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## The Future of the Foreign Commerce Clause

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# THE FUTURE OF THE FOREIGN COMMERCE CLAUSE

Scott Sullivan\*

*The Foreign Commerce Clause has been lost, subsumed by its interstate cousin, and overshadowed in foreign relations by the treaty power. Consistent with its original purpose and the implied, but unrefined view asserted by the judiciary, this Article articulates a broader and deeper Foreign Commerce power than is popularly understood. It reframes doctrinal considerations for a reinvigorated Foreign Commerce Clause—both as an independent power and in alliance with other coordinate foreign affairs powers—and demonstrates that increasing global complexity and interdependence makes broad and deep federal authority under this power crucial to effective and efficient action in matters of national concern.*

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## INTRODUCTION

In typical U.S. spousal revenge-murder attempts, knives, guns, and hands are the weapons of choice for the avenging parties. However for Carol Anne Bond, a microbiologist employed by the chemicals firm Rohm & Haas Co., the ingredients and know-how for making chemical weapons were readily accessible. Bond's decision to employ a toxic mix of substances from her suburban Philadelphia workplace and on Amazon.com in an attempt to poison the woman carrying her husband's baby generated a Supreme Court case with far-reaching implications.<sup>1</sup>

In 2011, the federal government indicted Ms. Bond under the Chemical Weapons Convention, the same arms control treaty that raised global pressure against sarin gas use in Syria, and to which President Bashar Assad acceded in late 2013.<sup>2</sup> In Bond's case, the defense disputed the applicability of the arms treaty to her domestic violence dispute. The Third Circuit concurred with the government, yet expressed its unease in applying federal chemical weapons prohibitions to a scenario as quintessentially local as a jilted spouse.

Complicated by its infidelity-laden and toxic chemical-wielding spousal revenge backstory, when the Supreme Court agreed to review the case, academics and commentators viewed the Court's action as one which threatened to upend the federal government's power to control foreign policy and internally enforce its agreements with other nations.

Both courts and scholars alike have struggled with untangling the scope of treaty power and its application in controversial cases like *United States v. Bond*.<sup>3</sup> The source of controversy and consternation is a direct conflict between two widely accepted precepts: There is broad consensus that the federal government must be able to exercise its power to effectively pursue national foreign policy interests. On the other hand, there is general agreement that the exercise of such power in this area cannot be unlimited. Complicated by the absence of any textual limitation within Article II, scholars have long sought limiting principles for use in contemplating the question.

However, a more direct and less barbed path to resolving questions of federal power is forthright. Since the Great Depression, the Commerce Clause has been the primary general power of the federal government at issue in unpacking treaty authority and applicability. While existing doctrine has fashioned itself around its interstate component, federal

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1. *Bond v. United States*, 134 S. Ct. 2077 (2014).

2. See *Syria Chemical Attack: What We Know*, BBC, <http://www.bbc.com/news/world-middle-east-23927399> (last updated Sept. 23, 2013, 5:46 AM).

3. 681 F.3d 149 (3d Cir. 2012), *rev'd*, 134 S. Ct. 2077.

authority derived from the power to regulate is greater, and thus can reach deeper into traditional state power.

Contemporary scholarship and judicial authorship routinely conflate the “Commerce Clause” into a singular entity unfastened from foreign affairs. Pervasively overgeneralized, the Commerce Clause is a tripartite doctrine consisting of the Interstate Commerce Clause, the Indian Commerce Clause, and the Foreign Commerce Clause, each with its distinct purpose, scope, and applicability.

Federal authority vested in the Interstate Commerce Clause has greatly expanded since the Founding, spurred by Depression-era presidential policy intended to stimulate the economy and support impoverished citizenry. This expansive interstate commerce authority is now a target of a reactive movement to reduce federal powers over commerce among the states. Communicated in five carefully selected words, the Foreign Commerce Clause reflects the Founders’ intent that the federal government maintain exclusive control over international relations, a power that has been relatively consistent over our history. It must not be lumped into a singular concept of the Commerce Clause and tangled in an embroiling contemporary debate when assessing treaty powers. To do so misconstrues and overcomplicates the issue.

This Article intends to clarify and simplify understanding of foreign powers against the increasingly convoluted backdrop of thought proffered by scholars, judges, and journalists-come-constitutional pundits lured by the suburban love triangle dramatics of *Bond*. The implications of reinvigorating the original, functional purpose of the Foreign Commerce Clause as a unilateral mechanism to maximize U.S. leverage in foreign affairs negotiations or to enforce international agreements is dramatic. The country’s ability to act on pressing contemporary concerns, such as national security, environmental protection, and immigration, hinges upon this currently twisted debate.

Part I considers the Commerce Clause and reorients the discussion through the lens of the foreign commerce power the Framers considered the heart of federal power.<sup>4</sup> This part distinguishes between foreign commerce from domestic parameters, both as understood by the Founders and subsequent judicial doctrine. Part II explains how foreign commerce power has been lost and conflated with two other powers: the interstate commerce doctrine and the treaty power. Part III reframes doctrinal considerations in

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4. James Madison described the federal government’s power relating to issues of foreign commerce as being “generally, perhaps universally, regarded as indisputabl[y]” at the core of federal authority by the delegates to the Constitutional Convention. 3 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES, PUBLISHED BY ORDER OF CONGRESS 572 (1865). As to the interstate commerce power, Madison confessed that he “always foresaw” interpretive difficulties as “[b]eing in the same terms with the power over foreign commerce. Yet it is very certain that it . . . was intended as a negative and preventive provision against injustice among the States themselves.” 4 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES, PUBLISHED BY ORDER OF CONGRESS 14–15 (1867).

contemplating the interaction between federal action under a reinvigorated Foreign Commerce Clause and the state police power. This part also considers how the Foreign Commerce Clause operates when aligned with other coordinate foreign affairs powers, thus deepening federal control in the areas affected, regardless of traditional state powers.

### I. REINTRODUCING THE FOREIGN COMMERCE CLAUSE

The Commerce Clause of the U.S. Constitution empowers Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>5</sup> The three parts of the Clause—foreign, interstate, and Indian—are related. However their purpose, applicability, and scope are discrete.

Despite these differences, jurists and scholars increasingly treat the Commerce Clause as a unitary, monolithic doctrine. In recent decades, the doctrine most often ascribed to the “Commerce Clause” represents only its interstate component.<sup>6</sup> Conflating the elements of the Commerce Clause subverts the original intents of the Framers and, left unchecked, will undermine U.S. foreign policy prerogatives of the federal government.

This part first sets out the crossroad at which the doctrine lies through a brief discussion of *Bond*.<sup>7</sup> While the Court ultimately chose a more minimalist approach to resolving *Bond*, three Justices made clear their distaste for the status quo doctrines invoked in the case.<sup>8</sup> The relevant moving parts in *Bond* are numerous and the fact that they are typically overlooked itself suggests the danger presented by the loss of the Foreign Commerce Clause.<sup>9</sup>

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5. U.S. CONST. art. I, § 8, cl. 3.

6. See *infra* note 94 and accompanying text.

7. *Bond*, 681 F.3d at 149.

8. The Court’s decision is a classic example of constitutional avoidance, by which the Justices seek to avoid making a final Constitutional interpretation. However, much as with the Voting Rights Act case considered during the same term, such decisions are often indicative of future court action should a majority of the Court see additional federal acts which they view as federal overreach. See, e.g., A. Christopher Bryant, *The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments*, 47 HOUS. L. REV. 579, 579 (2010) (explaining how preceding cases avoided judgments of constitutionality but presaged the Voting Rights Act’s “ultimate demise”); Daniel A. Farber, *Justice Stevens, Habeas Jurisdiction, and the War on Terror*, 43 U.C. DAVIS L. REV. 945, 965 (2010) (noting that a finding of constitutional habeas rights by the Supreme Court was a “predictable extension” of the Court’s immediately preceding nonconstitutional holdings).

9. *Bond* is most frequently discussed by the judiciary and scholars alike as presenting the question of federalism limitations on the Article II treaty power. See Zvi Rosen, *Treaty Power Justifications for Early Federal Trademark Laws*, 16 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 1 (2013) (asserting that Court consideration of *Bond* was reexamination of *Missouri v. Holland*’s treaty power holding); see also *United States v. Roque*, No. 12-cr-540(KM), 2013 WL 2474686, at \*1 n.3 (D.N.J. June 6, 2013) (describing *Bond* as a case presenting questions of “federalism-based limitations on a federal statute based on the Treaty Power”); Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 95 (2014) (“The Supreme Court is on the cusp of deciding another important case about the treaty power: *Bond v. United States*.”).

This part then proceeds to reintroduce the original intent and doctrinal underpinnings of a reinvigorated Foreign Commerce Clause analysis. As an originalist matter, current tendencies toward singular treatment undermine the Founders' intents and goals that gave rise to a tripartite clause that separately addresses distinct arenas of commerce. At the time of the Founding, the regulation of commerce, in particular commerce with foreign nations, was at the forefront of the delegates' minds.<sup>10</sup>

The Founders overwhelmingly agreed on the importance of federal control over foreign commerce.<sup>11</sup> Alexander Hamilton wrote that resolving an effective means of regulating intercourse with foreign countries "is one of those points, about which there is least room to entertain a difference of opinion, and which has in fact commanded the most general assent of men, who have any acquaintance with the subject."<sup>12</sup> While the Foreign Commerce Clause is underexamined and undertheorized, existing precedent portends a tremendous affirmative scope that has not yet been challenged, nor have courts given any indication that temporal circumstances justify a shift in its role or interpretation.

#### A. *At a Crossroads in Federal Power*

The facts surrounding *Bond* evoke a sense of a Desperate Housewives episode rather than the makings of a case challenging federal power.<sup>13</sup> The dramatic atmospherics reflect the petitioner's considered decision to characterize the issue as one of purely local concern, and thus outside the ambit of federal authority.

