsequent passage of McCarran-Ferguson reflect Congress's intent that any future domestic codification of that guarantee in the Federal Arbitration Act give to the states the right to decide whether that guarantee was applicable in the business of insurance?[161]

But perhaps the passage of an Act of Congress to implement a treaty was irrelevant to the drafters of McCarran-Ferguson. So long as courts do not find an Act of Congress to preempt a state law specific to insurance, McCarran-Ferguson is satisfied. By enacting McCarran-Ferguson, Congress recognized that continued regulation of insurance by the several states was in the public interest.[162] It intended that no future Congressional action would, by mere implication, interfere with the states' ability to regulate insurance.[163] Congressional commerce legislation—with either purely domestic or both domestic and international implications—has the potential to interfere with the state regulation of insurance. Hence, a Congressional action that guarantees the domestic enforceability of a treaty and that may interfere with the state regulation of insurance poses the same risk that Congress sought to address in passing McCarran-Ferguson. As such, Congress arguably intended McCarran-Ferguson to apply to any federal law—treaty or statute—that potentially implicated the business of insurance.

Additionally, the self-execution doctrine has relevance only in determining whether a party is asserting a domestically enforceable right under a treaty. The self-execution doctrine had little, if anything, to do with reverse preemption under McCarran-Ferguson until the Second Circuit's decision in *Stephens*. Prior to *Stephens*, the self-execution doctrine had been used only to answer the particular legal question of whether a treaty confers upon an individual a right that is domestically enforceable in U.S. courts.[164] Thus, the *Stephens* court perhaps accepted a faulty premise: that the self-execution doctrine is rele-

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[161] *Id*. at 720.
[162] *See* 15 U.S.C. § 1012(a) (2006).
[163] *See id.* § 1012(a).
[164] *Safety Nat'l Cas Corp.*, 587 F.3d at 730.

vant once Congress has enacted legislation implementing a treaty.

The Supreme Court of the United States first developed the self-execution doctrine in its 1829 decision of *Foster v. Neilson*.[165] In *Foster*, the plaintiff asserted rights over land in Louisiana pursuant to a land grant that was recognized by a treaty between the United States and Spain.[166] The Court sided with the defendant, holding that the treaty between the United States and Spain was not self-executing.[167] It reasoned that although a treaty is equivalent to a legislative act under the Supremacy Clause, it has no domestic legal effect unless Congress "[ha]s carried [it] into execution."[168] The test for whether a treaty is self-executing, *Foster* counsels, is whether the terms of a treaty are contractual (i.e., general obligations of the parties to the treaty) rather than legal (i.e., obligations that are directed to the judicial branches of the parties to the treaty).[169] Given the context in which the Court first developed the concept of self-executing treaties, courts in the United States have continued to use the doctrine only when the parties dispute whether a treaty confers a right that is legally enforceable in U.S. courts.[170] *Foster* implicitly instructs that where a party asserts a right under a treaty, the question is first whether the obligation is one the United States has undertaken by ratifying

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[165] *See generally* Foster v. Neilsen, 27 U.S. 253 (1829).

[166] *See id.*

[167] *Id.*

[168] *See id.* at 314.

[169] *See id.*

[170] *See* Medellin v. Texas, 552 U.S. 491, 504-05 (2008) (explaining the self-execution doctrine as intended to answer the question of whether an international treaty creates binding domestic law absent of domestic implantation); *see, e.g.*, Omar v. McHugh, 646 F.3d 13, 17 (D.C. Cir. 2011) ("This multilateral treaty is non-self-executing and thus does not itself create any rights enforceable in U.S. courts."). However, determining that a treaty is self-executing is not dispositive of whether the law actually confers a domestically enforceable right. *See* Gross v. German Found. Indus. Initiative, 549 F.3d 605, 615 (3d Cir. 2008) ("By itself, the status of 'self-executing' does not answer the question of whether a document creates a private right of enforcement.").

or acceding to the treaty.[171] The Court implied that execution could occur in one of two ways: either the treaty has been carried into effect through domestic legislation or the treaty is carried into execution by its own terms.[172] Where the United States has passed domestic legislation to give the treaty legal effect in U.S. courts, then the party asserting the right under the treaty has a legally enforceable right in U.S. courts.[173] In such circumstances, it is unlikely that a party would argue that another party had no domestically enforceable legal rights under the treaty, as it has already been implemented through domestic legislation.

