INTRODUCTION .................................................. 342
I. FOREIGN POLICY PREEMPTION: AN OVERVIEW ............ 348
   A. Foreign Policy Preemption—In General .................. 348
   B. Foreign Policy Preemption—Judicial Origins .......... 350
      1. Pre-Zschernig Decisions .......................... 351
      2. Zschernig v. Miller ................................ 356
   C. Foreign Policy Preemption—Modern Scope ............ 357
   D. Foreign Policy Preemption—Constitutional Justifications .... 365
II. A CRITIQUE OF THE CONVENTIONAL ARGUMENTS FOR
   FOREIGN POLICY PREEMPTION ............................. 369
   A. Argument from the Logic of the Federal System ......... 370
       1. What the Argument Must Show .................. 370
       2. Why the Argument Fails .......................... 374
   B. Argument from Framers’ Intent ........................ 379
   C. Argument from Context ................................ 388
III. THE TEXTUAL ARGUMENT FOR FOREIGN POLICY PRE-
    EPTION ........................................................ 390
    A. Executive Preemption in General .................... 391
    B. Foreign Policy Power Giving Rise to Executive Preemption... 396
    C. Advantages of the Argument for Executive Preemption ...... 400
    D. Conclusion ............................................ 402
IV. THE ORIGINAL UNDERSTANDING: THE IMPLAUSIBILITY OF
    FOREIGN POLICY PREEMPTION ............................. 403

* Associate Professor of Law, University of San Diego Law School. A.B.
  Dartmouth College, 1986; J.D. Stanford Law School, 1989. Thanks to Michael B.
  Rappaport, Peter J. Spiro, John C. Yoo, and the participants in the 1999 University of
  San Diego Law School Faculty Colloquium for helpful comments.
INTRODUCTION

The Supreme Court and most commentators say that state and local laws are unconstitutional if they "impair the effective exercise of the Nation's foreign policy."¹ This Article disagrees, at least to the extent of the original understanding of the Constitution. Many "impairments" would indeed be unconstitutional, since state and local activities affecting foreign policy are preempted by the Supremacy Clause of Article VI if they conflict with federal laws or treaties, and state activities may also be precluded by specific constitutional limitations (such as restrictions on state warmaking and treatymaking powers).² Based on these provisions, however, one might suppose that state interference in foreign policy not specifically excluded by the Constitution nor preempted by Article VI would be permissible (though not, perhaps, advisable). But the conventional view would also invalidate state laws as "unconstitutional encroach[ments] on the federal government's exclusive power over foreign relations,"³ even absent an applicable statute, treaty, or specific constitutional provi-


² See U.S. CONST. art. I, § 10; U.S. CONST. art. VI.

The central Government alone may directly exercise power in foreign affairs.

No State shall enter into any Treaty, Alliance or Confederation; [or] grant Letters of Marque and Reprisal. . . . No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . . . 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 a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

U.S. CONST. art. I, § 10.

sion, and that, I argue, is unsupportable by appeal to the original design.

The matter has gained prominence in recent years as states and local jurisdictions increasingly seek a voice in international matters, and courts view the exercise of that voice with constitutional suspicion. A 1996 Massachusetts law, for example, penalizes companies doing business in Burma as a response to the human rights record of the Burmese military regime; two federal courts invalidated that statute as interfering with federal foreign policy.4 Other states and local jurisdictions have adopted or proposed similar measures in response to the perceived misdeeds of, among others, Indonesia, Pakistan, Switzerland, Nigeria, and, in earlier years, South Africa, Northern Ireland, and the Soviet Union.5 The constitutionality of these measures is likewise much in doubt.6 Moreover, state and local laws of general application increasingly raise international issues when imposed upon foreign nationals and foreign governments or when in conflict with the public policy of foreign nations; these laws have been questioned and at times invalidated as interfering with federal foreign policy.7


6 See, e.g., Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1376 (D.N.M. 1980) (invalidating University policy against Iranian nationals adopted in response to the seizure of the United States embassy in Tehran); Board of Trustees v. Mayor of Baltimore, 562 A.2d 720 (Md. 1989) (acknowledging constitutional basis of challenge to city’s South Africa divestment law but rejecting challenge on particular facts).

7 See, e.g., Pravin Banker Assocs. v. Banco Popular del Peru, 109 F.3d 850 (2d Cir. 1997) (suggesting that application of state contract law to foreign government would be impermissible if in conflict with federal foreign policy); Torres v. Southern
No one has clearly identified the part of the Constitution producing these results, but it is generally thought that there must be some broad constitutional principle making foreign policy an exclusively national preserve and thus making the United States, in its international relations, "one people, one nation, one power." The need for uniformity in external matters seems overwhelmingly to militate against a constitutional regime permitting innumerable local jurisdictions to chart their own cacophony of conflicting policies. The usual justifications for a federal system—such as experimentation and local expertise—appear uniquely inapposite where international matters


8 See, e.g., Henkin, supra note 1, at 151–65 (describing general view); Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1295–97 (1996) (concluding that "the Constitution appears to preclude the states from exercising direct authority over foreign relations"); Brannon P. Denning & Jack H. McCall, Jr., The Consti tutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?, 26 Hastings Const. L.Q. 307 (1999) (arguing that state foreign policy activities are unconstitutional); Fenton, supra note 5, at 573 (arguing that state foreign policy trade restrictions are unconstitutional because they interfere with "the federal government's exercise of foreign relations powers"); Maier, supra note 1, at 832–33 (describing general view); Daniel M. Price & John P. Hannah, The Constitutionality of United States State and Local Sanctions, 39 Harv. Int'l L.J. 443 (1998) (arguing that state and local trade sanctions are unconstitutional); Schmahmann & Finch, supra note 4, at 203–06 (arguing that local sanctions against Burma are unconstitutional); Lee H. Hamilton, Local Interference with Foreign Policy, Boston Globe, Nov. 9, 1998, at A23 (stating the view of U.S. Representative Lee Hamilton (D. Ind.) that the Constitution vests complete responsibility for the conduct of foreign relations with the federal government and prohibits state laws that...impede the federal government's ability to 'speak with one voice when regulating commercial relations with foreign governments'); Max Vanzi, Wilson Rules Out California Action Against Myanmar Trade: On Asian Trip, Governor Says State-Imposed Sanctions on Firms Doing Business in that Nation Would Be Unconstitutional, L.A. Times, Jan. 23, 1997, at A3 (reporting Cal. Governor Pete Wilson's statements that foreign policy initiatives such as sanctions against Burma are reserved to the federal government by the U.S. Constitution). But see Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 85 Va. L. Rev. 1617, 1643–63 (1997) (criticizing non-statutory foreign policy preemption); Peter J. Spiro, Foreign Relations Federalism, 70 U. Colo. L. Rev. 1223, 1259–70 (1999) (arguing that modern international relations allow some room for state foreign policy).

9 Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889); see also Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575 (1840) (Taney, C.J.,) ("It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation.").
are concerned. The framers and ratifiers of the Constitution, moreover, embraced that document's substantial shift of power to the national government in part in reaction to the weakness and fractiousness of U.S. foreign policy under the Articles of Confederation.10 "If we are to be one nation in any respect," Madison said in defending the enhanced external powers of the national government under the Constitution, "it clearly ought to be in respect to other nations."11 Given this context, one might doubt that the framers intended to leave foreign policy powers to the states.12

Thus, in the conventional view, state laws13 with international implications may be invalidated to protect against interference with federal foreign relations:

The federal government wields exclusively the power to conduct foreign relations. . . . Any state statute that has more than an inci-

---


12 Foreign affairs preemption has been widely discussed with considerable passing references to the understanding of the constitutional generation, but its validity as an original matter rarely serves as a central focus of study. For a well-developed argument that the Constitution as originally understood does preempt state foreign relations activity, see Spiro, supra note 8, at 1228-41. Professor Clark also provides a concise statement of that view, although using it as a point of departure for an analysis of distinct points. See Clark, supra note 8, at 1295-97. A balanced consideration of the policy arguments ending in a mild endorsement of the doctrine is found in Richard B. Bilder, The Role of States and Cities in Foreign Relations, 83 Am. J. Int'l L. 821 (1989). Leading discussions of the application of the doctrine to particular controversies include Fenton, supra note 5 (S. Afr. and N. Ire.); Lewis, supra note 5 (S. Afr.); Schmahmann & Finch, supra note 4 (Burma). For a discussion of applications of the doctrine in general, see also Maier, supra note 1. A leading critic of the doctrine is Professor Jack Goldsmith, although he has primarily analyzed the matter as an issue of federal common law rather than constitutional law. See Goldsmith, supra note 8, at 1643-63; Jack L. Goldsmith, The New Formalism in United States Foreign Relations Law, 70 U. Colo. L. Rev. 1395 (1999); see also A.M. Weisburd, State Courts, Federal Courts, and International Cases, 20 Yale J. Int'l L. 1 (1995). As noted, Professor Spiro, though defending the original validity of the doctrine, has criticized its modern application. See Spiro, supra note 8, at 1259-70; Peter J. Spiro, The States and Immigration in an Era of Demi-Sovereignties, 35 Va. J. Int'l L. 121 (1994); see also Michael H. Shuman, Dateline Main Street: Courts v. Local Foreign Policies, 86 Foreign Pol'y 158 (1992) (offering a pragmatic defense of state foreign policy initiatives).

13 For convenience I will refer only to "state" laws and activities affecting foreign affairs, although I mean that term also to encompass the activities of local government. With respect to the U.S. Constitution the issues raised by state enactments and local enactments appear to be the same, and referring to all such activities as "state" activities avoids needless repetition of the phrase "state and local government."
dental or indirect effect on foreign countries is therefore preempted by the powers of the federal government. Significantly, this power does not necessarily have to be exercised in order to preempt state laws: the [Supreme] Court has located principles teaching "that the Constitution itself excludes such state intrusions even when the federal branches have not acted." 

Contrary to the broad consensus of courts and commentators, I argue that the "simplistic" view of foreign policy preemption is, as an original matter, the correct one (although the matter is not quite as simple as it first appears). As one might conclude upon first reading of the Constitution, the preemptive force of the national government arises from Article VI and from specific exclusionary clauses precluding state power (or establishing national exclusivity) over particular matters. There is no generalized, non-Article VI preemption in foreign policy matters, and under the original understanding of the Constitution, state laws interfering with federal foreign policy should stand despite that interference, unless preempted in the ordinary constitutional manner.

After providing an overview of the doctrine of foreign policy preemption in Part I, in Part II this Article examines the leading constitutional arguments in its favor and concludes that they are unpersuasive as an original matter. Although it is said that "the Constitution itself" overrides state laws affecting foreign relations, the conventional view identifies no provision of the text actually accomplishing this result. Instead, the conventional view's primary thrust is functional: permitting state interference would create an ineffectual and dangerous foreign policy regime. I reject this as an incomplete constitutional argument. True, state interference in foreign affairs may have negative repercussions and may—as the conventional view holds—even be on the whole a bad idea. That does not make it unconstitutional. The drafters of the Constitution had other bad ideas. Unless we can say that permitting state interference is so structurally irrational that no reasonable person could accept it, there is little justification for

---

14 Lewis, supra note 5, at 509 (quoting Louis Henkin, Foreign Affairs and the Constitution 239 (1st ed. 1972)).
15 See Curtis A. Bradley & Jack L. Goldsmith, Federal Courts and the Incorporation of International Law, 111 Harv. L. Rev. 2260, 2267 (1998) ("The most natural inference from these provisions and the enumerated powers structure of the Constitution is that all foreign relations power not denied to the states by Article I, Section 10 falls within the concurrent authority of the state and federal governments.").
16 Lewis, supra note 5, at 509 (quoting Louis Henkin, Foreign Affairs and the Constitution 239 (1st ed. 1972)).
17 See, e.g., U.S. Const. amend. XII (correcting the flawed system of selecting the President and Vice President adopted by the Constitution).
assuming that the Constitution must establish what we think is good public policy.

As elaborated below, permitting state interference is not structurally irrational. It does not prevent national supremacy in foreign policy—as state activities can be overridden by Congress or by treaty—but limits presidential foreign relations power. When the Supreme Court speaks of non-Article VI preemption of state activities that "impair the effective exercise of the Nation's foreign policy," it means the President's foreign policy—because, of course, state activities impairing congressional foreign policy or treaty-based foreign policy would be preempted by Article VI. But did the constitutional generation envision a President who could pursue a unilateral foreign policy backed up by, in effect, presidential lawmaking power to preempt state activities that stood in its way? Or did they think that presidential power in foreign affairs should be checked by the need to secure congressional (or senatorial) cooperation to give that policy the force of law? Without more, it is not obvious which system the constitutional generation chose, even if, from our perspective, it might seem that one is practically more efficacious than the other.

Nonetheless, the conventional view continues, the framers told us which system they preferred through statements emphasizing the need for national uniformity in foreign affairs. Part II of this Article also rejects that claim. Undoubtedly the Constitution was intended to give the federal government broad foreign relations powers and to redress the nation's dismal international performance under the Articles of Confederation. The need for national supremacy in foreign policy is a central theme in early constitutional thought. But, again, how was supremacy achieved: through a discretionary power of Congress (or President-plus-Senate) to preempt state activity by statute or treaty—already an enormous improvement over the Articles of Confederation—or by a generalized constitutional exclusion of the states implemented by the President or the federal courts without legislative action? As shown below, the much-quoted statements of the framers are inconclusive upon this question. Thus non-Article VI preemption in foreign affairs is neither inherent in the structure of a federal system nor compelled by the general outlook of the founding generation. Unless it has a basis in constitutional text, therefore, there seems little reason to think it a proper original interpretation of the Constitution.

19 See infra Part II.B.
That is not the end of the matter, however. Although advocates of foreign policy preemption rarely appeal to any specific constitutional text, in Part III of this Article I argue that there is a possible textual basis for their view. Article II, Section 1 of the Constitution vests the “executive Power” of the United States in the President.\(^{20}\) If this language gives the President a general foreign policy power, and if it carries a negative implication that states lack power to interfere with the foreign policy of the President, the text of Article II may create an implied constitutional preemption similar to that embraced by the modern conventional view. This is, in any event, a sounder base for national exclusivity in foreign affairs than the arguments conventionally asserted and is the only tenable argument for foreign policy preemption derivable from the text of the Constitution.\(^{21}\)

In Part IV I argue that although Article II, Section 1 standing alone might be read to preempt state interference in foreign policy, this reading creates substantial tension with other parts of the constitutional text.\(^{22}\) In addition, the drafting history and the commentary surrounding the Constitution indicate that no one at the time read Article II in this manner. Finally, practice following the adoption of the Constitution further confirms a limited reading of Article II, Section 1: states enacted laws implicating international issues without objection on this ground, and in prominent cases regarding the relative role of the states and the national government, no one argued such a constitutional limitation.\(^{23}\) I ultimately conclude that the best original reading of the Constitution is that there is no constitutional limit upon state power in foreign affairs beyond the express or implied limitations directed at particular subjects such as war and treatymaking and the general preemptive power of federal statutes and treaties under Article VI.

I. Foreign Policy Preemption: An Overview

A. Foreign Policy Preemption—In General

The doctrine of foreign policy preemption holds that state laws interfering with federal foreign policy may be unconstitutional. The preemption in question operates outside the scope of the Supremacy Clause,\(^{24}\) as it does not require for its invocation a conflicting congres-

\(^{20}\) U.S. Const. art. II, § 1.
\(^{21}\) See infra Part III.
\(^{22}\) See infra Part IV.A.
\(^{23}\) See infra Part IV.B.
\(^{24}\) See U.S. Const. art. VI; see also Hines v. Davidowitz, 312 U.S. 52 (1941) (invalidating a state alien registration statute on the grounds of conflict with federal law).
sional statute or treaty.\textsuperscript{25} It is, instead, non-Article VI preemption. It also does not depend upon the clauses of the Constitution explicitly or implicitly excluding states from particular subject matter. Article I, Section 10 excludes states from a list of specific activities, some (such as war and treatymaking) involving particular aspects of foreign policy.\textsuperscript{26} In addition, some of the powers granted the federal government by Article I, Section 8 are thought to be exclusive and thus implicitly preclusive of state activity, and some of these (such as the dormant Foreign Commerce Clause) involve particular aspects of foreign policy.\textsuperscript{27} These matters are not part of the present inquiry, for the idea of foreign policy preemption does not turn upon the presence of particular subject matter, but generally excludes state interference with federal foreign policy. Thus the present inquiry addresses the situation in which no constitutional clause specific as to subject matter applies: the question is whether the Constitution contains a

In the Massachusetts case, opponents of the Burma sanctions also argued that the state law conflicted with, and thus was preempted by, provisions of the federal Omnibus Consolidated Appropriations Act of 1997 relating to Burma. See National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287, 293 (D. Mass. 1998). The district court rejected this claim, see id., but it was accepted as an alternate holding by the court of appeals, see National Foreign Trade Council v. Natsios, 181 F.3d 38, 71–78 (1st Cir.), cert. granted, 1999 WL 753967 (U.S. Nov. 29, 1999).

With respect to treaties, preemption occurs through Article VI only if the treaty is "self-executing." John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 COLUM. L. REV. (forthcoming Dec. 1999) (discussing self-execution under Article VI). Foreign policy preemption is also distinct from so-called "field preemption," by which Congress may preempt an entire field of legislation, such that state regulation in that area, even if not inconsistent with a particular federal law, is excluded on this ground. See Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992). Some "fields" touching upon foreign policy may be preempted by particular federal statutes, but there is no general field preemption statute covering all foreign affairs. Rather, the preemption does not depend upon any affirmative activity of the federal government, but comes from "the Constitution itself." Lewis, supra note 5, at 508 (quoting Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 239 (1st ed. 1972)).


general preemption of state interference with foreign policy without reference to Article VI or to clauses of the Constitution excluding particular kinds of foreign relations activity.28

B. Foreign Policy Preemption—Judicial Origins

The Supreme Court has addressed state foreign affairs power relatively infrequently in a series of decisions dating to the late nineteenth century. Two themes emerge from the foundational judicial treatment of the topic. First, preemption of state interference in foreign affairs is discussed in broad language with ill-defined boundaries. On its face, preemption as judicially described seems to implicate a wide range of state activities. Its more-restricted practical impact appears due to limited invocation rather than narrow bounds. Second, as indicated above, the Court has not established any constitutional source for the doctrine. The idea that states cannot (or should not) interfere in foreign affairs arose as a non-determinative observation in early cases and only appeared as a rule of decision after acceptance

28 My inquiry also needs to be distinguished from two related matters. First, it has been argued that the national government has exclusive foreign relations authority as a “necessary concomitant of nationality” independent of any grants of power in the Constitution. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); see also Clark, supra note 8, at 1295 (relying on Curtiss-Wright, in addition to the Constitution, to conclude that “[e]xclusive federal authority over the conduct of foreign affairs is well established”); Manheim, supra note 27, at 940–41 (relying on Curtiss-Wright to conclude that “federalism, and all of its attendant implications for reserved powers in the states, is simply an inapposite construct when it comes to the external affairs of the nation”). The present inquiry addresses only whether the Constitution precludes state activities in foreign affairs, without considering whether some inherent attribute of federal or state government effects that preclusion. Second, I do not consider the validity of “federal common law” in foreign affairs. It has been argued that federal courts have the ability to fashion “judge-made” rules that may, among other things, preclude some state foreign relations activities. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424–27 (1964). Commentators have at times discussed this doctrine in the same terms as the theory of constitutional foreign policy preemption. See Clark, supra note 8, at 1299–1306; Goldsmith, supra note 8, at 1626–41; Weisburd, supra note 12, at 5–8. This Article addresses only the effect of the Constitution. If a nonconstitutional basis for federal common law exists, it would not be affected by the present inquiry. See Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824, 1825–26 (1998) (arguing that customary international law is part of federal common law without relying on the Constitution). But see Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997) (arguing that customary international law is not part of federal common law). However, to the extent federal common law is seen as an enforcement of constitutional divisions of power, see Clark, supra note 8, at 1272–76, then the validity of the original basis of that law is subsumed within the present inquiry.
had been achieved by repetition. As a result, there is no judicial dis-
cussion as to what part of the Constitution establishes preemption,
and little interpretive analysis of its scope.

1. Pre-Zschernig Decisions

The Supreme Court first suggested a generalized bar against state
foreign relations activities in the immigration case Chy Lung v. Freeman
in 1875.29 The Court there struck down a California law which, in
response to unwanted Chinese immigration, created an office of Com-
mmissioner of Immigration with wide discretion to require a bond for
the landing of supposedly undesirable immigrants.30 The opinion by
Justice Miller was ambiguous as to its constitutional basis, and the stat-
ute was arguably invalid under the negative implications of two spe-
cific clauses, the Commerce Clause and the Naturalization Clause.31
However, Justice Miller seemed to have a larger principle in mind,
and his argument applied equally to any state foreign affairs activity:

[A] silly, an obstinate, or a wicked [state] commissioner may bring
disgrace upon the whole country, the enmity of a powerful nation,
or the loss of an equally powerful friend.

... ...

... [I]f this plaintiff and her twenty companions had been sub-
jects of the Queen of Great Britain, can any one doubt that this
matter would have been the subject of international inquiry, if not a
direct claim for redress? Upon whom would such a claim be made?
Not upon the State of California; for, by our Constitution, she can
have no exterior relations with other nations. It would be made
upon the government of the United States. If that government
should get into a difficulty which would lead to war, or to suspen-

29 See Chy Lung v. Freeman, 92 U.S. 275 (1875). On the Court's historical view of
state power in foreign affairs, see Goldsmith, supra note 8, at 1641–64, Spiro, supra
note 12, at 135–45, and Spiro, supra note 8, at 1228–41. Something of this sort was
suggested even earlier, by Chief Justice Taney in Holmes v. Jennison, 39 U.S. (14 Pet.)
540, 575 (1840), although Taney's opinion seems to fall short of an assertion of a
generalized foreign policy preemption, see infra note 276.
30 See Chy Lung, 92 U.S. at 276–77.
31 The Court said of the California statute, for example,

It is hardly possible to conceive a statute more skilfully [sic] framed, to place
in the hands of a single man the power to prevent entirely vessels engaged in
a foreign trade, say with China, from carrying passengers, or to compel them
to submit to systematic extortion of the grossest kind.

Id. at 278. This passage suggests reliance on the dormant Foreign Commerce Clause,
a reading supported by some of the opinions in the factually similar Passenger Cases of
25 years earlier. See Passenger Cases, 48 U.S. (7 How.) 283 (1849); see also Goldsmith,
supra note 8, at 1652–53 (describing Chy Lung as a dormant Commerce Clause case).
sion of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?

The Constitution of the United States is no such instrument. . . . If it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations.32

This is very near to saying that the nature of the U.S. federal system requires that, at least with respect to laws likely to give offense to foreign nations, states as a general matter lack power to pass laws with international implications.

The Court repeated this theme fifteen years later in Chae Chan Ping v. United States,33 again in the context of anti-immigration legislation. Again, the decision did not turn upon constitutional foreign policy preemption, as the issue was whether an act of Congress relating to Chinese immigration overrode the terms of a prior U.S.-China treaty.34 As in Chy Lung, however, the Court's opinion added comments concerning foreign affairs exclusivity that seemed to have implications beyond the particular decision:

The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country . . . has been happily solved. 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.35

Neither opinion appealed to a particular part of the Constitution for support of its generalizations about state power in foreign affairs. Rather, both opinions are based upon what one commentator later called "the logic of the federal system."36 Simply as a matter of common sense, it seemed appropriate that the federal government, not

33 130 U.S. 581 (1889).
34 See id. at 599–602.
35 Id. at 605–06.
36 Maier, supra note 1, at 835.
the states, should conduct foreign relations. But since the specific issue in both cases turned on narrower points, the Court was not called upon to identify the particular operative provisions underlying its intuitive generalization.

