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## Congress and the Reconstruction of Foreign Affairs Federalism

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# CONGRESS AND THE RECONSTRUCTION OF FOREIGN AFFAIRS FEDERALISM

Ryan Baasch\* & Saikrishna Bangalore Prakash\*\*

## ABSTRACT

*Though the Constitution conspicuously bars some state involvement in foreign affairs, the states clearly retain some authority in foreign affairs. Correctly supposing that state participation may unnecessarily complicate or embarrass our nation's foreign relations, the Supreme Court has embraced aggressive preemption doctrines that sporadically oust the states from discrete areas in foreign affairs. These doctrines are unprincipled, supply little guidance, and generate capricious results. Fortunately, there is a better way. While the Constitution permits the states a limited and continuing role, it never goes so far as guaranteeing them any foreign affairs authority. Furthermore, the Constitution authorizes Congress to enact laws necessary and proper for carrying into execution federal powers. We believe that Congress can use this authority to adopt preemption mechanisms that reflect its view of the optimal role of states in international affairs. When it comes to policing state involvement in foreign affairs, Congress, rather than the courts, ought to be in the driver's seat. Critically, Congress can proactively police the states, meaning that it need not wait for state mischief before enacting legislation. To give a sense of the possible and to alter the terms of a debate focused on judicial policing of the states, we recommend several novel mechanisms of preempting or deterring state intervention in foreign affairs and suggest categories of state law that ought to trigger these mechanisms. The precise mix is for Congress to consider based on its own sense of the vices and virtues of state forays in international affairs and of our existing foreign affairs federalism.*

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“[I]f all the discontented people in this country are to be suffered to tamper and negotiate with foreign Powers, it would lead to the most serious consequences.”<sup>1</sup>

#### INTRODUCTION

Imagine that the president invites a divisive Middle Eastern leader to the United States for talks. An American mayor passionately disagrees with this decision and interjects in a fantastic way: the meddlesome mayor unceremoniously ejects the foreigner from a local event, branding him a terrorist and murderer. The mayor, lacking any diplomatic pedigree and unaccountable to the nation, has severely undercut the nation’s conduct of foreign policy.

This all seems farfetched. Yet it is no law school hypothetical. New York Mayor Rudolph Giuliani once ousted Palestinian Liberation Organization Chairman Yasser Arafat from a Lincoln Center concert, claiming that Arafat was a murderer of Americans and a terrorist.<sup>2</sup> The Clinton Administration

1. 9 ANNALS OF CONG. 2495 (1798) (comments of John F. Rutledge, Jr., of South Carolina).

2. David Firestone, *White House Condemns Giuliani for Ejecting Arafat from Concert*, N.Y. TIMES, Oct. 25, 1995, at A1, <http://www.nytimes.com/1995/10/25/us/un-50-arafat-white-house-condemns-giuliani-for-ejecting-arafat-concert.html> [<https://perma.cc/4PYH-XXHC>].

could do little more than sputter that the episode was “an embarrassment to everyone associated with diplomacy,”<sup>3</sup> and had greatly complicated the peace process and the federal government’s foreign policy agenda.<sup>4</sup>

The incident illustrates how subnational actors can complicate, unsettle, and obstruct our federal government’s conduct of foreign affairs.<sup>5</sup> While that government’s authority to steer our nation’s foreign affairs is undisputed, a few scholars insist that the Constitution leaves states with residual authority in foreign affairs.<sup>6</sup> Perhaps such scholars suppose that the often-amateurish state intrusions in foreign affairs are simply unavoidable because the Constitution affirmatively safeguards the ability of states to have their own foreign relations.

In our view, the Constitution forms a “more perfect” foreign affairs federalism. We agree that the Constitution does not forbid state and local actors from dabbling in foreign affairs. Yet that is a far cry from supposing that it somehow *guarantees* that states may pursue their own foreign policies. The Constitution contains no such pledge or assurance of states’ rights in foreign affairs. To the contrary, it contains the seeds of a federal solution to the problem of state interference. By statute, Congress may bar state meddling in foreign affairs. In fact, if Congress concludes that multiple voices burden the federal government’s exercise of its foreign affairs authority, it can wholly divest the states of their ability to pursue foreign policies. In sum, Congress can end foreign affairs federalism as it exists today.

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3. *Id.*

4. Lest one think the mayor’s policy is somehow more righteous than the federal approach, Giuliani had previously welcomed a leader of the Irish Republican Army to city hall. EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 98 (1998).

5. For a list of particularly controversial state intrusions into foreign affairs, see *id.* at 92–100. In the 1970s, Idaho sponsored trade missions to Libya despite Washington’s disapproval of the el-Qaddafi regime. *Id.* at 92. During the height of Cold War tensions, New York and New Jersey refused to allow a Soviet emissary to land in their airports in order to attend a U.N. session. *Id.* Acting against federal oil policy, Texas has sent representatives to OPEC meetings in order to influence global prices. *Id.* at 95.

6. See, e.g., Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L. L. 821, 826–27 (1989) (suggesting that the First Amendment might protect state foreign affairs resolutions); Terrence Guay, *Local Government and Global Politics: The Implications of Massachusetts’ “Burma Law”*, 115 POL. SCI. Q. 353, 365 (2000) (exploring the popularity of this position with state legislators); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L. L. 1, 47 (1999) (concluding that “state and local sense resolutions and market participation measures . . . lie beyond the preemptive power of the federal government”). Some local politicians suppose that they have “the right and ability to use state-level restrictions to respond to legitimate public concerns” even when those restrictions implicate foreign affairs. Guay, *supra*, at 365. Others argue that it is “an age-old function of state legislatures” to influence the national government, including its foreign dealings, via state resolves and participation in the marketplace. *Id.*

In Part I we advance our case for one voice—that, as a normative matter, the states *should not* intervene in foreign affairs.<sup>7</sup> The states should stand deaf and mute in the foreign arena because they lack the expertise and knowledge necessary to engage in that arena. States lack a cadre of resident international specialists (State Department bureaucrats) and do not have the benefit of semipermanent officials stationed abroad (ambassadors and their extensive retinue of experts). Moreover, as the Supreme Court and others have long recognized, difficulties and disadvantages ensue when states pursue their own foreign policies.<sup>8</sup> For instance, as a general matter little is gained by having some states court certain nations while others—including perhaps the federal government—disfavor those same sovereigns. Finally, and relatedly, the states may cause real mischief. Besides Mayor Giuliani’s escapade, consider Idaho’s misguided pursuit of trade with Libya in the 1970s. Despite clear executive disapproval of Muammar el-Qaddafi’s regime and Libya’s evident intention “to bring pressure to bear on Idaho’s representatives in Washington” as a means of securing withheld military jets, Idaho doggedly sought a commercial relationship with the rogue regime.<sup>9</sup>

Part II considers the judiciary’s role in aggressively policing state intrusion in the international arena and explains the inadequacies of this jurocentric approach. The Supreme Court employs aggressive preemption doctrines that, without entirely forbidding state involvement, often thwart state interloping. We have no quarrel with express or conflict preemption—where contrary federal law exists courts must declare state and local laws preempted. Moreover, we endorse the view that the states’ interventions in foreign affairs are often suboptimal. Yet to its discredit, the Court has repeatedly stretched and strained in this area, often preempting on specious grounds.<sup>10</sup> The judiciary’s overweening desire to suppress the states has generated some rather unedifying cases and doctrines.

Part III takes up the Constitution’s approach to foreign affairs federalism. We conclude that though the Constitution bars certain state actions in

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7. As we discuss later, ours is a claim about the need for federal stewardship of foreign affairs, even when that stewardship involves many voices, including Congress and the executive. Our claims are orthogonal to the debate about the allocation of federal foreign affairs authority across the political branches. Hence we have nothing to say about the Court’s recent decision in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). For an extended discussion of the case, see Saikrishna Bangalore Prakash, *Zivotofsky and the Separation of Powers*, 2015 Sup. Ct. Rev. 1.

8. See *infra* Section I.A.

9. See William Safire, *Libya and Idaho*, N.Y. TIMES, Feb. 14, 1979, at A27. El-Qaddafi viewed one of the senators from Idaho as a key figure in enabling his eventual receipt of the military jets. Demonstrating the considerable foreign policy implications of Idaho’s trade relations with Libya, one Idaho politician remarked that “the first question [the Libyans] ask everybody is how they’re going to get their jets delivered.” *Id.* It seems mistaken for a foreign sovereign to believe that a single state could secure the desired jets. Nonetheless, it was outrageous for Idaho to seek a relationship in the face of such apparent desires.

10. See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000). The *Crosby* Court implausibly read a federal statute imposing sanctions on Burma as if it erected an implied obstacle to supplemental state sanctions. *Id.* at 372–73.

foreign affairs,<sup>11</sup> it never ousts them from the field.<sup>12</sup> And yet it also never explicitly (or implicitly) guarantees the states a role in foreign affairs. In a sense, the Constitution establishes a default rule, one that permits states to have their own foreign policies without actually *safeguarding* any such authority. Part III closes by advancing a theory of congressional authority under which the political branches (rather than the courts) may more efficaciously cabin the states. The Necessary and Proper Clause, along with other foreign affairs grants to the federal government, empower Congress to completely oust the states from foreign affairs. Congress may do so on the theory that state interloping obstructs the sound exercise of federal power and that preemption is therefore necessary and proper to carry federal foreign affairs powers into execution. In sum, Congress may adopt measures meant to ensure that the states, rather than standing disunited, are “made one as to all foreign . . . matters.”<sup>13</sup>

Part IV advances a novel preemption regime. One scholar has argued that because “[t]here is no precise demarcation between the local and the international” it is impossible to “invalidate all state laws potentially implicating foreign nations.”<sup>14</sup> We take up this challenge. We suggest federal mechanisms that Congress could employ to guard against state intrusions, including preclearance and temporary suspension of state laws.<sup>15</sup> We also propose a number of categories (we call them state “triggers”) that Congress could consider as a means of identifying state laws that interfere in international affairs. For instance, Congress might wish to preempt state laws that single out particular countries (e.g., a state sanctioning Iran by name). Or Congress might wish to impede the enforcement of state laws that mete out different treatment based on the type of foreign government (e.g., a state law

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11. The Constitution expressly provides that the states may not “enter into any Treaty, Alliance, or Confederation [or] grant Letters of Marque and Reprisal.” U.S. CONST. art. I, § 10, cl. 1. Further, the states are permitted to do certain acts, but *only* with Congressional consent. Specifically, states may not “enter into any Agreement or Compact with . . . a foreign Power, or engage in War” except under extreme circumstances, *unless* they have the consent of Congress. *Id.* art. I, § 10, cl. 3.

12. How much foreign affairs authority the states retain under the constitutional default is uncertain. The answer turns on the scope of foreign affairs powers that they would have had in the absence of the express restrictions in Section 10 and any implicit constraints that arise from the affirmative grants to Congress and the president. The answer also rests on the breadth of those restrictions and constraints. We do not develop a theory of the scope of state authority but instead join the long list of scholars who read the Constitution as implicitly permitting states to play continuing roles in foreign affairs.

13. Letter from Thomas Jefferson to Joseph Jones (Aug. 14, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 33, 34 (Julian P. Boyd ed., 1955).

14. Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 374 (1999).

15. We use the term “state laws” to refer to all activities pursued by either state or local governments, as they relate to foreign affairs. Hence our use of the phrase goes beyond mere legislation. Our usage is in keeping with the bulk of scholarly literature on the topic. *See, e.g., id.* at 345 n.13 (“For convenience I will refer only to ‘state’ laws and activities affecting foreign affairs, although I mean that term also to encompass the activities of local government.”).

that turns on whether a government owns the means of production). Finally, we discuss how best to pair state law triggers with federal preemptive mechanisms. This is a complex undertaking, for an infinite number of state activities may affect our nation's foreign affairs. We believe, however, that Congress could construct a refined framework that would permit states to enact legislation pertaining to their traditional spheres of authority while also enabling the federal government to effectively and expeditiously block laws that interfere with its conduct of foreign affairs.

### I. CACOPHONOUS FOREIGN AFFAIRS

The case against state involvement in foreign affairs is easy to make. States are unqualified to act in the international arena because they lack the information and the expertise that comes from continued and sustained engagement in foreign matters. Because of their ignorance and inexperience, states are apt to anger allies and undermine the actions and priorities of the more expert federal political branches. Those untutored in foreign matters should not be suffered to hamper those more informed and skilled, however good the intentions of the former. Further, the international ventures of state officials run counter to popular expectations. Voters expect that local officials will stick to local matters and that federal officials—senators, representatives, presidents—will steer our nation's diplomacy. In sum, foreign affairs federalism, as it operates today, imposes substantial costs and renders the United States disunited before the world.

Some scholars disagree with our diagnosis. A few of them claim that state intervention generates weighty benefits. Others suggest that the drawbacks of state freelancing are insignificant, or are manageable. We disagree. This Part highlights the drawbacks of state involvement in foreign affairs. It then maintains that the supposed benefits of many voices in foreign affairs are illusory.

#### A. *The Need for One Voice*

The states are incompetent actors on the international stage and often act in ways that sabotage those more fluent in foreign affairs. First, the states lack the tools—the information, expertise, and infrastructure—to effectively formulate and pursue foreign policies. Second, and relatedly, because state and local actors are ignorant they are prone to offend and embarrass foreign nations, including valued allies. Third, their episodic interventions undermine the actions of more competent actors—Congress and the president—because they sow confusion internationally. Finally, state participation in foreign affairs contradicts a foundational premise of our national system, namely that the parts of the union ought not to be able to take actions that undermine the entire union.<sup>16</sup>

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16. See, e.g., Bilder, *supra* note 6, at 827–28 (expressing similar concerns).

Our first concern—state incompetence—has a long historical pedigree. One founder referred to the states as “dumb” and “deaf” in the international arena due to their inability to communicate with foreign nations.<sup>17</sup> We doubt that such claims rested solely on a supposed lack of constitutional authority in foreign affairs; rather, we think the claims also reflected the sense that the states were handicapped on the international stage. States are no less disadvantaged today. They continue to lack the capacity to participate in international affairs in meaningful ways.

Compare the competencies of federal and state institutions. No state maintains anything resembling the State Department that might help conduct or manage its foreign affairs. The closest analogs are a handful of “international trade offices.”<sup>18</sup> But these single-issue, tiny offices pale in comparison to the institutional expertise, experience, and resources of the State Department. Indeed, the size and expertise of foreign policy personnel in *other* federal departments (like the Departments of Commerce, Defense, and Homeland Security) vastly outstrips the scope and knowledge of these undersized state trade offices.

Consider California: The Golden State is a regular interloper in foreign affairs.<sup>19</sup> As the world’s eighth largest economy as of 2013,<sup>20</sup> it has the resources and, one would suppose, an acute need for extensive information as a means of fostering foreign trade. Yet if foreign trade expertise was truly vital, California’s resource allocation ill reflects that need. To date, California has established a trade office in China and granted it a \$700,000 budget.<sup>21</sup> That is its *only* international trade office.<sup>22</sup> By contrast, the fiscal year 2015 appropriation for the State Department was just short of \$50 billion.<sup>23</sup> Money earmarked for our nation’s spy agencies—the CIA, for example—is classified, but reputable insiders have indicated the sum nearly equals the

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17. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 323 (Max Farrand ed., rev. ed. 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION].

18. For a list of states and their international trade offices, see *State International Trade Offices*, MINORITY BUSINESS DEVELOPMENT AGENCY, U.S. DEP’T OF COM., <http://www.mdba.gov/main/global-business/state-international-trade-offices> [https://perma.cc/ZZU4-77VV].

19. See *Am. Ins. Ass’n. v. Garamendi*, 539 U.S. 396 (2003); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) (en banc); Arnold Schwarzenegger, Governor of Cal., Proclamation on Armenian Genocide (Apr. 7, 2008), <http://www.anca.org/assets/pdf/proclamations/CA2008.pdf> [https://perma.cc/9TVX-WX5A] (explicitly recognizing the Armenian genocide, in contrast to federal policy).

20. *California Once Again the World’s 8th Largest Economy*, CTR. FOR CONTINUING STUDY OF THE CAL. ECON. (July 2014), <http://www.ccsce.com/PDF/Numbers-July-2014-CA-Economy-Rankings-2013.pdf> [https://perma.cc/U5L7-T5VN].

21. For the statutory authority for this project, see CAL. GOV’T CODE §§ 13996.4–13996.75 (West 2015).

22. See GOVERNOR’S OFFICE OF BUS. AND ECON. DEV., CALIFORNIA-CHINA OFFICE OF TRADE AND INVESTMENT 2014 ANNUAL REPORT (2014), <http://www.business.ca.gov/Portals/0/InternationalBiz/Docs/2014%20China%20Trade%20Office%20Report%20FINAL.pdf> [https://perma.cc/9H6L-GZ9M].

23. H.R. REP. NO. 113-499, at 4 (2014).



State Department's allocation.<sup>24</sup> And this summary omits the massive resources expended on foreign affairs in the Departments of Defense, Homeland Security, Commerce, Treasury, and elsewhere.

Even if we were to concede that states somehow gather adequate *trade* intelligence through their tiny trade offices, states enact laws with serious ramifications outside the commercial realm. For instance, few would suppose that an Idaho trade office could possibly supply the state with the requisite knowledge necessary to gauge whether the state ought to aid in Libya's quest for military jets during the el-Qaddafi era. To have a meaningful opinion on the latter requires knowledge about Libya's neighbors, their potential reaction, and, of course, Libya's intentions. Similarly, a trade office cannot generate useful information about how foreign nations will react to economic sanctions meant to curb human rights violations, especially when those sanctions attach to companies that are from nations that have unblemished records. How Germany will react when its companies are sanctioned by Massachusetts for doing business in Burma is hardly obvious.

The gulf between the foreign experience and knowledge of the federal government as compared to the states cannot be overstated. Whatever else one might say about the sprawling federal bureaucracy, its superior information and familiarity in foreign affairs is beyond question.<sup>25</sup>

Our second concern is related to the first. Because the states are ignorant, they are prone to offend and inflame foreign nations. States can provoke already hostile or unfriendly regimes, making fraught relations worse. Recall Rudolph Giuliani's ouster of Yasser Arafat from the Lincoln Center, a decision that, to us at least, reflects a certain naïveté, namely a failure to appreciate the need to sometimes treat parties that have American blood on their hands with respect.<sup>26</sup> Enemies can, through time and a convergence of interests, become partners, as happened with Germany and Japan. States also can embarrass allies, damaging relationships the federal government has

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24. See Scott Shane, *Official Reveals Budget for U.S. Intelligence*, N.Y. TIMES (Nov. 7, 2005), [http://www.nytimes.com/2005/11/08/politics/official-reveals-budget-for-us-intelligence.html?\\_r=1](http://www.nytimes.com/2005/11/08/politics/official-reveals-budget-for-us-intelligence.html?_r=1) [<https://perma.cc/R3YZ-NG9P>] (suggesting that the 2005 budget for all of the nation's spy agencies exceeded 40 billion dollars).

