

## Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine

*Matthew Schaefer\**

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\* Author was a consultant to the National Governors' Association and Western Governors' Association during final negotiations of and legislative implementation of NAFTA and WTO Uruguay Round Agreements and was a Director, International Economic Affairs Office, National Security Council (White House) during the Massachusetts Burma Law Supreme Court case. The author would like to thank his colleague at the University of Nebraska, Eric Berger, for his comments on a draft of this article and also thank the University of Nebraska faculty, the University of New Mexico faculty and the California Western faculty for their comments during faculty colloquia. Finally, the author would like to thank the editors of the *Seton Hall Law Review*. The views in the paper and any errors and omissions are the author's alone.

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## I. INTRODUCTION

A reassessment of United States' constitutional constraints on state-level foreign policy is sorely needed. State engagement in foreign policy was rarely significant until the 1960s.<sup>1</sup> Since that time, state involvement has rapidly expanded in both sheer magnitude and the types of activities undertaken.<sup>2</sup> The most prominent and problematic among these state and local activities in the past fifty-plus years has been three waves of state and local sanction initiatives targeting countries ruled by regimes with repugnant human rights policies. In the mid-1980s, over half of the states and at least 100 localities adopted sanctions legislation against South Africa, most often in the form of divestment requirements for state or city pension funds, procurement restrictions applicable to companies active in South Africa, or both.<sup>3</sup> In the late 1990s, many states and localities targeted Burma (officially known as the Union of Myanmar), a country ruled by an undemocratic military regime with a repugnant human rights record that has included the killing of as many as several thousand pro-democracy demonstrators. More recently, states and localities have targeted the Sudanese government for its participation in the genocide in the Darfur region of the country. Divestment requirements and procurement sanctions continue to be tools of choice for states and localities seeking to use their substantial market leverage to change the behavior of these foreign governments. Unless halted through the faithful application of constitutional constraints by state and local officials, globalization and technological developments that increase access to and the exchange of information concerning con-

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<sup>1</sup> See, e.g., Ivo D. Duchacek, *Perforated Sovereignities: Towards a Typology of New Actors in International Relations*, in *FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNATIONAL UNITS* 5, 5 (Hans Michelmann & Panayotis Soldatos eds., 1990); Earl Fry, *The United States of America*, in *FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNATIONAL UNITS* 283, 283 (Hans Michelmann & Panayotis Soldatos eds., 1990).

<sup>2</sup> See generally John M. Kline, *Managing Intergovernmental Tensions: Shaping a State and Local Role in U.S Foreign Relations*, in *FOREIGN RELATIONS AND FEDERAL STATES* 105, 105 (Brian Hocking ed., 1993) (noting that not since the Republic's earliest decades had states attempted to engage directly and actively in foreign affairs in order to advance individual policy positions).

<sup>3</sup> *Id.* at 111.

ditions and policies in foreign countries will likely facilitate the trend of increased state and local involvement in foreign affairs.<sup>4</sup>

Constraints on state-level foreign policy flow from the Supremacy Clause (in the form of the preemption doctrine), the Foreign Commerce Clause (in the form of the dormant Foreign Commerce Clause), and the amalgam of clauses allocating foreign affairs powers to federal actors and denying them to the states (in the form of the dormant foreign affairs doctrine). In 1968, the Supreme Court in *Zschernig v. Miller* for the first time relied upon the dormant foreign affairs doctrine to invalidate a state law in an as-applied challenge.<sup>5</sup> This doctrine prohibits certain state foreign policy actions even in instances in which such state actions are not preempted by affirmative acts of the federal government (i.e., where the foreign policy powers of the federal government lie dormant or unutilized). The dormant foreign affairs doctrine is rooted in an *exclusive* federal government foreign affairs power.<sup>6</sup> By definition, if a power is exclusive to the federal government, then states are denied such power irrespective of whether the federal government has utilized its power. The Court has declared the foreign relations power to be exclusive to the federal government since the early 1800s, and a multi-modal interpretation of the Constitution supports a significant degree of federal exclusivity over foreign affairs.<sup>7</sup>

All three major waves of state and local sanction efforts—those involving South Africa in the 1980s, Burma in the 1990s, and Sudan in the 2000s—led to litigation challenging the constitutionality of the state and local legislation. The litigation involved challenges to state and local laws under the dormant foreign affairs doctrine, as well as preemption and the dormant Foreign Commerce Clause. Additional

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<sup>4</sup> See Matthew Schaefer, *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, 35 (1998).

<sup>5</sup> 389 U.S. 429, 432 (1968). Some commentators have used slightly different labels. See, e.g., Kevin Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 471 (1987) (referring to the “dormant foreign affairs power”); Johanna Medelson, *Foreign Policy by Federalism: The Reagan Years*, 21 U. MIAMI INTER-AM. L. REV. 81, 89 (1989) (referring to a “dormant foreign affairs clause”). I believe that use of the term “dormant foreign affairs clause” is inappropriate because the doctrine does not derive from a single clause nor does the Constitution grant a general foreign affairs power to the federal government in any single clause.

<sup>6</sup> See *Zschernig*, 389 U.S. at 436.

<sup>7</sup> See, e.g., *Holmes v. Jennison*, 39 U.S. 540, 550 (1840) (“From the very nature and organization of the general or national government, it is vested with the sole jurisdiction over all matters of a national character, and of external concern.”).

state measures outside of these major sanction initiatives have also been challenged in the courts since *Zschernig*.<sup>8</sup> Lower federal and state courts, however, have struggled to apply *Zschernig*'s test, which asks whether a state action has "more than 'some incidental or indirect effect'" on foreign relations,<sup>9</sup> given the test is not particularly well-suited for courts to independently analyze. In the past decade, the Supreme Court accepted certiorari in two cases, *Crosby v. National Foreign Trade Council*<sup>10</sup> and *American Insurance Association v. Garamendi*,<sup>11</sup> involving state level foreign policy sanctions, but the Court's opinions have not provided the clarity needed by lower courts, state actors, local actors, or federal actors. These Supreme Court rulings followed closely on the heels of significant academic criticism of the dormant foreign affairs doctrine—writings that challenged the orthodoxy of federal government exclusivity in foreign affairs.<sup>12</sup>

In the first case, *Crosby*, the Court struck down a Massachusetts law that provided a negative ten percent procurement preference against companies active in Burma.<sup>13</sup> In its opinion, the Court relied solely on "obstacles conflict"<sup>14</sup> preemption and did not rule on two additional grounds that the First Circuit had relied upon to strike the law down: the dormant foreign affairs doctrine and the dormant Foreign Commerce Clause. The choice to rely solely on preemption incorrectly fueled speculation by some that the academic assault on *Zschernig* succeeded.<sup>15</sup> Additionally, some incorrectly characterized the ruling as narrow and read it as only providing preemption of state

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<sup>8</sup> See *infra* Part VIII.E.2 (chart).

<sup>9</sup> *Zschernig*, 389 U.S. at 433 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

<sup>10</sup> 530 U.S. 363 (2000).

<sup>11</sup> 539 U.S. 396 (2003).

<sup>12</sup> See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 436 n.64 (2d ed. 1996); Jack Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1618–20 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1225 (1999) [hereinafter Spiro, *Foreign Relations*] ("The purpose of this essay is to present a coherent explanation of why the doctrine was once appropriate, even imperative, but fast becoming obsolete."); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121, 123 (1994) [hereinafter Spiro, *States and Immigration*] (arguing for a lack of federal exclusivity over immigration matters since the foreign affairs underpinning of such exclusivity is no longer valid).

<sup>13</sup> *Crosby v. NFTC*, 530 U.S. 363, 388 (2000).

<sup>14</sup> *Id.* at 384–85.

<sup>15</sup> Cf. Carlos Manuel Vazquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1261 (2001) (arguing that "a declaration of victory by the critics of the dormant foreign affairs doctrine would be premature" in response to the Court's opinion in *Crosby*).

law where a federal sanctions law specifically targeted the same country as the state law or as only impacting procurement sanctions.<sup>16</sup>

In the second case, *Garamendi*, the Court invalidated a California law requiring insurers operating in the state to disclose pre-Holocaust-era insurance policies sold in Europe in order to continue operating in the state.<sup>17</sup> But the Court provided a rather muddled analysis. The majority approvingly cited *Zschernig*, breathing life back into the doctrine for those that incorrectly believed *Crosby* left it critically wounded.<sup>18</sup> The *Garamendi* opinion, however, arguably mischaracterized *Zschernig* as a field preemption case<sup>19</sup> and ultimately seemed to rely more on *Crosby*-styled obstacles conflict preemption as the grounds for its decision.<sup>20</sup>

For their part, state and local governments read the opinions as continuing to allow state-level foreign policy sanctions (or at a minimum used the doctrinal confusion as an opportunity to pass such measures) as evidenced by the recent enactment of laws targeting Sudan. While a lower federal court partially invalidated Sudan-sanctions legislation enacted by Illinois in 2007,<sup>21</sup> a new issue was raised when Congress subsequently purported to authorize state and local divestment measures targeting Sudan in response to the litigation.<sup>22</sup> The Congressional authorization occurred in spite of the President questioning the constitutionality of such authorization in his signing statement of the legislation.<sup>23</sup> In sum, the academic criticism of the dormant foreign affairs doctrine, the Supreme Court's hesitance to rely clearly upon it, and Congress's purported attempt to authorize state actions otherwise running afoul of the doctrine, have left

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<sup>16</sup> See Daniel M. Price, John P. Hannah & Marinn F. Carlson, *Crosby v. NFTC and the Future of State and Local Sanctions*, 32 LAW & POL'Y INT'L BUS. 37, 40 (2001).

The omission of [dormant foreign affairs doctrine and dormant Foreign Commerce Clause] holdings, however, at least theoretically leaves open the possibility [state sanctions] could pass constitutional muster, provided no federal statute addressed the same issue. This conceptual space is what advocates of local foreign policy initiatives may seek to exploit.

*Id.* The authors think this reading by state and local officials is incorrect.

<sup>17</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003).

<sup>18</sup> *Id.* at 417-18.

<sup>19</sup> *Id.* at 419.

<sup>20</sup> *Id.* at 421.

<sup>21</sup> *NFTC v. Giannoulis*, 523 F. Supp. 2d 731, 749 (N.D. Ill. 2007).

<sup>22</sup> Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516.

<sup>23</sup> Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 Weekly Comp. Pres. Doc. 1645 (Dec. 31, 2007).

confusion and questions surrounding the doctrine. Further, because states and localities continue primarily to utilize procurement restrictions and divestment requirements in major sanctions initiatives, the failure of the Supreme Court to rule on the availability of a market participant exception to the dormant foreign affairs doctrine in the face of conflicting lower court opinions has created further uncertainty. Thus, the lack of clarity for state, local and federal officials, lower courts, and businesses, first created by the *Zschemig* opinion, has arguably worsened considerably in the past decade.

This reassessment of U.S. constitutional constraints on state level foreign policy will focus on (re)justifying, refining, and distinguishing the dormant foreign affairs doctrine. The (re)justification for the doctrine is twofold. First, all major policy considerations argue against state involvement in foreign affairs absent federal approval. Ultimately, even those policy goals that at first glance appear to support state involvement in foreign affairs do not require state involvement in order to be achieved. These policy arguments do not mandate a dormant foreign affairs doctrine. As critics of the doctrine point out, the federal government can always preempt harmful state activities.<sup>24</sup> Preemption by the federal government, however, is an imperfect device in eliminating state engagement in foreign affairs and gives less clear guidance to state and local actors. Further, relying on preemption is arguably less intellectually honest given unclear congressional intent regarding preemption of state and local sanctions measures in many instances. Most importantly, the various modes of constitutional interpretation, although providing somewhat conflicting signals, nevertheless support an exclusive foreign affairs power in the federal government and its corollary, the dormant foreign affairs doctrine.

The refinement of the doctrine is necessary because both courts and scholars have struggled to establish a doctrinal test for analyzing state actions that pays fealty to the Court's *Zschemig* opinion, suits the competence of courts, and allows for independent application by state and local officials. In establishing the dormant foreign affairs doctrine in the *Zschemig* case, the Supreme Court appeared to create a threshold-effects test asking whether the state action has "more than 'some incidental or indirect effect'" on U.S. foreign relations or a foreign nation.<sup>25</sup> The origins of the test, however, are somewhat ac-

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<sup>24</sup> See Goldsmith, *supra* note 12, at 1679.

<sup>25</sup> *Zschemig v. Miller*, 389 U.S. 429, 434 (1968) (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

cidental.<sup>26</sup> Moreover, such a standard is not particularly well-suited for independent determinations by the courts, nor is it particularly well-suited for independent application by state and local officials. Many commentators analyzing the doctrine have failed to support their chosen standard of review and have strayed from any standard arguably articulated by the courts. For instance, many commentators have mistakenly called for a balancing test relying on an analogy to the dormant Commerce Clause.<sup>27</sup> But courts struggle enough to independently determine the effect a state law has on foreign affairs without being called upon to balance that effect against the achievement of a legitimate local purpose. Fortunately, there is also language in *Zschernig* that indicates that the Court was concerned with the purpose of the state action.<sup>28</sup> Indeed, many lower courts have turned to purpose review as an additional test or sub-test in their application of the dormant foreign affairs doctrine.<sup>29</sup> Purpose review, while admittedly not unproblematic, is the most appropriate doctrinal test. Specifically, the test for reviewing the legality of state actions should be phrased as follows:

The dormant foreign affairs doctrine prohibits states from engaging in foreign policy. States engage in foreign policy when they take measures having a foreign-policy purpose. A foreign-policy purpose is evident when the *primary purpose*<sup>30</sup> of the state action is to change or criticize<sup>31</sup> a policy of a foreign government, or governments.

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<sup>26</sup> See *infra* Part IV.B–C.

<sup>27</sup> See, e.g., Glenn S. McRoberts, *Federalism and Foreign Affairs: Towards a Dormant Foreign Affairs Doctrine*, 11 LOY. L.A. INT'L & COMP. L. REV. 639, 652 (1989); John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 306 (1965).

<sup>28</sup> See *Zschernig*, 389 U.S. at 437.

<sup>29</sup> See discussion *infra* Parts III.D.3, VII.E.

<sup>30</sup> See McRoberts, *supra* note 27, at 652 (initially examining state actions for such a primary purpose but then engaging in balancing analysis). In the context of the dormant Commerce Clause, Don Regan has supported a motive-review standard that would only ask whether a protectionist purpose “substantially contributed” to enactment of the state law. See Don Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1148–49 (1986). While I have no great concerns about adopting this lesser standard, I do not think the choice between these two standards will matter very often under the dormant foreign affairs doctrine. In other words, I think the choice between a “primary purpose” and “purpose that substantially contributed” standard is probably more important under the dormant Commerce Clause because state laws often mix a protectionist purpose with a legitimate local purpose. I also think the standard can be higher under the dormant foreign affairs doctrine since the policing problems of state activities faced by the federal government are less significant. See also discussion *infra* Part IV.D–E.

<sup>31</sup> Some readers may wonder why state actions “supporting or encouraging” a foreign government’s behavior or policies are also not captured by the doctrinal



Such a test, it should be noted, will not prevent many activities states currently engage in that some broader definitions may define as foreign policy or foreign affairs. In sum, the adoption of purpose review is not intended to be revolutionary, but rather, it is appropriately adapted to respond to a multi-modal interpretation of the Constitution. Additionally, and importantly, no market participant exception should be available under the dormant foreign affairs doctrine. The justifications for the doctrine under the dormant Commerce Clause simply do not apply in the context of the dormant foreign affairs doctrine.

Third, the dormant foreign affairs doctrine must be distinguished from preemption analysis and the dormant Foreign Commerce Clause. Commentators often use the term preemption or preempt in the context of the dormant foreign affairs doctrine. This unduly confuses the two doctrines. Preemption doctrine has always been understood to flow from the Supremacy Clause plus an affirmative federal act.<sup>32</sup> Similarly, the relationship between the dormant foreign affairs doctrine and the dormant Foreign Commerce Clause is not well-understood. A complete understanding of the dormant foreign affairs doctrine requires distinguishing it from these other doctrines.

It is important to realize that the tasks of justifying, refining, and distinguishing the dormant foreign affairs doctrine are not exogenous to one another. For instance, justifying the existence of the dormant foreign affairs doctrine on policy grounds requires distinguishing the doctrine from preemption. As another example, refining the test under the doctrine to preclude balancing by courts requires distinguishing the doctrine from the dormant Commerce Clause. It is for this reason that this Article cannot be neatly divided up into addressing these three undertakings of justification, refinement, and distinction in succession. Although this Article follows this order as much as possible, some intermixing of these three undertakings is necessary.

Throughout this Article it is also important to bear in mind that the relevant question is not whether pariah states or rogue governments deserve condemnation or sanctions, but rather, the question is

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tests. But adding these to the doctrinal test is probably unnecessary for several reasons. First, it is my sense that states are relatively less engaged in this manner towards foreign governments. Second, foreign governments will not take offense, and thus they will not retaliate or threaten retaliation against such actions. Third, the Framers were particularly concerned with state actions that would affront foreign governments and lead to potential retaliation.

<sup>32</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

which level of government is to decide upon the timing, manner, form, and degree of the condemnation and sanction. The efficient working of democracy and government, the predictability needed by corporations and their workers in an interdependent world, and our nation's ability to influence foreign nations all demand a clearer understanding of the Constitution's limits on state and local government engagement in foreign policy. Indeed, a reassessment is necessary from the point of view of state government officials, federal government officials, *and* the courts.

First, there is evidence that some state legislators and governors have abandoned their role in constitutional interpretation, particularly as it relates to constraints on their powers in foreign affairs. One only need look towards the statements of Massachusetts state assemblyman Byron Rushing regarding Massachusetts' Burma law in which he declared, "Our Constitution is older than the country's. We can do these things."<sup>33</sup> A serious effort to faithfully interpret the U.S. Constitution must be undertaken by all state officials, but unfortunately it is not. Self-imposed constraints by state officials are necessary because state and lower federal courts rarely have cases presented to them. The lack of cases results from collective action problems faced by businesses injured by state foreign policy, even though these collective action problems have been overcome more frequently in the past decade,<sup>34</sup> and the political reluctance of the executive branch. Second, the federal political branches need a clearer understanding of constitutional limits on state foreign policy so that they know whether addressing preemption of state legislation in federal foreign affairs legislation is necessary, and alternatively, whether and in what instances they can authorize state and local foreign policy sanctions measures. Third, the Supreme Court could greatly assist federal, state, and local government officials and lower federal and state courts by confirming the continued existence of the dormant foreign affairs doctrine. More importantly, the Court should clarify the doctrinal test under the dormant foreign affairs doctrine and the distinctions between it and other doctrines. Even without such Supreme Court clarification, lower courts in large numbers continue to apply the dormant foreign affairs doctrine (with a significant emphasis on purpose review), and thus state and local officials must rely on

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<sup>33</sup> *A State's Foreign Policy: The Mass that Roared*, ECONOMIST, Feb. 8, 1997, at 32.

<sup>34</sup> See Richard Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 831 (1989); Howard Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 590-91 (1993).

these lower court opinions to aid in the independent examination of their own actions.

Part II of this Article examines the policy arguments both for and against state-level foreign policies. These prudential arguments fall into five general categories: fairness/retaliation, efficiency/expertise, democratization, effectiveness, and the new post-Cold War geopolitical environment. The ends desired in allowing active state-level foreign policies can be achieved even in an environment in which states face severe restrictions on establishing their own foreign policies. In short, state-level foreign policies are not sound as a prudential matter.

Part III engages in a multi-modal interpretation of the Constitution's provisions on foreign affairs. The text of the Constitution explicitly prohibits the states from engaging in foreign relations in certain ways. The real question, however, is whether limits exist beyond these explicit textual prohibitions. The multi-modal interpretation of the Constitution undertaken in this Part admits that there are conflicting indications in the text and drafting history of the Constitution but still finds plenty of support for the existence of a dormant foreign affairs doctrine.

Part IV focuses on an analysis of the Supreme Court's opinion in the *Zschernig* case. This Part of the Article examines the three possible doctrinal tests under the dormant foreign affairs doctrine: threshold effects, balancing, and purpose review. This Article expresses a strong preference for purpose review because courts are best able to engage in this type of review independent of the views of the executive branch and foreign governments. Purpose review will lead to more consistent results among lower courts, it better respects traditional areas of state regulation and federal political branch views on whether certain international obligations should be self-executing, and, most importantly, it provides the best guidance to state and local officials assessing the constitutionality of their own actions.

Part V continues the discussion of the test that should be adopted under the dormant foreign affairs doctrine by examining a potential market participant exception to the doctrine. A market-participant exception should be rejected under the dormant foreign affairs doctrine because justifications for the exception under the dormant Commerce Clause are inapplicable in the context of the dormant foreign affairs doctrine.

Part VI distinguishes the dormant foreign affairs doctrine from the dormant Foreign Commerce Clause. In particular, the discussion reduces the additional prongs of analysis undertaken in dormant

Foreign Commerce Clause cases to their bare bones and draws lessons for the dormant foreign affairs doctrine.

Part VII explores whether federal actors can authorize actions by the states that would otherwise run afoul of the dormant foreign affairs doctrine. It is well-established that Congress can authorize actions by the states that otherwise violate the dormant Commerce Clause, but authorizations of state actions otherwise violating the dormant foreign affairs doctrine will often require approval by both Congress and the President. But some actions, specifically those in areas of federal power that are not only exclusive but non-delegable, could never be authorized.

Part VIII critically examines the Supreme Court's rulings in *Crosby* and *Garamendi* that have created confusion and a lack of clarity. It also looks at post-*Garamendi* lower court cases. These cases reveal a degree of confusion regarding the doctrine among some lower courts but also indicate that a majority of lower courts continue to apply the dormant foreign affairs doctrine (with heavy emphasis on purpose review).

Part IX discusses the relative importance of courts vis-à-vis state officials in applying the dormant foreign affairs doctrine. The reality is that courts do not have the opportunity to constrain the states in many instances. Many businesses are simply not anxious to risk a public backlash by challenging state-level foreign policy measures in court.<sup>35</sup> While the National Foreign Trade Council, a coalition of over 300 businesses engaged in international trade, has overcome the fear of being a plaintiff in a couple of instances, faithful application of constitutional constraints by state officials and representatives is ultimately required. Such faithfulness could be enhanced through Supreme Court clarification as lower courts' opinions have jurisdictional limits.

Part X examines whether the Supreme Court's own rules of judicial restraint would prevent the Court from providing further clarity in a future case. A review of the cases suggests the Court could properly base a ruling on the dormant foreign affairs doctrine even when preemption grounds are also present.

Part XI concludes that the Supreme Court's reliance on, and clarification of, the dormant foreign affairs doctrine with a purpose-review test would allow state and local officials to discharge their responsibilities to act in accordance with the U.S. Constitution.

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<sup>35</sup> See Fenton, *supra* note 34, at 590–91.

## II. FUNCTIONAL ARGUMENTS FOR AND AGAINST STATE-LEVEL FOREIGN POLICY

### A. *Retaliation and Unfairness*

The most readily apparent policy argument against states engaging in foreign policy is found in The Federalist Papers. It is a concern related to fairness and retaliation.<sup>36</sup> Is it fair to the forty-nine other states if a foreign nation crafts sanctions against the United States as a whole in response to one state's foreign policy legislation? Clearly the answer is no. Is it actually the case that retaliation will fall upon the United States as a whole rather than the state engaging in foreign affairs in such instances? Critics of the dormant foreign affairs doctrine note that there are examples in recent trade disputes where retaliation has been targeted against a particular sub-national entity. Indeed, it has been argued elsewhere that at least the important nations of the world know the "difference between Washington and Sacramento."<sup>37</sup> In other words, foreign countries will not hold the rest of the United States responsible for the actions of California. The existence of multi-jurisdictional enterprises, however, leads to possible avoidance of such targeted retaliation, subsequently making targeted retaliation less attractive to aggrieved states.<sup>38</sup> Additionally, it is often tough to target sanctions against a particular sub-federal jurisdiction with no spill-over effects.<sup>39</sup> Indeed, there are a host of strategic considerations a foreign state will consider in deciding whether to target sanctions against the state enacting foreign policy legislation or to do so more broadly against the United States. Moreover, even if sanctions are targeted against a particular sub-federal jurisdiction, it is possible relations between the United States and the foreign nation will be spoiled on other matters or that the foreign nation will use the dispute as leverage in other negotiations.<sup>40</sup> Retaliation occurs in subtle as well as overt forms. For example, with regard to these more subtle forms, is it fair to the other forty-nine states if a foreign nation is less forthcoming in some international negotiations (or, in cooperating on the war on terror) as a result of one state's engagement of foreign policy?

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<sup>36</sup> See Moore, *supra* note 27, at 251.

<sup>37</sup> Spiro, *States and Immigration*, *supra* note 12, at 169.

<sup>38</sup> See Matthew Schaefer, *Federal States in the Broader World*, 27 CAN.-U.S. L.J. 35, 37–39 (2001); see also David Golove, *The Implications of Crosby for Federal Exclusivity in Foreign Affairs*, 21 BERKELEY J. INT'L L. 152, 156–58 (2003).

<sup>39</sup> See Schaefer, *supra* note 38, at 37–39; see also Golove, *supra* note 38, at 156–158.

<sup>40</sup> See *id.*

Rebuttals that will flow to the arguments above are easy to imagine but ultimately are not compelling. First, one may argue that retaliation against the United States as a whole or retaliation against a particular state are remote possibilities. Foreign countries are simply not anxious to retaliate against the United States, even for international law violations, due to the economic, political, and military power of the United States.<sup>41</sup> For smaller foreign nations, such retaliation is almost surely to be ineffective. Such an argument, however, presumes a narrow definition of retaliation. Retaliation may come in subtle forms and be manifest in a souring of cooperation rather than explicit sanctions. In other words, the power of the United States is a large, but still a limited and fungible commodity. If some of that power is “spent” preventing retaliation that might otherwise occur in response to a state-level foreign policy, then less of that power is available to be utilized for the interests of the nation as a whole.

Second, one can question the unfairness of retaliation against the nation as a whole in a situation in which a majority of states, say twenty-six, have enacted the foreign policy legislation (e.g., Massachusetts-styled Burma laws) or, to take even a more extreme example, forty-nine states have enacted such legislation. Is it unfair to the other twenty-four states that have not, or in the extreme example the single state that has not, enacted such legislation if retaliation falls upon the nation as a whole? The answer is that it is still unfair, although one might find the extreme situation somewhat less unfair. It seems that if a majority of states could enact a particular type of sanctions legislation against a particular foreign country, such legislation could be enacted at the federal level (or at least legislation authorizing the state legislation could be passed by Congress). But history has shown that this need not always be the case. In the mid-1980s, state sanctions against South Africa were widespread despite the inability of the federal government to initially enact comprehensive sanctions due to executive branch opposition.<sup>42</sup> The real question in these hypotheticals should be whether it is unfair to the twenty-four states or the one state abstaining from foreign policy action when the federal government has not authorized action by the states? It remains unfair because it circumvents the officials within the level of govern-

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<sup>41</sup> See, e.g., William Davey, *Dispute Settlement in the GATT*, 11 *FORDHAM INT'L L.J.* 51, 103 (1987) (noting the lack of power behind sanctions imposed by smaller countries).

<sup>42</sup> See Fenton, *supra* note 34, at 564.

ment that should be responsible for making such decisions,<sup>43</sup> and it also circumvents the separation of power constraints in the Constitution for the making of U.S. foreign policy. This statement, however, necessitates support from other modes of constitutional interpretation. While currently focusing on the prudential mode of interpretation, the various modes that are utilized are clearly linked together in some respects. For example, the whole question of unfairness can be considered in the procedural sense of notice. If our other modes of constitutional interpretation, including text, structure, original intent, and doctrinal, tend to support the conclusion that the Constitution allows states to enact such legislation and this was the compact created among the states or the people (a question, which I will not delve into), then one can argue there is no unfairness. This is, however, not the case. Part III of this Article will demonstrate that nearly all modes of constitutional interpretation ultimately support the conclusion that states are prohibited from engaging in foreign affairs.<sup>44</sup> Thus, even these “tougher” cases remain unfair to the abstaining states.

*B. Efficiency and Expertise*

State-level foreign policy arguments based on efficiency and expertise are similar to economic arguments concerning the division of labor. In short, it may make more sense for one level of government to focus on certain matters and leave other levels of government to focus on entirely separate matters. Indeed, two types of federalism are frequently distinguished: coordinate and cooperative. Coordinate federalism, similar to dual federalism, divides power between two levels of government by topic matter.<sup>45</sup> Coordinate federalism consists of a static allocation of responsibility between the two levels of government.<sup>46</sup> In contrast, cooperative federalism emphasizes concurrent jurisdiction and shared responsibility over all matters in the federal and sub-federal governments.<sup>47</sup> As a simple matter of efficiency, it seems as though some subject matters should be left to one level of government. Specialization and expertise can be developed at that level of government. Indeed, expertise in foreign policy clearly resides much more in the federal government than in state gov-

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<sup>43</sup> See Bilder, *supra* note 34, at 827 (noting state officials are not elected to conduct foreign policy).

<sup>44</sup> See *infra* Part III.

<sup>45</sup> See WILLIAM STEWART, CONCEPTS OF FEDERALISM 55, 65–68 (1984).

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 51–54.

ernments. Federal government representatives have access to more complete and timely information and analysis, particularly that which is confidential.<sup>48</sup> While this federal advantage over the states has been reduced somewhat by technological developments, an information and “institutional know-how” gap remains.<sup>49</sup> This is not to say that states have no expertise at all in foreign affairs and that this expertise has not grown in recent years, particularly in trade matters such as export promotion.<sup>50</sup> Proponents of regulatory competition may also offer a rebuttal to efficiency-based arguments, specifically that competition between jurisdictions can create efficient results by creating the optimal regulatory environment. Foreign policy, however, is a poor choice for regulatory competition between the states since a state-level experiment will be influenced by the foreign policy choices of other states, the federal government, and other nations.<sup>51</sup> Because it will be impossible to eliminate the effects of these other influences through regression analysis, there will be no basis for judging the state experiment a success.<sup>52</sup> Moreover, the costs of experimentation in foreign affairs are likely to fall upon other states as discussed above.<sup>53</sup>

### C. Democratization

Proponents of state engagement of foreign policy most frequently rely on the argument that it “democratizes” foreign policy. Instead of having foreign policy decided in secret by elite bureaucrats, the argument proceeds, state-level foreign policy increases citizen aware-

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<sup>48</sup> See Bilder, *supra* note 34, at 828 (noting a contrary argument can be made that many issues do not require special expertise or information). I, however, question Professor Bilder’s contrary argument. States can gain access to human rights conditions in various countries and know that such treatment is wrong or morally indefensible; however, selecting a policy to change those conditions and the policies of governments in those countries is a more complex matter.

<sup>49</sup> Cf. *id.* (“[S]tate and local governments lack the expertise, information and resources . . . about complex international relations issues.”).

<sup>50</sup> As an aside, by engaging in export and investment promotion activities, a state does not run afoul of the dormant foreign affairs doctrine as will be discussed below. See *infra* Part VI.

<sup>51</sup> See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 373 (1999); Schaefer, *supra* note 4, at 52. But see John Kincaid, *Constituent Diplomacy in Federal Politics and the Nation-State: Conflict and Cooperation*, in FEDERALISM AND INTERNATIONAL RELATIONS 56 (Hans Michelmann & Panayotis Soldatos eds., 1990) (arguing that preventing competition in foreign affairs is anti-democratic) [hereinafter Kincaid, *Constituent*].

<sup>52</sup> See Ramsey, *supra* note 51, at 373; Schaefer, *supra* note 4 at 52.