The next key cases arose in the 1930s, when a pair of opinions further entrenched the idea of federal exclusivity in foreign affairs. The first, *United States v. Curtiss-Wright Export Corp.*, had, on its face, nothing to do with state foreign policy. The controversy involved a federal statute delegating to the President the authority to impose arms embargoes upon certain foreign nations; Curtiss-Wright, in a prosecution for violation of such an embargo, objected to the delegation. No state law of any sort was involved. However, Justice Sutherland, writing for the Court, in upholding the delegation included observations on the nature of federal authority in foreign affairs that have since become far better known than the case's specific holding:

The Union existed before the Constitution, which was ordained and established among other things to form "a more perfect Union." Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be "perpetual," was the sole possessor of external sovereignty and in the Union it remained without change save in so far as the Constitution in express terms qualified its exercise. The Framers' Convention was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one.

In short, Sutherland asserted (perhaps unnecessarily) that the foreign affairs power of the national government was both plenary and exclusive. And Sutherland did not even purport to rely on the Constitution, but argued that national exclusivity arose "inherently" from "the conception of nationality" and would exist even without the Constitution.

---

37 299 U.S. 304 (1936).
38 See id. at 315.
39 Id. at 317.
41 *Curtiss-Wright*, 299 U.S. at 318.
The latter point was obscured in the next major decision, *United States v. Belmont.* Applying *Curtiss-Wright,* Sutherland held in *Belmont* that an executive agreement between the United States and the Soviet Union preempted certain aspects of New York state property law. *Belmont* relied largely upon the existence of the executive agreement and thus the preemptive effect of executive agreements in particular. As a result, the case did not directly involve a generalized preclusion of states in foreign affairs. However, Sutherland repeated some of the themes discussed in *Curtiss-Wright:*

> [T]he external powers of the United States are to be exercised without regard to state laws or policies. . . . Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.

Notably *Belmont,* though invoking *Curtiss-Wright,* also invoked federal constitutional powers—seemingly re-linking national exclusivity in foreign affairs with the Constitution (albeit unspecifically). The *Curtiss-Wright/Belmont* decisions thus reinforced Chy Lung's suggestion of a constitutional exclusive foreign affairs power in the national govern-

---

44 See id. The specific controversy was whether New York law recognized nationalizations by the Soviet regime. Prior to *Belmont,* state law recognized nationalizations of property located in the Soviet Union but not nationalizations of property located in New York. The Supreme Court held that President Roosevelt had, by executive agreement, recognized all Soviet nationalizations, including those occurring in New York, and that this action preempted New York's contrary rule. For further discussion of *Belmont,* see Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power,* 77 N.C. L. Rev. 133, 142-51 (1998).
45 See *Belmont,* 301 U.S. at 331-32 (discussing the preemptive effect of treaties under Article VI and asserting that executive agreements, although not approved by the Senate, had the same constitutional effect). I have elsewhere argued that this version of non-Article VI preemption is also indefensible as an original matter, although that point is not directly relevant to the present inquiry. See Ramsey, supra note 44, at 215-31.
ment, again without explicitly relying upon it and without identifying any basis for it beyond structural intuition. The Court repeated that approach soon afterward in *Hines v. Davidowitz*,\(^{47}\) a case involving a state alien registration statute. Again the Court’s opinion broadly proclaimed federal exclusivity in foreign affairs, without actually relying on that point to reach its decision. The federal government, the Court began,

is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interests 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.\(^{48}\)

Again the Court stopped short of actually relying on a constitutional preclusion. Instead, it found that the federal system of alien registration preempted the state system as a statutory matter.\(^{49}\) The broad assertions of federal exclusivity, it turned out, were necessary only to justify a somewhat expansive reading of the preemptive scope of the statute.

By the 1960s, therefore, there was almost a century of Court commentary asserting that states were excluded from foreign affairs. The exclusion seemed quite broad—foreign relations must be “entirely free from state interference” according to *Hines*; any law that may give offense to a foreign nation would be suspect under *Chy Lung*—but none of it was tied to anything specific in the Constitution. *Hines* said that the federal system “imperatively requires”\(^{50}\) this result; *Belmont* thought any other system “inconceivable”\(^{51}\) and *Chy Lung* thought the Constitution would be “foolish”\(^{52}\) to provide otherwise. None of the decisions explained *how* the Constitution established such an exclusion—and indeed, in light of *Curtiss-Wright*, there was some doubt as to whether the Constitution was even necessary to the discussion. The cases largely cited only to each other (except for *Chy Lung*, the first case, in which the relevant discussion has no citation). But specificity was not really required because it all seemed intuitively correct and, in any event, no state law was struck down explicitly on this ground.

---

\(^{47}\) 312 U.S. 52 (1941).

\(^{48}\) *Id.* at 63.

\(^{49}\) See *id.* at 72–74.

\(^{50}\) *Id.* at 63.

\(^{51}\) *Belmont*, 301 U.S. at 332.

\(^{52}\) *Chy Lung*, 92 U.S. at 280.
2. Zschernig v. Miller

The Supreme Court's first actual reliance on the constitutional exclusion of states from foreign affairs to invalidate a state statute came in *Zschernig v. Miller* in 1968. Zschernig, an East German national and putative heir to property located in Oregon, challenged a provision of Oregon law denying statutory inheritance of Oregon property to nationals of countries where the inherited property would be subject to confiscation. The case thus presented the issue fairly starkly. On the one hand, the law was clearly a foray by Oregon into Cold War politics. The inheritance statute was, at the least, a negative comment upon the communist system of property rights, and in the view of some a wartime measure to prevent resources from accruing to the enemy. It was not an isolated action, but rather was one of a number of similar state laws across the country. The negative effect on foreign relations was not speculative; other communist nations had protested the interference by such laws (including the one actually at issue in *Zschernig*) upon the inheritance rights of their citizens.

On the other hand, there was nothing (aside from generalized foreign policy preemption) from which to construct a barrier to the state law. No federal statute even arguably applied, and the Court found that the only related treaty did not in fact speak to the issue. The usual specific clauses of the Constitution also did not apply—in particular, no one claimed that foreign commerce was at issue.

In short, *Zschernig* was a case of first impression. The Court, however, did not treat it that way. For the majority, the only question was whether the statute entangled the state in foreign affairs. Once that was established, it followed that the statute was unconstitutional. As the Court stated, "[W]e conclude that the history and operation of this Oregon statute make clear that [it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." The balance of the opinion argued that the statute was "an intrusion into foreign affairs"; only in the con-

---

54 See, e.g., *id.* at 435 (finding the law to "radiate some of the attitudes of the 'cold war,' where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory"); *id.* at 437 ("As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata.").
55 See *id.* at 435 n.6.
56 See *id.* at 437 n.7.
57 See *id.* at 430–32 & nn.1–2; *cf.* *id.* at 443 (Harlan, J., concurring).
58 *Id.* at 432 (citing *Hines v. Davidowitz*, 312 U.S. 52 (1941)).
clusion did the opinion return to the point that interference amounts to unconstitutionality:

It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. . . . 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.59

Thus Zschernig found a constitutional limitation on state laws that "impair the effective exercise" of federal foreign policy (avoiding Curtiss-Wright's appeal to an extraconstitutional source for that limitation). But its conclusion was not derived from analysis of the Constitution. Rather, it followed the structural intuition that propelled Hines (the case on which it directly relied) and the Belmont/Curtiss-Wright/Chy Lung line of cases supporting Hines (and thus derivatively Zschernig). Since none of the cases before Zschernig depended upon a generalized constitutional preclusion of states from foreign affairs, they could without material challenge recite the fairly obvious point that multifarious state foreign policies may cause unfortunate repercussions at the national level; by the time a case arose that actually depended upon a generalized constitutional preclusion, the Hines view of the benefits of exclusivity had become such conventional wisdom that no analysis was required to support it. Zschernig was thus in one sense revolutionary—in that it found a constitutional foreign policy preemption for the first time—and yet at the same time conventional—in relying on a matter of common sense supported by almost a century of decisions repeating that common sense as dicta.60 As a result, the Supreme Court never made a constitutional inquiry into the power of states in foreign affairs; its conclusions in Zschernig rested instead on assumptions and intuitions.61

C. Foreign Policy Preemption—Modern Scope

While the existence of foreign policy preemption is widely accepted, there is less complete agreement upon its scope. Some com-

59 Id. at 440. The Court also distinguished its earlier decision in Clark v. Allen, 331 U.S. 503 (1947), which upheld a facial challenge to a similar California statute, on the ground that in Clark no "impairment" had been demonstrated. See Zschernig, 389 U.S. at 432–33.

60 Compare Goldsmith, supra note 8, at 1649 (finding Zschernig to mark a new departure in case law), with Spiro, supra note 12, at 135–45 (viewing Zschernig as an extension of Chy Lung's observations).

61 And since the Court has not directly revisited the issue, the constitutional basis of Zschernig remains unexplained.
mentators suggest that Zschernig can largely be limited to its facts and thus that foreign policy preemption lacks material practical importance. I am not so sanguine as to its limits, for five reasons.

First, as discussed above, the Supreme Court decisions underlying the doctrine speak of its purpose and effect in broad terms. In the foundational Chy Lung case, the Court’s concern was that a state law might offend a foreign country and thus involve the nation as a whole in hostilities (or at least in soured relations). That danger may arise from any state law having material international impact, whatever its scope or purpose. In Chae Chan Ping, Curtiss-Wright, and Belmont, the Court spoke broadly of the need for unity in external matters, again suggesting the infirmity of state laws of which a foreign nation is likely to take material notice. In Hines, the Court said that federal foreign relations must be “entirely free from local interference,” and federal foreign relations are not free from interference when state activities cause material international reactions. Finally, in Zschernig, the Court phrased the test as whether the state law would “impair the effective exercise of the Nation’s foreign policy,” and again that does not seem limited to any particular form of state activity. Rather, it would seem that, as the Zschernig Court itself said, any matter with more than an “incidental” international impact is implicated by foreign policy preemption; that would include state laws materially acting upon a foreign country, its nationals, or its public policy.

Second, the lower courts applying foreign policy preemption in the wake of Zschernig have carried over and expanded upon the Court’s broad statements of policy, even where the particular facts of the cases would have supported a much more limited holding. The leading example is the litigation involving Massachusetts’s Burma law,

---

62 See, e.g., Lewis, supra note 5, at 481 (suggesting Zschernig can be read narrowly to validate most South Africa divestment legislation); Weisburd, supra note 12, at 5–8 (suggesting that Zschernig can be limited to cases requiring judicial scrutiny of a foreign nation’s internal policies). Some weight is placed here on Clark v. Allen, 331 U.S. 503 (1947), which upheld a state inheritance reciprocity statute against facial attack, although it seems that Clark can be explained simply on the basis that there was no evidence of anything more than incidental effect on foreign affairs. For the suggestion that the modern Supreme Court is backing away from a broad application of Zschernig and related cases on the basis of the Court’s decision in Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298 (1994), see Goldsmith, supra note 12, at 1426–27.
64 See supra Part I.B.1 (discussing, among others, Chae Chan Ping, Curtiss-Wright, and Belmont).
65 Hines v. Davidowitz, 312 U.S. 52, 63 (1941).
67 See id. at 434–35.
which directly targets the military government of Burma (Myanmar) for punishment as a result of its human rights violations. Specifically, the law penalizes companies that do business in Burma by reducing their ability to bid on Massachusetts state contracts.\(^{68}\) The point was avowedly a foreign policy objective: "The Commonwealth [of Massachusetts] concedes," the district court noted, "that the statute was enacted solely to sanction Myanmar for human rights violations and to change Myanmar's domestic policies."\(^{69}\)

With this admission, the courts could have invalidated the statute on narrow grounds, closely tied to the facts in Zschernig. The law was solely a comment on (and an attempt to influence) a foreign nation's internal policies; there was arguably no state interest beyond this. It may even have been a weaker case than Zschernig, as the latter at least involved inheritance, a traditional area of state regulation. But the courts did not take a narrow view of Zschernig. The district court began by asserting broadly that "the federal government has exclusive authority to conduct foreign affairs" and that this authority "is not and cannot be subject to any curtailment or interference on the part of the several states."\(^{70}\) In the court's view, Zschernig "declared invalid state laws with more than 'some incidental or indirect effect in foreign countries,' or that have great potential 'for disruption or embarrassment' of United States foreign policy."\(^{71}\) "Zschernig teaches," the court continued, "that states and municipalities must yield to the Federal government when their actions affect significant issues of foreign policy."\(^{72}\) With this view of the law, the court had little trouble conclud-

---


The statute authorizes the Operational Services Division (OSD), an agency within the [Massachusetts] Executive Office of Administration and Finance, to establish a "restricted purchase list" of companies "doing business with Burma" as defined by the statute. . . . The Commonwealth [of Massachusetts] is allowed to procure from a "restricted purchase list" company only when: (1) the procurement is essential and the restriction would eliminate the only bid or offer . . . ; (2) the Commonwealth is purchasing certain medical supplies . . . ; or (3) there is no "comparable low bid or offer by an unrestricted bidder."

Id. at 289.

69 Id. at 291. The court also quoted the statement of Massachusetts Representative Rushing supporting the passage of the law: "[I]f you're going to engage in foreign policy, you have to be able to identify a goal that you will know when it is realized . . . . [T]he identifiable goal is, free democratic elections in Burma." Id.

70 Id. at 290 (quoting United States v. Belmont, 301 U.S. 324, 327 (1937)).

71 Id. (quoting Zschernig, 389 U.S. at 434–35).

72 Id. at 291.
ing that "[t]he Massachusetts Burma law . . . unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs." 73

Affirming, the court of appeals took a similar view. Its opinion repeated the broad articulations of foreign policy preemption in *Chae Chan Ping, Belmont, and Curtiss-Wright*, and concluded that "[t]he Constitution's foreign affairs provisions have been long understood to stand for the principle that power over foreign affairs is vested exclusively in the federal government." 74 Of *Zschernig*, it observed that the state law fell because the Supreme Court thought it "‘may well adversely affect the power of the central government to deal with’ problems of international relations." 75 Thus, "*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." 76 That threshold is, in turn, determined by asking, paraphrasing *Zschernig*, whether "the Massachusetts law has more than an incidental or indirect effect on foreign relations." 77

Other cases similarly recite the law broadly. The court in *Tayyari v. New Mexico State University*, in striking down a University policy against Iranian students adopted during the Tehran hostage crisis, alluded to "the superior right of the federal government . . . to dictate foreign policy without interference from the states." 78 The court went on to hold that the challenged policy "frustrates the exercise of the federal government's authority to conduct foreign relations of the United States" 79 and that "its potential affect on this nation's management of . . . foreign affairs . . . dictate[s] its demise." 80 In *New York Times Co. v. City of New York Commission on Human Rights* (which went somewhat further in striking down a city ordinance of general application as applied to activities relating to South Africa), the lead opinion quoted *Zschernig*'s broad language in finding that "[e]ven longstanding State regulation of traditional fields of law . . . must fall by the wayside if enforcement of State regulations would 'impair the effective

---

73 Id.
75 Id. at 51 (quoting *Zschernig*, 389 U.S. at 440–41).
76 Id. at 52.
77 Id. at 53. Indeed, the *Natsios* court may have subtly augmented the test, for *Zschernig* referred to an incidental effect "in the foreign country," *Zschernig*, 389 U.S. at 434–35, whereas the *Natsios* test is whether there is an incidental effect "on foreign relations," *Natsios*, 181 F.3d at 53.
78 495 F. Supp. 1365, 1376 (D.N.M. 1980).
79 Id. at 1378.
80 Id. at 1376.
exercise of the Nation's foreign policy.'"81 Thus, the momentum in the lower courts seems to be toward a reading that looks broadly to the degree of state "interference" or "impairment," in keeping with the broad language of the foundational Supreme Court cases and contrary to some commentary's attempt to limit Zschernig to its facts.

Third, the campaign to limit Zschernig to its facts has failed adequately to explain its rationale, as illustrated by the leading case upholding state interference in foreign policy. In Board of Trustees v. Mayor of Baltimore,82 the Maryland Court of Appeals upheld Baltimore's ordinances requiring divestment of its pension plan from companies investing in South Africa. The court acknowledged Zschernig's observation that "state laws relating to foreign affairs may be unconstitutional... if the 'State's policy may disturb foreign relations.'"83 But the court then distinguished Zschernig on its facts. The key to Zschernig, it said, was "the extensive judicial scrutiny and criticism of foreign governments"84 necessitated by the law in that case. By contrast, Baltimore's divestiture "requires no continuing investigation, assessment or commentary by local government officials or employees into the laws or operations of the South African government.... The ordinances merely represent a single, general decision by Baltimore mandating divestment of the City's pension funds...."85 While true, this is a factual distinction without a rationale. If the problem is state

---

81 New York Times Co. v. City of New York Comm'n on Human Rights, 361 N.E.2d 969, 968 (N.Y. 1977) (plurality opinion) (quoting Zschernig, 389 U.S. at 440); see also id. ("The peace and security of the United States has not been left to the whim of but one State whose actions would have consequences, perhaps dire, for all the States."). The specific issue in New York Times Co. was whether a city ordinance banning advertising by employers who practice discrimination could be applied to employers in South Africa; the court held it could not. See id; see also Bethlehem Steel Corp. v. Board of Comm'rs, 80 Cal. Rptr. 800, 802-05 (Cal. Ct. App. 1969) (invalidating California's selective purchasing law on grounds of foreign policy preemption, with quotations of broad statements of exclusivity in Belmont, Hines, Curtiss-Wright, and Chae Chan Ping).

82 562 A.2d 720 (Md. 1989).

83 Id. at 744 (quoting Zschernig, 389 U.S. at 441).

84 Id. at 746.

85 Id. The Maryland court also argued that the city ordinance did not have a material effect on foreign policy—a position consistent with the law of Zschernig and Clark v. Allen, 331 U.S. 503 (1947), but factually tenuous given the international situation. Laws with foreign relations implications were upheld on similar grounds in Trojan Techns., Inc. v. Commonwealth, 916 F.2d 903, 913-14 (1990) (finding that Pennsylvania's selective purchasing law had only incidental effect on foreign affairs), and Opusunju v. Giuliani, 669 N.Y.S.2d 156, 158 (N.Y. Sup. Ct. 1999) (relying on Clark to find that New York City naming a street corner after a Nigerian dissident had only incidental effect on foreign affairs).
laws "disturbing foreign relations" (as the Maryland court seemed to acknowledge) or "impair[ing] the exercise of the Nation's foreign policy" (as Zschernig said), the existence of a single, general decision, as opposed to an on-going review, seems meaningless. The supposed constitutional basis of the doctrine as a whole is that the nation should be one with respect to external matters, and Baltimore's independent attempt to isolate itself economically from the "moral offensiveness" of the South African regime stood at cross-purposes with the Reagan administration's policy of economic engagement in South Africa.\(^{86}\)

Once one accepts the broad statement that state interference in foreign policy is inefficacious, dangerous, and unconstitutional, it is hard to explain the narrow reading of Zschernig. The Maryland court's limitation of Zschernig to its facts came at the expense of disconnecting Zschernig's holding from its underlying rationale.

Fourth, federal courts have increasingly questioned, and in some cases invalidated, state laws affecting foreign policy without direct reliance on Zschernig, but in implementation of its idea of broad national exclusivity in foreign affairs. Two recent decisions illustrate the trend. In the first, the plaintiffs sued various U.S. and Peruvian defendants for environmental damage resulting from a mining operation in Peru.\(^{87}\) The basis of the suit was apparently Texas state tort law. Peru objected that the imposition of state tort law would interfere with its national policies; it was supported in this argument by the U.S. executive branch, which argued that extraterritorial application of Texas tort law would harm foreign relations. In somewhat confused opinions (and without citing Zschernig) both the district court and the court of appeals sided with Peru and the President, and dismissed the case on the basis of protecting the federal conduct of foreign affairs.\(^{88}\)

In Pravin Banker Associates, Ltd. v. Banco Popular del Peru, an unrelated case, the plaintiff was the holder of notes issued by the defendant bank and guaranteed by the Peruvian government.\(^{89}\) While attempting to renegotiate the external debt of its banking system, Peru placed the bank in temporary receivership and suspended payment on the notes. The bondholder sued under New York contract law, specified as the governing law of the contract. Peru objected, arguing that enforcement of this obligation would undermine its efforts to reach a comprehensive negotiated settlement with all of its

\(^{86}\) Board of Trustees, 562 A.2d at 746; see also Fenton, \textit{supra} note 5, at 578-79.
\(^{88}\) See Torres, 965 F. Supp. at 907, \textit{aff'd}, 113 F.3d at 544.
\(^{89}\) 109 F.3d 850 (2d Cir. 1997).
creditors and that the policy of the U.S. executive branch, as reflected in the debt negotiations set up under the auspices of the U.S. Secretary of the Treasury, conflicted with application of New York contract law to the dispute. The court disagreed and enforced the obligation, but only after examining U.S. foreign policy and concluding that enforcement was not contrary to the executive's views. The court heavily implied that, had Peru been correct in its view of U.S. foreign policy, the New York claim would not have been permitted.\(^9\)

As I have argued at greater length elsewhere,\(^9\) the best way to understand these decisions is as an outgrowth of the basic view, epitomized by Zschernig, that state laws must give way to the extent they "impair the effective exercise of the Nation's foreign policy."\(^9\)2 Obviously neither the New York contract law nor the Texas tort law was invalid as a general matter, but applied to the particular cases at hand they did pose some palpable threat to foreign relations. It seems clear in the first case that the prospect of piecemeal adjudication of individual bondholder claims would undermine international negotiations to reach a comprehensive debt-reduction settlement. In the classic pre-bankruptcy dilemma, absent some restraint no creditor would forebear collection and negotiate while others could obtain legal rights to the debtor's property by prior victories in court.\(^9\)3 If, as Peru asserted, U.S. policy was unambiguously in favor of a comprehensive negotiated settlement, application of the New York law would impair that policy by provoking a "rush to court" by Peru's creditors. Fortunately for the bondholder, the court concluded that this was not U.S. policy—but if it had been, a broad reading of the rationale of Zschernig would support non-application of the state law, and the court surely intimated that it was prepared to pursue such a decision given the appropriate factual predicate.\(^9\)4

The environmental case is similar, except that there the court (prodded by the executive branch) did find that U.S. foreign policy was impaired by the state law. Once that point was established, the court thought it evident that the state law should not be enforced. The clearest authority for this proposition (although the court did not cite it) again is Zschernig. Thus courts, often without a clear doctrinal

\(^9\) See id. at 855.
\(^9\)4 See Pravin, 109 F.3d at 855.
basis, increasingly seem to think federal foreign policy may carry something like non-Article VI preemptive force.95

Fifth, some commentary would have the doctrine extend even further, and there is no clear reason, upon the doctrine's current theoretical underpinnings, why it should not. In the 1998 Breard case,96 Virginia sought to impose the death penalty upon Breard, a Paraguayan national living in Virginia, for a murder committed in Virginia. Although Breard had otherwise been duly apprehended, tried, and convicted, he had not been notified upon his arrest that he had the right to contact the Paraguayan embassy for assistance. That, arguably, was a violation of a multilateral treaty to which both the United States and Paraguay were parties. Paraguay and Breard protested to Virginia, the United States, and the International Court of Justice (ICJ); while the matter was pending before the ICJ, Virginia scheduled Breard's execution, the Supreme Court in an emergency application declined to intervene, and Breard was executed.97

Breard was not argued as a Zschernig case,98 but it is not obvious that it could not have been. As commentary on the case has pointed out, there is no doubt that the matter materially affected United States foreign relations with Paraguay—Paraguay went so far as to file suit in its own name against Virginia. Moreover, the incident called into question the U.S.'s commitment to the ICJ and to international human rights in general, at a time when much federal foreign policy involves pressure upon foreign nations to conform to international norms of human rights. In short, it is difficult to argue that the incident did not "impair the effective exercise" of U.S. foreign policy.99


98 Breard claimed a violation of his rights under the Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261, thus asserting an Article VI basis for his claim. The Supreme Court found, among other things, that Breard's claim under the treaty was procedurally defaulted, and thus that there was no violation of the treaty by Virginia. See Breard, 523 U.S. at 373. For similar controversies arising in the wake of Breard, see Federal Republic of Germany v. United States, 119 S. Ct. 1016 (1999), and Spiro, supra note 8, at 1251–52 nn.127–30.
99 Zschernig, 389 U.S. at 440; see Frederic L. Kirgis, Zschernig v. Miller and the Breard Matter, 92 Am. J. Int'l L. 704 (1998) (making this argument); see also Spiro, supra note 8, at 1252 n.130 (highlighting foreign policy problems arising from the
True, on a narrow reading of Zschernig that case is inapplicable, since Breard did not involve a state evaluation of or judgment upon Paraguay's public policy. Also, as various commentators have observed, unlike Zschernig or the Burma sanctions cases Breard did involve a matter of local interest to Virginia. But if the basis for foreign policy preemption is that the United States is to present a single face to the outside world and that face is to be the federal government's—if, as Madison said, we are to be "one nation... with respect to other nations," and if (as Madison also said) "it ought not to be within the power of a part to upset the peace of the whole"—then Breard seems a reasonable candidate for preemption. Moreover, the fact that a local interest was present does not seem to make foreign policy preemption inapplicable. At most, it would seem to invite a judicial evaluation as to whether the local interest outweighed the international implications.