25. Some of the federal advantages are perhaps erodible, in that states might be able to set up their own foreign policy institutions. But to achieve anything close to parity with the federal government would take decades and involve the expenditure of truly vast sums in each state. The fact that states have yet to pour resources into the sound exercise of their foreign affairs powers suggests that states are unlikely to embark on a project of acquiring information and experience in foreign affairs. They seem content to make episodic interventions in this area with little or no knowledge or expertise.

26. See Firestone, *supra* note 2. That Arafat was the head of an entity that the United States did not recognize as a state hardly undermines our claim, for Giuliani might have meted out the same treatment to the prime minister of Great Britain or the president of Russia. As we discuss in Part III, nothing in the Constitution prevents mayors (or any other state officials) from branding foreign governments and officials as murderers, terrorists, or worse.

nurtured over time. For example, dozens of states have denounced the genocide of Armenians.<sup>27</sup> In contrast, the federal government has refused to use that precise word in order to avoid upsetting Turkey.<sup>28</sup> President Obama's decision to refer to "atrocities" instead of "genocide" in a speech commemorating the victims reflects longstanding federal policy and a concern for Turkish sensitivities.<sup>29</sup>

Or consider the state legislation at the heart of *Arizona v. United States*.<sup>30</sup> Arizona made it a crime for unauthorized aliens to work in the state, and it empowered police to arrest persons who they had probable cause to believe were in the country illegally.<sup>31</sup> The law prompted Mexico to take the unusual step of filing an amicus brief in the Supreme Court.<sup>32</sup> In that brief, our southern neighbor explained that the law "caused long-term harm to Mexico-U.S. relations."<sup>33</sup> Suggesting that the federal government agreed with that assessment, an American diplomat conceded to the Chinese that the Arizona statute was a human rights debacle.<sup>34</sup>

Our third concern arises from the proclivity of states to undermine our national government's conduct of foreign affairs. When the states adopt their own foreign policies, they may sow confusion in the international arena as to our nation's stances. This problem can manifest in numerous ways. The federal government may adopt a foreign policy and assure the international community of its commitment to it. But dissenting states may act at cross-purposes to that federal policy.

For instance, the United States policy towards Taiwan (the Republic of China) is a study in nuance and opacity.<sup>35</sup> The idea is to say the minimum that satisfies the People's Republic of China (namely, that there is one China and that we recognize the People's Republic), while not wholly abandoning our longtime ally, Taiwan.<sup>36</sup> But suppose that individual states, including

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27. For a list of states who have officially recognized the Armenian genocide, see *US State Recognition of Armenian Genocide*, ARMENIAN NAT'L COMMITTEE OF AM. (2015), [http://www.anca.org/genocide\\_resource/states\\_map.php](http://www.anca.org/genocide_resource/states_map.php) [<https://perma.cc/HZ44-HZJ2>].

28. Indeed, Congress has failed to muster the votes for a resolution recognizing the genocide. See H.R. Res. 106, 110th Cong. (2007).

29. See Peter Baker, *Obama Marks Genocide Without Saying the Word*, N.Y. TIMES, Apr. 25, 2010, at A10, [http://www.nytimes.com/2010/04/25/world/europe/25prexy.html?\\_r=0](http://www.nytimes.com/2010/04/25/world/europe/25prexy.html?_r=0) [<https://perma.cc/EF5Q-R8JQ>].

30. 132 S. Ct. 2492 (2012).

31. *Arizona*, 132 S. Ct. at 2497–98.

32. Brief for the United Mexican States, as Amicus Curiae Supporting Respondent, *Arizona*, 132 S. Ct. at 2492.

33. *Id.* at 6.

34. See McCain, *Kyl Call on Diplomat to Apologize for Arizona Law Comment to Chinese*, FOX NEWS: POLITICS (May 19, 2010), <http://www.foxnews.com/politics/2010/05/19/gop-senators-diplomat-apologize-arizona-law-comment-chinese/> [<https://perma.cc/66MG-CDC7>].

35. See SHIRLEY A. KAN & WAYNE M. MORRISON, CONG. RESEARCH SERV., R41952, U.S.-TAIWAN RELATIONSHIP: OVERVIEW OF POLICY ISSUES 4 (2013).

36. See Taiwan Relations Act, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)) (maintaining cultural, commercial, defense, and other relationships with Taiwan); see also *U.S. Relations with Taiwan*, U.S. DEP'T OF STATE (Feb. 12, 2015),

California, New York and Texas, decided to recognize Taiwan and its pretensions to sovereignty over the mainland.<sup>37</sup> And imagine further that such states sought to favor Taiwan, adopting policies that enraged the People's Republic. Can anyone doubt that these states could hazard our nation's relations with China, leading to heated rhetoric, trade wars, or—more troubling—real ones?

Even when states and the federal government have the same general stance toward some foreign matter, seemingly minute differences can generate significant problems. Consider the events leading up to *Crosby v. National Foreign Trade Council*.<sup>38</sup> In response to Burma's suppression of dissenters, Massachusetts barred state agencies from making purchases from almost any company doing business in Burma, a rather sweeping law.<sup>39</sup> Congress subsequently enacted a more restrained federal response to the suppression, creating some bars on foreign aid and delegating authority to the president.<sup>40</sup> Using that authority, the president barred U.S. persons from investing in Burma.<sup>41</sup>

The resultant mess left members of the international community annoyed and flummoxed. The state law threatened to derail effective multilateral diplomacy because, by penalizing foreign companies for doing business with Burma, it effectively punished other nations as well as Burma.<sup>42</sup> Many of our allies formally expressed their displeasure—some even filed complaints with the World Trade Organization alleging that the state act violated international trade agreements.<sup>43</sup> As the European Union (EU) complained in its Supreme Court amicus brief, the state law “creat[ed] confusion about

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[www.state.gov/r/pa/ei/bgn/35855.htm](http://www.state.gov/r/pa/ei/bgn/35855.htm) [<https://perma.cc/BP8V-VJ6J>] (“[T]here is but one China and Taiwan is a part of China. . . . [But] the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.”).

37. The recent case, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), held that the president had the exclusive right to recognize foreign nations and governments. But that exclusivity rested on the notion that only the president could speak for the nation. The opinion did not speak to what role, if any, the states may play in recognition. Even if the president alone may recognize on behalf of the United States, it does not follow that states lack more limited authority to recognize nations and governments. For instance, the California legislature might have authority to recognize a foreign nation on behalf of the state of California, and not the United States.

38. 530 U.S. 363 (2000).

39. MASS. GEN. LAWS ch. 7, §§ 22J, 22H, 22M (2014), *invalidated by Crosby*, 530 U.S. at 388.

40. See Foreign Operations, Export Financing, and Related Programs Appropriation Act, 1996, Pub. L. No. 104-107, § 570, 110 Stat. 704, 747 (1997).

41. *Crosby*, 530 U.S. at 368–70.

42. See MASS. GEN. LAWS ch. 7, §§ 22J, 22H, 22M.

43. See Brief for the European Communities et al. as Amici Curiae Supporting Respondent, *Natsios v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (No. 99-474), 2000 WL 177175, at \*7.

which entity speaks for and acts on behalf of American interests.”<sup>44</sup> Moreover, the EU explained, such laws “greatly increase the difficulty of the U.S. Government to speak consistently and with one voice [in] foreign affairs.”<sup>45</sup>

Finally, even where state dabbling does not sow international confusion, it is problematic because the *national government* actors are elected to conduct diplomacy with foreign nations. State actors are not. More precisely, voters expect that federal officials will handle our international affairs. For the most part, voters do not elect governors or state legislators in order to advance human rights in Burma or to determine whether some government exercises (or should exercise) sovereignty over Palestine, Tibet, or Kashmir. When state actors condemn genocide, real or imagined, or punish nations for trading with others, these state officials act outside their bailiwick, at least as voters understand it.

A few concluding words on the federal separation of powers in foreign affairs. In arguing for the elimination of state voices, we do not mean to exaggerate the level of unity at the federal level. Notwithstanding Justice Sutherland’s discussion in *United States v. Curtiss-Wright Export Corp.*,<sup>46</sup> presidents clearly are not the sole voice in foreign affairs. Though the executive enjoys significant residual authority over foreign affairs via the Vesting Clause’s grant of executive power,<sup>47</sup> Congress may declare war,<sup>48</sup> regulate foreign commerce,<sup>49</sup> and proscribe activity that violates the law of nations.<sup>50</sup> Hence, Congress enjoys constitutional authority that can be used to embarrass or offend nations that the executive wishes to cultivate or court. Relatedly, the executive can refuse to enforce Congress’s foreign affairs laws when he supposes them to be unconstitutional, creating a different sort of federal discord.<sup>51</sup> In sum, the Founders’ Constitution supposed that the federal government would have more than one voice in foreign affairs.

Having said that, foreign relations becomes far more discordant when we have not two federal actors, but a total of 102 national actors, with 50 state executives and 50 state legislatures adding their distinctive voices to those of the Congress and the president. That Congress and the executive may act at cross-purposes in foreign affairs hardly suggests the desirability of an even more jarring cacophony.

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44. *Id.* at \*4.

45. *Id.* at \*10.

46. 299 U.S. 304, 320 (1936) (writing that the president has “plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations”).

47. U.S. CONST. art. II, § 1, cl. 1. For a historical analysis of what this power might extend to, see Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *YALE L.J.* 231, 265–72 (2001).

48. U.S. CONST. art. I, § 8, cl. 11.

49. *Id.* art. I, § 8, cl. 3.

50. *Id.* art. I, § 8, cl. 10.

51. For a contemporary exploration of this issue, see *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015).

Moreover, some concerns about state intervention are inapplicable at the federal level, even where Congress and the president are at odds. As noted, the political branches have expertise that comes from recurring engagement on foreign matters, steady contact with foreign officials, and a constant supply of intelligence from the State Department and the CIA. Moreover, foreign nations rightly assume that federal institutions speak for the nation. Finally, American voters expect federal officials to steward our foreign affairs. In sum, periodic federal disunity in foreign affairs hardly undermines the case against the discordant noise stemming from a multitude of state voices.

### B. *Addressing the One Voice Critics*

Scholars who favor a state role in foreign affairs claim either that state foreign policies generate benefits or that the costs of state foreign policies are trivial or manageable. We think such assertions are erroneous.

First, consider the assertion that state freelancing benefits the states and their citizens. Some favor multiple voices in foreign affairs because it allows states to avoid “collaboration with . . . evil regime[s].”<sup>52</sup> As one noted scholar put it, the *Crosby* Court’s preemption prevented Massachusetts from condemning the Burmese atrocities any more harshly than the federal government had—a censure the state may have thought insufficient.<sup>53</sup> The benefit realized here is a familiar one, namely greater preference satisfaction stemming from a federal system.

We admit that suppressing state foreign policies may require Bay Staters and others to associate with regimes that many may regard as evil. But this does not trouble us. First, every democracy faces the same issue. For instance, citizens within a state of the Union may be upset with the choices struck by their state officials, as when a state government seems insufficiently hostile to some regime. After all, Cambridge or Newton may believe that the Massachusetts law also was insufficiently hostile to Burma’s government. Second, and relatedly, the Constitution replicates the same problem, for it limits the states in all sorts of ways and authorizes the federal government to make treaties with governments that some Americans regard as misguided or evil. The president (with the Senate’s consent) may make a treaty of alliance with an evil regime, and the dissenters in the states must tolerate it, for state laws cannot thwart a treaty. Third, Massachusetts has federal representation and those legislators may cast votes to craft and change federal policy. The corollary of that representation is that the state ought to handle political defeat gracefully. When Congress rejects the foreign policy preferences of a majority of Massachusetts citizens, the state should not be able to strike out on its own and craft its own foreign policy.

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52. Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 *FORDHAM L. REV.* 2189, 2194 (2001).

53. See *id.* at 2194–95.

Another difficulty of this argument is that it leaves to the states the determination of which sovereigns are “evil.” A state may view relations with a key ally as “collaboration with evil.” What if states had condemned and sanctioned Stalinist Russia during World War II, or Saudi Arabia in the wake of the 9/11 attacks? In modern times, a state with a sizable Muslim population may disfavor or discriminate against Israel as a show of support to Hamas or the Palestinian Authority. Or imagine a state with a strong Christian lobby choosing to speak out vigorously against foreign states that are insufficiently protective of Christians. However disagreeable its decisions may be from time to time, the federal government is best circumstanced to calibrate our relationships with foreign nations and to decide when it is necessary to make a deal with a devil, perhaps to join forces to oppose a worse devil, or perhaps to aid a faltering but innocent regime.

Finally, we must keep in mind that the state authority in question does not merely extend to punishing evil foreign states. State power to conduct foreign policy can also be wielded to *curry favor* with heinous or troubling regimes. As discussed earlier, Idaho collaborated with Libya’s el-Qaddafi. And today states might court despots like Kim Jong-Un of North Korea or theocrats like Ali Khamanei of Iran. State autonomy in foreign affairs may be used to satisfy all sorts of preferences, including base and ignoble ones.

Next, we take up the claim that the nation (as opposed to individual states) benefits from multiple voices. Some scholars claim that state action helps overcome federal inertia.<sup>54</sup> The supposition is that when individual states engage in the international arena, they spur the federal government to further develop and express its own policies and thereby assist the nation.<sup>55</sup> One scholar has argued that states prompted federal action against apartheid.<sup>56</sup>

The logic of this argument is sound. State action may spark a federal response when one was lacking. Yet we fail to see why states should set the foreign policy agenda of federal institutions. The question is which institutions are better positioned to decide the issues that ought to occupy the federal government’s limited resources. Children can spur parents to take useful action, but few would suppose that children be trusted with legal authority to force matters onto the family agenda.<sup>57</sup> Similarly, the question is whether, given the federal government’s conduct of foreign affairs, we want states to “burden” that exercise<sup>58</sup> by helping shape that agenda. We think not. As we have discussed, states are incompetent actors in the foreign arena

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54. Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1056–57 (2001).

55. *Id.* at 1058.

56. Sarah H. Cleveland, *Crosby and the “One-Voice” Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 995 (2001).

57. If our analogy seems unduly dismissive of the positive role states may play, consider the employee/management relationship. Employees will generate good ideas and sound managers listen to their various constituencies. Yet management is ultimately authorized to heed or rebuff the proposals of employees.

58. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819).

and are ill-equipped to think strategically either about what international matters are most important or the havoc their agenda setting may ultimately cause. A state measure designed to spur federal officials may thrust the nation into stormy waters before a proper federal intervention is feasible or possible. Sometimes the status quo is the best policy.

Finally this theory seems to assume that the federal government pays insufficient attention to foreign matters and that a spur to greater consideration would be useful. But we simply do not know the optimal amount of resources that Congress and the president should devote to foreign affairs. Indeed, perhaps the political branches already have too much of a foreign focus. It should be beyond cavil that federal officials must devote significant resources (personnel, funds, attention) to domestic affairs and therefore cannot obsess about international matters, much less the particular foreign concerns of states.

Other scholars contend that states may “produce international goodwill” by complying with international norms that the federal government fails to follow.<sup>59</sup> For instance, in 2005 the Kyoto Protocol went into effect with the support of 141 ratifying countries.<sup>60</sup> Though the United States never ratified the Protocol,<sup>61</sup> many states and localities adopted its recommendations.<sup>62</sup> We admit that voluntary state compliance with international norms may generate goodwill and that it is difficult to conceive how such compliance may simultaneously harm the nation as a whole.

But we fail to see why we should focus only on the potential for goodwill. Imagine a state dominated by those who believe that the theory of manmade climate change is hopelessly wrong. In a fit of spite, the state legislature enacts measures designed to *increase* carbon dioxide emissions. Surely this would generate ill will overseas, at least amongst foreign nations gravely concerned about greenhouse gases. Again, our point is that state autonomy can be used for ill or good. That state autonomy can be used to generate international goodwill hardly establishes that federalism in foreign affairs is worth preserving.

As a final point, which we discuss later, Congress can permit multiple voices in those instances where it believes that the cacophony generates net international goodwill. The benefits of multiple voices—if there are any—are not necessarily quashed by our suggestion that one federal voice is generally better. We simply believe that the political branches should determine

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59. David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1021 (2014).

60. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 62 (2007).

61. See *Status of Ratification of the Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php) [<https://perma.cc/Z5N3-6BCY>] (showing the ratification status of all nations).

62. See, e.g., Resnik, *supra* note 60, at 62 (documenting how “[s]everal cities . . . have enacted ordinances aimed at conforming to the Protocol’s targets for controlling local utility emissions”).

on a case-by-case basis whether state freelancing in foreign affairs is desirable. The current default, where states have some uncertain latitude to act on the international stage, has it backwards.

We next turn to those who suggest that the costs of cacophony can be contained or minimized. Consider the assertion that state participation in foreign affairs is not so problematic because the federal government can disclaim responsibility of state actions. One scholar argues that by carefully explaining when it is constitutionally *unable* to limit the states' ability to act, the federal government can "relieve itself of responsibility" for the impact that states have in the foreign arena.<sup>63</sup> Essentially, this argument calls for the federal government to explain that the Constitution prohibits it from impeding the states. As we understand it, the following example captures the argument's logic. Reconsider the facts of *Crosby*, where Massachusetts limited state agency purchases from firms doing business in Burma. This policy vexed our allies, as it adversely affected their companies. If the United States had simply told the international community that it had no means of suppressing the Massachusetts legislation, the theory supposes that foreign nations would not have had a grievance against the United States.

As we explain in Part III, this theory of federal fecklessness gets the Constitution wrong. The federal government may strip the states of their retained authorities in the foreign arena. Moreover, some foreign states are familiar with federal systems<sup>64</sup> and will perhaps recognize that in such systems, the central government often has plenary authority over foreign affairs, making claims of federal fecklessness implausible.

Other scholars respond that inflamed nations have the capacity to retaliate selectively, and target only the offending American state.<sup>65</sup> This argument assumes that because "the [American] states have become discretely dependent on the global economy, they are now also discretely subject to its discipline."<sup>66</sup>

Yet while it is true that foreign governments *may* selectively retaliate against rogue American states, nothing prevents foreign nations from retaliating against the United States rather than a particular state of the union. Indeed, foreign states may suppose that it is more practical to retaliate against the entire United States and that they are more likely to get results should they punish the entire nation. After all, the more people harmed by the retaliation, the more pressure will be brought to bear to reverse the offending state policy. Relatedly, the strategy of selective retaliation may fail,

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63. Porterfield, *supra* note 6, at 47–48.

64. Major international actors including Russia, India, and Germany employ federal systems of government. See *The World Factbook: Government Type*, CENT. INTELLIGENCE AGENCY (Mar. 5, 2016) <https://www.cia.gov/library/publications/the-world-factbook/fields/2128.html> [<https://www.perma.cc/3ZRE-EGZL>].

65. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1259–70 (1999).

66. *Id.* at 1261.



insofar as states lack a cadre of experienced officials and the ability to conclude international agreements. “[T]he individual American states neither send ambassadors to nor receive ambassadors from any foreign country and do not make treaties or international trade agreements,”<sup>67</sup> making it harder to negotiate with them and de-escalate tensions. Moreover, any compact with a foreign nation must be approved by Congress,<sup>68</sup> a fact that will cause many foreign states to suppose that leverage ought to be brought to bear against Congress and the president since they are the ultimate decisionmakers.

