REIMAGINING *TÜRKIYE HALK BANKASI*: A WAY FORWARD FOR COMMON LAW DISPLACEMENT DOCTRINE

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In Türkiye Halk Bankasi A.Ş. v. United States*, the Supreme Court reviewed the Second Circuit's holding that the passage of the Foreign Sovereign Immunities Act (FSIA) abrogated any immunity from prosecution that foreign sovereigns may have previously enjoyed under the federal common law. The Court reversed, holding that the FSIA is inapplicable in the criminal context and, therefore, left the federal common law of sovereign immunity from prosecution undisturbed. The Court's reasoning, however, did not explicitly draw upon or elucidate the doctrine of federal common law displacement. It is possible that the Court chose not to engage with this doctrine because its underlying case law has thus far failed to supply a clear, consistent, and administrable standard for federal common law displacement. Recent appellate decisions concerning the federal common law of foreign sovereign immunity illustrate the need for doctrinal reform.*

This Note advocates the adoption of a different method for analyzing federal common law displacement disputes, drawing upon an analogy to the better defined and familiar doctrine of state law preemption. Specifically, I argue that statutes may either "expressly displace," "conflict displace," or "field displace" the federal common law, categories which I define by reference to express, conflict, and field preemption. I contend that this framework, although never formally endorsed in so many words by any federal court, is already immanent in the Supreme Court's case law and the scholarly literature. Using Türkiye Halk Bankasi *as a case study, I illustrate how the Court could have applied this framework to reach the same result while providing courts and litigants with a more structured approach for future federal common law displacement controversies.*

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Introduction

On April 19, 2023, the Supreme Court decided *Türkiye Halk Bankasi A.Ş. v. United States*,[1] a case arising from the prosecution of Halkbank, a Turkish state-owned bank,[2] for money laundering, fraud, and conspiracy.[3] The bank allegedly laundered billions of dollars of Iranian oil money in violation of U.S. sanctions.[4] Halkbank's primary defense was that it was immune from prosecution under the Foreign Sovereign Immunities Act of 1976 (FSIA).[5] This statute immunizes foreign sovereigns, as well as their political subdivisions, agencies, and instrumentalities,[6] from suit in United States courts, subject to limited exceptions.[7]

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1 143 S. Ct. 940 (2023).

2 *See* Adam Liptak, *In Prosecution of Turkish Bank, the Supreme Court Issues a Mixed Ruling*, N.Y. Times (Apr. 19, 2023), https://www.nytimes.com/2023/04/19/us/supreme-court-turkish-bank-halkbank.html [https://perma.cc/6VL2-BJV6].

3 *See* United States v. Halkbank, No. 15 Cr. 867 (RMB), 2020 WL 5849512, at *1 (S.D.N.Y. Oct. 1, 2020) (detailing the charges against Halkbank), *aff'd sub nom.* United States v. Türkiye Halk Bankasi A.Ş., 16 F.4th 336 (2d Cir. 2021), *aff'd in part, vacated in part,* 143 S. Ct. 940 (2023).

4 *See id.*

5 *See id.* at *4; Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

6 "[A]genc[ies]" and "instrumentalit[ies]" refer to entities that are legally distinct from the state, but serve as organs or political subdivisions of the state or are majority-owned by the state, such as state-owned banks, airlines, oil companies, or procurement agencies. *See* 28 U.S.C. § 1603.

7 For example, the FSIA does not immunize foreign sovereigns from suit for nonsovereign "commercial activity." *See* 28 U.S.C. § 1605(a)(2). Although the FSIA does

The Supreme Court rejected Halkbank's FSIA defense, holding that the Act only applies in civil cases, and therefore does not immunize foreign sovereigns or their instrumentalities from criminal prosecution.[8] This decision resolved a longstanding debate about the FSIA's scope,[9] but, as we shall see, exposed a fundamental lurking question which is the focus of this Note: How should courts determine whether, and to what extent, a statute has displaced the federal common law?

This question arose from Halkbank's alternative theory of defense, to wit: Even if the FSIA does not immunize the bank from prosecution, the statute only abrogated the federal common law of foreign sovereign immunity in *civil* cases; in the *criminal* context, foreign states retain an immunity from prosecution under federal common law.[10] The Second Circuit, in an abbreviated analysis at the end of its opinion, had rejected

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not define what makes an act "commercial" rather than sovereign, the Supreme Court has clarified that a foreign state behaves commercially when it acts "not as regulator of a market, but in the manner of a private player within it," exercising powers that are not "peculiar to sovereigns" but that "can also be exercised by private citizens." Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614–17 (1992) (quoting Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976)) (holding that a breach-of-contract action against Argentina for defaulting on bonds could proceed because a private actor could issue and default on bonds just as Argentina had done); *cf.* Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) (listing war, diplomacy, and immigration enforcement as conduct traditionally viewed as sovereign). The FSIA also does not immunize states from certain suits related to their sponsorship of terrorism, *see* 28 U.S.C. §§ 1605A(a)(1), 1605B(b)(1), or for cases arising in admiralty jurisdiction, *see* 28 U.S.C. § 1605(b). But for conduct falling outside of these exceptions and a few others, foreign states are presumptively immune. *See* 28 U.S.C. § 1604.

[8] Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940, 947 (2023).

[9] For a useful comparison of the arguments on either side of the now-resolved debate about the FSIA's scope, compare Chimène Keitner, *Criminal Proceedings and the Foreign Sovereign Immunities Act*, Transnat'l Litig. Blog (Apr. 13, 2022), https://tlblog.org/criminal-proceedings-and-the-foreign-sovereign-immunities-act [https://perma.cc/68EC-SYL2] (arguing that the FSIA does not apply to criminal prosecutions because it contains "language and structure . . . sound[ing] in civil, rather than criminal, procedure," does not modify Title 18 where federal criminal subject matter is defined, and lacks indicators of congressional intent to cover criminal prosecutions), with Curtis Bradley & Jack Goldsmith, Türkiye Halk Bankasi A.Ş. v. United States*, Part 1: The FSIA and Criminal Prosecutions*, Lawfare (Jan. 11, 2023, 8:31 AM), https://www.lawfareblog.com/Turkiye-halk-bankasi-v-united-states-part-1-fsia-and-criminal-prosecutions [https://perma.cc/QF8K-QFGH] (arguing that the FSIA's sweeping grant of sovereign immunity and failure to explicitly distinguish between civil and criminal cases, along with the specter of state court prosecutions of foreign sovereigns, suggest that the FSIA was meant to cover both civil and criminal proceedings). This debate had also been taken up by the federal courts, resulting in a circuit split: Some circuits had decided that the FSIA does not apply to criminal proceedings, others had determined that it does, and still others had "gone to great lengths to avoid addressing the merits of the issue altogether." *See* John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. Int'l L. & Com. Regul. 43, 52–53 (2012) (identifying cases on either side of the circuit split).

[10] *See* Brief for Petitioner at 43–44, Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940 (2023) (No. 21-1450).

this very argument by gesturing to the doctrine of federal common law displacement: It held that the FSIA's enactment had "displaced any pre-existing common-law practice" of foreign sovereign immunity, including any common law protections which may, once upon a time, have shielded foreign sovereigns from criminal prosecution in the United States.[11]

The Supreme Court, in turn, rejected the Second Circuit's common law displacement holding. While acknowledging that the FSIA created a "comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state," it held that "[the FSIA's] scheme does not cover criminal cases."[12] Accordingly, although the FSIA displaced that portion of the federal common law concerned with foreign sovereign immunity in *civil* actions, criminal prosecutions are "not governed by the FSIA," and therefore "may still be barred by foreign sovereign immunity under the common law."[13] In other words, if it were true that the pre-FSIA federal common law afforded foreign sovereigns some measure of immunity from criminal prosecution—as Halkbank claims it did—then that immunity survived the passage of the FSIA and is presumably still in effect. Operating under the impression that the FSIA displaced the entire federal common law of foreign sovereign immunity, the Second Circuit had only briefly discussed what the hypothetical content of that immunity might look like in the criminal context.[14] Accordingly, the Supreme Court remanded the case for further consideration of whether foreign sovereigns are immune from criminal prosecution under federal common law and, if so, whether that immunity might contain an FSIA-like exception for commercial acts, and whether the Executive or Judiciary would be principally responsible for determining immunity in criminal proceedings against foreign sovereigns.[15]

This case illustrates two important points. First, as demonstrated by the Second Circuit's reasonable, but short-lived, disposition of Halkbank's federal common law displacement claim, the lower courts lack sufficient doctrinal guidance to accurately determine whether and to what extent a given statute has displaced the federal common law.

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11 United States v. Türkiye Halk Bankasi A.Ş., 16 F.4th 336, 350–51 (2d Cir. 2021), *aff'd in part, vacated in part,* 143 S. Ct. 940 (2023).

12 *Türkiye Halk Bankasi*, 143 S. Ct. at 942, 947 (emphasis added) (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983)).

13 *Id.* at 951 (quoting Samantar v. Yousuf, 560 U.S. 305, 324 (2010)).

14 *See Türkiye Halk Bankasi*, 16 F.4th at 350–51 (rejecting the argument that the common law would provide sovereign immunity for unlawful commercial activity without in-depth analysis).

15 *See Türkiye Halk Bankasi*, 143 S. Ct. at 951.

Second, the facts of *Türkiye Halk Bankasi* offer a powerful admonition about the potential real-world ramifications of getting a common law displacement analysis wrong. To see what I mean, consider the following two situations.

For the first scenario, imagine that the Supreme Court held (as it actually did) that the FSIA does not apply in criminal cases, but affirmed (counterfactually) the Second Circuit's holding that the FSIA had entirely displaced common law foreign sovereign immunity. With both statutory *and* common law immunities thus stripped away, there would be nothing to stop any American prosecutor from bringing domestic criminal proceedings against a foreign state, agency, or instrumentality, even for noncommercial sovereign acts such as their conduct during war. Such an outcome would not just be a paradox, insofar as it would produce an inexplicable asymmetry of immunity in civil and criminal cases—it would also be a stark deviation from the norms of sovereign co-equality and non-interference undergirding the Westphalian state system,[16] and would contradict litigating positions previously adopted by the United States government itself.[17] Even state and local prosecutors could criminally charge foreign sovereigns and try them in state courts,[18] raising acute federalism concerns and risking diplomatic catastrophe.[19]

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[16] *See, e.g.*, Chimène I. Keitner, *Prosecuting Foreign States*, 61 Va. J. Int'l L. 221, 251 (2021) ("The international legal responsibility of foreign states is largely *sui generis*, but it has generally not been conceptualized as criminal in nature . . . . Nor has international law generally envisioned foreign states themselves as subject to criminal sanction."); Hazel Fox & Philippa Webb, The Law of State Immunity 91 (3d ed. 2015) ("The exercise of criminal jurisdiction directly over another State infringes international law's requirements of equality and non-intervention. . . . Developments in the last 50 years or so in relation to civil proceedings from an absolute to a restrictive doctrine of State immunity left untouched the position in criminal proceedings.").