In *Bond*, the petitioner, Carol Anne Bond, became angry when she learned that a close friend, Myrlinda Haynes, was pregnant with Bond's husband's child.<sup>14</sup> Bond stole the chemical 10-chloro-10H-phenoxarsine from her employer's laboratory and ordered potassium dichromate over the

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10. See Richard B. Collins, *Economic Union As a Constitutional Value*, 63 N.Y.U. L. REV. 43, 53 (1988) ("When commercial issues were debated at the Convention, there was great concern about foreign commerce. In particular, the framers wanted a stronger national union to compete more effectively with the British."); Brian H. Havel, *The Constitution in an Era of Supranational Adjudication*, 78 N.C. L. REV. 257, 338–39 (2000) (describing foreign commerce power as possessing the "axial position of foreign commerce in the Framers' plan for government, ranking with war and peace . . ."); Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1731 (2012) (citing the Foreign Commerce Clause as the Framers' tool to ensure "that private or state actors did not embroil the nation in diplomatic difficulties").

11. See Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT'L L. 1, 17 (2001) ("Courts and legal scholars have long recognized that the desire for an effective national authority to regulate foreign commerce—more specifically, an authority that would enable the states to take concerted action to resist and retaliate against exclusionary British trade practices—was one of the primary causes of the agitation for the Constitution of 1787.")

12. THE FEDERALIST NO. 11, at 58 (Alexander Hamilton) (Gary Wills ed., 1982).

13. *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012), *rev'd*, 134 S. Ct. 2077 (2014).

14. *Id.* at 151.

internet.<sup>15</sup> After mixing the chemicals, Bond spread them at various locations on and around Haynes's home, car, and mailbox.<sup>16</sup> When Haynes discovered the foreign substances, she informed the U.S. Postal Service and federal authorities set up surveillance cameras on her property.<sup>17</sup> Investigators recorded Bond spreading chemicals more than twenty-four separate times for the purpose of poisoning Haynes.<sup>18</sup> Based on this evidence, Bond was arrested and charged with two counts of "possessing and using a chemical weapon" in violation of 18 U.S.C. § 229,<sup>19</sup> which Congress passed to implement domestic measures to enforce U.S. treaty obligations undertaken as part of the 1993 Chemical Weapons Convention.<sup>20</sup>

Both the trial court and the Third Circuit rejected Bond's federalism-based defense and recited Justice Holmes's opinion in *Missouri v. Holland*<sup>21</sup> throughout their decision.<sup>22</sup> In *Holland*, the Court upheld federal regulation of migratory birds by holding that the federal government's exclusivity in treaty-making, combined with Congress's authority to enact laws "necessary and proper"<sup>23</sup> to execute other federal powers, leads to the conclusion that "there can be no dispute about the validity of [a] statute" that implements a valid treaty.<sup>24</sup>

On appeal, the Third Circuit held that under *Holland*, "principles of federalism will ordinarily impose no limitation on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid,"<sup>25</sup> and that "Congress may . . . legislate to implement a valid treaty, regardless of whether Congress would otherwise

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15. *Id.*

16. *Id.*

17. The U.S. Postal Service was not her first option. Haynes first called the local police who suspected the substance might be cocaine. After tests indicated it was not cocaine, an officer suggested she wash the affected areas frequently. Unsatisfied, Haynes informed her letter carrier who forwarded the information to the U.S. Postal Inspection Service that ultimately performed the investigation. See John Shiffman, *High Court Hears Pennsylvania Case of Love, Poison and Constitutional Rights*, PHILA. INQUIRER (Feb. 23, 2011), [http://articles.philly.com/2011-02-23/news/28620640\\_1\\_carol-anne-bond-myrlinda-haynes-pennsylvania-case](http://articles.philly.com/2011-02-23/news/28620640_1_carol-anne-bond-myrlinda-haynes-pennsylvania-case).

18. *Bond*, 681 F.3d at 155.

19. *Id.*

20. Article VII of the treaty requires signatories to "adopt the necessary measures to implement its obligations," including "enacting penal legislation" to ensure that no "natural and legal person" undertakes "any activity" prohibited to the signatory state." See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter *Chemical Weapons Convention*], available at <http://www.un.org/disarmament/convention-prohibition-chemical-weapons/>. Such prohibited activities include the use of chemicals to cause physical harm to others.

21. 252 U.S. 416 (1920).

22. See *Bond*, 681 F.3d at 156.

23. See U.S. CONST. art. I, § 8, cl. 18.

24. *Holland*, 252 U.S. at 416, 432.

25. *Bond*, 681 F.3d at 153.

have the power to act or whether the legislation causes an intrusion into what would otherwise be within the state's traditional province."<sup>26</sup>

While the Third Circuit considered itself bound by the Court's opinion in *Holland*, it expressed little sympathy with the contours of that decision and substantial support for Bond's federalism argument as a normative matter.<sup>27</sup> In the narrow sense, the circuit's opinion reflects skepticism as to the wisdom of federal decisions in the case. Each judge on the appellate panel questioned the federal government's decision to charge Bond as it had.<sup>28</sup>

Permeating all of the opinions, however, is a view that the circumstances in *Bond* reflect a deeper problem of federal intrusion into state power.

The Third Circuit's majority opinion, authored by Judge Jordan, asserts that the "increasingly broad conceptions of the Treaty Power's scope . . . runs a significant risk of disrupting the delicate balance between state and federal authority."<sup>29</sup> It questions whether "the *Holland* court would have spoken in the same unqualified terms had it foreseen the late Twentieth Century's changing claims about the limits of the Treaty Power."<sup>30</sup>

In a separate concurring opinion, one panel member explicitly urged the Supreme Court to use the *Bond* case to "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the [Constitutional] Convention contemplated their inclusion in it."<sup>31</sup>

The Third Circuit's statement that it viewed the required outcome as in direct tension with the judiciary's "renewed attention on federalism over the last two decades" was prophetic.<sup>32</sup>

In reversing the Third Circuit's decision in 2014, the Supreme Court majority hazily invoked a "clear statement" requirement.<sup>33</sup> Specifically, that federal laws should not be applied to impinge upon traditional state

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26. *Id.* at 156.

27. *Id.* at 164 n.18 (pausing to consider how implementing legislation might be reviewed "in light of the apparently evolving understanding of the Treaty Power" if "*Holland* were not so clear").

28. *See, e.g., id.* at 165 n.20 ("The decision to use the Act—a statute designed to implement a chemical weapons treaty—to deal with a jilted spouse's revenge on her rival is, to be polite, a puzzling use of the federal government's power."). Clearly, prosecuting Bond for violating the statute that implements the Chemical Weapons treaty was not the only option to criminally punish her actions. All states possess a host of criminal laws, punishments, and rehabilitation programs that address assault and domestic violence as well as laws applicable to those engaged in attempted murder.

29. *Id.* at 158.

30. *Id.* at 163. The opinion questions whether the scope of federal authority would be considered as expansive as articulated in *Holland* if considered as a matter of first impression. In this vein, the circuit suggests that there may be "more to say about the uncompromising language used in *Holland* than we are able to say," and sought guidance from the Supreme Court to "clarify whether principles of federalism have any role" to play. *Id.* at 164 n.18.

31. *Id.* at 170 (Ambro, J., concurring).

32. *Id.* at 158 n.10 (majority opinion).

33. *United States v. Bond*, 134 S. Ct. 2077, 2088 (2014).

criminal law authority unless it is manifest that Congress intended such application.<sup>34</sup>

In concurrence, Justices Scalia, Thomas, and Alito repudiated the majority's reasoning, finding that it was "clear beyond doubt" that the Act covered Bond's acts, and that the relationship between Bond's case and the precedent cited by the majority was "entirely made up."<sup>35</sup> Having found the statute sufficiently clear, those in concurrence launched a broadside on the Court's holding in *Holland*, characterizing Justice Holmes's argument therein as one that "makes no pretense of resting on text, [and thus] unsurprisingly misconstrues it."<sup>36</sup> Invoking *United States v. Lopez*, Justice Thomas suggested that the broad federal authority articulated in *Holland* would "lodge in the Federal Government the potential for a 'police power' over all aspects of American life."<sup>37</sup>

The heat of the rhetoric in the Court's opinions obscures the fact that the majority and concurrences alike neglected to consider other relevant foreign affairs powers, thus failing to engage in a comprehensive review of an increasingly perplexing clash between federalism and foreign affairs.

Unfortunately, the Court's resurgent federalism approach relies on an approach to enumerated powers, at least as to the Commerce Clause, the broadest federal power that diverges from its original meaning and early construction. Properly understood, the Foreign Commerce Clause would independently justify the criminal statute at issue in *Bond* and reinforce the federal authority of the statute relative to the treaty power.

### B. *Origin of Foreign Commerce Clause As Domestic Regulation*

At the time of the Founding, consolidating and organizing the nascent power of the states internationally was crucial to the future of the nation and grossly underserved by the Articles of Confederation.<sup>38</sup> A primary driver of the Constitutional Convention of 1787 was to resolve federal powers over foreign affairs.<sup>39</sup>

During America's pre-constitutional era, the states were anxious to assert their independence and parochial competitiveness. The Declaration of Independence asserted each colony to be a "free and independent state," and when the Revolutionary War concluded, the former colonies were anxious

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34. *Id.* at 2087–88.

35. *Id.* at 2094–95 (Scalia, J., concurring).

36. *Id.* at 2098.

37. *Id.* at 2103 (Thomas, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 584 (1995)).

