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## NEGOTIATING FEDERALISM: STATE BARGAINING AND THE DORMANT TREATY POWER

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### ABSTRACT

*The orthodox view that states have no role in U.S. foreign relations is not only inconsistent with their place in the modern global economy, but the constitutional basis for a “dormant” bar on state participation—that is, absent a controlling federal statute or treaty—is obscure. Revisionist scholarship and recent Supreme Court case law suggest that Congress alone should decide when the states must stay out of foreign relations.*

*In this Article, Professor Swaine argues that both the orthodox and revisionist views neglect an alternative basis for a judicial role—the Treaty Clause, enforced through the dormant treaty power. The text, structure, and original understanding of the treaty power establish two important principles of continuing validity. First, the President was to have an independent and substantive authority to negotiate on behalf of the United States, the better to secure advantageous treaties and avoid perilous entanglements. Second, state interference with this negotiating authority, even prior to the conclusive adoption of a federal treaty or statute, was unlawful.*

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*Treaty Clause exclusivity is best maintained by a judicially enforced dormant treaty power barring the states from bargaining with foreign powers, including indirect bargaining through measures that are contingent on foreign government policies—such as the Massachusetts law targeting companies doing business with Burma. However, state activities that incidentally have effects overseas would not be precluded, and the jurisprudence must be informed by the original rationales for federal exclusivity and by the President’s discretion to exempt state activities posing no threat to federal functions.*

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## INTRODUCTION

Everyone used to agree that state and local governments had no role to play in U.S. foreign relations.<sup>1</sup> The Constitution may have been unclear about the precise responsibilities given to the President, the House, and the Senate, but together, somehow, they held a federal monopoly on foreign relations<sup>2</sup>—or, as the Supreme Court occasionally put the matter, there was “one voice” in U.S. foreign relations, and it was the reassuring bass of Uncle Sam.<sup>3</sup>

But there were always two nagging problems with the orthodoxy of a federal monopoly: it never really existed, and it was never clear why it

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1. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 150 (2d ed. 1996) (“At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states ‘do not exist.’”); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-6, at 230 (2d ed. 1988) (“[S]tate action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void . . . .”); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1632 (1997) [hereinafter Goldsmith, *Federal Courts*] (noting “a remarkable consensus about the legitimacy of the federal common law of foreign relations”); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832, 832-33 (1989) (“The consensus today is that the central Government alone may directly exercise power in foreign affairs. Most current controversy about the foreign affairs power concerns its distribution among the federal branches, not whether it resides in the nation rather than the states.”). Of course, saying “everyone” invariably sounds like hyperbole. *But see infra* note 320 (quoting John C. Calhoun’s endorsement of treaty power exclusivity).

For brevity’s sake, I will often refer solely to “states” as a shorthand for both states and subordinate political entities like counties and municipalities.

2. Thus, when Edward Corwin famously described a constitutional “invitation to struggle for the privilege of directing American foreign policy,” he assumed that only the Congress and the President were invited. Compare EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984*, at 201 (Randall W. Bland et al. eds., 5th ed. 1984) [hereinafter CORWIN, *THE PRESIDENT*] (“[T]he Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy.”), with EDWARD S. CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER passim* (1913) [hereinafter CORWIN, *NATIONAL SUPREMACY*] (describing the supremacy of national treaty authority).

3. For modern canonical expressions of this view, see *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (noting “the Framers’ overriding concern that ‘the Federal Government must speak with one voice when regulating commercial relations with foreign governments’” (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976))); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (finding unconstitutional “state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government”); *id.* at 441 (“[E]ven in absence of a treaty, a State’s policy may disturb foreign relations.”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) (“The Framers’ Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.”). For prior cases, see *infra* note 331.

should. States have always had an effect on U.S. foreign relations,<sup>4</sup> and they are now bolder than ever. Some state activities sound exactly like diplomacy. In addition to symbolic political ties<sup>5</sup> and routine economic transactions,<sup>6</sup> states establish offices overseas, launch trade and investment missions, sign bilateral and multilateral agreements, and participate in international summits.<sup>7</sup> Even ostensibly local acts can have serious effects abroad. In the 1960s, some states targeted Eastern Bloc countries through trade boycotts<sup>8</sup> and reciprocal inheritance laws;<sup>9</sup> in the 1970s, they shunned

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4. See generally JOHN M. KLINE, STATE GOVERNMENT INFLUENCE IN U.S. INTERNATIONAL ECONOMIC POLICY 16-19 (1983) (providing an historical overview of state participation in foreign affairs); Dennis James Palumbo, *The States and American Foreign Relations* 296-98 (1960) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (suggesting that state influence in foreign relations has remained relatively constant since the nation's founding).

5. See, e.g., Sister Cities International, *Welcome to Sister Cities International* (visited Feb. 15, 2000) <<http://www.sister-cities.org>> (on file with the *Duke Law Journal*) (cataloging sister-city relationships). Such relationships are not wholly devoid of substance: for example, several city councils forged ties with Nicaraguan cities as a means of dissenting from federal policy, see EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 90 (1998), while over two dozen cities and communities declared themselves sanctuaries for Central American refugees, see Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 822 (1989).

6. Sometimes even the purchase and sale of goods proved controversial, as in the decision by a Texas official to ship tons of hormone-free beef to England in the midst of highly contentious negotiations between the United States and the European Community ("EC") over the latter's barriers to hormone-treated beef. The federal government, incensed, initially withheld the health certifications necessary for shipment, and it also threatened to prosecute the official for negotiating with EC officials in violation of the Logan Act. See Earl H. Fry, *States in the International Economy: An American Overview*, in STATES AND PROVINCES IN THE INTERNATIONAL ECONOMY 23, 37 (Douglas M. Brown & Earl H. Fry eds., 1993) [hereinafter STATES AND PROVINCES] (describing Texas's beef shipment to England and the federal government's initial opposition to that shipment); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 515 (1994) (same); see also *infra* text accompanying notes 325-28, 434-36 (discussing the Logan Act).

7. See FRY, *supra* note 5, at 67-75 (describing states' international activities); *id.* at 92 (describing Idaho trade missions to and from Libya); STATES AND PROVINCES, *supra* note 6, at 34-35 (describing annual summits between U.S. governors and their Canadian and Mexican counterparts on regional trade and environmental matters); John M. Kline, *United States' Federalism and Foreign Policy*, in STATES AND PROVINCES, *supra* note 6, at 201, 221-22 [hereinafter Kline, *Federalism and Foreign Policy*] (describing attempts by oil-rich states to cozy up to OPEC); Martin Lubin, *The Routinization of Cross-Border Interactions: An Overview of NEG/ECP Structures and Activities*, in STATES AND PROVINCES, *supra* note 6, at 145 (describing the structure and activities of the Annual Conference of New England Governors and Eastern Canadian Premiers); Scott Baldauf, *Foreign Policy Goes Local*, CHRISTIAN SCI. MONITOR, Dec. 24, 1999, at 1 (describing regular meetings between officials from Texas and Mexico concerning implementation of NAFTA).

8. See Richard B. Bilder, *East-West Trade Boycotts: A Study in Private, Labor Union, State and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841, 882-84 (1970) (discussing the enactment of local laws that discouraged sales of goods from Communist nations). Other actions followed episodically:

Fifteen states pulled Soviet vodka from state liquor store shelves after the downing of a Korean passenger plane in 1983, while the governors of New York and New Jersey moved to deny the Soviet foreign minister's plane the right to land in their states during the United

firms supporting the Arab boycott of Israel;<sup>10</sup> in the 1980s, they used their economic clout to attack South African apartheid;<sup>11</sup> in the 1990s, they campaigned against European banks holding Holocaust-related assets<sup>12</sup> and against repressive regimes in Burma (Myanmar) and elsewhere,<sup>13</sup> and increasingly adopted “Buy American” laws, notwithstanding international procurement reform.<sup>14</sup>

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Nations’ debate on the incident. Oregon’s Health Division sought to bill the Soviet Union for costs associated with their response to the Chernobyl nuclear accident in 1986, and California’s governor appealed directly to the Soviet leadership regarding its handling of protests in the Armenian Republic in 1988.

Kline, *Federalism and Foreign Policy*, *supra* note 7, at 223.

9. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 430 n.1 (1968); William B. Wong, Comment, *Iron Curtain Statutes, Communist China, and the Right to Devise*, 32 UCLA L. REV. 643 (1985).

10. The states were at least successful in encouraging preemptive national legislation. See Eric L. Hirschhorn & Howard N. Fenton, III, *States’ Rights and the Antiboycott Provisions of the Export Administration Act*, 20 COLUM. J. TRANSNAT’L L. 517, 522-26 (1981); see also Export Administration Act, 50 U.S.C. app. § 2407(c) (1994) (preempting state foreign boycott laws).

11. See Bilder, *supra* note 5, at 822 (noting that a number of states, counties, and cities enacted divestment or procurement laws targeting South Africa’s apartheid policy); Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT’L L. & BUS. 563, 563-68 (1993) (discussing state and local sanctions against South Africa); Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 816-24 (1986) (examining anti-South Africa divestment measures taken by state and local governments). Lower court cases resolving challenges to these measures were not of one piece. Compare *Board of Trustees of the Employees’ Retirement Sys. v. Mayor of Baltimore*, 562 A.2d 720, 730-57 (Md. 1989) (upholding Baltimore ordinances requiring city pension funds to divest their holdings from companies engaged in business in South Africa), with *New York Times Co. v. City of New York Comm’n on Human Rights*, 361 N.E.2d 963, 966-69 (N.Y. 1977) (holding that New York City anti-discrimination laws did not prohibit the *New York Times* from carrying an advertisement for South African employment opportunities), and *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (invalidating an Illinois statute excluding South African coins from state tax exemptions available to other foreign coins).

12. A conference of nine hundred state officials threatened sanctions against Swiss banks notwithstanding the express objections of U.S. officials. See John Authers et al., *Banks Pay a High Price for Putting the Past Behind Them*, FIN. TIMES, Sept. 9, 1998, at 4. According to one estimate, “[e]very important breakthrough in the negotiations [with Swiss banks] came soon after threats from U.S. local government officials to impose sanctions.” John Authers & Richard Wolfe, *When Sanctions Work*, FIN. TIMES, Sept. 9, 1998, at 22. New York City’s comptroller also spearheaded a campaign to impose sanctions on Deutsche Bank, and to oppose its merger with Bankers Trust, until eventually prevailed upon by the State Department. See Marilyn Henry, *Deutsche Bank Gets Approval for \$10 B. U.S. Takeover*, JERUSALEM POST, May 23, 1999, at 4; *Fed Clears a Planned U.S.-German Bank Merger*, N.Y. TIMES, May 21, 1999, at C22.

13. See generally USA Engage, *State & Local Sanctions Watch List* (last modified July 27, 1999) <[www.usaengage.org/news/status.html](http://www.usaengage.org/news/status.html)> (on file with the *Duke Law Journal*) (compiling a “watch list” of pending proposals, failed or inactive proposals, and enacted divestment, selective purchasing, and other sanctions laws relating to over one dozen foreign countries); John M. Kline, *Continuing Controversies over State and Local Foreign Policy Sanctions in the United States*, PUBLIUS, Spring 1999, at 111 *passim* [hereinafter Kline, *Continuing Controversies*].

14. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 227-28 (2d ed. 1997) (noting the proliferation of state “Buy American” laws,

Matters have come to a head with Massachusetts's selective purchasing law, which was among the first to target Burma.<sup>15</sup> The European Union and Japan filed complaints before the World Trade Organization ("WTO") alleging that the law violated the Uruguay Round.<sup>16</sup> Those proceedings were suspended after the Massachusetts law was enjoined,<sup>17</sup> but the Supreme Court is now reviewing the matter in *Natsios v. National Foreign Trade Council*.<sup>18</sup> The international attention paid to these and like measures makes the nostrum that states are "unknown to foreign nations"<sup>19</sup> sound

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despite the terms of the Uruguay Round); Christopher F. Corr & Kristina Zissis, *Convergence and Opportunity: The WTO Government Procurement Agreement and U.S. Procurement Reform*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 303, 321-22 (1999) (same). Compare *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800, 805-06 (Ct. App. 1969) (invalidating the California Buy American Act as unconstitutionally infringing on the federal government's exclusive foreign affairs powers), with *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 906-15 (3d Cir. 1990) (upholding Pennsylvania's "Buy American" statute), and *K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 381 A.2d 774, 789 (N.J. 1977) (upholding the New Jersey "Buy American" statute).

15. The law establishes a restricted purchase list of all companies "doing business" with Burma—expansively construed—and bars the Commonwealth from procuring goods or services from those companies, unless procurement is essential and there is no other bid or offer, certain medical supplies are involved, or the bid or offer in question is more than 10% below the next-lowest alternative. See MASS. GEN. LAWS ANN. ch. 7, §§ 22G, 22H, 22I (West 1998).

16. See Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Laws Under the WTO Government Procurement Agreement*, 2 J. INT'L ECON. L. 3, 7 (1999) (noting the allegation by Japan and the EC that the Massachusetts law violates the Government Procurement Agreement); World Trade Organization, *Overview of the State-of-Play of WTO Disputes* (last modified Feb. 1, 2000) <<http://www.wto.org/wto/dispute/bulletin.htm>> (on file with the *Duke Law Journal*) (detailing the status of the EC and Japanese WTO complaints against the United States).

17. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998), *aff'd sub nom.*, *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir.), *cert. granted*, 120 S. Ct. 525 (1999).

18. 120 S. Ct. 525 (1999) (granting certiorari). The Massachusetts law, and the district court and court of appeals' decisions in *Natsios*, have been the subject of extensive commentary discussing preemption, the Foreign Commerce Clause, foreign affairs power, and even free speech issues involved. See, e.g., Lynn Loschin & Jennifer Anderson, *Massachusetts Challenges the Burmese Dictators: The Constitutionality of Selective Purchasing Laws*, 39 SANTA CLARA L. REV. 373, 375 (1999) (concluding that selective purchasing laws are not preempted by federal law and do not violate the dormant Commerce Clause or the federal government's exclusive foreign affairs power); 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 (1999) (postulating that some types of state and local foreign policy sanctions are protected by both the Tenth and the First Amendments); Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443, 447 (1998) (arguing that local economic sanctions infringe upon powers reserved exclusively to the federal government); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175, 179 (1997) (asserting that state initiatives to punish businesses engaged in activity in Burma are preempted, as well as violating the Foreign Commerce Clause, the Supremacy Clause, and possibly the Due Process Clause).

19. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring).

surreal, like the doctrine that excludable aliens have not “entered” the United States even if they are standing in Wrigley Field.<sup>20</sup> The precarious position of the executive branch, which was compelled to defend itself before the WTO (while futilely lobbying Massachusetts to repeal the law<sup>21</sup>), confirms that the federal government is not wholly in charge of the nation’s foreign policy<sup>22</sup>—and the manner in which Massachusetts assumed its role scarcely makes one sanguine about the alternatives.<sup>23</sup>

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20. See Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, 65 FOREIGN POL’Y 154, 162 (1987) [hereinafter Shuman, *Local Foreign Policies*] (noting “[t]he discrepancy between constitutional theory and practice”). See generally FRY, *supra* note 5, *passim* (detailing the growth of state and local activities); Fry, *supra* note 6, *passim* (same); Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 FOREIGN POL’Y 158 *passim* (1992) [hereinafter, Shuman, *Courts*] (same). Cf. Ethan A. Klingsberg, Note, *Penetrating the Entry Doctrine: Excludable Aliens’ Constitutional Rights in Immigration Processes*, 98 YALE L.J. 639, 639-40 (1989) (describing the entry doctrine).

21. The Clinton Administration conducted a “fierce internal debate” about whether to participate in the legal challenge to the Massachusetts law, which involved reconciling State Department condemnation of Burma, defense of the Massachusetts law as the named party in the WTO proceedings, and its well-understood opposition to the state law on grounds of principle and politics. Michael S. Lelyveld, *Clinton Refrains from Intervening in Myanmar Case*, J. COM., Mar. 11, 1999, at 3A; see also Fred Hiatt, *Boston’s Stand on Human Rights*, WASH. POST, Aug. 25, 1997, at A19; Michael S. Lelyveld, *U.S. May Defend, Oppose State’s Sanctions Law*, J. COM., Feb. 3, 1999, at 3A; Dierdre Shesgreen, *Can States Set Trade Policy?*, LEGAL TIMES, Aug. 17, 1998, at 4. Although the federal government declined to participate in the lower courts or at the certiorari stage in the Supreme Court, the Solicitor General recently filed an amicus brief in support of the private respondents. See Brief for the United States as Amicus Curiae Supporting Affirmance, *Natsios v. National Foreign Trade Council* (No. 99-474), 120 S. Ct. 525 (1999) (granting certiorari), available in 2000 WL 194805; David G. Savage, *Lawyers for U.S. Seek End to Myanmar Boycott*, L.A. TIMES, Feb. 16, 2000, at A3.

This clash between the President’s international interests and domestic capabilities is by no means unique. See, e.g., Richard Wolffe, *Sanctions Against Swiss Put Washington on Spot*, FIN. TIMES, July 4, 1998, at 2 (noting threats by the Swiss government to initiate WTO proceedings concerning state and city sanctions against Swiss banks and the Clinton administration’s opposition both to international proceedings and to sanctions).

22. In the Massachusetts matter, then–Undersecretary of State Stuart Eizenstat was reportedly informed by European allies that they would not cooperate further on multilateral action until the controversy was resolved. The controversy also occasioned a February 1998 negotiation between EU, United Kingdom, and Massachusetts officials, with a State Department official as a bystander, in which state representative Byron Rushing was petitioned to amend the law—and he replied that he would only do so if the EU imposed new sanctions against Burma. See Robert S. Greenberger, *States, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners*, WALL ST. J., Apr. 1, 1998, at A20; see also USA Engage, *Testimony of Deputy Assistant Secretary David Marchick Before the Maryland House of Delegates Committee on Commerce and Government Matters, March 25, 1998* (visited Feb. 18, 2000) <<http://usaengage.org/legislative/marchick.html>> (on file with the *Duke Law Journal*) (reprinting testimony that such laws might make U.S. policy preferences inconsistent and confusing, impair negotiation with foreign governments, and give rise to ancillary disputes over their consistency with international legal obligations, having “the practical effect of interfering with the President’s ability to conduct our foreign policy”); Lee H. Hamilton, Editorial, *Local Interference with Foreign Policy*, BOSTON GLOBE, Nov. 9, 1998, at A23 (arguing that state and local sanctions may “diminish the leverage of our diplomatic institutions” and “interfere with the ability of the president and Congress to pursue a coherent, united foreign policy,” so that “[t]o allow state and local governments to

This profound dissonance between theory and practice has only accentuated the second problem with the federal monopoly—no one has explained satisfactorily why it exists in the first place. The Constitution does not speak of foreign affairs, let alone a federal monopoly.<sup>24</sup> Unsurprisingly, then, leading cases either go outside the Constitution for support,<sup>25</sup> cite no textual support whatsoever,<sup>26</sup> or rely on judicially created doctrines of uncertain pedigree and scope.<sup>27</sup> The case law also fails to justify any role for the judiciary, leaving it vulnerable to suggestions that congressional toler-

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pursue their own foreign policies would create dangerous confusion in the way the United States interacts with other nations, and [it] would severely weaken our ability to protect U.S. national interests"); Steven Spear, *50 Different Departments of State*, THE EXPORT PRAC., July 15, 1997, at 8 (describing efforts by the State Department and the Office of the United States Trade Representative to change the Massachusetts Burma law, as well as a visit to Massachusetts by the U.S. Ambassador to Indonesia to dissuade state lawmakers from passing new sanctions legislation, and concluding that such efforts have generally met with "indifference"); Kevin Whitelaw, *The Very Long Arm of the Law*, U.S. NEWS & WORLD REP., Oct. 14, 1996, at 57 ("Trying to monitor the foreign policy of 50 states and 7,284 municipalities is, to put it simply, a nightmare for companies and national governments alike. 'There's no way we can keep track of all the individual actions,' admits one State Department official.").

23. This Article does not consider whether, apart from constitutional considerations, the Massachusetts Burma law is an appropriate instrument for encouraging change in Burma's profoundly anti-democratic and repressive regime. But the means by which the Massachusetts legislation was crafted (an anti-apartheid sanctions bill was adapted by removing the words "South Africa" and substituting "Burma (Myanmar)"), the attention paid to the international consequences (the bill's sponsor, Representative Byron Rushing, volunteered, "I had no idea we were party to the Government Procurement blah-blah"), and the preliminary understanding of its constitutional legitimacy (Representative Rushing commented, "Our constitution is older than the country's. We can do these things.") give one pause. *A State's Foreign Policy: The Mass That Roared*, ECONOMIST, Feb. 8, 1997, at 32-33.

24. See Shuman, *Courts*, *supra* note 20, at 162 ("Most people—and not a few legal scholars—would be surprised to learn that the Constitution nowhere contains the terms 'foreign relations,' 'foreign policy,' or 'international affairs.'"). Indeed, as explained further below, it appears to contemplate certain foreign affairs functions for the states. See U.S. CONST. art. I, § 10, cl. 3 (providing that the states may enter into agreements or compacts with foreign powers so long as there is congressional consent); *infra* text accompanying notes 244-46, 333-58.

25. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-18 (1936) (proposing an extra-constitutional theory of the federal monopoly over foreign affairs); *infra* text accompanying notes 45-47 (discussing *Curtiss-Wright*).

26. See *Zschernig v. Miller*, 389 U.S. 429, 440 (1968) (holding that state regulations "must give way if they impair the efficient exercise of the Nation's foreign policy"); *Chy Lung v. Freeman*, 92 U.S. 275, 279 (1875) (reasoning that a California immigration statute was impermissible because it gave a considerable amount of power to a state official who did not accordingly bear the risk for claims of action brought under the statute); *infra* text accompanying notes 48-57, 368-75 (discussing *Zschernig*).

27. See, e.g., *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 44 (1st Cir.) (enjoining a Massachusetts law on the grounds that it (1) violated the foreign affairs power; (2) violated Foreign Commerce Clause doctrines prohibiting facial discrimination against foreign commerce, interference with "one voice" in commercial matters, and extraterritorial regulation; and (3) was preempted by federal legislation), *cert. granted*, 120 S. Ct. 525 (1999).

ance of state activities should be enough to excuse state activity having foreign repercussions of the most significant kind.<sup>28</sup>

Stressing the persistence of state practices, and the lack of any apparent constitutional basis for a federal monopoly, an important recent wave of scholarship suggests doing away with the monopoly altogether—that is, abandoning the notion that the courts should enforce a “dormant” foreign relations preemption of state activities, absent intervention by the political branches.<sup>29</sup> Revisionist scholars depict dormant foreign relations preemp-

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28. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (holding that the Constitution permits application of California’s corporate franchise tax to a multinational banking enterprise).

29. For remarks on this renaissance, see Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1090-1106 (1999) (describing the components of, and recent shift away from, “foreign affairs exceptionalism”); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1120-25 (1999) (exploring the impact of the emerging international order on foreign affairs law). For exemplars, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 860-70 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*] (questioning the legitimacy and continuing validity of dormant foreign relations preemption); Goldsmith, *Federal Courts*, *supra* note 1, at 1624 (proposing the renunciation of dormant foreign relations preemption); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1410-24 (1999) [hereinafter Goldsmith, *The New Formalism*] (rejecting the foreign relations effects approach in political question, act of state, and dormant foreign affairs preemption doctrines); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1226 (1999) [hereinafter Spiro, *Foreign Relations*] (concluding that, in light of new participation by states in global affairs, “there is no justification for the courts to enforce a default rule protecting federal exclusivity in the face of contrary state-level preferences”); Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL’Y SYMP. 19, 20 (1997) (attributing the need for a reexamination of traditional international affairs law to the dilution of the primacy of the nation-state); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121, 123 (1994) [hereinafter Spiro, *Demi-Sovereignties*] (arguing that “the presumption of national uniformity and control over foreign relations matters . . . no longer prevails in a post-national world order”); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 20-27 (1995) (criticizing “broad federal common law of foreign relations” as inconsistent and lacking in authority).

In a recent contribution along similar lines, which appeared as this Article was being readied for publication, Michael Ramsey concludes that, based on the original understanding, “there is no constitutional limit upon state power beyond the express or implied limitations directed at particular subjects such as war and treaty-making and the general preemptive power.” Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 348 (1999). Though conceptually distinguishable, the revisionist view of dormant foreign relations preemption is closely affiliated with other work challenging the scope of positive political authority in the realm of foreign relations. See, e.g., Curtis Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 395 (1997) [hereinafter Bradley, *The Treaty Power*] (arguing that the federal treaty power should be subject to the same federalism limitations as are Congress’s legislative powers); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999) [hereinafter Yoo, *Globalism*] (arguing that congressional consent was originally considered indispensable before treaties would have domestic legislative effect). Like Professor Ramsey’s recent piece, John Yoo’s article on self-execution came to my attention shortly before this piece was to be published, making it impossible to address his

tion as both a departure from the original understanding *and* a relic of the past. To their lights, the doctrine emerged full-grown in *Zschemig v. Miller*,<sup>30</sup> a 1968 Supreme Court decision striking down an Oregon reciprocal inheritance statute,<sup>31</sup> before being reduced by *Barclays Bank PLC v. Franchise Tax Board*<sup>32</sup> to little more than what the dormant Commerce Clause would otherwise provide.

Taking *Barclays Bank* one step further, the new scholarship proposes getting rid of such preemption altogether, but not on the predictable basis of states' rights.<sup>33</sup> Instead, it is claimed, globalization makes confining the states to purely internal matters entirely untenable.<sup>34</sup> Cabining the states is also thought to be an inappropriate function for the courts, since Congress—not the judiciary—is in charge of federal law and the nation's for-

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arguments or those of his commentators with the care they deserve. *See also* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1999) (responding to Professor Yoo's *Globalism*); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999) (same); John C. Yoo, *Treaties and Public Law-making: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999) (replying to Professors Vázquez and Flaherty).

30. 389 U.S. 429 (1968).

31. *See id.* at 441; Goldsmith, *Federal Courts*, *supra* note 1, at 1630 (describing *Zschemig* as relying on dormant foreign relations preemption); Joel P. Trachtman, *Nonactor States in U.S. Foreign Relations?: The Massachusetts Burma Law*, 92 AM. SOC'Y INT'L L. PROC. 350, 357 (1998) (describing *Zschemig* as "[d]ormant foreign relations power preemption"); *see also infra* text accompanying note 51 (attributing the debut of dormant foreign relations preemption to *Zschemig*).

32. 512 U.S. 298 (1994); *see also infra* text accompanying notes 58-62, 75-76 (describing the premises and subsequent treatment of *Zschemig*).

33. Federalism's values are invoked more indirectly, either based on appeals to consistent treatment, *see* Bradley, *Treaty Power*, *supra* note 29, at 394 (arguing against "treaty power exceptionalism"), or tradition, *see* Goldsmith, *Federal Courts*, *supra* note 1, at 1714 (noting critically that "[t]hese new foreign relations issues are much more closely tied to traditional state prerogatives than traditional foreign relations issues, and decentralization of these matters often serves salutary ends"). *But see* Porterfield, *supra* note 18, at 23-48 (expressly emphasizing the speech and political participation functions of federalism). This Article does not seek to address the normative case for or against state participation in any depth, except to the extent of explicating the original warrant for the federal treaty power and considering whether that warrant has been unsettled by subsequent developments. *See infra* Part II. *But cf.* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906-08 (1994) (questioning the United States' preoccupation with federalism).

34. *See, e.g.*, Goldsmith, *Federal Courts*, *supra* note 1, at 1670-80 (positing that the blurring of the distinction between domestic and foreign affairs discredits the theory that states lack a legitimate interest in foreign affairs); Spiro, *Foreign Relations*, *supra* note 29, at 1246-52, 1259-75 (identifying the weaknesses and impracticality of federal exclusivity).

eign policy.<sup>35</sup> Such arguments may well appeal to a Court sympathetic to state sovereignty and suspicious of constitutional common law.<sup>36</sup>

The revisionist account is compelling if one accepts the premises of the federal monopoly orthodoxy—namely, that foreign relations effects must be the touchstone for any judicially imposed limit on state activities, and that any constitutional doctrine must speak in broad terms to all activities having the requisite effects. Such an approach, I would concede, has serious deficiencies, including its lack of any apparent basis in the Constitution. If those premises are wrong, however, perhaps both the orthodoxy and the revisionists are mistaken. The key, it seems, lies in locating a “new” constitutional principle, one recovered from a Constitution that still speaks to the modern world.

That principle, I argue, is the “dormant treaty power”—the Treaty Clause’s preemption of state authority even in the absence of any ratified treaty.<sup>37</sup> The dormant treaty power does not preclude all state activities affecting foreign relations. Instead, it proscribes a relatively well-defined class of state foreign affairs activities: those involving direct or indirect negotiating—put less formally, bargaining—with foreign powers on matters of national concern. The bargaining approach acknowledges, for example, a state’s presumed authority to engage in ordinary contractual relations with foreign corporations and governments, to tax foreign corporations, and to denounce foreign governments in the strongest terms, regardless of the effects.<sup>38</sup> At the same time, a state cannot negotiate with a foreign power in

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35. See, e.g., Goldsmith, *Federal Courts*, *supra* note 1, at 1692-95 (explaining the tendency of courts to err in attempting to create a federal common law in foreign affairs); Goldsmith, *The New Formalism*, *supra* note 29, at 1420 (describing the discrepant response of the political branches to judicial overprotection, as opposed to underprotection, of U.S. foreign relations interests).

36. In *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir.), *cert. granted*, 120 S. Ct. 525 (1999), the First Circuit noted recent criticisms of the federal monopoly and contentions that *Barclays* undermined prior case law but observed that lower courts lack the power to depart even from weakened Supreme Court precedent—leaving to the Supreme Court “the prerogative of overruling its own decisions.” *Id.* at 59 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

37. See U.S. CONST. art. II, § 2, cl. 2 (conferring the treaty power on the President and the Senate); *id.* art. I, § 10, cl. 1 (prohibiting states from entering into any treaty, alliance, or confederation). Describing the treaty power as “dormant” does not, of course, mean that the Senate and President need be inert, any more than congressional authority under the dormant Commerce Clause is dissipated when the House or Senate considers legislation. To the contrary, the principle reflects a constitutional judgment that the treaty power is never truly dormant, but may be exercised by engaging or failing to engage foreign powers in negotiations toward the conclusion of a treaty. The point of the label, instead, is to differentiate between “dormant” federal preemption by virtue of the Treaty Clause and federal preemption by a ratified treaty pursuant to the Supremacy Clause. See *id.* art. VI, cl. 2; *infra* text accompanying note 264 (considering the relationship between Article VI and the dormant treaty power).

38. It should be noted, however, that the dormant treaty power is not exclusive of other non-foreign relations preemption doctrines, such as might be raised by state laws discriminating against foreign commerce. See, e.g., Goldsmith, *Federal Courts*, *supra* note 1, at 1625 (making a similar ca-

order to secure concessions. Moreover, the state cannot *indirectly* negotiate (for example, by imposing higher taxes on corporations domiciled in the country in question) in pursuit of the same end.

The dormant treaty power's bargaining-oriented approach offers concrete advantages over both the federal monopoly orthodoxy and the revisionist critique. For one, it is founded on a clear grant of constitutional authority to the federal government and a parallel bar of state authority, rather than vaguer propositions concerning the desirability of exclusive federal authority (or, for that matter, the desirability of preserving state authority). Focusing on treaty-related functions also allows us to recognize the similarity between direct negotiations with a foreign government and indirect bargaining through unilateral changes in state law, without licensing a judicially unmanageable inquiry into foreign relations effects (or, for that matter, turning a blind eye toward those effects). Finally, the dormant treaty power provides a coherent justification for not passing the buck to Congress—namely, the judiciary's mandate to provide the President with the freedom necessary to exercise the treaty functions conferred on the executive branch by the Constitution.

Part I of this Article briefly evaluates the approach of present foreign affairs doctrines to the problem of state-conducted activities touching on foreign relations. As critics have suggested, prevailing foreign affairs doctrine is objectionable because it lacks any clear basis in the Constitution, and because it further requires the judiciary to engage in complex assessments concerning the foreign effects of state activities. As a result, current foreign affairs doctrine substitutes the judicial appraisal of foreign relations for the more considered judgment of Congress—or, at best, defers to executive judgment without any constitutional basis for doing so, to the apparent disadvantage of state interests. If recent case law has not abandoned this approach, perhaps it should.

Part II then examines the horizontal and vertical distribution of the constitutional power to negotiate international agreements. The original understanding is important here not only for the usual reasons,<sup>39</sup> but also to

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veat); Edward T. Swaine, *The Triumph of Local Politics?*, 93 AM. SOC'Y INT'L L. PROC. 247 (1999) (considering statutory preemption and dormant Commerce Clause objections to the Massachusetts Burma legislation); *infra* Part I.B (briefly summarizing the dormant Foreign Commerce Clause doctrine). State activities might also conflict with specific Article I grants of authority other than the Commerce Clause—for example, by touching on matters of defense policy. *See Perpich v. Department of Defense*, 496 U.S. 334, 353-54 (1990) (noting that, even while the Militia Clauses permit organized state militia, those militia are subject to federal limitations).

39. Those reasons are varied—and contested—but most scholars still assume that the original understanding is highly pertinent. *See, e.g.*, Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 104-24 (1997) (appraising critically the ubiq-

rebut the suggestion by revisionists that the entire notion of federal foreign relations exclusivity is ahistorical. This view is mistaken, at least to the extent that it impugns the exclusivity of treaty-related functions.<sup>40</sup> Without attempting to divine the outer perimeters of executive authority over foreign affairs, I argue that the constitutional text and early history of the Treaty Clause, as well as subsequent practice and case law, establish that the President is invested with an independent and substantive (if *not* necessarily plenary) authority to negotiate international agreements. The President was enlisted, I argue, both to facilitate effective negotiation and to reinforce federal barriers against unwise foreign entanglements. It is this power, not Congress's authority over commerce, that is at stake when states attempt to conduct foreign relations. It is absolutely clear, moreover, that both the Framers and their successors regarded state interference with this presidential power as unlawful.

The kernel of the dormant treaty power is evident in the abundant dicta and commentary supporting the federal monopoly,<sup>41</sup> and in Chief Justice Taney's extraordinary opinion in *Holmes v. Jennison*.<sup>42</sup> But this has not left us with a full-fledged doctrine to apply, particularly given the intervening confusion caused by cases like *Zschernig* and *Barclays Bank*. Accordingly, Part III develops a doctrine for judicial application. I first ex-

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uity of appeals to original understanding in legal scholarship); Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 616 (1999) ("[P]ractically everyone who deals with the Constitution treats the Founding as special and privileged in some sense."). *But cf.* Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 394-412 (1997) (critiquing halfway adherence to originalism). For a recent discussion of whether and how the original understanding of the treaty power may be determinative, compare Yoo, *Globalism*, *supra* note 29, at 1982-85 (defending the historical approach), with Vázquez, *supra* note 29, at 2158-68 (noting limits to narrow historical methods).

40. To be clear, however, the dormant treaty power *has* evolved over time. As explained below, nineteenth-century state activities touching on foreign relations may have been tolerated because of contemporary doubts about the scope of the federal government's power under the Treaty Clause. *See infra* text accompanying notes 303-32. Consequently, one might argue that preempting state activity based on the dormant treaty doctrine is somewhat asynchronous, in that it permits expanding federal power (via judicial enforcement of the now-limitless Treaty Clause) without any structural compensation. *See* Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 130 (defending, in principle, the "translation" of federalism limits to counterbalance the expansion of federal power under the Commerce Clause).

The significance of the objection in this particular context turns, among other things, on whether nineteenth-century uncertainties about the treaty power really amounted to a shared understanding about its limits, a matter generally beyond the scope of this Article. *But see, e.g., infra* notes 313-19 (highlighting the diversity of opinion on subject-matter limits). While translating the federal system *en masse* has undoubted virtues, I hope to demonstrate that the commitment to federal exclusivity in negotiating treaties, whatever the substantive reach of the Treaty Clause, has been a consistent constitutional objective—and is intellectually coherent in its own right.

41. *See, e.g., supra* notes 1-3; *infra* Part I.A and notes 320, 330-31.

42. 39 U.S. (14 Pet.) 540 (1840).

amine arguments to the effect that the Framers' approach is antiquated, or that positive political authority—that is, affirmative steps taken by the political branches to protect their prerogatives—renders judicial intervention unnecessary. I conclude, however, that neither line of argument comes to grips with the defensible (and constitutional) judgment as to the necessity of preserving the President's authority to negotiate treaties in the national interest.

The final part then argues that a judicially enforced prohibition on state bargaining with foreign powers is the most practical and the most principled means of fleshing out the dormant treaty power. The bargaining approach naturally proscribes certain forms of state conduct, such as state measures contingent on the policies of foreign powers, that occupy an uncertain position under prevailing doctrine, while just as plainly permitting other measures of otherwise uncertain legality—such as purely unilateral state conduct and state relations with foreign private parties. Incidental instances of state bargaining should also be permitted on grounds consistent with the treaty power's externality and collective action rationales. Finally, while the bargaining approach vests considerable authority in the judiciary, its basis in the Treaty Clause warrants inviting the executive branch to exempt unproblematic classes or instances of state conduct, substituting its judgment on foreign affairs matters that rest ultimately—if not solely—with the political branches.

### I. THE DORMANT DOCTRINES OF THE FEDERAL MONOPOLY

State and local measures touching on foreign affairs clearly cannot be maintained in the teeth of enacted federal law—including, at a minimum, federal statutes, treaties, and congressionally authorized regulations.<sup>43</sup> But state and local measures may also be preempted by one or more principles of *dormant* federal power arising directly from the Constitution—primarily, the foreign affairs power doctrine and the “one voice” component of the dormant Foreign Commerce Clause. Understanding these existing doctrines

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43. See U.S. CONST. art. VI, cl. 2; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987) [hereinafter RESTATEMENT (THIRD)] (describing international law and international agreements of the United States as supreme over state law); *id.* § 303 (broadly construing international agreements as including treaties and other measures within congressional and presidential authority under the Constitution); *id.* § 302 cmts. c, d (explaining that U.S. authority to make international agreements, including by means other than treaties, is not limited by the Tenth Amendment); HENKIN, *supra* note 1, at 191, 197 (explaining that the treaty power is not limited by powers reserved to the states by the Tenth Amendment). *But see, e.g.,* Bradley, *The Treaty Power*, *supra* note 29, at 391-95 (outlining disagreement with the “nationalist” view). For discussion of whether other executive policies, such as executive agreements, preempt state law, see *infra* text accompanying notes 107-10.

is critical to understanding the revisionist critique and the need for alternatives.

*A. The Federal Foreign Affairs Power*

The most general expression of the federal monopoly of international relations is commonly referred to as the federal foreign affairs power. The standard version posits that the United States, by its nature as an independent sovereign, possesses powers appropriate to nationhood and sovereignty—powers implicitly vested by the Constitution in the federal government, without reservation under the Tenth Amendment.<sup>44</sup> Justice Sutherland's variant, essayed in dicta in *Curtiss-Wright*, suggests that "external sovereignty" passed directly from Great Britain to the Union of States, therefore obviating any need for federal powers to be spelled out, either in the Articles of Confederation or subsequently in the Constitution.<sup>45</sup>

Few today subscribe to Justice Sutherland's views,<sup>46</sup> and any distinctive influence of his *Curtiss-Wright* dicta on the vertical distribution of foreign affairs authority has been more apparent than real.<sup>47</sup> The more general

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44. See, e.g., *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); cf. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (stating that the federal government's authority under the Treaty Clause may be broader than Article I authority).

45. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936). Justice Sutherland did not expressly claim any extra-constitutional assignment of power—the closest he came was in asserting that "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution" and that the powers, even if not detailed in the Constitution, "would have vested in the federal government as necessary concomitants of nationality," *id.* at 318—which by itself is consistent with a theory of implicit authority. The opinion also cited, if only incidentally, more traditional authority, like *The Chinese Exclusion Case*. See *id.* at 317. Nevertheless, many distinguish his explanation from the more conventional claims of implicit constitutional authority. See HENKIN, *supra* note 1, at 18-19.

46. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990) (summarizing "withering criticism" of *Curtiss-Wright*); see also RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 21-47 (1987) (discussing whether states were independent sovereignties before the adoption of the Constitution); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 57-61 (1995) (criticizing the practice of drawing legal support for foreign affairs from *Curtiss-Wright*); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 14-15 (1990) (addressing implied congressional will); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *YALE L.J.* 467 (1946).

47. *Curtiss-Wright* was a nondelegation case. Because President Roosevelt's proclamation of an embargo was directly authorized by a joint resolution of Congress, there was no conflict between presidential and congressional authority; likewise, because the company challenged a federal criminal prosecution, there was no issue of the residual authority remaining with the states. Accordingly, all the Court needed to conclude was that foreign affairs were different for nondelegation purposes. See HENKIN, *supra* note 1, at 20 n.\*\*. The case has since been cited extensively in support of construing executive authority liberally, especially as to statutory questions, see, e.g., *Haig v. Agee*, 453 U.S. 280, 291

notion of federal exclusivity, however, has had episodic bite. In *Zschernig v. Miller*,<sup>48</sup> the Supreme Court considered an Oregon statute conditioning inheritance by a nonresident alien upon proof that U.S. citizens possessed a nondiscriminatory right of inheritance in the alien's home country, that U.S. citizens had the right to receive payments from the estates of persons dying in that country, and that Oregon proceeds would not be confiscated by the foreign government—a standard that barred a citizen of East Germany from inheriting personal property.<sup>49</sup> Eschewing the *Curtiss-Wright* theory (and, indeed, any discernible theory at all), Justice Douglas wrote that “the history and operation of this Oregon statute make clear that [it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”<sup>50</sup> The Court accordingly struck down the Oregon statute, notwithstanding the lack of conflict with any demonstrable federal activity. To many, this was the debut of the dormant federal foreign affairs power.<sup>51</sup>

Precisely what state activities *Zschernig* precludes is notoriously unclear. The Court suggested at some points in *Zschernig* itself that the gravamen of its complaint lay with Oregon's arrogation of the authority to conduct foreign relations.<sup>52</sup> For the most part, though, the Court suggested

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(1981); KOH, *supra* note 46, at 93-95, 134-41, but it has been of virtually no significance in aggregating federal power. *But see* Charles Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 5 (1973) (arguing that while *Curtiss-Wright* is often dismissed as dicta, it continues to be available as precedent).

48. 389 U.S. 429 (1968).

49. *See id.* at 430-32.

50. *See id.* at 432 (citing *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941)).

51. *See Bilder, supra* note 5, at 825 (“*Zschernig* is a unique case—the only one in which the Supreme Court has clearly stated such a doctrine of ‘dormant’ foreign relations power.”); Goldsmith, *Federal Courts, supra* note 1, at 1625-30, 1649-58 (“*Sabbatino* and *Zschernig* were viewed at the time of their announcement to mark a significant break with prior law.”); *see also* HENKIN, *supra* note 1, at 162 (concluding, after describing general principle of foreign relations preemption, that “[u]ntil 1968 there was no hint of such a principle”); *id.* at 163 (saying, of *Zschernig*, that “[t]his was new constitutional doctrine”); Frederic L. Kirgis, *Zschernig v. Miller and the Breard Matter*, 92 AM. J. INT. L. 704, 704 (acquiescing in Bilder's description); Hans A. Linde, *A New Foreign-Relations Restraint on American States: Zschernig v. Miller*, 28 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 594, 601-03 (1968) (describing *Zschernig* as “without precedent”); Maier, *supra* note 1, at 835-36 (describing *Sabbatino* and *Zschernig* as novel applications of “a structural analysis to find that state authority may be found to be preempted even when there is no actual interference with the national conduct of foreign affairs”). *But see* Harold G. Maier, *Cooperative Federalism in International Trade: Its Constitutional Parameters*, 27 MERCER L. REV. 391, 403 (1976) (“*Zschernig*, however, does not represent a new doctrine. In fact, it represents only a more explicit verbalization of an approach to constitutional interpretation [sic] in foreign affairs cases which has been implicit and, sometimes, explicit for almost 200 years.”).

52. *See Zschernig*, 389 U.S. at 437-38 (“As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts.”); *see also id.* at 439

that the state's activities interfered with federal power to conduct foreign relations simply because they had an undue effect on foreign nations. Distinguishing *Clark v. Allen*,<sup>53</sup> which upheld a California statute having only an "incidental or indirect effect in foreign countries," Justice Douglas claimed that the Oregon statute created more than a mere "diplomatic bagatelle" and had "great potential for disruption or embarrassment,"<sup>54</sup> such that it might "well [have] adversely affect[ed] the power of the central government to deal with those problems."<sup>55</sup> The type of "problems" at issue and which branch of the central government retained responsibility were not made clear. But the Court's refusal to accept the executive branch's submission that Oregon's policy did *not* interfere with foreign relations,<sup>56</sup> coupled with the Court's references to powers "entrust[ed] to the President and Congress,"<sup>57</sup> suggests at a minimum that the doctrine in question was not rooted in Article II.

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(explaining that the purpose of one provision of the Oregon statute "was to serve as 'an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon.'" (quoting *Closterman v. Schmidt*, 332 P.2d 1036, 1042 (Or. 1958)); *id.* at 441 (highlighting the need to avoid interfering with "the power of the central government to deal with [foreign relations]"); *infra* text accompanying notes 84-90.

53. 331 U.S. 503 (1947). In *Clark*, the Supreme Court dismissed a facial challenge to a California reciprocal inheritance statute as "far-fetched," considering the law to be among the many state laws having "some incidental or indirect effect in foreign countries" that "none would claim cross the forbidden line" protecting the federal foreign affairs power. *Id.* at 517; *see also infra* text accompanying notes 363-67 (discussing *Clark*). Only four of the eight Justices participating in *Zschernig* thought the Court's results could be reconciled. Compare *Zschernig*, 389 U.S. at 433-35 (refusing the invitation to reexamine the Court's ruling in *Clark v. Allen*), with *id.* at 443 (Stewart, J., concurring) ("To the extent that *Clark v. Allen* is inconsistent with these views, I would overrule that decision." (citation omitted)), and *id.* at 458 (Harlan, J., concurring) ("It seems to me impossible to distinguish the present case from *Clark v. Allen* in this respect in any convincing way."), and *id.* at 462 (White, J., dissenting) (indicating agreement with the relevant portion of Justice Harlan's concurrence).

54. *Zschernig*, 389 U.S. at 435; *see also id.* at 436 (describing inquiries as entailing a "kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government").

55. *Id.* at 441; *see also infra* text accompanying notes 92-93.

56. Justice Stewart put the matter bluntly in his separate opinion:

The Solicitor General, as *amicus curiae*, says that the Government does not "contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.

*Zschernig*, 389 U.S. at 443 (Stewart, J., concurring) (quoting the Solicitor General's *amicus* brief).

57. *See supra* text accompanying note 50.

Whatever the Court's original intention, it has since neglected *Zschernig*.<sup>58</sup> Consequently, some believe that *Zschernig* is confined to its facts, and only proscribes state-directed inquiries, particularly by courts, into the nature or operation of foreign governments.<sup>59</sup> If so, why? Perhaps the Court felt that the states could be trusted to apply the principle,<sup>60</sup> or came to regard *Zschernig* as a period piece driven by Cold War anxieties.<sup>61</sup> Perhaps instead the Court wanted to continue to maintain the federal monopoly as a judicial rule, but decided to emphasize instead the dormant Foreign Commerce Clause and its "one voice" component.<sup>62</sup> If so, that decision may just as effectively have sealed the federal monopoly's doom.

### B. The Dormant Foreign Commerce Clause

The dormant Commerce Clause doctrine is hardly a promising alternative to *Zschernig*.<sup>63</sup> State laws touching on foreign commerce may be found unconstitutional for reasons wholly familiar from the interstate commerce context.<sup>64</sup> Notwithstanding the similarity of the constitutional

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58. As Frederic Kirgis recently observed, "[t]he Supreme Court has never squarely relied on it in the thirty years it has been on the books." Kirgis, *supra* note 51, at 705; *see also infra* text accompanying notes 75-76 (discussing the effects of *Barclays Bank*).

59. *See Bilder*, *supra* note 5, at 825 n.27 (stating that later opinions suggest that *Zschernig* can be "narrowly interpreted as proscribing only state or local statutes"); *see also* Kirgis, *supra* note 51, at 706 (noting that "[t]his interpretation limits *Zschernig* to its facts"). The *Restatement*, in contrast, suggests that *Zschernig* more broadly bars states "from 'intruding' on the exclusive national authority in foreign affairs"—without describing what actions might intrude, or where the exclusive national authority lies. RESTATEMENT (THIRD), *supra* note 43, § 402 reporter's note 5 (1987) (stating that an "exercise of jurisdiction to prescribe by states is governed by the same principles whether the exercise of jurisdiction has international or inter-state implications.").

60. After *Zschernig*, the Court summarily disposed of two cases, having been assured that the state courts would themselves apply the decision. *See Gorun v. Fall*, 393 U.S. 398, 398 (1969) (per curiam); *id.* at 398-99 (Douglas, J., concurring); *Ioannou v. New York*, 391 U.S. 604, 604-05 (1968) (per curiam); *see also* Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 141-45 (1971) (citing and analyzing lower-court cases involving state inheritance statutes); Wong, *supra* note 9, at 675-85 (same).

61. *See HENKIN*, *supra* note 1, at 165 n.\*\* ("One would be bold to predict that [*Zschernig*] has a future life; might it remain on the Supreme Court's pages, a relic of the Cold War?"); *see also id.* at 165.

62. *See, e.g., Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 434 (1979) (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) and requiring that courts first inquire whether a proposed tax on a foreign instrumentality prevents the federal government from speaking with one voice).

63. *See ITEL Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 79-80 (1993) (Scalia, J., dissenting) (describing the Court's ever-changing approach); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 428 (1982) (promoting a new model for judicial scrutiny grounded in the Privileges and Immunities Clause of Article IV); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191 (1998).

64. Laws facially discriminating against foreign commerce are "virtually *per se* invalid." Oregon

text conferring authority over foreign and interstate commerce,<sup>65</sup> potential interference with foreign commerce must survive additional hurdles.<sup>66</sup> States probably cannot defend themselves on the ground that they are act-

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Waste Sys., Inc. v. Department of Env'tl. Quality, 511 U.S. 93, 99 (1994); *accord* Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575 (1997); *id.* at 596 (Scalia, J., dissenting); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). But even facially discriminatory measures may survive this "strictest scrutiny," *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979), if they are not protectionist, *see, e.g., Oregon Waste Sys.*, 511 U.S. at 99 (defining "discrimination" as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter"). It is unclear whether discrimination against a particular foreign country's commerce, as opposed to discrimination against *all* foreign commerce, is covered. *See New Energy Co. v. Limbach*, 486 U.S. 269, 274-76 (1988); *cf. Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, 505 U.S. 71, 79-80 (1992) (noting that, if a state tax law "does not favor business activity in the United States generally over business activity abroad," "this would indeed suggest that the statute does not discriminate against foreign commerce"). In *Natsios*, the First Circuit assessed a less-direct form of foreign discrimination—by the state of Massachusetts against all companies doing business in Burma (not just against Burmese companies)—in a fashion indistinguishable from "one voice" analysis. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 67-68 (1st Cir.) (citing *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983); *Japan Line*, 441 U.S. at 448-49), *cert. granted*, 120 S. Ct. 525 (1999).

Nondiscriminatory state measures may also be held unconstitutional if "the burden imposed on [foreign] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *accord BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-72 (1996) (holding that a state can protect its own consumers but may not use punitive damages to impose its own regulatory policies on other states); *Oregon Waste Sys.*, 511 U.S. at 99; *see also Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) (stating that the Commerce Clause prohibits the application of a state statute to conduct that takes place "wholly outside of the state's borders" (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982))); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583 (1986) (holding that a New York law requiring wholesale alcohol prices in New York not to exceed the lowest prices charged by sellers elsewhere unconstitutionally controlled liquor prices in other states). In *Natsios*, the First Circuit held that the same principle applied to attempts by states to exercise control outside the United States, though presumably the case could also have been made based on the effects of the Massachusetts law elsewhere within the United States. *See Natsios*, 181 F.3d at 46.

65. *See* U.S. CONST. art. 1, § 8, cl. 3 (providing Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States").

66. *See, e.g., Kraft*, 505 U.S. at 79 ("[T]he constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce . . . in part because matters of concern to the entire Nation are implicated."); *Reeves, Inc. v. Stake*, 447 U.S. 429, 438 n.9 (1980) (noting "that Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged"); *Japan Line*, 441 U.S. at 446 ("When construing Congress' power to 'regulate Commerce with foreign Nations,' a more extensive constitutional inquiry is required."); *id.* at 448 (citations omitted):

Although the Constitution . . . grants Congress power to regulate commerce "with foreign Nations" and "among the several States" in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater. Cases of this Court, stressing the need for uniformity in treating with other nations, echo this distinction.

*Accord Bowman v. Chicago & N.W. Ry. Co.*, 125 U.S. 465, 482 (1888):

It may be argued . . . [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation.

ing more as market participants than as regulators.<sup>67</sup> More important, at least until recently, state laws could violate the dormant Foreign Commerce Clause if they impaired the federal government's ability to "speak with one voice" in foreign commercial matters.<sup>68</sup> That test originated in the Import-Export Clause, which involved a power that was both conferred on the federal government and expressly denied to the states.<sup>69</sup> Perhaps because the

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67. See *Reeves*, 447 U.S. at 437-38 & n.9 (1980) (noting that "[w]e have no occasion to explore the limits imposed on state proprietary actions by the 'foreign commerce' Clause," but that "scrutiny may well be more rigorous when a restraint on foreign commerce is alleged"); see also *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 96 (1984) (plurality opinion) (citing this reservation in *Reeves*); *id.* at 100 (concluding, after finding that a protectionist state restriction did not qualify for the market-participant exception and that the restriction violated ordinary Commerce Clause restrictions, that "[w]e are buttressed in our conclusion that the restriction is invalid by the fact that foreign commerce is burdened by the restriction"). Some of the defense's stated rationales—including "evenhandedness" relative to private market participant and the lower risk that states will favor their own citizens when buying and selling, see *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2230-31 (1999)—may not apply as well in the foreign context. The erosion of the sovereignty basis for the market participant defense may also make the Court reluctant to extend it further. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (overruling *National League of Cities*); *Reeves*, 447 U.S. at 438-39 (citing sovereignty considerations); *Japan Line*, 441 U.S. at 449 n.13 ("In *National League of Cities v. Usery*, the Court noted that Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress' power to regulate foreign commerce could be so limited." (citation omitted)); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 822 n.4 (1976) (Brennan, J., dissenting) ("The absence of any articulated principle justifying this summary conclusion leads me to infer that the newly announced 'state sovereignty' doctrine of *National League of Cities v. Usery* . . . is also the motivating rationale behind this holding." (citing *National League of Cities v. Usery*, 426 U.S. 833 (1976))). But cf. Dan T. Coenen, *The Impact of the Garcia Decision on the Market-Participant Exception to the Dormant Commerce Clause*, U. ILL. L. REV. 727, 727 (1995) (contending that *Garcia* supports, rather than undermines, the market-participant exception). Even if there is a market-participant defense, matters going beyond "merely choosing [the state's] trading partners" to "attempting to govern the private, separate economic relationships of its trading partners," may not qualify. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 95-96, 99 (1984) (plurality opinion). Finally, states would obtain little comfort unless there were also a market-participant exception to *Zschernig*. See *Natsios*, 181 F.3d at 60 (rejecting such an exception). But see *Trojan Techs., Inc. v. Pennsylvania*, 742 F. Supp. 900, 903 (M.D. Pa.) (describing the incidental effect of a "Buy American" law as owing to state "participation in the market place and not to any effort to control or regulate commerce with foreign countries"), *aff'd*, 916 F.2d 903 (3d Cir. 1990); *Amarel v. Connell*, 202 Cal. App. 3d 137, 139 (1988) (distinguishing, for purposes of a *Zschernig* challenge, the "purely commercial" nature of alleged below-cost sales by the defendant of milled California rice to the Republic of Korea).