[17] *See, e.g.*, Brief for the United States of America as Amicus Curiae in Support of Partial Reversal at add. 38, Servaas Inc. v. Mills, 661 F. App'x 7 (2d Cir. 2016) (No. 14-385) ("No criminal proceedings can be started against sovereign states and its [sic] diplomatic agents.").

[18] FSIA's removal proceeding provides only for the removal of civil actions against foreign sovereigns; there is no alternative statutory basis for federal preemption or removal to federal court, thus raising the specter of politically disastrous state prosecutions of sovereign states with no means of federal intervention. *See* Bradley & Goldsmith, *supra* note 9 (exploring the procedural intricacies of state prosecution of sovereigns in absence of sovereign immunity). When this topic arose during oral argument on remand to the Second Circuit, the Government identified no legal basis other than federal common law that would prevent a subfederal prosecutor or court from proceeding against a foreign sovereign. *See* Oral Argument at 33:30, United States v. Türkiye Halk Bankasi A.Ş., 120 F.4th 41 (2d Cir. 2024) (No. 20-3499), https://ww3.ca2.uscourts.gov/oral_arguments.html [https://perma.cc/BT72-CL89] (audio available by searching for docket number "20-3499" in search bar, then selecting audio for entry dated "2-28-24").

[19] The Supreme Court recognized this exact threat in *Türkiye Halk Bankasi*. The majority expressed concern about this "consequentialist argument," but noted its duty to "interpret the FSIA as written" in spite of it, stating that the political branches "may always respond

Hostile nations without independent judiciaries would undoubtedly reciprocate with tit-for-tat prosecutions against the United States in their own courts.

The second scenario, fortunately, is the real world: The Supreme Court has just held that the FSIA does not immunize foreign sovereigns from criminal prosecutions, but that it does not abrogate the federal common law in such cases either. On remand, the Second Circuit further explained that, in the common-law context, courts must generally defer to immunity decisions rendered by the Executive, providing a federal check against state and local prosecutors eager to unilaterally indict Russia, China, or Iran on criminal charges.[20] Moreover, although the Executive is entitled to deference when it chooses to prosecute a foreign sovereign agency or instrumentality based on commercial activity, the Second Circuit declined to decide whether it would receive the same deference if its "denial of immunity to a foreign sovereign derogated from the common law—for instance, if the Executive indicted a state *qua* state."[21] And lastly, the Second Circuit appeared to endorse the principle that foreign sovereign entities may retain immunity under the common law for their sovereign, non-commercial conduct.[22] In sum, it appears that a salutary equilibrium has been reached: Prosecutions against sovereign instrumentalities for commercial malfeasance may proceed on the Executive's initiative, the specter of constitutional and diplomatic crises has been mitigated, and the fundamental principle of non-interference with sovereign actions has been left more or less intact.

It should be alarming that the only thing separating these two scenarios is the application of federal common law displacement

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by enacting additional legislation." Türkiye Halk Bankasi A.Ş. v. United States, 598 U.S. 264, 279 (2023). Nor is this possibility farfetched: Although no state prosecutions against foreign sovereigns have evidently commenced since *Türkiye Halk Bankasi*, the Missouri Attorney General recently brought suit against China for alleged misconduct pertaining to the COVID-19 pandemic, such as hoarding personal protective equipment. *See* Canaan Araujo, *Missouri Becomes First State to Sue China over Covid-19; Court Expected to Rule Soon*, MSN, https://www.msn.com/en-us/politics/government/missouri-becomes-first-state-to-sue-china-over-covid-19-court-expected-to-rule-soon/ar-AA1xXLyK [https://perma.cc/E7AY-NTYA]. While this is a civil suit in federal court, it is significant that it was brought by an elected state official. In a post-*Türkiye Halk Bankasi* world, it is entirely plausible that a similarly situated political actor would instead pursue a criminal proceeding in state court, but for the survival of federal common law immunity. For a discussion of the several states' role in sensitive U.S. foreign policy decisions, see *infra* note 73.

[20] United States v. Türkiye Halk Bankasi A.Ş., 120 F.4th 41, 48 (2d Cir. 2024) ("[I]n the common-law context, we [still] defer to the Executive's determination of the scope of immunity . . . ." (quoting Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009))).

[21] *Id.* at 59.

[22] *See id.* at 54–55.

doctrine. It is rare for a federal court to confront a difficult common law displacement argument, such as the one in *Türkiye Halk Bankasi*, head-on, and as others have observed, the relatively sparse case law on the subject does not articulate an easily identifiable and administrable standard for federal common law displacement.[23] So the Second Circuit can hardly be blamed for neglecting to identify and analyze the few canonical cases on this subject when it first took up Halkbank's appeal, or for initially reaching the wrong outcome.[24]

This Note imagines what a more useful doctrinal approach to federal common law displacement analysis might look like. It argues for the adoption of a displacement framework that is analogous to the method used by federal courts in state law preemption cases: Courts entertaining displacement claims should consider whether the federal statute has either *expressly* displaced the federal common law, displaced the federal common law by *conflict*, or displaced it by occupying the *field* previously governed by the federal common law. Part I provides a brief history of the federal common law of foreign sovereign immunity, which serves as helpful background for the remainder of the Note. Part II summarizes the existing doctrine of federal common law displacement and highlights its ambiguities, which are illustrated by dissecting the Second and Ninth Circuits' federal common law displacement analyses in two recent foreign sovereign immunity cases (one of which is the now-familiar *Türkiye Halk Bankasi* decision). Part III lays out a proposed alternative displacement framework based on an analogy to preemption doctrine, drawing on both scholarly works and case law which support the adoption of this framework. The Note concludes by imagining how the Supreme Court might have employed this proposed framework in *Türkiye Halk Bankasi* and arrived at the same substantive outcome—namely, that the FSIA does not displace the federal common law of foreign sovereign immunity in the criminal context—while providing helpful doctrinal guidance for the lower courts to follow.

I
The Evolution of Sovereign Immunity

This section begins with an abbreviated account of foreign sovereign immunity's common-law evolution from the Founding, to the passage of the FSIA in 1976, and up to the present day. Although this Note is not

[23] *See infra* notes 84–97 and accompanying text (discussing inadequacies of the Supreme Court's "speaks directly" test and difficulties that lower courts and scholars have faced in adding substance to the test).

[24] *See infra* notes 98–107 and accompanying text (describing the Second Circuit's reasoning and potential explanations).

principally about foreign sovereign immunity, this historical account provides helpful context for the remainder of the piece, which will use foreign sovereign immunity doctrine as an illustrative case study.

A. The Roots of Common Law Sovereign Immunity

Foreign sovereign immunity, the doctrine which bars domestic courts from hearing cases against a foreign sovereign defendant, has ancient common law roots: The doctrine predates the founding of the United States[25] and was recognized in American courts even before the ratification of the Constitution.[26] Early American discussions of foreign sovereign immunity described it as a requirement of the "law of nations," stemming from sovereign co-equality and a sovereign's absolute right to be sued only by consent.[27] Shortly after ratification, the Court suggested that both the law of nations and the Constitution itself counsel against exercising jurisdiction over foreign sovereigns,[28] although the Court would later disavow any constitutional basis for foreign sovereign immunity.[29]

In *The Schooner Exchange v. McFaddon*, the Supreme Court held that an armed vessel in the service of the French emperor was not subject to the jurisdiction of the federal courts.[30] This case is often credited with the adoption in American courts of the "absolute theory" of sovereign immunity, according to which one sovereign cannot be sued without its consent in the domestic courts of another.[31] This theory was prevalent

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25 *See* Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 133, 144–45 (1812) (discussing sovereign immunity in the writings of Bynkershoek, Vattel, and Grotius, scholars who lived before the American Revolution); *id.* at 134 (stating that "the immunity of the public armed vessel of a sovereign" can be inferred "from the nature of sovereignty, and from the universal practice of nations from the time of *Tyre and Sidon*").

26 *See* Nathan v. Virginia, 1 U.S. (1 Dall.) 77, 78 (Pa. Ct. Com. Pl. 1781) (holding that the Commonwealth of Virginia was immune from suit in Pennsylvania state court by analogizing to the "laws of nations," which dictates "[t]hat a sovereign, when in a foreign country, is . . . exempt from its jurisdiction").

27 *See id.* (stating that "[n]o compulsory action" could be brought against "the king of England, as sovereign of the nation . . . even in his own courts").

28 *See* United States v. Peters, 3 U.S. (3 Dall.) 121, 127 (1795) (noting that "[t]he Constitution . . . might have rendered the individual states, nay, the Union itself, amenable as defendants at the suit of individuals," but did not "bind other sovereign nations, not parties to the compact," and that the not-yet-ratified Eleventh Amendment "furnishe[d], at least, a legislative opinion of the exemption of sovereigns" from suit); *id.* ("[T]he law of nations is express on the subject.").

29 *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("[F]oreign sovereign immunity is . . . not a restriction imposed by the Constitution.").

30 11 U.S. (7 Cranch) 116, 147 (1812).

31 *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Just. (May 19, 1952) [hereinafter Tate Letter],

in American state and federal courts,[32] as well as English courts,[33] until the early 20th century.[34]

The theory of absolute sovereign immunity broke down starting in the 1920s, as American courts became more willing to exercise jurisdiction over foreign sovereigns,[35] subject to the recommendations of the Executive,[36] which "ordinarily requested immunity in all actions against friendly sovereigns."[37] Some attribute this shift to the "general expansion of presidential power" occurring around the same time and skepticism of federal common law in the wake of *Erie Railroad Co. v. Tompkins*.[38] This new practice led to inconsistencies, and placed courts in the uncomfortable position of having to guess the State Department's

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reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711–15 (1976) (explaining the "absolute" and "restrictive" theories of sovereign immunity).