38. See generally Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 FORDHAM L. REV. 757 (2013).

39. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 175 (2d ed. 1996) (describing the Articles of Confederation foreign policy process as "anarchy"); MARK W. JANIS, *AMERICA AND THE LAW OF NATIONS 1776-1939* 33 (2010) ("[I]t was the inability of the United States under the Articles of Confederation to live up to its obligations as a sovereign state under international law which proved to be one of the principal causes of the downfall of that early form of U.S. government.").

to maximize economic and social gains.<sup>40</sup> States imposed tariffs and imports on other states, as well as foreign nations.<sup>41</sup> Competition among the states for commercial gain and leveraged security tended to leave each individual state vulnerable during negotiations with foreign powers.<sup>42</sup>

The legal architecture of the Articles of Confederation ignored that the “sovereign states” it intended to align lacked many of the hallmarks of international sovereignty.<sup>43</sup> While several states had engaged in independent foreign affairs actions, none were recognized by any major foreign powers as possessing international legal sovereignty.<sup>44</sup> Furthermore, none of the states exercised effective control of movement across their borders, especially from sister states.<sup>45</sup> All of the states were vulnerable to interference in their internal affairs, both by sister states and foreign powers.<sup>46</sup>

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40. As detailed by Fiona McGillivray, following the Revolutionary War, “the U.S. economy hit a recession” as “[d]emand for tobacco, rice and other primary products stagnated.” See FIONA MCGILLIVRAY ET AL., *INTERNATIONAL TRADE AND POLITICAL INSTITUTIONS: INSTITUTING TRADE IN THE LONG NINETEENTH CENTURY* 91 (2001). As such, individual states and the Continental Congress undertook a variety of acts to break into lucrative foreign markets. *Id.* at 91–95.

41. HENKIN, *supra* note 39, at 160–63.

42. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1446 (1987); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 *Nw. U. L. REV.* 1027, 1055 (2002).

43. This Article adopts the dimensions of sovereignty widely accepted by scholars of the subject matter outlined by Stephen Krasner: international legal sovereignty, interdependence sovereignty, domestic sovereignty, and Westphalian sovereignty. International legal sovereignty relates to rules regarding state recognition as part of the international community. Interdependence sovereignty reflects a state’s ability to control its borders such to exclude (or allow) the movement of goods, services, people and even ideas across those borders. Domestic sovereignty refers to domestic authority structures and their effectiveness of governance. Finally, Westphalian sovereignty refers to a state’s ability to independently determine their domestic authority structures. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 9–22 (1999).

44. State experiments in foreign relations were disastrous. The states were frequently taken advantage of by foreign sovereigns in relationship to trade and their isolated nature made them incapable of ensuring (or enforcing) compliance by foreign states abroad. Meanwhile, several states passed laws prohibiting the payment of debts to British creditors, directly frustrating the United States’ obligations under the Treaty of Paris that concluded the Revolutionary War. See Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 *Stat.* 80, available at <http://www.ourdocuments.gov/doc.php?doc=6&page=transcript>.

45. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *TEX. L. REV.* 1, 23 (2002) (such control is “integral to nineteenth century concepts of sovereignty because, under international law principles, a sovereign’s jurisdiction to legally regulate conduct was coterminous with its [ability to control its] territory”); Timothy Zick, *Constitutional Displacement*, 86 *WASH. U. L. REV.* 515, 527 (2009) (discussing control over territory and borders).

46. THE FEDERALIST NO. 7, at 35 (Alexander Hamilton) (Gary Wills ed., 1982) (“Each state . . . would pursue a system of commercial polity peculiar to itself. This would occasion distinctions, preferences and exclusions, which would beget discontent.”); see also Cindy Galway Buys & Grant Gorman, *Morsesian v. Victoria Versicherung and the Scope of the President’s Foreign Affairs Power to Preempt Words*, 32 *N. ILL. U. L. REV.* 205, 210 (2012) (describing “[p]roblems arising from competition among states with respect to foreign trade . . .”).

To the Framers, the key to economic prosperity was successful international trade, and the key to successful international trade was acquiring leverage in negotiations with foreign nations.<sup>47</sup> Under the Articles of Confederation, the core infirmity of the national government in international affairs flowed not from hindrances in entering treaties, but from a lack of authority to enforce its treaty rules in state courts where judges were predisposed to protecting local parties and state officials were promulgating inconsistent state law.<sup>48</sup> The emasculation of the national government was further pronounced as states often independently negotiated trade agreements, which enabled foreign powers to play the states against each other.<sup>49</sup>

In order to gain leverage internationally, the United States needed to be able to come to the negotiating table with the power to assure potential partners that it could effectuate any agreement uniformly throughout the nation.<sup>50</sup> The presence of the Foreign Commerce Clause in the Constitution served this goal. Exercised following the consummation of an international agreement, internal regulations under the Foreign Commerce Clause promoted economic efficiency.<sup>51</sup> Exercised independently, such regulations could capture efficiency benefits or use commercial regulation

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47. The Framers, all members of privileged, propertied classes, viewed Great Britain's wealth as a direct product of its management of foreign trade. *See* FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 86–88 (1958) (describing the commercial backgrounds of the Framers); *see also* Conrad J. Weiler, Jr., *Explaining the Original Understanding of Lopez to the Framers: Or, the Framers Spoke Like Us, Didn't They?*, 16 *WASH. U. J.L. & POL'Y* 163, 190–91 (2004).

48. *See* Carlos M. Vázquez, *Laughing at Treaties*, 99 *COLUM. L. REV.* 2154, 2159 (1999) (“[V]iolations of treaties by the states were a major problem during the period of the Articles of Confederation. . . . [T]he Articles were widely perceived to be flawed because they did not provide for the enforcement of treaties against the states. . . . [T]his was a key reason for the Framers’ decision to draft a new Constitution. . . . [T]he state courts failed to enforce treaties during this period because, adhering to the British rule, they understood that treaties were not enforceable in court without legislative implementation.”).

49. *See* 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 179 (2d ed. photo. reprint 2005) (1833); *see also* Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 *FLA. L. REV.* 1139, 1168 n.167 (2013) (“Because foreign nations were aware that Congress did not have the power to assure that all states would act uniformly in accordance with the treaty terms, they refused to enter into reciprocal import agreements. Moreover, because the several states acted in their independent self-interest and competed to attract foreign vendors, often foreign goods were not subject to duty, thus negating any incentive a foreign nation might have to negotiate such a treaty.”).

50. Economically, the ability to present uniform, consolidated power relative to commerce would resolve the collective action problem and avoid a “race to the bottom.” *See* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 *HARV. L. REV.* 377, 380 (1996) (describing the danger of states engaged in “race to the bottom” during Founding era).

51. *See* Collins, *supra* note 10, at 63–64 (examining the interplay of economic efficiency and interstate harmony embedded in the Commerce Clause); *see also* Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 *VA. L. REV.* 949, 965 (2010) (arguing that the Foreign Commerce Clause enabled the United States to organize “national uniformity over U.S. commerce . . . so that the United States could act as a single economic unit”).

within the states to exert pressure on foreign nations toward political ends desired by the United States.<sup>52</sup>

In contrast, the regulation of interstate commerce was intended to prevent states from engaging in internal discrimination and competition that could jeopardize collective economic success and invite internal dissension.<sup>53</sup> Moreover, the opportunity for its exercise was seen as relatively limited.

To those at the Founding, the current emphasis on the Interstate Commerce Clause over the Foreign Commerce Clause would seem odd.<sup>54</sup> During the Founding era, foreign commerce represented the lion's share of commercial activity in the nation.<sup>55</sup> Given the makeup of the U.S. economy of the time, the broad qualitative authority imbued in the Foreign Commerce Clause reflected its quantitative presence as part of the economy. Applied to the interstate power, the inverse was true. In the eyes of the Framers, "internal commerce was slight, and a power that turned upon its extent would be slight as well."<sup>56</sup>

As expressed by Professor Albert Adel, "[T]here can be little doubt that the [Framers'] major preoccupation was with foreign trade and that the power over interstate commerce, while coordinate in expression, was distinctly secondary in scope and intended operation."<sup>57</sup>

### C. The "Greater" Foreign Commerce Clause: Its Text and Precedent

Unlike the Interstate Commerce Clause, the Foreign Commerce Clause has largely evaded close attention by courts or scholars. Beyond its original purpose, the understanding of a broadly conceived Foreign Commerce Clause is supported by particularities within the text and, while infrequent and ultimately shallow in analytical depth, a body of overwhelmingly unified court precedent.

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52. See Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 454 n.412 (2012) (setting out central elements of foreign policy at the time of the Founding).

53. See Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 449 (2004) ("It is widely recognized that the Commerce Clause was necessary to prevent states from engaging in protracted trade wars that stifled interstate commerce and undermined national prosperity.").

54. James Madison suggested in correspondence that given the exceedingly broad powers needed in regulating foreign commerce he "always foresaw" an interpretive difficulty in delineating the scope of the interstate commerce power. See 4 MADISON, *supra* note 4, at 14–15.

55. See JOSEPH NIMMO, DIV. OF INTERNAL COMMERCE, FIRST ANNUAL REPORT ON THE INTERNAL COMMERCE OF THE UNITED STATES 8 (1877) (most "commerce" at the Founding was foreign commerce, with the result that little attention was paid to "comparatively small internal commerce").

56. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 140.

57. Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 469 (1940).

### 1. Regulating “with” Rather Than “Among”

All three elements of the Commerce Clause aim to regulate “commerce,” and there is little reason to believe that the Framers would silently contemplate varying definitions of the word within the same sentence.<sup>58</sup> While the definitional attributes of “commerce,” remain static,<sup>59</sup> the differential powers within the clause textually flow from those granted “to regulate” such commerce “with foreign Nations” versus “among the several States.”<sup>60</sup>

The significance of preposition choice—“with” or “among”—is substantial. As Justice Marshall first observed in *Gibbons v. Ogden*,<sup>61</sup> “The word ‘among’ means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.”<sup>62</sup> The purpose of regulating commerce “among” the states of the Union was to promote equal treatment between the states and effectuate uniform national policy within the Union when deemed necessary.<sup>63</sup>

The Foreign and Indian Commerce Clauses, however, empower the federal government to regulate commerce “with” foreign nations and the Indian tribes, both of which represent sovereign powers.<sup>64</sup> Regulating commerce “with” other sovereign powers describes a relationship vis-à-vis foreign states as “such states are on equal footing with the United States”

58. This has been called a “presumption of intrasentence uniformity.” See Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003). This is also consistent with the Court’s statement in *Gibbons v. Ogden* that commerce, “is a unit, every part of which is indicated by the term. . . . [I]n its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.” 22 U.S. (9 Wheat.) 1, 193–94 (1824).