<sup>53</sup> See *infra* Part II.A.



ness, access, and influence in the foreign policy process.<sup>54</sup> This effect may be enhanced because citizens, it is argued, have greater access to local government structures vis-à-vis federal government structures.<sup>55</sup>

Such an argument is problematic in several respects. First, one might question whether foreign policy is truly made in secret anymore. In an information-technology era, only the most sensitive national security secrets typically escape the public's eyes and ears, and even then only for a limited period of time. Even if one believes that foreign policy is still too secretive, the "democratic" solution lies in an activist Congress.<sup>56</sup>

Second, is it truly the case that state government involvement in foreign affairs will help democratize foreign policy? State government officials are unlikely to properly weigh the potential effects of their actions on other states in the nation.<sup>57</sup> Does Massachusetts care if European retaliation (even subtle forms like interference with other negotiations) in response to the Burma law falls on other states? State government representatives are likely to weigh (or at least have greater competence to weigh) the costs and benefits to their state only, and this is why states are denied *a priori* certain powers in the Constitution.<sup>58</sup> Citizens in these other states have no say in the decision-making process, although states may have an ultimate recourse in persuading the federal government to set aside other matters under consideration and preempt the state measure. Additionally, state-level foreign policy can lead to a lack of accountability. Indeed, this is a frequent criticism of cooperative federalism in which federal and state governments simultaneously regulate in the same field.<sup>59</sup> If the policy fails, citizens do not know who to hold responsible.<sup>60</sup>

Third, one might also question as an empirical matter whether state foreign policies are the result of democracy at work or rather the result of the imperfections within the democratic system. Indeed, polling data indicates that the general public does not believe that sub-national government involvement in foreign affairs is appropri-

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<sup>54</sup> See Bilder, *supra* note 34, at 828–29; John Kincaid, *Consumerism Versus Citizenship: Is There Wiggle Room for Local Regulation in the Global Economy?*, in FOREIGN RELATIONS AND FEDERAL STATES 27, 27–28 (Brian Hocking ed., 1993); Kincaid, *Constituent*, *supra* note 51, at 73.

<sup>55</sup> See Bilder, *supra* note 34, at 828–29.

<sup>56</sup> See Ramsey, *supra* note 51, at 372.

<sup>57</sup> See *id.* at 372.

<sup>58</sup> See *id.* at 372–74.

<sup>59</sup> See Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1289 (2009).

<sup>60</sup> *Id.*

ate.<sup>61</sup> Therefore, many assume that foreign affairs issues are a federal government responsibility, and are less likely to pay attention to foreign affairs when voting in state elections. Public choice theory may have a measure of descriptive force in the enactment of state and local foreign policy sanctions. Public choice theory posits that politicians act in the interests of reelection and that concentrated interest groups will have great influence on politicians because of the smaller transaction costs of organizing (and hence contributing to reelection campaigns) vis-à-vis the general public.<sup>62</sup> Although anecdotal, there is some support for the relevance of public choice theory in explaining the passage of the Massachusetts Burma law, which appears to have been passed in response to the calls of one particular lobbyist.<sup>63</sup>

Lastly, because state governments may maintain First Amendment rights and individual politicians certainly do,<sup>64</sup> commentators argue that state engagement in foreign policy serves some of the same purposes as the First Amendment.<sup>65</sup> But states need not engage in foreign policy to express their views on federal foreign policies. Other avenues for the expression of a state's opposition to federal foreign policy or recommendations for future policies exist: state resolutions transmitted to the federal government, resolutions of state government organizations, and statements of individual politicians.

#### D. Effectiveness

The effectiveness of foreign policy is a difficult assessment to make. Is U.S. foreign policy more effective with state involvement? Proponents of state involvement argue that state sanctions were critical to changing the apartheid policies of South Africa. Significant

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<sup>61</sup> See Kline, *supra* note 2, at 114 n.19.

<sup>62</sup> See Alan O. Sykes, *The Economics of Injury in Anti-Dumping and Countervailing Duty Cases*, 16 INT'L REV. L. & ECON. 5, 18-21 (1996).

<sup>63</sup> 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.

<sup>64</sup> See David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1638 (2006).

<sup>65</sup> Bilder, *supra* note 34, at 829 (arguing that some state foreign policy activities "implicate significant freedom of speech and petition values"); Andrea McCardle, *In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values into Foreign Policy Making*, 62 TEMP. L. REV. 813, 840 (1989) (arguing that "state and local government measures intended specifically to communicate foreign policy positions to the national government and influence the direction of that policy, implement the expressive and associational interests of the citizenry and should be presumptively protected under the 1st Amendment"); Matthew Potterfield, *State and Local Foreign Policy Initiatives & Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT'L L. 1, 33 (1999).

change in the policies of South Africa, however, did not occur until comprehensive federal sanctions were enacted and other nations in the international community joined in imposing sanctions. At best, one can claim the states placed pressure on the first domino (i.e., the federal government), which in turn provided the pressure to knock down the other dominos (i.e., other nations) in the sanctions chain. Such pressure, however, could have come in other forms and through other means. In fact, state engagement in foreign policy may deflect interest group pressure away from the federal government and thus impede the pace at which comprehensive and effective federal and multilateral sanctions can be imposed. This could allow foreign states to continue engaging in reprehensible behavior longer than they would otherwise.<sup>66</sup>

Other arguments might also be put forth claiming positive benefits for U.S. foreign policy through state involvement. For example, one argument for state involvement is analogous to a “good cop/bad cop” situation. The federal government plays “good cop” and follows a policy of “engagement” with a particular foreign nation, while the states play “bad cop” and pass sanction legislation. The problem with such a scenario is that the “bad cop” may turn the foreign nation off from any talks with the federal government. Second, one might also argue that state sanctions provide extra punch to federal foreign policy measures when both seek to accomplish the same goal. The existence of state measures, however, interferes with the manner, form, and degree of federal sanctions and reduces flexibility to respond to changing conditions. Unless it preempts all such action or if the Constitution prevents such action, the federal government cannot predict or depend upon what level of state sanctions will be in place at any one time. If it takes federal action to control the level of state sanctions, then only one “cop” is involved. If the policy adopted is to use less force as progress is made by the foreign country, it will be hard to achieve because both the state and federal government will need to act. State legislatures may not be in session every year, they may have very short legislative sessions, and/or they may have other pressing business. Moreover, state governments may make different judgments about when progress is achieved on the issue and refuse to scale back sanctions even though the federal government has done

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<sup>66</sup> See Spiro, *States and Immigration*, *supra* note 12, at 173–74 (indicating that this is actually beneficial in the immigration context that poor immigration policies are only adopted in a few states rather than the nation as a whole because state involvement can act as a safety valve).

so. Again, such problems can be avoided by preemptive federal action, but at that point only one “cop” is working.

Lastly, recent studies indicate that even unilateral sanctions by the United States as a whole are largely ineffective.<sup>67</sup> If sanctions by the U.S. federal government are largely ineffective, sanctions by various states are unlikely to achieve results. It would be more effective if the federal government imposed sanctions and authorized state and local sanctions<sup>68</sup> targeting the identical conduct in a manner that would allow the federal government to also enlist other countries in the sanction regime.

*E. Geopolitical Changes: End of the Cold War*

Some scholars suggest that *Zschernig* is a Cold War relic<sup>69</sup> and that the end of the Cold War is grounds for eliminating the dormant foreign affairs doctrine.<sup>70</sup> In the view of these scholars, there is now room for state level foreign policies because there is no longer a draconian penalty—complete destruction in response to a state-level foreign policy. One can argue, however, that the risks of severe retaliation in response to a state-level foreign policy are greater today than they were during the Cold War.<sup>71</sup> Clearly, the Soviets were not going to respond to minor irritants like insults by state court judges, the actions at issue in *Zschernig*, with a draconian penalty such as nuclear war.<sup>72</sup> Today, there are horizontal proliferation concerns, and the rationality of rogue state leaders differs from the ex-Soviet leaders under a regime of Mutually Assured Destruction. In an era of asymmetric warfare, retaliation takes many forms, especially hard-to-detect forms, such as cyber warfare, the spreading of false rumors to injure financial markets and economies, or even low-cost measures used to jam or interfere with satellite communications.<sup>73</sup> Thus, a dormant foreign affairs doctrine makes even more sense in a post-Cold War geopolitical environment than during the Cold War.

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<sup>67</sup> See GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 128 (1994).

<sup>68</sup> See discussion *infra* Part IX.

<sup>69</sup> See Goldsmith, *supra* note 12, at 1671.

<sup>70</sup> See Spiro, *Foreign Relations*, *supra* note 12, at 1259; Spiro, *States and Immigration*, *supra* note 12, at 175.

<sup>71</sup> Vazquez, *supra* note 15, at 1312; see Schaefer, *supra* note 4, at 35–37. Vazquez does not say risks are greater today than during the Cold War; rather, he says that he “does not share Spiro’s belief that the stakes are significantly lower today.” Vazquez, *supra* note 15, at 1312.

<sup>72</sup> See Schaefer, *supra* note 4, at 35–37.

<sup>73</sup> See *id.*

### III. JUSTIFYING THE EXISTENCE OF A DORMANT FOREIGN AFFAIRS DOCTRINE THROUGH A MULTI-MODAL INTERPRETATION OF THE CONSTITUTION

If state and local sanctions are unwise as a policy matter, one effective legal constraint is the dormant foreign affairs doctrine, which recognizes the federal government's foreign affairs powers as exclusive. Of course, critics of the doctrine assert that the federal government can always preempt harmful or disruptive state laws (i.e., federal government policing of harmful state and local foreign policies is sufficient).<sup>74</sup> This debate raises the question of whether the foreign affairs powers of the federal government are indeed exclusive or rather only plenary but to some large degree, shared or concurrent. A multi-modal interpretation of the Constitution, utilizing text, structure, Framer's intent, and doctrinal modes of interpretation, despite some conflicting signals, still strongly suggests federal exclusivity.<sup>75</sup>

#### A. *Constitutional Text & Structure*

The text of the Constitution does not contain the terms foreign affairs or foreign policy. Nor does it grant a general foreign affairs power. Instead, the Constitution assigns the federal government certain enumerated powers relating to foreign affairs.<sup>76</sup> Additionally, the states are specifically prohibited under the Constitution from engaging in some of these same activities by Article I, Section 10.<sup>77</sup> Some scholars have criticized the existence of the dormant foreign affairs

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<sup>74</sup> Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647 (2007); see also Goldsmith, *supra* note 12, at 1681–87. But see Spiro, *Foreign Relations*, *supra* note 12, at 1253 (“[T]he politics of particular controversies will too often cut against disciplining a state . . .”).

<sup>75</sup> See generally PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) (analyzing forms of constitutional power).

<sup>76</sup> See Goldsmith, *supra* note 12, at 1619–20.

The Constitution establishes plenary federal power by four means. Article I, Section 10 bars states from performing certain foreign affairs functions, such as treaty-making. Article I, Section 8 and Article II broadly authorize the federal political branches to conduct foreign relations through the enactment of federal statutes, treaties, and executive agreements. Article VI establishes that these federal enactments are supreme over state law. And Article III extends the federal judicial power to cases involving these federal enactments and to other transnational controversies. Taken together, these provisions give the federal political branches comprehensive power to conduct foreign relations without interference or limitation by the states.

*Id.*

<sup>77</sup> See U.S. CONST. art. I, § 10.

doctrine as not having a textual basis in the Constitution.<sup>78</sup> The argument is two-fold. First, the Constitution did not grant the federal government a general affairs power, but instead, it granted only a limited number of enumerated powers to the federal government.<sup>79</sup> Second, the textualist critics of the dormant foreign affairs doctrine argue that there would be no need to prohibit a limited number of state activities in Article I, Section 10 if the federal government's foreign affairs powers were exclusive.<sup>80</sup>

However, no one seriously questions that the federal government's foreign affairs powers are plenary; thus, any alleged gaps in the textual allocations of powers to federal actors are not considered gaps in substance. Instead, the textual gaps probably arose simply because the Framers wanted to divide foreign affairs powers between the executive and legislative branches, thus preventing the allocation of a general foreign affairs power to either and necessitating specific grants of power to each.<sup>81</sup> This leaves, however, the question of why the Framers found it necessary to deny certain powers to the States in Article I, Section 10 if they understood the foreign affairs powers to be exclusive. Critics of the dormant foreign affairs doctrine point out that Eighteenth Century drafting did not favor such repetition.<sup>82</sup> Article I, Section 10 reads as follows:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, *without the Consent of the Congress*, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, *without the Consent of Congress*, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a for-

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<sup>78</sup> See Ramsey, *supra* note 51, at 342 (“[N]o one has clearly identified the part of the Constitution producing these results.”).

<sup>79</sup> See Goldsmith, *supra* note 12, at 1619.

<sup>80</sup> See *id.* at 1642.

<sup>81</sup> See *id.* at 1619.

<sup>82</sup> See Ramsey, *supra* note 51, at 386–87.

eign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.<sup>83</sup>

It is well accepted, as shown below, that the Framers were concerned with state intrusions in foreign affairs, and one way the Framers emphasized federal exclusivity was by granting a power to the federal government and denying it to the states.<sup>84</sup> If the allocation of powers to the federal government is plenary and many of the prohibitions on the states exercising certain powers parallel those same federal powers, then this text and structure support at least a degree of federal exclusivity. In other words, if the supposed gaps in federal powers do not prevent those powers from being plenary, then any alleged gaps in state denials of power should also not be read in such a narrow fashion so as to preclude federal exclusivity beyond particular prohibitions in Article I, Section 10. Additionally, a close reading of Article I, Section 10 reveals the necessity of the second and third paragraphs since those paragraphs do not provide blanket bans on state actions but instead require Congressional authorizations prior to states taking certain actions. They both begin with the words: “No state shall, *without the Consent of Congress . . .*”<sup>85</sup> Further, much of what is found in the first paragraph of Article I, Section 10 is not a denial of parallel powers allocated to the federal government—although there are a few, such as the denial to states of the right to enter into a Treaty—but rather, this language places prohibitions on the states that are parallel to the prohibitions placed on the federal Congress. In this light, it is difficult even as a textual matter to interpret Article I, Section 10 as standing for the proposition that the federal government’s foreign affairs powers are not exclusive beyond the specific bans in Article I.

Other textual based arguments against a dormant foreign affairs doctrine abound. For example, some argue that since the Constitution allows the states to enter into compacts and agreements with foreign powers with the approval of Congress, it necessarily foresees states entering into negotiations with foreign nations; thus, states could engage in foreign affairs prior to the Congressional approval.<sup>86</sup> For instance, under such an argument, a state governor could enter into negotiations with Burma or the Sudan to conclude a human rights agreement. Such a limited textual reading, however, ignores

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<sup>83</sup> U.S. CONST. art. I, § 10 (emphasis added).

<sup>84</sup> See *infra* Part III.B.

<sup>85</sup> U.S. CONST. art. I, § 10 (emphasis added).

<sup>86</sup> See, e.g., Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, 86 FOREIGN POL’Y 158, 163 (1992).

and is contrary to the interpretation one would reach after engaging in other modes of constitutional interpretation. There are strong indications that the Supreme Court would declare unconstitutional a state's entering into negotiations on a topic of that nature.<sup>87</sup> Indeed, scholars have argued for a dormant Treaty Power preventing states from directly negotiating with a foreign country and even prohibiting state actions involving indirect negotiations,<sup>88</sup> such as passing a sanctions law, which is viewed as a negotiating offer of "if you change your behavior, we will no longer sanction you." Such an argument was created to lodge much of what is currently found in the dormant foreign affairs doctrine in a specific textual allocation of power to the federal government, namely the Treaty Clause. One potential complication with declaring the existence of a dormant foreign affairs doctrine, as mentioned above, is that no general foreign affairs power is granted to the federal government.<sup>89</sup> One might argue that dormant doctrines can only develop for specific clauses, hence the argument for a dormant Treaty Clause to replace much of what is covered by the more general dormant foreign affairs doctrine.<sup>90</sup> But this type of argument overlooks the importance of structure and intent in constitutional interpretation. The collection of grants of power to the federal government in the Constitution related to foreign affairs give the federal government authority to regulate on all matters of

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<sup>87</sup> See *Clark v. Allen*, 331 U.S. 503, 517 (1947) ("Nor has California entered the forbidden domain of negotiating with a foreign country.") (citing *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304, 316–17 (1936)). Additionally, while the Logan Act may preempt such negotiations, it is unlikely that anyone would want to proclaim that in the absence of the Logan Act a state could negotiate with a foreign power on any topic. See 18 U.S.C. § 953 (2006). It is true that states have entered into negotiations and even concluded agreements with other sub-federal jurisdictions without the consent of Congress. See Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071 (2008) (analyzing state agreements with foreign countries in absence of Congressional consent and the role of the Executive in such situations). In fact, the Court has held that only those agreements infringing on the "just supremacy of the United States" require Congressional approval. See *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893); see also *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 468–69 (1978). But legally binding agreements clearly would need approval. In any event, the Court has interpreted and must interpret the Compacts Clause by relying on other modes of interpretation beyond its text. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 743–44 (2010).

<sup>88</sup> See Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1134 (2000).

<sup>89</sup> See discussion *supra* Parts II.A.

<sup>90</sup> Indeed, courts have occasionally referred to a dormant war power, derived only from those clauses dealing with war and military matters. See, e.g., *Von Saher v. Norton Simon Museum of Art*, 592 F.3d. 954, 965–66 (9th Cir. 2010).



foreign affairs.<sup>91</sup> Again, there are no significant suggestions among scholars or courts that there is a gap in the foreign affairs powers of the federal government. Interpretation of all of these powers individually and collectively leads to the conclusion that the foreign affairs powers, at least to a significant degree, are exclusive to the federal government. Federal exclusivity necessitates a dormant foreign affairs doctrine. A dormant doctrine is the necessary partner of federal exclusivity. If federal power over certain matters is exclusive, then state intrusions are prohibited even where the federal government has not spoken (i.e., the power lays dormant).

Finally, one critic of the dormant foreign affairs doctrine has pointed out that the clause granting federal courts jurisdiction over “controversies . . . between a State, or the Citizens thereof, and foreign states, Citizens or Subjects”<sup>92</sup> necessarily assumes interaction between the states and foreign states.<sup>93</sup> While it is likely that the main concern of the Founders was cases involving foreign citizens and not cases between a State and a foreign nation, the clause, nevertheless, was drafted in this particular manner and another formulation could have excluded the possibility altogether of a case involving a state and a foreign state. To infer that this clause allows states to engage in foreign affairs, however, stands the purpose of the clause on its head. The jurisdictional clause does not mention what the nature of the interaction between states and foreign states would entail. Those issues are covered in other clauses and provided for in the structure of the Constitution.

#### B. *Original Understanding*

The clause that gives the federal courts jurisdiction over suits between an American state and a foreign state is but another example of the structural framework apparent in the Constitution of keeping the actions of one state from endangering the nation as a whole. Alexander Hamilton wrote in Federalist No. 80:

To judge with accuracy of the proper extent of the federal judicature it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy that the Judiciary authority of the Union ought to extend to these several descriptions of cases: . . . 4th. to all those which involve the peace of the Confederacy . . . .

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<sup>91</sup> See Goldsmith, *supra* note 12, at 1621.

<sup>92</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>93</sup> See Shuman, *supra* note 86, at 163.

The fourth point rests on this plain proposition, 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. . . . As the denial or perversion of justice by the sentences of courts, is with reason classed among the just causes of war, it will follow that the Federal Judiciary ought to have cognizance of all causes in which citizens of other countries are concerned. . . . So great a proportion of the controversies in which foreigners are parties involve, national questions, that it is by far most safe, and most expedient, to refer all those in which they are concerned to the national tribunals.<sup>94</sup>

While state-level foreign policy was not the subject of robust debate during the formation of the U.S. Constitution,<sup>95</sup> this relative lack of attention was not the result of a lack of concern among the Framers about the potential ramifications of separate state-level foreign policies. Rather, it was clear to the Framers that foreign affairs, more so perhaps than any other power, needed to be an exclusive federal power.<sup>96</sup> In Federalist No. 42, James Madison refers to a

class of powers lodged in the General Government, consists of those which regulate the intercourse with foreign nations, [and other particular powers].

This class of powers forms an obvious and essential branch of the Federal administration. If we are to be one nation in any respect, it clearly ought to be in respect of other nations.<sup>97</sup>

One of the listed specific powers is the power to define and punish offenses against the law of nations.<sup>98</sup> Madison noted that the Articles of Confederation “contain[ed] no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations.”<sup>99</sup> There is no explicit prohibition in the Constitution, however, against states defining and punishing such offenses. Nevertheless, it is clear that such a prohibition on state activity could be found by implication.

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<sup>94</sup> THE FEDERALIST NO. 80, at 434–36 (Alexander Hamilton) (E.H. Scott ed., 1898).

<sup>95</sup> See Ramsey, *supra* note 51, at 416.

<sup>96</sup> See *id.* at 345.

<sup>97</sup> THE FEDERALIST NO. 42, at 231–32 (James Madison) (E.H. Scott ed., 1898).

<sup>98</sup> *Id.*

<sup>99</sup> See Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 398 (2000) (citing THE FEDERALIST NO. 42 (James Madison)).

The Framers envisioned instances in which a grant of power to the federal government, although not explicitly made exclusive, would necessarily have to operate as an exclusive power.<sup>100</sup> Federalist No. 32 lays out the criteria for when exclusivity of federal power should be implied.<sup>101</sup> Exclusivity would exist in three cases:

[1] where the constitution in express terms granted an exclusive authority to the union; [2] where it granted, in one instance, an authority to the Union, and in another prohibited the states from exercising the like authority; and [3] where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.<sup>102</sup>

Categories two and three are relevant to any discussion of the dormant foreign affairs doctrine. As discussed above, in the analysis of Article I, Section 10, a strong argument can be made that the Framers utilized category two to make at least some foreign relations powers exclusive to the federal government.<sup>103</sup> Turning to category three, Hamilton uses as an example of this category the clause of the Constitution that declares that Congress “shall have the power to establish a *uniform rule* of naturalization throughout the United States.”<sup>104</sup> Hamilton states that this must necessarily be exclusive because if each state had power to prescribe a distinct rule, there could not be a uniform rule.<sup>105</sup> Thus, the question becomes whether an exclusive federal power, and thus an implied prohibition on state activities in the area, can be found even in the absence of some strong language such as “uniform.” The general test elaborated for category three above indicates that this can indeed occur.

Nevertheless, some scholars have found category three inapplicable to foreign affairs because most complaints over state actions in the field are based on “expedience and convenience” rather than the argument that such actions are “absolutely and totally contradictory and repugnant” to the exercise of federal authority.<sup>106</sup> This is a judgment call, however, and is likely true only if we examine the impact of the state actions rather than the purposes. One could well find that state laws that impact foreign affairs without intending to do so would

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<sup>100</sup> See THE FEDERALIST NO. 32, at 169 (Alexander Hamilton) (E.H. Scott ed., 1898).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See discussion *supra* Part III.A.

<sup>104</sup> THE FEDERALIST NO. 32, at 170 (Alexander Hamilton) (E.H. Scott ed., 1898).

<sup>105</sup> *Id.*

<sup>106</sup> See Ramsey, *supra* note 51, at 409–10.

not be absolutely repugnant to federal-foreign-affairs authority but that state actions with a foreign policy purpose (i.e., those seeking to change or criticize the behavior of a foreign government) are absolutely repugnant to the federal authority.

C. *Doctrinal and Historical Arguments*

Those scholars opposing a dormant foreign affairs doctrine pre-*Crosby* and pre-*Garamendi* pointed out that the first 181 years of our constitutional history did not contain such a doctrine and that the Supreme Court had never, prior to *Garamendi*, revisited the doctrine since its 1968 *Zschernig* opinion.<sup>107</sup> The Court, however, hinted at such a doctrine well before *Zschernig* and implicitly supported such a doctrine with its recognition that foreign affairs was an “exclusive” federal domain in numerous opinions for well over a century before *Zschernig*.<sup>108</sup> The origins of the Court’s view of exclusive federal foreign affairs powers dates back to an 1840s case in which Vermont sought to negotiate the extradition of a criminal back to Canada.<sup>109</sup> Additionally, in a little recognized case, the Court considered a claim

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<sup>107</sup> See Goldsmith, *supra* note 12, at 1649; Ramsey, *supra* note 51, at 419.

<sup>108</sup> *United States v. Pink*, 315 U.S. 203, 223 (1942) (“[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.”); see also *id.* at 244 (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”); *United States v. Belmont*, 301 U.S. 324, 330–31 (1937) (“Governmental power over external affairs is not distributed, but is vested exclusively in the national government. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.”); *Chae Chan Ping v. United States*, 130 U.S. 581, 604–05 (1893) (“[G]reat mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries, are one nation . . . for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *Ex parte Virginia*, 100 U.S. 339, 354 (1879) (“[S]o to the common government which grew out of this prevailing necessity was granted exclusive jurisdiction over external affairs.”).

<sup>109</sup> *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 550–51 (1840).

From the very nature and organization of the general or national government, it is vested with the sole jurisdiction over all matters of a national character, and of external concern. The states, by the adoption of the existing Constitution, have become divested of all their national attributes, except such as relate purely to their internal concerns. They are not known to foreign governments as states . . . . In short, as to all such matters, we are one and indivisible; precisely the same as if we had no separate states, nor any authorities in the country except those of the Union.

. . . [T]hus is the whole subject of the foreign relations of the country placed under the exclusive jurisdiction of the government of the Union.

*Id.*

under the dormant foreign affairs doctrine ten years after *Zschernig*.<sup>110</sup> Thus, the Court implicitly admitted the continuing vitality of the doctrine, although in that case the court ultimately rejected the claim because the state measure had “insignificant international consequences.”<sup>111</sup> Scholars opposed to *Zschernig* also point to the 1941 case, *Hines v. Davidowitz*,<sup>112</sup> in which the Supreme Court explored but ultimately hedged on finding a dormant foreign affairs doctrine.<sup>113</sup> Yet, the Court’s opinion in *Hines* is one of many that contains an indication that the foreign affairs powers of the federal government are exclusive. Moreover, the Court clearly indicated in the 1947 case of *Clark v. Allen* that a dormant foreign affairs doctrine was available to strike down a state law impinging too greatly on U.S. foreign relations.<sup>114</sup> Additionally, the ready availability of the preemption doctrine in most cases involving a challenge to state laws in the foreign affairs realm, and the Supreme Court’s preference for relying on preemption grounds in its opinions, may readily explain why the Supreme Court generally finds it unnecessary to rely on the dormant foreign affairs doctrine.

There is an additional, and perhaps stronger, rebuttal to the argument as to why the dormant foreign affairs doctrine was not relied upon by the Supreme Court until 1968. As discussed in the introduction, state involvement in foreign affairs has only existed to a significant degree in the past five decades, or at the very least, it has been more prevalent in the past five decades and increased throughout this time period.<sup>115</sup> There was no significant state involvement in foreign affairs prior to the second half of this century of the type that a dormant foreign affairs doctrine, involving purpose review as opposed to threshold effects or balancing tests, would capture. While one can list numerous state measures throughout our nation’s history that caused diplomatic protests,<sup>116</sup> most of these measures did not carry the primary purpose of changing or criticizing foreign government policies. State laws imposing a tax on the arrival of foreigners<sup>117</sup> were

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<sup>110</sup> *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

<sup>111</sup> *Id.* at 180.

<sup>112</sup> 312 U.S. 52 (1941).

<sup>113</sup> See, e.g., Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 855–56 (2004).

<sup>114</sup> 331 U.S. 503, 516–17 (1947).

<sup>115</sup> See also Kline, *supra* note 2, at 106–07; Schaefer, *supra* note 38, at 37.

<sup>116</sup> See Goldsmith, *supra* note 12, at 1653–58.

<sup>117</sup> See, e.g., *Smith v. Turner*, 48 U.S. 283, 298 (1849).

not enacted with the primary purpose to change or criticize the policies of foreign governments.<sup>118</sup> The prosecution of a British agent for murder in connection with the Caroline incident<sup>119</sup> was not done with the primary purpose of changing or criticizing the policies of the British government.<sup>120</sup> Several Southern States in the early to mid-1800s adopted Negro Seamen Acts, which required imprisonment of black seamen upon arrival.<sup>121</sup> While these acts caused “a persistent diplomatic embarrassment,” the changing of foreign government policies was not their primary purpose.<sup>122</sup> Similarly, the primary purpose of Anti-Alien Acts passed by the states in the late 1800s and early 1900s, at least those that did not single out aliens from particular nations, was not intended to change foreign government policies.<sup>123</sup> State Buy-American Procurement Laws enacted in the 1930s<sup>124</sup> similarly did not have the primary purpose of changing foreign government policies; rather, these laws were meant to protect in-state and U.S. industries.<sup>125</sup> Thus, few, if any, historical examples pointed to by scholars are glaring examples of the absence of a dormant foreign affairs doctrine<sup>126</sup> because such claims were not even made in these cases. They simply did not deal with state actions whose primary purpose was to change or criticize the policies of foreign governments. The absence of dormant-foreign-affairs-doctrine-styled-claims in these early cases might simply indicate that federal “exclusive” powers over

<sup>118</sup> See, e.g., Jason Mazzone, *The Security Constitution*, 53 UCLA L. REV. 29, 54 n.115 (2005) (“measure aimed at deterring the indigent”).

<sup>119</sup> See *People v. McLeod*, 1 Hill 377, 483 (N.Y. Sup. Ct. 1841).

<sup>120</sup> See *Impunity of Agents in International Law*, CENTRAL INTELLIGENCE AGENCY, September 22, 1993, available at [https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol5no2/html/v05i2a10p\\_0001.htm](https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol5no2/html/v05i2a10p_0001.htm) (indicating the United States ultimately viewed the Caroline incident as a public sovereign act and thus immune but that New York State considered it an act of an individual for murder rather than an act of the British government and thus, rejected the habeas petition of the British agent).

<sup>121</sup> See *The Cynosure*, 6 F. Cas. 1102, 1103 (D. Mass. 1844).

<sup>122</sup> Gerald L. Neuman, *The Lost Century of American Immigration Law*, 93 COLUM. L. REV. 1833, 1873–77 (1993) (sparked by fears of insurrection if black seamen were allowed “to wander at liberty”).

<sup>123</sup> See Nicholas Montario, *The Issue of Mexican Immigration: Where Do We Go From Here?*, 6 J. INT’L BUS. & L. 169, 176–77 (2007) (stating that anti-alien fervor behind laws was due to job concerns not changing foreign government policies).

<sup>124</sup> See James D. Southwick, *Binding the States: A Survey of State Conformance with the Standards of the GATT Procurement Code*, 13 U. PENN. J. INT’L BUS. L. 57, 71 (1991).

<sup>125</sup> See *id.*; see also Lawrence Hughes, *Buy North American: A Revision to FTA Buy America Requirements*, 23 TRANSP. L.J. 207, 208 (1995) (asserting the purpose of the Buy America Acts was “to require the federal government to spend taxpayers’ dollars only on goods produced in the United States”).

<sup>126</sup> See Goldsmith, *supra* note 12, at 1653.

foreign affairs only prohibited state actions with a primary foreign policy purpose rather than actions having a direct and significant impact on U.S. foreign relations. Additionally, it might indicate that lawyers were comfortable with the strength of their other claims, preemption or otherwise.

To be fair, there are examples of state laws enacted prior to the 1960s that involved a primary purpose to change or criticize foreign government policies. For example, states passed what are commonly referred to as “sense of the legislature” resolutions on foreign affairs issues as early as the turn of the Nineteenth Century.<sup>127</sup> These types of resolutions, however, are not necessarily captured by the dormant foreign affairs doctrine with a purpose standard of review, as will be discussed below.<sup>128</sup> Additionally, the states enacted reciprocity statutes addressing inheritance matters in the 1940s that only allowed an alien to inherit property in a state if the alien’s home nation allowed U.S. citizens to inherit property.<sup>129</sup> Such statutes arguably have as one of their purposes the changing of foreign government policies.<sup>130</sup> Supreme Court precedent, however, has upheld such statutes, at least with respect to facial challenges,<sup>131</sup> and a purpose-review test can be respectful of prior precedent in this regard. For instance, it can be plausibly argued that such statutes do not seek to change foreign government policy but have as their primary purpose reciprocity (or equal treatment) in and of itself. Thus, one need not draw the inference that the doctrine is of questionable validity because these state actions causing diplomatic controversy occurred throughout our nation’s history without plaintiffs challenging such actions under a dormant foreign affairs doctrine.

Instead, one might reasonably conclude that this history simply suggests that the scope of the doctrine is limited to those actions that have a foreign policy purpose. Indeed, under this reading of history and law, it is unsurprising that the dormant foreign affairs doctrine was not formally relied upon until the 1960s. Significant state actions with a foreign policy purpose began around this time. For instance,

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<sup>127</sup> See QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 264–65 (1922).

<sup>128</sup> See *infra* Part IV.

<sup>129</sup> See generally Note, *Reciprocal Inheritance Statutes and Federal Powers*, 56 *YALE L.J.* 150 (1946) (describing 1940s state statutes regarding non-resident property acquisition and the subsequent court challenges).

<sup>130</sup> See Moore, *supra* note 27, at 309 (noting an additional purpose of state statute’s of this type during this time frame may have been to keep property out of enemy hands during World War II).