32 *See, e.g.*, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 352 (1822) (emphasizing that "no sovereign is answerable for his acts to the tribunals of any foreign sovereign" and characterizing this as "an absolute right"); Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another . . . ."); Kingdom of Roumania v. Guar. Tr. Co. of N.Y., 250 F. 341, 343 (2d Cir. 1918) ("It is the long-accepted law that a foreign sovereign cannot be sued nor his property attached in the courts of a foreign friendly country without his consent."); Walley v. Schooner Liberty, 12 La. 98, 100–01 (1838) ("It appears to be a settled principle of international law, . . . recognized by the highest judicial authority of the Union, that a public armed vessel of a foreign state . . . is exempt from the jurisdiction of the local tribunals."); Hassard v. United States of Mexico, 61 N.Y.S. 939, 939 (N.Y. App. Div. 1899) (affirming a lower court order based on the premise that "a sovereign state cannot be sued in its own courts, or in any other, without its consent and permission").

33 *See* Mason v. Intercolonial Ry. of Canada, 83 N.E. 876, 877 (Mass. 1908) (recounting American and British cases from the 1800s, such as *Wadsworth v. Queen of Spain*, *De Haber v. Queen of Portugal*, and *The Parlement Belge*, collectively establishing that "courts have no jurisdiction to proceed with a suit against the sovereign of another state").

34 The Second Circuit, in its opinion on remand from the Supreme Court, offered its own historical account of the common law of foreign sovereign immunity and concluded that American courts have *always* recognized the Executive's power to withdraw the grant of immunity enjoyed by foreign sovereigns as far back as *The Schooner Exchange*. *See generally* United States v. Bankasi, 120 F.4th 41, 46–48 (2d Cir. 2024). Based on my own reading of the same authorities, and those cited in the preceding footnotes, I believe that American courts were divided about the Executive's ability to unilaterally abrogate foreign sovereign immunity as a theoretical matter, and that in practice they behaved as though foreign sovereign immunity was an absolute right until the early 1900s. My minor disagreement with the Second Circuit is unimportant for this Note's purposes.

35 *See* Keitner, *supra* note 16, at 230.

36 *See, e.g.*, The Navemar, 303 U.S. 68, 74 (1938) (stating that the court would have to order the release of a seized ship "[i]f the claim is recognized and allowed by the Executive Branch"); *In re* Hussein Lutfi Bey, 256 U.S. 616, 619 (1921) (refusing Turkey's request for a court order to release a seized vessel because the State Department had not "avow[ed] that the ship belonged to the Turkish or Ottoman government and was immune from seizure").

37 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

38 Curtis A. Bradley, International Law in the U.S. Legal System 231 (1st ed. 2013); *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

intentions when it declined to intervene in a case against a foreign sovereign.[39]

The United States embraced a new theory of sovereign immunity in 1952, in the early days of the Cold War. In the "Tate Letter," a missive from Acting State Department Legal Adviser Jack Tate to the Acting Attorney General,[40] the State Department adopted the "restrictive theory" of sovereign immunity, according to which states have immunity with respect to their *public* or *sovereign* acts, but not their *private or commercial* acts.[41] This innovation was a response to changing practices in other countries,[42] the growing involvement of states in international commerce,[43] and the proliferation of state-owned enterprise due to the rise of communism.[44]

However, in the decades following the Tate Letter, the State Department continued to intervene sporadically to request immunity

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39 *Compare Ex parte* Republic of Peru, 318 U.S. 578, 586–87 (1943) (upholding sovereign immunity where the State Department had indicated its intent to pursue diplomatic, rather than legal, remedies against a "friendly sovereign state"), *with* Republic of Mexico v. Hoffman, 324 U.S. 30, 34–35, 38 (1945) (asserting that when the State Department declines to opine, "the courts may decide for themselves whether all the requisites of immunity exist," and ultimately denying immunity). *See also In re* Transportes Maritimos do Estado, 264 U.S. 105, 108 (1924) (denying an application for a writ of prohibition or mandamus in a case where "[t]he Secretary of State gave no sanction or approval" to Portugal's "protest[] against exercise of jurisdiction by the court").

40 Tate Letter, *supra* note 29.

41 *Id.* at 711 ("[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of the state, but not with respect to private acts (*jure gestionis*)."); *see also* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983) (stating that the restrictive theory confines immunity "to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts").

42 *See* Tate Letter, *supra* note 29, at 712–13 (noting, for example, that Belgium and Italy had always embraced the restrictive theory of sovereign immunity, whereas France, Austria, and Greece had adopted it in the 1920s and that lower Dutch courts were gradually trending toward it); Jack B. Tate, Professor of Law, N.Y. Univ., Remarks to the Association of the Bar of the City of New York (Apr. 15, 1954), *in* Robert M. Jarvis, *The Tate Letter: Some Words Regarding Its Authorship*, 55 Am. J. Legal Hist. 465, 468–72 (2015) (noting that the State Department consulted the positions of various foreign states, as well as both bilateral and multilateral treaties to which the United States was not a party, in formulating the Tate Letter).

43 *See* Jarvis, *supra* note 42, at 469 ("The Department of State, during and after World War I, was troubled by the application of the doctrine of sovereign immunity to merchant vessels owned or operated by foreign governments.").

44 *See* Ruth Donner, *The Tate Letter Revisited*, 9 Willamette J. Int'l L. & Disp. Resol. 27, 29 (2001) (noting that the Tate Letter's embrace of restrictive immunity was "necessary due to . . . the increase in state trading in the form of participation by public authorities in economic enterprises, especially . . . in the communist countries of the Soviet sphere"); Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 Hastings L.J. 585, 617 (2022) (stating that the Tate Letter's adoption of the restrictive theory was a "practical necessity in a globalized trading system in which communist state-owned companies were important players").

for friendly governments, even in cases concerning commercial acts.[45] To end this practice, Congress enacted the FSIA in 1976 both to codify the restrictive theory of sovereign immunity and to vest sole responsibility for immunity determinations in the courts.[46]

B. The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act provides the decisional framework that courts have used since 1976 to render foreign sovereign immunity decisions. First, it creates a presumption that foreign states and instrumentalities are immune from the jurisdiction of state and federal courts.[47] Second, it establishes a handful of exceptions to this general grant of immunity: A foreign state or instrumentality is not immune if the foreign sovereign has waived its immunity "either explicitly or by implication,"[48] or by international agreement;[49] if the action is based on "commercial activity,"[50] certain types of property expropriations,[51] certain torts,[52] or acts of international terrorism;[53] or if the suit is brought in admiralty to enforce a maritime lien.[54] There is also an exception for counterclaims in suits brought by foreign sovereigns in American courts.[55]

If one of the exceptions applies, the FSIA bestows the district courts with subject matter and personal jurisdiction over the suit.[56] The FSIA also provides for removal of suits against foreign sovereigns from

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45 *See* Republic of Austria v. Altmann, 541 U.S. 677, 690–91 (2004) (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983)) (noting that the adoption of restrictive immunity had "little, if any, impact on federal courts' approach to immunity analyses" because the courts continued to honor Executive immunity requests); Kevin P. Simmons, Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543, 548–49 (1977) ("[N]otwithstanding adoption of the Tate Letter, the State Department, as an essentially political body, often succumbed to the daily exigencies of political pressure exerted by foreign states and issued State Department suggestions in return for concessions or political trade-offs on the foreign relations front.").

46 Samantar v. Yousuf, 560 U.S. 305, 313 (2010) (identifying the FSIA's "two primary purposes" as: "(1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts" (quoting 28 U.S.C. § 1602)); *see also* H.R. Rep. No. 94-1487, at 7 (1976) (identifying the same two primary purposes underlying the FSIA).

47 28 U.S.C. § 1604.

48 *Id.* § 1605(a)(1).

49 *Id.* § 1604.

50 *Id.* § 1605(a)(2).

51 *Id.* § 1605(a)(3)–(4).

52 *Id.* § 1605(a)(5).

53 *Id.* §§ 1605A(a)(1), 1605B(b)(1).

54 *Id.* § 1605(b).

55 *Id.* § 1607.

56 *Id.* § 1330.

state to federal court and requires that suits against foreign sovereigns receive a bench trial.[57]

C. Common Law Immunity in the Criminal Context

As already discussed, the FSIA regime—with its clear statutory prescriptions and abundant case law—applies only in civil cases. By contrast, "the common law of criminal immunities for a corporation owned by a foreign state," to say nothing of states themselves, was "unsettled . . . in 1976 and remains [unsettled] today."[58] The Second Circuit's opinion on remand in *United States v. Bankasi* is a valuable step toward untangling this subject. I add my own brief account here.

Schooner Exchange noted the "exemption of the person of the sovereign from arrest or detention within a foreign territory."[59] This statement suggests that the absolute theory of immunity originally barred criminal as well as civil process against the physical body of a monarch or head of state, a concept which survived into the 20th century.[60] In the mid-1900s, the D.C. district court quashed a subpoena in a criminal investigation of a state-owned corporation because the firm's operations were deemed to be so integrated with sovereign functions as to be "indistinguishable" from the sovereign itself.[61] After the Tate Letter, the same court later held that a state-owned company investigated for commercial conduct may be subpoenaed,[62] suggesting that the common law restrictive theory of foreign sovereign immunity had taken root in both the civil *and* criminal contexts.

Very few cases since 1976 discuss the federal common law of foreign sovereign immunity, no doubt because, until *Türkiye Halk Bankasi*, many

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57 *Id.* § 1441(d).

58 *In re* Grand Jury Subpoena, 912 F.3d 623, 630 (D.C. Cir. 2019).

59 Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

60 *See* United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 201 (S.D.N.Y. 1929) ("The person of the foreign sovereign and those who represent him are immune, whether their acts are commercial . . . , tortious, *criminal*, or not, no matter where performed. Their person and property are inviolable." (emphasis added)).

61 *See In re* Investigation of World Arrangements with Rel. to the Prod., Transp., Refin. & Distrib. of Petroleum, 13 F.R.D. 280, 290–91 (D.D.C. 1952) (quashing a subpoena duces tecum in a grand jury investigation of the Anglo-Iranian Oil Company because the company was formed to supply oil to the British Navy, a "fundamental government function serving a public purpose").