68. See generally *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 320-30 (1994); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 9 (1986); *Japan Line*, 441 U.S. at 448-49, 451-53; *Container Corp. of Amer. v. Franchise Tax Bd.*, 463 U.S. 159, 193 (1983).

69. See U.S. CONST. art. 1, § 8, cl. 1 (empowering Congress "[t]o lay and collect Taxes, Duties, Imposts and Excises" for certain general purposes, provided "Duties, Imposts and Exercises shall be uniform throughout the United States"); *id.* art. I, § 10, cl. 1 (providing that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports," save under narrowly defined circumstances). For brief accounts of the background, see, for example, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) (discussing the Framers' three main concerns with committing this power to the federal government); *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534, 556-58

states are less clearly prohibited from regulating foreign commerce, the Court has cautioned that the merest deviation from national uniformity will not invalidate a state policy. Instead, the “one voice” doctrine requires distinguishing matters “merely [having] foreign resonances” from those “implicat[ing] foreign affairs.”<sup>70</sup> The “one voice” test thus appears “functionally identical” to the dormant foreign relations preemption indicated by *Zschernig*, because “[i]t requires courts to analyze the extent to which state law will ‘offend’ foreign nations and provoke foreign retaliation.”<sup>71</sup>

The two doctrines are at least equally toothless. *Japan Line* remains the only Supreme Court case holding that a state policy violated the “one voice” requirement.<sup>72</sup> In *Barclays Bank*, the Supreme Court gave short shrift to a claim that California’s use of a “worldwide combined reporting” method to determine corporate franchise tax owed by multinationals violated the “one voice” doctrine, notwithstanding the serious diplomatic controversy produced by California’s policy.<sup>73</sup> Central to the Court’s reasoning was the idea that Congress—which, as the branch tasked with the “active” Commerce Clause, was better placed than a court to determine what was compatible with the federal voice—had failed to override the California tax in question.<sup>74</sup> Some read *Barclays Bank* as the death-knell for the “one voice” doctrine,<sup>75</sup> and further consider the Court’s apparent disdain for

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(1959) (Frankfurter, J., dissenting) (same).

70. *Container Corp.*, 463 U.S. at 194. The Court noted, however, that a state law might still violate the “one voice” doctrine if it conflicted with a “clear federal directive,” apparently for reasons familiar from the preemption context. *Id.*

71. Goldsmith, *Federal Courts*, *supra* note 1, at 1637; *see also* Spiro, *Demi-Sovereignties*, *supra* note 29, at 164-65 (criticizing the application of the “one voice” test in *Barclays Bank* on the ground that the Court failed to take foreign repercussions into account).

72. *See Vinmar, Inc. v. Harris County Appraisal Dist.*, 947 S.W.2d 554, 555 (Tex. 1997).

73. *Barclays Bank*, 512 U.S. at 324. As the Court noted, 20 countries supported amici briefs against California’s position. Then-Secretary of State George Schultz noted in 1986 that “[t]he Department of State has received diplomatic notes complaining about state use of the worldwide unitary method of taxation from virtually every developed country in the world.” *Id.* at 324 n.22. Also, the British Parliament enacted legislation that would, if implemented, tax U.S. corporations. *See id.*

74. *See id.* at 320-31.

75. *See* Goldsmith, *Federal Courts*, *supra* note 1, at 1705 (“As for the one-voice test in dormant foreign Commerce Clause cases: *Barclays Bank* effectively eliminated it.”). For (slightly) milder assessments, *see* Bradley, *The Treaty Power*, *supra* note 29, at 447 (describing *Barclays Bank* as having “largely repudiated the strong ‘one voice’ doctrine suggested in some of [the Court’s] earlier foreign commerce clause decisions”); Spiro, *Demi-Sovereignties*, *supra* note 29, at 164 (describing *Barclays Bank* as “a highly significant retreat” in the “one voice” doctrine); Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 MINN. J. GLOBAL TRADE 45, 53 (1998) (claiming that *Barclays Bank* “all but ended the era of the *Japan Line* ‘one voice’ doctrine”); Trachtman, *supra* note 31, at 356 (noting “a shift toward greater deference to state law” in “one voice” doctrine and other aspects of dormant Foreign Commerce Clause jurisprudence). *But see* *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 68-69 (applying “one voice” doctrine), *cert. granted*, 120 S. Ct. 525 (1999).

*Zschernig* as definitively indicating that there was no longer any general foreign affairs power.<sup>76</sup> Particularly to those skeptical of federal judicial power, *Barclays Bank* was not unlike a powerful general-purpose pesticide: whatever the foreign relations doctrines were, it killed them.

*C. Why the Dormant Doctrines Are . . . Dormant*

If a legal doctrine's success lies in its ability to resolve controversies in a predictable fashion, then neither the foreign affairs power nor the "one voice" doctrine has been terribly successful. One problem is that neither has much support in the constitutional text. As noted previously, the Constitution does not speak in general terms of foreign relations or foreign affairs, nor does the mélange of more specific federal authority in Articles I and II necessarily exclude all state authority.<sup>77</sup> It is not unprecedented, of course, for the Supreme Court to resolve issues of governmental authority

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76. See, e.g., Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 560 n.189 (1999) (claiming that *Barclays Bank* "rejected dormant preemption in the international taxation context"); Bradley & Goldsmith, *Customary International Law*, *supra* note 29, at 865 (citing *Barclays Bank* as one of the "reasons to think that *Zschernig*'s dormant foreign relations preemption retains little, if any, validity"); Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 678 n.23 (1998) [hereinafter Bradley & Goldsmith, *Abiding Relevance*] (claiming that *Barclays Bank* "may have eliminated the remnants of the dormant foreign affairs preemption announced in [*Zschernig*]"); Goldsmith, *Federal Courts*, *supra* note 1, at 1700 ("The Court rejected the [plaintiffs'] challenge and in the process gutted the essential components of the federal common law of foreign relations."); Goldsmith, *The New Formalism*, *supra* note 29, at 1426 (same); Spiro, *Foreign Relations*, *supra* note 29, at 1266 ("[T]he *Barclays Bank* decision bodes ill for the 'one-voice' jurisprudence, most obviously with respect to the dormant foreign Commerce Clause. But the same reasoning could be deployed to reverse the rules of *Zschernig* and *Sabbatino* as well."). *But see Natsios*, 181 F.3d at 49-59 (applying *Zschernig* to the Massachusetts Burma law); Kirgis, *supra* note 51, at 706-08 (considering the application of *Zschernig* to the *Breard* controversy, and noting that "on the few occasions when the Supreme Court has characterized its own holding in *Zschernig*, it has done so broadly" (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972) (opinion of Rehnquist, J.))).

77. See U.S. CONST. art. I (authorizing Congress to raise and support military forces, to declare war by a majority vote of both houses, to borrow money, to regulate immigration and naturalization, to punish piracy and felonies on the high seas, as well as offenses against the law of nations, and to regulate tariffs and foreign commerce); *id.* art. II (assigning the President the general "executive Power," designating the President as Commander-in-Chief, assigning the President at least part of the power to make treaties and to select "ambassadors, other public ministers and consuls," authorizing the President to "receive Ambassadors and other public Ministers," and generally entrusting the power to "take care that the laws be faithfully executed"). While these powers may authorize the federal government to accomplish whatever it may need, they do not exhaust the potential for foreign relations. For example, as explored below, states enjoy the power of forming agreements or compacts with foreign powers. See *infra* text accompanying notes 244-46, 333-58. As the First Circuit observed, "*Zschernig* makes clear that, by necessary implication, the federal government's foreign affairs power exceeds the power expressly granted in the text of the Constitution . . ." *Natsios*, 181 F.3d at 60.

extra-textually.<sup>78</sup> But there is a bias against creating extra-constitutional *federal* authority, particularly where parallel state authority is excluded.<sup>79</sup> The dormant doctrines also failed to articulate any coherent theory about which part, if any, of the federal government possessed the requisite authority. The result, in practice, is that the federal courts have been left in charge—a result that many find less acceptable than enduring the occasional excesses of state activity.

1. *The Problematic Role of the Judiciary.* For as many allusions as one can find to the incompetence of states in the arena of foreign affairs,<sup>80</sup> there may be just as many adverting to the incompetence of the judiciary. In *Barclays Bank*, for example, the Court declared, in a coda to its “one voice” analysis, that “[t]he Constitution does ‘not make the judiciary the overseer of our government,’” and concluded that “we leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.”<sup>81</sup>

78. See, e.g., *Printz v. United States*, 521 U.S. 898, 905 (1997) (explaining that “[b]ecause there is no constitutional text speaking to th[e] precise question” of the constitutionality of federal commandeering of state officers, “the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court”). See generally Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B.U. L. REV. 1089 (1997) (defending the Rehnquist court’s reliance on penumbral readings).

79. As Louis Henkin noted of attempts to articulate a federal foreign affairs power: “That the new United States government was to have major powers outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, in the Federalist Papers, or in contemporary debates.” HENKIN, *supra* note 1, at 19-20. Moreover, as Justice Scalia observed in the dormant Commerce Clause context, the Framers not only knew how to deny authority to the states, but also how to vest exclusive authority in the federal government, rather than leaving the matter for inference. See *Tyler Pipe Indus. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 259-65 (1987) (Scalia, J., dissenting).

80. See *infra* note 331 (collecting cases).

81. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 330-31 (1994) (quoting *Youngtown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)); accord *Bradley & Goldsmith, Abiding Relevance*, *supra* note 76, at 678; Goldsmith, *Federal Courts*, *supra* note 1, at 1643 (criticizing the “judicially enforceable, self-executing realm of federal exclusivity in foreign affairs”); cf. *Barclays Bank*, 512 U.S. at 328 (“The judiciary is not vested with power to decide ‘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.’” (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983))); *Reeves*, 447 U.S. at 439 (justifying the market participant doctrine on grounds that “the competing considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess. . . . [which is] a task better suited for Congress than this Court.”). Prior to *Barclays Bank*, at least, the Court also evidenced concern about encroaching on matters better entrusted to the President. See, e.g., *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948):

It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of

In *Banco Nacional de Cuba v. Sabbatino*,<sup>82</sup> a contemporary of *Zschernig* that likewise emphasized the preemptive effect of federal law, the Court nonetheless stressed the judiciary's relative incompetence at foreign relations questions, not to mention the risks that court judgments might "seriously interfere with negotiations being carried on by the Executive Branch."<sup>83</sup>

The perils of involving courts in foreign affairs have been accentuated by the pivotal importance to the dormant doctrines of discerning the foreign effects of state activities. Even prior to *Barclays Bank*, the Court indicated its reluctance to conduct such inquiries. As previously discussed, *Zschernig* went the farthest in espousing an effects approach, but the Court may also have been emboldened in that instance by the fact that its immediate rivals in foreign-effects prophesizing were state probate courts, bodies equally ill schooled in foreign relations (and likely more parochial to boot).

*Zschernig* and other cases otherwise struggled without success to frame the issue of dormant foreign relations preemption in non-effects terms. Sometimes the test invoked highly legalistic considerations—such as whether the contested state policy set a precedent for other polities to follow,<sup>84</sup> conflicted with a legally cognizable national policy,<sup>85</sup> or simulated a

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prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

See also Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 517 n.135 (1987) (noting application of Justice Jackson's reasoning in a constitutional context). The incompetence of courts in foreign affairs matters is not, of course, universally acknowledged. See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 46-48, 126-55 (1992) (recognizing that "cases turning on foreign facts present unusual evidentiary [sic] problems for judges" but arguing that problems of competence and proof may be overcome); Spiro, *Foreign Relations*, *supra* note 29, at 1257 n.140 (arguing that whether a state measure is likely to disrupt national foreign policy is readily susceptible of judicial analysis).

82. 376 U.S. 398 (1964).

83. *Id.* at 430-33 (explaining that judicial evaluation of exceptions to the "act of state" doctrine would interfere with policy judgments best conducted by the executive branch).

84. In *Zschernig*, for example, the Court seemed to be concerned with the prospect that similar "foreign policy attitudes" by other jurisdictions would impair the ability of the federal government to manage national affairs. See *Zschernig v. Miller*, 389 U.S. 429, 437-38 n.8 (1968); Kirgis, *supra* note 51, at 705 (noting multiple-jurisdiction emphasis). *Japan Line*, too, emphasized the risks presented by copycat laws, observing:

If other States follow California's example (Oregon already has done so), foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make "speaking with one voice" impossible. California, by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade.

*Japan Line*, 441 U.S. at 453 (citations omitted).

85. The Court emphasized that the asymmetric taxation of Japanese cargo containers occurred in

federal function<sup>86</sup>—but invariably the test required distinguishing between permissible and impermissible impacts. Alternatively, the Court tried to look for some threshold effect of the state policy on foreign nations—usually, an affront that risked retaliation<sup>87</sup>—from which it could infer an effect on U.S. foreign relations. Such an approach may have seemed more objective, and less intrusive, than asking the judiciary to determine whether a particular state initiative was consistent with the nation’s foreign policy.<sup>88</sup> But providing foreign nations with what amounts to a “heckler’s veto” over state policies sits uncomfortably,<sup>89</sup> particularly when the loudest heckler is likely to be the very target of often-legitimate state condemnation.<sup>90</sup>

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the shadow of a treaty evidencing “a national policy to remove impediments to the use of containers as ‘instruments of international traffic.’” *Japan Line*, 441 U.S. at 453 (quoting 19 U.S.C. § 1322(a) (1994)); *see also id.* at 452 (“California’s tax prevents this Nation from ‘speaking with one voice’ in regulating foreign trade. The desirability of uniform treatment of containers used exclusively in foreign commerce is evidenced by the Customs Convention on Containers, which the United States and Japan have signed.”). While the Court also cited the risk of retaliation against the entire nation, it did so in part because such retaliation appeared nearly automatic. *See id.* at 453 & n.18 (acknowledging an “acute” risk of retaliation from Japan and a German statutory mechanism for automatic reprisal).

86. *See supra* text accompanying note 52.

87. *See, e.g.,* *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (distinguishing matters merely having “foreign resonances” from those also “implicat[ing] foreign affairs”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432 (1964) (predicting that judicial invalidity of foreign acts of state would “likely . . . give offense to the expropriating country”).

88. *Cf.* Brief for the United States as Amicus Curiae Supporting Respondent, 19, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (Nos. 92-1384 & 92-1839) [hereinafter *Barclays Bank Amicus Brief*]:

The factual question whether a particular state tax will precipitate foreign complaints, although far more expertly addressed by the political branches, is not wholly unsusceptible of resolution through judicial proceedings. Questions concerning the federal government’s proper response to such complaints, however, raise issues of foreign policy falling entirely outside the judicial ken.

Thus, *Zschernig* identified the state law in question as having had more than an “incidental or indirect effect in foreign countries,” from which the Court concluded that there was a “direct impact upon foreign relations” without attempting to determine whether Oregon was in sync with an overall national policy. *Zschernig*, 389 U.S. at 441; *see also id.* at 440 (“It seems *inescapable* that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way.” (emphasis added)). As if to contrast its approach, the Court noted that Oregon probate courts had “launched inquiries into the type of governments that obtain in particular foreign nations,” *id.* at 434, leading to “minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should not preclude wonderment as to how many may have been denied the right to receive,” *id.* at 435 (internal quotation marks omitted).

89. *See Barclays Bank Amicus Brief, supra* note 88, at 18 (“Threats of retaliation by foreign governments, however, cannot be sufficient in themselves to render a state tax invalid. Such a legal rule would in essence give foreign governments a ‘heckler’s veto’ over state taxing authorities.”).

90. In *Zschernig*, the Supreme Court cited Bulgaria’s protests to substantiate the claim that foreign relations had been affected. *See Zschernig*, 389 U.S. at 437 n.7. In *Natsios*, the First Circuit, citing that example, held that “foreign government views . . . are *one factor* to consider in determining whether a

The bottom line, almost unavoidably, was whether the state regulations in question interfered with federal authority where it mattered,<sup>91</sup> or genuinely “impair[ed] the effective exercise of the Nation’s foreign policy.”<sup>92</sup> Yet even in *Zschernig*, where the precedent of *Clark* placed a premium on identifying distinctive foreign effects, the Court failed to advert to any evidence that Oregon’s judicial practices were of concern to anyone outside the state other than the plaintiffs.<sup>93</sup> Small wonder, then, that the *Barclays Bank* Court came to stress that even the most basic assessments of overseas effects were within the competence of the federal political branches.<sup>94</sup>

2. *The Problematic Role of the Political Branches.* Given these considerations, it may seem that the better part of valor would have been to defer to the coordinate branches, particularly where the inquiry focused on the consistency of states with the federal government’s “voice.” Indeed, the federal government’s position was sometimes portrayed as dispositive.<sup>95</sup>

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law impermissibly interferes with the federal government’s foreign affairs powers” and noted the objections by fellow Association of Southeast Asian Nations (“ASEAN”) members to the treatment of Burma—but did not, for whatever reason, note Burma’s objections. *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 55 (1st Cir.), *cert. granted*, 120 S. Ct. 525 (1999).

91. The *Japan Line* Court, for example, claimed the objective of preserving “federal uniformity in an area where federal uniformity is essential,” but it quickly turned its inquiry to the foreign impacts. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1976). Similarly, in *Container Corp.*, the Court explained that “if a state tax merely has foreign resonances, but does not implicate foreign affairs,” it will not violate the “one voice” doctrine and that “a state tax at variance with federal policy will violate the ‘one voice’ standard if it . . . implicates foreign policy issues which must be left to the Federal Government.” *Container Corp.*, 463 U.S. at 194. As became clear in *Barclays Bank*, the Court had no preordained notion of what matters “must be left to the Federal Government.”

92. *Zschernig*, 389 U.S. at 440; *see also* Ramsey, *supra* note 29, at 361 (concluding, after reviewing case law, that “the momentum in the lower courts seems to be toward a reading that looks broadly to the degree of state ‘interference’ or ‘impairment,’ in keeping with the broad language of the foundational Supreme Court cases and contrary to some commentary’s attempt to limit *Zschernig* to its facts”).

93. *See Zschernig*, 389 U.S. at 441 (asserting that Oregon’s statute had a “direct impact upon foreign relations” and speculating that “it may well adversely affect the power of the central government to deal with those problems”). As Justice Harlan argued in his concurring opinion, the majority’s result was “based almost entirely on speculation”: “[T]he Court does not mention, nor does the record reveal, any instance in which such an occurrence has been the occasion for a diplomatic protest, or, indeed, has had any foreign relations consequence whatsoever.” *Id.* at 460 (Harlan, J., concurring); *see id.* (Harlan, J., concurring) (citing representations by the U.S. government as to the lack of consequences). Justice Harlan noted the majority’s citation of a complaint by Bulgaria, but he attributed the complaint to the “very existence of state statutes which result in the denial of inheritance of inheritance rights to Bulgarians,” rather than to inflammatory judicial opinions. *Id.* at 460 n.27 (Harlan, J., concurring). Indeed, Bulgaria’s complaint as excerpted indicated little more than that the denial of proceeds was ill received. *See id.* at 437 n.7.

94. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 327-28 (1994).

95. *See id.* at 332 (Scalia, J., concurring) (construing the “one voice” analysis in *Itel Containers* as

But the Court relied on political branch views almost solely to buttress findings that state measures were *not* problematic. Where the Court struck down state laws as unconstitutional, it did so with little regard to the expert opinion of the executive branch: the State Department's input was considered irrelevant in *Zschernig*,<sup>96</sup> and it was consulted solely on the operation of foreign law in *Japan Line*.<sup>97</sup> Rejecting the "one voice" claim in *Container Corp. of America v. Franchise Tax Board*,<sup>98</sup> on the other hand, the Court held up the executive branch's failure to file in opposition to the California tax as proof that U.S. foreign policy "is not seriously threatened."<sup>99</sup> Informal congressional input has been treated similarly: acquiescence has been read not merely as *permitting* state action (and, thereby, abnegating the need for any enhanced dormant Commerce Clause analysis),<sup>100</sup> but as indicating that Congress found no fault with, or approved of, the state policy in question.<sup>101</sup> The United States, it would appear, is just another heckler, conspicuous mainly when silent.

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giving to the executive branch "the power to determine the constitutionality of a state law"); *Intl Containers Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring) (comparing the majority opinion to *Japan Line* and concluding that "it thus appears that a ruling on the constitutionality of a state law ultimately turns on the position of the Executive Branch"); Shuman, *Courts*, *supra* note 20, at 160 (speculating that a Baltimore anti-apartheid ordinance "surely" would have been found to disrupt foreign relations "had the Justice Department joined the case").

96. See *supra* text accompanying note 56.

97. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 452 n.17 (1976) (citing attestations by the Solicitor General and the State Department that Japan taxed containers at full value, thereby giving rise to double taxation).

98. See *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 195-96 (1983) (noting that "unlike *Japan Line*, the Executive Branch has decided not to file an *amicus curiae* brief in opposition to the state tax. The lack of such a submission is by no means dispositive.").

99. *Id.* at 196; see also *Opusunju v. Giuliani*, 669 N.Y.S.2d 156, 159 (Sup. Ct. 1997) (noting, in rejecting a *Zschernig*-based challenge to a decision by the city of New York to rename a city street near the Nigerian consulate after a jailed Nigerian rebel, that the "State Department has claimed no interference by New York City with foreign policy, and has elected not to participate in this matter"). In distinguishing *Japan Line* on these grounds, *Container Corp.* plainly attributed greater significance to the executive branch's submission in the former case than had the original decision. The Solicitor General had submitted pertinent views in another case before the Court in the very same Term as *Container Corp.*, but the majority discounted that. Compare *Container Corp.*, 463 U.S. at 195 n.33 (noting the absence of any indication that the Solicitor General intended a previous memorandum to govern *Container Corp.*), with *id.* at 204 (Powell, J., dissenting) (concluding that absent any indication to the contrary, views submitted in connection with another case may be pertinent).

100. See *Barclays Bank*, 512 U.S. at 323. The Court found the premises of both *Wardair Canada Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986), and *Container Corp.* to be that

Congress may more passively indicate that certain state practices do *not* "impair federal uniformity in an area where federal uniformity is essential"[:]. . . it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce or otherwise falls short under *Complete Auto* inspection.

*Barclays Bank*, 512 U.S. at 323 (quoting *Japan Line*, 441 U.S. at 448)).

101. See *Barclays Bank*, 512 U.S. at 326 (citing the history of Senate action as "reinforc[ing] our

This asymmetric treatment of political branch input makes perfect sense given the doctrinal bases for the dormant federal monopoly. No state policy can really *prevent* the federal government from speaking with one voice; Congress, should it so choose, can always preempt the offending state policy.<sup>102</sup> The real questions, instead, are whether the federal government is entitled to maintain the nation's voice by lesser means—speaking at a softer volume, as it were—and how interference with that authority can possibly be evidenced.<sup>103</sup> For Congress, the issue should never arise, since it speaks preemptively or not at all.<sup>104</sup> Treating nonauthoritative expression (for example, amici briefs, committee reports, debates, and failed legislation) as preemptive would not only raise federalism problems, but would also exceed congressional authority under Article I.<sup>105</sup> Such concerns are not present, however, if the same means of expression are read merely to relieve states from burdens imposed by the dormant Foreign Commerce Clause.<sup>106</sup>

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conclusion that Congress implicitly has *permitted* the States to use the worldwide combined reporting method"); *id.* at 327 (citing "indicia of Congress' willingness to tolerate States' worldwide combined reporting mandates"); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 75 (1993) (citing an amicus brief by the United States and congressional acquiescence as indicating that "[t]o the extent *Itel* is arguing that taxes like Tennessee's engender foreign policy problems, the United States disagrees"); *Wardair Canada*, 477 U.S. at 12 ("It would turn dormant Commerce Clause analysis entirely upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow."); *cf.* *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 53 (1st Cir.) (citing divergence between Massachusetts law and federal policy as one factor in *Zschernig* analysis), *cert. granted*, 120 S. Ct. 525 (1999).

102. See *Itel Containers*, 507 U.S. at 80-81 (Scalia, J., concurring).

103. See *Barclays Bank* Amicus Brief, *supra* note 88, at 17 n.12 ("The danger, more precisely stated, is that a State's taxing scheme may prevent the federal government from implementing its policies by *methods other than statutes or treaties*. That danger is particularly acute in the realm of foreign relations, where important international understandings may for various reasons be less formalized.").

104. See DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 334 (1985) [hereinafter CURRIE, *THE CONSTITUTION IN THE SUPREME COURT*] ("[T]he Constitution makes clear that Congress can act only by the affirmative vote of both Houses.").

105. See *INS v. Chadha*, 462 U.S. 919, 944-59 (1983) (holding that the "one-House veto" was an unconstitutional attempt by Congress to usurp Article I's "explicit and ambiguous provisions" relating to the legislative process).

106. See *Barclays Bank*, 512 U.S. at 323-28 (construing congressional silence as sufficient to resolve a "one voice" claim, whether or not it would be sufficient to satisfy fully other standards imposed by the dormant Commerce Clause); *id.* at 332 (Scalia, J., concurring) (construing the majority's satisfaction with legislative inaction as similar to restrictive view of dormant Commerce Clause); see also *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 614-15 (1997) (Scalia, J., dissenting) (noting that existing dormant Commerce Clause jurisprudence relies in part on the theory that congressional silence connotes preemption of state legislation, a proposition "rejected by this Court in virtually every analogous area of the law"). *But see Barclays Bank*, 512 U.S. at 336 (O'Connor, J., concurring in part and dissenting in part) (indicating that, absent "express congressional authorization," multiple taxation of foreign corporations violates the Foreign Commerce Clause).

The executive branch is nominally more versatile in expressing federal policy, but its authority for interfering with state activities is less clear. As long as federal authority is rooted in the Foreign Commerce Clause, the President has precious little to say about it: absent congressional delegation, any residual authority not exercised by Congress or reserved to its use falls to the states, not to the executive branch.<sup>107</sup> The President has some rather hazy independent constitutional authority that, when definitively exercised, may preempt inconsistent state law.<sup>108</sup> But this authority probably

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107. See, e.g., *Itel Containers*, 507 U.S. at 81 (1993) (Scalia, J., concurring) (“[The President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.”); see also *Trojan Tech., Inc. v. Pennsylvania*, 916 F.2d 903, 913-14 (3d Cir. 1990):

And while it is possible that sub-national government procurement restrictions may become a topic of intense international scrutiny, and a target in international trade negotiations, that possibility alone cannot justify this court’s invalidation of the Commonwealth’s statute. This is especially true when Congress has recently directed its attention to such restrictions and has taken no steps to preempt them through federal legislation. Indeed, in light of Congress’ evident concern with achieving freer trade on a reciprocal basis, to strike Pennsylvania’s statute would amount to a judicial redirection of established foreign trade policy—a quite inappropriate exercise of the judicial power.

108. Nonplenary authority, at least, may have any of several bases. One is the “executive Power.” U.S. CONST. art. II, § 1, cl. 1. Compare *Myers v. United States*, 272 U.S. 52, 128 (1926) (citing “executive power” as its basis for permitting the President to remove the postmaster, notwithstanding the statute), with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (interpreting the Executive Power Clause as “an allocation to the presidential office of the generic powers thereafter stated”). A second is the President’s duty to “take care that the laws be faithfully executed.” U.S. CONST. art. II, § 3; see also *In re Neagle*, 135 U.S. 1, 64 (1890) (construing the Take Care clause to extend to the enforcement of “the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution”). A third is the unenumerated foreign affairs power. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (citing the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,” together with congressional delegation, as a basis for presidential authority). Presidential authority in this realm is commonly teased together from these or other specific constitutional grants, or otherwise implied, but has never been the model of consistency or influence. See HENKIN, *supra* note 1, at 40:

[T]he constitutional lawyer will have the hard choice between the theory that the conduct of foreign affairs, undefined, was indeed “granted in bulk” to the President as executive power, and the need to scrounge among, and stretch, spare constitutional clauses to eke out full powers which the President has in fact commanded and many of which he was probably intended to have.

See also *id.* at 13-62 (discussing the potential bases for presidential authority).

One recurring issue is whether independent executive authority has the same domestic legal effect as a formal preemptive enactment. See *id.* at 54 (“No one has suggested that under the President’s ‘plenary’ foreign affairs power he can, by executive act or order, enact law directly regulating persons or property in the United States.”); Ramsey, *supra* note 29, at 390-432 (considering, and rejecting, constitutional bases for executive preemption). Where the Court has conceded such effect, it is often hard to determine whether the President’s authority was genuinely independent of Congress. Compare, e.g., *United States v. Pink*, 315 U.S. 203, 229 (1942) (describing the executive’s “[p]ower to remove such

lacks the force of legislation, and so may be regarded as inferior to expressions of congressional sentiment.<sup>109</sup> Less definitive pronouncements, like executive suggestions, are of even more controversial weight, and in the absence of congressional authorization might be regarded as attempts to usurp either congressional or judicial authority.<sup>110</sup>

obstacles to full recognition as settlement of claims” as “a modest implied power of the President” from his authority as the “sole organ”), and *United States v. Belmont*, 301 U.S. 324, 330 (1937) (same), with *Dames & Moore v. Regan*, 453 U.S. 654, 678-80 (1981) (requiring implicit congressional approval as a “crucial” element for upholding executive action); cf. Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679, 681-82 (1998) [hereinafter Henkin, *Provisional Measures*] (construing *Ex Parte Peru*, 318 U.S. 578, 579 (1943), and *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945), as indicating that “[t]he states are bound by U.S. foreign policy decisions even if they do not take any formal form” and that such decisions have preemptive effect in both federal and state courts); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 134, 145-59 (1998) [hereinafter Ramsey, *Executive Agreements*] (discussing claims settlement case law); Evan Todd Bloom, Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 155, 157-63 (1985) (same). The same may be said of the President’s authority to negotiate foreign agreements outside the scope of the treaty power. See *Dames & Moore*, 453 U.S. at 679-80 (relying, in addition, on congressional approval to support presidential action); *Pink*, 315 U.S. at 222 (recognizing that the judiciary should not review the propriety of the President’s conduct of foreign relations); *Belmont*, 301 U.S. at 330-32 (holding that the President’s actions resulting in the recognition of the Soviet government did not require the advice and consent of the Senate); RESTATEMENT (THIRD), *supra* note 43, § 303(4) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”); HENKIN, *supra* note 1, at 229 (citing, as agreements the President can conclude “on his own authority,” “those related to establishing and maintaining diplomatic relations, agreements settling international claims, and military agreements within the Presidential authority as Commander in Chief,” and “doubtless many other ‘sole’ agreements” are acceptable, “but which they are is hardly agreed”). *But cf.* Ramsey, *Executive Agreements*, *supra*, at 236-37 (arguing that original understanding would have denied any domestic effect to sole executive agreements).

109. Consistent with the principle that executive authority is most precarious where it is “incompatible with the expressed or implied will of Congress,” *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring), lower courts have held that executive agreements do not have the capacity to override congressional statutes enacted under the explicit authority of the Foreign Commerce Clause. See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953), *aff’d on other grounds*, 348 U.S. 296 (1955); see also RESTATEMENT (THIRD), *supra* note 43, § 303 cmt. j (explaining that, while sole executive agreements preempt state law, “[t]heir status in relation to earlier Congressional legislation has not been authoritatively determined”); CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 66-68 (Comm. Print. 1993) [hereinafter CRS] (discussing cases in which courts have voided sole executive agreements that were incompatible with federal laws); 1 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, 1981-1988, § 5, at 1296-311 (Marian Nash Leich ed., 1994) (same).

110. See Goldsmith, *Federal Courts*, *supra* note 1, at 1708-10 (proposing that the courts should “create” foreign relations law only when the executive suggests). For representative criticisms, see Thomas M. Franck, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101, 1102-04 (1960) (arguing that courts should not abdicate authority to the executive branch automatically, instead employing a “pragmatic” technique to determine when to adjudicate foreign relations claims); John Norton Moore, *The Role of the State Department in Judicial Proceedings*, 31 FORDHAM L. REV. 277, 296-302 (1962) (concluding that courts should not always de-

The treatment of executive branch views in *Barclays Bank* is illuminating. The United States' position on the legality of California's method of taxation was not the model of constancy. After steadily supporting the taxpayers, the Justice Department changed its view at the eleventh hour to oppose refunds, on the ground that California's tax had not conflicted with U.S. foreign economic policy during the tax years in question.<sup>111</sup> The Solicitor General's brief did not, accordingly, emphasize the domestic and international fracas the tax had engendered,<sup>112</sup> but nevertheless argued carefully for the relevance of executive branch views. As the brief explained, federal foreign policy "is especially likely to take the form of informal agreements, understandings, long-term strategies, etc., that have not been codified in a statute or treaty,"<sup>113</sup> but which are nonetheless vital to the President's ability to deal effectively with foreign governments.<sup>114</sup> At the same time, the mere existence of foreign complaints should not be taken to mean—in the absence of authoritative executive action—that a state policy violates the Constitution.<sup>115</sup> Absent a controlling treaty or statute, the brief argued, "the courts must respect the judgments of the President regarding matters of foreign policy *both* where the President has determined that state compliance with an international norm is essential and where he has determined that foreign governments should not be allowed to dictate the practices of the States."<sup>116</sup>

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fer to executive determinations on matters of international law).

111. For the United States' account of its litigating position, see *Barclays Bank* Amicus Brief, *supra* note 88, at 1-14.

112. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 342 n.22, 328 n.30 (1994); *supra* text accompanying note 73.

113. *Barclays Bank* Amicus Brief, *supra* note 88, at 16.

114. See *id.* at 17. As the brief later put it, "[t]he danger of improper encroachment on the President's conduct of foreign affairs, as noted above, is not limited to the situation where a State's method of taxation conflicts with an international understanding agreed to by the President or otherwise undermines the nation's international trade policies." *Id.* at 20.

115. As the brief explained:

Executive power is also improperly diminished when a court strikes down a state law on the basis of a foreign complaint that the President has determined to resist. . . . The executive branch must be free in addition to adopt a middle ground: to acknowledge the validity of foreign concerns, and to attempt to persuade state officials to respond thereto, without insisting upon the States' immediate conformity with the federal norm. The courts therefore should not lightly infer a Foreign Commerce Clause violation from the mere fact that executive branch officials have attempted to persuade state authorities to alter their policies. Such an approach not only risks undue impairment of legitimate state prerogatives; it may also reduce presidential power by diminishing the executive's ability to employ "jawboning" and informal negotiation without invoking the specter of a constitutional confrontation.

*Id.*

116. *Id.* (emphasis added); see also *id.* at 19 ("[T]he Court must ascertain the contours of federal policies not codified in any statute or treaty; and in that process the statements of executive branch officials are entitled to substantial evidentiary weight.").

The Court plainly rejected this approach. One reason may have been the difficulty in identifying executive branch policy. The government's position in *Barclays Bank* suggested that even determining whether a national policy exists is a matter of art, one that might require deferring to executive branch policy developed in the throes of litigation—something the Solicitor General acknowledged to be problematic, as if the shifts in the *Barclays* litigation itself were not proof enough.<sup>117</sup> And surely broadcasting U.S. negotiating positions, and executive branch views on the complaints of foreign countries, would scarcely be conducive to diplomacy.

The more intractable difficulty was the absence of a constitutional basis for deferring to the executive branch. California, the putative beneficiary of the executive's revised views, argued that any authority vested in the President was subsumed, in effect, by the dormant Foreign Commerce Clause.<sup>118</sup> The Court agreed. Foreign commerce, in the Court's view, was entrusted to Congress, and if Congress had tolerated the state's conduct, "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting."<sup>119</sup>

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117. *See id.* at 21.

118. According to California, this argument was

consistent with the rule that the Congress and the President share authority over foreign affairs. If a state tax affecting foreign commerce is valid either by way of congressional authorization or under the dormant Foreign Commerce Clause tests (which include the balancing of foreign policy considerations), it cannot be unconstitutional on the basis of infringement upon foreign affairs.

Brief for Respondent at 46-47, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (No. 92-1384) (citation omitted) [hereinafter *Barclays* Respondent's Brief]. "[C]onstru[ing] Executive Branch foreign policy aspirations as authoritative federal policy," California argued, would disable Congress and the Constitution's requirement that treaties become law only upon Senate ratification. *Id.* at 47. Any other indication from the executive branch would merely be "thwarted aspirations." *Id.*

119. *Barclays Bank*, 512 U.S. at 330; *see also id.* at 328-29 (distinguishing between the "one voice" of the "Federal Government" and "[t]he Executive statements to which Colgate refers"); *id.* at 329-30 (describing cited executive branch actions as "merely precatory"). At oral argument, a member of the Court responded to the suggestion that the executive branch evidenced federal policy by noting that foreign commerce "is in fact entrusted to Congress." Transcript of Oral Argument at 12, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (Nos. 92-1384 & 92-1839); *see also id.* at 18 (quoting one Justice as replying to the originalist argument that the President required the ability to constrain states in order credibly to bargain for advantages for U.S. business by stating, "I thought Mr. Hamilton was arguing that in support of giving Congress the power to regulate foreign commerce . . .").

Harold Koh, responding to arguments that *Barclays Bank* spelled the end to the federal foreign affairs monopoly, claims that the decision "reveals less about the Supreme Court's view of federalism than about the Court's traditional judicial deference to the *executive branch* in foreign affairs." Harold Hongju Koh, *Commentary: Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1848 (1998); *see also* National Foreign Trade Council v. Natsios, 181 F.3d 38, 58 n.13 (1st Cir.), *cert. granted*, 120 S. Ct. 525 (1999). While *Barclays Bank*'s holding may indeed be exaggerated, *see infra* text accompanying note 523, it is hard to conclude that the Court was deferring to the executive branch. The Court's explanation that the judiciary should be loathe to intervene in matters "more the province

Given its premises, the Court's conclusions seem perfectly valid. If the federal government's powers derive from an Article I clause, it is hard to perceive why the President's quasi-evidentiary submissions should determine whether a foreign or state government should prevail. The executive's assumption of such authority would seem to be an affront not only to the states, but also to Congress. However, if those premises are invalid, perhaps the President's authority does not live or die with the "one voice" test. Another possible foundation—the Article II treaty power—has routinely been neglected.<sup>120</sup>

## II. THE DORMANT TREATY POWER

The seemingly simple vesting of the "Power . . . to make Treaties" raises more than its share of intractable constitutional questions. Fortunately for present purposes, the dormant treaty power rests on several discrete propositions. The first concerns the scope of the President's power to negotiate. At least in the absence of Senate instruction, the President's negotiating authority is substantive, not merely communicative, and is coextensive with the federal government's authority. This is obviously so in practice. Contrary readings of the original understanding begrudge the President such a role largely because they suppose that the horizontal distribution of authority was zero-sum. In fact, the President's role was introduced in the expectation that his service as the Senate's surrogate would in some respects augment, rather than diminish, legislative authority, by permitting the Senate to change the U.S. course and to decline to endorse flawed treaties. Involving the President would also advance extrinsic inter-

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of the Executive Branch and Congress" absent proof of a serious threat, *see Barclays Bank*, 512 U.S. at 327 (quoting *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)), does not say *how* such a threat might be determined. Indeed, the Court expressly disregarded the Solicitor General's views in upholding the state tax, *see Barclays Bank*, 512 U.S. at 330 n.32, and entertained no opinion concerning his submission that courts must respect "the judgments of the President regarding matters of foreign policy," Koh, *supra*, at 1849 (quoting *Barclays Respondent's Brief*, *supra* note 118, at 20).

120. Michael Ramsey's recent article is somewhat of an exception. Professor Ramsey also finds the Article I case for dormant foreign relations preemption wanting, *see Ramsey, supra* note 29, at 369-90, prompting him to consider—and ultimately reject—the Executive Power Clause as an alternative basis. *See id.* at 391-432. Although he notes the potential preemptive effect of the Treaty Clause, it is primarily as a standard against which broader theories might be measured and ultimately dismissed. *See, e.g., id.* at 384 n.157 (citing evidence of the original understanding); *id.* at 393-94 & n.192 (citing textual evidence and case law); *id.* at 406-07 (citing textual evidence); *id.* at 404-06 (arguing that dormant foreign relations preemption is contraindicated by Article VI supremacy of treaties). Otherwise, he appears to view the Executive Power Clause as the only legitimate basis for any substantial preclusion of state foreign relations activities. *See id.* at 391 (concluding that "the appropriate way to view the exclusion of states from interference in foreign policy is as a consequence of the executive power in foreign affairs, and that a constitutional exclusion of the states can be defended—if at all—only on this ground.").

ests by facilitating the negotiation of superior treaties and checking inferior ones.

The President's constitutional prerogative to forge American foreign relations, and to stymie them, is accordingly of great significance for construing the authority left to the states in the absence of a treaty or statute. Both the Articles of Confederation and the Constitution demonstrated hostility toward state activities tending to interfere with the dormant treaty power. Here, the Framers were quite clear in supposing that the vertical distribution of authority *was* zero-sum, and that permitting the states to simulate the international bargaining powers of the national government would disserve the interests of all concerned. The rationale and scope of any broader federal monopoly was occasionally obscured, but prior to the Supreme Court's inconsistent decisions in *Clark* and *Zschernig*, both political practice and case law clearly proscribed state activities that amounted to bargaining with foreign powers.

#### A. *The President's Treaty Power*

Contemporary disputes over the horizontal allocation of treaty powers—for example, over alternatives to treaties<sup>121</sup> and executive treaty reinterpretation<sup>122</sup>—typically concern the end-game of agreements, rather than how they are made. Aside from a few pitched battles dully familiar to constitutional scholars,<sup>123</sup> negotiating treaties has been relatively pacific. Practice has consistently and unswervingly accorded the President primary and complete (if *not* necessarily plenary) authority over treaty negotiation.<sup>124</sup> At

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121. The controversy appeared to be resolved by mid-century, before its revival among academics—but not politicians—during the debates over NAFTA and the Uruguay Round. Compare, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 820-32 (1995) (defending congressional-executive agreements), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228-35 (1995) (suggesting alternatives to treaty-making are unconstitutional).

122. Compare, e.g., David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1396-401 (1989) (attacking the executive power to reinterpret treaties), with Lawrence J. Block et al., *The Senate's Pie-in-the-Sky Treaty Interpretation: Power and the Quest for Legislative Supremacy*, 137 U. PA. L. REV. 1481, 1483-92 (1989) (defending same).

123. See *infra* text accompanying notes 214 (discussing the treaty with the Creek Indians), 220 (discussing the neutrality proclamation of 1793), 221 (discussing the Jonathan Robbins incident).

124. The consistency of this view over time bears emphasis. See, e.g., Howard R. Sklamberg, *The Meaning of "Advice and Consent": The Senate's Constitutional Role in Treaty-making*, 18 MICH. J. INT'L L. 445, 474 (1997) ("Nowadays, the Senate plays no part in treaty-making other than to consider agreements that the President has already signed."); *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652 (9th Cir. 1993) ("The President alone has the authority to negotiate treaties with foreign countries."); CRS, *supra* note 109, at 69 (1993) ("[T]he actual negotiation of treaties and other international agreements is widely recognized as being within the power of the President."); Stefan A. Riesenfeld & Fre-

the same time, the Senate has set negotiating objectives and inserted itself or its members into negotiations without provoking substantial debate over its prerogatives.<sup>125</sup>

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derick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 579 (1991) (“Since the founding of the republic, it has been accepted practice that the President initiates and conducts the negotiation of treaties, bringing a signed or otherwise final draft to the Senate for its advice and consent.”); GLENNON, *supra* note 46, at 164 (1990) (“Participation by the Senate (or Congress) in certain [aspects of the treaty-making] process is not constitutionally permitted. The core presidential power, perhaps, is negotiation.” (citations omitted)); CORWIN, THE PRESIDENT, *supra* note 2, at 214 (1984) (“[T]here is no more securely established principle of Constitutional practice than the exclusive right of the President to be the nation’s intermediary in its dealings with other nations.”); *Aris Gloves v. United States*, 420 F.2d 1386, 1393 (Ct. Cl. 1970) (“The making of treaties is a power delegated to the President with the advice and consent of the Senate. The negotiation of treaties is a matter solely within the discretion of the President.”); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pt. 1), 54 YALE L.J. 181, 203 (1945) (“No one today doubts that the President has complete control of the actual conduct of negotiations in the making of all international agreements or that he is the appropriate authority to make final utterance of an agreement as the international obligation of the United States.”); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936) (“[The President] alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it.”); ALBERT H. PUTNEY, UNITED STATES CONSTITUTIONAL HISTORY AND LAW 293 (1908) (“Throughout the whole history of the country the share of the Senate in treaties has consisted in ratifying treaties already negotiated.”); WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77 (1908):

The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. . . . [H]e may guide every step of diplomacy, and to guide diplomacy is to determine what treaties must be made, if the faith and prestige of the government are to be maintained.

*Accord* 5 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW § 739, at 179 (1906) (“The negotiation and modification of treaties is a prerogative of the Executive, with which the courts cannot interfere.”); 2 FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES § 139, at 75 (2d ed. 1887) (“The negotiation and modification of treaties is a prerogative of the Executive, with which the courts cannot interfere.”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1517, at 370 (1833):

The question was, whether the agency of the Senate was admissible previous to the negotiation, . . . or was limited to the exercise of the power of advise and consent, after the treaty was formed . . . . The practical exposition . . . which seems to have occurred in President Washington’s administration, was, that the option belonged to the executive to adopt either mode . . . .

*Accord* Jefferson’s Manual and Rules of the House of Representatives of the United States, One Hundred Fifth Congress, H.R. Doc. No. 104-272, § 554, at 298-99 (2d Sess. 1997) (“By the Constitution of the United States this department of legislation is confined to two branches only of the ordinary legislature—the President originating and the Senate having a negative. . . . [T]he negotiations are carried on by the Executive alone . . . .”); Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 The Papers Of Thomas Jefferson, 1789-1790, at 379 (Julian P. Boyd et al. eds., 1961) (“The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate. *Exceptions* are to be construed strictly.”).

125. For a good discussion of such initiatives, see CRS, *supra* note 109, at 69-81 (considering the negotiation and conclusion of international agreements).

The difficult question is whether these practices are simply the bad habits of institutions more attuned to politics than to the Constitution, each secure in the knowledge that it has a further opportunity to veto any errant treaty that may result.<sup>126</sup> Some think that the President has compromised his authority by permitting Senate intervention.<sup>127</sup> Many more feel that practice deviates from the original understanding of the President as merely an agent—the nation’s negotiator and “sole organ of foreign relations,” perhaps, but only in the sense of relaying the Senate’s will to foreign countries.<sup>128</sup> Permitting the President to determine the message, in this view, is more in the nature of a lapse than an entitlement.

The original understanding, and the nation’s early practices, are certainly more equivocal than the settled routines of today. And neither provides clear answers to the issues that might be raised by a death match over constitutional authority—were the President, for example, to flout clear negotiating instructions from the Senate. But if we focus on the scope of presidential authority in the *absence* of such a struggle, the original understanding of the treaty power is quite in keeping with modern practice. The best evidence indicates that where the Senate’s power to involve itself in treaty preliminaries (whatever that power’s potential scope) lay unexercised, the President was to have full authority to negotiate on behalf of the United States, including complete latitude either to conduct and conclude negotiations or to avoid them altogether.

The federal separation of powers under the Treaty Clause may at first seem unrelated to the proper role of the *states* in foreign affairs. But understanding what amounts to the President’s dormant authority to control the negotiation of treaties is indispensable, not only to understanding where *Zschernig* and *Barclays Bank* erred, but also to articulating the constitu-

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126. See, e.g., PUTNEY, *supra* note 124, at 292 (“The system of checks and balances, so often referred to, hinders the establishment of a vigorous foreign policy.”); cf. Dennis J. Mahoney, *Advice and Consent*, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 31 (Leonard W. Levy et al. eds., 1986) (arguing that the present practices of consulting influential Senators, party leaders, and prominent committee members “are better understood as political devices to improve the chances of obtaining consent than as deference to the constitutional mandate to obtain advice”).

127. Among leading contemporary authorities, Phillip Trimble seems to fall within this category. See Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 756 (1989) (“Congress and individual members have induced the Executive to advance claims of present positions of particular interest to the member.”); accord Phillip R. Trimble & Alexander W. Koff, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT’L L. 55, 58 (1998) (noting that members of Congress can have a “practical impact” on foreign policymaking by the executive).

128. See generally H. Jefferson Powell, *The Founders and the President’s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1471-72 nn.2-3 (1999) [hereinafter Powell, *The Founders*] (listing authorities subscribing to the “congressional-primacy” theory of the foreign affairs power).

tional basis for withholding from the states authority left unexercised by Congress.

1. *Text and Structure.* As indicated above, the Treaty Clause does not assign clear roles to the President or to the Senate, leaving the President's authority in the absence of Senate instruction rather unclear.<sup>129</sup> The design of the two branches seems to give the President decided advantages in initiating negotiations,<sup>130</sup> but the Framers scarcely anticipated the modern presidency, and may equally have had a different understanding of the Senate's power to provide "advice" than we do today.<sup>131</sup>

Indeed, Arthur Bestor's leading studies of the original understanding of the Treaty Clause concluded that Senate advice was a prerequisite for presidential action.<sup>132</sup> In his view, the Senate was obliged to determine "the

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129. That the Treaty Clause resides in Article II says nothing about the nature of the authority vested in the President, nor does it suggest that some aspect of that power is his alone. Compare *Goldwater v. Carter*, 617 F.2d 697, 705 (D.C. Cir.) (en banc) (per curiam) (concluding, from the location of the Treaty Clause, that "[i]t is the President as Chief Executive who is given the constitutional authority to enter into a treaty"), *vacated*, 444 U.S. 996, 996-97 (1979), with Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-Making Clause as a Case Study*, 1 PERSP. IN AM. HIST. (n.s.) 233, 278-79 (1984) (concluding that the "placement of the treaty clause within Article II was an act with editorial significance, not an editorial quirk," but noting that the precise significance is elusive), and Sklamberg, *supra* note 124, at 457 (suggesting that the location of the Treaty Clause is inconsistent with strong claims of Senate dominance, but noting that the veto power is located in Article I).

The text permits various means of reconciling the power to "make" treaties and the Senate's prerogative to render "advice and consent." Perhaps the President is empowered to do everything, and the Senate is entitled only to react to a fully negotiated treaty. (Although such an interpretation tends to eliminate the function of "advice.") Perhaps, as is often casually asserted, the treaty power is shared in every respect. (But this simply resigns to Corwin's "struggle," and assumes no attempt to differentiate the roles of very different institutions.) Finally, it is possible, though uncommon, to argue that the presidential role is separable but wholly modest: the power to "make" treaties could mean just the power to ratify, following Senate consent. See LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 41 (1988) ("Make," however, might have signified merely that no treaty had been executed until signed by the President."). If so, however, the means by which treaties are "made" in ordinary parlance is left mysterious, as are the matters on which the Senate provides "advice."

130. See, e.g., HENRY CABOT LODGE, *The Treaty-Making Powers of the Senate*, in A FIGHTING FRIGATE AND OTHER ESSAYS AND ADDRESSES 219, 232 (1902) ("The Senate . . . cannot in the nature of things initiate a negotiation with another nation, for they have no authority to appoint or to receive ambassadors or ministers."); TRIBE, *supra* note 1, § 4-4, at 219 ("[T]he Constitution plainly grants the President the initiative in matters directly involved in the conduct of diplomatic and military affairs."); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1292 (1988) ("Congress is poorly structured for initiative and leadership . . . . The Presidency, in contrast, is ideally structured for the receipt and exercise of power . . .").

131. Compare Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577, 1579 (1992) (defining "advice" in purely contemporary terms), with Sklamberg, *supra* note 124, at 448 (criticizing Reynolds's approach).

132. See Arthur Bestor, "Advice" from the Very Beginning, "Consent" When the End is Achieved, 83 AM. J. INT'L L. 718, 725-27 (1989) [hereinafter Bestor, *Advice*]; Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of*

policy to be pursued in a treaty negotiation” and to “formally approv[e] the diplomatic instructions embodying this policy,” while the President was to seek advice and to justify any deviations in terms of “some more fundamental aim of the agreed-upon policy.”<sup>133</sup> “Advice” thus meant *permission*, making the Senate an indispensable participant in the negotiation of treaties.<sup>134</sup> Were this view correct, the President’s function under the dormant treaty power would seem just as meager as under the dormant Foreign Commerce Clause.

The permission hypothesis, however, is hardly dictated by the text. Nothing in the term “advice” specifies the timing of Senate counsel. It might, as subsequent practice suggested, relate to the postnegotiation phase, perhaps including such authoritative actions as attaching reservations, amendments, or demands for renegotiation.<sup>135</sup> The contemplated ad-

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*the Constitution Historically Examined*, 55 WASH. L. REV. 1, 15-17 (1979) [hereinafter Bestor, *Respective Roles*]; Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 534-41 (1974) [hereinafter Bestor, *Separation of Powers*]. Bruce Ackerman and David Golove consider Bestor’s writings, with Rakove’s, to be “[t]he best modern account[] of the Founders’ deliberations on treaty-making.” Ackerman & Golove, *supra* note 121, at 809 n.21. And Rakove characterizes Bestor’s as “[t]he most careful analysis of the evolution of the treaty clause.” Rakove, *supra* note 129, at 235 n.5; *see also* Charles A. Lofgren, *War Powers, Treaties, and the Constitution* [hereinafter Lofgren, *War Powers*], in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 242, 254 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (describing Bestor as “a most careful student of the subject”).

133. Bestor, *Respective Roles*, *supra* note 132, at 112; *see also* Bestor, *Advice*, *supra* note 132, at 726:

[T]he phrase ‘by and with the advice and consent of the Senate’ constituted a requirement that in performing the executive segment of the task of conducting foreign relations, the President is to seek the formal advice of the Senate . . . concerning the policy to be pursued and the ends to be sought.

*Accord* Bestor, *Separation of Powers*, *supra* note 132, at 540-41:

[T]he self-evident meaning of the treaty clause is that the Senate is to reach through discussion a consensus as to the policy to be embodied in a projected treaty; that the President, acting through the nation’s diplomatic agents, is to take charge of negotiations designed to realize that policy; and that when an international agreement is negotiated (with concessions necessarily given and received), the Senate is to decide whether its final terms are acceptable.