<sup>131</sup> See *infra* Part IV.B.

in 1963, Florida enacted a law that prohibited the issuance of fishing licenses for fishing in the territorial waters of the state to any vessel owned by a foreign state, or national thereof, which subscribed to communism.<sup>132</sup> Other states enacted statutes discriminating against goods from communist countries around this time.<sup>133</sup>

#### IV. DOCTRINAL TEST UNDER THE DORMANT FOREIGN AFFAIRS DOCTRINE: MAKE IT PURPOSE REVIEW

While the existence of a dormant foreign affairs doctrine is well-founded in modes of constitutional interpretation, “scholars and judges have continued to puzzle over [*Zschernig*’s] reasoning and scope, and, in particular, over precisely where and how the courts should draw the line between constitutionally permissible and prohibited state and local action.”<sup>134</sup> While the starting point in any examination of the test to be adopted under the dormant foreign affairs doctrine is the *Zschernig* case, that case can only be understood (or at least is best understood) in the context of *Clark v. Allen*,<sup>135</sup> a 1947 U.S. Supreme Court case analyzing a similar state statute twenty-one years prior to *Zschernig*, and *Hines v. Davidowitz*,<sup>136</sup> a 1941 case in which the Supreme Court flirted with establishing a dormant foreign affairs doctrine rationale.<sup>137</sup> *Zschernig* borrowed its most often cited test from the *Clark* opinion and approvingly cited to *Hines*.<sup>138</sup>

##### A. *Hines v. Davidowitz*

In the foreign affairs field, at least as broadly defined since it might also be considered to fall in the immigration field, the most well-known pre-*Crosby* preemption case is *Hines v. Davidowitz*.<sup>139</sup> *Hines* involved a challenge to Pennsylvania’s Alien Registration Act.<sup>140</sup> The

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<sup>132</sup> Enforcement of the Florida statute by state authorities against Cuban fisherman created a significant international incident. Cuba raised the issue at the United Nations and cut off the water supply to the U.S. military base at Guantánamo Bay. See Moore, *supra* note 27, at 312–14 (discussing the statute, enforcement of statute, and international repercussions of enforcement).

<sup>133</sup> See, e.g., Gustavo Otalvora, Note, *From Stalin to Bin Laden: Comparing Yesteryear’s Anti-Communist Statutes with the Public Employer Provision of the Ohio Patriot Act*, 2010 U. ILL. L. REV. 1303, 1318–20 (2010).

<sup>134</sup> Bilder, *supra* note 34, at 825–26.

<sup>135</sup> 331 U.S. 503 (1947).

<sup>136</sup> 312 U.S. 52 (1912).

<sup>137</sup> See McRoberts, *supra* note 27, at 649.

<sup>138</sup> *Zschernig*, 398 U.S. at 432–33.

<sup>139</sup> 312 U.S. 52 (1941).

<sup>140</sup> *Id.* at 59.



Court in *Hines* came close to grounding its opinion in a dormant foreign affairs doctrine, although the Court's holding is ultimately based on preemption analysis.

It is important to ask what we should make of the Court's "flirtation" with the dormant foreign affairs doctrine.<sup>141</sup> At various points in its opinion, the Court indicated that foreign affairs powers were exclusive to the federal government.<sup>142</sup> For instance, it stated that "our system of government is such that the interests of the cities, counties and states, no less than the interests 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."<sup>143</sup> In other portions of its opinion, the Court merely refers to the "*supremacy* of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation."<sup>144</sup> The Court also stated:

Any concurrent state power that may exist is restricted to the narrowest limits . . . . [O]ur conclusion is that appellee is correct in his contention that the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of the state and nation, but that whatever power a state may have is *subordinate* to supreme national law.<sup>145</sup>

Even this statement indicates a large measure of exclusivity in foreign relations. Later in its opinion, the Court again hedged on whether a dormant limitation was at issue: "And whether 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."<sup>146</sup>

Ultimately, the failure of the Court to adopt a dormant foreign affairs doctrine rationale does not damage the support for such a doctrine in this article because the law at issue in *Hines* would not run afoul of the dormant foreign affairs doctrine when employing purpose review. Additionally, *Hines* might be best thought of as an immigration case rather than a foreign affairs related case.

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<sup>141</sup> See McRoberts, *supra* note 27, at 649 ("However, even in *Hines*, the Court discussed at length the federal foreign affairs powers and flirted with the dormant foreign affairs analysis.").

<sup>142</sup> *Hines*, 312 U.S. at 63.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 62 (emphasis added).

<sup>145</sup> *Id.* at 68 (emphasis added).

<sup>146</sup> *Id.* at 73.

*B. Clark v. Allen*

In *Clark v. Allen*,<sup>147</sup> the California statute at issue provided that a non-resident alien could inherit real or personal property within California “under the same terms and conditions as residents and citizens of the United States” only if U.S. citizens enjoyed a reciprocal right to inherit such property as residents and citizens of the alien’s country of inhabitance.<sup>148</sup> In enacting the statute, the California Legislature stated:

Because the foreign governments guilty of [confiscating inheritances of U.S. citizens] constitute[d] a direct threat to the Government of the United States, it [was] immediately necessary that the property and money of citizens dying in [the United States] should remain in the [United States] and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.<sup>149</sup>

The federal Trading with the Enemy Act would have prevented the proceeds of any inheritance going to countries with which the United States was at war.<sup>150</sup> The district court struck down the California law on two separate grounds: the dormant foreign affairs doctrine and “occupation of the field” preemption by the Trading with the Enemy Act.<sup>151</sup> In the portion of its opinion dealing with the exclusive federal power over foreign relations, the district court seemed to hinge its decision on the purpose of the statute—in other words, the goal sought to be achieved by the statute.<sup>152</sup> The court noted the “expressed design was to fix a policy of international relations.”<sup>153</sup> The district court did not examine any actual effects of the statute on foreign countries or U.S. foreign policy. Rather, it noted that “if the limitation of the powers of the state were not sustained in principle, evils now incapable of definition, would result from state entry into the Federal field.”<sup>154</sup>

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<sup>147</sup> 331 U.S. 503 (1947).

<sup>148</sup> Law of July 1, 1941, CAL. PROB. CODE, §§ 259, 259.1, 259.2, *invalidated by Clark*, 331 U.S. at 517.

<sup>149</sup> *Id.* at § 259.2 (as reprinted in *Crowley v. Allen*, 52 F. Supp. 850, 853 (N.D. Cal. 1943)).

<sup>150</sup> *See* 50 U.S.C. § 616 (2006).

<sup>151</sup> *Crowley*, 52 F. Supp. at 854.

<sup>152</sup> *Id.* at 853.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 855.

The U.S. Court of Appeals for the Ninth Circuit reversed.<sup>155</sup> The respondents seemed to argue for a dormant “war powers” doctrine rather than a more general dormant foreign affairs doctrine.<sup>156</sup> Specifically, the respondents argued that the Constitution had granted the federal government the right to capture enemy property and that the California statute interfered with this exclusive power.<sup>157</sup> The Ninth Circuit, however, rejected the respondents’ argument as illogical.<sup>158</sup> If the California statute were valid in denying the property rights through inheritance, then the property was not enemy property but property of California.<sup>159</sup> The Ninth Circuit also worried that the war powers of the federal government could affect “almost every field of private right on the basis of necessity.”<sup>160</sup>

If this great reservoir of Federal power is ipso facto a denial of any power to the States in that reservoir, whether or not a war is being waged or such powers are being exercised, then the power of the states is thrown into the utmost uncertainty and confusion.<sup>161</sup>

Such a statement certainly calls into question the existence of a broader dormant foreign affairs doctrine. It is not necessarily the case, however, that dormant prohibitions on the states are completely co-extensive with federal powers to affirmatively act. Dormant Commerce Clause jurisprudence clearly speaks to this point.<sup>162</sup> Additionally, the cases that the Ninth Circuit cited in support of its statement that the federal government under its war powers could affect “almost every field of private right on the basis of necessity” have since been discredited.<sup>163</sup>

The Supreme Court partially overturned the Ninth Circuit’s decision.<sup>164</sup> The Supreme Court found that the California statute was preempted with respect to real property by the Treaty of Friendship, Commerce and Consular Rights between Germany and the United

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<sup>155</sup> *Allen v. Markham*, 156 F.2d 653, 663 (9th Cir. 1946).

<sup>156</sup> *Id.* at 659.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 660.

<sup>161</sup> *Allen*, 156 F.2d at 660.

<sup>162</sup> See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422–23 (1946); Richard A. Paschal, *Congressional Power to Change Constitutional Law: Three Lacunae*, 77 U. CIN. L. REV. 1053, 1124 (2009).

<sup>163</sup> *Allen*, 156 F.2d at 660. For instance, the *Allen* court cited *Korematsu v. United States*, 323 U.S. 214 (1944), which has generally been discredited by commentators. *Id.*

<sup>164</sup> *Clark v. Arizona*, 331 U.S. 503 (1947).

States.<sup>165</sup> With respect to personal property, the California statute was valid because it was not an unconstitutional intrusion by the state into the field of foreign affairs.<sup>166</sup> After noting that the state measure was not preempted and did not violate a specific provision of the Constitution, the Court stated: “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.”<sup>167</sup> Thus, *Clark* indicates that there is a “forbidden line” preventing a state’s intrusion into foreign affairs. It also suggests that this line might be drawn by determining whether the state law only has an “incidental or indirect effect in foreign countries.”<sup>168</sup> While the Court spent little time in its opinion justifying or considering this test, it unfortunately has assumed great importance in later cases. Because the Court gave such short treatment to its dormant foreign affairs doctrine analysis, one would hope the statement would not forever foreclose the adoption of other, or at least additional, tests by the Court. Admittedly, the *Clark* Court had an opportunity to adopt a purpose-review standard. Petitioners argued that reciprocity statutes were “in substance invitations to foreign countries to trade inheritance rights abroad for inheritance rights in these states” and thus infringed the federal government’s sole negotiating authority.<sup>169</sup> Indeed, this argument seems most akin to a dormant Treaty Clause argument.<sup>170</sup> Most of the petitioners’ argument, however, focused on the effect of such statutes on foreign relations, rather than the purposes of the law.<sup>171</sup> Respondents’ argument also focused primarily on the effects test and laid out the test that Justice Douglas ultimately incorporated into his opinion.<sup>172</sup> Specifically, the respondents argued that it would be a novel and startling proposition to rule that a state statute “is invalid merely because that state action has some incidental or indirect effect in foreign countries.”<sup>173</sup>

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<sup>165</sup> *Id.* at 517.

<sup>166</sup> *Id.* at 516–18.

<sup>167</sup> *Id.* at 517.

<sup>168</sup> *Id.*

<sup>169</sup> Brief of Petitioner at 70, *Clark v. Allen*, 331 U.S. 503 (1947) (No. 626).

<sup>170</sup> *See Swaine, supra* note 88, at 1138.

<sup>171</sup> Brief for the Petitioner at 72–73, *Clark v. Allen*, 331 U.S. 503 (1947) (No. 626).

<sup>172</sup> Brief for Respondents at 63–64, *Clark v. Allen*, 331 U.S. 503 (1947) (No. 626).

<sup>173</sup> *Id.* at 59.

C. *Zschernig v. Miller*

*Zschernig v. Miller* came before the Supreme Court twenty-one years after *Clark v. Allen*.<sup>174</sup> *Zschernig*, like *Clark*, dealt with an inheritance reciprocity statute.<sup>175</sup> The Oregon statute at issue also contained two additional criteria beyond reciprocity in order for a non-resident alien to inherit real or personal property: (1) “the right of U.S. citizens to receive payment here in the United States of funds from estates in the foreign country;” and (2) “the right of non-resident aliens to receive proceeds of Oregon estates ‘without confiscation.’”<sup>176</sup> The statute was not challenged on its face, although these two additional criteria may have made the statute distinguishable from the one in *Clark*, particularly if the Court had adopted a purpose-review test.<sup>177</sup> Instead, the statute was challenged as applied.<sup>178</sup> The Court stated that the statute at issue in *Clark* involved the state probate courts in “no more than a routine reading of foreign laws.”<sup>179</sup> The Court, however, found in the application of the Oregon statute and in the “reciprocity area under inheritance statutes” generally, that:

the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called “rights” are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.<sup>180</sup>

The Court struck down the Oregon statute as applied, finding that it had “more than ‘some incidental or indirect effect in foreign countries.’”<sup>181</sup> Before turning to the Court’s elaboration of a doctrinal test, it is important to realize that the Court’s opinion, authored by Justice Douglas, was grounded in dormant foreign affairs doctrine, rather than preemption analysis:

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<sup>174</sup> 389 U.S. 429 (1968).

<sup>175</sup> *Id.* at 430.

<sup>176</sup> ORE. REV. STAT. § 111.070 (1957).

<sup>177</sup> The reason for this is that only communist countries would subject proceeds to confiscation (although other countries may have subjected proceeds to high taxes). Thus, the statute can be viewed as seeking to change communist governments’ behavior with respect to treatment of the proceeds. *See supra* Part IV.B.

<sup>178</sup> *Zschernig*, 389 U.S. at 430.

<sup>179</sup> *Id.* at 433.

<sup>180</sup> *Id.* at 432–33.

<sup>181</sup> *Id.* at 434 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

[W]e conclude that the history and operation of this Oregon statute make clear that [the statute] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress. . . . The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. . . . Where those laws conflict with a treaty, they must bow to the superior federal policy. . . . Yet, even in absence of a treaty, a State's policy may disturb foreign relations.<sup>182</sup>

The Court did not find the Oregon statute preempted by treaty or by legislation but nonetheless invalidated it for disturbing foreign relations.<sup>183</sup>

With regard to the doctrinal test elaborated by the Court for the dormant foreign affairs doctrine, one can discern numerous possible tests from Justice Douglas's *Zschernig* opinion, beyond the "more than some incidental or indirect effect in foreign countries."<sup>184</sup> These tests include:

1. Does the state action have a "great potential for disruption" of U.S. foreign relations or "embarrassment" to the United States or a foreign country?<sup>185</sup>
2. Does the state action "affect[] international relations in a persistent and subtle way"?<sup>186</sup>
3. Does the state action have a "direct impact upon foreign relations" and might it "adversely affect the power of the central government to deal with [foreign affairs] problems"?<sup>187</sup>
4. Does the state action "impair the effective exercise of the Nation's foreign policy"?<sup>188</sup>
5. Does the state action threaten to create an international controversy or retaliation?<sup>189</sup>

<sup>182</sup> *Id.* at 432, 440, 441.

<sup>183</sup> *Id.* at 441.

<sup>184</sup> *Clark*, 331 U.S. at 517; *see also Zschernig*, 389 U.S. at 433 (explaining how the California statute at issue in *Clark* would have only "some incidental or indirect effect in foreign countries").

<sup>185</sup> *Zschernig*, 389 U.S. at 435.

<sup>186</sup> *Id.* at 440.

<sup>187</sup> *Id.* at 441.

<sup>188</sup> *Id.* at 440.

<sup>189</sup> *Id.* at 441 ("Yet, even in absence of a treaty, a State's policy may disturb foreign relations. . . . 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.") (internal quotations omitted).

Each of these tests laid out in Justice Douglas's opinion appears to focus on the impact or effects of a particular state action, rather than the purpose of the state law. The Court's opinion, however, also gives some credence to the establishment of a purpose-based test. Justice Douglas stated that "[a]s 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"<sup>190</sup> and that the California decisions "radiate some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime."<sup>191</sup> These statements indicate the Court's concern that the statutes as applied served a foreign policy purpose. Importantly, the Court specifically pointed out that although the district court in *Clark* had found the statute at issue unconstitutional based upon its purpose, that unconstitutional purpose was not argued before it in *Clark*.<sup>192</sup> As discussed above, this is largely true; the briefs in *Clark* focused almost exclusively on effects rather than purpose, and to the extent that purpose was argued, the argument focused on implied negotiations with foreign countries or something more akin to a dormant Treaty Clause.<sup>193</sup> The Court noted that in *Clark* the statute was only challenged on its face and at that time it had "no reason to suspect that the California statute in *Clark* was to be applied as anything other than a general reciprocity provision requiring just matching of laws."<sup>194</sup> Additionally, Justice Douglas stated: "The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy."<sup>195</sup> Thus, it is possible to read *Zschernig* as striking down the statute as applied for a foreign policy purpose as well.

The fact that one finds at least some support for purpose review is not a surprise when one examines the parties' arguments in *Zschernig*, as well as a little known dissent by Justice Douglas, the author of both *Zschernig* and *Clark*, in the intervening period. The heirs of the estate at issue in *Zschernig* argued threshold effects, relying on *Clark v. Allen*.<sup>196</sup> The State of Oregon's brief found the threshold-effects test comfortable terrain upon which to defend the state law, arguing that the heirs could only speculate as to such effects and that the U.S. So-

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<sup>190</sup> *Id.* at 437.

<sup>191</sup> *Zschernig*, 389 U.S. at 435.

<sup>192</sup> *Id.* at 433, n.5.

<sup>193</sup> See *supra* notes 169–73 and accompanying text.

<sup>194</sup> *Zschernig*, 389 U.S. at 433, n.5.

<sup>195</sup> *Id.* at 441.

<sup>196</sup> Brief for Appellants at 58–62, *Zschernig v. Miller* 389 U.S. 429 (1968) (No 21).

licitor General had confirmed the State Department's view that such statutes did not interfere with foreign relations.<sup>197</sup> Only in their reply brief did the heirs finally argue for a purpose-based standard of review, arguing that the purpose of the law was the same as the purpose of the California law at issue in *Clark*, namely to prevent funds from going to unfriendly nations (and thus, by denying such funds, seeking to change the behavior of those nations)—the same purpose the district court in *Clark* had relied upon in invalidating California's reciprocity statute.<sup>198</sup> Oregon's additional statutory conditions, including proving that proceeds of an estate would not be subject to confiscation, would only have provided further proof of this legislative purpose.<sup>199</sup> The heirs' reply brief also pointed to Justice Douglas's dissent to the Supreme Court's denial of certiorari, on the basis of a lack of a federal question, in the 1962 case of *Ioannou v. New York*.<sup>200</sup>

*Ioannou* concerned a New York State Court of Appeals ruling upholding the application of a New York law calling for the escheat to the state of any estate in which the assignee would not have the benefit or use of the proceeds.<sup>201</sup> The statute was applied to prevent a Czech beneficiary of an estate from giving her interest as a gift to her niece in London.<sup>202</sup> In dissent, Justice Douglas indicated that a foreign policy purpose would be enough to invalidate the New York statute and its application to the Czech heir:

The issue is of importance to our foreign relations and I think this Court should decide whether, under existing federal policy and practice, the New York statute should be given effect. . . . We should note jurisdiction and ask the Solicitor General to file a brief.

. . . If New York's purpose is to preclude unfriendly foreign governments from obtaining funds that will assist their efforts hostile to this Nation's interests[,] . . . the complete prohibition of assignments made in those countries may have some basis in reason. But, if this is the purpose behind the statute, it seemingly is an attempt to regulate foreign affairs.<sup>203</sup>

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<sup>197</sup> *Zschernig*, 389 U.S. at 434.

<sup>198</sup> Brief in response to Brief of Appellee State Land Board of Oregon, and Brief for the United States as Amicus Curiae at 3–6, *Zschernig v. Miller* 389 U.S. 429 (1968) (No 21).

<sup>199</sup> *Id.* at 5–6.

<sup>200</sup> *Id.* at 3. *Ioannou* is located at 371 U.S. 30 (1964).

<sup>201</sup> *Ioannou v. New York*, 371 U.S. 30, 30 (1962) (Douglas, J., dissenting).

<sup>202</sup> *Id.* at 34.

<sup>203</sup> *Id.* at 32–34 (citations omitted).



To be fair, Douglas's dissent in *Ioannou* also laid out several additional effects-based tests that were later utilized in his *Zschernig* opinion: "The present restraints are not as gross an intrusion in the federal domain as those others would be. Yet they affect international relations in a persistent and subtle way."<sup>204</sup> Nonetheless, there is little doubt that Douglas's opinion in *Zschernig* can be read to at least support purpose review as an additional test.

Justice Stewart's concurring opinion in *Zschernig*, joined by Justice Brennan, also displays a clear reliance on dormant foreign affairs power doctrine rather than preemption analysis.<sup>205</sup> Additionally, the opinion lends support to purpose review because it places emphasis on the evaluation and disapproval of foreign government policies.<sup>206</sup> Indeed, Justice Stewart and Justice Brennan would have struck down the Oregon statute on its face, rather than only as applied:

All three [conditions in the Oregon statute] launch the State upon a prohibited voyage into a domain of exclusively federal competence. Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, and *the policies of foreign governments*. Of course, state courts must routinely construe foreign law in the resolution of controversies properly before them, but here the courts of Oregon are thrust into these inquiries only because the Oregon Legislature has framed its inheritance *laws to the prejudice of nations whose policies it disapproves*, and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate. 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. Our system of government is such that the 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.<sup>207</sup>

Thus, Justice Stewart's concurrence makes clear that the realm of foreign affairs is exclusively federal, and the Justices subscribing to Justice Stewart's opinion read *Hines* as well as earlier cases to establish this federal exclusivity.

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<sup>204</sup> *Id.* at 32.

<sup>205</sup> *Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring).

<sup>206</sup> *Id.* at 443.

<sup>207</sup> *Id.* at 442–43 (emphasis added) (citations omitted).

Not all of the justices agreed with the use of this doctrine. Justice Harlan's concurrence expressed concern over the dormant foreign affairs doctrine grounds relied upon by the other six Justices.<sup>208</sup> Although he concurred in the result, he would only have struck down the statute for its conflict with the treaty between Germany and the United States.<sup>209</sup>

*D. Assessing the Possible Doctrinal Tests*

1. Threshold-Effects Test

As discussed above, the threshold-effects test draws significant support from the language of *Zschernig*.<sup>210</sup> The Court, however, borrowed the "more than incidental and indirect effects" test from suggestions in *Clark*, and *Clark*'s purported adoption of the test was somewhat accidental, given the arguments the parties made before the Court.<sup>211</sup> Yet there are much stronger reasons for rejecting this test than the fact that it has its origins in *Clark*.

First, a threshold-effects test does not suit courts particularly well.<sup>212</sup> Are courts particularly adept at assessing the impact a state measure will have on a foreign country or on U.S. foreign policy? Certainly, a court can hear evidence on the impact in a foreign country. As to the impact on U.S. foreign policy, it seems that courts are less adept at making such determinations than the federal government.<sup>213</sup> The courts, however, have feared that deferring to executive branch views in amicus briefs would leave the fate of litigants solely in the hands of the executive branch and injure the independence of the judiciary.<sup>214</sup> There are historical examples in the foreign relations arena that warrant skepticism of the executive branch's ability to independently apply a legal test—in this instance, a threshold-effects test—in a consistent and apolitical fashion. For example, one reason that immunity decisions regarding foreign governments were taken

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<sup>208</sup> *Id.* at 457–58.

<sup>209</sup> *Id.* at 449.

<sup>210</sup> See *supra* note 181 and accompanying text.

<sup>211</sup> See *supra* notes 169–73 and accompanying text.

<sup>212</sup> See Goldsmith, *supra* note 12, at 1699–1702; Swaine, *supra* note 88, at 1151–53.

<sup>213</sup> This is true for a variety of reasons, including the fact that the executive branch is in constant communication with foreign governments, through U.S. Embassies abroad, and has a continuous flow of intelligence information, some of which would not be accessible to a court.

<sup>214</sup> See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring) (suggesting resolution of fundamental constitutional issues cannot depend on "shifting winds" of the executive branch).

out of the hands of the executive branch and placed in the hands of the courts under the Foreign Sovereign Immunities Act was the inconsistent results that occurred when courts essentially entrusted the executive branch with application of the restrictive theory of immunity.<sup>215</sup>

Courts could also seek guidance in the amicus briefs of foreign governments that claim damaging effects on relations with the United States as a result of a state measure, or rely on evidence of actual retaliatory measures by foreign governments, or even rely on cases brought against the U.S. government in international tribunals, such as the World Trade Organization (WTO). But this would place the resolution of the constitutional issue in the hands of foreign governments, a far more unacceptable result than leaving it in the hands of the executive branch.<sup>216</sup>

Even if courts resist suggestions in amicus briefs, it is likely that inconsistent results will arise among lower courts considering similar measures.<sup>217</sup> For example, in *Bethlehem Steel Corp. v. Board of Commissioners*, a California state court struck down the California “Buy America” Act as having more than some incidental or indirect effect on U.S. foreign relations under *Zschernig*.<sup>218</sup> Conversely, in *KSB Technical Sales Corp. v. North Jersey District Water Supply Commission*, the New Jersey Supreme Court upheld a similar New Jersey statute, finding that the statute did not have more than some incidental or indirect effect.<sup>219</sup> The *KSB Technical Sales* court did note that the New Jersey statute had exceptions if domestic materials would unreasonably raise costs or their purchase was otherwise impracticable.<sup>220</sup>

Second, there is a potential problem with equity between the states. If the test adopted is concerned with effect on a foreign country or foreign affairs, then a measure by Wyoming, North Dakota, or New Hampshire is more likely to be upheld, because it is less likely to have an effect on a foreign nation or U.S. foreign relations, than a

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<sup>215</sup> See, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIAL 74-77 (3rd ed. 2009).

<sup>216</sup> See Swaine, *supra* note 88, at 1153 (expressing concern over giving foreign governments a “heckler’s veto”).

<sup>217</sup> Compare *Bethlehem Steel Corp. v. Bd. of Comm’rs*, 276 Cal. App. 2d 221, 229 (Cal. Ct. App. 1969), with *Trojan Techs. v. Pennsylvania*, 916 F.2d 903, 913-14 (3d Cir. 1990), and *K.S.B. Technical Sales Corp. v. N. Jersey Dist. Water Supply Comm’n*, 381 A.2d 774, 784 (N.J. 1977).

<sup>218</sup> *Bethlehem Steel Corp.*, 276 Cal. App. 2d at 229.

<sup>219</sup> 381 A.2d 774 (N.J. 1977).

<sup>220</sup> *Id.* at 784.

measure undertaken by California, New York, or Massachusetts.<sup>221</sup> This seems rather unfair and indeed almost ironic. Wyoming might be able to enact a law sanctioning Burma's government while California, a much larger economic actor in the world, may be denied the ability to do so.

Third, and somewhat related, the question arises whether the impact of each state's measure should be examined individually or in the aggregate. If a court only examines the impact of each state's measure individually, a situation would exist where, for example, twenty states have enacted measures that are together creating an enormous interference with U.S. foreign policy but no single measure has a "more than indirect effect."<sup>222</sup> Additionally, the potential inequities between large and small states would need to be addressed. It seems that a court must aggregate the incidence of all state practices. Indeed, there is some support in *Zschernig* for cumulating the total incidence of a particular action taken by several states.<sup>223</sup> A court, however, would also need to go further. It would need to assess a particular state's foreign policy measure based on the assumption that all fifty states enacted similar measures, whether or not other states actually have such measures in place at the time of the challenge. Otherwise, the validity of a state's measure will depend on how many other similar state measures are in place at time of the litigation. For example, if a particular state enacts a Burma law similar to Massachusetts and it is challenged in court under a threshold-effects test, then a court unconcerned with accumulation could find the statute does not create sufficient effects on Burma or U.S. foreign policy to invalidate it. If in the next six to twelve months, twenty or thirty other states enact such measures, then a new challenge to that state's Burma statute leads to a different result. Ultimately, however,

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<sup>221</sup> See, e.g., Spiro, *States and Immigration*, *supra* note 12, at 158 n.146 (discussing how immigration measures by those states with large alien populations are more subject to invalidation under a foreign affairs rationale because measures by those states are more likely to cause foreign policy effects).

<sup>222</sup> See Peter J. Spiro, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 825 (1986) [hereinafter Spiro, *State and Local*] (indicating that this would have been the case if state sanctions against South Africa were analyzed in such a fashion in the 1980s).

<sup>223</sup> See *Zschernig v. Miller*, 389 U.S. 429, 438 n.8 (1968); see also *NFTC v. Natsios*, 181 F.3d 38, 53-54 (1st Cir. 1999); Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L. J. 443, 458 (1998) ("[C]onsideration should also be given to the cumulative effect that a multiplicity of such laws would have on the ability of the federal government to conduct a coherent foreign policy.").

even hypothetical accumulation fails to cure the significant problems with a threshold-effects test.

Fourth, a threshold-effects test provides little useful guidance to state officials. State officials, much like courts, will be hard-pressed to assess the potential impact of their actions on foreign governments or U.S. foreign relations, let alone assess the impact of their measure in combination with other states, real or hypothetical. Moreover, they will face political pressures to conclude that their actions only cause an “indirect effect” on U.S. foreign relations.

Finally, a threshold-effects test is potentially more threatening to state regulation in traditional areas,<sup>224</sup> such as criminal law, and potentially less respectful of federal government views on whether certain international obligations (i.e., treaty obligations) should be self-executing than a purpose-based test. There is, of course, some irony here given that respect for traditional areas of state regulation, such as testamentary disposition, was one of the reasons that a threshold-effects test was argued for by state entities in their briefs before the Supreme Court in the *Clark* and *Zschernig* cases.<sup>225</sup> Part of the problem is that many additional areas of regulation have become of interest to foreign nations in their relationship with the United States in the post-WWII era.<sup>226</sup> For example, imposition of the death penalty by U.S. states leads to constant diplomatic protests by other nations,<sup>227</sup> and thus one could envision an argument that such statutes have more than some incidental or indirect effect on U.S. foreign relations. But one could hardly make the argument that the primary purpose of death penalty statutes is to change or criticize the behavior or policy of a foreign government, and thus such laws are not at risk under a purpose-based test.

Similarly, state court unwillingness to implement a World Court ruling requiring “review and reconsideration” by state judicial bodies of convictions and sentences of foreign nationals not read their consular notification rights at the time of arrest, as required by the Vienna Convention on Consular Relations, has arguably caused more than some incidental or indirect effect on U.S. foreign relations—as evidenced by the World Court cases and diplomatic protests against

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<sup>224</sup> See Goldsmith, *supra* note 12, at 1711.

<sup>225</sup> See Brief for the Respondent at 56–57, *Clark v. Allen*, 331 U.S. 503 (1947) (No. 626); Brief of Appellee State Land Board of Oregon at 7–11, *Zschernig v. Miller*, 390 U.S. 974 (1968) (No. 21).

<sup>226</sup> See Goldsmith, *supra* note 12, at 1671.

<sup>227</sup> See, e.g., *Arizona Executes German Killer Pleas for Clemency Unheeded as State Uses Gas Chamber*, KAN. CITY STAR, March 4, 1999, at A3.

such failures.<sup>228</sup> The Supreme Court, however, in a 2008 case, *Medellin v. Texas*, found that World Court rulings are non-self-executing (thus not a part of domestic law), and accordingly, they do not bind state courts nor do they preempt state procedural default doctrine rules.<sup>229</sup> The *Medellin* Court even found Presidential attempts to implement the World Court rulings by memorandum invalid given Senate intent that such rulings be non-self-executing.<sup>230</sup> If one made a *Zschernig*-based argument using a threshold-effects test, such state court activity could be ruled unconstitutional given the number of international disputes and diplomatic protests concerning the application of state procedural default doctrines in such circumstances. This would lead to a result contrary to that which the legislative branch desired.

## 2. Balancing

Several scholars, analogizing the dormant foreign affairs doctrine to the dormant Commerce Clause, have proposed a balancing test that would weigh the impact that a state's measure has on foreign relations (or a foreign country) against the state's interest in the measure.<sup>231</sup> There is, of course, a question whether the balancing that occurs under the dormant Commerce Clause is mere window dressing for purpose-review.<sup>232</sup> Indeed, other scholars surmised shortly after *Zschernig* that balancing is what courts would ultimately lean toward.<sup>233</sup> But such a proposal has many flaws both as a descriptive matter of what courts are doing and as a practical matter of what courts should be doing under the dormant foreign affairs doctrine. The *Zschernig* opinion lends no support to a balancing test. Moreover, a lower court proposed a balancing test on only one occasion, and in that case the court never actually engaged in balancing because it found no effect on foreign affairs.<sup>234</sup> Thus, courts have almost

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<sup>228</sup> See, e.g., Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (March 31) (finding that the Court had jurisdiction to hear claim against the United States and that Mexican nationals in U.S. Custody were entitled to review of their convictions); see also *supra* note 227.

<sup>229</sup> 552 U.S. 491, 521 (2008).

<sup>230</sup> *Id.* at 530.

<sup>231</sup> See Lewis, *supra* note 5, at 501; see also McRoberts, *supra* note 27, at 651 (applying balancing test after first asking whether primary purpose was to influence foreign government conduct).

<sup>232</sup> See Regan, *supra* note 30, at 1217.

<sup>233</sup> See Henkin, *supra* note 12, at 164 (questioning also the need for the doctrine altogether).