59. This has been established by constitutional scholars such as Akhil Amar, Jack Balkin, and others. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 108 (2005) (suggesting the “Commerce Clause” be renamed the “with-and-among clause”); BORIS I. BITTKER & BRANDON P. DENNING, *BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE* 3–24 (2d ed. 1999) (discussing evolution and convergence of the Court’s doctrines); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

60. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMM. 427, 429–32 (2007).

61. 22 U.S. (9 Wheat.) 1.

62. *Id.* at 194.

63. James Madison directly ascribed the federal government’s authority to regulate commerce “among the several States” as a “preventive provision against injustice among the States themselves.” See 4 MADISON, *supra* note 4, at 15.

64. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (reorganizing sovereignty of Indian tribes due to similar classifications of foreign nations); see also *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) (comparing Indian tribes to states and foreign sovereigns, and concluding that both states and Indian tribes are domestic sovereigns); Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1275 n.301 (2013) (noting that “separate sovereigns (like Indian tribes and foreign governments) have a constitutionally imposed distinctness”).

and the regulation of commerce between such nations is a crucial dimension of managing a relationship with external powers.<sup>65</sup>

The selective wording in defining relationship and delineation of partners among the clauses directly implicates federalism dynamics. By design, enabling the federal government to regulate “among the several States”<sup>66</sup> allows some state regulation of interstate commerce, while those provisions designed to regulate commerce “with” other entities represent efforts in which displacement of state power in favor of federal power is the intended goal.<sup>67</sup>

The significance of displacing state power in favor of federal power has been most frequently considered related to the authority of the federal government’s dealings “with the Indian Tribes” set out within the Commerce Clause.<sup>68</sup> The Indian Commerce Clause was designed to explicitly exclude the states from any involvement in Native American affairs.<sup>69</sup> In 1984, the Court clearly stated its understanding of federal scope when it wrote the “Constitution vests the Federal Government with exclusive authority over relations with Indian tribes.”<sup>70</sup> Further, the types and scope of relations with tribes encompassed by the Indian Commerce Clause are broadly construed. As explained by Professor Robert Pushaw, “Congress can (and has) invoked its power to regulate commerce with Indian Tribes and foreign nations to *govern not merely trade and business but all interactions* (and altercations) with those entities.”<sup>71</sup>

The sovereignty distinction between the Indian and interstate commerce powers is even more pronounced relative to foreign commerce. While the sovereignty of Indian tribes was settled, the scope of that sovereignty was much in debate. In assessing the sovereignty question, there was consensus that, whatever the level of Indian sovereignty, it did not approach the full sovereign status of foreign nations contemplated in the Foreign Commerce Clause.<sup>72</sup>

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65. Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 148 (2007).

66. U.S. CONST. art. I, § 8, cl. 3.

67. See Nathan Speed, Note, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467, 471–78 (2010) (discussing the early laws governing Indian tribes).

68. U.S. CONST. art. I, § 8, cl. 3.

69. *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 & n.4 (1985) (the Indian Commerce Clause makes “Indian relations . . . the exclusive province of federal law”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (holding that under the Indian Commerce Clause the U.S. interaction with Native American tribes is “committed exclusively to the government of the Union”).

70. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

71. Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress’s Powers*, 2012 U. ILL. L. REV. 1703, 1727 (emphasis added); see also Amar, *supra* note 59, at 107; Balkin, *supra* note 59, at 6–7, 13, 23–29 (concurring in the significance of the difference between “with” and “among”).

72. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (“Foreign nations is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable.”); see also *United States v.*

## 2. Judicial Precedent

Overall, judicial assessments of the Foreign Commerce Clause have been blunt and unrefined. Court opinions agree that the scope of the Foreign Commerce Clause is, at the very least, decidedly broader than that of the Interstate Commerce Clause.

In *Gibbons*, Chief Justice Marshall presented an all-encompassing view of the Foreign Commerce Clause as a power that “comprehend[s] every species of commercial intercourse between the United States and foreign nations” and unbound by considerations of federalism and state sovereignty.<sup>73</sup> In 1974, the Supreme Court asserted that evidence indicated that the “foreign commerce power to be the greater” when compared to its interstate counterpart.<sup>74</sup> Cases pronouncing Foreign Commerce Clause superiority are many and often use legal superlatives such as “exclusive and absolute.”<sup>75</sup>

However, the hyperbole courts have used to describe the power enshrined in the Foreign Commerce Clause has left little room for more nuanced definition of the question. As the Ninth Circuit expressed less than a decade ago, “[i]t is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny.”<sup>76</sup>

## II. LOST, CONFLATED, AND CONFUSED

Two dominant forces have rendered unnecessary any careful consideration of the Foreign Commerce Clause as a power distinct from its interstate cousin. First, a seemingly endless expansion of the Interstate Commerce Clause over the twentieth century rendered its foreign counterpart of little freestanding consideration.<sup>77</sup> Second, the Supreme Court’s controversial and expansive view of the treaty power in *Holland* rendered the Foreign Commerce Clause (however broad in scope) as an ancillary source of power where an international agreement was concerned.<sup>78</sup>

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Kagama, 118 U.S. 375, 381 (1886) (“[Indian tribes] were, and always have been, regarded . . . not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people.”).

73. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 3 (1824).

74. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

75. See, e.g., *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904).

76. See *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006).

77. Julie Muething, *An Analysis of the Disparate Tax Treatment of Municipal Bonds: Department of Revenue of Kentucky v. Davis*, 75 U. CIN. L. REV. 1711, 1717 (2007) (“Congress’s authority to control interstate commerce is essentially limitless.”); A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 305 (2003) (stating that post-New Deal precedent “gave Congress expansive, if not potentially unlimited, power to regulate in matters of interstate commerce”).

78. As discussed below, *Missouri v. Holland* established the proposition that when the federal government acts via treaty it can act beyond its enumerated powers. Under this view, via international agreement the federal government could accomplish all encompassed within its enumerated power and more.

Both of these forces are receding, but the attention these powers have received has inflicted tremendous damage to the correct understanding of the Foreign Commerce Clause and the doctrinal malfeasance they set in motion is threatening the functionality of U.S. foreign relations.

A. *Lost*

The distinctiveness of the Foreign Commerce Clause, textually and analytically, from Congress's power to regulate commerce "among the several states" has been overlooked in favor of an all-encompassing "Commerce Clause" doctrine. The progression of *Bond* prior to its arrival in front of the Supreme Court in 2013 exemplifies the problem of the loss of the Foreign Commerce Clause.

The Chemical Weapons Convention's core purpose is commercial in nature, seeking to "promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information."<sup>79</sup> The trade element is a necessary component of the Convention as many chemicals that serve as the elements of chemical weapons also possess peaceful purposes.<sup>80</sup> However, given the ready adaptability of many chemicals for weaponization, the Convention requires comprehensive regulation and criminalization for acts that violate the uses and purposes set out within the Convention.<sup>81</sup>

In *Bond*, the defendant argued that the statute criminalizing the use of chemical weapons violated both "the Commerce Clause" and the treaty power.<sup>82</sup> Instead of considering both justifications for the statute, the government repudiated a commercial justification with the statement that "Section 229 was not enacted under the interstate commerce authority."<sup>83</sup>

The possibility that the Foreign Commerce Clause might serve as a justification for the regulation of the trade and use of chemicals as weapons was subsequently brought forth by the government upon remand from the

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79. *Chemical Weapons Convention*, *supra* note 20, at 1.

80. Brief of Amici Curiae Chemical Weapons Convention Negotiators and Experts in Support of Respondent at 7–8, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12–158), 2013 WL 4518601, at \*7–8 ("The CWC's comprehensive approach is necessary to address the 'dual use' nature of potentially harmful chemicals. Because toxic chemicals can have both a weapons use and a non-weapons use, they are easy for both states and non-state actors to get their hands on.").

81. *Id.* at 9 ("The drafters of the Convention intended to preserve the peaceful chemical industry," and included "clear and carefully considered requirements that make it possible for the chemical industry to operate lawfully.").

82. *United States v. Bond*, 681 F.3d 149, 151 (3d Cir. 2012), *rev'd*, 134 S. Ct. 2077 (2014).

83. *See id.* at 151–52 n.1 ("The government has, at different stages of this case, been willing to jettison one legal position and adopt a different one, as seemed convenient. Before the District Court, it expressly disclaimed the Commerce Clause as a basis for Congress's power to approve the Act. Title 18, United States Code, Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties.").

Supreme Court in 2012.<sup>84</sup> Given the lower court's renunciation of the argument and its finding of authority under the treaty power, the government initially argued that the court should decline to address "the Commerce Clause" issue.<sup>85</sup> Despite briefing the Commerce Clause issue as its first justification to the Supreme Court, the Court was dismissive of its relevance.<sup>86</sup> In its final decision, to the dismay of the concurring Justices seeking a more robust opinion, the majority determined that there was insufficient evidence that Congress intended the statute to apply to conduct like Bond's at all.<sup>87</sup>

In sum, the Foreign Commerce Clause issue is: (1) unconsidered and immediately abandoned by the government, the very party to which it benefits, and (2) subsequently rolled into a general "Commerce Clause" argument that ignores the power's differing, and by all accounts "greater," authority.

The avoidance in considering the Foreign Commerce Clause is far from unique to *Bond*. Like *Bond*, the loss of the foreign commerce power occurs in spite of its obvious relevance. Over the past year, federal courts have expressly invoked the Interstate Commerce Clause while ignoring the Foreign Commerce Clause in cases involving regulation of an international television company,<sup>88</sup> the sale of consumer information online,<sup>89</sup> and the regulation of financial instruments.<sup>90</sup> Most perplexingly was *United States v. Carvajal*,<sup>91</sup> a case involving the conviction of two aliens arrested in Colombia for drug-dealing activities.<sup>92</sup> The Court never cited federal power in regulating foreign commerce and instead approvingly quoted interstate precedent that Congress may "regulate purely local activities . . . that have a substantial effect on interstate commerce."<sup>93</sup> Consistent with these anecdotes, despite the tremendous growth in imports, exports, foreign investment, and international economic integration, court

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84. *Id.* The remand followed the Supreme Court's decision that individuals (like Bond) possessed standing to assert Tenth Amendment claims against the federal government. *Id.* at 152 n.2.

