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# Foreign Affairs Federalism: A Revisionist Approach

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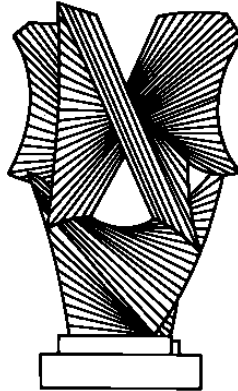
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## FOREIGN AFFAIRS FEDERALISM: A REVISIONIST APPROACH

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## Foreign Affairs Federalism: A Revisionist Approach

*Daniel Abebe and Aziz Z. Huq\**

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#### INTRODUCTION

In April 2010, the Arizona legislature enacted the Support Our Law Enforcement and Safe Neighborhoods Act.<sup>1</sup> Commonly known as SB 1070, the law created a slate of new criminal offenses and arrest powers covering aliens within Arizona's borders.<sup>2</sup> SB 1070 proved divisive. It inspired copycat legislation in several states,<sup>3</sup> provoked sharp criticism from the legal academy,<sup>4</sup> and—most relevant here—

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1. Ch. 113, 2010 Ariz. Sess. Laws 1070 (codified in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, 41), *as amended by* Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 2162; *see also id.* § 1 (“The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona.”).

2. *See Arizona v. United States*, 132 S. Ct. 2492, 2497–98 (2012) (describing core provisions). SB 1070 created new, state-level, immigration-related crimes, such as working in the state without authorization and failing to carry an immigration document; allowed police to arrest people suspected of being removable from the United States; required police to investigate the immigration status of those lawfully stopped, detained, or arrested; and enabled immigration enforcement activities by public employees. *Id.*

3. *See, e.g.*, Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Adv. Legis. Serv. 535 (LexisNexis); Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Code Ann. Adv. Legis. Serv. 252 (LexisNexis); Illegal Immigration Enforcement Act, 2011 Utah Adv. Legis. Serv. 21 (LexisNexis) (codified in scattered sections of UTAH CODE ANN. tits. 76, 77), *as amended by* Act of Mar. 15, 2011, 2011 Utah Adv. Legis. Serv. 18 (LexisNexis).

4. *See, e.g.*, Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 252 (2011) (arguing that state immigration prosecutions are “irremediably unconstitutional”); Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill*

catalyzed a lawsuit by the U.S. Department of Justice seeking a preliminary injunction against the state law on the ground that it was preempted by federal law.<sup>5</sup> Initially, the federal government's litigation prospects seemed dim. One term before SB 1070 reached the Supreme Court, the Justices had upheld an earlier Arizona effort to tamp down on undocumented aliens in the workplace. Doing so, the Court had limned a narrow reach for the preemptive penumbra of federal immigration law.<sup>6</sup> In the SB 1070 oral argument, the Solicitor General seemed to fare poorly, with Justice Sotomayor even suggesting that his central preemption argument was not "selling very well" and that he try "to come up with something else."<sup>7</sup>

Yet in June 2012, the Court handed down an opinion giving the federal government "close" to everything it had sought.<sup>8</sup> By a vote of five Justices to three, the Court invalidated three of the four challenged provisions and upheld the fourth subject only on condition that the state satisfied demanding limiting qualifications.<sup>9</sup> What many expected to be a rout in favor of Arizona's position<sup>10</sup> ended instead in a robust affirmation of national authority. What is more interesting, at least for our purposes, is how the majority and dissenting Justices reached their results. Both Justice Kennedy's majority opinion and Justice Scalia's dissent in *Arizona v. United States* began not with statutory or constitutional text, but rather with

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1070, 25 GEO. IMMIGR. L.J. 47, 77 (2010) (addressing concerns about state power to regulate immigration and preemption by federal law).

5. *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012).

6. In *Chamber of Commerce v. Whiting*, the Court upheld Arizona's alien employment law, which allowed the suspension and revocation of business licenses for employing unauthorized aliens and required every employer to verify the employment eligibility of hired employees through a specific Internet-based system. The Court emphasized the "high threshold [that] must be met if a state law is to be pre-empted for conflicting with the purposes of a federal Act." 131 S. Ct. 1968, 1985 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part, concurring in the judgment)).

7. Transcript of Oral Argument at 56, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-182.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf). We say "even" because Justice Sotomayor is not one who would have been expected *ex ante* to disfavor the government's position in the case.

8. David A. Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41, 45 (2012).

9. *Arizona v. United States*, 132 S. Ct. 2492, 2501-09 (2012) (invalidating criminal penalties on the nonpossession of immigration documents and applications for unauthorized work, and also the power of warrantless arrest, but upholding, with limitations, police power to require the production of immigration papers).

10. *See, e.g.*, Edward Sifuentes, *Three USD Professors Say Arizona Law Is Constitutional*, N. COUNTY TIMES (May 13, 2010, 7:44 PM), [http://www.nctimes.com/news/local/sdcounty/article\\_9631a761-1a36-597b-8467-2173655b4465.html](http://www.nctimes.com/news/local/sdcounty/article_9631a761-1a36-597b-8467-2173655b4465.html) ("Professor Lawrence Alexander, who teaches constitutional law at USD, said that [the constitutional] argument would fail because the Arizona law does not conflict with federal immigration law.").

a judicial *presumption* about the appropriate distribution of authority between the federal government and the states on matters of intersecting state and federal foreign affairs–related concerns. In both opinions, that threshold presumption powerfully motivated the ensuing analysis.

For Justice Kennedy, “[t]he federal power to determine immigration policy is well settled” because of its entanglement in foreign affairs.<sup>11</sup> Immigration “affect[s] trade, investment, tourism, and diplomatic relations for the entire Nation,”<sup>12</sup> and so touches “‘the most important and delicate of all international relationships.’”<sup>13</sup> By contrast, Justice Scalia opened with the opposite presumption: “As a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress.”<sup>14</sup> That principle quickly yielded the result that “the federal alien registration system is certainly not of uniquely federal interest.”<sup>15</sup>

This Article takes up the core of the debate between Justices Kennedy and Scalia. More precisely, it analyzes how courts should resolve cases that arise at the intersection of foreign affairs and federalism concerns when there is no dispositive constitutional, statutory, or treaty-derived rule. Cognizant of the competing approaches in *Arizona*, it considers the appropriate judicial presumption across the board in foreign affairs federalism cases. But the choice of presumption matters well beyond immigration-related cases. Indeed, the Court repeatedly confronts cases in which federalism and foreign affairs claims conflict and no text supplies clear direction.<sup>16</sup> Previous cases involve not only immigration authority,<sup>17</sup>

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11. *Arizona*, 132 S. Ct. at 2498.

12. *Id.*

13. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).

14. *Id.* at 2511 (Scalia, J., dissenting). Justices Thomas and Alito filed separate dissents (neither joining Justice Scalia’s opinion) on narrower grounds pertaining to the application of preemption doctrine, rather than reasoning grounded on federalism-first principles.

15. *Id.* at 2518.

16. Some scholars point to “a structural change . . . that has begun to transform the global order of unitary nation-states into a system that empowers subfederal units such as the American states.” CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, *THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT* 190 (2012). This implies that foreign affairs federalism cases will continue to arise with some frequency before the Supreme Court.

17. See *De Canas v. Bica*, 424 U.S. 351, 356 (1976) (upholding California regulation of alien employment against preemption challenge); *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (invalidating Pennsylvania’s 1939 Alien Registration Act); *Chy Lung v. Freeman*, 92 U.S. 275, 279, 281 (1875) (invalidating California bonding requirement for certain international passengers).

but also state efforts to sanction repressive foreign regimes,<sup>18</sup> encourage restitution for Holocaust survivors,<sup>19</sup> settle money claims against foreign nations and their citizens,<sup>20</sup> tax the global activities of corporations operating within a state's borders,<sup>21</sup> and impose capital punishment notwithstanding objections from international organizations and courts.<sup>22</sup> Nor does the Supreme Court resolve all such conflicts. Lower courts also address and provide final dispositions of many disputes arising at the intersection of foreign affairs and federalism without the guidance of statute or treaty.<sup>23</sup> There is, in sum, no shortage of justiciable controversies raising the knotty question of foreign affairs federalism.

This Article offers a functional analysis of that problem by asking what presumption best serves to maximize diverse constitutional goods. Although any effort to identify the goods our Constitution is meant to promote will be controversial, it seems plausible in our view to say that social welfare, a robust democratic process, and individual rights are among them.<sup>24</sup> Our rough

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18. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (invalidating Massachusetts statute that imposed penalties on companies dealing with Burma); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (invalidating Oregon escheat law that imposed reciprocal requirements that disabled citizens of certain Communist Bloc countries from inheriting property). The Court's opinion in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), can also be situated in this class.

19. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (invalidating California insurance law related to unresolved Holocaust-related claims).

20. These cases involve preemption of state common law claims respecting contract or property interests. See *United States v. Pink*, 315 U.S. 203, 241–42 (1942) (affirming dismissal of a suit to recover the assets of a New York branch of a Russian insurance company); *United States v. Belmont*, 301 U.S. 324, 332 (1937) (reversing dismissal of an action by the federal government to recover a sum of money deposited by a Russian corporation).

21. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 331 (1994) (upholding California's worldwide reporting requirement for corporate income tax); *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 448 (1979) (invalidating application of ad valorem property tax on foreign shipping).

22. See *Medellín v. Texas*, 552 U.S. 491, 522–23 (2008) (holding that the President lacks authority to delay Texas executions based on an International Court of Justice judgment); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 359–60 (2006) (finding that consular rights treaty did not oust state procedural bar rules).

23. See, e.g., *Faculty Senate of Fla. Int'l Univ. v. Winn*, 616 F.3d 1206, 1208 n. 2, 1210 (11th Cir. 2010) (per curiam) (rejecting challenge to state ban on use of university funds for travel to listed "terrorist state[s]"); *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 903 (9th Cir. 2010), *rev'g* 578 F.3d 1052 (2009) (considering state law tort suit based on human rights violations against Armenians); *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518–19 (M.D. Pa. 2007) (invalidating local immigration regulation).

24. In harmony with most consequentialist analysis in public law, we do not specify a complete welfare function to maximize. Rather, we recognize that there are a plurality of goods to maximize, including (as mentioned in the text) welfare, democratic process values, and individual rights. Our (weak) assumption is that it is desirable to maximize some bundle of those

consequentialist approach requires a specification of both the costs and the benefits of different approaches. The central task of this Article, therefore, is to assess the strength of states' federalism interest and the national government's foreign affairs interest in such cases. We offer two key results. *First*, accepting the conventional economic case for federalism, states have an interest in foreign affairs federalism matters that is no less powerful than in domestic-policy domains. *Second*, the national government's interest in foreign policy control varies in magnitude over time. Putting these results together, we conclude that whereas states and the federal government both have interests in regulating what we term "foreign affairs federalism disputes," the relative strength of their respective interests varies with changing geopolitical circumstances.

Translating this analysis into a doctrinal form, we conclude that courts should vary the operative presumption in foreign affairs federalism cases over time. Sometimes the states should receive the benefit of the doubt, sometimes the federal government should. We offer a parsimonious rule to discern when the federal interest likely rises to the level to oust state interests. This rule is based on the concept of *polarity* in international relations. Briefly stated, the federal government's interest is at its zenith—and hence should be most respected by courts—when the United States is in a multipolar global environment. In this context, the United States is significantly constrained and the benefits of centralizing authority in the national government are plural. Correlatively, the federal interest is weakest when the United States has hegemonic influence in a unipolar world. The United States' status as a superpower frees it from some constraints, and the benefits of centralizing authority in the national government are present but smaller. On this view, we argue, the Court in *Arizona* erred by simply stipulating the "important and delicate"<sup>25</sup> matters of international relationships as the launching point for its analysis without further elaboration. Although we disagree with the Court's specific reasoning, we suggest that its ultimate result might nonetheless be justified on more subtle grounds.

To defend this conclusion, we engage first in a critical project and then offer our own reconstruction of the doctrine. Accordingly, we begin by offering critiques of leading accounts of foreign affairs federalism. For the sake of convenience, we group these accounts into

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values. We also do not offer a precise qualitative welfarist analysis. Again in common with most public law analysis, our evaluation of different rules' welfare effects necessarily relies on some estimation on our part.

25. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).



two camps, which we label “formalist”—which is generally pitched on originalist terrain—and “functionalist”—which attends more to consequences.<sup>26</sup> Formalist accounts tend to favor the states.<sup>27</sup> We reject these formalist accounts on methodological grounds. Disagreement about original understandings means the Founding-era history is indeterminate. In any event, such arguments fail to account for changing institutional and geopolitical circumstances, making policies that were desirable in 1787 seem dysfunctional in 2012. In our view, this problem of “translation”<sup>28</sup> is so intractable and pervasive in foreign affairs that little benefit accrues from framing inquiries in originalist terms.

Functionalist accounts, by contrast, focus on how institutional choices promote various constitutional goods. We believe that functionalist analyses provide more promising avenues for analyzing the foreign affairs federalism problem. Existing accounts offered by Professors Jack Goldsmith and David Sloss identify the correct questions.<sup>29</sup> We respectfully differ from their respective approaches, even as we benefit from their real insights, over their treatment of the relevant costs and benefits.

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26. We employ the familiar terms “functionalist” and “formalist” because we believe they capture important elements of the relevant theories. We do not here aim to explore the familiar distinction between functionalist and formalist approaches to the separation of powers. All that is at stake here is a convenience of labeling, and not some deeper jurisprudential insight.

27. The leading such account is Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (2000); see also Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1575–76 (2007) (arguing against the validity of sole executive agreements, in part for federalism reasons, on originalist grounds). But see Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re)Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 221–28 (2011) (employing text and original meaning to reach a conclusion in favor of more federal authority). A similar position can be defended using structural arguments—i.e., derived from first principles of the separation of powers and federalism. See, e.g., Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 830–32 (2004) (arguing in favor of state control on the basis of formalist axioms of structural constitutionalism).

28. See Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1170–71 (1993) (developing the idea that original constitutionalists may require “translation” to ensure fidelity under changed circumstances).

29. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 [hereinafter Goldsmith, *Statutory Foreign Affairs Preemption*] (analyzing the doctrines and justifications for the Court’s preemption jurisprudence); Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1622 (1997) [hereinafter Goldsmith, *Federal Courts*] (focusing on functional arguments as opposed to historical claims); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1964–65 (2003) (noting the different effects of treaties, congressional executive agreements, and sole executive agreements).

In lieu of those existing accounts, we develop a novel functionalist analysis of how courts should resolve foreign affairs federalism disputes in the absence of decisive guidance from Congress. Since our focus is upon cases in which neither the House nor the Senate has spoken to a specific question, the inquiry here is really about when the President should win out against the several states in the absence of compelling evidence of congressional intent.<sup>30</sup> To that end, we consider systematically the advantages and costs of centralizing foreign relations power. This analysis requires first the identification of benefits that accrue from state policies that impinge on foreign affairs–related matters. It further demands consideration of whether the federal executive will consider those benefits in his or her policymaking. Scholars of federalism have long argued that there are “political safeguards” of federalism within the national policymaking framework.<sup>31</sup> A foundational question for our analysis is whether those safeguards operate equally in the foreign policy domain to mitigate the need for judicial intervention. In brief, we conclude that state policymaking on matters touching on foreign affairs does accrue benefits traditionally associated with decentralized policymaking, but that any political safeguards are likely to be weaker than in the domestic-policy context. This result provides a potential justification for judicial solicitude for federalism values.

But this does not end the analysis. The idea that federal primacy on external matters yields immediate benefits, of course, is hardly unfamiliar.<sup>32</sup> Indeed, it has prompted incautious language from the Supreme Court that “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.”<sup>33</sup> We diverge from this conventional wisdom by positing that the benefits of presidential control of foreign policy are not fixed. Instead, we argue that the benefits of centralizing foreign affairs control in the

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30. For a cogent and insightful development of this point in the immediate aftermath of the *Arizona* decision, see Eric Posner, *The Imperial President of Arizona*, SLATE (June 26, 2012), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/06/the\\_supreme\\_court\\_s\\_arizona\\_immigration\\_ruling\\_and\\_the\\_imperial\\_presidency\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/the_supreme_court_s_arizona_immigration_ruling_and_the_imperial_presidency_.html).

31. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (noting that states play a “crucial role in the selection and the composition of the national authority”).

32. For canonical statements of this principle, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 14–15, 149–69 (2d ed. 1996); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1846–52 (1998).

33. *United States v. Pink*, 315 U.S. 202, 233 (1942); accord *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (indicating that the President alone has the power to negotiate with foreign nations).

presidency *vary over time*. The strength of the federal interest is not static because geopolitical circumstances are not static. And shifts in those external circumstances—a factor that has until now been almost wholly ignored in the legal scholarship—conduce to a federal interest that waxes and wanes in intensity.<sup>34</sup> We then offer a parsimonious heuristic for courts to gauge those benefits: courts should be more willing to credit the value of centralization in foreign affairs when the international environment is multipolar—that is, when there is a multiplicity of threats to U.S. influence and aims—but not when the environment is unipolar, such that the United States is able to project hegemonic power more effectively.<sup>35</sup> A full account of both the advantages and costs of centralizing foreign affairs authority in the presidency yields a nuanced but tractable doctrinal rule that allows for change over time. We also address the potential objection that such a rule falls outside the reach of federal judges' competence. In our view, courts have been sensitive to geopolitical conditions in a surprising proportion of cases—and often have no choice but to assess such conditions—blunting arguments on institutional competence grounds that courts should not employ any presumption.

We should at this threshold stage distinguish our inquiry from others raised by scholars working at the intersection of federalism and foreign affairs. First, we focus solely on instances in which neither treaty nor statute supplies a dispositive rule of decision. As a result, we do not address here the long-standing dispute about federalism-based constraints on the Treaty Power.<sup>36</sup> Second, there is a long-running debate concerning the status of customary international law (“CIL”) as federal common law.<sup>37</sup> The question addressed here, however, does not concern CIL, but rather the resolution of disputes in a “twilight” zone where legislative and constitutional sources of law arguably apply but are incomplete.

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34. See generally Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT'L L. 1 (forthcoming 2013) (manuscript on file with authors).

35. *Id.* (developing concepts of unipolarity and multipolarity and defending their analytic utility).

36. Compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 394 (1998) (arguing that the federal government's “plenary authority” under the Treaty Power is inconsistent with American federalism), with David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1080 (2000) (supporting the Treaty Power as consistent with federalism).

37. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997) (no), with Carlos M. Vasquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1501 (2011) (yes).

The analysis proceeds as follows. Part I provides necessary background by cataloging cases that fall within the scope of our inquiry. This includes instances in which there is a clash between the presidential and state claims to regulatory authority but in which no clear textual rule provides a solution. Part II explains how the extant literature treats these clashes and argues that those treatments are inadequate. Parts III and IV, the heart of our analysis, consider respectively the costs and the benefits of centralizing policymaking control in the presidency and show how our recommended presumption applies to other Supreme Court cases.