Moreover, even if foreign states pursue targeted retaliation, they may rationally retaliate against an innocent American state. Suppose a foreign sovereign has little or no leverage against the American state that has antagonized it, but nonetheless retaliates against a state over which it does have leverage. A Mississippi law discriminating against Canadian businesses may enrage our northern ally. Ottawa may reasonably conclude that it has no carrots or sticks with which to influence Mississippi, but that it has plenty at its disposal vis-à-vis New York. Canadians may suppose that New York, the more powerful state, will wield sufficient influence in the halls of Congress to ensure the preemption of the Mississippi act. Here, the Canadian government engaged in the kind of targeted retaliation that some critics of the one voice theory posit, but it harmed an innocent state.

In sum, the strategies of disclaiming responsibility for state actions and trusting that the other nation will engage in targeted retaliation should not inspire any confidence. The former is legally incorrect, for Congress can bar offensive state laws. The latter strategy rests entirely on speculation about how foreign states may choose to respond. The United States cannot force another nation to train its ire upon a rogue American state as opposed to an innocent state or the entire United States.

## II. HAPHAZARD JUDICIAL PREEMPTION OF THE CACOPHONY

We have argued that the nation should speak with one voice, yet have said little about why prevailing mechanisms are inadequate. At present, the courts stand as the principal institutional check on state interference with foreign affairs. Under the Supremacy Clause, the Constitution, laws, and treaties of the United States trump contrary state law.

Though the judiciary is generally seen as passive, we believe it has been overly active in this area, preempting state laws based on highly dubious readings of the three types of federal laws. Its keenness for preemption likely stems from a (justified) sense that the United States should stand united on matters of foreign affairs. As much as we agree with the policy impulse, we believe that courts act outside their bailiwick when such concerns motivate their decisions.

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67. Brief for the European Communities, *supra* note 43, at \*4.

68. U.S. CONST. art. I, § 10, cl. 3 (stating that “[n]o State shall . . . enter into any Agreement or Compact . . . with a foreign Power” without the consent of Congress).

Besides its general eagerness to preempt, the judiciary has proven a less than ideal institution for constraining state forays into the international arena. Courts are ill-equipped to decide whether the states have interfered too much with the federal government's foreign policies. First, the courts act ex post and respond sluggishly to state intrusions. But often, foreign policy requires ex ante rules and speed. Second, the courts are incompetent actors in this arena. They cannot evaluate whether the states have interfered with the federal conduct of foreign affairs, for, very much like the states they censure, the courts lack the information and expertise necessary to judge the matter. Finally, perhaps because of courts' inexperience, their preemption jurisprudence is capricious. Sometimes the courts read federal law narrowly, preempting little. Other times, they sweep away state law in implausible and misguided ways. This vacillation sacrifices predictability and leaves all confused as to what the states may do in foreign affairs.

Below, we group Supreme Court preemption of state laws into four categories: dormant Foreign Commerce Clause, so-called Dormant Foreign Affairs, executive, and statutory and treaty. In each context, the courts have proven too willing to preempt state law, often based on no more than a vague sense that states have intruded too far into foreign affairs.

#### A. *Dormant Foreign Commerce Clause*

The first category for preempting the states in foreign affairs is the dormant Foreign Commerce Clause. Courts have long supposed that the Interstate Commerce Clause has a "dormant" aspect, meaning that they read the Clause as preempting state laws even in the absence of affirmative federal legislation. After some justices suggested that states could not regulate interstate commerce at all, the courts now apply an analysis that turns on whether state law facially discriminates against interstate commerce. If the law facially discriminates against such commerce, the law will only be upheld if the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."<sup>69</sup> Nondiscriminatory statutes that regulate interstate commerce will be upheld unless the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."<sup>70</sup>

In *Japan Line, Ltd. v. County of Los Angeles* the Court distinguished the reach of the dormant Commerce Clause from the dormant foreign Commerce Clause, noting that the latter requires "a more extensive constitutional inquiry."<sup>71</sup> *Japan Line* concerned a California state tax applied to Japanese

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69. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Or.*, 511 U.S. 93, 100–01 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 279 (1988)).

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

71. 441 U.S. 434, 445–46 (1979). Notably, the Court made no reference to the possibility of federal exclusivity in this domain.

shipping containers present in the state on a given date. Because the containers were already subject to Japanese taxes,<sup>72</sup> California's law subjected foreign commerce to a risk of double taxation that domestic commerce did not share.<sup>73</sup> As one might expect, the state statute drew the ire of many important trading partners.<sup>74</sup>

The Court invalidated the law, observing that two additional considerations surface when a state seeks to tax articles of foreign commerce. First, the possibility of multiple taxation becomes relevant. Second, a court must discern whether a state tax on a foreign article impairs federal uniformity.<sup>75</sup> California's tax clearly implicated the first factor. Further, concluding that the federal government sought to remove impediments to the use of shipping containers in foreign commerce, the Court held that the tax undermined federal uniformity and impaired the national government's ability to speak with one voice.<sup>76</sup>

Subsequent case law reveals the malleability of these factors. In *Container Corp. of America v. Franchise Tax Board*, the Court considered whether a California income tax applied to a multi-national company based on the percentage of its *global* operations that occurred in-state, was tailored to satisfy the *Japan Line* inquiry.<sup>77</sup> The Court found multiple taxation<sup>78</sup> and that the federal government "seem[ed] to prefer the taxing method adopted by" the foreign countries over California's.<sup>79</sup> Nonetheless, the Court found the tax permissible.<sup>80</sup> To distinguish *Japan Line*, the Court contrasted laws that have acceptable "foreign resonances" with those that improperly "implicate foreign affairs."<sup>81</sup> According to the Court, laws in the latter category involve "foreign policy issues which must be left to the Federal Government."<sup>82</sup>

Not surprisingly, this distinction has proven elusive. One might suppose that where the federal executive disapproves of some state law's effect on foreign affairs, it would follow that the statute must "implicate foreign affairs" and hence be struck down. Yet the Court has found state laws permissible even where there is clear executive branch disapproval.<sup>83</sup> Moreover, the

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72. *Japan Line*, 441 U.S. at 436–38.

73. *Id.* at 453.

74. See Brief for the United States as Amicus Curiae at 7, *Japan Line*, 441 U.S. at 434.

75. *Japan Line*, 441 U.S. at 451–53.

76. *Id.* at 452–54.

77. 463 U.S. 159 (1983).

78. *Container Corp.*, 463 U.S. at 187 ("[S]ome of the income taxed without apportionment by foreign nations as attributable to appellant's foreign subsidiaries was also taxed by California as attributable to the State's share of the total income of the unitary business of which those subsidiaries are a part.").

79. *Id.*

80. *Id.* at 196–97.

81. *Id.* at 194.

82. *Id.*

83. See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 328–30 (1994) (finding that congressional acquiescence to the state action was sufficient, notwithstanding

Court's application of its own test is inconsistent with the outcomes it seeks to avoid. For instance, in *Container Corp.* the Court noted that the most troublesome and obvious way in which a state tax law could implicate foreign affairs is where it causes foreign trading partners to retaliate against the United States. Yet despite the presence of such retaliation in a later dormant foreign commerce case—*Barclays Bank PLC v. Franchise Tax Board of California*<sup>84</sup>—the Court found no preemption.

This judicial line drawing is disconcerting. It invites the courts to be arbiters of a fatuous distinction, namely whether a state action has a tolerable “foreign resonance” or whether it intolerably “implicate[s] foreign affairs.” Because there is no real test here, we believe that the distinction turns on nothing more than whether the Court thinks state law interferes too much with federal foreign policy. If it does, it implicates foreign affairs. If not, it is a mere resonance.

One need not look far to uncover criticism of the Court's approach.<sup>85</sup> After the Court announced its “test” in *Container Corp.*, it immediately (and candidly) acknowledged its own limited competence.<sup>86</sup>

This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.<sup>87</sup>

Exactly. In struggling to distinguish tolerable foreign affairs resonances from intolerable foreign affairs implications, the Court finds itself crafting, refining, and discarding senseless distinctions. The dormant foreign commerce clause, like the dormant Commerce Clause, lacks a sound textual foundation because the grant of commerce authority to Congress does not necessarily bar state regulation of the same commerce.<sup>88</sup> The judiciary's move to add extra bite to the dormant Commerce Clause test as a means of being more protective of foreign commerce merely reflects a judicial policy choice to show greater solicitude for foreign commerce.

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executive disapproval, to determine that the nation's ability to speak with one-voice had not been undermined).

84. 512 U.S. 298; see Todd Cameron Taylor, *Barclays Bank PLC v. Franchise Tax Board: The Need for Judicial Restraint in Foreign Commerce Clause Analysis*, 20 N.C. J. INT'L. L. & COM. REG. 329, 330 nn.11–12 (1995).

85. Scholars have also been critical. See, e.g., Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT'L L. 337, 347 (2001) (mocking the dichotomy between laws that have foreign resonances and those that implicate foreign affairs).

86. *Container Corp.*, 463 U.S. at 194.

87. *Id.*

88. See, e.g., Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause after Garamendi and Crosby*, 107 COLUM. L. REV. 746, 777 (2007) (“The dormant Foreign Commerce Clause . . . lacks textual support . . .”)

B. *Dormant Foreign Affairs*

Having concluded that the grant of commerce authority to Congress could preempt state regulation of commerce, perhaps it was only a matter of time before the Court read the grants of foreign affairs authority as preemptive. That moment came more than a century and a half after the Constitution's creation.

*Zschernig v. Miller* invalidated a state act in the absence of any relevant federal statute or treaty.<sup>89</sup> At issue was an Oregon statute that largely operated to bar citizens of communist countries from inheriting property of in-state decedents. The case concerned the estate of a resident who died intestate, and whose only heirs were resident citizens of East Germany. Oregon's statute provided that the deceased's property escheated to the state unless the heirs satisfied certain requirements. Heirs needed to show that their home country permitted a reciprocal right of inheritance, one free of any governmental confiscation.<sup>90</sup> It is no stretch to conclude that the state had "establish[ed] its own foreign policy."<sup>91</sup> The law was a "foray by Oregon into Cold War politics."<sup>92</sup>

In striking down the law, the Court noted that even in the absence of a federal law or treaty, "a State's policy may [unacceptably] disturb foreign relations."<sup>93</sup> The Court went on to assert that the Oregon law had "a direct impact upon foreign relations and may well [have] adversely affected the power of the central government to deal with those problems."<sup>94</sup> Essentially, *Zschernig* demands the invalidation of state laws that disturb or adversely affect the federal government's ability to conduct foreign affairs.<sup>95</sup>

As a normative matter, we consider the outcome correct, for we do not believe that states should be able to discriminate against foreign nations. Yet *Zschernig*'s reasoning leaves much to be desired. Most troublingly, the Court found preemption based on the idea that the Constitution implicitly barred state action that "disturb[s]" our nation's foreign affairs.<sup>96</sup> Yet there is a compelling argument that the courts have no license to sit in judgment of state law in this way. Because Article I, Section 10 carefully preempts only certain state involvement in foreign affairs,<sup>97</sup> there is no warrant for reading

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89. 389 U.S. 429 (1968). The *Zschernig* Court did not coin this descriptive phrase, but it has since been used as a shorthand for the court's conclusion that "'even in [the] absence of a treaty' or federal statute, a state may violate *the constitution* by 'establish[ing] its own foreign policy.'" *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 (9th Cir. 2003) (emphasis added) (quoting *Zschernig*, 389 U.S. at 441).

90. *Zschernig*, 389 U.S. at 430–31.

91. *Id.* at 441.

92. Ramsey, *supra* note 14, at 356.

93. *Zschernig*, 389 U.S. at 441.

94. *Id.*

95. See, e.g., Ramsey, *supra* note 14, at 357 ("*Zschernig* found a *constitutional* limitation on state laws that 'impair the effective exercise' of federal foreign policy.>").

96. See *Zschernig*, 389 U.S. at 441.

97. U.S. CONST. art. I, § 10.

the Constitution as if it also contained a hidden generic “dormant” foreign affairs preemption principle. Rather, whether the states have unduly interfered with the foreign affairs powers of the political branches is a matter for those branches to decide upon and, if need be, remedy.

In *Zschernig*, the executive had conceded that the Oregon act had no impact on the nation’s conduct of foreign affairs.<sup>98</sup> Yet the Court never explained why the executive branch’s expertise was irrelevant to the question of whether the state law interfered with foreign affairs. In a concurring opinion, Justice Potter Stewart explained that “so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department.”<sup>99</sup> We cannot help but wonder whether “shifting winds” at the Supreme Court are a better means of judging when a state has interfered with the federal conduct of foreign affairs, even if gauging such interference is the provenance of the judiciary.

Finally, scholars have rightly questioned the doctrine’s workability. *Zschernig* requires courts to evaluate interference with federal prerogatives, but leaves them with absolutely no guidance. How much state involvement is too much? What distinguishes acceptable participation from unacceptable disruption?<sup>100</sup> The Court never said. Moreover, the judiciary is hardly equipped to judge whether a state law has disturbed a foreign nation. As the Court would later admit, it “has little competence in determining precisely when foreign nations will be offended by particular acts.”<sup>101</sup> As one scholar put it, *Zschernig* sanctions “judicial intrusion into a political arena”<sup>102</sup>—a forum where judges are unqualified and out of their element. In our view, judicial intervention ineluctably leads to inconsistent and unprincipled application of the dormant foreign affairs doctrine.<sup>103</sup>

More recently, *Crosby v. National Foreign Trade Council*<sup>104</sup> hinted that the Court recognizes that *Zschernig* is problematic. There, both the trial and appellate courts applied *Zschernig* and the dormant foreign affairs preemption doctrine to find Massachusetts’s Burma sanctions preempted.<sup>105</sup> Yet the Supreme Court rested preemption on an implausibly broad reading of a

98. Brief for the United States as Amicus Curiae at 6 n.5, *Zschernig*, 389 U.S. 429.

99. *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring).

100. Compare *Zschernig*, 389 U.S. at 433 (noting that no one suggests that states are forbidden from taking actions that might have a remote possibility of disturbing a foreign nation), with *id.* at 441 (noting, with disapproval, that state action may disturb foreign nations).

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

102. Bilder, *supra* note 6, at 830.

103. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1396 (1999).

104. 530 U.S. 363 (2000).

105. *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999), *aff’d sub nom. Crosby*, 530 U.S. 363 (“[W]e agree with the district court that the Massachusetts Burma Law is unconstitutional under *Zschernig*.”); *Nat’l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 290–91 (D. Mass. 1998), *aff’d sub nom. Natsios*, 181 F.3d 38 (explaining that the Massachusetts Burma Law “unconstitutionally impinges on the federal government’s exclusive authority to regulate foreign affairs”).

federal act—not *Zschernig*'s dormant foreign affairs doctrine.<sup>106</sup> As Jack Goldsmith has argued, the Court's failure to revisit *Zschernig* in the context of its hyper-aggressive reading of a federal statute suggests that the dormant foreign affairs doctrine is so "illegitimate that it requires masking."<sup>107</sup> In other words, dormant foreign affairs preemption lives on, albeit in the guise of statutory preemption.

*Zschernig* is something of an embarrassment. For close to fifty years, the Court has never relied on it again. Yet lower courts have. Consider *Tayyari v. New Mexico State University*.<sup>108</sup> *Tayyari* concerned a New Mexico State University regulation that barred the enrollment of "any student whose home government holds, or permits the holding" of U.S. hostages.<sup>109</sup> Its events took place during the Iranian hostage crisis. The court's preemption analysis turned on whether the regulation impermissibly "interfere[d] with federal immigration policy and federal foreign policy."<sup>110</sup> In finding that it did interfere, the court indicated "[t]he potential effect on international relations *vis-a-vis* Iran is much greater here than with a regulation affecting all aliens regardless of nationality," and "the action by [the state] impose[d] an impermissible burden on the federal government's power to . . . conduct foreign affairs" and thus its ability to resolve the crisis in Iran.<sup>111</sup>

The former statement is odd. By its terms the regulation *did* apply to all aliens regardless of nationality—it was not Irano-centric.<sup>112</sup> As for impermissible burden, the court pointed to an amicus brief and to a federal regulation requiring Iranian students to report to the Immigration and Nationalization Service (INS) for student visa validation, to demonstrate that the state rule impeded the federal government's ability to conduct our nation's foreign affairs.<sup>113</sup> As the basis for invalidating state law, this analysis leaves much to be desired.

Given continuing state forays into foreign affairs and cases like *Tayyari*, there remains the distinct possibility that the Court might yet return to the

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106. In fact, the Supreme Court only mentioned *Zschernig* once in the entire *Crosby* opinion as a means of explaining what guided the decisions below. *Crosby*, 530 U.S. at 371 ("[The lower courts] found the state Act unconstitutionally interfered with the foreign affairs power of the National Government under *Zschernig*.").

107. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 221; see also Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1304 (2001) ("*Crosby* is virtually a dormant foreign affairs case in disguise.").

108. 495 F. Supp. 1365 (D.N.M. 1980).

109. *Tayyari*, 495 F. Supp. at 1368.

110. *Id.* at 1376.

111. *Id.* at 1380.

112. A caveat is probably in order here; while the state's regulations did not specifically identify Iran, they did state that the prohibition on enrolling aliens of relevant nationalities would be lifted if "American hostages are returned unharmed by July 15, 1980." *Id.* at 1368. Of course, the only foreign sovereign in a position to return American hostages by this date was Iran. So, while the state regulations did not specifically identify Iran, it is rather clear that the Iran hostage crisis was the impetus for the provisions. To us, the court's approach is unpersuasive either way.

113. *Id.* at 1378–79.

Zschernig notion that the Constitution implicitly preempts state interference in foreign affairs and that the courts may judge what constitutes interference.

### C. Executive

The first two categories of preemption involved reading the Constitution as implicitly barring certain state laws. The third category rests on the conclusion that the Constitution authorizes the executive to preempt state law outside the context of treaties or laws.

The Court first took this step in the early part of the 20th century, reading executive agreements as if they could preempt state law. In *United States v. Pink* and *United States v. Belmont*, the Court read the Litvinov Assignment recognizing Russia to preempt inconsistent state law.<sup>114</sup> In *Dames & Moore v. Regan*, the Court read President Carter's agreement with Iran to preempt state law claims, citing *Pink* and *Belmont* as justification.<sup>115</sup> Thus modern doctrine imagines that the executive, via sole executive agreements with foreign nations, may preempt state law, at least to some extent.

The problem with this view is that the Supremacy Clause does not list sole executive agreements as preempting inconsistent state law. As Michael Ramsey has observed, the Constitution never grants executive agreements any preemptive effect, for the Supremacy Clause only lists the Constitution, treaties, and statutes.<sup>116</sup> In other words, the president seems to lack any constitutionally-granted power to preempt state law, whether by executive agreement or otherwise. If the president wants to preempt state law, he needs to get Congress to pass legislation or the Senate to pass a treaty. At least that is what the Constitution's text suggests.