85. *Id.* at 151–52 n.1.

86. At oral argument, Justice Scalia stated frankly, "we didn't take this case to—decide the Commerce Clause question." Transcript of Oral Argument at 6, *Bond*, 134 S. Ct. 2077 [hereinafter *Bond* Transcript], available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-158\\_8m58.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-158_8m58.pdf).

87. *Id.* at 2088 (articulating a presumption that federal power does not intend to infringe upon traditional state criminal law unless explicitly stated).

88. See *Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.*, 742 F.3d 414, 432–33 (9th Cir. 2014).

89. See *Ela v. Orange Cnty. Sheriff's Office*, No. 6:13-cv-491-Or1-28KRS, 2014 WL 325697, at \*1 (M.D. Fla. Jan. 29, 2014).

90. A slew of cases challenging federal oversight of the secondary mortgage market rely solely upon the interstate commerce doctrine, even when recognizing that the market "is nationwide, and indeed worldwide, with home mortgages being traded in vast quantities." *County of Erie v. Fed. Hous. Fin. Agency*, No. 13-cv-2845, 2014 WL 795967, at \*1, \*4 (W.D.N.Y. Feb. 27, 2014); see also *Randolph County v. Fed. Nat. Mortg. Ass'n*, No. 3:12-cv-886-WKW, 2013 WL 3947614, at \*1 (M.D. Ala. July 31, 2013).

91. 924 F. Supp. 2d 219 (D.D.C. 2013).

92. See *id.* at 224.

93. *Id.* at 258 (quoting *Gonzales v. Raich*, 545 U.S. 1, 17 (2005)).

cases invoking “interstate commerce” power outpace those invoking the foreign power by over 100 to 1.<sup>94</sup>

The loss in importance and meaning of the Foreign Commerce Clause demonstrated by *Bond* and in other cases is two-fold.<sup>95</sup> First, it reflects a failure to recognize the clause’s distinctiveness (and greater scope) when compared to its interstate counterpart.<sup>96</sup> Second, it reflects the judiciary’s unwillingness to assess the enhanced reach that the application of the Foreign Commerce Clause might enable after finding statutory authority under the treaty power or the interstate power. Both compromise and conflate the Foreign Commerce Clause power.

Scholars have also overlooked a distinctive Commerce Clause analysis relative to foreign affairs.<sup>97</sup> After leaving the realms of constitutional, foreign affairs, and national security law, scholars’ assessments of the doctrinal prospects of treaties or laws affecting trade almost universally pitch their Commerce Clause analysis within the more familiar, but inapposite, contours of the interstate commerce power.

### B. Two Axes of Conflation

The disappearance of the Foreign Commerce Clause from judicial and academic scrutiny and application has left a powerful, yet highly underexamined congressional power to be further consumed by the attention paid to the Interstate Commerce Clause and the treaty power.

#### 1. Internal Conflation with Interstate Commerce Power

Even when invoked, the Foreign Commerce Clause is often collapsed within the paradigm crafted to judge the appropriateness of interstate commercial regulation. As a result, Congress’s ability to regulate under the

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94. See Alaina Caliendo, Comment, *What Happens Abroad Does Not Stay Abroad: United States v. Pendleton and Congress’ Constitutional Authority to Regulate Child Sex Abuse Abroad*, 10 SETON HALL CIRCUIT REV. 375, 381 (2014) (noting that “circuits have conflated the Foreign Commerce Clause and Interstate Commerce Clause analyses”).

95. See *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933) (noting that “[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power” and without compliance with federal law “would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create”).

96. See Goodno, *supra* note 49, at 1151 (finding a “majority of the lower courts have applied the legal framework of the Interstate Commerce Clause to Foreign Commerce Clause issues without explaining why”); Sarah C. Haan, *Federalizing the Foreign Corporate Form*, 85 ST. JOHN’S L. REV. 925, 983 (2011) (remarking that a “key facet of the Court’s Commerce Clause jurisprudence is its tendency to force all state laws concerning interstate or foreign commerce to converge”); see also, e.g., *K.S.B. Technical Sales Corp. v. N.J. Dist. Water Supply Comm’n*, 381 A.2d 774, 787–88 (N.J. 1977) (expressly finding no need to differentiate between foreign and interstate commerce in the context of governmental contracting).

97. See, e.g., Jeffrey Clay Clark, *The United States Proposal for a General Agreement on Trade in Services and Its Preemption of Inconsistent State Law*, 15 B.C. INT’L & COMP. L. REV. 75, 84 n.52 (1992) (“Some scholars and jurists differentiate between the [foreign and interstate clauses]. In this Article, the term ‘Commerce Clause’ will refer to the Commerce Clause as a whole.”).

Foreign Commerce Clause is artificially limited to the categories commonly used to judge interstate commercial regulation.

The Supreme Court's 1995 decision in *United States v. Lopez*<sup>98</sup> is credited with igniting a renewed interest in limiting federal power in favor of state authority. These limitations existed, but only in theory, since the New Deal.

In the first decision invalidating a federal statute since 1937, the *Lopez* Court articulated a Commerce Clause limitation.<sup>99</sup> It specified that exercise of the commerce power must touch upon the channels or instrumentalities of commerce or "economic activity" that substantially affect interstate commerce.<sup>100</sup> While *Lopez* failed to initiate the dramatic contraction of Commerce Clause authority that federalism proponents sought, it has changed the doctrine, and perhaps even more importantly, altered the atmosphere and approach surrounding federal regulation of activities that are not obviously national.<sup>101</sup>

Reiterated in *Lopez*, the doctrine governing the scope of congressional power under the Interstate Commerce Clause cites three categories of activity over which Congress may exercise its regulatory power.<sup>102</sup> First, Congress may regulate "the use of the channels of interstate commerce."<sup>103</sup> Second, Congress has the power "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Finally, Congress may "regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce."<sup>104</sup>

Under the Interstate Commerce Clause doctrine, Congress acts beyond the scope of its powers when it moves beyond these categories into regulating "purely local" activity occurring within a state. In this arena, the Foreign Commerce Clause is inherently more respectful of local activity than the Interstate Commerce Clause. Both the interstate and foreign elements of the federal commerce power revolve around the notion of a market.<sup>105</sup> For the interstate power, the relevant market is that between states. For the Foreign Commerce Clause, the relevant market is that between the territory of the United States and foreign states. The interstate power does not enable Congress to regulate the "purely local" activity

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98. 514 U.S. 549 (1995).

99. *Id.* at 558–61.

100. *Id.*

101. See Scott Boykin, *The Commerce Clause, American Democracy, and the Affordable Care Act*, 10 GEO. J.L. & PUB. POL'Y 89, 102 (2012).

102. This doctrine was first set out by the Court in *Perez v. United States*, 402 U.S. 146, 150 (1971). The test was popularized and reinvigorated by *Lopez*. See 514 U.S. at 558.

103. *Lopez*, 514 U.S. at 558.

104. *Id.* at 558–59 (internal citation omitted).

105. In his concurrence in *Lopez*, Justice Kennedy notes that the commerce power enables "a single market and a unified purpose to build a stable economy." *Id.* at 574 (Kennedy, J., concurring).

within American states.<sup>106</sup> Likewise, the Foreign Commerce Clause does not empower Congress to regulate the “purely local” activity within a foreign state.<sup>107</sup> However, the interstate power enables Congress to regulate substantial activities throughout the relevant market where such activity fits within the three-category test of *Lopez*. In contrast, the effective jurisdictional reach of congressional action regulating foreign commerce is, by definition, compromised by the jurisdictional authority of the foreign state where the regulated acts might occur.

The Fifth and Ninth Circuits recently held that the three-category test set out in *Lopez* is inapplicable when Congress acted pursuant to the Foreign Commerce Clause.<sup>108</sup> Those cases, *United States v. Clark*<sup>109</sup> and *United States v. Bredimus*,<sup>110</sup> both dealt with the constitutionality of provisions from the PROTECT Act,<sup>111</sup> a federal statute punishing U.S. nationals for engaging in sex with a minor in foreign jurisdictions.

Either court could have ended their inquiry following its holding as to the expansive scope of the Foreign Commerce Clause. Either court could have been more ambitious and spoke as to what, if any, limits would apply to Congress’s exercise of the Foreign Commerce Clause power. Instead, both courts retreated to the familiar three-category test of interstate commerce regulation, even after having explained the inaptness of such a test.<sup>112</sup>

Law, like nature, abhors a vacuum.<sup>113</sup> When the judiciary lacks adequate doctrine to provide meaningful guidance it will understandably reach for an imitation, regardless of its inadequacy and inapplicability. The more frequently conflation occurs, its ability to self-perpetuate becomes stronger. As the interstate commerce doctrine grows more defined, the challenge posed in untangling the unfamiliar and aging precedent surrounding the Foreign Commerce Clause undoubtedly appears increasingly unattractive.

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106. This does not mean that no regulation is possible, only that the United States will often find any attempts to enforce such regulations compromised given the lack of jurisdictional authority absent there but present within states that are part of the Union.

107. This reality is recognized in other related doctrine, such as the presumption against extraterritoriality. See Jonathan Turley, “When in Rome”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 603–05 (1990) (discussing extraterritorial presumptions); see also Colangelo, *supra* note 65, at 134.

108. See *United States v. Clark*, 435 F.3d 1100, 1102 (9th Cir. 2006); *United States v. Bredimus*, 352 F.3d 200, 205 (5th Cir. 2003); see also *United States v. Martinez*, 599 F. Supp. 2d 784, 805–06 (W.D. Tex. 2009) (detailing both *Bredimus* and *Clark* and noting that both courts “hold that when regulating foreign commerce, Congress’s authority is not constrained by the three categories in the *Lopez/Morrison* framework”).