134. Bestor is not alone in this view, but he is its most thorough proponent. *See, e.g.*, LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 50 (1990) (“The framers had probably intended that the President and a small Senate would deliberate together, prior to and during negotiations, leading to treaties acceptable to both.”); TRIBE, *supra* note 1, § 4-4, at 221 (citing the requirement of Senate advice and consent as an example of where “the Constitution’s text . . . expressly forecloses unilateral presidential conduct of foreign policy.”); Richard E. Webb, *Treaty-Making and the President’s Obligation to Seek the Advice and Consent of the Senate with Special Reference to the Vietnam Peace Negotiations*, 31 OHIO ST. L.J. 490, 490 (1970) (“[T]he President must seek the advice of the Senate both before entering substantive treaty negotiations and also during their course, and the consent of the Senate when specific agreements are to be pursued.”).

135. *See* Bestor, *Separation of Powers*, *supra* note 132, at 540 (acknowledging that the Senate’s advisory function has “dwindle[d] away” into postnegotiating advice). Even the first treaty ratified by

vice might also be nonbinding, such as offering counsel to the President about how to improve prospects for Senate approval, or about whether ratification is advisable.<sup>136</sup> More important, nothing in the text suggests that it is the President's task to solicit such advice, let alone suspend his activities until it is rendered.

Nor is the parallel usage in state constitutions decisive on this point. As Professor Bestor recounts, nearly half of the state constitutions had councils providing "advice and consent" in areas of concurrent authority, examples that were surely familiar to the Framers.<sup>137</sup> But there are obvious reasons to doubt the Framers' intention to import such meanings unchanged—particularly since the President was created largely in abreaction to the state executive model.<sup>138</sup> Hamilton, as Publius, freely "admitted that

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the Senate, the French Consular Convention of 1788, provides a ready example. The Continental Congress had directed Franklin to conclude a treaty along agreed lines, but Franklin came back with some different terms, causing the treaty to be rejected. Jefferson later took up the negotiations, and Washington sent the fully negotiated treaty to the Senate "for your consideration and advice." RALSTON HAYDEN, *THE SENATE AND TREATIES, 1789-1817*, at 4-5 (1920); see also DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801*, at 22-23 (1997) [hereinafter CURRIE, *THE CONSTITUTION IN CONGRESS*] (discussing the Consular Convention).

136. Cf. HENKIN, *supra* note 134, at 48 ("[B]ut what is 'advice,' when and by whom is it to be given, and must it be heeded?").

137. See Bestor, *Advice*, *supra* note 132, at 726; Bestor, *Separation of Powers*, *supra* note 132, at 644-45 & n.430; cf. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 218 (1996) (stressing the interpretive significance of state constitutions). Not all such clauses were alike. For example, the Framers and their contemporaries saw substantial differences between the relative autonomy accorded the executive in the New York and Massachusetts constitutions and the executive's subjugation to the legislature elsewhere. See RICHARD B. BERNSTEIN, *ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION* 56, 61, 173 (1987); CLINTON ROSSITER, *1787: THE GRAND CONVENTION* 65-66 (1966).

138. Even the Articles of Confederation rejected an analogous national Council of State, see Bestor, *Respective Roles*, *supra* note 132, at 49-52, and the Constitutional Convention ignored calls for councils, see Bestor, *Separation of Powers*, *supra* note 132, at 647-52. It is generally thought that the Framers consciously modeled the President after the more independent state chief executives of the New York and Massachusetts constitutions. See, e.g., BERNSTEIN, *supra* note 137, at 173. As Charles Thach explained,

[s]tate experience thus contributed, nothing more strongly, to discredit the whole idea of the sovereign legislature . . . . The majority of the delegates [to the Constitutional Convention] brought with them no far-reaching distrust of executive power, but rather a sobering consciousness that, if their new plan should succeed, it was necessary for them to put forth their best efforts to secure a strong, albeit safe, national executive.

CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1774-1789*, at 53 (1969); see also 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 35 (Max Farrand ed., 1937) [hereinafter FARRAND'S RECORDS] (Madison's notes) (statement of Madison) ("The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable.").

in this instance [of treaty-making] the power of the federal executive would exceed that of any State executive."<sup>139</sup>

Finally, the suggestion that the Senate's power to render "advice" translates into a presidential duty to secure permission entails serious structural deficiencies. The permission hypothesis suggests that the Senate could disable negotiating by stonewalling—paralyzing the President's supposed advantage of initiative.<sup>140</sup> This interpretation of advice would also make it the functional equivalent of consent, though Bestor and others hew to the conventional view that consent per se (including the two-thirds requirement) refers solely to the Senate's decision concerning a fully negotiated treaty. Therefore, the permission hypothesis should persuade us only if we find supporting evidence elsewhere.

2. *Understanding at the Founding.* Indicia of the original understanding may help us understand what the constitutional text leaves unclear. If we follow Madison's counsel that the best guides are "the evils which were to be cured or the benefits to be obtained,"<sup>141</sup> further doubt is cast on the notion that the Senate's permission is required before the President assumes responsibility for negotiating with foreign nations.

a. *The formal evolution from the Articles.* The changed structure of American treaty-making, by itself, makes a compelling case against the permission hypothesis and in favor of the President's dormant power. Under the Articles of Confederation, Congress was the repository for all national authority, and had the exclusive authority to send and receive ambassadors and to enter into treaties and alliances.<sup>142</sup> Congress could appoint a quasi-executive "Committee of the States" to manage certain national affairs during its recesses, but it could not delegate any committee

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139. THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

140. See *infra* text accompanying notes 203-05. The result would differ considerably from stonewalling during the consent process, when the public at least would be given an opportunity to judge the merits of the negotiated treaty. The analogous risk posed by executive-oriented interpretations, of course, is that the President might disable advice-rendering by concealing the fact of a negotiation until it has been concluded. See Sklamberg, *supra* note 124, at 473-74 (proposing a presidential obligation to satisfy Senate requests for information concerning policy goals to be pursued). There, however, the Senate is not equally defenseless, since it still has the recourse of rendering advice afterward (and, more importantly, of withholding consent).

141. See Letter from James Madison to Joseph Cabell (Oct. 30, 1828) (Madison's annotations), in 9 THE WRITINGS OF JAMES MADISON 323 n.4 (Gaillard Hunt ed., 1910) [hereinafter MADISON WRITINGS].

142. See ARTICLES OF CONFEDERATION arts. VI (restricting the authority of the states), IX (detailing congressional authority); *infra* notes 251-55 and accompanying text (discussing the division of authority under the Articles on treaty-related powers).

matters requiring approval by a supermajority of nine states, such as the entry into treaties and alliances.<sup>143</sup> When actually created for what proved to be a brief period in 1784, the Committee was specifically precluded from “transact[ing] business” with foreign ministers “unless authorized thereto by particular acts of Congress.”<sup>144</sup> Congress seems to have delegated no more authority to its presidents<sup>145</sup> or to the succession of committees established to address foreign affairs during its sessions.<sup>146</sup>

Against this background, the creation of the presidency, and the vesting in that President of the power to make treaties, is clearly significant. The Treaty Clause involved the President in matters that the Articles of Confederation confined to a legislative supermajority. And unlike the Committee of the States as finally constituted—let alone the various congressional committees assigned to foreign affairs—the Constitution did not expressly require that the President refrain from acting without prior specific authorization.

None of this was elaborated upon during the Convention. The delegates began with a narrow view of the presidential role,<sup>147</sup> and there was

143. See ARTICLES OF CONFEDERATION art. IX, § 5.

144. 27 JOURNALS OF THE CONTINENTAL CONGRESS 476-77 (1904-1937 ed.) (May 29, 1784) [hereinafter JCC], available in <<http://lcweb2.loc.gov/ammem/amlaw/lwjc.html>>. As a result, the Committee served as “little more than a message center.” Bestor, *Respective Roles*, *supra* note 132, at 52. According to Richard Morris, the Committee’s “ineffective efforts constitute one of the most dismal chapters in the history of the Congress.” RICHARD B. MORRIS, *THE FORGING OF THE UNION 1781-1789*, at 97 (1987) [hereinafter MORRIS, *FORGING*]; accord FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 153* (1973); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1772 n.260, (1996).

145. See MORRIS, *FORGING*, *supra* note 144, at 99-108.

146. The Committee of Correspondence was renamed the Committee of Secret Correspondence, and later became the Committee for Foreign Affairs, before being replaced by the Department of Foreign Affairs in 1781. See EDMUND CODY BURNETT, *THE CONTINENTAL CONGRESS 118* (1941); H. JAMES HENDERSON, *PARTY POLITICS IN THE CONTINENTAL CONGRESS 270* (1974); MORRIS, *FORGING*, *supra* note 144, at 95. Congress gave little or no authority to its committees, including those for foreign affairs. See 1 BRADFORD PERKINS, *THE CREATION OF A REPUBLIC EMPIRE, 1776-1865*, at 54-55 (1993); JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 196* (1979); Bestor, *Respective Roles*, *supra* note 132, at 52-60; Calvin C. Jillson & Rick K. Wilson, *A Social Choice Model of Politics: Insights into the Demise of the U.S. Continental Congress*, 12 LEGIS. STUD. Q. 5, 9-10 (1987); see also MARKS, *supra* note 144, at 152-53 (noting the difficulties caused by overlapping committees). *But see* GAILLARD HUNT, *THE DEPARTMENT OF STATE OF THE UNITED STATES: ITS HISTORY AND FUNCTIONS 53* (1914) (claiming the gradual development of “a real foreign office”).

147. In a debate on June 1, for example, the delegates exhibited concern that the Virginia Plan’s proposal to give the executive “Executive rights vested in Congress by the Confederation,” 1 FAR-RAND’S RECORDS, *supra* note 138, at 21 (Madison’s notes) (Resolution 7), might contain the more legislative powers of making war and peace, and the delegates thus struck that portion of the proposal. See Bestor, *Advice*, *supra* note 132, at 720-22; Bestor, *Respective Roles*, *supra* note 132, at 79-81; Bestor, *Separation of Powers*, *supra* note 132, at 575-76.

little mention of a treaty-making role for the President (or, for that matter, for the Senate) through most of the Convention.<sup>148</sup> The first harbinger may have been James Madison's remark on August 23 that because the Senate "represented the States alone," and for "other obvious reasons," "the President should be an agent in Treaties"—thus "[a]llowing the President & Senate to make Treaties."<sup>149</sup> Contemporaneous discussion highlighted the traditional role the Senate was expected to assume in instructing American envoys.<sup>150</sup> With little further consideration, the treaty power was transformed in committee into something nearly identical to its final version<sup>151</sup>—and was ultimately approved without significant controversy.<sup>152</sup>

Citing Madison's remarks,<sup>153</sup> a failed amendment,<sup>154</sup> and the contrasting development of the Appointments Clause,<sup>155</sup> Professor Bestor argues

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148. See Bestor, *Advice*, *supra* note 132, at 719. In June, Alexander Hamilton proposed, in language quite similar to that ultimately adopted, that a chief executive was "to have with the advice and approbation of the Senate the power of making all treaties." 1 FARRAND'S RECORDS, *supra* note 138, at 292 (Madison's notes) (Article 4); *accord id.* (Article 6) (granting to the Senate "the power of advising and approving all Treaties"). Bestor notes that Hamilton did not offer his plan as a "proposition" because he "frankly conceded that neither the delegates nor the people 'out of doors' were ready to adopt such a plan," that no vote was taken, and that subsequent consideration was minimal. Bestor concludes that this amounts, "*in itself*, to a refutation of the view that the framers were determined to create a powerful presidency for the purpose of giving it primary responsibility for foreign affairs." Bestor, *Separation of Powers*, *supra* note 132, at 590-91 (emphasis added). This seems hasty. Many proposals were made and abandoned in the course of the Convention, or at least abandoned so far as the records reflect. In the case at hand, the issue of the executive's authority for at least some of the matters proposed by Hamilton was simply left to the Committee of Detail (as Bestor acknowledges in a note), not dismissed out of hand (as Bestor intimates). See *id.* at 590 & n.231. Furthermore, Hamilton's tentativeness in presenting his non-"proposition" was professedly due to his desire to refine his proposals and present them at a more opportune point. See 2 FARRAND'S RECORDS, *supra* note 138, at 291 (Madison's notes). Hamilton asserted that the populace would "[a]t present" adopt *neither* his plan nor Randolph's plan, but that eventually they would "be ready to go as far at least as he proposes." *Id.*

149. 2 FARRAND'S RECORDS, *supra* note 138, at 392, 394 (Madison's notes).

150. See *id.* at 392-94 (concerning debate on whether requiring Senate ratification would harm American diplomatic effectiveness).

151. The Treaty Clause was referred to the Committee of Detail, see *id.* at 394, and then to the Committee of Postponed Parts (sometimes known as the Brearley Committee), see *id.* at 473, which reported back on September 4 with a clause providing that "[t]he President by and with the advice and Consent of the Senate, shall have power to make Treaties . . . [b]ut no Treaty shall be made without the consent of two thirds of the members present," *id.* at 498-99.

152. Bestor notes that in the course of debate over the Senate's powers relating to elections and appointments, James Wilson and Gouverneur Morris both adverted to the Senate's power "to make Treaties," as did Gouverneur Morris. See Bestor, *Respective Roles*, *supra* note 132, at 121-23. Bestor concludes from Wilson's remarks that the addition of the President to the Treaty Clause "did not give that officer an independent, let alone a dominant, role in treaty-making," while Morris's remark (and Madison's failure to intercede) are read as indicating that the revised Treaty Clause "did not significantly increase the President's involvement." *Id.* It is hard to attribute such significance to these stray remarks, or to the failure to correct them in the course of debating another issue, and the variant conclusions Bestor draws from them are striking.

153. See Bestor, *Respective Roles*, *supra* note 132, at 109 (arguing that Madison "was not propos-

that the authors of the Treaty Clause “assumed it was a legislative responsibility to determine the objectives of any contemplated treaty negotiation.”<sup>156</sup> By his reading, that responsibility mandated legislative intervention at some point early in any treaty negotiation.<sup>157</sup> The argument relies largely on the lack of fuss during the Treaty Clause’s drafting. To Bestor and others, “[t]he absence of controversy on the matter is almost conclusive proof that no radical change from previously established practices was contemplated or apprehended.”<sup>158</sup>

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ing a wholesale transfer of foreign-policy making from legislative to executive hands”); Bestor, *Separation of Powers*, *supra* note 132, at 635. For Madison’s remarks, see 2 FARRAND’S RECORDS, *supra* note 138, at 382-83 (Journal); *id.* at 392 (Madison’s notes).

154. Madison proposed that treaties of peace be exempted from the two-thirds rule, then suggested that such treaties require only consent by two-thirds of the Senate “without the concurrence of the President,” who might be too enamored of wartime authority. See 2 FARRAND’S RECORDS, *supra* note 138, at 540 (Madison’s notes). To Bestor, Madison must have assumed “that the Senate would possess the authority and the means to force the continuance of treaty negotiations along lines which the President opposed, and to take up for ratification a treaty that he refused to recommend.” Bestor, *Respective Roles*, *supra* note 132, at 129; accord Bestor, *Separation of Powers*, *supra* note 132, at 653-55. That interpretation is not inevitable—Madison may have imagined a President changing his mind, receiving a disappointing accord from his agents, or succeeding to a treaty negotiated by his predecessor. Witness, for example, Jay’s later treaty with Great Britain, which Washington sat on for four months before forwarding to Congress. See Gaillard Hunt, *Introduction to SAMUEL FLAGG BEMIS, JAY’S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* xiii (1962).

155. The Treaty Clause, unlike the nominating power, does not confer upon the President “any exclusive right to propose the course of action to be taken in foreign affairs,” nor “preclude[] the Senate from giving formal advice before the beginning or during the progress of any treaty negotiation.” Bestor, *Respective Roles*, *supra* note 132, at 117.

156. *Id.* at 118.

157. See *id.* Bestor contends that, under the Treaty Clause,

[p]olicy matters were to be considered, at the beginning as well as at the end of negotiations, by some kind of legislative body, in active collaboration with whatever executive officer might be charged with carrying through or superintending the face-to-face bargaining with other foreign ministers. Though the executive might be called upon to formulate the required instructions to diplomatic agents, the legislative body would still be called upon to approve the formulation, thereby giving “advice” in a formal mode.

*Id.*

158. *Id.* at 101. Again, Bestor is simply the most thorough expositor of this position. See HENRY MERRITT WRISTON, *EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS* 50 (1929); Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 11 (1972); William Whitwell Dewhurst, *Does the Constitution Make the President Sole Negotiator of Treaties?*, 30 YALE L.J. 478, 483 (1921); Lofgren, *War Powers*, *supra* note 132, at 255. The point is put more tentatively by Professor Rakove, who concludes that

[n]othing in this debate suggests that the framers viewed the president as the principal and independent author of foreign policy, or that they would have reduced the advice and consent required of the Senate to the formal approval of treaties negotiated solely at the initiative and discretion of the executive.

JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 266-67 (1996).

The methodological objections to this reasoning are powerful. Assuming the Convention records have evidentiary significance,<sup>159</sup> it stretches them rather far to claim that their omissions positively demonstrate a shared point of view. Delegates may have already accepted a more expansive presidential role before actively considering the Treaty Clause,<sup>160</sup> perhaps within the Committee on Postponed Parts.<sup>161</sup>

Moreover, even if the Convention did not sing the virtues of presidential diplomacy, there are indications that the delegates desired to temper the Senate.<sup>162</sup> The evident concern for maintaining the political independence

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159. As has been widely observed, the fact that such records were kept secret speaks volumes about the practical impact of the views expressed on ratification, as well as about the expectations of the participants. Hamilton was among those rejecting the relevance of decisions made at the convention. See Alexander Hamilton, Opinion of the Constitutionality of an Act to Establish a National Bank (1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett ed., 1965) [hereinafter HAMILTON PAPERS]. James Madison opined that state conventions were a better guide. See James Madison, Speech on the Jay Treaty (April 6, 1796), in 6 MADISON WRITINGS, *supra* note 141, at 263, 272. *But see infra* note 169 (noting the frailties in state convention records). For modern expressions of skepticism as to the value of convention records, see, for example, RAKOVE, *supra* note 158, at 16-18 (suggesting that records of the ratification debates are superior to those of the Convention); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513, 1531-42 (1987) (“[T]he records of the Constitution’s framing and ratification vary wildly in their reliability . . .”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903-04 (1985) (arguing that the Framers expected that future interpreters would rely on the intrinsic language of the Constitution, not extra-textual records). *But cf.* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 139 (1996) (“The Constitutional Convention is surely among the best places to begin an examination of original understanding.”).

160. See Rakove, *supra* note 129, at 246.

161. The President’s role materialized in the Committee, which left no record of its proceedings. But subsequent discussions in the South Carolina assembly provide some insight into its deliberations. General Charles Cotesworth Pinckney, who had been a delegate to the Convention (but not a Committee member), in seconding a point made by Major Pierce Butler (who *had* served on the Committee), confirmed that, after a wide-ranging debate, the Committee “agreed to give the President a power of proposing treaties, as he was the ostensible head of the Union, and to vest the Senate (where each state had an equal voice) with the power of agreeing or disagreeing to the terms proposed”—in part, apparently, to avoid vesting the Senate with both the impeachment power and the responsibility for treaties. 4 ELLIOT’S DEBATES 263-65 (Burt Franklin ed., 1968) (1888). It cannot be known whether these comments accurately reflected the prevailing views in the committee. See Jack N. Rakove, *Making Foreign Policy—The View from 1787*, in FOREIGN POLICY AND THE CONSTITUTION 1, 9-10 (Robert A. Goldwin & Robert A. Licht eds., 1990); Rakove, *supra* note 129, at 242-43. The point remains, however, that whatever meaning(s) the Committee attached to the Treaty Clause, it may have been thoroughly discussed, and hotly contested, in proceedings not reflected in surviving records.

162. See *supra* text accompanying note 149 (discussing Madison’s August 23 remarks). The same concern for establishing a check on the Senate and the states was reflected in Gouverneur Morris’s failed amendment, which would have made Senate-negotiated treaties binding only on approval by both the House and Senate. See 2 FARRAND’S RECORDS, *supra* note 138, at 382-83 (Madison’s notes) (“The Senate shall have power to treat with foreign nations, but no Treaty shall be binding on the United States ‘which is not ratified by a Law.’”); Rakove, *supra* note 129, at 240-41. Contrary to Bestor, see Bestor, *Respective Roles*, *supra* note 132, at 109, 110; Bestor, *Separation of Powers*, *supra* note 132, at 635-36, their concern was precisely that Senate control of treaties would *too* closely resemble the state-

of the President from the Senate also suggests a strong role for the President in their shared undertakings. On balance, as Jack Rakove notes, it is difficult to read the Convention proceedings and conclude that the President was added to the Treaty Clause “simply to serve as the agent of the Senate or to avoid violating the principle of the unitary executive.”<sup>163</sup> Indeed, precisely contrary to any presumption of continuity, the President seems to have been added to the mix largely because leaving treaties to the Senate alone would too closely resemble the ineffective treaty regime administered by the Continental Congress.

*b. Pre-constitutional experience and its diagnosis.* As discussed further below, some of the most common complaints against the pre-constitutional conduct of foreign affairs focused on state interference with federal treaty policy—not only their refusal to abide by completed treaties, but also the dissipation of American bargaining leverage through independent state foreign policies.<sup>164</sup> There were also failings in the operation of the national legislature, but these too could largely be traced to the influence of the federal system. Dependent upon state concessions, the Continental Congress was deprived of significant regulatory authority over trade matters, as well as a stable income. The legislature’s operation was also impaired by the inevitable parochialism of its delegates; the members increasingly agreed on the need for centralization, but the persistent regional divisions contributed to delay and outright inaction on important foreign policy matters.<sup>165</sup> As Professor Rakove has concluded, “[n]othing contributed more directly to the calling of the Constitutional Convention than the conviction that Congress was no longer capable of managing external affairs in a satisfactory manner.”<sup>166</sup>

The potentially disastrous delays attending the peace with Great Britain were a clear and embarrassing signal that post-Revolution America would find it difficult to maintain a united front.<sup>167</sup> But the contemporary

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driven mechanism of the old Congress, *see infra* text accompanying notes 187-93.

163. Rakove, *supra* note 129, at 250.

164. *See infra* text accompanying notes 261-302.

165. *See* MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 399-421 (1950); *see also* Frederick W. Marks III, *Power, Pride, and Purse: Diplomatic Origins of the Constitution*, 11 *DIPLOMATIC HIST.* 303, 303-04, 308 (1987) (suggesting that Jensen and other historians routinely underestimated the role of foreign relations difficulties in spurring constitutional reform).

166. Rakove, *supra* note 129, at 268; *accord* REGINALD HORSMAN, *THE DIPLOMACY OF THE NEW REPUBLIC, 1776-1815*, at 23-24 (1985) (describing congressional ineptness in foreign relations); *cf.* ROSSITER, *supra* note 137, at 50 (noting sympathetically that “the years between 1774 and 1789 should be judged as a period of useful (if also nearly fatal) experiment rather than of inglorious folly”).

167. Professor Rakove notes:

episode that loomed largest at the Convention concerned the unsettled rights to navigate the Mississippi River—an issue the Framers tried to resolve through the two-thirds rule for Senate consent,<sup>168</sup> but which nonetheless threatened the Constitution's ratification in Virginia and helped scotch it in North Carolina.<sup>169</sup> By the time of the Convention, the United States

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In 1779, Congress had needed seven months to set its peace terms, even though [the French] had continually pressed for prompt action. For those members of Congress who believed that the premier object of American foreign policy was the preservation of a warm alliance with France, this deadlock had loomed as a threat to the nation's security as well as an embarrassing example of habitual congressional indecision.

Rakove, *supra* note 129, at 275; *see also* ROSSITER, *supra* note 137, at 50 (citing as emblematic the fact that the completed Treaty of Paris, "almost a 'steal' for the United States, lay unratified [for nearly two months] before a Congress that could not muster the nine state delegations necessary for approval"). *See generally* HORSMAN, *supra* note 166, at 23-24 (citing routine delay and inaction and concluding that "in the years from 1783 to 1789 Congress was to be inept in its conduct of foreign policy").

Given the Continental Congress's obvious liabilities, and Jay's departure from its instructions in negotiating peace with the British, the conclusion of Professors Ackerman and Golove that Congress "had managed foreign relations with considerable skill"—and their citation of the peace treaty as a leading example—begs elaboration. *See* Ackerman & Golove, *supra* note 121, at 808; *see also* Bestor, *Separation of Powers*, *supra* note 132, at 563-65 (describing the successes of the Continental Congress).

168. *See, e.g.*, SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 80 (1936); Eli Merritt, *Sectional Conflict and Secret Compromise: The Mississippi River Question and the United States Constitution*, 35 AM. J. LEGAL HIST. 117, 162 (1991); Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 271-72 (1934); *cf.* Lofgren, *supra* note 132, at 254; Rakove, *supra* note 129, at 274-75. Even those in favor of tempering the two-thirds requirement spoke of vindicating U.S. interests on the issue. Gouverneur Morris, for example, wanted to exempt treaties of peace so as to make it easier to wage war on "account of the Fisheries or the Mississippi, the two great objects of the Union." *See* 2 FARRAND'S RECORDS, *supra* note 138, at 548 (Madison's notes).

169. It is dangerous to rely on the state convention records, particularly Virginia's, for anything definitive. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 23-24 (1986). But the records indisputably show the prominence of the navigation issue, of which there is abundant confirmation elsewhere. *See, e.g.*, Warren, *supra* note 168, at 297 (estimating, through a page count, that the Mississippi issue consumed one-tenth of the Virginia convention); Letter of John Marshall to Arthur Lee (Mar. 5, 1787), in 1 PAPERS OF JOHN MARSHALL 205, 206 (Herbert A. Johnson et al. eds., 1974) (citing Patrick Henry's declaration of March 1787 that "he would rather part with the confederation than relinquish the navigation of the Mississippi"); *infra* notes 174, 178, 187 (citing authorities). Both conventions also had tangible results. The Virginia convention, reacting to what John Dawson termed "a diabolical attempt . . . to surrender the navigation of a river," 10 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1493 (John P. Kaminski et al. eds., 1993) [hereinafter DOCUMENTARY HISTORY], recommended to the first new Congress that it consider an amendment providing in relevant respect that "no treaty, ceding, contracting, restraining or suspending" rights in "navigating the American rivers, shall be made, but in cases of the most urgent and extreme necessity, nor shall any such treaty be ratified without concurrence of three fourths of the whole number of the Members of both Houses respectively." *Id.* at 1554. North Carolina proposed a substantively identical amendment. Both were considered and rejected by the Senate on September 8, 1789. *See* Warren, *supra* note 168, at 299-300. The Mississippi dispute also played a role in generating opposition in Kentucky and Tennessee. *See, e.g.*, JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 1781-1788*, at 245 (1961); Jon Kukla, *Yes! No! And If . . . Federalists, Antifederalists, and Virginia's "Federalists Who are For Amendments"*, in

had attempted for nearly a decade to secure a guarantee of navigation rights from Spain.<sup>170</sup> With the exception of one period when the United States was desperately seeking Spain's assistance against Great Britain, American negotiator John Jay's orders had instructed him to insist on the American right to free navigation.<sup>171</sup> But negotiations went nowhere. Hemmed in, Jay requested that a secret committee be appointed "with power to instruct and direct me on every point and Subject relative to the proposed treaty with Spain."<sup>172</sup> Called instead before the full assembly, he proposed that the United States seek advantageous commercial terms with Spain by agreeing to forbear navigation on the Mississippi for a period of twenty-five or thirty years.<sup>173</sup>

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ANTIFEDERALISM: THE LEGACY OF GEORGE MASON 43, 49 (Josephine F. Pacheco ed., 1992).

170. For excellent historical summaries, see Michael Allen, *The Mississippi River Debate, 1785-1787*, 36 TENN. HIST. Q. 447 (1977); Editor's Note: The Debate in the Virginia Convention on the Navigation of the Mississippi River, 12-13 June 1788, in 10 DOCUMENTARY HISTORY, *supra* note 169, at 1179. For thorough discussions of the legal import, see Merritt, *supra* note 168, and Warren, *supra* note 168.

171. Jay's original instructions in 1779 required that he insist on unfettered American navigation rights. See Instructions from Congress to Jay (Oct. 4, 1780), in 1 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 434, 435 (Henry P. Johnston ed., 1890) [hereinafter JAY PAPERS]. In 1781, Congress instructed John Jay to concede those rights if absolutely necessary to secure Spanish assistance, see 19 JCC, *supra* note 144, at 151-54 (Feb. 15, 1781), and though the gambit proved unsuccessful, Congress let those instructions linger long after the exigencies ceased. See Editor's Note: The Debate in the Virginia Convention on the Navigation of the Mississippi River, 12-13 June 1788, in 10 DOCUMENTARY HISTORY, *supra* note 169, at 1180-81. In 1784, Congress reverted to its prior instructions, see 27 JCC, *supra* note 144, at 529-30 (June 3, 1784), even as Spain upped the ante by closing the lower Mississippi to Americans. See HORSMAN, *supra* note 166, at 35. Congress reiterated those instructions to Jay, now Secretary for Foreign Affairs, when Spain rekindled negotiations in 1785. See 29 JCC, *supra* note 144, at 658 (Aug. 25, 1785). Jay was told "particularly to stipulate the right of the United States to their territorial bounds, and the free Navigation of the Mississippi, from the source to the Ocean, as established in their Treaties with Great Britain," and reminded to "neither conclude nor sign any treaty, compact or convention, with the said Encargado de Negocios, until he hath previously communicated it to Congress, and received their approbation." *Id.*

The United States argued that it had inherited, via revolt, the navigation rights Great Britain had established with France under the Treaty of Paris of 1763. See 18 JCC, *supra* note 144, at 935-47 (Oct. 17, 1780) (final version of instructions to Jay); Draft of Letter to John Jay, Explaining His Instructions (Oct. 17, 1780), in 2 PAPERS OF JAMES MADISON 127, 127-35 (William T. Hutchinson & William M.E. Rachal eds., 1962) [hereinafter MADISON PAPERS]. The merits of this claim were far from certain; the Treaty of Peace of 1783 subsequently attempted to claim free navigation for both Great Britain and the United States, but by then Great Britain had complicated matters by returning Florida to Spain. Nevertheless, U.S. negotiators steadfastly maintained that Spain would merely be recognizing preexisting U.S. rights. See EDWARD S. CORWIN, FRENCH POLICY AND THE AMERICAN ALLIANCE OF 1778, at 229-32, 281-83 (1916) (discussing pre-1783 American claims); ARTHUR PRESTON WHITAKER, THE SPANISH-AMERICAN FRONTIER: 1783-1795, at 9-13 (Bison Book 1969) (1927) (discussing post-1783 claims).

172. Letter of John Jay to the President of Congress (May 29, 1786), in 30 JCC, *supra* note 144, at 323 (May 31, 1786).

173. See 31 JCC, *supra* note 144, at 480 (Aug. 3, 1786). Jay submitted a more substantial report

In the resulting furor,<sup>174</sup> Congress voted 7-5, on strictly sectional lines, to withdraw the portion of Jay's instructions prohibiting negotiation on Mississippi-related matters.<sup>175</sup> Charles Pinckney protested that the new instructions were unconstitutional, since they had drawn less than the nine states necessary under the Articles to assent to treaties (and less than the nine states that had authorized the original instructions).<sup>176</sup> Though Pinckney and his allies were unsuccessful, his accompanying message was unmistakable: Congress might ordinarily feel obliged to approve treaties consistent with its instructions, but not if the instructions were approved or amended by a mere seven states.<sup>177</sup> Jay was formally left free to sacrifice the Mississippi until the fall of 1788,<sup>178</sup> but it is clear that any such treaty would have failed in Congress.<sup>179</sup> Jay eventually reported that Congress's

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later that month. *See id.* at 537-52 (Aug. 22, 1786) (reprinting report of Aug. 17, 1786).

174. "A bomb tossed into the hall of Congress and about to explode would scarcely have produced greater consternation." BURNETT, *supra* note 146, at 655. Madison, writing to Jefferson shortly afterward, considered Jay's proposal unlikely to succeed, but he worried that "an unsuccessful attempt by six or seven [states] will favor the views of Spain and be fatal I fear to an augmentation of the federal authority." Letter of Madison to Jefferson (Aug. 12, 1786), in 9 MADISON PAPERS, *supra* note 171, at 93, 96-97. He echoed these concerns in a letter to his father later that year. *See* Letter of Madison to James Madison, Sr. (Nov. 1, 1786), in 9 MADISON PAPERS, *supra* note 171, at 153-54.

175. *See* 31 JCC, *supra* note 144, at 574-96 (Aug. 29, 1786).

176. *See id.* at 597 (Aug. 30, 1786).

177. *See id.* at 598, 598-600. Pinckney had earlier delivered a substantial speech on the merits of the Mississippi question, in response to Jay's remarks before Congress. *See* Notes on Debates in the Continental Congress: Pinckney's Speech, in 31 JCC, *supra* note 144, at 933-48.

178. The Virginia legislature, egged on by James Madison, continued to agitate. *See* Resolutions Reaffirming American Rights to Navigate the Mississippi (Nov. 29, 1786) (editorial note), in 9 MADISON PAPERS, *supra* note 171, at 181-82. In Congress, William Pierce successfully moved that Jay be required to report on the state of negotiations. *See* 32 JCC, *supra* note 144, at 147 (Apr. 4, 1787). Soon after, Madison unsuccessfully moved to transfer negotiations with Spain to Madrid, where they would fall to Thomas Jefferson, the Minister at the Court of France. *See* Resolution to Transfer Negotiations with Spain to Madrid (Apr. 18, 1787), in 9 MADISON PAPERS, *supra* note 171, at 388; Notes on Debates (Apr. 18, 1787), in 9 MADISON PAPERS, *supra* note 171, at 389-90. And, on April 25, Madison moved that Jay be informed, in essence, as to the legal nullity of the seven-state instruction. *See* Notes on Debates (Apr. 25, 1787), in 9 MADISON PAPERS, *supra* note 171, at 404. But these matters stood until September 1788, when Congress restated its dedication to maintaining free navigation and referred the matter to the government taking office under the new Constitution. *See* 34 JCC, *supra* note 144, at 530-35 (Sept. 16, 1788).

179. *See, e.g.,* HENDERSON, *supra* note 146, at 396 ("It was understood by all that, barring a radical change of attitude in the South, the proposed treaty could never be consummated."). Even Madison accepted that a treaty was unlikely. *See* Letter from Madison to Jefferson (Mar. 19, 1787), in 3 THE EMERGING NATION: A DOCUMENTARY HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES UNDER THE ARTICLES OF CONFEDERATION 1780-89, at 452-53:

The Spanish project sleeps. A perusal of the attempt of seven states to make a new treaty by repealing an essential condition of the old satisfied me that M<sup>r</sup>. Jay's caution would revolt at so irregular a sanction. . . . [I]t appears that the intended sacrifice of the Missisipi [sic] will not be made . . . .

*Accord* Letter from Madison to Jefferson (Aug. 12, 1786), in 3 EMERGING NATION, *supra*, at 258-59

fracture impaired his ability to negotiate with Spain and made it wisest not to conclude a treaty.<sup>180</sup>

For some modern commentators, the Mississippi River episode is thought to have demonstrated to Jay's peers the importance of subordinating diplomatic agents to legislatures—particularly so as to secure minority interests—thus supporting a narrow interpretation of the President's role under the Treaty Clause.<sup>181</sup> Many, indeed, blamed Jay for evading his prior instructions.<sup>182</sup> It seems unlikely, however, that they considered the episode as a caution against executive-led diplomacy: Jay had earlier demonstrated the virtues of defying instructions,<sup>183</sup> and even his own diplomatic career

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(stating that a treaty would likely fail in Congress). His concerns, instead, stemmed principally from the risks posed to the constitutional movement. *See id.* Madison's later efforts to change negotiators and shift the negotiations abroad appear to have been designed largely to keep at a remove discussions that might have imperiled a new Constitution, rather than designed to defend against actual concessions to the Spanish. *See* Merritt, *supra* note 168, at 142-43. Southerners were also concerned that the Mississippi negotiations foreshadowed secession by the commercially minded eastern and middle bloc, giving them independent reason to thwart further attempts at division. *See* HENDERSON, *supra* note 146, at 394-96.

180. *See* Letter from Jay to the President of Congress (Apr. 11, 1787), in 3 JAY PAPERS, *supra* note 144, at 240, 243; 32 JCC, *supra* note 144, at 184, 187-88 (Apr. 13, 1787). Jay's April 12 report, which focused on domestic conflicts between Americans and the Spanish, cautioned "that a Treaty disagreeable to one half of the Nation had better not be made, for it would be violated, and that a War disliked by the other half, would promise but little success, especially under a Government so greatly influenced and affected by popular Opinion." *Id.* at 204.

181. *See, e.g.,* Bestor, *Separation of Powers*, *supra* note 132, at 619 (arguing that the 1786 negotiation crisis left the executive branch with little authority in independently determining the content of foreign treaties).

182. *See, e.g.,* HORSMAN, *supra* note 166, at 36 (claiming that westerners were enraged with Jay because he advocated a treaty hostile to their interests); Allen, *supra* note 170, at 463 (stating that Jay was "denounced" by westerners). Monroe was particularly relentless in circulating accusations. *See, e.g.,* Letter from Monroe to Jefferson (June 16, 1786), in 3 EMERGING NATION, *supra* note 179, at 203 (accusing Jay of "evading his instructions"); Letter from Monroe to Jefferson (July 16, 1786), in 3 EMERGING NATION, *supra* note 179, at 236 (stating his "conviction . . . that Jay ha[d] manag'd this negotiation [sic] dishonestly"). Monroe also led a more public charge against Jay in the Virginia ratifying convention, albeit in a long speech excoriating Congress's treatment of the issue. *See* 10 DOCUMENTARY HISTORY, *supra* note 169, at 1231-35 (statement of Monroe) (criticizing Jay); *id.* at 1236 (statement of William Grayson) (same); *id.* at 1247 (statement of Patrick Henry) (same). *But see id.* at 1240 (statement of Madison) (defending Jay).

183. At Jay's prompting, the American delegates to the Treaty of Paris negotiations had defied instructions that matters be cleared with the French before anything was signed. Jay seems to have been warranted in suspecting that the French (and their American sympathizers in Congress) did not necessarily have America's best interests at heart. *See, e.g.,* RICHARD B. MORRIS, *THE PEACEMAKERS: THE GREAT POWERS AND AMERICAN INDEPENDENCE* 204-05, 208-17 (1965) [hereinafter MORRIS, PEACEMAKERS]; RICHARD B. MORRIS, *WITNESSES AT THE CREATION: HAMILTON, MADISON, JAY, AND THE CONSTITUTION* 85-91 (1985) [hereinafter MORRIS, WITNESSES]; JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 264-74, 321-22 (1979); Rakove, *supra* note 129, at 270-71, 275. Though Jay and the commissioners were subsequently criticized in Congress and by the Secretary for Foreign Affairs, Robert Livingston, they received private demonstrations of support from some of the same persons criticizing them in pub-

was not substantially affected by the Mississippi imbroglio.<sup>184</sup> It is also notable that nothing more specific was done to reduce such risks under the Constitution. Simply requiring the Senate's "advice and consent" addressed none of the South's grievances. Congress's decision in 1786 to relieve Jay of responsibility for clearing every proposed negotiating term before communicating it to Spain seemed equally permissible under the new Constitution. The Senate also remained free to instruct negotiations via a simple majority, a committee, or perhaps even something less.<sup>185</sup> The only hint of a solution to the problem of executive deviation appears outside the Treaty Clause, through the mechanism of impeachment.<sup>186</sup>

In the end, it was impossible to blame Jay without blaming the Congress that had instructed him<sup>187</sup>—and the Senate's resemblance to the Con-

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lic. See MORRIS, PEACEMAKERS, *supra*, at 442-44.

It is difficult even to generalize about Jay's conduct on the Mississippi question. In negotiating with the French, Jay had helped defend America's right to western lands and the Mississippi. See HENDERSON, *supra* note 146, at 302-04, 322-23. Nor could his early negotiations with the Spanish be faulted. Jay advised Congress *against* offering to concede on the Mississippi in order to secure Spanish assistance. See Letter from Jay to the President of Congress (Nov. 6, 1780), in 4 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 112, 148 (Francis Wharton ed., 1889) [hereinafter REVOLUTIONARY DIPLOMATIC CORRESPONDENCE] (advising that "we should endeavor to be as independent on the charity of our friends as on the mercy of our enemies"). Afterward, Jay read the U.S. willingness to make such a cession exceedingly narrowly. See MORRIS, WITNESSES, *supra*, at 81-82. He was commended by Robert Livingston, on behalf of the Congress, for his tactics, see Letter from Robert R. Livingston to Jay (Apr. 16, 1782), in 2 JAY PAPERS, *supra* note 171, at 187, 188, and given increased latitude in his dealings with the Spanish, see Letter from Robert R. Livingston to Jay (Apr. 27, 1782), in 2 JAY PAPERS, *supra* note 171, at 202, 206.

184. As Secretary for Foreign Affairs, a position he held during the later negotiations with the Spanish (and afterwards), Jay earned increased autonomy from congressional control. See JENSEN, *supra* note 165, at 365-66; MORRIS, FORGING, *supra* note 144, at 194-95; HENRY MERRITT WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS 21 (1929). When Jay was later appointed as envoy to Great Britain, Republican opposition focused primarily on other matters, such as the fact that he had not first resigned his position as Chief Justice. See JERALD A. COMBS, THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS 127 (1970); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 394-95 (1993); HAYDEN, *supra* note 135, at 68-70; Letter from Jay to Mrs. Jay (May 12, 1794) (editor's note), in 4 JAY PAPERS, *supra* note 171, at 21 n.1.

185. *But see* Bestor, *Respective Roles*, *supra* note 132, at 117 (arguing that "it is the advice of the Senate as an organized body, not the advice of individual senators (over coffee and doughnuts at the White House, perhaps) which the Constitution calls for").

186. Alexander Hamilton argued that, while principal security in the Treaty Clause consisted of the "JOINT AGENCY" of the President and Senate, the latter might punish a President for misconduct in "deviat[ing] from the instructions of the Senate, or a want of integrity in the conduct of the negotiations committed to him;" he also held out the possibility of punishing "a few leading individuals in the Senate." THE FEDERALIST NO. 66, at 406 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also 2 FARRAND'S RECORDS, *supra* note 137, at 52-54 (Madison's notes) (statement of Gouverneur Morris) (advocating for a strong executive to check the legislature).

187. Jay spent over half of his appointed ambassadorships under explicit instructions to offer navigation rights under the appropriate conditions. As a result, popular criticism was scarcely limited to Jay. See RAKOVE, *supra* note 158, at 255 (suggesting that southern delegates learned both to be wary of ex-

tinental Congress made it seem part of the problem, rather than a solution.<sup>188</sup> Improving legislative operations was complicated,<sup>189</sup> and the advantages of the executive alternative must have been apparent.<sup>190</sup> Discussion at the Constitutional Convention and afterward wrestled with whether a two-thirds rule would protect minority state interests as well as the Articles of Confederation had, but no one seemed to believe that Senate control over the nation's emissaries had actually been *increased* by the Constitution.<sup>191</sup> The result was put most plainly by George Nicholas in the Virginia convention: it was "Congress, under the existing system," that had threatened invasion of navigation rights;<sup>192</sup> the representation of minority interests in the Senate would be no less than in the previous Congress; and finally, in the new system, at least the President would serve as a check.<sup>193</sup>

3. *The New Constitution and the Horizontal Scope of the Treaty Power.* As Nicholas indicated, one advantage of involving the President

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ecutive discretion and to realize "the virtues of executive independence"); WHITAKER, *supra* note 171, at 76-77 (describing Jay as "intimidated by the widespread denunciation of Congress' decision, which, though taken in secret session, soon became public property"); Allen, *supra* note 170, at 463 (describing "the great public outcry . . . over Congress's August 29 reversal of Jay's instructions," as well as "[d]enunciations of Jay pour[ing] in from all over the country"). A circular from Pennsylvanians to the people of Kentucky blamed Jay, but the resulting Kentucky circular omitted mention of Jay and seemingly blamed Congress. See THOMAS MARSHALL GREEN, *THE SPANISH CONSPIRACY* 109-10 (1891).

188. See JACK N. RAKOVE, *DECLARING RIGHTS* 111 (1998) (describing how the August 1787 Convention debates "brought a reaction against the Senate, which many framers saw increasingly as a replica of the Continental Congress (because of the equal vote and its election by the state legislatures). This reaction worked to the advantage of the presidency."); Rakove, *supra* note 129, at 274 (citing a supporter of the two-thirds requirement as "reply[ing] that the Navigation of the Mississippi after what had already happened in Congress was not to be risked in the Hands of a meer [sic] Majority").

189. No one was terribly sure which voting rules would be most effective; in the end, the Convention defeated proposals that would have subjected a treaty to consent by two-thirds of all the members of the Senate, apparently with the help of Virginia's delegates. See 2 FARRAND'S RECORDS, *supra* note 138, at 548-49 (Madison's notes); see also Warren, *supra* note 170, at 295 ("All these efforts were to make it as difficult as possible for any combination of Northern States to ratify a treaty which should bargain away the navigation of the Mississippi."). As previously noted, moreover, making peace treaties more difficult might deter Congress from waging war on behalf of navigation interests. See 2 FARRAND'S RECORDS, *supra* note 138, at 548 (Madison's notes) (statement of Gouverneur Morris).

190. See RAKOVE, *supra* note 158, at 267 (explaining that divisive congressional debates over the Newfoundland and Mississippi instructions allowed the Framers "readily [to] appreciate the diplomatic and political advantages of allowing the president a significant initiative in the conduct of foreign relations"); see also Rakove, *supra* note 129, at 275 (articulating the lessons the Framers may have drawn concerning "the dangers of allowing foreign policy to be made exclusively by a Senate that would bear an unfortunate resemblance to the existing Congress").

191. At the Virginia ratifying convention, critics doubted the adequacy of both the new and the old systems. See 10 DOCUMENTARY HISTORY, *supra* note 172, at 1244 (statement of William Grayson) (June 13, 1788); *id.* at 1246 (statement of Patrick Henry) (June 13, 1788).

192. *Id.* at 1249 (statement of George Nicholas) (June 13, 1788).

193. See *id.* at 1249-52 (statement of George Nicholas) (June 13, 1788).

was to enhance the minority-state check in the Senate. References to the President's value as a check on the Senate abound in the Convention records,<sup>194</sup> period correspondence,<sup>195</sup> pamphlets and articles,<sup>196</sup> and the ratification debates.<sup>197</sup> The Virginia debates saw fit to emphasize the President's role in thwarting any attempt to give away navigation rights.<sup>198</sup>

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194. See, e.g., 2 FARRAND'S RECORDS, *supra* note 138, at 540 (Madison's notes) (citing Rufus King as arguing in opposition to the two-thirds requirement, on the grounds "that as the Executive was here joined in the business, there was a check which did not exist in Congress where The [sic] concurrence of 2/3 was required"); *id.* at 540-41 (stating that Gouverneur Morris asserted the need for the President's inclusion in peace treaties because of the President's status as "the general Guardian of the National interests").

195. In one of his many important letters to George Nicholas, Madison explained that the circumstance most material to be remarked in a comparative examination of the two systems, is the security which the new one affords by making the concurrence of the President necessary to the validity of Treaties. This is an advantage which may be pronounced conclusive. At present the will of a single body can make a Treaty. If the new Government be established no treaty can be made without the joint consent of two distinct and independent wills. The president also being elected in a different mode, and under a different influence from that of the Senate, will be the more apt and the more free to have a will of his own.

Letter from Madison to George Nicholas (May 17, 1788), in 11 MADISON PAPERS, *supra* note 171, at 44, 48.

196. See, e.g., THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing "the additional security which would result from the co-operation of the executive" and the "the joint possession of the power in question, by the President and Senate"); Letter from "Civis" [David Ramsay] to the Citizens of South Carolina (Feb. 4, 1788) (alteration in original), in 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 147, 150 (Bernard Bailyn ed., 1993) [hereinafter DEBATE ON THE CONSTITUTION] ("Neither the senate nor president can make treaties by their separate authority.—They both must concur.—This is more in your favor than the footing on which you now stand."). Even the Anti-Federalists, who were wary (though not uniformly so) of a strong executive, considered the Senate's role in treaty-making to be an even worse aspect of the treaty power, as it "represented for many of them all that was wrong with the Constitution." HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 48 (1981); accord MAIN, *supra* note 169, at 138-39, 141.

197. See RAKOVE, *supra* note 158, at 266-67; Rakove, *supra* note 129, at 246. The best exponent of this view in the ratification debates was James Wilson of Pennsylvania, who defended the Senate against the charge that it would control treaty-making, observing that "[t]he Senate can make no treaties; they can approve of none unless the President . . . lay it before them." 2 DOCUMENTARY HISTORY, *supra* note 169, at 480 (statement of James Wilson) (Dec. 4, 1787); accord *id.* at 491 (statement of James Wilson) (Dec. 4, 1787) ("With regard to their power in forming treaties, they can make none, they are only auxiliaries to the President."); see also 4 ELLIOT'S DEBATES, *supra* note 161, at 119-20 (statement of William Davie) (July 28, 1788) (arguing that the treaty power is divided equally between the President and the Senate).

198. See 9 DOCUMENTARY HISTORY, *supra* note 169, at 1130 (statement of George Nicholas) (June 10, 1788) ("The consent of the President is a very great security."); 10 *id.* at 1241 (statement of Madison) (June 13, 1788) ("[T]he President[] must concur in every treaty which can be made."); *id.* at 1251 (statement of George Nicholas) (June 13, 1788) (refuting Patrick Henry's argument that "the concurrence of the President to the formation of treaties will be no security"). But see *id.* at 1246 (statement of Patrick Henry) (June 13, 1788) ("[T]he President as distinguished from the Senate, is nothing. They will combine and be as one.").

Involving the President, in other words, made it harder to produce unwise treaties.<sup>199</sup>

Inviting the President also improved the American prospects for success in any bargaining that was undertaken. As John Jay ably explained in *The Federalist No. 64*, the President enjoyed clear advantages in negotiation—principally greater “secrecy” and “dispatch” than even the Senate could manage—that would “tend to facilitate the attainment of the objects of the negotiation.”<sup>200</sup> Hamilton argued, as well, that increasing the President’s power would increase his credibility and standing in foreign negotiations, which would in turn inure to the nation’s advantage.<sup>201</sup>

The Senate, it must be stressed, was thought to have advantages of its own—such as in defining, or at least in helping to define, the “objects of the negotiation.”<sup>202</sup> But emphasizing those virtues was perfectly consistent

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199. Cf. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 456-58 (1988) (explaining the role of independent chief negotiators in exercising veto power over international agreements).

200. As Jay elaborated:

Those matters which in negotiations usually require the most secrecy and the most dispatch are those *preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation*. For these the President will find no difficulty to provide; and *should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them*. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.

THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961) (emphases added); *see also* THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (insisting that “decision, secrecy, and dispatch” are compatible with the President as an individual negotiator, but that they are incompatible with “a body so variable and so numerous” as the House or the Senate); 4 ELLIOT’S DEBATES, *supra* note 161, at 119-20 (William Davie) (arguing that negotiations between nations require the “secrecy, design, and despatch” characteristic of the executive). Jay is sometimes misunderstood to have trivialized these advantages by suggesting that they were “not otherwise important in a national view,” THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961), but his suggestion that they were important in achieving the ends of negotiation seems critical. *See id.*

201. *See* THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

202. THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961); *see also* Bestor, *Separation of Powers*, *supra* note 132, at 620-23 (interpreting Jay’s *The Federalist No. 64*); Rakove, *supra* note 129, at 253-54 (same). In general, the Senate was regarded as a more appropriate body for the exercise of those components of the treaty power resembling legislative activities. Responding to the objection that the Treaty Clause improperly intermixed powers, Hamilton argued that the power to make treaties was neither strictly legislative nor executive in nature and that the Constitution properly employed both the Senate and the President:

The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions; while the vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.

THE FEDERALIST NO. 75, at 451 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* Bestor, *Separation of Powers*, *supra* note 132, at 663-65 (interpreting Hamilton’s *The Federalist No. 75*);

with an understanding that involving the President was a significant innovation in the process of advice and consent. Whether advice should be sought was plainly left to the President's judgment,<sup>203</sup> and because the Senate would not always be available for consultation,<sup>204</sup> the President would almost invariably take the initiative in defining certain objects of negotiation. Finally, the fact that the President would take the lead in designating diplomatic agents was scarcely overlooked.<sup>205</sup>

It is critical to recognize, moreover, that the overall diminution in legislative authority was not so significant as to warrant concern or occasion objection. The Mississippi experience had demonstrated that, whatever the procedure for instruction, the Senate's control over treaty approval could ultimately check any diplomatic excesses. What is more, any potential decrease in congressional control over negotiation—its power of “advice”—was offset by its increased autonomy with respect to treaty ratification—its power of “consent.” As the debate over Jay's instructions indicated, Congress might have felt obligated to ratify treaties negotiated in accordance with legislative instructions,<sup>206</sup> but it scarcely felt the same

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Rakove, *supra* note 129, at 254 (noting that “the most striking feature of Hamilton's essay is that he seems almost to strain to justify *any* presidential involvement”). As Bestor assumes, and Rakove explicitly concludes, the views Hamilton expressed as Publius during the process of ratification are more significant than the views he expresses in the Pacificus-Helvidius debates with Madison in 1793. See *infra* text accompanying note 220.

203. See THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961) (“[A]lthough the President must, in forming [treaties], act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.”).

204. See 2 DOCUMENTARY HISTORY, *supra* note 169, at 562 (statement of James Wilson) (Dec. 11, 1787) (asking whether, given the duration and distance involved in bilateral negotiations, Congress would necessarily be in session during an entire negotiation); cf. THE FEDERALIST NO. 84, at 519 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the President's assumption of executive functions meant Congress would no longer incur the expense of sitting year-round and that “[e]ven the management of foreign negotiations will naturally devolve upon him, according to general principles concerted with the Senate, and subject to their final concurrence”).

205. See 2 FARRAND'S RECORDS, *supra* note 138, at 538-40 (Madison's notes). This afforded greater Senate control than Hamilton's earlier proposal, under which the President would have the sole power to appoint “the heads or chief officers of the departments of Finance, War, and Foreign Affairs,” with the Senate involved in the appointment of “all other officers,” specifically including “Ambassadors to foreign Nations.” 1 *id.* at 292.

206. See SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 33 (1904) (“Congress, in which were combined the negotiating and ratifying functions, recognized an obligation to ratify what it had authorized.”). Indeed, the commission of American envoys frequently included solemn promises to foreign sovereigns that Congress would abide by the envoy's signature. For example, Jay was commissioned to negotiate with Spain as

our minister plenipotentiary, [with] full power, general and special, to act in that quality, to confer, agree and conclude . . . a treaty of commerce; and whatever shall be so agreed and concluded for us and in our name, to sign, and thereupon make a treaty of commerce; and to transact every thing that may be necessary for completing, securing and strengthening the same, in as ample form, and with the same effect, as if we were personally present and acted

about treaties negotiated *contrary* to diplomatic instructions.<sup>207</sup> Early in his first term, President Washington asserted to the Senate that U.S. practice now distinguished between negotiation and signature, on the one hand, and ratification, on the other, and he indicated that only the latter would be binding.<sup>208</sup> President Washington's argument—which went unquestioned

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therein; hereby promising, in good faith, that we will accept, ratify, fulfil and execute whatever shall be agreed, concluded and signed by our said minister plenipotentiary; and that we will never act, nor suffer any person to act, contrary to the same, in whole or in part.