Consistent with that view, for much of the first century of the Republic, executive agreements were *never* treated as if they could alter domestic law—state or federal.<sup>117</sup> While treaties were published along with acts of Congress in the statutes at large, executive agreements enjoyed no such treatment.<sup>118</sup> There presumably was no need for their dissemination precisely because they could not alter domestic law.

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114. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

115. 453 U.S. 654 (1981).

116. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133, 218–35 (1998). To argue otherwise is to suppose that “treaties” mean one thing for the purposes of the president’s Article II powers, and another in the Supremacy Clause. *Id.* at 220. The argument would need to suppose that, while the president requires the advice and consent of two-thirds of the Senate to make Treaties for purpose of Article II, Article VI’s reference to Treaties as supreme law of the land would encompass acts (such as executive agreements) that are not subject to Article II’s requirements.

117. *Id.* at 229–31.

118. *Id.* at 231 n.384.



In *American Insurance Association v. Garamendi*, the Court further empowered the executive to preempt state law.<sup>119</sup> *Garamendi* concerned a California statute (the Holocaust Victims Insurance Relief Act, or HVIRA) that required all insurance companies doing business in the state to disclose the details of policies that such companies had sold to persons in Europe between 1920 and 1945.<sup>120</sup> HVIRA's purpose was clear: to promote payment on insurance claims owed to Holocaust victims. There was, however, an executive agreement between the United States and various European parties, including Germany, geared toward a lasting resolution of all Holocaust claims.<sup>121</sup> As the Court explained, the president's agreement made a commitment to discourage litigation against insurers who sold policies encompassed by the California act.<sup>122</sup>

Though the Court discussed *Zschernig*,<sup>123</sup> it ultimately carved out an entirely new doctrine, one that went beyond anything before it. The Court could not rest upon the executive agreement's terms because it did not purport to preempt state law. Nonetheless, the Court found that executive *policy*, as implicitly expressed through "valid executive agreements [could] preempt state law."<sup>124</sup>

We agree that the states have no business targeting companies based on their conduct abroad. Absent federal approval or authorization, the states should not meddle in foreign affairs. Yet there is much to criticize in *Garamendi*. Even if one supposes that executive agreements may preempt, *Garamendi* is problematic because it extended the preemptive effect of executive agreements into domains where their conflict with state law was rather questionable. As the dissent noted, this was the first case in which the Court found executive agreement preemption by implication.<sup>125</sup>

Furthermore, the executive agreement at issue evinced absolutely no disapproval of state disclosure laws.<sup>126</sup> Nonetheless the Court discerned a "sufficiently clear conflict" with executive foreign policy to find preemption of HVIRA.<sup>127</sup> Given that the executive agreement was silent about insurance disclosure laws, the Court seemed to be applying little more than a variant of *Zschernig*. The Court, believing that California had disturbed the executive's stewardship of foreign affairs, found the implications of the executive agreement preempted state law.

In reading an executive agreement to implicitly preempt state insurance disclosure laws when the agreement said nothing about such disclosure, the

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119. 539 U.S. 396 (2003).

120. *Garamendi*, 539 U.S. at 401.

121. *Id.* at 406–07.

122. *Id.* at 406–12.

123. *Id.* at 417–19.

124. *Id.* at 416–17.

125. *Id.* at 440 (Ginsburg, J., dissenting) (arguing against "implied preemption by executive agreement" (emphasis added)).

126. *See id.* at 430.

127. *Id.* at 420 (majority opinion).

Court went out of its way to gauge when state action impermissibly intrudes into foreign affairs. The judicial intervention, grounded on its amateurish sense of foreign affairs, reflected poorly on the Court.

#### D. *Preemption via Statutes and Treaties*

Thus far we have largely focused on the Court's recourse to dubious readings of the Constitution as a means of discovering authority to preempt state actions in foreign affairs. While these cases are the most troubling, the Court's faults extend beyond them. Even when the Court preempts via more conventional mechanisms—treaties and statutes—it often adopts unpersuasively broad readings of them. In so doing, it applies a more jaundiced eye towards state law, at least where foreign affairs is at stake. In our view, the Court thereby circles back to the inquiry that undergirds this entire area: In the Court's estimation, does this state law interfere with foreign affairs too much?

Return to *Crosby*. As discussed, *Crosby* invalidated Massachusetts's Burma statute based on its supposed conflict with a federal statute. The Court declined to apply its presumption against the preemption of state law,<sup>128</sup> and found preemption through a curious analysis. First, the Court noted that Congress had vested the president with “as much discretion . . . as our law will admit” in dealing with Burma.<sup>129</sup> According to the Court, “[i]t is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state [law].”<sup>130</sup> Second, the Court noted that the state law had a much broader reach than the federal one, barring certain actions and applying to actors that Congress's act did not.<sup>131</sup> That the laws “share[d] the same goals and . . . [that] compl[iance] with both sets of restrictions” was possible did not matter.<sup>132</sup> Finally, the Court found that the law impeded Congress's directive that the president establish a “comprehensive, multilateral strategy.”<sup>133</sup> This is because the act “compromise[d] the very capacity of the President to speak for the Nation with one voice.”<sup>134</sup>

The first and third reasons are duplicative. Essentially, the Court observed that Congress vested the president with tremendous power to deal with Burma. But, despite its authority to do so, the executive branch “had taken no formal action intended to preempt the Massachusetts law” a fact that the Court seemed to treat as irrelevant.<sup>135</sup> In any event, the fact that

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128. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000).

129. *Id.* at 375–76.

130. *Id.* at 376.

131. *Id.* at 378–80.

132. *Id.* at 379.

133. *Id.* at 380, 385.

134. *Id.* at 381.

135. Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 171 (2001).

Congress vested the president with broad discretion hardly suggests that the statute itself preempted state law. The Court's second reason, while more conventional, is still unpersuasive. The federal law did no more than "set out an array of . . . sanctions, with no explicit indication that those sanctions were meant to be exclusive."<sup>136</sup> And given the Court's conclusion that the laws shared common goals and that private actors could comply with both, why it nonetheless concluded that the federal statute's narrow terms and scope should be read to preempt a broader state statute is a mystery.

Ernest Young observes that state laws that touch upon foreign affairs are subtly subject to "the application of different preemption rules—in particular, rules that are more likely to result in the displacement of state regulation."<sup>137</sup> We agree with this diagnosis. As Carlos Manuel Vázquez suggests, *Crosby* was basically a "dormant foreign affairs case in disguise."<sup>138</sup>

Across all these foreign affairs preemption doctrines, the same themes recur. The Court preempts state law whenever it supposes that the states have interfered with the federal government's stewardship of foreign affairs or whenever the states are disturbing foreign affairs. We do not quarrel with the policy behind the impulse. To the contrary, we wholeheartedly concur that the states should not interfere with the political branches and that states should not disturb our nation's foreign relations. We merely deny that the inconsistent application of vague doctrines by judges who usually lack any sort of foreign policy pedigree is the optimal (or even a sound) way of policing the states. Courts should not capriciously and belatedly wade neck deep into foreign policy and expound from on high, seizing on penumbras emanating from the Constitution, treaties, statutes, executive agreements, and executive policy to preempt state law.

From a system-design perspective, no one crafting a constitution would embrace this approach. Can't we harness our nation's foreign policy experts to preempt state laws that upset our nation's foreign affairs? There must be a better way.

### III. THREE PRINCIPLES OF FOREIGN AFFAIRS FEDERALISM

Fortunately, there is. As we discuss here, and illustrate in Part IV, Congress may craft preemption regimes that take authority out of the courts' hands, with Congress preempting state law or delegating preemption decisions to executive experts. The Constitution makes such a system possible and Congress and the president ought to embrace it, with the courts tactfully receding into the background.

To see how the Constitution permits such a system of nonjudicial policing of state interventions in foreign affairs, this Part discusses how our foreign affairs Constitution incorporates three overarching federalism

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136. *Id.* at 172.

137. *Id.* at 141.

138. Vázquez, *supra* note 107, at 1304.

principles.<sup>139</sup> First, it assumes that states retain some powers in international affairs, meaning that the Constitution itself does not require that the states stand united on foreign matters. Next, notwithstanding the first principle, the Constitution never guarantees the states any foreign affairs powers; it establishes no “states’ rights” in foreign relations. Third, and for our purposes most importantly, the Constitution empowers Congress to completely oust the states from foreign affairs. Hence, though the Constitution does not of its own terms preclude a dis-United States in the international arena, it empowers Congress to ensure that the United States actually stands united.

We lay out the case for each principle in the subparts that follow. But to fully perceive these embedded rules, we must bear in mind the system that predated the Constitution and the difficulties that the latter was designed to remedy.

One of the impetuses for the Philadelphia Convention was the sense that the existing foreign affairs regime was defective. That regime, established by the Articles of Confederation, suffered from a trio of foreign affairs deficiencies: an absence of adequate legislative authority; an incapacity to prevent or curb state “infractions of treaties or of the law of nations”;<sup>140</sup> and a feeble and ineffective executive. As Edmund Randolph observed in his address to the Philadelphia Convention of 1787, these failings meant that the Articles contained no check against states that may, “by their conduct, provoke [foreign] war without control.”<sup>141</sup>

The dearth of legislative authority in foreign affairs was plain. While the Continental Congress had power to raise an army, this power was more imaginary than real because Congress had to rely upon balky states to heed congressional requisitions.<sup>142</sup> Moreover, as Randolph had noted, Congress could not punish violations of the laws of nations, meaning that it was helpless as states (and individuals) jeopardized our international standing.<sup>143</sup> Finally, Congress could not regulate foreign commerce.<sup>144</sup> After all, the Articles “expressly delegated” neither power.<sup>145</sup>

While Congress could make commercial treaties, those treaties were judicially unenforceable.<sup>146</sup> In a sense, the federal government could do little

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139. One might add a fourth, largely uncontroversial proposition, namely that the Constitution does not *grant* the states any power in foreign affairs. This is in keeping with the general thrust of the Constitution. It endows the *federal* government and only rarely seeks to empower the states. A conspicuous exception might be the power to conduct federal elections, discussed in Article I, Section 4. But even that provision can be read as assuming state power to create rules and imposing a federal obligation upon the states to establish the time, place, and manner of federal elections.

140. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 19.

141. *Id.*

142. See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1964–65 (1993).

143. See 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 19.

144. See ARTICLES OF CONFEDERATION of 1781, arts. II, IX.

145. *Id.*

146. See Ramsey, *supra* note 14, at 380–81.

more than make “recommendations” to the states concerning treaties.<sup>147</sup> Unsurprisingly, Congress was unable to “persuade the states that the national interest took precedence over local political considerations.”<sup>148</sup> For instance, many states did not honor the Treaty of Paris’s command to erect “no lawful impediment” to British creditors’ recovery of debts.<sup>149</sup> America’s failure to honor its obligations prompted the British to hold on to its outposts in the western United States.<sup>150</sup>

The structural shortcomings compounded the problems, for the confederation had an ineffective plural executive. Many supposed that Congress, “as a multi-member [executive] body, was not up to the task” of exercising its foreign affairs power.<sup>151</sup> “Congress could not keep secrets; it could not act expeditiously; [and] it could not pursue a consistent policy.”<sup>152</sup> Relatedly, the lack of a unitary executive made accountability particularly difficult.<sup>153</sup> As John Jay—the Secretary of Foreign Affairs—put it, the Continental Congress was not up to the task of wielding executive authority because it “could not act with secrecy, dispatch, or responsibility.”<sup>154</sup>

The inadequacies of the American regime in foreign affairs were notorious, even in Europe. For instance, the British and Spanish were indisposed to strike trade deals, believing they had little to gain.<sup>155</sup> As one American put it, “the feebleness of our general government” was such that “foreign powers openly declare their unwillingness to treat with” America.<sup>156</sup>

Legislative impotency, an ineffectual treaty power, and a divided and inattentive executive meant “states could (and did) establish foreign policies in competition with Congress.”<sup>157</sup> When it came to foreign affairs, the “United States of America,” an entity nominally recognized by the Articles of Confederation, stood disunited in aspects of foreign affairs.

Given these difficulties, as well as others, the impetus in 1787 was to fortify the central government. As Alexander Hamilton would later put it, the “disposition in the [Philadelphia] convention [was] to disembarass and reinforce” national supremacy.<sup>158</sup> The Constitution that emerged from the

147. See Prakash & Ramsey, *supra* note 47, at 276–77.

148. See JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 343 (1979).

149. 26 *JOURNALS OF THE CONTINENTAL CONGRESS* 26 (photo. reprint 2005) (1928).

150. RAKOVE, *supra* note 148, at 343. This state of affairs confounded even the most ardent critics of federal power. George Mason, for instance, found state obstruction of British creditors “indefensible.” *Id.* at 344.

151. Prakash & Ramsey, *supra* note 47, at 273.

152. *Id.*

153. See *id.*

154. *Id.* at 277–78.

155. See 9 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 836 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

156. *Id.*

157. Ramsey, *supra* note 14, at 381.

158. 6 *THE WORKS OF ALEXANDER HAMILTON* 188 (Henry Cabot Lodge ed., 1904).

Convention proved Hamilton right. It created a unitary executive with a long horizon,<sup>159</sup> partially neutralizing complaints about an amateurish and incompetent plural executive. It granted Congress new powers over foreign commerce<sup>160</sup> and violations of the laws of nations.<sup>161</sup> To guard against embarrassments from state treaty violations, the latter were made “supreme Law of the Land”<sup>162</sup> thereby making it clear that federal and state courts could enforce treaties as law.

As we discuss below, despite the Constitution’s more effectual investiture of foreign affairs powers in the federal government,<sup>163</sup> it did not establish foreign relations as an exclusively national enclave. States could continue to dabble in foreign affairs because the Constitution did not bar such dabbling. And yet, the Constitution never granted states an irrevocable right to establish their own foreign policies. In fact, the Constitution empowers Congress to oust states from foreign affairs.

#### A. *The Retained Foreign Relations Powers of the States*

Although the Supreme Court has from time to time claimed that the states have no authority over foreign affairs, it has, for the most part, shied away from the assertion’s sweeping implications.<sup>164</sup> Like many who have considered the subject,<sup>165</sup> we think it evident that the Constitution’s default rule is that the states retain and may exercise some foreign affairs powers.

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159. See U.S. CONST. art. II, § 1, cl. 1 (“The Executive power shall be vested in a President.”).

160. *Id.* art. I, § 8, cl. 3 (granting Congress the power to “regulate Commerce with foreign Nations”).

161. *Id.* art. I, § 8, cl. 10 (granting Congress the power to “define and punish . . . Offences against the Law of Nations”).

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

163. See, e.g., Prakash & Ramsey, *supra* note 47, at 236 (“The Constitution’s text supplies a sound, comprehensive framework of foreign affairs powers.”).

164. Compare *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (holding that the states’ powers in this sphere are “restricted to the narrowest of limits,” but not eliminated entirely), and *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (remarking that decisions touching on international relations are a “delicate, plenary, and exclusive power of the President”), with *Medellin v. Texas*, 552 U.S. 491 (2008) (tolerating a state’s utter disregard for federal foreign policies).

165. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2267 (1998) (“The most natural inference from . . . the Constitution is that all foreign relations powers not denied to the states by Article I, Section 10 fall within the concurrent authority of the state and federal governments until the political branches act to preempt state authority.”); Ramsey, *supra* note 14, at 346 (“[S]tate laws interfering with federal foreign policy should stand despite that interference, unless preempted in the ordinary constitutional manner.”).

Having said this, we note that many scholars have argued that the federal government’s power is indeed exclusive. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1298 (1996) (“[T]he Constitution[ ] allocat[es] . . . exclusive authority over foreign affairs to the federal government.”); Joseph B. Crace, Jr., Note, *Gara-Mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 229–30 (2004) (suggesting that comments from Madison and Hamilton in the Federalist Papers reflect

Consider the Declaration of Independence's avowal that the "United Colonies" were "Free and Independent States" with "full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do," a locution that intimated that *each state* had powers in foreign affairs.<sup>166</sup> Consider also the Articles of Confederation, which, though it constrained the foreign affairs powers of the states in various ways, never completely barred them from the international arena. In the language of modern preemption cases, the Articles lacked any hint that it "field preempted" the states in foreign affairs. To the contrary, by barring certain state interventions in foreign affairs<sup>167</sup> and by further declaring that the states retained all those powers not expressly delegated to the Continental Congress,<sup>168</sup> the Articles fairly proved that the "free and independent" States, referenced in the Declaration of Independence, retained those foreign relations powers not so barred.

This context helps us discern whether, and to what extent, the Constitution modified this default. The Constitution's text repeatedly signals that states continued to retain some authority in foreign affairs, albeit with some changes. To begin with, Article I, Section 10, Clause 1 absolutely bars treaties, alliances, confederations, and letters of marque and reprisal.<sup>169</sup> By absolutely prohibiting only *some* of the most significant exercises of power in this arena, this provision is best read to imply that the states retain whatever foreign affairs powers not proscribed. After all, there is no need to bar the states from exercising powers that they lack in the first instance.

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that "the Framers intended the federal government to be the sole organ of foreign policy"); Brannon P. Denning & Jack H. McCall, *States' Rights and Foreign Policy: Some Things Should Be Left to Washington*, FOREIGN AFF., Jan./Feb. 2000, at 9, 12 (arguing that "[i]t is hardly credible to look at the Constitution's assignment of power and its proscriptions on state involvement in foreign affairs and to argue that, absent an express ban" the states were free to involve themselves in foreign affairs); Sandra L. Lynch, *The United States, the States, and Foreign Relations*, 33 SUFFOLK U. L. REV. 217, 222 (2000) (arguing that the Constitution's grants of power to the federal government over foreign affairs have been understood "from the earliest days of our country . . . to embody the principle that power over foreign affairs is vested exclusively in the federal government").

Most of these scholars rely upon two quotes from the Federalist Papers. See Ramsey, *supra* note 14, at 382–85 (making this observation). Yet, as Michael Ramsey has persuasively shown, when viewed in context, Hamilton and Madison seem to assert no more than federal *supremacy* in foreign affairs. See *id.* at 383–88. Moreover, because the Constitution does not expressly preclude the states from foreign affairs in all respects, one would have to suppose that both gentlemen supposed that the Constitution *implicitly* barred the states. But Hamilton, at least, did not read the Constitution in this manner. As he explained, the Constitution only implicitly bars the states where it "grant[s] an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." THE FEDERALIST NO. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961). As an example, he cited Congress's power to provide a *uniform* rule of naturalization. *Id.* With respect to foreign affairs, the Constitution never demands a uniform approach across the United States.

166. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

167. ARTICLES OF CONFEDERATION OF 1781, art. VI.

168. *Id.* art. II.