In short, the doctrine of foreign policy preemption is a substantial matter and is likely to gain greater importance as state activities increasingly carry international implications and courts become increasingly suspicious of the role of states in foreign affairs. Accordingly, the doctrine's constitutional basis—never adequately explained by the courts—merits serious re-examination.

D. Foreign Affairs Preemption—Constitutional Justifications

The "consensus" academic view agrees that "the central government alone may directly exercise power in foreign affairs" and that "state authority may be found to be preempted by the logic of the result in Breard). It has also been argued that the President could have required Virginia to stay the execution through the exercise of his foreign policy powers. See Carlos Manuel Vázquez, Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures, 92 Am. J. Int'l L. 683 (1998). In light of Zschernig, however, it is unclear why presidential action would be thought necessary.


101 The Federalist No. 42, supra note 11, at 278.


103 See Maier, supra note 1, at 837 (suggesting an implementation of Zschernig by balancing the strength of local interests against the degree of conflict with foreign policy). But see National Foreign Trade Council v. Natsios, 181 F.3d 38, 45 (1st Cir.), cert. granted, 1999 WL 753967 (U.S. Nov. 29, 1999) (rejecting a balancing approach despite assertion of state interest).

104 Maier, supra note 1, at 832–33.
Most commentators arrive at this view by some combination of three arguments. First, writers on this subject emphasize the difficulties of state interference in federal foreign policy. Because a system permitting interference would have unmanageable structural problems, they conclude that, in Professor Maier’s phrase, the “logic of the federal system” must preclude it even in the absence of a specific textual provision. Second, the commentary, in a broad appeal to the original understanding of the constitutional generation, invokes the writings of key figures of that time arguing the need for national uniformity in foreign policy. Third, commentators note that the constitutional text does explicitly grant many foreign policy powers (war, treatymaking, tariffs, etc.) to the national government and deny them to the states; from this they conclude that the drafters’ intent was to vest all foreign policy powers exclusively in the national government.

These three arguments are, for example, succinctly deployed in a recent commentary:

Exclusive federal authority over the conduct of foreign affairs is well established. The Constitution contains no single clause vesting exclusive authority over this area in the federal government. But the sum of its parts, considered in light of the constitutional structure, leaves little doubt in this regard. . . . Taken together, Article I and II vest virtually complete authority over foreign relations in Congress and the President. At the same time, the Constitution disables the states from conducting foreign relations of their own. By simultaneously granting authority to the political branches and denying power to the states, the Constitution appears to vest exclusive and plenary control over foreign relations in the federal government.

. . . .

The constitutional structure strongly suggests that the states conferred all rights of external sovereignty on the federal government and retained none for themselves. Unlike power over domestic matters, power over foreign affairs cannot be shared without substantially impairing its effective exercise. The founders were aware that the states’ exercise of concurrent authority over matters touching on “external sovereignty” would be incompatible with the conduct of foreign affairs. As Hamilton wrote in The Federalist, “The Union will undoubtedly be answerable to foreign powers for the conduct of its members.” For this reason, the Constitution appears

---

105 Id. at 835.
106 Id.
to preclude states from exercising direct authority over foreign relations, even in the absence of specific prohibitions.\textsuperscript{107}

The centerpiece of most commentary is the dysfunction arising from state participation in foreign affairs. This in turn has two principal components. With respect to influencing foreign nations, the dominant metaphor is the need to “speak with one voice.”\textsuperscript{108} As one commentator summarizes this view,

\begin{quote}
[T]he vital national interest in the effective and efficient achievement of U.S. foreign relations objectives requires that other nations perceive our foreign policy as unified and coherent . . . . Consequently, state and local involvement in international issues, particularly if not in accord with administration policy, may undermine the conduct of U.S. foreign relations and the credibility of our negotiating posture by conveying the appearance of disagreement, confusion, uncertainty and weakness in our Government’s foreign policy positions.\textsuperscript{109}
\end{quote}

Dean Howard Fenton, a leading critic of state foreign policy initiatives, makes this argument with respect to the South Africa divestment laws of the 1980s.\textsuperscript{110} The theory of divestment was that economic pressure applied by eliminating business contacts would induce liberalization in the South African regime (or, in a more cynical view, weaken it so that it could be overthrown). The Reagan administration, on the other hand, favored a strategy of constructive engagement—that is, using economic contacts to encourage change. As Dean Fenton asks rhetorically, “What ‘voice’ of U.S. policy toward South Africa does U.S. business or the South Africa government listen to?”\textsuperscript{111}

A similar argument is leveled against the recent laws, as in Massachusetts, targeting Burma:

While a particular locality may succeed in pressing a corporation to withdraw from Burma . . . , such action may undermine efforts at the federal level to assist U.S. businesses to compete internationally, may limit the President’s ability to choose between a range of policy options, and may restrict the federal government from responding

\begin{itemize}
\item \textsuperscript{107} Clark, \textit{supra} note 8, at 1295–97.
\item \textsuperscript{108} Schmahmann & Finch, \textit{supra} note 4, at 199 (“[T]he nation must speak with one voice, and . . . particularly in foreign matters, the voice must emanate from the federal government.”).
\item \textsuperscript{109} Bilder, \textit{supra} note 12, at 827.
\item \textsuperscript{110} See Fenton, \textit{supra} note 5, at 578–79.
\item \textsuperscript{111} Id.
\end{itemize}
to positive changes such as a commitment to start a dialogue with the democratic opposition.\textsuperscript{112}

The second key problem identified with state foreign policy is that it may produce adverse reactions on the part of foreign nations: "It is inappropriate and irresponsible for particular states and localities, acting on their own and without regard to broader national public opinion or policy, to adopt measures that may result in adverse consequences for the nation as a whole."\textsuperscript{113} "[C]arrying parochial concerns to the international stage," one commentary argues, could have repercussions well beyond the localities themselves. No harm is done when Boston's large population of Irish politicians gathers to sing Irish songs on St. Patrick's day; there may be harm done, however, if Boston is allowed to instigate a skirmish with the United Kingdom over Northern Ireland in which the rest of the country is not inclined to participate.\textsuperscript{114}

Thus, the central attack on state interference in foreign policy is functional: to pursue unified foreign policy goals and avoid conflicting signals to foreign nations, a federal system needs to concentrate foreign relations power in the national government.\textsuperscript{115} Even some commentators sympathetic to preemption of state interference in foreign policy, however, have worried about the "absence of a more compelling constitutional foundation" for the doctrine.\textsuperscript{116} As a result, historical appeals play an important secondary role in many analyses. "The states' accession of authority over foreign affairs to the central government was one of the foundational elements of the Constitution,"\textsuperscript{117} one critic emphasizes, citing Madison's \textit{Federalist 42}; another

\textsuperscript{112} Schmahmann & Finch, \textit{supra} note 4, at 203.
\textsuperscript{113} Bilder, \textit{supra} note 12, at 827. For example, the negative European reaction to Massachusetts's Burma law has been directed at the United States government. \textit{See} Theo Emery, \textit{State with Foreign Policy Roils Trade Beyond Seas}, \textit{BOSTON GLOBE}, Sept. 21, 1997, at D1; \textit{see also} Frank Phillips, \textit{Massachusetts to Be Warned on Burma Law: U.S. Trade Officials Target Sanctions}, \textit{BOSTON GLOBE}, Apr. 15, 1997, at B5 (noting that "[t]he law has created an international furor among America's trading partners and a migraine headache for the Clinton administration").
\textsuperscript{114} Schmahmann & Finch, \textit{supra} note 4, at 204.
\textsuperscript{115} In recent years, a "revisionist" view has emerged challenging what had been a relatively comfortable consensus upon the necessity of foreign affairs preclusion. \textit{See}, \textit{e.g.}, Goldsmith, \textit{supra} note 8; Spiro, \textit{supra} note 8. In particular, Professor Goldsmith emphasizes that no foreign affairs preclusion was actually enforced by the courts until the 1960s, that states previously engaged in substantial foreign affairs activity without objection on this ground, and that Article VI preemption should be adequate protection against truly harmful state activities. \textit{See} Goldsmith, \textit{supra} note 8.
\textsuperscript{116} Bilder, \textit{supra} note 12, at 829.
\textsuperscript{117} Fenton, \textit{supra} note 5, at 588.
begins by noting that "[a] major purpose of the Constitution was to place control of foreign relations in the hands of the national Government."  

The historical argument combines with the observation that most key foreign relations activities were allocated exclusively to the central government by the constitutional text. Professor Spiro puts it thus:

The constitutional architecture itself evinces a norm of federal exclusivity in foreign affairs, on the one hand granting expansive foreign relations powers to the federal government, on the other denying them to the states. . . . [A]gainst the landscape of foreign relations as they were conducted at the time of the Founding, the allocation seems decisively to have established a principle of federal exclusivity. War, trade, treaties, and the maintenance of diplomatic relations—arguably the foreign relations of the Founding era consisted of nothing else.

In sum, then, the argument for the dormant foreign affairs power is as follows: state interference in federal foreign policy is functionally problematic; the drafters of the Constitution wanted the national government to have broad powers in foreign affairs, and most foreign affairs power is, in any event, exclusively allocated to the national government by the constitutional text. Thus, it is said, the overall exclusion of the states by implication is clear, even if the text lacks specificity. In the ensuing Section, I examine each of these propositions.

II. A Critique of the Constitutional Arguments for Foreign Policy Preemption

This Section considers the leading conventional arguments for foreign policy preemption from the perspective of the original understanding of the Constitution. In Part II.A, I address the claim that state interference in foreign policy is unconstitutional because it has unfortunate practical ramifications. Whether this is true (or whether it is true to a troublesome extent) has been widely debated, and I make no comment on that discussion. I argue instead that, even if true, the claim is insufficient. There may also be a structural benefit to permitting state interference in foreign policy, and thus an affirmative reason that a federal system might be designed in such a manner. State activity in general interferes with executive foreign policy (as in-

118 Bilder, supra note 12, at 821; see also Spiro, supra note 8, at 1228 (noting that "some among the Framers highlighted the special dangers of disruptive state action in foreign affairs").
119 Spiro, supra note 8, at 1228–29; see also Clark, supra note 8, at 1296–97.
terferences with congressional foreign policy ordinarily would be pre-empted by Article VI). State interference thus affects the intrafederal separation of powers, as it limits the President's ability to conduct an independent foreign policy. Whether such a limit is desirable as a policy matter, and whether it outweighs the negative aspects of state foreign affairs interference, is debatable. The key point, though, is that there is a conceivable reason to permit state interference—and thus the drafters of the Constitution might have chosen to allow it. They would not, in any event, have been acting irrationally to do so. It is not the case that state interference in foreign affairs is precluded by "the logic of the federal system": a federal system could reasonably be designed upon either principle.

Second, Part II.B rejects the suggestion of a "framers' intent" to bar state interference in foreign policy. Although the intent of the constitutional generation assuredly was to strengthen the national government's foreign affairs powers, the framers might have thought the enhancement of congressional power through Article I, Section 8 and Article VI and the enhancement of treaty power in Article VI were sufficient to achieve that goal. The statements of the framers commonly adduced in support of the conventional view do not show an intent constitutionally to preempt the states. Rather, they are generalized statements that the conduct of foreign affairs should be a power of the national government and do not address how that nationalization should be accomplished. These statements establish only a proposition that no one disputes—that the federal government has power over foreign affairs—and do not speak to the issue explored here.

Finally, I argue in Part II.C that state interference in foreign affairs in ways not addressed by the specific provisions of the Constitution were familiar to the constitutional generation. Indeed, some of the difficulties encountered under the Articles of Confederation turned upon such interferences. Thus, it seems strained to view the specific provisions of the Constitution—in particular Article I, Section 10—as establishing a principle of complete exclusion when there were obvious circumstances to which they would not apply.

A. Argument from the Logic of the Federal System

1. What the Argument Must Show

Many academic and judicial arguments for foreign policy pre-emption reduce to the claim that state interference in foreign affairs is a bad idea. For this claim, standing alone,\textsuperscript{120} to be constitutional in-

\textsuperscript{120} That is, unsupported by constitutional text or historical context.
interpretation rather than policymaking, it must show more than simply that interference carries some risks and causes some problems. Rather, the task must be to show that permitting state interference in foreign affairs is not just a bad idea, but so fundamentally irrational that it could not have been the understanding of the constitutional generation.

This burden is substantial, but one might think it could be met here. From a federalism perspective, there is no obvious reason why the states should have the ability to interfere in national foreign policy. Foreign policy is perhaps the definitive national issue. In part this arises from the undeniable dual attributes of foreign affairs traditionally adduced by critics of state involvement: the national government cannot act effectively in the absence of uniformity, and the gravity of harm attending the entire nation from a foreign policy misstep argues for centralizing foreign relations functions in a single governmental unit able to weigh the national consequences of an action rather than dispersing those functions across a multitude of parochial decisionmakers.

Beyond these familiar arguments against the efficacy of foreign policy federalism, a deeper problem with the states' claim to an unconstrained foreign policy role is that there appears to be no credible argument in favor of such a claim. Most of the conventional structural arguments for federalism and state power in the U.S. system do not apply in the field of foreign policy. A common claim, for example, is that states act as "laboratories" to test social polices. "Intuition suggests that with fifty different parallel state governments, and countless substate governments as well, innovations in governing or problem solving will occur that will inure to the benefit of the entire populace in the long run." But this argument seems unavailing

---


122 See, e.g., Chy Lung v. Freeman, 92 U.S. 275, 279-80 (1994) (noting dangers of diffused foreign policy authority). As Professor Spiro argues, "[t]he stakes were simply too high. To have tolerated state-level action that at points threatened to embroil the country in warfare, even in the face of inaction by the political branches, now must be taken as a foolish constitutional risk." Spiro, *supra* note 8, at 1239.

123 Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397 (1997). Professor Friedman further explains the argument:

[T]he best model to describe what is at stake here may be an understanding of innovation as an evolutionary process. Countless state and local govern-
with respect to international matters. One cannot test foreign policy locally. If Massachusetts restricts commercial relations with Burma and California does not, one cannot judge which has been the more effective approach. What affects Burma is the aggregate of U.S. approaches; one cannot disaggregate and analyze the effect of each.

Further, the theory of federalism is that states are good decisionmakers with respect to local matters (because of local expertise and sensitivity to local desires), but poor decisionmakers with respect to matters having effects outside the state because the state may not internalize all of the ill-effects of its decisions. This expression of federalism theory cuts doubly against state involvement in foreign affairs. First, it seems unlikely that states will have local expertise in international matters. In the case of Burma, for example, there is no local expertise to be had: the debate is whether engagement or disengagement will work a more favorable result in internal Burmese politics. It may be true that some foreign affairs issues have a local component (as has been argued with respect to immigration). However, as a general matter, they do not, and an argument based on local expertise does not support a general claim by the states to foreign policy power. Second, foreign affairs are by definition external, and thus the activities of one state will inevitably affect other states. Massachusetts’s policy of disengagement will always undercut California’s policy of engagement (and vice-versa); again, there is no way to disaggregate foreign policies. Moreover, nations upset by a state’s foreign policy are likely to respond at the national level, and thus the cost of a state’s foreign policy is likely to fall largely upon persons

ments, remote from one another but facing similar problems, develop numerous twists on solving them. At conferences, and through observation, governments learn of techniques employed elsewhere. The ones that seem sensible, that work, survive; many other ideas die on the vine. This evolutionary process works best precisely because many governments concoct ideas on their own, not a few of which prove to be unsuitable in the long run. One might doubt whether so much creative thinking would emanate from [a] national boardroom or laboratory.

Id. at 399–400; see also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if the citizens choose, serve as a laboratory and try novel social and economical experiments without risk to the rest of the country.”).

124 See Friedman, supra note 123, at 401–02 (“Drinking ages, speed limits, and gun usage are all examples of subjects that have played out on the national stage in recent years despite good arguments in each instance that state cultures differ in important ways that justify decisions being made at a local level.”).

125 See Spiro, supra note 12, at 123–34; see also Bradley & Goldsmith, supra note 100 (noting substantial local aspects of state treatment of aliens).
outside the state.\footnote{126} It may be true that this argument is mitigated if foreign nations perceive states as semi-autonomous actors,\footnote{127} but it remains difficult to build an affirmative case for state interference in foreign policy on this ground.\footnote{128}

As a result, the structural argument against foreign policy federalism has two central components: first, that state interference has substantial costs as compared to national exclusivity, and second, that it carries no material structural benefits. The first point is widely emphasized. But the second point, typically assumed rather than demonstrated, is also critical to the argument. If the choice between national exclusivity and foreign policy federalism is simply a trade-off of costs and benefits of two competing systems, it is impossible to say that the structure of constitutional federalism \emph{requires} one rather than the other. On the other hand, if there is no structural reason to give states power in foreign affairs, and many structural reasons to deny them such power, one may conclude that only one structure—national exclusivity—represents a sensible constitutional choice. If the latter is true, perhaps it is superfluous to search the text for a plain statement of such a view: it must be inherent in a federal system that federalism does not extend to matters of uniquely national concern, most evidently foreign affairs.

This argument depends, however, upon it being truly impossible to articulate a coherent rationale for state interference in foreign affairs. In this sense arguments purely from governmental structure, without textual or contextual support, face a heavy burden, for it is not sufficient to show that the structure advocated is a good one. Rather, the argument must be that any alternative structure is so dysfunctional or purposeless that one would doubt it could have been contemplated.

\footnote{126} For example, in response to Massachusetts's Burma law, the European Union and Japan filed a complaint against the United States in the World Trade Organization (WTO). See Spiro, supra note 8, at 1249 n.120. A WTO resolution of the dispute in favor of the complainants may ultimately authorize retaliatory duties against the United States as a whole, thus imposing the adverse consequences of the Massachusetts law largely upon persons living outside Massachusetts. On the problem of externalities in state foreign policy, see Spiro, supra note 8, at 1246–52.

\footnote{127} See Spiro, supra note 12, at 123–34.

\footnote{128} A further aspect of the "local expertise" argument turns on the claim that there are certain areas traditionally within the states' domain, where states have a long history of exposure to what works and what does not. See United States v. Lopez, 514 U.S. 549, 581–83 (1995) (Kennedy, J., concurring); Friedman, supra note 123, at 400. Again, this argument seems attenuated in foreign policy areas in which the states have been, at most, intermittent players.
By this standard, the structural argument for exclusion of the states from foreign affairs is unpersuasive, but not because of claims based on federalism. Instead, important values of national separation of powers may be served by permitting a state role in foreign affairs. As elaborated below, a federal system that does not constitutionally preclude state interference in foreign affairs enhances the foreign policy initiative of Congress, whereas a system constitutionally preemptive of state interference makes foreign affairs more fully the province of a less-constrained executive. We may debate whether the value of a division of power in foreign affairs outweighs the need for national uniformity, but—once the value of separation of powers is acknowledged—the structural argument, standing alone, cannot resolve the proper reading of the Constitution.

2. Why the Argument Fails

We may acknowledge that foreign policy is fundamentally a matter of national concern, and that state policies—at least to the extent they interfere with national objectives—should be superseded if national policy is to be fully effective. There are two ways to achieve these goals. First, Congress can be empowered to override by enactment state laws and other activities interfering with national policy. Second, states may be constitutionally precluded by some procedure other than (or in addition to) congressional enactment. The question is whether one or the other system is compelled by the structural logic of the U.S. system.

The initial step in the structural analysis is to recognize that a system of constitutional preemption of state activity approximates, formally or informally, a system of presidential preemption. In theory, one could accomplish constitutional preemption of state interference in foreign affairs in three ways: (i) declare that all state laws affecting foreign nations are unconstitutional; (ii) declare that state laws the judiciary thinks interfere with national foreign policy are unconstitutional; or (iii) declare that state laws the President thinks interfere with national foreign policy are unconstitutional. In fact, each of these subcategories is likely to collapse into a similar practical result in which the President plays a central role.

First, one could not, as a practical matter, possibly invalidate all state laws potentially implicating foreign nations. There is no precise demarcation between the local and the international, and the category of state laws having some potential effect upon foreign policy is
unmanageably broad. Not surprisingly, no court or commentary takes this position. The matter is generally phrased as an inquiry whether a state law, concededly having some international implications, is inconsistent with (or, in Zschernig's phrase, would "impair the effective exercise of") federal foreign policy.

This formulation, however, invites the question of who is to evaluate the degree of inconsistency or impairment. The extent of inconsistency may be difficult for judges to evaluate, so any such system is likely to lead to reliance upon advice from the President, and thus to approximate a system in which the President has actual preemptive authority. Moreover, even if the judiciary exercises fully

129 See M.J.C. Vile, THE STRUCTURE OF AMERICAN FEDERALISM 194–95 (1961) ("'[F]oreign affairs' are not autonomous[,] they are always 'about' something—trade, tariffs, land, shipping—and those are all things in which the States can have considerable interest."). For example, even matters appearing to be wholly local, such as city police treatment of detained suspects, may become international issues when the President seeks to pressure other nations on their human rights records.

130 Zschernig, 398 U.S. at 440; see also supra Part I.B–D (discussing academic and judicial theories of state preclusion in foreign affairs).

131 Compare Goldsmith, supra note 12, at 1414–21 (criticizing independent judicial decisionmaking in foreign affairs matters), with Zschernig, 389 U.S. at 440–41 (rejecting reliance on executive in favor of independent judicial evaluation).