15 JCC, *supra* note 144, at 1117 (Sept. 28, 1779); *accord* 29 JCC, *supra* note 144, at 561-562 (July 20, 1785) (commissioning Jay to negotiate with Spain). The American practice does not appear to have been unique. *See id.* at 562-64 (reprinting, in translation, the commission of Don Diego de Gardoqui of Spain).

207. *See supra* text accompanying notes 176-77. Pinckney's proposition was not in fact well settled at that time, *see* 5 MOORE, *supra* note 124, § 743 (collecting authorities), nor was it necessarily well understood in the states, *see* 10 DOCUMENTARY HISTORY, *supra* note 172, at 1236-37 (statement of William Grayson) (purporting to recall the "dilemma of either violating the Constitution by a compliance [by permitting seven states to prevail], or involving us in war by a non-compliance"). It also did not necessarily imply the same liberty where the party instructing the negotiator was simply different than the party responsible for ratification. The Convention touched on this in debating whether the House should have a hand in approving treaties; at least two delegates considered awkward the prospect of having ministers instructed by a different body than would be responsible for ratification, but they did not appear to have contemplated that it would change the legal status of American negotiations. *See* 2 FARRAND'S RECORDS, *supra* note 138, at 392 (Madison's notes) (Nathaniel Gorham); *id.* at 393 (Madison's notes) (William S. Johnson); *id.* at 395 (James McHenry's notes) (Nathaniel Gorham).

The Senate later queried Jay as to whether they were bound, "either by former agreed stipulations, or negotiations entered into by our Minister at the Court of Versailles, to ratify" the Consular Convention with France, which had been negotiated under the Continental Congress. 1 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 7 (July 22, 1789) (1828) [hereinafter SENATE EXECUTIVE JOURNAL]. Jay replied, in essence, that although it was a bad treaty, it conformed with the scheme Congress had proposed and had conveyed through Jefferson to France with a promise to ratify any conforming convention—a promise reiterated in Jefferson's commission—and that approval was therefore indispensable. *See* 33 JCC, *supra* note 144, at 425-26 (July 27, 1787) (Jefferson's commission); 1 SENATE EXECUTIVE JOURNAL, *supra*, at 7-8 (July 27, 1789) (reprinting Jay's letter of July 25, 1789). *See generally* HAYDEN, *supra* note 135, at 6-9 (concluding that both Jay and the Senate felt compelled to approve the treaty as it was negotiated).

208. Washington's letter, which was focused on developing a common understanding of the procedure to be followed in Indian treaties, advised:

It is said to be the general understanding and practice of nations, as a check on the mistakes and indiscretions of ministers or commissioners, not to consider any treaty negotiated and signed by such officers as final and conclusive until ratified by the sovereign or government from whom they derive their powers. This practice has been adopted by the United States respecting their treaties with European nations, and I am inclined to think it would be advisable to observe it in the conduct of our treaties with the Indians; . . . being formed on our part by the agency of subordinate officers, it seems to be both prudent and reasonable that their acts should not be binding on the nation until approved and ratified by the Government. It strikes me that this point should be well considered and settled, so that our national proceedings in this respect may become uniform and be directed by fixed and stable principles.

Letter from Washington to the Senate, *reprinted in* 30 WRITINGS OF GEORGE WASHINGTON 406, 406-07 (John C. Fitzpatrick ed., 1939) [hereinafter WASHINGTON WRITINGS]. The Senate did not directly address the merits of the practices described by Washington, but it did follow his recommendations. *See* CURRIE, THE CONSTITUTION IN CONGRESS, *supra* note 135, at 26-28; HAYDEN, *supra* note 135, at 11-

by the Senate—was more prescient than accurate as a reading of international law,<sup>209</sup> but it was unimpeachable in its understanding of the structural change in the treaty power. Under the Constitution, the U.S. position during negotiation and ratification might differ for perfectly legitimate reasons: if the Senate instructed and dictated the course of negotiations, the President might decline to ratify; if the President were in charge of negotiations, on the other hand, the Senate might signal disagreement when it came time for consent.

The new treaty power, in consequence, liberated the Senate's power of consent by permitting it to judge the merits of completed treaties with a relatively fresh eye.<sup>210</sup> Framers and ratifiers of the Constitution thus could unselfconsciously emphasize the Senate's treaty power without diminishing the new authority conferred on the President. Even in the event that the Senate failed to participate in directing negotiations—whether due to constraints on its authority, a desire not to intervene, or presidential circumvention—its consent power would suffice to derail unwanted presidential initiatives. The premise, then, that presidential authority was inconsistent with claims of Senate authority—or at least should have provoked a greater hue and cry—is fundamentally misguided.<sup>211</sup>

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209. See, e.g., HAYDEN, *supra* note 135, at 153-56 (describing a diplomatic contretemps with Great Britain over the U.S. obligation to ratify an entire treaty). But Washington's view became increasingly prevalent over the course of the nineteenth century. See Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 275-76 n.115 (1983) (citing J. MERVYN JONES, RATIFICATION AND FULL POWERS 12, 74-78 (1949)). Compare *Porto Rico—License to Construct Wharf*, 23 Op. Att'y Gen. 551, 558 (Oct. 17, 1901) (noting President Monroe's position, but explaining that "[n]ow, the general maxim that public conventions do not become obligatory until ratified is firmly established," at least in view of the clear division of the U.S. treaty-making power), with Bruce Stein, Note, *The Framers' Intent and the Early Years of the Republic*, 11 HOFSTRA L. REV. 413, 456 (1982) ("According to international law, the 'monarch cannot, in honor, refuse to ratify a Convention made by a minister with full powers, unless it can be proved that the minister had remarkably and openly deviated from his instructions.'" (quoting W. STULL HOLT, TREATIES DEFEATED BY THE SENATE 26 (1964))).

210. Cf. HAYDEN, *supra* note 135, at 32 (reprinting a resolution pledging ratification that was "of a type adopted several times by the Senate during the early administrations" and observing that "[l]ater Senates did not bind themselves thus in advance, and would have deemed such a promise incompatible with their right to withhold their assent from any provision of a treaty submitted to them").

211. See, e.g., THE FEDERALIST NO. 66, at 402-03 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The Senate, it is observed, is to have concurrent authority with the executive in the formation of treaties and in the appointment to offices . . ."); 2 DOCUMENTARY HISTORY, *supra* note 172, at 563 (statement of James Wilson) (Dec. 11, 1787) ("Neither the President nor the Senate solely can complete a treaty; they are checks upon each other and are so balanced, as to produce security to the people."); 10 *id.* at 1391-92 (statement of Francis Corbin):

[The treaty power] is . . . given to the President and the Senate (who represent the States in their individual capacities) conjointly.—In this it differs from every Government we know.—It steers with admirable dexterity between the two extremes—neither leaving it to the Executive, as in most other Governments, nor to the Legislative, which would too much retard such negotiations.

Early practice was highly consistent with this depiction.<sup>212</sup> President Washington, entrusted by Congress with a new diplomatic relations apparatus,<sup>213</sup> seems to have conscientiously explored means of securing Senate advice,<sup>214</sup> yet he clearly considered himself free to proceed without the

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212. Practices in the Washington administration may illuminate both because of their proximity to 1787 and because of the attention paid by the institutions involved toward the delicate, precedent-setting nature of their relations. See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 232 (1989). This is not to say, however, that the mere existence of a practice determines its constitutionality. See *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."). The further one proceeds, however, the more substantial the objections become to employing post-ratification history. See Ramsey, *Executive Agreements*, *supra* note 108, at 174 & n.171.

213. The creation of the new government's Department of Foreign Affairs in 1789 made clear, for example, that the President was to direct the department's secretary in his duties, which were to be "agreeable to the Constitution" and related to matters such as diplomatic instructions and negotiations with foreign governments. An act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, 1 Stat. 28 (1789). Representative Sedgewick, addressing the issue of the President's removal power, reasoned that "[i]f . . . the Secretary of Foreign Affairs is the mere instrument of the President, one would suppose, on the principle of expediency, this officer should be dependent upon him." 1 ANNALS OF CONG. 522 (Joseph Gales ed., 1789). More generally, this department was among the few not defined in terms of carrying out congressional mandates, thus permitting the President to "determine what should be done, as well as how it should be done." THACH, *supra* note 138, at 160. See generally HUNT, *supra* note 146, at 54-78 (describing the creation of the Department of Foreign Affairs).

214. Much has been made of Washington's personal appearance before the Senate in 1789 in connection with the Treaty with the Creek Indians, when his failure to obtain instantaneous advice and consent on his proposed instructions led him to forswear any further appearance—and marked the last occasion that any President personally sought out the Senate's counsel. See, e.g., CURRIE, THE CONSTITUTION IN CONGRESS, *supra* note 135, at 24-26; *id.* at 24 (concluding that the episode demonstrates a mutual understanding that the Senate's advice and consent includes "discussion in advance of the course of action to be pursued"); HAYDEN, *supra* note 135, at 20-27 (recounting Washington's unsuccessful visit to the Senate). But as Currie recognizes, Washington also sought counsel where it was anything but obligatory, such as in his attempt in 1790 to solicit advice from the Supreme Court. See CURRIE, THE CONSTITUTION IN CONGRESS, *supra* note 135, at 25 n.136. In the case of treaties, Washington had just beforehand indicated uncertainty as to the nature of his constitutional obligation. See Sentiments Expressed to the Senate Committee on the Mode of Communication Between the President and the Senate on Treaties and Nominations (Aug. 8, 1789), in 30 WASHINGTON WRITINGS, *supra* note 208, at 373, 373-74; Sentiments Expressed to the Senate Committee at a Second Conference on the Mode of Communication Between the President and the Senate on Treaties and Nominations (Aug. 10, 1789), in 30 WASHINGTON WRITINGS, *supra* note 208, at 377, 378-79. The Senate's response to both sets of suggestions was wholly concerned with matters of form. See 1 SENATE EXECUTIVE JOURNAL, *supra* note 207, at 19 (Aug. 21, 1789); see also ELKINS & MCKITRICK, *supra* note 184, at 56 (noting the Senate's apparent acquiescence in Washington's treaty with the Southern Indians). At the same time, as Washington had already had cause to guess, the Senate was treating Indian treaties differently, and might thus have regarded his initial consultation with them as constituting the *entirety* of their advice and consent on the matter. See, e.g., Letter from Washington to the Senate (Sept. 17, 1789), in 30 WASHINGTON WRITINGS, *supra* note 208, at 406-08; 1 SENATE EXECUTIVE JOURNAL, *supra* note 207, at 27-28 (Sept. 18, 1789); *id.* at 28 (Sept. 22, 1789); see also CURRIE, THE CONSTITUTION IN CONGRESS, *supra* note 135, at 26-28 (describing the evolution of treaty-making practices with respect to Indian tribes); HAYDEN, *supra* note 135, at 11-16 (same). It is difficult to conclude that President

Senate's permission.<sup>215</sup> The Senate, in keeping with its new constitutional role, felt equally at liberty to withhold consent from any resulting treaty, but it did so on substantive grounds, not based on the President's failure to seek advice beforehand.<sup>216</sup> Notably, the Senate acquiesced in President Washington's decision to take over instructing Jay in his negotiations with the British,<sup>217</sup> and when the sensitive negotiations with Spain were resumed, the Senate was provided with only partial instructions on navigation rights,<sup>218</sup> with the apparent result that Senate ratification was promised only on the matters more specifically detailed.<sup>219</sup> It is surely possible to lean too

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Washington's thinking about the Treaty Clause, or that of the Senate, was fixed in any meaningful sense at the time he appeared before the Senate, as his subsequent change of practice would seem to confirm.

215. On one occasion, the cabinet advised him that consulting the Senate would only tip off the British. See HAYDEN, *supra* note 135, at 37-39; ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 96 (1976). On other occasions, Washington negotiated and concluded Indian treaties without consulting the Senate and without any apparent exigent circumstances. See HAYDEN, *supra* note 135, at 34-37 (discussing a proposed treaty with the Wabash and Illinois Indians).

216. See HAYDEN, *supra* note 135, at 37 ("In no case did the [Senate] take exception to being . . . ignored [by the President before and during his negotiations] . . .").

217. See *id.* at 71; Instructions to Jay as Envoy Extraordinary (May 6, 1794), in 4 JAY PAPERS, *supra* note 171, at 10, 10-21 (transmitting Jay's instructions from the executive branch via Secretary of State Edmund Randolph). The Senate did, however, provide informal counsel. See HAYDEN, *supra* note 135, at 72-73 ("[T]he Senatorial group still exercised a powerful if not a predominant influence" in instructing Jay before he left for England, although their input was passed on through "informal conferences.").

218. After the Senate confirmed the appointment of commissioners, see 1 SENATE EXECUTIVE JOURNAL, *supra* note 207, at 99 (Jan. 24, 1792), Spain expressed the desire to negotiate over commercial matters not described in the President's nomination message. Washington returned to the Senate with proposed instructions on those matters, see *id.* at 106 (Mar. 7, 1792), which the Senate approved, see *id.* at 115 (Mar. 16, 1792). But the instructions sent to the commissioners on the original topics for negotiation—including the infamous question of navigation rights to the Mississippi—were never provided to the Senate. See HAYDEN, *supra* note 135, at 56; see also Report on Negotiations with Spain (Mar. 18, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON 296, 296 (Charles T. Cullen et al. eds., 1990) [hereinafter JEFFERSON PAPERS] (stating that the enclosed instructions from Secretary of State Jefferson to President Washington would be provided to the commissioners appointed to negotiate with Spain, but not stating that they would be provided to the Senate). See generally HAYDEN, *supra* note 135, at 54-57 (describing the appointment of the commissioners and the Senate's role in this treaty-making endeavor). It should be emphasized, however, that the President had pledged to instruct the commissioners as to "the foundation of our rights to navigate the Mississippi, and to hold our southern boundary at the 31st degree of latitude, and that each of these [was] to be a sine qua non" of the treaty. 1 SENATE EXECUTIVE JOURNAL, *supra* note 207, at 107 (Mar. 7, 1792).

219. The President's nomination of the commissioners described the topics for a treaty only in general terms, but pointedly "sav[ed] to the President and Senate their respective rights as to the ratification of the same." *Id.* at 96 (Jan. 11, 1792). The Senate confirmation repeated the proviso. See *id.* at 99 (Jan. 24, 1792). The Senate's subsequent promise to advise and consent to a conforming treaty followed Washington's specific request for advice and consent, albeit with several additions to the treaty proposed by a Senate Committee. See *id.* at 106-09 (Mar. 7, 1792) (documenting Washington's request and the committee's recommended additions); *id.* at 115 (Mar. 16, 1792) (documenting the Senate's two-

heavily on some early assertions of presidential authority—such as Hamilton’s defense of the neutrality proclamation of 1793<sup>220</sup> or John Marshall’s defense of President Adams’ conduct in the Jonathan Robbins incident.<sup>221</sup> But both controversies and more workaday practices shared the premise that the President could at least assume diplomatic authority in the absence of Senate instruction or congressional constraint, and the Treaty Clause was viewed as an important source of this authority.<sup>222</sup>

thirds acceptance of Washington’s March 7 proposal with the incorporated additions proposed by the committee).

220. In any event, the exchange between Hamilton and Madison regarding President Washington’s proclamation reveals little about either writer’s view concerning the Senate’s advice function. *See, e.g.*, Powell, *The Founders*, *supra* note 128, at 1476 n.13 (“[I]t is unclear what weight to give [the exchange] as expressions of the authors’ constitutional views.”).

221. Pursuant to a provision of the Jay Treaty, President Adams directed the delivery to the British Consul of Jonathan Robbins (a/k/a Thomas Nash), who had been accused of murder during a mutiny aboard a British frigate. Defending President Adams’s decision in Congress, then-Representative John Marshall declared:

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . .

. . . .

The Executive is not only the Constitutional department, but seems to be the proper department to which the power in question [that is, the interpretation and execution of treaty obligations] may most wisely and most safely be confided.

The department, which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration.

10 ANNALS OF CONG. 613-14 (1800). Justice Sutherland emphasized some of the broader aspects of Marshall’s rhetoric. *See* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“The President alone has the power to speak or listen as a representative of the nation . . . . He alone negotiates.”); *see also* *United States v. Pink*, 315 U.S. 203, 229 (1942) (“Power to [settle the claims of U.S. nationals] certainly is a modest implied power of the President who is the ‘sole organ of the federal government in the field of international relations.’” (quoting *Curtiss-Wright Export Corp.*, 299 U.S. at 320)). Yet, others have interpreted it more narrowly—either as consistent with the President’s essentially subordinate responsibilities for communicating with foreign governments and executing treaties, or even as bespeaking the President’s subordination to Congress. *See* GLENNON, *supra* note 46, at 8 (“[T]he truth is that it probably never occurred to John Marshall . . . that the President, acting within the Constitution . . . could disregard this congressional restriction.”); Louis Fisher, *Evolution of Presidential and Congressional Powers in Foreign Affairs*, in CONGRESS, THE PRESIDENCY, AND THE TAIWAN RELATIONS ACT 20 (Louis W. Koenig et al. eds., 1985); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 690 (1998); *see also* Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 351-52 & n.466 (1990) (citing, but disagreeing with, authorities).

222. Marshall, for example, clearly considered that the President’s authority in any particular situation would be augmented in the event of Senate inaction. Thus, he conceded that “Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract [i.e., treaty]; but, till this be done, it seems the duty of the Executive department to execute the contract by any means it possesses.” 10 ANNALS OF CONG. 614 (1800). As Professor Powell observed,

Early practices also began to disclose the negative, or dormant, dimension of the treaty power—that is, the notion that the assignment of treaty functions to the Senate and President entailed the prohibition of practices interfering with these functions. For example, the House’s attempt to obtain documents relating to the negotiation of the Jay Treaty was resisted on the ground that releasing the documents would interfere with the President’s exercise of authority under the Treaty Clause. As President Washington explained, such disclosures would be “extremely impolitic,” potentially endangering future negotiations or causing other harms.<sup>223</sup> But he also clearly claimed that these policy ends were protected by the Constitution, and spoke in almost legalistic terms of avoiding a precedent for future encroachments.<sup>224</sup>

Whatever the incident’s significance for the relative authority of the Senate and President, it clearly demonstrated President Washington’s conviction, with the eventual acquiescence of the House,<sup>225</sup> that other institutions had no right to intrude on the executive’s negotiating authority. The class of prohibited encroachments was not limited to rival attempts to enter

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[t]he most likely interpretation . . . is that [Marshall’s] general assumptions about the constitutional distribution of authority over foreign affairs were similar to those of Jefferson in 1790, Washington’s cabinet in the various events of 1793-94, and many speakers during the 1796 House debates . . . : Whatever authority Congress or the Senate may have to limit or control presidential discretion, the President ordinarily has responsibility for the direction of United States foreign policy and the initiation of diplomatic efforts. As in the 1793 discussions, furthermore, Marshall drew connections between the President’s authority over foreign affairs and his power to direct “the force of the nation.”

Powell, *The Founders*, *supra* note 128, at 1527-28; *see also id.* at 1532 (drawing the conclusion that “one interpretive option in Founding-era constitutionalism was to read the Constitution to accord the President independent authority in the area of foreign affairs”).

223. 5 ANNALS OF CONG. 760 (1796).

224. *See id.* at 760-61; *see also* Letter from Alexander Hamilton to George Washington (Mar. 7, 1796), in 20 HAMILTON PAPERS, *supra* note 159, at 68 (“A discretion in the Executive Department how far and where to comply in such cases is essential to the due conduct of foreign negotiations . . .”).

225. Representative William Smith opined:

The Constitution had assigned to the Executive the business of negotiation with foreign Powers; this House can claim no right by the Constitution to interfere in such negotiations; every movement of the kind must be considered as an attempt to usurp powers not delegated, and will be resisted by the Executive; for a concession would be a surrender of the powers specially delegated to him, and a violation of his trust.

5 ANNALS OF CONG. 440 (1796); *see also id.* at 745 (noting, in favoring disclosure, that “the power claimed by the House was not that of negotiating and proposing Treaties; it was not an active and operative power of making and repealing Treaties; . . . it was only a negative, a restraining power on those subjects over which Congress had the right to legislate”) (Rep. Albert Gallatin). *But cf.* HAYDEN, *supra* note 135, at 51-52 (describing how Washington consciously kept the House and Senate equally informed during his three-year negotiation of the Treaty with Algiers of 1795, in accord with Jefferson’s views about proper conduct with treaties requiring substantial legislation); *id.* at 60-61 (discussing measures by Washington to brief both houses during early negotiations with Great Britain preceding Jay’s appointment).

into binding foreign commitments. Even the President had no such power under the Treaty Clause. His agreement with a foreign power, while not to be casually discarded,<sup>226</sup> did not bind the nation until the Senate had consented and the treaty was ratified.<sup>227</sup> The Treaty Clause did, however, ordinarily contemplate that the President would be entitled to engage in preparatory acts without interference. An 1816 report by the Senate Foreign Relations Committee, which advised against a proposed resolution recommending that the President pursue a treaty with Great Britain on specific terms, asserted that the President's constitutional responsibility as the U.S. representative to foreign nations meant that he "must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success," and that any interference necessarily diminished that responsibility.<sup>228</sup>

Whether or not the Committee's minimalist view of the Senate's role was constitutionally inevitable<sup>229</sup>—and certainly both the Senate and Con-

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226. Thus, Jefferson felt confident in claiming that the President was "the only channel of communication between this country and foreign nations[;] it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right and are bound to consider as the expression of the nation . . ." Letter from Thomas Jefferson to Edmond C. Genet (Nov. 22, 1793), in 9 THE WRITINGS OF THOMAS JEFFERSON 256 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903) [hereinafter JEFFERSON WRITINGS].

227. If the President possessed genuinely unilateral authority, it arose from an extra-textual source independent of the Treaty Clause. For a thorough discussion of the original understanding of the President's ability to enter into executive agreements, see Ramsey, *Executive Agreements*, *supra* note 108, *passim*. The line between the President's authority under the Treaty Clause and his ability to forge sole executive agreements is far from clear, but it would appear that as the latter power grew more certain, the emphasis on making the President choose between the procedures increased. Compare *Frelinghuysen v. Key*, 110 U.S. 63, 75 (1884) (permitting the President, while a treaty was pending before the Senate, to act in accord with the agreement "until the diplomatic negotiations between the two governments on the subject are finally concluded"), with *SEC v. International Swiss Invs. Corp.*, 895 F.2d 1272, 1275-76 (9th Cir. 1990) (concluding that the Inter-American Convention "has no force until ratified by a two-thirds vote of the Senate," at least as against conflicting Federal Rules of Civil Procedure, and given stated presidential intention to treat the Convention as requiring ratification rather than as an executive agreement).

228. See Foreign Relations Comm. Report of Feb. 15, 1816, in 8 COMPILATION OF REPORTS OF THE COMM. ON FOREIGN RELATIONS, UNITED STATES SENATE 1789-1901, S. DOC. NO. 56-231, at 24 (1901).

229. Justice Sutherland took the report's language at face value. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (adopting a lengthy quote from the report's discussion of the President's role as a representative in international relations). Others, however, dispute its relevance. Michael Glennon, for example, construes the Committee's report as referring to "the President's sole power to *communicate*, not the power to do *its* job or that of the Senate or Congress," GLENNON, *supra* note 46, at 24, when in fact the Committee was plainly addressing the broader question of whether it should employ advice to direct foreign relations. Raoul Berger simply gives the report the back of his hand, citing contrary views expressed in an earlier report and a subsequent speech by Rufus King, notwithstanding the fact that the 1816 report demurred to a resolution introduced by King. See Berger, *supra* note 46, at 30-31. For thorough discussions of the report and its implications, see

gress as a whole have deviated on occasion<sup>230</sup>—its assumption that there was presidential authority *not* to enter into foreign engagements was uncontroversial. Even those with reservations about the federal treaty authority at least endorsed the constitutional authority of the President to derail unwise international commitments.<sup>231</sup> Indeed, the treaty power unavoidably invests the President with a variety of means to terminate the national intercourse with a foreign power, even without relying on the more extreme option of derecognition.<sup>232</sup> And there appears to be no precedent for the notion that the Senate or Congress could compel the President to enter into negotiations against his will.<sup>233</sup> That challenge, instead, has come from below.

### *B. The Treaty Power's Relation to State Authority*

Much discussion of the relationship between federal treaty-making authority and state power concerns the limits, if any, on the potential field for federal treaties.<sup>234</sup> Even broader reflections on the relationship between foreign affairs and federalism are inclined toward this focus on the end-game of treaty-making, as with assertions that the federal interest in diplo-

HAYDEN, *supra* note 135, at 199-208; Powell, *The Founders*, *supra* note 128, at 1528-33.

230. See, e.g., CRS, *supra* note 109, at 72-75 (describing nonbinding resolutions and binding legislation authorizing, calling for, or suggesting presidential negotiation on various topics).

231. See *infra* text accompanying note 269 (noting concerns that treaties not be too easily made). An exception may be President Jefferson's comment that the American "system" on treaties "was to have none with any nation, as far as can be avoided," in preference for more informal relations. Letter from Jefferson to Philip Mazzei (July 18, 1804), in 11 JEFFERSON WRITINGS, *supra* note 226, at 38, 38-39. It is not clear whether Jefferson was speaking of a constraint imposed by the Constitution, or a more ephemeral party preference, but his comments do not indicate any indulgence for commitments entered into without federal control.

232. The President has a variety of powers in this area:

It is on [the President's] initiative and responsibility that the treaty-making process is undertaken; he determines what provisions the United States wishes to have embodied in the treaty; he decides whether reservations or amendments that the Senate attaches to a draft treaty are acceptable to him and should be submitted to the other parties to the treaty; and, even if the Senate by two-thirds vote approves a treaty that he has negotiated, he may, influenced by change of heart or of political conditions, decide not to ratify it and at the last minute file it in his wastebasket.

HOLLIS W. BARBER, FOREIGN POLICIES OF THE UNITED STATES 30 (1953). The President may also determine whether to recognize a foreign government as the subject for negotiations, but that authority has not always been respected. See HENKIN, *supra* note 1, at 43-45.

233. Indeed, there is precedent to the contrary. See *Curtiss-Wright*, 299 U.S. at 319 ("Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."); *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652-53 (9th Cir. 1993) (declining to enforce, on constitutional grounds, a statutory requirement that the Secretary of State initiate certain negotiations with foreign countries to achieve protection for sea turtles).

234. For an excellent elaboration and critique of the "nationalist view" of the treaty-making power, which rejects any such limitations, see Bradley, *The Treaty Power*, *supra* note 29.

macy is protected by the exclusive power to enter into binding treaties.<sup>235</sup> But such accounts neglect the degree to which both the Articles of Confederation and the Constitution were concerned with establishing a federal monopoly over the *process* of bargaining with foreign powers, not just its results. State defiance of this monopoly was endemic at the beginning, and was recognized as a threat to the successful negotiation—as well as avoidance—of preemptive federal treaties. Low-level defiance has persisted ever since, but has only recently come to be viewed by some as legitimate, largely because the standard view (or, as Jack Goldsmith puts it, “popular lore”<sup>236</sup>) of state diplomacy as frustrating common ends has been lost.<sup>237</sup>

1. *Text and Structure.* Focusing on the *Missouri v. Holland*<sup>238</sup> problem, Martin Flaherty recently opined that the constitutional clauses granting the federal government “treaty-making and corollary powers . . . are, on their face, as broad or broader as any other such provisions in the document,”<sup>239</sup> and that “[c]onversely, when the text does refer to states in this area, it proclaims the exclusivity of federal power in no uncertain terms.”<sup>240</sup>

Can it be that it was all so simple then? The “Power . . . to make Treaties” is certainly vested in the President, by and with the advice and consent of the Senate;<sup>241</sup> treaties made “under the authority of the United States” are surely part of the supreme law of the land;<sup>242</sup> and states are expressly prohibited from “enter[ing] into any Treaty, Alliance, or Confederation.”<sup>243</sup> But states *may* enter into an “Agreement or Compact” with a foreign power, if so permitted by Congress,<sup>244</sup> and it may be impossible for us to recapture any clear distinction between such agreements and the prohibited treaties, alliances, and confederations.<sup>245</sup> The puzzling result, it has been

235. See Goldsmith, *Federal Courts*, *supra* note 1, at 1643-50, 1707.

236. *Id.* at 1644.

237. Cf. Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1311 (1999) [hereinafter Flaherty, *Are We to Be a Nation?*] (urging recovery of “another reason for the Constitution that most of us learn in high school—that the national government under the Articles of Confederation was hopelessly weak, especially in national affairs”).

238. 252 U.S. 416 (1920).

239. Flaherty, *Are We to Be a Nation?*, *supra* note 237, at 1305.

240. *Id.* at 1306.

241. U.S. CONST. art. II, § 2, cl. 2.

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

243. *Id.* art. I, § 10, cl. 1.

244. *Id.* art. I, § 10, cl. 3.

245. See *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459-63 & n.12 (1978) (“The records of the Constitutional Convention . . . are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause.”). For the sake of convenience, I will

suggested, is that there is no distinction between the preparatory steps that a state may take toward compacts and the federal government's exclusive exercise of treaty-making—each is free, in other words, to negotiate toward its own legitimate ends.<sup>246</sup>

The Convention and ratification debates offer little insight, probably because the Constitution's prohibition on state treaty-making was thought to be derived directly from the Articles of Confederation—a point emphasized by Publius.<sup>247</sup> To Madison, the only differences were that the Constitution was “disembarrassed . . . of an exception under which treaties might be substantially frustrated by regulations of the States,”<sup>248</sup> and that the federal government was expressly given the power to appoint and receive not

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refer to the class of “treaties, alliances, and confederations” as “treaties” and the class of “agreements or compacts” as “compacts,” except where necessary to avoid confusion.

246. See *infra* text accompanying notes 333-58.

247. See THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) (asserting that the power to make treaties and the power to send and receive ambassadors “speak their own propriety. Both of them are comprised in the Articles of Confederation . . . .”); THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961) (“The prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution.”); David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 80-81 (1965) (explaining that the Constitution expanded the prohibition against state treaty-making by eliminating the possibility of congressional consent); Goldsmith, *Federal Courts*, *supra* note 1, at 1644 (“But the foreign relations provisions of Article I, Section 10 were borrowed directly from the Articles of Confederation.”). Joseph Story's account is worth quoting at length:

The prohibition against treaties, alliances, and confederations, constituted a part of the articles of confederation, and was from thence transferred in substance into the constitution. The sound policy, nay, the necessity of it, for the preservation of any national government, is so obvious, as to strike the most careless mind. If every state were at liberty to enter into any treaties, alliances, or confederacies, with any foreign state, it would become utterly subversive of the power confided to the national government on the same subject. Engagements might be entered into by different states, utterly hostile to the interests of neighbouring or distant states; and thus the internal peace and harmony of the Union might be destroyed, or put in jeopardy. A foundation might thus be laid for preferences, and retaliatory systems, which would render the power of taxation, and the regulation of commerce, by the national government, utterly futile. Besides; the intimate dangers to the Union ought not to be overlooked, by thus nourishing within its own bosom a perpetual source of foreign corrupt influence, which, in times of political excitement and war, might be wielded to the destruction of the independence of the country. This, indeed, was deemed, by the authors of the Federalist, too clear to require any illustration. The corresponding clauses in the confederation were still more strong, direct, and exact, in their language and import.

3 STORY, *supra* note 124, § 1349 (footnotes omitted).

248. THE FEDERALIST NO. 42, at 264-65 (James Madison) (Clinton Rossiter ed., 1961). Article IX barred commercial treaties that would restrain the states “from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.” See ARTICLES OF CONFEDERATION art. IX. The “result [was] that . . . Congress could regulate trade by treaty, but could provide no effective check upon conflicting state regulations—a deficiency which would cause Congress, its committees, and later secretaries of foreign affairs considerable embarrassment.” MORRIS, FORGING, *supra* note 144, at 90; see also *infra* text accompanying notes 266-67.

just ambassadors, but also “other public Ministers and Consuls.”<sup>249</sup> Such additions, in his view, were consistent with the notion that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”<sup>250</sup>

To understand the Constitution, then, we must recover the meaning of the Articles of Confederation. Article IX gave the United States the “sole and exclusive right and power . . . of sending and receiving ambassadors [and] entering into treaties and alliances.”<sup>251</sup> Article VI provided in relevant part that “[n]o State without the consent of [Congress] . . . shall send any embassy to, or receive any embassy from, or enter into any conference [sic], agreement, alliance, or treaty with any King prince or state.”<sup>252</sup> Congressional consent was required, in other words, for any state desiring to exercise those rights otherwise entrusted “solely” and “exclusively” to Congress.<sup>253</sup> From the presumptive prohibition—barring state activity unless permission were obtained—one can infer that consent needed to be obtained beforehand.<sup>254</sup> The same provision also required consent for the

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249. U.S. CONST. art. II, § 2, cl. 2.

250. THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961).

251. ARTICLES OF CONFEDERATION art. IX.

252. *Id.* art. VI. I assume for purposes of this discussion that “any King prince or state” has the same scope as the references to “foreign powers” in the Constitution. *See infra* note 499 and accompanying text (discussing state relations with foreign corporations). *But see* Timothy C. Blank, *Significant Development: A Proposed Application of the Compact Clause*, 66 B.U. L. REV. 1067, 1076-78 (1986) (speculating that the Constitution, by referring to compacts with “foreign powers,” expanded the reach of the prohibition on state foreign relations activities articulated in the Articles of Confederation). The Articles lacked any comparable provision for congressional review of interstate compacts, such as those resolving boundary matters, but instead provided a special mechanism for dispute resolution. *See* ARTICLES OF CONFEDERATION art. IX; Engdahl, *supra* note 247, at 81.

253. Though the text is unclear, it appears that the “consent” of Congress was required for “any conference [sic], agreement, alliance, or treaty,” just as for the sending and receiving of an “embassy.” ARTICLES OF CONFEDERATION art. VI. Otherwise, states would seem to have lacked any provision for making arrangements with foreign powers, and the new Constitution’s terms would have created a new class of permissible state-based foreign relations—a result colliding both with the supposed lack of meaningful change and the direction of constitutional reform as understood by Madison and others. *See* Draft of ARTICLES OF CONFEDERATION art. IV (July 12, 1776), in 1 DOCUMENTARY HISTORY, *supra* note 169, at 79 (“No Colony or Colonies, without the Consent of the United States assembled, shall send any Embassy to or receive any Embassy from, or enter into any Treaty, Convention or Conference with the King or Kingdom of Great-Britain, or any foreign Prince or State . . .”).

254. *See* Goldsmith, *Federal Courts*, *supra* note 1, at 1644 n.121 (assuming that “Article VI of the Articles prohibited treaty-making by states without *prior* congressional consent” (emphasis added)); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 12 (1999) (stating that “the states were required to seek the consent of Congress before entering into” international agreements other than treaties). The July 12, 1776, draft was much clearer, providing in Article V that “[n]o two or more colonies shall enter into any Treaty, Confederation or Alliance whatever between them, without the *previous and free Consent and Allowance of the United States assembled*, specifying accurately the Purposes for which the same is to be entered into, and how long it shall continue.” Draft of ARTICLES OF CONFEDERATION art. IV (July 12, 1776), in 1 DOCUMENTARY

diplomatic missions that might be thought a prerequisite for reaching agreement. There, even more clearly, consent meant consent obtained beforehand, given the then-traditional means of instructing treaty negotiations. Consistent with this construction, Madison bemoaned the existence of interstate compacts made “without previous application [to Congress] or subsequent apology” as an “encroachment on the federal authority.”<sup>255</sup>

Because the Constitution lacks the Articles’s express requirement of consent for state embassies, it is unclear whether consent was supposed to be a prerequisite for negotiating or even for entering into compacts.<sup>256</sup> But the widespread assumption that the Constitution continued the Articles’s bar on independent state diplomacy is more than tenable.<sup>257</sup> The formal assignment to the President of control over diplomatic matters was intended to expand federal authority, not contract it,<sup>258</sup> and was perceived by Madi-

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HISTORY, *supra* note 169, at 79 (emphasis added). The substance of this provision was substantially preserved in the final Article VI, except that the “previous and free” qualifiers to “consent,” and the reference to the “Allowance” of the United States, were eliminated. There is no surviving explanation of the change.

255. 1 FARRAND’S RECORDS, *supra* note 138, at 316 (Madison’s notes).

256. Like the Articles, the Constitution does not specify when “consent” is required for agreements or compacts, prohibiting states only from “enter[ing] into any Agreement or Compact . . . with a foreign Power.” U.S. CONST. art. I, § 10, cl. 3 (emphasis added).

257. *See* Seminole Tribe v. Florida, 517 U.S. 44, 150 (1996) (Souter, J., dissenting) (citing the embassy prohibition as an example of how “even the Articles of Confederation” diminished state independence and sovereignty); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575-76 (1840) (“It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities.”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 11 (1824) (“By the confederation . . . [n]o state . . . could send or receive an embassy; nor make any treaty; nor enter into any compact with another State, or with a foreign power; nor lay duties, interfering with treaties which had been entered into by Congress.”); *infra* text accompanying notes 339-58 (discussing *Holmes*); *see also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1297-98 (1996) (“[F]ew would argue that states possess authority to send and receive ambassadors, even though the Constitution does not explicitly deny this power to the states.”); Ramsey, *supra* note 29, at 393-94 (“[I]t seems unlikely that a state, or even a convention of states, could send or receive ambassadors on behalf of the United States.”).

Professor Goldsmith criticizes the assumption that “this quintessentially international activity should be anything other than an exclusive prerogative of the federal government.” Goldsmith, *Federal Courts*, *supra* note 1, at 1707 & nn.367-68. He notes that “it is far from inconceivable that states retain some authority to ‘send and receive ambassadors’”; to the extent that such activity “impinges on traditional diplomatic prerogatives,” the combination of the “express prohibition against states entering into treaties or making compacts or waging war,” together with the preemptive force of federal enactments, will sufficiently attenuate the possibility of state interference. *Id.* at 1707. For the reasons noted above, though, it seems highly unlikely that the Constitution would have so substantially improved on the authority of the states to conduct foreign affairs. *See also infra* Part III.B (discussing the adequacy of positive substitutes for the dormant treaty theory).

258. The President was entrusted to “nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors [and] other public Ministers and Consuls,” U.S. CONST. art. II, § 2, cl. 2, and “receive Ambassadors and other public Ministers,” *id.* art. II, § 3. Although Hamilton, as

son to be one of the many instances in which the new Constitution tended to “obviate the necessity or the pretext for gradual and unobserved usurpations of power” by the states at Congress’s expense.<sup>259</sup> The other assumptions of the Articles had not changed—under prevailing diplomatic practices, consent would ordinarily precede negotiation (at least),<sup>260</sup> and would certainly be necessary to preempt state attempts to engage in the prohibited negotiation of treaties. Still, because the Constitution’s text is unclear on this point, it is worth examining the problems to which the Articles and the Constitution were responding.

2. *Understanding at the Founding.* The treaty powers assigned to the federal government by the Constitution were designed to address specific problems experienced under the Articles of Confederation. The clearest problem was that states had failed to abide by federally negotiated treaties.<sup>261</sup> This sorely embarrassed the Continental Congress<sup>262</sup> and had

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Publius, stressed the essentially formal nature of these powers, his remarks were intended to minimize the significance of this expansion relative to the Senate, not relative to the states. *See* THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[I]t was far more convenient that it should be arranged in this manner than that there should be a necessity of convening the legislature, or one of its branches, upon every arrival of a foreign minister . . . .”); THE FEDERALIST NO. 84, at 518 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“As ambassadors and other ministers and agents in foreign countries, the proposed constitution can make no other difference than to render their characters . . . more respectable . . . .”). *See generally* HENKIN, *supra* note 1, at 37-39 (discussing the significance of the President’s powers in a horizontal context).

259. THE FEDERALIST NO. 42, at 265 (James Madison) (Clinton Rossiter ed., 1961). Madison cited, in particular, the ability to receive consuls from abroad, which had not been specifically provided under the Articles.

260. *See supra* text accompanying notes 177, 206. This line of argument may seem inconsistent with the preceding interpretation of the Treaty Clause, in which the Senate’s power of “advice and consent” was construed to permit Senate intervention *after* presidential negotiation—even notwithstanding the additional prerogative of “advice,” which may be thought to emphasize the temporal priority of legislative counsel. As indicated in the text, the varying interpretations of the Compact and Treaty Clauses are best explained by the different problems confronting the Framers, which would have led them to be more concerned about state freelancing and less confident concerning alternative means of controlling it. As a purely textual matter, though, there is a patent difference between the Treaty Clause’s grant of authority to the President, subject to advice and consent, and the Constitution’s prohibition of state authority subject to a permissive exception, particularly when the absolute bar on state treaty-making is considered.

261. Treaties were not clearly designated as the supreme law of the land; even had they been, as Frederick Marks has emphasized, “[t]here was no federal judiciary to decide cases in dispute between federal and state governments, and no coercive force to back up such a judiciary had it existed.” MARKS, *supra* note 144, at 3.

262. *See* DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER 75 (1985) (“For men like Hamilton the inability of Congress to fulfill its treaty obligations was embarrassing and troubling . . . .”); *see also* 1 FARRAND’S RECORDS, *supra* note 138, at 316 (Madison’s notes):

The files of Congs. contain complaints already, from almost every nation with which treaties

material consequences: for example, state failures to heed provisions of the 1783 Treaty of Paris were exploited by the British as a basis for their own failure to withdraw militarily.<sup>263</sup> The Supremacy Clause, together with the Necessary and Proper Clause, was intended to allow the federal government to ensure U.S. compliance with its international obligations.<sup>264</sup>

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have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

263. See MARKS, *supra* note 144, at 5-11. British negotiators were fully aware that Congress generally lacked authority to enforce obligations against states. See MORRIS, FORGING, *supra* note 144, at 364 n.5 (observing that Americans made clear to the British that "Congress lacked the power to enforce treaty obligations"); MORRIS, PEACEMAKERS, *supra* note 183, at 379-80 (describing the aggressive negotiation by the British of the Treaty of Paris and noting the states' failure to abide by the treaty's provisions for restitution for state seizure of British property); see also PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776-1814, at 121 (1993) (contrasting the British refusal to negotiate trade concessions for America with a liberal British treaty with France and concluding that this difference resulted from America's inability to enforce its treaties). It is clear now that the British reluctance to vacate their forts was foreordained. See, e.g., BEMIS, *supra* note 168, at 70-72 (discussing the relationship between Great Britain's refusal to abandon its posts and the states' refusal to abide by the Treaty of Paris); ELKINS & MCKITRICK, *supra* note 184, at 126 (stating that the inability of Congress to enforce its treaties was a "settled excuse" for British resistance to the withdrawal of troops demanded by the Treaty of Paris, and the resistance was actually prompted by British concern over its control of the fur trade and over the military security of Canada); MORRIS, FORGING, *supra* note 144, at 201-03.

At the time, though, Jay reacted to the British allegations of treaty infringements by drafting a strong analysis of the incompetence of states to make, interpret, or breach any compacts whatsoever, which Congress then adopted. See Letter from President of Congress to the State Governors (Apr. 13, 1787), in 3 EMERGING NATION, *supra* note 179, at 472, 473 ("Treaties must be implicitly received and observed by every member of the Nation; for as State Legislatures are not competent to the making of such Compacts or Treaties, so neither are they competent in that capacity, authoritatively to decide on, or ascertain the construction and Sense of them." (emphasis added)); see also MORRIS, FORGING, *supra* note 144, at 202 (describing Jay's letter and the resulting congressional resolution as the foundation for the Constitution's Supremacy Clause).

264. See MARKS, *supra* note 144, at 14-15; Flaherty, *Are We to Be a Nation?*, *supra* note 237, at 1312-15; see also, e.g., 1 FARRAND'S RECORDS, *supra* note 138, at 164, 316 (Madison's notes); James Madison, Preface to Debates in the Convention of 1787, in 3 FARRAND'S RECORDS, *supra* note 138, at 539, 548. As Hamilton observed:

The treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

THE FEDERALIST NO. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

As is made clear elsewhere in this discussion, Article VI supremacy does not by itself obviate the need to accord preemptive force to the federal treaty power; among other things, satisfactory treaties could not easily be attained were the states entitled to negotiate on their own behalf, or on behalf of the United States. Professor Ramsey's recent suggestion, in considering Representative Lee Hamilton's concerns about the Massachusetts Burma law, that "a treaty relating to sanctions would be drafted to

These same experiences also suggested that America needed a means of forcing other nations to comply with *their* obligations.<sup>265</sup> The power under the Constitution to regulate domestic and foreign commerce was thought to be essential in forcing other nations to cease discriminatory conduct against U.S. commerce<sup>266</sup> and in protecting other vital interests.<sup>267</sup>

remove state as well as federal sanctions and *would* preempt state law under Article VI,” see Ramsey, *supra* note 29, at 382 n.148 (emphasis added), is correct only to the extent that a treaty *could* be so drafted. But Representative Hamilton may have had in mind the federal anti-apartheid sanctions, which preempted state sanctions neither when passed nor when repealed, or trade accords that have gone to great length to exempt state laws from challenge. See Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, § 102, 108 Stat. 4809, 4815-19 (codified at 19 U.S.C. § 3512 (1994)) (barring anyone other than the United States, including private parties, from challenging U.S. or state action or inaction based on its consistency with the statute, as well as providing a process by which the United States is to consult with the states and provide notice to Congress before taking legal action against a state or local government for noncompliance with the statute); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1087 (1986) (codified at 22 U.S.C. § 5001), *repealed by* South African Democratic Transition Support, Pub. L. No. 103-149, §§ 4(a)(1), (a)(2), (c)(1), (c)(2), 107 Stat. 1504 (1993) (urging states, local governments, and private entities to repeal restrictions on economic interactions with South Africa). Whether or not this poses a substantial additional hurdle to the exercise of national power, it plainly shows that Article VI does not invariably obviate the need for other forms of federal preemption.

Nor, conversely, can it fairly be said that the dormant treaty power would render “the treaty provisions of Article VI largely superfluous.” Ramsey, *supra* note 29, at 406. Not only is Article VI necessary in order to maintain the significance of Senate consent and presidential ratification, *cf. id.* at 406 n.232 (conceding that “Article VI still might serve to make treaties superior to federal law”), but it is required to permit treaties to preempt state and local laws that do *not* interfere with the dormant treaty power, yet are of national concern, see *infra* text accompanying notes 484, 527.

265. See, e.g., James Wilson’s Opening Address to Pennsylvania Ratifying Convention (Nov. 24, 1787), in 1 DEBATE ON THE CONSTITUTION, *supra* note 196, at 791, 800 (citing the “lamentable history” of America’s inability to retard imports (or at least gain revenue through tariffs), its inability to export, and its inability to “perform treaties on our own part, or to compel a performance on the part of the contracting nation”).

266. See Marks, *supra* note 165, at 308 (claiming that “commercial problems caused by inability to retaliate effectively against foreign trade restrictions tended, more than anything else, to unite the new nation” and pointing out that “by 1786 it was evident to all but a few that the states acting individually would never achieve the uniformity necessary to retaliate against external constraints or to vest Congress with requisite power. This despite the fact that nearly all states agreed on the need to do so.”); see also ALBERT ANTHONY GIESECKE, AMERICAN COMMERCIAL LEGISLATION BEFORE 1789, ch. 6 (1910) (describing the prevalence and failings of state-level trade legislation); MARKS, *supra* note 144, at 69-70, 80-83 (discussing disappointing attempts by individual states to mount retaliatory policies); VERNON G. SETSER, THE COMMERCIAL RECIPROCITY POLICY OF THE UNITED STATES, 1774-1829, at 63-65 (1937) (concluding that the lack of uniformity permitted individual states to profit from restrictions adopted by neighboring states, allowed Great Britain to invoke restrictions on trade to only those vessels carrying goods from that state, and gave rise to embarrassing conflicts); Letter from John Adams to John Jay (June 26, 1785), in 2 EMERGING NATION, *supra* note 179, at 672-73 (emphasizing the need for uniform measures); Letter from Adams to Jay (July 19, 1785), in 2 EMERGING NATION, *supra* note 179, at 699 (same). A congressional committee reported in 1784 that

unless the United States can act as a nation and be regarded as such by foreign powers, and unless Congress for this purpose shall be vested with powers competent to the protection of Commerce they can never command reciprocal advantages in trade and without such reciprocity our foreign commerce must decline and eventually be annihilated.

The Framers were not content, however, merely to achieve universal compliance with existing treaties as an end in itself; to the contrary, enforcement was also seen as a means of enhancing the federal government's power to *create* treaties.<sup>268</sup> Although some were concerned that treaties not be too easily made,<sup>269</sup> there was also an overwhelming consensus on the

26 JCC, *supra* note 144, at 318-19 (Apr. 30, 1784); *see also* Letter from Adams to Jay (May 8, 1785), in 2 EMERGING NATION, *supra* note 179, at 620, 623 (urging that "it behoves [sic] the United States then to knit themselves together . . . form their foreign Commerce into a System, and encourage their own Navigation and Seamen, and to these Ends their carrying Trade" and expressing the fear that "[w]e shall never be able to do this, unless Congress are vested with full Power, under the Limitations prescribed of 15 Years and the Concurrence of Nine States, of forming Treaties of Commerce with foreign Powers"). Jay was so convinced that he advocated delaying the conclusion of treaties where possible, and advocated limiting the duration of those treaties that were too far along, because the advent of a centralized government would so improve the U.S. negotiating posture. *See* MORRIS, FORGING, *supra* note 144, at 207-08. This argument was naturally invoked in attempts to gain support for the new Constitution. *See* THE FEDERALIST NO. 11, at 85-86 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The American estimation of foreign perceptions seems to have been accurate. *See* MARKS, *supra* note 144, at 83 (quoting a British magazine that dubbed the American states as the "thirteen Dis-United States"); MORRIS, FORGING, *supra* note 144, at 194 (citing the British assurance that this dissention would prevent Americans from taking measures against Great Britain); ONUF & ONUF, *supra* note 264, at 120 (citing the British perception of this disharmony and sentiments that the Americans did not merit serious attention).

267. Jay, perhaps having the Mississippi mess in mind, was particularly attentive to this potential. *See* THE FEDERALIST NO. 4, at 47-48 (John Jay) (Clinton Rossiter ed., 1961) (assuring that "[i]n the formation of treaties, [one government] will regard the interest of the whole, and the particular interests of the parts as connected with that of the whole" and declaring that one government "can apply the resources and power of the whole to the defense of any particular part, and that more easily and expeditiously than State governments or separate confederacies can possibly do, for want of concert and unity of system").

268. Thus, Chief Justice Marshall, elaborating the dormant Foreign Commerce Clause doctrine in *Brown v. Maryland*, recounted that

[t]he oppressed and degraded state of commerce, previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless.

*Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445-46 (1827); *see also* Spiro, *Foreign Relations*, *supra* note 29, at 1230.

269. Such comments are occasionally invoked as a guide for interpreting the intended scope of the treaty power. *See, e.g.*, HENKIN, *supra* note 1, at 442 n.2 (quoting Convention participants in support of a limited reading); Bradley, *The Treaty Power*, *supra* note 29, at 410-11 (same). But they were made for a variety of other purposes. Gouverneur Morris made the point in advocating an amendment that would have permitted treaties to be binding only where ratified by law—but he failed to persuade others at the Convention, and he seemed in any event to be mainly concerned about treaties of alliance. *See* 2 FARRAND'S RECORDS, *supra* note 138, at 392-93 (Madison's notes). Madison, too, remarked that "it had been too easy in the present Congress to make Treaties," *id.* at 548—perhaps an allusion to the Mississippi—but spoke for his own proposal to make treaties of peace easier, *see id.* at 540. Finally, James Wilson projected that there would be few treaties, but he was concerned chiefly with minimizing the case against the Senate by stressing how infrequently it would meet, and secondarily with the difficulties posed by European alliances. *See* James Wilson, Summation and Final Rebuttal (Dec. 11, 1787),

need to maximize U.S. leverage through unified, centralized treaty negotiations.<sup>270</sup> This was understood to require not only greater substantive federal authority, but also the means to prudently exercise it. The goal of becoming “one nation” for foreign affairs,<sup>271</sup> rather than a “thirteen-headed sovereign,”<sup>272</sup> was to be promoted internally by replacing state-centered decisionmaking with the representation of state interests in the Senate.<sup>273</sup> Externally, the new Constitution would dispel any foreign uncertainty about where legislative competence lay.<sup>274</sup>

An indispensable assumption of this new scheme was that the Constitution would strengthen the principle of federal exclusivity that the Articles of Confederation had already attempted to instill. The risk that states would reciprocate the occasional interest of foreign nations in establishing formal diplomatic relations was not considered great—on that score, an occasional admonition from the national government was generally thought sufficient.<sup>275</sup> There remained the risk, however, that individual states would sap

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*in* 1 DEBATE ON THE CONSTITUTION, *supra* note 196, at 831, 851.

270. See CRANDALL, *supra* note 206, at 50; LANG, *supra* note 262, at 80-81 (discussing this need as highlighted by the weaknesses of the Articles of Confederation); MARKS, *supra* note 165, at 308 (noting that “by 1786 it was evident to all but a few that the States acting individually” would never be able to maximize American bargaining power). See generally BEMIS, *supra* note 168, ch. 5 (describing dissatisfaction with negotiations during the Jeffersonian period and the War of 1812); MARKS, *supra* note 144, ch. 2 (describing the rise of nationalist sentiment regarding commercial authority); *id.* at 146-51 (describing a Convention debate on this topic).

271. See, e.g., THE FEDERALIST NO. 42, at 264 (James Madison) (Clinton Rossiter ed., 1961) (declaring that “[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations”); Letter from Thomas Jefferson to James Madison (Dec. 16, 1786), *in* 10 JEFFERSON PAPERS, *supra* note 218, at 603 (instructing that national government should “make us one nation as to foreign concerns, and keep us distinct in Domestic ones”).

272. Paul, *supra* note 221, at 730.

273. Thus, under the Constitution, it was no longer necessary to prevail upon at least nine states in order to secure congressional approval for a treaty or to pursue certain commercial matters through the wholly independent agencies of the 13 states. See MORRIS, FORGING, *supra* note 144, at 91 (detailing problems of “indifference and irresponsibility” that plagued the delegates to the Continental Congress); Paul, *supra* note 221, at 730-31 (detailing the weaknesses of the Union and their effects on America’s place in the world). The fact that the Senate was expected to defend state interests has been emphasized in the recent literature. See Bradley, *The Treaty Power*, *supra* note 29, at 412; Goldsmith, *Federal Courts*, *supra* note 1, at 1645. However, the difference between the federal expression of state interests and independent state action has perhaps not been sufficiently appreciated—nor has the intended function of the President in checking state preferences. See *supra* text accompanying notes 193-99.