62 *See In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 319–20 (D.D.C. 1960) (reserving judgment on a motion to quash a subpoena duces tecum pending a showing by the government that the Philippine National Lines was engaged in commercial activities and that the subpoena would produce information implicating the company or other shipping lines in the violation of federal law).

thought that the FSIA had displaced the federal common law entirely.[63] The few courts to correctly apprehend that the FSIA does not govern in criminal cases offered differing views on the protections afforded by the federal common law of foreign sovereign immunity. In *In re Grand Jury Proceeding Related to M/V Deltuva*, the Puerto Rico district court held that the FSIA does not apply to criminal cases and that, in the absence of the FSIA, there is "no constitutional, statutory or *common-law* grounds" for immunity, at least for commercial activities.[64] But in *United States v. Noriega*, the Eleventh Circuit held that, because the FSIA does not "address[] . . . foreign sovereign immunity in the criminal context," prosecutions against sovereigns are governed by "the principles and procedures outlined in *The Schooner Exchange* and its progeny"[65]—in other words, by federal common law. Specifically, the Eleventh Circuit examined mid-20th century, pre-FSIA common law practices, holding that "this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim," but that "courts should make an independent determination regarding immunity when the Executive Branch neglects to convey clearly its position on a particular immunity request."[66] The Second Circuit in *United States v. Bankasi* more-or-less endorsed the Eleventh Circuit's view, emphasizing deference to Executive immunity determinations.[67] At a minimum, foreign sovereign instrumentalities do not possess absolute immunity from prosecution in American courts, unlike in those of the UK and France,[68] as is clear from post-FSIA prosecutions of state-owned corporations in American courts which ended in plea deals or nonprosecution agreements.[69]

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63 *See, e.g.*, Samantar v. Yousuf, 560 U.S. 305, 313 (2010) ("After the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.").

64 752 F. Supp. 2d 173, 180 (D.P.R. 2010) (emphasis added).

65 117 F.3d 1206, 1212 (11th Cir. 1997).

66 *Id.*

67 *See* United States v. Bankasi, 120 F.4th 41, 48–49 (2d Cir. 2024).

68 *See* Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia [2006] UKHL 26, [2007] 1 AC (HL) 270 [31] (appeal taken from Eng.) ("A state is not criminally responsible in international or English law."); Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 23, 2004, Bull. crim., No. 04-84.265 (Fr.) (dismissing a criminal case against the Malta Maritime Authority, a state instrumentality, due to the supposed international custom which prohibits prosecution of foreign states and their organs in the domestic courts of another).

69 *See* Nonapplicability in Criminal Cases, 2020 Digest of United States Practice in International Law, ch. 10, §A(4) at 397 (listing cases illustrating the "federal government's traditional role in deciding whether to prosecute or subpoena a foreign-government-owned business," *e.g.*, United States v. Statoil, ASA, No. 06-CR-960 (S.D.N.Y. Oct. 13, 2006) (entering deferred prosecution agreement against oil company owned by Norway); United States v. Aerlinte Eireann, No. 89-CR-647, Dkt. No. 12 (S.D. Fla. Oct. 6, 1989) (entering a guilty plea for an Irish state airline)).

II
Federal Common Law Displacement Doctrine

In this Part, I first offer a brief discussion of federal common law and the areas of the law where it remains influential. Next, I review the doctrine governing congressional displacement of the federal common law and argue that, in its present form, this doctrine is too amorphous, vague, and internally inconsistent to provide useful guidance to lower courts. Finally, I discuss in depth two recent FSIA decisions which, I contend, illustrate the inadequacy of federal common law displacement doctrine. The reasoning of these opinions reflects the need for broad doctrinal reform.

A. Defining Federal Common Law

Federal common law comprises the body of judge-made federal rules of decision which do not derive from interpretation of federal statutes or the Constitution.[70] Professors Charles Wright, Arthur Miller, and Edward Cooper identify four defining principles of federal common law: Federal common law "falls within an area of federal or national competence," is binding on both state and federal courts, comes within the "federal question" jurisdiction of the federal courts, and, most importantly for the purposes of this Note, can be overridden by congressional enactment.[71]

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[70] Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's the Federal Courts and the Federal System 635 (7th ed. 2015) (defining federal common law as "federal rules of decision whose content cannot be traced directly by traditional methods of interpretation to federal statutory or constitutional commands"); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 890 (1986) (defining federal common law as "any rule of federal law created by a court . . . *when the substance of that rule is not clearly suggested by federal enactments*—constitutional or congressional" (citations omitted)); 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4514 (3d ed. 2016) (defining federal common law as "substantive rules of decision not expressly authorized by either the Constitution or any Act of Congress").

[71] *See* Wright, Miller & Cooper, *supra* note 70, § 4514. According to Wright, Miller, and Cooper, areas of "federal or national competence" may include areas whether there is a "significant conflict between a federal policy . . . and the application of the forum state's law," *id.* §§ 4514, 4515, or where "federal courts are called upon to create law to fill the interstices of a pervasively federal framework," *id.* § 4516, or where the exercise of federal common-lawmaking power is justified "by implication from the Constitution or based on tradition or necessity," *id.* § 4517. Apart from the familiar example of federal preclusion law, some illustrative instances of federal common law rules include the rule that states must "pay prejudgment interest on debts owed to the Federal Government," United States v. Texas, 507 U.S. 529, 539 (1993); that an airline may limit its liability for lost shipments to the agreed value of the goods if the shipper knowingly declined to pay for greater coverage, First Pa. Bank, N.A. v. E. Airlines, Inc., 731 F.2d 1113, 1122 (3d Cir. 1984); and that military equipment manufacturers are immune from design defect liability when they adhere to

The federal courts may craft federal common law only in limited circumstances. In *City of Milwaukee v. Illinois*—also a seminal case on displacement doctrine, as discussed below—the Supreme Court articulated a pragmatic constraint on this power, stating that courts may fashion federal common law to decide matters "of national concern" in the "absence of an applicable act of Congress . . . because the Court is compelled to consider federal questions which cannot be answered from federal statutes alone."[72] In 2019, the Court in *Rodriguez v. Federal Deposit Insurance Corp.* pronounced a somewhat narrower license to make federal common law, confining it to "limited areas" where the making of common law is either congressionally authorized or "necessary to protect uniquely federal interests."[73]

As described in Part I, the Supreme Court has recognized foreign sovereign immunity as a species of federal common law, noting that it "developed as a matter of common law long before the FSIA was enacted" and that the FSIA codified the then-existing common law of foreign sovereign immunity.[74] The Supreme Court in *Türkiye Halk Bankasi* clearly instructed the Second Circuit on remand to describe or formulate rules of federal common law.[75] And it stands to reason that, even under the stringent *Rodriguez* standard, foreign sovereign immunity remains a proper subject for federal common-lawmaking: Although Congress has not expressly authorized federal courts to engage in common-lawmaking in this field, sovereign immunity *is* a "uniquely federal interest," as suggested by the FSIA's removal provision[76] and the long-held understanding that foreign relations are virtually always the exclusive province of the federal government.[77]

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precise government specifications and warn the government about potential hazards, Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988).

72 451 U.S. 304, 313–14 (1981) (citations omitted).

73 140 S. Ct. 713, 717 (2020) (quoting Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

74 Samantar v. Yousuf, 560 U.S. 305, 311, 320 (2010) (discussing sovereign immunity's federal common law roots and the FSIA's relationship to "the common law that it codified").

75 Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940, 954 (2023) (Gorsuch, J., concurring) ("[R]ather than decide whether the common law shields Halkbank from this suit, the Court shunts the case back to the Second Circuit to figure that out."). *But see id.* at 955 ("[S]ince *Erie R. Co. v. Tompkins* . . . , federal courts have largely disclaimed the power to develop federal common law outside of a few reserved areas." (citations omitted)).

76 *See supra* note 54 and accompanying text.

77 *See* Louis Henkin, Foreign Affairs and the United States Constitution 150 (2d ed. 1996) ("The language, the spirit, and the history of the Constitution deny the states authority to participate in foreign affairs, and constitutional construction by the courts has steadily reduced the ways in which the states can affect U.S. foreign relations."); Zschernig v. Miller, 389 U.S. 429, 440 (1968) (noting that state law, even in areas traditionally regulated by the states, "must give way if they impair the effective exercise of the Nation's foreign policy"); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l L. 832,

B. Common Law Displacement Versus State Law Preemption

Federal common law is susceptible to displacement by legislation, which occurs when "Congress addresses a question previously governed by . . . federal common law," in which case "the need for such an unusual exercise of lawmaking by federal courts disappears," and the federal common law disappears along with it.[78] This seemingly simple feature of the federal common law conceals a world of complexity: How is a court to tell whether Congress has "addressed a question previously governed" by federal common law, and when Congress has done so, how much of the federal common law does it wipe out?

To answer this question, it is helpful to draw an analogy to the doctrine of preemption, the process by which federal legislation supersedes *state* statutory and common law. Preemption can happen in one of three ways. "Express preemption" occurs "when Congress has 'unmistakably . . . ordained' that its enactments alone" are to govern a particular type of dispute, and that any contrary state law therefore "must fall."[79] For example, the Nutritional Labeling and Education Act contains a preemption clause expressly prohibiting any state from establishing food labeling requirements that are "not identical" to the requirements of the Act.[80] Second, "conflict preemption" occurs "when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[81] Finally, "field preemption" occurs when either "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation," or where "the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[82]

832–33 (1989) ("The consensus today is that the central Government alone may directly exercise power in foreign affairs.").

[78] *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313–14 (1981) ("We have always recognized that federal common law is 'subject to the paramount authority of Congress.'" (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))).

[79] N.Y.C. Health & Hosps. Corp. v. WellCare of N.Y., Inc., 801 F. Supp. 2d 126, 135 (S.D.N.Y. 2011) (citations omitted); *see also* Gadda v. Ashcroft, 377 F.3d 934, 944 (9th Cir. 2004) ("Express preemption occurs when Congress enacts a statute that expressly commands that state law on the particular subject is displaced.").

[80] Nutrition Labeling and Education Act of 1990 § 6(a), 21 U.S.C. § 343-1.

[81] Johnson v. Am. Towers, LLC, 781 F.3d 693, 707 (4th Cir. 2015) (quoting Hillsborough Cnty. v. Automated Med. Lab'ys., Inc., 471 U.S. 707, 713 (1985)); *see also* Fresenius Med. Care Holdings, Inc. v. Tucker, 704 F.3d 935, 939 (11th Cir. 2013) (quoting substantially the same language, as found in Arizona v. United States, 567 U.S. 387, 399 (2012)).