<sup>234</sup> See *State v. Bundrat*, 546 P.2d 530, 542 (Ala. 1976).

uniformly rejected the adoption of a balancing test. The rejection of balancing by courts is appropriate since such a doctrinal test leads to even greater problems than a threshold-effects test.

First, the Court, Justice Scalia in particular, has criticized balancing in the dormant Commerce Clause context, primarily because it can lead to uncertain results.<sup>235</sup> If one wonders about a court's ability to discern the appropriate line in a threshold-effects test, then one can be truly skeptical of a court's ability to balance the effect of a state action on U.S. foreign policy or a foreign country with the right of states to regulate matters of traditional state concern (e.g., inheritance or achievement of a legitimate local purpose). The question whether courts have the competence to properly balance becomes even greater when one considers that in numerous cases the constraint will be interpreted by state legislators themselves. Balancing, like a threshold-effects test, simply does not give state legislators sufficient guidance regarding their conduct.

Second, as will be discussed in greater detail in Part V of this Article, the dormant foreign affairs doctrine is analogous only to the extra "one voice" prong of analysis under the dormant Foreign Commerce Clause, as opposed to the facial discrimination and balancing tests that occur prior to the "one voice" prong.<sup>236</sup> In *Japan Line, Ltd. v. Los Angeles County*, the Supreme Court identified two additional prongs of analysis to undertake when a state tax affects foreign commerce as opposed to interstate commerce.<sup>237</sup> First, the Court needs to consider whether the state tax creates a risk of multiple taxation.<sup>238</sup> Second, the Court queries whether the state tax interferes with an area where federal uniformity is essential.<sup>239</sup> Some, including the Court itself, have termed this second prong the "speak with one voice" test since the prong is often paraphrased as a question of whether the state tax prevents the federal government from speaking

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<sup>235</sup> See, e.g., *Am. Trucking Ass'n v. Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring) (claiming that balancing the importance of the state interest against the degree of impairment to commerce is "weighing the imponderable"); see also *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 260 (Scalia, J., concurring in part and dissenting in part) (arguing that balancing leads to unpredictable results).

<sup>236</sup> See *infra* Part V.

<sup>237</sup> 441 U.S. 434, 446 (1979).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 448.

with one voice.<sup>240</sup> The dormant foreign affairs doctrine has been described in terms similar to this second prong in *Japan Line*.<sup>241</sup>

While differences and similarities between the extra prongs of analysis under the dormant Foreign Commerce Clause and the dormant foreign affairs doctrine will be explored further below,<sup>242</sup> the crucial point here is that the Court has utilized these additional prongs after finding a state tax would satisfy the test for the dormant interstate Commerce Clause. Thus, the extra tests are separate from the normal test for interstate commerce and apparently are applied after any balancing has taken place.<sup>243</sup> Accordingly, the Court has at least implicitly rejected any sort of balancing under the second prong of the *Japan Line* test. Therefore, support for balancing under the dormant foreign affairs doctrine is further weakened.

### 3. Purpose Review

Purpose review is the best available means of assessing state actions under the dormant foreign affairs doctrine.<sup>244</sup> Under purpose

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<sup>240</sup> See, e.g., *id.* at 449. See also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 186 (1983).

<sup>241</sup> See, e.g., Goldsmith, *supra* note 12, at 1637.

<sup>242</sup> See discussion *infra* Part VI.

<sup>243</sup> The *Japan Line* tests to date have only been applied by the Supreme Court to state taxes and not state regulations, and the interstate Commerce Clause tests for taxes do not involve balancing. But lower courts have applied the *Japan Line* additional tests even to regulations after engaging in facial discrimination and balancing tests. See *Piazza's Seafood World, L.L.C. v. Odom*, 448 F.3d 744, 750 (5th Cir. 2006); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 57 (1st Cir. 1998).

<sup>244</sup> Support for purpose review can be gleaned from the articles of several scholars and practitioners, although these articles combine purpose review with other additional tests criticized in this Article or view purpose review as a second best option to eliminating the doctrine altogether. Professor Fenton places the greatest emphasis on purpose review of any commentator; however, he also places continued reliance on asking whether the state action prevents the federal government from "speaking with one voice," a test which this Article criticizes. See Fenton, *supra* note 34, at 571. Professor Goldsmith criticizes the existence of the dormant foreign affairs doctrine; however, he admits that purpose review is most appropriate if the doctrine is to exist. See Goldsmith, *supra* note 12, at 652. Similarly, McRoberts would initially review state laws for a primary foreign policy purpose but would secondarily examine state laws lacking such a purpose under a balancing test. See McRoberts, *supra* note 27, at 652. Professor Moore appears to argue for a purpose-based test that would invalidate state laws having a foreign policy purpose but would also engage in a balancing test weighing a state law's effect on international relations with a legitimate local purpose, arguing at various points for a purpose test, balancing test or a combination of the two. See Moore, *supra* note 27, at 289, 306, 311, 321. Daniel M. Price and John P. Hannah argue that a primary purpose to "singl[e] out individual foreign regimes for condemnation; and . . . coerce changes in their domestic policies" places a state law "well within Zschernig's zone of constitutional impermissibility." Price & Hannah, *supra* note 223, at 460. But at other times in their article, they seem to apply an ef-



review, courts would ask if the primary purpose of the state law is to change or criticize the policy of a foreign government or governments. This may strike some readers as strange at first glance—even after reading concerns raised about a threshold-effects test and balancing—because of one of the central policy justifications for excluding states from foreign policy, and a concern that the Framers focused upon, was that state foreign policy measures could have an effect on a foreign country, or U.S. foreign policy towards that country, and this could lead to retaliation that might befall the country as a whole. This seems to indicate that it is indeed the effects of the state measure that should be the preeminent concern under the dormant foreign affairs doctrine. But courts cannot gauge well the effects of a state action on the achievement of U.S. foreign policy goals and the potential for retaliation.<sup>245</sup> The best independent indicator of a state measure's effect that does not require a court to rely on judgments of the executive branch or, more disturbingly, foreign governments, is its purpose. Simply put, purpose is not entirely detached from effect. Purposes are important, at least in part, because of the likely effects. A foreign country is much less likely to cooperate with the United States or be more likely to institute retaliatory measures against state actions that have as their explicit purpose criticism of that foreign country's policies or the desire to change those policies.

Other questions or concerns regarding purpose review have been raised, particularly in the context of the dormant Commerce Clause. First, there is the worry of mixed purposes of a state measure or that different legislators may have different motives for approving a measure. For instance, the Massachusetts Burma law may have been passed by some legislators to change human rights policies in Burma and by others to increase their chances for reelection because it was a popular measure that polls seemed to support. This last motivation is irrelevant. Many legislators may have the ultimate goal of being reelected, but this is not the relevant motive or purpose.<sup>246</sup> The relevant purpose is the goal that the legislation is designed to accomplish.<sup>247</sup> Having eliminated the motive of increasing chances of reelection, one would now have to decide whether the primary purpose

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fects test. *Id.* at 463 (“Therefore, a reviewing court should consider [state laws for] their potential cumulative impact on the federal government’s ability to conduct a coherent foreign policy[,]” including by examining foreign diplomatic protests).

<sup>245</sup> See discussion *infra* Part VII.

<sup>246</sup> See Regan, *supra* note 30, at 1149, n.98.

<sup>247</sup> See *id.* at 1142–51.

of the Burma law was to change or criticize the behavior of the Burmese government.

The next concern raised with regard to purpose or motive review in the context of the dormant Commerce Clause is the problem of “laundered legislative history” to disguise the legislature’s true purpose.<sup>248</sup> This is less likely to happen in foreign affairs legislation than in protectionist legislation, and it is surprising how many times even a protectionist motive is revealed in the development of legislation.<sup>249</sup> In the context of protectionism, legislators are sometimes anxious to reveal their purpose in order to obtain the maximum political rewards for favoring domestic industry.<sup>250</sup> Legislators, in general, will be similarly anxious to reveal their foreign policy purpose.<sup>251</sup> Indeed, the Massachusetts Burma law’s sponsor, state Rep. Byron Rushing, stated upon introduction of the bill:

The Commonwealth has a history of assisting fledgling, democratic movements throughout the world. Burma calls on our support now. The new South Africa demonstrates that economic pressure can be effective in moving governments away from oppression. Continued pressure from Massachusetts is necessary to vigorously combat well-documented repression and intolerance in Burma.<sup>252</sup>

Assuming, however, that legislators attempt to hide their purpose, they are unlikely to be successful, even if legislators launder the legislative history. A foreign policy purpose is more likely to be evident from the face of the statute than a protectionist purpose. Often such legislation singles out a particular foreign country.<sup>253</sup> Indeed, lower courts applying a purpose-based test have highlighted the singling out of a particular foreign nation as a key determinant of the state action’s purpose.<sup>254</sup> Some scholars have even declared that singling out a foreign nation should be the sole test for reviewing state actions

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<sup>248</sup> See *id.* at 1239.

<sup>249</sup> See, e.g., Matthew Schaefer, *Sovereignty, Influence, Realpolitik, and the World Trade Organization*, 25 HASTINGS INT’L & COMP. L. REV. 341, 350 (2002) (discussing the WTO Reformulate Gasoline case that “involved a ‘smoking gun’ in that an EPA official testifying before Congress admitted that they wanted to give domestic refiners a break”).

<sup>250</sup> See Regan, *supra* note 30, at 1156.

<sup>251</sup> See Spiro, *State and Local*, *supra* note 222, at 822.

<sup>252</sup> See Price & Hannah, *supra* note 223, at 462.

<sup>253</sup> See, e.g., *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1367–68 (D.N.M. 1980) (singling out Iran); *Springfield Rare Coin Galleries v. Johnson*, 503 N.E.2d 300, 307 (Ill. 1986) (singling out South Africa).

<sup>254</sup> See, e.g., *Tayyari*, 495 F. Supp. at 1371; see also *Springfield Rare Coin Galleries*, 503 N.E.2d at 307 (striking down state tax law that discriminated against South African currency on state constitutional grounds for having a foreign affairs purpose).

under the dormant foreign affairs doctrine.<sup>255</sup> But using singling out as the lone test may not be wise if a state targets, for example, a large group of countries that maintain a particular policy such that singling out loses meaning (e.g., one that targets all foreign nations placed on a list by the U.S. Trade Representative as providing insufficient intellectual property protection or all foreign nations lacking a free trade agreement with the United States). Additionally, one has to be careful that a singling-out test does not give blanket immunity to generally applicable or facially neutral laws (non-foreign affairs related laws) that may be used in a particular case or applied in a manner that has a primary foreign policy purpose.<sup>256</sup> Nevertheless, singling out will be present in many cases, and therefore, even without legislative history, the foreign policy purpose of a law can often be determined by reference to its text and structure. For example, one might compare a generally applicable state tort law being applied in a manner that causes foreign policy effects to a specific cause of action or an extension of an applicable statute of limitations that apply only with respect to actions arising from certain historical occurrences such as WWII forced labor or the “Armenian genocide.” The former type of law is more likely to survive purpose review while the latter type of provision is more likely to be found to have a foreign policy purpose—a primary motive of changing or criticizing the behavior of certain countries.

Legislators may also attempt to disguise their purpose as protecting the moral or psychological health of their constituents from the damage that would be caused by procuring from (or investing in) companies active in a country with a poor human rights record. But courts have not accepted such arguments in the context of extraterritorial legislation and are unlikely to do so in the context of dormant

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<sup>255</sup> See Vasquez, *supra* note 15, at 1262.

<sup>256</sup> For an example of a court checking to ensure a generally applicable statute is not in fact being used to target a particular country, see *North American Salt Co. v. Ohio Department of Transportation*, 701 N.E.2d 454, 462 (Ohio Ct. App. 1997). The court found that the Ohio law and regulations

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. Nor is there any evidence in the record that suggests that these provisions have been selectively applied to goods mined or produced in Canada. As a result, we are unable to find that [the Ohio laws and regulations] have any more than an indirect or incidental effect upon the nation’s foreign affairs.

*Id.* For those familiar with subsidy rules in the WTO system, one might wish to analogize to the concept of de facto specificity (e.g., where a subsidy is generally available under neutral criteria but only given to or utilized by selected companies or industries).

foreign affairs doctrine decisions.<sup>257</sup> Admittedly, there will be close calls, and states may make a significant attempt to hide purpose. For example, one could envision a divestment statute that calls upon fund administrators to divest from any excessively risky investments. The fund administrator determines that companies active in a particular foreign country with a terrible record on human rights are particularly risky investments since they might become subject to consumer boycotts. Alternatively, those companies' assets could be viewed as particularly subject to political risk because, for example, the regime may grow weary of a foreign presence. If the fund administrator only divests from companies active in that particular foreign country, we may have a situation where it must be determined if the divestment statute as applied runs afoul of the dormant foreign affairs doctrine with purpose review. It is, however, very likely that the fund administrator will have a series of risk calculations and projections exclusively based on the financial impact of various investments and thus be able to demonstrate alternative support for such a decision. The argument is not that there will never be close calls under a purpose-based test but rather that close calls are likely to be less frequent than under the other tests.

Other concerns expressed with respect to purpose review in the context of the dormant Commerce Clause are also likely to be less prevalent with regard to the dormant foreign affairs doctrine. For example, it is hard to imagine a particular piece of legislation being kept in place for a foreign policy purpose, although not originally enacted for such a purpose, in the context of the dormant foreign affairs doctrine. Similarly, it seems that judges should be less timid about concluding that state legislators have enacted legislation (or state executive branch officials have taken certain actions) for a foreign policy purpose than a protectionist purpose.<sup>258</sup> A court finding that a state has acted with a foreign policy purpose is less directly offensive to other states in the nation than a finding that the state acted with a protectionist purpose.

Purpose review also fits the competence of judges better than the other two tests in the context of foreign affairs. It is hard to argue

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<sup>257</sup> See Spiro, *supra* note 222, at 834 (claiming that recognition of a state's moral interest as legitimate in the dormant Foreign Commerce Clause context would be unprecedented). The Maryland Court of Appeals, however, did accept such an interest in its review of the City of Baltimore's divestment statute in the mid-1980s. See *Bd. of Trs. of the Emps.' Ret. Sys. v. Mayor of Baltimore*, 562 A.2d. 720, 746 (Md. 1989).

<sup>258</sup> See Regan, *supra* note 34, at 1215 (suggesting that courts are reluctant to find a protectionist purpose).

that U.S. judges are somehow less adept at fleshing out legislative purpose vis-à-vis their counterparts in other nations. In both Australia and Canada, judges undertake the task of characterizing a particular law as one either dealing with foreign affairs or one dealing with a matter of state or provincial concern.<sup>259</sup> A central consideration in the characterization is the purpose of the law or, in other words, the object the law seeks to achieve.<sup>260</sup> This is normal, everyday fare for Australian and Canadian judges. U.S. judges are no less able to flesh out purpose and do so in many contexts outside the dormant foreign affairs doctrine.<sup>261</sup> Additionally, a purpose-based test is also likely to achieve more consistent results among lower court judges and provide the best guidance to state government officials.<sup>262</sup>

An examination of lower federal court and state court decisions in the post-*Zschernig* (1968) and pre-*Crosby* (2001) era reveals a significant number of lower courts paying fealty to the threshold-effects test but prominently adding purpose review as a sub-factor or an independent test as well. In *Tayyari v. New Mexico State University*, the federal district court for New Mexico considered a challenge to a university board of regent's ban on Iranian students enrolling during the Iranian Hostages Crises.<sup>263</sup> The court struck down the board of regent's measure, in part relying on the ban's purpose: "[The Board of] Regents' motion is directed at one nation, Iran. Their purpose was to make a political statement about the hostage situation in Iran and retaliate against Iranian nationals here."<sup>264</sup> In *Springfield Rare Coin Galleries v. Johnson*, the Illinois Supreme Court considered a dormant foreign affairs challenge to an Illinois law excluding the South African Kruggerand from a tax exemption given to currency from every other country.<sup>265</sup> In striking down the law, the court stated: "[I]n both purpose and effect, the exclusion shares important attributes with the various measures struck down in *Zschernig* [and post-*Zschernig* lower court cases]. . . . In this case we hold only that disapproval of the political and social policies of a foreign nation does not provide a

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<sup>259</sup> See PETER HOGG, CONSTITUTIONAL LAW OF CANADA 15-7 to 15-10 (5th ed. 2007); KEVEN BOOKER, ARTHUR GLASS & ROBERT WATT, FEDERAL CONSTITUTIONAL LAW: AN INTRODUCTION 50 (1994).

<sup>260</sup> See HOGG, *supra* note 259, at 15-7 to 15-10; see BOOKER, *supra* note 259, at 50.

<sup>261</sup> See Regan, *supra* note 30, at 1145.

<sup>262</sup> On this latter point, see Regan, *supra* note 30, at 1146-47 (arguing that motive review provides the best guidance to state legislators in the context of the dormant Commerce Clause).

<sup>263</sup> 495 F. Supp. 1365, 1368 (D.N.M. 1980).

<sup>264</sup> *Id.* at 1379-80.

<sup>265</sup> 503 N.E.2d 300, 307 (Ill. 1986).

valid basis for a tax classification by this state.”<sup>266</sup> In *National Foreign Trade Council v. Natsios*, the First Circuit invalidated a Massachusetts statute that provided a negative ten percent preference in state procurements against companies active in Burma.<sup>267</sup> The court paid fealty to the threshold-effects test finding that “*Zschernig* stands for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed.”<sup>268</sup> But the first factor the court pointed to in finding the law had more than some incidental or indirect effect on foreign affairs was that the “design and intent of the law [was] to affect the affairs of a foreign country.”<sup>269</sup>

*E. Is Purpose Review Too Weak, Too Strong or Just (About) Right (i.e. Is Purpose Review Revolutionary in Its Consequences)?*

One major concern with adopting purpose review to assess state actions under the dormant foreign affairs doctrine is that it will capture too many state actions. In short, there is some concern that purpose review is too harsh, particularly with respect to non-binding resolutions. But purpose review allows state actions that affect foreign policy or foreign countries to escape condemnation provided that the actions do not have a foreign policy purpose. Thus, some might alternatively argue that this makes purpose review too weak for the dormant foreign affairs doctrine. In responding to arguments that purpose review is either a too aggressive or too lenient test under the doctrine, one must begin by again recognizing and acknowledging that purpose is linked to a certain extent with effects. Effects may be a small part of the evidence assessed in searching for purpose. Nonetheless, the text and structure of enactments will probably be sufficient in most cases to assess purpose, particularly the singling out a particular country or group of countries in the legislation or action. As already mentioned, legislation passed with the purpose of changing or criticizing the policies of a foreign government is more likely to have effects on U.S. foreign policy or foreign countries than some measure whose primary purpose is not to change or criticize a foreign government’s behavior.<sup>270</sup> In most cases where a foreign policy purpose is found, effects on U.S. foreign policy or the foreign country will also be found.

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<sup>266</sup> *Id.*

<sup>267</sup> 181 F.3d 38, 46 (1st Cir. 1999).

<sup>268</sup> *Id.* at 52.

<sup>269</sup> *Id.* at 53.

<sup>270</sup> See discussion *supra* Part IV.D.3.

But what about cases in which purpose is present but substantial effects are not, or a case where substantial effects are present but purpose is not? As to the latter, which I would consider a rarer state of affairs than the former, federal government preemption is always available. Since it is rare, the “overburdened policing” concern is not as significant. Additionally, the failure of the dormant foreign affairs doctrine to capture state actions in this category is not troublesome because a state legislature is not likely to have any notice or reasonable means of assessing such effects in advance. As to the former category, where purpose is present but effects are not, a measure that is essentially ineffectual will be involved, such as a non-binding resolution.

To further explore this problem, it is appropriate to contrast the Massachusetts Burma law imposing a negative ten percent preference in the procurement bidding process against companies active in Burma with the following hypothetical non-binding resolution passed by the Massachusetts legislature:

Be it resolved:

The state of Massachusetts deplores the human rights situation in Burma. It believes sanctions should be imposed on the SLORC.

This resolution shall be transmitted to U.S. representatives and senators serving the state of Massachusetts by the Governor.

Under a threshold-effects test, a procurement sanctions law is more likely to be invalidated than a non-binding resolution. Under purpose review, it appears at first glance that both types of laws will be held unconstitutional. It is important to remember, however, that the primary purpose behind the law must be a foreign policy purpose; that is, a primary purpose to change or criticize the behavior or a policy of a foreign nation.

It could be argued that the primary purpose behind the resolution is to voice the opinion of the Massachusetts State Legislature to the federal government. Perhaps this is drawing too fine of a line, particularly given that state laws sanctioning companies active (in trade or investment terms) with a rogue foreign country ultimately are designed to change or criticize the targeted government’s behavior. One could certainly argue that the ultimate purpose is to change the policy of the Burmese government although the intermediate purpose is somewhat different— namely, to have the federal government enact a stronger policy towards Burma. Similarly, state and local actions such as naming a street after a famous dissident in a

foreign country,<sup>271</sup> or establishing sister state or sister city relationships,<sup>272</sup> or even sending humanitarian aid<sup>273</sup> would all be upheld under a purpose-based test since one could likely successfully argue that the *primary* purpose of such laws is not to change or criticize the policies or behavior of a foreign government. Street naming ordinances recognize efforts of courageous individuals, sister city/state relationships primarily are intended to enhance cultural and economic ties of private actors in the sister communities,<sup>274</sup> and sending aid is humanitarian in nature with the purpose to alleviate suffering. If one is dissatisfied with making these types of distinctions among purposes or believes that deciding upon a primary purpose is simply too close to call, then one could consider limiting the test in four other possible ways.

First, a dormant foreign affairs doctrine with a purpose-based test can be respectful of historical practice. For example, there is significant historical support for allowing “sense of” resolutions since such resolutions date at least as far back as the turn of the Nineteenth Century.<sup>275</sup> Thus, the dormant foreign affairs doctrine with a pur-

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<sup>271</sup> See *Opusunju v. Guliani*, 669 N.Y.S.2d 156, 159 (N.Y. Sup. Ct. 1997).

Petitioners have made no reasonable showing that the naming of the street corner will have more than ‘some incidental or indirect effect,’ if any, on foreign affairs, that would intrude unconstitutionally on the exclusive federal powers of the United States . . . . The name ‘Kudirat Abiola Corner’ honors and commemorates a slain Nigerian woman whose husband, a dissident, is jailed in Nigeria. This cannot reasonably be deemed to be New York City ‘establish[ing] its own foreign policy,’ as petitioners argue.

*Id.* (internal citations omitted).

<sup>272</sup> See, e.g., *Bilder*, *supra* note 34, at 822 (noting that over 830 cities and municipal governments have established sister-city relationships with over 1,270 cities in 90 countries).

<sup>273</sup> In the 1980s, Burlington, Vermont sent 560 tons of humanitarian goods, including medicine, to its sister city in Nicaragua. See Michael Shuman, *Dateline Mainstreet: Local Foreign Policies*, 65 FOREIGN POL’Y 154, 161 (1986-1987).

<sup>274</sup> See, e.g., *Fry*, *supra* note 1, at 286; see also *Kline*, *supra* note 2, at 113 (noting that in the 1980s, political objectives emerged in sister-city relationships established between U.S. cities and communities in El Salvador, Nicaragua, and Palestine).

<sup>275</sup> For a brief description of similar “sense of” resolutions at the federal level, see CHRISTOPHER M. DAVIS, CRS REPORT FOR CONGRESS: “SENSE OF” RESOLUTIONS AND PROVISIONS (April 20, 2007), available at <http://www.rules.house.gov/archives/98-825.pdf>.

A “sense of” resolution is not legally binding because it is not presented to the President for his signature. Even if a “sense of” provision is incorporated into a bill that becomes law, such provisions merely express the opinion of Congress or the relevant chamber. They have no formal effect on public policy and are not considered law.

*Id.* at 1. For examples of modern resolutions, see *Robinson*, *supra* note 74, at 707–09.



pose-based test need not interfere with the transmission of views from state governments to the federal government via non-binding resolution.<sup>276</sup> Although individual politicians could transmit such views, there may be benefits to allowing formal transmission.<sup>277</sup> It is, however, important to keep in mind that there are some state constitutional and statutory restrictions on transmitting state or local views on foreign policy via referendum.<sup>278</sup> As another example, a dormant foreign affairs doctrine with a purpose-based test, particularly one that accounts for historical practice, need not threaten even the vast majority of state and local government agreements with foreign governments (national or sub-national), some 340 of them over the past fifty years.<sup>279</sup> Agreements between states and foreign governments, either national or sub-national, creating detailed regulatory regimes to force a change in foreign country practices by legally binding agreement would be the most prominent agreements threatened by a purpose-based test. Agreements meeting these criteria, however, are rare, and Congress can use its power to grant approval to save them from the dormant foreign affairs doctrine should it so desire.<sup>280</sup> Most of the agreements between states and foreign or foreign sub-national governments simply create cooperation similar to a services contract

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<sup>276</sup> Indeed, such resolutions are unlikely to be challenged in the courts anyway. See Judith Resnick, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 77–78 (2007).

While hortatory resolutions calling for federal legislation are unlikely to be challenged or, if challenged, are likely to be protected by the First Amendment, implementation efforts that impose obligations would not be so shielded. But the courts cannot reach the question without a challenger, and it is a pattern in the case law that most challenges arise because a local action affects the commercial interests of a person or an entity, in some instances of a network of entities.

*Id.*

<sup>277</sup> See Duchacek, *supra* note 1, at 9 (noting that sub-federal lobbying of federal governments has always been consistent with both democratic and federal theory and practice).

<sup>278</sup> See, e.g., *Brant v. Beermann*, 350 N.W.2d 18 (Neb. 1984) (finding that an advisory vote placed should not be placed on the election ballot because it was merely an expression of public opinion); *Fossella v. Dinkins*, 485 N.E.2d 1017 (N.Y. 1985) (affirming a decision to strike a referendum from a ballot, in part, because it was an indirect way to influence public opinion which is against state policy).

<sup>279</sup> For an overview of these agreements, see Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741 (2010). Professor Hollis appears to prefer using a reinvigorated Compact Clause to exert greater control over these state agreements and activities than controlling them through a dormant foreign affairs doctrine. *Id.* at 769.

<sup>280</sup> See discussion *infra* Part VII.

(e.g., bridge building projects or fire fighting plans<sup>281</sup>), announce a common position with information sharing or studies as a follow-up (and therefore involve no criticism or change in behavior unless negotiated for prior to reaching the common position), or establish an ongoing relationship (similar to sister city/sister state arrangements, to advance trade, investment, and tourism opportunities).<sup>282</sup> Few of these types of agreements would appear to involve a *primary* purpose of the state to change or criticize the behavior of a foreign government, either national or sub-national. They are also unlikely to create more than some incidental or indirect effect on U.S. foreign relations. Again, even if one finds these distinctions among purposes too difficult or arbitrary, as with non-binding resolutions, the long history of these (mostly) non-legally binding agreements can be respected when applying the dormant foreign affairs doctrine. The dormant foreign affairs doctrine with a purpose-based test could, of course, remain a doctrinal tool used to ensure states do not become overzealous in using these agreements in a manner deviating from historical practice, although more robust regulation under the Compact Clause may be preferable in any event.<sup>283</sup>

A second way to possibly protect non-binding resolutions from a purpose-based test would be to only capture state measures that employ traditional tools of foreign policy. Trade and investment sanctions legislation would clearly meet this “traditional tools” test. The question is whether non-binding resolutions would be caught within a “traditional tools” test. Diplomatic notes transmitted to a foreign government or the support of non-binding resolutions within international organizations might be considered “traditional tools” of foreign policy. But internal resolutions of a federal agency, or congressional committee, or a political party’s platform are not tools of foreign policy, and state resolutions are more analogous to such resolutions. Of course, state agreements with foreign governments, although mostly representing political commitments at best, would still

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<sup>281</sup> Agreements on bridge building and fire fighting cooperation have garnered congressional approval. See Hollis, *supra* note 279, at 742 nn.10–12.

<sup>282</sup> See *id.* at 755–56, 768–69 (listing the major types/categories of agreements and noting such agreements are most commonly political commitments without legal effect or institutions).

<sup>283</sup> See *id.* at 805 (admitting that the dormant foreign affairs doctrine “remains” a control device “on the table” but preferring more robust regulation by federal actors under the Compact Clause). It may well be that a reinvigorated Compact Clause is the best way to treat state agreements with foreign governments (both national and sub-national) given that we typically think that the dormant foreign affairs doctrine applies to activities beyond those express limitation on the states in Article I, Section 10 of the Constitution.

be captured under a “traditional tools” test. Moreover, problems with a “traditional tools” test could arise because tools can change over time, and lower courts struggled with the “traditional governmental functions” test that was used in the context of limits on the scope of the federal government’s Commerce Clause powers in the late 1970s and early 1980s.<sup>284</sup>

A third possibility to try to limit difficult determinations concerning a state action’s purpose through additional filters might be to seek to limit only those state foreign policy measures having legal effect. This limitation, however, may be overly broad or too narrow depending on how the force of law is defined. For instance, the hypothetical non-binding resolution above directs the governor to transmit the message to the state’s representatives in Congress. It is unclear whether this law binds the Governor and thus has legal force. But if this provision were excluded, then there would be no legal effect present, and the issue could be easily avoided. This limiting factor would also be an alternative or additional way to ensure that the vast majority of state agreements with foreign governments, either national or sub-national, are not implicated by the dormant foreign affairs doctrine.

Fourth, and finally, in employing a purpose-based test, courts can be respectful of prior court precedent and rulings concerning particular state laws. For example, as discussed earlier, pure reciprocity requirements have been upheld in a variety of contexts and one could always argue the purpose of such reciprocity requirements is just that—reciprocity—rather than an attempt to change or criticize the behavior of the foreign government in failing to allow U.S. nationals to inherit property or engage in certain professions in the foreign country. At least three of these four refinements or additional filters (historical practice, legal effect, and respect for precedent) seem quite workable should courts struggle in close cases in determining a state action’s primary purpose.

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<sup>284</sup> See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 849–52 (1976) (“We hold that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress.”), *overruled by* *San Antonio Metro. Auth. v. Garcia*, 469 U.S. 528, 546–47 (1985) (“We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is ‘integral’ or ‘traditional.’ Any such rule leads to inconsistent results.”).

## V. A MARKET-PARTICIPANT EXCEPTION TO THE DORMANT FOREIGN AFFAIRS DOCTRINE?

The Supreme Court has recognized a market-participant exception to dormant Commerce Clause restraints on states.<sup>285</sup> Specifically, when a state acts as a market participant, rather than a market regulator, it is exempted from the constraints of the doctrine.<sup>286</sup> The exception primarily creates carve-outs for state purchases of goods and services.<sup>287</sup> In the past several years, the Roberts' Court has created an additional "state self-promotion" exception that allows states to favor an in-state public entity above both in-state and out-of-state private entities, and three justices have indicated a willingness to expand the market-participant exception to cases where state regulation is accompanied by state market participation.<sup>288</sup>

The Court has never formally decided whether the market-participant exception applies to the dormant *Foreign* Commerce Clause much less the dormant foreign affairs doctrine. The Court, however, has strongly hinted,<sup>289</sup> and several lower courts have held,<sup>290</sup>

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<sup>285</sup> See, e.g., *White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 206–10 (1983) ("Nothing in the purposes animating the Commerce Clause prohibits a state, in the absence of congressional action, from participating in the market."); *Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause."); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 807–10 (1976) ("Nothing in the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.").

<sup>286</sup> See *Reeves, Inc.*, 447 U.S. at 439.

<sup>287</sup> I will not address a separate exception under the dormant Commerce Clause for direct payment subsidies in this Article. Certain direct subsidies, however, will not survive dormant Commerce Clause challenge. See, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (holding that a direct payment subsidy to in-state milk producers was invalid because it was funded through tax on all retail milk sold, rather than general treasury funds).

<sup>288</sup> See Dan T. Coenen, *Where United Haulers May Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 541 (2009) [hereinafter Coenen, *United Haulers*] (arguing that this new exception may have significant consequences and application in various factual contexts); Dan T. Coenen, *The Supreme Court's Municipal Bond Decision and the Market-Participant Exception to the Dormant Commerce Clause*, 70 OHIO ST. L.J. 1179, 1185 (2009) [hereinafter Coenen, *Municipal Bond Decision*] (arguing against any such expansion of the market-participant exception for fear it will undermine the purposes of dormant Commerce Clause).