169. U.S. CONST. art. I, § 10, cl. 1.

More importantly, the qualified prohibitions in Clause 3 implicitly countenance a continued state role. Without congressional consent, states cannot lay tonnage duties or enter into international agreements or compacts.<sup>170</sup> Only in time of war or with congressional consent may the states raise troops and keep warships.<sup>171</sup> Similarly, states are barred from engaging in war unless invaded or in imminent danger of invasion.<sup>172</sup> Because Clause 3 never grants powers, it presupposes that states have preexisting foreign affairs powers that remain intact where the Constitution does not abridge them. Absent such antecedent state power, congressional consent would be meaningless.

To underscore our point, one should note that, in certain respects, the Constitution affords the states *greater* leeway in foreign affairs than the Articles, for it lacks some of its predecessor's constraints. The latter forbade states from sending or receiving ambassadors without the consent of Congress.<sup>173</sup> The Constitution never purports to constrain a state's ability to send or receive emissaries. Similarly, the Articles barred state officers from receiving "present[s], emolument[s], office[s] or title[s] . . . from any king, prince or foreign state."<sup>174</sup> Again, the Constitution never restrains state officers in this way.<sup>175</sup>

Relatedly, the Constitution's proscriptions on state action in foreign affairs were clearly not comprehensive, even with regard to activities states were engaged in *at the time of* ratification. For instance, some states discriminated against foreign nationals,<sup>176</sup> even though such treatment could "provoke international incidents."<sup>177</sup> Some states also passed selective purchasing laws geared at rewarding—or punishing—the conduct of particular nations.<sup>178</sup> One might also suppose that the states retained the right to impose embargos, a power that they had exercised repeatedly during the War of

170. *Id.* art. I, § 10, cl. 3.

171. *Id.*

172. *Id.*

173. ARTICLES OF CONFEDERATION OF 1781, art. VI.

174. *Id.*

175. See U.S. CONST. art. I, § 9, cl. 8.

176. For an example of such legislation, see 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 542–45 (James T. Mitchell & Henry Flanders comps., 1906), which conferred generous judicial rights upon subjects of "his most Christian Majesty"—a reference to the King of France. Because this law favored French nationals, it essentially discriminated against all other nationals.

177. Ramsey, *supra* note 14, at 398 n.178.

178. See, e.g., An Act Providing Arms and Ammunition for the Defence of the State, reprinted in 1 THE STATUTES AT LARGE: BEING A COLLECTION OF THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 494 (William Waller Hening ed., 1823) ("[I]f any . . . arms and accoutrements shall be imported from Europe, such importation shall be from France."). For a discussion of this law and others like it, see Ramsey, *supra* note 14, at 390 n.181.



Independence.<sup>179</sup> Although some Framers sought to strip states of this power, delegates rejected this proposal.<sup>180</sup>

These historical examples hardly exhaust the possibilities. By receiving an ambassador to negotiate an international compact, a state might recognize a new nation, despite the fact that the federal government had not recognized it.<sup>181</sup> Although the United States did not recognize Haitian independence until 1862,<sup>182</sup> a state might have done so a half century before. In another move replete with foreign implications, states might have established special immigration procedures for certain favored nationals during the century in which the federal government left immigration wholly to the states.<sup>183</sup> Imagine, for example, the foreign complications of a state choosing to disfavor British immigration during the French Republic's war against Europe in the late 18th century.

Given the Constitution's text, structure, and context, we wholeheartedly agree with Curtis Bradley and Jack Goldsmith that "all foreign relations powers not denied to the states by Article I, Section 10 fall within the concurrent authority of the state and federal governments."<sup>184</sup> The Constitution does not render the states mute and deaf on the international stage. Nor does it ensure that the United States stands united on that stage.

Stepping back for a moment and contemplating the bigger picture, it seems fair to say that the Constitution implicitly divides state intervention in foreign affairs into three categories. For certain acts, like making treaties and granting letters of marque and reprisal, the Constitution erects an absolute bar.<sup>185</sup> Other times, for example, with keeping warships or troops in peacetime or making international compacts, it enacts a qualified bar that Congress can lift via legislation.<sup>186</sup> Finally, with respect to foreign affairs powers

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179. See, e.g., Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1383 & n.112 (2013) (exploring this phenomenon).

180. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 440–41.

181. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (discussing how the power to receive ambassadors is "tantamount to recognizing the sovereignty of the sending state").

182. See RAYFORD W. LOGAN, *THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH HAITI, 1776-1891*, at 298–303 (1941).

183. As Gerald Neuman has shown, the states regularly enacted regulation touching on immigration in the century preceding the Founding. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 98 COLUM. L. REV. 1833, 1841–84 (1993) (comprehensively documenting the various forms of state legislation in this arena). For an example of the states provoking consternation through their regulation of immigration, see *Chy Lung v. Freeman*, 92 U.S. 275 (1875). California required that a bond be paid for certain passengers upon their entry into the state. One class of passengers for which this bond was required was "lewd and debauched women." *Id.* at 276. As the Court explained, it was "hardly possible to conceive a statute more skillfully [sic] framed, to place in the hands of a single man the power to prevent entirely vessels engaged in a foreign trade . . . with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind." *Id.* at 278.

184. Bradley & Goldsmith, *supra* note 165, at 2267.

185. See *supra* notes 169–172 and accompanying text.

186. See *supra* note 171 and accompanying text.

not in these two categories, such as sending and receiving ambassadors, the Constitution erects no impediment.<sup>187</sup>

B. *The Constitution Does Not Safeguard the Retained Foreign Relations Powers*

Much of the scholarship about foreign affairs federalism emphasizes the previous principle. Yet we think this idea of retained powers hardly exhausts the principles derivable from the Constitution's foreign affairs federalism. Indeed, excessive focus on the first principle leads to a distorted sense of the actual contours of the Constitution.

We believe that there is a second principle of foreign affairs federalism. While the Constitution assumes that states may continue to dabble in foreign affairs, it never actually guarantees them such a role. In particular, it never declares or implies that the states have a constitutional right to adopt and pursue their own foreign policies.

Our argument for this proposition is simple. The Constitution rarely specifies the authorities states have,<sup>188</sup> preferring to specify what states may not do.<sup>189</sup> Occasionally the Constitution makes clear that it guarantees a right to the states, as when it "reserve[es]" to the states the rights to appoint militia officers and to implement congressional training rules.<sup>190</sup> And infrequently, the Constitution promises the states something, as when it assures them a "Republican Form of Government" and protection against invasions and rebellions.<sup>191</sup>

The conspicuous failure to reserve the states a particular role in foreign affairs or guarantee them any set of constitutional powers in foreign affairs signals that the Constitution itself does not cede states a "constitutional right" to engage in foreign affairs. There is no provision "reserving" to the states the power to send ambassadors or "guaranteeing" them the right to denounce fascist or communist countries. Likewise, there is no clause specifying that states have a constitutional right to regulate foreign commerce or the rights of aliens. And, of course, American states lack a constitutional right to adopt laws that favor particular foreign regimes (say England) and disfavor others (say Iran).

We would go so far as to say that the states do not even have a constitutional right to defend themselves from attack, at least in the sense of an infeasible right not subject to congressional regulation. For instance, if states repeatedly and wrongfully invoked the provision that permits them to

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187. See *supra* notes 174–181 and accompanying text.

188. For an exception to this general principle, see U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.")

189. See, e.g., *id.* art. I, § 10; *id.* amend. XIV.

190. *Id.* art. I, § 8, cl. 16. We are inclined to read this provision as indicating that the Constitution establishes that only states can appoint militia officers and implement congressional training rules.

191. *Id.* art. IV, § 4.

wage war when in “imminent Danger [of an invasion] as will not admit of delay”,<sup>192</sup> we believe that Congress may impose a prophylactic rule barring resort to that authority. Imagine if Texas, in a thinly veiled grab for territory, repeatedly invaded Mexico over the course of years, each time claiming that Mexico was contemplating an imminent incursion into Texas. Or imagine that in the wake of a Canadian invasion, Minnesota insisted on fielding its own army, consistent with its retained right to “keep Troops” in the aftermath of an invasion,<sup>193</sup> but repeatedly deployed that army in ways that hampered the federal government’s military efforts against Canada. In the latter case, we believe that Congress might step in and preempt Minnesota’s action, because under our reading of the Constitution states lack an absolute right to conduct their own defense. Instead, their right to defend themselves is a default right that may be modified or abridged by federal statute.

Some may suppose that the Tenth Amendment indicates that states have a constitutional right to exercise all powers that they retain. But that is surely mistaken. That amendment only provides that the powers “not delegated to the United States . . . are reserved to the States . . . or the people.”<sup>194</sup> If we are right that the federal government has constitutional power to bar interference with its conduct of foreign affairs,<sup>195</sup> the amendment is inapplicable. After all, if we are right, *there would be power delegated* to the United States to preempt the states in foreign affairs and hence no foreign affairs authority could be reserved (guaranteed) to the states or the people. The amendment’s purpose, to guard against the “national government . . . exercis[ing] powers not granted,”<sup>196</sup> is simply not implicated by our claim.

In sum, while the Constitution permits the states to retain a role in foreign affairs (the first principle), it never provides—explicitly or implicitly—that states have a constitutional entitlement to engage in foreign affairs (the second principle). Hence, even if the Constitution protects “states’ rights,” the latter does not encompass an unconditional right to advance state foreign policies.

### C. Congressional Power to Preempt in Foreign Affairs

Even if the Constitution never safeguards state authority in the international arena, it does not follow that Congress cannot bar the states from pursuing their own foreign policies. This is where the third feature of foreign affairs federalism enters the analysis. The third principle, one crucial to our policy suggestions at the end of this Article, is that Congress enjoys legislative power to bar the states from the foreign arena.

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192. *Id.* art. I, § 10, cl. 3.

193. *Id.*

194. *Id.* amend. X.

195. See *infra* Section III.C.

196. *United States v. Darby*, 312 U.S. 100, 124 (1941).

In speaking about power to preempt in foreign affairs, the Supreme Court has said “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law.”<sup>197</sup> Though true with respect to foreign affairs, the Court never specified the basis for this power. Similarly, scholars have claimed that Congress can preempt when states interfere with federal foreign policy, without generally indicating the sources of such authority.<sup>198</sup>

The power to preempt state law cannot come from the Supremacy Clause. The Clause does not grant power to preempt state law. Instead, it merely provides a rule of decision favoring federal law when it conflicts with state law, a directive that is premised on a valid exercise of federal authority.<sup>199</sup> If a federal enactment (law or treaty) is invalid (unconstitutional), there can be no preemption of state law by virtue of that enactment. Put another way, though the Supremacy Clause declares that federal statutes and treaties are supreme, the Court has never held that *all* federal statutes and treaties prevail over contrary state law, for doing so would render unconstitutional federal enactments supreme over state law, something the Constitution never declares. In its earliest cases, the Court decided not only whether there was a conflict between federal and state law, it also judged whether the federal law was constitutional, an irrelevant inquiry if all federal laws, constitutional or not, preempted state law.<sup>200</sup>

The statutory power to preempt state law, when it exists, arises from the substantive powers of Congress, found in Article I and elsewhere. The statutory power to preempt in foreign affairs arises from congressional power over foreign commerce, the law of nations, and the Necessary and Proper Clause.

Consider the Foreign Commerce Clause<sup>201</sup> and its broad grant of authority, a power that the Court has sometimes described as “plenary.”<sup>202</sup> Under that Clause, we are certain that Congress could declare that the importation of a good from a foreign country “shall be legal and permitted.” Necessarily, this statute would supplant any state statutes that bar that good’s importation. Going further, Congress could impose a tariff on the importation of a foreign good and append a provision that preempts all state regulation of that good’s importation. This would be a regulation coupled with a federal occupation of the foreign commerce field with respect to

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197. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

198. See *Ramsey*, *supra* note 14, at 398 n.211 (noting common assumption that federal government can preempt the states in foreign affairs). *Ramsey* briefly attempts to make the case for federal authority by citing Congress’s need to legislate in support of the president’s authority. *Id.*

199. See *Haywood v. Drown*, 556 U.S. 729, 750–51 (2009) (Thomas, J., dissenting).

200. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190, 200–01 (1824) (affirming federal commerce power over navigation before concluding that federal statute preempted state law).

201. U.S. CONST. art. I, § 8, cl. 3.

202. *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904) (describing power of Congress over foreign commerce as “plenary”).

the good. Going further still, using its extensive commerce authority, Congress may choose to enact no substantive rules with respect to foreign commerce but may decide, via statute, *that no state shall enact any regulation of foreign commerce*. This would be “a naked preemption” statute,<sup>203</sup> albeit one that established laissez-faire as the method of federal “regulation” of foreign commerce. Our point is that the Clause includes extensive authority to preempt state regulation of foreign, interstate, and Indian commerce, whether or not Congress enacts affirmative regulations of those streams. In other words, Congress can “regulate” foreign commerce by barring state regulation of it.

The same sorts of analyses apply to the power to define and punish violations of the law of nations. For instance, states might authorize their officials to arrest and detain foreign ambassadors, something contrary to the law of nations. But Congress may preempt such state laws using its “define and punish” authority.<sup>204</sup> Congress could criminalize trespasses against foreign ambassadors, even those conducted under the color of state law. Such a law would implicitly preempt any state law that permitted state officials to accost foreign ambassadors. Similarly, states might authorize the detention of private parties who have federal “safe conducts,”<sup>205</sup> thereby violating international law. In response, Congress may enact federal law that seeks to punish (and therefore deter) such state detention.<sup>206</sup> Again, such a statute would implicitly preempt the state detention law. In sum, using its define and punish power, Congress has some authority to preempt state laws that conflict with the law of nations.

Constitutional power to preempt state interference in foreign affairs also derives from the Necessary and Proper Clause.<sup>207</sup> As Chief Justice John Roberts recently explained, the Clause does not grant Congress unlimited legislative authority.<sup>208</sup> But we think the Clause clearly vests Congress with power to preempt state involvement in foreign affairs. In particular, when Congress

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203. Although the concept of naked preemption remains relatively unexplored, some scholars have before used the term in different settings. See David A. Gerber, *On Nimmer on Copyright*, 26 UCLA L. REV. 925, 927, 935–37 (1979) (book review) (discussing the concept of naked preemption).

204. U.S. CONST. art. I, § 8, cl. 10. Judicial interpretations of the Define and Punish Clause are notoriously few in number, but for useful background see Peter Margulies, *Justice at War: Military Tribunals and Article III*, 49 U.C. DAVIS L. REV. 305, 352–56 (2015). For a broader explication of the clause, see Sarah H. Cleveland & William S. Dodge, *Defining and Punishing Offenses Under Treaties*, 124 YALE L.J. 2202 (2015).

205. Safe conducts were permits to receive protection while in a foreign country and were issued to foreigners. For a general discussion, see Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 836–37 (2006) (discussing the First Congress’s three conceptions of safe conducts).

206. See, e.g., Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 118 (criminalizing violations of safe conducts granted to ambassadors).

207. U.S. CONST. art. I, § 8, cl. 18.

208. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012) [hereinafter *NFIB*] (opinion of Roberts, C.J.) (“Although the Clause gives Congress authority to ‘legislate on that vast mass of incidental powers which must be involved in the constitution,’ it does not

concludes that such interventions make it more difficult for the efficacious exercise of federal foreign affairs authority by the Congress or the president, Congress may preempt the states on the grounds that such supersession is necessary and proper.

In order to be necessary, a law must be “‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’”<sup>209</sup> A law’s consistency “with the letter and spirit of the constitution”<sup>210</sup> conduces to its propriety. Hence Congress may not use the Necessary and Proper Clause to do what the Constitution elsewhere prohibits, nor usurp powers not granted to it.<sup>211</sup> Moreover, the law in question must “carry into execution” a power of the federal government.<sup>212</sup> As one Federalist summed it up at the Founding, where Congress passes a law “in consequence of this clause, [it] must pursue some of the delegated powers, but can by no means depart from them, or arrogate any new powers.”<sup>213</sup>

In the abstract, the usefulness of preempting state involvement in foreign affairs should be evident. As Part I discussed, state laws in this arena can interfere with the proper exercise of federal authority. To ensure that the nation is united, that it is “made one as to all foreign . . . matters,”<sup>214</sup> it may be necessary to suppress counterproductive state overtones so that the federal voice can be heard without distortion or distraction. We believe that the deleterious effects of foreign affairs freelancing make for one of the strongest cases for preemption of state law.<sup>215</sup>

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license the exercise of any ‘great substantive and independent power[s]’ beyond those specifically enumerated.”) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411, 421 (1819)).

209. *Id.* at 2592 (quoting *United States v. Comstock*, 560 U.S. 126, 133–34 (2010)); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 316 (1819) (explaining that Congress may pass laws “essential to the beneficial exercise of [its] power” even where they are not “indispensably necessary,” and that “right[s] incidental . . . and conducive” to the exercise of the enumerated powers are similarly appropriate); Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 288 (1993) (“[U]se of the phrase ‘absolutely necessary’ in Article I, Section 10, Clause 2 strongly suggests that ‘necessary,’ by itself [in the Necessary and Proper Clause], does not connote indispensability.”).

210. *McCulloch*, 17 U.S. at 421; see also *NFIB*, 132 S. Ct. at 2592 (echoing this standard).

211. See *NFIB*, 132 S. Ct. at 2592 (opinion of Roberts, C.J.); see also Lawson & Granger, *supra* note 209, at 297 (“[T]he word ‘proper’ was often used during the founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity.”).

212. *McCulloch*, 17 U.S. at 324.

213. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 441 (Jonathan Elliot ed., J.B. Lippincott Co. 1937) (1836).

214. Letter from Thomas Jefferson to Joseph Jones, *supra* note 13, at 34.

215. To the extent one insists on a higher standard for legislation enacted under the Clause, we do not doubt that our proposal satisfies it. For an argument that “necessary” means something more than “useful,” see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 184 (2003) (stating that “the truth lies somewhere in between” the standards of “indispensably requisite” and “merely ‘convenient’”).

Little further need be said about why preemption might be useful or convenient for carrying *congressional* foreign affairs powers into execution. For instance, Congress may more efficaciously provide for the nation's defense<sup>216</sup> when states are not pursuing their own foreign policies, provoking nations that are at peace with the United States. Relatedly, if reliance upon the Necessary and Proper Clause is necessary to block state regulation of foreign commerce (meaning that exercises of Commerce Clause authority are insufficient for such preemption), Congress may preempt on the belief that preemption furthers its foreign commerce policies.

Likewise, preempting state interference with the *president's* foreign affairs powers<sup>217</sup> is no less useful. Preemption of state intrusions serves to make the president's exercise of foreign affairs authority more effective. For instance, the executive may be able to more effectually extract concessions from foreign nations in treaty negotiations if individual states are not attempting to strike separate agreements or compacts with foreign governments. The general point is that executive can more effectively speak for the country on the international stage when the states are not in the foreground singing discordant tunes.

As for the Clause's "proper" prong, we believe that federal statutes that preempt state intrusions in foreign affairs are proper because such federal laws are consistent with the Constitution's letter and spirit. Again, while the Constitution never ousts the states from foreign affairs, we believe it never *guarantees* them a role either. The absence of such reserved state enclaves in foreign affairs makes it impossible to conclude that federal preemptive statutes are improper.