132 See Goldsmith, supra note 8, at 1690–97 (discussing lack of judicial expertise in foreign affairs). For an example of the difficulties of independent judicial evaluation, see Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985), in which the Second Circuit initially affirmed a judgment for the foreign defendant on the basis of a supposed U.S. executive policy favoring renegotiation of foreign debt, and then reversed itself upon a submission by the executive branch explaining that there was no such policy. See Ramsey, supra note 91, at 938 (discussing the Allied Bank litigation); Roger M. Zaitzeff & C. Thomas Kunz, The Act of State Doctrine and the Allied Bank Case, 40 Bus. Law. 449, 450 (1985) (same).

133 Judicial reliance—formal or informal—on the executive in matters of foreign affairs is common in other areas. An example of formal reliance is recognition of governments: the judiciary looks to executive judgment on the matter of what constitutes the legitimate government of a foreign country. An example of informal reliance arises in some versions of the act of state doctrine. That rule generally states that courts will not hold invalid the territorial acts of a foreign country. However, in some descriptions of the doctrine, the rule is not applied where adjudication would not interfere with the executive's conduct of foreign policy—and when interference is debated, the courts tend to be influenced by executive views (although they deny that they are bound by those views). See generally Joseph Dellapenna, Deciphering the Act of State Doctrine, 35 VILL. L. REV. 1 (1990). A similar practice can sometimes be seen in modern dormant Commerce Clause cases. See Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 75–76 (1998); id. at 81 (Scalia, J., concurring) ("Having appropriated a power of Congress for its own use, the Court now finds itself, at least in the area of foreign commerce, incompetent to wield that power, and passes it off (out of "due regard" for foreign-policy expertise) to the President.").
independent judgment, so long as it does its job correctly, it should sweep at least as broadly as a system of formal presidential preemption: surely any state law that actually conflicted with a presidential foreign policy would be preempted. Thus there are, as a practical matter, two potential systems: congressional preemption and executive preemption (whether formal or informal).134

The Constitution explicitly establishes the first method, through the Supremacy Clause of Article VI. Thus it is not generally believed that a state could maintain laws or policy interfering with federal foreign relations against the statutory direction of Congress.135 The Constitution also explicitly establishes the second system in part, by specifically excluding the states from particular activities such as war and treatymaking.136 The question is whether the Constitution also establishes the second system to exclude the states in full: namely, that the President, formally or informally, should have the power to establish national foreign policy preemptive of state law.

Once the issue is cast in this fashion, it can be seen—properly—as an issue of intrafederal separation of powers. The issue is not, as Zschernig put it, whether a state may “impair the effective exercise of the Nation’s foreign policy,”137 but whether a state may impair the effective exercise of the President’s foreign policy. The “Nation’s” foreign policy, expressed in legislation adopted by Congress and enforced by the President (or in a treaty negotiated by the President and approved by the Senate), would override putative state interference under Article VI. The question is whether foreign policy established by only one branch, the executive, has a similar effect. This is fundamentally a question of presidential power, not a question of state power.138

134 There is, of course, also the option of precluding the states from specific aspects of foreign policy, as is done by Article I, Section 10 of the Constitution. This, however, does not of itself establish a generalized preclusion—only a preclusion from areas actually mentioned in Article I, Section 10. For the balance of this discussion, I assume the subject matter in question lies outside the Constitution’s specific preclusions.

135 This assumes that Congress has an enumerated power to legislate with respect to foreign affairs. In Part III, infra, I discuss the specific derivation of that power. I leave aside the question whether there are any federalism-based limits upon this power. See Printz v. United States, 521 U.S. 898 (1997); Bradley, supra note 121, at 450–60; Neuman, supra note 121, at 48; Carlos Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317 (1999).

136 See U.S. Const. art. I, § 10.

137 Zschernig, 389 U.S. at 440 (emphasis added).

138 The principal objection to this formulation is the claim that Congress’s silence establishes a federal policy of non-action. Consider, for example, a foreign country with human rights violations to which neither the President (by policy statement) nor
A system of non-Article VI preemption gives the President substantial latitude to pursue an independent foreign policy. The President can formulate policy and compel states not to interfere. A system based only on Article VI preemption limits presidential power through the activities of the states. The President may formulate a policy, but if states interfere with it, the President must seek the protection of Congress—and if Congress does not agree, the presidential policy will be to some extent frustrated. Thus, a general limitation on state power in foreign affairs beyond Article VI fosters an independent presidential policymaking role, while an absence of such a limitation reduces independent presidential power and encourages a cooperative foreign policy at the national level.

As an example, consider again the state laws relating to Burma. Assume the President wishes to pursue an accommodative strategy toward Burma which is undermined by state laws penalizing firms with Burmese commercial contacts. Under a system of constitutional preclusion, the President is largely free to set the United States upon a course of accommodation. Regardless of how the judicial test is described, it seems likely that a court would invalidate the conflicting state laws.\footnote{This course would then be reversed only if Congress intervened to overrule the President (as actually occurred with respect to Ethiopia).} This course would then be reversed only if Congress intervened to overrule the President (as actually occurred with respect to Ethiopia).

Congress (by statute) has objected. One might argue that this non-action establishes a federal policy (not just a presidential policy) of tolerating the foreign government, and that a state policy penalizing that government would conflict with the policy of the United States in this regard. The difficulty here is the problem of inferring a congressional policy from congressional silence. Ordinarily in the U.S. system a congressional policy needs to be expressed by statute to have the force of law. \textit{See} U.S. CONST. Art. VI; I.N.S. v. Chadha, 462 U.S. 919 (1983). Without a statute, it is difficult to say what the policy outlook of a collective body such as Congress may be. In the example given above, it might be that Congress has taken a collective decision not to object to the human rights abuses, but it also might be that Congress has not considered the matter, or that Congress has not been able to reach any decision. Without more, one simply cannot say what Congress's policy is. As the Supreme Court has said in other contexts, "[C]ongress' silence is just that—silence." \textit{See}, e.g., Tyler Pipe, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 261 (1987) (Scalia, J., dissenting in part); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). For a related observation, see \textbf{David Currie}, \textit{The Constitution in the Supreme Court: The First Hundred Years 1789-1888}, at 334 (1985) (observing "the recurring fallacy that in some undefined cases congressional inaction was to be treated as if it were permissive or prohibitory legislation—though the Constitution makes clear that Congress can act only by the affirmative vote of both Houses").
to South Africa).\textsuperscript{140} On the other hand, in a system without constitutional preclusion, the states may limit independent executive policymaking. If the President wishes to pursue accommodation but enough local jurisdictions enact contrary laws, the President’s policy will be undermined unless Congress affirmatively endorses it. Thus, in one system the President’s Burma policy is fully effective only with the support of \textit{either} Congress \textit{or} local jurisdictions; in the other the President’s policy is fully effective on its own, \textit{despite} opposition from local jurisdictions, unless two-thirds of Congress objects. Obviously, the President’s ability to establish an independent (and unpopular) foreign policy is far greater in one case than in the other.\textsuperscript{141}

My point is not to argue that one or the other of these is a better structure of government. The point, rather, is that either is a plausible structure. Those who believe that foreign policy requires a strong active president, and who distrust both the ability and speed of congressional decisionmaking, will likely favor one; those who harbor greater distrust of the aggrandizement of executive power, and believe that key policy decisions should not rest with a single person, will favor the other.\textsuperscript{142} Ultimately, the choice is a matter of one's governmental priorities.

That is critical because we can no longer say that the structure of a federal system of government \textit{compels} an extra-legislative limitation upon state interference with (the President's) foreign policy. The states do serve a structural role, although it is not one of federalism but of separation of powers. Removing the states from foreign affairs


\textsuperscript{141} A similar point could be made with respect to the \textit{Breard} case, see \textit{supra} notes 97-99 and accompanying text. If the President's policy is to defer to the ICJ, Virginia's refusal to honor an ICJ request for a stay of execution obviously interferes with that policy. If the President can override Virginia's action, then the President can unilaterally establish a policy of deference. If the President cannot override Virginia's action directly, but must secure preemptive legislation, then U.S. policy toward the ICJ will need to be a cooperative effort of the President and Congress. \textit{Cf.} Vazquez, \textit{supra} note 99. Or, to take an example that has divided courts, assume that the international community objects to state "Buy-American" laws, and further assume that the federal government as a whole could override the Buy American laws in furtherance of national foreign policy. There remains an issue of distribution of powers: must the override come from Congress (as a statute) or the Senate (as a treaty), or can the President alone invalidate the state laws through constitutional preemption. Again, the implications for the relative roles of the President and Congress in foreign policy are substantial.

broadens presidential power. Whether that is appropriate given the exigencies of international relations is a matter of opinion—but we can no longer say with confidence that no one could have designed or envisioned a contrary system.\footnote{This conclusion can be avoided if one believes that the dangers of state foreign affairs activity are so great as to overwhelm any possible countervailing consideration. For example, one might think that the danger of a state precipitating a war overrides all other matters. See Chy Lung, 92 U.S. at 279–80; Spiro, supra note 8, at 1239. But this concern seems overstated. Few, if any, state activities actually involve such a danger, even when they affect hostile nations. For example, there was no credible claim that the inheritance statute in Zschernig risked war, even though it was directed at hostile nations at the height of the cold war. Realistically described, the danger is damaged relations, not outright hostilities. On the other hand, if a state activity actually were to threaten war, Congress would be able to act to preempt it. Whatever institutional constraints exist within Congress, it seems unrealistic to suggest that these constraints would prevent Congress from avoiding a war it wanted to avoid. See infra Part II.B. (discussing arguments of the constitutional generation that Congress needed to be given a constitutional power to override state laws with international implications).}

In a larger sense this illustrates the problem of argument purely from governmental structure. Such arguments, standing alone, should succeed only if the alternatives to the proposed structure are wholly implausible, in that no one could reasonably contemplate such a design. That, however, is rarely the case: usually, as here, there are several plausible structures, one of which is preferred by the party making the structural appeal. But this is not truly an argument from governmental structure but an argument from policy: it would be better, it is said, to have this (plausible) design than that (plausible) one. Such an argument depends on a value choice—trading off, in this example, efficacious foreign policy against executive unilateralism. As such, it may be an argument about the proper modern reading of the Constitution (depending upon one’s interpretive theory), but it is not an originalist argument. While it is appropriate to presume that the framers did not establish an irrational governmental structure, it seems wrong to presume that they established one in all cases congruent with our own policy choices.

B. The Argument from Framers’ Intent

The intuitive structural opposition to state interference in foreign affairs is bolstered by appeal to the statements of various individual framers. The thrust of these arguments is that the framers assumed that all foreign affairs power would be located in the federal government, and thus it is appropriate to interpret the Constitution to ac-
complish this result even if no specific operative text can be identified.

At the outset, I reiterate that the question is not whether the federal government as a whole has power over foreign affairs. I assume, for present purposes, that state activities interfering with federal foreign policy can, in general, be preempted by treaties or legislation under Article VI. The ultimate authority in foreign affairs is the national government. The question is whether states are precluded from foreign affairs activity in the absence of Article VI preemption. The question, in short, is not one of federal supremacy, but of federal exclusivity. Thus, observations tending to show a general consensus among the constitutional generation that the national government should be supreme in foreign affairs—that is, that it should be empowered, as against the states, to conduct foreign policy—are insufficient. Such a consensus would certainly suggest that, since national empowerment must entail the power to override contrary state policies, a power of preemption to protect national foreign policy must exist in the national government. That, however, is not the issue in dispute. It is widely agreed that the federal government has a power of preemption to establish uniformity in foreign affairs. The question is where it is lodged: only in Congress (or President-plus-Senate, in the case of treaties), via Article VI, or also—directly or indirectly—in the President as well, through some limitation beyond Article VI protecting unenacted and unilateral presidential policies?

The appeal to the “framers’ intent” to answer this question is couched both generally and specifically. In general, it is said, a leading purpose of the Constitution was to increase the power of the federal government in foreign affairs, in comparison to the weak and ineffectual foreign affairs power wielded by the Continental Congress under the Articles of Confederation. The Confederation period plainly illustrated the dangers of diffused foreign affairs powers. Among other difficulties, the national government proved unable to enforce treaties (and once this deficiency was revealed, unable even to negotiate treaties), unable to establish a coherent international trade policy, and unable to prevent violations of international law. These difficulties, in turn, arose from the weakness of the national government vis-a-vis the states. States flouted federal treaties and international law; the states’ conflicting tariff and navigation policies

144 See Rakove, supra note 10, at 333–400 (discussing weakness of the Articles of Confederation in foreign policy as a motivation for the Constitutional Convention).
undercut and ultimately negated each other.\footnote{See id.; Records, supra note 102, at 19 (recording Edmund Randolph's opening speech to the Constitutional Convention, listing as his first two indictments of the Confederation government the fact that Congress lacked power to enforce treaties and international law).} Nor is there any doubt that the Constitution was in part motivated by a desire to remedy this situation. The Annapolis convention, precursor of the Philadelphia convention, was called initially to work out a coherent trade policy.\footnote{See RAKOVE, supra note 10, at 333–400.} Much of the text of the Constitution is addressed to remedy the foreign relations problems of the Confederation—in particular, giving Congress power over international trade and international law, and providing for enforcement of federal directives (statutes and treaties) through the Supremacy Clause.

None of the foregoing is materially in dispute. The difficulty, however, is to derive from this history a generalized intent greatly to enhance presidential prerogatives in foreign affairs. The specific difficulties confronted in the international sphere under the Articles stemmed from weaknesses of Congress: Congress lacked the power to pass trade legislation and to enforce treaties and international law. The problem under the Articles was that the national government was not supreme in foreign affairs—states could (and did) establish foreign policies in competition with Congress. The Constitution responded by enhancing legislative powers over international trade and international law (Article I, Section 8), and by making federal laws and treaties supreme over state law (Article VI). It is not obvious, though, that it additionally responded by creating a preemptive status outside Article VI for unenacted policies. The drafters of the Constitution were not immediately concerned with whether legislative preemption in foreign affairs would be sufficient to establish national supremacy—they were concerned with establishing federal legislative preemption in the first place, since it had not previously existed. Perhaps the framers of the Constitution thought that the preemptive effect of treaties and statutes (an enormous advance over the Articles) would be sufficient to establish an effective national government in foreign affairs; perhaps they thought that unenacted policy also needed preemptive effect.\footnote{As illustrated by a recent exchange between Professors Spiro and Goldsmith, as a practical matter one's view of this matter likely turns on one's confidence (or lack of confidence) that Congress realistically will be able to detect and preempt dangerous state foreign policy activity. Compare Goldsmith, supra note 8, at 1681–84 (arguing that Congress has such an institutional capacity), with Spiro, supra note 8, at 1246–59 (disputing Congress's capacity in this regard). Whatever one's view of this debate as a functional matter, it is surely difficult to say that the framers inevitably held one view...} The general outlines of constitutional
history do not provide an answer to this question. The fallacy of the general appeal to the Constitution's intent is that federal supremacy—concededly a constitutional goal—does not require preemption of state activity by unenacted presidential policy but can be accomplished through Article VI.\textsuperscript{148}

Proponents of broad preemptive powers typically respond with specific appeals to the statements of the framers in this regard. We can, it is argued, answer the foregoing question because the framers themselves emphasized the need for federal exclusivity (as well as supremacy). However, none of the adduced quotations of the "framers' intent" actually addresses this matter. Rather, the specific appeal to framers' intent founders upon the same difficulty encountered by the general appeal: the framers' views relate only to the need for federal supremacy, not federal exclusivity.

Initially, it is noteworthy how few quotations are actually offered by proponents of generalized foreign affairs preemption. Most cases rest upon two sections of *The Federalist* and a 1786 letter from Jefferson to Madison, plus an occasional citation to additional parts of *The Federalist* as peripheral support.\textsuperscript{149}

\textsuperscript{148} A recent example of this mistaken line of argument is Representative Lee Hamilton's constitutional critique of the Massachusetts Burma trade law. \textit{See} Hamilton, \textit{supra} note 8, at A23. Representative Hamilton argues, correctly, that under the Articles of Confederation the national government's incomplete power over foreign affairs was a serious concern, and that the framers designed the Constitution to rectify the problem. However, he too quickly assumes that the problem was fixed by a constitutional preclusion of state foreign policy (such that the Massachusetts law is automatically invalid). Thus he further argues that, absent a constitutional preclusion, "[a] foreign nation has much less incentive to negotiate an agreement with our State Department to remove federal sanctions when a dozen state-imposed sanctions may remain." \textit{Id.} But this ignores the fact that a treaty relating to sanctions would be drafted to remove state as well as federal sanctions and would preempt state law under Article VI, and that any informal agreement relating to sanctions could be implemented by Congress via legislation also preemptive of state law. Neither of these options would have been available under the Articles of Confederation; they were added to the Constitution to obviate the difficulties Representative Hamilton correctly identifies.

\textsuperscript{149} I am not aware of any claim that anything in the records of the Constitutional Convention or the ratification debates or, indeed, any other contemporaneous source directly supports the idea of generalized federal exclusivity. The one possible exception is Professor Spiro's quoting of Madison's statement at the convention that "[i]t
In this context, the quotations upon which this case is built are worthy of particular attention. The first common citation is Madison’s Federalist No. 42, which states, “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”\footnote{150} Even in isolation, this phrase does not necessarily argue for any more than national supremacy in foreign affairs. In context, it is clear that Madison was justifying the grant of particular foreign relations powers to the federal government; that is, not only was he not suggesting a generalized constitutional preclusion of the states, but in fact he was not even asserting, in this passage, a generalized foreign relations power on the part of the federal government.

Federalist No. 42 is part of a series, running from number 41 to number 46, entitled General View of the Powers Proposed to Be Vested in the Union.\footnote{151} In this series Madison proposes to review the several powers conferred on the government of the Union; and that this may be the more conveniently done they may be divided into different classes as they relate to the following topics: 1. Security against foreign danger; 2. Regulation of intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the states; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving efficacy to all these powers.\footnote{152}

ought therefore to be effectually provided that no part of a nation shall have it in its power to bring [calamities] on the whole.” Spiro, \textit{supra} note 8, at 1228 n.20; see also 1 Records, \textit{supra} note 102, at 316 (quoting the same). It is not clear that Professor Spiro offers this in direct support of national exclusivity. In any event, it is not supportive. In making this statement, Madison was defending the “negative” on state laws (that is, a general power to void state laws) he proposed to give to Congress. This proposal was, of course, not adopted; the language that became Article VI was substituted as a more-limited alternative. Madison continued to argue for a broader “negative.” However, this says nothing about Madison’s views of preemption by means other than congressional action, and indeed the broader context suggests that Madison actually thought congressional action—as reflected in the negative or, later, in the Supremacy Clause—would be sufficient. \textit{See infra} Part IV.B.


\footnote{151}{\textit{See The Federalist No. 41, at 266 (James Madison) (Isaac Kramnick ed., 1987).}}

\footnote{152}{\textit{Id. at 266–67.}}
Accordingly, Federalist No. 41 discusses the first category, relating to war and military power.\textsuperscript{153} Federalist No. 42, from which the key quote is drawn, begins as follows:

The second class of powers lodged in the general government consist of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies on the high seas, and offenses against the law of nations; to regulate foreign commerce, including a power to prohibit, after the year 1808, the importation of slaves, and to lay an intermediate duty of ten dollars per head, as a discouragement of such imports.

This class of powers forms an obvious and essential branch of the federal administration. \textit{If we are to be one nation in any respect, it clearly ought to be in respect to other nations.}\textsuperscript{154}

Madison then goes on, in the balance of Federalist No. 42, to analyze and defend each of the particular powers described in the first paragraph of the number.\textsuperscript{155}

Thus the quotation is an argument for granting to the federal government a particularized list of powers. It is not discussing the whole generalized idea of foreign relations power, for part of that subject falls under the first category (security) discussed in number 41.\textsuperscript{156} Nor is it even discussing particularized preclusions of state power; that is Madison’s fifth category, which he discusses in Federalist No. 44, the fourth of the series.\textsuperscript{157} There is simply no argument that Madison was saying anything about a generalized preclusion of states from interference with unenacted foreign policy.

The second principal quotation is from Hamilton, in Federalist No. 80: “[T]he 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.”\textsuperscript{158} Again, even in isolation this statement seems to do no more than argue for federal supremacy in for-

\begin{flushleft}
\textsuperscript{153} See \textit{id.} at 266–73.
\textsuperscript{154} \textit{The Federalist} No. 42, \textit{supra} note 11, at 273 (emphasis added).
\textsuperscript{155} See \textit{id.} at 273–79.
\textsuperscript{156} See \textit{The Federalist} No. 41, \textit{supra} note 151, at 267–73 (discussing war power and military and naval powers).
\textsuperscript{157} See \textit{The Federalist} No. 44, at 286–88 (James Madison) (Isaac Kramnick ed., 1987) (discussing, among other matters, the exclusion of states from specific foreign policy matters such as treatymaking and issuing letters of marque).
\end{flushleft}
eign affairs; it does not compel state preclusion. Context confirms that, like Madison in *Federalist No. 42*, Hamilton had something much more limited in mind.

*Federalist No. 80* is part of a series, beginning at number 78, discussing the federal judiciary.\(^{159}\) Number 80 is directed to the “proper objects” of the judiciary, of which there are five:

1st, to all those which arise out of the laws of the United States . . . ; 2nd, to all those which concern the execution of the provisions expressly contained in the articles of Union; 3rd, to all those in which the United States are a party; 4th, to all those which involve the peace of the confederacy, whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly to all those in which the State tribunals cannot be supposed to be impartial and unbiased.\(^{160}\)

In working through each of these matters, Hamilton comes to the fourth category:

The fourth point rests upon 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. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, 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 the citizens of other countries are concerned.\(^{161}\)

Thus Hamilton was justifying federal diversity jurisdiction where one party was the citizen of a foreign state. This has nothing to do with a generalized foreign affairs power, and in fact has nothing to do with any preclusion of the states of any sort, since state courts would have concurrent jurisdiction over such cases. Hamilton’s only point was that federal courts should have this aspect of diversity jurisdiction (even, he emphasized, where the only issues were ones of state law)\(^{162}\) so that if state courts were not willing to give justice to foreigners, federal courts would be available to do so.

A third leading quotation is from Jefferson, stating that “it is indispensably necessary that with respect to everything external we be

\(^{159}\) See *The Federalist* No. 78, at 436 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

\(^{160}\) *The Federalist* No. 80, supra note 158, at 445.

\(^{161}\) Id. at 446 (emphasis added).

\(^{162}\) See id.
one nation only, firmly hooped together."\textsuperscript{163} Unlike the preceding quotes, this is at least a statement of general structural philosophy rather than a defense of a particular (and irrelevant) aspect of the Constitution. However, it shows only a view that the federal government should be supreme in foreign affairs, not the means of achieving that goal. It is not illuminating on the question whether the constitutional generation chose to exclude states from foreign affairs as a general matter or only gave the power to Congress to do so as necessary.

Finally, other parts of The Federalist are cited (though generally not quoted) as additional support, notably numbers 3, 4, 5, and 81.\textsuperscript{164} The first three are general statements by John Jay to the effect that a Union would be stronger in foreign affairs and less likely to succumb to internal disputes than a collection of independent states.\textsuperscript{165} Number 81 is another in Hamilton's series on the judiciary and is not relevant to the present inquiry.\textsuperscript{166} None of these citations provides any further support for the proposition of exclusivity (as opposed to supremacy).\textsuperscript{167}

A response might be to combine the foregoing structural argument with the statements of intent. True, this argument might concede, there are two plausible governmental structures available, and one might be forced to choose between inefficacious foreign policy and unchecked executive power. However, it would be further contended, as discussed above, that the disposition of the framers was to

\textsuperscript{163} Letter from Thomas Jefferson to James Madison, Oct. 8, 1786, reprinted in CHARLES WARREN, THE MAKING OF THE CONSTITUTION 46 (1937), and quoted in Clark, supra note 8, at 1296 n.242. Jefferson also stated, "My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty." Letter from Thomas Jefferson to George Wythe, 1787, quoted in Hines, 312 U.S. at 63 n.11.