<sup>289</sup> See *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (involving a dormant Foreign Commerce Clause challenge where the Court still examined the state's claim that it was a market participant not a market regulator, implying the exception would be available under the dormant Foreign Commerce Clause). Four

that the exception should exist under the dormant Foreign Commerce Clause. Such a holding is in fact necessary if courts are serious about preserving the exception under the dormant interstate Commerce Clause. If the exception were not recognized in foreign commerce cases, its existence would risk obliteration. This is true because in a global economy most state actions affect both interstate and foreign commerce. A state does not have to specifically target or discriminate against foreign commerce in order to be subject to dormant Foreign Commerce Clause constraints. Indeed, in *South-Central Timber Development, Inc. v. Wunnicke*, the Court subjected a state measure that de facto required in-state processing of raw logs sold by the state to heightened scrutiny under the dormant Foreign Commerce Clause because ten percent of the raw logs subject to the de facto in-state processing requirement were bound for export.<sup>291</sup>

Thus, this Article presumes that the market-participant exception does exist for the dormant Foreign Commerce Clause. Although, as will be explored later, such an exception should only apply to the facial discrimination and balancing tests of the dormant Commerce Clause, and not the additional “one voice” prong.<sup>292</sup> An analysis of the reasons for the market-participant exception in the dormant Commerce Clause context indicates that such an exception should not exist for the dormant foreign affairs doctrine, in spite of a

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years earlier, the Court expressly declined to rule on the issue. *See Reeves*, 447 U.S. at 439 n.9.

<sup>290</sup> *Bd. of Trs. of the Emps.’ Ret. Sys. v. Mayor of Baltimore*, 562 A.2d 720, 750–752 (Md. 1989) (holding that conditions enforced by the city did not “have a substantial regulatory effect outside of the market in which it is participating”); *Carll v. S.C. Jobs-Econ. Dev. Auth.*, 327 S.E.2d 331, 337 (S.C. 1985) (holding that “[t]he Commerce Clause does not prohibit implementation of any portion of this Act because South Carolina is a market participant and is entitled to establish guidelines for its participation regardless of the effect on interstate or foreign commerce”); *K.S.B. Technical Sales Corp. v. N. Jersey Dist. Water Comm’n*, 381 A.2d 774, 787 (N.J. 1977) (upholding state “Buy American Act” under market-participant exception and claiming it would be ironic to hold that as a state became less parochial vis-à-vis a “buy New Jersey” act that a state law becomes invalid under the dormant Commerce Clause). Most commentators have argued that the exception should not apply in the dormant Foreign Commerce Clause context. *See McArdle*, *supra* note 65, at 831; Mendelson, *supra* note 5, at 89. As discussed below, I would find the exception does apply but not to the second additional prong of analysis that occurs under the dormant Foreign Commerce Clause. *See infra* Part V. In essence, it is really the dormant foreign affairs doctrine, and thus should be subsumed within the doctrine.

<sup>291</sup> 467 U.S. 82, 99–100 (1984).

<sup>292</sup> *See infra* Part VI.B.

split among lower courts on this issue.<sup>293</sup> Prior to proceeding to that analysis, two additional points regarding the Supreme Court's dormant Commerce Clause and market-participant exception jurisprudence must be explained. First, it logically follows that if the justifications for the current (narrow) market-participant exception are not supported within the context of the dormant foreign affairs doctrine, neither would any expanded version of such exception be supported. Additionally, it logically follows that the new "state self-promotion" exception should not apply in the context of the dormant foreign affairs doctrine. The state self-promotion exception is based on a "private-gains-centered notion of state protectionism," namely that the anti-protectionism norm of the dormant Commerce Clause allows a state to favor public in-state entities as long as it is not discriminating among private entities from inside and outside the state.<sup>294</sup> The dormant foreign affairs doctrine is not concerned with protectionism so the new effort under the state self-promotion exception to limit the conception of protectionism has no relevance in the context of the dormant foreign affairs doctrine.

#### A. *Textual*

The market-participant exception to the dormant Commerce Clause has a textual basis that is inferred from the grant of power to Congress to "regulate" interstate and foreign commerce.<sup>295</sup> While this grant acts as a limit on state power even when Congress has not spoken, the actual text of the clause suggests it is regulatory activities rather than non-regulatory activities that are exclusive to Congress.<sup>296</sup> No such textual basis exists for establishing a market-participant exception to the dormant foreign affairs doctrine.<sup>297</sup> This is because the dormant foreign affairs doctrine is implied not from a particular clause granting the federal government power to "regulate" foreign

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<sup>293</sup> See *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d. at 748–49 (Md. 1989); See also Price & Hannah, *supra* note 223, at 42 (concluding that the market-participant exception would not be available under a foreign affairs challenge).

<sup>294</sup> See Coenen, *United Haulers*, *supra* note 288, at 545.

<sup>295</sup> See U.S. CONST. art. I, § 8, cl. 3; Daniel T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L.REV. 395, 436–37 (1989) [hereinafter Coenen, *Untangling*].

<sup>296</sup> *Id.*

<sup>297</sup> See Goldsmith, *supra* note 12, at 1639 (stating that "in contrast to treaties, customary international law is not mentioned in either the Supremacy Clause or Article III").

affairs but rather an amalgam of clauses and the structure of the Constitution relating to foreign affairs.<sup>298</sup>

*B. Analogy to a Private Actor in the Market*

The market-participant exception to the dormant Commerce Clause also draws support from analogizing a state participating in the market to a private actor in the market.<sup>299</sup> Private actors can pick and choose to and from whom to buy and sell their goods and services. A private company could choose to buy inputs from only in-state suppliers, or sell its products to only in-state buyers. States, it is argued, should be treated in an “evenhanded” fashion and subject to no greater restraints than private actors.<sup>300</sup>

Private actors will be driven by profit maximization in choosing buyers and sellers. It is possible that a private company might choose to buy from a “higher-priced” in-state supplier rather than a “lower-priced” out-of-state supplier as a profit-maximizing strategy. For example, utilizing in-state suppliers may allow for more long-term reliability in terms of a source of supply or may lead to a higher tax base in the community and thus lower tax rates. It is questionable whether states act on a profit-maximizing rationale; however, one can analogize to a state’s in-state procurement preference (or a subsidy to attract investment) on a revenue-maximization basis. Although a state will pay more for the “higher-cost” in-state goods, the extra employment created may increase the tax base and leave the state treasury better off as a whole.

The merits of such an argument are considerably weakened under the dormant foreign affairs doctrine, however, because the analogy between state and private actors clearly breaks down with regard to participation in foreign affairs. Nonetheless, those sympathetic to state participation in foreign policy often point to the foreign policy influence of large U.S.-based multinational corporations. Since U.S.-based multinational corporations can suffer a reduction in profits to ensure human rights or labor standards are met in foreign countries, why shouldn’t states be allowed to restrict their purchasing on similar foreign policy considerations?

First, it is not as likely that states can justify such actions as revenue-enhancing measures and thus the analogy to private actors seems to wear thin. Chief Executive Officers (CEOs) of corporations are

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<sup>298</sup> See *id.* at 1642.

<sup>299</sup> See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

<sup>300</sup> Coenen, *Untangling*, *supra* note 295, at 421.

charged with maximizing profits and traditionally needed to justify measures meant to encourage human rights in foreign countries in such terms.<sup>301</sup> Naturally, they do not make such explanations public because to do so would negate the positive public relations image sought by taking such steps. Second, and much more importantly, states are in fact far different from private actors, since the Constitution limits governmental power, not private conduct. Indeed, the Supreme Court stated—in discussing a state procurement law sanctioning labor law violators—that “government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints” and “in our system States simply are different from private parties and have a different role to play.”<sup>302</sup> Foreign nations are far more likely to be offended by government as opposed to private actions. Indeed, international law holds federal states responsible for violations of international rules by their sub-federal governments<sup>303</sup> but not for actions taken by private parties unless the government, through acts or omissions, was somehow connected to the private conduct.<sup>304</sup> Thus, the chances for retaliation and unfairness are greater with governmental action. Additionally, the federal government employs traditional foreign policy tools like procurement restrictions.<sup>305</sup> To exempt state spending and state purchasing decisions from the purview of the doctrine would be to exempt traditional tools of foreign policy from the limits of the doctrine.

### C. *Allowing Particular Projects to Go Forward*

Another reason for the market-participant exception to the dormant Commerce Clause is to allow states and localities to meet particular local needs. Without the exception, some have argued that

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<sup>301</sup> See generally Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, available at <http://www.umich.edu/~thecore/doc/Friedman.pdf>. Stakeholder models of corporate governance, questioning this traditional (narrow) duty of corporate chiefs, have recently been revived. For a discussion, see, e.g., Aaron A. Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365, 369-72 (2006).

<sup>302</sup> Wis. Dep't. of Indus., Labor & Human Relations v. Gould, Inc., 475 U.S. 282, 290 (1986).

<sup>303</sup> See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Chap. II, Art. 4, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) available at <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N07/590/90/PDF/N0759090.pdf?OpenElement>.

<sup>304</sup> See G.A. Res. 56/83, *supra* note 303, Art. 8–9.

<sup>305</sup> See WRIGHT, *supra* note 127, at 302–03.



certain projects may not be undertaken at all.<sup>306</sup> In short, if, for example, a state could not require a certain percentage of workers on a project to be local residents, then the project, like the building of a road, would not go forward. This argument, to the extent it has validity, is certainly weaker in the context of state foreign affairs legislation. If a state cannot refuse to buy from a particular rogue foreign country or companies active in that rogue country, it is unlikely to decrease the chances of a project going forward.

*D. Reduced Risk to Constitutional Values*

In the context of the dormant Commerce Clause, it is argued that when a state acts as a market participant and favors its own residents, there is less risk of harm to the unified market intended to be constitutionally established.<sup>307</sup> This is so because other states will see favoritism to in-state residents by another state as less hostile when done through a procurement preference rather than through a tax or regulation.<sup>308</sup> The argument continues that because other states will find such actions less hostile they are less likely to retaliate.<sup>309</sup> It is not necessary here to debate and resolve whether this is indeed an accurate assessment of how other states will view such actions in the dormant interstate Commerce Clause context. It does not appear, however, that a state acting as a market participant in foreign affairs will lessen the risk to the constitutional values at issue under the dormant foreign affairs doctrine. First, the offense or hostility engendered in a foreign nation is not likely to be any less because a state acts as a market participant.<sup>310</sup> This is all the more so because procurement sanctions are, as previously mentioned, traditional tools of foreign policy.<sup>311</sup> Second, the injury to foreign policy is not lessened because such enactments will change the U.S. federal government's chosen manner or degree of pressure or support.<sup>312</sup>

The other argument as to why a reduced risk to Commerce Clause values exists when a state acts as market participant relates to the inherent costliness of such measures.<sup>313</sup> Protectionist procurement preferences are relatively expensive and have a direct link to

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<sup>306</sup> See Regan, *supra* note 30, at 1194.

<sup>307</sup> See Coenen, *Untangling*, *supra* note 295, at 430–35.

<sup>308</sup> See *id.* at 434; Regan, *supra* note 30, at 1194.

<sup>309</sup> See Coenen, *Untangling*, *supra* note 295, at 434; Regan, *supra* note 30, at 1194.

<sup>310</sup> See Spiro, *supra* note 222, at 846.

<sup>311</sup> See WRIGHT, *supra* note 127 at 302–03.

<sup>312</sup> See Spiro, *supra* note 222, at 845–46.

<sup>313</sup> See Coenen, *Untangling*, *supra* note 295, at 434; Regan *supra* note 30, at 1194.

the state treasury.<sup>314</sup> Procurement sanctions for foreign-policy purposes will, however, likely be significantly less expensive than procurement preferences for protectionist purposes.<sup>315</sup> The reason is simple: a procurement preference targeted at suppliers from a particular nation, or even suppliers active in a particular foreign nation, will exclude less low-cost bidders than a preference that discriminates against all foreign bidders, as in the case of state “Buy-American” legislation.

E. “Sowing and Reaping” or Investment Capture

Others have suggested a “sow and reap” rationale to justify the market-participant exception to the dormant Commerce Clause.<sup>316</sup> Put in other terms, it is argued that in-state residents should be able to capture the benefits of their investments (i.e., programs created through their tax payments) to the exclusion of out-of-state persons, at least in some instances.<sup>317</sup> The argument is that if a state’s residents have invested in a particular enterprise, then they should be able to reap the rewards.<sup>318</sup> For example, in *Reeves, Inc. v. Stake*, the citizens of South Dakota, through their tax payments, invested in the creation of a cement plant.<sup>319</sup> Thus, the citizens should be able to choose to reap the rewards, namely be “first in line” to purchase cement from the plant during times of shortage. The “sow and reap” rationale involves a distinction made between investors (i.e., residents) and non-investors (i.e., non-residents) in a particular enterprise. Using the “sow and reap” rationale for a distinction between buyers or sellers of goods and services based on a foreign-policy purpose makes little sense. Moreover, some foreign policy legislation prevents those who have “sowed” from “reaping.” For instance, Massachusetts Burma law denied procurement opportunities to Massachusetts firms active in Burma.<sup>320</sup>

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<sup>314</sup> See *id.*

<sup>315</sup> See Regan *supra* note 30, at 1193–95.

<sup>316</sup> See Coenen, *Untangling*, *supra* note 295, at 421–26.

<sup>317</sup> See Norman R. Williams, *Taking Care of Ourselves: State Citizenship, the Market, and the State*, 69 OHIO ST. L.J. 469, 469 (2008).

<sup>318</sup> See Coenen, *Untangling*, *supra* note 295, at 423; Jonathan D. Varat, *State “Citizenship” and Interstate Equality*, 48 U. CHI. L. REV. 487, 523 (1981).

<sup>319</sup> 447 U.S. 429, 430 (1980).

<sup>320</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366 (2000).

F. *The Inapplicability of the Market-Participant Exception in Numerous Cases*

Even if the market-participant exception were theoretically available under the dormant foreign affairs doctrine, it is unlikely that many state foreign policy actions would fit within its confines. In *South-Central Timber Development, Inc. v. Wunnicke*, Alaska only sold timber from state lands to those buyers willing to agree by contract to process the timber in-state.<sup>321</sup> Alaska claimed that as a seller and as a market participant, it could choose to whom to sell, and thus, the measure was valid under dormant Commerce Clause analysis.<sup>322</sup> The Court, however, invalidated the provision, holding that the market-participant exception only allows a state “to impose burdens on commerce within the market in which it is a participant.”<sup>323</sup> The market-participant exception did not allow the state to “impose conditions . . . that have a substantial regulatory effect outside . . . [the] market.”<sup>324</sup> Alaska, the Court found, was “attempting to govern the private, separate economic relationships of its trading partners.”<sup>325</sup> Thus, for example, it is likely that the Massachusetts Burma law would not fit within the market-participant exception’s confines because even if the exception were theoretically available under the dormant foreign affairs doctrine, Massachusetts was seeking to control the relations and transactions of those companies from whom they considered purchasing.<sup>326</sup> Indeed, in *South-Central Timber*, the Court noted, referring to a previous case, that a state could not impose a residency requirement with respect to the work force of all projects (both public and private) of a contractor doing business with a state.<sup>327</sup> It might be possible, however, for Massachusetts to reject buying Burmese-made goods under the market-participant exception since the state would not be imposing restrictions outside of the particular transaction involved. Additionally, divestment statutes may fall within the exception; the state has a continuing relationship with those companies in which its pension fund invests, and once it divests and no longer has a relationship, it no longer cares whether the company is

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<sup>321</sup> *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

<sup>322</sup> *Id.* at 95.

<sup>323</sup> *Id.* at 97.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 99.

<sup>326</sup> See *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 63 (1st Cir. 2001).

<sup>327</sup> *South Central Timber*, 467 U.S. at 97–98, n.10.

active in the targeted country.<sup>328</sup> Thus, rejection of the market-participant exception under the dormant foreign affairs doctrine is still relevant to some possible state-foreign-policy measures.

#### VI. FURTHER DISTINGUISHING THE DORMANT FOREIGN AFFAIRS DOCTRINE FROM THE DORMANT FOREIGN COMMERCE CLAUSE

As discussed briefly in Part V, scholars are split as to what type of analysis courts are or should be undertaking in the dormant Commerce Clause context.<sup>329</sup> The language of courts' opinions seems to indicate that courts are balancing the effect of the state measure on commerce with the achievement of a legitimate local purpose.<sup>330</sup> There is an exception for facially discriminatory measures which are virtually per se illegal,<sup>331</sup> although even in such cases a particularly high showing of the need for the discrimination to achieve an important legitimate local purpose might save the law.<sup>332</sup> In the course of the analysis, courts ask whether the state could achieve its legitimate objective through a less trade-restrictive means.<sup>333</sup> This question indicates that courts may actually be attempting to flesh-out a protectionist motive. If a state can achieve its purported objective by a less trade-restrictive means, then the state probably has a different or additional motive, namely protectionism. Those scholars supporting purpose review believe that courts are striking down state actions that have a primary purpose of protectionism or, in certain cases, isolating out-of-state interests, even though not competitors.<sup>334</sup> How might the Massachusetts Burma law fare under the dormant Commerce Clause with a balancing or purpose-review test? The Massachusetts Burma law would survive purpose-review scrutiny because the purpose of the

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<sup>328</sup> *Bd. of Trs. of the Emps.' Ret. Sys. v. Mayor of Baltimore*, 562 A.2d. 720, 750–52 (Md. 1989).

<sup>329</sup> *See supra* Part V.

<sup>330</sup> *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”).

<sup>331</sup> *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“Where simple economic protectionism is effected by state legislation, [there exists] a virtual per se rule of invalidity. . .”).

<sup>332</sup> *See Maine v. Taylor*, 477 U.S. 131 148-50 (1986) (upholding a state law banning the import of live baitfish, and noting that “Maine’s fisheries are unique and unusually fragile.”).

<sup>333</sup> *See, e.g., id.* at 146.

<sup>334</sup> *See Regan, supra* note 30, at 1143.

law is not protectionism and it does not isolate out-of-state interests.<sup>335</sup> Indeed, the law applies to both Massachusetts companies active in Burma and non-Massachusetts companies.<sup>336</sup> Under a balancing analysis, however, the law may very well be invalidated. While the extent of the law's effects on commerce may be debated, the objective the law seeks to achieve is not a legitimate one for the state.<sup>337</sup> But even under a balancing analysis, the dormant foreign affairs doctrine is not superfluous because a portion of the law may be protected by the market-participant exception to the dormant Commerce Clause. Specifically, Massachusetts could refuse to purchase Burmese-made goods. The discussion above has ignored the additional analysis that Supreme Court jurisprudence requires for state actions affecting foreign commerce. Yet, this is the most important part of the comparison between the two constraints because the dormant foreign affairs doctrine is most analogous to one of the additional inquiries the court undertakes when state action affects foreign commerce, as opposed to simply interstate commerce.<sup>338</sup>

As described earlier, when foreign commerce is implicated by a state measure, the Supreme Court has launched two additional inquiries.<sup>339</sup> First, in tax-related measures, the Court has asked whether the state action risks multiple taxation.<sup>340</sup> Second, the Court queries whether the state action interferes with federal uniformity in an area where federal uniformity is essential.<sup>341</sup> This second additional prong of analysis is paraphrased by the Court as a question of whether the state prevented the federal government from "speaking with one voice."<sup>342</sup> If any part of the dormant Commerce Clause analysis is analogous to the dormant foreign affairs doctrine, it is this second prong of the additional tests under the dormant Foreign Commerce Clause.<sup>343</sup> Indeed, several lower courts have acknowledged the similarity between the two inquiries and even transferred results from one

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<sup>335</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 367–68 (2000) (describing the Massachusetts law).

<sup>336</sup> *Id.* at 366.

<sup>337</sup> See *id.* at 370; see also *supra* Part IV.D.2.

<sup>338</sup> Compare *Zschernig v. Miller*, 389 U.S. 429 (1968), with *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434 (1979); see *supra* Part IV.C. and *infra* Part VI.A.

<sup>339</sup> *Japan Line*, 441 U.S. at 451; see also *supra* notes 237–41 and accompanying text.

<sup>340</sup> *Japan Line*, 441 U.S. at 451.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> See, e.g., *Spiro, States and Immigration*, *supra* note 221, at 164; *Goldsmith, supra* note 12, at 1637.

context to the other.<sup>344</sup> But, of course, the states can never prevent the federal government from “speaking with one voice.”<sup>345</sup> The problem with leaving the control of state-level foreign policy to federal preemption is that the states can prevent the federal government from speaking with “no voice” or a “quiet voice,” or more generally, change the voice that the federal government would otherwise choose. If the federal government, for example, chooses quiet diplomacy to address a situation, then a state enactment sanctioning the foreign government, if not challenged under a dormant doctrine, leads the federal government into a Hobbesian choice: say nothing about the state law and thus risk undermining its preferred strategy of quiet diplomacy, or preempt the state law and thus risk sending a message that the foreign government’s behavior is not so objectionable. Therefore, the “one voice” paraphrase is inappropriate. So what really lies beneath this second prong, and what are its implications for the dormant foreign affairs doctrine? An examination of the line of Supreme Court dormant Foreign Commerce Clause cases is necessary to answer these questions.

A. *Examining the Line of Supreme Court Dormant Foreign Commerce Clause Cases*

The 1979 case, *Japan Line, Ltd. v. County of Los Angeles*,<sup>346</sup> was the first Supreme Court case that enunciated the additional prongs of the analysis when a state measure implicates foreign commerce. *Japan Line* involved a challenge to a California tax on cargo containers that would have disturbed an almost-uniform international custom.<sup>347</sup> The custom almost assuredly did not rise to the level of a customary international law rule, perhaps due to a lack of *opinio juris*.<sup>348</sup> The Court believed retaliation would be the inevitable result of allowing the California tax.<sup>349</sup> Moreover, the nation as a whole would feel such retaliation.<sup>350</sup> Additionally, “if other States follow[ed] California’s exam-

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<sup>344</sup> See *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d. 903, 912–13 (3d Cir. 1990) (keeping the two doctrines separate in its opinion but using a similar analysis for each); *Bd. of Trs. of the Emps.’ Ret. Sys. v. Mayor of Baltimore*, 562 A.2d 720, 752 (Md. 1989) (“[T]he concerns which underlie the Foreign Commerce Clause are closely related to concerns underlying the limits on a state’s authority to affect foreign policy.”).

<sup>345</sup> See discussion *infra* Part VIII.A.

<sup>346</sup> 441 U.S. 434 (1979).

<sup>347</sup> See *id.* at 452–53.

<sup>348</sup> See *id.* at 438.

<sup>349</sup> *Id.* at 453.

<sup>350</sup> *Id.*

ple, . . . foreign-owned containers w[ould] be subjected to various degrees of multiple taxation, depending on which American ports they enter.”<sup>351</sup> The Court believed this “would make ‘speaking with one voice’ impossible.”<sup>352</sup>

In the 1983 case, *Container Corporation of America v. Franchise Tax Board*, a domestic corporation with foreign subsidiaries challenged California’s system of unitary taxation.<sup>353</sup> California’s unitary taxation scheme had led to actual multiple-taxation as in *Japan Line*.<sup>354</sup> Nonetheless, the Court, in a 6-3 ruling, found that the taxation scheme did not violate the dormant Foreign Commerce Clause.<sup>355</sup> Based on prior rulings, the Court explicitly found that the tax satisfied the tests applied to interstate commerce.<sup>356</sup> After this initial finding, the Court proceeded to examine the two additional prongs of analysis laid out in *Japan Line*.<sup>357</sup> With respect to the second prong of *Japan Line*, the Court iterated the two formulations of the tests: (1) whether the state action “may impair federal uniformity in an area where federal uniformity is essential;” and (2) whether it “prevents the Federal Government from ‘speaking with one voice’ in international trade.”<sup>358</sup> The Court held that “a state tax at variance with federal policy will violate the ‘one voice’ standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive.”<sup>359</sup> It noted that the latter half of this test is essentially a preemption analysis.<sup>360</sup> The Court then found that “[t]he most obvious foreign policy implication of a state tax is the threat it might pose of offending . . . foreign trading partners and lead[ing] them to retaliate against the Nation as a whole.”<sup>361</sup> The Court acknowledged that it had little competence in determining when a foreign nation

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<sup>351</sup> *Id.*

<sup>352</sup> *Japan Line*, 441 U.S. at 453 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

<sup>353</sup> 463 U.S. 159, 163 (1983).

<sup>354</sup> *Id.* at 187 (“[T]he tax imposed here, like the tax imposed in *Japan Line*, has resulted in actual double taxation.”).

<sup>355</sup> *Id.* at 197.

<sup>356</sup> *Id.* at 169–84.

<sup>357</sup> *Id.* at 185 (“Given that [unitary business here] is international, however, we must subject this case to the additional scrutiny required by the Foreign Commerce Clause.”); *see also id.* at 185–97 (outlining the Court’s examination of the additional prongs).

<sup>358</sup> *Id.* at 193 (citations omitted).

<sup>359</sup> *Container Corp.*, 463 U.S. at 194.

<sup>360</sup> *Id.* (“The second of these considerations is, of course, essentially a species of pre-emption analysis.”).

<sup>361</sup> *Id.*

would be offended by particular acts and “even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.”<sup>362</sup> Nevertheless, the Court attempted to “develop objective standards that reflect very general observations about the imperatives of international trade and international relations.”<sup>363</sup> Ultimately, the Court did not develop general objective considerations for determining the risks of retaliation and instead identified “three distinct factors . . . [which] weigh[ed] strongly against the conclusion that the tax imposed by California might justifiably lead to significant foreign retaliation.”<sup>364</sup> First, the Court noted that the tax at issue did not create an automatic asymmetry.<sup>365</sup> Second, the tax was imposed not on a foreign entity but rather a domestic entity.<sup>366</sup> Third, foreign nations would have less of an interest in the tax burden of domestic corporations than corporations based in their particular nations.<sup>367</sup> Further, foreign nations would realize the domestic entity was amenable to be taxed in California and the amount of the tax it paid was more a function of the tax rate than its allocation method.<sup>368</sup> While the Court did note that a state tax might have foreign policy implications other than the threat of retaliation,<sup>369</sup> it did not discuss any other potential implications and instead observed that unlike in *Japan Line*, the executive branch had decided not to file an amicus brief in opposition to the state tax.<sup>370</sup> The Court made clear that the lack of a submission was not dispositive, but it did “suggest that the foreign policy of the United States—whose nuances . . . are much more the province of the Executive Branch and Congress than of this court—is not seriously threatened by California’s unitary taxation scheme.”<sup>371</sup>

There are several important conclusions to draw from these first two Supreme Court cases addressing the second additional prong of the dormant Foreign Commerce Clause. First, the Court appears to establish a threshold-effects test under prong two of *Japan Line* that is

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<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 194.

<sup>365</sup> *Container Corp.*, 463 U.S. at 194–95.

<sup>366</sup> *Id.* at 195.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 195.

<sup>371</sup> *Container Corp.*, 463 U.S. at 196.



arguably similar to the test established in *Zschernig*.<sup>372</sup> Second, despite establishing such a standard, the Court admitted that it was ill-suited to perform an analysis of the standard, and, in fact, was unable to develop any objective criteria other than the “automatic asymmetry” standard that can be applied to the limited field of state taxes.<sup>373</sup> Third, while the Court preserves its independence in making judgments on constitutional questions, as a result of its lack of competence, the Court is predisposed to give weight to the views of the executive branch expressed in amicus briefs.<sup>374</sup> In short, the Court’s ability to analyze prong two of *Japan Line* suffers from many of the same difficulties that led to this article’s conclusion rejecting a threshold-effects test for the dormant foreign affairs doctrine. These concerns are heightened in subsequent cases.

*Wardair Canada Inc. v. Florida Department of Revenue* followed *Container Corp.* in the line of Supreme Court dormant Foreign Commerce Clause cases.<sup>375</sup> *Wardair* involved a challenge by a Canadian airline company to a Florida state tax on the sale of aviation fuel within Florida.<sup>376</sup> The tax at issue applied even if the air carrier used the fuel to fly outside the state.<sup>377</sup> The Canadian charter airline challenging the tax conceded that the tax met the all the dormant interstate Commerce Clause tests.<sup>378</sup> The airline also conceded that the state tax did not violate prong one of *Japan Line* because there was no risk of multiple taxation since the tax was imposed on a discrete transaction occurring within Florida.<sup>379</sup> Instead, the airline’s claim relied exclusively on prong two of *Japan Line* and argued that the tax threat-

<sup>372</sup> See *supra* notes 358–59 and accompanying text.

<sup>373</sup> *Container Corp.*, 463 U.S. at 194.

The most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the nation as a whole. In considering this issue, however, we are faced with a distinct problem. This Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.

*Id.* (internal citations omitted); see also *Japan Line*, 441 U.S. at 453.

<sup>374</sup> *Container Corp.*, 463 U.S. at 196.

<sup>375</sup> 477 U.S. 1 (1986).

<sup>376</sup> *Id.* at 3.

<sup>377</sup> *Id.* at 4.

<sup>378</sup> *Id.* at 8 (“[I]t is not disputed that if this case did not involve foreign commerce, the Florida tax on the sale of aviation fuel would not contravene the Commerce Clause.”).

<sup>379</sup> *Id.* at 9.

ened the ability of the federal government to “speak with one voice.”<sup>380</sup> The airline argued that “a Resolution . . . [of] an international organization of which the United States is a member . . . [and] more 70 bilateral agreements, including the U.S.-Canadian Agreement,” established a federal policy of reciprocal-tax exemption for aviation fuel.<sup>381</sup> Disagreeing with the airline, the Court first noted that the multilateral convention and the bilateral treaties did not prohibit the taxation of the sale of fuel by political subdivisions.<sup>382</sup> The resolution was more broadly worded than the treaties and it sought to prohibit sales taxes by “any taxing authority within a [nation].”<sup>383</sup> The Court determined, however, that since the United States never formally agreed to the resolution, neither approving it as a treaty nor implementing the resolution through legislation, it was “untenable to assert . . . that th[e] resolution represents a policy of the United States, as opposed to a policy of an organization of which the United States is one of many members.”<sup>384</sup> Finding the resolution inapplicable, the Court thus found through negative implication in the conventions that the “United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel.”<sup>385</sup> Indeed, the Court stated that “the facts presented by this case show that the Federal Government has affirmatively decided to permit the States to impose these sales taxes on aviation fuel.”<sup>386</sup> The Court continued:

Accordingly, there is no need for us to consider, and nothing in this opinion should be understood to address, whether, in the absence of these international agreements, the Foreign Commerce Clause would invalidate Florida’s tax.

. . . [Nothing in *Japan Line’s* prong two] suggest[s] . . . that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.<sup>387</sup>

Justice Blackmun argued in dissent that the negative implication relied upon by the Court was not enough to remove a state tax or regulation from dormant Commerce Clause scrutiny.<sup>388</sup> Previous cas-

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<sup>380</sup> *Id.*

<sup>381</sup> *Wardair*, 477 U.S. at 10.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.* at 11.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 12.

<sup>386</sup> *Id.*

<sup>387</sup> *Wardair*, 477 U.S. at 12–13.

<sup>388</sup> *Id.* at 18–19 (Blackmun, J., dissenting).

es required that the intent of the federal government to permit state activity “must be unmistakably clear.”<sup>389</sup> Thus, *Wardair* signals a difference between the dormant interstate Commerce Clause and the dormant Foreign Commerce Clause’s additional prongs. In the former, the approval of the federal government must be unmistakably clear; by contrast, inferred acquiescence in the latter is enough to remove a state measure from scrutiny. But this inferred acquiescence is only relevant once it has been determined that the state measure satisfies the tests under the dormant interstate Commerce Clause. Once these tests are satisfied, acquiescence is enough because the need for uniformity becomes the sole, or key, consideration. The Court cannot demand uniformity between a state’s actions and foreign nation’s actions where the federal government has considered the need for uniformity and failed to require it or adopted instruments in which it could have preempted state action and failed to do so. It is important to emphasize the strength of the negative implication in *Wardair*, which involved over seventy conventions—including one between Canada and the United States—that did not prohibit the state taxation in spite of an awareness that such taxes were being imposed.

Justice Blackmun also stated in his dissent that “Florida’s actions may also hamper the United States’ position in negotiations designed to achieve the federal policy of reciprocity because the Nation cannot speak with ‘one voice.’”<sup>390</sup> This argument lacks merit, however, because the federal government can always speak with “one voice” through legislation or treaty. Further, maintenance of the state taxes might create desirable “negotiating leverage” for the U.S. federal government. Therefore, one might argue that the Court need not even find implied acquiescence through numerous instances of federal failure to preempt despite addressing a particular matter (e.g., a tax on the sale of airline fuel) in treaties in order to uphold a state law under the “one voice” prong of analysis with a threshold-effects test.

The next in the line of dormant Foreign Commerce Clause cases is *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, which involved a statute that discriminated on its face against foreign commerce.<sup>391</sup> Facially discriminatory state measures are virtually per

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<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 20.