## I. FEDERALISM AND FOREIGN AFFAIRS IN THE “ZONE OF TWILIGHT”

### A. *Defining the Domain of Inquiry*

This Part identifies several strands of precedent in which the Supreme Court grapples with the appropriate presumption—whether pro-federal executive or pro-states—in cases where a decision implicates both federalism and foreign affairs concerns, but no text (constitutional, statutory, or treaty derived) directs an outcome.<sup>38</sup> We are concerned only with instances in which there is an “absence of clear guidance from Congress”<sup>39</sup> or the Constitution. These disputes arise in what Justice Robert Jackson famously characterized as a “zone of twilight.”<sup>40</sup> In the *Youngstown Steel Seizure* case, Jackson set forth a three-part typology of presidential action keyed to the degree of congressional support present. Presidents (1) have “maximum” legitimacy when acting with express authorization from Congress; (2) enter a zone of twilight when “ac[ting] in absence of either a congressional grant or denial of authority”; and (3) are at the “lowest

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38. Such cases arise when states regulate matters touching on international interests. This happens with some frequency. See BANKS & BLAKEMAN, *supra* note 16, at 191 (“In the latter half of the twentieth century, state governments have become increasingly activist in foreign affairs . . .”); Timothy J. Conlan, Robert L. Dudley & Joel F. Clark, *Taking On the World: The International Activities of American State Legislatures*, 34 PUBLIUS 183, 184 (2004), available at <http://publius.oxfordjournals.org/content/34/3/183.full.pdf> (“[S]tate and local governments in the United States have become increasingly involved in international affairs.”); see also EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 67–76 (1998) (discussing state and local economic and trade initiatives); *id.* at 91–100 (describing noneconomic initiatives). Fry celebrates economic initiatives and describes noneconomic initiatives as “worrisome.” *Id.* at 91. Fry simply assumes the force of this economic/noneconomic distinction. But it is by no means clear that states’ legitimate interests should be limited to only economic matters.

39. Faculty Senate of Fla. Int’l Univ. v. Winn, 616 F.3d 1206, 1210 (11th Cir. 2010).

40. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

ebb” of power when “tak[ing] measures incompatible with the expressed or implied will of Congress.”<sup>41</sup> Courts invoke this framework in federalism cases as well as separation of powers cases.<sup>42</sup> Jackson’s intermediate zone of twilight produces copious litigation, as the costly adversarial process of federal litigation typically selects from the larger population of disputes a subset of particularly close and contentious matters.<sup>43</sup>

How should the Court resolve such cases? Justice Jackson’s guidance—his call to look toward “the imperatives of events and contemporary imponderables”—is simultaneously inspiring and useless.<sup>44</sup> Quite how “events” and “imponderables” (whatever the latter are) can generate reasoned and neutral justifications for adjudication remains unclear more than a half century after Jackson wrote. Rather than puzzling over Jackson’s enigmatic counsel, we contend, courts must engage in a more mundane enterprise of crafting an appropriate default presumption. In common with any other instance in which the textual sources of law are either underdetermined or ambiguous, judges must look beyond the express words of a constitutional, statutory, or treaty-derived provision to develop a default rule to break deadlocks. When engaged in the complex task of statutory interpretation,<sup>45</sup> judges often use such presumptions, or “substantive canons,”<sup>46</sup> as weights on the analytic

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41. *Id.* at 635–38.

42. In the federalism context, Chief Justice Roberts invoked *Youngstown* in *Medellín v. Texas*, 552 U.S. 491, 525 (2008) (invoking the “*Youngstown* framework”). Other important applications of the framework include *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (reporting that “both parties agree [that Justice Jackson’s concurring opinion in *Youngstown*] brings together as much combination of analysis and common sense as there is in this area”), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 503 n.6 (1977) (Powell, J., concurring) (citing the first part of Justice Jackson’s analysis).

43. The basic intuition here is that cases closer to the legal line will generate more uncertainty about outcomes, and are thus more likely to be litigated. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984) (explaining that in clear-cut cases, since the verdict is generally expected, parties tend to compromise; in contrast, when the case is close, parties may anticipate different verdicts and disagree as to the proper amount of the settlement). The Supreme Court’s selection of cases involving important questions of law and circuit splits only amplifies that selection effect. See SUP. CT. R. 10 (“[A] writ of certiorari will be granted only for compelling reasons.”).

44. *Youngstown*, 343 U.S. at 637.

45. Cf. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (“The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”).

46. William N. Eskridge Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68–69 (1994).

scales.<sup>47</sup> Substantive canons commonly give effect to constitutionally inspired (if not compelled) values such as the availability of judicial review<sup>48</sup> and individual rights.<sup>49</sup> Pertinent here, the Court has applied canons in favor of federalism<sup>50</sup> and Article II presidential autonomy.<sup>51</sup> The resolution of disputes between the federal government and the states can implicate both federalism and foreign affairs concerns and therefore trigger the application of competing, even diametrically opposed, canons.<sup>52</sup> As we show below, the Court more often than not brokers these disputes in favor of presidential authority, although not always. Precedent yields no obvious pattern.

This Part organizes jurisprudence in the zone of twilight by substantive policy area. It first addresses immigration law, then economic policy disputes, and finally treaty-related controversies.

### *B. Oscillating Positions in Federal Immigration Law*

Consider first the Court's erratic path on immigration matters. The 1941 case of *Hines v. Davidowitz* concerned Pennsylvania's Alien Registration Act, which required specified aliens over the age of eighteen to register with the state, pay an annual registration fee of

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47. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2111 (1990) (noting canon's reliance on "something external to legislative desires"); accord William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (noting that clear statement rules protect constitutional values that otherwise would not be directly judicially enforced). See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316–17 (2000) (detailing the operation and advantages of canons that serve nondelegation principles).

48. See, e.g., *Demore v. Kim*, 538 U.S. 510, 517 (2003) (requiring a clear statement from Congress before eliminating jurisdiction to review an agency action).

49. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500–01 (1979) (requiring a clear statement of statutory authority for an agency action that impinged on First Amendment interests).

50. See *Gregory v. Ashcroft*, 501 U.S. 452, 467–70 (1991) (using a clear statement rule to shield states' ability to determine the forms of their own government structures, a federalism value not directly enforced by the Court); accord *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (requiring clear statement with respect to jurisdiction over navigable waters).

51. See *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (construing the Federal Advisory Committee Act narrowly lest it "infring[e] unduly on the President's Article II power to nominate federal judges and violat[e] the doctrine of separation of powers"). For a general defense of a pro-presidential canon on institutional competence grounds, see Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1224 (2007).

52. For a claim in a classic article published in these pages to the effect that this is endemic to the operation of legal canons, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (contending that "there are two opposing canons on almost every point").

one dollar, and carry an alien identification card at all times on penalty of fines or imprisonment.<sup>53</sup> By contrast, the relevant federal statute, the Alien Registration Act, which contained no express preemption provision, required solely that all aliens over the age of fourteen register, provide information, and submit to fingerprint identification. It did not require an alien to carry his or her identification card or produce it upon request, and it imposed criminal sanctions only for willful failures to comply.<sup>54</sup> Despite the absence of explicitly preemptive statutory text, the *Hines* Court held that Congress intended to “occupy the field” via a comprehensive regulatory framework to regulate naturalization, a power specifically delegated to Congress in the Constitution.<sup>55</sup> In so doing, the Court pointed to the “possible international repercussions” of state registration laws.<sup>56</sup> And it left no doubt as to how it viewed the default allocation of regulatory authority: “The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”<sup>57</sup>

The next time the Justices addressed an immigration-related foreign affairs federalism conflict, however, they set the default in favor of the states. The 1976 case of *De Canas v. Bica*<sup>58</sup> concerned a California statute that prohibited employers from employing aliens who could not demonstrate that they were lawfully in the United States if their employment had a negative or “adverse effect” on the employment opportunities of lawful residents.<sup>59</sup> After *Hines*, the argument that the federal immigration law ousted state regulation from the field<sup>60</sup> might have seemed strong. Instead, the Court began by describing in sweeping terms state police power over regulation of

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53. *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941) (describing Pennsylvania law).

54. *Id.* at 60–61.

55. *Id.* at 62–64.

56. *Id.* at 64 n.12.

57. *Id.* at 63. Later in the opinion, the Court conceded that it had previously “made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick.” *Id.* at 67.

58. 424 U.S. 351 (1976).

59. CAL. LABOR CODE § 2805(a), *repealed by* 1988 Cal. Stat., ch. 946, § 1 (stating, in relevant part, that “[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers”).

60. *See De Canas*, 424 U.S. at 352–54 (rehearsing this argument).

employment relationships.<sup>61</sup> Against this backdrop, California's prohibition of "the knowing employment by California employers of persons not entitled to lawful residence in the United States . . . certainly [fell] within the mainstream of such police power regulation."<sup>62</sup> Evincing a presumption in favor of state concern, the Court demanded a "clear and manifest purpose of Congress" to oust California's law.<sup>63</sup>

*Arizona v. United States*<sup>64</sup> continues this oscillation. During the 2011 term, the Court, acting in harmony with *De Canas*, applied a presumption against the ouster of state immigration regulation where there was no explicit federal statutory direction. The Court emphasized the "high threshold [that] must be met if a state law is to be preempted for conflicting with the purposes of a federal Act."<sup>65</sup> Yet—as we explained in the Introduction—Justice Kennedy's *Arizona* majority opinion treated *Hines*, not *De Canas*, as instructive guidance on the sensitive foreign affairs concerns of the national government with respect to immigration.<sup>66</sup>

### C. Conflicts in Economic Regulation

Three lines of cases concern state and federal regulatory efforts in what might be loosely termed "economic matters." The first arose against the backdrop of conflict with the Soviet Union. The second emerged from more recent, and more localized, foreign policy conflicts. The final series stemmed from the Court's analysis of the dormant Foreign Commerce Clause power.

The first wave of cases arose in response to the 1918 Soviet nationalization and appropriation of all assets held by Russian companies anywhere in the world. In 1933, President Roosevelt negotiated an agreement with the Soviet Union—the Litvinov Agreement—executed through an exchange of letters with the Soviet Foreign Commissar. In relevant part, the Agreement resolved all outstanding claims by citizens and corporations of the United States and the Soviet Union and required the assignment to the United

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61. *Id.* at 356 ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State.").

62. *Id.*

63. *Id.* at 357.

64. 132 S. Ct. 2492 (2012).

65. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)).

66. See *Arizona*, 132 S. Ct. at 2498–99 (discussing the connection of immigration and foreign affairs concerns).



States of all amounts due to the Soviet Union.<sup>67</sup> Consistent with the Agreement, the United States brought actions in federal district court to confiscate the nationalized Russian assets held in New York.<sup>68</sup> New York law, however, treated the Soviet nationalization as an invalid act of confiscation, thus teeing up a conflict with federal law.<sup>69</sup> The Supreme Court in *United States v. Pink*<sup>70</sup> and *United States v. Belmont*<sup>71</sup> easily resolved that conflict in favor of federal authority. As the *Belmont* Court pithily stated, “[T]he external powers of the United States are to be exercised without regard to state laws or policies.”<sup>72</sup> If doubt persisted about the locus of the applicable default rule, it added that “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally . . . the state of New York does not exist.”<sup>73</sup>

This powerful presumption in favor of federal executive action also helped resolve a 1968 challenge to an Oregon property law. The state statute at issue in that case provided for escheat to the state when a nonresident alien claimed real or personal property as an heir of an Oregon resident unless, inter alia, the alien nation allowed U.S. nationals to inherit.<sup>74</sup> In *Zschernig v. Miller*, the Court invalidated the application of Oregon’s law to an East German national. Invoking *Hines*, the Court summarily dispatched the state statute as “an intrusion . . . into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”<sup>75</sup>

State economic regulation fared no better in the second line of cases, which arose in the last two decades over more localized

67. Exchange of Communications Between the President of the United States and Maxim M. Litvinov People’s Commissar for Foreign Affairs of the Union of Soviet Socialist Republics (Nov. 16, 1933), reprinted in 28 AM. J. INT’L L. 2 (Supp. 1934).

68. E.g., *United States v. Pink*, 315 U.S. 203, 213 (1942).

69. See *United States v. Belmont*, 85 F.2d 542, 544 (2d Cir. 1936) (describing New York policy).

70. 315 U.S. 203 (1942).

71. 301 U.S. 324 (1937).

72. *Id.* at 331.

73. *Id.* at 331–32; see also *id.* (“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.”).

74. *Zschernig v. Miller*, 389 U.S. 429, 430–31 (1968) (describing Oregon law). The Court had previously upheld such state property rules against a facial challenge. See *Clark v. Allen*, 331 U.S. 503 (1947).

75. *Zschernig*, 389 U.S. at 432; see also *id.* at 435 (warning against “minute inquiries concerning the actual administration of foreign law . . . [and] the credibility of foreign diplomatic statements”). In other instances in which state regulation of alien property holdings had come before the Court, Congress had entered treaties to resolve such property disputes. See, e.g., *Kolovrat v. Oregon*, 366 U.S. 187 (1961) (ousting Oregon law based on treaty with Yugoslavia).

questions of foreign economic relations. In *Crosby v. National Foreign Trade Council*, the Court affirmed the preemption of a 1996 Massachusetts statute barring state agencies from purchasing most goods and services from entities designated by the state as doing business with Burma.<sup>76</sup> Three months after the Burma law's passage, Congress enacted rules concerning Burma (including delimited sanctions), restrictions on Burmese officials' ability to enter the United States, and prohibitions on new investment in Burma by "United States persons."<sup>77</sup> It directed the President to create "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma" and authorized the White House to waive sanctions if the "national security interests of the United States" so warranted.<sup>78</sup> Despite the absence of any express preemptive statutory text, the Court identified the Massachusetts Burma law as "an obstacle to the accomplishment of the Congress's full objectives under the federal act."<sup>79</sup> That is, it presumed "state law [was] *naturally* preempted to the extent of *any* conflict with a federal statute,"<sup>80</sup> even if they aimed for the same goal.

Three years later, the Court in *American Insurance Ass'n v. Garamendi* struck down as preempted a California statute imposing on insurance companies a set of disclosure obligations pertaining to obligations to Holocaust victims.<sup>81</sup> *Garamendi*, unlike *Crosby*, involved no federal statute, but solely an agreement signed by the President and the German Chancellor.<sup>82</sup> That is, there was again no *statutory* preemption. Citing *Crosby*, the *Garamendi* majority explained that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy" on foreign relations, including exercises of the President's "independent authority."<sup>83</sup> Despite the absence of an on-point statute and the lack of a preemption clause in the relevant presidential agreement—"[leaving the] claim of preemption to rest on asserted interference with the

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76. 530 U.S. 363, 366–67 (2000) (describing the so-called "Burma law" enacted by Massachusetts).

77. See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, enacted by the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009 (1996).

78. *Crosby*, 530 U.S. at 369–70 (quotation omitted).

79. *Id.* at 373.

80. *Id.* at 372 (emphases added).

81. 539 U.S. 396 (2003).

82. Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-Ger., July 17, 2000, 39 I.L.M. 1298.

83. *Garamendi*, 539 U.S. at 413–14.

foreign policy”<sup>84</sup>—the Court held that California’s statute was displaced. It reasoned that any “likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law.”<sup>85</sup>

Finally, there is a third line of cases concerning state economic regulation that touches on international trade in ways that are inconsistent with congressional authority to regulate commerce “with foreign nations.”<sup>86</sup> Two exemplary cases merit attention here. First, in *Japan Line v. County of Los Angeles*, the Court invalidated an *ad valorem* property tax on foreign shipping that risked multiple taxation.<sup>87</sup> As in *Garamendi*, this ouster required no congressional action, and no salient affirmative constitutional text existed. Rather, the Court held that the fact that “[the subnational tax] prevent[ed] the Federal Government from speaking with one voice when regulating commercial relations with foreign governments” sufficiently warranted preemption.<sup>88</sup> In a later case, however, the Court declined to preempt a controversial California corporate-tax rule that calculated net income based on global assets.<sup>89</sup> Formally applying the doctrinal logic of *Japan Line*’s “one voice” test, Justice Ginsburg’s majority opinion in substantial effect inclined instead toward a more pro-state and antifederal position. She explained that in the absence of “specific indications of congressional intent,” no ouster of state law was warranted.<sup>90</sup> Such a clear statement rule in effect shifts the presumption in favor of the states and imposes a burden of persuasion on those who favor centralized federal control.

#### D. *The Vienna Convention and Capital Punishment*

Treaties, as well as statutes, can cast penumbras that touch on state law. In grappling with that conflict in the capital punishment domain, the Court has strongly favored state control.<sup>91</sup> For example, in

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84. *Id.* at 417.

85. *Id.* at 420. The Court here was paraphrasing Justice Harlan, but doing so approvingly.

86. U.S. CONST. art. I, § 8, cl. 3. For a useful survey of the doctrine, see Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 966 (2010).

87. *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434 (1979) (invalidating application of *ad valorem* property tax on foreign shipping).

88. *Id.* at 453–54. For an early, nonfatal application of the “one voice” test, see *Wardair Canada, Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 9–13 (1986) (finding no uniform federal policy).

89. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 331 (1994).

90. *Id.* at 324.

91. So much is also evident from pre-*Medellín* cases that declined either to regulate directly state court criminal procedure or to oust procedural bars in habeas litigation pursuant to

*Medellín v. Texas*<sup>92</sup> the Supreme Court addressed a conflict between the state's capital punishment regime and the United States' obligations under the Vienna Convention on Consular Relations ("VCCR"). *Medellín* arose in the wake of the International Court of Justice's ("ICJ") judgment in the *Case Concerning Avena and Other Mexican Nationals*, where the ICJ interpreted the United States' obligations under the VCCR when an individual's treaty-guaranteed right to consular access has been violated by one of the several states.<sup>93</sup> The ICJ in *Avena* held that VCCR entitled such individuals to "review and reconsideration" of their convictions.<sup>94</sup> When a Texas tribunal denied one of *Avena's* beneficiaries, Ernesto Medellín, such reconsideration, President George W. Bush issued a memorandum to the U.S. Attorney General directing the United States to "discharge its international obligations . . . by having State courts give effect to the [*Avena*] decision."<sup>95</sup> As presented to the Supreme Court, the litigation turned on a conflict between presidential implementation of a treaty and state control of its postconviction-procedure rules.<sup>96</sup> The ensuing judgment in favor of Texas turned largely on a reticulated (and much-contested) point of treaty-related doctrine: the idea that treaties are not "self-executing," in the sense of creating domestic legal obligations, absent a clear statement to that effect.<sup>97</sup> Effectively treating that presumption as a way of proxying for congressional intent, the Court found the presidential memo fell into Justice Jackson's category of

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the Vienna Convention on Consular Relations ("VCCR"). *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *accord* *Breard v. Greene*, 523 U.S. 371 (1998).

92. 552 U.S. 491 (2008).

93. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31). The *Sanchez-Llamas* Court declined to find authority in the VCCR for the judicial imposition of a suppression remedy, in effect applying a pro-federalism default rule. 548 U.S. at 346–47. On grounds not salient here, it also declined to treat International Court of Justice decisions as binding. *Id.* at 353–54.

94. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 65–66 (Mar. 31):

[T]he Court is of the view that, in cases where the breach of the individual rights of Mexican nationals under Article 36, paragraph 1 (b), of the Convention has resulted . . . the legal consequences of this breach have to be examined and taken into account in the course of review and reconsideration. The Court considers that it is the judicial process that is suited to this task.

95. *Medellín*, 552 U.S. at 498.

96. *Id.* at 503–04.

97. *Id.* at 504–13 (searching for congressional intent of self-execution respecting the Convention and effectively imposing a default rule of nonexecution); *accord* *Sanchez-Llamas*, 548 U.S. at 347 ("[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.").

direct conflicts between legislative and executive wills, rather than the zone of twilight articulated in *Youngstown*.<sup>98</sup>

At least with respect to treaties' federalism-related implications, a presumption against self-execution operates as a default rule favoring states' interests. Moreover, the *Medellín* Court explicitly pointed to states' interests in controlling their criminal procedures to justify its conclusions. Chief Justice Roberts thus cautioned against federal acts that reached too "deep into the heart of the State's police powers."<sup>99</sup> Citing federal habeas corpus precedent, the Court insisted that "[s]tates possess primary authority for defining and enforcing the criminal law."<sup>100</sup> It thus insisted that state procedural-default rules apply absent a "clear and express statement" to the contrary.<sup>101</sup>

The Court applied this presumption notwithstanding the possibility that a given state's policy decisions might have externalities for the whole United States, in the form of increased foreign policy complications. Despite the public-good character of the national-security interest at stake in *Medellín* and the other cases described here, the interest in maintaining a federal balance still prevailed.<sup>102</sup>

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This review of foreign affairs federalism jurisprudence reveals an absence of any coherent principle operating across the cases. Some rules of thumb nonetheless emerge from the overview of case law. The federal government, for example, generally tends to prevail when economic issues are in play (but not always); states tend to win when their criminal justice systems might be affected; and immigration-related cases reveal wild oscillations. These results admit of no simple principled explanation. At a minimum, therefore, it seems fair to conclude the Supreme Court has failed to supply a principled doctrinal test to interpret underdetermined or ambiguous congressional directives in this domain.