\textsuperscript{164} See Henkin, supra note 1, at 422 n.2.

\textsuperscript{165} See The Federalist Nos. 3-5, at 94-103 (John Jay) (Isaac Kramnick ed., 1987).


\textsuperscript{167} The court in Natsios, 181 F.3d at 49-50, also relied on quotes from Federalist Nos. 22 and 45, which have nothing to do with the matter. The quote from Federalist No. 22 contains Hamilton's observations about interstate rivalries, justifying the grant of interstate commerce power to the federal government. See The Federalist No. 22, at 177-78 (Alexander Hamilton) (Isaac Kramnick ed., 1987). The quote from Federalist No. 45, in which Madison says that "[t]he powers . . . of the federal government are few and defined," seems to be evidence against an ill-defined and wide-ranging preemption of state laws. The Federalist No. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987); see also Denning & McCall, supra note 8, at 317-18 & n.51 (relying on various materials from the ratifying debates urging the need for congressional supremacy in foreign relations matters).
favor a strong foreign policy in response to the international ineptitude of the Articles of Confederation. The foregoing quotes support this general disposition, even though made in contexts not directly relevant. Thus, it is said, while in theory a reasonable person could choose either alternative, there can be no doubt that the framers, given their particular concerns, would have chosen one rather than the other.

The difficulty with this response is that it is not possible to discern a generalized consensus upon the matter among the constitutional generation. Assuredly, the framers generally agreed upon a federal government with strong powers in foreign affairs (and the antifederalists, to the extent they disagreed, were conclusively rejected in the ratification process). That would seem to suggest a broadly distributed preemptive power. On the other hand, there was also a general distrust of executive power and a commitment to the checking of the power of each branch through separation of powers, including in the foreign affairs field. Madison, for example, later wrote,

The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging, and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

Accordingly, during the post-constitutional period Madison generally expressed a limited view of executive power in foreign affairs, suggesting that he would not have favored presidential preemption power in foreign affairs. In reality, most of the framers probably held

168 See Rakove, supra note 10, at 333–400 (discussing weakness of Articles of Confederation in foreign policy as a motivation for the Constitutional Convention).
171 See Jack N. Rakove, James Madison and the Creation of the American Republic (1976) (emphasizing Madison’s concerns over unchecked executive power in foreign affairs); Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 231 & n.* (1977) (discussing Madison’s views). Hamilton, on the other hand, expressed a more expansive view of executive power in foreign affairs, and might well have been comfortable with broad powers of executive preemption. See Ramsey, supra note 45, at 212–16 (discussing views of Madison and Hamilton).
both views, and it is difficult to speculate in the abstract how each would have balanced them in the context of state power in foreign affairs. In any event, it is not obvious that the founding generation as a whole would have chosen one alternative over the other.

This discussion illustrates the danger of arguing from generalized intentions. That the framers had a generalized intention to empower the national government in foreign affairs does not establish that they adopted any particular strategy to do so, or that this generalized intent was not tempered by countervailing generalized intents (such as the need to limit the reach of presidential power). Again, the burden one must carry to support any assumption about the necessary reading of the text (without actually reading it) is difficult to sustain.

C. The Argument from Context

A third argument for constitutional preclusion of state interference in foreign policy looks to the historical context of the Constitution. In this view, the text excludes states from essentially all foreign relations activities that would have been familiar to eighteenth-century drafters. Thus the text, at the time it was adopted, would have amounted to, in effect, a complete exclusion by virtue of its specific provisions. A measure such as Massachusetts’s Burma law would have been inconceivable in the eighteenth century, when the limited scope of state governments would not give the states the leverage to engage in commercial boycotts. As result, it is said, there is no text covering additional state interferences because the framers excluded all those they could imagine.¹⁷²

The difficulty with this argument is that states did interfere in foreign policy during the Confederation period in ways not comprehensively prohibited by the specific exclusions of the Constitution. For example, a substantial issue under the Articles was state treatment of foreign nationals, in particular British subjects. At the time, the rights of aliens under state law were greatly restricted, in such areas as the ability to inherit or to own property. States had varied the rights of nationals of particular countries based on whether their countries were friendly or unfriendly to the United States. Virginia, among others, limited the ability of British creditors to recover debts from Virginia debtors,¹⁷³ while granting special rights to citizens of nations

¹⁷² See Clark, supra note 8, at 1296–97; Spiro, supra note 8, at 1228–29; supra notes 107 & 119 and accompanying text.

friendly to the United States. Numerous states also broadly limited the rights of British subjects who had fought against the revolution (or in some cases, had merely failed to support the revolution). The anti-British legislation created a foreign relations challenge for the national government, which sought an amicable settlement with Britain following military success in 1781.

The constitutional generation resolved the most pressing of the issues with Britain by incorporating certain rights of British nationals into the 1783 peace treaty ending the revolution, and then, when states refused to abide by the treaty, ultimately by making treaties preemptive of state law under Article VI of the Constitution. However, absent a treaty there was no obvious clause in the Constitution preventing states from recourse to similar measures in future foreign policy disputes. States retained broad powers to legislate with respect to the rights of aliens, and no explicit provision prevented them


176 See infra Part IV.B & D (discussing foreign relations difficulties arising from Virginia laws); see also Robert Brunhouse, The Counter-Revolution in Pennsylvania 1776-1790, at 140-41 (1942) (discussing British objections to Pennsylvania anti-loyalist activities).

177 See infra Part IV (discussing disputes leading to the drafting of Article VI).

178 See, e.g., Act of Apr. 11, 1799, reprinted in 14 Statutes at Large of Pennsylvania, supra note 174, at 337 (Pennsylvania law giving aliens right to own land, subject to certain restriction); Act of Mar. 8, 1792, reprinted in 14 id. at 1607 (same); Act of Feb. 23, 1791, reprinted in 11 id. at 12 (Pennsylvania law permitting rights of inheritance to subjects of countries friendly to the United States). Obviously, states also retained the ability to provoke international incidents by their treatment of individual aliens, see infra Part IV.D.3, a problem of which the constitutional generation was well aware, see 29 Journals of Continental Congress 595 (W. Ford ed., 1906) (recording minutes of Aug. 2, 1785) (reporting congressional debate concerning the De Longchamps incident, in which France sought redress—thought to be beyond Congress's power—for an assault on the French minister in Pennsylvania); 28 id. at 306 (recording minutes of Apr. 27, 1785) (same); cf. Republica v. De Longchamps, 1 U.S. (1 Dall.) 120 (Pa. Oyer & Term. 1784) (reporting Pennsylvania state court's resolution of the matter).
from imposing that legislation in a discriminatory manner, for foreign policy reasons. This, of course, is exactly what happened during the cold war, when states such as Oregon adopted inheritance statutes discriminating against unfriendly foreign powers. The Supreme Court declared Oregon's law unconstitutional in Zschernig, on the textually-unspecific grounds of interference with national foreign policy. But whatever one thinks of the Zschernig decision, it is difficult to argue that Oregon's version of foreign policy interference would have been unknown to the framers. To the contrary, the Oregon law in Zschernig was a direct descendant of the Virginia anti-British legislation during the revolution—legislation provoking one of the leading foreign policy disputes of the 1780s. Thus at a minimum Zschernig—the judicial centerpiece of national exclusivity in foreign affairs—concerns a matter easily foreseeable, and not obviously resolved, by the constitutional generation.

III. THE TEXTUAL ARGUMENT FOR EXCLUDING STATES FROM FOREIGN AFFAIRS

In this section I suggest a textual source for the exclusion of state interference in foreign policy. Specifically, I propose that the argument against the states should be reconceptualized as one of "execu-

180 See id. at 440-41.
181 Moreover, state enactment of discriminatory legislation in general was well known in the constitutional period. Virginia had a selective purchasing law as early as 1784. See Act of Oct. 1784, reprinted in 11 LAWS OF VIRGINIA, supra note 173, at 494 (providing that arms and munitions needed by the state of Virginia should be purchased from France). During the Confederation period, states actively passed commercial laws attempting to punish or influence the conduct of foreign nations. See, e.g., Act of Sept. 20, 1785, reprinted in 12 STATUTES AT LARGE OF PENNSYLVANIA, supra note 174, at 99 (imposing various retaliatory duties, in particular an extra duty on Portuguese goods “the said duties to continue so long as the flour of America is prohibited from being imported into the kingdom and territories” of Portugal); Act of Oct. 1786, reprinted in 12 LAWS OF VIRGINIA, supra note 173, at 289 (imposing punitive tariffs on British goods in response to British restrictions on U.S. shipping); Act of June 23, 1785, reprinted in 1 LAWS OF COMMONWEALTH OF MASSACHUSETTS 245 (Manning & Loring eds., 1801) (same); see also THE FEDERALIST NO. 22, supra note 167, at 177 (noting that “[s]everal States have endeavored to influence the conduct of that kingdom [i.e., Britian]”). And Virginia had inserted itself directly into the U.S.-U.K. dispute over the northwestern frontier, by restoring the rights of British creditors to sue in Virginia courts contingent upon the British evacuating the frontier forts as required by treaty. See Act of Dec. 1787, reprinted in 12 LAWS OF VIRGINIA, supra note 173, at 528. Though many of these particular laws would have been precluded by the specific provisions of the Constitution, the framers plainly knew of the states' propensity to legislate with foreign policy objectives.
tive preemption”: just as Congress by statute can oust states from international matters through Article VI preemption, perhaps the executive should be able to protect its constitutional role in foreign affairs from state interference by preemptive action.\textsuperscript{182} Describing the exclusion of states from foreign affairs as a species of executive preemption solves a number of difficulties. First, the exclusion can be grounded directly in the text of the Constitution. Second, it supports a preeminent presidential role—as compared to either the courts or Congress—in determining the scope of the preemption. As I explain below, that in turn solves a number of the practical difficulties in implementing the exclusion and answers much of the functional criticism of it. In short, I conclude that the appropriate way to view the exclusion of states from interference in foreign policy is as a consequence of the executive power in foreign affairs, and that a constitutional exclusion of the states can be defended—if at all—only on this ground.

A. Executive Preemption in General

The embarrassment for proponents of foreign policy preemption is that there is no obvious text in the Constitution on which to base such a rule. Quite plainly, no part of the Constitution directly excludes states from all matters implicating foreign affairs, nor does anything in the Constitution explicitly declare the national government’s power in this area to be exclusive. Thus if the text contains a generalized preemption, it must arise from a grant of foreign relations power to the national government, which is exclusive by implication.

The idea that an express grant of power to the national government implicitly excludes states from acting upon the same subject is a familiar argument in the context of certain of Congress’s Article I, Section 8 powers. A leading example is of course the so-called dormant Commerce Clause doctrine, which precludes state regulation of certain aspects of interstate commerce as a consequence of the affirmative grant of commerce power to Congress by Article I, Section 8.\textsuperscript{183}


Similarly, in Tarble's Case the Supreme Court said of state activities affecting national military policy,

[A]mong the powers assigned to the National government, is [sic] the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. . . . It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with, and controlled for any period by officers or tribunals of another sovereignty.\(^{184}\)

Since the state action in Tarble's Case was not directly inconsistent with federal law (but rather was an enforcement of federal law against military officials), it appears from context, as well as from the tenor of the Court's statements, that the Court thought the negative implication of the grant of military power to the federal government removed that power from the states.\(^{185}\)

This view is, moreover, consistent with the theoretical understanding of state-federal relationships expressed by the constitutional generation. Hamilton, for example, argued that state power over a subject might be precluded, not only by express federal exclusivity or express preclusion of the states, but also where the Constitution "granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant."\(^{186}\) This general view appears to have been widely accepted; although the constitutional generation disagreed as to when such an implied preclusion might arise, they seemed to agree that it could arise.\(^{187}\)

\(^{184}\) Tarble's Case, 80 U.S. (13 Wall.) 397, 408-09 (1871) (quoting U.S. CONST. art. I, § 8).

\(^{185}\) See id; see also Manheim, supra note 27, at 958-68 (discussing argument that the Naturalization Clause of Article I, Section 8 carries a negative implication excluding states from immigration matters).


\(^{187}\) In Federalist No. 32 and in related statements in the New York ratifying convention, Hamilton advanced a narrower view of implied exclusion than his opponents, who thought that the Constitution might be read generally to exclude state activity in areas of federal interest. See 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 350-60 (Jonathan Elliot ed., 2d ed. 1836) (recounting the debate in the New York convention); THE FEDERALIST No. 32, supra note 186, at 220. In the Virginia convention a similar debate arose concerning whether Congress's power to arm the state militia was exclusive or concurrent. See 3 ELLIOT, supra, at 378-82 (statements of George Mason); id. at
The idea of implied preclusion also underlies the conventional view of foreign policy preemption, and the connection with the dormant Commerce Cause theory is suggested by the common terminology “dormant foreign affairs power.” However, unlike the dormant Commerce Clause, nothing in the specific grants of power to Congress in Article I, Section 8 accomplishes the asserted result. Although there are specific grants of particular aspects of foreign relations power in Article I, there is no grant of generalized foreign relations power (and thus no dormant foreign affairs clause).*188 Any other powers achieved through the Necessary and Proper Clause*189 must be derivative of power granted elsewhere in the document. Since the only potentially relevant powers are those afforded the President (judicial power being plainly inapposite), if there is an exclusive grant of power in foreign affairs, it must arise from a power granted by Article II.190

Although less common, arguments for implied exclusivity under Article II should have at least as much force as such arguments under Article I. For example, while Article II gives the President the power to receive ambassadors and the President-plus-Senate the power to appoint ambassadors,191 no explicit provision makes these powers exclusive. However, it seems unlikely that a state, or even a convention of states, could send or receive ambassadors on behalf of the United

---

382–83 (statements of James Madison); id. at 391 (statements of George Nicholas); id. at 419–20 (statements of John Marshall). Again, the contenders agreed that a negative implication could arise, but disagreed as to the showing required. See generally infra Part IV.A.

188 The foreign affairs powers granted in Article I, Section 8 are the power to tax imports, to regulate commerce with foreign nations, to establish a uniform rule on naturalization, to define and punish piracies and felonies on the high seas and offenses against the law of nations, to declare war and grant letters of marque, to raise, regulate, and support armies, and to provide and maintain a navy. See U.S. CONST. art. I, § 8. Even if each of these powers carried a negative implication excluding states from exercising concurrent powers, states would still have significant foreign affairs capacities. The law invalidated in Zschernig, for example, which the Court found to be a substantial interference in foreign affairs, does not easily fit into any of these categories. See Zschernig v. Miller, 389 U.S. 429, 432 (1968) (declining to rely upon the negative implication of any particular clause); see also infra part III.C.


190 Or from the powers denied the states: presumably Congress can pass laws clarifying the preemptive effect of the restrictions on the states expressed in Article I, Section 10. However, none of these restrictions supports a generalized foreign affairs preclusion.

191 See U.S. CONST. art. II, § 2.
States. Similarly, there would appear to be some negative implications from the Commander-in-Chief Clause of Article II. A state law purporting to give the governor of the state direction over U.S. military forces within the state seems plainly unconstitutional without the necessity of any congressional preemption under Article VI. That is, indeed, a necessary reading, for otherwise the President would depend upon Congress for the exercise of the Commander-in-Chief power, and the power would not be an independent power despite the language of Article II.

It also seems that a law impeding the exercise of one of the President’s explicit powers would be unconstitutional without any preemptive action of Congress. Such a law otherwise would also have the effect of making the President’s purportedly independent power in fact dependent upon the support of Congress. Consider, for example, a state law which prevented U.S. military personnel from carrying weapons or conducting exercises within the state without the permission of the state’s governor. Even in the absence of congressional preemption, one would think that such a law, having the effect of preventing the President from exercising a fundamental aspect of command over the military, would be unconstitutional.


[If the general government deemed it to be the true policy of the country to have no communication or connection with foreign nations, by ambassadors, other public ministers or consuls; and refused, on that account, to appoint any; could it be said that this power was dormant in the hands of the government, and that the states might exercise it? . . . There can be but one answer, we think, given to this question.

Id. at 577. Whether a state could send or receive diplomatic agents on its own behalf is less clear, especially given historical practice, see Spiro, supra note 8, at 1223, but to the extent this power is thought to be limited, presumably that limitation also arises from a negative implication of Article II, Section 2, see Holmes, 39 U.S. (14 Pet.) at 575–76 (endorsing a total ban on state appointment or reception of diplomatic agents by negative implication of the federal government’s power over ambassadors).

193 See U.S. Const. art. II, § 2. The ensuing discussion assumes that the grant of Commander-in-Chief status carries some substantive powers beyond mere titular head of the armed services.

194 With respect to laws directly regulating federal actors, exclusion of state laws might be conceptualized as a federal immunity rather than as preemption. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 430–31 (1819) (concluding that federal instrumentality had immunity from state taxation, since the power to tax is the “power to destroy”). However, an immunity-based theory would not reach laws indirectly constraining federal power, such as the one at issue in Boyle v. United Technologies Co., 487 U.S. 500 (1987), discussed infra notes 195–202 and accompanying text.
Somewhat more controversially, one might also claim a presidential power to preempt laws that *indirectly* amount to interference with presidential powers—such as state actions not affecting the military directly but influencing third party interaction with the military in a way detrimental to the President’s military policy. *Boyle v. United Technologies Corp.*, for example, involved a suit under state tort law against a military contractor for the defective design of a United States military helicopter. Although the helicopter was built to the military’s specifications, the plaintiff alleged that the design caused the death of his son in a crash during a training exercise. No congressional enactment affected the state law, so the Court found no Article VI preemption. But the Court nonetheless held for the defendant, on the ground that “the state-imposed duty of care that is the asserted basis of the contractor’s liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).”

The Court labeled the case a matter of “federal common law,” but the result seems equally derivable from the Constitution itself. If the plaintiff had prevailed, the state law would have indirectly regulated the type of helicopters the military could fly, which is a decision committed to the national government by the Constitution. True, no congressional action conflicted with the state tort law. Further, the state law did not directly prevent Congress or the President from exercising constitutional control over the military; however, the state law would have made the helicopters the President sought to acquire unavailable or significantly more expensive. Thus the state law conflicted with a *presidential policy*, since the duty of the manufacturer to which the Court referred—“the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism . . . [specified in] the Government contract”—was a duty established by the executive branch. Consequently, the result in *Boyle* can be described as illustrating executive preemption of laws indirectly interfering with the Com-

195 *Boyle*, 487 U.S. at 500. On *Boyle* generally, see Clark, *supra* note 8, at 1368–75.
196 *See Boyle*, 487 U.S. at 502–04.
197 Indeed, Congress had declined to pass a law preempting such claims despite lobbying by the defense contracting industry. *See id.* at 515–16 & n.1 (Brennan, J., dissenting).
198 *Id.* at 509.
199 *Id.* at 508–09; *see also* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (elaborating on the Court’s theory of federal common law).
200 *Boyle*, 487 U.S. at 509.
mander-in-Chief power: a law which inhibits the President's military policy—even indirectly—is invalid under Article II, Section 2, even in the absence of preemptive legislation.

Thus one may conclude that states are constitutionally prevented from interfering with (some) powers given to the President by Article II, even in the absence of an express constitutional limitation or preemptive statute. Implied preclusion was accepted, at least as a theoretical matter, by the constitutional generation and indeed seems to be necessary to protect the independence of the President's Article II powers. As a result, if state activities in foreign affairs interfere with the exercise of an Article II power, that may be the basis of a constitutional limit on the states' powers.

B. Foreign Policy as a Presidential Power Giving Rise to Preemption

The next difficulty is that the President, like Congress, is not explicitly granted a general power over foreign affairs, and the President's explicit foreign relations powers do not seem broad enough to preempt much of the states' foreign relations activity in non-military contexts. Thus, the argument against the states must identify a gen-

201 Professor Clark discusses the use of federal common law in Boyle on grounds very similar to those I have used here: namely, that the Constitution assigns military policy to the national government and, by negative implication, removes it from the states. See Clark, supra note 8, at 1368–75; id. at 1372 (concluding that the result in Boyle "appear[s] merely to define and implement the constitutional preemption of state authority in this context"). So described, I do not think my position differs from Professor Clark's—or, for that matter the Court's, see Boyle, 487 U.S. at 504—other than semantically. I do not see what the Court's reliance on "federal common law"—as opposed to the negative implication of the Constitution—adds to the analysis.

202 Moreover, the principal counterarguments to the result in Boyle appear to concede the existence of preemption based on presidential military policy under some circumstances. One could argue, for example, that (1) the state law would not seriously interfere with presidential policy, or (2) the selection of helicopters is a congressional prerogative under Article I, Section 8's power to "raise and support armies" and thus the state law was not a constitutional problem in the absence of a congressional policy (and the absence of congressional policy is shown by the fact that Congress considered and rejected a preemptive law). See Boyle, 487 U.S. at 515–22 (Brennan, J., dissenting). Both arguments seem to acknowledge that a state law substantially interfering with a power of the President would be unconstitutional.

203 Although Hamilton was speaking, in Federalist No. 32, of an implied preclusion from a power of Congress, his comments appear generally applicable to any power granted to the federal government, including presidential powers. See The Federalist No. 32, supra note 186, at 220–21.

204 Other than military powers, the President's explicit foreign relations powers are (only) to receive ambassadors and, in conjunction with the Senate, to make trea-
eralized grant of foreign relations powers from constitutional language which does not, on its face, provide one.

Nonetheless, a source of generalized foreign affairs power is discernable. By Article II, Section 1, the "executive Power" of the United States is vested in the President. By Article II, Section 1, the "executive Power" of the United States is vested in the President. One long-standing reading of this language includes the power to establish the foreign policy of the United States. Briefly, "executive power" in eighteenth-century political theory and practice included the foreign relations powers, as described by writers such as Montesquieu and Blackstone. Many foreign relations powers previously described as "executive" were allocated to Congress or to the President-plus-Senate by the Constitution. However, certain aspects of foreign relations were not allocated nor even mentioned in the Constitution. Particularly relevant for the present argument, there is no mention of the power to set foreign policy. However, it is structurally inconceivable that the framers designed a system in which the national government could not set American foreign policy, and no one at the time understood it ties and to appoint ambassadors and other public ministers. See U.S. Const. art. II, § 2.


By the power to set foreign policy, I mean the power to determine the views of the United States on international matters, and to place the moral and diplomatic force of the United States behind a particular side of an international issue. The communication of that policy is presumably entrusted to the President by virtue of the President's (textually explicit) control over ambassadors, but the power to formulate policy seems unmentioned. See Ramsey, supra note 44, at 210–16; see also id. at 216–18 (discussing the power to enter into minor "nontreaty" agreements as an additional example of unallocated foreign relations power).
The power must exist somewhere, and the best reading of the text is that it is given to the President as an element of the "executive Power" of Article II, Section 1.

If that is correct, then one can make a textual argument that state laws interfering with the President's foreign policy power are precluded by the Constitution. Plainly, a state law which directly declared that the President did not speak for the United States in foreign relations would be invalid, as would a law that in effect prevented the President from speaking in such a capacity. Of course, no one seriously contemplates a state law directly denying or restricting the President's ability to speak internationally. Rather, the state laws at issue are ones which indirectly make the President's job more difficult, either by angering foreign governments the President seeks to accommodate, or by sending signals of support for a foreign nation's policy to which the President objects. In other words, the state laws and actions act upon third parties in ways that lessen the effectiveness of the President's actions. In this respect, they are like the law in Boyle, which acted on a third party in a way that interfered with presidential military policy.