274. For representative expressions of uncertainty, see Letter from W.S. Smith to John Jay (Apr. 1, 1787), *in* 5 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 183, at 459-60 (“[W]ith respect to the American Governments, . . . we do not know whether they are under *one head*, directed by many, or whether they have any *head at all*.”) (quoting Lord Grenville)); *id.* at 460; Letter from Comte de Moustier to Comte de Montmorin (Apr. 21, 1788), *in* 3 EMERGING NATION, *supra* note 179, at 761, 762 (expressing uncertainty about Congress’s competency).

275. Foreign interest in conducting 13-part relations seems to have been easily rebuffed. In 1781, John Adams resisted a proposal for separate negotiations between Great Britain and each of the 13

the national government's negotiating authority through less direct means. In addition to their authority over foreign commerce,<sup>276</sup> states engaged foreign governments on matters as prosaic as loans<sup>277</sup> and as fundamental as political independence.<sup>278</sup> As Madison put it, shortly before the Constitutional Convention, "[e]xamples of [encroachments by the states on the federal authority] are numerous and repetitions may be foreseen in almost every case where any favorite object of a State shall present a temptation."<sup>279</sup>

These activities imperiled the national interest in a number of regards. State trading policies, even if unilateral, risked impairing common negotiating efforts. Seemingly benign decisions, like the efforts by some states to resume trade with Great Britain upon the cessation of hostilities, had been "disastrous" for ongoing efforts by U.S. negotiators to achieve commercial

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states. As he reported to the French, such an approach would breach the Articles of Confederation, and it would be a "public disrespect and contempt offered to the constitution of the nation" for any foreign power to so circumvent the Congress. Letter from John Adams to Vergennes (July 21, 1781), in 4 REVOLUTIONARY DIPLOMATIC CORRESPONDENCE, *supra* note 183, at 595. According to Adams, "[t]here is no method . . . to convey anything to the people of America but through the Congress of the United States, nor any way of negotiating [sic] with them but by means of that body." *Id.* at 596; *see also* MARKS, *supra* note 144, at 123 (discussing the demand by Great Britain "for thirteen ambassadors from the United States"); MORRIS, FORGING, *supra* note 144, at 66-67; Letter from Jay to Adams (Aug. 3, 1785), in 2 EMERGING NATION, *supra* note 179, at 720 ("There is no Reason to suspect that the different States even wish to send Ministers to foreign Powers in any other Way than the one directed by the Confederation."); Letter from Adams to Jay (May 8, 1785), in 2 EMERGING NATION, *supra* note 179, at 621 (noting settled authority under the Articles and viewing the contrary view of British officials as attributable either to misunderstanding or a desire for delay). For one account of an inadvertent breach by a Swedish consul, and a swift reaction by Jay, see Gary D. Olson, *The Soderstrom Incident: A Reflection upon Federal-State Relations Under the Articles of Confederation*, 55 N.Y. HIST. SOC'Y Q. 109 (1971).

Rufus King's assessment at the Convention was not inaccurate:

The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign.

1 FARRAND'S RECORDS, *supra* note 138, at 323 (Madison's notes).

276. *See supra* note 266.

277. *See* MARKS, *supra* note 144, at 4.

278. Vermonters, for example, who had intrigued with the British throughout the Revolutionary War in order to gain independence from New York and New Hampshire, were bought off only by false promises of statehood near the close of the war, and they continued to deal directly with Great Britain through the 1780s. *See* BERNSTEIN, *supra* note 137, at 86-87 (concluding that this and similar controversies helped weaken the Articles of Confederation). Jay was also suspicious of ties between Vermont and Canada, and he suspected that Shay's Rebellion of 1786 had been assisted by the British in Canada. *See* HORSMAN, *supra* note 166, at 34.

279. James Madison, Vices of the Political System of the United States (Apr. 1787), in THE MIND OF THE FOUNDERS: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 83, 83 (Marvin Meyers ed., 1973).

concessions as part of the general peace.<sup>280</sup> Conversely, separate attempts at retaliation came to be regarded not only as ineffectual, but also as posing the risk of diplomatic contretemps and counterattack against the entire nation.<sup>281</sup> Most generally, the Framers saw the coordinated conduct of foreign policy as indispensable for rescuing America's diplomatic dignity and domestic unity. Separate state conduct threatened to perpetuate the low esteem in which U.S. ministers, and the nation as a whole, were held abroad,<sup>282</sup> with material effect on the prospects for securing commercial

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280. MARKS, *supra* note 144, at 151; *see also* LANG, *supra* note 262, at 76 (discussing Sheffield's view that individual American states would compete for British trade, making the treaty unnecessary); Letter from Chevalier de la Luzerne to Comte de Vergennes (Apr. 15, 1783), *in* 2 EMERGING NATION, *supra* note 179, at 89, 89-90 (forecasting, and criticizing, the premature rush of different states for British trade); RAKOVE, *supra* note 146, at 346 (pointing out that "some delegates already believed that the country had to be protected from its own lust for British goods").

Other state attempts to grant concessions to particular nations with generosity backfired because of treaty rights already fashioned for others. *See* 33 JCC, *supra* note 144, at 676, 678-83 (Oct. 13, 1787) (adopting resolutions apologizing to the Netherlands for Virginia measures that favored import of French brandies and reprinting the views of the Secretary of Foreign Affairs); *see also id.* at 522-26 (reprinting a committee report concerning those Virginia measures); *infra* text accompanying notes 297-300. Jefferson had anticipated this problem. *See* Answers to D meunier's First Queries (Jan. 24, 1786), *in* 10 JEFFERSON PAPERS, *supra* note 218, at 11, 15-16.

281. Hamilton remarked that "[s]everal States have endeavored by separate prohibitions, restrictions, and exclusions to influence the conduct of [Great Britain] in this particular," and he warned that "the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the States, has hitherto frustrated every experiment of the kind, and will continue to do so as long as the same obstacles to a uniformity of measures continue to exist." THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He also noted the prospect of embarrassment: "The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others . . ." *Id.* at 144. Hamilton warned that "it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy." *Id.* at 144-45; *see also* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (proposing that "the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."); Madison, *supra* note 279, at 84 (noting that "those disputes with other nations, which being among the greatest of public calamities, it ought to be least in the power of any part of the community to bring on the whole"); *cf.* THE FEDERALIST NO. 42, at 265 (James Madison) (Clinton Rossiter ed., 1961) (criticizing the Articles of Confederation for "leav[ing] it in the power of any indiscreet member to embroil the Confederacy with foreign nations"); THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961) (explaining that under the Constitution, letters of marque required licenses from the federal government even following declaration of war, an amendment "fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible").

282. *See* Marks, *supra* note 165, at 313-19 (attributing low esteem and low national pride to independent state conduct of foreign relations). With a divided sovereignty, America had a hard time persuading foreign governments to conduct the most basic diplomatic relations. At the time of the Convention, Great Britain had still not sent an ambassador to America, but the United States felt that until the new Constitution was adopted it lacked the wherewithal to reciprocate the slight. *See* 33 JCC, *supra*

advantage.<sup>283</sup> Foreign intrigue with states and private citizens was also widely regarded as a serious threat to the union.<sup>284</sup>

This spectrum of concerns was again well illustrated in the matter of the negotiations over the Mississippi. Notwithstanding concerns about the direction of negotiations,<sup>285</sup> southerners were by no means sure that they desired the treaty-making power of Congress to be impaired. Under the status quo, the northern states, with their lesser attachment to western emigration and greater emphasis on foreign commercial opportunity, would use the issue to divide the nation in two.<sup>286</sup> Accordingly, many insisted that the only way to ensure access to the Mississippi was through a treaty negotiated by a unified federal power. Responding in the Virginia convention to Patrick Henry's warning that the new government would give away American rights, Madison declared:

No treaty has been formed, and I will undertake to say, that none *will* be formed under the old system, which will secure to us the actual enjoy-

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note 144, at 520-21 (Sept. 24, 1787) (report of the Secretary for Foreign Affairs) (cautioning that returning the slight "would eventually produce more inconveniences than advantages"); Letter from Adams to Jay (Feb. 14, 1788), in 3 EMERGING NATION, *supra* note 179, at 723 (complaining of being treated with "dry Decency and cold Civility abroad").

283. Hamilton and Jay, as Publius, hammered these points home. See THE FEDERALIST NO. 4, at 49 (John Jay) (Clinton Rossiter ed., 1961) (explaining that foreign nations would respect a united America, but "[i]f, on the other hand, they find us either destitute of an effectual government . . . or split into three or four independent and probably discordant republics or confederacies . . . what a poor, pitiful figure will America make in their eyes!"); see also THE FEDERALIST NO. 5, at 53 (John Jay) (Clinton Rossiter ed., 1961) (warning of the same); THE FEDERALIST NO. 15, at 107 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (claiming that "[t]he imbecility of our government even forbids [foreign powers] to treat with us. Our ambassadors abroad are the mere pageants of mimic sovereignty."); THE FEDERALIST NO. 22, at 149 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (cautioning that "[a] nation, with which we might have a treaty of commerce, could with much greater facility prevent our forming a connection with her competitor in trade, even though such a connection should be ever so beneficial to ourselves"). Onuf and Onuf relate that "Revolutionary diplomats sought, but failed, to negotiate treaties that would secure national independence, foster trade and promote a more lawful world," and that "Britain refused to negotiate a commercial treaty with the erstwhile colonists that would reopen lucrative West Indian markets." ONUF & ONUF, *supra* note 264, at 95. They also add that "Spain's refusal to acknowledge American rights to the free use of the Mississippi precipitated sectional divisions that threatened the union." *Id.* Finally, "[c]onstitutional reformers recognized that advantageous treaties, particularly with Britain and Spain, were the *sine qua non* of union. They also knew that the creation of a strong union was an essential precondition for success in negotiating such treaties." *Id.*

284. See MARKS, *supra* note 144, at 100-01 (detailing the fear of subversive activity).

285. See *supra* text accompanying notes 168-93; see also Letter from Madison to James Madison, Sr. (Nov. 1, 1786), in 9 MADISON PAPERS, *supra* note 171, at 153-54 (expressing such concerns and a fear that the entire project might be frustrated).

286. See HENDERSON, *supra* note 179, at 394-95 (detailing thoughts of disunion); Drew R. McCoy, *James Madison and Visions of American Nationality in the Confederation Period: A Regional Perspective*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 226, 243 (Richard Beeman et al. eds., 1987) (noting Monroe's conviction that the eastern states would convince the middle states to join them in forming a permanent "northern bloc").

ment of the navigation of the Mississippi. Our weakness precludes us from it. We *are* entitled to it. But it is not under an inefficient Government that we shall be able to avail ourselves fully of that right.—I most conscientiously believe, that it will be far better secured under the new Government, than the old, as we will be more able to enforce our right.<sup>287</sup>

Madison's emphasis on the "inefficiency" and "weakness" of the existing government is vague, as is the means by which the new government would resolve these matters,<sup>288</sup> but Madison and his contemporaries clearly viewed unity, and the appearance of authority, as instrumental to successful negotiations with the Spanish. All this was plainly threatened by the attempts of westerners and foreign powers to circumvent the national monopoly on negotiations. Beginning in the mid-1780s, Tennessee, Kentucky,

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287. 10 DOCUMENTARY HISTORY, *supra* note 169, at 1225 (statement of Madison) (June 12, 1788). As Madison put it in private correspondence, "[w]hat ought to be desired therefore by the Western people is not so much that no treaty should be made, as that some treaty should be made which will procure them an immediate and peaceable use of the river." Letter from Madison to George Nicholas (May 17, 1788), in 11 MADISON PAPERS, *supra* note 171, at 49; *accord* 10 DOCUMENTARY HISTORY, *supra* note 169, at 1242 (statement of Madison) (June 13, 1788); Letter from Madison to George Nicholas (Apr. 8, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 169, at 707; Letter from Madison to John Brown (Apr. 9, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 169, at 711-12; Letter from Madison to Jefferson (Aug. 12, 1786), in 9 MADISON PAPERS, *supra* note 171, at 97; *see also* 9 DOCUMENTARY HISTORY, *supra* note 169, at 1117 (statement of Marshall) (demanding "[h]ow shall we attain [the Mississippi]? By retaining that weak Government which has hitherto kept it from us?"); An Address from an American (Tenche Coxe) to the Members of the Virginia Convention (May 21, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 169, at 832, 835-36:

[S]uch is the effect of our *distracted* politics, and of the *feebleness of our general government*, that foreign powers *openly* declare their unwillingness to treat with us, while our affairs remain *on the present footing* . . . [Yet, as with Great Britain and France,] [t]he Court of Spain too, however they might be influenced by a *firm and respectable union*, will never listen to our demands *for the navigation of the Mississippi*, while we remain in *our present unconnected situation*. We are no object *even of respect* to them much less of *apprehension*; and should the present constitution be rejected, they will laugh at all future attempts to continue or invigorate the union. Our Minister at that Court expects to effect *no arrangements there*, without an efficient government being *first adopted here*.

*Accord Resolution of the Inhabitants of Pittsburgh*, PITTSBURGH GAZETTE, Nov. 17, 1787, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 196, at 324, 324 (citing as the one specific advantage of Constitution its improvement on "the weakness of Congress" to negotiate with Spain and Britain so as to obtain the advantages of the Mississippi trade to obtain compliance with foreign treaty obligations to surrender defensive outposts). *But see* 10 DOCUMENTARY HISTORY, *supra* note 169, at 1211 (statement of Patrick Henry) (June 12, 1788) (warning that "[t]he navigation of the Mississippi, which is of so much importance to the happiness of the people of this country, may be lost by the operation of [the Constitution]").

288. It would have been hard to state with confidence that sectionalism in Congress would cease, or that Spain would soon rethink its decision to close the Mississippi. The reopening of the Mississippi in 1788, and Spain's eventual capitulation in Pinckney's Treaty of 1795, in fact owed more to Spain's difficulties in Europe and to westward emigration than to any constitutional evolution in the United States. *See* Allen, *supra* note 170, at 466-67 (concluding that "European diplomacy ultimately combined with American expansion and Spanish setbacks in the old Southwest to bring about a victory for the United States in the Mississippi affair").

and Georgia separatists alternately threatened, and conspired with, the Spanish in attempts to obtain commercial privileges and access to the Mississippi.<sup>289</sup> Others sought French intervention with Spain,<sup>290</sup> and even the British tried their hand at influence.<sup>291</sup> Such efforts were frequently at odds with one another and complicated bilateral negotiations: Spain was entreated by some, for example, *not* to capitulate on Mississippi navigation, so as better to foment western revolt.<sup>292</sup> These intrigues could substantially be resolved by entering into a satisfactory treaty, but it was also abundantly clear that stamping out such divisive attempts at foreign relations was a precondition for any optimal treaty.<sup>293</sup> It is striking that, in the midst of partisan debate over federal prerogatives, there was little or no argument that subnational entreaties were permissible or appropriate under the Articles of Confederation.

Ostensibly unilateral acts were viewed in exactly the same light. In 1787, for example, Virginia had to officially disavow the reprisals by its sometime-agent General George Rogers Clark against the property of

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289. For accounts of these fascinating and complicated episodes, see SAMUEL FLAGG BEMIS, *PINCKNEY'S TREATY: AMERICA'S ADVANTAGE FROM EUROPE'S DISTRESS, 1783-1800* chs. 6-7 (reprint 1965) (1960) (focusing on the Spanish conspiracy with Kentucky and Tennessee); HORSMAN, *supra* note 166, at 37 (focusing on the dealings of Tennesseans and Kentuckians); WHITAKER, *supra* note 171 (same); Allen, *supra* note 170, at 466 (detailing Spain's plan to gain the loyalties of western Americans); see also GREEN, *supra* note 187 (focusing on Kentucky); *The Spanish Conspiracy in Tennessee*, 3 TENN. HIST. MAG. 229 (1917) (focusing on Tennessee). Reginald Horsman described the significance of these experiences:

The problem of conducting an effective foreign policy was only one ingredient in a complex of motives that eventually led to a new constitution, but it was an important one. It was not simply that many were disappointed with the inability of Congress to shape effective commercial agreements with Great Britain, Spain, or other powers, or that there was an obvious inability to defend American interests against either the Indian tribes or foreign powers in the Mississippi Valley, it was now strongly felt that the situation on the borders of the United States threatened the very security and survival of the republic.

HORSMAN, *supra* note 166, at 37.

290. See HENDERSON, *supra* note 179, at 397-98 (describing contacts with Otto, a French *charge d'affaires*).

291. See HORSMAN, *supra* note 166, at 33-34 (noting British attempts to recruit American citizens); see also Letter from Madison to Jefferson (Mar. 19, 1787), in 9 MADISON PAPERS, *supra* note 171, at 320 (stating that "[i]t is hinted to me that British partisans are already feeling the pulse of some of the West settlements").

292. See THOMAS PERKINS ABERNATHY, *WESTERN LANDS AND THE AMERICAN REVOLUTION* 330 (1937) (detailing one such entreaty, from General James Wilkinson, a Kentucky merchant).

293. Under Madison's guidance, for example, Virginia censured lawless action against the Spanish and Indians in the Kentucky district, but paired that resolution with one urging that the westerners be given prompt satisfaction through the negotiation of a treaty with Spain guaranteeing navigation rights. See Resolutions on Western Law Enforcement and Mississippi Navigation (editorial note), in 8 MADISON PAPERS, *supra* note 171, at 124. One of the most active conspirators, James Wilkinson, seems to have believed that the new Constitution would spell the end of his intrigues. See ABERNATHY, *supra* note 292, at 330, 347.

Spanish subjects, in retaliation for Spanish policy on the Mississippi.<sup>294</sup> Secretary Jay and Congress registered their disapproval even more strongly,<sup>295</sup> even complaining that Virginia's communication of its disavowal to Spain had violated the federal government's monopoly on communicating with foreign governments.<sup>296</sup> Virginia's preferential treatment of French brandies also provoked controversy after the Dutch protested that their most-favored-nation status under the bilateral treaty had been violated.<sup>297</sup> A congressional committee reviewing the protest, unsure of whether Virginia's favors were gratuitous or compensatory, took the view that any quid pro quo would violate the constitutional norm "that no State, or part of the nation, shall have any part in making a treaty . . . between the nation and a foreign power, but by its delegates in the national Council."<sup>298</sup> Secretary of State Jay's report, which Congress later followed, considered the Virginia policy gratuitous, but cautioned as to the disruptive effect of unilateral state trade policies. Citing Article VI of the Articles of Confederation, Jay noted that "[t]his Article appears to have been calculated to preserve uniformity, not only in our political, but also in our commercial Systems. If no Individual State can contract with a foreign power, it fol-

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294. See GREEN, *supra* note 187, at 78-80; WHITAKER, *supra* note 171, at 81, 97.

295. See 32 JCC, *supra* note 144, at 189-99 (Apr. 13, 1787) (reflecting Jay's recommendations that Congress formally declare its "displeasure" with the "offenders" and immediately punish them); *id.* at 231 (Apr. 24, 1787) (calling on the Secretary of War to intervene). Not incidentally, on the same day Congress received Jay's report, it ordered issuance of the strong reminder, also drafted by Jay, of the states' comprehensive lack of authority either to make or construe treaties. See *supra* note 263.

296. See 32 JCC, *supra* note 144, at 189-99 (Apr. 13, 1787) (reprinting Jay's report of Apr. 12, 1787). Among the Virginia delegates reprimanded by Jay was Madison, who had, after communicating the Virginia governor's declaration, participated in what he described as a "free conversation" on the subject of the western temper and the Mississippi. See GREEN, *supra* note 187, at 79-80 n.\*; see also *id.* at 81 n.\* (noting that Madison urged prosecution of Clark under state law).

In another episode involving the Mississippi, the Georgia state assembly created a district called Bourbon County in territory claimed not only by Georgia, but by Spain and the United States as well. Four justices of the peace from Georgia were instructed to negotiate with Spain, but one exceeded his authority, threatened Spain, and was expelled by the Spanish governor. After receiving Spanish protests, Congress condemned the activities and apologized to Spain. See ABERNATHY, *supra* note 292, at 312-13, 323; WHITAKER, *supra* note 171, at 55-58; Letter from Madison to Monroe (June 21, 1785) (editorial note), in 8 MADISON PAPERS, *supra* note 171, at 308 n.2. Madison, seeking further information, professed to "willingly suppose that no State could be guilty either of so flagrant an outrage on the federal [sic] Constitution, or of so imprudent a mode of pursuing their claims against a foreign Nation." Letter from Madison to Monroe (June 21, 1785), in 8 MADISON PAPERS, *supra* note 171, at 306-07.

297. See, e.g., SETSER, *supra* note 266, at 64.

298. Accordingly, it drafted a resolution providing that "no individual state can constitutionally, without the Consent of the [Congress], make any compensation for privileges or exemptions granted in trade Navigation or Commerce by any foreign power to the United States or any of them." 33 JCC, *supra* note 144, at 526 (Sept. 24, 1787). Moreover, any simple grant of privileges or exemptions would have to be extended to any nation given most favored nation status under U.S. treaties. See *id.*

lows that the States individually can grant no privileges otherwise than gratuitously.”<sup>299</sup> Put simply, even implicit exchanges with foreign powers ran afoul of the federal monopoly on treaty negotiations.<sup>300</sup>

Madison understood this point completely,<sup>301</sup> and there was no consideration of weakening this norm under the proposed Constitution. If anything, the experience of the Framers pointed to the importance of insisting on the federal prerogative. By extending the federal treaty monopoly to commercial matters previously reserved to the states,<sup>302</sup> the Constitution eliminated any pretext state and local authorities may have had for engaging in bargaining with Spain and the other relevant foreign powers.

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299. *Id.* at 682-83 (Oct. 13, 1787).

300. Professor Ramsey’s recently published work cites a number of state enactments discriminating against foreign nations, some seeking a quid pro quo of some kind. Addressing the thesis that the Constitution barred all state activities impacting foreign affairs, he observes that “the framers plainly knew of the states’ propensity to legislate with foreign policy objectives,” but took no obvious action to enshrine any new principle of exclusivity. Ramsey, *supra* note 29, at 390 n.181 (citing Pennsylvania, Massachusetts, and Virginia laws); see also GIESECKE, *supra* note 266, ch. 6 (describing the ubiquity of state-level trade legislation discriminating against foreign nations and other states under the Articles of Confederation); SETSER, *supra* note 266, at 62-63 (same).

During the relevant period, the national government lacked the ability to effectuate treaty relations on such trade matters, though they gained this ability under the new Constitution. See *supra* text accompanying note 250. As Professor Ramsey recognizes, “many of these particular laws would have been precluded by the specific provisions of the Constitution.” Ramsey, *supra* note 29, at 390 n.181. Though I have not examined the history of each state enactment in detail, they were generally ineffective and counterproductive, and were considered one of the strongest reasons to expand the scope of the federal treaty power and, more generally, to unify negotiations with foreign nations. See *supra* text accompanying notes 265-74; see also Virginia General Assembly, House of Delegates, Broadside of Nov. 14, 1785 (Early American reprints, No. 19352) (urging Virginia delegates to the Continental Congress to regulate trade and import tariffs, given that the United States “require[s] uniformity in their commercial regulations, . . . for obtaining in the ports of foreign nations a stipulation of privileges reciprocal to those enjoyed [in U.S. ports], for preventing animosities, . . . among the several States . . . and for deriving from commerce such aids to the public revenue as it ought to contribute”); ROBERT L. BRUNHOUSE, *THE COUNTER-REVOLUTION IN PENNSYLVANIA, 1776-1790*, at 152, 172, 181 (Octagon Books 1971) (1942) (describing the state interest in investing the national government with authority over trade and revisions to the general tariff act of 1784-85, including the failure of discriminatory tariffs due to the diversion of trade to neighboring states).

301. Madison was keenly aware of the French brandies controversy, carefully setting out the dispute as to the issues of treaty construction and noting Jay’s conclusion that, in Madison’s terms, “the states have no right to form tacit compacts with foreign nations.” Letter from Madison to Jefferson (Mar. 19, 1787), in 9 MADISON PAPERS, *supra* note 171, at 320-21; see also Letter from Madison to Edmund Randolph (Feb. 18, 1787), in 9 MADISON PAPERS, *supra* note 171, at 271, 272-73 (describing the controversy); Letter from Virginia Delegates to Randolph (Mar. 25, 1787), in 9 MADISON PAPERS, *supra* note 171, at 333 (same). There is cause to think that the issue of state encroachment was a foremost concern for Madison as he prepared for the Convention. See Letter from Virginia Delegates to Randolph (Mar. 25, 1787) (editorial note), in 9 MADISON PAPERS, *supra* note 171, at 333-34 n.2.

302. See *supra* notes 248, 265-66 (describing the dissatisfaction with Article IX of the Articles of Confederation).

At the same time, the Constitution expanded the range of impediments the states could pose to the actual execution of federal authority. The Framers' argument was not merely that the federal government needed sufficient authority to adopt binding law; instead, they also perceived that achieving results under that authority required unified expression.

3. *The New Constitution and the Vertical Scope of the Treaty Power.* The new Constitution scarcely did away with the problems federalism posed for foreign relations.<sup>303</sup> Some of the more egregious early episodes, like the occasional refusal by states and localities to comply with ratified treaties and foreign affairs statutes,<sup>304</sup> are better understood as intransigence than as illustrating a constitutional understanding. But states also enacted a number of measures that caused acute diplomatic complications—laws discriminating against aliens<sup>305</sup> or foreign corporations,<sup>306</sup> as well as general

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303. Indeed, various Mississippi intrigues continued to fester. See generally ARTHUR PRESTON WHITAKER, *THE MISSISSIPPI QUESTION: 1795-1803*, at 189-217 (1934) (discussing various foreign relations issues that persisted after ratification). President Washington and his Secretaries of State, for example, doggedly sought Kentucky's assistance in quashing French-led threats against the Spanish territory, laying particular stress on the delicacy of ongoing negotiations. See A Message from the President of the United States to Congress, Transmitting Certain Documents Relative to Hostile Threats Against the Territories of Spain, in the Neighbourhood of the United States (May 20, 1794), (Doc. No. 271), in 22 NATIONAL STATE PAPERS OF THE UNITED STATES 1789-1817 (pt. II) 255, 256, 257, 262, 265-66 (Eileen Daney Carzo ed., 1985). In Washington's farewell address on September 17, 1796, he stressed the need for the American west to depend upon

the Atlantic side of the Union, directed by an indissoluble community of interest as *one nation*. Any other tenure by which the *West* can hold this essential advantage, whether derived from its own separate strength or from an apostate and unnatural connection with any foreign power, must be intrinsically precarious.

WHITAKER, *supra*, at 120.

304. See Palumbo, *supra* note 4, at 37-48 (discussing American defiance of the 1807 Embargo Act); Shuman, *Courts*, *supra* note 20, at 164 (discussing defiance, by the governor of South Carolina, of President Washington's Neutrality Proclamation of 1793 and the violation by New England towns of the 1807 Embargo Act).

305. For discussion of the prolonged controversy surrounding discrimination by the western states against the Japanese, see PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1913, at 625-53 (1920) (collecting diplomatic correspondence relating to the dispute); Goldsmith, *Federal Courts*, *supra* note 1, at 1655 (citing Theodore Roosevelt's concern on this issue); Spiro, *Demi-Sovereignities*, *supra* note 29, at 140-41 (intimating that similar anti-alien statutes in effect at that time were less likely to have engendered diplomatic complications); Palumbo, *supra* note 4, at 168-88. Compare, e.g., *Oyama v. California*, 332 U.S. 633, 653-56, 662 n.17 (1948) (Murphy, J., concurring) (noting foreign and, derivatively, federal protests concerning land laws), with *Clarke v. Deckebach*, 274 U.S. 392, 396-97 (1927) (upholding a Cincinnati ordinance prohibiting aliens from obtaining licenses to run pool and billiard rooms based on the Equal Protection Clause and an 1815 commercial treaty with Great Britain).

306. The highest-profile cases involved the retaliation against German companies for Prussia's treatment of American insurance companies. See S. DOC. NO. 54-140 (1897) (collecting diplomatic correspondence relating to the dispute); PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1899, at 284 (1901) [hereinafter PAPERS] (collecting further diplomatic correspondence, in-

provisions, like the Negro Seamen laws, that adversely affected both U.S. and foreign citizens.<sup>307</sup>

These conflicts may cast light on the contemporary understanding of the federal monopoly. With the exception of *Chy Lung v. Freeman*,<sup>308</sup> there was relatively little suggestion that the overseas repercussions of state activities like these would, by themselves, violate the Constitution. As Professor Goldsmith insists, this casts doubt on any strong claim that a full-blown, judicially enforced dormant foreign relations doctrine preceded *Zschernig*.<sup>309</sup> At the very least, cases like *Chy Lung* should be seen in light

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cluding the ultimate readmission of American companies to Prussia and Prussian companies to New York); Goldsmith, *Federal Courts*, *supra* note 1, at 1656-57 (same); Palumbo, *supra* note 4, at 48-50 (discussing the 1896 conflict between Prussia and New York). The British complained about similar legislation, in that case enacted without any apparent retaliatory animus. See PAPERS, *supra*, at 345-48 (collecting correspondence).

307. For general historical accounts of this legislation, see Philip M. Hamer, *British Consuls and the Negro Seamen Acts, 1850-1860*, 1 J. S. HIST. 138 (1935) [hereinafter Hamer, *British Consuls*]; Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822-1848*, 1 J. S. HIST. 3 (1935) [hereinafter Hamer, *Great Britain*]. For legally oriented commentary, see CORWIN, NATIONAL SUPREMACY, *supra* note 2, at 125-29; CARL B. SWISHER, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-64, at 378-81 (1974) (detailing cases challenging the Negro Seamen Acts); Goldsmith, *Federal Courts*, *supra* note 1, at 1655 n.163 (same); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1873-78 (1993) (discussing the constitutional debate surrounding these acts as well as the subsequent legislation of immigration law).

308. 92 U.S. 275 (1875). In *Chy Lung*, the Court found unconstitutional a California law permitting a state commissioner to demand indemnification bonds for certain vaguely described classes of passengers disembarking at California ports. See *id.* at 276. Justice Miller, in an opinion for a unanimous Court, speculated that were California to apply the law to British passengers, Great Britain would retaliate against the nation as a whole. See *id.* at 279. As he emphasized, since the Constitution "has forbid-den the States to hold negotiations with any foreign nations . . . and has taken the whole subject of these relations [as reserved for the federal government]," the Framers could not be held to have "done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just recriminations that it must answer, while it does not prohibit to the States the acts for which it is held responsible." *Id.* at 279-80.

309. See Goldsmith, *Federal Courts*, *supra* note 1, at 1625-30 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968), as one of the first cases to establish a dormant foreign relations doctrine). Although Professor Spiro properly cautions that we should not expect nineteenth-century case law to neatly express a federal exclusivity principle, and notes that certain episodes "demonstrate a . . . constitutional understanding that the states were severely constrained in their foreign relations activities," see Spiro, *Foreign Relations*, *supra* note 29, at 1230, I am less confident that such an understanding was "prevalent," *id.*, or that it amounts to anything so broad as *Zschernig*. Construing cases like *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), and *Chy Lung* as suggesting that a well-formed dormant foreign relations doctrine existed in the nineteenth century requires disregarding other cases, like *Blythe v. Hinckley*, 180 U.S. 333 (1901), and downplaying the most notable episodes of that era, like the Negro Seamen Acts and alien discrimination episodes, in which state actions having significant foreign relations effects were tolerated. But see Spiro, *Foreign Relations*, *supra* note 29, at 1228-41 (arguing that the dormant foreign relations doctrine has "firm roots" in the nineteenth and early twentieth centuries).

At the same time, I do not share Professor Goldsmith's confidence that the notion of dormant foreign relations preemption debuted in the 1960s and therefore was absent from the debate over the

of others, like *Blythe v. Hinkley*,<sup>310</sup> in which the Court gave the proverbial back of its hand to a particularly attenuated claim that states could not touch matters open for international adjustment. The Court elsewhere indicated that state authority touching on foreign affairs grounds would only be restricted upon final treaty ratification.<sup>311</sup>

alien discrimination acts. See Goldsmith, *Federal Courts*, *supra* note 1, at 1655 (observing that “no one suggested that [the anti-alien acts] should be preempted under a dormant foreign relations theory”). For example, in a 1914 note intended for the State Department, the Japanese Minister for Foreign Affairs argued that California lacked the authority over international affairs necessary to enact its so-called Alien Land Law restricting the ownership of land by foreign citizens. See Letter from the Japanese Minister for Foreign Affairs to the Japanese Ambassador (June 9, 1914), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1914, at 426 (1922) [hereinafter 1914 FOREIGN RELATIONS PAPERS]. And in a later court case, the California Supreme Court found no conflict between a provision of California’s Alien Land Act and a 1911 treaty between the United States and Japan, but after invalidating the law as violating the Equal Protection Clause, the court opined that the underlying objective of discouraging immigration was “international in character, and [was] a matter to properly to be disposed of by the federal government.” *In re Tetsubumi Yano’s Estate*, 206 P. 995, 1001 (Cal. 1922). Finally, some of Elihu Root’s observations at the 1907 meeting of the American Society for International Law hint at a dormant federal relations power. See Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT’L L. 273, 283 (1907) (emphasis added):

Since the rights, privileges, and immunities . . . to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of the treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any state, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be.

310. 180 U.S. 333 (1901). In *Blythe*, the Court considered “extraordinary” the claim that “in the absence of any treaty whatever upon the subject, the State had no right to pass a law in regard to the inheritance of property within its borders by an alien.” *Id.* at 340. *Blythe* was later cited in *Clark v. Allen*, 331 U.S. 503 (1947), in support of the proposition that a dormant preemption claim concerning a state reciprocal inheritance law was “equally farfetched.” *Id.* at 517. *Blythe* is also cited by Professor Goldsmith as grounds for doubting the tenure of any such doctrine. See Goldsmith, *Federal Courts*, *supra* note 1, at 1653 n.157. There is, however, a critical difference between *Blythe* and cases like *Clark*. In *Blythe*, the complainant argued that California had overstepped its authority by permitting “any person, whether citizen or alien,” to inherit property, thereby permitting the defendant, a British subject, to take property otherwise available to the complainant. See *Blythe*, 180 U.S. at 336-37 n.1 (quoting statutes referred to in the original complaint, including Cal. Civ. Code § 671); *id.* at 340-41. The claim that California had intruded on matters of foreign relations by *failing* to discriminate against an alien does indeed seem “extraordinary.” *Id.* at 340. Such a statute functions very differently, in any event, from those having the effect of bargaining with foreign powers in a fashion reserved to the federal government. The California Supreme Court, in consequence, construed *Blythe* to be making the unusual claim that

the very silence of our treaties with Great Britain upon the question is the equivalent of an express denial to its subjects of the right to inherit within our republic, and that therefore a conflict arises and [the California law] becomes void as an illegal attempt to encroach upon the treaty making power of the general government.

*Blythe v. Hinckley*, 127 P. 431, 436 (Cal. 1900), *aff’d*, 180 U.S. 333 (1901).

311. See, e.g., *People of New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 371 (1858) (concluding that a New York state law prohibiting trespass upon Indian reservations was valid unless it conflicted with the express terms of a federal treaty). Another early case, *People v. Gerke*, 5 Cal. 381

There was greater consensus, however, on *Chy Lung*'s major premise that state bargaining with foreign powers—if not all state activities having foreign effect—would unconstitutionally violate the dormant treaty power.<sup>312</sup> Few episodes provided a good opportunity to test that doctrine, or to explore the parameters of the state conduct so precluded. Where there were strong claims of conflict between a state law and a federal statute treaty, or the Equal Protection Clause, dormant federal authority objections may have seemed beside the point.<sup>313</sup> Moreover, federal authority over the

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(1855), held that a federal treaty could supersede state law on the inheritance of property, but also suggested that states retained some power with respect to foreign affairs issues. *See id.* at 385. While *Gerke*'s dicta indicated that "mutual concession . . . can only be effected" by the federal government, not by unilateral state acts, and thus seems to support a federal monopoly, the California Supreme Court clearly contemplated that state policies like those in question would continue in force until preempted by federal treaty. *Id.* Among commentators, it is perhaps particularly notable that Professor Corwin's brief for national power routinely expresses the rule in this fashion, albeit without expressly addressing the issue of the dormant treaty power. *See* CORWIN, NATIONAL SUPREMACY, *supra* note 2, at 21-165 (discussing the relationship between the national treaty power and state police powers).

312. *See Chy Lung*, 92 U.S. at 280 (asserting that the Constitution "has forbidden the States to hold negotiations with any foreign nations . . . and has taken the whole subject of these relations upon herself"). An 1897 memorandum from Senator Hale encapsulated an altogether plausible view of the distinction:

[A] State of the Union, although having admittedly no power whatever in foreign relations, may take action uncontrollable by the Federal Government, and which, if not properly a *casus belli*, might nevertheless as a practical matter afford to some foreign nation the excuse of a declaration of war. We may instance the action which might have been taken by the State of Wyoming in relation to the Chinese massacres, or by the State of Louisiana in relation to the Italian lynchings, or by the State of New York in its recent controversy with German insurance companies with relation to the treatment of its own insurance companies by Germany.

S. DOC. NO. 54-56, at 5 (1897); *see also* QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 265 & n.8 (1922) (citing the Hale memorandum, and adding that "[t]he intention of the Constitution is undoubtedly to render the states incompetent to make political decisions which affect foreign nations in more than the most remote degree, yet state laws have occasionally given rise to international controversy").

313. For example, Justice Johnson's opinion on the South Carolina Negro Seamen Act cited several other grounds for considering it illegal. *See Elkison v. Deliesseline*, 8 F. Cas. 493, 495 (C.C.D.S.C. 1823) (No. 4366) (Johnson, J., riding circuit) (holding that a South Carolina law violated the dormant Foreign Commerce Clause and the 1815 commercial treaty with Great Britain, but that it lacked jurisdiction to order redress). Attorney General William Wirt agreed with Justice Johnson on the merits, *see* 1 Op. Att'y Gen. 659, 661 (1824) (opining that South Carolina's Negro Seamen Act was unconstitutional), but a successor, John Berrien, came to the opposite conclusion, *see* 2 Op. Att'y Gen. 426, 442 (1831). Berrien's successor, Roger B. Taney, wrote an unpublished opinion claiming that the federal government lacked the power to deprive slave-holding states of their authority over blacks within their jurisdiction. *See* SWISHER, *supra* note 307, at 380 & nn.8-9 (citing and discussing Attorney General Taney's opinion). A majority of the House Committee on Commerce issued a report that sided with Justice Johnson and argued that the South Carolina act and others like it encroached on Congress's foreign Commerce Clause powers, but the House as a whole took no action. *See generally* H. R. REP. NO. 27-80, at 1-7 (1843) (arguing that the South Carolina act violated the dormant Commerce Clause); *see also* Hamer, *Great Britain*, *supra* note 307, at 22 (noting that the House voted to take no action on the Commerce Committee's report). The U.S. Attorney in Charleston subsequently volunteered his conclu-

recurring subjects of controversy—slavery,<sup>314</sup> insurance,<sup>315</sup> and the right of aliens to real property<sup>316</sup>—was also truncated at the relevant times. By the

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sion that the South Carolina law violated the treaty, *see* CHARLESTON COURIER, Dec. 15, 1851, at 1; *see also* Hamer, *British Consuls*, *supra* note 307, at 157 & n.65, but the British ultimately decided not to court further controversy, *see id.* at 157-59 (noting that by 1852 the British had adopted a more conciliatory approach to relations with South Carolina).

Case law addressing alien land laws also illustrate a limited conception of the dormant treaty power, focusing instead on Equal Protection Clause issues and potential conflicts with already-existing treaties. *See, e.g.*, Frick v. Webb, 263 U.S. 326, 334 (1923) (upholding against equal protection and express treaty-based challenges a provision of the same law preventing aliens ineligible for citizenship from purchasing shares in corporations dealing in agricultural land); Webb v. O'Brien, 263 U.S. 313, 326 (1923) (upholding against similar challenges a provision of the same law prohibiting sharecropping contracts with Japanese aliens); Porterfield v. Webb, 263 U.S. 225, 233 (1923) (upholding against similar challenges a provision of California's Alien Land Law prohibiting the leasing of agricultural land to Japanese aliens); *see also* Terrace v. Thompson, 263 U.S. 197, 224 (1923) (upholding against similar challenges a provision of a Washington state statute preventing Japanese aliens from acquiring leases for agricultural land). *But see* Asakura v. Seattle, 265 U.S. 332, 341 (1924) (striking down a Seattle pawnbroking license ordinance as applied to lawfully admitted Japanese aliens as conflicting with a federal treaty and noting that while the treaty-making power "does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations" (quoting *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890))). For further discussion, *see* Goldsmith, *Federal Courts*, *supra* note 1, at 1653-54 nn.157 & 159 (discussing the relationship between anti-alien state laws and the Equal Protection Clause and dormant treaty power); Spiro, *Demi-Sovereignities*, *supra* note 29, at 141 (arguing that in deciding *Chy Lung* on equal protection grounds, the Court missed "a classic opportunity to deploy the foreign relations rationale for constraining state activity").

314. At the time of the Negro Seamen Act controversies, the federal government was powerless to enforce far less ambiguous dictates against South Carolina, and the federal government's power was to wane further as South Carolina and other states sought to secede. *See* Hamer, *British Consuls*, *supra* note 307, at 138, 148-49 (noting the federal government's lack of effective action against the Negro Seamen Acts and also noting the House of Representative's refusal to act on the Commerce Committee's report on the illegality of the Acts); Hamer, *Great Britain*, *supra* note 307, at 28 (noting that the federal government was unable to take effective action to block the Negro Seamen Acts); *see also supra* note 313 (describing Attorney General Taney's opinion that the federal government lacked the power to block the Negro Seamen Acts). An 1831 opinion by Attorney General Berrien also illustrates the widespread perception that the federal government had limited power to temper the slave-holding states. *See* 2 Op. Att'y Gen. 426, 426-27 (1831). Berrien's opinion reconciled the South Carolina Negro Seamen Act with the 1815 commercial treaty with Great Britain principally on the ground that Congress was "under a constitutional obligation to respect" state exercises of police powers like quarantine laws "in the formation of treaties, and in the enactment of laws," and that treaties should be interpreted in light of those principles. *Id.*; *see also id.* at 432 (noting that treaty privileges were conferred "subject always to the laws and statutes of the two countries").

315. Insurance policies were not then considered articles of commerce, and so they were for the most part beyond the scope of national regulation. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 183 (1868) (holding that insurance policies "are not articles of commerce in any proper meaning of the word"); *see also* Philip L. Merkel, *Going National: The Life Insurance Industry's Campaign for Federal Regulation After the Civil War*, 65 BUS. HIST. REV. 528, 528 (1991) (noting that in the mid- to late-nineteenth century, insurance was regulated almost entirely by state law); Mark J. Roe, *Foundations of Corporate Finance: The 1906 Pacification of the Insurance Industry*, 93 COLUM. L. REV. 639, 664 (1993) (discussing the historical limitations on the federal government's ability to regulate insurance).

late nineteenth century, Supreme Court case law more consistently indicated that the treaty power might support federal regulation where purely domestic authority would otherwise be lacking,<sup>317</sup> but lingering doubts likely clouded the perceived scope of any dormant treaty power.<sup>318</sup> Finally,

316. Here it is enough to say that the scope of federal authority was open to controversy. See Bradley, *The Treaty Power*, *supra* note 29, at 419-20 (distinguishing various Supreme Court treatments of treaties according to aliens equal property rights); Spiro, *Demi-Sovereignties*, *supra* note 29, at 142 nn.85-86 (speculating that judicial tolerance of alien land laws may have been predicated upon the traditional view that such matters were "largely within the state's exclusive regulatory preserve"); see also Raymond Leslie Buell, *Some Legal Aspects of the Japanese Question*, 17 AM. J. INT'L L. 29, 38-39 n.53 (1923) (concluding that the federal government could use its treaty power to assure the property rights of aliens); Thomas Reed Powell, *Alien Land Cases in the United States Supreme Court*, 12 CAL. L. REV. 259, 267-68 (1924) (presuming that the federal government had plenary authority to override the California land law); Root, *supra* note 309, at 279 (noting that "certain implied limitations arise[] from the nature of our government and from other provisions," but opining that "those implied limitations do not in the slightest degree touch the making of treaty provisions relating to the treatment of aliens within our territory").

Perhaps the most illuminating discussion of the federal government's perceived ability to modify alien's property ownership rights through treaty is contained in the correspondence of Secretary Bayard, who opined:

Were the question whether a treaty provision which gives to aliens rights to real estate in the States to come up now for the first time, grave doubts might be entertained as to how far such a treaty would be constitutional. A treaty is, it is true, the supreme law of the land, but it is nevertheless only a law imposed by the Federal government, and subject to all the limitations of other laws imposed by the same authority. While internationally binding the United States to the other contracting powers, it may be municipally inoperative because it deals with matters in the States as to which the Federal government has no power to deal. That a treaty, however, can give to aliens such rights, has been repeatedly affirmed by the Supreme Court . . . and consequently, however much hesitation there might be as to advising a new treaty containing such provisions, it is not open to this Department to deny that the treaties now in existence giving rights of this class to aliens may in their municipal relations be regarded as operative in the States.

Letter from Mr. Bayard, Secretary of State, to Mr. Miller (June 15, 1886), in 5 MOORE, *supra* note 124, at 178-79. Bayard's ambivalence was symptomatic of the uncertainties surrounding the exercise of state police powers with respect to aliens. See, e.g., Neuman, *supra* note 307, at 1893 (concluding that the "mysterious line between the exercise of the police power and the regulation of commerce left indeterminate room for state control of immigration" and that this indeterminacy was not entirely resolved by the introduction of foreign affairs concerns in *Chy Lung*, 92 U.S. 259 (1876), and *The Chinese Exclusion Case*, 130 U.S. 581 (1889)).

317. See *Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890) (noting the broad scope of the treaty-making power and citing cases to that effect); see also *In re Ross*, 140 U.S. 453, 463 (1891) ("The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments.").

318. See, e.g., *Geofroy*, 133 U.S. at 267 (noting that "[i]t would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the latter, without its consent"). Numerous commentators have discussed the scope of the dormant treaty power. See, e.g., THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 117 (102 (Andrew McLaughlin ed., 3d ed. 1898) (claiming that "[t]he Constitution imposes no restriction upon [the treaty power], but it is subject to the implied restriction that nothing can be done under it which changes the constitution of the country, or robs a department of the government or any of the States of its constitutional authority"); CORWIN, *NATIONAL SUPREMACY*, *supra* note 2, at 42-165 (dis-

any judicially enforced doctrine was surely less appealing in light of the political branches' apparent conviction that the treaty power should not (or could not, for political reasons) be used to invade areas in which the states traditionally reigned sovereign.<sup>319</sup>

Nevertheless, both critics and defenders of the national government's prerogatives converged on one critical proposition: if the national government lacked the authority to forge international agreements, then such authority existed nowhere, as states were powerless to conduct international relations on behalf either of themselves or the United States.<sup>320</sup> This

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cluding assertions in the case law and commentary that state sovereignty places limitations on the treaty power); PUTNEY, *supra* note 124, at 158-59 (arguing that the treaty power is limited by the reserved powers of the states); HENRY ST. GEORGE TUCKER, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES 284-341 (1915) (discussing the limits that the state police power places on the federal treaty power); WRIGHT, *supra* note 312, at 73-74 (same); Bradley, *The Treaty Power*, *supra* note 29, at 409-22 (discussing the subject-matter and states' rights limitations on the treaty power during the late eighteenth and nineteenth centuries); William Draper Lewis, *Treaty Powers: Protection of Treaty Rights by the Federal Government*, 34 ANNALS AM. ACAD. POL. & SOC. SCI. 313 (1909) (noting some uncertainties in the scope of the dormant treaty power); William E. Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States*, 57 U. PA. L. REV. 435, 559 (1909) (discussing whether the states' reserved rights place a limit on the federal treaty power); White, *supra* note 254, at 9-10, 21-26 (describing the limitations of the unenumerated federal foreign relations powers when they conflict with reserved state authority).

319. This is illustrated by Secretary of State Hay's response to promptings for a bilateral treaty to preempt state laws discriminating against British fire insurance companies, in which he recounted that

[T]he negotiation of such a treaty would probably be futile . . . [owing to] the indisposition of the people of the United States to suffer encroachment upon the ordinary and constitutional exercise of the legislative functions of the respective States by the making of treaties which are passed on by only one branch of the Federal Congress but which have the force of supreme law.

Letter from John Hay, Secretary of State, to Reginald Tower (July 19, 1899), in 1914 FOREIGN RELATIONS PAPERS, *supra* note 309, at 347-48; *see also* Letter from John Hay, Secretary of State, to Reginald Tower (Apr. 27, 1899), in 1914 FOREIGN RELATIONS PAPERS, *supra* note 309, at 346 (concluding that "[l]egislation such as that enacted by the State of Iowa is beyond the control of the executive branch of the General Government, and even did this legislation contravene any existing treaty . . . the remedy would lie in an appeal to the courts of law"); *cf.* *Manchester Fire Ins. Co. v. Herriott*, 91 F. 711 (C.C.S.D. Iowa 1899) (dismissing a Fourteenth Amendment challenge by British fire insurance companies to a discriminatory Iowa state law).

320. The argument was precisely stated by the Attorney General's opinion on the *droit d'aubaine*, the antiquated principle that some states had invoked to prevent aliens from inheriting real property:

[I]n the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus . . . if the power of negotiation be not in the United States, then it exists nowhere, and one great field of international relation, of negotiation, and of ordinary public and private interest, is closed up, as well against the United States as each and every one of the States.

8 Op. Att'y Gen. 411, 415 (1857); *see also* 1 CHARLES HENRY BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES § 22, at 39 (1902) (arguing that the resting of treaty-making power in the national government "absolutely prohibit[s]" a state from "performing any functions of sovereignty beyond its own boundaries, except through the medium of the Central Government"); ROBERT T. DEVLIN, THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES § 141, at 138 (1908) (describing the federal government as "the only government recognized by the Constitution as possessing a

did *not* limit state activities to those with purely internal effects, but it did mean that the solution to matters of international controversy could lie only with the central government. In sum, states might legislate or opine on innumerable subject-matters to the extent otherwise permissible under federal law, but could not, in so doing, abridge the federal government's monopoly on treating with foreign powers.

Episodes like the Negro Seamen Act controversies usefully illustrated the distinction between permissible state effects and impermissible state bargaining.<sup>321</sup> As it did later in the alien land controversies,<sup>322</sup> the federal

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national character" and thus possessing "all the powers that relate to intercourse with other nations"); FRANKLIN PIERCE, *FEDERAL USURPATION* 254 (1908) (arguing that while expansive federal power is undesirable, it is clear that within subject-matter limitations "the whole of the treaty-making power was conferred upon our national government"); 3 STORY, *supra* note 124, § 1349 (describing the breadth of the prohibition on state treaty-making); 2 JOHN RANDOLPH TUCKER, *THE CONSTITUTION OF THE UNITED STATES* 822 (1899):

The treaty-making power between the United States and foreign nations was given, as we have seen, to the President and Senate as representing all. The relations of each State, therefore, to foreign powers was fully met by this power to make treaties between the United States and foreign countries. To make peace and avert conflict, it was the wise policy of the Constitution to give the exclusive treaty-making power to the President and Senate as representing all the United States, and to exclude any one State from entering into any such international obligation.

*See also infra* note 331 (citing Supreme Court case law); *cf.* WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 60 (1825) (contending, with respect to argument that legislation was necessary to effectuate treaty obligations, that "[h]aving felt the necessity of the treaty making power, and fixed in the department in which it shall be rested, the people of course excluded from all interference with it, those parts of the government which are not described as partaking of it").

Perhaps the most striking endorsement of treaty power exclusivity came in John C. Calhoun's comments before the House of Representatives:

The enumeration of legislative powers in the Constitution has relation, then, not to the treaty-making power, but to the powers of the states. In our relation to the rest of the world the case is reversed. *Here the states disappear. Divided within, we present, without, an exterior of undivided sovereignty. . . . Whatever, then, concerns our foreign relations, whatever requires the consent of another nation, belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution.*

4 ELLIOT'S DEBATES, *supra* note 161, at 464 (emphasis added).

321. The Prussian matter is arguably an exception, given that the retaliatory regulation contemplated (and, in some cases, adopted) by the states concerned seems to be the kind of indirect negotiation with foreign powers that should ordinarily be deemed unconstitutional. *See supra* text accompanying note 306. At the same time, the states generally relied on the State Department to communicate their threats to the government of Germany, and it apparently agreed with their position, even while cautioning against the disruptive effects of the tactic. *See* Letter from Mr. Uhl to Mr. Runyon (June 4, 1895), in S. DOC. NO. 54-140, at 3-4; *see also* Letter from Governor Morton to Mr. Olney (Dec. 3, 1895), in S. DOC. NO. 54-140, at 21 (observing that "the people of no state have diplomatic relations with the Kingdom of Prussia save as they are represented by the General Government").

322. The federal government jawboned California into temporarily suspending enforcement of its anti-alien policies due to foreign policy considerations, but the President appeared to share California's premise that the laws, however unwise, were within the state's constitutional authority. *See Oyama v.*

government effectively conceded that, however much it might disagree with South Carolina's law, the mere fact of international controversy did not oust state jurisdiction.<sup>323</sup> South Carolina's authority actually to negotiate with a foreign power, however, was another matter. The Secretary of State reacted vigorously upon learning that South Carolina had begun negotiating with Great Britain, and there was virtually no attempt to defend the state's actions against the criticism that it was usurping a federal function.<sup>324</sup>

Congressional legislation also suggested something in the nature of a federal monopoly on diplomacy. The Logan Act of 1799,<sup>325</sup> for example, broadly criminalized conduct by unauthorized U.S. citizens (including, on the Act's face, state officials) designed to influence foreign governments or officials relative to disputes or controversies with the United States, or to defeat its measures.<sup>326</sup> Though very rarely invoked, the Act was predicated

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California, 332 U.S. 633, 653-54 (1948) (Murphy, J., concurring) (noting the temporary success of presidential, gubernatorial, and corporate intervention in convincing California to limit enforcement of its alien land law); *id.* at 662 n.17 (attributing California's nonenforcement of its alien land law to a desire to remain consistent with federal policy).

323. See *supra* text accompanying note 307; see also *supra* note 313 and accompanying text; cf. H. R. REP. NO. 27-80, at 3 (1843) (noting that the application of the Negro Seamen Acts to foreign vessels had been suspended).