109. See *Clark*, 435 F.3d 1100.

110. See *Bredimus*, 352 F.3d 200.

111. See 18 U.S.C. § 2423 (2012).

112. See *Clark*, 435 F.3d at 1105–07; *Bredimus*, 352 F.3d at 205.

113. And the law loves a test. The courts in *Clark* and *Bredimus* could have simply found, as earlier decisions have, that the Foreign Commerce Clause fatally undermines federalism concerns and, thus, the PROTECT Act stands. After all, what sense does it make to apply a test designed to assess whether federalism principles have been violated immediately after having found that federalism did not apply?

## 2. Foreign Affairs Conflation with Treaty Power

As Commerce Clause doctrine assimilated foreign and interstate commerce, the Foreign Commerce Clause was obscured in foreign relations by controversial holdings of near limitless federal authority under the Article II treaty power occurring around the same time.<sup>114</sup>

While the internal conflation of the Commerce Clause reflects its textual proximity, conflation of the Foreign Commerce Clause with the treaty power flows from their shared purposes and the commonality in the “foreign” characteristic of the powers.

In many ways, the Foreign Commerce Clause serves as a foundation for the treaty power, and the two work in concert. By providing for national uniformity relative to questions of foreign commerce, the Clause aggregates the economic force of the United States and renders the nation a more attractive treaty partner.<sup>115</sup> Simultaneously, the Clause strengthens the United States’ ability to effectively respond to treaty violations of foreign powers via trade reprisals or to exert economic pressure to accomplish foreign policy goals absent an official treaty agreement.<sup>116</sup>

The Court’s 1920 decision in *Holland* wrestled with a case that pitted the state’s traditional power to manage its own natural resources against a statute limiting such management pursuant to a treaty.<sup>117</sup> The view that federalism is discarded when the federal government acts via treaty is the core of the controversy in the case.<sup>118</sup> Under *Holland*, “principles of federalism will ordinarily impose no limitation on Congress’s ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid.”<sup>119</sup> As a result, “Congress may . . . legislate to implement a valid treaty, regardless of whether Congress would otherwise have the power to act or whether the legislation causes an intrusion into what would otherwise be within the state’s traditional province.”<sup>120</sup>

Justice Holmes’s opinion makes clear that the breadth of the treaty power flows directly from the importance of foreign affairs and the need for

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114. While not possessing the same memorable name as the “one voice” doctrine, the Foreign Commerce Clause also served as the basis for initial determinations finding federal authority in immigration. See Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 718–21 (2005).

115. See Colangelo, *supra* note 51, at 963 (describing Foreign Commerce Clause as solution to “a basic ‘collective action problem’ among the states under the Articles of Confederation”).

116. See Delahunty, *supra* note 11, at 17.

117. The statute in question was the Migratory Bird Treaty Act of 1918 which implemented treaty obligations under a treaty the United States had consummated with Great Britain. The Act (which had been preceded by the Migratory Bird Act of 1913) was aimed at protecting migratory birds in danger of becoming extinct. See Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1115–16 (2008).

118. *Missouri v. Holland*, 252 U.S. 416, 431–33 (1920).

119. *United States v. Bond*, 681 F.3d 149, 153 (3d Cir. 2012), *rev’d*, 134 S. Ct. 2077 (2014).

120. *Id.* at 156.

flexibility when seeking international cooperation. The preeminence of foreign affairs, regardless of subject matter regulation, is driven home by the notion that the treaty as to conservation of migratory birds at issue is characterized as an international issue of “the first magnitude” that “can be protected only by national action in concert with that of another power.”<sup>121</sup> In such instances, the federal government’s acts cannot be undercut by the absence of specific grants of power present in the Constitution’s enumerated powers.<sup>122</sup>

The Supreme Court’s 1936 decision in *United States v. Curtiss-Wright Export Corp.*<sup>123</sup> expresses a view of federal authority in foreign affairs that makes the *Holland* decision appear modest in comparison.<sup>124</sup> In *Curtiss-Wright*, the Court assessed the validity of a weapons embargo declared by the President pursuant to a joint resolution of Congress.<sup>125</sup> In upholding the embargo, the Court differentiated “between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs.”<sup>126</sup> According to the *Curtiss-Wright* Court, the concept that “the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs.”<sup>127</sup> The federal government’s broad foreign affairs power is not reliant on an expansive view of constitutional grants of authority such as the treaty power, but from a notion of “external sovereignty passed from the [British] Crown.”<sup>128</sup> The colonies had never possessed this international sovereignty, thus they never possessed the authority to limit the federal government’s exercise of such power through the Constitution.<sup>129</sup>

Prior to the Constitution, the federal government struggled to ensure state compliance with the nation’s international agreements. State violations were routine.<sup>130</sup> Enforcement difficulties crippled the nation’s efforts at international agreement formation as the “faith, the reputation, the peace of the whole union, are thus continually at the mercy of the prejudices, the passions, and the interests” of each state and corrupted the trust the nation could inspire in potential treaty partners.<sup>131</sup>

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121. *Holland*, 252 U.S. at 435.

122. *See id.*

123. 299 U.S. 304 (1936).

124. *Id.*

125. *Id.* at 311–12.

126. *Id.* at 318.

127. *Id.* at 315–16.

128. *Id.* at 316.

129. *Id.* at 317–18.

130. According to James Madison, “not a year has passed without instances” of treaty violations by the states. James Madison, *Vices of the Political System of the United States* (Apr. 1787), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html>.

131. THE FEDERALIST NO. 22, at 131 (Alexander Hamilton) (Gary Wills ed., 1982); see also Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties As “Supreme Law of the Land,”* 99 COLUM. L. REV. 2095, 2125 (1999).

The intertwined purposes of the Foreign Commerce Clause and the treaty power have masked important characteristics that distinguish them as well. Unlike the treaty power, exercise of the Foreign Commerce Clause power does not require an international partner. This independent ability is a cornerstone of U.S. foreign policy through both inward- and outward-looking regulation.<sup>132</sup>

Inwardly, the United States can and has routinely prohibited or limited transactions within the United States and beyond the nation's borders relative to U.S. nationals.<sup>133</sup> Outwardly, the power serves as a justification for extraterritorial regulation that is divorced from any notion of foreign consent or acquiescence.<sup>134</sup> The subject matters the United States hopes to affect through such regulation are usually far removed from the economic sphere in areas such as human rights, terrorism, and the proliferation of weapons of mass destruction, among other topics.<sup>135</sup>

The Foreign Commerce Clause has also effectively broadened the generative reach of the Article II treaty power in the pursuit of foreign policy goals through the rise of congressional-executive agreements.

The proliferation of congressional-executive agreements has been controversial due to the absence of a strong textual basis for the practice while express procedural requirements exist for making treaties.<sup>136</sup> Congressional-executive agreements forego the Article II-dictated process of supermajority Senate ratification in favor of passage by both houses of Congress.<sup>137</sup> Perhaps to avoid the controversy inherent to bypassing Article II procedural dictates, the limited judicial precedent available has held that, unlike Article II treaties, congressional-executive agreements are limited to the subjects set out within the federal government's enumerated powers, and specifically the power of the federal government to regulate foreign commerce.<sup>138</sup>

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132. See 31 C.F.R. §§ 501–598 (detailing the country-based sanctions programs); see, e.g., International Emergency Economic Powers Act, 50 U.S.C. §§ 1701–1706 (2012); Trading with the Enemy Act of 1917, 50 U.S.C. §§ 1–44 (2012). See generally Jose W. Fernandez, Asst. Sec'y of State for Econ. & Bus. Affairs, Smart Sanctions: Confronting Security Threats with Economic Statecraft (July 25, 2012), available at <http://www.state.gov/e/eb/rls/rm/2012/196875.htm>.

133. See Barry E. Carter & Ryan M. Farha, *Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT'L L. 903, 904–05 (2013).

134. See Colangelo, *supra* note 51, at 952.

135. See Michael P. Malloy, *Human Rights and Unintended Consequences: Empirical Analysis of International Economic Sanctions in Contemporary Practice*, 31 B.U. INT'L L.J. 75 (2013) (discussing U.S. sanctions programs for purposes of effecting human rights); see also Carter, *supra* note 133.

136. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 807–13 (1995) (expressing the view that treaties and congressional-executive agreements are interchangeable); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249–78 (1995) (arguing that complex, extensive agreements must be adopted as treaties).

137. See *Weinberger v. Rossi*, 456 U.S. 25 (1982); see also *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001).

138. See, e.g., *Made in the USA*, 242 F.3d at 1313 (holding NAFTA congressional-executive agreement constitutional and noting that “[m]ost significantly, the Constitution also confers on the entire Congress (and not just the Senate) authority ‘to regulate commerce

The volume and substantive expanse of congressional-executive agreements over time is significant.<sup>139</sup> Despite the enumerated power limitation, the areas regulated via congressional-executive agreement are diverse and include defense, trade, agriculture, employment, drugs, the environment, maritime, space, and energy.<sup>140</sup>

Moreover, congressional delegation to the President to make sole executive agreements, which is not possible through Article II, has served as a multiplier to the effect of congressional-executive agreements.<sup>141</sup> When Congress acts pursuant to the Foreign Commerce Clause, it can delegate its subsequent assent, obviating the need for the President to return to Congress for separate ratification of agreements.<sup>142</sup> During the final decade of the twentieth century, over 1300 executive agreements were made pursuant to delegation by Congress.<sup>143</sup>

In addition to its affirmative authority, the placement of the Foreign Commerce Clause within Article I has served as a rare limitation on unilateral federal authority in foreign affairs. As a dormant matter, due to the explicit grant to Congress, the President may not impose, reduce, or effect any other change in existing duties via executive agreement.<sup>144</sup>

### III. THE FOREIGN COMMERCE CLAUSE AND ALIGNED POWERS IN CONTEMPORARY FOREIGN RELATIONS

The details of a new constitutional paradigm lay in the future. The shape of that paradigm depends on resolution of important questions: How deeply should a renewed Foreign Commerce Clause reach into traditional areas of state authority? To what extent would that reach be limited relative to the appearance of only marginal effects on foreign policy? Which touchstones should the judiciary use to define to the “greater” authority of Congress when regulating commerce with foreign connections?

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with foreign nations’—an express textual commitment that is directly relevant to international commercial agreements such as NAFTA” (quoting U.S. CONST. art. 1, § 8, cl. 3)).