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98. *Medellín*, 552 U.S. at 524–32 (analyzing *Youngstown* question).

99. *Id.* at 532

100. *Id.* (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

101. *Id.* at 517 (citation omitted).

102. *Medellín* is not the only case in this area of law. See also *Sanchez-Llamas*, 548 U.S. at 331; *accord* *Breard v. Greene*, 523 U.S. 371 (1998).

## II. FOREIGN AFFAIRS FEDERALISM DILEMMAS: A CRITIQUE OF THE EXISTING SOLUTIONS

This Part examines the leading scholarship analyzing how judges should resolve deadlocks between federalism and foreign affairs interests in the absence of a dispositive constitutional, statutory, or treaty-derived rule. Broadly speaking, the literature yields two strategies that can be usefully labeled as formalism and functionalism. The formalist strategy relies on the original meaning of (or inferences from) the constitutional text to identify categorical rules for allocating regulatory authority. This approach yields “a fixed set of rules and not by reference to some purpose of those rules.”<sup>103</sup> By contrast, a functionalist approach focuses on consequences. It begins with a set of values or goods singled out by the Constitution as particularly important. Then, it aims to develop workable, general rules “designed to advance th[ose] ultimate purposes of” the Constitution.<sup>104</sup> Functionalists tend to be more sensitive to questions of institutional choice and less concerned with the role of history than formalists.

Profound theoretical disagreements about the status and binding force of the Constitution as law engender and maintain this divide.<sup>105</sup> We do not aim here to resolve these disagreements; to do so would take us far beyond this Article’s ambit. Instead, we use the formalist and functionalist labels as useful labels, which link the theories under discussion here to larger bodies of jurisprudential thought. In our view, the labels fairly capture the salient attributes of the two approaches to be found in the literature. Our modest goal in this Part is to sketch and then critique the existing positions in the limited domain of foreign affairs federalism using that familiar set of labels as organizing devices.

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103. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1138 (2000). The functionalist/formalist divide is familiar from debates on the separation of powers, and we adapt it *mutatis mutandi* for use here because it provides a useful set of labels for organizing the existing literature.

104. Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 231.

105. Theories of constitutional interpretation differ on what the source of authority is for a judge’s action—the historical fact of ratification or contemporary acceptance of the Constitution. See Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 627–40 (2008) (discussing problems of constitutional authority). Theories also differ as to how much discretion judges should possess. See J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY* 11–103 (2012) (describing and critiquing several leading theories of constitutional interpretation on the ground that they endow judges with too much authority). These two questions—on whose authority, and by which institution?—can usefully be understood as organizing (if implicitly) questions in ongoing debates on constitutional hermeneutics.

We make two central points. First, at least with respect to foreign affairs federalism, the formalist approach quickly runs up against inherent limitations and yields paradoxical results. We accordingly reject it as a viable approach in this domain. Second, we examine the two leading functionalist solutions, associated with Professors Jack Goldsmith and David Sloss. Both, we believe, make important and penetrating points. Nevertheless, we will endeavor to show how their analyses are incomplete and their bottom-line positions untenable. While gleaning much from their work, we offer a critique here that provides a foundation for the construction of our second-generation functional account of foreign affairs federalism discussed in Parts III and IV.

### A. Formalist Approaches

Justice Scalia's dissenting opinion in *Arizona v. United States* succinctly encapsulates the formalist approach.<sup>106</sup> Drawing on Founding-era sources, his dissent proffers this categorical rule grounded on "inherent" first principles of "sovereignty": "[a state] has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress."<sup>107</sup> To sustain this conclusion, Justice Scalia draws further on constitutional text—implicitly invoking the canon of *expressio unius est exclusio alterius*—to read Article I, Section 10's enumerated limits on state sovereignty as exhaustive.<sup>108</sup> Scholarly accounts of the formalist argument draw on those same sources, contending that "the preemptive force of the national government arises from Article VI and from specific exclusionary clauses precluding state power" while denying the existence of a "generalized, non-Article VI preemption in foreign policy matters."<sup>109</sup> Recognizing that "state interference in foreign affairs may have negative repercussions and may . . . even be on the whole a bad idea," formalists nonetheless insist that absent evidence that the Framers'

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106. *Arizona v. United States*, 132 S. Ct. 2492, 2511–22 (2012) (Scalia, J., dissenting).

107. *Id.* at 2511.

108. *Id.* at 2512. Justice Scalia also relied on a postenactment history of immigration control by the states. *Id.* at 2512–13. For this reason, Scalia's approach cannot be glossed in terms of textualism, but is better understood as an effort to derive formal categories from a combination of text, interpretive principle, and history.

109. Ramsey, *supra* note 27, at 346; accord MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 264–82 (2007) (setting forth the basic structural and historical argument); *id.* at 288–99 (extending that argument to claims of executive preemption).

original solution is “so structurally irrational that no reasonable person could accept it,” it remains binding.<sup>110</sup>

This Section develops reasons for resisting the formalist approach. Although our own general methodological priors tilt in favor of functionalism, we aim here to present objections that do not simply reiterate those priors. Moreover, we emphasize that our rejection of the formalist approach is not a backwardly induced consequence of objections to its substantive conclusions. As will become clear, the outputs from our proposed functionalist solution converge, to some extent, with those of the leading formalist account.

The formalist position—best developed in a careful and comprehensive article by Professor Ramsey—rests primarily on twin claims about history and text. First, it asserts that Presidents possessed limited foreign affairs authority pursuant to the Constitution’s original design.<sup>111</sup> Second, it asserts that the Constitution supplies “no obvious text” on which to base a broad power of executive preemption.<sup>112</sup> We argue here that both claims are debatable on the formalists’ own terms. In addition, we suggest a third reason to repudiate formalism as a way to resolve the foreign affairs federalism problem: formalism fails to explain how to “translate” claims about eighteenth-century institutions into the twenty-first century context.

Consider some objections to formalist accounts. First, scholars reasonably disagree about the historical scope of independent presidential foreign affairs authority at the Founding.<sup>113</sup> There is no easy way to resolve these disputes, and we doubt that judges are uniquely well placed to select “winners.” Historical claims about foreign affairs federalism *as a practical matter* do less to resolve legal questions than to reframe them as open-ended debates over ambiguous historical practices and fragmentary textual evidence. Rather than resolving hard questions, adopting a formalist approach

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110. Ramsey, *supra* note 27, at 346–47.

111. *Id.* at 396–403 (arguing 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”).

112. *Id.* at 391.

113. Compare PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 10–46 (2002) (advocating broad view of presidential authority), with Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551–52 (2004) (arguing against a broad view on textualist and historical grounds); accord Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006) (examining the executive’s constitutional authority in formal foreign affairs and his ability to compel compliance).



merely expands the pool of conflicting evidence by shifting the terrain of debate.<sup>114</sup> Formalists' implicit assumption that Founding-era sources converged on a single answer is also vulnerable in light of the extensive, elaborate, and internally contradictory evidence they themselves have surfaced, which attests to the existence of plural—even competing—original meanings.

A historical lens on foreign affairs federalism questions, moreover, creates paradoxes within the originalism frame. For example, the leading formalist advocate of states' primacy in foreign affairs federalism, Professor Ramsey, is also a leading advocate of ambitious readings of presidential foreign affairs authority.<sup>115</sup> To resolve the conflict between his strong claims on behalf of both the President and the states, Professor Ramsey explains that “[t]he President’s power is executive, which means, above all else, that it is not legislative” and so cannot include “executive lawmaking power.”<sup>116</sup> This distinction hardly avails judges confronted by actual conflicts. As Chief Justice Rehnquist acutely observed in another context, the use of “rigid categories” like “executive” and “legislative” offers little resolving power when applied to the complex and dynamic forms of contemporary government.<sup>117</sup> Rather than addressing the underlying problem, formalism generates a category-based rule whose application is likely to yield arbitrary and ad hoc results, or alternatively, work merely to obscure the application of first-order value judgments by judges.

The second, textual element of foreign affairs formalism fares no better. “Supremacy Clause textualism,” as it has been insightfully labeled by Professor Henry Monaghan, is the idea that “the Supremacy Clause is a trump, a decisive factor in constitutional adjudication that (ordinarily) overrides every other consideration.”<sup>118</sup>

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114. See Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 781 (2010) (“[A]ll forms of originalism seem . . . to assume much greater clarity about the original understanding than in fact existed.”).

115. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 234 (2001) (arguing that “the Constitution establishes a presumption that the President will enjoy those foreign affairs powers that were traditionally part of the executive power”); *cf. id.* at 255 n.97 (bracketing federalism concerns).

116. RAMSEY, *supra* note 109, at 289.

117. *Morrison v. Olsen*, 487 U.S. 654, 689–90 & n.28 (1988).

118. Monaghan, *supra* note 114, at 734, 740. For examples of Supremacy Clause textualist claims, see Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330 (2001) (arguing that “the Supremacy Clause recognizes only the ‘Constitution,’ ‘Laws,’ and ‘Treaties’ of the United States as ‘the supreme Law of the Land’ ”); see also RAMSEY, *supra* note 109, at 285–86; accord Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421, 1424–25 (2008) (arguing federalism is designed to give political minorities power to prevent constitutional changes).

It limits the domain of binding federal law to constitutional text, statutes, and treaties. In foreign affairs, Supremacy Clause textualism requires repudiating the use of sole executive agreements,<sup>119</sup> as well as restraining other forms of presidential authority, absent an enacting statute or treaty. In the domestic context, it entails denying legal force, at least in some instances, to the principle of stare decisis, federal common law, and federal regulation.<sup>120</sup> Quite apart from the cogent methodological criticisms of Supremacy Clause textualism others have developed,<sup>121</sup> we find it improbable as a predictive matter that the Court will embark on so radical a path. The practice of judicial review cannot be untangled from its surrounding political and institutional contexts.<sup>122</sup> Historical experience makes it abundantly clear that the Justices' reach is necessarily tempered by willingness of elected actors—wielding appointments and jurisdictional control—to accept the exercise of judicial power.<sup>123</sup> Simply put, Justices are hedged in with plural *ex ante* and *ex post* institutional constraints by the political branches. It is impossible to imagine the Court abandoning all of the aforementioned features of our legal system as advocated by Supremacy Clause textualists, if only because of the sheer disruption to accepted practice it would cause. A claim about constitutional interpretation that is impossible to implement in practice supplies thin guidance to current federal courts.<sup>124</sup>

Our third objection concerns the relationship between claims about eighteenth-century institutional arrangements and twenty-first-century doctrine. Many problems in constitutional interpretation require courts to grapple with novel social, institutional, or

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119. Clark, *supra* note 27, at 1575–76; accord Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 240 (1998).

120. Monaghan, *supra* note 114, at 756–65.

121. In particular, we find Professor Monaghan's elegant brief against Supremacy Clause textualism to be devastating. *Id.* at 756–81.

122. See Aziz Z. Huq, *Enforcing (but not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001 (2012) (analyzing enforcement-litigation gaps in terms of their effect on constitutional values).

123. *Id.*; see also Aziz Z. Huq, *When Was Judicial Restraint?*, 100 CALIF. L. REV. 579 (2012) (charting and explaining historical development of judicial review in terms of changing national political forces). To be clear, we do not deny that the relevant institutional equilibrium is general and not specific to particular cases. The Court thus often has considerable retail discretion, and we also do not deny that the scope of this retail discretion is a function of how capable of responding the political branches are, which might change over time.

124. Cf. Gillian Metzger, *The Constitutional Legitimacy of Freestanding Federalism*, 122 HARV. L. REV. F. 98, 105 (2009) (arguing against the rejection of nontextual sources of constitutional meaning on the ground that “the costs associated with [the resulting] disruption to settled practice and precedent outweigh the asserted benefits of respecting constitutional processes and compromise”).

technological developments. Examples include the interaction of new technology with the Fourth Amendment<sup>125</sup> and the developing understanding that flogging, a punishment considered acceptable at the Founding, is cruel and unusual.<sup>126</sup> In the foreign affairs context, “the nature of international relations, and of the United States’ role in such relations, ha[s] changed dramatically.”<sup>127</sup> In response, the federal executive developed over time military, diplomatic, and epistemic competences that citizens of the early Republic could not have imagined.<sup>128</sup> Today’s executive branch is just a wholly different entity from the skeletal staff that President Washington directed. History has disrupted, and in some cases wholly transformed, categories such as foreign and domestic, military and civilian, and war and peace, upon which legal formalism tends to rely.

Further, the current understanding of federalism is dramatically different; the Founding-era “belief that the division of authority among levels of government should be determined according to the subject matter at issue”<sup>129</sup> contrasts with the contemporary impossibility of drawing cogent and coherent divisions.<sup>130</sup> To assume categorical rules that worked a certain way under the dramatically different institutional and geopolitical circumstances of the late eighteenth century can be mechanically imposed on twenty-first-century institutions to the same effect and for the same reasons is to make a large number of potentially unjustified assumptions.

The obligation to honor Founding-era principles under new circumstances poses a challenge to the formalist jurist who seeks “fidelity” to original understandings. Inevitably, she will find that her normative commitments applied mechanically to new conditions can generate erratic and even perverse results.<sup>131</sup> Growing executive

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125. See, e.g., *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that police attachment of a GPS tracker to a vehicle’s undercarriage was a search for Fourth Amendment purposes).

126. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–82 (1989) (discussing, and rejecting, the constitutionality of flogging as used at the time of the Founding on Eighth Amendment grounds).

127. Goldsmith, *Federal Courts*, *supra* note 29, at 1663; accord Schaefer, *supra* note 27, at 220–21 (asserting that a dormant foreign affairs doctrine makes sense in a post–Cold War environment).

128. For a general account of relevant institutional trends, see Aziz Z. Huq, *Imperial March*, DEMOCRACY, Winter 2008, at 44, 46–53 (summarizing historical trends).

129. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 7 (2010).

130. See Roderick Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 815 (1998) (describing the demise of dual-sovereignty theories).

131. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 403 (1995) (“[I]n at least some cases, a changed reading could be consistent with fidelity. For some changed readings simply accommodate changes in context, by aiming to find a

foreign affairs power, for example, might be commensurate with and necessary to the robust defense of the Union that the Framers defended and desired.<sup>132</sup> But at the same time it might also undermine the appropriate balance of powers in the federal system.<sup>133</sup> Goals that the Framers saw as equally important are now achieved by making very different sorts of institutional design choices. Or consider how the growing complexity of governance and increasing frequency of emergencies in foreign affairs may push Congress toward increasingly generous delegations of policy authorities, while at the same time unraveling side constraints on the exercise of executive authority such as congressional-oversight mechanisms.<sup>134</sup> As a result, “the executive . . . drives the policy agenda even where the cooperation of other branches is needed for political reasons.”<sup>135</sup> It is not clear this tendency can be checked without limiting the federal government’s capacity for effective action in the national-security and foreign affairs domains.

In short, whereas the Framers could achieve multiple goals, including efficiency and antityranny ends, in 1787 simply by enforcing a rule of clear separation between Congress and the executive, today those aspirations sometimes push simultaneously in opposite directions. And where the Framers perceived the possibility of a stable institutional equilibrium under the specific rules delineated in the 1787 Constitution, historical, socioeconomic, and institutional changes have created new conflicts between policies designed originally to work in tandem to secure constitutional goods. Worse, the deliquescence of Founding-era intellectual certainties about the use of subject-matter demarcations between the states and the federal government means that it is no longer clear when or how federal actions impinge on state autonomy. In ways that cannot be undone,

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reading in the new context that has the same meaning as a different reading had in a different context.”).

132. See PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814*, at 95 (1993) (“The move toward federal union followed from the failure of confederal arrangements to guarantee harmony among the states and Congress’s resulting inability to conduct foreign policy.”).

133. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1727 (1996) (noting the Framers’ focus on Congress as the most dangerous branch, but then observing that “[n]ever has the executive branch been more powerful, nor more dominant over its two counterparts, than since the New Deal”).

134. For a useful account of how congressional oversight has foundered in respect to intelligence issues, see AMY B. ZEGART, *EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 55–84* (2011).

135. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 8–12* (2010).

time has sapped the intellectual foundations for many of the justifications for legal formalism in respect to foreign affairs matters.

The transformative effect of historical and institutional dynamics can render the endeavor of identifying categorical rules in the Constitution's text either irrelevant or at odds with some of the Framers' goals. In a world of broad delegations and frequent foreign affairs emergencies, for example, the distinction between legislation and execution of the law loses much of its coherence. It fails to account for the complexity of government action and does little to advance the values embodied in the original design. Furthermore, formalists face an especially high justificatory burden in explaining why their (highly contentious) version of fidelity to original meaning should trump the immediate and compelling claims of those whose interests the constitutional status imperils. The dead-hand problem immanent in originalism is thus amplified in foreign affairs.<sup>136</sup>

Therefore, we find little reason to recommend a formalist solution to problems of foreign affairs federalism. Rather, we submit that until its advocates pay sufficient attention to its internal paradoxes, its inconsistencies with current, broadly accepted practices, and its deep normative difficulties, formalism will remain an unattractive, ultimately unviable, approach. It is far better to grapple openly with the practical problems of translating constitutional goals identified in 1787 under the radically different institutional and geopolitical conditions of today.

### *B. Functionalist Approaches*

The functionalist view offers a more promising solution to problems of foreign affairs federalism. The functionalist endeavors to craft doctrinal rules of decision so as to maximize the attainment of constitutional goods. Functionalists endeavor to attend closely to institutional dynamics and predict how doctrinal assignments of authority will either promote or subvert commonly shared goals.<sup>137</sup>

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136. See generally Samaha, *supra* note 105, at 609 (elaborating problem).

137. See, e.g., Julian Ku & John Yoo, Hamdan v. Rumsfeld: *The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 200 (2006) (arguing that the executive branch's ability to act on new information absent a new case makes that branch better suited to foreign affairs powers); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 154–55 (engaging in a “functionalist” approach by relying on institutional competence arguments); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 865 (2007) (“In emergencies, and in the areas of foreign policy and national security, even more discretion flows to the executive because its institutional advantages in speed, decisiveness, force, and secrecy become pronounced, and because power must be concentrated to meet threats.”). Many

Rather than pursuing fidelity to the Constitution through rigid, ex ante categorical suppositions, functionalists seek fidelity by identifying the institutional and doctrinal conditions under which the goals of the Constitution are most likely to be met under today's exigencies.

In the context of foreign affairs federalism, functionalism supplies a methodological toolkit superior to formalism. We offer here our own functionalist analysis. Ours, however, is not the first such endeavor; it is therefore incumbent on us to explain why existing functionalist approaches leave room for further analysis. Professors Jack Goldsmith and David Sloss offer the two leading functionalist accounts.<sup>138</sup> Both provide important services by casting light on necessary elements of a plausible functionalist analysis. Nevertheless, in the balance of this Part, we explain why neither of these two approaches adequately responds to the question addressed here: What is the appropriate judicial presumption absent clear constitutional, statutory, or treaty-based instructions in cases at the intersection of federal affairs and federalism?