As our discussion of the Commerce Clause suggested, the sweep and manner of federal preemption in foreign affairs under the Necessary and Proper Clause can vary dramatically. Again, Congress may choose to regulate and preempt narrowly, for example, it may regulate a discrete area by establishing certain rules *and* preempting state regulation of that zone. For instance, Congress could enact foreign extradition rules for the states and provide that the states may not negotiate foreign compacts in contravention of those rules. Such a statute would help carry into execution Congress's authority over the making of state compacts with foreign nations by setting limits on permissible compacts.

Moreover, as with the case of the Commerce Clause, Congress may employ the Necessary and Proper Clause to nakedly preempt the states. For instance, Congress could provide that no state shall separately negotiate any compact with foreign nations related to trade, leaving the federal government with a monopoly on striking such agreements. In this case, Congress would have decided that the president or Congress ought to craft trade agreements on behalf of the entire nation and that individual states should not even attempt to strike such an accord.

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216. U.S. CONST. art. I, § 8.

217. Prakash & Ramsey, *supra* note 47, at 265–75.

Relatedly, Congress's naked preemption statutes enacted under the Necessary and Proper Clause need not be narrowly drawn. In fact, we believe that the Constitution permits Congress to enact a statute that flatly prohibits all state involvement in foreign affairs. While such a statute would be somewhat vague, it would not be unconstitutional, for it would be designed to carry federal foreign affairs authorities into execution.

Although we have focused on preemption, we believe that Congress may do more than preempt state law under the Necessary and Proper Clause. After all, preemption does not wholly eliminate the state impetus to engage in foreign affairs as much as it seeks to nullify the effects of those state interventions. One can imagine state legislators attempting to legislate on matters barred to them by federal statute when those politicians believe that the mere *attempt* to legislate, whether successful or not, will garner them donations or votes. If members of Congress believe that states should be more comprehensively deterred from entering the foreign arena, they may craft rules designed to induce state officials to avoid the field altogether. Subject to normal rules applicable to all criminal laws, like the rule of lenity, etcetera., Congress may conclude that criminalizing interference with federal foreign affairs prerogatives is useful and suitable as a means of implementing those authorities.

Lest we be mistaken, ours is a claim about the sweeping scope of federal authority over *foreign affairs*. We believe that the federal government likely cannot completely oust the states from certain domestic spheres. For instance, the federal government likely cannot wholly divest the states of their ability to tax property because such a federal statute would be inconsistent with the Constitution's spirit and therefore improper. While Congress may lay various taxes, it must not constrain state taxation to the point that it cripples the independence or existence of the states.

Our limited point here is that foreign affairs is not an area where the states enjoy an unassailable enclave of guaranteed authority. There is no warrant for treating foreign affairs like taxes. While money is the mother's milk of politics, and therefore a vital resource for state governments, no one can imagine that foreign affairs rests at the heart of state sovereignty.

### 1. Historical and Doctrinal Support for this Power

We believe that constitutional text sufficiently establishes that Congress may deter and preempt state interventions in foreign affairs. But we also draw support from long-established federal statutes and judicial doctrines. Enduring federal laws bespeak extensive congressional power to bar interference with federal stewardship of foreign affairs.<sup>218</sup> And the Supreme Court has endorsed the proposition that Congress may oust the states from broad spheres, even in the absence of comprehensive federal legislation.<sup>219</sup> These

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218. See *infra* notes 220 and 223 and accompanying text.

219. See *supra* note 200 and accompanying text.



legislative enactments and judicial declarations should leave little doubt that Congress enjoys authority to oust the states from foreign affairs.

Examples of Congresses barring interference in international matters date back to the Federalist era. For instance, the Crimes Act of 1790 outlawed attempts to imprison foreign public ministers or seize or attach their assets and also criminalized attempts to seek, prosecute, or enforce judicial decrees related to the same.<sup>220</sup> The Act explicitly applied to “officers” who might enforce such decrees.<sup>221</sup> Moreover, the Act criminalized violations of safe conducts and “offering violence” to foreign public ministers.<sup>222</sup> These prohibitions evidently applied to state officials.

Or consider the 1794 Neutrality Act.<sup>223</sup> At the time, Americans were taking up arms and siding with France in its war against Great Britain.<sup>224</sup> Given the capacity of nonfederal actors to draw the country into war, “[i]t would be most deplorable if no such controlling power existed in” the federal government to prevent such actions.<sup>225</sup> Of course, Congress had such authority. The Act not only barred attacks on nations with which the United States was at peace, it also barred certain forms of assistance to foreign warships.<sup>226</sup> Again, the Act applied to all persons, including state officials.<sup>227</sup>

The 1799 Logan Act bars any citizen (including state officials) from “influenc[ing] the measures or conduct of . . . foreign government[s] . . . in relation to any disputes or controversies with the United States.”<sup>228</sup> Congress found the law necessary because such attempts at private diplomacy were a “usurpation of executive authority.”<sup>229</sup> The Act’s application to state officials is apparent not only from its text, but from its history as well; the Act was a response to the foreign affairs freelancing of a state legislator, George Logan.<sup>230</sup>

220. Act of Apr. 30, 1790, ch. 9, §§ 25–26, 1 Stat. 112, 117–18.

221. *Id.* § 26.

222. *Id.* § 28.

223. Act of June 5, 1794, ch. 50, 1 Stat. 381.

224. Application of the Neutrality Act to Official Gov’t Activities, 8 Op. O.L.C. 58, 59–62 (1984).

225. *United States v. O’Sullivan*, 27 F. Cas. 367, 383 (S.D.N.Y. 1851) (No. 15,975).

226. §§ 3–5, 1 Stat. at 383–84.

227. See An Act of June 5, 1794, 1 Stat. 381. Some may say that these prohibitions did no more than duplicate the Constitution’s own prohibitions. That requires an aggressive interpretation of the Constitution’s proscriptions. Article I, Section 10 prohibits the states from engaging in war. But the 1794 Neutrality Act barred far more. For instance, the bill forbade the outfitting of foreign ships where those vessels were to be used by “any foreign prince or state to cruise or commit hostilities upon the subjects” of other states, even those whom the United States was not allied with. *Id.* § 3, 1 Stat. at 383. Also forbidden was “adding to the number or size of the guns of such vessel[s],” *id.* § 4, 1 Stat. at 383 a proscription that sounds more in commercial regulation than a bar on making war.

228. 18 U.S.C. § 953 (2012).

229. 9 ANNALS OF CONG. 2488–89 (1789).

230. See *id.* at 2503–04; see also Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 292 (1987).

While early acts of Congress support our theory of broad legislative power to bar interference in foreign affairs, the Supreme Court's jurisprudence is even more supportive. First, as was discussed in Part II, the Court has eagerly read all manner of federal enactments—statutes, treaties, executive agreements—as if they preempted state law. In so doing, the Court has shown a penchant for preemption of state interference. Though we question its approach, we share this policy preference. For our purposes, the Court's enthusiasm for finding preemption signals that there is nothing amiss in congressional preemption of state interference in foreign affairs. After all, it would be odd for the Court to adopt broad readings of federal enactments if doing so raised constitutional issues about Congress's ability to preempt. We think that the Court embraced expansive readings of federal statutes because it saw absolutely no difficulties with federal preemption in this arena. What Justice Souter said in *Crosby*—that “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law,”<sup>231</sup> is undoubtedly true with respect to foreign affairs.

Second, the Court has occasionally discussed field preemption in a way that supports broad federal power to preempt. For over a century the Court has spoken of federal authority to oust the states from certain regulatory spheres entirely. The Court most clearly recognized this power in a line of cases at the beginning of the 20th century, beginning with *Southern Railway Co. v. Reid*.<sup>232</sup> *Reid* concerned the intersection of federal and state authority over the burgeoning railroad industry.<sup>233</sup> The Court invalidated a South Carolina act regulating railroad companies, finding that, by virtue of the Interstate Commerce Act, Congress had “taken possession of the field” of railroad regulation.<sup>234</sup>

Given the Court's reading of a federal statute to implicitly oust the states from the entire sphere of railroad regulation, it is clear that the Court supposed Congress could occupy that sphere, even in the absence of federal legislation that sought to regulate every aspect of railroads. The *Reid* court spoke of a “[f]ederal exertion of authority which takes from a State the power to regulate,” unqualified by any need for a conflict between state and federal law.<sup>235</sup> In other words, the Court did not conclude that specific provisions of federal and state law were incompatible. Instead the Court found that Congress had completely stripped the states of their authority to regulate in this arena.

The Court spoke more clearly three years later in *Chicago, Rock Island & Pacific Railway Co. v. Hardwick Farmers Elevator Co.*<sup>236</sup> The case concerned

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231. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

232. 222 U.S. 424 (1912).

233. For a thorough examination of *Reid* and its progeny, see Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 803–06 (1994).

234. *Reid*, 222 U.S. at 442.

235. *See id.* at 435–37, 442.

236. 226 U.S. 426 (1913).

the regulation of railroad car delivery, a subject over which the Court assumed the states were permitted to regulate “in the absence of [controlling] legislation by Congress.”<sup>237</sup> The Court construed an act of Congress to completely strip the states of their authority. Specifically, “the power of the State over the subject-matter ceased to exist,” when Congress dealt with a subject over which the states had “no inherent, but only permissive, power.”<sup>238</sup> In a case decided later that year, the Court explained that this jurisdiction stripping of the states could extend to cases where their acts purport to supplement, rather than conflict, with the relevant federal law.<sup>239</sup>

To be sure, the Court no longer preempts state action in a given arena unless Congress manifests such an intent.<sup>240</sup> We have no quarrel with this focus on intent as a touchstone for preemption. Our only point is that it should be clear that the Supreme Court supposes that Congress may strip the states of authority in certain arenas of concurrent jurisdiction. More precisely, the Court believes that where the Constitution does not guarantee the states certain powers, Congress may strip the states of their concurrent authority when the latter concludes that state involvement interferes with the exercise of federal authority.

We agree with what is implicit in the Court’s foreign affairs federalism cases. Because the states lack a constitutional right to engage in foreign affairs and because Congress enjoys authority to ensure the implementation of federal foreign affairs powers, Congress may enact measures meant to prevent state interference with federal stewardship of foreign affairs.

## 2. Considering Counterarguments

Because our constitutional claims are novel, we are hard-pressed to identify the objections one might lodge. Nonetheless, we see four possible concerns: (1) the Founders rejected the idea of a congressional negative on state laws; (2) Congress does not possess the power to tell the states they may not exercise concurrent authority when the national legislature has not itself yet acted in that arena—Congress cannot “nakedly preempt”; (3) the First Amendment prevents Congress from stifling the voices of the states, even in the foreign arena; (4) Congress cannot preempt the states in order to shield

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237. See *Chi., Rock Island & Pac. Ry. Co.*, 226 U.S. at 435.

238. *Id.*

239. *Charleston & W. Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915) (“When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.”).

240. See Gardbaum, *supra* note 233, at 806. This change in approach was necessary in order to retain state competence over its traditional areas of legislation in the face of growing federal power. The absence of intent to preempt from Congress might have otherwise resulted in the Court stripping the states of far more authority than was necessary to effectuate Congress’s aims. See *id.*

the president's executive power where the president wishes no such defense—that is, our claim raises substantial separation of powers concerns. We take these issues up in turn.

At the Founding there was a move to grant federal authority to negative state laws. The Virginia Plan provided that Congress could “negative *all* laws passed by the several States contravening . . . the articles of union.”<sup>241</sup> Charles Pinckney of South Carolina conceived of a power to negative all state laws that Congress judged “improper.”<sup>242</sup> Of course, the state delegations never acted on such suggestions and the Constitution contains no express “power to negative” state acts, unconstitutional or otherwise.

The failure to enact such provisions is irrelevant to our claims, for we do not argue that Congress, via the Necessary and Proper Clause or otherwise, can preempt all unconstitutional or improper state laws. Instead, we believe that the federal government has power that is both broader and narrower than the ones discussed at Philadelphia. Federal power is broader because Congress may enact laws that preempt state laws even in the absence of a constitutional conflict; in other words, Congress can preempt state laws that are *entirely* constitutional. Moreover, Congress need not wait for the states to pass such laws. Rather than preempting particular state laws as and when they arise, Congress can enact prophylactic rules. To take a real example, Congress may provide that an executive agency must preclear state laws before they become operative.<sup>243</sup>

In our view, federal power is narrower in that Congress cannot preempt state law where it lacks subject matter authority over the relevant area. For instance, even if Congress thought that state bans on gun possession within 1,000 feet of schools was improper, it likely could not preempt such state bans because Congress lacks substantive authority over this behavior.<sup>244</sup> Similarly, Congress probably cannot preempt where the Constitution guarantees states concurrent authority. For instance, Congress probably cannot provide that the states may not erect quarantines.<sup>245</sup> Our point is that Congress does not have a roving commission to preempt all state laws that it regards as improper, and our constitutional claims do not suggest otherwise.

In any event, notwithstanding the failure to enact a provision that would have enabled Congress to nullify all unconstitutional state laws, absolutely no one can gainsay that Congress can preempt at least some state laws. The Supremacy Clause would have no reason to declare that federal statutes

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241. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 17, at 61 (emphasis added); *see also id.* at 21.

242. *Id.* at 164.

243. *See* 52 U.S.C. § 10304(a) (2012) (providing that no “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” shall be enacted without preclearance from the Attorney General or the United States District Court for the District of Columbia).

244. *Cf.* *United States v. Lopez*, 514 U.S. 549 (1995).

245. *See, e.g.,* *People ex rel Barmore v. Robertson*, 134 N.E. 815, 817 (Ill. 1922) (“The duty to preserve the public health finds ample support in the police power, which is inherent in the state, and which the state cannot surrender.”).

supersede state law if it were constitutionally impermissible for Congress to preempt state law.

The idea that Congress cannot impose field preemption absent some affirmative federal regulation is also misguided. As argued earlier, the fundamental question is whether Congress has legislative power to preempt. If it does, that should be the end of the discussion. Hence if the Commerce Clause gives authority to preempt or if the Necessary and Proper Clause conveys power to supersede, naked preemption statutes are entirely constitutional.

Moreover, we are aware of no doctrinal authority requiring the creation of a federal regulatory scheme in order for the national government to divest the states of power in an arena. To the contrary, the most relevant case law concerning this issue supports our view. The Professional and Amateur Sports Protection Act (“PASPA”) is a simple, one-page act that makes it illegal for *governmental entities* to “sponsor, operate, advertise, promote, license, or authorize by law or compact” any form of gambling on sports contests.<sup>246</sup> In *NCAA v. Governor of New Jersey*, the Third Circuit considered PASPA’s constitutionality.<sup>247</sup> Despite the fact that “PASPA provides no federal regulatory standards or requirements of its own,”<sup>248</sup> the majority upheld its constitutionality, citing the Commerce Clause.<sup>249</sup> Judge Vanaskie dissented, positing that “the Supremacy Clause simply does not give Congress the power to tell the states what they can and cannot do in the absence of a validly-enacted federal regulatory or deregulatory scheme.”<sup>250</sup>

We agree that the Supremacy Clause does not grant a power to preempt. But, as we have explained, the substantive powers of Congress include authority to preempt state law. As the Third Circuit majority put it, “the federal [commercial] policy with respect to sports gambling is that such activity should not occur under the auspices of a state license.”<sup>251</sup> Similarly, the policy of a foreign affairs preemption statute would be that the states should be barred from certain aspects of foreign affairs. Because Congress has some authority over foreign affairs and may help carry federal foreign affairs powers into execution, it may preempt state interference with the federal exercise of those powers.

Even if our claims about the constitutionality of naked preemption statutes are misbegotten, any federal law that preempts state foreign policies is

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246. 28 U.S.C. § 3702 (2012). The 1992 Act grandfathered all existing activities by governmental entities, meaning that Nevada could continue to license and authorize gambling on sports. *See id.* § 3704.

247. 730 F.3d 208 (3d. Cir. 2013).

248. *NCAA*, 730 F.3d at 247 (Vanaskie, J., dissenting); *see also id.* at 245 n.3 (“[T]here is no federal regulatory or deregulatory scheme on the matter of sports wagering. Instead, there is the congressional directive that states not allow it.”).

249. *Id.* at 224–25 (majority opinion).

250. *Id.* at 245 n.3 (Vanaskie, J., dissenting).

251. *Id.* at 236 (majority opinion).

best understood as preempting in a field where there already is much substantive federal regulation. After all, Congress legislates in many areas pertaining to foreign affairs.<sup>252</sup> Congress could judge that the range of state statutes it chooses to preempt are inconsistent with the broad outlines of *existing* federal statutes and treaties. As we argued earlier, the Supreme Court's willingness (approaching on avid eagerness) to infer something like field preemption in foreign affairs stands as good reason to suppose that express congressional authorization of field preemption must be constitutional. Again, if the Court can infer that Congress *meant* to occupy some parts of the foreign affairs field, it can hardly be illegitimate for Congress to make clear its intentions to do so.

As noted, some argue that the First Amendment effectively limits the restrictions the federal government may impose on the states. Under this view, the Constitution accords state governments and actors the same First Amendment protections as private actors.<sup>253</sup> Because private parties cannot be stripped of the right to speak on foreign affairs, the argument goes, the states likewise have the right to express themselves on international matters.

We find this argument perplexing, and believe that the First Amendment poses no obstacle to federal statutes that bar the states from opining on foreign matters. Even if state governments stand in the same shoes as private actors with respect to the First Amendment's protections,<sup>254</sup> the federal government's interest in preempting state activity here is more compelling than would be legislation aimed at limiting the speech of private actors. States are capable of greater mischief because foreign nations are more likely to conclude that the state officials speak with an official imprimatur, in contrast to the musings of private individuals. The Supreme Court has noted that national observance of a treaty, protecting relations with foreign governments, and demonstrating a commitment to international law are

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252. Congress has legislated on an immense range of subjects touching on foreign affairs, from multilateral treaty implementation to rendering nation-specific aid. *See, e.g.*, 22 U.S.C. § 3302 (2012) (providing that it is U.S. policy to "make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability"); *id.* § 6303 (barring the rendering of assistance in nuclear matters to any "individual, group, or non-nuclear-weapon state"); *id.* §§ 6701–6771 (implementing the Chemical Weapons Convention); *id.* § 7402 (prohibiting extradition of U.S. citizens to countries that are under obligation to "surrender persons to the International Criminal Court").

253. *See* Andrea L. McArdle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policymaking*, 62 *TEMP. L. REV.* 813, 831 (1989); Porterfield, *supra* note 6, at 1–2.

254. To call this principle of law "unsettled" would be an understatement. The Supreme Court has never addressed the subject of whether the First Amendment protects the states from federal speech restrictions. For the "most recent summary of the issue," see David Fagundes, *State Actors as First Amendment Speakers*, 100 *Nw. U. L. REV.* 1637 (2006); *see also* Eugene Volokh, *Do State and Local Governments Have Free Speech Rights?*, *WASH. POST: THE VOLOKH CONSPIRACY* (June 24, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/24/do-state-and-local-governments-have-free-speech-rights/> [https://perma.cc/53CC-AVA2].