<sup>391</sup> 505 U.S. 71, 82 (1992).

se illegal.<sup>392</sup> Finding facial discrimination, the Court did not proceed to examine the additional prongs from *Japan Line*.<sup>393</sup> The Court did note, however, that because the statute discriminated against foreign commerce it was unnecessary to find that the purpose was to benefit local corporations.<sup>394</sup> In other words, the singling out or discrimination prohibited by the dormant Commerce Clause is not only singling out or discriminating against out-of-state interests but also singling out or discriminating against non-U.S. interests.

In the 1993 case, *Itel Containers International Corp. v. Huddleston*, the Supreme Court sustained a Tennessee sales tax on the lease of containers owned by a domestic corporation used in international shipping.<sup>395</sup> The lower court found, and the Supreme Court reaffirmed, that the tax at issue satisfied the four-part test for taxes merely affecting interstate commerce.<sup>396</sup> Interestingly, the Court added that meeting the four-part test for interstate commerce “has relevance to our conclusion that the state tax meets those inquiries unique to the Foreign Commerce Clause” because it confirmed a legitimate state interest and the absence of an attempt to interfere with foreign commerce.<sup>397</sup> As to the additional prongs of Foreign Commerce Clause analysis, the Court found, for several reasons, that the analysis and holding in *Container Corp.* controlled.<sup>398</sup> First, there was no risk of multiple-taxation because the tax was upon a discrete transaction within the state and, in any event, gave a credit against its own tax for a tax paid in another jurisdiction.<sup>399</sup> Additionally, regarding *Japan Line* prong two, the Court found that the Tennessee tax did not create foreign policy problems because the federal government had acted on numerous occasions on the subject of taxing cargo containers, and the state tax at issue was not prohibited in any of the previous international conventions or federal legislation.<sup>400</sup> Finally, the Court noted that the U.S. amicus brief defended the Tennessee tax.<sup>401</sup>

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<sup>392</sup> See *id.* at 81 (“Absent a compelling justification, however, a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.”).

<sup>393</sup> *Id.* at 79.

<sup>394</sup> *Id.*

<sup>395</sup> 507 U.S. 60, 63 (1993).

<sup>396</sup> *Id.* at 73.

<sup>397</sup> *Id.* at 73–74.

<sup>398</sup> *Id.* at 74.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 75.

<sup>401</sup> *Itel*, 507 U.S. at 75–76.

Justice Scalia, concurring in part and concurring in the judgment, criticized the two considerations the Court relied upon under prong two of *Japan Line*.<sup>402</sup> As to the implied acquiescence from the conventions, Justice Scalia stated this was indistinguishable from *Japan Line*.<sup>403</sup> Indeed, one might argue the Court moved away from imposing uniformity requirements on the states, at least where the political branches considered imposing uniformity and declined. As to the government-filed amicus brief, Justice Scalia admitted it distinguished the case from *Japan Line*.<sup>404</sup> He complained, however, that reliance on the amicus brief made the constitutionality of the law turn on the position of the executive branch despite the fact that the Constitution grants Congress the power to regulate foreign commerce.<sup>405</sup> Ultimately, the Court was responsive to Justice Scalia's criticism in the subsequent case, *Barclays Bank PLC v. Franchise Tax Board*.<sup>406</sup>

*Barclays* is the last significant dormant Foreign Commerce Clause case that the Supreme Court decided. In *Barclays*, the Court once again examined the constitutionality of California's unitary taxing scheme, this time as applied to domestic corporations with foreign parents and to foreign corporations with either foreign parents or subsidiaries.<sup>407</sup> For a variety of reasons, the Court upheld application of the California tax as applied to such entities.<sup>408</sup> First, although the risk of multiple taxation increased, multiple taxation was not an inevitable result, and the alternative arms-length method of allocating income would not eliminate the risk.<sup>409</sup> The Court also noted that international practice, which was uniform with respect to the arms-length method of allocation, did not have such force to "dictate" a dormant Commerce Clause holding.<sup>410</sup> As in *Container Corp.*, *Wardair*, and *Itel*, the Court only turned to prong two of *Japan Line* after finding the challenged state action was otherwise constitutional.<sup>411</sup> The Court found that with respect to *Japan Line*'s prong two, "Congress may more passively indicate that certain state practices do *not* 'impair

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<sup>402</sup> *Id.* at 81 (J. Scalia, concurring in part and concurring in the judgment).

<sup>403</sup> *Id.*

<sup>404</sup> *Id.* at 80–81.

<sup>405</sup> *Id.*

<sup>406</sup> 512 U.S. 298 (1994).

<sup>407</sup> *Id.* at 301.

<sup>408</sup> *Id.* at 303.

<sup>409</sup> *Id.* at 318–20.

<sup>410</sup> *Id.* at 320.

<sup>411</sup> *Id.*

federal uniformity in an area where federal uniformity is essential.”<sup>412</sup> Stated differently, Congress need not convey its intent “with the unmistakable clarity required to permit state regulation that . . . falls short under [interstate Commerce Clause] inspection.”<sup>413</sup> The Court found by negative inference that Congress had indicated its willingness to tolerate state unitary taxation.<sup>414</sup> The Court reached this conclusion after noting Congress’s failure to preempt state unitary taxation despite considering such a step in several bills, as well as the exemption of sub-federal governments from tax treaties requiring the arms-length method despite congressional awareness that foreign governments were greatly displeased with state unitary taxation systems.<sup>415</sup> The Court refused to consider arguments of likely retaliation, finding these were directed to the wrong forum.<sup>416</sup> Indeed, actual retaliation had already occurred prior to the case reaching the Court.<sup>417</sup> The Court, following Justice Scalia’s suggestions in *Itel*, also rejected executive branch statements that the taxation interfered with foreign affairs because Congress was the preeminent speaker in regulating foreign commerce.<sup>418</sup>

*B. The Status of Japan Line Prong Two and Its Implications for the Dormant Foreign Affairs Doctrine*

What does the rest of this line of dormant Foreign Commerce Clause cases tell us about *Japan Line*’s prong two, and what are the implications for the dormant foreign affairs doctrine? To begin, the Court will only consider prong two of *Japan Line* after concluding the state law passes the test for interstate commerce.<sup>419</sup> Additionally, a state law that facially discriminates against foreign commerce will be virtually per se illegal without ever reaching prong two of *Japan Line* as was seen in *Kraft*.<sup>420</sup> As to prong one, multiple taxation is not

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<sup>412</sup> *Barclays Bank*, 512 U.S. at 323 (quoting *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 448 (1979)).

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* at 324–28.

<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 328.

<sup>417</sup> *Id.* at 337 (O’Connor, J., concurring in the judgment in part and dissenting in part) (citing a brief for Government of United Kingdom as establishing that “[a]t least one country has already enacted retaliatory legislation”).

<sup>418</sup> *Barclays Bank*, 512 U.S. at 329–30.

<sup>419</sup> See *Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue & Fin.*, 505 U.S. 71, 83 (1992).

<sup>420</sup> *Id.* at 79.

enough to violate this prong.<sup>421</sup> The multiple-taxation must be an “inevitable result.”<sup>422</sup> In other words, multiple-taxation must result from the application of the state tax in all instances.<sup>423</sup> Additionally, even if multiple-taxation is an inevitable result, it must be the case that the alternatives would not eliminate the risk.<sup>424</sup> Thus, it will be very rare that a state tax is invalidated under prong one. As to prong two of *Japan Line*, it is less clear what remains. If a court is truly looking for purposes under the dormant Commerce Clause, it is looking for a protectionist or a singling out purpose and it will have made a finding on this prior to reaching prong two of *Japan Line*. So what is the Court actually looking for under prong two? The Court appears to be examining whether the state action has an effect on U.S. foreign relations or foreign policy.<sup>425</sup> The central effect the Court attempts to assess is the risk of retaliation by foreign trading partners.<sup>426</sup> The Court, however, admits it is not competent to ascertain this risk.<sup>427</sup> It is also clear that the Court is not balancing this risk against a state’s interest in a legitimate local purpose.<sup>428</sup> A certain threshold level of risk or, more generally, effect on U.S. foreign relations is what the Court tried to ascertain in its early cases.<sup>429</sup>

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<sup>421</sup> *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 438 (1979).

<sup>422</sup> *Id.* at 447.

<sup>423</sup> *Barclays Bank*, 512 U.S. at 329-30.

<sup>424</sup> *Japan Line*, 441 U.S. at 447-48.

<sup>425</sup> *See, e.g.*, *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 455 (1979) (stating that “California may not tell this Nation or Japan how to run their foreign policies”); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) (concluding that “a state tax at variance with federal policy will violate the ‘one voice’ standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive”).

<sup>426</sup> *Japan Line*, 441 U.S. at 450-51.

<sup>427</sup> *See, e.g.*, *Container Corp.*, 463 U.S. at 194.

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

*Id.*; *see also* *Itel Containers Int’l Corp. v. Huddleston*, 505 U.S. 71, 75-76 (1993).

But given the strong indications from Congress that Tennessee’s method of taxation is allowable, and with due regard for the fact that the nuances of foreign policy ‘are much more the province of the Executive Branch and Congress than of the Court,’ we find no reason to disagree with the United States’ submission.

*Id.* (quoting *Container Corp.*, 463 U.S. at 196).

<sup>428</sup> *See id.*

<sup>429</sup> *See* *Wardair Canada, Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 9 (1986); *Container Corp.*, 463 U.S. at 194; *Japan Line*, 441 U.S. at 446.

In these early cases, such as *Japan Line* and *Container Corporation*, the Court purportedly sought to establish objective criteria and rely upon views of the executive branch to support its conclusions, although declaring that such views were not dispositive.<sup>430</sup> Unfortunately, the court failed at its attempt to establish objective criteria. The only objective criteria the Court developed was whether the state tax created an automatic asymmetry or inevitable multiple taxation.<sup>431</sup> This criteria, however, is identical to prong one of *Japan Line*.<sup>432</sup> The Court in its latest case, *Barclays*, also decided that executive branch views were irrelevant, at least when the congressional posture, based on a strong negative inference, was to the contrary.<sup>433</sup> Thus, in examining a state measure under the dormant Commerce Clause, the Court will likely find that the measure has an insignificant effect on U.S. foreign relations or foreign policy if it finds congressional acquiescence as a result of a failure to preempt after congressional consideration of the state measures. The cases described above, including *Wardair*, *Itel*, and *Barclays*, all suggest that it is only where Congress, while aware of the state measures, has repeatedly focused its attention on a policy matter and yet, declined to preempt the state measures, that an inference of approval will be made.<sup>434</sup> In the absence of implied approval, what will a court do now that it apparently has eschewed reliance on executive branch views under prong two of *Japan Line*? For instance, how would the Court handle a case like *Barclays* minus the implied acquiescence from the legislation and treaties that failed to preempt the state laws? The Court could look for evidence of a uniform international practice or custom. But this would seem to elevate such practice or custom to the state of customary international law without proof of *opinio juris* or a sense of legal obligation. Moreover, the Court seemed to indicate in *Barclays* that an international practice that is not incorporated into federal legislation or treaty applying to the states would not dictate a dormant Foreign Commerce Clause decision, although such uniformity may remain peripherally important to prong one.<sup>435</sup> The Court could also look for evidence of foreign dissatisfaction through diplomatic protests, amicus briefs, or actual retaliation. It would seem, however, rather strange that the Court would reject executive branch views deferring

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<sup>430</sup> See *Container Corp.*, 463 U.S. at 194; see also *supra* Part VI.A.

<sup>431</sup> *Container Corp.*, 463 U.S. at 194–95; *Japan Line*, 441 U.S. at 453.

<sup>432</sup> Compare *Container Corp.*, 463 U.S. at 194–95, with *Japan Line*, 441 U.S. at 451.

<sup>433</sup> *Barclays Bank*, 512 U.S. at 329.

<sup>434</sup> See, e.g., *Itel Containers*, 507 U.S. at 70–71.

<sup>435</sup> See *Barclays Bank*, 512 U.S. at 328–29.



to Congress's special role in foreign commerce only to place particular weight in the views and protests of foreign nations. Indeed, the Court ignored an instance of actual retaliation by the United Kingdom in *Barclays*.<sup>436</sup> Reliance on retaliation measures to determine the validity of state measures challenged under the dormant foreign affairs doctrine would have the perverse effect of encouraging foreign retaliation because foreign nations would know that retaliation could achieve results in U.S. courts. Additionally, the success of a challenge would hinge on the timing of a suit. A challenge might fail prior to foreign retaliation and succeed if filed after some form of foreign retaliation occurred.

Ultimately, it appears that the Court is gradually moving towards giving up the entire exercise of engaging in analysis under prong two of *Japan Line*. Lower courts applying *Japan Line* also seem to simply be avoiding an examination of the risk of retaliation.<sup>437</sup> State statutes seeking to either protect in-state producers from out-of-state producers or to protect in-state and out-of-state producers from foreign producers are caught prior to prong two of *Japan Line*.<sup>438</sup> Instead of asking whether a state measure prevents the federal government from speaking with one voice, which can never be the case, or attempting to assess the effects on U.S. foreign policy, which it can never do competently and independently, the Court could continue to give heightened scrutiny to measures affecting foreign commerce by simply being extra careful in searching for a protectionist, or isolationist, purpose vis-à-vis foreign states in cases involving foreign commerce. If courts are not engaging in purpose review but are in fact balancing, then courts could give extra weight to the effects on foreign commerce in balancing those effects against the state's legitimate local purpose.

What does this understanding of *Japan Line* prong two tell us about the dormant foreign affairs doctrine? All of the above leads, once again, to the conclusion that the threshold-effects test is a tough task that courts are not particularly competent at undertaking. The trouble the Supreme Court has encountered in *Japan Line* prong two analysis indicates that purpose review is in fact the most appropriate standard under the dormant foreign affairs doctrine. One could argue, however, that courts could give greater weight to amicus briefs in dormant foreign affairs doctrine cases because Congress's special role

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<sup>436</sup> See *id.* at 312.

<sup>437</sup> See, e.g., *NCR Corp. v. S.C. Tax Comm'n*, 402 S.E.2d 666, 667 (S.C. 1991); *NCR Corp. v. Comm'r of Revenue*, 438 N.W.2d 86, 95 (Minn. 1989).

<sup>438</sup> See *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 452 (1979).

in regulating foreign commerce is not at issue. In the field of foreign affairs generally, the President and Congress share powers, whereas in the foreign commerce area Congress has control.<sup>439</sup> But if courts are searching for purpose rather than effects, the executive branch has no greater, or perhaps lesser, competence in assessing the purpose behind a particular state action, and thus, the courts should not give any particular weight to executive branch amicus briefs. The dormant foreign affairs doctrine should only capture those state measures enacted with a foreign policy purpose. If a state measure has an effect on foreign relations despite not having a foreign policy purpose, the federal political branches may always preempt the state measure.

Could prong two of *Japan Line* still be saved if the Court turned to purpose review under that prong? If the Court did so, it would be looking for one of two purposes: either a protectionist purpose or the purpose of changing or criticizing the trade, tax, or other policy of a foreign government. The Court, however, will already have searched for a protectionist or singling out purpose prior to reaching *Japan Line's* prong two, at least if those scholars promoting purpose review under the dormant Commerce Clause are correct.<sup>440</sup> If the Court instead searches for whether the purpose of the state law is to change the trade, tax, or other policy of a foreign government, then *Japan Line* prong two becomes repetitive of, or a subset of, the dormant foreign affairs doctrine. Thus, if the Court readdressed the dormant foreign affairs doctrine and clarified that purpose review is the appropriate standard under that doctrine, the Court could additionally dispense with *Japan Line* prong two—which it appears only to give lip-service to as time has passed<sup>441</sup>—and relieve itself of the complications it has faced in applying it. Accordingly, the market-participant exception would apply to the dormant Foreign Commerce Clause, thus reduced to facial discrimination and balancing tests, and not apply to the dormant foreign affairs doctrine, which would subsume the old prong two of *Japan Line*.

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<sup>439</sup> Compare U.S. CONST. art. II, § 2, cl. 2, with U.S. CONST. art. I, § 8, cl. 3.

<sup>440</sup> See *Japan Line*, 441 U.S. at 452; see also Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that the Court should be concerned with “preventing purposeful protectionism”).

<sup>441</sup> See *supra* Part VI.A.

VII. CAN FEDERAL ACTORS (AND IF SO WHICH ONES) AUTHORIZE STATE ACTIONS THAT WOULD OTHERWISE RUN AFOUL OF THE DORMANT FOREIGN AFFAIRS DOCTRINE?

The last distinction to draw between the dormant Commerce Clause generally, and *Japan Line* prong two specifically, on the one hand and the dormant foreign affairs doctrine on the other is whether federal actors can authorize state actions that otherwise run afoul of these doctrines. It is well-established that Congress can authorize actions that would otherwise run afoul of the dormant Commerce Clause, but the Supreme Court has never addressed whether federal actors, or which federal actors, can authorize state action that violate the dormant foreign affairs doctrine. The Court has stated that congressional intent to permit state activity that would otherwise run afoul of the dormant Commerce Clause “must be ‘unmistakably clear.’”<sup>442</sup> Yet, it appears with prong two of *Japan Line* that the unmistakably clear intent can come from a particularly strong negative inference rather than affirmative authorization.<sup>443</sup> As seen in *Wardair, ITEL*, and *Barclays*, with respect to *Japan Line*’s prong two, the courts have been willing to infer authorization for the state taxes at issue when the federal government has failed to preempt those state taxes on numerous occasions despite an awareness of them.<sup>444</sup> In essence, the Court has refused to declare that uniformity is essential in an area when the federal government has considered the state actions on numerous occasions—and not been prevented from doing so because of a busy legislative calendar, more pressing priorities, and the like—and declined to preempt. Again, if the state action runs against the central value sought to be protected by the Commerce Clause (e.g., protectionism, broadly defined as either protecting purely local industry or even the broader U.S. industry), it will not be necessary to examine it under these additional prongs. It is only where state actions clear this first hurdle that the additional consideration of uniformity comes into play.

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<sup>442</sup> *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 408 (1994) (holding that “Congress must be ‘unmistakably clear’ before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause”) (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984) (plurality opinion)).

<sup>443</sup> See *Japan Line*, 441 U.S. at 452 (explaining how the need for federal uniformity is no less paramount in ascertaining the negative implications of Congress’s power to “regulate Commerce with foreign Nations” under the Commerce Clause).

<sup>444</sup> See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324–25 (1994); *ITEL Container Int’l Corp. v. Huddleston*, 507 U.S. 60, 75 (1993); *Wardair Can., Inc. v. Fla. Dep’t of Rev.*, 477 U.S. 1, 10 (1986).

It is important to keep in mind that the bar for permission by negative inference is incredibly high, given that *Wardair* involved inferences from seventy agreements failing to preempt, and that *Barclays* involved numerous, specific attempts over a period longer than a decade in which Congress turned its attention to preemption but ultimately declined to do so.<sup>445</sup> Should Congress's failure to preempt, even when it actively considered doing so, be given the same credence under the dormant foreign affairs doctrine as *Japan Line's* prong two? Or should we demand unmistakably clear and explicit authorization as with the dormant Commerce Clause generally? Either way, it is apparent, given *Wardair* and *Barclays*, that a simple failure in one federal sanctions enactment to preempt prior state sanctions legislation against the same country should not be sufficient. Moreover, several arguments caution against such an approach and indicate that the Court should require the federal government to be either explicit in its authorization or at a minimum require an extremely high bar for negative implication authorization.<sup>446</sup> If the Court truly moves to a pure purpose-based test for the dormant foreign affairs doctrine, then one might argue that explicit authorization should be required, thus eliminating any possibility for a high-bar negative inference authorization. The reason for this is that if effects are the standard, the federal political branches are in the best position to assess the effects of a state action on foreign relations, and if the political branches have turned their attention to possible preemption of a state law multiple times and rejected doing so, then the Court might understandably wish to infer authorization in such instances. If purpose review is the standard, however, a court is in a better position than the political branches to assess the purpose. In this instance, the federal political branches' failure to preempt means little in terms of inferring authorization, since they may very well be rejecting preemption because they believe the state action to already be barred due to its illicit purpose. Hence, the Court could, and indeed should, require the same unmistakably clear level of authorization to permit a state to take action otherwise running afoul of the dormant foreign affairs doctrine as that which it requires under the dormant interstate Commerce Clause.

The next question is what federal body should give the states permission to take actions otherwise running afoul of the dormant foreign affairs doctrine—Congress, the President or both? The answer to this question depends on whether the state action is intruding

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<sup>445</sup> See *Barclays*, 512 U.S. at 324–27; *Wardair*, 477 U.S. at 10–12.

<sup>446</sup> See *supra* Part IV.D.

on a largely presidential area of foreign relations (e.g., power to recognize foreign governments and new nations), a largely congressional area of foreign relations (e.g., foreign commerce), or a shared area. The Supreme Court has established a framework for analyzing if a presidential action in foreign affairs is constitutional.<sup>447</sup> The framework was first enunciated by Justice Jackson in a concurring opinion in the *Steel Seizure* case and was subsequently adopted by the entire Court in the Iranian Hostages case.<sup>448</sup> Specifically, where the President acts with the express or implied approval of Congress, his power is at a maximum, and his action will only be invalidated where the federal government as a whole lacks the requisite power (e.g., a Bill of Rights violation).<sup>449</sup> Where the President acts with the express or implied disapproval of Congress, his power is at its “lowest ebb,” and his action can only be upheld by disabling the Congress.<sup>450</sup> Where the President acts in the face of congressional silence or acquiescence, he can only rely on his own constitutional powers, but congressional inertia can, as a practical matter, invite presidential action in the area.<sup>451</sup>

The analytical framework in the Jackson concurrence can be useful for analyzing authorizations or permissions of state actions that would otherwise violate the dormant foreign affairs doctrine.<sup>452</sup> Where the President and Congress both authorized the state activity, the authorization would be considered valid except where it violated an explicit constitutional prohibition (e.g. an Article I, Section 10 prohibition that does not allow for the possibility of congressional approval or a Bill of Rights provision) or if the power was an exclusive but non-delegable power of one of the federal political branches, a topic discussed shortly below.<sup>453</sup> The *Barclays* case makes clear that congressional authorization is the key in matters core to the Foreign Commerce Clause.<sup>454</sup> Thus, if Congress attempted to approve state actions that would run afoul of the dormant Foreign Commerce Clause, and the President vetoed the legislation, but Congress over-

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<sup>447</sup> See generally *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952).

<sup>448</sup> *Id.* at 637–39 (Jackson, J., concurring); *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981).

<sup>449</sup> *Steel Seizure*, 343 U.S. at 635–37 (Jackson, J., concurring).

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> Cf. Sapna Desai, Note, *Genocide Funding: The Constitutionality of State Divestment Statutes*, 94 CORNELL L. REV. 669, 701–02 (2009).

<sup>453</sup> See *Steel Seizure*, 343 U.S. at 635–37 (Jackson, J., concurring).

<sup>454</sup> *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. at 336.

rode the veto to pass the law, it would seemingly be unproblematic that the President did not agree in the authorization. Additionally, if Congress overcomes a Presidential veto to pass an authorization of any of the actions specifically listed in Article I, Section 10, Clauses 2 and 3, the authorization would certainly be sufficient to authorize the state action. In matters touching upon core Presidential powers, however, such as the recognition of a foreign state or foreign government, or diplomatic approaches or outreach to particular countries in times of crisis, presidential permission would be necessary. Moreover, in the vast shared area, approval by both Congress and the President would be necessary. Thus, in a shared area, even if Congress was able to override a presidential veto, this might well be insufficient because the President would not have joined in the authorization. Indeed, for simplicity's sake, one might wish to eschew utilizing the Jackson concurrence analysis and create a fixed rule that under the dormant foreign affairs doctrine authorizations must come from both the President and the Congress. Perhaps as a middle road, a presumption could be created in this regard.

State procurement sanctions and divestment requirements seem to fall most closely in the foreign commerce realm, but because they target specific nations and seek changes in the non-commerce related behavior or policies of a foreign nation, they also implicate the President's communication and diplomatic powers with foreign governments. Thus, state sanctions legislation that would otherwise run afoul of the dormant foreign affairs doctrine must receive permission from both the Congress and the President under this framework. This could happen through congressional legislation authorizing state procurement sanctions or divestment requirements signed by the President and perhaps further buttressed by a presidential signing statement supporting state measures of this kind. In practice, Congress has only attempted once to explicitly authorize or permit state divestment requirements targeting a particular foreign country. A federal district court struck down an Illinois banking and divestment sanctions law targeting the Sudan in 2007.<sup>455</sup> Congress responded within months by authorizing the state divestment sanctions in a federal act that ratcheted up sanctions against Sudan.<sup>456</sup> The President signed the bill into law, but in a signing statement, he ques-

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<sup>455</sup> *NFTC v. Giannoulas*, 523 F. Supp. 2d 731, 749 (N.D. Ill. 2007).

<sup>456</sup> Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516.

tioned the constitutionality of the congressional authorization.<sup>457</sup> Should the authorization be considered as coming from both branches since the President signed the legislation? Or should the President's signing statement objecting to the authorization be given weight? Recently, many have debated whether and what level of weight can be given to presidential signing statements in determining the scope of legislation.<sup>458</sup> But Presidents have long declared a power to refuse to enforce unconstitutional elements of legislation.<sup>459</sup> If we believe presidential as well as congressional authorization is needed for the state action, then the signing statement should be accorded weight under this rationale but not under the rationale that the President can limit the scope of the legislation or the interpretation of the legislation.<sup>460</sup>

As a prudential matter, it is also advisable to allow the federal government to authorize state actions, such as sanctions legislation, that would otherwise violate the dormant foreign affairs doctrine and the dormant Commerce Clause because the federal government's sanctions regime will potentially have a greater impact if it involves state procurement markets and divestment requirements which will give the federal government more bargaining leverage. Often sanctions are ineffective unless enforced on a multilateral basis.<sup>461</sup> Multi-leveled sanctions within the United States can make up for some of the unwillingness of foreign nations to join sanctions regimes, particularly when one realizes the market size and power of many U.S. states in comparison to many foreign nations.

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<sup>457</sup> Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 Weekly Comp. Pres. Doc. 1645 (Dec. 31, 2007).

<sup>458</sup> See, e.g., Ronald A. Cass & Peter L. Strauss, Symposium, *The Last Word? The Constitutional Implications of Presidential Signing Statements: The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11 (2007) (arguing that the concerns over the use of presidential signing statements is exaggerated).

<sup>459</sup> See, e.g., Memorandum from Walter Dellinger on Presidential Authority to Decline to Execute Unconstitutional Statutes to the Honorable Abner Mikva, Counsel to the President (November 2, 1994), available at <http://www.justice.gov/olc/nonexecut.htm>.

<sup>460</sup> See Marc N. Gurber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretation of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 378–81 (1987); A.B.A., TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND SEPARATION OF POWERS DOCTRINE RECOMMENDATION (2006), available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

<sup>461</sup> See, e.g., Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 917–18 (2009); Sean D. Murphy, *International Law, the United States, and the Non-Military 'War' Against Terrorism*, 14 EUROPEAN J. INT'L L. 347, 349 (2003).

The above discussion leads to the conclusion that certain foreign affairs powers are not only exclusive but sometimes delegable in the sense that the federal government can authorize the states to engage in them. Other foreign affairs powers should be considered exclusive but non-delegable, such as the Commander-in-Chief power, although it is highly unlikely that federal actors would seek to delegate these powers in any event.

VIII. SUPREME COURT OPINIONS THIS CENTURY:  
*CROSBY, GARAMENDI, THEIR PROGENY, AND THE IMPLICATIONS OF  
RELYING ON PREEMPTION*

The above analysis indicates that limits on state-level foreign policy are justified as a policy matter,<sup>462</sup> that the existence of a dormant foreign affairs doctrine is fully justified under a multi-modal interpretation of the U.S. Constitution,<sup>463</sup> that a purpose-based test under the doctrine would better suit the capacity of courts and state-level officials,<sup>464</sup> that no market participant exception should be available under the dormant foreign affairs doctrine,<sup>465</sup> that the dormant Foreign Commerce Clause's additional "one voice" prong should be subsumed within the dormant foreign affairs doctrine,<sup>466</sup> and that the federal government can in many instances authorize state actions otherwise violating the dormant foreign affairs doctrine.<sup>467</sup> If state-level foreign policy is not wise as a matter of policy, however, the question remains as to whether a dormant foreign affairs doctrine is necessary as a practical matter because the federal government always has a readily available constraint through the enactment of preemptive federal legislation or executive branch regulation (perhaps in part relying on congressional delegation) if a state-level foreign policy is judged to be unwise from the national perspective.<sup>468</sup> The Supreme Court has seemingly shown a preference in its two state foreign affairs related cases this past decade, *Crosby v. National Foreign Trade Council*<sup>469</sup> and *American Insurance Assoc. v. Garamendi*,<sup>470</sup> to rely on preemption

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<sup>462</sup> See *supra* Part II.A.

<sup>463</sup> See *supra* Part III.A–C.

<sup>464</sup> See *supra* Part IV.D–E.

<sup>465</sup> See *supra* Part V.

<sup>466</sup> See *supra* Part VI.A.

<sup>467</sup> See *supra* Part VII.

<sup>468</sup> See Goldsmith, *supra* note 12, at 1682–88.

<sup>469</sup> 530 U.S. 363 (2000).

<sup>470</sup> 539 U.S. 396 (2003).



rather than the dormant foreign affairs doctrine.<sup>471</sup> But it should be noted that the Court approvingly cited to *Zschernig* in its *Garamendi* opinion.<sup>472</sup> The Court's choice of preemption has had negative implications for restricting state-level foreign policies. Moreover, the Court's choice to rely on preemption grounds to the exclusion of dormant foreign affairs grounds is not required by the court-created rules of judicial restraint, the rules imploring the Court to determine cases on statutory interpretation rather than constitutional grounds, since the preemption doctrine resolves a constitutional question. Further exacerbating the situation, the Court's analysis in *Crosby* and *Garamendi* has unnecessarily confused preemption analysis with dormant foreign affairs doctrine analysis. Lower courts applying *Crosby* and *Garamendi* reflect some of this confusion, but fortunately, in large part, these courts do not read the opinions as undermining or eliminating the dormant foreign affairs doctrine.<sup>473</sup> Nevertheless, Supreme Court clarification would certainly assist state officials in conscientiously applying the doctrine to proposed actions in advance of litigation.

#### A. Preemption Overview

The Supreme Court has established the doctrine of preemption based on the Supremacy Clause of the Constitution, which makes federal law the "supreme Law of the Land."<sup>474</sup> In preemption analysis, the intent or purpose of Congress is the "ultimate touchstone."<sup>475</sup> Preemption analysis can be divided into three sub-types: express, conflict, and implied.<sup>476</sup> The first type, express preemption, occurs if Congress expressly declares that it intends to wholly occupy the field (i.e., leave no room in the field for the state to operate).<sup>477</sup> Conflict preemption occurs where state law conflicts with federal law, either because it is impossible to comply with both ("direct conflict preemption") or the state law is an obstacle to achieving the full purposes and objectives of the federal policy ("obstacles conflict preemp-

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<sup>471</sup> See *infra* notes 583–93 and accompanying text.

<sup>472</sup> *Garamendi*, 539 U.S. at 398.

<sup>473</sup> See *infra* notes 583–93 and accompanying text.

<sup>474</sup> U.S. CONST., art. VI, cl. 2.

<sup>475</sup> *Retail Clerk Int'l Ass'n v. Schermehorn*, 375 U.S. 96, 103 (1963).

<sup>476</sup> I have borrowed the preemption terminology in this paragraph from Eugene D. Cross, *Preemption of Member States Law in the European Economic Community: A Framework for Analysis*, 29 COMMON MARKET L. REV. 447 (1992). The U.S. Supreme Court uses identical or similar terminology. See, e.g., cases cited *infra* notes 477–482.

<sup>477</sup> See, e.g., *Shaw v. Delta Air Lines*, 463 U.S. 85, 95–100 (1983).

tion”).<sup>478</sup> The last type, implied or field preemption, occurs where the federal occupation of the field is so thorough and extensive that Congress’s intent to wholly occupy the field can be inferred (“occupation of the field preemption”).<sup>479</sup> The Court, until recently, generally applied two additional, and potentially competing, factors in its analysis: first, preemption can also be implied where the federal interest in the field is clearly dominant or superior (“dominant interest preemption”),<sup>480</sup> and second, the Court is generally reluctant to infer preemption, particularly in fields that the states have traditionally occupied.<sup>481</sup> Thus, the Court insists that Congress’s intent to preempt must be “clear and manifest.”<sup>482</sup> *Crosby* and *Garamendi* left murky the strength of these potentially conflicting presumptions in foreign affairs related cases.