[82] Aldridge v. Miss. Dep't of Corr., 990 F.3d 868, 874 (5th Cir. 2021) (citing *Hillsborough Cnty.*, 471 U.S. at 713); *see also* Pharm. Rsch. & Mfrs. of Am. v. McClain, 95 F.4th 1136, 1140 (8th Cir. 2024) ("Field preemption exists where 'Congress has forbidden the State to take

When federal courts are confronted with a common law displacement question, their analysis differs from the preemption approach in two key ways. The first difference between preemption and displacement analysis is in the burdens that they respectively place on claimants. "In pre-emption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress'";[83] by contrast, "[l]egislative displacement of federal common law *does not* require the 'same sort of evidence of a clear and manifest [congressional] purpose'" as in the preemption context.[84] There are two primary reasons that the federal courts apply a presumption against preemption but not against displacement. First, federalism cautions against federal preemption of state law, whereas the displacement of federal common law does not directly implicate the state-federal balance.[85] Second, preemption usually springs from the conflict between two democratically elected lawmaking bodies (Congress and the state legislature), whereas displacement pits Congress against the unelected federal judiciary, whose role is traditionally understood to be adjudicative rather than legislative. As the Second Circuit puts it: Federal common law "threatens a potent mix of judicial lawmaking and encroachment on our federalist structure."[86] Thus, while structural concerns about federalism, separation of powers, and democratic legitimacy suggest caution and forebearance in the preemption context, these principles weigh in favor of finding that legislation has displaced the federal common law whenever that question is in dispute.[87]

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action in the *field* that the federal statute pre-empts.'" (quoting Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 377 (2015))).

[83] Arizona v. United States, 567 U.S. 387, 400 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[84] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011) (quoting City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981)) (alteration in original) (emphasis added).

[85] *See* Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1402 (2020) (stating that "[f]ederal common law is relatively rare" in part because "state common law is usually more appropriate; only in exceptional cases involving a handful of interstate issues has the Court required a federal law of decision to ensure uniformity"). Indeed, federal common law is arguably a *more* egregious intrusion on state prerogatives than preemption by congressional enactment: States participate meaningfully in the federal legislative process and can advocate against statutes that would preempt the exercise of their police powers but exert relatively little influence over a federal judge engaged in crafting federal common law.

[86] City of New York v. Chevron Corp., 993 F.3d 81, 90 (2d Cir. 2021).

[87] *See In re* Oswego Barge Corp., 664 F.2d 327, 335 (2d Cir. 1981) ("While federalism concerns create a presumption *against* preemption of state law, including state common law, . . . separation of powers concerns create a presumption *in favor* of preemption of federal common law whenever it can be said that Congress has legislated on the subject."); *see also* Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENV'T L. 293,

The second difference between preemption and displacement, of greater importance to this Note, is that unlike the well-defined and frequently applied triad of express, conflict, and field preemption, the Supreme Court has not articulated a robust analytical framework for common law displacement analysis. Rather, "[t]he test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute '*speak[s] directly* to [the] question' at issue."[88] This vague "speaks directly" test is devoid of the analytical categories and instructions that assist courts in the preemption context, making it far more challenging for courts to apply[89] and leading to befuddled observers[90] and confusion among the lower courts.[91]

Lower courts have occasionally tried to add substance to the "speaks directly" test, to no avail. For example, in *In re Deepwater Horizon*, a federal district court in Louisiana formulated and applied a three-prong displacement test, asking whether Congress's enactment "intended to occupy the entire field," whether "the statute speak[s] directly to the question addressed by the common law," and if "application of common

314 (2005) ("Displacement . . . presents issues of constitutional structure that go beyond the issues implicated by preemption, and warrant a special presumption against judicial lawmaking."). *See generally* Nathan W. Raab, *Displacement of Federal Common Law*, 58 Wake Forest L. Rev. 709, 753 (2023) (discussing the separation of powers and federalism concerns raised by federal common-lawmaking, and describing federal common-lawmaking as a "separation-of-powers anomaly, to be avoided whenever possible").

88 *American Electric*, 564 U.S. at 424 (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)) (alterations in original) (emphasis added).

89 *See Oswego*, 664 F.2d at 339 ("[W]e recognize, as *City of Milwaukee* instructs, . . . a presumption that legislation preempts the role of federal judges in developing and applying federal common law, but we also recognize that it is not a simple task to determine the force and proper application of this presumption."); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856 (9th Cir. 2012) ("Although plainly stated, application of the ['speaks directly'] test can prove complicated."). For an illustration of the difficulty, see generally *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236–39 (1985). In rejecting the petitioner's displacement claims based on the Nonintercourse Act of 1793, the Supreme Court emphasized that this statute did not speak sufficiently "*directly*" to the "*particular*" remedial issue at hand. *Id.* at 237. As this case illustrates, the application of the "speaks directly" test turns on fine interpretive distinctions which are difficult for litigants to grasp and for courts to reliably apply.

90 *See* Raab, *supra* note 87, at 767 ("Contemporary displacement doctrine is a muddle."); Merrill, *supra* note 87, at 311 (stating that *City of Milwaukee*, an oft-cited case on displacement doctrine, is "ambiguous as to what the standard for displacement of federal common law should be"); Zachary Hennessee, Note, *Resurrecting a Doctrine on Its Deathbed: Revisiting Federal Common Law Greenhouse Gas Litigation After* Utility Air Regulatory Group v. EPA, 67 Duke L.J. 1073, 1083 (2018) (noting the scholarly disagreement as to whether courts generally apply a "field" or "conflict" theory of displacement).

91 *See infra* Section II.C (discussing the circuit courts' inconsistent analyses of whether the FSIA displaces federal common law sovereign immunity in the wake of the "speaks directly" test).

law [would] have a frustrating effect on the statutory remedial scheme."[92] If these three prongs sound familiar, it is because they appear roughly analogous to the standards for field, express, and conflict preemption, respectively. The district court professed to derive this test from the Supreme Court's 2008 opinion in *Exxon Shipping Co. v. Baker*.[93] But if the Supreme Court had indeed adopted this helpful blueprint in *Exxon Shipping*, it did not last long: Just three years later in *American Electric Power Co. v. Connecticut*, the Court reiterated the analytically thin "speaks directly" test, with no mention of the short-lived *Exxon Shipping* / *In re Deepwater Horizon* three-part framework.[94] Some cases, including *Türkiye Halk Bankasi*, suggest that the "comprehensiveness" of the statutory scheme is a factor in the displacement analysis,[95] but other recent cases omit even that modicum of guidance.[96]

Scholars have also attempted to make sense of the "speaks directly" test. In one recent and comprehensive survey of displacement doctrine, Nathan Raab concludes that when a statute is silent or ambiguous as to displacement of the federal common law, courts generally find that the common law has been displaced if "the legislation creates (1) a rule governing substantially the same conduct as that previously governed by federal common law, and (2) some remedial scheme providing for private enforcement of the newly legislated rule."[97]

Raab's summary is impressively thorough and descriptively sound. However, it does not offer a complete panacea for displacement doctrine's inadequacies, for a few reasons. First, Raab develops his framework by interpolating from the facts and outcomes of many displacement cases; his two-part analysis does not follow logically from the "speaks directly" test itself, nor has it been explicitly endorsed by any federal court. Thus, a court confronted with a common law displacement claim would have to choose between taking its chances with the nebulous "speaks directly" test—which, for all its deficiencies, has the Supreme

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92 *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, 808 F. Supp. 2d 943, 960 (E.D. La. 2011) (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008)).

93 *Id.* at 90–91 (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008)).

94 *See* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (citing Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

95 *See* Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940, 947 (2023) (emphasizing that the FSIA created a "comprehensive scheme," but that it was comprehensive only as to civil matters); *see also In re* Oswego Barge Corp., 664 F.2d 327, 339 (2d Cir. 1981) (noting that "[t]he detail and comprehensiveness of a statute will frequently aid" the court's determination of common law displacement).

96 *See, e.g.*, *American Electric*, 564 U.S. at 424 (reciting only the "speaks directly" standard); Michigan v. U.S. Army Corps of Eng'rs, 758 F.3d 892, 901 (7th Cir. 2014) (same).

97 Raab, *supra* note 87, at 714.

Court's express approval—or applying Raab's framework which, even if descriptively accurate, differs from the Supreme Court's approved test and lacks judicial endorsement. Second, even if Raab's framework gained recognition, applying it would entail difficult line-drawing exercises, as Raab readily acknowledges.[98]

Indeed, the FSIA poses a unique challenge to Raab's framework. Suppose a foreign sovereign commits a single act that constitutes both a crime and a tort; a private actor sues and a prosecution begins in tandem. Before 1976, the question of immunity in both the ensuing civil and criminal cases would have been governed by federal common law, but after the FSIA, the civil case—which involves the exact same conduct between the exact same parties—is regulated by statute. Thus, the FSIA created a "rule governing substantially the same conduct"[99] as was previously governed by federal common law, fulfilling the first prong of Raab's displacement test. The FSIA also prescribes rules for if and how the private litigant may sue the foreign state; in other words, it created a "remedial scheme providing for private enforcement of the newly legislated rule,"[100] satisfying Raab's second prong. With both prongs met, Raab's framework would predict that the FSIA *should* displace the federal common law entirely and control both the hypothetical civil and criminal cases arising from the foreign sovereign's conduct. But the Supreme Court rejected that outcome: under *Türkiye Halk Bankasi*, the civil case would be governed by the FSIA, but federal common law would dictate immunity in the criminal case.[101] At best, this example illustrates the difficult line-drawing exercises that arise in the application of Raab's framework; at worst, it presents a departure from that framework.

In sum, the prevailing "speaks directly" test for federal common law displacement is vague and amorphous, and neither lower courts nor scholars have yet succeeded in adding substance to it. As the following section illustrates, this deficiency has led courts to misapply or ignore common law displacement doctrine, strongly suggesting a need for reform.

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98 For example, Raab notes that courts applying his framework would struggle to resolve displacement claims where the statute at issue governs conduct "[s]imilar [b]ut [n]ot [i]dentical" to that which was previously governed by federal common law, and that courts may reach different conclusions about the scope of displacement depending on the "level of generality" with which they view the regulated conduct. *Id.* at 729–32.

99 *Id.* at 714.

100 *Id.*

101 Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940, 951–52 (2023).