324. South Carolina and Great Britain took great pains to conceal their interactions, and when correspondence between the South Carolina governor and the British consul was leaked to the press, there was considerable protest. See Hamer, *British Consuls*, *supra* note 307, at 153-56 (discussing the controversy). After the British ambassador was called in by Secretary of State Daniel Webster, he issued a face-saving notice declaring that the British consul should have been clearer that he was "merely attempting, as a local agent, to procure a remedy for a grievance inflicted by a local law" (a misleading description, it must be said, of the consul's activities). Letter from Ambassador Bulwar to Daniel Webster, Secretary of State (Jan. 31, 1851), *quoted in* Hamer, *British Consuls*, *supra* note 307, at 153. Even conservative southern newspapers were given pause—a Richmond paper objected that South Carolina had "no political existence whatever in the eyes of foreign nations," and a Savannah paper warned that, were states to confer with foreign governments, "[t]he Federal Government . . . becomes a nullity, and the Confederacy resolves itself into thirty-one separate and distinct sovereignties, each possessing the right to treat with other Powers, form alliances, and declare war." *Id.* at 151 (internal citations omitted); cf. Spiro, *Foreign Relations*, *supra* note 29, at 1235-36 & n.63 (noting the controversy as evidence of foreign effects, but concluding that the "[t]he context . . . presented the rare case in which the domestic consequences of suppressing state action outweighed any diplomatic complications prompted by its persistence"). This was not effective, however, in suppressing British-state negotiations. See Palumbo, *supra* note 4, at 205-10 (describing negotiations about the Negro Seamen Acts between British representatives and the government of South Carolina).

325. Act of Jan. 30, 1799, ch. I, 1 Stat. 613 (codified as amended at 18 U.S.C. § 953 (1994)).

326. The Act takes its name from Dr. George Logan, a well-known Pennsylvania state legislator who undertook a negotiating mission to France. Logan's mission caused something of an uproar and incited Federalist supporters of the Act, who were openly skeptical that his mission to France was independent. See CRS, *supra* note 109, at 70-71 (discussing the background of the Logan Act); Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 EMORY L.J. 285, 292-303 (1987) (same). In light of their suspicions, it is hardly surprising that congressional debate

on the notion that the federal government, in particular the President, should not be disturbed in the exclusive exercise of foreign relations<sup>327</sup>—and, as one proponent put it, on the view that if state governments were constitutionally excluded from such activities, so too should private citizens.<sup>328</sup> Such views are surely probative of constitutional meaning, at least to the same extent as Congress's occasional tolerance of state-created contretemps.<sup>329</sup>

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flagged the issue of criminal liability for public officials. See 8 ANNALS OF CONG. 2504 (1798) (transcribing the statement of Rep. Harper that notes Logan's membership in the Pennsylvania state legislature); *id.* at 2618 (noting the statement by Rep. Harper that assumes that the Act would encompass purposeful, but not inadvertent or incidental, conduct by a member of Congress); see also Goldsmith, *Federal Courts*, *supra* note 1, at 1708 (assuming that the Logan Act applies to public officials); Brad Roth, *The First Amendment in Foreign Affairs Realm: "Domesticating" the Restrictions on Citizen Participation*, 2 TEMPLE POL. & CIV. RTS. Q. 255, 265 (1993) (same); Matthew Schaefer, *Sovereignty Revisited: The "Grey Areas" and "Yellow Zones" of Split Sovereignty Exposed by Globalization: Choosing Among Strategies of Avoidance, Cooperation, and Intrusion to Escape an Era of Misguided "New Federalism"*, 24 CAN.-U.S. L.J. 35, 45 & n.46 (1998) (same); Kearney, *supra*, at 287-306 (same). There have since been occasional threats of prosecution against both Members of Congress, see CRS, *supra* note 109, at 71-72 (noting that "[q]uestions concerns the Logan Act" have been raised in relation to the activities of several members of Congress); Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 681-82 (1992) (noting that while the Logan Act is only rarely applied, it has sometimes been applied to members of Congress, and state officials, see, e.g., 135 CONG. REC. 25, 481 (1989) (statement of Rep. Bentley) ("Many Governors are acting as their own State Departments completely disregarding the constitutional prohibition against anyone save the Executive having treaty-making powers. There is also the old Logan Act dating from the period of the War of 1812 which forbids citizens other than those charged with those specific constitutional powers to treat with foreign governments."); Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT'L L.J. 459, 515 (1994) (noting threats by the U.S. Secretary of Agriculture against the Texas Agriculture Commission for its offer of negotiating assistance and cooperation with European Commission officials).

327. There was bipartisan endorsement of the notion that the authority for all governmental diplomacy rested exclusively with the President and his authorized agents. See 8 ANNALS OF CONG. 2586 (1798) (statement of Rep. Pinckney); *id.* at 2494, 2607 (statement of Rep. Griswold); *id.* at 2521 (statement of Rep. Smith); *id.* at 2588 (statement of Rep. Bayard); *id.* at 2594 (statement of Rep. Pinckney); *id.* at 2617 (statement of Rep. Harrison). Albert Gallatin, the bill's most vigorous opponent, submitted that if the bill were intended to criminalize interference with the President's constitutional authority, it did not go far enough, since it addressed only matters of "controversy or dispute." *Id.* at 2498. Gallatin also argued that it was ridiculous to believe that an individual, acting on his own authority, could usurp the President's unquestioned monopoly on official authority. See *id.* at 2637-38. Not everyone agreed with Gallatin. See *id.* at 2531-32 (statement of Rep. Harper) (emphasizing a broad understanding of negotiation and suggesting that even private acts less than negotiation could interfere with foreign relations as conceived by the executive).

328. See *id.* at 2496 (statement of Rep. Rutledge).

329. See Goldsmith, *Federal Courts*, *supra* note 1, at 1655 (noting that prior to the Supreme Court decisions in the 1960s that clarified the federal government's exclusive foreign relations power, "states often acted in ways not prohibited by a federal enactment that either looked like the exercise of foreign relations power or that stirred foreign relations controversy"); Spiro, *Foreign Relations*, *supra* note 29, at 1229 n.25 ("It is now generally accepted that institutions other than the courts contribute to constitutional lawmaking.").

In short, the persistence of state activities with foreign effect may cast doubt on suggestions that the federal government alone could be “known” to foreign nations in some factual or consequential sense. Yet there was surprisingly little dissent—in an era where the bounds of federal authority were hotly contested—to the proposition that the states must remain “unknown” *as states* to foreign nations.<sup>330</sup> Well prior to *Zschernig*, case after case observed that the federal government enjoyed a monopoly on the conduct of foreign relations, and that the states possessed no such power;<sup>331</sup>

330. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228-29 (1824) (Johnson, J., concurring):

The States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

331. See, e.g., *United States v. California*, 332 U.S. 19, 35 (1947) (“[P]eace and world commerce are the paramount responsibilities of the nation, rather than an individual state . . . .”); *Clark v. Allen*, 331 U.S. 503, 517 (1947) (describing the “forbidden domain of negotiating with a foreign country”); *United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941):

The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . [T]he interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

*Accord id.* at 68 (noting that international relations are “the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the State . . . does not exist.”); *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933) (“In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) (“The United States . . . are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective.”); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (noting that the federal government “has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government” and that “[i]f it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations”); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875) (noting that regulation “must of necessity be national in its character” when it affects “a subject which concerns our international relations”); *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 555 (1871) (Bradley, J., concurring) (“The United States . . . is the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments.”); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1840) (“All the powers which relate to our foreign intercourse are confided to the general government.”); *id.* at 575-76 (“It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation . . . .”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 414 (1821) (“[T]he government which is alone capable of controlling and managing their interests in [war, making

power was not used in the all-embracing modern sense of being able to affect others,<sup>332</sup> but instead meant legal power or the authority to engage other nations in their sovereign capacities. The only such authority was conferred by the Treaty Clause on the national government and denied just as emphatically to the states.

There was just one weak spot—what about the express license for states to enter into foreign compacts and, it would seem to follow, to negotiate toward that end?<sup>333</sup> If anything, early case law accentuated this problem by reading the class of “agreement[s] or compact[s]” quite broadly, creating pressure to diminish the burden of requiring congressional consent.<sup>334</sup> Thus, it was held that the form and timing of consent for interstate compacts were almost entirely up to Congress,<sup>335</sup> and that no consent was necessary for compacts not increasing the relative political power of the states.<sup>336</sup> Modern commentary often assumes that foreign compacts are to

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peace, and ‘all commercial regulations,’ *id.* at 413] is the government of the Union.”).

332. See, e.g., Jessica T. Mathews, *Power Shift*, FOREIGN AFFS., Jan.–Feb. 1997, at 50 (describing the decline of nation-state autonomy and the increasing power of nonstate actors); see also Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFFS., Sept.–Oct. 1997, at 183 (describing the disaggregation of power).

333. See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the consent of Congress . . . enter into any agreement or compact with another state or with a foreign power.”).

334. See, e.g., *Holmes*, 39 U.S. (14 Pet.) at 571 (suggesting that “compact” and “agreement” have broad meanings that are independent of each other and of the term “treaty”). The best description of this dynamic is Engdahl, *supra* note 247, at 64-67 (discussing the scope of the terms “compact,” “agreement,” and “treaty”).

335. See *Poole v. Fleeger*, 36 U.S. (11 Pet.) 185, 209 (1837) (upholding a compact between Tennessee and Virginia that was consented to by Congress after the states reached agreement); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 85-87 (1823) (upholding a compact between Kentucky and Virginia that Congress only consented to after the fact, and then only indirectly, in the course of recognizing Kentucky as a state); *accord Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R.R. Co.*, 4 G. & J. 1, 1-3 (Md. 1832) (discussing a compact between Virginia and Maryland, regarding the establishment of railroad companies, that became effective after Congress consented). Also noteworthy is the Court’s pronouncement in *Virginia v. Tennessee*, 148 U.S. 503 (1893), that “[t]he Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied.” *Id.* at 521. For a helpful digest of early compacts and their history, including many instances in which congressional approval followed agreement between the states, see Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 735-48 (1925), which contains a list of various compacts between states dating from 1789 to 1925. As Frankfurter and Landis also indicate, the practice of seeking congressional approval for state compacts has its roots in colonial practice, where agreements between colonies typically required the approval of the Crown. See *id.* at 692-93.

336. See *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 218-19 (1803) (assuming the validity of a boundary agreement between Virginia and Tennessee that largely codified the states’ preexisting rights); *Virginia*, 148 U.S. at 519 (stating in dicta that the Compact Clause applies to agreements “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States”). The dictum from *Virginia* has been adopted by modern courts as an accurate statement of the law. See, e.g., *New Hamp-*

be treated likewise, so that the states might negotiate and reach agreement with foreign powers before seeking consent, and perhaps even conclude some binding agreements without ever submitting them for federal approval.<sup>337</sup> If so, the resulting loophole seems to doom any argument that might be mustered for a dormant treaty power and leave the case law profoundly conflicted well before the late-twentieth-century explosion in state conducted foreign relations.

But just as the Court has for some time distinguished between foreign and interstate commerce,<sup>338</sup> its case law has differentiated foreign com-

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shire v. Maine, 426 U.S. 363, 369 (1976) (citing the above language from *Virginia* as part of the “test” for whether an agreement between states requires the consent of Congress and applying such a test to uphold a settlement agreement interpreting the language of an already-binding 1740 decree); *see also*, e.g., *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 175-76 (1985) (following the approach of the *New Hampshire* and *Virginia* cases); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (same); *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 471 (1978) (same). *But see Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724-25 (1838) (assuming that the prohibition on “any treaty, alliance, or confederation,” and the requirement of consent for “any agreement or compact with another state, or with a foreign power,” made consent a requirement for all interstate boundary disputes).

337. *See* RESTATEMENT (THIRD), *supra* note 43, § 302f (“By analogy with inter-State compacts, a State compact with a foreign power requires Congressional consent only if the compact tends ‘to . . . increase . . . political power in the States which may encroach upon or interfere with the just supremacy of the United States.’” (quoting *Virginia*, 148 U.S. at 503); HENKIN, *supra* note 1, at 155 (“Since the same language applies to foreign compacts, one might extend and adapt the Court’s distinction [in *Virginia v. Tennessee*] to such agreements as well.”); *id.* at 156 n.†:

[S]ince the states may make foreign agreements with the consent of Congress (and some even without such consent . . .), they must have the right to negotiate with foreign governments or with their subsidiary units to achieve such agreements. It has not been suggested that states must obtain Congressional consent to begin negotiations.

*Accord* Herbert H. Naujoks, *Compacts and Agreements Between States and Between States and a Foreign Power*, 36 MARQ. L. REV. 219, 233 (1953) (assuming that interstate compacts should be subject to the same congressional consent requirements and exemptions that govern compacts between states and foreign nations); Schaefer, *supra* note 326, at 44 (same); Note, *The Power of States to Make Compacts*, 31 YALE L.J. 635 (1922) (same). *But see* Engdahl, *supra* note 247, at 88 (“Arrangements with foreign powers must satisfy other constitutional requirements than those imposed by the compact clause.”); Schaefer, *supra* note 326, at 45 (arguing that the fact that states can and do negotiate with foreign governments on some topics does not imply that “a state could begin negotiating with a foreign government on any topic” (emphasis added)).

338. *See supra* text accompanying note 66; *see also* *The Lottery Case*, 188 U.S. 321, 373 (1903) (Fuller, C.J., dissenting) (distinguishing between interstate commerce power—“intended to secure equality and freedom in commercial intercourse as between the States”—and the foreign commerce power, which “clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject . . . to no implied or reserved power in the State”); *Bowman v. Chicago & N.R. Co.*, 125 U.S. 465, 482 (1888):

It may be argued [that] the inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation.

*But see* *The License Cases*, 46 U.S. (5 How.) 504, 578 (1847) (“The power to regulate commerce

pacts—precisely because of the exclusive federal treaty power. *Holmes v. Jennison*,<sup>339</sup> decided in 1840, concerned the governor of Vermont’s attempt to extradite an alien prisoner to Canada in the absence of an extradition treaty with Great Britain. An evenly divided Court dismissed the appeal, but Chief Justice Taney, writing what was nearly a plurality opinion,<sup>340</sup> would have held that Vermont’s conduct amounted to an implicit agreement with Great Britain—through the latter’s anticipated acceptance of the extradited prisoner—that was unlawful in the absence of congressional consent.

Understood solely as a Compact Clause case, *Holmes* courts paradox. Chief Justice Taney’s expansive view of compacts seems strained<sup>341</sup>—at least in part because it expanded the range of agreements to which Congress may consent.<sup>342</sup> There was also no hint that Vermont’s conduct pro-

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among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it.”).

339. 39 U.S. (14 Pet.) 538 (1840).

340. Chief Justice Taney’s opinion was joined by three other Justices, with the remaining four Justices writing separately. Justice Catron clearly leaned against any finding of a compact, absent proof of a demand by Canada for Holmes—evidence that existed at the time, but was not reflected in the Supreme Court record. *See id.* at 594-98 (Catron, J., dissenting); *Ex parte Holmes*, 12 Vt. 631, 632-33 (1840) (quoting a letter from the government of Vermont that suggests that Canada requested Holmes’s extradition); *id.* at 641 (noting that Justice Catron based his opinion on the lack of evidence that Canada had demanded Holmes’s extradition and that therefore “[h]ad the return been as it now is [i.e. had Canada demanded Holmes’s extradition], it is to be inferred, from his [Catron’s] opinion that he would have concurred with the other justices”). But having decided “that it is better for the country [that] this question should for the present remain open,” he voted to dismiss, taking care to note that he was not in any respect bound in his future deliberations. *Holmes*, 39 U.S. (14 Pet.) at 597. Justice Thompson’s opinion rested primarily on the supposed inability of the Court to enforce its judgment. *See id.* at 585 (Thompson, J., dissenting). Justice Baldwin essentially ignored the compact question in favor of the view that, absent a treaty, states retained police powers over the presence of “fugitives, vagabonds, criminals, or convicts” that could not even be invaded by congressional statute, and he suggested too that Chief Justice Taney’s result would be politically infeasible for the Court to enforce. *Id.* at 614, 618-19 (Baldwin, J., dissenting).

341. *Compare Holmes*, 39 U.S. (14 Pet.) at 569, 572-74 (describing the breadth of the consent requirement), *with id.* at 579, 80 (Thompson, J., dissenting) (disputing the view of the Vermont-Canada arrangement as a “compact”), *and id.* at 588 (Barbour, J., dissenting) (same), *and id.* at 595-96, 598 (Catron, J., dissenting) (same).

342. Chief Justice Taney understandably balked at viewing the informal arrangement at issue as a treaty, *id.* at 571, but his opinion may be read to suggest that Congress could consent to less formal arrangements even on traditionally national issues like extradition. Though attempts to distinguish the various subjects-matter appropriate to treaties and compacts were at odds, none appear to contemplate that extradition would be an appropriate topic for compact. *See* St. George Tucker, *Editor’s Appendix* to 1 WILLIAM BLACKSTONE, COMMENTARIES 310 (St. George Tucker ed., 1803) (describing treaties as “relat[ing] ordinarily to subjects of great national magnitude and importance” and “often perpetual, or made for a considerable period of time,” while compacts “concern[] transitory or local affairs, or such as cannot possibly affect any other interest but that of the parties”); 3 STORY, *supra* note 124, §§ 1395-97 (distinguishing “treaties of a political character,” “treaties of confederation,” and “treaties of cession of sovereignty, or conferring internal political jurisdiction, or general commercial privileges,” from

duced undesirable foreign effects, presumably because Canada favored extradition. Instead, *Holmes* is best understood as addressing state activities germane to *either* foreign compacts or treaties—the process of obtaining pacts rather than their eventual classification.<sup>343</sup> As Taney explained, the treatment of every form of pact in Article I signaled that

the framers of the Constitution . . . anxiously desired to cut off all connection or communication between a state and a foreign power: and we shall fail to execute that evident intention, unless we give to the word “agreement” its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.<sup>344</sup>

There was no allegation of congressional consent, and so Taney was not called upon to discuss issues of timing or procedure. But his description of compacts and agreements as prohibited—and of the Framers’ intention that “there would be no occasion for negotiation or intercourse between the state authorities and a foreign government”—left no doubt but that consent would be required for all compacts or agreements, and that it could tenably be granted only *before* intercourse with a foreign government.<sup>345</sup>

The constitutional bases for Taney’s understanding were the federal treaty power and the subordinate power to send and receive ambassadors.<sup>346</sup>

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compacts concerning “mere private rights of sovereignty; such as questions of boundary; interests in land, situate in the territory of each other; and other internal regulations for the mutual comfort, and convenience of States bordering on each other”; Engdahl, *supra* note 246, at 75-81 (suggesting that the Framers followed Vattel in distinguishing between compacts that were “dispositive” in nature—e.g., boundary settlements and cessions—and all other, nondispositive arrangements that were treaties strictly proscribed to the states); *see also* Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by “Agreements or Compacts”?*, 3 U. CHI. L. REV. 453, 464 (1936) (concluding that compacts “included (1) settlements of boundary lines with attending cession or exchanges of strips of land, (2) regulation of matters connected with boundaries as for instance regulation of jurisdiction of offenses committed on boundary waters, of fisheries or of navigation”). Today, the Court does not deny that some such distinction was intended, only that it has been lost. *See United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459-64 (1978) (recounting the interpretations of the words “treaty,” “compact,” and “agreement” by the Framers and the Court, and concluding that the distinct meanings were lost by 1833 when perceived by Justice Story).

343. *Cf. Spiro, Foreign Relations, supra* note 29, at 1230-32 (considering Chief Justice Taney’s opinion as “expound[ing] a dormant theory of federal power over foreign relations”).

344. *Holmes*, 39 U.S. (14 Pet.) at 572.

345. *Id.* at 573-74. Justice Catron, who would have concurred had the record reflected evidence of a demand by Canada for *Holmes*, *see id.* at 595-96 (Catron, J., dissenting), was apparently of a like mind.

346. As the opinion put it,

[e]very part of [the Constitution] shows that our whole foreign intercourse was intended to be committed to the hands of the general government: and nothing shows it more strongly than the treaty-making power, and the power of appointing and receiving ambassadors; both of which are immediately connected with the question before us, and undoubtedly belong exclusively to the federal government. It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off

For Justice Barbour, any such federal authority rested in the hands of the political branches: where no agreement or compact, narrowly defined, had been entered into, and no federal treaty nor legislative authorities had actually been exercised, the states were free to act.<sup>347</sup> To Chief Justice Taney, in contrast, state diplomacy conflicted with federal authority that was “dormant” in the modern sense.<sup>348</sup> The federal government’s power to appoint and receive ambassadors, he argued, entailed not just the authority to change officials but also the authority (vested, in the ordinary case, in the President) to *abstain* from political communication with foreign nations.<sup>349</sup> Therefore, because the treaty-making power contemplated the power to conduct and *refrain* from all manner of foreign engagements, any state exercise of foreign relations would plainly invade that power.<sup>350</sup>

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all communications between foreign governments, and the several state authorities. The power now claimed for the states, is utterly incompatible with this evident intention; and would expose us to one of those dangers, against which the framers of the Constitution have so anxiously endeavoured to guard.

*Id.* at 575-76.

347. *See id.* at 588-94 (Barbour, J., dissenting) (quoting Chief Justice Taney to show that the actions of Vermont’s governor did not infringe on the treaty-making power because “[i]t is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states” (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196 (1819))); *see also id.* at 598 (Catron, J., dissenting) (“There being no agreement in the case; certainly none of the exclusive powers secured to the general government . . . were violated.”). *But see id.* at 576-77 (arguing emphatically that the treaty-making power could not be dormant and that it is vested wholly with the federal government, even though the Constitution expresses no explicit prohibition on the states).

348. To Taney himself, however, “dormant” literally meant open to use by the states. *See id.* at 576 (“From its nature, [the treaty-making power] can never be dormant in the hands of the general government.”).

349. Chief Justice Taney argued:

[I]f the general government deemed it to be the true policy of the country to have no communication or connection with foreign nations, by ambassadors, other public ministers, or consuls; and refused, on that account, to appoint any; could it be said that this power was dormant in the hands of the government, and that the states might exercise it? Or if the general government deemed it advisable to have no such communications with some particular foreign nation, could any state regard it as an unexercised power, and therefore undertake to exercise it? We can readily imagine that there may be reasons of policy, looking to the whole Union, that might induce the government to decline an interchange of ambassadors with certain foreign countries. It is not material to the question in hand, whether that policy be right or wrong. But assuming such a case to exist, can any state regard it as an unexecuted portion of the power granted to the federal government; and, by appointing an ambassador or consul, counteract its designs, and thwart its policy? There can be but one answer, we think, given to this question.

*Id.* at 577. Elsewhere in the opinion, the Chief Justice emphasized the role of the President in exercising this power. *See id.* at 570 (describing aspects of the President’s treaty-making power, such as acting upon the Senate’s authorization to make treaties, and nominate and receive ambassadors, public ministers, and foreign officials).

350. Chief Justice Taney reasoned:

The argument which supposes this power may be dormant in the hands of the federal government, is founded, we think, in a mistake as to its true nature and character. It is not the mere power to deliver up fugitives from other nations upon demand; but the right to deter-

Chief Justice Taney's *Holmes* opinion, not Justice Barbour's, was regarded as authoritative,<sup>351</sup> perhaps in part because Taney's general preju-

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mine whether they ought or ought not to be delivered, and to make that decision, whatever it may be, effectual. It is the power to determine whether it is the interest of the United States to enter into treaties with foreign nations generally, or with any particular foreign nations, for the mutual delivery of offenders fleeing from punishment from either country; or whether it is the interest and true policy of the United States, to abstain altogether from such engagements, and to refuse, in all cases, to surrender them.

*Id.* at 576.

351. The Chief Justice's opinion was certainly seen at the time to have carried the day. The Vermont Supreme Court subsequently ordered Holmes's release, based on the combination of Taney's opinion for four Justices along with evidence that would have satisfied Justice Catron as to a compact's existence. *See Ex parte Holmes*, 12 Vt. 631, 635-37, 640-42 (1840) (holding that the governor of Vermont does not have the power to surrender a suspect wanted by a foreign country); *see also Holmes*, 39 U.S. (14 Pet.) at 595-96 (Catron, J., dissenting) (finding nothing in the record to support a prior agreement between the governor of Vermont and Great Britain that would have been a violation of the Constitution); *id.* at 598 (reporter's note) (clarifying that even though no judgment was given, the Court found no power by which the state could deliver the prisoner). Later cases have treated Chief Justice Taney's opinion as authoritative. *See, e.g.*, *United States v. Rauscher*, 119 U.S. 407, 413-14 (1886) (citing Taney's opinion in *Holmes* with approval); *Safe Harbor Water Power Corp. v. Federal Power Comm'n.*, 124 F.2d 800, 808 (3d Cir. 1941) (citing Taney's opinion to illustrate the broad meaning of the terms "treaty," "agreement," and "compact"); *In re Manuel P.*, 215 Cal. App. 3d 48, 67-69 (Ct. App. 1989) (incorporating Taney's distinction between exercising the state's police power and assisting a foreign country in punishing those who have violated the foreign laws into recognizing California's right to remove a Mexican national); *People v. Curtis*, 50 N.Y. 321, 325 (1872) ("This subject [a compact between a state and foreign country] was so fully and elaborately considered by the Supreme Court . . . in [*Holmes v. Jennison*] that an extended discussion here is unnecessary, if not inappropriate."); 3 Op. Att'y Gen. 661, 661 (1841) ("I think, from the whole argument of the bench in the case of [*Holmes*], . . . we may consider it as law."); *see also COOLEY, supra* note 318, at 102 ("An attempt by a State to deliver a fugitive from justice to a foreign sovereignty, in response to a demand therefor, would be an attempt to perfect and perform an agreement, and is therefore unauthorized." (citing *Holmes*)); NATHANIEL C. TOWLE, A HISTORY AND ANALYSIS OF THE CONSTITUTION OF THE UNITED STATES 160 (1871) (citing Taney's opinion for the proposition that the Constitution "intended to cut off all negotiation and intercourse between the State authorities and foreign nations"); 1 DAVID K. WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 846 (1910) (citing Taney's *Holmes* opinion in support of his assertion that the Framers "anxiously desired to cut off all connection or communication between a State and a foreign power").

Where *Holmes* has been noted but disregarded, it has either been because of the mistaken view that it was effectively overruled by *Virginia v. Tennessee*, *see, e.g.*, *Fraser v. Fraser*, 415 A.2d 1304, 1305 (R.I. 1980) (finding that the Court had changed from the literal approach used in *Holmes* to a "functional view" of the Compact Clause), or because *Holmes* dealt with the traditionally national area of extradition, *see, e.g.*, *McHenry County v. Brady*, 163 N.W. 540, 544 (N.D. 1917) (distinguishing the right of extradition as a "national and governmental power" from an agreement regarding the construction of a drainage system between a state and a foreign country where the drain was in the United States and the outlet in Canada). These attempts to lump foreign compacts with domestic compacts, and at the same time isolate *Holmes* to a particular class of international problem, are transparently at cross-purposes. As explained below, *Virginia v. Tennessee* is consistent with the *Holmes* plurality, and the Supreme Court has subsequently cited Chief Justice Taney's opinion with approval. *See New York v. United States*, 505 U.S. 144, 183 (1992) (citing, and distinguishing, the plurality opinion as inapplicable to the collaboration of states in seeking federal legislation); *id.* at 198 (White, J., concurring in part and dissenting in part) (finding an informal "agreement" to an interstate compact, for estoppel purposes, under the test articulated by the *Holmes* plurality).

dice against theories of dormant national power made his departure in *Holmes* seem truly obligatory.<sup>352</sup> Taney's specific suggestion that the states are not free to negotiate foreign agreements without prior consent has survived considerable evolution in the Court's Compact Clause doctrine.<sup>353</sup> To be sure, it has not always been adhered to in practice.<sup>354</sup> But it is hard to at-

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352. See CURRIE, *THE CONSTITUTION IN THE SUPREME COURT*, *supra* note 104, at 247-49 (praising Chief Justice Taney's "well-crafted opinion" and noting a "striking[]" contrast between the Chief Justice's position concerning the competence of states to regulate commerce and the authority to enforce Article IV's Fugitive Slave Clause); 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1821-1855*, at 338, 340 (1922) (describing Chief Justice Taney's opinion as "superbly able" and adding that "[t]he most striking feature . . . of Taney's notable opinion was the fact that it sustained the supremacy of the Federal Government, with a breadth and completeness which had been excelled by no one of Marshall's opinions"); see also FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* 55-56 (1937) (observing that Chief Justice Taney "never voted to invalidate a state statute because it offended the protection of the 'dormant' commerce clause"). *But see, e.g.*, *The Passenger Cases*, 48 U.S. (7 How.) 283, 465-66 (1849) (Taney, C.J., dissenting) (suggesting limitations to the treaty power); *The License Cases*, 46 U.S. (5 How.) 504, 579-83 (1847) (denying that the Commerce Clause abridges state power to regulate commerce within the state absent conflicting federal legislation, or that state authority is limited to matters of "police powers"). In *Holmes* itself, Chief Justice Taney observed that "[t]he state does not co-operate with a foreign government nor hold any intercourse with it, when she is merely executing her police regulations." *Holmes*, 39 U.S. (14 Pet.) at 569.

353. In *Virginia v. Tennessee*, 148 U.S. 503 (1893), the Court departed from any broad construction of *Holmes* in dicta, suggesting that consent was required only for compacts affecting "the political power or influence" of particular states or "encroach[ing] . . . upon the full and free exercise of Federal authority," and further indicating that consent could in any event be more appropriately provided in some cases after an agreement was reached. *Id.* at 520, 521.

As to consent, *Virginia v. Tennessee* did not cite *Holmes*, but is entirely consistent with Chief Justice Taney's view that foreign compacts invariably fall among those encroaching on federal authority and requiring consent. See, e.g., *Waterfront Comm'n of N.Y. Harbor v. Construction & Marine Equip. Co.*, 928 F. Supp. 1388, 1401-02 (D.N.J. 1996) (applying both *Virginia v. Tennessee* and the *Holmes* plurality opinion in holding that the state Waterfront Commission Act requires consent because "[w]aterfront governance is closely related to interstate and foreign commerce, and unquestionably impinges on the supremacy of the federal government"); cf. 27 Op. Att'y Gen. 327, 332 (1909) ("The State of Minnesota can not enter into a compact or agreement with Great Britain or the Canadian government whereby the dam can be constructed without the consent of Congress."). As to the timing of consent, the Court remarked that "the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war." *Virginia*, 148 U.S. at 521.

354. A few foreign compacts have been entered into without prior consent. Congress has consented to perhaps six or seven compacts ultimately entailing participation by Canada or its provinces. See COUNCIL OF STATE GOVERNMENTS, *INTERSTATE COMPACTS 1783-1977 (A REVISED COMPILATION)* 3, 5, 6, 8 (1977) (listing compacts and referring to the Champlain Basin Compact, which contained a provision for Canadian participation); HENKIN, *supra* note 1, at 153 (giving examples of congressional authorization of compacts between foreign nations and states); see also Frankfurter & Landis, *supra* note 335, at 743 (considering a flood-control compact possibly permitting cooperation with Canada). In three compacts, Canadian participation (or at least the opportunity for Canadian participation) followed congressional consent. See COUNCIL OF STATE GOVERNMENTS, *supra*, at 5, 6, 8 (listing compacts); FREDERICK L. ZIMMERMAN & MITCHELL WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 98-99 (1976) (noting the Northeastern Interstate Forest Fire Protection Compact, consented to by Con-

tribute much significance to compacts where Congress was informed tardily or not at all, and the executive agencies have reliably resisted those foreign compacts of which they were made aware.<sup>355</sup>

gress in 1949 with a provision authorizing joinder by Canadian provinces, later to attract Quebec and New Brunswick); Frankfurter & Landis, *supra* note 335, at 743 (noting that the Flood Control Commission initially included only states, but that a North Dakota resolution moved to include Canada).

In other cases, compacts may never have received consent. *See, e.g.*, Union Branch R.R. Co. v. East Tenn. & Ga. R.R. Co., 14 Ga. 327, 333 (1853) (upholding the constitutionality of a state authorization for a railroad bridge); McHenry County v. Brady, 163 N.W. 540, 544 (N.D. 1917) (upholding the constitutionality of an agreement between North Dakota counties and a Canadian municipality for the construction of a transborder drain entered into with prior or subsequent congressional consent). *See generally* 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW § 464, at 24-25 (1943) (providing examples of interstate compacts and state-foreign agreements, while warning that agreements tending to increase state political power or infringing on the treaty power are either not allowed or require consent); Raymond Spencer Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021, 1024-28 (1967) (describing recent developments in the roles of both states and the federal government in the "international sphere," including references to several agreements between states and Canada, throughout which the Department of State has made an effort to stay involved); Schaefer, *supra* note 326, at 45 (examining the boundaries of state authority in foreign relations and noting that states have entered into negotiations with Canadian provinces without congressional approval).

355. The Department of State has, when asked, rejected proposed compacts out of hand or insisted on congressional consent. *See* 5 HACKWORTH, *supra* note 354, § 464, at 24-25 (citing 1924 advice given by the State Department that it was unaware of the "conclusion of any treaty or agreement between a State of the United States and a foreign government"; its reply to a 1937 proposal to promote trade between Florida and Cuba that it "did not contemplate the conclusion of special agreements or pacts between separate states and foreign governments even if the consent of Congress to such special agreements could be obtained"; and its view that congressional consent would be required for a California proposal of reciprocity arrangements with Mexico relating to motor vehicle registration); Rodgers, *supra* note 354, at 1022-23 (describing the traditional view of the State Department's denying the power of the states to enter into foreign compacts without congressional consent—even in the case of reciprocal exemption of motor vehicle registration and fees).

Similarly, the Department of Justice has advised that states must, at a minimum, obtain the permission of Congress before entering into any foreign compacts. *See* 3 Op. Att'y Gen. 661, 662 (1841) ("[I]t is necessary to refer the whole matter to Congress, and submit to its wisdom the propriety of passing an act to authorize such of the states as may choose to make arrangements with the government of . . . any . . . foreign state . . ."). In a later opinion, Attorney General Wickersham emphasized that congressional permission was not only required, but could properly be obtained only in view of the contemplated agreement. While this might be read to authorize prior negotiations, the point instead seems to have been that a very general authorization would not by itself suffice. *See* 27 Op. Att'y Gen. 327, 332 (1909):

[W]hen such consent is given, Congress shall have in mind the particular matter consented to; and certainly Congress did not intend by the general act in question to give its consent for a State to enter into an agreement with a foreign power by which such power might occupy the soil within the jurisdiction of the United States.

The State and Justice Departments were among the many federal agencies urging Congress to reject the proposed inclusion of Canadian provinces in the Great Lakes Commission, in part on the ground that it would interfere with the treaty power. *See* WELDON V. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 119 & n.65 (1967); Michael J. Donahue, *Strengthening the Binational Great Lakes Management Effort: The Great Lakes Commission's Provincial Membership Initiative*, 1998 TOLEDO J. GREAT LAKES' L. SCI. & POL'Y 27, 32-33. Their efforts resulted in language specifi-

Critically, moreover, *Holmes* captured the norm against state bargaining as a rule that courts should enforce, one that was *not* just dependent on state self-policing or intervention by the federal political branches.<sup>356</sup> Such authority was defensible because it was rooted in specific textual authority granted to the President and Senate and the specific preclusion of state authority.<sup>357</sup> Consequently, *Holmes* suggested a narrower, more rigorous dormant preemption doctrine, one premised not on avoiding foreign effects but instead on prohibiting acts too closely resembling exclusive federal functions.<sup>358</sup>

As previously stressed, that doctrine was highly dependent upon contemporary notions of the treaty power's limits,<sup>359</sup> even in areas like immigration and foreign commerce.<sup>360</sup> Nonetheless, to the extent that positive

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cally withholding congressional consent to Canadian membership, declaring that consent would not interfere with the work of federal agencies or the federal treaty-making power and reserving to Congress the right to "alter, amend or appeal" its consent. Great Lakes Basin Compact, Pub. L. No. 90-419, art. 9, 82 Stat. 414, 418-19 (1968). It appears that the Great Lakes Commission is undeterred. *See* Donahue, *supra*, at 32-35 (describing the Commission's interest in Canadian relations).

356. In my view, accordingly, Professor Goldsmith is mistaken in stressing that Chief Justice Taney "always tie[d] the exclusivity point to a federal policy, inferred from the absence of federal extradition treaties, to prohibit all extraditions to foreign countries." Goldsmith, *Federal Courts*, *supra* note 1, at 1650 n.147. While the Chief Justice cited what he "believed" to be federal policy, the point seems to have been to illustrate that the federal government's power to control extradition by treaty was "as fully exercised by the decision not to surrender, as it could be by a decision the other way"; in either case, "[t]he question to be decided is a question of foreign policy; committed, unquestionably, to the general government." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 538, 577 (1840). Goldsmith similarly suggests that Chief Justice Taney's argument regarding the exclusive federal power to appoint ambassadors supposes that the power is exercised. *See* Goldsmith, *Federal Courts*, *supra* note 1, at 1650 n.147. But Chief Justice Taney's point again is that the power *invariably* conflicts with state diplomacy. *See Holmes*, 39 U.S. (14 Pet.) at 577. Some federal policy is presupposed, but only in the sense of a decision to act or not to act.

357. *See supra* text accompanying notes 344-45. Attempts, then, to determine whether *Holmes* and its progeny rest on either a Compact Clause basis or a dormant preemption doctrine, *see* Goldsmith, *Federal Courts*, *supra* note 1, at 1651-52 & n.150, not only overlook the treaty power, but imply that dormant preemption doctrine cannot have any textual basis—which, if true, would for many answer the question of the doctrine's validity before it was asked.

358. This seems consistent with the reading of *Holmes* in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), in which the Court rejected a facial challenge to the Multistate Tax Commission on the ground that conducting audits of foreign taxpayers would interfere with the federal foreign relations power. *See id.* at 476-77. After noting that prior consent had always been required for matters involving foreign powers, *see id.* at 460 n.10, the Court explained how Chief Justice Taney's opinion in *Holmes* could be reconciled with dicta in *Virginia v. Tennessee* if his focus on matters with the "exclusive foreign relations power" of the federal government were properly understood. *See id.* at 465 n.15.

359. *See supra* text accompanying notes 314-19.

360. In *The License Cases*, for example, Justice Daniel opined that

[e]very power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated . . . . A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a

political authority was permitted, dormant treaty power preemption followed.<sup>361</sup> The obvious puzzle of why courts and scholars might find dor-

State.

The License Cases, 46 U.S. (5 How.) 504, 613 (1847) (Daniels, J., concurring). Foreign commerce was not regarded distinctly. *See id.* at 578 (Taney, C.J., dissenting). This line of thinking was eventually overcome, but it took some time. *See Leisy v. Hardin*, 135 U.S. 100, 108-10, 115-18 (1890) (dismissing the idea that a state may act when Congress does not exercise its power). In the interim, even those cases recognizing the dormant Commerce Clause acknowledged exceptions for the exercise of state police powers. Thus, in *The Passenger Cases*, the first to find a Commerce Clause violation in the absence of a federal statute, both sides of a divided Court—including Chief Justice Taney—recognized limits to federal authority in a setting pertaining both to foreign commerce and immigration. *See The Passenger Cases*, 48 U.S. (7 How.) 283, 457 (1849) (opinion of Grier, J.) (distinguishing cases involving the “sacred law of self-defence, which no power granted to Congress can restrain or annul”); *id.* at 466 (Taney, C.J., dissenting) (“Any treaty or law of Congress invading [the right to expel dangerous or immoral persons] . . . would be a usurpation of power which this Court could neither recognize nor enforce. I had supposed this question not now open to dispute.”).

361. In *Hines v. Davidovitz*, 312 U.S. 52 (1941), the Court stated: “[W]hether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable.” *Id.* at 73. Since Congress had acted in *Hines*, the Court did not have to decide whether “the federal power in this field, whether exercised or unexercised, is exclusive.” *Id.* at 62. *Hines* legitimately calls into question whether there was a dormant immigration preemption doctrine and arguably suggests that *Zschernig* was novel. *See HENKIN*, *supra* note 1, at 434 n.57; Goldsmith, *Federal Courts*, *supra* note 1, at 1653-54. *But see* Spiro, *Demi-Sovereignties*, *supra* note 29, at 138-41 (defending the pedigree of dormant foreign relations preemption); Spiro, *Foreign Relations*, *supra* note 29, at 1227-41 (reviewing the historical foundations of federal exclusivity over foreign relations). But *Hines* also endorses *Chy Lung*’s concerns about the ultimately federal responsibility for state acts. *See Hines*, 312 U.S. at 63-64 & n.12. More important, it takes the view that the Constitution “imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference,” *see id.* at 63, 62-68, and leaves undisturbed *Chy Lung*’s conclusion that states were neither free to negotiate with foreign powers nor to engage in equivalent acts, *see Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (indicating that the Constitution “has forbidden the States to hold negotiations with any foreign nations . . . and has taken the whole subject of these relations upon herself,” including the power to pass laws engendering diplomatic controversy). Judge Feld, writing in *Ho Ah Kow v. Nunan*, 12 Fed. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546), similarly noted, with respect to a San Francisco ordinance requiring the apparently offensive treatment of Chinese prisoners, that

to [the national] government belong[s] exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic, and, with the exceptions presently mentioned, the power to prescribe the conditions of immigration or importation of persons. The state in these particulars, and with those exceptions, is powerless, and nothing is gained by the attempted assertion of a control which can never be admitted.

*Id.* at 256.

In commercial matters, *Missouri v. Holland*, 252 U.S. 416, 433 (1920), raised complex questions of how to reconcile congressional authority over foreign commerce with Senate and executive control over treaties respecting those matters, particularly if the treaty power might regulate matters out of congressional reach. *See HENKIN*, *supra* note 1, at 209-11, 486-87 n.131. *But see* 2 BUTLER, *supra* note 320, §§ 361, 378, 388, at 64-65, 84-86, 185-87 (stating that the last in time of a conflicting treaty stipulation and act of Congress controls, thus implicitly assuming, prior to *Missouri v. Holland*, that congressional and treaty authority were coextensive). But it was plain, under those conditions, that enforcing a dormant Foreign Commerce Clause entailed the judicial protection of the treaty power as well and that the former’s scope might be enhanced by invoking treaty considerations. The clearest illustration was in

mant preemption appropriate for other aspects of the burgeoning federal authority,<sup>362</sup> but not for the treaty power, results from underestimating the rocky beginnings of *any* exclusive federal authority, and from ignoring the centrality of treaty-related bargaining to the *raison d'être* of the foreign relations monopoly.

This evolving constitutional understanding was set back, of course, by the narrowing of the dormant treaty power in *Clark v. Allen*, and was hardly restored by the monopoly's distension in *Zschernig v. Miller*. *Clark* presented the question of whether state reciprocal inheritance legislation unconstitutionally interfered with the dormant treaty power. The federal government argued not only that the California statute violated a treaty with Germany, but also that such laws unconstitutionally attempted to negotiate with foreign states by inviting them to "trade inheritance rights abroad for inheritance rights in these states."<sup>363</sup> Describing the state's program in those terms, and emphasizing the exclusivity of the federal government's negotiating power, was perfectly in keeping with dormant treaty power doctrine. But the brief confused matters by also citing possible interference with the federal treaty "program" and asserting that such laws could only have adverse effects on foreign relations.<sup>364</sup> The respondents accordingly disputed that state laws might be unconstitutional merely because

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*Henderson v. Mayor of New York*, 92 U.S. 259 (1875), in which the Court adverted to international relations concerns bearing on municipal regulation of maritime passengers before concluding that "if there be a class of laws which may be valid when passed by the States until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class." *Id.* at 273 (emphasis added).

362. Cf. Goldsmith, *Federal Courts*, *supra* note 1, at 1648-49 & nn.139-40 (querying why dormant preemption developed relative to, among other areas, the Commerce Clause, the power to tax federal instrumentalities, and fugitive slave legislation, but not in relation to Congress's bankruptcy power, its "define and punish" power, and its copyright and patent powers).

363. Brief for Petitioner at 69-70, *Clark v. Allen*, 331 U.S. 503 (1947) (No. 626) [hereinafter *Clark* Petitioner's Brief]; *accord* Petition for Writ of Certiorari at 8, *Markham v. Allen*, *cert. granted sub nom.* *Clark v. Allen*, 331 U.S. 503 (1947) [hereinafter *Clark* Petition].

364. See *Clark* Petitioner's Brief, *supra* note 363, at 69-75; see also *Clark* Petition, *supra* note 363, at 8. Thus, the brief also suggested that the constitutionality of such an act depended on whether the state "ha[d] the same objective as the existing reciprocal inheritance rights treaties and must, therefore, be regarded as an indirect attempt to negotiate with foreign countries and as an attempted duplication of the treaty-making program." *Clark* Petitioner's Brief, *supra* note 363, at 70. This would make any dormant treaty power doctrine depend on the actual content of federal policy, just like a more typical "positive" preemption claim. Neither argument was helped terribly by the citation of dicta in *Hines v. Davidowitz*, 312 U.S. 52 (1941), or *People v. Gerke*, 5 Cal. 381 (1855). Compare *Clark* Petitioner's Brief, *supra* note 363, at 70-71 (citing cases), with note 361 (discussing *Hines*), and note 311 (discussing *Gerke*). The brief also invoked *Curtiss-Wright's* tenuous argument concerning the absence of state authority, see *Clark* Petitioner's Brief, *supra* note 363, at 70-71, claimed sweepingly that "all efforts of a state to engage in foreign relations" are unconstitutional, *id.* at 70, and suggested that the California statute was unconstitutional because its object—protecting the inheritance rights of Americans abroad—was solely one that could be pursued by the federal government, see *id.* at 72.

they had “some incidental or indirect effect in foreign countries”—an argument incorporated (and even quoted) by the Supreme Court.<sup>365</sup> While noting the argument that California’s initiative might undercut national objectives<sup>366</sup> and endorsing the view that “negotiating with a foreign country” was solely a task for the federal government, the Court concluded simply that the state had not actually “entered th[at] forbidden domain.”<sup>367</sup>

The different result twenty years later in *Zschemig* could be viewed as a return to first principles, insofar as the Court cited Oregon’s usurpation of the federal negotiating function.<sup>368</sup> In the main, though, *Zschemig* continued *Clark*’s ill-advised focus on foreign effects. The government revived its position that the governing treaty resolved the question—a position necessarily diminishing its interest in vindicating dormant federal negotiating authority<sup>369</sup>—and minimized any potential conflict with what it cast as the “brooding omnipresence” of federal authority over foreign relations.<sup>370</sup> The

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365. See Brief for Respondents at 59 n.19, *Clark v. Allen*, 331 U.S. 503 (1947) (arguing that a state acting within its own jurisdiction, whose actions do not conflict or hinder federal authority, should not be held invalid); see also *Clark*, 331 U.S. at 517 (reasoning that actions that have some “incidental or indirect effect in foreign countries” may be prohibited).

366. As the Court characterized it, the claim was that “by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California,” which was “said to be a matter for settlement by the Federal Government on a nation-wide basis.” *Clark*, 331 U.S. at 516-17.

367. *Id.* at 517; see also *id.* (“What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line.”). Although the Court cited a number of cases as counterpoints, its primary support was *Blythe v. Hinckley*, 180 U.S. 333 (1901). See *Clark*, 331 U.S. at 517; see also *supra* text accompanying note 310 (discussing *Blythe*).

368. See *Zschemig v. Miller*, 389 U.S. 429, 439 (1968) (explaining that the Oregon statute “was to serve as ‘an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon’” (quoting *Clostermann v. Schmidt*, 332 P.2d 1036, 1041 (Or. 1958))).

369. In *Clark*, the Court had rejected the Solicitor General’s argument that the treaty covered personal property located in the United States that was left by an American citizen to a German national. See *Clark*, 331 U.S. at 516; see also *Virginia v. Meekison*, *Treaty Provisions for the Inheritance of Personal Property*, 44 AM. J. INT’L L. 313 *passim* (1950) (setting forth the State Department’s position at length). In *Zschemig*, the Solicitor General opposed certiorari, but indicated that the threshold question would be the issue of treaty interpretation decided in *Clark*—indeed, after certiorari was granted, he argued that this aspect of the decision should be overruled. See Memorandum for the United States at 5-8, *Zschemig v. Miller*, 389 U.S. 429 (1968) (No. 730) [hereinafter *Zschemig* Memorandum]; Brief for the United States as Amicus Curiae at 6, *Zschemig v. Miller*, 389 U.S. 429 (1968) (No. 21) [hereinafter *Zschemig* Amicus Brief]. The treaty issue may have been the more significant, given that similar or identical language was used in 10 other treaties then in force. See *id.* at 4-5 & nn.3-4 (listing the treaties containing identical and similar provisions).

370. *Zschemig* Memorandum, *supra* note 369, at 6. In its brief, the United States simply asserted that the Oregon statute did not unduly interfere with U.S. foreign relations, without even framing the matter as a constitutional question. See *Zschemig* Amicus Brief, *supra* note 369, at 6 nn.5, 10 & 15.

Court, as previously noted, disagreed, and distinguished *Clark* principally on the ground that the potential for adverse foreign effects in *Zschernig* was in fact demonstrable.<sup>371</sup> The better distinction lay in the design of the state statute at issue in *Zschernig* to effect change abroad—not just its tendency to generate ill will. The state court had opined that Oregon intended its statute as “an inducement to foreign nations to so frame the[ir] inheritance laws . . . to insure to Oregonians the same opportunities” as they enjoyed in Oregon.<sup>372</sup> To the Supreme Court, this bespoke a penchant for inquiring too closely into foreign concerns and intruding into “matters for the Federal Government, not for local probate courts,”<sup>373</sup> which it regarded as posing too high a risk of adverse effect on foreign relations.<sup>374</sup>

The real import, instead, had been sketched by the government in *Clark* and by the private appellants in *Zschernig*. However much distress the Oregon law might cause U.S. foreign relations, and however much Oregon might be legislating in an area susceptible to resolution by treaty, the *constitutional* problem was that Oregon was implicitly “negotiating” with foreign nations, and, in so doing, exceeding its authority under the Constitution.<sup>375</sup>

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371. See *Zschernig*, 389 U.S. at 434-35 (noting that Oregon’s statute has “great potential for disruption and embarrassment”); see also *id.* at 443 (Stewart, J., concurring) (dismissing the argument that state law does not conflict with the national interest today, while expressing a concern that it may in the future and that this constitutional issue is too important to risk a variance of interpretation). *But see supra* text accompanying notes 92-93 (observing an absence of proof concerning foreign effect). The same emphasis was suggested in Chief Justice Burger’s dissent in *In re Griffiths*, 413 U.S. 717 (1973), in which the Court struck down Connecticut’s refusal to admit a Dutch lawyer to the state bar on grounds of citizenship. After outlining his disagreement with the majority, the Chief Justice consoled that

the States may well move to adopt, by statute or rule of court, a reciprocal proviso, familiar in other contexts; under such a reciprocal treatment of applicants a State would admit to the practice of law the nationals of such other countries as admit American citizens to practice. I find nothing in the core holding of *Zschernig v. Miller* . . . to foreclose state adoption of such reciprocal provisions.

*Id.* at 733 (Burger, C.J., dissenting) (citing *Clark v. Allen*, 331 U.S. 503 (1947)). The “core holding” distinguishing *Zschernig* from *Clark* and *Griffiths* was likely thought to be *Zschernig*’s emphasis on the foreign effects of judicial commentary, which one might fairly presume would be less prominent in bar-related matters.

372. *Closterman*, 332 P.2d at 1041, quoted in *Zschernig*, 389 U.S. at 438-39.

373. *Zschernig*, 389 U.S. at 438; see also *id.* at 433 n.5 (claiming that in *Clark* the statute’s motive had not been litigated, permitting the conclusion that “just matching of laws” was requested and that representations by foreign officials as to their governments’ laws would suffice to establish reciprocity); *id.* at 438-39 (citing *Clostermann*, 332 P.2d at 1042).

374. See *supra* text accompanying notes 49-57.

375. The appellants’ argument was somewhat distinct from the one made here. Rather than focusing on state encroachments on the negotiating function, the appellants suggested that Oregon’s proposal had violated an absolute prohibition on *entering* into a compact with a foreign power, asserting almost as an afterthought that negotiating toward that end was also barred. See Brief of Appellants at 59-60,

## III. RECONSIDERING THE DORMANT TREATY POWER

Even if constitutional text and structure, as elaborated through the nineteenth century, suggests the basic contours of a dormant treaty power, revisionist scholarship argues that global changes warrant revisiting the matter. The increasingly untenable distinction between matters of international and local concern, and the newly cosmopolitan nature of state and local governments, is thought to have unsettled the Framers' assumptions about the proper functions of state government. Perhaps the states are so thoroughly invested in the business of foreign nations that their excesses will be checked by self-interest. If not, perhaps legitimate concerns about federal supremacy can be adequately protected by the political branches, thereby avoiding the obvious difficulties courts have had in evaluating the potential costs of state interference in foreign relations—and, perhaps, their insensitivity to its benefits.

To the extent that such arguments suggest partial “translations” of the Constitution,<sup>376</sup> they face daunting difficulties: if political conditions have changed constitutional meaning, why have they not also undermined any obligation to respect state sovereignty?<sup>377</sup> But even if it is appropriate, under some circumstances, to adapt constitutional readings in light of changed circumstances and experience, the claim that the state activities touching on foreign relations may be blithely entrusted to legislative supervision is unpersuasive. The better course, instead, is to articulate a judicially manageable standard that respects the balance struck by the Constitution. As I argue below, an act-oriented prohibition on explicit or implicit state bargaining with foreign powers—tailored to exempt state conduct bearing little relationship to the original warrant for assigning the treaty power to the federal government—is vastly superior to conventional approaches focusing on effects or purpose.

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Zschernig v. Miller, 389 U.S. 429 (1968) (No. 21). They also failed to emphasize the location of federal authority in the Treaty Clause, instead relying on the Foreign Commerce Clause. *See id.* at 60-61.

376. For a comprehensive account of this practice, see Larry Lessig, *Fidelity and Translation*, 71 TEX. L. REV. 1165 *passim* (1993) (arguing that originalism—that is, “fidelity to the text”—can at times require changes in the interpretation of the Constitution). Of course, some degree of translation is always necessary. *See, e.g.*, H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 672 (1987) (“To converse with the founders, you need a translator.”).

377. *Cf.* Klarman, *supra* note 39, at 395-96 (considering analogous conundrums concerning how to reconcile an original-intent interpretation of the Constitution with changing circumstances); *supra* text accompanying note 40 (noting the possible partial “translation” of the dormant treaty power).

A. *Is the Dormant Treaty Power Antiquated?*

1. *A New International Function for States?* The exclusive federal authority to control foreign relations was premised on several simple propositions. First, multiple entreaties robbed the nation of the uniformity, credibility, and critical bargaining mass necessary to achieve advantageous treaties and stave off adverse actions. Second, separate state action risked retaliation against the nation as a whole. Finally, uniformity would enhance national pride and dignity, thus indirectly assisting in foreign relations, and serve as a bulwark against internal collapse due to conflicting interests. These propositions were based on concrete experience under the Articles of Confederation, and they were essentially uncontroversial.