#### B. *Crosby v. National Foreign Trade Council*

*Crosby v. National Foreign Trade Council* involved a challenge to a Massachusetts law that imposed a negative ten percent preference against companies active in Burma.<sup>483</sup> In other words, companies that found themselves on the restricted list of companies trading with or investing in Burma had ten percent added to their bids for state contracts prior to the state determining the lowest bidder. The Massachusetts law was passed three months before a comprehensive federal sanctions law.<sup>484</sup> The federal law imposed several sanctions against Burma.<sup>485</sup> The federal law eliminated certain bilateral assistance, required the U.S. Treasury Secretary to instruct the U.S. Executive Director of each international financial institution to vote against loans to Burma, and denied entry visas to the U.S. for Burmese government officials except as required by treaty obligations or to staff the Burmese mission, until the President certified to Congress that Burma is making measurable and substantial progress in improving human

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<sup>478</sup> See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141–43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>479</sup> See, e.g., *Fidelity Fed. Sav. & Loan Ass’n v. De is Cuesta*, 485 U.S. 141, 153 (1982).

<sup>480</sup> See, e.g., *North Dakota v. United States*, 460 U.S. 300, 309 (1983); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>481</sup> See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>482</sup> *Id.*; see, e.g., *Metro. Life Ins., Co. v. Massachusetts*, 471 U.S. 724, 739–40 (1985).

<sup>483</sup> *Crosby v. Nat’l. Foreign Trade Council*, 530 U.S. 363, 366–88 (2000).

<sup>484</sup> *Id.*

<sup>485</sup> Omnibus Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009, § 570 (1996) (also called the Cohen-Feinstein Amendment (Burma)).

rights practice and implementing democratic reforms.<sup>486</sup> The bill also required the President to prohibit U.S. persons from making new investments in Burma “if the President determines and certifies to Congress, that after the date of the enactment of this act, the Government of Burma has physically harmed, rearrested for political acts, or exiled Daw Aung Suu Kyi [the head of the pro-democracy movement] or has committed large-scale repression of or violence against the Democratic opposition.”<sup>487</sup> President Clinton issued an Executive Order on May 20, 1997 making such findings and prohibiting new investments in Burma.<sup>488</sup> The statute also granted broad waiver authority to the President to waive sanctions if he found it in the national interest, and also directed the President to develop a comprehensive multilateral strategy with other nations to address the human rights problems within Burma.<sup>489</sup>

The Supreme Court, in a unanimous opinion, struck the Massachusetts law down under obstacles conflict preemption finding the state law an obstacle to achieving the full purposes of the federal act in three ways.<sup>490</sup> First, the state law changed the careful calibration of sanctions chosen by the federal government.<sup>491</sup> Second, it interfered with the presidential flexibility desired by Congress in granting broad waiver authority to the President.<sup>492</sup> The President might elect to lessen sanctions at the same time states were ramping up sanctions. Third, it interfered with the direction to the President to establish a comprehensive multilateral strategy because trading partners preferred to talk about the state law than conditions in Burma.<sup>493</sup> The Court pointed to a WTO dispute settlement case lodged against the United States by the European Union and Japan concerning the Massachusetts law as well as diplomatic protests lodged by these governments as proof that developing such a strategy was made more difficult by the state law.<sup>494</sup> Importantly, the Court expressly declined to rule on the additional grounds of the dormant foreign affairs doctrine and the dormant Foreign Commerce Clause, which the First

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<sup>486</sup> *Id.*

<sup>487</sup> *Id.*

<sup>488</sup> Exec. Order No. 13047, 62 Fed. Reg. 28,299 (May 21, 1997) (Executive Order Prohibiting New Investment in Burma).

<sup>489</sup> Pub. L No. 104-208, § 570(c).

<sup>490</sup> *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000).

<sup>491</sup> *Id.* at 380.

<sup>492</sup> *Id.* at 376.

<sup>493</sup> *Id.* at 390.

<sup>494</sup> *Id.* at 382.

Circuit had relied upon.<sup>495</sup> The Court also stated that they found it unnecessary to rule on the field preemption claim.<sup>496</sup> In refusing to rule on these additional grounds, the Court relied on the principle, expressed in *Ashwander v. TVA*,<sup>497</sup> that the Court should decide a case based on statutory interpretation rather than constitutional grounds if it had the option.<sup>498</sup> As analyzed more fully in Part X of this Article, however, the application of this principle to validate applying the preemption doctrine rather than the dormant foreign affairs doctrine can be criticized because the preemption doctrine is also a constitutional doctrine based on the Supremacy Clause.<sup>499</sup>

The Court's choice of preemption grounds had two negative consequences. First, the opinion's failure to rely upon or approvingly cite *Zschernig* lead some to conclude that maybe the dormant foreign affairs doctrine was on insecure ground.<sup>500</sup> Second, because the Court relied on the narrowest grounds possible, some state officials read the opinion as only preventing Burma sanctions or, at most, preempting state sanctions where a specific federal law targeted the same foreign country as the state law.<sup>501</sup> Academics have criticized reading the opinion in such narrow fashion.<sup>502</sup> Additionally, the one case decided by lower courts in the post-*Crosby* and pre-*Garamendi* timeframe—not involving matters eventually resolved in *Garamendi*—did in fact indicate that *Zschernig* was alive and well.<sup>503</sup>

### C. American Insurance Association v. Garamendi

*American Insurance Association v. Garamendi* involved a challenge by the American Life Insurance Association against the California Holocaust Victim Insurance Relief Act (HVIRA) that required any insurer doing business in the state to disclose information about all pol-

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<sup>495</sup> *Id.* at 374.

<sup>496</sup> *Crosby*, 530 U.S. at 373–74.

<sup>497</sup> 297 U.S. 288, 341 (1936).

<sup>498</sup> *Crosby*, 530 U.S. at 374.

<sup>499</sup> See, e.g., Vazquez, *supra* note 15, at 1266–68 (arguing that “the general approaches the Court employs to resolve preemption issues are more properly regarded as interpretations of the Supremacy Clause than as statutory interpretation”); see also *infra* Part X.

<sup>500</sup> See *supra* Part IV.C.

<sup>501</sup> See Brannon P. Denning & Jack H. McCall, *Crosby v. National Foreign Trade Council*, 94 AM. J. INT’L L. 750, 754 (2000).

<sup>502</sup> See Vazquez, *supra* note 15, at 1323 (“Indeed, it is only a slight exaggeration to say that *Crosby* is a dormant foreign affairs case in disguise.”); see also Golove, *supra* note 38, at 156.

<sup>503</sup> See *Deutsch v. Turner Corp.*, 324 F.3d 692, 710 (9th Cir. 2003).

icies sold in Europe between 1920 and 1945.<sup>504</sup> The HVIRA allegedly conflicted with the German Foundation Agreement entered into between the United States and German governments under which Germany agreed to establish a 10 billion dollar fund administered by the Foundation to compensate all those who suffered at the hands of German companies during the Nazi era.<sup>505</sup> The Foundation agreed to work with the International Commission on Holocaust Era Insurance Claims (ICHEIC) to determine outstanding insurance claims.<sup>506</sup> In its agreement with Germany, and similar ones entered into with Austria and France, the United States promised to urge its courts and state and local governments to respect the foundations as the exclusive means for resolving WWII-era claims against private companies.<sup>507</sup> The Supreme Court had previously ruled in the 1940's that presidential executive agreements could preempt state law if valid just as treaties could. Defenders of the California law argued that the German Foundation agreement was distinguishable from prior agreements because it attempted to settle claims against private foreign companies rather than foreign governments.<sup>508</sup> The Court declared the difference immaterial and held the agreement valid.<sup>509</sup>

The Court, however, seemed troubled by the fact that the German Foundation Agreement contained no express preemption clause.<sup>510</sup> While this conclusion is contentious, given language in the agreement that the executive branch considered the agreement to be the “exclusive forum” for resolving Holocaust-era claims, both the petitioners and the U.S. amicus brief acknowledged no express preemption.<sup>511</sup> Regardless, the Court did not immediately apply other strands of preemption analysis (i.e., field and conflict preemption) or cite to familiar cases in those areas. Interestingly, the Court also did not consider whether the executive agreement was self-executing, although it is clear from the Court's jurisprudence that only self-executing provisions of treaties preempt state law because non-self-executing provisions are not a part of the domestic legal system.<sup>512</sup> Instead, the Court said that the petitioners left “their claim of

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<sup>504</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003).

<sup>505</sup> *Id.* at 405.

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Id.* at 415–16.

<sup>509</sup> *Id.* at 416–17.

<sup>510</sup> *Garamendi*, 539 U.S. at 416–17.

<sup>511</sup> *See id.* at 417, 422.

<sup>512</sup> *Id.* at 413 n.7.

preemption to rest on asserted interference *with the foreign policy those agreements embody*. Reliance is placed on our decision in *Zschernig*.<sup>513</sup> While the Court acknowledged that both the majority opinion and Justice Stewart's concurring opinion in *Zschernig* spoke in terms of federal exclusivity in foreign relations, and thus relied on the dormant foreign affairs doctrine, the Court also gave considerable attention to Justice Harlan's concurring opinion in *Zschernig*, which expressed concern with finding state regulation preempted in traditional areas that had some modest impact on foreign relations.<sup>514</sup> Of course, *Zschernig's* dominant threshold-effects test cured Justice Harlan's most significant concern, that field preemption or the dormant foreign affairs doctrine threatened state actions in traditional areas that somehow had an incidental impact on foreign relations.<sup>515</sup> The Court then stated, "it is a fair question whether respect for the executive foreign relations power require a categorical choice between contrasting theories of field and conflict preemption evident in the *Zschernig* opinions."<sup>516</sup> At this point, however, the Court seems to have reduced *Zschernig* to a field preemption case, which is not the truest, or, at a minimum, not the fairest way to read Justice Douglas' opinion.<sup>517</sup> Returning to Justice Harlan's concurrence, the Court stated that "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."<sup>518</sup> In short, the Court seems to have applied a presumption against preemption in areas of traditional legislation, thus requiring a stronger showing of conflict in such cases.<sup>519</sup> Moreover, the Court mischaracterizes *Zschernig* as a field preemption case, and turns its threshold-effects test into a balancing test that balances the strength of the state interest with the degree of conflict with federal policy.<sup>520</sup> On the other hand, the Court cited approvingly to *Zschernig*

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<sup>513</sup> *Id.* at 417 (emphasis added). Additionally, as Professors Denning and Ramsey point out, the Executive Agreement did not cover certain countries whose insurers might be harmed by the Act anyway. See Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 908 (2004).

<sup>514</sup> *Garamendi*, 539 U.S. at 418–19.

<sup>515</sup> *Zschernig v. Miller*, 389 U.S. 429, 457–58 (1968).

<sup>516</sup> *Garamendi*, 539 U.S. at 419.

<sup>517</sup> *Id.* at 420.

<sup>518</sup> *Id.*

<sup>519</sup> *Id.*

<sup>520</sup> See Denning & Ramsey, *supra* note 513, at 925–26 ("We begin by describing, as best we can, the new test articulated by the majority. It apparently balances the

and, in footnote eleven of its opinion, the Court acknowledged—in contrast to the analysis in its opinion—the presence of a dormant foreign affairs doctrine, even though the Court mislabeled it field preemption:

If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government.<sup>521</sup>

Ultimately, after mixing the two doctrines, the majority chose to rely on conflict preemption, specifically obstacles conflict preemption, citing approvingly to *Crosby*.<sup>522</sup> The Court even relied on several factors from *Crosby* to find obstacles conflict.<sup>523</sup> Specifically, the Court found that the California law was changing the calibration of sanctions decided upon by the federal government, namely the U.S. President.<sup>524</sup> The Court was untroubled that, unlike in *Crosby*, the President acted without Congressional authority because the President “possesses considerable independent constitutional authority to act on behalf of the United States on international issues . . . and conflict with the exercise of that authority is a comparably good reason to find preemption of the state law.”<sup>525</sup>

Justice Ginsberg’s dissent stated the following about *Zschernig*:

We have not relied on *Zschernig* since it was decided and I would not resurrect that decision here. The notion of “dormant foreign affairs preemption” with which *Zschernig* is associated resonates most audibly when a state action “reflects a state policy critical of foreign governments and involves ‘sitting in judgment’ on them.” . . . The HVIRA entails no such state action or policy. It takes no position on any contemporary foreign government and requires no assessment of any existing foreign regime. It is directed solely at private insurers doing business in California and it requires them solely to disclose information in their or their affil-

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strength of the state’s interest against the degree of conflict with federal policy. Neither prong of the new test is adequately explained or easy to apply. . . .”).

<sup>521</sup> See *Garamendi*, 539 U.S. at 420, n.11.

<sup>522</sup> *Id.* at 414.

<sup>523</sup> *Id.* at 424.

<sup>524</sup> *Id.* at 423.

<sup>525</sup> *Id.* at 424 n.14.

iates possession or control. I would not extend *Zschernig* into this dissimilar domain.<sup>526</sup>

Thus, even the four justices subscribing to the dissent recognized the continuing viability of *Zschernig*, though they did not believe it would invalidate the HVIRA.<sup>527</sup> The conclusion that the HVIRA does not run afoul of *Zschernig*, when properly understood as a dormant foreign affairs doctrine case, is questionable. Although directly targeting private insurance companies, the disclosure law could be read as seeking to criticize or change the behavior of the German government and other European governments regarding their failure to adequately compensate insurance beneficiaries or the failure of those governments to require compensation be given by the private insurers or both. Although the dissent refers to “dormant foreign affairs preemption,” and, thus, unnecessarily mixes the labels of the two doctrines, the dissent appears to more accurately characterize *Zschernig* as a dormant foreign affairs doctrine case rather than a field preemption case.<sup>528</sup> The dissent’s treatment of *Zschernig* also seems to support a purpose-based standard under the doctrine, because it focuses on *criticism* of foreign governments and sitting in judgment of them, rather than the threshold-effects test.<sup>529</sup>

As to the obstacles conflict claim, which the majority ultimately appears to rely upon, the dissent states that executive agreements must expressly preempt state law.<sup>530</sup> It is not clear why other strands of preemption would not be applicable to executive agreements if they are valid. The dissent notes that some executive agreements involved in prior decisions of the Court expressly preempted state law, but the dissent does not show that all prior executive agreements did so.<sup>531</sup> The dissent also states that if HVIRA-type laws were a threat to the operation of the mechanism created in the Executive Agreements, then “one might expect to find some reference to laws like the HVIRA in the later-in-time executive agreements.”<sup>532</sup> The same argument could be made, however, about any legislation enacted subsequent to state sanctions legislation. Of course, the Court has never required express preemption in cases in which the federal act occurs subsequent to the state act. Moreover, an international agreement is

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<sup>526</sup> *Id.* at 439–40 (Ginsburg, J., dissenting) (citations omitted).

<sup>527</sup> *Garamendi*, 539 U.S. at 439–40 (Ginsburg, J., dissenting).

<sup>528</sup> *Id.* at 439–40.

<sup>529</sup> *Id.*

<sup>530</sup> *Id.* at 443–44.

<sup>531</sup> *Id.* at 440.

<sup>532</sup> *Id.* at 441.



less likely to address domestic matters, such as preemption, than legislation. The court dependably applies all strands of preemption analysis to federal legislation, regardless of the timing, and *Crosby* is but one example of this.<sup>533</sup> It is not clear why valid executive agreements should be subject to a different analysis, assuming they are self-executing and thus part of the U.S. domestic legal system.

Thus, *Garamendi* further muddled the situation. As the following analysis of lower court cases indicates, the majority and dissenting opinions in *Garamendi* are generally read by lower courts as confirming the continued vitality of *Zschernig*—perhaps even giving some additional support for purpose review under *Zschernig*.<sup>534</sup> Yet, in light of the majority’s seeming mischaracterization of the *Zschernig* case as a field preemption case, its positive comments towards Justice Harlan’s concurrence in *Zschernig*, and its ultimate reliance on obstacles conflict preemption,<sup>535</sup> the Court in *Garamendi* once again did not provide the degree of clarity desired by state and local actors and lower courts. A few lower courts have suffered from this confusion.<sup>536</sup> Indeed, we might summarize the pros and cons for *Zschernig* and the dormant foreign affairs doctrine found in the *Garamendi* opinion as follows:

Favorable Elements for Dormant Foreign Affairs Doctrine (DFAD) and <i>Zschernig</i>	Unfavorable Elements for the Dormant Foreign Affairs Doctrine (DFAD) and <i>Zschernig</i>
The majority cites to <i>Zschernig</i> and placed emphasis on it early in its opinion. <sup>537</sup>	The majority seems to characterize <i>Zschernig</i> as field preemption case. <sup>538</sup>
Footnote 11 of the opinion recognizes DFAD at least in concept, if not by label. <sup>539</sup>	The majority cited approvingly to Justice Harlan’s concurrence from <i>Zschernig</i> . <sup>540</sup>

<sup>533</sup> See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–74 (2000).

<sup>534</sup> Lower courts have generally read the case in this manner. See *Hartford Enters. v. Coty*, 529 F. Supp. 2d 95, 102–03 (D. Me. 2008) (applying both *Garamendi* and *Zschernig* to review the Maine Workers’ Compensation Act’s effect on Canadian employees); *Nat’l Foreign Trade Council v. Giannoulas*, 523 F. Supp. 2d 731, 741 (N.D. Ill. 2007) (applying *Garamendi* and *Zschernig*, along with explicit purpose-review, to review the Illinois Sudan Act).

<sup>535</sup> See Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 79 (2006) (indicating that by choosing obstacles conflict, the Court has “gone out of its way not to endorse *Zschernig*”).

<sup>536</sup> See, e.g., *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1188 (C.D. Cal. 2005).

<sup>537</sup> *Garamendi*, 539 U.S. at 417–18.

<sup>538</sup> See *Denning & Ramsey*, *supra* note 513, at 877.

<sup>539</sup> *Garamendi*, 539 U.S. at 419 n.11.

Favorable Elements for Dormant Foreign Affairs Doctrine (DFAD) and <i>Zschernig</i>	Unfavorable Elements for the Dormant Foreign Affairs Doctrine (DFAD) and <i>Zschernig</i>
The policy reflected in the executive agreement was interfered with, not the executive agreement itself, and since the Court does not examine if the executive agreement is self-executing, our normal understanding of preemption, requiring an affirmative federal act with legal effect in the U.S. domestic legal system, is not present. <sup>541</sup>	The majority ultimately seems to say executive branch policy, as long as it is consistent, can preempt state laws even without an affirmative federal act. The majority arguably creates a new type of preemption or expands what we normally consider necessary for preemption to occur (i.e., an affirmative federal act with legal effect). <sup>542</sup>
Four justices in dissent seem to believe that the majority relied on <i>Zschernig</i> and that the doctrine exists, but that it just should not be applied to these facts. <sup>543</sup>	

<sup>540</sup> *Id.* at 418–19.

<sup>541</sup> See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUPREME CT. REV. 153, 208–09

The *Garamendi* Court did not reject *Zschernig*. On the other hand, it also did not extend *Zschernig*'s endorsement of an independent federal court power to supervise foreign relations. . . .

Thus, the *Garamendi* Court neatly sidestepped the main criticism of *Zschernig*, which attacked *Zschernig*'s empowerment of federal courts to preempt independently state laws in the complete absence of any input from (or indeed in opposition to) the wishes of the President or Congress. By relying on executive "statements" of national policy, the *Garamendi* Court avoided the problem of unchecked federal courts by empowering the executive branch to settle future disputes over state interference with foreign affairs by issuing statements of national policy.

*Id.*

<sup>542</sup> See Denning & Ramsey, *supra* note 513, at 830, 901–02

The *Garamendi* decision gives the President the power to decide which state laws affecting foreign affairs survive and which do not. This executive preemption concentrates foreign affairs power in the President in a way not countenanced by the Constitution's text nor contemplated by its Framers, who emphasized the importance of separating executive power from legislative power. Previously, if the executive branch wished to pursue a foreign policy with which a state law interfered, the President usually had to seek the support of Congress (or the Senate via a treaty) to override the competing state law through Article VI of the Constitution. This procedure assured that state laws would not stand as obstacles to federal foreign policy, as they had under the Articles of Confederation.

*Id.*; see also Todd Steigman, *Lowering the Bar: Invalidation of State Laws Affecting Foreign Affairs Under the Dormant Foreign Affairs Power After American Insurance Association v. Garamendi*, 19 CONN. J. INT'L L. 465, 477–79 (2004).

<sup>543</sup> *Garamendi*, 539 U.S. at 439–40 (Ginsburg, J., dissenting).

Perhaps this merging or muddling of the two doctrines was inevitable. Scholars have increasingly expressed concerns as to the “muddling” occurring in preemption cases generally.<sup>544</sup> In *Crosby*, the Court explicitly stated that the line between field and conflict preemption was not a rigid one.<sup>545</sup> The Court’s threshold-effects test under *Zschernig*, asking if there is more than some incidental or indirect effect on U.S. foreign policy—perhaps even as only expressed in an executive branch amicus brief—starts melding into a preemption analysis by asking how substantial a conflict there is between the state law and a U.S. policy, one that does not, according to *Garamendi*, necessarily have to come in the form of a federal act with legal binding effect. For this reason, we have seen a lower court ruling post-*Crosby* and post-*Garamendi* referring to “incidental effect in conflict” in its preemption analysis.<sup>546</sup> This reference was apparently borrowed from both *Zschernig* and *Garamendi*.<sup>547</sup> If the Court had more clearly adopted a purpose-based test for the dormant foreign affairs doctrine in *Zschernig*, the muddling between it and preemption analysis would likely never have occurred.

Finally, the Supreme Court’s 2008 opinion in *Medellin v. Texas*<sup>548</sup> may suggest that the Court is backtracking from the proposition that preemption can occur through executive branch policy statements alone.<sup>549</sup> In *Medellin*, the Court found that the International Court of Justice’s judgment, requiring review and reconsideration of sentences

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<sup>544</sup> See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000).

<sup>545</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373, n.6 (2000).

We recognize, of course, that the categories of preemption are not “rigidly distinct.” Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, field pre-emption may be understood as a species of conflict pre-emption.

*Id.* (internal citations omitted).

<sup>546</sup> *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1188 (C.D. Cal. 2005).

<sup>547</sup> *Id.* at 1185–87.

<sup>548</sup> *Medellin v. Texas*, 552 U.S. 491, 532 (2008) (“The Executive’s narrow and strictly limited authority to settle international disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.”).

<sup>549</sup> See, e.g., Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 333–34 (2009); Jeremy K. Schrag, *A Federal Framework for Regulating the Growing International Presence of the Several States*, 48 WASHBURN L.J. 425, 452–57 (2009). Professor Van Alstine argued that *Garamendi* should not be read in a manner that allows Executive Branch preemption through mere policy statements prior to the Supreme Court issuing the *Medellin* opinion. See, e.g., Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 350 (2006).

and convictions by judicial bodies of foreign nationals not notified of their rights to meet with a consular official at time of arrest, was not self-executing and thus did not bind Texas state courts.<sup>550</sup> The Court in *Medellin* also found that the President's memorandum, which attempted to implement the ruling into domestic law, and thus preempt state procedural default doctrines, was invalid.<sup>551</sup>

*Medellin* is welcome in that it helps recreate a solid distinction between the dormant foreign affairs and preemption doctrines. Under *Medellin*, the preemption doctrine would be based on legally binding federal acts having effect in the U.S. domestic legal system, and the dormant foreign affairs doctrine, with the proper purpose-based test, would not require courts to pay heed to policy suggestions that do not have legal effect domestically. As discussed earlier, a dormant foreign affairs doctrine with a purpose-based test not only avoids the potential muddling of the dormant foreign affairs doctrine with the preemption doctrine, but it also respects the non-self-executing nature of certain international obligations that a threshold-effects test potentially would not.<sup>552</sup>

*D. The Supreme Court's (Apparent) Reliance on Preemption Comes with Many Drawbacks*

The Court's apparent preference to rely on preemption rather than the dormant foreign affairs doctrine has many downsides. First, there are significant practical problems with relying exclusively on the federal government's ability to preempt unconstructive state-level foreign policy measures. The federal government may be overburdened in serving this policing function. The legislative calendar is often too busy to allow Congress to actively police state-level foreign policy. Therefore, a failure to preempt should not necessarily be read as implied approval. At most, one could claim that the state measure is not as important or as damaging to the national interests as other legislative issues being addressed. Scholars have argued that the executive branch is quite able to police state-level foreign policy activities, and this should distinguish the policing problem that justifies the dormant Commerce Clause.<sup>553</sup> It is clear that the executive branch has greater time and resources to police state measures than Congress and that the President maintains greater constitutional

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<sup>550</sup> *Medellin*, 552 U.S. at 531.

<sup>551</sup> See *id.* at 532; see also Reinstein, *supra* note 549, at 333–34; Schrag, *supra* note 549, at 452–57; Van Alstine, *supra* note 549, at 350.

<sup>552</sup> See discussion *infra* Part IV.D.1.

<sup>553</sup> Goldsmith, *supra* note 12, at 1684.

power over foreign affairs generally than interstate or foreign commerce. But Congress could delegate to the President the power to preempt state laws that interfere with interstate and foreign commerce to eliminate any policing problem under the dormant Commerce Clause.<sup>554</sup> Yet, the dormant Commerce Clause still persists. Moreover, it is not clear that the President's foreign affairs powers, combined with existing statutory delegations of power from Congress, are sufficient authority for the President to preempt by executive order any and all state-level foreign policy activity.<sup>555</sup> Thus, further congressional legislation or delegations of power may be necessary in particular instances. Lastly, even if the President can police any and all foreign policy actions of the states, politics, particularly in the current environment, may prevent him from doing so. The Constitution may not have left the "resolution of so fundamental a constitutional issue" to "the shifting winds" within the executive branch.<sup>556</sup>

Second, congressional intent, the crux or the "ultimate touchstone" of any preemption analysis,<sup>557</sup> is not always so clear. For example, in the case of Baltimore's divestment requirements targeting businesses active in South Africa in the 1980s, Congress sent conflicting signals on its intention regarding preemption. On the one hand, the House of Representatives passed a resolution at the same time it passed the law stating it had no intent to preempt state anti-apartheid measures.<sup>558</sup> Of course, the resolution did not have the force of law. On the other hand, the so-called D'Amato Amendment, which was incorporated into the statute, stated that the federal government would not penalize a state by, for example, withdrawing federal funds utilized in certain projects as a result of application of state anti-apartheid procurement laws for ninety days after the entry into force of the federal statute.<sup>559</sup> The Maryland Court of Appeals, in examining the Baltimore ordinance, concluded that the provision would be superfluous if state and local anti-apartheid procurement laws were already preempted by the Act.<sup>560</sup> The court agreed with a memoran-

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<sup>554</sup> See discussion of Justice Jackson concurrence in *Steel Seizure*, *supra*, notes 448–51.

<sup>555</sup> *Medellin*, 552 U.S. at 530.

<sup>556</sup> *Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring).

<sup>557</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

<sup>558</sup> *Bd. of Trs. of the Emps.' Ret. Sys. v. Mayor of Baltimore*, 562 A.2d 720, 743 (Md. 1989).

<sup>559</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 5116 (1986).

<sup>560</sup> *Bd. of Trs. of the Emps.' Ret. Sys.*, 562 A.2d at 742.

dum prepared by Professor Tribe that the D'Amato Amendment "leaves the negative implication that investment decisions are not preempted nor are disbursements not using federal funds."<sup>561</sup> Yet the amendment could be interpreted as providing an exception to the preemption that would otherwise occur. Other parts of the legislative history also lead to potentially conflicting views on the intent of Congress with respect to preemption. For instance, an amendment that would have expressly preempted states was withdrawn.<sup>562</sup> Its supporters argued that the federal law would already preempt state law and thus there was no need to go forward with the amendments.<sup>563</sup> Other Senators believed that the express preemption amendment was withdrawn due to its poor prospects for passage.<sup>564</sup> In sum, it may be less intellectually honest to find preemption of state laws in situations in which there are such widely conflicting views of congressional intent.

Third, to the extent *Garamendi* suggests balancing, the degree of the state law's conflict with the federal act or policy against the state's interest, it encourages the very type of analysis state officials would find difficult to engage in independently and dispassionately. State actors are likely to underestimate the degree of conflict with federal law and are also likely to overestimate the strength of their interest in the matter.

Fourth, while it is true that a broad notion of field preemption may be effective at curbing disruptive state foreign policy actions, even such an approach has significant downsides. Courts could claim that the federal government has occupied the entire field of foreign policy or of foreign policy sanctions by citing to all the presidential and congressional acts in the area, including broad delegations by Congress to the President to sanction foreign governments in framework statutes, such as the International Emergency Economic Powers Act.<sup>565</sup> But this may have adverse consequences for preemption analysis generally. Courts are reticent to define fields so broadly in field preemption cases.<sup>566</sup> Purpose review under the dormant foreign affairs doctrine will be more capable of providing guidance to state and local officials and lower courts.

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<sup>561</sup> *Id.*

<sup>562</sup> *Id.* at 741.

<sup>563</sup> *Id.* at 742 n.44.

<sup>564</sup> *Id.* at 741.

<sup>565</sup> See Vazquez, *supra* note 15, at 1292 (discussing a similar argument based on obstacles conflict); see also Golove, *supra* note 38, at 153.

<sup>566</sup> See, e.g., Nelson, *supra* note 544, at 227; Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 623 (2008).

Fifth, if state and local officials continue to read Supreme Court opinions narrowly, as only preempting state laws when there is a specific federal law targeting the same country, and if they continue to enact sanctions legislation, the federal government may be tempted to expressly preempt. Yet attempting to preempt state action through express clauses has its dangers.<sup>567</sup> In short, the inclusion of an express clause can imply that matters beyond the express statement are not preempted, although implied preemption is still possible even with an express clause.<sup>568</sup> Thus, there is a significant risk that Congress will mistakenly draft an under-inclusive express preemption clause. Additionally, there is some indication that court interpretations of express clauses lead to unpredictable results.<sup>569</sup>

*E. Litigation in the Lower Federal and State Courts in the Post-Crosby and Post-Garamendi Era*

Since state sanctions legislation is the most prominent and problematic form of state and local foreign policy, it is appropriate to begin an analysis of the impact of *Crosby* and *Garamendi* in lower court litigation by focusing on that form of state and local foreign policy. The third major wave of state and local sanctions legislation, this time targeting Sudan, followed on the heels of *Crosby* and *Garamendi* and numerous federal acts sanctioning Sudan.<sup>570</sup> Thus, it appears that numerous state and local governments read those opinions quite narrowly, suggesting that the Supreme Court's choice to rely on preemption grounds did not curb the state and local appetite for targeting countries other than Burma. Additionally, states shifted to divestment and banking measures since *Crosby* only dealt with a procurement measure.<sup>571</sup> Part of this shift and reading of *Crosby* may have been created by the executive branch's amicus brief in *Crosby* indicat-

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<sup>567</sup> See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530–31 (1992) (holding that claims not explicitly contained in the express-preemption clause in the Public Health Cigarette Smoke Act of 1969 were not preempted).

<sup>568</sup> *Id.*; see also *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289–90 (1993) (noting that express clauses do not entirely foreclose any possibility of implied preemption).

<sup>569</sup> See, e.g., Greg J. Scandaglia & Therese L. Tully, *Express Preemption and Pre-Market Approval Under the Medical Device Amendments*, 59 FOOD & DRUG L.J. 245, 254–57 (2004).

<sup>570</sup> See *Bush Signs into Law Sudan Investment Measure*, REUTERS, Dec. 31, 2007, <http://in.reuters.com/article/idINN3156518420071231> (“Some 20 U.S. states have initiated divestment efforts because of the conflict in Sudan’s Darfur region” by the end of 2007).

<sup>571</sup> See, e.g., 15 ILL. COMP. STAT. 520/0.01 (West 2010); 40 ILL. COMP. STAT. 5/1-110.5 (West 2010).

ing that divestment sanctions might be constitutional.<sup>572</sup> The amicus brief hedged on this, claiming it was unnecessary to decide the issue, and it also indicated that divestment measures targeting other states would be more problematic than those targeting foreign countries.<sup>573</sup> The latter statement, of course, conflicts with long-standing Supreme Court precedent that those measures affecting foreign commerce are subject to greater scrutiny than those affecting interstate commerce.<sup>574</sup> The occurrence of this third major wave of state and local sanctions legislation might serve as some evidence that the Court's choice of preemption as the grounds for its rulings, with confusing references to *Zschernig*, was not the best choice.