“plainly compelling” interests.<sup>255</sup> If so, maintaining friendly relations with foreign nations likewise counts as a compelling interest in suppressing state declamations against foreign governments.

Healthy skepticism of the Logan Act should not cloud the issue. While we take no position on the Act’s constitutionality, others have registered strong objections.<sup>256</sup> Those doubts center on its vagueness, overbreadth, and overall tension with the First Amendment.<sup>257</sup> The Act “fails to properly inform citizens of the conduct that it proscribes”<sup>258</sup> and it seemingly prohibits some actions that the government’s national security interest cannot justify.<sup>259</sup> Moreover, the Act’s proscriptions apply to *all* citizens and thus may be too sweeping.<sup>260</sup> But even if these claims have merit, Congress could surely design a narrowly tailored and precise statute that only squelches the states (and not private citizens).

Finally, some might raise an objection grounded in the separation of powers. When Congress preempts in order to more efficaciously exercise its own constitutional powers, there can be no separation of powers concern. Yet when Congress preempts to help implement presidential powers, perhaps it is surreptitiously “aggrandiz[ing] itself at the expense of the” executive.<sup>261</sup> A statute that precludes *all* state foreign affairs activities will doubtless bar some state interventions where the president (and not Congress) has substantive authority. For instance, Congress might suppose that a federal statute barring states from sending or receiving emissaries helps better carry into execution the president’s foreign affairs powers because the states will be less able to confound and combat the president’s foreign policies. But perhaps a particular president welcomes the exchange of such emissaries by the states. In this context, Congress’s approach clashes with the president’s sense of the best means of conducting foreign policy and hence might be thought to encroach upon the executive’s foreign policy prerogatives.

This argument misunderstands the ambit of Congress’s Necessary and Proper Clause authority. Congress has broad power to help implement presidential power and may do so in ways that the president disapproves. For

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255. *Medellin v. Texas*, 552 U.S. 491, 524 (2008).

256. *See, e.g.*, Kearney, *supra* note 230; Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT’L L. 268 (1966).

257. Kearney, *supra* note 230, at 346–47. Kearney also asserts the Act’s invalidity on the ground that while Congress may have extra authority to impinge upon constitutionally protected rights in the realm of national security, the Act is not narrowly tailored. *Id.* at 341; *see also* Vagts, *supra* note 256, at 292–300.

258. Kearney, *supra* note 230, at 346.

259. *See, e.g.*, Vagts, *supra* note 256, at 299 (explaining that were a group of Americans to “cabl[e] their support of Khrushchev to the Kremlin during the Cuban missile crisis[,] [i]t seems unlikely that a statute penalizing such action would be unconstitutional”; and yet, “the Logan Act covers a great deal more than this and therein lie many problems”).

260. Logan Act, 1 Stat. 613 (1799) (codified as amended at 18 U.S.C. § 953 (1994)).

261. *INS v. Chadha*, 462 U.S. 919, 974 (1983) (White, J., dissenting).

instance, the president may disapprove of a bill that splits one existing department into two on the grounds that it unnecessarily complicates the federal bureaucracy and makes it harder for him to faithfully execute the laws. Nonetheless, Congress may override his policy objections, and, if necessary, his veto as well. Just as the president has no power to preserve the status quo with respect to departments, he likewise has no constitutional right to insist that states retain their power to intervene in foreign affairs. Stripping the states of power the president wishes them to retain may upset the president, but it is not unconstitutional.

Moreover, as Part IV makes clear, we envision mechanisms through which Congress might grant the executive the final say on most matters of state interference. To the extent that preemption of the states in foreign affairs raises separation of powers concerns, we conclude that the mechanisms set out in Part IV substantially obviate them.

#### IV. A SUPERIOR PREEMPTION REGIME

As Part II noted, the courts currently act as the principal checks on a state dabbling in foreign affairs. But a better system is available, one that would curb the interventions of amateurish states and that could greatly reduce the need for the courts to act as the frontline defenders of federal authority. Congress can play a more active role, declaring when state interventions are impermissible. Additionally, Congress can delegate to the executive the power to determine when to preempt or bar state interventions.

We see at least two approaches that Congress may take to preempt state action, even where that action does not conflict with existing federal law. Congress may pursue a reactive course. Where mischievous state laws come to its attention, Congress has the power to invalidate them on a case-by-case basis. Though proper, this mechanism is less than ideal. Congress lacks the time and attention to respond to every state intrusion into the foreign arena.

Fortunately, we see another way in which Congress may preempt. Congress may enact a far-reaching preemption regime, one that bars troublesome state laws, both those currently on the books and those that will spring up in the future. Proceeding in two sections, this Part considers how Congress might accomplish this feat.

Section A discusses the mechanisms that Congress may deploy to preempt state actions. Those mechanisms include: (i) judicial enforcement of a flat ban on various types of legislation; (ii) a preclearance regime whereby the State Department must review state legislation before it can take effect; (iii) a suspensive veto allowing the State Department to preempt a state law for a limited period, thereby giving Congress time to judge whether a more enduring preemption is appropriate, and (iv) civil or criminal sanctions for recalcitrant state actors. The overarching goal is to create a fairly comprehensive structure that expressly preempts state activity (mechanism (i)), allows an informed and expert federal actor (the State Department or



Congress) to quickly react to *any* state laws impacting foreign affairs (mechanisms (ii) and (iii)), and deters obstinate state officials from subverting this federal scheme (mechanism (iv)).

Section B discusses triggers for each mechanism. We envision the following triggers: (i) state laws that discriminate based on foreign sovereign; (ii) state laws that discriminate based on the content of foreign laws; (iii) state laws that discriminate based on activities that occur in a foreign nation; (iv) a catchall for any state law that may, broadly speaking, create friction with the federal government's conduct of foreign affairs; and (v) speech and conduct by state officials on matters of international concern.

This Part also suggests how our triggers might be paired with mechanisms. To illustrate, Congress could provide by statute that state laws discriminating against foreign sovereigns (trigger 1) would face automatic preemption (mechanism 1). For instance, suppose some states have selective purchasing laws that specifically preclude state agencies from doing business with companies doing business in Iran. By virtue of the statutory references to Iran in these state laws, Congress's statute would preempt such state laws. Alternatively, if Congress wished to permit some state discrimination, it could subject such laws to a State Department temporary suspensive veto (mechanism 3).

Before proceeding further, we note some conceptual and practical problems with a federal statutory solution. The problems pertain to definition and enforcement. Definition, in outlining the sphere within which the states are preempted, and enforcement, in determining how to ensure that the states remain outside that sphere. Consider, for instance, a federal law that does no more than prohibit the states from "interfering in foreign affairs" and leaves enforcement to the courts. The resulting system would, in practice, be no different than the current regime, save for perhaps more judicial invalidation of state law. Without defining "interfering in foreign affairs," Congress would leave the courts with as much latitude as they currently exercise. The enforcement method—*ex post* litigation—also would not change the status quo.<sup>262</sup>

The courts already have enough trouble with preemption in foreign affairs. A broad statutory directive that the courts police state interference in this arena barely moves the goalposts, as opposed to working any conceptual change. It continues the haphazard and unsatisfying judicial preemption that motivated our solution in the first place.

Our proposed framework largely neutralizes these concerns. It moves most decisions out of the judiciary and into the executive or Congress, thereby increasing the likelihood of knowledgeable and sophisticated approaches to state involvement. While we retain a role for the courts, it is a

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262. While the statute would legitimize judicial invalidations of state law because they would no longer need to resort to dubious doctrines, our point is that the courts would still be left guessing what kind of state conduct qualifies as "too much" interference with foreign affairs.

circumscribed one. Congress will provide the courts greater guidance and confine them to circumstances that suit their capabilities.

### A. *Federal Preemptive Mechanisms*

#### 1. Judicial Preemption Based on Congressional Statutory Bans

Our first mechanism consists of judicial enforcement of federal statutes barring state laws. Section B outlines the broad contours of the triggers that might generate bars on state law. But, for the sake of illustration, consider the following: Congress might decide that the states should be voiceless with regard to national policy on Iran. To effectuate this desire, it might bar all state laws that discriminate against Iran, its citizens, and firms conducting business with the theocratic nation. Or consider more innocuous activities: seeking to reduce barriers to foreign trade, Congress might prohibit states from regulating the sale of foreign goods sold within the states.<sup>263</sup>

As compared to the status quo, the courts would have a statute to refer to, one that provides a definition of the activity states may not engage in (triggers), and also one that provides a remedy (invalidation). The courts will no longer need to rely on aggressive readings of the Constitution (*Zschernig*), federal statutes (*Crosby*), or executive agreements (*Garamendi*) in order to preempt apparently inappropriate state laws.

In keeping with our theory of a limited judicial role, we believe that absolute bans are best aimed at state laws that are easily identifiable. Ideally, the courts should be able to determine rather quickly whether a given state law runs afoul of the statute's command. Were this mechanism attached to a vague trigger, that is, where it was unclear which state laws the mechanism prohibits, it would essentially leave the courts in their current role, a role we believe to be undesirable.

Accordingly, Congress ought to carefully draw well-defined triggers for absolute bans. This will put the states on notice about what is preempted and will limit the reach of provisions that invalidate both existing and future state laws. We provide some examples of state laws that might fall under this mechanism in Sections B.1 and B.2 of this Part.

Further, because this mechanism prescribes harsh medicine, it should attach to laws that, in the view of Congress, most *clearly* intrude into the foreign arena. Categories of laws that only infrequently touch upon foreign affairs are better policed through *review* by the political branches rather than a complete prohibition.

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263. Article I, Section 10 would seem to only restrict state power to impose an excise tax on imports but not prohibit states from imposing other regulations on imported goods. U.S. CONST. art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . .”). For a discussion of the Import-Export Clause, see Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 Miss. L.J. 521, 524 (1998) (“To be sure, the Import-Export Clause restricts only the taxing powers of the states, not their regulatory authority . . .”).

Although this mechanism may seem unforgiving, Congress could choose to create exceptions to its flat bans. Congress might declare that the states are barred from singling out specific sovereigns for trade restrictions. But, at a later date, Congress could permit the states to sanction a particular government. For instance, with respect to North Korea, the national government might initially act to safeguard its voice but later conclude that multiple state voices are acceptable.

## 2. State Department Preclearance

Where flat bans are undesirable, Congress might choose to borrow from the Voting Rights Act,<sup>264</sup> by creating a preclearance regime and vesting authority with the State Department. This effectively gives the president (as constitutional superintendent of the State Department) an absolute veto over new state laws that trigger this mechanism, subject to a judicial check to determine whether the executive has exceeded its preclearance authority.<sup>265</sup> A judicial determination of whether the executive has overstepped its delegated authority is far preferable to the judiciary deciding whether to preempt in the first instance.

Congress could apply this mechanism to state laws that presumptively hinder the federal government's ability to conduct foreign affairs. It may suppose that a certain set of state laws pose a high likelihood of interfering with the federal government's conduct of foreign affairs and grant the State Department authority to make the ultimate determination. Consider the line of dormant Foreign Commerce Clause cases dealing with state taxation of foreign assets in the United States. Congress might conclude that the states presumptively intrude on federal prerogatives when they regulate in this sphere. But perhaps Congress does not wish to strip them of *all* such power to do so. The final determination about preemption might rest on complex foreign policy considerations and rely upon classified information. While the judiciary is ill-equipped to perform this task, the State Department is better suited to it.

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264. 42 U.S.C. §§ 1971–1974 (2012). The statute's preclearance provision provides that certain jurisdictions may not enact changes with respect to voting unless those changes are approved by the United States District Court for the District of Columbia or where the jurisdiction submits its change to the Attorney General and the Attorney General does not "object[ ] within sixty days after such submission." *Id.* § 1973c(a). Importantly, the Supreme Court did not invalidate this provision in its landmark decision on the Act in 2013. *See Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). Nor did it say that preclearance itself was always unconstitutional. *See id.* Rather, the *Shelby County* Court found that the formula used to determine the jurisdictions subject to this preclearance regime was unconstitutional under principles of "equal sovereignty." *Id.* at 2623–24, 2631. We think a preclearance regime that applies to *all states* is less susceptible to the charge that it violates the equal sovereignty of the states.

265. We think it makes sense to vest authority with the State Department because the president would be freed from having to make all decisions. Rather, the State Department could make decisions, subject to occasional presidential intervention and override. For particularly sensitive preclearance decisions, Congress might sensibly suppose that the president should be the decider.

A few comments on this mechanism's features are in order. First, we again believe that Congress should carefully define the category of laws subject to preclearance so as to put state actors on notice. Second, unlike the absolute ban, this mechanism does not affect state laws already on the books. The State Department cannot preclear state laws that exist at the time it receives a congressional grant of authority.

### 3. State Department Suspensive Veto Coupled with Congressional Review

As a final mechanism, Congress might utilize a suspensive veto whereby the State Department could suspend the operation of existing and new state laws for a period of time. We believe this mechanism is most appropriate for state laws whose effect on international affairs is rather uncertain. It allows the states to legislate without automatic preemption (mechanism one) and without State Department preapproval (mechanism two).

Further, Congress might authorize the State Department to suspend state laws on an *as applied* basis. For an example of this application, recall *Zschernig* and Oregon's statute for alien inheritance predicated on reciprocal rights in the alien's home nation.<sup>266</sup> If the State Department had the power to suspend state laws as applied to particular countries, it could have decided that the Oregon law inappropriately interfered with our nation's policy towards the Eastern Bloc. But it could have deemed such state laws perfectly acceptable with regard to other regions of the world, say Central America.<sup>267</sup>

To limit this delegation, Congress might make the veto effective only for a number of months—six perhaps—before the suspension expires and the state law becomes operational again. This window is designed to give the State Department adequate time to brief Congress on the issues the state law presents and for Congress to take action. If Congress stays its hand, one might assume that Congress did not regard the law's intrusion into the foreign arena as sufficiently troublesome so as to overcome legislative inertia. A positive byproduct of this approach is the effect it may have on later litigation. Should a state law face a challenge under a *Zschernig* or *Garamendi* theory (assuming those doctrines are not jettisoned), a court might give weight to Congress's failure to extend the temporary preemption. Rather than blindly assessing foreign policy concerns, courts could take cues from Congress's seeming indifference to the intrusion.

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266. See *supra* notes 89–98 and accompanying text.

267. We take no position on the wisdom of preempting state laws in an “as-applied” manner. We offer it up as an example of how the State Department may exercise this power, and note that the State Department is the actor best equipped to make such determinations.

#### 4. Judicial Enforcement of Civil and Criminal Sanctions for States and State Officials

The previous mechanisms consist of different methods of preempting state law. But Congress might suppose that sometimes preemption is inadequate. After all, some state interference does not take the form of law, and when it takes a nonlegal form, preemption is irrelevant. Recall the example of Mayor Giuliani.<sup>268</sup> No amount of preemption could have stopped his treatment of Arafat. Moreover, whatever form state interference takes, Congress might suppose that some such involvement is sufficiently troubling that more severe consequences ought to attach as a means of deterring that interference. A state law that discriminates against an ally and its nationals does some harm, even if preemption prevents enforcement of its provisions.

Where Congress believes that preemption is insufficient, it may wish to attach civil or criminal consequences to state involvement in foreign affairs. For instance, Congress might wish to restrain bellicose states by imposing fines on or imprisoning state officers who authorize a state to wage war absent an imminent danger of invasion. Or consider the enactment of state laws or resolutions that demonize the leadership of a foreign country—denunciations that could lead to hostilities. Again, Congress might wish to dissuade such vilification by attaching civil and criminal penalties.

Obviously, civil and criminal penalties should only attach when Congress is certain that deterrence of state actors is absolutely necessary, where state involvement most clearly interferes with the federal conduct of foreign affairs, and where *ex ante* restraints are inadequate. Moreover, Congress must ensure that it defines crimes with particularity in order to pass constitutional muster. Vague standards will not do.

##### B. *State Triggers*

This section proposes five categories of state laws that Congress should consider when choosing a mechanism. Our triggers cover the gamut of state activity that might interfere with the federal government's conduct of foreign affairs.

##### 1. State Laws that Facially Distinguish Among Nations and Nationals

State laws that single out specific nations or nationals most clearly interfere with the federal government's conduct of foreign affairs, for such laws make little pretense of regulating an area of traditional state concern. Such state legislation can assume many shapes. States may decide not to conduct business with a foreign sovereign; bar its instrumentalities from doing business with firms headquartered in a particular nation; or treat adversely a foreign sovereign's citizens. Florida's recently enacted HB 959 fits in the second category, singling out companies that conduct business in Syria and

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268. See *supra* notes 2–4 and accompanying text.

Cuba.<sup>269</sup> Floridian agencies are barred from engaging in a number of interactions with companies doing business in those nations.<sup>270</sup> The Massachusetts law in *Crosby*, which barred state entities purchasing from any firms “doing business with *Burma*,” was comparable.<sup>271</sup> Of course, bills that disfavor foreign nations and citizens are not the only ones capable of mischief. This trigger also would encompass state laws that *favor* sovereigns. To see why such coverage is necessary, consider a state law that favors Israeli firms that build settlements on the West Bank. The statute may seem of little moment because it seems to harm no one. Yet the statute may well complicate our relationship with the Palestinians, the Saudis, and others who oppose such settlements. The point is that preferences for some countries can inflame others. Moreover, through artful drafting, states can grant favorable treatment to all but a handful of nations, effectively disfavoring those omitted.

We believe that laws that facially discriminate against (or in favor of) certain nations call for our first mechanism—a flat ban. These sorts of laws have a significant and obvious capacity to annoy foreign sovereigns. They embarrass our federal government’s conduct of foreign affairs and undercut the benefits of one informed and experienced federal voice in foreign affairs.

Because the state laws in this section are easily identifiable—after all, they reference foreign nations or their nationals—and because the remedy is plain—preemption—the judiciary is a capable arbiter. The courts need not assess national interests in order to perform their role. They need not make complex factual or policy determinations. They must do no more than determine whether a state law facially discriminates against (or in favor of) certain nations or nationals.

## 2. State Laws that Discriminate Based on Foreign Law

State laws that turn on the content of foreign law, even though they may not identify particular sovereigns, nonetheless have the capacity to spark hostility and recriminations. After all, such state laws mete favorable (or

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269. FLA. STAT. § 215.471 (2015).

270. *Id.* Florida Governor Rick Scott bizarrely signed the bill into law, but speculated in his signing statement that it is unconstitutional and thus unenforceable. Letter from Rick Scott, Governor of Fla., to Ken Detzner, Fla. Sec’y of State, (May 1, 2012), <http://www.flgov.com/wp-content/uploads/2012/05/5.1.12-HB-959-Transmittal-Letter1.pdf> [<https://perma.cc/7FDC-D6JU>] (“[T]he restrictions will not go into effect unless and until Congress passes, and President Obama signs, a law permitting states to independently impose such sanctions against Cuba and Syria.”). We are not as certain about the law’s unconstitutionality. Regardless, we would preempt it under the first category set forth in this section. Of further intrigue, even Floridians recognized that this bill had uncertain, and perhaps undesirable, effects in the international sphere. See *Scott Signs Bill Banning Business Ties to Cuba, Syria*, HERALD TRIB. (May 1, 2012), <http://politics.heraldtribune.com/2012/05/01/scott-expected-to-sign-bill-banning-business-ties-to-cuba-syria/> [<https://perma.cc/9RF6-K5NE>] (describing how, among other things, this bill was expected to enflame Brazil and Canada, two of Florida’s most important foreign trading partners).