Only where Congress has not passed legislation carrying the treaty into execution is the self-execution, non-self-execution dichotomy relevant.[174] If the terms of a treaty reflect that the parties have bound their courts to follow the terms of the treaty, then the treaty is self-executing[175] and a party may assert a right under the treaty regardless of the absence of domestic legislation.[176] Alternatively phrased, if a treaty is self-executing, then the legal conclusion a court must reach is that the treaty confers on a party a domestically enforceable right despite the absence of domestic legislation conferring the right pursuant to the treaty.

Given the context in which the self-execution doctrine arose—and the way in which the doctrine has been applied by courts in the United States since *Foster*—reliance on the doctrine to address whether McCarran-Ferguson permits state law to reverse preempt the New York Convention is misplaced. The Court developed the self-execution doctrine as a way to answer the question of whether a treaty confers upon a party a right that is enforceable in U.S. courts.[177] Because Congress has passed legislation to carry the New York Convention into execution,[178] the question of whether a party has a right enforceable in U.S. courts has already been asked and answered.

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[171] *See generally* Foster v. Neilsen, 27 U.S. 253 (1829).
[172] *See id.*
[173] *See id.*
[174] *See id.*
[175] *See id.*
[176] *See id.*
[177] *See generally* Foster v. Neilsen, 27 U.S. 253 (1829).
[178] 9 U.S.C. §§ 201–208 (2006).

Because Congress has already carried the New York Convention into execution,[179] raising the issue of self-execution in the McCarran-Ferguson context is erroneous. Ignoring the question of *whether* a treaty confers upon a party a domestically enforceable right, the Fifth and Second Circuits have used the doctrine of self-execution to ask *how* a party is asserting the domestically enforceable right under the New York Convention. The mootness of this question is underscored by *Foster*'s explanation that the self-execution question only becomes relevant in the *absence* of domestic legislation.[180] Following *Foster*'s logic, a self-execution analysis of a treaty that has been domestically implemented is irrelevant.[181]

Rather, opinions from the Fifth and Second Circuits have taken the self-execution doctrine out of its element. According to *Foster*, if a treaty operates "without the aid of any legislative provision," then it is self-executing.[182] To hold that McCarran-Ferguson does or does not apply to the New York Convention because the latter is or is not self-executing requires a fallacious understanding of *Foster* by flipping the precedent and antecedent as follows: if a treaty is self-executing, then it operates "without the aid of any legislative provision."[183] By the reasoning of the Fifth and Second Circuit opinions, only if the New York Convention operates without the aid of domestic legislation—Chapter 2 of the Federal Arbitration Act—does McCarran-Ferguson not apply to the New York Convention.[184] This reasoning is circular because it requires ascertaining whether the Convention operates "without the aid of any legislative provision" to determine whether the Convention is self-executing for the purpose of concluding that the Convention

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[179] *Id.* § 201.

[180] *Foster*, 27 U.S. at 253.

[181] *See id.*

[182] *Id.*

[183] *Id.* at 254.

[184] *See* Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714 (5th Cir. 2009); *see also* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995).

operates "without the aid of any legislative provision."[185] It is further flawed because, under the self-execution doctrine as it originated in *Foster*, ascertaining whether a treaty operates "without the aid of any legislative provision" requires a determination of whether the treaty is self-executing for the purpose of concluding that a party may assert rights conferred by the treaty in U.S. courts.[186]