### 1. The “No-Presumption” Presumption

Consider first Professor Goldsmith's influential functionalist account of foreign affairs federalism. In his study of the Supreme Court's decision in *Crosby v. National Foreign Trade Council*,<sup>139</sup> Goldsmith cannily zeroes in on the important question of what “the proper interpretative default presumption” should be in the absence of authoritative textual directions.<sup>140</sup> Finding no justification for either a pro-federal or a pro-states presumption, he contends instead that the “prudent course is for courts to apply ‘ordinary’ principles of preemption without any presumption in favor of state or federal law,”

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functionalist arguments are little more than a recitation of the claim that the executive always knows best. For a skeptical view of that claim, see Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904–18 (2012).

138. A third functionalist inquiry, offered by Professor Schaefer, “would ask if the primary purpose of the state law is to change or criticize the policy of a foreign government or governments.” Schaefer, *supra* note 27, at 248–49. Absent some reason to think that legislative motivations have an independent normative salience—as they arguably do in discrimination law and the First Amendment—it is hard to discern a reason for organizing the jurisprudence around so empirically slippery and analytically discredited a concept as legislative purpose. *Cf.* Kenneth A. Shepsle, *Congress Is a ‘They,’ Not an ‘It’: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (arguing that because Congress is comprised of many individuals with diverse motivations, legislation rarely has a singular joint goal).

139. 530 U.S. 363 (2000).

140. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 29, at 177.

and to “preempt state law only on the basis of choices traceable to the political branches in enacted law.”<sup>141</sup>

This nuanced and careful argument requires some unpacking. In the first step of Goldsmith’s analysis, he rejects as unfounded both the presumption against preemption and the presumption in favor of federal control of foreign affairs. Goldsmith bases these dual rejections partly on the difficulty of reconstructing congressional intent related to preemption. Further, he argues, foreign affairs and domestic questions are so entangled that it cannot be assumed federalism will always be beneficial.<sup>142</sup> The second step of Goldsmith’s analysis assimilates rejection of these presumptions with what he labels a “flight *toward* statutory interpretation.”<sup>143</sup> Courts engaging in statutory interpretation “eliminate from their bag of interpretive sources any independent judicial consideration of the foreign relations consequences of federalism.”<sup>144</sup> They also “preempt state law only when the justification for preemption is fairly traceable to . . . the federal political branches.”<sup>145</sup> Consistent with positions developed elsewhere in his extensive corpus of scholarship,<sup>146</sup> Goldsmith asserts that the political branches tend to strike a desirable balance and that judicial intervention will do more harm than good in foreign affairs.<sup>147</sup> Applying this approach to the specific facts of *Crosby*, he identifies Justice Souter’s opinion as an exemplar of his preferred minimalist approach and endorses its analytic approach, which is characterized as being rooted “self-consciously to the text and purposes of the statute.”<sup>148</sup>

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141. *Id.*

142. *Id.* at 181–95.

143. *Id.* at 201.

144. *Id.* at 201, 208.

145. *Id.* at 213.

146. *Cf.* Goldsmith, *Federal Courts*, *supra* note 29, at 1668 (denying judicial competence in foreign affairs matters); *id.* at 1680–98 (“There is little reason to think that state control over matters not governed by enacted federal law affects U.S. foreign relations in a way that warrants preemption . . . . The political branches are quite capable of identifying and responding to any adverse consequences of [state] behavior.”).

147. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 29, at 210 (claiming that it is difficult for “courts to identify and weigh genuine U.S. foreign relations interests and to balance the trade-offs of those interests against the benefits of state control”).

148. *Id.* at 215–21. To the extent that Goldsmith can be read to suggest that *Crosby* presaged a minimalist judicial role in foreign affairs matters, his hopes have certainly been dashed. As Part I demonstrated, cases as varied as *Medellin*, *Garamendi*, and *Arizona* have all invoked presumptions of one sort or another in resolving foreign affairs federalism cases. A predictive failure of this sort, of course, is not to be confused with an analytic shortfall and so says little about the persuasiveness of Goldsmith’s underlying claims.

Professor Goldsmith's analysis accurately identifies many of the factors that an account of foreign affairs federalism must address. For example, he correctly points out that the substantial overlap of foreign affairs and domestic matters makes any effort to delineate separate domains of "dual sovereignty" infeasible. Additionally, he rightfully considers institutional competence and error costs to be central to any analysis. Nevertheless, we are skeptical about his ultimate conclusion. Although several reasons to resist his analysis of federalism and foreign affairs interests exist,<sup>149</sup> we focus on the core of his claim, which we call the "no-presumption" solution to foreign affairs federalism problems, and explain we think why there is less to it than first meets the eye.

As a threshold matter, consider why courts require a "proper interpretative default presumption."<sup>150</sup> Courts most urgently need a presumption in cases where constitutional text, federal statutes, and

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149. We note in passing that some of Professor Goldsmith's retail arguments are unconvincing. Consider his three objections to the presumption against preemption—that it fails credibly to track Congress's likely preferences; that there is no federalism value at stake so long as a federal law is within an enumerated power; and that the presumption is superfluous in light of the Rehnquist Court's revival of Commerce Clause jurisprudence. *Id.* at 181–87. On the first point, as Ernest Young and Matthew Stephenson have persuasively argued, canons are better understood as mechanisms for promoting a constitutional value, rather than tracking congressional preferences. See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008) (describing how clear statement rules enforce constitutional values by increasing the enactment costs of particular types of legislation); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000) (proposing "the concept of 'resistance norms'—that is, constitutional rules that raise obstacles to particular governmental actions without barring those actions entirely"). On the second point, Goldsmith seems to assume a sharp divide between state and federal regulatory domains. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 29, at 184 ("State sovereignty ends precisely at the point to which federal power, properly exercised, extends."). His own analysis of the overlap between state and federal regulation interests, however, amply demonstrates that this picture is somewhat misleading. In the domains in which state and federal regulatory interests overlap, moreover, it is hardly nonsensical to suggest that a "resistance norm" (to use Young's phrase) be employed to ensure Congress does not incidentally or unintentionally trench on state regulatory interests. Finally, Goldsmith's reliance on Commerce Clause jurisprudence is a non sequitur. Just because the Court is willing to enforce directly a policy value through one mechanism in one domain does not mean it should not enforce the same value through a different mechanism in a different statutory domain. The Court's Commerce Clause jurisprudence only sporadically touches on most federal regulation. *Cf.* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2048 (2008) (emphasizing "the Court's unwillingness to curb congressional regulatory authority on constitutional federalism grounds"). And as Justice Breyer acutely noted, "the practical importance of preserving local independence, at retail . . . by applying preemption doctrine with care" is wholly distinct, different, and arguably more consequential than "the occasional constitutional effort to trim Congress' commerce clause power at the edges." *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

150. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 29, at 177.



treaties fail to unequivocally supply an answer.<sup>151</sup> In these instances, courts need a “tie-breaker.”<sup>152</sup> For questions of fact that are disputed in a trial court, for example, the allocation of the burden of persuasion serves as a tie-breaking rule. But questions of law are quite unlike questions of fact. They cannot be decided merely by default in favor of one of the litigants.<sup>153</sup> Unlike decisions on facts, decisions on the law have spillover effects from case to case that make prodefendant or proplaintiff default rules implausible. Nor is randomization, sometimes used to assign cases in the courts of appeals, a desirable response to the problem.<sup>154</sup> Few think the path of the law should be calibrated by rolling a die.

As Part I demonstrated, moreover, the need for a tie-breaking presumption of law arises in a meaningful proportion of cases. In general, the legislative incentive to delegate strengthens as the complexity, difficulty, and enactment costs of legislative specificity rise.<sup>155</sup> Foreign affairs issues often raise such complex, difficult, and costly questions. Consequently, over the past century, “many of the grants of authority [enacted in foreign affairs have] become increasingly vague and open-ended,” leaving ample room for uncertainty and debate.<sup>156</sup> Delegation in this area increased over the second half of the twentieth century.<sup>157</sup> Hence, the frequency of textual ambiguity also increased, extending the crepuscular reach of Justice

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151. See Nina Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 746 (2004) (“[T]he presumption [against preemption] is better understood as helping resolve a situation involving conflicting evidence on statutory meaning.”).

152. Daniel Halberstam, *The Foreign Affairs of Federal System: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1061 (2001).

153. The doctrine of qualified immunity, pursuant to which judges defer to officials’ good faith belief about the law, is an exception to this claim. See *Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009) (holding qualified immunity applicable unless the official’s conduct violated a clearly established constitutional right).

154. For a defense of randomization, however, see Adam Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1 (2009).

155. DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST APPROACH TO POLICY-MAKING UNDER SEPARATE POWERS* 197 (1999) (modeling causes of statutory delegations); see also Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 6–58 (1982) (arguing that Congress engages in responsibility-shifting delegations so as to avoid blame for bad outcomes while claiming credit for good outcomes). The Aranson et al. theory of delegation also predicts that textual ambiguity will be rife in the foreign affairs context. *Id.*

156. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 145 (2008). More generally, Professor Goldsmith’s optimism is at odds with the pervasive possibility of semantic incoherence in legislation induced by cycling. See Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 984–88 (1989) (describing briefly cycling and the underlying voting paradox in Parliament).

157. Hathaway, *supra* note 156, at 181–94 (describing postwar growth of executive power in foreign relations).

Jackson's zone of twilight. It is precisely in these increasingly frequently encountered cases that courts most urgently need a tie-breaking presumption. Requiring the court to decide whether there is "fairly traceable" evidence of preemptive legislative intention evades the core problem. Because of "institutional myopia and political incentives"<sup>158</sup> such intention—whether pro- or antipresumption—often does not exist. In this light, Goldsmith's approach yields nonsolutions, not answers.

Moreover, it is simply no response to send judges back to the study of "ordinary" principles of preemption."<sup>159</sup> As one of the leading treatments of preemption—and a source cited prominently by Professor Goldsmith<sup>160</sup>—says pithily, "Modern preemption jurisprudence is a muddle."<sup>161</sup> The Court's decisions oscillate around many important points of preemption doctrine based on the specifics of the case considered. Consider this example: in the 2011 case of *Chamber of Commerce v. Whiting* the Court endorsed a "high threshold" for any finding of implied conflict preemption in immigration cases.<sup>162</sup> In the very next term, the Court found sweeping implied conflict preemption based largely on a presumption of federal control of immigration.<sup>163</sup> Further, the Court's invocation and then subsequent repudiation of a presumption against preemption in express preemption clause cases has seemed arbitrary.<sup>164</sup> These pendular swings in approach and result from one case to another render the law of preemption highly unstable and unpredictable. In the most charitable light, it might be said that the Court's preemption jurisprudence responds to individual policy considerations and circumstantial detail. More skeptically, it might be posited that the latter jurisprudence is to date wanting in guiding principles. As a result, directing federal judges not to consider foreign affairs considerations and to treat a preemption dispute as ordinary is not at

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158. *Id.* at 145.

159. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 29, at 177.

160. *Id.* at 182 n.36, 184 nn.42 & 46.

161. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000). Nelson's view is widely shared; for various reiterations over the past decades, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2085–86 (2000); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 524 (2012) (voicing a similar concern about the coherence of preemption doctrine); Ernest A. Young, "The Ordinary Diet of the Law": *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 256 (same).

162. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011).

163. *See Arizona v. United States*, 132 S. Ct. 2492, 2501–09 (2012) (holding three of four challenged sections of Arizona's Support Our Law Enforcement Act were preempted).

164. *Compare Altria Grp., Inc. v. Good*, 555 U.S. 70 (2008) (applying such a presumption), with *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (refusing to do so).

all helpful. It simply begs the question of how an ordinary case should be resolved in the absence of clear evidence of congressional intent.<sup>165</sup>

In any event, we think that Professor Goldsmith fails to take an evenhanded approach as between the states and the federal government. He declares that preemption demands “fairly traceable” evidence of preemptive intent, but then imposes “a modest preference for obstacle over field preemption.”<sup>166</sup> This reinstalls, albeit *sotto voce*, a mildly pro-state presumption against preemption. It leaves space in the analysis for federalism considerations, but not for foreign affairs values. This is assuredly not a no-presumption presumption: it is simply an antinationalism presumption on stockinged feet.

In our view, this is not mere inconsistency on Goldsmith’s part. Instead, it simply demonstrates the on-the-ground infeasibility of the kind of no-presumption position he ostensibly espouses. When statutory meaning is either underdetermined or ambiguous and yet some resolution is needed, judges need something to break the analytic logjam. Courts cannot flip a coin to determine the result in such cases (at least in public). They need direction of some sort. Quite clearly, a no-presumption approach offers no workable guidance. When courts need a tie breaker, in other words, applying the “ordinary” rules of preemption and a no-presumption presumption is a fruitless enterprise. For this reason, Professor Goldsmith’s account may fail to provide real assistance to judges. Rather, he leaves the path open for a second-generation functionalist analysis.<sup>167</sup>

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165. Is current preemption law any more of a “muddle” than other areas of the law? We think so. There are many rules of law the application of which is relatively straightforward and predictable, often because uncertainties have been ironed out in past litigation. Consider, by way of somewhat random examples, the application of qualified and absolute immunities; the availability of a *Bivens* remedy beyond the core cases already recognized; and the application of state sovereign immunity. In each of these cases, an informed lawyer could give a confident prediction about how a case would be resolved by either the Supreme Court or the courts of appeals. We think this cannot be said of preemption doctrine.

166. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 29, at 213.

167. Professor Goldsmith describes *Crosby* as an exemplar of the no-presumption presumption. *Id.* at 215–21. But it is not clear that the decision is accurately characterized in those terms. In *Crosby*, the text of the statute was not squarely inconsistent with the state action, and “no regulation was promulgated, no opinion letter issued, no administrative adjudication undertaken—in short, the Clinton administration had taken no formal action intended to preempt the Massachusetts law.” Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 171 (2001). Arguably, a different result would have been reached “[o]utside the foreign affairs context.” *Id.* at 172; accord Carlos Manuel Vazquez, *W(h)ither Zschering?*, 46 VILL. L. REV. 1259, 1261 (2001) (arguing that “the [*Crosby*] Court’s preemption analysis was anything but ordinary” and is fairly characterized as “narrow only if its approach to preemption were confined to suits implicating foreign relations”).

Before moving to Professor Sloss's functionalist account, we should also note here that some of the criticisms developed above also bear on the substance of Professor Goldsmith's assumptions about institutional competence. As we have already noted, increased legislative delegation of foreign affairs issues means that the courts will be presented with a steady diet of disputes turning on ambiguous or underdetermined texts.<sup>168</sup> This casts doubt on Professor Goldsmith's claim that the political branches need no judicial help because foreign policy disputes tend to be higher profile than their domestic analogs.<sup>169</sup> It is not the case that low salience is always a barrier to congressional action. To the contrary, the higher the salience of an issue, the more controversial the related politics—and the more difficult it is to resolve the issue without delegation or statutory ambiguity.<sup>170</sup> As a result, it may be precisely because of the high political salience of foreign affairs questions that Congress finds them hard to resolve.

More generally, one might plausibly doubt Goldsmith's implicit assumptions about the nature of institutional choice. Perhaps useful analysis does not start (as Goldsmith's does) with the assumption that one must make binary choices between the courts on the one hand and the political branches on the other. Rather, it may be more productive to think about how the various branches can *interact* to coproduce public goods.<sup>171</sup> For a variety of reasons, political actors might view courts as complementary instruments in the joint production of public policy even when their own epistemic competence is at a zenith.<sup>172</sup> To view courts as Goldsmith does—as competitors, rather than collaborators, in the production of complex public goods—is hardly necessary and often descriptively inaccurate.

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168. See *supra* text accompanying notes 155–158 (noting that as legislative delegation increases courts are faced with more ambiguous questions).

169. Goldsmith, *Foreign Courts*, *supra* note 29, at 1681–83; Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 29, at 191–92.

170. Consider in this regard the Food and Drug Administration's struggle to regulate tobacco, and the Court's denial of such authority in the teeth of a fairly clear statement of agency authority based on a mass of contrary legislative behavior. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–29 (2000) (finding that cigarettes and smokeless tobacco do not fall within “combination products”).

171. Outside the foreign affairs context, scholars have emphasized how the realization of constitutional rights has been the work of Congress and the courts acting in complex and dynamic interactions. See, e.g., Evan Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1172–73 (2001) (focusing on realization of racial equality interests).

172. See, e.g., Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1443–54 (2012) (cataloguing several different ways in which the political courts can manipulate jurisdiction for epistemic ends or to minimize agency costs in the national-security domain).

## 2. The (Faux) Political Safeguards of Federalism

Another leading functionalist approach, which is offered by Professor Sloss, provides yet another general theory of judicial review of foreign affairs federalism questions. Under this theory, judicial review operates as a compensatory safety valve whenever the federal political process fails to address federalism-related concerns.<sup>173</sup> The intensity of judicial scrutiny, therefore, is inversely proportional to the effectiveness of federalism's "political safeguards."<sup>174</sup> In emphasizing the failings of the political process as a justification for judicial intervention, Sloss follows John Hart Ely's famous account of judicial review as based on political process failure,<sup>175</sup> while simultaneously drawing on Herbert Wechsler's famous account of the "political safeguards of federalism."<sup>176</sup> That emphasis on the political process leads Professor Sloss to distinguish between treaties, where congressional involvement vitiates the need for judicial action, and sole executive agreements, which compel more careful judicial scrutiny because of the absence of congressional involvement.<sup>177</sup> He further draws on the Senate's longstanding habit of incorporating federalism conditions into treaties. Specifically, he argues that "the disproportionate representation of small states in the Senate, combined with the constitutional supermajority requirement for treaties, suggests that the political safeguards inherent in the treaty process" for all states' interests make stringent judicial review unnecessary.<sup>178</sup> Although this analysis does not encompass presidential action in the absence of a sole executive agreement—such as in a case akin to *Garamendi*<sup>179</sup>—the theory readily extends to such cases. With respect to such agreements, the absence of congressional

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173. Sloss, *supra* note 29, at 1964 ("[T]he need for judicially created constitutional rules to protect the states is inversely related to the degree of political safeguards inherent in the different mechanisms for entering into international agreements.").

174. For the coining of this term, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543 (1954) (describing how federalism guards against tyranny).

175. See JOHN HART ELY, DEMOCRACY AND DISTRUST 73–104 (1980) (developing a process-based theory of individual rights protection).

176. Wechsler, *supra* note 174, at 552 ("Congress, from its composition and the mode of its selection, tends to reflect the 'local spirit' predicted by Madison . . .").

177. Sloss, *supra* note 29, at 1970–72, 1984–87. His analysis extends to congressional-executive agreements, but the focus is more on the permissible subject-matter scope of such agreements. *Id.* at 1988–95.

178. *Id.* at 1984–85. We note that Sloss's argument might be turned on its head by arguing that the disproportionate representation of small states in the Senate in fact is a cause for concern because small states will tend to exploit unfairly large states.

179. 539 U.S. 396, 401–14 (2003).

involvement would seem plainly to warrant a judicially enforced check for federalism values.

This analysis offers an important core insight upon which we build in subsequent parts of our argument: the idea that judicial review is most valuable when other institutional mechanisms to secure the same constitutional ends fail.<sup>180</sup> Accounting for nonjudicial mechanisms that enforce federalism values is clearly an important part of any functional approach. In other ways, however, the analysis is unpersuasive. First, Sloss's account of the political safeguards is incomplete.<sup>181</sup> It cannot be assumed, as Sloss suggests, that the Senate will defend federalism values merely because small states are overrepresented. To be sure, the Senate's deviation from per capita representation "ensures small population states a disproportionately large slice, and large population states a disproportionately small slice, of the federal fiscal and regulatory 'pie.'" <sup>182</sup> This redistributive effect<sup>183</sup> reflects the influence of small states under the Articles of Confederation—more specifically, their ability to secure a disproportionate stream of rents—but it is not clear how it reflects any *federalism good*.<sup>184</sup> The Senate, that is, may "(possibly) give state and local interests a greater voice in national politics," but it does so in "ways that do not necessarily protect state and local institutions."<sup>185</sup>

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180. Theories of judicial review based on political process have been criticized on the ground that they lack a baseline for ascertaining when political-branch process is sufficient. See, e.g., Lawrence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073 (1980) ("[H]ow we are supposed to distinguish . . . 'prejudice' from principled, if 'wrong,' disapproval. Which groups are to count as 'discrete and insular minorities'? Which are instead to be deemed appropriate losers . . . ?"). This has some force, but a proponent of such theories might respond that even in the absence of a baseline, theories based on political process failure guide courts by providing information about where comparatively more or less judicial investment is warranted, even if it cannot say precisely how much investment is ever needed in any one place.