271. MASS. GEN. LAWS ch. 7, §§ 22J, 22H, 22M (2014), *invalidated by Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (emphasis added).

unfavorable) treatment based on the content of foreign laws, drawing distinctions that may annoy or infuriate foreign governments.

Again, such laws can take many forms. States might ban their agencies from transacting with firms that do business in a communist country. They may bar private firms from exporting to countries ruled by Sharia law. They may prohibit agencies from conducting business with nations that take property without compensation.

Our second trigger complements the first and prevents evasion of that trigger. After all, if a state may not expressly punish Vietnamese or Cuban entities but may penalize communist countries as a class, states may circumvent the first restriction with ease. Oregon's inheritance law from *Zschernig* is illustrative.<sup>272</sup> Had Oregon simply enumerated a list of Eastern Bloc countries and discriminated against them in inheritance, the result would come close to duplicating their actual, less particularized, law.<sup>273</sup>

One difference between a law that enumerates countries and one that turns on the content of foreign law is worth discussing. A law that operates in the latter fashion becomes inoperable against certain countries when they change their laws. Perhaps encouraging such change is the entire point. But as we have explained, the states lack knowledge and expertise, and their attempts to punish (or favor) certain foreign laws undermine the federal government's ability to form a comprehensive and unitary national policy with regard to those foreign sovereigns.

A flat ban seems ideal because these laws have the tendency to anger foreign governments and complicate the federal government's stewardship of foreign affairs. As with category-one triggers, we believe the courts are well equipped to police these laws. Courts need do no more than determine if a state law discriminates based on the content of foreign law.

### 3. Laws that Distinguish Based on Foreign Activity

We now move to triggers with broader sweep. Here we are concerned with state laws that create rules that facially discriminate on the basis of *actions* overseas. This is distinct from a focus on the *laws* of a foreign nation. The waging of war would fall into this third category, but not necessarily the latter. Likewise, nuclear weapons research and development would fall into the former category, even though it might not fall into the latter. Even activity that occurs without the express blessing of a foreign sovereign—such as religious practices—would be covered under this category if they took place overseas. For an example of an actual state law that turned on foreign activity, consider California's Holocaust Victims Insurance Relief Act—the focus

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272. OR. REV. STAT. § 111.070 (1957), *invalidated by* *Zschernig v. Miller*, 389 U.S. 429 (1968) (repealed 1969).

273. One might respond that Oregon's law in *Zschernig* said nothing about communist countries per se, even if communist countries were in fact the targets of the bill. This much is true. *Zschernig*, 389 U.S. 429. However, Congress might well conclude that conditioning any state activity on the *laws* of a foreign sovereign is enough. Thus, this trigger would sweep in the facts of *Zschernig*.

of *Garamendi*.<sup>274</sup> The law discriminated based on the issuance of insurance policies (action) in Europe (overseas).<sup>275</sup>

Absent this category, states could disrupt national foreign policy and yet fall outside the prior two categories. For instance, a state with a considerable Cambodian population could pass a law declaring that foreign nationals who come from states with a genocidal past must submit to a background check (to demonstrate that they are not war criminals) upon applying for work in the state. The ultimate purpose of this law is to help the state's Cambodian population track down Pol Pot's military officers. Of course, this law makes no reference to a country by name, nor to its form of government or laws, but will have a significant impact on a select few countries—Cambodia chief among them. It is no stretch to suppose that such a law could anger some nations.

Given the breadth of this category, some caution is in order. California, for instance, could prohibit the import of genetically modified foods. But suppose no nation actually exports such foods, meaning that the law seems unlikely to upset any foreign sovereign. This California law is clearly not designed with any sovereigns in mind. The state may not be interested in influencing foreign affairs or swaying nations or their citizens.<sup>276</sup> Instead, the state seems to be regulating to protect the health of its populace.

Because this third trigger is broad and because these laws are perhaps less likely to provoke international consternation, we believe State Department preclearance is the most appropriate mechanism. Congress could decide that the State Department (rather than the courts) should determine whether new state laws that turn on overseas activities adversely impact our foreign relations and whether those laws ought to take effect. Because not all state laws that turn on foreign activity should be preempted, those making the decision to preempt ought to be well informed about our foreign affairs.

Alternatively, Congress could judge that the State Department should be able to temporarily suspend new state laws only if their operation causes foreign controversies. For instance, even though state bars on the import of genetically modified foods may not initially interfere with the nation's foreign affairs, over time such laws could become problematic. Should nations start to export genetically modified foods, the California ban could raise the hackles of these nations and lead to a trade dispute with the United States. A

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274. CAL. INS. CODE §§ 13800–13807 (West 2015), *invalidated by* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

275. *Id.*

276. Some may suppose that laws subject to our first two triggers could be benign as well—at least in the sense that they do not anger foreign sovereigns. Perhaps subjecting these laws to a flat bar in all instances is thus overinclusive. But that hardly counsels against those triggers, or the mechanism. As we explained in Part II, state interference in foreign affairs yields costs that outweigh the benefits. Hence, a rule that presumptively disfavors clear state involvement in foreign affairs will generate more favorable than unfavorable outcomes. Moreover, our first two triggers do not sweep in all state action that affects foreign affairs—only the most egregious. Finally, Congress retains the power to exempt state bills and laws from the applications of its various triggers and mechanisms.



law that was once inconsequential, from a foreign policy perspective, now is at the center of an international storm. At a minimum, a temporary suspension seems appropriate, as it would give Congress time to consider and craft a more permanent response.

#### 4. Any State Law that Disrupts the Federal Conduct of Foreign Affairs

Delineating where domestic affairs end and where foreign affairs begin is challenging.<sup>277</sup> Hence no statute can be drafted with the requisite precision to sweep in all laws affecting foreign affairs while leaving undisturbed all other laws. Moreover, the line between disturbing our nation's foreign affairs and intervening in inconsequential ways is no less uncertain.

Aware that there are no clear dividing lines, Congress may see the need for a catchall, one that encompasses any state law that disrupts federal foreign policy. A slight tweaking of *Garamendi*'s facts offers a compelling example of when such a law might be necessary. Begin with the premise that the president believes that he has satisfactorily resolved issues pertaining to Holocaust victim reparations with the German government. Now suppose that California is unsatisfied with his resolution and passes a law broader than the one at issue in *Garamendi*.<sup>278</sup> Counterfactually, California evades the strictures of our first four categories and passes a law requiring that all insurance companies who wish to do business in the state to disclose details related to policies issued between 1920 and 1945, without regard to where those policies were written. There is no longer an international nexus to the law, for the law is not limited to issuance in Europe. Yet the law may significantly affect foreign affairs and lead to the unraveling of the president's agreement with the German government. Actual examples are available as well. "Buy American" laws fall outside the first three categories, yet their impact on our nation's foreign affairs is real.<sup>279</sup>

Laws that fall into this broad category ought to be subject to the weakest mechanism, a suspensive veto. Admittedly, under the status quo, Congress may preempt state laws that interfere with foreign affairs. For instance, Congress could invalidate existing state "Buy America" laws. However, this final trigger and its corresponding mechanism would improve upon the current state of affairs in two ways. First, the State Department would be able to act

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277. See, e.g., Zachary D. Clopton, *Foreign Affairs Federalism and the Limits on Executive Power*, 111 MICH. L. REV. FIRST IMPRESSIONS 1, 6 (2014), [http://repository.law.umich.edu/mlr\\_fi/vol111/iss1/9](http://repository.law.umich.edu/mlr_fi/vol111/iss1/9) [<https://perma.cc/76CM-558U>] ("Not only is the constitutional basis for the dormant foreign affairs doctrine thin, but there is no coherent rule for drawing the line around 'foreign affairs.'").

278. With the first four categories of our statute in place, the *actual* California law would find itself in the third category, subject to State Department preclearance. This is because it required insurance companies that issued policies *in Europe* between 1920 and 1945 to make certain disclosures related to those policies. CAL. INS. CODE § 13804.

279. See, e.g., Kevin Carmichael & Heather Scoffield, *Obama Sends Diplomat to Davos to Quell Trade Outrage*, CTR. FOR INT'L GOVERNANCE INNOVATION (Feb. 2, 2009), <http://www.cigionline.com/articles/2009/02/obama-sends-diplomat-davos-quell-trade-outrage/> [<https://perma.cc/4LZB-4LVV>].

more quickly than Congress to suspend the law. Where a state law has serious and immediate effects on foreign affairs, waiting for Congress to act may be less than ideal. Second, this structure gives Congress adequate time, as well as assistance from an expert agency, to make a reasoned judgment.

Congress might suppose that a catchall is both necessary and proper. As we have explained, without a catchall, many state laws that disrupt our nation's foreign affairs will evade the other four categories. Hence a catchall is useful and thus necessary. Whether a catchall provision is proper is more complicated. Our position is that a catchall would be proper because the mechanism this category would trigger is rather restrained. The suspensive veto itself only minimally disrupts state laws, with more lasting effects left to the wisdom of Congress.

Some may argue that this trigger reaches too far. Whereas other triggers encompass clear state intrusions into the foreign arena, this one operates against all state laws that may, in the State Department's judgment, be detrimental to our foreign relations. Suppose foreign states are disgusted by the death penalty that many states employ. Should the State Department be able to suspend state death penalty statutes because of their tendency to provoke other nations? Moreover may Congress permanently preempt state death penalty statutes on the grounds that they detrimentally impact the foreign relations of the United States?

We admit that there may be constitutional limits to the reach of this trigger. We leave it to others to delineate what those limits are. Suffice it to say that if the Constitution constrains the reach of this trigger, then those constraints should operate as implicit exceptions to the trigger's reach. Perhaps the courts will find constitutional carve outs in as-applied challenges. Moreover, Congress may believe that there are constitutional limits on the reach of this trigger and impose those limitations on the suspensive power that it grants to the State Department.

That there might be some limits to the reach of this mechanism hardly means that the use of this trigger is somehow constitutionally impermissible. We do not believe there is anything unsound in the general notion that Congress can preempt state laws that make the federal stewardship of foreign affairs more difficult or unmanageable, even if there are constitutional limits to what sorts of state laws the federal government may preempt.

## 5. Conduct and Speech by State Officials

We turn to state conduct and speech, a category distinct from state laws, and the possibility that the federal government might wish to deter such conduct and speech on the grounds that they interfere with the federal government's conduct of foreign affairs. Like the federal government, states that wish to establish their own distinct foreign policies have two options. They can enact laws and allow those laws to speak to foreign nations. Alternatively, they can use more informal conduct and speech, such as legislative resolutions, gubernatorial proclamations, or other conduct. No less than

laws, these informal means of expressing state foreign policy can prove troublesome.

By way of example, foreign affairs conduct might consist of state officers discriminating against foreign dignitaries. Mayor Giuliani's conduct towards Arafat likely fits within this category, as would situations where state officers refuse to provide protection to a disfavored foreign dignitary. The state arrest of an ambassador is a classic example of an act that has serious foreign policy implications because such an arrest is contrary to international law.

State speech that implicates foreign affairs requires no stretch of the imagination. State legislators may enact resolutions condemning Iran. In a bid to attract the electoral support of a state's significant Arab populace, a governor might condemn Israel. State judges may gratuitously insult another nation's system of government. If these examples seem farfetched, recall Mayor Giuliani's branding of Arafat as a "terrorist."<sup>280</sup> Or consider that a supermajority of states have passed resolutions recognizing the Armenian genocide, determinations in tension with federal policy on the subject.<sup>281</sup>

Because inflammatory conduct, speeches, and resolutions tend to aggravate tensions, Congress may wish to stifle them. Congress may suppose that muffling state conduct and speech conduces to a superior federal stewardship. After all, if the federal government may preempt state laws in conflict with that goal, but must tolerate meddlesome state conduct and speech, the one-voice objective may prove unattainable.

A congressional bar on state conduct and speech that interferes with foreign affairs raises three difficulties. First, there are questions of definition. What *is* state speech or conduct that interferes with foreign affairs? Second, there is the problem of scope. To whom will such a bar apply? Assuming the bar covers governors and state legislators, what about less consequential actors like police officers? Finally, the First Amendment lingers in the background, raising significant constitutional concerns.

Sketching the contours of what constitutes speech and conduct that interferes with foreign relations is no easy task, and arbitrary line drawing is likely necessary. Some activity will no doubt remain unregulated if Congress writes a statute narrow enough to pass judicial scrutiny. Indeed, we hope that Congress initially treads lightly. Yet the narrowness of federal statutes limiting the conduct and speech of state officials is hardly an indictment of its usefulness.

On scope, Congress might tailor such a statute to sweep in only those actors who might plausibly be thought to represent the entire state. Governors, of course, should be included. So too might the legislature when considered as a unit (for instance, where it proposes to pass certain resolutions), while legislators themselves might be exempt. State Attorneys General and Secretaries of State might also come within the terms of the statute.

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280. Firestone, *supra* note 2.

281. See ARMENIAN NAT'L COMMITTEE OF AM., *supra* note 27.

A local police chief, on the other hand, is an example of a state official on the other end of the spectrum—one whose speech is perhaps so insignificant that she should be omitted. In between these two poles is a wide range of actors whose voices have varying resonances in the international arena. We leave the line drawing to Congress, but note that limitations on the number of state officials covered will buttress the case for the measure's constitutionality because it will tend to show that the federal statute's means are more closely tailored to its end.

For similar reasons, we believe that a thoughtful and restrained definition of “conduct and speech that interferes with foreign relations” would conduce to the measure's constitutionality. Mayor Giuliani's conduct should surely be included. It is inappropriate for a local official to forcibly eject a foreign dignitary from a public event. We also would include Giuliani's condemnation. The branding of Arafat as a terrorist and a murderer has the obvious tendency to inflame.

More generally, we believe a narrowly drafted federal statute would be constitutional. To begin with, there is a long history of Congress regulating state conduct and speech that interferes with foreign affairs. As for conduct, recall that the Crimes Act of 1790 made it a crime to attach or seize the property of foreign ministers, a prohibition that expressly extended to “all officers.”<sup>282</sup> It also made it a crime to imprison or assault ambassadors, a bar that applied to state officers no less than private parties.<sup>283</sup> Likewise the Neutrality Act barred all persons from assisting warring parties, a ban that extended to state officials that sought to aid France.<sup>284</sup> As for speech, the Logan Act passed in 1798, continues to criminalize speech designed to influence the conduct of foreign governments towards the United States.<sup>285</sup> Its prohibition covers state officers, including governors, legislators, judges, and employees.<sup>286</sup>

As noted, some modern commentators insist that the Logan Act is unconstitutional.<sup>287</sup> Though we have some sympathy, a couple of points are worth bearing in mind. First, as we noted earlier, the Court has never declared that states (as opposed to private parties) even have First Amendment rights.<sup>288</sup> Obviously if the states lack such rights, there can be no First Amendment problem with federal regulation of state speech in foreign affairs.

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282. Act of Apr. 30, 1790, ch. 9, §§ 25–26, 1 Stat. 112, 117–18.

283. *Id.*

284. Act of June 5, 1794, ch. 50, 1 Stat. 381.

285. 18 U.S.C. § 953 (2012).

286. *Id.*

287. See *supra* notes 256–259 and accompanying text.

288. See, e.g., Fagundes, *supra* note 254, at 1637–39 (“Courts have varied in their receptivity to the notion that the First Amendment may extend to government speech. The majority of courts have reflexively rejected the notion . . . .”); see also *id.* at 1676 (proposing that state actors receive no First Amendment protections if “the government speaker [is not] institutionally well suited to engage in the speech in question”).

Second, modern doctrine makes it possible to adopt content- or view-point-based restrictions on speech when doing so is necessary to further a compelling interest, and where the means are narrowly tailored to advancing that interest.<sup>289</sup> As compared to other interests the courts have found compelling—diversity in higher education, for instance<sup>290</sup>—the interest in assuring that our foreign relationships are not imperiled by amateurish state interventions seems undeniable. For instance, a federal statute barring state condemnations of religions (such as Islam), censures of foreign heads of state, or alleged genocides would seem quite compelling to us. As for the narrowly tailored requirement, we believe that narrowly crafting the class of officials *and* speech may satisfy the courts. Although we leave the particulars to Congress, we note that our recommendation—that such a bar cover only *state* speech—goes some way toward neutralizing concerns.

Our claim is not that *all* suppression of official state speech and action in foreign affairs would, *in all circumstances*, be constitutional. If a particular nation's people or leaders were phlegmatic or stoic, meaning that they were unmoved by criticism, then perhaps Congress should be indifferent to state interference with that relationship. For instance, if the bond between the United States and a foreign nation is incredibly strong—the unique relationship with Great Britain comes to mind—maybe no level of state criticism or actions will ever be of consequence, in which case no federal statute should regulate state speech or action directed towards Great Britain. More generally, if, over time, foreign states prove rather insensitive to the insults of American states, in the way they are insensitive to boorish comments found in an internet chat, then a federal statute condemning state speech in foreign affairs would advance no compelling interest.

We believe that state conduct or speech that falls into this category should be subject to our fourth mechanism. Deterrence can come from civil and criminal penalties imposed on state violators, with the fines collectible by federal prosecutors in court. The courts can then hear defenses against such prosecutions, including claims that the relevant federal statute proscribing state conduct and speech in foreign affairs is unconstitutional.

#### CONCLUSION

For decades the courts have struggled to contain state forays into the international arena. The courts recognize that the states have little expertise or experience in foreign affairs and that the periodic and often ill-considered state interventions can irritate allies and comfort adversaries. Yet in serving as umpires of foreign affairs federalism, the courts have relied upon strained readings of the Constitution, statutes, and treaties. The results are unedifying judicial doctrines that sporadically and arbitrarily erect roadblocks to state involvement in foreign affairs.

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289. See, e.g., *Boos v. Barry*, 485 U.S. 312, 321 (1988) (applying this test to content-based restrictions on speech relating to foreign affairs).

290. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The courts have the right policy impulses. But the judiciary is the wrong institution to set the first-order rules for state involvement in foreign affairs. The Constitution, because it never guarantees states a role in foreign affairs and because it empowers Congress to enact necessary and proper laws for executing federal powers, authorizes Congress to determine when and how states may engage in foreign affairs. Congress, rather than the courts, should be in the driver's seat.

Seeking to alter the terms of the debate, we have suggested a set of triggers and a set of appropriate statutory responses to the problem of state intervention in foreign affairs. The statutory mechanisms are designed to help eliminate the problems that arise from particular forms of state involvement. The precise mix is for Congress to decide.

We encourage other scholars to consider the right combination of triggers and mechanisms, permutations that may be more or less permissive than the ones we have suggested. We also hope that others will consider our novel claim that Congress may help carry into execution federal foreign affairs powers by precluding state forays into foreign affairs.