Some conditions have changed dramatically—such as the need to ensure the internal stability and external credibility of the infant United States—without provoking widespread reconsideration of the treaty power.<sup>378</sup> Other changes seem overstated. The federal government has not really yielded its international role to the states.<sup>379</sup> Failures to preempt state foreign relations activities might signal genuine agreement with a state's position, an inability to intervene due to political or administrative constraints, or simply opposition to preemption as a matter of principle.<sup>380</sup> And even if concessions to states in recent treaties and implementing legislation outweigh parallel incursions into state sovereignty—a point open to dispute<sup>381</sup>—they hardly suggest that states are at liberty to determine their own constitutional privileges.

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378. Cf. FRY, *supra* note 5, at 110-11 (contrasting the contemporary United States with problems posed for Canada by Quebec separatism). *But see id.* at 1-3 (asserting political and economic vulnerability of post-Cold War America).

379. *But see* Bradley & Goldsmith, *Customary International Law*, *supra* note 29, at 861-70 (citing examples of federal accommodation of state activities affecting international relations); Goldsmith, *Federal Courts*, *supra* note 1, at 1674-78, 1683 (same).

380. *See* Bradley, *supra* note 29, at 1098-99 (positing different explanations for presidential and congressional passivity). Professor Spiro suggests that the federal government is almost always begrudging of any state intervention. *See* Spiro, *Foreign Relations*, *supra* note 29, at 1258 & n.143 (disagreeing with Professor Bradley's position that "state-level activity may now be unproblematic because in some cases Congress may 'agree' with it").

381. For emphasis on the loss of local sovereignty, see, for example, A.J. Tangeman, Comment, *NAFTA and the Changing Role of State Government in a Global Economy: Will the NAFTA Federal-State Consultation Process Preserve State Sovereignty?*, 20 SEATTLE U. L. REV. 243, 244-46 (1996); Joseph Wilson, Note, *Section 102 of the Uruguay Round Agreements Act: 'Preserving' State Sovereignty?*, 6 MINN. J. GLOBAL TRADE 401, 402-03 (1997); William T. Warren, *Balancing Act: Free Trade and Federalism*, STATE LEGISLATURES, May 1996, at 12. For emphasis instead on the loss of U.S. sovereignty, see William J. Aceves, *Lost Sovereignty? The Implications of the Uruguay Round Agreements*, 19 FORDHAM INT'L L.J. 427, 428 (1995). For analyses suggesting that sovereignty concerns are misplaced, see John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Im-*

To be sure, many traditionally local issues now implicate foreign relations, domestic laws often have international repercussions, and states and localities have higher international profiles.<sup>382</sup> This much-ballyhooed leap into globalization surely continues trends that began much earlier this century,<sup>383</sup> and raises issues not unknown even under the Articles of Confederation: the controversy over navigation on the Mississippi, for example, demonstrated how regional interests implicated foreign relations right in our own backyard, and states have competed for overseas business since they were colonies.<sup>384</sup> However new and fundamental globalization may

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*plementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 170-88 (1997); Charles Tiefer, *Free Trade Agreements and the New Federalism*, 7 MINN. J. GLOBAL TRADE 45, 47 (1998).

382. See, e.g., BRIAN HOCKING, LOCALIZING FOREIGN POLICY: NON-CENTRAL GOVERNMENTS AND MULTILAYERED DIPLOMACY 8-30 (1993); Goldsmith, *Federal Courts*, *supra* note 1, at 1670-80; Peter J. Spiro, *New Players on the International Stage*, 2 HOFSTRA L. & POL'Y SYMP. 19, 31-32 (1997).

383. See EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 162 (1914):

With the growth of international trade relations, immigration, and other forms of international intercourse, the conditions of life within particular nations become of ever increasing concern to their neighbors, with the result that treaty-making among the independent states of the world tends to extend to matters earlier deemed to lie quite without its sphere.

*Accord* FISHER, *supra* note 46, at 59 & n.82 ("The framers made no such distinction and world events since 1936 have increased the overlap between foreign and domestic affairs."); Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1092 (1996) (describing pre-World War I writings of Norman Angell and the International Polity movement). In an article cited in *Zschernig* itself, Arthur Selwyn Miller predicted the "obsolescence of the nation-state as a form of social ordering," contributing to his conclusion that "[t]he social milieu in which the Constitution operates having changed so radically, the answers produced by the Founding Fathers must be re-examined." Arthur S. Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539, 1570-72 (1960), *cited in* *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968). Just three years after *Zschernig*, Raymond Vernon declared that the concept of national sovereignty seemed "curiously drained of meaning." RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES 3 (1971); see also Bayless Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306, 308-10 (1977) (describing the interrelationship between issues on international and domestic agendas). The tendency to greatly exaggerate the death of national sovereignty, and contemporary evidence indicating its continuing significance, may be cause for skepticism. See PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE 1 (1996) (writing with a "mixture of scepticism [sic] about global processes and optimism about the possibilities of control of the international economy"); Movsesian, *supra*, at 1089 (arguing that "the decline of the nation state has been greatly exaggerated").

384. Compare Blaine Liner, *States and Localities in the Global Marketplace*, INTERGOVERNMENTAL PERSP., Spring 1990, at 11 (describing Virginia's overseas effort in 1969 as a "stroke of genius" and "an historic and very lonely act"), with Harry N. Scheiber, *International Economic Policies and the State Role in U.S. Federalism: A Process Revolution?*, in STATES AND PROVINCES IN THE INTERNATIONAL ECONOMY at 71 (Douglas M. Brown & Earl H. Fry eds., 1993) (noting the parallel with eighteenth-century regulatory competition for European business). It remains the case, however, that domestic relations are generally more significant. See Dani Rodrik, *Sense and Nonsense in the Globalization Debate*, FOREIGN POL'Y, Summer 1997, at 21-22 (citing a study indicating that "trade between a Canadian province and a U.S. state (that is, *international* trade) is on average 20 times smaller than between two Canadian provinces (that is, *intranational* trade)").

seem, we must also recall how suffused with international concerns even “domestic” America was at its beginning, and how critical a role that context played in the founding.<sup>385</sup>

Even if today’s globalization is revolutionary, it is hard to determine its constitutional import. The erosion of national boundaries might as readily argue for expanding federal authority on the ground that matters are increasingly of common interest—certainly the conventional translation in our constitutional tradition.<sup>386</sup> Globalization might also counsel in favor of some intermediate approach, such as improving the channels by which states can influence national policy.<sup>387</sup> The constitutional significance of globalization ultimately depends to a great degree on one’s extrinsic commitment to the virtues either of federal or state government.

One attempt to make sense of globalization emphasizes the diminishing prospect of state-induced externalities. Peter Spiro stresses that the federal monopoly has “constitutional pedigree” and rests on a wholly defensible thesis, the notion that externalities will prevent states from shouldering, or even accurately predicting, the costs of their foreign relations activi-

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385. See generally Marks, *supra* note 165, *passim* (emphasizing the significance of foreign relations issues at the Founding).

386. See, e.g., National Foreign Trade Council v. Natsios, 181 F.3d 38, 58 n.14 (1st Cir.) (noting, in response to commentary criticizing *Zschernig*, that “in an increasingly interdependent and multilateral world, *Zschernig*’s affirmation of the foreign affairs power of the national government may be all the more significant”), *cert. granted*, 120 S. Ct. 525 (1999); CORWIN, *supra* note 383, at 171:

What with cable, steamship, wireless telegraphy, and inter-oceanic canals, the world to-day is astonishingly small and the consequence is that the nations can no longer live unto themselves in the way that was earlier possible. . . . The development of uniform national legislation of social character, in pursuance of international agreement, is but another phase of the broader development of international solidarity.

*Accord* FRY, *supra* note 5, at 110 (noting that “the ability to act quickly and decisively in an increasingly complex and interdependent world might favor the maintenance—or even the strengthening—of authority in the nation’s capital”); Comment, *Treaty-Making Power as Support for Federal Legislation*, 29 YALE L.J. 445, 449 (1920) (describing the “drawing together” of the world as the basis for increased international and, derivatively, federal regulation). Compare Goldsmith, *Federal Courts*, *supra* note 1, at 1672 (describing the new reach of public international law into “issues like environmental protection and family law that in prior times were exclusively governed by domestic law”), with *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (holding that the federal government’s authority to regulate migratory birds by treaty may be broader than its statutory authority), and Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1126, 1128-30 (1999) (describing the degree to which *Missouri* was anticipated). By analogy, much the same argument could have been made about the impact of a burgeoning national market on constitutional notions of state authority, see Larry Kramer, *What’s a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the *New Deal*, 46 CASE W. RES. L. REV. 885, 919-20 & n.88 (1996) (noting the original insignificance of interstate commerce), but the dormant Commerce Clause jurisprudence does not seem to have been deterred—even without any of the traditional biases against states in foreign affairs.

387. For consideration, see KLINE, *supra* note 4, at 217-21.

ties.<sup>388</sup> According to Spiro, however, the emerging prospect of “targeted retaliation”—the ability of foreign powers to respond directly against the offending state, rather than against the nation as a whole—might warrant reexamining of the traditional rule.<sup>389</sup>

His argument is somewhat tentative as to whether this evolution has achieved constitutional significance,<sup>390</sup> and appropriately so. Although cases of targeted retaliation are not unknown,<sup>391</sup> it is hard to find examples demonstrating its sufficiency.<sup>392</sup> In fact, the controversies surrounding state capital sentencing,<sup>393</sup> the formative experience with the California taxing

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388. See Spiro, *Foreign Relations*, *supra* note 29, at 1246-47.

389. See *id.* at 1259-75.

390. See *id.* at 1261 (arguing that episodes of targeted retaliation “could mark the emergence of a new doctrine of subnational responsibility, and the treatment of the states as demi-sovereigns under international law. . . . To the extent this development is perfected, the basis for federal exclusivity over foreign relations slips away.”); see also *id.* (“[T]he case for shelving federal exclusivity hinges on the innovation of targeted retaliation.”). *But see id.* at 1226 (asserting that “there is no justification for the courts to enforce a default rule protecting federal exclusivity in the face of contrary state-level preferences”).

391. See KLINE, *supra* note 4, at 179 (citing the Japanese retaliation against Texas-based banks in response to a Texas prohibition on foreign-bank branches, as well as Swiss constraints on Chicago-based banks in response to an Illinois law); Schaefer, *supra* note 326, at 51 n.67 (citing the example of U.S. retaliation against Ontario beer concerns). Professor Kline’s 1983 study concluded that “there is not yet any firm evidence that foreign countries act so as to hold individual states accountable for their restrictive policies (although states that are relatively free from discriminatory regulations emphasize that fact in their promotional pitches abroad).” KLINE, *supra* note 4, at 97.

392. Two of the three recent examples Spiro provides are speculative, and the states in question seem to have been utterly unaffected by any prospect of retaliation. As Spiro observes, California’s Proposition 187, which withheld public benefits from undocumented aliens, was immediately enjoined (for reasons unrelated to the foreign relations power) and was the subject of relatively vague threats of reprisal by Mexico. See Spiro, *Foreign Relations*, *supra* note 29, at 1262-64. A few death penalty cases have drawn clearer threats of investment or tourism boycotts, but they have been nonbinding and low-level, and they have had no discernible effect on the states. See *id.*

393. In the controversy surrounding the proposed execution of a Canadian citizen, the Canadian foreign minister appealed directly to Secretary of State Albright, who sought to intercede with the Texas governor on grounds of national interest—claiming that if the United States breached the Vienna Convention, “it could not expect foreign governments to honour their obligation to grant access to Americans facing imprisonment abroad.” David Osborne, *Albright Plea to Spare Killer*, THE INDEPENDENT (London), Dec. 10, 1998, at 19. After Albright’s request for a stay was refused, the Inter-American Commission on Human Rights of the Organization of American States formally requested the State Department again to intervene. See Mike Ward, *Human Rights Group Joins Call to Spare Canadian Killer*, AUSTIN-AMERICAN STATESMAN, June 11, 1999, at B1.

The even more controversial execution by Virginia of a Paraguayan citizen also demonstrated how foreign governments and international institutions did not rely on state-level pressure, but instead pressured the United States, which again tried to intercede to protect what it regarded as the national interest in ensuring the proper treatment of similarly situated Americans (not just Virginians) abroad. See Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT’L L. 666 *passim* (1998).

method in *Barclays*,<sup>394</sup> and the ongoing Massachusetts Burma controversy<sup>395</sup> illustrate perfectly how foreign powers typically pursue both conventional diplomacy (including threats of reprisals) with the federal government *and* diplomacy targeted at the responsible state. Retaliation, in other words, is not an either/or proposition; consequently, even if a state cared for some reason to minimize externalities and could predict which foreign powers might take offense, it might be hard-pressed to know whether they would forego national-level diplomacy.<sup>396</sup> It remains at least as common for those powers electing between the options to impose national responsibility, which gives them the broadest range of possibilities for recourse.<sup>397</sup> Put simply, the pattern since 1787 has shown more consistency than change and tends to vindicate the experience and concerns of the Framers.<sup>398</sup>

At a minimum, though, the new incidence and diversity of state initiatives suggest that we should avoid generalizing about the federal interest (or the lack of state interest) in foreign relations. Sister-city relationships and simple purchase agreements, for example, seem different from treaties of cession. As I have argued, case law and practice offer an appealing distinction between state laws having foreign effects and state laws interfering with the exclusive federal control over diplomacy, and modern foreign relations provide no basis for unsettling that distinction. And even if the new international profile of the states warrants reconsidering broad rules, *à la Zschernig*, that broadly indict state activities having foreign effect, we

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394. See *supra* text accompanying notes 73-74, 111-19. For an account describing the importance of foreign efforts at both the federal and state levels, as well as the differing emphases of the Japanese and British, see HOCKING, *supra* note 382, at 130-51.

395. See *supra* text accompanying notes 13, 15-23.

396. See Schaefer, *supra* note 326, at 51 & n.67 (noting that there is "no guarantee that [the targeted retaliation] will occur"). The targeted-retaliation thesis overlooks, in any event, the fundamental perversity of externalities. States should systematically prefer acts that do *not* risk targeted retaliation, without regard for externalities. A foreign power, correspondingly, should be most inclined toward targeted retaliation in those cases that do *not* implicate the national interest, and should tend to prefer national-level retaliation in those cases where more than the interests of the state are at stake. (If many states impose economic sanctions, foreign opponents would be unlikely to commence a whirlwind tour of state capitals, but instead would be encouraged to concentrate their energies on Foggy Bottom.) As a result, targeted retaliation is least likely to deter, or resolve, those cases posing the greatest risk to the national interest.

397. Minds accustomed to international trade remedies, in which, for example, EC discrimination against bananas from U.S. growers is thought to be redressed by tariffs against Italian cheese, should have no necessary attachment to redressing the original injustice allegedly suffered. While Spiro suggests that "the costs of disciplining the United States as a unit are often greater than foreign actors are willing to bear," Spiro, *Foreign Relations*, *supra* note 29, at 1267-68, the diversity of options would seem to preserve the possibility of appropriately modulated, credible threats.

398. See, e.g., KLINE, *supra* note 4, at 16-19, 90-91, 98-99 (describing historical examples of fall-out from state and local legislation); *id.* at 96-97 (dismissing the significance of state-level retaliation).

should be cautious about discarding dormant federal preemption in its entirety simply because one or more versions are ill suited to marginal cases.

2. *A New Domestic Function for States?* Revisionist accounts of the changed world of international relations tend to ignore the Framers' argument that a federal monopoly is necessary in order to maximize and apply American bargaining power—in modern terms, their “collective action” argument. Here again, focusing on the new function of states in international relations does not seem terribly rewarding. Modern doubts about assuming a unitary state,<sup>399</sup> and the feasibility of maintaining “one voice” in foreign affairs,<sup>400</sup> were equally within the Framers' contemplation—indeed, it was their decision to deliberately fracture the congressional monopoly on treaty-making and to vest part of that authority in the presidency, an institution less responsive to state interests.<sup>401</sup> The Framers seem to have supposed that the possibility of achieving one (final) voice, along with the theoretical appeal of the federal objective, was enough to warrant a federal monopoly; and it is difficult to see how changed circumstances have unsettled that judgment.

One might question, however, whether they were right in supposing that consolidating the treaty power in the federal government conferred an advantage in international bargaining.<sup>402</sup> Modern two-level game analysis<sup>403</sup> predicts that while domestic constraints may decrease the likelihood of a mutually satisfactory accord—by limiting the range of outcomes to which both parties can agree<sup>404</sup>—they increase the likelihood that any agreement

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399. See Keisuke Iida, *When and How Do Domestic Constraints Matter?*, 37 J. CONFLICT RESOL. 403, 403-04 (1993) (criticizing realists for “treat[ing] nation-states as unitary actors . . . [when, in] reality, foreign policy decisions are the result of political processes within nation-states”).

400. See, e.g., Bradley, *supra* note 29, at 446; Goldsmith, *Federal Courts*, *supra* note 1, at 1688.

401. See *supra* Part II.A.

402. See TRIBE, *supra* note 1, § 4-6, at 230 (“[S]tate action, whether or not consistent with current federal foreign policy, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void . . . .”); *supra* text accompanying notes 270-74, 287; see also Andrew Moravcsik, *Introduction: Integrating International and Domestic Theories of International Bargaining*, in DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 3, 28 (Peter B. Evans et al. eds., 1993) [hereinafter DOUBLE-EDGED DIPLOMACY] (noting the “normal expectation that the statesman will preserve the maximum possible level of executive autonomy”).

403. For a concise exposition, see Putnam, *supra* note 199; for one of the rare applications in the legal setting, and a useful literature review, see Robert J. Schmidt, Jr., *International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission*, 26 ENVTL. L. 95 (1996).

404. This relies on the assumption that larger win-sets improve the prospect of reaching agreement, see Putnam, *supra* note 199, at 437-38, rather than leading to squabbles over a larger range of possible outcomes, see Frederick W. Mayer, *Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments*, 46 INT'L ORG. 793, 797-98 (1992).

actually achieved will favor the constrained side.<sup>405</sup> It is often difficult for negotiators to demonstrate credibly that they are bound by domestic constraints,<sup>406</sup> but state laws might overcome this problem by directly communicating domestic constraints to foreign powers. A country confronted by state sanctions, for example, might be more easily convinced that U.S. negotiators must achieve certain objectives in bilateral negotiations in order to secure domestic political support, and may offer concessions in order to placate those interests and obtain a ratifiable agreement.<sup>407</sup>

On balance, though, two-level game theory does not unsettle the Framers' model, largely because the Treaty Clause they designed establishes just such a game. One of the Constitution's important innovations, as we have seen, was precisely the creation of a credible constraint: assigning negotiation to a substantially independent President, while simultaneously liberating the Senate's advice-and-consent function, meant that the President could reasonably assert that agreements under discussion would have to satisfy a third party.<sup>408</sup> Adding the states would upset the calculus. An additional constraint, in the form of House approval, was specifically contemplated and rejected, and there is abundant evidence that securing state

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405. See Putnam, *supra* note 199, at 440 (quoting THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 19-28 (1960)):

"The power of a negotiator often rests on a manifest inability to make concessions and meet demands . . . . When the United States Government negotiates with other governments[,] . . . if the executive branch negotiates under legislative authority, with its position constrained by law, . . . then the executive branch has a firm position that is visible to its negotiating partners. . . . [Of course, strategies such as this] run the risk of establishing an immovable position that goes beyond the ability of the other to concede, and thereby provoke the likelihood of stalemate or breakdown."

406. See James A. Caporaso, *Across the Great Divide: Integrating Comparative and International Politics*, 41 INT'L STUD. Q. 563 *passim*. But see Howard P. Lehman & Jennifer L. McCoy, *The Dynamics of the Two-Level Bargaining Game: The 1988 Brazilian Debt Negotiations*, 44 WORLD POL. 600, 640-42 (1992) (hypothesizing that Brazilian bargaining strength derived from domestic opposition and weakness). Credibility problems are naturally greatest where the constraints have been artificially generated. See Robert Pahre, *Endogenous Domestic Institutions in Two-Level Games and Parliamentary Oversight of the European Union*, 41 J. CONFLICT RESOL. 147, 147 (1997). See generally SCHELLING, *supra* note 405, at 19-28 (presenting "a tactical approach to the analysis of bargaining"); Peter B. Evans, *Building an Integrative Approach to International and Domestic Politics: Reflections and Projections*, in DOUBLE-EDGED DIPLOMACY, *supra* note 402, at 397, 402-03 (discussing "tied hands" in negotiations).

407. Indeed, such a dynamic may be particularly useful in circumstances where international bargains are distributive rather than creating joint gains, such as where human rights are at issue. See Mayer, *supra* note 404, at 797, 805, 816; *id.* at 798-805 (providing graphic illustrations relating to two-party negotiations).

408. See *supra* text accompanying notes 206-11; see also Mayer, *supra* note 404, at 796 ("Having one's hands tied can be quite useful in extracting concessions from an opponent in negotiation. U.S. negotiators, for example, have long used the threat of congressional rejection as a device for leveraging concessions at the bargaining table."); Putnam, *supra* note 199, at 448 (considering the influence of the Senate on bargaining power of American negotiators and on the prospects for agreement).

approval was deemed undesirable, largely because such consent posed too serious a hurdle to agreement.<sup>409</sup>

We should also distinguish between the credible communication of domestic preferences—which need not, of course, take legal form—and activities that interfere with the conduct of diplomacy. The Senate, for its part, was thought to lack diplomatic capacity and could not influence negotiations save through negotiating instructions, indirectly enforced through its power of consent. In contrast, state and local governments possess a fluidity, dispatch, and authority that together poses a serious risk to executive diplomacy.<sup>410</sup> In particular, state activities creating multiple negotiating channels, establishing or maintaining subjects for ongoing negotiation (and, potentially, agreement), or generating demands for preemption that otherwise would not exist, can hardly be said to ease the task for presidential negotiators.<sup>411</sup>

Finally, for domestic constraints to be useful, they must be reasonably consistent with the federally defined interest.<sup>412</sup> Plainly, state policies that are antithetical to the federal objective—for example, opposing normalized relations under any circumstances—will more likely hinder than help. But even states desiring to support a federal objective may find it difficult to conform to, or even to identify, that objective.<sup>413</sup> The less elaborate, two-level game embodied in the constitutional allocation of foreign relations

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409. See *supra* text accompanying notes 162, 164-66.

410. It is no accident, perhaps, that strong governors—a phenomenon even less well anticipated by the Framers than a strong President—have taken the lead in establishing states in foreign affairs. For an early discussion of this phenomenon, see John Kincaid, *The American Governors in International Affairs*, PUBLIUS, Fall 1984, at 95.

411. If domestic constraints are too credible, moreover, such as to overwhelm the capacity of the federal government to resolve them, any value is lost. At the extreme, for example, the lack of a supremacy clause might seem an ideal demonstration of domestic constraints, but it would also demonstrate that the negotiator could not promise to uphold any bargain struck. See Putnam, *supra* note 199, at 438-39 (discussing involuntary defection); see also HELEN V. MILNER, INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS 80-81 (1997) (noting that international agreements are in general more difficult where domestic politics are involved).

412. See, e.g., MILNER, *supra* note 411, at 234.

413. For example, Massachusetts may have understandably considered its anti-Burma law to be consistent with federal objectives, even when third-party relations were considered; the EU, for example, had publicly supported international action against the Burmese regime. But federal Burma policy was intended to foster multilateral cooperation, and the Europeans viewed the particular type of sanction selected by Massachusetts—secondary boycotts—as particularly offensive. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 46-47, 53-54, 76-77 (1st Cir.), cert. granted, 120 S. Ct. 525 (1999). Federal sanctions policy, writ large, appears to have rationed such tools and resorted to them only in select cases, and federal European and east Asian policies created multi-issue linkages that could scarcely have been anticipated. See *id.* at 47, 53-54.

power seems better suited to the advantages of entrusting policy development to a negotiator with at least qualified independence.<sup>414</sup>

*B. Does Positive Political Authority Suffice?*

Most of the post-Founding insights into the scope of the Treaty Clause have been afforded by the political branches, and the instances in which the judiciary has enforced, rather than merely declared, the relevant norms are passing few. The rarity of judicial intervention should not be surprising. The treaty power is expressly allocated to the President and the Senate. Justice Stewart's concurrence in *Zschernig* noted that "the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States"<sup>415</sup>—and, he might have added, neither was it entrusted to the Supreme Court. Dormant doctrines presuppose, of course, that the judiciary is not usurping federal prerogatives, but is merely preserving them for exclusive exercise by the political branches.<sup>416</sup> Still, there is room for doubt as to whether courts have the deft touch necessary to perform that function.<sup>417</sup> If judicial intervention is to be redeemed, we need a clearer explanation as to why the best judicial rule is simply not to interfere.

1. *The General Argument Against Judicial Intervention.* A threshold issue then, and one posed repeatedly and skillfully by Professor Goldsmith, is why the political branches should not be left to protect their own prerogatives. Congress may pass preemptive legislation, and the President has executive agreements and regulations at his disposal. Given those instruments, and the obvious superiority of the political branches in assessing foreign relations, why empower the courts to intrude as well? To be sure, the political branches can correct any decisions with which they may disagree, thereby ameliorating the downside to judicial involvement. Goldsmith argues, however, that the federal government is more likely to step in where the courts underprotect federal interests—and thus courts will tend, on balance, to generate uncorrected errors that unnecessarily

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414. Cf. Putnam, *supra* note 199, at 456-58 (relaxing the assumption of the chief negotiator as a faithful agent for her constituents).

415. See *Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring).

416. Cf. Spiro, *Foreign Relations*, *supra* note 29, at 1256 n.139 (distinguishing between intervention by federal courts against the federal political branches and protective intervention, as in *Zschernig*).

417. If, as Justice Jackson asserted, courts lack the necessary information and capacity to second-guess the political branches on questions that are "delicate, complex, and involv[ing] large elements of prophecy," perhaps even judicial intervention on *behalf* of the political branches may do more harm than good. See *supra* text accompanying note 83.

federalize state law and preempt genuinely tolerable state activities.<sup>418</sup>

This argument raises numerous questions worth pursuing, though not easily resolved. The turn to self-enforcing constitutional law seems to rest on a fundamental skepticism about the traditional function of federal courts—almost a political question doctrine favoring the states.<sup>419</sup> The premises of such a move, obviously, are debatable. Even if one concedes that dormant foreign relations preemption is constitutional common law, that does not mean that all such law is presumptively illegitimate, nor that the foreign relations preemption should be discarded first.<sup>420</sup>

In any case, there is cause to be skeptical that Congress represents a sufficient alternative. Even if Congress is fully aware of state encroachments, and concerned about them, it may find it difficult or costly to intervene—particularly given its notorious weaknesses at managing foreign policy.<sup>421</sup> In the alien land law controversies, for example, the federal gov-

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418. See Goldsmith, *Federal Courts*, *supra* note 1, at 1692-95; Goldsmith, *Formalism*, *supra* note 29, at 1420.

419. Cf. Louis Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597, 622-23 (1976) (suggesting the existence of "constitutional provisions which can properly be interpreted as wholly or in part 'self-monitoring' and not the subject of judicial review," with the arguable exception of the Guarantee Clause).

420. To the contrary, commentators with varying views on the legitimacy of federal common law consider foreign relations to be the paradigmatic case for it. See Clark, *supra* note 257, at 1292-311 & 1298 n.252; Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1048 (1967); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 36-39, 54-59 (1985) (describing the principle of preemptive lawmaking as a potential warrant for federal common law); *id.* at 56 n.238 (identifying the federal common law of international relations as a possible example of preemptive lawmaking).

421. Compare Goldsmith, *Federal Courts*, *supra* note 1, at 1683 ("Congress is more likely to address state activity that harms the national foreign relations interest than it is to address other harmful state acts."), with ROBERT A. DAHL, CONGRESS AND FOREIGN POLICY (1950) (generally describing congressional inadequacies), and BARBARA HINCKLEY, LESS THAN MEETS THE EYE: FOREIGN POLICY MAKING AND THE MYTH OF THE ASSERTIVE CONGRESS *passim* (1994) (rebutting claims that Congress has reestablished control over foreign relations), and KOH, *supra* note 46, at 123-33 (describing congressional inadequacies, with particular reference to matters of national security), and STEPHEN R. WEISSMAN, A CULTURE OF DEFERENCE: CONGRESS'S FAILURE OF LEADERSHIP IN FOREIGN POLICY 12-16 (1995) (describing congressional efforts at foreign policy as "reactive" and "well below even its general norm," due largely to the lack of constituent interest). Much of the criticism directed at Congress, to be sure, concerns its deference to the President, but many of the reasons for its inattention and paralysis would also seem to impair its ability to react to state encroachment. What is more, Congress's attempts to maintain a modicum of influence on presidential policy have often found expression through nonstatutory means, such as public relations, which may have less than the desired effect on state laws. See James M. Lindsay & Randall B. Ripley, *How Congress Influences Foreign and Domestic Policy*, in CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 17 (Randall B. Ripley & James M. Lindsay eds., 1993).

I assume, with Professor Goldsmith, that any significant foreign relations controversy will come to Congress's attention, see Goldsmith, *Federal Courts*, *supra* note 1, at 1682, though I am less sanguine that state activities discriminating against foreign nations are somehow more visible than analo-

ernment tolerated state activities with manifest adverse effects on U.S. foreign relations.<sup>422</sup> Although the federal government may since have grown more sure of its authority, it continues to yield to state pressures.<sup>423</sup> It is hard to determine in any given case, of course, whether federal officials are genuinely disturbed by state policies, and easy to speculate that Congress would intervene if it *really* objected, as in the case of the Arab boycott.<sup>424</sup> But the prevailing pattern—including the survival of state laws on the Eastern Bloc, South Africa, Burma, and the taxation of multinationals<sup>425</sup>—suggests that Congress is solicitous of state interests even in cases where foreign policy considerations, taken alone, might dictate a different approach.

The assertion that involving the judiciary tips the result toward excess federalization is vulnerable for many of the same reasons. It seems like

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gous activities discriminating against interstate commerce. Even if there is a more specialized legislative apparatus for foreign matters, the fact that potential complainants in cases of interstate discrimination enjoy legislative representation may more than make up the difference. *See infra* text accompanying note 426. The increasingly blurry distinction between foreign and domestic matters will further erode the ability of Congress's specialized committees to monitor foreign relations matters and quickly initiate change. Compare Goldsmith, *Federal Courts*, *supra* note 1, at 1682-83 (emphasizing the function of legislative committees' specializing in foreign affairs), with WILLIAM I. BACCHUS, *THE PRICE OF AMERICAN FOREIGN POLICY: CONGRESS, THE EXECUTIVE, AND INTERNATIONAL AFFAIRS FUNDING* 38-40 (1997) (emphasizing the adverse effects of decentralizing reforms on committee authority and ease of legislating), and HINCKLEY, *supra* note 421, at 12-15 (same), and Manning, *supra* note 383, at 311 (citing overlapping committee jurisdictions on foreign policy issues as posing "deep-seated and probably ineradicable" problems).

422. Indeed, this very fact is cited to show the supposed absence of dormant foreign relations law. *See* Goldsmith, *Federal Courts*, *supra* note 1, at 1655.

423. *See, e.g.*, Bradley & Goldsmith, *supra* note 76, at 676-78 (citing examples of federal accommodation of state activities affecting international relations); Goldsmith, *Federal Courts*, *supra* note 1, at 1674-78, 1683 (same).

424. *See supra* text accompanying note 10. The Export Administration Act of 1979 may have been successful in part because it was focused less on state-designed policies than on those reacting to "restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries." 50 U.S.C. § 2407(c) (1994).

425. *See supra* text accompanying notes 8, 11-13. As William Wong has explained, the persistence of Iron Curtain statutes, notwithstanding *Zschernig*, posed potential problems for nonresident Chinese aliens. *See* Wong, *supra* note 9, at 658-62; *cf.* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (advocating judicial nullification on grounds of desuetude). In the case of South Africa, moreover, Congress passed and then retracted sanctions without preempting state measures, notwithstanding apparent disagreement with their continuation. *See supra* note 264. This result may have been anticipated in *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986), where the Supreme Court of Illinois opined that "[t]he ability of this country to choose between a range of policy options in developing its foreign policy in relation to the Republic of South Africa would be compromised by the existence of State-sponsored sanctions which the Federal government could not remove or modify to fit changing conditions." *Id.* at 307. That description may make little formal sense, given the Supremacy Clause, but it captures the practical difficulty in orchestrating a measured and flexible federal response.

guesswork to suppose that legislative intervention is more likely to be inspired by foreign policy interests than by the desire to vindicate state interests wounded by an adverse judgment, particularly given the domestic orientation of representative politics.<sup>426</sup> And even if the risks of uncorrected error are asymmetric, the consequences of the two types of error may not be identical or equally intolerable. Judicial intervention may indeed protect federal prerogatives when Congress would deem it unnecessary, but the case for specially heeding that risk is unconvincing.

Finally, even if the ability of the federal branches to defend their own prerogatives were *currently* satisfactory, the notion that their authority would be unaffected by the demise of the judiciary's role seems unrealistic. Were the Supreme Court to conclude, for example, that the Constitution is insufficiently clear to bar automatically state foreign relations activities, political branch defenses of the federal monopoly—not infrequently couched as principled defenses of a constitutional assignment—would be deeply undermined, and states might naturally assume that the range of permissible conduct had expanded.<sup>427</sup> The dormant foreign relations doc-

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426. One would assume that foreign interests are relatively less influential in congressional politics than are the states, though it is certainly difficult to measure in conventional terms. Foreign interests are handicapped by their lack of voting power and the foreclosure of most campaign contributions, *see* Spiro, *Foreign Relations*, *supra* note 29, at 1253 & n.133, but so are states. Both foreign interests and states will find U.S. private surrogates for their interests, such as (in the case of the foreign governments) the National Foreign Trade Council. *But see* KLINE, *supra* note 4, at 223-26 (suggesting that Congress tends to be disproportionately responsive to domestic interest groups on international issues); *cf.* FRY, *supra* note 5, at 109 (contrasting the domestic orientation of Congress with the reorientation of states toward international interdependence).

The stronger point, it seems to me, is that by comparison to congressional delegations from a state in controversy, opposition from other members will be relatively diffuse—as will participation by the State Department, which has other programmatic interests that may make it vulnerable to concerted pressure from Congress. *Cf.* Spiro, *Foreign Relations*, *supra* note 29, at 1253-54 (supposing that support of congressional delegation from an affected state will be relatively more intense).

427. *See* CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY passim* (1960) (describing the “building” and “legitimizing” work of judicial review). This is not the only possible reaction to judicial abdication, of course. One might also suppose that “[l]egislators and other officials are likely to take the Constitution more seriously if they cannot pass the buck to the courts[,] [f]or they are more likely to be blamed for unconstitutional actions if there is no mode of correction.” Richard A. Posner, *Appeal and Consent*, *NEW REPUBLIC*, Aug. 16, 1999, at 37 (book review). But this supposes more obvious or well-understood norms than the dormant treaty power, which has not been wholly successful when left to its own devices. *See* Kirgis, *supra* note 51, at 707-08 (noting, in light of lack of Supreme Court guidance, that states have to “take responsibility for ensuring that they act within appropriate constitutional bounds when foreign relations are at hand” (citing authorities)); Shuman, *Local Foreign Policies*, *supra* note 20, at 162 (“The relevant court pronouncements have been so ambiguous and contradictory that few city attorneys have been convinced that their municipal foreign policies were clearly illegal and not worth trying.”); *id.* at 167 (arguing that standards announced by a lower court in the wake of *Zschernig* “are so vague and depend so heavily on each case’s peculiar facts and circumstances that it is hardly surprising that few cities have been deterred by the highly uncertain prospect of a *Zschernig* violation”).

trines and positive political authority are not, it seems clear, genuinely independent variables.

2. *Positive Political Authority and the Dormant Treaty Power.* Even if judicial intervention in foreign relations is generally deleterious, that does not necessarily impugn the dormant treaty power. If other dormant doctrines are a yardstick, the case for reading a dormant component into the Treaty Clause is relatively strong. Even Justice Scalia, a dogged critic of the dormant Commerce Clause, acknowledges that the treaty power's structure—the assignment of positive authority to the federal government, and the corresponding denial of that authority to the states—makes it an appealing candidate for a preemptive judicial rule.<sup>428</sup> Professor Goldsmith, however, offers a clever inversion of this argument. In his view, clear grants of federal authority make it more likely that the political branches will successfully ward off any state encroachment. At the same time, the prohibition on certain state ends—here, barring states from entering into treaties, and requiring congressional consent for compacts—“attenuates the possibility that states will . . . interfere[] with federal diplomatic prerogatives.”<sup>429</sup>

Whether the possibility of state interference has actually been attenuated depends on how broadly the federal prerogative is construed. Whether positive federal authority is a sufficient defense against state conduct, moreover, depends on which branch's power is being defended. While Goldsmith assumes (with *Barclays Bank*) that Congress's power to regulate commerce is at stake,<sup>430</sup> the treaty power is at risk too—and that has meaningfully distinct implications.

To be sure, Congress possesses substantial authority to address state interference with the treaty power. Though its own power to encroach on negotiations may be limited,<sup>431</sup> it has the power to authorize—or refrain

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428. See *Tyler Pipe Indus. v. State Dep't of Revenue*, 483 U.S. 232, 261 (1987) (Scalia, J., dissenting) (observing that “there is no correlative denial of power over commerce to the States in Art. I, § 10, as there is, for example, with the power to coin money or make treaties”).

429. Goldsmith, *Federal Courts*, *supra* note 1, at 1707. In the quoted passage, Goldsmith was particularly addressing the need for a supplemental rule barring the states from sending or receiving ambassadors, but the example was meant to be illustrative. Were he to accept that *prior* consent was necessary in order to enter into foreign compacts, see *supra* text accompanying notes 252-60, congressional guardianship would presumably seem still more adequate.

430. See Goldsmith, *Federal Courts*, *supra* note 1, at 1698-1705.

431. For example, Congress may be barred from intruding in ongoing negotiations, or from restricting the President's ability to pursue negotiations on certain topics or with certain parties. Cf. HENKIN, *supra* note 1, at 80 (“Limitations on Congressional power are implied in grants of power to the President . . .”); *id.* at 88 (“Even for champions of maximum Congressional authority, . . . [there is] no doubt that [the President] alone, not Congress[,] can make treaties . . . Congress has not seriously

from authorizing—state negotiation with foreign powers toward compacts, and appears to be the sole judge of the distinction between those pacts and treaties.<sup>432</sup> Congress may also enact legislation expressly proscribing state diplomacy. It is difficult for it to do so, however, in any fine-tuned or expedient way. Congress's ordinary frailties in managing foreign relations are multiplied when it is asked to safeguard the integrity of international negotiations with which it may be wholly unfamiliar, particularly where intervention seems to sacrifice domestic interests for foreign ends or abstract principle.<sup>433</sup> More programmatic intervention is also rare, and rarely effectual.<sup>434</sup> Goldsmith regards the Logan Act as dispelling “[a]ny remaining doubt about the adequacy of legal protection for federal interests,”<sup>435</sup> but many would consider that statute’s virtual desuetude to prove quite the opposite point.<sup>436</sup>

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doubted that the President is the sole organ of communication with foreign governments . . .”). At the same time, though, it can enact legislation overriding any treaty. *See id.* at 209-14 (distinguishing between the legislative override of a treaty and treaty termination). It may also interfere with the negotiating process in a number of ways that would be constitutionally problematic were they pursued by individual states. Thus, the House Committee on the Judiciary, in a report arguing for the now-discredited view that the treaty-making power could not be used to invade congressional authority over matters such as tariffs, conceded that while Congress “cannot reach out to negotiate with other nations” and “cannot make compacts or agreements[,] [i]t may condition its own legislation on that of foreign nations, and thus make overtures of international policy.” J.R. TUCKER, POWER OF THE PRESIDENT TO NEGOTIATE TREATIES WITH FOREIGN GOVERNMENTS, H. REP. NO. 2680, at 7 (1885).

432. *See supra* text accompanying note 335. It may not, however, authorize the states to negotiate toward treaties, however defined. *See Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724-25 (1838) (“By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into ‘any treaty, alliance, or confederation:’ no power under the government could make such an act valid, or dispense with the constitutional prohibition.”); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 37 (1823) (describing an argument of counsel).

433. *See supra* text accompanying notes 421-25. Should Congress affirmatively disagree with state policies, of course, legislating may be attractive. But where it desires simply to clear the field for the exercise of the treaty power, intervention will still be perceived as a substantive disagreement with the extant state policies, with all the attendant political and legal problems that might entail. Spear notes:

For the administration, though, suits against the states over constitutional matters are a rather conspicuous way to handle this particular flap. At issue, after all, is the country’s trade policies toward countries with nasty human rights records—a debate that the Clinton White House is not exactly eager to provoke. “Washington is scared to death because it does not want to be accused of being soft on human rights,” noted one Massachusetts official.

Spear, *supra* note 22, at 8. The more abstract constitutional arguments that Congress might muster in favor of the federal monopoly are not only tough sells in any particular context, but also apply with some force against congressional involvement.

434. *Cf. KOH, supra* note 46, at 124-25 (describing cumbersome and ineffectual procedural statutes for controlling foreign policy, such as the War Powers Resolution).

435. Goldsmith, *Federal Courts, supra* note 1, at 1707-08.

436. *See, e.g.,* Detlev F. Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 AM. J. INT’L L. 268, 268-69 (1966) (noting the near-desuetude of Logan Act and criticizing its constitutionality); Curtis S. Simpson III, Comment, *The Logan Act of 1799: May It Rest in Peace*, 10 CAL. W. INT’L L.J. 365, 365-67 (1980) (same). As previously noted, however, the Act is important as an indication of early per-

The courts, in consequence, are typically left to construe congressional silence, and the import of that silence is very different in the treaty context. With the dormant Foreign Commerce Clause, the alternative to congressional authority is state authority; silence passes the baton, as it were.<sup>437</sup> In matters subject to the treaty power, on the other hand, the Senate is left free to instruct the President and to insist either on sacrificing state authority or preserving it. Barring Senate intervention, in turn, the President is considered to have unfettered authority to negotiate, or to refrain from negotiating. This raises the question, then, whether the *Senate* and the *President*, and not just the *Congress*, have genuinely effective means of protecting their authority and their vision of the federal interest against state encroachment.

The usual repository of federal treaty authority is the President, and dormant treaty power preemption seems indispensable to protecting his (and the Senate's<sup>438</sup>) negotiating prerogatives. Certainly the conventional alternatives seem meager. The power to adopt preemptive rules or regulations is commonly considered to require prior congressional authorization,<sup>439</sup> and founding any such lawmaking on the President's independent

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ceptions as to the negotiating authority. *See Vagts, supra*, at 269.

437. *See supra* text accompanying notes 102-19 (discussing *Barclays Bank*).

438. State activities might interfere with some segregable Senate interest, such as its instructions to the President to pursue certain policies in negotiations, or to refrain from negotiating on certain matters or with certain sovereigns. Yet, the Senate has no authority to preempt state activities, save with the cooperation of the House, which cannot be regarded as a necessary participant in exercising the treaty power. *See supra* note 162 (noting that the Constitutional Convention rejected any role for the House in treaty-making). The President, in any event, is not solely defending executive prerogatives. Unless presidential negotiating authority is plenary, the Senate has engaged in de facto delegation of its authority to instruct, which has then by hypothesis been misappropriated—along with its statutory entitlement to notice from the President concerning significant developments in negotiations. *See* U.S. Department of State, *Treaties and Other International Agreements*, 11 FOREIGN AFF. MANUAL ch. 700 (rev'd 1985) (Department of State Circular 175), *reprinted in* CRS, *supra* note 109, at app. 4 (detailing negotiating procedures, including the obligation to inform and consult with congressional leaders and committees). *But cf.* Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty-making*, 8 TEMPLE INT'L & COMP. L.J. 257, 301 n.389 (1994) (reporting the circumvention of Circular 175 procedures); Richard J. Erickson, *The Making of Executive Agreements by the United States Department of Defense: An Agenda for Progress*, 13 B.U. INT'L L.J. 45 *passim* (1995) (describing formal and de facto exemptions to Circular 175 procedures); Phillip R. Trimble & Jack S. Weiss, *The Role of the President, The Senate and Congress with Respect to Arms Control Treaties Concluded by the United States*, 67 CHI.-KENT L. REV. 645, 648 (1991) (speculating that procedures "probably do not have much impact on actual Executive branch decisions").

439. *See, e.g., Chrysler Corp. v. Brown* 441 U.S. 281, 302 (1979) (holding that the exercise of substantive authority having the force and effect of law "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes"); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975) ("[N]o undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency.").

constitutional authority might fare poorly when confronted by contrary indications of congressional preference.<sup>440</sup> Even were it authorized under the Treaty Clause itself, requiring that the executive branch engage in law-making to protect negotiating authority would plainly compromise the warrant for involving the President in the first place. (Surely the constitutional authority to negotiate in secrecy with foreign powers, subject only to Senate advice and consent, would be compromised by the need to anticipate potential interference by rival state negotiators through publicly promulgated rules.<sup>441</sup>) More flexible instruments, such as executive intervention in litigation, may offend norms against executive law making or arrogation of the judicial function,<sup>442</sup> and may not even be conclusive.<sup>443</sup> The best course,

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Congress has, in point of fact, entrusted the President with some powerful regulatory instruments. The International Emergency Economic Powers Act ("IEEPA"), for example, permits the exercise of substantial authority over private economic activity. See 50 U.S.C. § 1701 (1994); see also KOH, *supra* note 46, at 48 (noting the possible abuses of IEEPA, including an invocation by the President to overcome congressional resistance); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1414-18 (1989). The Secretary of State also has some rather open-ended authority to regulate the State Department's functions. See 22 U.S.C. § 2651a(a)(4) (1994) (delegating to the Secretary of State the powers to "promulgate such rules and regulations as may be necessary to carry out the functions of the Secretary of State," and the power to delegate any "authority to perform any of the functions of the Secretary or the Department to officers and employees under the direction and supervision of the Secretary"). To the best of my knowledge, there is at present no general statutory authority that would permit the President to regulate state diplomacy.

440. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (describing presidential authority as at "its lowest ebb" when it is contrary to the established will of Congress, such that "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter"). In *Youngstown*, Congress's consideration and rejection of a proposal to seize the steel mills appears to have sufficed to signal its will. See *id.* at 586. Irrespective of congressional preference, it may be doubted whether the President has any solid basis for preemptive lawmaking of this kind. See *supra* text accompanying note 108 (describing the constitutional bases and the effect of independent executive authority, as well as the conventional treatment of executive branch input in dormant foreign relations preemption case law). Such authority may be present, however, were the premises of *Zschernig* accepted. See HENKIN, *supra* note 1, at 163 (claiming that, under the facts of *Zschernig*, "[n]o doubt, an act of Congress or a treaty, probably an executive agreement, perhaps an official declaration, possibly even a rule made by the federal courts, could have forbidden what Oregon purported to do").

441. Cf. Vagts, *supra* note 436, at 300-01 (proposing that "one might give the Executive power to issue regulations forbidding intercourse with specific countries on specific sensitive topics during particularly delicate times," but noting that "[t]he authorities might, however, shrink from putting themselves in a position where they would have to incur the onus of declaring an emergency," and also that "[i]t might also seem dangerously like a censorship arrangement, viewed as a restraint on speech").

442. See *supra* text accompanying note 110 (citing authorities).

443. Prior to the adoption of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603-11 (1994), executive suggestions were often considered authoritative on sovereign immunity issues. See, e.g., *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); Henkin, *Provisional Measures*, *supra* note 108, at 681-82; cf. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945) (failing to extend immunity in the absence of presidential action). In other areas, like recognition matters, executive suggestions were regarded as less conclusive. See Moore, *supra* note 110, at 293-96. For consideration of their revival in

it would seem, is for the judiciary to protect the President's ability to exercise the treaty power, rather than cobbling together authority of more dubious origins and efficacy.

*C. The Dormant Treaty Power and the Proper Scope of State Authority*

As the preceding discussion suggested, the need for any dormant foreign relations doctrine depends substantially on the constitutional basis for federal authority. Congress's ability to legislate on matters of national concern may suffice to protect federal prerogatives under the Commerce Clause; although a substantial body of case law suggests that it is not *always* enough, even in a purely domestic context.<sup>444</sup> The treaty power, however, is a clearer basis for a dormant regime. The Treaty Clause assigns constitutional responsibility to the President and the Senate, raising serious doubts about the adequacy of Article I safeguards for Article II authority.

The scope of the federal authority at stake is also germane, since the judiciary's function in any dormant regime may be problematic if the authority in question is either too slight or too great. If the interests at stake are incidental, then positive political authority may yet suffice: Congress may be an imperfect safeguard for the President and Senate, but so too is the judiciary. For the reasons elaborated in Part II, however, the dormant treaty power entails more than, say, preserving the President's monopoly on diplomatic formalities. The Framers intended to give the President substantive authority to determine the nation's course of negotiations, subject to Senate instruction. They supported that objective by denying the states any corresponding authority—and by requiring that the states obtain congressional consent before they negotiate toward, or enter into, even lesser international pacts.<sup>445</sup> This allocation of authority is anything but incidental, and seems to warrant judicial assistance.

On the other hand, if the dormant authority is substantial and wide-ranging, the problem becomes how to *constrain* the judiciary, including by heeding customary separation of powers and federalism considerations.<sup>446</sup> These fundamental and continuing concerns, more than the need to accommodate the states' new toe hold on the global stage, and they require careful tailoring of the judicial standard to its constitutional basis.<sup>447</sup> This

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connection with the dormant treaty power, see *infra* text accompanying notes 455-58.

444. See, e.g., *supra* text accompanying note 63.

445. See U.S. CONST. art. I, § 10, cl. 3; *supra* text accompanying notes 256-60.

446. See *supra* text accompanying notes 79 (noting bias against extra-constitutional exclusive federal authority), 81-83 (noting bias against judicial authority over foreign affairs).

447. Cf. Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1127-31 (1978) (describing the tension between constitutional common law

approach rules out importing the traditional approaches to dormant foreign relations preemption, which are hardly better suited to the Treaty Clause than to their other bases—whatever those might be. At the same time, the potential vulnerability and significance of the treaty power demands a more active role for the courts in enforcing its dormant aspect than revisionist critics of the federal monopoly have recognized.

1. *Adapting Dormant Foreign Relations Preemption.*

a. *Effects testing.* Defining the dormant treaty power through an “effects” test might reorient and recover the entire dormant foreign relations preemption doctrine, but at the price of importing its familiar and debilitating flaws. All state activities “intru[ding] . . . into the field of foreign affairs”<sup>448</sup>—not just those attempting to conduct foreign relations, as was the case under the facts of *Zschernig* itself<sup>449</sup>—might equally be regarded as interfering with the federal negotiating authority by, for example, raising new and unwanted subjects for discussion and settlement.<sup>450</sup> Absent significant remedial limitations,<sup>451</sup> even state laws having no foreseeable effect on foreign relations when adopted, but later flowering into a topic for international bargaining, might be regarded as unconstitutional.

The near-inevitable process of balancing these effects with other values<sup>452</sup> would pose a textbook problem of incommensurability:<sup>453</sup> there is no

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and separation of powers and federalism principles); *cf. also* Merrill, *supra* note 420, at 54-59.

448. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

449. *See id.* at 437 (describing the Oregon statute, and judicial decisions applying it, as oriented toward accomplishing foreign objectives); *supra* text accompanying notes 52, 372-75.

450. *See Geofroy v. Riggs*, 133 U.S. 258, 266 (1890) (“[T]he treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations.”); *id.* at 267 (citing cases); *see also In re Ross*, 140 U.S. 453, 463 (1891) (paraphrasing *Geofroy*).

451. Such as those suggested by the Solicitor General’s position in *Barclays Bank*. *See supra* text accompanying note 111.

452. *See* Charles Fried, *Types*, 14 CONST. COMMENTARY 55, 57 (1997) (“Balancing is entailed by effects tests because as a logical matter most courses of action have *some* tendency to contribute to a forbidden effect—or to undermine the pursuit of a required effect.”).

453. For introductions to the problem of incommensurability, see Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L.J. 785 (1994); Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 795-812 (1994). *See generally* Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998). For representative criticisms in the constitutional context, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987). For a relatively sympathetic view of balancing against its alternatives, see Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 78-83 (1997). While some incommensurability objections are

obvious means of comparing the national interest in bargaining unity with the interests of individual states in autonomy. The difficulty of evaluating an individual state's interests is compounded by the Treaty Clause's premise that the states' individual interests are best promoted through national unity.<sup>454</sup>

The courts might ameliorate these drawbacks to adjudicating foreign relations by entertaining executive suggestions, a procedure that becomes more appealing when federal exclusivity is grounded in the treaty power. Here, the President's agents would be opining on Article II authority, which reduces separation of powers concerns about judicial abdication. Courts would not defer, in other words, in the estimation that the issues are better "righted through diplomatic negotiations rather than by the compulsions of judicial proceedings"<sup>455</sup>—itself a judicial judgment about the proper means of conducting foreign relations and not always a correct one<sup>456</sup>—but instead because the Treaty Clause itself dedicates the matter to the President.

Still, many of the problems that dog executive suggestions, like their ad hoc nature and lack of procedural protection for litigants, would persist.<sup>457</sup> And even if the President's entitlement to opine is clearer under the

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clearly focused on the difficulty of comparing governmental interests with individual liberties, *see, e.g.*, Robin West, *The Supreme Court, 1989 Term—Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 47-48 (1990), one need look no further than interests analysis in the conflict of laws to see comparable problems in weighing governmental or institutional interests. *See* Larry Kramer, Note, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 755 (1995) (criticizing multifaceted balancing in the choice-of-law context).

454. *See supra* text accompanying notes 268-74. The dynamic elements of any such balancing approach may also be disabling. The notion that one state's activities might be found unconstitutional, while another state's similar activities are sustained because the national interest shifted somewhat over time, is likely to sorely test the integrity of executive branch submissions and judicial review. Unless an unrealistic parity is maintained, the result may be to open up more severe problems of federal-state relations than the underlying state activities could ever pose.

455. *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943).

456. In point of fact, successful diplomatic negotiations may be spurred by the shadow of judicial proceedings—see, for example, the recent negotiations involving reparations by German industry to survivors of the Holocaust—and diplomatic negotiations may determine that judicial proceedings are the only appropriate solution. *See* *Dames & Moore v. Regan*, 453 U.S. 654, 662-68 (1981) (describing the genesis of the Iran-United States Claims Tribunal).

457. *See* Goldsmith, *Federal Courts*, *supra* note 1, at 1709-10; Moore, *supra* note 110, at 299-302. These flaws might be partially addressed by routinizing the process through administrative rules. *See* Goldsmith, *Federal Courts*, *supra* note 1, at 1710; *see also* 22 U.S.C. § 2651a(a)(4) (1994) (authorizing the Secretary of State to adopt rules and regulations necessary to carry out department functions). *But cf.* Moore, *supra* note 110, at 299 n.119 ("[I]f the State Department were to set up a procedure for hearings, its exercise of a judicial function would merely be more apparent." (quoting PHILIP JESSUP, *THE USE OF INTERNATIONAL LAW* 83-84 (1959))). It is questionable, however, whether such a scheme could easily promote both certainty and procedural fairness at the same time, and the ultimate discretion

treaty power, its underlying rationale calls the wisdom of case-by-case defense into question.<sup>458</sup> Routinely requiring executive input on specific matters of foreign relations, such as the status of pending discussions between the United States and a foreign nation, will either yield nothing of value or betray some of the virtues originally driving the decision to invest the President with the treaty power. A solution that suffers many of the disadvantages of prevailing case law, and conflicts with its doctrinal *raison d'être*, seems like no solution at all.