C. Grappling with Displacement in the Courts of Appeals: Türkiye Halk Bankasi *&* WhatsApp

Only two circuit courts have recently analyzed whether and to what extent the FSIA displaced the federal common law of sovereign immunity, and both reached conclusions irreconcilable with the Supreme Court's holding in *Türkiye Halk Bankasi*. These decisions illustrate the dearth of guidance that the current state of federal common law displacement doctrine provides for the lower courts and the resulting potentiality for errors.

The Second Circuit's first *Türkiye Halk Bankasi* opinion concluded that the FSIA had displaced the entire federal common law of foreign sovereign immunity, but in reaching that conclusion it cited none of the seminal cases on federal common law displacement—e.g., *City of Milwaukee*, *Oneida County*, or *American Electric*—and neglected even to mention the "speaks directly" test.[102] Rather, it relied entirely on two sovereign immunity cases, contained in a single footnote, to conclude that the "[FSIA's] enactment displaced any pre-existing common-law practice."[103] I discuss each in turn.

The Second Circuit first pointed to *Samantar v. Yousuf* which, in the portion cited, reads: "After the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity."[104] At first blush, that language appears to be dispositive of the federal common law displacement argument in *Türkiye Halk Bankasi*. But, as the Supreme Court would remark on appeal, *Samantar* later states that "if a suit is not governed by the [Foreign Sovereign Immunities] Act, it may still be barred by foreign sovereign immunity under the common law."[105] That language should have signaled to the Second Circuit that a more fulsome common law displacement analysis might be necessary. Perhaps if the "speaks directly" test were not so formless and underdeveloped, the Second Circuit might have taken this cue and performed a displacement analysis from first principles instead of resting on an overly literal interpretation of *Samantar*.[106]

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102 16 F.4th 336, 350–51 (2d Cir. 2021).

103 *Id.* at 350–51, 351 n.69.

104 Samantar v. Yousuf, 560 U.S. 305, 313 (2010).

105 *Id.* at 324.

106 Admittedly, the Second Circuit may not have glossed over the latter passage from *Samantar*, but instead concluded that it was inapposite because the Second Circuit had already concluded that the FSIA *did* govern the suit at hand. On the one hand, it is somewhat unfair to suggest, with the benefit of hindsight, that the Second Circuit should have done a more thorough displacement analysis, just in case it was wrong about the scope of the FSIA; nobody likes a Monday morning quarterback. On the other hand, *Samantar* was a civil suit,

A clearer standard for common law displacement may have also rescued the Second Circuit from its mistaken reliance on *Argentine Republic v. Amerada Hess Shipping Corporation*,[107] in which the Supreme Court articulated the "'general rule' that the [Foreign Sovereign Immunities] Act governs the immunity of foreign states in federal court."[108] *Amerada Hess* examined the FSIA's text, structure, and legislative history and concluded that the FSIA's drafters intended to "enact a comprehensive statutory scheme" that would form the "sole basis for obtaining jurisdiction over a foreign state in our courts."[109] Absent an easily administrable test for federal common law displacement, it is easy to see why the Second Circuit would interpret this holding as a eulogy for common law foreign sovereign immunity, even in the very different context of a criminal case.

However, as the Supreme Court would later clarify on appeal, "*Amerada Hess*'s rationale," and thus its zone of common law displacement, "does not translate to the criminal context" because it was "based on . . . the 'comprehensiveness' of the statutory scheme as to *civil* matters."[110] In support of this proposition, the Court stressed that *Amerada Hess* was a civil case, that "the FSIA contains no grant of criminal jurisdiction and says nothing about criminal matters," and that the statute does not modify Title 18 of the U.S. Code, the section devoted to crimes and criminal procedure.[111] Although I agree wholeheartedly with the Supreme Court's conclusion and the indicia on which it relied, it is hard to imagine how a lower federal court, equipped only with the formless "speaks directly" standard, could know *ex ante* to examine this hodgepodge of factors. By cabining *Amerada Hess*'s displacement holding in this way, with no explicit reference to or exposition of the "speaks directly" test, the Court let slip a golden opportunity to model the proper application of common law displacement doctrine.

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and as the Supreme Court cautioned on appeal, when courts speak in broad generalities, the language must be read as referring "to circumstances similar to the circumstances then before the Court," not "quite different circumstances that the Court was not then considering." *Türkiye Halk Bankasi*, 143 S. Ct. at 950 (quoting Illinois v. Lidster, 540 U.S. 419, 424 (2004)). Given the vastly different circumstances in *Türkiye Halk Bankasi* and *Samantar*, it would not have been unreasonable for the Second Circuit to have more fully considered the common law displacement question in the first instance, rather than batting it away in reliance on the partial and literal word of *Samantar*.

107 *Türkiye Halk Bankasi*, 16 F.4th at 350–51, 351 n.69 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)).

108 Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435 (1989) (citations omitted).

109 *Id.* at 434, 435 n.3.

110 *Türkiye Halk Bankasi*, 143 S. Ct. at 950 (emphasis added) (citations omitted).

111 *Id.*

In *WhatsApp Inc v. NSO Group Technologies Ltd.*, the Ninth Circuit held that the FSIA displaced the entire federal common law of sovereign immunity for foreign entities (i.e., sovereign states, agencies, state-owned corporations, or any other sovereign being besides a natural person).[112] The plaintiff, an encrypted mobile chat provider, alleged that NSO, an Israeli provider of law enforcement and intelligence software,[113] had accessed the mobile devices of over a thousand WhatsApp users in violation of federal and state law.[114] NSO argued that WhatsApp's suit warranted dismissal because, as an agent working at the direction of a foreign sovereign, NSO was entitled to common law "conduct-based" sovereign immunity.[115] NSO conceded—too generously, as it turns out—that "[t]he FSIA supersedes the common law for foreign states and their agencies and instrumentalities," but argued that the FSIA "has no effect on conduct-based foreign sovereign immunity for foreign officials and agents, which remains a matter of common law."[116] Using the language of what I will call "field displacement,"[117] the Ninth Circuit rejected NSO's argument, holding that the FSIA displaced the common law of sovereign immunity by taking "the entire field of foreign sovereign immunity as applied *to entities*," with "entities" meaning anything other than a natural person.[118] A literal reading of the Ninth Circuit's sweeping holding is plainly incompatible with the Court's eventual decision in *Türkiye Halk Bankasi*, which clarified that the FSIA occupies the field of foreign sovereign immunity only as to entity defendants in *civil* suits.

In arriving at its overly broad holding, the *WhatsApp* Court engaged more deeply with displacement doctrine than the Second Circuit did. First, it articulated a legal standard approximating the "speaks directly" test: "[W]hen federal statutes directly answer the federal question, federal common law does not provide a remedy because legislative action has displaced the common law."[119] It proceeded to analyze the FSIA's expansive language, its sprawling definition of "foreign state," and

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112 17 F.4th 930, 933 (9th Cir. 2021).

113 For a helpful primer on NSO Group, see Ronen Bergman & Mark Mazzetti, *The Battle for the World's Most Powerful Cyberweapon*, N.Y. Times (June 15, 2023), https://www.nytimes.com/2022/01/28/magazine/nso-group-israel-spyware.html [https://perma.cc/P5RA-4CHF].

114 *WhatsApp*, 17 F.4th at 933–34.

115 *See* Appellants' Opening Brief at 30, WhatsApp Inc. v. NSO Grp. Techs. Ltd., 17 F.4th 930 (9th Cir. 2021) (No. 20-16408).

116 *Id.* at 9 (citing Samantar v. Yousuf, 560 U.S. 305, 313, 321, 324 (2010)).

117 *See infra* Part III.

118 *See WhatsApp*, 17 F.4th at 937 & n.2; *see also id.* at 940 ("The proper analysis begins and ends with the FSIA, the comprehensive framework Congress enacted for resolving any entity's claim of foreign sovereign immunity.").

119 *Id.* at 937 (alteration in original) (quoting a portion of Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 856 (9th Cir. 2012), which also cites seminal displacement cases such as *City of Milwaukee*, *County of Oneida*, and *American Electric Power*).

its legislative purpose of "address[ing] a modern world where foreign state enterprises are every day participants in commercial activities" to conclude that the FSIA had entirely displaced the common law in cases involving private corporations acting on a sovereign's behalf.[120]

The *WhatsApp* case is significant because it engaged seriously with the current state of displacement doctrine and used essentially the same interpretive tools that the Supreme Court would use in *Türkiye Halk Bankasi*,[121] but nevertheless reached a holding too broad to be reconciled with *Türkiye Halk Bankasi*'s. Of course, even when provided with clear standards, courts often reach conclusions that are incorrect or overly capacious; it may be that criminal prosecutions of foreign sovereign entities simply did not occur to the *WhatsApp* court which, after all, was deciding a civil dispute. Nevertheless, if a clearer common law displacement standard could have prevented the Ninth Circuit from reaching its overly expansive holding, it is worth imagining what that framework might look like.

III
Improving Common Law Displacement Doctrine

The remainder of this Note is dedicated to proposing and illustrating a path forward. Instead of settling for the amorphous "speaks directly" test, courts should approach common law displacement analysis analogously (but not identically) to how they approach preemption analysis: through a three-part framework of "express," "conflict," and "field displacement." The only difference between state law preemption and common law displacement should be the level of judicial scrutiny applied—courts should start with a presumption against preemption, but no presumption against displacement. In all other respects, the analysis should be the same.

At least one academic observer has indirectly suggested the viability of this approach. A 2008 article by Professor Thomas Merrill, discussing *City of Milwaukee v. Illinois*,[122] pointed out that the Supreme Court's opinion was "ambiguous as to what the standard for displacement of federal common law should be."[123] He argued that the case could be read to endorse either a theory of "conflict displacement" or "field

120 *Id.* at 936–40 (citing Samantar v. Yousuf, 560 U.S. 305, 313–23 (2010)).

121 *See* Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940, 946–50 (2023) (relying on the FSIA's text and historical context in its analysis).

122 451 U.S. 304 (1981) (holding that, in areas of national concern, federal common law should be resorted to in the absence of an act of Congress).