Recently, however, businesses acting through the same trade association as in the *Crosby* litigation, the National Foreign Trade Council (NFTC), challenged an Illinois law sanctioning Sudan.<sup>575</sup> The case is the most prominent post-*Crosby* and post-*Garamendi* case, and serves as an example of the impact the Supreme Court's rulings in *Crosby* and *Garamendi* have had on lower court analysis.

1. *National Foreign Trade Council v. Giannoulis*

In 2007, the NFTC was one of several plaintiffs to file suit challenging the Illinois Act to End Atrocities and Terrorism in the Sudan ("Illinois Act").<sup>576</sup> The 2005 Illinois Act prohibited the state from depositing state funds in any financial institution that maintained customers defined as forbidden entities.<sup>577</sup> Forbidden entities included "[a]ny company who has failed to certify under oath that it does not own or control any property or asset located in, have employees or facilities located in, provide goods or services to . . . or invest in i) the Republic of Sudan; or ii) any company domiciled in the Republic of Sudan."<sup>578</sup> The Illinois Act also prohibited state and local government pension funds from maintaining investments in businesses with Sudanese ties or contacts.<sup>579</sup> The federal government had imposed various sanctions against Sudan pursuant to an Executive Order and leg-

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<sup>572</sup> Brief for the United States as Amicus Curiae Supporting Affirmance at 28, *Crosby v. NFTC*, 530 U.S. 363 (2000).

<sup>573</sup> See *id.* at 29 n.24.

<sup>574</sup> See *Japan Line, Ltd. v. City of Los Angeles*, 441 U.S. 434, 449 (1979).

<sup>575</sup> See *Nat'l Foreign Trade Council v. Giannoulis*, 523 F. Supp. 2d 731, 733 (N.D. Ill. 2007).

<sup>576</sup> See *id.*

<sup>577</sup> *Id.* at 733.

<sup>578</sup> *Id.* at 734.

<sup>579</sup> *Id.* at 733.



islation beginning in 1997 and continuing through the time of the litigation.<sup>580</sup> These federal sanctions prohibited most transactions by U.S. companies with Sudan, other than humanitarian and medical efforts, and ultimately included travel restrictions on Sudanese officials involved in the genocide in Darfur.<sup>581</sup> The federal laws also granted the President broad waiver authority similar to the Burmese sanction law.<sup>582</sup>

In *Giannoulis*, the federal district court struck down the Illinois Act's banking provisions on preemption grounds, relying primarily on *Crosby*.<sup>583</sup> The court highlighted the fact that the Illinois Act contained no exceptions and targeted foreign subsidiaries of U.S. companies that were not covered under the federal act.<sup>584</sup> Further, the Illinois Act applied to companies operating anywhere in the Sudan even though the federal sanctions were loosened to exempt certain geographic areas in the Sudan.<sup>585</sup> Thus, similar to *Crosby*, the Illinois Act changed the calibration of sanctions determined to be appropriate by the federal government.<sup>586</sup> Illinois attempted to rely upon *Board of Trustees of the Employees Retirement System v. Mayor of Baltimore*, which upheld divestment legislation aimed at South Africa in the mid-1980s,<sup>587</sup> to support the law.<sup>588</sup> But the court rejected the approach of *Board of Trustees* because the case was decided prior to *Crosby*, and it believed that *Crosby* had either strongly questioned or explicitly rejected two key elements of the *Board of Trustees* opinion.<sup>589</sup> The first element the Supreme Court strongly questioned in *Crosby* was the presumption against preemption in areas of traditional state regulation.<sup>590</sup> Second, the Court explicitly rejected the validity of laws not directly targeting a foreign government but merely private companies trading with a foreign government.<sup>591</sup> Nonetheless, the district court in *Giannoulis* ruled that the impact of the divestment provisions was too attenuated to be considered an obstacle to achieving the full

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<sup>580</sup> *Id.* at 735.

<sup>581</sup> *Giannoulis*, 523 F. Supp. 2d at 735.

<sup>582</sup> *Id.* at 740.

<sup>583</sup> *Id.* at 738.

<sup>584</sup> *Id.* at 738.

<sup>585</sup> *Id.*

<sup>586</sup> *Id.* at 738–39.

<sup>587</sup> 562 A.2d. 720 (Md. 1989).

<sup>588</sup> *Giannoulis*, 523 F. Supp. 2d at 740.

<sup>589</sup> *Id.*

<sup>590</sup> *Id.*

<sup>591</sup> *Id.* at 740.

purposes of the federal act.<sup>592</sup> The court's analysis seems to be based on conjecture or perhaps a lack of evidence of the impact of the divestment measures.<sup>593</sup>

The court reached similar conclusions under its dormant foreign affairs doctrine analysis.<sup>594</sup> Interestingly, the court cited both *Zschernig* and *Garamendi* in this section of its analysis.<sup>595</sup> It also ultimately adopted the traditional threshold-effects test (i.e., "more than an incidental or indirect effect") as the appropriate test, after earlier complaining that neither case clearly laid out what test to apply to determine if a state or local law ran afoul of the federal government's foreign relations powers.<sup>596</sup> The court found the banking section of the act ran afoul of the threshold-effects test because it singled out a particular foreign country.<sup>597</sup> The court also relied on evidence that banks had lost \$275 million in state deposits for failure to comply with the Illinois Act's requirements, and this loss of business could ultimately cause the banks to cease doing business with prohibited entities.<sup>598</sup> Thus, the Illinois Act impacted Sudan.<sup>599</sup> In contrast, the court found the divestment measures did not have more than some incidental or indirect effect on Sudan or U.S.-Sudan relations.<sup>600</sup>

Interestingly, much earlier in its opinion, the court found from the Illinois Act's title, preamble, and legislative history that the purpose of the state law was to criticize or change the behavior of the government of Sudan.<sup>601</sup> While the court did not tie this purpose-finding back into its dormant foreign affairs doctrine analysis, the court probably would have invalidated the banking *and* divestment provisions of the law if it had exclusively employed this Article's preferred purpose-based test. Moreover, it seems likely the court's analysis gave at least some weight to the Illinois Act's purpose, otherwise

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<sup>592</sup> *Id.*

<sup>593</sup> *See id.* at 742 ("The Court has been presented with no evidence suggesting that these pension funds' inability to purchase the securities of such companies would be in any way likely to affect their decision to do business in that country.").

<sup>594</sup> *Giannoulas*, 523 F. Supp. 2d at 746.

<sup>595</sup> *Id.* at 742.

<sup>596</sup> *Id.* at 745 (citing *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999)).

<sup>597</sup> *Id.* at 745.

<sup>598</sup> *Id.*

<sup>599</sup> *Id.*

<sup>600</sup> *Giannoulas*, 523 F. Supp. 2d at 745.

<sup>601</sup> *Id.* at 734.

there would have been little reason to delve into such analysis at the start of the opinion.<sup>602</sup>

The *Giannoulis* case is an example of a lower federal court following the *Crosby* and *Garamendi* lead in relying first on obstacles conflict preemption grounds.<sup>603</sup> It is also an example of how a court can find wiggle room to uphold, under preemption doctrine, portions of state laws singling out a particular foreign nation for criticism, even though such laws would not survive under the dormant foreign affairs doctrine.<sup>604</sup> *Giannoulis* also suggests that lower courts will read *Zschernig* as still alive but that a threshold-effects test may also permit states to take actions singling out particular foreign countries for criticism. Importantly, and regrettably, the *Giannoulis* court did not seek to hypothetically aggregate similar actions being enacted by other states and localities in deciding whether the threshold-effects test was met. The fact that the court struck down the divestment provisions under the dormant Foreign Commerce Clause does not minimize the court's failures under the dormant foreign affairs doctrine, given that the court came to its finding because the state was directing local pension funds to divest, and thus, under Seventh Circuit case law, acting in a regulatory capacity, not a market participant capacity.<sup>605</sup> If the state had merely required divestment of Sudanese connected companies by state pension funds, the court might have found that the market-participant exception protected the divestment provision from challenge.

## 2. More Post-*Crosby* and Post-*Garamendi* Lower Court Treatment of *Zschernig*-Based Claims

The *Giannoulis* opinion provides an example of the types of problems that can arise in a post-*Garamendi* examination of state laws—*Zschernig* is alive, but not preferred, and a threshold-effects test is employed more prominently than a purpose-based test. But are the types of problems present in *Giannoulis* widespread among lower courts?

Over a dozen other lower court cases, all but one of them federal, have significantly addressed *Zschernig* claims since *Crosby* and *Ga-*

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<sup>602</sup> See *id.* at 745. (acknowledging that the very purpose of the Illinois Act was to enact economic sanctions on Sudan).

<sup>603</sup> *Id.* at 738.

<sup>604</sup> See *id.* at 742.

<sup>605</sup> See *id.* at 748.

*ramendi*.<sup>606</sup> The bare majority of these cases (summarized in the chart below) indicate that indeed *Zschernig* is alive, the doctrines of preemption and the dormant foreign affairs doctrine can be kept distinct, and an act's purpose frequently plays a key role in analyzing state measures under the dormant foreign affairs doctrine, even if fealty is paid to the threshold-effects test. Nevertheless, many lower court cases also indicate some confusion and mixing at times of preemption and dormant foreign affairs doctrine claims in the post-*Crosby* and post-*Garamendi* era.

Case Name	Law or Action at Issue	Test Under DFAD & Order of Analysis	Type of Preemption Analysis	Result
<i>Condon v. Inter-Religious Foundation for Community Organization</i> <sup>607</sup>	Commissioner of city school district's special investigation into whether travel to Cuba by students chaperoned by school employees violated federal law.	The court used the threshold-effects test but gave <u>some commentary on the act's purpose</u> as well. This was the <i>first and only</i> doctrine analyzed.	None.	No violation of DFAD.
<i>ABC Charters, Inc. v. Bronson</i> <sup>608</sup>	Additional bonding requirements on travel agencies arranging travel to Cuba, which created two classes of travel agencies, those that do business with Cuba and other terrorist states and those that do not.	The court used the threshold-effects test but <u>with the act's purpose ("design and intent") considered as the first sub-factor</u> . This was the <i>first doctrine analyzed</i> (prior to preemption).	The court used <i>Crosby</i> -styled obstacles conflict preemption analysis, <i>Hines</i> -styled field preemption analysis, and did not cite to <i>Garamendi</i> .	Violation of DFAD, preempted, and a violation of the dormant Foreign Commerce Clause.
<i>Faculty Senate of Florida Internationals University v. Winn</i> <sup>609</sup>	Restricted state universities from spending both state and "non-state" funds on activities related to	The court used the threshold effects test, but the act's <u>purpose was the first sub-factor</u> (and the court	The court used a <i>Crosby</i> -styled obstacles conflict preemp-	Violation of DFAD and preempted.

<sup>606</sup> Additional cases, other than those analyzed in the chart, cite to *Zschernig* in the post-*Garamendi* era, but the chart is limited to those cases that involve a significant discussion and analysis of *Zschernig*.

<sup>607</sup> *Condon v. Inter-Religious Found. for Cmty. Org., Inc.*, 850 N.Y.S.2d 841 (N.Y. Sup. Ct. 2008).

<sup>608</sup> *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272 (S.D. Fla. 2008).

<sup>609</sup> *Faculty Senate of Fla. Intern. Univ. v. Winn*, 477 F. Supp. 2d 1198 (S.D. Fla. 2007).

Case Name	Law or Action at Issue	Test Under DFAD & Order of Analysis	Type of Preemption Analysis	Result
	travel to a "terrorist state," as designated by the U.S. Department of State as a state sponsor of terrorism.	almost seems to declare the act unconstitutional based on purpose alone). This was the <i>first doctrine analyzed</i> (prior to preemption).	tion analysis.	
<i>Hartford Enterprises Inc., v. Coty</i> <sup>610</sup>	Maine Workers' Compensation Act applied to Canadian employees who came into Maine for only restricted purposes and limited times.	The court used the threshold-effects test but the act's <u>purpose was the first sub-factor</u> . This was the <i>second doctrine applied</i> (after preemption).	The court stated that <i>Garamendi</i> stands for the proposition that traditional field preemption requires greater conflict.	No violation of DFAD and no preemption.
<i>Central Valley Chrysler-Jeep v. Witherspoon</i> <sup>611</sup>	California greenhouse gas (GHG) limits.	The court mixed DFAD and preemption analysis ( <i>Zschernig</i> and <i>Garamendi</i> ).	The court mixed DFAD and preemption ( <i>Zschernig</i> and <i>Garamendi</i> ).	No violation.
<i>Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie</i> <sup>612</sup>	Vermont GHG limits.	The court used the "disruption and embarrassment" test, rather than threshold-effects, but <u>hints at purpose-review</u> . This was the <i>first doctrine analyzed</i> (prior to preemption).	The court used a <i>Garamendi</i> -styled analysis but required an express policy (presumably in legal measures such as an executive agreement).	No violation of DFAD or preemption doctrine.
<i>In re Nat'l Security Agency Telecommunications Records Litigation</i> <sup>613</sup>	Investigation by state officials of telecommunications companies that turned over records and information to the NSA.	<u>The purpose-based test was applied first</u> , but a threshold-effects test was also applied. This was the <i>first doctrine analyzed</i> (prior to preemption).	None.	No violation of DFAD.
<i>Republic of Iraq v. Beaty</i> <sup>614</sup>	Suit under the FSIA Act against the state of Iraq by children of Americans impr-	The court seems to mix <i>Garamendi</i> and <i>Zschernig</i> into a	The court used a <i>Garamendi</i> -styled	No violation.

<sup>610</sup> *Hartford Enters., Inc. v. Coty*, 529 F. Supp. 2d 95 (D. Me. 2008).

<sup>611</sup> *Cent. Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160 (E.D. Cal. 2006).

<sup>612</sup> *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

<sup>613</sup> *In re Nat'l Sec. Agency Telecomm. Records Litig.*, 633 F. Supp. 2d 892 (N.D. Cal. 2007).

<sup>614</sup> *Republic of Iraq v. Beaty*, 129 S.Ct. 2183 (2009).

Case Name	Law or Action at Issue	Test Under DFAD & Order of Analysis	Type of Preemption Analysis	Result
	soned and tortured by the former regime for intentional infliction of emotional distress under tort laws of Oklahoma and Florida.	preemption analysis (although it makes a late reference to there being no intent to criticize the foreign government).	analysis (noting that since tort law is a traditional area of state law, the conflict with U.S. foreign policy would need to be significant).	
<i>Mujica v. Occidental Petroleum Corp.</i> <sup>615</sup>	Columbian nationals sued an oil company and a private security firm under the Alien Tort Statute and state law to recover for their personal injuries and for deaths of family members caused by the bombing of a village by the Columbian military.	The court largely merged preemption and DFAD analysis (late in the court's opinion it speaks of "incidental conflict").	The court used <i>Garamendi</i> but gave weight to a State Department statement of interest, rather than insist on express policy (further indication of some merging of DFAD with preemption).	Violation of DFAD.
<i>Cruz v. United States</i> <sup>616</sup>	Mexican nationals who worked in the United States during and after WWII brought action against Mexico, Mexican banks, the United States, and American bank for failure to pay wages. California enacted a statute removing statute of limitations for actions such as the one brought.	The court applied <i>Zschernig</i> , describing it as a field preemption case, although the test applied focused on criticism of foreign government ( <u>close to purpose-based test</u> ). <i>The court analyzed Zschernig second</i> (after preemption).	The court used a <i>Garamendi</i> -styled analysis (finding no preemption based on executive agreements with Mexico since the agreements seemed to envision possibility of such suits).	No violation of DFAD or preemption.
<i>In re Agent Orange Product Liability Litigation</i> <sup>617</sup>	Application of state tort law concerning products liability in ATS by Vietnamese non-profit and nationals against manufactures.	The court cites <i>Zschernig</i> focusing on minute inquiries and criticism concerns in the case, and found no such risk in ordinary application of New York tort law	The court used a <i>Garamendi</i> -styled analysis and found no preemption, noting that plaintiff's	No violation of DFAD or preemption.

<sup>615</sup> *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

<sup>616</sup> *Cruz v. United States*, 387 F. Supp. 2d 1057 (N.D. Cal. 2005).

<sup>617</sup> *Nguyen Thang Loi v. Dow Chemical Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d. 7 (E.D.N.Y. 2005).

Case Name	Law or Action at Issue	Test Under DFAD & Order of Analysis	Type of Preemption Analysis	Result
		were it applicable.	domestic law claims were already barred by the government contractor defense.	
Saleh v. Titan Corp. <sup>618</sup>	Application of state tort law to claims by Iraqi nationals of abuse by U.S. military contractors in Iraq.	The court gives little attention to <i>Zschernig</i> (only in a string cite with other preemption cases for the general proposition that states have no role in war time policy making).	The court mixed its analysis. It relied on <i>Crosby</i> and <i>Garamendi</i> as obstacles conflict-type preemption (changing the calibration of sanctions), but since there was no affirmative act of the federal government that preempts, the case may be considered a DFAD case. <sup>619</sup>	Preempted.
<i>Movsesian v. Victoria Versicherung AG</i> <sup>620</sup>	California Statute extending statute of limitations for claims arising out of life insurance policies for Armenian genocide victims. <sup>621</sup>	The court only once cited <i>Zschernig</i> (for the proposition that “courts look past superficial legislative intent to ascertain true legislative intent”).	The court finds <i>Garamendi</i> allows preemption by executive branch statements alone (no formal affirmative legal act is required). The court balanced the degree of conflict against the state interest.	Preempted.

<sup>618</sup> Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009).

<sup>619</sup> Indeed, this is what the dissent suspected. See *id.* at 17 (Garland, J., dissenting) (arguing no precedent to strike down facially neutral generally applicable law under dormant foreign affairs doctrine).

<sup>620</sup> *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009).

<sup>621</sup> See *id.* at 1054 (internal quotations omitted).

Case Name	Law or Action at Issue	Test Under DFAD & Order of Analysis	Type of Preemption Analysis	Result
<i>Von Saher v. Norton Simon Museum of Art at Pasadena</i> <sup>622</sup>	California statute extending statute of limitations for claims seeking recovery of Holocaust-era art.	The court examined the <u>purpose (or aim) of the law first</u> and then examined effects. <sup>623</sup> This was the <i>second doctrine analyzed</i> (after preemption).	The court initially kept preemption (citing <i>Crosby</i> and <i>Garamendi</i> first) and the dormant foreign affairs doctrine (citing <i>Zschernig</i> ) distinct. Later, in its opinion, <i>Garamendi</i> creeps into the DFAD analysis, and there was some mixing of the doctrines.	Not preempted but conflicts with DFAD (or more specifically dormant War Powers doctrine). <sup>624</sup>

As displayed in the above chart, seven of the thirteen lower court opinions analyzing *Zschernig*-based claims were able keep their dormant foreign affairs doctrine analysis separate and distinct from a preemption analysis.<sup>625</sup> Of the seven cases that kept the doctrines distinct, six placed considerable emphasis on purpose in their dormant foreign affairs doctrine analysis.<sup>626</sup> As also displayed in the above chart, however, a large minority of lower courts did not escape the

<sup>622</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010).

<sup>623</sup> *See id.* at 965 (“California ‘seeks to redress wrongs committed during the second World War’—a motive that [is] fatal.”) (citing *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003)).

<sup>624</sup> *Id.* at 965–66 (“The District Court held that [the California statute] intrudes on the power to make and resolve war, a power reserved exclusively for the federal government under the Constitution. We agree.”).

<sup>625</sup> The seven cases are the following: *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010); *Hartford Enters., Inc. v. Coty*, 529 F. Supp. 2d 95 (D. Me. 2008); *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272 (S.D. Fla. 2008); *Condon v. Inter-Religious Found. for Cmty. Org., Inc.*, 850 N.Y.S.2d 841 (N.Y. Sup. Ct. 2008); *In re Nat’l Sec. Agency Telecomm. Records Litig.*, 633 F. Supp. 2d 892 (N.D. Cal. 2007); *Faculty Senate of Fla. Intern. Univ. v. Winn*, 477 F. Supp. 2d 1198 (S.D. Fla. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

<sup>626</sup> These cases include the following: *Von Saher*, 592 F.3d 954; *Hartford Enters.*, 529 F. Supp. 2d 95; *ABC Charters, Inc.*, 591 F. Supp. 2d 1272; *Condon*, 850 N.Y.S.2d 841; *Nat’l Sec. Agency Telecomm. Records Litig.*, 633 F. Supp. 2d 892; *Faculty Senate of Fla. Intern. Univ.*, 477 F. Supp. 2d 1198.



potential confusion arising out of *Garamendi*. Thus, a need exists for further clarification by the Supreme Court.

IX. THE DORMANT FOREIGN AFFAIRS DOCTRINE IN THE COURTS  
OR IN STATE CAPITOLS?

U.S. courts cannot be relied upon as the sole, or perhaps not even the primary, forum for applying the dormant foreign affairs doctrine. Private parties affected by state-level foreign policy legislation must weigh the benefits of bringing a successful claim under a doctrine with an uncertain test against the risks of bringing a suit, including potential consumer boycotts<sup>627</sup> from those supporting the state's incursion into foreign policy. Therefore, because of the ambiguity of the doctrine, the uncertainty of success, and the risks to private parties, the courts cannot serve as a comprehensive forum of constraint.

Accordingly, self-imposed constraint by state legislators and governors is necessary, at least to some degree.<sup>628</sup> State legislators and governors have a duty to impose constitutional constraints upon themselves.<sup>629</sup> Both take oaths to uphold and support the U.S. Constitution.<sup>630</sup> The Constitution, in fact, requires such "oaths or affirmations" by all state government representatives and officials.<sup>631</sup> Madison opined in the Federalist Papers No. 44 that "the members and officers of the State governments . . . will have an essential agency in giving effect to the federal Constitution."<sup>632</sup> It is part of the "conscientious" state official's duty to analyze the constitutionality of proposed legislation, executive orders, and other formal acts.<sup>633</sup> Legislators and governors, however, do not have complete independence in interpreting the U.S. Constitution for purposes of reviewing proposed acts. Legislators and governors are bound to follow, or at least give extreme deference to, the decisions of the highest court of the land, the U.S. Supreme Court.<sup>634</sup> The Court has established a dormant for-

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<sup>627</sup> See Fenton, *supra* note 34, at 591.

<sup>628</sup> Thus, while I agree with Professor Fenton that cases will rarely be brought, I disagree that judicial invalidation is the only realistic option for correction of the problem. See Fenton, *supra* note 34, at 592.

<sup>629</sup> Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587 (1975).

<sup>630</sup> See U.S. CONST. art. VI, cl. 3.

<sup>631</sup> *Id.*

<sup>632</sup> THE FEDERALIST NO. 44, at 133 (James Madison) (Roy Fairfield 2d ed., 1981).

<sup>633</sup> See Brest, *supra* note 629, at 587.

<sup>634</sup> In the context of federal legislators, see Brest, *supra* note 629, at 587. On the debate as to whether non-judicial officials must follow the Constitution as interpreted

eign affairs doctrine.<sup>635</sup> The better reading of *Crosby* and *Garamendi*, as supported by a multi-modal interpretation of the Constitution and lower court opinions in the post-*Crosby* and post-*Garamendi* era, confirms the vitality of the doctrine and the importance of purpose in analyzing state actions under the doctrine. Thus, state legislators and governors should not interpret the Constitution so as to deny the existence of such a doctrine.<sup>636</sup> Nevertheless, because the Court has not addressed every issue related to the doctrine, for example, the existence of the market-participant exception, some independent interpretation of the doctrine must occur. The Court could facilitate and ease the difficult interpretational task state legislators and governors currently face by clearly adopting a purpose-based doctrinal test and rejecting a market-participant exception under the dormant foreign affairs doctrine. Clarification by the Court would provide far greater guidance to state officials than the current threshold-effects test. Such action would also allow lower courts to serve a greater role as a forum of constraint since private parties would be less hesitant to challenge state measures without the ambiguity over the doctrinal test. However, one might hope that in time the faithful application of the dormant foreign affairs doctrine with a purpose-based test will eliminate the need for even infrequent litigation.

X. MAY THE SUPREME COURT RELY ON  
THE DORMANT FOREIGN AFFAIRS DOCTRINE WHEN  
PREEMPTION COULD ALSO BE RELIED UPON?

In *Crosby*, the Court cited *Ashwander v. TVA*<sup>637</sup> as a reason why it chose not to address the First Circuit's additional grounds for invalidating the Massachusetts Burma law, including the dormant foreign affairs doctrine.<sup>638</sup> Justice Brandeis' concurrence in *Ashwander* is frequently cited to as laying out the rules on Supreme Court judicial restraint.<sup>639</sup> The fourth principle in *Ashwander* relied upon by the Court to rule exclusively on preemption grounds in *Crosby* states:

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by the Supreme Court, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>635</sup> See *Zschemnig v. Miller*, 389 U.S. 429, 432 (1968).

<sup>636</sup> See Matthew Schaefer, *Conscientious State Legislators and the Cultures of Compliance and Liberalization Relating to International Trade Agreements*, 95 AM. SOC'Y INT'L L. PROC. 52, 54 (2001).

<sup>637</sup> 297 U.S. 288 (1936).

<sup>638</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 (2000).

<sup>639</sup> See *Ashwander*, 297 U.S. at 341.

The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.<sup>640</sup>

It is immediately apparent that if the application of preemption doctrine is considered to involve a constitutional question—as it rightfully should be, given the doctrine involves interpretation of the Supremacy Clause as well as statutory construction to glean congressional intent—then *Ashwander* is not a sufficient reason to chose preemption grounds over dormant foreign affairs doctrine grounds.<sup>641</sup> It appears the Court, prior to *Crosby*, never before relied on *Ashwander* to rule on preemption grounds over a dormant doctrine (i.e., either dormant foreign affairs doctrine or dormant Commerce Clause), so it was a novel application of the rule rather than long-standing practice.<sup>642</sup> In fact, while Justice Harlan’s concurrence in *Zschernig* argued that the Court should rule on preemption grounds in part based on *Ashwander*,<sup>643</sup> the six Justices in the majority rejected the argument and relied instead on the dormant foreign affairs doctrine.<sup>644</sup> To be fair, relying on preemption grounds would have required revisiting the interpretation of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Germany established earlier in *Clark v. Allen*, something the majority was unwilling to do.<sup>645</sup> Therefore, there was not an *explicit* rejection by the *Zschernig* majority of the application of the fourth principle of *Ashwander* in their decision to rely on dormant foreign affairs doctrine grounds rather than preemption grounds.

The strength of *Ashwander*’s fourth principle, however, as applied to situations involving a choice between preemption grounds or dormant foreign affairs doctrine grounds is further lessened when its

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<sup>640</sup> *Id.* at 347.

<sup>641</sup> See Vazquez, *supra* note 15, at 1265-68; see also Garrick Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 957 (2007) (“Preemption issues should be treated like any other constitutional issues for purposes of Pullman abstention and the rule that courts, where possible, should decide issues in the order that avoids constitutional questions.”).

<sup>642</sup> The court, however, chose preemption grounds over other constitutional doctrines, such as the Equal Protection Clause in certain cases. See Pursley, *supra* note 641, at 913.

<sup>643</sup> See *Zschernig v. Miller*, 389 U.S. 429, 444 (1968) (Harlan, J., concurring).

<sup>644</sup> See *Zschernig*, 389 U.S. at 432; see also Schaefer, *supra* note 4, at 47.

<sup>645</sup> See *supra* Part IV.B.

origins are considered. In laying out the fourth principle, Justice Brandeis cited to two cases: *Siler v. Louisville & Nashville Railroad Co.*<sup>646</sup> and *Light v. United States*<sup>647 648</sup>. Neither of these involved a decision to rely on preemption grounds over a dormant doctrine. Indeed, the cases involved a choice between local law and federal constitutional doctrines to resolve the case at hand.<sup>649</sup> Moreover, neither *Siler* nor *Light* speaks in terms of any obligation that a court must, or indeed certainty that a court would prefer, to resolve questions on a local law basis, rather than a federal constitutional question. In *Siler*, the Court stated that it can “if it deem[s] it proper, decide the local questions only, and omit to decide the Federal questions.”<sup>650</sup> In *Light*, the court, citing to *Siler*, stated that “where [a] case in this court can be decided without reference to questions arising under the Federal Constitution that course is usually pursued, and is not departed from without important reasons.”<sup>651</sup> Thus, it appears that in certain situations, the presumption against deciding on constitutional grounds can be overcome. Eliminating unnecessary confusion and uncertainty over a significant constitutional doctrine might be sufficient grounds to overcome the normal rule of judicial restraint, even assuming that it applies in the context of choosing between two constitutional doctrines: preemption and dormant foreign affairs doctrine.

## XI. CONCLUSION

U.S. state involvement in foreign affairs continues. Sanctions legislation for foreign-policy purposes, namely to change or criticize the behavior of foreign governments, is perhaps the most significant and problematic manifestation of this increased involvement. Yet the existence of a dormant foreign affairs doctrine that invalidates certain state actions in foreign affairs, even when such actions have not been preempted by federal enactments, is increasingly criticized and questioned.<sup>652</sup> The plenary preemptive powers of the federal government over foreign affairs, it is argued by many scholars, are suffi-

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<sup>646</sup> 213 U.S. 175 (1909).

<sup>647</sup> 220 U.S. 523 (1911).

<sup>648</sup> *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (citing *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191 (1909); *Light v. United States*, 220 U.S. 523, 538 (1911)).

<sup>649</sup> See *Siler*, 213 U.S. at 191; *Light*, 220 U.S. at 538.

<sup>650</sup> *Siler*, 213 U.S. at 191.

<sup>651</sup> *Light*, 220 U.S. at 538 (citing *Siler*, 213 U.S. at 193).

<sup>652</sup> See *supra* note 12.

cient to eliminate any negative effects of state-level foreign policies.<sup>653</sup> Yet sole reliance on preemption analysis does not allow the federal government to pursue quiet diplomacy with respect to a foreign-policy matter. Moreover, there will always be questions of congressional intent to preempt when uncertainty over the existence and scope of the dormant foreign affairs doctrine persists. For example, congressional representatives believing that such a doctrine exists may not explicitly preempt state sanctions activity in a federal sanctions law because they believe such state activity is already prohibited by the Constitution.

The existence of the dormant foreign affairs doctrine is supported by a multi-modal interpretation of the Constitution. While there are conflicting signals of the appropriate test to be utilized under the doctrine in the Court's 1968 *Zschernig* opinion, purpose review is the most appropriate standard. Specifically, the dormant foreign affairs doctrine should prohibit state actions that have a foreign policy purpose. A foreign policy purpose is evident when the primary purpose of the state action is to criticize or change a policy of a foreign government. Such a test best suits the competence of the courts, can be more consistently applied by courts, prevents the executive branch or—even worse—foreign governments from serving as the de facto judges of the validity of state legislation, and provides the greatest degree of guidance to state government officials.

Importantly, purpose review also respects traditional areas of state regulation and federal government views on whether certain international agreements are self-executing to a much greater degree than a threshold-effects test. Such review also will not prevent many activities states currently engage in that some broader definitions of foreign policy may include. For instance, state trade missions and overseas investment offices do not, as a general matter, violate the dormant foreign affairs doctrine since their primary purpose is not to change foreign government policies but rather to facilitate private business contacts and private investment. Similarly, state activities that create foreign controversies such as imposition of the death penalty will not violate a purpose-review-based dormant foreign affairs doctrine. States do not take such actions with the primary purpose of changing foreign government policies. A purpose-review test further refined, such that it is both limited to measures with legal effect and respectful of prior precedent, might be preferred. It would allow state governments to voice their views on foreign policy matters to the

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<sup>653</sup> See discussion *supra* Part VIII.A.

federal government, just as a state can on any other federal matter, through non-binding resolutions and allow states to maintain reciprocity-inspired legislation. Additionally, a market participant exception should not be available under the dormant foreign affairs doctrine, and the additional “one voice” prong of analysis under the dormant Foreign Commerce Clause should be eliminated because the concerns that led to the creation of the “one voice” prong are cured through faithful application of the dormant foreign affairs doctrine.

While the Court’s decisions in the early 2000s in *Crosby* and *Garamendi* have arguably created some confusion over the status of, and test to be used under, the dormant foreign affairs doctrine, a majority—bare as it may be—of lower courts continue to treat the doctrine as alive and well, and place significant emphasis on purpose in their analysis. Yet, because state officials must engage in a review of their actions even in the absence of litigation, it would be preferable for the Court to eliminate any confusion it has created. The Court appears to have the flexibility to do so in a future case, given its own rules on judicial restraint do not absolutely require otherwise. Even if the Court elects not to do so, state officials have plenty of reasons to independently apply a dormant foreign affairs doctrine with purpose review playing a key role as they assess the constitutionality of their own actions.