*b. Purpose review.* Other difficulties, though of a lesser degree, afflict any attempt to focus exclusively on the purpose of state activities.<sup>459</sup> Tests turning on legislative motivation are in vogue because they are thought to be more amenable to judicial administration.<sup>460</sup> But the challenge of determining legislative purpose should not be too quickly discounted—if, indeed, one can speak meaningfully of a unitary legislative intent in the first place.<sup>461</sup> In the foreign relations context, difficult matters of judgment would be commonplace—such as whether reciprocal inheritance laws are aimed more at fairness than at foreign relations, extending equal treatment to aliens only to the extent that their home countries see fit to do likewise, or whether state procurement policies aim at external influence or just at avoiding moral taint and ethical compromise.<sup>462</sup> Such inquiries would also be delicate. The ordinary

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of the Justice Department in representing U.S. interests in litigation may limit the State Department's ability to manage matters administratively.

458. As discussed at greater length below, the appropriateness of employing the treaty power to permit case-by-case preemption of state activities depends to some degree on the default rule employed. See *infra* Part III.C.3.

459. For a tentative endorsement, see Goldsmith, *Federal Courts*, *supra* note 1, at 1711 (suggesting that, if positive political authority is insufficient, motive review may be the most appropriate solution, but noting the problem of identifying legislative intent).

460. See, e.g., Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 321-23, 353-56, 368 (1997); Richard Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 750 & n.105 (1994).

461. See Fallon, *supra* note 453, at 72-73. Professor Bhagwat, for one, does not consider the issue at length, but claims that courts are relatively experienced at what he concedes may be an essentially metaphorical inquiry. See Bhagwat, *supra* note 460, at 322-23; see also Fried, *supra* note 452, at 59-66 (considering intent as related to constitutionally constituted bodies). Of course, similar problems attend inquiries into the intent of a body of "Framers." See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 212-17 (1980). As explained below, though, the alternatives to such an inquiry are more evident and more appealing in the dormant foreign relations context.

462. For example, in *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986), in which the Illinois Supreme Court held unconstitutional the state's refusal to accord favorable tax treatment to South African Kruggerands, the only legislative history cited by the court indicated that that state legislators wished to avoid association with the unpopular South African regime. The court at one point read this to indicate that the "plain purpose behind the exclusion was to avoid the appearance

sensitivity of asking whether state and local officials purposefully violated the Constitution<sup>463</sup> might be compounded by the avowed reluctance of the Supreme Court to probe similarly into congressional motivations behind the invocation of the Commerce Clause.<sup>464</sup>

Such difficulties may be avoided only where the declaration of purpose is explicit or nearly so. Focusing on such cases, though, raises potential problems of fit and overbreadth. The clarity of a foreign relations ambition has no necessary connection with the risk of interfering with federal treaty functions. Many foreign-focused state and local activities pose little risk of interfering with federal functions.<sup>465</sup> At the same time, focusing on explicit attempts to conduct foreign relations raises concerns about encroaching on the speech interests of state and local officials<sup>466</sup> and in any

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of encouraging South African investment," *id.* at 302, but later ventured that "[t]he undisputed purpose of the exclusion is to express disapproval toward South Africa and to discourage investment in its products," *id.* at 305. In contrast, the Maryland Supreme Court concluded that "Baltimore City's purpose in enacting [its anti-apartheid ordinance] was simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds." *Board of Trustees of the Employees' Retirement Sys. v. Mayor & City Council of Baltimore*, 562 A.2d 720, 746 (Md. 1989).

In *National Foreign Trade Council v. Natsios*, the legislation's purpose seemed apparent. The sponsor of the bill, Representative Rushing, had been explicit in proclaiming the legislation's foreign-policy objectives; the lieutenant governor and governor had largely subscribed; and Massachusetts cited no other objective in defending the legislation. See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 46 (1st Cir.), *cert. granted*, 120 S. Ct. 525 (1999). But it would have been open to Massachusetts to disavow foreign-policy ambitions, in preference for a desire to avoid immoral associations. In a 1998 letter, Secretary of State Albright had acknowledged that, "one voice" considerations aside, "President Clinton and I recognize the authority of state and local officials to determine their own investment and procurement policies, and the right—indeed their responsibility—to take moral considerations into account as they do so." Jim Lobe, *Trade-U.S.: Clinton Backs Multinationals in Big Court Case*, INTER PRESS SERVICE, Feb. 16, 2000, available in LEXIS, News library, Curnws file.

463. See Fallon, *supra* note 453, at 72.

464. See TRIBE, *supra* note 1, § 5-3.

465. The city of Boulder's decision to help build a Nicaraguan preschool, for example, was sympathetically portrayed as an attempt to "challenge U.S. policies in Central America," and it was just one of "thousands of bilateral foreign agreements" that cities have negotiated that are "tantamount to political treaties." Shuman, *supra* note 20, at 161.

466. Professor Porterfield, for one, has argued that nonbinding state and local resolutions, as well as restrictions on the expenditure of public funds, are protected from preemption by the First Amendment. See Porterfield, *supra* note 18, at 2. For other invocations of free speech interests, see Bilder, *supra* note 5, at 829; Jay A. Christofferson, Comment, *The Constitutionality of State Laws Prohibiting Contractual Relations with Burma: Upholding Federalism's Purpose*, 29 MCGEORGE L. REV. 351, 361-63 (1998). But see *Natsios*, 181 F.3d at 61 (rejecting an argument that Massachusetts's free speech interests should influence the balance of interests in *Zschernig* analysis). As Professor Porterfield acknowledges, the Supreme Court has never recognized that state or local governments have First Amendment rights, and lower courts have split on the question. See Porterfield, *supra* note 18, at 32-35. One would have to take into account the risk that government speech may instead violate the First Amendment. See TRIBE, *supra* note 1, § 12-4; see also MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 42-50 (1983) (considering, and

event tends to earmark those measures already likely to attract sufficient scrutiny from the political branches.

Finally, any purpose-dominated approach presupposes that we can define the improper purpose with sufficient clarity and that the motives constitute the constitutional wrong (or at least a good proxy for it).<sup>467</sup> Considering the question as it is usually framed—whether the state aimed at conducting foreign relations<sup>468</sup>—might be helpful if the Constitution expressly established foreign relations as a prerogative of the national government. But the Constitution is not written in these terms, and whether a state has a foreign relations purpose provides us with little useful insight into whether the dormant treaty power has been offended. A governor's blistering address on a matter of international concern, for example, might create a fuss, inviting (or derailing) treaty negotiations. So too, however, might a neighboring state's evenhanded but severe liability regime, and it is difficult to see how one could competently distinguish in kind or degree among these, and other, state activities. Globalization, presumably, will make drawing such distinctions still harder. If states and localities can legitimately claim that they no longer enjoy any purely "domestic" authority,<sup>469</sup> attempts to distinguish improper foreign relations purposes, or even to define benign purposes,<sup>470</sup> may become impossible, especially if the judiciary defers to legislative expressions of purpose.<sup>471</sup>

At bottom, a purpose inquiry has the same problem as an effects approach: before considering how much state activity is too much, or what purposes are illegitimate, we must first establish more clearly the constitutional basis for the claim of interference. If the premise for the claim is the dormant treaty power, we need look no further than the type of acts as-

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rejecting, the case for deeming governments to have free speech rights); Beth Orsoff, Note, *Government Speech as Government Censorship*, 67 S. CAL. L. REV. 229, 243-47 (1993) (arguing against attributing free speech interests to government entities).

467. Cf. Bhagwat, *supra* note 460, at 332-37 (noting that the adequacy of the state purpose may vary by context and that it must be closely tied to the underlying constitutional provision at issue).

468. See, e.g., Goldsmith, *Federal Courts*, *supra* note 1, at 1711 (citing *Zschernig*).

469. See *supra* Part III.A.

470. See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 895 (1985) (O'Connor, J., dissenting) ("The test of a legitimate state purpose must be whether it addresses valid state concerns."); cf. *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (citing cases and distinguishing between illegitimate government action "with the purpose of advancing or inhibiting religion" and with legitimate secular purposes).

471. Keeping within the establishment context, see, for example, *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (requiring that "a statute must be invalidated if it is entirely motivated by a purpose to advance religion"); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (confessing a "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute").

signed to the President and Senate, together with those acts denied the states.

2. *An Act-Oriented Approach: Precluding State Bargaining.* The superior approach, both in terms of fidelity to the original understanding and judicial manageability, is to proscribe a certain class of state acts likely to interfere with the constitutional function of the national government—an approach similar to that taken in recent cases establishing the anticommandeering principle for the federal government.<sup>472</sup> An act-oriented approach tries to delimit a class of activities that exceeds the limits of state authority under the Constitution, eschewing any attempt at measuring effects, balancing, or focusing on governmental purpose. As made clear in the next section, such an approach may be tempered by the interests of the federal political branches, but otherwise assumes that the positive grants and negative limitations of the Constitution establish a rule for judicial application.

The state activities conflicting with the dormant treaty power might be imagined as three bands progressing outward from the positive grant of federal authority. The most proximate band consists of conduct that would directly usurp the power given the President and the Senate—the power to conclude agreements with foreign powers on behalf of the United States. This unambiguously violates the constitutional text only to the extent that it results in treaties or unconsented compacts. But it is highly unlikely that the move from the Articles of Confederation was supposed to invest the states with *increased* authority to send and receive ambassadors, and the federal monopoly on diplomacy would mean little were individual states free to hold themselves out as the United States.<sup>473</sup>

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472. See *Printz v. United States*, 521 U.S. 898, 932-33 (1997) (holding that a balancing of interests analysis is inappropriate when a congressional act amounts to the commandeering of state officials); *New York v. United States*, 505 U.S. 144, 187 (1992) (defending “formalistic” inquiries into whether federal measures, despite their “perceived necessity,” improperly deviate from the form of government set forth in the Constitution). See generally Fallon, *supra* note 453, at 67-68 (describing such principles as “forbidden-content” tests); *id.* at 83-84 (explaining why forbidden-content tests play only a small role in constitutional decisionmaking when compared to other kinds of tests); Fried, *supra* note 452, at 56-74 (distinguishing between “intents,” “effects,” and “acts” as bases for constitutional doctrine). *Printz* specifically rejects balancing as “inappropriate” where “it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty . . .” *Printz*, 521 U.S. at 932. As the remainder of the opinion makes clear, however, the “object” of the law—apart from its form—is irrelevant. See, e.g., *id.* at 904 (emphasizing that “the Brady Act purports to direct state law enforcement officers to participate . . . in the administration of a federally enacted regulatory scheme”).

473. See *supra* Part III.B.2.

A less proximate, but broader, second band of activities—transparent attempts by states to fashion agreement in their own capacities—represents a more significant problem.<sup>474</sup> Left unconstrained, states occasionally perceive matters to be of local interest that in fact implicate the national interest, or fail to realize opportunities that would have been secured by the aggregation of state interests through unified negotiation.<sup>475</sup> The Constitution is best read as continuing the prohibition in the Articles of Confederation on the sending or receiving of emissaries without congressional consent, and as requiring in any event that agreements with foreign powers receive consent before they are effectuated, as well as vesting the authority for treaties exclusively in the federal government.<sup>476</sup>

A third band encompasses implicit bargaining—ostensibly unilateral state measures, like the reciprocal inheritance statute at issue in *Zschernig* or the procurement law in *Natsios*, that are in practice contingent on the policy of foreign powers. It is unclear whether such activities are generally more or less harmful than explicit bargains. Ostensibly unilateral conduct does not raise the same risk of conflicting foreign engagements, or occasion as many disputes with foreign powers over breach. By the same token, however, such conduct lacks some of the safeguards of more formal bilateral or multilateral bargains. States pursuing an actual agreement might wish to enhance the agreement's legitimacy and efficacy by seeking approval as an Article I compact, which creates an incentive to conform with Congress's vision of the national interest.<sup>477</sup> Actual agreements with foreign powers, constitutional or not, also require the other party's consent, perhaps reducing the possibility of conflict.<sup>478</sup>

Whether or not their effects are strictly comparable, unilateral but contingent state activities bear a strong functional resemblance to explicit bargaining. The state of Washington, for example, would be barred, even absent relevant federal enactments, from negotiating toward an agreement

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474. Even prior to the adoption of the Constitution, foreign powers did not easily mistake an individual state's authority with the authority of the United States. *See supra* note 274-75 and accompanying text.

475. *See supra* Part III.B.2.

476. *See supra* text accompanying notes 257-60.

477. Unless adopted as a proper Article I compact, state agreements lack the force of federal law and may be more vulnerable as a consequence. *But see* *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (explaining that "congressional consent 'transforms an interstate compact [from a creature of state law] into a law of the United States'" (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (citing *Texas v. New Mexico*, 462 U.S. 554, 564 (1983))).

478. Ill-considered agreements with foreign powers would still risk disputes with third parties: a pact with Taiwan, for example, may be perfectly amicable, but it would tend to pose other problems. In addition, the interests of the United States may be injured if the bargain was less than what might possibly have been achieved.

with China on the subject of software piracy.<sup>479</sup> Similar collective action and externality problems would be raised, however, were Washington instead to enact a measure that was expressly contingent upon China's satisfaction of otherwise negotiable conditions, such as by permitting state purchase of goods only from countries that have satisfactory software policies (or by barring purchases from those that do not). The same issues would be raised, finally, even were a quid pro quo merely implicit—such as where Washington imposed a flat procurement ban, but it could be discerned that the ban would likely be relieved were China to remedy the basis for the state's complaint.<sup>480</sup>

Under each of these scenarios, the state of Washington would be implicitly or explicitly offering to alter state policy if a foreign government changes its policy. This is bargaining, in one form or another,<sup>481</sup> and has been recognized and reproofed as such—important exceptions like the Prussian life insurance saga notwithstanding. The bar on state entreaties to for-

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479. Cf. James Kynge, *China Throws Out Microsoft Piracy Case*, FIN. TIMES, Dec. 18, 1999, at 6 (“Software piracy in China is rampant and independent analysts believe more than 90 per cent of the software patented by Microsoft and other companies is pirated.”).

480. Distinguishing between such cases and “purely” unilateral conduct may appear to reintroduce troublesome issues of intent. It should be stressed, however, that intent is at issue solely for purposes of determining whether the state conduct is bargaining in the first place, not for distinguishing between legitimate and illegitimate motivations for identical conduct. Cf. Fried, *supra* note 452, at 63 (explaining how consequences can be examined as inconclusive evidence of intent, rather than as an independent or determinative effects inquiry). In practice, most of the relevant legislation will be contingent in nature. Instances in which a state discriminates against a foreign power without respect to its political character or policies—discriminating, as it were, on grounds that are diplomatically immutable—should be relatively rare.

481. See WILLIAM C. MITCHELL, PUBLIC CHOICE IN AMERICA: AN INTRODUCTION TO AMERICAN GOVERNMENT 383 (1971) (defining bargaining as “[a] means of exchange in which the terms of settlement are within the control of the partners to the exchange”). The precise typology of these forms of bargaining has been considered by international lawyers. In the example employed in the text, Washington's decision to condition eligibility for government procurement on establishing a satisfactory software policy might be characterized as a *reciprocal* law—essentially, a contingent reward “mak[ing] the observance of a certain conduct by foreign governments a condition for its operation.” Arthur Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U. L. REV. 619, 628 (1954). Its decision to bar procurement based on explicit or implicit conditions could be characterized as “retorsion,” that is, contingent retaliation that attempts to “induc[e] another state to change a policy which is undesirable but not unlawful.” *Id.* at 629; see also *id.* at 630 (differentiating between reciprocal acts and those of retorsion).

The bargaining approach would ordinarily exclude, on the other hand, “reprisals,” which are oriented solely toward past acts. While reprisals may incidentally influence future conduct, they aim at reparation rather than at attempting to modify the other party's acts, and are not contingent upon any change. See *id.* at 629. In the context of interstate compacts, it has also been suggested that reciprocal legislation does not in practice require much formal negotiation. See Joseph R. Starr, *Reciprocal and Retaliatory Legislation in the American States*, 21 MINN. L. REV. 371, 373 (1937). That overlooks the negotiating function of the legislation itself as well as the possibility of iteration between sovereign authorities. For further discussion, see *infra* note 508.

eign powers has always been construed more broadly than as a mere proscription of state emissaries. Under the Articles of Confederation, Virginia's preferential treatment of French brandy was permissible only to the extent that it could be construed as purely gratuitous, rather than compensatory.<sup>482</sup> Chief Justice Taney's opinion in *Holmes v. Jennison* later made clear that ostensibly unilateral bargains may fall within the Compact Clause, a principle largely consistent with subsequent decisions discussing the treatment of foreign compacts.<sup>483</sup> And there is a significant and unavoidable body of case law standing for the proposition that the power to engage in foreign relations was generally denied the states. The notion that both formal and implicit bargaining violate the dormant treaty power was most clearly, if unsuccessfully, captured in the briefs in *Clark v. Allen* and *Zschernig v. Miller*, only to be swamped in the *Zschernig* majority's overbroad vindication of federal supremacy.<sup>484</sup>

So construed, the dormant treaty power may be regarded as either underinclusive or overinclusive. The bargaining approach certainly does not proscribe all state activities that may disrupt U.S. foreign relations, omitting in particular unilateral but noncontingent conduct. Some activities—for example, Boulder's donation of playground equipment to the Sandinistas,<sup>485</sup> or New York City's renaming of a city street corner near the Nigerian mission to the United Nations<sup>486</sup>—may or may not be sufficiently

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482. See *supra* text accompanying notes 297-300. Those decisions have reflected Chief Justice Taney's approach to the variety of bargaining even in the domestic context. In *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), the Court regarded various "interstate agreements effected through reciprocal legislation without congressional consent," *id.* at 469, as permissible *not* because they failed to meet the requisite form of compacts, but rather because they did not enhance state power within the meaning of the test suggested by *Virginia v. Tennessee*, see *id.* at 469-72. As noted previously, though, the Court appeared to accept that the scope of the exemption owed harmless state compacts would differ in the context of foreign compacts. See *supra* note 358.

483. See *supra* text accompanying notes 339-58.

484. See *supra* text accompanying notes 363-75.

485. See *supra* note 465.

486. See *Opusunju v. Giuliani*, 669 N.Y.S.2d 156, 157 (Sup. Ct. 1997). *Opusunju* considered New York City's decision to name the street corner opposite the Nigerian Mission to the United Nations for Kudirat Abiola, the slain wife of a Nigerian dissident. See *id.* Superficially, at least, the city's action seems best classified as a reprisal. See *supra* note 481. Were it apparent that New York City would rename the street corner in response to some accommodation by the Nigerian government, the matter might fall within the purview of the bargaining approach; the best indications, however, are that the name change was intended to be permanent. See *East Timor Action Network, Inc. v. City of New York*, 71 F. Supp. 2d 334, 339-40 (S.D.N.Y. 1999) (describing various city naming initiatives and characterizing the Abiola street sign as "permanent"); Clyde Haberman, *Spelling Out Foreign Policy in Street Signs*, N.Y. TIMES, Dec. 5, 1997, at B1 (noting that Nelson and Winnie Mandela Corner remains so named even after the fall of apartheid and the divorce of the eponymous activists). The Nigerian response was to rename a street in front of the U.S. embassy in Lagos after Louis Farrakhan. See *Political Street Game*, INDEPENDENT, Feb. 7, 1998, at 13. Any explicit or implicit bargaining between the city of

incendiary to be caught by an effects-focused test, but even more clearly would not be deemed unconstitutional under the dormant treaty power. More prominent state “Buy American” laws<sup>487</sup> and tax laws impacting multinational corporations<sup>488</sup> would similarly survive any dormant treaty power objection. Such measures do not meaningfully attempt to alter the conduct of foreign governments (which cannot, for example, easily become “American” so as to satisfy a procurement statute). Perhaps surprisingly, such measures are generally excused under the prevailing effects-centered approach without serious contemplation of their potential impact, illustrating both the unpredictability of the effects approach and the intuitive appeal of an alternative.<sup>489</sup>

For much the same reason, the bargaining approach would also excuse most speech-tinged conduct by state officials. An inflammatory “sense” resolution, denunciation of a foreign leader, or other one-time affronts<sup>490</sup>

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New York and Nigeria would undoubtedly fall within the exceptions indicated below. *See infra* text accompanying notes 507-14.

487. *See supra* text accompanying note 14.

488. *See supra* text accompanying note 73.

489. Thus, for example, while a California state court struck down the California “Buy American” statute on *Zschernig* grounds primarily because of its potential overseas effects, *see Bethlehem Steel Corp. v. Board of Comm’rs*, 80 Cal. Rptr. 800, 805 (Ct. App. 1969), similar statutes were upheld at least in part because they were not contingent on foreign government behavior—in addition to avoiding other behaviors criticized in *Zschernig*. *See Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913-14 (3d Cir. 1990) (holding that, in contrast to *Zschernig*, “Pennsylvania’s statute provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes”); *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm’n*, 381 A.2d 774, 783-84 (N.J. 1977) (“Nor is there any evidence to suggest that the political climate in a potential foreign bidder’s nation has ever motivated the inclusion of the Buy American condition in an invitation for bids or that its inclusion is predicated on an assessment of the internal policies of any foreign country.”); *North Am. Salt Co. v. Ohio Dep’t of Transp.*, 701 N.E.2d 454, 462 (Ohio Ct. App. 1997) (observing that statutory provisions favoring in-state and U.S. purchasing “do not provide Ohio officials with an opportunity to treat foreign nations differently based upon the ideological bent of a nation’s government, or based upon any other factor. Rather, the provisions apply equally to all foreign nations.”).

Courts have reached similar results with respect to state inheritance statutes not contingent on foreign-government conduct, even where the statutes do attempt to influence the conduct of foreign citizens or might be the basis for complaint by foreign governments. *See Shames v. Nebraska*, 323 F. Supp. 1321, 1326 (D. Neb. 1971) (distinguishing state statute precluding nonresident aliens from inheriting a certain class of Nebraska land from *Zschernig* both on the grounds of its benign application and because, “[u]nlike the Oregon statute, the Nebraska statute herein challenged does not contain such a reciprocity provision”). *Compare Estate of Kraemer v. Kraemer*, 81 Cal. Rptr. 287, 294 (Ct. App. 1969) (holding unconstitutional, on *Zschernig* grounds, provisions of the California probate code that conditioned the inheritance of real property on foreign reciprocity), *with Estate of Horman v. State*, 485 P.2d 785, 797-98 (Cal. 1971) (en banc) (upholding, against a challenge based on *Zschernig*, provisions of the California probate code requiring that all nonresident aliens claim their interests in estates within five years from the date of death).

490. *See, e.g., FRY, supra* note 5, at 98 (citing New York City’s removal of Yasser Arafat from a

might easily cause greater consternation than an arid statute or judicial decision;<sup>491</sup> if an effects approach is to distinguish such cases, it must depend on the tenuous First Amendment interests of governments and their officials.<sup>492</sup> The dormant treaty power, in contrast, naturally targets a narrower class of speech-related conduct—bargaining<sup>493</sup>—but disregards other speech without attempting to invoke the First Amendment.<sup>494</sup>

Finally, the dormant treaty power takes a relatively generous view of state activities relating to private parties. States engage in a wide variety of internationally oriented commercial activities involving domestic and foreign corporations.<sup>495</sup> They also regulate the conduct of private individuals in a wide variety of ways, as *Zschernig* and *Barclays Bank* illustrate.<sup>496</sup> Under the orthodox federal monopoly, the identity of the immediate target of state action was less significant than whether such action might cause offense; state interaction with private parties might be preempted given sufficient secondary consequences, such as where influential foreign complainants might realistically enlist a foreign power in espousing their claims.<sup>497</sup>

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public concert and Mayor Rudolph Giuliani's welcome of the IRA's Gerry Adams); Palumbo, *supra* note 4, at 219 (citing Mayor LaGuardia's criticism of Adolph Hitler); *id.* at 221 (citing Mayor Wagner's conduct toward King Saud); Porterfield, *supra* note 18, at 7 (describing state and local "sense" resolutions); Kevin Whitelaw, *The Very Long Arm of the Law*, U.S. NEWS & WORLD REPORT, Oct. 14, 1996, at 57, 57 (reporting that "[a]t least one chamber of 42 state legislatures has declared support for U.N. representation for Taiwan").

491. For example, were Oregon's legislature to have adopted a resolution condemning Iron Curtain governments, the risk of confrontation might well have exceeded those posed by low-visibility declarations by the state's probate courts on reciprocal inheritance rights.

492. See *supra* note 466 (evaluating First Amendment considerations).

493. Cf. Roth, *supra* note 326, at 270 n.102 (criticizing the draft of a Logan Act indictment of Philip Agee but not the "much narrower and more compelling" case that might have been made against Agee based on Agee's offer of a specific quid pro quo: his betrayal of classified information about covert CIA operations in Iran in exchange for the Iranian release of U.S. hostages).

494. It is still possible, however, that such conduct would come under the Logan Act, see *supra* notes 326, 434, or under other federal statutory provisions, see, e.g., 18 U.S.C. § 954 (1994) (criminalizing false statements made to influence a foreign government). Free speech objections might be interposed in any such prosecution.

495. See generally FRY, *supra* note 5, at 66-100; HOCKING, *supra* note 382, at 70-99; John M. Kline, *Managing Intergovernmental Tensions: Shaping a State and Local Role in US Foreign Relations*, in FOREIGN RELATIONS AND FEDERAL STATES 105 (Brian Hocking ed., 1993).

496. See *supra* text accompanying notes 49, 73.

497. See, e.g., *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979) (projecting that "[t]he risk of retaliation by Japan [to a tax imposed on Japanese corporations] is acute, and such retaliation of necessity would be felt by the Nation as a whole"); *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) ("Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."), quoted in *Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875) (speculating about potential retaliation by the British government to the application of a California statute respecting aliens); *Bethlehem Steel Corp. v. Board of Comm'rs*, 80 Cal. Rptr. 800, 805 (Ct. App. 1969) (speculating, in applying *Zschernig*, that the California Buy American Act

Such an approach invites speculative and potentially self-fulfilling worst-case scenarios, given the clear incentive, on the foreign entity's part, for saber-rattling. Courts have resisted this impulse largely on extrinsic grounds, such as the domestic orientation of the state law in question, or its evenhandedness, that have little to do with the prospect of foreign effects.<sup>498</sup>

The bargaining approach, in contrast, disregards not only noncontingent state conduct, but also state relations with foreign (and domestic) private parties contingent on *their* conduct rather than that of a foreign power. There is no hint that the Framers were concerned about state agreements with private parties, domestic or foreign. To the contrary, their use of the term "foreign powers" makes it clear that they considered the forbidden counterparts to state compacts to be precisely the same parties with which the national government would be forging treaties.<sup>499</sup> State activities like

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invited retaliation by foreign nations concerned by the state's "selfish provincialism"); *cf.* *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (noting, in addressing personal jurisdiction over a private defendant in a products liability matter, the relevance of "the Federal Government's interest in its foreign relations policies"); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 321 (5th Cir. 1987) (noting, after advertent to *Zschernig*, that for the purposes of forum non conveniens analysis, "[f]ederal foreign policy interests do not disappear when purely private foreign parties come before U.S. courts"); *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231, 239 (9th Cir. 1969) (Ely, J., dissenting) (arguing that, in light of *Zschernig*, "[i]f alien corporations are to be made subject to the jurisdiction of American courts on the basis of an isolated transaction, then that decision should be made as a matter of national policy, particularly in light of possible reprisals, political, economic, or legal").

498. A federal district court concluded that the state of Washington's rules relating to oil spills did not interfere with federal authority by regulating foreign vessels because the rules merely allowed the State to "exercis[e] its police power by regulating both foreign and domestic tankers to protect the environment" and were not keyed to the worthiness of a foreign regime. *International Ass'n of Indep. Tanker Owners (Intertanko) v. Lowry*, 947 F. Supp. 1484, 1499 (W.D. Wash. 1996). In affirming in relevant part on appeal, the Ninth Circuit ignored the latter consideration and focused on the fact that the state regulations operated within Washington's territorial limits and had only incidental or indirect extraterritorial impact. *See International Ass'n of Indep. Tanker Owners (Intertanko) v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998), *rev'd on other grounds sub nom. United States v. Locke*, 120 S. Ct. 1135, 1152 (2000). It should be clear, however, that a foreign government's ire will not necessarily be mollified by arguments that a U.S. state treats all parties equally shabbily.

499. *See, e.g.*, THE FEDERALIST NO. 15, at 107 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The imbecility of our government even forbids [foreign powers] to treat with us. Our ambassadors abroad are the mere pageants of mimic sovereignty."); THE FEDERALIST NO. 22, at 144 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The want [of a power to regulate commerce] has already operated as a bar to the formation of beneficial treaties with foreign powers, and has given occasions of dissatisfaction between the States."); THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961) (describing "the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible"); THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

[t]he ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign powers in the same degree with the constitutional representatives of the nation, and, of course, would not be able to act with an equal degree of weight or efficacy. . . . [T]he Union would, from this cause, lose a considerable advantage in the management of its

the funding of export initiatives by local concerns, attempts to entice foreign direct investment, and regulation of foreign persons, will rarely offer any basis for a court to infer an attempt to bargain with a foreign country, regardless of the potential for controversy.<sup>500</sup> In less transparent circumstances, attributes like evenhandedness can serve not merely as questionable proof that state conduct will not irritate foreign relations, but rather as evidence that the state law is not in fact contingent on altering foreign sovereign policies.<sup>501</sup>

As these examples indicate, the bargaining approach's lenity toward certain classes of state activities may in practice be nonunique, with the only difference being the ability of that approach to explain the omissions.

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external concerns . . . .

*Accord* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (observing that "[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members"). Timothy Blank has argued that the shift from the Articles of Confederation's bar on agreements "with any King prince or state" and the similar dynamics involved with foreign trade groups, license treating at least some private foreign interests as "foreign powers" for Compact Clause purposes. Blank, *supra* note 252, at 1075-89. For the reasons expressed above, however, I find that argument unconvincing, not the least because it suggests that the federal treaty power and the areas presumptively proscribed to the states are not coextensive. *See* RESTATEMENT (THIRD), *supra* note 43, § 301(1) (defining an "international agreement" in relevant part as one "between two or more states or international organizations"); Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(a), 8 I.L.M. 679, 681 (defining a treaty, for the purposes of the convention, as "an international agreement . . . between states"); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *done* Mar. 21, 1986, art. 2(1)(a), 25 I.L.M. 543, 545 (defining the scope of the Convention to cover "treaties between one or more states and one or more international organizations"); *see also* RESTATEMENT (THIRD), *supra* note 43, § 301 rptr. note 5 (defining a "negotiating state" as one that "takes part in drawing up and adopting the text of a multilateral agreement"); *id.* § 312 (defining the responsibilities of "negotiating states"); Vienna Convention on the Law of Treaties, *supra*, art. 2(1)(e), 8 I.L.M. at 681 (defining negotiating states); Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *supra*, art. 2(1)(e), 25 I.L.M. at 546 (defining negotiating states and negotiating organizations). While Arthur S. Miller argued as long ago as 1960 that modern economic conditions demanded that the agreements between American corporations and foreign nation-states be treated like international agreements of the United States, *see* Miller, *supra* note 383, at 1557-66, that advice has not been heeded.

500. *See, e.g.*, Blank, *supra* note 252, at 1073-75, 1080-85 (describing agreements of Indiana, Oregon, and Florida with Japanese corporations in which these states agree to repeal unitary tax structures in exchange for promises of investment).

501. Applying this approach to *New York Times Co. v. City of New York Commission on Human Rights*, 361 N.E.2d 963 (N.Y. 1977), for example, it would be permissible for New York City to maintain its general ordinance prohibiting racial discrimination in employment advertising, even to the extent of inferring discrimination on the part of South African employers, so long as the policy was not in fact an invitation to the South African government to revise its practices. The New York Court of Appeals, in contrast, based its constitutional holding on the ground that the municipal commission, in reviewing employment advertising by South African firms, "conducted an inquiry that might have been considered offensive by the Republic of South Africa and which might have been an embarrassment to those charged with the conduct of our Nation's foreign policy." *Id.* at 969.

Even if the result is unsatisfactory in some respects, insofar as it fails to preempt some potentially harmful state activities, that is simply the result of deriving the limits on state authority from the Constitution rather than from the pages of *Foreign Affairs*. Locating federal exclusivity in the principles of the Treaty and Compact Clauses permits us to see that the constitutional value at stake is control over the beginning, middle, and end of negotiations, not control over every possible topic of negotiation. Other mechanisms, too, may license federal preemption. Established constitutional doctrine, such as the prohibition on discrimination toward foreign commerce, would continue to block certain kinds of state policy. The political branches, moreover, are undeniably best able to protect their institutional interests in any cases causing genuine alarm.<sup>502</sup>

The more serious objection, it seems to me, is that the dormant treaty power is *overinclusive*, in too broadly condemning the wide variety of arrangements that states may seek to strike with foreign powers. States may, of course, seek congressional consent for anything short of a treaty—a class which Congress is substantially free to define.<sup>503</sup> But it is by no means clear that “any agreement or compact” was supposed to comprise *all* pacts between states and foreign powers. Certain instances of bargaining—for example, negotiations by Virginia with the Kingdom of Belgium to open a foreign trade office in Brussels<sup>504</sup>—are obviously unworthy of congressional attention. Distinguishing such circumstances threatens to involve the judiciary in freewheeling effects testing, or requires importing other possible bases for exemption, such as one for state proprietary activities,<sup>505</sup> that may be neither doctrinally sound nor easy to administer.<sup>506</sup>

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502. See *supra* Part III.B (discussing whether action undertaken by the political branches renders judicial intervention unnecessary).

503. But see, e.g., Blank, *supra* note 252, at 1068 n.8 (suggesting that all agreements between states and foreign nations are “absolutely forbidden”).

504. Cf. Liner, *supra* note 384, at 11 (updating the impact of Virginia’s choice to place an economic development office in Brussels); see also Brenda S. Beerman, Comment, *State Involvement in the Promotion of Export Trade: Is It Time to Rethink the Concept of Federalism as It Pertains to Foreign Relations?*, 21 N.C. J. INT’L L. & COM. REG. 187, 206 (1995) (describing the state of North Carolina’s activities).

505. See *supra* note 67 (discussing the relevance of the market-participant doctrine to dormant Foreign Commerce Clause analysis and to *Zschernig*).

506. Given a market-participant exception, the decision by certain states to pull Soviet vodka from state liquor store shelves after the Soviet Union shot down flight KAL-007, or Oregon’s attempt to dun the Soviet Union for costs it had incurred after Chernobyl, might be suspect, while the purchase by Oregon of Soviet-made nuclear reactors would have been unlikely to attract scrutiny—even if the former activities were no more governmental in character, and the reactor purchase no less fraught with potential foreign policy complications (perhaps for relations with third countries downwind). A similar distinction may be extracted from treaty law, which traditionally regards commercial agreements between states, governed by some body of contract law, as something less than an international agreement

A focus on the externality and collective action rationales for the dormant treaty power permits some intuitively appealing line-drawing. Typical purchasing or investment agreements between a state and a foreign power are not contingent on the foreign power's affairs of state, or, if they are, they pose no appreciable risk of altering those conditions for other states or municipalities—such agreements are exchanges purely on economic terms, seeking a transaction-specific economic response.<sup>507</sup> Under these circumstances, such activities cannot be said to produce externalities of the kind that the treaty power was intended to avoid.<sup>508</sup>

or treaty. For example,

[a]n international agreement, as defined, does not include a contract by a state, even with another state, that is essentially commercial in character and is intended to be governed by some national or other body of contract law. Examples include a loan agreement, a lease of a building, or a sale of goods.

RESTATEMENT (THIRD), *supra* note 43, § 301 cmt. d. But nothing in the commercial character of such agreements is inimical to resolution by treaty, and they may take that form. *See* 14 DIGEST OF INTERNATIONAL LAW 7-11 (Marjorie M. Whiteman ed., 1970) (citing authorities).

507. Thus, if Oregon had elected to buy Soviet nuclear reactors, it would have influenced the Soviet Union only to the extent of encouraging the production of nuclear reactors. The purchase would not, in the ordinary course, have sought more broadly to compel a shift in Soviet energy policy or to deprive the other states of reasonably equivalent economic opportunities. Likewise a typical sister-city relationship. Such agreements do not, to put the matter formally, create any cognizable externalities of the kind warranting the federal monopoly and its dormant component.

Contractual relations may, of course, presuppose certain background political conditions; a state government might for example insist on an escape clause to protect itself against dramatic shifts in foreign exchange rates or political regime. But such ancillary terms can be easily distinguished from the primary conditions indicated by typical sanctions legislation, and they would moreover be exempted under the exceptions described below.

508. A further example concerns state law relating to the reciprocal recognition of foreign judgments, a complicated issue that can only briefly be sketched. In *Hilton v. Guyot*, 159 U.S. 113 (1895), a diversity case, the Supreme Court suggested that federal law—informed by “the structure of international jurisprudence”—required a rule of reciprocity. *Id.* at 227. It is unclear whether *Hilton* is still good law in the wake of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS, § 98 cmt. e (1971) (querying whether reciprocity continues to be an obligatory consideration); LEA BRILMAYER, CONFLICT OF LAWS: CASES AND MATERIALS 885-86 (4th ed. 1995) (same); EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 24.35 (2d ed. 1992) (same). Further doubt has been sown by *Zschernig*, compare Eugene F. Scoles & Laila E. Aarnas, *The Recognition and Enforcement of Foreign Nation Judgments: California, Oregon, and Washington*, 57 OR. L. REV. 377, 381 (1978) (suggesting that, given *Zschernig*, state courts may no longer apply reciprocity requirements, even where required to do so by a state statute), and Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 70 n.90 (1991) (same), with BRILMAYER, *supra*, at 885-86 (indicating the uncertainty regarding the scope of *Zschernig*), and SCOLES & HAY, *supra*, § 24.35, 1000 n.5 (same), and by the appreciation that the reciprocity aspect of *Hilton* was “magnificent dictum,” *Johnston v. Compagnie Générale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926). The result is that some states either disregard the requirement or enforce it solely as a matter of state law. *See, e.g.*, *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 691 n.7 (7th Cir. 1987) (holding that Illinois law does not recognize a reciprocity requirement); *Tahan v. Hodgson*, 662 F.2d 862, 867-68 (D.C. Cir. 1981) (considering it unlikely that federal or D.C. law mandates a reciprocity inquiry); *Chabert v. Bacquié*, 694 So. 2d 805, 814 (Fla. Dist. Ct.

State bargaining may also involve zero-sum situations—where the risk posed by one state’s bargain with a foreign power is solely to another state’s opportunity to engage in precisely the same conduct. In these conditions, the opportunity for collective-action gains are likely to be minimal. If, in fact, there is jockeying for the singular right to open a trade mission, or to become a sister city,<sup>509</sup> the purposes of the federal monopoly are not obviously implicated. While the states might benefit from collusion, or the federal government might wish to intervene for distributive reasons, either possibility assumes a situation in which American governments possess near-monopoly power.<sup>510</sup>

Distinguishing cases where externalities or collective action advantages are absent is by no means easy, and it impairs the analytic clarity of the bargaining approach. Yet such difficulties are more defensible than the line-drawing problems characterizing a pure effects test. Unlike an effects approach, the basis and limits for which do not appear in the Constitution, the dormant treaty power and its exceptions are derived from the convergence of the Treaty and Compact Clauses. The grant of the treaty power was coupled with the understanding that federal authority was conferred to help the states avoid the externalities and collective-action problems that

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App. 1997) (holding that, under Florida law, reciprocity is a permissive, but not a mandatory, precondition for recognizing a judgment).

But if reciprocity is otherwise relevant under state law, *see, e.g.*, *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1004 (5th Cir. 1990), or under international law incorporated as federal common law, *see Hilton*, 159 U.S. at 227; *cf. Her Majesty, Queen v. Gilbertson*, 597 F.2d 1161, 1163-64 (9th Cir. 1979) (assuming, without deciding, that reciprocity may be required either by federal or state law), would it violate the dormant treaty power? In form, yes. But mere reciprocity—absent any procedure for evaluating and inspiring other change in the content of foreign law—seems to impose no externalities. The United Kingdom’s decision to recognize the laws of Ohio does not in any way diminish the prospect that it would also recognize the laws of Kentucky. Accordingly, state adoption of a reciprocity requirement would not violate the dormant treaty power, whether or not it would have violated *Zschernig*.

509. Sister City International (“SCI”) insists that a foreign jurisdiction have “only one sister city, county, or state in the US,” though it is not clear whether SCI’s threat to withhold recognition has any real effect. *SCI Affiliations Policy* (visited Mar. 3, 2000) <<http://sister-cities.wego.com/go/wego.pages.page?groupId=10442&view=page&pageId=17772&folderId=17188&panelId=-1&action=view&JServSessionId=3fef9dccb8101ff.6796.952313303413>> (on file with the *Duke Law Journal*).

510. Such a “beggar-thy-neighbor” scenario, in which one state is pitted against the other, should be distinguished from collective action benefits that might occur by coordinating foreign offices, not to mention the externalities that the former may impose as a result of inconsistencies with national policy. *See, e.g.*, HOCKING, *supra* note 382, at 79-84 (describing the problems with coordinating foreign investments). The political alternative to judicial intervention in these circumstances may be especially attractive: not only could Congress preempt disruptive or otherwise counterproductive state competition, but the political branches could indicate that borderline state conduct should be exempted from dormant treaty power scrutiny. *See infra* Part III.C.3 (discussing the benefits of positive political authority).

persisted under the Articles of Confederation, rather than to remedy “whatever concerns [the states] alone.”<sup>511</sup>

Similarly, whatever the scope of the Compact Clause, it does not appear to have been contemplated that it would extend to state activities of no national interest. This is the thesis, at any rate, of the litmus test proposed in *Virginia v. Tennessee*,<sup>512</sup> where the Court described the interstate compacts of significance under the Compact Clause as those leading to “the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”<sup>513</sup> One would anticipate that few cases falling below this threshold would even be subjected to challenge.<sup>514</sup>

Neither exception would redeem, however, the Massachusetts legislation on Burma presently before the Supreme Court. The Massachusetts statute falls squarely within the bargaining approach to the dormant treaty power. While the immediate objects are corporations doing business in Burma, the statute is unambiguously conditioned not just on their behavior, but on the present regime’s indefensible conduct. (Were a democratically legitimate government to succeed to power, and the expected reforms to ensue, one might safely assume the legislation would be repealed—a matter confirmed by evidence of Massachusetts’s objective.<sup>515</sup>) The state legislation evidently seeks to alter conditions for all manner of interactions with Burma and could scarcely be said to be devoid of externalities, or to create externalities solely appreciable by a rival for the very same bargain.

This conclusion does not, it must be said, mean that all nonfederal protest against Burma is unconstitutional. To the contrary, the bargaining approach more clearly delineates permissible alternatives than does the ef-

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511. *Hines v. Davidowitz*, 312 U.S. 52, 63 n.11 (1941) (“My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty.”) (quoting a 1787 letter from Jefferson to George Wythe). One of the singular appeals of the federal monopoly, it must be recalled, is its claim to defend the interests of the states as participants in a federal system, not just the interests of the national government writ large. Cf. Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT’L L.J. 1 (2000) (arguing that the European Court of Justice must take a similar approach in assessing “federal” benefits of uniformity).

512. 148 U.S. 503 (1893).

513. *Id.* at 519; *accord* *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 472-73 (1978) (endorsing this approach).

514. One reason that a state might refrain from challenging such arrangements, of course, is that a challenge would not only be an indictment of its own right to participate, but would also establish precedent limiting its own opportunities on future occasions.

515. *See supra* notes 23, 462; *see also* text accompanying notes 479-80 (describing the use of legislative purpose to provide evidence of bargaining).

fects-oriented approach of *Zschernig* and its “one voice” proxy. Massachusetts officials may deliver speeches condemning Burma, even if the disruptive effect of such speeches is far more severe than the effects of the state’s procurement policy.<sup>516</sup> Perhaps more significant, procurement policy may properly make doing business with the state contingent on a corporation’s compliance with standards governing its *own* conduct, so long as those standards are not a pretext for effecting change by a foreign sovereign. An evenhanded policy concerning respect for worker rights,<sup>517</sup> for example, would ordinarily be unobjectionable. Internationally oriented requirements reasonably consistent with foreign power policies—such as state requirements that companies doing business in Northern Ireland refrain from religious discrimination<sup>518</sup>—would also pass muster, so long as they are consistent with other federal law. Finally, as described below, state activities caught by the bargaining approach may be excused by the federal political branches, including the President, under circumstances appropriate to the administration of the treaty power.

3. *The Judicial Function of Positive Political Authority.* As others have observed, one of the failings of the present dormant foreign relations doctrine is that it “prompts judicial intervention by the same trigger that induces political response,” namely observable foreign effects.<sup>519</sup> This point is easily overstated, even in regard to the present doctrine. Neither the courts nor Congress are self-starting, and the effective power in either quarter of foreign complainants, particularly those espousing the national government’s rights against the states, has not been overwhelming.<sup>520</sup> But the claimed redundancy between the political process and judicial doctrine is certainly worsened when the prospect of political participation in

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516. Those espousing the orthodox approach to dormant foreign relations preemption make similar claims, though it is by no means clear why. See, e.g., Brannon P. Denning & Jack H. McCall, *States’ Rights and Foreign Policy: Some Things Should Be Left to Washington*, FOREIGN AFF., Jan.–Feb. 2000, at 13-14 (2000) (suggesting that the Constitution allows state officials to pass nonbinding resolutions or to lobby congressional representatives in order to effect changes in national foreign policy). A difficult case for the bargaining approach would be raised under certain circumstances, of course—for example, were Massachusetts to adopt a law requiring gubernatorial protests against Burma unless and until a change in the regime transpires.

517. See *supra* note 501 (describing *New York Times Co. v. City of New York Commission on Human Rights*, 361 N.E.2d 963 (N.Y. 1977)).

518. See Kline, *Continuing Controversies*, *supra* note 13, at 116; *Cities Slap Sanctions Against Foreign Powers*, TELEGRAPH HERALD, Apr. 15, 1998, at C7.

519. See Goldsmith, *The New Formalism*, *supra* note 29, at 1414 (discussing the dormant Commerce Clause and quoting Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 436 (1982)).

520. See *supra* text accompanying notes 422-25.

litigation is considered. Not only is judicial intervention stimulated as the political branches are prompted, but the executive branch is given the opportunity, however tenuous, of applying its resources in lobbying the judiciary—rather than the legislature, the American public, and the foreign governments concerned.<sup>521</sup> The appeal of removing the judicial option from the equation is apparent.

To a degree, the dormant treaty power's bargaining approach avoids this problem: because it focuses on the act of state bargaining, rather than foreign effects, executive branch expertise is less obviously relevant. But it also possible, in my view, to rationalize political participation in the judicial process without estranging it. Under the bargaining approach, a more productive task for the executive branch lies in determining when the rule's application is too severe. One means by which that might be accomplished is through congressionally authorized rules or regulations delineating certain types of acts which, in the President's view, do not amount to proscribed bargaining. Barring that, the executive branch might be permitted to submit its conclusion, without elaboration, that a given state activity does *not* interfere with the performance of the treaty power and to require that the judiciary treat a timely submission to that effect as dispositive in the absence of exceptional circumstances.

Permitting this sort of executive branch involvement has several compelling virtues. First, it ameliorates the potential severity of the dormant treaty power for state bargaining activities bearing on foreign relations—though, for the reasons described above, the bargaining approach is more predictable, and less broad in certain regards, than its alternatives.<sup>522</sup>

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521. The problem is all the more acute on those occasions when members of Congress participate in judicial proceedings as amici—as quite a few did in both the lower court and Supreme Court proceedings in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 44 (1st Cir.), *cert. granted*, 120 S. Ct. 525 (1999).

522. In some cases, accordingly, the bargaining approach's severity is no greater than the orthodox federal monopoly shorn of ad hoc exceptions. For example, both the bargaining approach and *Zschernig* are bedeviled by potentially positive practices like the state recognition of foreign judgments. As Justice Harlan observed in *Zschernig*, if inquiry into the administration of foreign law is prohibited to the states, then the provision of the Uniform Foreign Money-Judgments Recognition Act (which is identical to the current version, *see* UNIF. FOREIGN MONEY-JUDGMENTS RECOG. ACT § 4(a)(1), 13 U.L.A. 268 (1986)) permitting nonrecognition of judgments "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" is presumably unconstitutional—a conclusion Justice Harlan found difficult to believe was intended by the majority. *See Zschernig v. Miller*, 389 U.S. 429, 461-62 (1968) (Harlan, J., concurring); *see also* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 98 (1971) (predicating the recognition of foreign judgments rendered "after a fair trial in a contested proceeding"). Perhaps other federal law validly dictates such considerations, as *Hilton v. Guyot*, 159 U.S. 113 (1895), once suggested. *See id.* at 202 (suggesting general conditions for recognition). *But see supra* note 508 (noting the questionable authority of *Hilton* in light of *Erie* and *Klaxon*). In any event, such an awkward result exemplifies the need for permitting po-

Second, permitting executive submissions provides a limited check against judicial overreaching, by allowing low key executive intervention as an alternative to the definitive lawmaking characteristically required to overcome a displeasing court decision. Although the resulting rule does not go nearly so far as the judicial abdication proposed by some,<sup>523</sup> it serves the political branches better by allowing the judiciary to protect their prerogatives while permitting the low-cost correction of judicial error.

The resulting burdens on the executive branch would not likely be ruinous. A rule or regulation exempting certain types of state activities from automatic preemption, on grounds that they do not pose serious risk of externalities or afford collective action advantages, may be less controversial than requiring executive-led preemption in the throes of a particular controversy. The alternative, executive submission, may occasion more frequent and divisive dispute. At the same time, voluntary and programmatic executive branch intervention would run little risk of compromising the national interest in the confidentiality of negotiations (or the lack of negotiations) with foreign powers. The relatively small class of cases subject to the bargaining approach as compared to, say, cases involving a potential defense of foreign sovereign immunity, should also help ensure that the burden is manageable.<sup>524</sup> Of course, to the extent that the executive branch prefers *not* to have the option of submission, it is free to adopt a conservative approach, or even an administrative rule to the effect that the participation will be systematically declined.<sup>525</sup>

Nor would executive submission in this context unsettle the separation of powers between the President and the courts. To be sure, such submissions encroach on the judicial function, in the sense that they deny to judges the sole power to determine outcome. Any procedural doctrine permitting waiver, or statutory restriction on standing, does much the same thing.<sup>526</sup> Assigning an outcome-determining role to the executive branch *alone* is more the crux of the problem, but that is hardly unique in constitu-

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litical intervention, a function difficult to reconcile with the conventional bases for the federal monopoly. *See supra* Part I.C.2 (noting that because the Court has found the federal monopoly to be derived from the Foreign Commerce Clause, it tends to ignore the executive's input in these matters).

523. *See supra* note 29.

524. *But cf.* *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983) (describing the political pressure placed on the State Department by foreign nations seeking immunity prior to the adoption of the Foreign Sovereign Immunity Act of 1976).

525. Such "housekeeping" rules would not present the same potential difficulties as administrative rules directed at primary state conduct. *But cf.* Goldsmith, *Federal Courts*, *supra* note 1, at 1710 (proposing the consideration of administrative rules as an alternative to judicial intervention).

526. *See, e.g., supra* note 264 (citing Uruguay Round Agreements Act provisions limiting causes of action against states for breaches).

tional or statutory matters.<sup>527</sup> Critically, moreover, it is appropriate given the structure of the treaty power. One may well question an outcome in which the President assumed the authority to preempt, by brief, an individual state's laws; this would exceed the President's authority under the Treaty Clause itself, since a negotiated treaty has preemptive effect only after the Senate has consented and the President afterward ratified. With the dormant treaty power as the preemptive backdrop, however, the President's decision to exempt certain state acts from scrutiny is precisely as broad as his plenary authority to prevent national treaties from being negotiated. In authorizing state participation in world affairs, the President is really doing no more than exercising his prerogative to cash in the national chips.

Finally, there would be little if any harm done to the separation of powers between the President and the legislature. Executive submissions have the beneficial function of signaling, however obliquely, the direction of the President's management of foreign relations; either the Senate or Congress may, within the constraints of the Treaty Clause, informally intervene to direct or correct the executive branch judgment. Equally important, Congress retains the power to dictate the permissible scope of state activities, thereby relieving the states not only of dormant treaty power concerns but also, at the same stroke, of uncertainties created by the dormant Foreign Commerce Clause and statutory preemption. The importance of the treaty power requires, of course, that the legislative authorization or acquiescence in state activities should not lightly be inferred. *Barclays Bank*, properly understood, was less a wholesale rejection of dormant foreign relations preemption than an indulgent reading of congressional delegation to the states.<sup>528</sup> The Court's reasoning, however defensible in purely Foreign Commerce Clause terms, plainly does not consider the effect on

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527. The dormant Commerce Clause, for example, may be characterized as a rule precluding the states from certain types of regulations while permitting the Congress to override the principle as it deems fit, *see* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10-17 (1975), or as one invalidating state regulations in the relevant areas absent congressional authorization, *see* Merrill, *supra* note 420, at 56 & n.239; Schrock & Welsh, *supra* note 447, at 1138-41. An analogue of the purely statutory front might be the procedure for approving antitrust consent decrees prior to the enactment of the Tunney Act, *see* Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974), and perhaps even afterward, *see* *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995) (holding that a "public interest" inquiry under the Tunney Act entails limited judicial review).

528. *Compare* *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324-27 (1994) (discussing the congressional tolerance of state initiatives), *with id.* at 329 (noting the possibility for congressional delegation to the executive branch), *and* *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 71-77 (1st Cir.) (concluding that Congress had not implicitly assented to state regulation touching on Burma and had instead delegated its authority to the President), *cert. granted*, 120 S. Ct. 525 (1999).

the President's treaty power—authority that congressional *inaction* cannot, under any view, divert to the states.

#### CONCLUSION

Viewed through the lens of the dormant treaty power, the flowering of state foreign relations activities is less a source of constitutional dissonance than an opportunity to revitalize neglected doctrine, doctrine that was itself inspired by intensive state activities in the late eighteenth and mid-nineteenth centuries. The grounding of the dormant treaty power in the Constitution, political branch practice, and case law interposes a powerful constraint on latter-day efforts to retreat wholesale from the federal monopoly orthodoxy.

At the same time, the dormant treaty power, and the bargaining approach it commends, does not lightly dismiss the normative virtues of localism. Instead, it attempts to respect one of the central insights of the Founding—namely, that state bargaining generates disadvantages for the collective interests of the states that are best avoided by centralizing the conduct of international negotiations in the Senate and the President. Understanding the treaty power as the source of dormant federal foreign relations authority not only explains why some dormant doctrine is necessary but also frees states and localities to engage in a wide range of activities regardless of their consequences. If a constitutional struggle remains, it is between state activities and the terms of the Constitution, not the struggle of a house divided.