181. This point is developed in more depth *infra* in Part III.C.

182. Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 476 (2003).

183. For empirical evidence of this effect, see Lynn A. Baker, *Constitutional Ambiguities and Originalism*, 103 NW. U. L. REV. 495, 535–36 (2009) (listing per capita transfers for the ten largest and smallest states).

184. For a discussion of possible definitions of federalism goods, see Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. (forthcoming 2013) (on file with authors).

185. Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 223 (2000); accord William H. Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452, 455 (1955) (showing that the Senate has historically failed to reflect states' interests in any systematic way).

Sloss offers some empirical evidence of federalism-related treaty reservations,<sup>186</sup> but the evidence does not bridge this theoretical gap. Reservations to treaties do not necessarily demonstrate that Senators are willing to expend political capital to preserve federalism values. That reading would only be reasonable if the absence of such provisos would have yielded intrusions on state sovereignty. It is not clear that this is so. If the Court in *Medellín v. Texas*<sup>187</sup> accurately identified a prevailing presumption of non-self-execution, then federalism-related provisions are a form of “cheap talk.” That is, they are a means for Senators to genuflect to federalism concerns without altering the legal status quo in any meaningful way. Alternatively, federalism-related provisos can be explained by the Senate’s limited willingness to tolerate international commitments—particularly human rights commitments that the Senators historically have perceived as intrusions on U.S. management of race relations.<sup>188</sup> On this view, federalism provisos are best explained not by federalism concerns writ large, but by specific and localized dynamics unrelated to state sovereignty per se.

A third possibility is that the Senate’s default approach to international instruments is one of parochial, *nationalistic* suspicion of foreign entanglements.<sup>189</sup> Federalism-related provisos may be merely one way to express a claim of American exceptionalism. In short, absent further evidence such provisos are not persuasive evidence of Sloss’s thesis.

Beyond his reliance on a now-discredited iteration of the political safeguards of federalism, Sloss’s argument rests on a kind of Nirvana fallacy.<sup>190</sup> From the presence of putative political safeguards

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186. Sloss, *supra* note 29, at 1985–86.

187. 552 U.S. 491, 519, 526 (2008) (relying on textual clues to determine a treaty’s self-execution provisions).

188. Efforts to excise treaties from the Supremacy Clause during the 1950s, known collectively as the Bricker Amendment, point toward the presence, at least in some periods, of more general hostility to the binding effects of international law. Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 *YALE J. INT’L L.* 51, 68–70 (2012).

189. *Accord* Kenneth Roth, *The Charade of United States Ratification of International Human Rights Treaties*, 1 *CHI. J. INT’L L.* 347, 347 (2000) (arguing that the U.S. approach to human rights treaties is characterized by “fear that international standards might constrain the unfettered latitude of the global superpower, and arrogance in the conviction that the United States, with its long and proud history of domestic rights protections, has nothing to learn on this subject from the rest of the world”).

190. *Cf.* MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* 112 (2009) (“Scholars commit the nirvana fallacy when they identify a defect in a given institution and then, based upon the perceived defect, propose fixing the problem by shifting decisional responsibility somewhere else.”).

in Congress, he deduces an absence of political safeguards in the executive branch. But the second proposition does not follow from the first. There may be complementary political safeguards within the executive branch, and a claim about the appropriate calibration of judicial review must account for that possibility. No less than the no-presumption presumption, therefore, Professor Sloss's solution fails to convince.

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In this Part, we have aimed to demonstrate that the existing scholarship fails to provide a persuasive resolution for conflicts between federalism and foreign affairs values in the absence of dispositive text. On the one hand, formalist approaches suffer from internal incoherencies that render them particularly ill suited for answering foreign affairs-related questions. On the other hand, functionalist approaches employ the right tools, but the leading functionalist accounts either rest on unconvincing predicate assumptions or else fail to generate cogent solutions for judges. This leaves the ground open for a "second generation" of functionalist analyses.

### III. THE CASE FOR DECENTRALIZING FOREIGN AFFAIRS FEDERALISM

#### A. *Developing a Judicial Presumption for the "Zone of Twilight"*

In the following two Parts, we develop a "second-generation" functionalist analysis to help courts resolve problems of foreign affairs federalism in the absence of a dispositive text. We develop a presumption to apply in cases where textual sources of domestic law either fall short of supplying an answer or generate conflicting signals. The analysis has two elements. First, we consider the arguments *against* a pronational presumption and *for* a pro-state presumption (the task of this Part). Second, we analyze the case *for* a pronational presumption, and *against* a pro-state presumption (a question taken up in the following Part). We aim to establish which of these arguments is the more persuasive, and thus more appropriate, foundation for a judicial presumption. As decisions such as *Arizona v. United States*<sup>191</sup> suggest, while a presumption provides only the launching point for analysis, it can play a large role in determining case outcomes.

We conclude that a uniform rule is inappropriate. To be more specific, and to preview a point we make in greater detail in Part IV,

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191. 132 S. Ct. 2492, 2497–511 (2012).



we contend that the strength of the arguments in favor of centralizing policy authority in the federal government varies as geopolitical circumstances change. Emphasizing this relationship, we diverge from many other scholars who posit a fixed judicial approach that turns out to ill fit foreign affairs.

At the outset, we emphasize that the rule we offer here is a default presumption designed to reflect the outcome rational parties would have settled upon had they resolved the question by statute.<sup>192</sup> We do not recommend what contracts scholars label a “penalty default”<sup>193</sup> and legislation scholars call a “preference eliciting” canon.<sup>194</sup> Such canons are justified when “the default result is more likely to be reconsidered (and deliberated) by the legislature because it burdens some politically powerful group with ready access to the legislative agenda.”<sup>195</sup> That is, they rest upon an assumption of stable, predictable interest group dynamics.<sup>196</sup> In the context of foreign affairs federalism, however, the several states face many opposing interest groups; these groups include immigrants and their domestic allies (in *Arizona*<sup>197</sup>), multinational corporations (in *Barclays Bank*<sup>198</sup> and *Garamendi*<sup>199</sup>), and overseas claimants of domestic real property (in *Zschering*). In some of these instances, states will likely prevail. In some, they will more likely lose. It is thus implausible to expect a consistent, context-invariant, public-choice account that points toward

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192. An early and important law and economics account of statutory interpretation favors preference-tracking default rules of statutory construction. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (arguing that courts enforce deals struck by interest groups in the form of laws). For the purposes of this Article, we do not distinguish between the preferences of a historical enacting Congress and those of a current Congress. Cf. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2084 (2002) [hereinafter Elhauge, *Preference-Eliciting Statutory Default Rules*] (drawing this distinction and favoring current legislators’ preferences). But Elhauge includes pro-federalism canons somewhat akin to our ultimate recommendation under this rubric. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2250–51 (2002) (discussing the federalism canon in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)).

193. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989).

194. Elhauge, *Preference-Eliciting Statutory Default Rules*, *supra* note 192, at 2165.

195. *Id.*

196. The description and analysis of interest-group dynamics in legislatures is the domain of public choice scholarship. Cf. STEARNS & ZYWICKI, *supra* note 190, at 49–53 (summarizing economic theory of regulation).

197. 132 S. Ct. 2492, 2496–97 (2012).

198. 512 U.S. 298, 298–99 (1994).

199. 539 U.S. 396, 396–97 (2003).

the same outcome in all these cases.<sup>200</sup> As a result, a preference-eliciting rule may have erratic and occasionally deleterious consequences in the foreign affairs federalism context.<sup>201</sup>

By contrast, a default rule that vindicates “policies [that] have a source in widely held social commitments” can more easily be justified in this context.<sup>202</sup> By way of example, in several cases the Court applied a default presumption in the course of statutory interpretation in order to vindicate federalism values.<sup>203</sup> This default has been applied across a variety of contexts: regulatory preemption cases, which concern the states’ ability to set primary conduct rules, and one nonpreemption (bankruptcy) case, which concerned the states’ power to define property interests.<sup>204</sup> This shows that preference-estimating default rules can be stable and widely applied with relatively little burden on courts. Another reason to prefer a default presumption based on “widely held social commitments” is that the outcome of judicial intervention is likely to stick as a result of legislative inertia,<sup>205</sup> endowment effects,<sup>206</sup> and the expressive side effects of judicial action.<sup>207</sup> The balance of our discussion assumes the appropriate presumption is one that reflects the most likely desired outcome—a preference-enforcing rather than a preference-eliciting canon.

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200. *But see* Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007) (proposing an antipreemption default rule as a way of promoting “an open and vigorous debate on the floor of Congress”).

201. Further, it will be difficult for courts to identify any subcategory of cases in which a preference-eliciting rule is warranted. *See* Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104, 2137 (2009) (arguing that “the institutional capacity of judges to apply the preference-eliciting canons seems particularly questionable”).

202. Sunstein, *supra* note 47, at 334.

203. *See, e.g.*, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203–06 (2009) (invoking federalism as a reason to narrowly construe the Voting Rights Act); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (applying pro-federalism canon to limit intrusions on state government functions).

204. *See, e.g.*, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (reading federal bankruptcy statute in light of state property law norms); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (discussing presumption against preemption).

205. *Cf.* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1253 (1999) (noting “legislative inertia,” even on foreign affairs–related matters, in Congress).

206. For a defense of preference-estimating canons along these lines, see Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 649–50 (1999) (noting that default rules can affect the preferences of relevant actors). Moreover, canons are a way to ensure that “existing understandings” are not changed “any more than is needed to implement the statutory objective.” David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992).

207. Sunstein, *supra* note 206, at 649–50 (noting that “background rules can affect the judgments, beliefs, and preferences of the parties”).

In this Part, we take up the first element of the analysis—the case in favor of state control and against federal control—while the next Part considers the opposite argument. Then we assess the balance of the arguments and explain our proposed default presumption.

*B. The Costs of Centralization in Foreign Affairs Federalism*

While the value of federal control over foreign affairs—related matters is well established, the extent to which the policy questions in the cases detailed in Part I implicate states’ interests is less clear. Absent some reason to value states’ continuing involvement in such policy matters, a strong presumption in favor of federal control would obviously be desirable.<sup>208</sup> Therefore, in order to demonstrate that there is not a simple desirable presumption in favor of the federal government in all cases, we first identify the goods typically associated with state-level action in a federal structure and consider whether they translate to the foreign affairs domain. After identifying reasons to preserve the states’ role even when foreign affairs concerns are in play, we ask whether national institutional mechanisms adequately protect state sovereignty.

A threshold problem arises when analyzing the benefits of state involvement in the underlying policy questions in the foreign affairs federalism cases discussed in Part I. There is an absence of any convergent understanding in American constitutional theory of the proper role of the states.<sup>209</sup> Deontic accounts of federalism have periodically been fashionable. It is possible, for example, to identify a state’s “sovereignty” as a central value, as Justice Scalia does in *Arizona v. United States*.<sup>210</sup> We reject this approach. The historical concept of sovereignty, which on some accounts derives from predemocratic notions of governance and international law,<sup>211</sup> is

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208. Michael McConnell has noted that this question about the continuing role of the states can be asked more generally. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491 (1987) (“That the states should retain substantial independent authority is not self-evident.”).

209. Cf. Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 439 (2002) (“There is no agreed-upon definition of constitutional federalism.”).

210. *Arizona v. United States*, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., dissenting); see also *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”).

211. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1923 (2003) (describing the Court’s use of dignity in analyzing federalism interests as “a return to an older conception of the

undertheorized. Given the complex context in which disputes about federal displacement of state policy choices arise, the concept of state sovereignty therefore does little independent analytic work.<sup>212</sup> It is too ductile to discipline judges' substantive preferences. As a result, it seems to us that the question whether state sovereignty is impinged will often be in the eye of the beholder.

We focus, instead, on a consequentialist account of federalism: how does a federal structure promote goods such as liberty, welfare, and self-government that the Constitution promises? Even so narrowed, impressive complexities remain even when formulating the question. The Court's federalism jurisprudence recognizes several forms of state autonomy. These forms include: regulatory autonomy (i.e., the ability to establish policy through the imposition of rules of decision upon private transactions and behaviors);<sup>213</sup> financial autonomy (i.e., control over their own purses);<sup>214</sup> and the independent operation of state political institutions (i.e., governors and state legislatures).<sup>215</sup> Different species of federal action therefore implicate varied regulatory, fiscal, and political autonomy interests to divergent degrees.

We believe that foreign affairs-based ousters of state policy choices most commonly come at a cost to states' regulatory autonomy, but do not directly compromise states' fiscal or political integrity.<sup>216</sup> As a result, our analysis of foreign affairs federalism is focused solely upon state regulatory autonomy, and not fiscal or political independence.

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sovereign" under monarchical rule); cf. Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 6–8 (2003) (suggesting that the concept of state sovereignty should be given meaning by drawing on international law).

212. Cf. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 151 (1993) (Stevens, J., dissenting) (calling the dignity rationale "embarrassingly insufficient").

213. See, e.g., *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory").

214. Fallon, *supra* note 209, at 445 (noting the role of fiscal concerns in the Court's federalism jurisprudence).

215. See, e.g., *New York v. United States*, 505 U.S. 144, 168–75 (1992) (protecting state legislatures from "commandeering").

216. Federal ouster of state regulatory authority might have either a positive or a negative effect on states' fisc. On the one hand, the substitution of federal for state regulatory authority lowers states' expenditures. On the other hand, federal regulatory preemption coupled with federal underenforcement might leave or create a situation in which a policy problem imposes costs on the state, but where the state cannot directly mitigate those costs. Immigration might be one such case.

With that caveat in mind, we delineate the central focus of our inquiry in this Part: When does it matter that states have some effectual measure of autonomous regulatory power? The division of regulatory authority between the national government and subnational entities is typically thought to generate four important goods. We outline these four goods and point to some theoretical or empirical evidence in each instance for thinking that state autonomy is welfare enhancing. Before enumerating these goods, we hasten to clarify that is not our aim here to embark on the onerous task of mounting a full-scale consequentialist defense of federalism.<sup>217</sup> That is, in specifying these four goods, we implicitly accept for the purposes of this analysis that the canonical approaches to federalism are not wide off the mark. We do not attempt to disregard the aggregate results of past economic and political science analyses of federalism, which identify at least some social welfare benefits from decentralization. Rather, we accept the following well-established results as a baseline for analysis (i.e., that federalism does tend to be valuable in at least four ways) and then ask whether there is any reason to diverge from that approach.<sup>218</sup>

*First*, regulatory decentralization is posited as a catalyst for greater governmental responsiveness to divergent interests and preferences.<sup>219</sup> Since a national policy is almost inevitably characterized by heterogeneous preferences and interests, “[f]ederalism eliminates the need for a one-size-fits-all policy.”<sup>220</sup> This means that different subnational units can adopt different regulatory regimes. And as a result, more individuals will be able to migrate between states in order to find the bundle of policies that best matches their preferences.

*Second*, subnational units are thought to be more likely to identify fiscally efficient policies because they have an incentive to

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217. Note that we list here only the potential *benefits* of decentralization. We do not claim that decentralization does not have detriments—such as destructive races to the bottom and spillover effects—only that they are not relevant to the current point. For a comprehensive taxonomy and analysis of both costs and benefits, see JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* 25–52 (2009) (outlining both benefits and problems with federalism).

218. We are grateful to Alison LaCroix for pressing us to clarify our thinking on the relationship between the standard welfarist defenses of federalism and our approach to foreign affairs federalism.

219. McConnell, *supra* note 208, at 1493–94. Note the assumption in what follows—and indeed in the political science literature on federalism more generally—that states wish to attract more residents. We accept that assumption, but note that its theoretical and empirical foundations are not pellucid.

220. BEDNAR, *supra* note 217, at 45–46.

compete for populations.<sup>221</sup> For example, subnational units are more motivated than national governments to deliver essential services efficiently. Efficient delivery helps the unit attract residents through lower taxes.<sup>222</sup> National legislators, on the other hand, are tempted to engage in pork-barrel spending to benefit their local constituents at the expense of the general fisc.<sup>223</sup> This fiscal effect goes beyond the welfare gain that comes from better sorting of individuals to policy bundles.

*Third*, regulatory competition has the potential to create “greater opportunity and incentive [for subnational units] to pioneer useful changes” through experimentation.<sup>224</sup> Wisconsin’s experiments with welfare and Massachusetts’s health-care reforms are recent examples of innovation that spread to the national level. It is possible to argue that in both instances state innovation was beneficial because it opened the door to national policymaking.

*Fourth*, and finally, it is argued that regulatory autonomy of subnational units is necessary to protect individual liberties against potential national overreaching.<sup>225</sup> The “inherent fragmentation” of federalism makes it more difficult for a potential national tyrant to

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221. Jonathan A. Rodden, *Federalism*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 357, 360 (Barry R. Weingast & Donald A. Wittman eds., 2006) (describing the “competitive federalism” thesis as the claim that “under decentralization, a government must compete for mobile citizens and firms, who sort themselves into the jurisdiction that best reflects their preferences for bundles of governmental goods and policies”). The disciplining mechanism here is migration by populations between states, otherwise known as Tiebout sorting. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (arguing that a market in local government services, created by federal structure, allows individuals to “vote with their feet” in ways that could under certain ideal conditions generate efficient allocations of public goods). We should emphasize, however, that Tiebout’s formal model has demanding preconditions that in practice are rarely met, and so sorting will not secure all possible efficiency gains. See Susan Rose-Ackerman, *Market Models of Local Government: Exit, Voting, and the Land Market*, 6 J. URB. ECON. 319 (1979). Moreover, Tiebout sorting can be driven by wealth effects rather than by preferences. Stephen Calabrese, Dennis Eppel, Thomas Romer & Holger Sieg, *Local Public Good Provision: Voting, Peer Effects, and Mobility*, 90 J. PUB. ECON. 959, 960 (2006).

222. BEDNAR, *supra* note 217, at 55.

223. *Cf. id.* 46–47 (noting that “large-population republics do not provide as many public goods” as federations, and that “[w]hen national legislators represent particular districts, there is a potential for overprovision”). Federalism can also have a “market-preserving effect” because interjurisdictional competition “solves the problem of the state that steals from its citizens.” *Id.* at 43.

224. BEDNAR, *supra* note 217, at 50–51 (noting that experimentation works only if subnational units share the same goal); McConnell, *supra* note 208, at 1498.

225. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Perhaps the principal benefit of the federalist system is a check on abuses of government power.”); see also THE FEDERALIST NO. 28, at 205–07 (Alexander Hamilton) (I. Kramnick ed., 1987) (arguing that “the State governments will, in all possible contingencies, afford complete security against invasion of the public liberty by the national authority”).

seize control.<sup>226</sup> Along similar lines, subnational units provide “alternative locations of independently derived government power.”<sup>227</sup> Minority interest groups otherwise excluded from the national process need not stand perpetually on the sidelines in a federal polity such as the United States. Rather, such groups can try to influence subnational units as a first step in a national campaign.<sup>228</sup> In this way, states are styled as perennially important sites for political mobilizations against lock-ups of national political power.<sup>229</sup> To the extent that “decentralization in the United States is a function of, and bound up with, federalism,”<sup>230</sup> these benefits arguably cannot be replicated by regions or cities.