123 Merrill, *supra* note 82, at 311.

displacement," terms he coined "by analogy" to preemption doctrine.[124] Taking Professor Merrill's observation just a small step further, this Note would argue that *City of Milwaukee* presents no such dichotomy; courts should entertain the possibility of conflict *and* field displacement, as well as express displacement.[125]

This proposed three-part displacement framework is lurking in the case law as well. As discussed above, the Supreme Court in *Exxon Shipping Co. v. Baker* came close to endorsing this framework. In asking whether the Clean Water Act (CWA) displaced the federal (maritime) common law of punitive damages, the Court considered whether applying the common law would "have any frustrating effect on the [statute's] remedial scheme,"[126] an analysis that could be analogized to conflict preemption.[127] The Court also inquired whether, in enacting the CWA, Congress "inten[ded] to occupy the entire field of pollution remedies,"[128] mirroring the language of field preemption.[129] Although later displacement cases such as *American Electric* retreated to the "speaks directly" test rather than following *Exxon Shipping*'s more prescriptive analysis, a smattering of federal courts have continued to rely on *Exxon Shipping*'s approach.[130]

The courts should move on from the formless "speaks directly" test and instead embrace a displacement framework grounded in this analogy to state law preemption doctrine. A court confronted with a displacement question would determine whether Congress has displaced

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124 *Id.* at 311 & n.83.

125 In my view, *City of Milwaukee* was actually decided on field displacement grounds. *City of Milwaukee*, 451 U.S. at 316 (holding that the Federal Water Pollution Control Act's 1972 amendments displaced the common law by "occup[ying] the field through the establishment of a comprehensive regulatory program"). This does not mean, however, that the *City of Milwaukee* Court disavowed the possiblity of express or conflict displacement. Indeed, in explaining how the analysis for "determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law," the Court focused solely on the fact that a showing of "clear and manifest purpose" is required in the preemption context but not the displacement context. *Id.* at 316. In no other way did the *City of Milwaukee* Court suggest that preemption is an inapt analogue to displacement.

126 Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008).

127 *See supra* notes 88–89 and accompanying text.

128 *Exxon Shipping*, 554 U.S. at 489.

129 *See supra* notes 88–89 and accompanying text.

130 *See, e.g.*, United States v. Am. Com. Lines, LLC, No. 11-2076, 2013 WL 1182963, at *4 (E.D. La. Mar. 21, 2013) (citing *Exxon Shipping*, 554 U.S. at 489, for its "three-part analysis" for displacement of maritime law); Lewis v. United States, No. 17-1644-JWD-SDJ, 2024 WL 1216719, at *18 (M.D. La. Mar. 21, 2024) (repeating the *Exxon Shipping* analysis); La. Crawfish Producers Ass'n v. Amerada Hess Corp., No. 6:10-0348, 2015 WL 12781021, at *10 (W.D. La. Oct. 28, 2015) (same); *see also* Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 862 (9th Cir. 2012) (Pro, J. concurring) (citing *Exxon Shipping*'s displacement analysis approvingly).

the federal common law in any of three ways: by enacting a statute that explicitly expresses its intention to displace the common law (which may be termed "express displacement"), or which is incompatible with the federal common law ("conflict displacement"), or which establishes a statutory scheme so comprehensive that it occupies the entire field previously governed by federal common law ("field displacement").

Adopting this framework would allow courts to articulate clear standards for each displacement modality by analogizing to their counterparts in preemption law. For example, drawing on the test for conflict preemption, courts would determine whether a statute conflict displaces the federal common law by asking firstly if "compliance with both" the statutory command and the federal common law "is a physical impossibility," or secondly if federal common law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[131] For simplicity, the remainder of this Note refers to these two hypothetical tests for conflict displacement as the "physical impossibility" test and the "congressional intent" test, respectively. Alternatively, drawing upon the standard for field preemption, a statute might be deemed to field displace the federal common law if the statutory scheme is "sufficiently comprehensive" to infer that Congress intended to "le[ave] no room" for supplementary common law regulation.[132]

However, preemption doctrine cannot be copied wholesale into the displacement context because of the different federalism and separation of powers concerns at play.[133] Whereas courts in preemption cases start with a presumption against preemption, courts entertaining displacement claims should begin with no such presumption (or, arguably, with a presumption *in favor* of common law displacement).[134]

In sum, this Note proposes that displacement analysis use the same analytical framework as preemption analysis, but without the

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131 *See* Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (citations omitted).

132 *See* Hillsborough Cnty. v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 713 (1985) (citations omitted)); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 377 (2015) (focusing the field preemption inquiry on whether Congress "intended 'to foreclose any state regulation in the *area*'" (citations omitted)).

133 *See supra* notes 79–83 and accompanying text; *see also* City of Milwaukee v. Illinois, 451 U.S. 304, 316–17 (1981) (explaining that displacement of common law does not require "the same sort of evidence of a clear and manifest purpose" as preemption because of the different federalism and separation of powers implications).

134 *See City of Milwaukee*, 451 U.S. at 317 (differentiating preemption from displacement on the grounds that, in displacement cases, the court "'start[s] with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law").

negative presumption that applies in the preemption context. As an illustration of how this might be deployed in practice, the following sections demonstrate that if the Supreme Court had applied this proposed framework to the question of FSIA's displacement of the common law, it likely would have reached the same outcome, but would have provided lower courts with a better model to follow in future displacement disputes.[135]

A. The FSIA Does Not "Conflict Displace" Common Law Criminal Sovereign Immunity

1. The "Physical Impossibility" Test

The "physical impossibility" test asks whether, in the context of a criminal prosecution of a foreign sovereign, it would be impossible to simultaneously comply with the FSIA and the federal common law. The only plausible source of irreconcilability between these two sources of law is found in § 1604 of the FSIA, which states that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in §§ 1605–1607 of this chapter."[136] Read in isolation, this passage superficially seems to present a conflict between the statute and common law immunity, but as *Türkiye Halk Bankasi* would reiterate, the Supreme Court has a "duty to construe statutes, not isolated provisions."[137] Section 1604 must be read "in tandem" with § 1330(a),[138] which specifies that "[t]he district courts shall have original jurisdiction . . . of any *nonjury civil action* against a foreign state . . . with respect to which the foreign state is not entitled to immunity either under §§ 1605–1607 . . . ."[139] Accordingly, if § 1604's seemingly broad language is confined to civil actions, as is implied by the most straightforward reading of the statute, then there is no inherent incompatibility between the existence of the FSIA and the survival of common law immunity in the criminal context.[140]

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135 The following sections consider only conflict and field displacement. They do not consider express displacement because the FSIA does not contain a clause explicitly abrogating the common law. The only possible basis for express displacement is section 1602 of the FSIA, titled "Findings and Declaration of Purpose," which is explored in the conflict displacement analysis instead.

136 28 U.S.C. § 1604.

137 Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940, 948 (2023) (quoting Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel*. Wilson, 559 U.S. 280, 290 (2010)).

138 *Id.* at 949 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989)).

139 28 U.S.C. § 1330(a) (emphasis added).

140 *See Türkiye Halk Bankasi*, 143 S. Ct. at 949 ("Section 1330(a) spells out a universe of civil (and only civil) cases against foreign states over which district courts have jurisdiction,

2. *The "Congressional Intent" Test*

The "congressional intent" test dictates that the common law of foreign sovereign immunity in the criminal context is displaced if the survival of that doctrine would thwart the "full purposes and objectives of Congress" embodied in the FSIA.[141] The most important indicator of congressional intent is the text. The FSIA's "declaration of purpose" in § 1602 expressed Congress's intention that "United States courts" should determine foreign sovereigns' claims to immunity "in conformity with the principles set forth in this chapter."[142] But it does not follow from this language that Congress intended for the courts to administer the FSIA's immunity rules in *all* cases with foreign sovereign defendants. Reading section 1602 in tandem with § 1330(a)'s reference to nonjury civil actions seems to evince a narrower intent: to keep the Executive Branch out of immunity determinations in the civil context. Other semantic clues throughout the statutory text, such as the use of the word "litigants" (which ordinarily does not encompass prosecuting authorities) and "suit" (which connotes a civil action[143]), buttress this textual exegesis of Congress's intent.[144]

If one were not convinced by these textual indicators of purpose, the FSIA's legislative history confirms that the statute was directed to civil cases only. The FSIA's sponsors in the Senate—Senators Roman Hruska, James Eastland, and Hugh Scott—framed the bill as a solution to a "major problem faced by plaintiffs who seek to bring suit against a foreign state—how to deal with that state's assertions of foreign sovereign immunity."[145] The word "plaintiff" refers to civil complainants, not prosecuting authorities.[146] Similarly, Senator Scott expressed his wish that the courts, rather than the Executive, should

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and section 1604 then clarifies how principles of immunity operate within that limited civil universe.").

141 *See* Fid. Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (citations omitted).

142 28 U.S.C. § 1602.

143 *See Suit*, Black's Law Dictionary (11th ed. 2019) (defining "suit" as "[a]ny proceeding by a party or parties against another in a court of law"). The Supreme Court in *Türkiye Halk Bankasi* noted this linguistic choice as well, commenting that "suit" does not ordinarily encompass "criminal investigation or prosecution." 143 S. Ct. at 947.

144 *See Türkiye Halk Bankasi*, 143 S. Ct. at 947–48 (listing textual indications that the FSIA applies only to civil cases, including the fact that it is "silent as to criminal matters"); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012) ("The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it.").

145 122 Cong. Rec. 17462 (1976).

146 *See Plaintiff*, Black's Law Dictionary (11th ed. 2019) (defining "plaintiff" as "[t]he party who brings a civil suit in a court of law"). The congressional record elsewhere uses the word "litigant," 122 Cong. Rec. 17462 (1976), which, as the Court remarked in *Türkiye Halk*

determine "whether the plaintiff will or will not be permitted to pursue his *cause of action*,"[147] a phrase which almost exclusively appears in civil proceedings.[148] The FSIA's congressional record contains words such as "civil," "suit," "claim," and "judgment" but never mentions "criminal," "prosecution," or "conviction."[149] The FSIA's House Report contains a short list of illustrative applications of the Act, all of which are hypothetical civil disputes against foreign state-owned corporations or insrumentalities.[150] An official called to testify about the proposed legislation similarly understood the Act to address how "*private persons* [can] maintain a lawsuit against a foreign government or against a commercial enterprise owned by a foreign government."[151] Unsurprisingly, the handful of courts that have considered the FSIA's legislative history agree that "the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states."[152]

The historical context in which the FSIA was enacted further suggests that the statute was not intended to affect the criminal prosecution of foreign sovereign entities. True, the statute's authors viewed the vagaries of the common-law approach to sovereign immunity as an undue impediment in "a modern world where foreign state enterprises

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Bankasi, "does not ordinarily sweep in governments acting in a prosecutorial capacity," 143 S. Ct. at 947.