139. See Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1240 (2007) (“[The] majority of multilateral agreements are concluded through congressional-executive agreements.”); David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 UCLA L. REV. 598, 607 n.47 (2012) (“[T]he congressional-executive agreement is used much more frequently than the Article II treaty.”).

140. See Hathaway, *supra* note 139, at 1260 (setting out table of areas regulated by congressional-executive agreements from 1980 to 2000).

141. Michael P. Van Alstine, *Stare Decisis and Foreign Affairs*, 61 DUKE L.J. 941, 978–79 (2012).

142. See *Star-Kist Foods, Inc. v. United States*, 275 F.2d 472, 483–84 (C.C.P.A. 1959) (upholding trade agreement executed by the President pursuant to the Reciprocal Trade Agreements Act of 1934).

143. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 155–65 (2009). “Between 1990 and 2000, for example, approximately twenty percent of [the 1747 total executive agreements concluded] were sole executive agreements. The remaining eighty percent [or 1300 executive agreements] were congressional-executive agreements.” *Id.* at 155.

144. See *United States v. Yoshida Int’l, Inc.*, 526 F.2d 560, 572 (C.C.P.A. 1975).

This Article is the beginning, rather than the end, of a conversation. Its goal is to define a framework that, as the dialogue unfolds and ideas solidify into doctrine and future practice, incorporates the fundamental analytical dimensions for assessing Foreign Commerce Clause powers.

Parts I and II above reconsider the Foreign Commerce Clause as an independent doctrine, sketch the contours of its form, and strip away extraneous and muddled prongs of its analysis. Part III seeks to set the direction of the analytical questions that would follow a rediscovered Foreign Commerce Clause, both independently and when the Foreign Commerce Clause aligns with other foreign affairs-oriented powers.

#### A. *Power Elasticity and Alignment*

Implicit in the challenges to the federal government's power under the Commerce Clause and the treaty power is a concern of governmental intrusion more generally.<sup>145</sup> For a reinvigorated Foreign Commerce Clause, the most significant driver of governmental regulation, however, is a changing world in which the commercial interests of the United States are increasingly bound to actors beyond U.S. jurisdiction.

##### 1. Elastic Power and Integrated Markets

Much of the controversy regarding federal powers remains mired in the struggle of theories that trade between an ability to adapt to changing circumstances and adhering to limiting principles.<sup>146</sup> The intense scholarly attention to such subjects is merited but largely inapplicable as to foreign affairs powers generally and the Foreign Commerce Clause in particular.<sup>147</sup>

Unlike the treaty power, the Foreign Commerce Clause's delineation of regulation of "commerce with foreign nations" expressly embeds a federal power that expands or contracts relative to changing circumstances.<sup>148</sup> As a textual matter, the consensus that surrounds the need for broad foreign affairs powers at the time of the Founding rendered the breadth of the intent

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145. See *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875) (reasoning that issues in foreign commerce that "may be, and ought to be, the subject of a uniform system or plan" do not permit state regulation, even if there might be other aspects of foreign commerce that could be regulated by the states until addressed by treaty or statute); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (upholding a state pilotage law while explaining that Congress's commerce power is exclusive as to subjects that "are in their nature national, or admit only of one uniform system").

146. See John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1737 (2010) (discussing flexibility in powers and concluding that "[t]he Framers avoided anachronism when drafting constitutional provisions").

147. See David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 965 (2014) ("The judiciary has principally engaged in dormant preemption informed by the one-voice doctrine under two federal powers: federal commerce authority and federal foreign affairs authority.").

148. See McGinnis & Rappaport, *supra* note 146, at 1736 (noting that commerce clause authority "will automatically expand (or contract) as circumstances change, causing additional (or fewer) matters to fall under the category of interstate commerce even though the meaning of commerce does not change").

evident. Likewise, the breadth of intent is reflected by correspondingly broad language that effectuates such intent, which enables leeway in application.<sup>149</sup>

Critics of broad federal foreign affairs power decry federal incursion into “decidedly local” affairs.<sup>150</sup> In critics’ view, such intrusions reflect an unchecked and power-vacuuming federal state with proclivities that are pronounced by a steadily marching international legal system intent to creep into every nook of domestic life.<sup>151</sup>

Governmental regulation through the exercise of foreign affairs policy has indeed expanded dramatically over the past two centuries.<sup>152</sup> Part of this expansion reflects growth of law more generally, both domestically and internationally. But that generous expansion has not flowed from a permissive doctrine. While there are multiple factors that underlie this growth, there is little doubt that primary drivers of this phenomenon are societal demands generated by the increasingly complex and interconnectedness among persons, businesses, states, and nations.<sup>153</sup>

The accelerating volume of institutions and legal regulations that characterize the contemporary world do not cause global complexity but respond to it. The quantity and domestic invasiveness of national regulations necessarily grow relative to a government’s increasing foreign relations interests and the amount and quality of its obligations to (and demands of) foreign states.

This expansion of international law since the Founding era has led some to a view that the substantive scope of foreign affairs powers ought to be limited to those matters that are of “legitimate” interest to a foreign state.<sup>154</sup>

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149. It is striking how one can rather accurately determine the most controversial elements of the Constitutional Convention simply by reviewing the level of detail attached to the subject matter. Detail and controversy were intertwined, of course, because the various sides of the debate would insist upon assurances that could not be left to textually ambiguity and later consideration. See generally Kent, *supra* note 38 (discussing drafting practices of the Framers and the relationship to “New Originalist” interpretation).

150. As put by the petitioner in *Bond*, “the underlying facts are far removed from . . . any issues of national or international importance. Instead, the case arises out of a domestic dispute over marital infidelity that took place in a small residential borough in Montgomery County, Pennsylvania.” Brief for Petitioner at 2, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-158\\_pet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-158_pet.authcheckdam.pdf).

151. See, e.g., John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1179 (2007) (“Emerging international law norms on a wide range of issues, such as hate speech, the death penalty, and labor unions, may conflict with domestic legal norms [with] ever farther-reaching consequences as the scope of international law grows.”).

152. See Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 415–18 (2008).

153. See Peter J. Spiro, *Resurrecting Missouri v. Holland*, 73 MO. L. REV. 1029, 1034–35 (2008) (noting that “[a]s the costs of opting out of international regimes rise, state authorities may be subdued. Federalism may yet be sacrificed at the altar of globalization”).

154. Assessing the “legitimate” interest of foreign states is common within the judiciary as well as within academia. See *Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (encouraging U.S. courts to “take account of the legitimate sovereign interests of

For example, Justice Alito recently asserted that “[o]ne of the original purposes” of the Constitution was to deal with “the issue of debts owed to British creditors.”<sup>155</sup> He continued,

[a]nd there have been cases about . . . foreign subjects, about the treatment of foreign subjects here, about things that are moving across international borders, about extradition. But in all of those, until fairly recently, certainly until generally after World War II, all of those concerned matters that are of legitimate concern of a foreign State.<sup>156</sup>

Not only would it be difficult for judges to determine what is of “legitimate” interest to foreign nations, the interests of states change routinely, and often quickly relative to world events. This reality is a primary reason that international instruments are often written broadly and provide for substantial discretion in domestic enforcement.<sup>157</sup> In recent decades, the world has become substantially more networked and interconnected along multiple dimensions. In 2014, the United States is not simply a major participant in this complex world but the global economic and military leader. While it reaps tremendous benefits from this position, its role also imposes tremendous vulnerability and high expectations in its behavior.

The scope of global economic integration is extraordinary. The financial crisis that unfolded in the years following 2008, unprecedented in global scope and magnitude, dramatically demonstrated the degree of commercial interdependence in the global commercial system.<sup>158</sup> From 1990 to 2012, U.S. direct investment abroad increased nearly 900 percent from \$42 billion to \$360 billion annually while foreign investment in the United States increased three-fold.<sup>159</sup> Over that same period, U.S. imports and exports of

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other nations”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (a state or nation has a “legitimate interest in the orderly resolution of disputes among those within its borders”).

155. See Bond Transcript, *supra* note 86, at 9.

156. *Id.*

157. The judiciary is horribly positioned institutionally to second-guess the determination of a “legitimate” interest as well as the means of implementation utilized by the United States or other states.

158. See Fariborz Moshirian, *The Global Financial Crisis and the Evolution of Markets, Institutions and Regulation*, 35 J. BANKING & FIN. 502, 507 (2011) (arguing that the “highly interdependent nature of the global financial market in the 21st century and the mobility of assets which can instantaneously move from one country to another or from one country to an offshore centre” require international action “ratified and fully supported by national legislations and laws”).

159. See JAMES K. JACKSON, CONG. RESEARCH SERV., RS21118, U.S. DIRECT INVESTMENT ABROAD: TRENDS AND CURRENT ISSUES 2 (2013), available at <http://fas.org/sgp/crs/misc/RS21118.pdf>. The Federal Register defines direct investment abroad as the ownership or control, directly or indirectly, by one person (individual, branch, partnership, association, government, etc.) of 10 percent or more of the voting securities of an incorporated [or unincorporated] business entity. 15 C.F.R. § 806.14 (a)(1).

goods and services rose nearly 500 percent; when the timeline is expanded to 1970, the growth in imports and exports rises to over 3800 percent.<sup>160</sup>

The core national security interests of the United States are likewise tied to commercial concerns.<sup>161</sup> Formal U.S. military commitments have also grown dramatically over the past twenty-five years. Following the collapse of the Soviet Union, the North Atlantic Treaty Organization (NATO) has expanded from sixteen to twenty-eight members with more pending.<sup>162</sup> As a result of enlargement to nations such as Lithuania and Poland, NATO (and thus U.S.) security guarantees have expanded far into Eastern Europe.<sup>163</sup> All of these expansionary moves were justified in security and economic terms.<sup>164</sup>

The interconnectedness of states has naturally led to an expansion of subject matters on which states seek to regulate, both internally and relative to each other. Following the global financial crisis, international regulation of financial instruments of all types has increased dramatically as has the international architecture created to maintain and enforce such regulations.<sup>165</sup> International entities such as the World Bank and the International Monetary Fund, as well as the European Union, have played a highly interactive and invasive role in restructuring governmental functions inside countries receiving financial assistance.<sup>166</sup> While this degree of domestic law intrusion had occurred in the past, the use of such tools in fully developed states was unprecedented as was the domestic reach proposed as part of G20 states in 2009.<sup>167</sup>

While the machinations of major investment banks might intuitively feel international, the same forces are at play with regard to regulations relating to every dimension of the unfolding U.S. natural gas boom. As it stands, the states regulate nearly every component of natural gas production and

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160. See U.S. CENSUS BUREAU, U.S. TRADE IN GOODS AND SERVICES—BALANCE OF PAYMENTS (2014), available at <https://www.census.gov/foreign-trade/statistics/historical/gands.pdf>.