All this shows that *in the ordinary course* a division of regulatory authority between the states and the national government has welfare benefits. The key question for our purposes, however, is whether these goods obtain in roughly the same measure in those policy domains touched by foreign affairs concerns. The short answer is that most of the positive goods of federalism obtain when there is a foreign affairs interest. Consequently, there is no reason to repudiate federalism-related interests merely because they involve a matter of foreign relations.<sup>231</sup> The exception is fiscal efficiency, the second virtue of decentralization listed above. The creation of fiscal efficiencies through intergovernmental competition has no clear analog in the foreign affairs domain.<sup>232</sup> This suggests that at least on one margin, regulatory decentralization is less important to the states when there are foreign affairs questions at stake.

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226. BEDNAR, *supra* note 217, at 49–50. It bears noting that federalism may also enable local tyrannies, as the history of American race relations amply demonstrates.

227. Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2218 (1998).

228. See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1551–52 (1994) (noting stepping stone function).

229. See Jackson, *supra* note 227, at 2219 (“[S]tates need not threaten the use of military force in order to provide structures for development and organized expression of countervailing positions to those of the national government.”). Indeed, the several states have been playing this role since the Virginia and Kentucky resolutions.

230. *Id.* at 2217.

231. Note that this argument is distinct from Goldsmith’s observation that foreign and domestic affairs overlap. That might be true, and still the presence of a foreign affairs connection might somehow obviate or dilute the states’ interests.

232. One possible domain for such efficiency is foreign aid. We might, for example, imagine a localized foreign aid system that drew on the epistemic competence and affiliative interests of different ethnic and national groups with foreign ties in different states to make decisions about where foreign aid should go—imagine USAID run a la Medicaid. Such a radically decentralized model arguably would have advantages as compared to a centralized system, which may be more vulnerable to political and institutional distortions and thus less faithful to democratic preferences. We are grateful to Tom Ginsburg for raising this example.

Nevertheless, the remaining three arguments in favor of regulatory decentralization do apply to the foreign affairs federalism context. To begin with, the several states may accommodate the national population's varied preferences on foreign affairs issues better than a single national policy. On some foreign policy issues, to be sure, there may be no obvious way to increase preference satisfaction through decentralization (e.g., military deployments). On many other issues, though, it may be possible. For example, it may be entirely feasible to comply with diverse preferences on the question of corporate taxation at stake in *Barclays Bank* or the appropriate domestic attitude toward those who deal with repressive foreign governments in *Crosby* through the decentralization of policy choices to the states.<sup>233</sup>

When states have concentrated groups with distinct powerful stakes in foreign relations,<sup>234</sup> it is hard to see any *a priori* reason to prevent these groups from expressing their most pressing and deeply felt political preferences through the state as well as the federal government. Indeed, the unusual intensity of the group preferences may further justify the availability of multiple forums in which those preferences can be expressed. Hence, in *Garamendi*, the Court noted the presence of several thousand Holocaust survivors in California, and yet it failed to attribute any significance to that fact.<sup>235</sup> We believe it erred in this respect. Opening states as forums for the expression of their preferences may be more desirable than readily engineered alternatives.<sup>236</sup>

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233. Preferences can vary over whether or when international law should trump state law. See Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2388–92 (2006) (describing governors' divergent reactions to International Court of Justice rulings on American death penalty cases).

234. In many states, for example, there are population concentrations defined by ethnic or national origin with narrowly defined interests. To select an example proximate to the authors, there is a large Burmese community in northern Indiana with strong views about U.S. policy toward Myanmar.

235. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425–26 (2003) (noting the presence of “roughly 5,600 documented Holocaust survivors” in California, but also criticizing “the weakness of the State’s interest . . . in regulating [the insurance industry for the purpose of mitigating its reliance on profits gained through exploitation of the Holocaust]”). The Court’s failure here is made more egregious by the compelling normative interests on the side of Holocaust survivors, but the point has more general application. Consider, for example, the Apartheid-related divestiture movement. See Note, *State and Local Anti-South African Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 815 (1986) (discussing state, county, and municipal actions restricting trade with South Africa).

236. Bans on vote trading mean that intensely held preferences cannot be satisfied through buying others' stakes in a single political forum, making the multiplicity of forums a useful means of allowing citizens to register intensity. For an illuminating account of the connection between intensity of preferences and bans on vote trading, see Saul Levmore, *Voting with*



To be clear, we do not mean to suggest that state-level regulatory action will always be justified or that it should be absolutely immune from federal ouster. An interest group, defeated on the national level but successful on the state level, may well pursue interests that are sufficiently antithetical to the national interest to warrant preemption.<sup>237</sup> Rather, our point is that local preferences over foreign policy questions are *a priori* valid, and that they clearly count in favor of decentralization.

Furthermore, the potential for innovation through experimentation obtains at the state level as much in the foreign affairs domain as it does in the domestic sphere. Of course, not all foreign policy issues allow experimentation—again, military deployments may be a good example from contemporary policymaking. In many instances, though, state-level experimentation might be valuable to the whole nation. The worldwide combined reporting scheme at issue in *Barclays Bank PLC v. Franchise Tax Board*, for example, arguably tested a potentially valuable means of preventing tax evasion that was more feasible by alternative accounting approaches.<sup>238</sup> The facts of *Barclays Bank* further suggest the value of experimentation can outweigh foreign relations costs. In that case, foreign governments, including the United Kingdom, had either threatened or enacted retaliatory legislation aimed not just at California corporations but all U.S. corporate entities.<sup>239</sup> Yet Congress decided only to “stud[y] state taxation of multinational enterprises,” but not to use its unquestioned Foreign Commerce Clause authority to impose uniformity.<sup>240</sup>

In addition, state experimentation may be preferable to the alternative where Congress acts as the arena for contestation of executive foreign policy choices. For example, state-level efforts by Armenian Americans to seek recognition of and recompense for the large-scale human rights violations committed by the Turkish state at the beginning of the twentieth century have proved less disruptive to

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*Intensity*, 53 STAN. L. REV. 111, 113 (2000) (“The obvious question in the case of voting rights is whether intense preferences can be accommodated without shifting enormous power to wealthier citizens.”).

237. In particular, problems of multiple taxation may render state interventions problematic. See, e.g., *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434, 448 (1979) (invalidating application of ad valorem property tax on foreign shipping).

238. 512 U.S. 298, 305 (1994) (noting that the alternative approach of separate accounting “poses the risk that a conglomerate will manipulate transfers of value among its components to minimize its total tax liability”).

239. See *id.* at 324 n.22 (describing retaliatory measures).

240. *Id.* at 324–26.

foreign relations than parallel efforts at the congressional level.<sup>241</sup> The lower salience of states, that is, may allow for the vindication of democratic values without excessive disruption of executive foreign policy initiatives.

To reinforce this point, we flag another California measure that illustrates the virtues of state-level experimentation. The Holocaust Victim Insurance Relief Act,<sup>242</sup> which was invalidated in *American Insurance Ass'n v. Garamendi*, innovatively approached an intractable international problem and a grave historical injustice: Holocaust-era profiteering. In early negotiations with the German government, U.S. representatives found ways to accommodate the possibility of such independent action by subnational actors.<sup>243</sup> It is indeed plausible that in such negotiations, the existence of subnational actors—willing to act aggressively if a certain deal is not struck—even endowed the American executive with greater capacity to extract favorable compromises.<sup>244</sup> Experimentation, that is, may be directly valuable by revealing new policy options, but also may be indirectly valuable by influencing the dynamics of international negotiations. Yet the Supreme Court perceived insufficient value in the California law and held it preempted.

The fourth and final benefit of state regulatory autonomy spills over into the foreign affairs domain. Even the small sample of disputes reaching the Supreme Court demonstrates how states play an important role as “alternative locations of independently derived government power.”<sup>245</sup> Consider Massachusetts’s sanctions on companies trading with Burma.<sup>246</sup> Three months after Massachusetts

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241. The Ninth Circuit Court of Appeals recently held that there was no conflict between U.S. federal policy regarding the Armenian genocide and a California statute extending the statute of limitations for claims of descendants of Armenians involving insurance policies purchased by their ancestors prior to 1923. *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010).

242. CAL. INS. CODE §§ 13800–07 (West 2003).

243. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 405–06 (2003) (describing early negotiations).

244. For a more general theory of the importance of domestic constraints in international negotiations, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two Level Games*, 42 INT'L ORG. 427 (1988) (discussing entanglement of domestic and international politics).

245. Jackson, *supra* note 227, at 2218. For an argument that this kind of state regulatory role is functionally inevitable in the immigration context, see Cristina M. Rodríguez, *The Significance of the Local in Immigrant Regulation*, 106 MICH. L. REV. 567, 572 (2008) (advocating an integrated approach to immigration reform that involves both states and the federal government).

246. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 367 (2000) (describing 1996 Mass. Acts 239, ch. 130).

enacted its Burma law, Congress enacted its statutory framework.<sup>247</sup> On one view, this timing is suggestive of Congress's alacrity in responding to any state action that threatens to destabilize international relations. On another—and perhaps more compelling—view, the Burma case study highlights the ability of a state to catalyze national action. Although the federal law employed different regulatory tools—rejecting, for example, the state's secondary boycott—the sequence and proximate timing of the two enactments hint at how states can identify foreign policy matters that might otherwise remain outside Congress's limited span of attention. *Crosby* shows how minority interest groups, while unable to access the national political process, can nonetheless bring specific policy questions to national salience.

Massachusetts's law is not an outlier. States have long been involved “in a wide variety of activities with international aspects, ramifications or consequences.”<sup>248</sup> In many of these domains, the states may blaze a trail, providing other subnational units—and even the federal government—with evidence of the consequences of a given policy change.<sup>249</sup> Implementation of innovative policies on a smaller scale incurs lower start-up and failure costs. Again, the point is not that state policy innovation is so important that it necessarily trumps any federal interest. Rather, the point is that there is no reason to assume that the judicial protection of state regulatory autonomy is any less justified because it arises in a policy domain that touches on foreign relations concerns.

With the exception of one efficiency-related argument, we have argued there is no reason to discount the federalism interest merely because it intersects with a foreign affairs concern. It follows that there remains a case for institutional safeguards of federalism in respect to foreign affairs questions (at least assuming that the standard welfarist case for some federal-state division of regulatory authority holds).

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247. *See id.* at 368 (noting timeframe between Massachusetts law and Congressional action).

248. Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 821–22 (1989) (describing economic efforts partnerships, immigration-related policies, and South Africa–related divestiture policies).

249. *See, e.g.*, Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 56–57 (2007) (documenting state and local action to implement the Convention on the Elimination of Discrimination Against Women); *id.* at 60–62 (same for climate change).

C. *The Political Safeguards of Foreign Affairs Federalism (Revisited)*

Judicial protection of federalism interests does not turn solely on whether states have a valid regulatory interest when federalism and foreign affairs intersect. States, as James Madison noted, were envisaged by the Framers as no mere bit player in the national drama; they are instead “constituent and essential parts of the federal government,” with “each of the principal branches of the federal government [owing] its existence more or less to the favor of the State governments.”<sup>250</sup> State involvement in the “federalist political process might more effectively promote the . . . substantive values federalism is supposed to serve than any attempt to enforce those values directly.”<sup>251</sup> At the very least, a theory of judicially enforced federalism must account for the role that the states already play in federal government when gauging the appropriate scope of judicial solicitude for federalism values.<sup>252</sup> The more effectively that nonjudicial means protect states’ interests, the less need exists for a presumption in favor of the states’ interests in foreign cases.<sup>253</sup>

To estimate the efficacy of nonjudicial mechanisms for vindicating federalism values, we build upon and strive to deepen Professor Sloss’s analysis of the “political safeguards” of foreign affairs federalism.<sup>254</sup> Whereas Sloss’s argument begins and ends with the House and the Senate, we consider a broader range of institutional safeguards. To that end, we focus on the possibility (not addressed by Professor Sloss) that the executive branch also contains mechanisms to shelter states’ interests. We conclude, based on this enlarged inquiry, that political safeguards of foreign affairs federalism are likely to be fragile. This means that a judicial supplement remains useful. The constitutional interest in federalism *prima facie* justifies a presumption favoring the preservation of state regulatory authority under certain conditions. This conclusion leads us to further inquire as

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250. THE FEDERALIST NO. 45, at 294–95 (James Madison) (I. Kramnick ed., 1987).

251. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 374.

252. Cf. BEDNAR, *supra* note 217, at 132 (“[Judicial and political s]afeguards also bolster one another’s performance and stand in where others are weak.”).

253. This assumes that “federalism . . . must operate so as to keep centrifugal and centripetal forces in rough equipoise,” Josh Chafetz, *Multiplicity in Federalism and Separation of Powers*, 120 YALE L.J. 1084, 1092 (2011), notwithstanding changed circumstances that, as a matter of first principles, might justify a rebalancing of authority between national and subnational units. We accept *arguendo* the stipulated goal of “rough equipoise” as a restatement of the commonly accepted views of American federalism; we do not mean (at least here) to suggest there are no reasons to doubt this common wisdom.

254. See *supra* Part II.A.

to whether and when the federal interest in centralized foreign affairs authority should be prioritized—a question we take up in the following Part.

As a threshold matter, we emphasize once more that the narrow focus of our inquiry in this Article is Justice Jackson’s zone of twilight, a domain in which textual direction and congressional intent are not readily available.<sup>255</sup> In each of the cases discussed in Part I, it was unclear if Congress had spoken to a particular legal question. For this reason, three canonical accounts of political safeguards can be discarded as irrelevant at the outset. First, the Framers identified direct action by the states as an “obstacle[] to [federal] usurpation and the facilities of resistance” through military force.<sup>256</sup> This obviously has little practical importance today when the states maintain no effectual military resources. Second, the Framers assumed that “Congress, from its composition and the mode of its selection, [would] ten[d] to reflect the ‘local spirit’ predicted by Madison.”<sup>257</sup> The Framers accordingly spoke of the Senate as a “representation . . . of the States.”<sup>258</sup> Further, they imagined that linking voting qualifications for the House to voting qualifications for a state’s most numerous branch<sup>259</sup> would ensure representatives would consistently vote in alignment with state interests.<sup>260</sup> Even if these mechanisms work—a matter of considerable debate today<sup>261</sup>—they are irrelevant when there is no clear evidence of congressional action.

Third, contemporaneous efforts to revive the Founding-era account of political safeguards point to the way in which “national and local political parties engender ‘a political culture in which members of local, state, and national networks are encouraged, indeed expected, to work for the election of candidates at every level’ in a way that ‘promotes relationships and establishes obligations among officials that cut across governmental planes.’”<sup>262</sup> However, these efforts are

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255. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

256. THE FEDERALIST NO. 28, *supra* note 225, at 206.

257. Wechsler, *supra* note 174, at 552.

258. THE FEDERALIST NO. 58, at 394 (James Madison) (I. Kramnick ed., 1987); *accord* Wechsler, *supra* note 174, at 547–48 (discussing the Senate’s role in protecting state interests).

259. *See* U.S. CONST. art. I, § 2 (linking state electoral qualifications to federal electoral qualifications).

260. *See* Wechsler, *supra* note 174, at 548–49 (noting that states’ power to fix voting requirements provided some state control over the House).

261. *See* Kramer, *supra* note 185, at 223–27 (arguing that Wechsler’s approach provides insufficient safeguards for federalism).

262. *See* BEDNAR, *supra* note 217, at 113–16 (describing a theory of political safeguards and noting its weakness—because of parties’ “motivation is to win elections” their actions will not

not salient here because parties largely depend on Congress for the vindication of federalism's values in national politics. In short, both traditional and contemporary iterations of the political-safeguards argument fail in the zone of twilight where many foreign affairs federalism cases arise.

Yet this does not mean that we should wholly abandon the political-safeguards argument. Recent scholarship in administrative law shows "executive agencies generally have significant incentives to take state concerns seriously."<sup>263</sup> In stark contrast to "Congress[, which] proves, in actuality[] to be nearly indifferent to those committed to state regulatory interests," federal administrative agencies have been labeled by some commentators "the best possible protectors of state regulatory interests."<sup>264</sup> The evidence of agency solicitude for federalism values has been decidedly mixed until now.<sup>265</sup> Even so, scholars offer three general reasons to rely on internal executive processes as "political safeguards," and to develop more robust agency structures to ensure federal regulatory efforts consider state interests.<sup>266</sup>

*First*, agencies use mandatory notice-and-comment periods for rulemaking. Compared to the opaque negotiation and drafting processes on Capitol Hill, notice-and-comment rulemaking provides states with more advanced notice and a better opportunity to raise concerns about proposed regulations.<sup>267</sup> The formal structure of notice-

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always converge with what is required to defend federalism-related goods); Kramer, *supra* note 185, at 279; *id.* at 282 ("The political dependency of state and federal officials on each other remains among the most notable facts of American government.").

263. Mendelson, *supra* note 151, at 741; *accord* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1939, 1948–83 (2008) (arguing that "for the most part, agencies outperform" other federal branches as allocators of policy-setting power); Sharkey, *supra* note 161, at 527–28 (finding, based on interviews with agency staff, the "continu[ed] significance of agency participation in preemption, especially in the rulemaking context").

264. Catherine Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2127–28 (2009).

265. *See* Mendelson, *supra* note 151, at 783 (finding that "agencies tend to identify possible federalism implications only rarely"); *accord* Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695, 695–718 (2008) (discussing lack of institutional competence of agencies in preempting state law); Sharkey, *supra* note 161, at 527 (noting rarity of federalism impact statements in agency-issued rules).

266. In particular, Professor Catherine Sharkey has developed a quiver of reforms designed to promote the administrative safeguards of federalism. *See* Sharkey, *supra* note 161, at 570–95 (recommending deeper consultation, reporting requirements, and review procedures); *accord* Galle & Seidenfeld, *supra* note 263, at 1974 ("[A]gencies frequently underprotect federalism values by a little, whereas Congress either over- or underprotects them greatly.").

267. *See* Mendelson, *supra* note 151, at 777–78 (explaining benefits states receive from notice-and-comment rulemaking).

and-comment rulemaking also hinders agency officials from ignoring or evading state interests. By contrast, since legislators manage a broader portfolio of responsibilities and require fundraising, they may focus on wealthy interest groups to the detriment of the states. This frequently results in greater sensitivity to state regulatory concerns by agencies than by Congress.<sup>268</sup> In addition, states can avail themselves of regulatory review by the Office of Management and Budget (“OMB”); states frequently request meetings with OMB on significant rules that affect their regulatory agendas.<sup>269</sup>

*Second*, the White House promulgates executive orders and memoranda to promote agency consideration of federalism interests. The most recent presidential memorandum directs agencies to undertake preemption “only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.”<sup>270</sup> The associated executive order requires agencies to implement “an accountable process to ensure meaningful and timely input by State . . . officials.”<sup>271</sup> The order also instructs agencies to generate “a federalism impact statement” whenever regulations have “substantial direct effects on the States” or preempt state law.<sup>272</sup>

*Third*, some executive agencies “maintain cooperative relationships with states” because the latter help in the implementation of federal statutory policies.<sup>273</sup> Such cooperative federalism schemes provide opportunities for states to assert their regulatory interests within the framework of a larger regulatory program.<sup>274</sup> Cooperative federalism often fosters close relationships between states and federal agencies. These relationships may reduce

268. See, e.g., Sharkey, *supra* note 264, at 2150–52 (documenting how agencies were more responsive than Congress to state regulatory concerns around the 2006 REAL ID Act).

269. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Perspective*, 70 U. CHI. L. REV. 821, 843–45 (2003) (documenting state contacts with OIRA).

270. For the most recent of these, see *Preemption: Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 24,693, 24,693–94 (May 20, 2009); see also Exec. Order No. 13,132, 3 C.F.R. 206 (2000), *reprinted as amended in* 3 U.S.C. § 301 (2006) (entitled “Federalism”).

271. Exec. Order No. 13,132, §6(a).

272. *Id.* §6(c).