To use a more precise analogy, suppose (not entirely hypothetically) the President establishes a policy, pursuant to the Commander-in-Chief power, that soldiers admitting homosexual activity will be discharged from the military. (Assume for purposes of this illustration that there is no constitutional objection to this policy, and that it is

---

210 See id. (discussing historical practice); cf. supra Part II.A (discussing appeals to structural irrationality in constitutional interpretation).

211 See U.S. CONST. art. II, § 1; see also Yoo, supra note 206, at 196–217 (making a similar argument with respect to the residual war-making ability of the executive). This reading also identifies the source of Congress's foreign relations powers. It is now generally assumed that Congress has a power to preempt state laws interfering with foreign policy, and many of the framers also seemed to assume that power. The source of that power is not obvious. However, if the President has foreign policy power under Article II, Section 1, then Congress presumably has the power to legislate in support of that power under Article I, Section 8's power to "make all Laws which shall be necessary and proper for carrying into Execution ... all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8. Thus Congress would have the power, for example, to preempt the Oregon law at issue in Zschernig, even though the law did not implicate commerce or any other explicit congressional power under Article I, Section 8. The power would arise from Congress's ability to legislate in support of the President's foreign relations powers—specifically the President's desire to accommodate the Soviet bloc on this matter.

212 See supra notes 195–202 and accompanying text.

213 Compare Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (rejecting Equal Protection Clause challenge to similar policy), with Watkins v. United States
implemented on the President’s independent authority without statu-
tory direction or support.) Now suppose a state, objecting to the Pres-
ident’s policy, adopts a law that it will, for example, not do business
with any enterprise that also does business with the U.S. military until
the policy is changed. This seems somewhat analogous to the Massa-
chusetts law limiting contact between the state and firms having a
presence in Burma, on the ground that Massachusetts disapproves of
Burma’s human rights policies.214

Is the hypothetical state policy constitutional? Although open to
some doubt, it seems that there is a reasonable argument against it.
The state is, in effect, attempting to tell the President how to regulate
the military. Under Boyle, presumably a state law giving a cause of
action to servicepeople discharged under the President’s policy would
be unconstitutional (even aside from sovereign immunity issues).215
That the hypothetical law acts indirectly rather than directly seems
constitutionally irrelevant if it acts as an impediment to the Presi-
dent’s control over the military.

If we accept that the President’s power to set foreign policy is
analogous to the President’s power to set military policy, then we
should be able to argue that a state activity such as Massachusetts’s
Burma law is unconstitutional by the preemptive effect of Article II,
Section 1.216 Just as the hypothetical state law attempts to tell the Pres-

---

214 True, the Burmese human rights record is not directly a presidential policy. However, the partial toleration of the Burmese human rights record is a presidential policy.

215 See supra notes 195–202 and accompanying text (discussing Boyle).

216 Under this argument, it might be more difficult to argue that a state activity is precluded where there is no evident conflict with executive policy. However, there are two responses. First, a presidential policy may consist simply of not antagonizing foreign nations. Thus a state policy which does offend a foreign nation interferes with that policy, making it more difficult for the President to interact with that nation on other matters. For example, on the facts of Torres v. Southern Peru Copper Co., see supra notes 87–88 and accompanying text, the President did not have a particular policy encouraging environmentally destructive development in Peru. However, the President sought amicable relations with Peru and did not seek to contend with Peru over environmental policy. If Texas law were extended to cover activities in Peruvian territory, the resulting insult to Peru would complicate executive relations with Peru on other matters. Second, even a state policy which tracks an executive policy may interfere with executive policymaking. One of the President’s advantages in foreign policy is the ability to shift positions in response to external events. However, if there is a parallel state policy, the executive cannot shift so quickly: the state law can be eliminated only by appeal to the state government or by legislation, neither of which may yield prompt results. Indeed, this argument has been raised against Massachu-
ident how to formulate military policy, Massachusetts's Burma law is attempting to tell the President how to formulate policy towards Burma.

C. Advantages of the Argument for Executive Preemption in Foreign Affairs

Once the argument is framed in this manner, it is not subject to the usual objections directed against negative implications from Congress's power. Two principal pragmatic objections are raised against a generalized preclusion of states from foreign affairs. First, as a practical matter, how is such a preclusion to be implemented? Assuredly not all state policies implicating international issues are unconstitutional. Some evaluation of the impact on foreign affairs is necessary; but that evaluation may be beyond the competence of the judiciary, which is not well-suited to discern what is and is not a serious foreign policy matter.\footnote{See Goldsmith, supra note 8, at 1690–98 (discussing institutional limitations on judicial decisionmaking in this area).} The obvious response to this difficulty is for the courts to rely on advice from the President. Such reliance, however, has been criticized as inconsistent with separation of powers and with the judicial role.\footnote{See First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Powell, J., concurring) (criticizing judicial reliance on executive pronouncements in foreign affairs as contrary to separation of powers).} Thus judges seem caught in a difficult dilemma: without reliance on the President, these cases cannot be decided with confidence, but reliance on the President seems excluded by procedural and institutional considerations.

The second difficulty is that one may question whether constitutional preemption of state interference in foreign affairs is needed as a practical matter. As emphasized above, we assume here that Congress can preempt state foreign affairs activity if it desires. Once that is recognized, the worries (exemplified in \textit{Chy Lung}) that renegade states may involve the country in wars, burdensome reparations, or diplomatic incidents may seem overstated. Surely a state law with such adverse consequences would promptly be preempted by Congress (and Congress is likely a better decisionmaker than the courts in determining when such dangers are threatened).\footnote{See Goldsmith, supra note 8, at 1665–70 (making this argument).} The argument that states should be constitutionally precluded from regulation of foreign

\setts's Burma law: the executive's ability to respond to signals of cooperation from the Burmese government is limited by the Massachusetts law, even if the state law, at the particular moment, is not in conflict with executive policy. See Schmahmann & Finch, \textit{supra} note 4, at 204–07.
affairs requires the demonstration not only that such state regulation frustrates the original design, but also that structural or practical considerations prevent Congress from remedying the problem by legislation—\textsuperscript{220}—which is not such an easy matter to establish.\textsuperscript{221}

Both of these difficulties are resolved once the claim is reconceptualized as one of executive preemption. The argument in these cases, properly understood, is that the states are interfering with a presidential power. That interference cannot be remedied fully by appeal to Congress’s power of statutory preemption. The point of the independent presidential powers of Article II is that they are truly independent—that is, they do not depend upon Congress for their existence. However, if states could frustrate the exercise of presidential power unless Congress intervened, the presidential power would depend on Congress for its existence. Therefore, if the power to formulate foreign policy is a presidential power under the Constitution, perhaps it should carry a power of executive (not congressional) preemption in order to give it effect.

To illustrate, consider again the Burma trade law. By the above hypothesis, the President has an independent power to adopt a policy of economic engagement in response to Burma’s human rights record. In formulating its own policy (that commerce be restricted), Massachusetts upsets what should be a presidential prerogative. True, the President can ask Congress to protect the presidential prerogative by preemting the Massachusetts law. At that point, however, it is Congress, not the President, determining U.S. policy (for Congress could decline to act and thus frustrate the President’s policy). Thus power to set policy with respect to Burma is denied the executive by Massachusetts. Whatever the outcome of the debate in Congress, the effect of the Massachusetts law has been to shift foreign policymaking power from the President to Congress. If foreign policy power is truly an independent presidential power under the Constitution, that shift should not be permitted. Article VI preemption simply is not a remedy for state interference. This, I think, is what is truly at stake in the state

\textsuperscript{220} See Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring) (arguing in the context of the dormant Commerce Clause that states’ “restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters”). These observations, made in the context of the local economic regulations, apply much less readily to matters of great national import such as war and diplomatic rupture, as are by hypothesis involved in foreign affairs matters.

\textsuperscript{221} Compare Goldsmith, supra note 8, at 1681–83 (arguing that Congress has such an institutional capacity), with Spiro, supra note 8, at 1246–59 (disputing Congress’s abilities).
preclusion cases—not the less likely hypothetical of a renegade state provoking an international incident that Congress is unable to prevent or remedy.

Moreover, once the importance of the executive role is recognized, the courts' necessary reliance on the executive in making decisions in this area need not be seen as problematic. If states are to be excluded from interference in unenacted foreign policy, it is likely that, explicitly or implicitly, an executive statement that a challenged state law does or does not interfere with executive policy will be accorded great weight. Under the new view of state preclusion, that should not be a matter of concern. The executive is, in effect, engaged in lawmaker.\textsuperscript{222} Congress by law preempts state activities inconsistent with its policies, and of course no one argues that a structural problem is created by the courts "deferring" to Congress as to what state policies do and do not interfere. Under a theory of executive preemption, the executive is engaged in exactly the same task with respect to the executive's independent powers. Thus, again, there should be no problem with the courts "deferring" to the executive determination of what is and is not a state interference. As in the legislative context, it is not that the court is "deferring," but rather that it is enforcing the policy choice of a political branch made within that branch's area of competence.

Thus, if one accepts the idea of an independent executive power in foreign affairs, executive preemption of inconsistent state laws seems constitutionally plausible. Preemptive executive lawmaking is necessary—despite the remedy of Article VI—because the President's independent power should not depend on Congress; it is implemented by executive orders or statements binding on (or at least highly persuasive to) the courts, because those statements have—within the executive's area of power—something like the force of law. The executive's role in this limited area parallels Congress's role in the wider legislative area (which of course raises no separation of powers concerns).

D. Conclusion

In summary, the textual argument for foreign affairs preemption proceeds as follows. First, affirmative grants of power to the federal government may carry corresponding restrictions on state activities interfering with the exercise of those powers. From \textit{Tarble's Case} and \textit{Federalist No. 32}, it seems that this argument is correct at least as a

\begin{flushright}
\textsuperscript{222} See generally Monaghan, supra note 182 (arguing that the President has a "protective power" to engage in lawmaking to protect executive prerogatives).
\end{flushright}
theoretical matter. Second, this rule is true for powers granted to the executive by Article II, as well as for powers granted to Congress by Article I, Section 8. Indeed, the argument is more powerful with respect to the executive. Congress can pass laws in support of its powers and preempt state activity by operation of Article VI. In the absence of constitutional preemption, the President, in contrast, must rely on Congress to take advantage of Article VI—and thus executive powers are not truly independent but are dependent upon the support of Congress. So, for example, the President’s power as Commander-in-Chief of the military implies a constitutional preemption (that is, preemption without the benefit of Article VI) of state laws interfering with military policy. Third, the President is granted power to establish foreign policy by Article II, Section 1. Foreign relations are an aspect of the traditional “executive power;” to the extent not allocated elsewhere by the Constitution, foreign relations powers adhere in the President by virtue of the grant of “executive power.” The residual aspects of foreign relations—such as establishing foreign policy—thus belong to the President. As a result, foreign policy, like military policy, has a preemptive effect on state law even in the absence of congressional action.\footnote{I emphasize that the foregoing reading is subject to difficulties at several stages. First, one may not accept (or may be highly suspicious of) negative implications in general, and thus may not accept doctrines such as the dormant Commerce Clause. Second, one may not accept \textit{Boyle}, or that, more generally, the President has any preemptive power against indirect state interference even in areas specifically designated as matters of independent executive authority. Third, one may not accept that the Executive Vesting Clause of Article II, Section 1 conveys to the President any substantive powers. Finally, as I elaborate below, one might think that the foreign policy power in particular does not carry preemptive powers. However, since there seems to be no other plausible originalist argument against foreign policy federalism, one holding these doubts should be persuaded of my ultimate conclusion that the Constitution as originally understood did not preclude state interference in foreign affairs.}

IV. THE ORIGINAL UNDERSTANDING: THE IMPLAUSIBILITY OF FOREIGN POLICY PREEMPTION

The preceding Section argues that the Executive Vesting Clause, standing alone, is ambiguous as to the preemptive effect of executive foreign policy. It is possible to read the clause as establishing, in effect, a preemptive power in the President to override state activities interfering with executive foreign policy. It is also possible to read the clause more narrowly, to give the President the \textit{policymaking} authority with respect to foreign relations but reserving what is effectively law-
making authority—the power to preempt state law—to the legislative branch. In this Section, I argue that there are substantial interpretive reasons to believe that the original understanding of the clause did not encompass executive lawmaking authority in foreign affairs. First, the broader reading creates serious tension with other parts of the Constitution, particularly the parts of Article VI relating to treaties, and with contemporaneous explanations of the text. Second, post-constitutional history suggests that no one in the founding generation or shortly thereafter read the text in such a manner.

A. Constitutional Text

As developed above, the argument against state interference in foreign affairs depends upon a claim that the grant of foreign policy power in the Executive Vesting Clause is exclusive of the states’ ability to act in related areas. There is, however, substantial evidence from the text and its contemporaneous interpretations indicating the contrary.

First, finding a generalized limitation on the states seems problematic in light of the treaty provisions of Article VI. Article VI reads in part, “[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

As noted, a leading difficulty under the Articles of Confederation was the inability of Congress to enforce its treaties—in particular, the 1783 peace treaty with Great Britain. This problem would have

224 U.S. Const. art. VI.
225 The 1783 treaty provided that British creditors should meet with “no lawful impediment” to the collection of pre-war debts. Treaty of Paris, Sept. 4, 1783, U.S.-Gr. Brit., art. 4, reprinted in 2 David Hunter Miller, Treaties and Other International Acts of the United States of America 154 (1931). Under the Confederation, however, states declined to remove their “impediments,” such that collection was frustrated. The resulting international difficulties severely undermined the Confederation’s diplomacy and led the framers to search for a way to make treaties automatically override state law. As Oliver Ellsworth described the problem to the Connecticut Convention,

Another ill consequence of this want of energy [in the national government] is that treaties are not performed. The treaty of peace with Great Britain was a very favorable one for us. But it did not happen perfectly to please some of the states, and they would not comply with it. The consequence is, Britain charges us with the breach, and refuses to deliver up the forts on our northern quarter.

2 Elliot, supra note 187, at 189; see also 2 id. at 57–60 (recording statement of William Dawes to the Massachusetts convention) (“By the 9th [section] of the old arti-
been solved simply by the Constitution's Necessary and Proper Clause (presumably giving Congress the ability to legislate in support of treaties) plus Article VI (making congressional legislation supreme over state law). However, the Convention took the additional step of making treaties preemptive of their own force, by including treaties in Article VI directly through the language quoted above. The provision, in short, creates the "self-executing" treaty superior, by its own force, to state law.\textsuperscript{226} Presumably this was done so that the whole of the treaty power, including the power of implementation, would rest in the first instance in the same body, namely the President-plus-Senate.

Yet if state laws implicating foreign affairs give way to federal (executive) foreign policy automatically under the Constitution, it would not have been necessary to subordinate state laws to treaties in Article VI. The President would already have the power to override state law. Consider, for example, the Virginia law limiting collection of debts owed to British creditors.\textsuperscript{227} Virginia's law was apparently inconsistent with the provisions of Article 4 of the 1783 treaty (and thus preempted under Article VI once the Constitution was ratified).\textsuperscript{228} But presumably a federal treaty is reflective of federal foreign policy (and the 1783 treaty was reflective of federal foreign policy upon this matter).\textsuperscript{229} Obviously the Virginia law frustrated federal policy by refusing to recognize the treaty provision. Britain made substantial diplomatic and military objections in response to the Virginia law, in-

\begin{itemize}
\item \textsuperscript{228} The subsequent legal debates concerning this law and its relation to the treaty are discussed in greater detail \textit{infra} Part IV.B.
\item \textsuperscript{229} The Confederation Congress urged the states to comply with the treaty to prevent further hostilities with Britain. See \textit{Rakove}, \textit{supra} note 10, at 343–44.
\end{itemize}
cluding refusal to evacuate frontier posts as required by the treaty.\footnote{230} If the Constitution generally invalidated state laws interfering with federal foreign policy, surely the Virginia law—which thoroughly frustrated early attempts at rapprochement with Great Britain—would have been invalidated by such a rule. Yet the drafters and ratifiers of the Constitution thought that Article VI was necessary to override the Virginia law, and others like it—and thus one must conclude that, in their view, absent Article VI the law would not have been unconstitutional.\footnote{231}

This in turn strongly suggests that as a general matter a state law inconsistent with national foreign policy \textit{not} reflected in a treaty (or statute) was not thought unconstitutional, since such a law is not preempted by Article VI. A reading of Article II, Section 1 giving the executive a power of preemption in foreign affairs renders the treaty provisions of Article VI largely superfluous.\footnote{232} Even in the absence of Article VI, the Virginia law should have been invalidated by the preemptive effect of the Executive Vesting Clause, if such clause in fact had a preemptive effect, since it plainly interfered with U.S. foreign policy toward Britain.

The second textual problem is that Article I, Section 10 contains a number of specific limitations on state power in particular aspects of foreign affairs.\footnote{233} One would think that most, if not all, foreign affairs activities precluded by this section would also be precluded by the general exclusion (if one existed), and thus that the preemptive effect of Article II, Section 1 would render these portions of Article I, Sec-


\footnote{231} See, e.g., 4 Elliot, supra note 187, at 187–88 (recording statement of William Johnston to North Carolina convention); 4 id. at 215 (recording statement of James Lancaster to North Carolina convention opposing the wording of Article VI because that wording would "repeal the laws of the different states" where inconsistent with treaties); 3 id. at 500–03 (recording statement of Patrick Henry opposing this aspect of the Supremacy Clause on the ground that treaties ought not to be superior to state law); see also Ware v. Hylton, 3 U.S. (3 Dun.) 199, 271, 277 (1796) (Iredell, J.) (describing treaties as preemptive as a result of Article VI).

\footnote{232} This argument is not wholly conclusive purely as a textual matter, for the Treaty Clause of Article VI is not wholly superfluous even if the Executive Vesting Clause has preemptive effect: Article VI still might serve to make treaties superior to federal law. However, the discussion surrounding Article VI shows that its primary purpose was to preempt state law. See Ramsey, supra note 44, at 220–25; Yoo, supra note 25. Given that context, it seems difficult to argue that state laws inconsistent with treaties were \textit{already} preempted by another provision of the Constitution, namely Article II, Section 1.

\footnote{233} See U.S. Const. art. I, § 10 (excluding states from war, treatymaking, keeping troops or warships in peacetime, and issuing letters of marque and reprisal).
tion 10 superfluous. That is not absolutely conclusive: the drafters of the Constitution might have added the specific clauses out of an excess of caution, to specify the extreme cases, while also relying on a generalized exclusion to cover more ordinary cases. However, the presence of these clauses suggests that the drafters pursued a different strategy: rather than adopting a general limitation on all state power in foreign affairs (a category difficult to define or defend to antifederalist critics), they selected specific activities that were particularly problematic and excluded these by name.

The specific clauses, moreover, highlight the fact that the argument for generalized preemption of state foreign affairs activities runs contrary to two leading facets of eighteenth-century textual interpretation. The argument depends upon two claims: (i) that the grant of foreign policy power to the executive in Article II, Section 1 contains an implicit exclusion of (a negative implication against) state foreign policy power; and (ii) that the Constitution's specific exclusions of state power in foreign affairs in Article I, Section 10 are mere insurance, confirming and highlighting exclusions already contained in the negative implication of Article II, Section 1. However, these claims are inconsistent with the conventional interpretation of texts in the eighteenth century, as reflected in the drafters' own writings. Negative implications were highly disfavored, and superfluous elaboration of specific limitations following a general limitation was considered inappropriate and dangerous because of the so-called "negative pregnant"—the view that a specific limitation implied that no general limitation existed in the same field. The existence of these interpretive conventions make it extraordinarily unlikely that the drafters would have used the specific limitations but not an explicit general limitation had the latter been intended, or that the ratifiers would have understood the document to contain an implicit general limitation upon state foreign policy in addition to the explicit specific limitations.

First, consider the difficulty with negative implications. As an initial matter, most of the powers denied to the states in Article I, Section 10 are also specifically allotted by name to the federal government in Article I, Section 8 or Article II, Section 2. Apparently the drafters did not think that a negative implication from, say, the treaty clause

234 See VILE, supra note 129, at 194–95 (discussing the inherent difficulty of defining a field of "foreign relations" activity).

235 See U.S. Const. art. I, § 8 (giving Congress the power to declare war, issue letters of marque and reprisal, and maintain an army and a navy); U.S. Const. art. II, § 2 (giving the President, with consent of the Senate, the power of treatymaking).
was an obvious, or even appropriate, reading of Article II, Section 2. Absent the preclusive provision of Article I, Section 10 (and attendant commentary), presumably one could read the treatymaking power to be concurrent, with states able to enter into treaties at least in the absence of contrary federal treaties or enactments. Yet this casts enormous doubt upon the viability of the negative implication from the Executive Vesting Clause. The argument must be that, even though the very specific grant of treatymaking power in Article II, Section 2 was not thought to have a negative implication, the generally worded, ill-defined (and little discussed) residual power granted by the Executive Vesting Clause did have a negative implication (and a fairly wide-reaching one at that).

In addition, the framers made clear during the ratification debates that limitation of state power by negative implication was disfavored and reserved for extreme cases. Hamilton in *The Federalist* wrote that the Constitution should be read to deny power to the states "where it granted a power to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant"—thus acknowledging the permissibility of argument by negative implication. However, he continued,

> I use these terms [i.e., the phrase "absolutely and totally contradictory and repugnant"] to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different; I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of the administration but would not imply any direct contradiction or repugnancy in point of constitutional authority.

This description thus establishes a heavy burden for the proof of a negative implication.

The specific context of Hamilton's statement shows its relevance to the issue at hand and confirms Hamilton's understanding of a high barrier for arguments from negative implication. A leading antifederalist argument during the ratification debates was that the Constitution denied the states, in whole or part, the power of taxation—and thus would lead to the destruction of the states from lack of reve-

236 See *The Federalist* No. 44, *supra* note 157, at 286–89 (discussing the specific limitations on the states in Article I, Section 10).
238 *Id.* at 220–21.
nue. Federalist No. 32, from which the foregoing quotes are taken, was a response to this argument.

First, Hamilton pointed out that nothing in the Constitution explicitly gave the national government an exclusive right of taxation, nor explicitly denied it to the states. Thus, the issue turned on whether there was "repugnancy between the power of taxation in the States and in the Union." There was no repugnancy, Hamilton argued,

in the sense which would be requisite to work an exclusion of the States. It is, indeed, possible that a tax might be laid on a particular article by a State which might render it inexpedient that a further tax should be laid on the same article by the Union; but it would not imply a constitutional inability to impose a further tax.... It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of sovereignty.

Thus in Hamilton's view mere inconvenience or inexpediency to federal policy is insufficient to deny a concurrent state power.

Foreign policy interference, although distinct, is analogous. Like taxation, foreign relations power (as a general matter) is not specifically granted exclusively to the federal government or specifically denied the states. Thus, by Hamilton's reasoning, it can be denied the

239 See 2 Elliot, supra note 187, at 332 (recording the argument of Melancton Smith to New York ratifying convention); 2 id. at 355 (recording the argument of Alexander Hamilton to New York ratifying convention responding to antifederalist argument); see also The Federalist No. 32, supra note 186, at 220 (alluding to the antifederalist position in this matter).