147 122 Cong. Rec. 17472 (1976) (emphasis added).

148 For example, as of the time of writing, the exact search term "criminal cause of action" returns less than 400 case results on Westlaw's online legal research platform. By comparison, "civil cause of action" returns 10,000 results, the maximum number of cases that the platform can query at a time, indicating that the actual number is probably vastly larger than 10,000.

149 *See* 122 Cong. Rec. 17462–17472 (1976).

150 *See* H.R. Rep. No. 94-1487, at 6–7 (1976) (imagining a pricing dispute between a U.S. businessman and a foreign state-owned trading company, a contract dispute between an American property owner and foreign state-owned real estate investor, and a car accident involving a vehicle owned by a foreign embassy). Admittedly, the auto accident example could also give rise to criminal liability, but the same paragraph introduces these scenarios as examples where, absent the FSIA, it is uncertain "whether our citizens will have access to the courts in order to resolve ordinary legal disputes," clearly evoking civil, rather than criminal, liability. *Id.* at 6.

151 *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 94th Cong. 24 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State) (emphasis added), *reprinted in* 1 William H. Manz, Foreign Sovereign Immunities Act of 1976 with Amendments: A Legislative History of Pub. L. No. 94-583 (2000).

152 *In re* Grand Jury Subpoena, 912 F.3d 623, 630 (D.C. Cir. 2019); *see also* United States v. Hendron, 813 F. Supp. 973, 974–77 (E.D.N.Y. 1993) (reviewing both the text and legislative history of the FSIA and concluding that the FSIA only contemplated immunity in civil cases). Both of these cases concluded that the FSIA does not immunize foreign states or instrumentalities from criminal prosecution, but neither entertained the question of whether the common law may do so.

are every day participants in commercial activities."[153] But it does not follow that the 94th Congress saw *prosecuting* foreign sovereigns as part of the solution. In 1976, although corporate criminal liability had been a feature of American law for many years, prosecution of domestic corporations was only just coming into its own.[154] In this context, and in view of the sheer historical scarcity of criminal proceedings against foreign state-owned companies—most of which concerned grand jury subpoenas rather than full-blown prosecutions[155]—Congress likely would have understood civil actions to be the primary means of holding foreign sovereign corporations accountable. And if the notion of prosecuting foreign sovereign *corporations* would have seemed odd to the 94th Congress, the idea of prosecuting foreign states *themselves*—which the Second Circuit seemed to recognize as unprecedented even today[156]—would have been beyond the pale. Indeed, when the Senate Judiciary Committee was contemplating amendments to the FSIA in

153 Samantar v. Yousuf, 560 U.S. 305, 323 (2010) (quoting H.R. Rep. No. 94-1487, at 7 (1976)).

154 *See* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 Fla. L. Rev. 1, 14 (2014) (noting that "[a]lthough corporate-level criminal liability was recognized in a famous 1909 case, organizational criminal liability remained relatively rare" until the 1970s, when "an eruption of corporate scandals inspired law enforcement authorities to strengthen their policing of corporate behavior"); *see also* Brandon Garrett, *Biden Administration Revisions to the Principles of Federal Prosecution of Business Organizations*, Corp. Prosecution Registry (Jan. 10, 2022, 9:51 AM), https://corporate-prosecution-registry.com/blog/biden-administration-revisions [https://perma.cc/QA4R-S8HS] ("American law on corporate criminal liability dates back to the 19th century. However, it was not until the end of the 20th Century that investigating and prosecuting corporations . . . became a major feature of criminal justice in the United States . . . .").

155 *See* Brief for the United States at 25, Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940 (2023) (No. 21-1450) (naming only two examples of pre-FSIA criminal cases involving sovereign instrumentalities: *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952), and *In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298 (D.D.C. 1960)); *see also* Brief for Petitioner at 29–30, Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940 (2023) (No. 21-1450) (identifying nine cases of domestic criminal proceedings against sovereigns, each of which either was limited to a subpoena or occurred after the FSIA's enactment).

156 United States v. Bankasi, 120 F.4th 41, 52 (2d Cir. 2024). The parties and multiple amici expressed this view when the case was before the Supreme Court as well. *See* Brief for Petitioner at 36, Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940 (2023) (No. 21-1450) (noting the "traditional rule" that "[a] state . . . cannot be prosecuted" (quoting Elizabeth Helen Franey, Immunity from the Criminal Jurisdiction of National Courts, in Research Handbook on Jurisdiction and Immunities in International Law 205, 207 (Alexander Orakhelashvili ed., 2015))); Brief for the United States at 7, Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940 (2023) (No. 21-1450) ("[F]oreign states qua states have historically been accorded immunity from criminal prosecutions . . . ."); Brief for Amici Curiae Republic of Azerbaijan, Islamic Republic of Pakistan, and State of Qatar in Support of Petitioner at 13, Türkiye Halk Bankasi A.Ş. v. United States, 143 S. Ct. 940 (2023) (No. 21-1450) (describing the "centuries-old global consensus . . . . that imposing criminal liability on sovereign states would be unprecedented and undesirable").

1994, State Department representatives[157] and legal scholars[158] alike testified that foreign states could not be directly subject to criminal liability, a conviction that evidently had not been disturbed by nearly twenty years of experience with the FSIA.

In sum, because the FSIA is intended to control only in civil cases, it is possible for the FSIA and the federal common law of sovereign immunity to coexist peacefully in the criminal context. Neither the statute's text, nor its legislative history, nor its historical context suggests that this coexistence is contrary to Congress's purposes. Thus, the FSIA did not "conflict displace" the federal common law of sovereign immunity from criminal prosecution.

B. The FSIA Does Not "Field Displace" Common Law Criminal Sovereign Immunity

Having shown that the FSIA did not conflict displace the federal common law of foreign sovereign immunity in the criminal context, the next question is whether Congress intended for the FSIA to occupy the entire field of foreign sovereign immunity.

No doubt, the 94th Congress intended that the FSIA would occupy *a* field; the question is whether that field stretches into the universe of criminal proceedings.[159] The reasoning of *Samantar v. Yousuf* is instructive. In that case, the Court held that the FSIA did not displace the common law immunities of foreign officials.[160] The *Samantar* Court reasoned that, while cases implicating official immunity "did arise in the pre-FSIA period, they were few and far between," with only a small

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157 *See The Foreign Sovereign Immunities Act: Hearing on S. 825 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary*, 103d Cong. 16 (statement of Jamison S. Borek, Deputy Legal Adviser, Department of State), *reprinted in* 2 William H. Manz, Foreign Sovereign Immunities Act of 1976 with Amendments: A Legislative History of Pub. L. No. 94-583 16 (2000) ("We have not believed in the criminal behavior of States and foreign governments committing criminal behavior . . . .").

158 *See* Letter from Allan Gerson, Professor of Int'l L. & Transactions, George Mason Univ., and Mark S. Zaid, Of Counsel, Law Offs. of Allan Gerson, to Sen. Howell Heflin, Chairman, S. Subcomm. on Cts. & Admin. Prac. (June 16, 1994), *reprinted in* 2 William H. Manz, Foreign Sovereign Immunities Act of 1976 with Amendments: A Legislative History of Pub. L. No. 94-583, 93 (2000) ("[I]t is accepted international practice that states and their leaders are generally immune from criminal proceedings in other countries . . . . [I]t is impossible given our current state system to haul a foreign government or its leaders into a United States court for the purpose of criminal punishment.").

159 *See* 122 Cong. Rec. 17465 (1976) ("This bill . . . sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states . . . . It is intended to preempt any other state or federal law . . . for according immunity to foreign sovereigns, their political subdivisions, their agencies and their instrumentalities.").

160 560 U.S. 305, 325 (2010) (holding that the FSIA did not govern the petitioner's claim of immunity as a foreign official, based on the statute's "text, purpose, and history").

handful of such cases in existence between 1952 (the year of the Tate Letter) and 1976 (the year the FSIA was enacted).[161] The Court reasoned that the paucity of such cases suggests that Congress did not intend for the FSIA's comprehensive scheme to reach into and take over the realm of common law foreign official immunity. *Samantar*'s reasoning applies with even greater force to the prosecution of foreign sovereign entities, given that criminal proceedings against foreign sovereigns between 1952 and 1976 were virtually unheard of.[162] Courts should not extend the FSIA's field of displacement into an area of common law which there is "no reason to believe that Congress saw as a problem, or wanted to eliminate."[163]

A second reason to believe that the FSIA was not intended to reach the field of criminal proceedings is that the statute is wholly contained within Title 28 of the U.S. Code, which deals mostly with the structure and procedures of the federal judiciary; it does not modify any part of Title 18, the portion dedicated to crimes and criminal procedure.[164] This legislative decision belies the argument that the FSIA is sufficiently "comprehensive" as to displace the entire field of common law foreign sovereign immunity. The FSIA's zone of comprehensiveness is better understood to reach only as far as the statutory text suggests: civil cases against foreign sovereigns.

To sum up, because the federal common law of foreign sovereign immunity in criminal proceedings neither conflicts with the FSIA nor lies within its field of displacement, the FSIA did not displace the common law. This Note's proposed framework would have yielded the same outcome that the Court ultimately reached in *Türkiye Halk Bankasi*, but would provide a more structured approach for courts to follow in future displacement cases.

Conclusion

The doctrine of federal common law displacement is due for a makeover. The "speaks directly" test for common law displacement is too nebulous for the important role that it serves. The Second and Ninth Circuits' recent attempts to grapple with common law displacement in

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161 *Id.* at 323 & n.18 (noting that, of the 110 cases involving sovereign immunity between 1952 and 1976, only two involved head of state immunity and four involved foreign official immunity).

162 *See supra* note 152 and accompanying text.

163 *Samantar*, 560 U.S. at 323.

164 *See generally* H.R. Rep. No. 94-1487 (1976) (noting the sections of the U.S. Code added or modified by the FSIA).

the foreign sovereign immunity context highlight the need for doctrinal innovation.

This Note has proposed a solution with several features to recommend it: The proposed framework is grounded in an analogy to a well-defined body of law and is consistent with both the scholarly literature and the reasoning that a handful of federal courts have already endorsed. Applying the language and logic of preemption doctrine to common law displacement would go a long way toward averting judicial error in this important area of law.