273. Mendelson, *supra* note 151, at 741. Recent examples of cooperative regulatory schemes that reserve significant roles for state exercises of discretionary authority are the Patient Protection and Affordable Care Act and the Dodd-Frank Act. See Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 614 (2011) (discussing structures of Dodd-Frank Act that provide state officials with a direct role in administrative decisionmaking).

274. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271–84 (2009) (providing examples); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1698–1703 (2001) (describing local tailoring, interstate competition, and experimentation as reasons for cooperative federalism).

agency willingness to use coercive powers to force strict compliance with Congress's mandates.<sup>275</sup>

Again, we need not resolve the empirical questions implicit in these ambitious claims lodged on behalf of "administrative federalism."<sup>276</sup> For it is not at all clear that many (or any) of these arguments can be carried over to the foreign affairs context. As a threshold matter, the Administrative Procedure Act expressly exempts foreign policy matters from its reach.<sup>277</sup> Centralized regulatory review by the Office of Information and Regulatory Affairs ("OIRA") does not reach most foreign affairs matters.<sup>278</sup> Even the rarely used Congressional Review Act excludes security and trade matters, thereby excluding most foreign affairs questions.<sup>279</sup> As a result, states cannot participate in foreign affairs matters as fully as they participate in domestic rulemaking because they lack the full panoply of tools for intervening in the regulatory process that would otherwise be available. Worse, information about many nonstatutory international arrangements is unavailable until months after a policy decision has been made.<sup>280</sup> Perhaps unsurprisingly, although empirical studies reveal a handful of instances in which any agency—the State Department or otherwise—formally analyzed a regulation for federalism concerns, to the extent we are able to tell, none of these

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275. See, e.g., Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 462 (2008) (noting that the federal agency responsible for Medicaid "is notoriously uninterested in enforcing the terms of State plans against the states; instead it seeks cooperation, when it makes demands at all"); accord Abigail R. Moncrieff, *The Supreme Court's Assault on Litigation: Why (and How) It Might Be Good for Health Law*, 90 B.U. L. REV. 2323, 2328 (2010) ("The problem today is not a lack of regulatory presence but rather a lack of regulatory rigor.").

276. Metzger, *supra* note 273, 610–19 (defining and describing the term).

277. See 5 U.S.C. § 553(a)(1) (2006) (stating that rulemaking requirements do not extend to any "military or foreign affairs function of the United States"). This cannot be defended on the ground that Congress carefully considered the question. See Hathaway, *supra* note 156, at 243 & n.312 (discussing legislative history of exception).

278. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 3(d)(2) (Sept. 30, 1993), *reprinted as amended in* 5 U.S.C. § 601 (refusing to include most regulations that pertain to foreign affairs review from the reach of the order). In any case, there is some recent evidence to suggest that OIRA review is slanted toward business interests. See RENA STEINZOR ET AL., BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 8 (2011), *available at* [http://www.progressivereform.org/articles/OIRA\\_Meetings\\_1111.pdf](http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf) (discussing the politics of OIRA review).

279. 5 U.S.C. § 801(c)(2)(C)–(D). We have identified no instance in which the Congressional Review Act has been employed in a foreign relations matter.

280. Hathaway, *supra* note 156, at 222 ("Until fairly recently, the text of many [sole executive agreements and ex ante congressional executive agreements] was not available until at least a year after they were concluded.").



involved a foreign affairs matter.<sup>281</sup> Finally, we think it is important to recognize that none of our examples of federalism foreign affairs conflict arise in the context of a cooperative federalism scheme. Hence, there is no reason to think that executive actors will be influenced by their past interactions with state officials.

In addition to these disanalogies in the administrative process with respect to domestic and foreign policy matters, foreign policy is often the product of idiosyncratic internal bureaucratic dynamics.<sup>282</sup> Most studies suggest that interagency politics, internal hierarchies, and entrenched organizational pathways exert great influence on agencies' final decisions.<sup>283</sup> Policies emerge through competition among agencies in a "marketplace of ideas,"<sup>284</sup> refereed in some instances by the President. None of this is to say that foreign policy making is perfectly insulated from domestic political forces.<sup>285</sup> Of course, it is not. Rather, the arguments we have presented here suggest that there is little evidence to conclude that institutional structures for the generation of federal foreign policy purposefully and carefully consider the states' interest in regulatory autonomy.

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Legislative safeguards of federalism fail to consider the effect of foreign affairs action on states. Recent accounts of executive-branch safeguards are equally dismaying. There is no reason to believe the policymaking process, through which the federal government identifies and promotes foreign policy (as distinct from domestic

281. See Mendelson, *supra* note 151, at 783; Mendelson, *supra* note 265, at 695–718; Sharkey, *supra* note 161, at 527.

282. For seminal studies of bureaucracy in the foreign policy-making domain, see Graham Allison & Mort Halperin, *Bureaucratic Politics: A Paradigm and Some Policy Implications*, 24 *WORLD POL.* 40, 42 (1972) (emphasizing bureaucratic dynamics). For an early challenge to this claim, see Robert J. Art, *Bureaucratic Politics and American Foreign Policy: A Critique*, 4 *POL'Y SCI.* 467, 486 (1973) (doubting the explanatory force of models that focus exclusively on bureaucratic dynamics without accounting for external partisan political forces).

283. See GRAHAM ALLISON & PHILIP ZELLIKOW, *ESSENCE OF DECISION* 166–70 (2d ed. 1999) (emphasizing the importance of "standard operating procedures" in determining policy outcomes); Art, *supra* note 282, at 479 (exploring limits of presidential control); Barton J. Bernstein, *Understanding Decision-Making: United States Foreign Policy and the Cuban Missile Crisis*, 25 *INT'L SECURITY* 134, 159–64 (2000) (emphasizing importance of hierarchy and presidential leadership). Even critics of the bureaucratic politics paradigm nevertheless concede the importance of "factors that are either determined or strongly influenced by organizational or bureaucratic considerations." David A. Welch, *The Organizational Process and Bureaucratic Politics Paradigm*, 17 *INT'L SECURITY* 112, 138 (1992).

284. Martin A. Smith, *U.S. Bureaucratic Politics and the Decision to Invade Iraq*, 14 *CONTEMP. POL.* 91, 97 (2008).

285. For an acute analysis of the connection between domestic politics and military conflicts, see James D. Fearon, *Domestic Political Audiences and the Escalation of Political Disputes*, 88 *AM. POL. SCI. REV.* 577, 586 (1994).

policy), will systematically account for the federalism-related goods identified in the previous Section. Assuming that weak executive-branch mechanisms for internalizing federalism values warrant additional safeguards, we demonstrated in this Part that the case for judicial vigilance on behalf of states' regulatory autonomy is strong. That result means that it is necessary to assess the case on behalf of federal control when foreign affairs and federalism concerns overlap—a task we turn to in the next Part.

#### IV. THE CASE FOR CENTRALIZED PRESIDENTIAL AUTHORITY IN FOREIGN AFFAIRS

This Part analyzes the case for centralizing foreign affairs-related authority in the presidency.<sup>286</sup> We first demonstrate that cogent arguments exist for centralization. But we add a crucial caveat: the strength of these arguments varies as the geopolitical environment changes. The core of our argument is that the presumption should favor federal control when the U.S. faces a more hazardous and demanding international environment (i.e., when the world is multipolar and not unipolar). We develop a parsimonious doctrinal framework to account for relevant international factors. We conclude by canvassing the mechanisms that courts could use to assess the geopolitical state of the world.

##### *A. The Variable Benefits of Foreign Affairs Centralization*

Consider the general case for centralizing regulatory authority over foreign affairs. Traditional justifications for centralization in the national government focus on collective action problems.<sup>287</sup> Public goods such as military security and a national free market are often best achieved through national, rather than subnational, interventions. At the time of the Founding, the Framers perceived the absence of a concerted American voice in the international sphere to

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286. Recall that by stipulation we are concerned with cases where Congress has not clearly spoken.

287. BEDNAR, *supra* note 217, at 25 (“In general, security is promoted through command coordination, implying centralization of foreign policy and war-making.”); accord CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 208–09 (4th ed. 2011); see also JAMES MADISON, *Vices of the Political System of the United States*, in JAMES MADISON: WRITINGS 69, 71 (Jack N. Rakove ed., 1999) (framing flaws in the Articles of Confederation in terms of modern conceptualization of collective action problems).

be a major weakness of the Articles of Confederation.<sup>288</sup> The Constitution, accordingly, limits the capacity of states to sign international agreements<sup>289</sup> or engage in military activity.<sup>290</sup> The functional argument for centralization is even more compelling: given the importance of speed, secrecy, and foreign affairs expertise in providing military security, the centralization of diplomatic, military, and intelligence authorities in a single institutional actor makes sense.<sup>291</sup> Were such authority dispersed among the several states, it would be extremely difficult for the United States to address diplomatic or military threats in the current international environment.

Similarly, maintenance of economic prosperity requires national-level coordination. For geographic, demographic, and technological reasons, the several states are unlikely to share the same interests in shaping economic policy. Some states' economies depend on agricultural goods, others on manufacturing, and still others on the provision of goods and services. Such varied commitments naturally lead to competing interests in relation to free trade, tariffs, taxes, and trade-related subsidies. States will inevitably try to achieve their internal economic goals without taking full account of the externalities of their policies on other states.<sup>292</sup> This collective action problem is best addressed at the national level, where the federal government can select net beneficial economic policies. Centralization increases overall social welfare.<sup>293</sup>

This is all familiar fare. Less canonical is the further observation that the benefits of centralized foreign affairs authority

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288. See ONUF & ONUF, *supra* note 132, at 93–122 (explaining how the Articles of Confederation inhibited the development of a unified American foreign policy); accord Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 618 (1999).

289. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .”).

290. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay . . .”).

291. *But cf.* Matthew C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289, 307–09 (2012) (arguing that some decentralization of intelligence powers is inevitable).

292. This can be understood as a claim about the negative externalities that arise from states' free riding. *Cf.* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 138 (2010) (linking free riding to the need for national solutions).

293. One of the authors has elsewhere developed some reasons for caution about standard collective action federalism arguments. See generally Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. (forthcoming 2013) (on file with authors). The argument developed here does not rely on the species of broad-brush, wholesale arguments critiqued in that article.

vary with the international environment. To see why the value of centralization depends on characteristics of the international environment, imagine a world with no dictatorships—a world with only democratic states that are committed to the resolution of international disputes by peaceful means.<sup>294</sup> In this world, the need for military security exists, but probably not at the level required in a world with many competing authoritarian regimes. Stated otherwise, fully realizing the benefits of centralization with regard to military security is more important in a competitive geopolitical environment than in one where the United States acts as a *de facto* hegemon.<sup>295</sup> Trade provides another example. Consider a world with high levels of trade protectionism, tariffs, and import duties. In this world, centralization is particularly important. The national government must navigate a complicated international environment to maintain economic prosperity. This requires expertise and an effective (i.e., not plurivocal) negotiation strategy. Under these conditions, a decentralized approach to policy will likely be suboptimal for the nation.

These examples suggest that the value of centralization varies with geopolitical conditions facing the United States. To be sure, the examples do not reflect the full complexity of international politics, the difficulty of determining salient factors that affect the value of centralization, or the integration of international political variables into a default presumption for courts to apply. However, they do clarify that geopolitical conditions lie at the heart of any defense of centralization's virtues in the foreign affairs context.

### *B. Judicially Manageable Proxies for Geopolitical Conditions*

It is one thing to observe that the value of centralization varies with changes in the international environment. It is quite another to say that *federal courts* should take account of such changes in setting the appropriate presumption in foreign affairs federalism. In the balance of this Part, we argue this task is judicially manageable. We argue courts should apply a presumption in favor of federal control in foreign affairs federalism cases (as we have defined that term) when the U.S. operates in a multipolar (or highly constrained) international environment. However, courts should apply a presumption in favor of state control when the United States is the hegemon of a unipolar (or

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294. There are different conceptions of democratic peace theory. For greater discussion, see Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983).

295. See Abebe, *supra* note 34 (developing this argument at length).

weakly constrained) international environment. At present, courts lack a framework to account for international political factors that should inform the appropriate presumption. This deficiency leads to the kind of ad hoc, erratic jurisprudence described in Part I. To fill this gap, we offer a parsimonious and easily applied framework for evaluating the international political environment.

Conventional wisdom suggests that courts lack the competence to analyze the international political environment and integrate their findings into foreign affairs jurisprudence. Scholars often argue that the President enjoys institutional and epistemic advantages that place him in a better position than judges to consider international politics and make foreign affairs decisions.<sup>296</sup> As a result, courts' participation in foreign affairs cases is unhelpful, or even counterproductive. Even if one assumes *arguendo* that the President is more competent in foreign affairs, that does not lead inexorably to the conclusion that courts have *no* capacity to identify and to account for the foreign affairs implications of their doctrinal rules. As we will discuss, the courts use this institutional capacity—often supplemented by the State Department and amicus curiae briefs—to analyze the foreign affairs consequences of some of its decisions.

Nevertheless, if the optimal preemption rule in foreign affairs cases depends in part upon international political factors, courts need a parsimonious, clear, and functional tool to reduce the complexity of international politics and integrate the resultant information into their doctrinal analysis. Such a tool is difficult to develop because of the plurality of salient actors in current international politics. Today, multiple powerful countries drive international politics by pursuing their own national interests; international organizations purport to regulate world affairs;<sup>297</sup> international tribunals attempt to apply

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296. See POSNER & VERMEULE, *supra* note 135, at 174 (“Executives have always had the leading role in foreign affairs because of the fast-changing nature of international relations and the importance of secrecy and unity.”); accord Posner & Sunstein, *supra* note 51, at 1204–07 (arguing that courts should defer to the executive branch unless “it is plainly inconsistent with the statute, unreasonable, or constitutionally questionable,” because of the executive’s continued activism in foreign relations and greater accountability).

297. The United Nations is the most salient example of this type of organization. N.D. WHITE, KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 3 (2d ed. 1997) (“The principal function of the United Nations is to maintain international peace and security.”). *But see* John J. Mearsheimer, *The False Promise of International Institutions*, INT’L SECURITY, Winter 1994-95, at 7 (arguing that “institutions . . . hold little promise for promoting stability in the post-Cold War world,” because institutions “are based on the self-interested calculations of great powers” and thus “have no independent effect on state behavior”). See generally LELAND M. GOODRICH & ANNE P. SIMONS, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 597–603 (1955) (describing the purpose of the United Nations as the “maintenance of international peace and

international law;<sup>298</sup> and nongovernmental actors lobby states and encourage best practices.<sup>299</sup> This partial list highlights the range and complexity of actors influencing the contemporary international political environment.

Building on an earlier article, we draw on the concept of “polarity” to develop a framework that enables courts to evaluate the international political environment.<sup>300</sup> That framework, originally developed to help courts appropriately constrain the President in foreign affairs, can also enable courts to determine the value of centralization in foreign affairs federalism matters. The framework captures many of the relevant variables and generates parsimonious guidance for resolving conflicts between the state and federal governments.

### 1. Polarity and Centralization

To assess the value of foreign affairs centralization, judges can employ an idea developed in international relations theory—the concept of polarity<sup>301</sup>—to categorize the powerful countries in the world and their impact on international politics. Polarity refers to the number of “great powers” (powerful countries) in the world at any given time. Great powers are determined by their material power, namely their military strength and economic wealth.<sup>302</sup> The number of

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security,” which is accomplished through the actions of their collective members in various principal United Nations organizations).

298. Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. 160 (2000); Suzannah Linton & Firew Kebede Tiba, *The International Judge in an Age of Multiple International Courts and Tribunals*, 9 CHI. J. INT'L L. 407, 408 (2009) (“Within this evolving international system, legal disputes are increasingly brought for resolution before judicial or quasi-judicial institutions.”).

299. For example, Human Rights Watch regularly provides detailed reports on human rights abuses, health, environmental protection, corporate responsibility, and state counterterrorism efforts, among other things. *Reports*, HUMAN RIGHTS WATCH, <http://www.hrw.org/publications/reports> (last visited Jan. 17, 2013).

300. See Abebe, *supra* note 34, at 23 (developing this argument at length).

301. ARTHUR A. STEIN, WHY NATIONS COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS 11 (1990) (“Indeed, the realists’ very distinction between different international systems as unipolar, bipolar, and multipolar is drawn from economics.”); see, e.g., Joanne Gowa, *Bipolarity, Multipolarity, and Free Trade*, 83 AM. POL. SCI. REV. 1245, 1255–56 (1989) (demonstrating that bipolar international political systems are more advantageous than multipolar systems in free trade because of stronger incentives for alliance and lower chances of exit); Edward D. Mansfield, *Concentration, Polarity, and the Distribution of Power*, 37 INT'L STUD. Q. 105, 110–12 (1993) (arguing that polarity is more useful when combined with an analysis of concentration of power).

302. See JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 55–67 (2001) (summarizing how power in international politics is based on latent, or socioeconomic, power, and military power); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 193 (1979)

great powers determines the structure, or polarity, of the international system. A world with three or more great powers is a multipolar system; one with two great powers is a bipolar system; one with one dominant superpower is a unipolar system. The key point here is that the structure of the international system—whether multipolar, bipolar, or unipolar—roughly correlates to the ease or difficulty of achieving U.S. foreign policy goals. As a consequence, polarity provides a simply proxy for the value of centralization in the foreign affairs domain.

To see how this would work, consider the effect of multipolar and unipolar international conditions on the United States' ability to achieve policy goals. In a multipolar system, the United States is one of several great powers. No single great power is more powerful than the others; they are relative equals in international politics. To make the example more concrete, imagine the United States is competing with Countries X, Y, and Z. They are rough equals, and each is pursuing its own foreign policy goals. In pursuit of their goals, these great powers might find that they have convergent or competing objectives. The United States and Country X might want greater trade liberalization. The United States, Country Y, and Country Z might disagree on economic coordination, environmental policies, and security concerns. Since each great power is relatively similar in economic and military strength, none is strong enough to go it alone and impose its preferences on the other great powers. The United States and Countries X, Y, and Z must instead pursue their respective foreign policy goals in a highly competitive international political environment. Each lacks the ability to impose unilaterally its preferences. In this multipolar world, the interests of Countries X, Y, and Z therefore constrain the United States' ability to achieve its foreign policy goals. Simply put, the United States cannot pursue its preferred policies as it pleases. Instead, it must internalize the costs of interference with Countries X, Y, and Z and determine whether a goal is worth those potential costs. The complexities of international politics in a multipolar world thus present serious challenges to the achievement of U.S. interests.

From this stylized example, it becomes clear that multipolarity directly influences any assessment of foreign affairs federalism. Consider the following extension of the previous example. Imagine that the United States is in a multipolar system with China, Germany, and Russia. China has the world's largest economy; many

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(explaining that modern "great powers" are distinguished by their relatively high levels of economic and military independence).

countries, including the United States, want to access the Chinese market. Imagine further that China is an authoritarian government with a poor human rights record. Wyoming, angered by the Chinese government's abuse of people in Tibet, passes a statute prohibiting the state from doing business with companies that conduct business with the Chinese government and any of its state-owned enterprises. The United States, through the President and Congress, already condemned the Chinese government's human rights record and passed a statute placing targeted sanctions against a small number of Chinese state-owned enterprises. The statute is ambiguous as to whether its enumeration of sanctioned enterprises is exhaustive or illustrative.

The Supreme Court must either invalidate or uphold the Wyoming statute. In effect, the Supreme Court must decide if a presumption in favor of centralization (in the federal government) or decentralization (through federalism) is warranted in the absence of clear statutory direction either one way or another. In this example, many countries, including the United States and the other great powers, want to ensure that their companies can pursue business opportunities in the Chinese market. The United States, though, lacks the capacity to try and impose its preferences on China or the other great powers. Its leverage is therefore limited—Wyoming's statute might generate a Chinese response that restricts U.S. business opportunities in China and creates serious losses for the nation. Hence, the multipolar geopolitical conditions mean that one state's action can have grave implications for the United States.