240 See The Federalist No. 32, supra note 186, at 221 ("There is plainly no expression in the granting clause which makes that power [i.e., taxation] exclusive in the Union. There is no independent clause or sentence which prohibits the states from exercising it.").

241 Id. at 222.

242 Id. Hamilton's example of repugnancy is not illuminating: he posits the Naturalization Clause, which gives Congress the power to create a uniform rule, and, says Hamilton, "This must necessarily be exclusive; because if each state had the power to prescribe a distinct rule, there could not be a uniform rule." Id. at 221. However, if Congress did prescribe a uniform rule pursuant to this power, one would think state laws would be preempted, in any event, by Article VI; and if Congress did not exercise its power to prescribe a uniform rule, Hamilton does not really explain why (or even if) state laws would be precluded. A better example of "repugnancy" is probably the Commander-in-Chief power discussed above. See supra note 193. States cannot have the power to command the military, else the President would not be its ultimate commander—and thus existence of the state power simply contradicts (or, in Hamilton's phrase, is "repugnant to") the constitutional grant of power.
states only in the extreme case of "repugnancy," not merely on the basis of inexpediency or inconvenience. However, the principal attacks on state power in foreign affairs seem to be based entirely on expediency and convenience. The usual state law does not prevent the President from speaking on behalf of the United States in foreign affairs or establishing U.S. foreign policy; it only makes the President's job somewhat more difficult, by undermining the President's policy with a contrary policy or irritating nations the President would prefer not to irritate.

In this sense Hamilton's discussion of taxation is very much applicable. If the federal government taxes an item, a state tax on the same item may substantially blunt the effectiveness of the federal tax by overtaxing the item and thus driving it out of production. This is presumably what Hamilton had in mind in saying that it might be "inexpedient" for both sovereignties to tax the same item. Yet it seems that a state law having international implications would not have any more of a negative effect upon the President's contrary policies than would the taxes that Hamilton suggested. In these situations the state participation does not prevent the President's policy, but exists in parallel, though not in harmony. The Massachusetts law on Burma, for example, does not prevent the President from encouraging engagement with Burma—at most it discourages some of what the President is trying to encourage. The two can exist as concurrent though competing policies, unlike in the military example, where the military can have only one commander, but like the taxation example, where the concurrent taxes may undermine but will not totally contradict each other. Clearly Hamilton thought that the latter was not enough to show state preclusion.

243 One may also characterize the President's policy as pursuit of harmonious relations with Europe and Japan. The Massachusetts law somewhat undermines that policy, as these nations object to Massachusetts's limitations on their corporations' commercial activities. See Spiro, supra note 8, at 1249 & n.10. However, the Massachusetts law does not prevent the President from pursuing harmonious relations; it only makes that pursuit more difficult.

244 Statements by the Constitution's supporters in the Virginia convention are to a similar effect. George Nicholas, for example, argued with respect to the militia, The power of arming them [the militia] is concurrent between the general and state governments; for the power of arming them rested in the state governments before; and although the power be given to the general government, yet it is not given exclusively; for, in every instance where the Constitution intends that the general government shall exercise power exclusively of the state governments, words of exclusion are particularly inserted. Consequently, in every case where such words are not inserted, the
Thus the text of the Constitution itself shows that its drafters distrusted negative implications, and Hamilton's influential explication of the text confirms that negative implications against state power should be reserved for extreme cases. The difficulty is that the foreign affairs power does not seem to be an extreme case. The state laws under consideration do not directly attack the President's role as chief spokesperson for the United States in foreign affairs. They may be "inexpedient" for such a power at times, but are not inherently contradictory of it. Moreover, truly destructive state overreaching can be controlled by Congress through Article VI. As a result, it seems a stretch to identify a negative implication from Article II, Section 1, particularly where such a negative implication was not discussed at all during the drafting and ratifying debates.

The second interpretive problem with the argument for foreign policy preemption is the difficulty of the "negative pregnant." As shown above, a proponent of preemption must argue not only that Article II, Section 1 has a negative implication, but also that the preclusions of particular state foreign affairs powers in Article I, Section 10 are precautionary but ultimately superfluous limitations in light of this generalized negative implication. However, in eighteenth-century interpretive discourse the denial of a specific power to the states would affirm in the states related broader powers not specifically denied.

Hamilton made this point, for example, also in Federalist No. 32. The states are denied power to impose duties on imports and exports by Article I, Section 10. Opponents of the Constitution, Hamilton noted, claimed that the Constitution denied the states general taxing authority (by a negative implication of Article I, Section 8). Yet, Hamilton argued, such a generalized preclusion would encompass duties on imports and exports, as well as other forms of taxes, and thus render the specific preclusion of import and export duties mere surplusage. In Hamilton's view this was an impermissible interpretation.

power is concurrent to the state governments and Congress, unless where it is impossible that the power should be exercised by both.

3 Elliot, supra note 187, at 391; see also id. at 419 (recording the statement of John Marshall) ("The truth is, that when power is given to the general legislature, if it was in the state legislature before, both shall exercise it; unless there be an incompatibility in the exercise by [the one] to that by the other, or negative words precluding the state governments from it.").

245 Thus, Chy Lung's fear of state-precipitated war is greatly overstated. See Chy Lung, 92 U.S. at 179–80. Congress's power obviates substantial concerns on this score. It seems reasonable to suppose that Congress would be capable of acting decisively where war would otherwise result.
Rather, said Hamilton, the "negative pregnant" of the Imports Clause was that other taxes were not precluded. As Hamilton put it,

This restriction [upon taxing imports and exports] implies an admission that if it were not inserted the States would possess the power it excludes; and it implies a further admission that as to all other taxes, the authority of the States remains undiminished. In any other view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the Union of the power of laying such duties implied the exclusion of the states . . . there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned. . . . The restriction in question amounts to what lawyers call a negative pregnant—that is, a negation of one thing, and an affirmation of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmation of their authority to impose them on all other articles. 246

Essentially the same argument can be posed against the idea of a generalized preclusion of state foreign relations powers. If the states are denied specific foreign relations powers such as war and treatymaking, that implies that they retain other, non-specified foreign relations powers—just as the denial of specific taxing powers such as duties on imports and exports implies that states retain other non-specified taxing powers. If the drafters had intended a general foreign affairs preclusion, surely they would have understood that the inclusion of specific foreign affairs preclusions would be used to argue against the general preclusion and would not have left the general preclusion to implication.

In short, reading the Executive Vesting Clause to preempt state interference in foreign policy creates substantial tension with other parts of the constitutional text. Giving it the opposite reading—that the President may conduct foreign policy subject to the need to ask Congress for supporting preemptive legislation—lacks similar difficulties, for such a reading creates tension with no other part of the Constitution. Thus, merely on the text alone, the more limited view of the Article II, Section 1 power appears the better reading of the document as a whole.

B. Drafting History

The drafting history of the Constitution confirms the narrower reading. In the early stages of the Convention, a central issue was how Congress would control the states. This was to a large extent a foreign

246 The Federalist No. 32, supra note 186, at 221–22.
affairs issue, as it followed from the commonly-perceived weakness of the Articles that Congress was not able to enforce its policies in foreign affairs, particularly with respect to the obligations of treaties and of international law. The initial "Virginia Plan" proposed to the Convention by Edmund Randolph gave Congress the power "to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States contravening in the opinion of the National Legislature the articles of Union." The first clause would presumably give Congress legislative authority over foreign affairs matters; the second would allow Congress to eliminate obtrusive state laws.

However, as Madison pointed out, even after the "negative" on state legislation was amended to extend to state laws contravening treaties, it did not seem to go far enough, as the states "had evinced a constant tendency . . . to encroach on the federal authority" in international matters among others. To remedy this, Madison wanted to widen the "negative" on state laws to extend to "all laws which to them [the national legislature] shall appear improper." Otherwise, it seemed, there was no way of dealing with state laws conflicting with federal laws, since even in case of conflict "[t]he judges of the state must give the state laws their operation." Though Madison's proposal drew the support of nationalists such as James Wilson, it was ultimately defeated.

At this point some less-nationalistic delegates proposed the competing "New Jersey plan," which granted narrower, well-defined legislative powers to Congress, but also contained the first version of what became the Supremacy Clause of Article VI, making federal laws and treaties supreme and binding on state judges. Madison was unsatisfied, in part for foreign relations reasons. Because the plan did not give "to the general Council [i.e., the Congress] any negative on the will of the particular states," it left states with the power, among other

247 Randolph, in his opening address to the Convention, listed as his first criticism of the government under the Articles the fact that "[C]ongress . . . could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without controul." 1 RECORDS, supra note 102, at 19.
248 Id. at 21.
249 See id. at 47 (on motion of Franklin).
250 Id. at 164.
251 Id. at 162.
252 Id. at 169.
253 See id. at 165–72.
things, to involve the nation in international disputes. Thus Madison renewed his earlier proposal.

The ultimate resolution was to adopt the supremacy language from the New Jersey plan, together with the broader legislative powers of Congress in the Virginia Plan. This gave Congress more power to protect national interests, including foreign policy interests (by legislation that would preempt inconsistent state law), but was not so open-ended as Madison's proposal, and therefore, the delegates believed, would not be as objectionable to the states.

Thus the primary focus in this part of the Convention was upon creating a preemptive power in Congress to protect national foreign policy interests. No one during the course of this discussion suggested that there would be or should be a preemptive power in the executive, or that limitations would arise from the Constitution itself. Indeed, at this point the delegates' draft contained no specific limitations upon state power in foreign affairs—these were added later in the process.

Once the basic outlines of the Constitution—including the preemptive powers of Congress—were worked out, the plan was referred to a Committee of Detail. That Committee's report first introduced the idea of specific constitutional limits on the states, excluding coinage of money, granting letters of marque, entering into treaties, and granting titles of nobility. In the ensuing weeks the delegates debated whether other powers (including some powers implicating foreign affairs) should be specifically denied the states—including the power to tax exports, the power to impose embargoes, and the

254 Id. at 242–45. In debating the New Jersey plan, Madison observed, "It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them [such calamities] [i.e. disputes with foreign nations] on the whole." Id. at 316. In context, it is plain that Madison sought, as a remedy for this difficulty, a preemptive power of Congress to override troublesome state legislation. See supra note 149 (discussing this quote).

255 See 1 RECORDS, supra note 102, at 21–29.

256 One may speculate that the opposition to Madison's "negative," which generally came from the smaller states, arose in part from the fear that their interests would not be represented in Congress. Once some protection was given the smaller states through the mechanism of the Senate, adopted in general outlines from the New Jersey plan, the smaller states were willing to accede to the somewhat wider preemptive powers of Congress reflected in the final document. See RAKOVE, supra note 169, at 169–80 (suggesting this interpretation). However, this further suggests that there were not thought to be broad preemptive powers in the executive, which would have upset this compromise.

257 See 1 RECORDS, supra note 102, at 187.

258 See id. at 358–63 (exports); id. at 440–41 (embargoes); id. at 624–26 (tonnage duties).
power to impose tonnage duties. All of these discussions reflect a belief that, if a particular foreign relations power were not denied the states in what became Article I, Section 10, it would be fully retained by the states unless preempted under Article VI or excluded by some other specific provision of the Constitution. No one suggested that a general constitutional preemption existed.

Madison, for example, at one point late in the Convention proposed prohibiting state embargoes, as he thought the states ought not to have this power. Others opposed this limitation, arguing that states should have the power: George Mason observed that reliance upon the states might be necessary in this regard "as the General Legislature would not sit constantly and therefore could not interpose at the necessary moments." This discussion was all nonsense if the delegates contemplated some other constitutional method of restraining state foreign affairs activities, so it seems likely that someone would have pointed this out, particularly as the power of embargo was one states had previously exercised. There was some inconclusive discussion as to whether the power of embargo was precluded by the Commerce Clause of Article I, Section 8. But no one mentioned foreign policy preclusion as a possible additional ground, despite the obvious importance of the point. The delegates' discussion of other foreign policy powers follows this pattern. Thus the drafting history confirms the idea that preemption under Article VI was the primary method of controlling destructive state legislation, augmented by self-executing constitutional restrictions on particularly dysfunctional categories of state activity. The absence of comment upon presidential preemptive powers in foreign affairs—particularly in light of the delegates' focus on how to control state interference in international matters—suggests that the drafters did not read their language to establish any such preemptive powers.

259 See id. at 440–41.
260 See id. at 624–26.
261 See id. at 440–41.
262 Id.
263 See id.
264 See id. at 359 (recording the argument of John Langdon that if states were not prohibited by specific language from taxing exports, they would have an unlimited power to do so); id. at 625 (recording the argument of Gouverneur Morris that if states were not prohibited by specific language from laying tonnage duties, they would have power to do so).
Like the proceedings of the Convention, the debates on the ratification of the Constitution contain only silence with respect to a constitutional preemption of state foreign relations activities. This is remarkable because, as illustrated by the discussions on taxes mentioned above, the ratifiers actively considered the issue of negative implications limiting state power. In addition, the preeminence of the national government in foreign affairs was at the forefront of the debate, because the Federalists used the external weakness of the Confederation and the need for strong external policy as reasons for supporting the Constitution. The ratifiers did discuss, at length, the effect of Article VI upon state laws conflicting with national foreign policy. However, there is no record of any discussion of non-Article VI limitations upon state laws, other than with respect to specific clauses such as those involving wars and treaties.

Discussions of the preemptive effect of treaties are particularly noteworthy. Opponents of the Constitution made the reach of the treaty power a central point of contention. The people as a whole, they argued, lacked a check on the treaty power because treaties could be made by the President plus (in theory, at least) Senators representing only a handful of states. That in turn was a concern because, among other things, treaties had preemptive effect under Article VI. "The president and two thirds of the senate will be empowered to make treaties indefinitely," warned an early antifederalist critic, "and when these treaties shall be made, they will also abolish all laws and state constitutions incompatible with them." Another argued that, in consequence of treaties being included in Article VI, "[t]he most important article in any [state] constitution may therefore be repealed, even without a legislative act." Antifederalists carried these

265 See supra notes 235–44 and accompanying text.
267 See supra note 225.
268 This arises from the provision that treaties could be approved by two-thirds of a quorum of the Senate.
themes into the ratifying conventions as well, particularly in Pennsylvania, Virginia, and North Carolina.\textsuperscript{271}

However, if any of the participants in this debate had understood there to be an implied preemptive power in the President (or worse, from an antifederalist perspective, in the federal judiciary) to override state laws that interfered with treaties, surely they would have been more concerned about this power than about Article VI. Article VI only overrode state laws and constitutions where the President, \textit{plus} two-thirds of the Senate, entered into a formal agreement with a foreign power. As argued above, executive preemption would surely also cover these situations (since a state law in conflict with a U.S. treaty assuredly would interfere with U.S. foreign policy), \textit{plus} it would also allow preemption on the authority of the President alone, without the Senate \textit{and} without a formal agreement. The antifederalists already saw the presidency as a proto-monarchy.\textsuperscript{272} It was bad enough, in their view, that the President plus a rump Senate could override state laws through Article VI. If the antifederalists had read the Constitution to allow the king-president to interfere with state laws (in respect of, for example, treatment of aliens) to appease foreign powers, it seems likely that they would have pointed this out. Nor did the Constitution's defenders appear to conceive of such a power. They minimized the power of the President and argued that, because of the supermajority vote required, the Senate was a better check on preemptive power than the antifederalists supposed.

All this might be understandable if there had been a widely shared (but unspoken) understanding that foreign policy preemption would work in a narrow and carefully defined manner.\textsuperscript{273} But it seems unlikely that this could have been the case. There is no clear line between local matters and international matters, and any rule against foreign policy interference will raise constitutional suspicions of some laws thought by others to be legitimately of local interest. In modern discourse, scholars broadly comfortable with foreign policy preemption cannot agree on its scope or application to particular cases.\textsuperscript{274}

\textsuperscript{271} See 4 ELLIOT, supra note 187, at 187, 215 (North Carolina); 3 id. at 502-03 (Virginia); Yoo, supra note 25.

\textsuperscript{272} See 3 ELLIOT, supra note 187, at 60 (recording the statements of Patrick Henry).

\textsuperscript{273} For example, there likely was a consensus, largely unspoken, that the power to send ambassadors was exclusive to the President-plus-Senate. Cf. Spiro, supra note 8, at 1229 n.24; supra notes 190-92 and accompanying text.

\textsuperscript{274} See also Zschernig v Miller, 389 U.S. 429, 440-41 (1968) (adopting a seemingly broad rule that "impair[ment]" of federal foreign policy is unconstitutional); Bilder, supra note 12, at 825 (generally endorsing a limit on state involvement in foreign
Inevitably, it seems to turn on the exercise of some degree of discretion by the President or the federal courts. Given the modern doctrinal difficulties, it seems unlikely that the constitutional generation had it all resolved by tacit understanding.

Thus, the ratifying history again confirms a system in which Article VI plus specific preclusive clauses of the Constitution were the operative restrictions upon the states. On these, the Federalist/Anti-Federalist debate centered. A generalized preclusion to protect unenacted foreign policy does not appear to have been in anyone's contemplation.

D. Post-Constitutional Practice

The role of the states in foreign affairs was a central issue in a number of important legal debates in the late eighteenth and early nineteenth century. Critically, however, in none of these debates did any of the contending sides take the position that the Constitution contained a generalized exclusion of states from foreign affairs—even when that view, if accepted, would have been determinative of the litigation. Indeed, despite the frequency of post-constitutional struggles to define federalism in the field of foreign affairs, it seems not to have occurred to anyone that the states were disabled by a negative implication of the type suggested above. As a result, this post-constitutional history confirms that the more natural reading of the text—that is, as excluding states only through specific clauses or by Article VI preemption—is the correct one.

In this Section I examine three leading cases concerning foreign policy federalism: *Ware v. Hylton*, involving the Virginia laws confiscating debts owed to British merchants; the so-called "Passenger Cases," involving restrictions placed by state and local governments upon ships discharging passengers from foreign countries; and the events surrounding the *Caroline* incident, in which a British government agent was tried in state court for murder committed while suppressing a revolt in Canada. Each case directly raised the issue of state interference in federal foreign policy; yet in none of these disputes
was it suggested that the Constitution as a general matter rendered these state interferences unconstitutional.\(^{276}\)

1. **Ware v. Hylton**

During the Revolution, a number of states confiscated or invalidated debts owed by U.S. parties to British creditors.\(^{277}\) Virginia, for example, initially provided that debts owed to British citizens could be discharged by making payment (in depreciated Virginia currency) to the state;\(^{278}\) later, Virginia enacted a complete bar on the recovery of debts by British parties.\(^{279}\) In the treaty ending the Revolutionary War, the United States, addressing British concerns on this point, agreed in Article 4 that British creditors would "meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."\(^{280}\)

Initially this provision was of little concern to Virginia debtors, since the national government under the Articles lacked power to en-

\(^{276}\) Other examples are available, including the debates over the "negro seamen" acts passed by the southern states prior to the civil war, recounted in Goldsmith, *supra* note 8, at 1643–58. Two counterexamples have been suggested: the opinion of Justice Johnson, at the circuit court level, with respect to the negro seaman acts, *Elkison v. Delieseline*, 8 F. Cas. 493, 494 (C.C.D. S.C. 1823) (No. 4366), and the opinion of Chief Justice Taney, for four members of the Supreme Court, in *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840). *See generally* Spiro, *supra* note 8, at 1230–36 & nn.38–43, 55–61. Both opinions argue against a challenged state power in foreign affairs. However, although both contain some broad language on the proper role of the states in foreign affairs, both rely on specific clauses of the Constitution in support of their immediate conclusions. *See Jennison*, 39 U.S. (14 Pet.) at 557 (relying on Article I, Section 10's prohibition of state agreements with foreign nations); *id.* at 575–76 (in alternative holding, relying on negative implication of Treaty Clause and Ambassador Clauses of Article II, Section 2); *Elkison*, 8 F. Cas. at 495 (relying on dormant Commerce Clause and preemptive effect of a U.S.-U.K. treaty). Nationalization of foreign relations powers, in both instances, seems described more as a goal than as an operative constitutional provision. Despite his *Jennison* opinion, Chief Justice Taney would have upheld the state foreign policy interference at issue in the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), because he found no specific constitutional provision. *See supra* notes 302–17 and accompanying text.

\(^{277}\) See *supra* notes 225–31 and accompanying text. On the British debts generally, see *Beaus*, *supra* note 230, at 103 & n.18 (reporting almost five million dollars in aggregate U.S. private debt to British creditors).


\(^{279}\) See *9 Laws of Virginia*, *supra* note 173, at 75–76.

force treaty provisions\textsuperscript{281} and the state government (and state courts) refused to comply with the controversial Article 4.\textsuperscript{282} Once the new Constitution was ratified, however, the British position improved, for Article VI—specifically with the British debts in mind—provided that treaties were supreme law, and Article III provided for federal courts to enforce that supreme law.\textsuperscript{283} Thus it appeared that if the Virginia laws contravened Article 4 of the Treaty of Paris, British creditors would be able to sue in federal court and win, despite contrary Virginia laws, on the strength of Article VI of the Constitution. British creditors accordingly filed an array of suits in the early 1790s.\textsuperscript{284}

Counsel for the Virginia debtors, led by future Chief Justice John Marshall,\textsuperscript{285} did not contend that Article VI of the Constitution meant anything other than what it appeared quite plainly to say: that state laws inconsistent with treaty obligations were void. However, Marshall attempted to evade the effect of Article VI on a number of grounds, including (1) that the treaty itself was void as a result of persistent British violations, and thus could not claim the preemptive effect of Article VI, and (2) that the Virginia discharge law (that is, the law discharging private debts upon payment to the state) was not inconsistent with Article 4 of the treaty.\textsuperscript{286}

The federal courts considered these issues in Ware v. Hylton,\textsuperscript{287} a typical case between a British creditor, Ware, and a Virginia debtor, Hylton.\textsuperscript{288} In federal circuit court, the British creditors prevailed against Marshall’s first defense: the court refused to hold the treaty

\textsuperscript{281} See Rakove, supra note 10, at 343–44.
\textsuperscript{282} See Smith, supra note 278, at 153–54 & n.55.
\textsuperscript{283} See U.S. Const. art. III; U.S. Const. art. VI. On the importance of the debt controversy to the drafters of these provisions, see Ware v. Hylton, 3 U.S. (3 Dall.) 199, 277 (1796) (Iredell, J.), and Story, supra note 225, at 686.
\textsuperscript{284} See Smith, supra note 278, at 154–55 (noting that after the federal courts were established in 1790, several hundred such suits were filed by British creditors in Virginia alone).
\textsuperscript{285} On Marshall’s role, see Smith, supra note 278, at 153–58.
\textsuperscript{287} 3 U.S. (3 Dall.) 199 (1796). The initial debt case was Jones, 13 F. Cas. at 1059, which was argued in 1791. See Hobson, supra note 286, at 187. Ware was substituted when the plaintiff in Jones died during the pendency of the case. See id.; Smith, supra note 278, at 157.
\textsuperscript{288} In modern discourse, Ware is primarily known for its affirmation that state laws inconsistent with treaty obligations are void under Article VI of the Constitution, but—as indicated above—that general point was not seriously in dispute.
void. As a result, Virginia’s outright cancellation of British debt—plainly inconsistent with Article 4 of the Treaty—could not stand. However, on Marshall’s second point the court held for the Virginians. In the court’s view, the discharge statute was not inconsistent with the treaty, because the statute had not eliminated the debts but only shifted them from the private parties to the state. The state had effectively assumed the debt, and the creditors still had a remedy— they had simply pursued the wrong party. As a result, the court permitted the creditors’ suits only to the extent the debtors had not previously paid the state under the discharge statute.\(^{289}\)

On appeal, the U.S. Supreme Court disagreed.\(^{290}\) The intent of the treaty, it held, was that creditors should have the remedies they ordinarily would be entitled to, without state interference. Shifting the debt to the state, even if it did not wholly eliminate the creditors’ rights, changed their ordinary remedies and thus constituted an “impediment” proscribed by Article 4 of the Treaty. Thus, the discharge statute, as well as the cancellation statute, was inconsistent with the treaty and preempted by Article VI of the Constitution.\(^{291}\)

What is striking about the arguments in *Ware* is that everyone—both courts and both sets of distinguished counsel—thought the case turned wholly upon the effect of Article 4 of the treaty combined with Article VI of the Constitution. According to the debtors, the treaty had no preemptive effect, either because it was itself void, or because it was not inconsistent with Virginia law, and therefore, *because the treaty had no preemptive effect*, the Virginia laws remained in force.\(^{292}\) The circuit court agreed as to the discharge statute, upholding that law *because it was consistent with the treaty*.\(^{293}\) The creditors argued, and

---

\(^{289}\) The lead opinion, by Circuit Justice James Iredell, is reported at 3 U.S. (3 Dall.) 199, 256–80 (1796) (reprinting the circuit court opinion). Circuit Justice Jay dissented as to the second point. See *Jones*, 13 F. Cas. at 1061.