And regardless of a court's outcome in the self-execution analysis, a party asserting rights under the New York Convention necessarily relies on Chapter 2 of the Federal Arbitration Act. The *Safety National* majority reasoned that regardless of whether a treaty is self-executing or non-self-executing, legislation that implements a treaty does not replace or displace the implemented treaty.[187] As such, the *Safety National* majority's reasoning would proceed as follows: even if a treaty operates through domestic legislation, the treaty is still a treaty and not an Act of Congress subject to McCarran-Ferguson.[188] Although it is not arguable that subsequently enacted legislation dissipates the legal agreement that the President makes with other nations, in order to assert the rights guaranteed by the New York Convention, a party must rely on either of the first two chapters of the Federal Arbitration Act. Consider the following hypothetical situations:

A, Inc., a British reinsurance company, and B, Co., a Louisiana insurance company, agree to arbitrate disputes arising out of an international reinsurance agreement despite Louisiana's prohibition on arbitration agreements in insurance contracts.

If A sued B in federal court to collect its past due premiums from B, B could move to compel arbitration. B could rely on Chapter 2 of the Federal Arbitration Act, which gives the federal court the authority to compel arbitration "in accordance with the agreement at any place therein provided."[189] In permitting the court to compel arbitration in accordance with the arbitration agreement, section 206 of Chapter 2 would conflict

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[185] *Safety Nat'l Cas. Corp.*, 587 F.3d at 732.
[186] *See* Foster v. Neilsen, 27 U.S. 253, 253 (1829).
[187] *Safety Nat'l Cas. Corp.*, 587 F.3d at 722-23.
[188] *See id.*
[189] 9 U.S.C. § 206 (2006).

with and arguably preempt Louisiana's prohibition against arbitration agreements in insurance contracts. Given the potential for such a conflict, McCarran-Ferguson would require that this provision of an Act of Congress not be construed to preempt Louisiana law. Such a construction of section 206 would require the exercising of a federal court's power to grant a motion to compel arbitration in that case. Alternatively, B could rely on section 4 of Chapter 1, which permits courts to compel arbitration. This would still be a provision in an Act of Congress, however, to which McCarran-Ferguson would also apply.

If B sued A in federal court for failure to pay claims under the reinsurance contract, A similarly could move to compel arbitration under either section 206 of Chapter 2 or section 4 of Chapter 1. However, this would require construing a provision of an Act of Congress to preempt Louisiana law in direct contravention of McCarran-Ferguson, as would the previously presented hypothetical.

Congress required a party relying on the New York Convention to also rely on an Act of Congress. Without reliance on either of the first two chapters of the Federal Arbitration Act, a federal court presumably would lack the power to compel parties to arbitrate their disputes. And section 201 of Chapter 2 provides that the New York Convention "shall be enforced in United States courts in accordance with this Chapter."[190] Thus, the self-execution question provides little help in understanding why McCarran-Ferguson would not reverse preempt the New York Convention.

V. CONCLUSION

The Second and Fifth Circuit Courts of Appeals's method of resolving whether McCarran-Ferguson permits a state law to reverse preempt the New York Convention has turned on whether the Convention is self-executing or non-self-

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[190] *Id.* § 201.

executing.[191] This approach fails to take into account commonly accepted method of statutory interpretation, as it almost completely disregards Congress's purpose in passing McCarran-Ferguson. Moreover, it takes the self-execution doctrine out of a context to resolve a legal issue to which the doctrine was not intended to apply. Regardless of whether the Convention is or is not self-executing, a party asserting its rights to have a federal court recognize and enforce its international arbitration agreement under the Convention must necessarily rely on an Act of Congress. A party making such a claim must rely on the Federal Arbitration Act, which provides a federal court with the express authority to compel arbitration. The Federal Arbitration Act is an Act of Congress under McCarran-Ferguson, and McCarran-Ferguson therefore compels a reading of the Federal Arbitration Act that federal courts have no authority to compel arbitration where doing so would effectively preempt a state insurance law. Because the self-execution framework fails to answer the interpretive problem posed by McCarran-Ferguson, courts should consider alternatives approaches that rely more substantially on congressional intent.

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[191] *See* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995); *Safety Nat'l Cas. Corp.*, 587 F.3d. at 722-23.