Therefore, when the United States confronts a multipolar world, the Supreme Court should apply a presumption in favor of the federal government. In a multipolar world, the benefits of centralization to national economic prosperity likely outweigh the benefits to all but one of the fifty states. The United States does not have the power to leverage its economic or military strength on other countries to pursue its preferences. In consequence, the federal government's ability to coordinate the interests of the several states and determine appropriate policy is a valuable policy tool. Perhaps more ominously, other great powers might strategically exploit conflicts between the federal government and the several states. For example, the third-party great power can effectively "divide and conquer" by providing the state with some marginal benefit (e.g.,



investment or trade opportunities) that impedes the realization of collective goods by the United States.<sup>303</sup>

This dynamic, however, changes in a unipolar world in which the United States is the hegemon of international politics.<sup>304</sup> Under those (hypothetical) conditions, it has the world's strongest military and the largest economy. While the United States certainly cannot impose binding global rules, it can more easily influence foreign policy than under multipolar circumstances. To be clear, this does not mean that the United States is omnipotent or unconstrained. Rather, our argument is that the constraints on the United States created by other great powers in the multipolar world do not exist to the same degree in the unipolar world. Hence, in these circumstances the federal government has greater flexibility—although not infinite capacity—to realize its objectives.

Returning to our example, how should the Supreme Court treat the same Wyoming statute in a unipolar world? When the United States operates as a hegemon in a unipolar system, the Supreme Court should apply a presumption in favor of the states. Under these hypothetical conditions, the United States is far better situated to realize its preferences and gain access to the Chinese market regardless of what Wyoming does. Here, China must be sensitive to the American foreign policy objectives because of the United States' superpower status. In light of American strength, the case for centralized control of economic policy is weaker because the costs of decentralization are smaller.<sup>305</sup> Indeed, the greater freedom of action that the United States has as a hegemon in a unipolar world might even encourage experimentation at the state level. Experimentation, like the hypothetical Wyoming enactment, might identify instances in which the national government is too narrowly defining the national interest in relation to public preferences. While this possibility arises without regard to the international political environment, the cost of

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303. See Eric A. Posner, Kathryn E. Spier & Adrian Vermeule, *Divide and Conquer*, 2 J. LEGAL ANALYSIS 417, 426–27 (2010) (modeling divide and conquer strategies as, inter alia, a Stag Hunt game, and explaining how third-party bribes can yield suboptimal outcomes for participants).

304. For arguments that the United State is often hegemonic, see Stephen G. Brooks & William C. Wohlforth, *American Primacy in Perspective*, FOREIGN AFF., July-Aug. 2002, at 20–21 (“If today’s American primacy does not constitute unipolarity, then nothing ever will.”); Ian L.G. Wadley, *U.S. and Them: Hubs, Spokes, & Integration with Reference to Transboundary Environment and Resource Issues*, 21 BERKELEY J. INT’L L. 572, 578–79 (2003) (noting American attempts to maintain good state-to-state relationships while preserving its status as a hegemonic state).

305. We do not address here the possibility that it is centralization that yields hegemonic status. It suffices to say that the United States has arguably played the role of a hegemon historically despite some decentralization.

addressing such deficiencies is smaller in a unipolar world than in a multipolar world.

Building on this last point, we note that it is difficult to quantify the magnitude of the potential benefits from state foreign affairs experimentation in the unipolar world (or the potential costs of such experimentation in a multipolar world). Similarly, it is hard to quantify the potential benefits from and costs of centralization in a multipolar world. We concede that there is no precise answer to these inquiries; they rest on several context-specific factors beyond the scope of our parsimonious theory. Nevertheless, our approach makes significant progress on these complex questions.

With respect to questions of optimal institutional design, our approach suggests that state experimentation in foreign affairs will be more likely to generate positive outcomes and catalyze national government action in the unipolar world since the United States can more easily absorb the potential geopolitical consequences. At the same time, the values of centralization—including speed, coordination, and expertise—will most likely generate the greatest benefits in the multipolar world, where the United States is most constrained. Unlike formalists, who fail to consider the costs and benefits of centralization, and unlike some functionalists, who tend to favor centralization in the presidency when it comes to foreign affairs matters, our claim takes seriously the role of international political factors. In our view, it appropriately homes in on a metric for thinking about the tradeoffs between foreign affairs federalism and national government centralization.

Finally, we note that the conceptual tool that drives the analysis—polarity—is an especially valuable heuristic because judges can employ it as a way to organize vast information into a manageable, readily usable form. Like any heuristic device in a parsimonious structural theory, the concept of polarity will sometimes seem vague or will fail to capture all of the intricacies of international politics. If the international political environment informs the costs and benefits of foreign affairs federalism—and we believe it does—we must not jettison polarity. We must not continue to evaluate foreign affairs federalism solely on formalist doctrine and the sparse, incomplete textual directives of a 225-year-old Constitution. Polarity provides a useful, easily applicable tool to understand the international environment and the wisdom of varying levels of foreign affairs centralization.

To summarize, there is a simple correlation between polarity and the benefits of foreign policy centralization: As geopolitical constraints on the United States grow, the courts should favor

centralization. As those constraints on the United States shrivel away, the courts should favor greater federalism in foreign affairs. A multipolar world should produce foreign affairs presumptions in favor of the national government. A unipolar world with the United States as the superpower should produce presumptions in favor of the states, resulting in greater federalism.

## 2. Polarity, Issue by Issue

As described so far, a polarity-based framework assesses the benefits of foreign affairs–related centralization at a high level of generality through a composite judgment about material, military, and economic power. Nations can vary along these dimensions: military, material, and economic wealth might not all correlate. Moreover, superiority along any one of these measures may not be relevant to a particular national policy question—for example, trade sanctions against Burma (or Myanmar) or negotiations with Austrian insurance companies. Although more speculative, this suggests that the framework of polarity might provide some guidance, however limited, at a more granular, issue-by-issue level: we should consider power or influence within a specific field in foreign affairs. Without expanding the concept of polarity beyond a point at which it is no longer useful, it may nonetheless be feasible to refine the analysis in ways that promote effective judicial action without dramatically raising decision costs.<sup>306</sup>

Consider a motivating example: the United States has the most advanced military in the world, and its military expenditures exceed those of the next ten countries combined.<sup>307</sup> Along the military or security dimension, the United States is clearly a superpower today; it operates in functionally unipolar circumstances. Its capacity to leverage its power and realize its preferences in international politics is correspondingly high when military power is at issue. At the same time, the United States is not a superpower in a unipolar world when it comes to setting international trade or environmental policy. Rather, the United States operates in a multipolar context; it cannot impose its preferences on, for example, China or the European

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306. *Accord* BANKS & BLAKEMAN, *supra* note 16, at 224 (suggesting that the Court could “pragmatically adjudicate cases in terms of discrete policy areas” in foreign affairs federalism matters).

307. *Background Paper on SIPRI Military Expenditure Data, 2011*, STOCKHOLM INT’L PEACE RES. INST., 2 (Apr. 17, 2011), <http://www.sipri.org/research/armaments/milex/sipri-factsheet-on-military-expenditure-2011.pdf>.

Union.<sup>308</sup> Hence, the United States might be generally unconstrained, but significantly limited with respect to a specific foreign affairs issue.

Nevertheless, a polarity-based framework still provides guidance. Though the analysis certainly becomes more complicated at the more granular level, courts can still ascertain the merits of presumption in favor of centralization in light of the constraints on the United States. Courts would simply consider the constraints with respect to a *specific* foreign affairs issue, such as international trade, the environment, or national security. Even if the international political environment varies on an issue-to-issue basis, the concept of polarity is still helpful in capturing the relative costs and benefits of centralization. At the very least, it provides a rough metric to evaluate the power of the United States relative to the rest of the world in more discrete areas of foreign affairs.

We want to emphasize that polarity does not provide a *perfect* proxy for judgments about the international political environment. Rather, the polarity framework sufficiently guides judges in evaluating the merits of centralization in light of the vagaries of international politics. This is true at the systemic level and we posit that it can be useful at the issue-by-issue level as well. We also should be clear that this more granular use of the presumption requires judges to impose some taxonomical order on the unruly world of international affairs—deciding, for example, how to draw the line between trade and military disputes, or human rights and resource access questions. Although we recognize that many of these lines will be debatable, we think that courts and commentators already employ a rough categorization of foreign affairs issues that serves tolerably well for our doctrinal purposes.

To make more granular judgments about the benefits of centralization in a given case, courts could use a variety of practical tools and devices available in the litigation process to gain information about polarity in discrete areas of foreign affairs, including State Department statements of interest and amicus curiae briefs. Attention to the usage of these tools in earlier cases suggests that the conventional skepticism about courts' ability to make careful judgments about the relative costs or benefits of foreign policy centralization can be overstated. Informed directly by the political branches, but still able to benefit epistemically through adversarial

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308. See Krittivas Mukherjee & Alister Doyle, *World Leaders Try to Save Troubled Climate Talks*, REUTERS (Dec. 16, 2009), <http://in.reuters.com/article/2009/12/16/idINIndia-44776420091216> (describing divisive climate talks at Copenhagen in which U.S. negotiators were locked in debate and unable to reach an agreement accommodating their preferences).

presentations, the courts seem not to be disabled meaningfully from the sort of general judgment that a polarity analysis entails.

Judicial experience with international human rights litigation is instructive in this regard. Under the Alien Tort Statute (“ATS”),<sup>309</sup> aliens can bring suit in U.S. courts against other aliens for a tort in violation of the law of nations or a treaty. Aliens have filed hundreds of lawsuits alleging violations of international human rights law; many of the lawsuits involve sensitive foreign policy issues. In such cases, federal courts solicited statements of interest (“SOI”) from the U.S. State Department to better understand the potential foreign policy complications of specific cases. Courts also considered the merits of the executive branch’s suggestions of dismissal. Additionally, courts independently have determined the wisdom of adjudicating cases involving serious violations of human rights. While these SOIs do not comprehensively describe U.S. foreign policy, they provide the courts with sufficient information to evaluate the international political environment. If the executive branch concludes that a specific case will likely complicate its foreign affairs initiatives, it has ample incentive to provide enough information in the SOI to be persuasive to a court.<sup>310</sup>

Another example derives from cases arising from the resolution of claims between either (1) the United States and the Soviet Union<sup>311</sup> or (2) the United States and Iran.<sup>312</sup> In both lines of cases, the Court generally has succeeded in identifying and carefully balancing foreign policy concerns, even when validating presidential action. Courts also consider potential international relations ramifications when determining whether to hear cases on the merits. Consider, for example, the landmark case of *Banco Nacional de Cuba v. Sabbatino*.<sup>313</sup> This seminal foreign affairs case involves the act of state

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309. Alien Tort Claims Act, 28 U.S.C. § 1350 (1948); *see, e.g.*, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 261 (2d Cir. 2007) (ruling that plaintiffs may sue defendant corporations for violations of international law related to Apartheid under the Alien Tort Claims Act); *Kadic v. Karadzic*, 70 F.3d 232, 242–44 (2d Cir. 1995) (reversing the lower court and finding claims of genocide, war crimes, torture, and summary execution in Bosnia-Herzegovina to be sufficiently alleged under the Alien Tort Claims Act).

310. SOIs can take a variety of positions, from counseling dismissal to supporting plaintiffs.

311. *United States v. Pink*, 315 U.S. 203, 227–28 (1942); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (allowing the President to resolve outstanding claims between Russia and the United States without the advice and consent of the Senate).

312. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (holding that the President has power to settle by executive order claims that are “a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we conclude that Congress acquiesced to the President’s action”).

313. 376 U.S. 398 (1964).

doctrine.<sup>314</sup> In weighing the application of the doctrine, the Supreme Court closely analyzed the relationship between the United States and Cuba after the Bay of Pigs and the Cuban Missile Crisis, recognized limits to its capacity to make foreign affairs determinations, and interpreted the international law restrictions on expropriation.<sup>315</sup> While foreign affairs concerns, by themselves, were not the central focus of the case, the Court considered the potential consequences of its decision in light of the international political conditions of the day. In all these domains, courts successfully gather information and make reasoned judgments about geopolitical conditions.

In addition to SOIs from the State Department, courts routinely gain information about polarity from two other sources. First, courts learn about foreign affairs through the amicus curiae briefs. For example, consider *Sosa v. Alvarez-Machain*,<sup>316</sup> a pivotal case regarding the validity of international human rights litigation in United States courts. In *Sosa*, the Supreme Court addressed the meaning and scope of the ATS, concluding that the ATS permitted, under certain conditions, a limited number of actionable claims based on international law.<sup>317</sup> At least seventeen amicus curiae briefs informed the Court's decision, including submissions from the United Kingdom, Switzerland, and Australia; the National Foreign Trade Council, the World Jewish Congress, and the American Jewish Committee; and a number of women's human rights organizations and

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314. *Id.* at 416:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

315. *See id.* at 410 ("Respondents . . . contend that relations between the United States and Cuba manifest such animosity that unfriendliness is clear . . ."); *id.* at 429:

There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments [with free market economies] . . . for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision of prompt, adequate, and effective compensation. However, Communist countries . . . commonly recognize no obligation on the part of the taking country.

*Id.* at 433 ("Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade.").

316. 542 U.S. 692, 697 (2004) (holding that Mexican national could not bring a Federal Tort Claims Act suit against the U.S. government based on his "allegation that the Drug Enforcement Administration instigated his abduction from Mexico for criminal trial" and that he could not "recover under the Alien Tort Statute").

317. *Id.* at 720.

the Presbyterian Church of Sudan.<sup>318</sup> Given the breadth of submissions, it is plausible to think that amicus briefing will often serve as another mechanism for courts (and especially the Supreme Court) to gather information about the foreign affairs implications of adjudicating sensitive cases on the merits.

Finally, federal judges tend to be simply more informed about foreign affairs and international politics relative to the recent past. Due to a constellation of factors, including the rise of information technology and states' increased usage of international institutions like the United Nations and the World Trade Organization, the ready availability to judges of information about governance structure, national interests, and foreign policies has never been greater. While courts have not suddenly become experts in the conception, design, and execution of U.S. foreign policy, they have an improved capacity to evaluate foreign affairs. We argue that courts also have improved capacity to utilize our framework to better understand the relationship between international politics and the merits of a presumption against centralization under certain conditions.

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In sum, courts already make determinations about the magnitude of foreign affairs concerns. Once that is conceded, the polarity-based framework simply becomes a way of organizing and rationalizing what are now ad hoc judgments into a clear and parsimonious framework. That framework provides a simple way for courts to assess whether there is an interest in centralized policymaking that is likely to overcome the states' interest in regulation.

### *C. Applications*

By now, our basic analytic framework for foreign affairs federalism cases should be clear. Stated briefly, we recommend the following: Apply a presumption in favor of state regulatory authority when centralization is unnecessary, and apply a presumption in favor of federal regulatory authority when centralization is necessary. In determining whether centralization is warranted, ask whether the United States operates in a multipolar or a unipolar environment on a given issue. If the world is effectively multipolar, centralization is likely the better default rule.

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318. See *Highlights of the Supreme Court's 2003-2004 Term: References for Sosa v. Alvarez-Machain (June 29, 2004)*, CORNELL UNIV. L. SCH. LEGAL INFO. INST., [http://www.law.cornell.edu/supct/background/03-339\\_ref.html](http://www.law.cornell.edu/supct/background/03-339_ref.html) (last visited Jan. 20, 2013) (listing various amicus filings).

To show how this works in practice, we return briefly to some of the cases discussed in Part I. To begin with, consider *Belmont* and *Pink*, which concerned the Litvinov Agreement.<sup>319</sup> The Court decided these two cases in 1937 and 1942, in the midst of a time of rapid changes in international politics.<sup>320</sup> At the time, the world was best characterized as highly multipolar. The Soviet Union, Nazi Germany, imperial Japan, and the United States were all great powers with starkly competing national interests. The United States confronted an international environment that entailed grave constraints. Accordingly, it could not readily leverage its power and realize its policy preferences, especially in light of the interests of other states. Given these conditions, our polarity-based framework suggests that the Court in *Belmont* and *Pink* applied the proper presumption in favor of centralization to resolve conflicts over the President's authority to settle claims in New York.<sup>321</sup> Notice that the same logic might be extended to *Hines v. Davidowitz*, the 1939 case that concerned Pennsylvania's alien registration statute,<sup>322</sup> and *Zschernig v. Miller*, in which the Court invalidated Oregon's Cold War-era escheat rule specifying the inheritance rights of heirs from Communist countries.<sup>323</sup> In both of these cases, the state rule touched upon delicate international concerns at a time when the multipolar international political environment made such experimentation risky or even dangerous. In each case, the Court properly applied a presumption in favor of the national government because the benefits of centralizing foreign policy authority in the national government were likely high.

In contrast, we find cause to reconsider *Crosby v. National Foreign Trade Council*<sup>324</sup> and *American Insurance Ass'n v. Garamendi*,<sup>325</sup> more recent cases in which states targeted, respectively, entities trading with Burma and insurance companies that had connived with the Nazi regime during World War II. In both instances, a polarity-based framework suggests that the Court likely erred in assuming that federal regulation was presumptively

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319. See *supra* text accompanying notes 68–73.

320. See *supra* text accompanying notes 68–73.

321. See *supra* text accompanying notes 68–73.

322. 312 U.S. 52, 74 (1941).

323. 389 U.S. 429, 435–36 (1968).

324. 530 U.S. 363, 366, 388 (2000) (declaring Massachusetts statute prohibiting certain state transactions with Burma unconstitutional under the Supremacy Clause).

325. 539 U.S. 396, 401 (2003) (holding that executive authority in domain of foreign affairs preempted California statute requiring disclosures by insurance companies that sold policies in Europe during the Holocaust).



warranted. When these cases were decided, the United States was the clear hegemon in a unipolar world. The United States was not only the dominant country vis-à-vis the other powerful states in the world, but also with regard to Burma, and the United States market was exceedingly attractive to European insurance companies. In this unipolar context, the benefits of centralizing authority in the national government are reduced with respect to military security. The United States is already a superpower; greater centralization would likely produce diminished returns. Application of a polarity framework suggests that the Court should have applied the presumption in favor of Massachusetts and California, respectively, over the national government.

Finally, in the recent immigration context in which *Arizona v. United States*<sup>326</sup> arises, the United States (to date) has no clear competitor. It sets the terms for its own global migration. Under those circumstances, the costs of state experimentation—at least setting aside any questions of individual rights—are low. Accordingly, the *Arizona* Court should at minimum have begun its analysis with a presumption in favor of the relevant state law, rather than the peroration to nationalism with which Justice Kennedy opened his argument.

#### CONCLUSION

The Supreme Court's approach to foreign affairs federalism—the resolution of overlapping claims to regulatory authority by the states and the President in the absence of some dispositive source of enacted law (constitutional provision, statute, or treaty)—has until now been muddled and inconsistent. The most recent entry in that ledger, *Arizona v. United States*, does little or nothing to clarify matters. This Article demonstrates why the existing scholarly approaches to this problem are inadequate. It offers a second-generation functionalist argument that seeks to correct the shortfalls of previous efforts. To that end, we propose a parsimonious rule: apply a presumption in favor of state regulation when the United States is the hegemon of a unipolar world (where the benefits of centralizing authority are lower), and apply a presumption in favor of the national government in a multipolar world (where the benefits of centralizing authority are higher). We do not contend that our framework will inexorably and necessarily yield the right answer—this is beyond the grasp of most tractable doctrinal heuristics. Rather, we suggest that

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326. 132 S. Ct. 2492 (2012).

this framework warrants serious consideration because it has the potential to lend structure, predictability, and analytic rigor to an area of jurisprudence that to date has been erratic, unpredictable, and unprincipled.

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