\(^{290}\) See *Ware*, 3 U.S. (3 Dall.) at 199. On the Court’s disposition, see *Smith*, supra note 278, at 153–58.

\(^{291}\) See id. Justices Chase, Paterson, Wilson, and Cushing each wrote separately; Chief Justice Jay did not participate, and Justice Iredell adhered to the view he expressed in the lower court. See id.

\(^{292}\) See *Marshall*, supra note 286, at 300–13 (recording the argument of defendant’s counsel). At the Supreme Court, Marshall argued first that the Virginia law allowed Hylton to discharge the debt by payment to Virginia, and having established that point to his satisfaction, he concluded that the only remaining question was “whether [the] treaty revived the debt in favour of [Ware].” *Ware*, 3 U.S. (3 Dall.) at 213 (summarizing defendant’s argument).

\(^{293}\) See 3 U.S. (3 Dall.) at 256–80 (Iredell, J.).
the Supreme Court agreed, that both Virginia laws were void because (and only because) they conflicted with the treaty. 294

Yet whatever the technical effect of the treaty, the British debts were a major issue of U.S. foreign policy. The British government made the recovery of pre-war debts a central diplomatic effort in the 1780s and 90s, filing repeated protests with the U.S. government. 295 Unable to secure a diplomatic solution, the British threatened military responses: in particular, they maintained and reinforced a series of forts in the frontier territories supposedly ceded to the United States. 296 The Washington administration supported the British claims, ultimately agreeing to refer them to international arbitration to circumvent the states' opposition. 297 In short, treaty or no, this was a substantial issue setting states such as Virginia against federal government policy in an external matter that—but for a favorable decision by the Supreme Court and adroit diplomacy by U.S. negotiators—might well have led to war between the United States and Britain. 298

Despite these circumstances, no one suggested that the Virginia laws were invalid as an interference with federal foreign policy. Rather, as indicated above, it was agreed that the laws were potentially invalid only by the effect of the treaty. 299 Yet plainly British diplomatic

---

294 See id.; see also id. at 217–18 (summarizing plaintiff's argument that the issue turned upon "the operation of the treaty of peace").


296 See Bemis, supra note 230, at 101–10 (discussing British countermeasures).


298 See id.

299 A second argument pursued in this litigation—though not adopted by the Court—was that the Virginia law was invalid as contrary to the law of nations. See Ware, 3 U.S. (3 Dall.) at 220 (summarizing plaintiff's argument). Although that line of argument does suggest that some members of the constitutional generation thought that state law was constrained by international law, it does not suggest any conception of a generalized constitutional preclusion of states from foreign affairs. Any such preclusion, had it been recognized, would have been applicable to the Virginia law whether or not that law violated the law of nations. Plaintiff's counsel also argued that the power to confiscate debts was a national power on the ground that it was delegated to the United States government as an aspect of the war power. This is as close as anyone came to asserting a generalized foreign affairs preclusion; however, the argument turned upon a specific power—war—not a generalized foreign relations power:

If the power to confiscate debts existed, it existed in the United States, and not in the individual states. It has been admitted, that Congress possessed the power of war and peace; and that the right of confiscation emanates from that
demands were not bounded by the Virginians' technical reading of the treaty: even if (perhaps especially if) the court found that the treaty was void or that its language did not extend to the Virginia law, the British would continue to insist (and the U.S. federal government would continue to agree) that British creditors should be paid. Thus, regardless of the actual meaning of the treaty, the Virginia laws were a dangerous venture into foreign policy. Yet no one argued they should be invalidated on that ground alone, and counsel for the Virginians—including future Secretary of State and Chief Justice John Marshall—assumed that defeating the preemptive effect of the treaty would ensure victory. That suggests a broad consensus, as of the 1790s, against a generalized preemption of state laws interfering with U.S. foreign policy.

2. The Passenger Cases

A similar consensus is shown by the early debates concerning state regulation of immigration, culminating in the Supreme Court decisions in Mayor of New York v. Miln in 1837 and Smith v. Turner and Norris v. City of Boston (the Passenger Cases) in 1849. The issue in these cases was whether states could impose regulations upon ships landing foreign passengers. In modern discourse they represent largely-forgotten early gropings toward the doctrine of "dormant" commerce powers articulated in Cooley v. Board of Wardens in 1851. However, like Ware, they also represent a dispute over foreign policy federalism in which no one suggested a generalized constitutional preemption of state laws impinging upon foreign affairs.

Miln, the initial case in the series, involved a New York law requiring shipowners to report certain personal information about each passenger landed. Miln argued that the law interfered with foreign commerce, a field reserved to Congress by the Foreign Commerce Clause of Article I, Section 8 of the Constitution.

source. . . . It is absurd to suppose that Congress and Virginia could, at the same time, possess the powers of war and peace.

Id. at 219 (recording argument of plaintiff's counsel) (emphasis added). In any event, no member of the Court made anything of that argument, nor did the defendant's counsel address it. See id.

300 See 5 MARSHALL, supra note 286, at 300–13 (recording the argument of defendant's counsel that the 1777 statute should stand because it was consistent, by a technical reading, with the provisions of the treaty).


303 53 U.S. (12 How.) 299 (1851).

responded that the law did not conflict with any federal statute, and that the states had a concurrent power of legislation absent conflict.  

The Supreme Court adopted neither view, ruling instead that the law was not a regulation of commerce but instead was a regulation of "welfare" pursuant to the state’s police powers. As a result, said the Court, whether or not Congress’s commerce powers were exclusive, the state law was constitutional.  

The Court returned to the issue a decade later in Norris v. City of Boston and Smith v. Turner, decided together in 1849 as the "Passenger Cases." Norris was a challenge to an 1837 Massachusetts law requiring, among other things, a payment of two dollars from the shipowner for each alien passenger landed. Smith was a challenge to a similar New York statute imposing a tax of one dollar for every passenger upon a ship arriving "from a foreign port."  

The shipowners argued principally "[t]hat the act in question is a regulation of commerce . . . and that Congress possesses the exclusive power of making such a regulation." In response the states relied largely on Miln, claiming that the regulations were not commercial—either because "[p]assengers are not the subjects of commerce," or because the laws were directed at protecting the welfare of the citizens of the state rather than commercial goals. Thus, in their view, the laws did not conflict with the Article I, Section 8 powers of Congress. A fractured Supreme Court found the laws unconstitutional but was unable to produce a majority upon the central point. In the lead opinion, Justice McLean based his ruling upon the propositions first, that "the power to regulate commerce with foreign nations . . . is exclusively vested in Congress" and that "transportation of passengers" was a "great branch of our commerce" falling within this congressional power. Justice Wayne, concurring with three other justices, declined to reach these matters, finding instead that the state acts conflicted with prior acts of Congress relating to the landing of passengers. Chief Justice Taney, one of four dissenters, argued first that the commerce power of Article I, Section 8 was not exclusive of state regulation, and second that, even if it were, the laws were not regula-

---

305 See id. at 142-53.  
306 See id. at 143-53.  
308 Smith, 48 U.S. (7 How.) at 283-84 (quoting 1 N.Y.R.S., tit. 4, § 7); Norris, 43 U.S. (7 How.) at 285.  
309 Norris, 48 U.S. (7 How.) at 288 (summarizing plaintiff's argument).  
310 Id. at 351.  
311 See id. at 401-03 (McLean, J.) (quotation omitted).  
312 See id. at 412 (Wayne, J.).
tions of commerce. Justice Daniel, also in dissent, exhaustively explored the definition and etymology of "commerce" to show that the challenged laws were not regulations of commerce. Daniel’s dissent, and a separate dissent by Justice Woodbury, also defended the states’ right to exclude aliens (a matter not directly raised by the cases).

Thus, just as Ware was seen as a case about the effect of treaties, Mill and the Passenger Cases were seen as cases about the regulation of foreign commerce. This was not inevitable: the potential foreign affairs effects of the state laws were recognized by the participants, who acknowledged that restrictions on landing of aliens could "lead to collision" with the aliens’ countries of origin (which had policies of encouraging emigration). The participants also generally acknowledged the policy of the federal government to encourage immigration. Thus, whether or not involving "commerce," the cases could be viewed as state interference in federal foreign policy. Yet there was no appeal to (or defense against) the claim that the laws at issue were unconstitutional under a generalized exclusion of states from foreign affairs. Rather, just as the outcome in Ware depended solely upon the effect of the peace treaty and Article VI of the Constitution, the outcome in the Passenger Cases depended upon, first, the scope and exclusiveness of the Foreign Commerce Clause of Article I, Section 8, and second, whether there were any preemptive treaty or statutory provisions. Again, the cases are reflective of a broad consensus that state exclusion was accomplished only by particularized clauses of the Constitution or through the Supremacy Clause of Article VI.

3. The Caroline Incident

A third leading foreign affairs controversy of the relevant period arose out of the rebellion in Canada in the 1830s. The revolt had supporters in the border regions of the United States, and at one point the rebels moored a captured ship, the Caroline, on the U.S. side

313 Id. at 464–71 (Taney, C.J., dissenting). Taney further argued that because "[t]here is no conflict . . . between the law of Massachusetts and any treaty or law of the United States," the law should stand. Id. at 473 (emphasis added). Significantly, he did not say that there was no conflict between any "treaty, law or foreign policy of the United States," which would have been the appropriate inquiry had the Court accepted the theory of executive preemption in foreign affairs.
314 Id. at 505–06 (Daniel, J., dissenting).
315 See id. at 509–12 (Daniel, J., dissenting); id. at 522–23 (Woodbury, J., dissenting).
316 Id. at 568 (Woodbury, J., dissenting).
317 See id.
of the Niagara River. In December 1837, British government agents crossed the river and set fire to the *Caroline*, killing two of the crew. Alexander McLeod, believed to be one of the British agents, was later arrested and tried in New York for murder in connection with the *Caroline* fire.\(^{318}\)

The British government vigorously protested the proceedings against McLeod to the U.S. government. In the British view,

the transaction on account of which Mr. McLeod has been arrested . . . was a transaction of a public character, planned and executed by persons duly empowered by Her Majesty's colonial authorities. . . . It would be contrary to the universal practice of civilised nations to fix individual responsibility upon persons who with sanction or by orders of the constituted authorities of a State engaged in military or naval enterprizes in their country's cause.\(^{319}\)

Secretary of State Daniel Webster, on behalf of the U.S. government, agreed:

The government of the United States entertains no doubt that, after this avowal of the transaction, as a public transaction, authorized and undertaken by the British authorities, individual concerned in it ought not, by the principles of public law, and the general usage of civilised states, to be holden personally responsible in the ordinary tribunals of law, for their participation in it.\(^{320}\)

Webster accordingly pressured New York not to go forward with the prosecution. When New York refused to accede, Webster reported to the British that he had no further recourse, as it was a state rather than a national matter.\(^{321}\) This was contrary to the British view of state-federal relations; expecting this argument, the British minister argued, in terms anticipating the Supreme Court's fears in the later *Chy Lung* case,\(^{322}\)

> [W]ith the particulars of the internal compact which may exist between several States that compose the Union, foreign Powers have nothing to do; the relations of foreign Powers are with the aggre-


\(^{319}\) Letter from Henry Fox, British Minister, to Daniel Webster, U.S. Secretary of State (Mar. 12, 1841), in 29 BRITISH AND FOREIGN STATE PAPERS 1840–1841, at 1127 (London, Ridgway & Sons 1857) [hereinafter BRITISH PAPERS].

\(^{320}\) Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister (Apr. 24, 1841), in 24 BRITISH PAPERS, *supra* note 319, at 1129.


\(^{322}\) See *supra* note 32 and accompanying text.
The Power of States in Foreign Affairs. . . . Therefore, when a foreign Power has redress to demand for a wrong done to it by any State of the union, it is to the federal government, and not the separate state, that such power must look for that wrong. And such foreign Power cannot admit the plea that the separate State is an independent body over which the Federal Government has no control.323

Nonetheless, despite evident desire to placate the British, Webster thought that the U.S. government had no authority other than attempting to persuade New York to cooperate and giving assistance to McLeod in his defense. Thus McLeod was indicted and tried in New York court, despite the desires of the national government. As one historian of the affair describes it,

The political overtones of the case were clear for all to hear: Britain wanted McLeod released, and so did the federal authorities. So transparent was Washington's position that one of McLeod's lawyers, Joshua Spencer, was also the local United States attorney . . . . But New York's prosecutors had none of it. The governor refused to issue a *nolle prosequi*, which would have terminated the proceedings. Moreover, the attorney general of New York, Willis Hall, joined the county district attorney in fighting against McLeod's release. It shaped up to be a political battle royal.324

As a result, McLeod was tried in state court (and a substantial foreign affairs crisis averted only by his rather fortuitous acquittal).325 Acknowledging the potential dangers of such a situation and the U.S. government's inability to respond adequately, the executive branch subsequently proposed, and Congress enacted, a statute permitting removal of such cases to federal court and providing certain defenses upon intervention of the President.326

Like *Ware* and the Passenger Cases, McLeod's case involved a substantial clash between state law and federal foreign policy—to the extent of having the U.S. attorney for New York and the New York state attorney general opposing each other in court. Moreover, also like *Ware* and the Passenger Cases, the diplomatic overtones were substantial, as Britain energetically sought McLeod's release. However, unlike *Ware* and the Passenger Cases, there was no specific limitation on

323 Letter from Henry Fox, British Minister, to Daniel Webster, U.S. Secretary of State, *supra* note 320, at 1376-77.
324 Bederman, *supra* note 318, at 521 (footnote omitted).
state power upon which the federal government could rely. No treaty or federal statute implicated the matter, thus precluding appeals to Article VI of the Constitution, and none of the specific powers granted the federal government or denied the states applied to the case. Neither McLeod in his own defense nor Webster on behalf of the U.S. and British governments bothered to make a constitutional argument that the state activity was preempted.\(^\text{327}\)

This could happen only in the context of a broad consensus against a generalized exclusion of states from foreign affairs. Had there been any thought at the time that state laws raising substantial foreign policy issues were potentially unconstitutional as a general matter, \textit{McLeod} would have been the case in which to deploy that argument. McLeod’s case was a major foreign policy matter involving strong protests by a foreign government, in which the state activity squarely contradicted federal foreign policy. That the argument was not even raised shows that no one at the time read the Constitution to contain such a generalized exclusion.\(^\text{328}\) Rather, it seems clear that all parties thought a constitutional preclusion could arise only from a specific provision of the Constitution (none of which was applicable) or from a treaty or statute by way of Article VI—and indeed the executive branch ultimately pursued statutory preemption to prevent repetition of the difficulty.

4. The Implications of Post-Constitutional Practice

The legal discourse of \textit{Ware}, the Passenger Cases, and \textit{McLeod} thus suggests a post-constitutional consensus regarding foreign affairs federalism. In this view, state laws could be overridden by the preemptive effect of a treaty (as in \textit{Ware})\(^\text{329}\) or a statute (as in the concurrence in the Passenger Cases)\(^\text{330}\) under Article VI of the Constitution;

\(^{327}\) \textit{See McLeod}, 25 Wend. at 528–54.

\(^{328}\) Moreover, the issue had arisen at least twice before in less prominent but similar cases. In 1794, Pennsylvania authorities arrested the French former governor of Guadeloupe in connection with acts committed during his tenure. Despite French protests, U.S. Attorney General Bradford concluded that the matter must necessarily be handled at the state level. \textit{See} 1 Op. Att’y Gen. 43 (1794). Similarly, in 1805, a Spanish consular agent was imprisoned, also in Pennsylvania, and a federal circuit court concluded that it had no power to interfere with state processes despite the obvious foreign relations implications of the matter. \textit{See Ex parte Cabrera}, 4 F. Cas. 964, 966 (G.C.D. Pa. 1805) (No. 2278). On both matters, \textit{see} Bederman, \textit{ supra} note 318 at 526–27. No one connected to either case suggested that the state action might be precluded by the federal government’s foreign relations power.

\(^{329}\) \textit{See supra} Part IV.D.1.

\(^{330}\) \textit{See supra} Part IV.D.2.
or they might be overridden by an exclusive grant to the federal government of a particular power such as the foreign commerce power of Article I, Section 8 (as Justice McLean and the shipowners in the Passenger Cases argued). However, there was no generalized exclusion of state laws affecting foreign affairs. If no Article VI preemption existed (as the Virginia debtors argued and the circuit court held in Ware and no specific exclusive power in the federal government could be claimed (as the dissent in the Passenger Cases argued), the state law would be upheld. Thus, when a foreign affairs conflict arose in the absence of any colorable claim to Article VI preemption and outside any specific grant of federal power, as occurred in McLeod, no one thought a constitutional objection to the state activity could be raised, despite the state's clear interference with federal foreign policy. In short, the modern claim to a generalized "foreign affairs" preemption, founded neither upon Article VI nor upon a specific constitutional power of the federal government, requires a reading of the Constitution which was not held by prominent lawyers and judges associated with the leading foreign affairs cases of the post-constitutional period.

**Conclusion**

This article has sought to make three principal points with respect to the constitutional debate over federalism in foreign policy. First, recognizing a role for states in foreign policy matters serves a structural separation of powers purpose. A regime in which states are disabled from acting in foreign affairs allocates broad power to the President to establish foreign policy. Accepting some measure of state power (in the absence of statutory preemption or explicit constitutional preclusion) constrains executive policymaking, for the President would (outside of cases specifically controlled by the Constitution) require the cooperation of a majority of Congress (or two-thirds of the Senate) to impose a particular foreign policy upon the states. Thus the real issue posed by foreign policy federalism is one of executive power in foreign relations: should that power include the power to override state law, or should it be subject to the competing policies of Congress and the states?

Whatever one thinks of that question, there is no doubt that it poses a serious structural issue upon which reasonable people may

---

331 See supra Part IV.D.2.
332 See supra Part IV.D.1.
333 See supra Part IV.D.2.
334 See supra Part IV.D.3.
disagree. That alone is sufficient to undermine the conventional case against foreign policy federalism. As discussed above, the conventional view thinks it inherent in the idea of a federal system—or at least inherent in the conception of a federal system held by the constitutional generation—that states could not serve a meaningful role in foreign relations. Thus the exclusion of the states has been deduced broadly from structure and intent, rather than grounded in particular constitutional provisions. As I have argued in this Article, that approach simply does not work once one recognizes the structural effect of state participation. One may argue for a preemptive executive power to set foreign affairs, or one may argue for a cooperative role that requires the President frequently to enlist the aid of Congress in implementing foreign policy. Neither, however, is an inherently obvious choice dictated by the abstract logic of federalism or by the general views of the framers. Thus, one cannot assume the conclusion but must consult the Constitution directly.

Second, this Article has attempted to describe the strongest textual case for an exclusion of states from foreign policy. As indicated above, most conventional considerations of the role of the states do not make a textual case, but rely on presumptions about the necessities of a federal system which are in my view insufficient. Nonetheless, there is a textual case for foreign affairs preclusion. It depends upon two propositions: first, that powers granted to the President by Article II may imply a power of executive preemption to protect against state encroachment upon those powers; and second, that the power to establish foreign policy is a power granted to the executive by Article II. The first proposition is illustrated by the example of the Commander-in-Chief power. That grant of power must imply a correlative power of executive preemption—otherwise states could pass laws which effectively denied the President control over the military. Moreover, the preemptive power must be held by the executive (and not be dependent upon Congress acting to preempt under Article I and Article VI); otherwise the President’s Commander-in-Chief power would be in part dependent upon Congress and would not be an independent executive power. The second proposition depends upon reading the grant of “executive power” in Article II, Section I to include, at minimum, foreign relations powers not otherwise allocated by the Constitution. That reading is supported by the common eighteenth-century identification of “executive power” with the power to act in foreign relations. Taken together, these propositions suggest that the President is given the power to set foreign policy by the Constitution, and that this grant implies a preemptive power in the President to override state statutes which diminish this power.
The third point of the Article is that the foregoing reading, although a plausible view of the Executive Vesting Clause read in isolation, is inconsistent with other aspects of the text and with the historical context of the document. The text’s use of specific exclusions of states from particular aspects of foreign affairs suggests that no generalized exclusion was understood. The inclusion of treaties under the preemptive force of Article VI suggests that there was no recognition of a generalized preemptive power that could give treaties a preemptive effect outside Article VI (even though that would assuredly have been the case if the executive wielded a non-Article VI preemptive power in foreign affairs). Moreover, there is no contemporaneous indication that a presidential preemptive power was recognized in the constitutional debates even by those most solicitous of state sovereignty or those most distrustful of executive power. Because such a power would have had open-ended implications even in the eighteenth-century context, the absence of any remark upon it confirms that it was not thought to exist. Finally, in the foreign affairs cases of the immediate post-constitutional period no one suggested a generalized power of executive preemption, even when it would have helped their case enormously—further confirming that no one thought such power existed.

Thus, I conclude that the modern view of foreign policy preemption is unsupported by the original understanding. The executive power vested in the President likely did contain a power to set foreign policy. But that power did not carry a corresponding power to preempt state laws that would “impair [its] effective exercise” in order to leave the field “entirely free from local interference.” Rather, the constitutional generation understood that “interferences” would be removed, as necessary, through Article VI—the article that they focused on as the remedy for the international ills of the Confederation. To take the leading relevant controversy from the constitutional period, the invalidation of Virginia’s laws on British debts in *Ware v. Hylton* depended upon a finding that the laws violated a federal treaty. Had no violation been found—that is, had *Ware v. Hylton* been decided the other way—President Washington might still have wished to accommodate Britain by allowing collection of the debts. But he could not have done that unilaterally, simply by a presidential declaration—or judicial finding—that Virginia’s laws interfered with his foreign policy (even though they clearly did). Rather, he would

336 Hines v. Davidowitz, 312 U.S. 52, 63 (1941).
337 See supra Part IV.D.1 (discussing the Virginia laws on British debts)
have needed to ask Congress to legislate on the matter (or ask the Senate to approve a new treaty with Britain), in order to effect preemption through Article VI. That imposed a check on unilateral presidential power, and made Congress (or the Senate) and not the President (or the federal courts) the judge of when state interferences in foreign policy should be preempted. This may seem like an inefficient system to our modern view, but it was, nonetheless, the founders’ system.