161. See generally Garrett Jones & Tim Kane, *U.S. Troops and Foreign Economic Growth*, 23 DEF. & PEACE ECON. 225 (2011) (describing link between national security outlays and economic interests); Jordan Becker, *Offshoring or Overbalancing: A Preliminary Empirical Analysis of the Effect of U.S. Troop Presence on the Political Behavior of Regional Partners* (United States Military Academy, Dep't of Social Science), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2377507](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377507) (providing an empirical study on troop deployments and economic agreements).

162. Philip Seib, *Public Diplomacy and Hard Power: The Challenges Facing NATO*, 38 FLETCHER F. WORLD AFF. 95, 95–96 (2014).

163. *Id.*

164. See Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 488 (2007) (“The most important purpose of republican government was to protect the members of the society from internal and external dangers.”).

165. See generally HOWARD DAVIES & DAVID GREEN, *GLOBAL FINANCIAL REGULATION: THE ESSENTIAL GUIDE* (2009) (describing agreements for international cooperation in banking, securities, insurance, and finance as well as IMF and World Bank regulations).

166. SEAN KAY, *NATO AND THE FUTURE OF EUROPEAN SECURITY* 108–10 (1998).

167. *The Global Plan for Recovery and Reform: The Communiqué from the London Summit*, 15 L. & BUS. REV. AM. 703, 703–706 (2009).

storage.<sup>168</sup> Federal officials have long taken the position that the placement of state authority was appropriate.<sup>169</sup> This is likely to change soon, and the change of heart will reflect a change in facts. Specifically, Europe's dependency on Russian natural gas, and the United States's desire for European economic sanctions on Russia align in a manner that seem likely to encourage U.S. action on natural gas production, liquefaction, and export.<sup>170</sup>

## 2. When Foreign Affairs Powers Align

The Constitution's foreign affairs powers were established with a basic functional goal in mind: to ensure the United States could act effectively on the international stage.<sup>171</sup>

The foreign affairs powers of the United States are often treated as one entity rather than as separate authorities possessing overlapping, yet distinct borders.<sup>172</sup> In addition to misconstruing the outer boundaries of these powers, this aggregation also fails to recognize the significance when powers align. Currently, when foreign affairs powers align, the significance only manifests itself in the alternative. In other words, a statute challenged as beyond the scope of the treaty power might be viewed as justified in the alternative as a proper regulation of foreign commerce. In contrast, recognizing a deepening of authority means that when a statute is justified under multiple foreign affairs powers, congressional authority to displace traditional state authority is at its height, thus enabling application beyond that which might be allowed under a statute justified under a single power. When a federal statute falls within the ambit of multiple federal powers, the power of that action must be viewed as greater than the sum of its parts. As

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168. See Rachel A. Kitze, *Moving Past Preemption: Enhancing the Power of Local Governments over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 386 (2013) (noting that "state and local governments have primary regulatory authority" over fracking).

169. Hannah Wiseman, *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 FORDHAM ENVTL. L. REV. 115, 186 (2009) (noting that the Department of Energy has "vehemently argued against federal regulation of fracking, urging that state regulation is adequate").

170. Joao Peixe, *U.S. to Move LNG to Help Europe*, OILPRICE.COM, (May 8, 2014, 7:17 PM), <http://oilprice.com/Latest-Energy-News/World-News/U.S.-To-Move-LNG-to-Help-Europe.html>.

171. Part of this concern reflected worries regarding the weak defensive posture of the United States at the time, however, the Founders contemplated the future of a strong nation. See, e.g., THE FEDERALIST NO. 11, at 59–60 (Alexander Hamilton) (Gary Wills ed., 1982) ("Suppose, for instance, we had a government in America, capable of excluding Great-Britain (with whom we have at present no treaty of commerce) from all our ports, what would be the probable operation of this step upon her politics? Would it not enable us to negotiate with the fairest prospect of success for commercial privileges of the most valuable and extensive kind in the dominions of that kingdom?").

172. There are numerous powers relating to foreign affairs bequeathed by the Constitution, but the Foreign Commerce Clause, the Article II treaty power, and the Define and Punish Clause are typically aggregated into a general foreign affairs power. The Define and Punish Clause grants Congress the power to "define and punish Piracies and Felonies committed on the High seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

a result, the federal government's regulatory authority is at its strongest and the displacement of state police powers should be absolute.<sup>173</sup>

Several scenarios are easy to imagine in which the Foreign Commerce Clause might interact (or not) with other major foreign affairs powers. A federal statute criminalizing acts such as those related to the market for sex trafficking could be justified in regulating the illegal market as well as an expression of Congress's power to "define and punish" offenses against the law of nations.<sup>174</sup> An anticorruption treaty prohibiting businesses from engaging in bribery while seeking contracts abroad could be executed through a federal statute which also would be independently justified under the Foreign Commerce Clause.<sup>175</sup>

The justification for a deepening of federal authority when foreign affairs powers are aligned is substantial.<sup>176</sup> Textually, this "aligned power" argument is consistent with the Constitution's approach toward residual power.<sup>177</sup> The accumulation of aligned authority necessarily diminishes the authority residing within the states. There is no residual state power in circumstances in which the federal government properly exercises its own authority. Further, aligned power federal action invokes the varying foreign affairs concerns that gave rise to these independent powers. A specific example from the Founding era demonstrates the intermingled concerns. The drafters expressed particular concerns regarding the subsidiary issues that frequently accrue following the consummation of a peace treaty. Such treaties typically require the settlement of claims—especially of foreign creditors—and Congress would require the power to override state contract law in order to effectuate such a settlement. In conjunction, the treaty power and foreign commerce power, via separate mechanisms, could resolve this question in a manner greater than could be accomplished separately.

Moreover, an aligned powers approach respects procedural distinctions in the powers that require unusually high political branch alignment. Statutes can be passed despite the opposition of the President. Treaties (and congressional-executive agreements) cannot. Treaties require presidential approval and a supermajority of the Senate. Especially given the

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173. In this context, absolute is meant to refer to the scope of federal authority relative to competing state interests. Consistent with Court precedent such as *Reid v. Covert*, this does not suggest that such a statute could violate other constitutional provisions. See 354 U.S. 1 (1957).

174. See Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 161 (2010).

175. Inversely, there are a number of scenarios in which one could imagine the exercise of authority only one area of authority that does not invoke the others. All non-self-executing treaties, for example, that remain unexecuted by subsequent legislation would operate only within the treaty power. Likewise, all federal statutes regulating foreign commerce which are not criminal (or at least punitive in some manner) and lack a formal underlying international agreement would only operate under the Foreign Commerce Clause.

176. See *infra* Part III.B–C.

177. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

preeminence of political authority in foreign affairs, this confluence of the power from the varying political branches also counsels a deeper federal authority.

Combined with the more nuanced view of the Foreign Commerce Clause power outlined above, the aligned power approach would prove tremendously effective in resolving issues that currently foment unnecessary controversy.

Again, *Bond* proves instructive. At its core, the issue in *Bond* is about the allowable depth of federal regulation.<sup>178</sup> The challenge to the statute is that, “*as applied to her conduct*, the statute exceeds Congress’ enumerated powers . . . and criminalizes conduct that lacks any nexus to a legitimate federal interest.”<sup>179</sup> Petitioner conceded that the statute, § 229, would pose no constitutional concern when applied to the “war-like” acts of terrorists because of the link of the Chemical Weapons Treaty to such ends. Similarly, *Bond* conceded that applying the statute to the use of chemicals such as sarin gas by non-terrorists would also be within federal authority.<sup>180</sup>

Assuming the facts in *Bond* are purely “local,” are there federal powers that would justify the depth of federal authority to reach these activities?<sup>181</sup>

Three foreign powers might provide the prima facie justification for § 229’s criminalization regime: the treaty power,<sup>182</sup> the Foreign Commerce Clause,<sup>183</sup> and the Define and Punish Clause.<sup>184</sup> An argument for each of

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178. Section 229 criminalizes “knowingly” “possess[ing]” or “us[ing]” a “chemical weapon.” 18 U.S.C. § 229(a)(1) (2012). The section reflects the Chemical Weapons Convention obligation of parties to implement domestic criminal legislation prohibiting “natural and legal persons anywhere on its territory . . . from undertaking any activity prohibited to a State Party.” See Chemical Weapons Convention, *supra* note 20, at art. VII, para. 1(a). State parties are likewise prohibited from such possession or use. *Id.* at art. I, para 1(a).

179. Brief for Petitioner at 12, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158) (emphasis added), available at [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-158\\_pet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-158_pet.authcheckdam.pdf). At oral argument, the “as applied” or “facial” distinction is more muddled as counsel characterizes the challenge as a “classic as-applied challenge” which could justify complete statutory invalidation if the Court found that the statute exercises a “police power, by which I mean it criminalizes conduct without regard to jurisdictional element or some nexus to a matter of distinctly Federal concern.” *Bond* Transcript, *supra* note 86, at 12–13. As the treaty (and its implementing statute) regulate the use of chemical weapons, a subject clearly within federal purview, a facial challenge would have been difficult to maintain.

180. Under the petitioner’s view, such a prohibition would be valid given its “war-like” nature and the fact that the federal government would be able to completely prohibit that substance. See *Bond* Transcript, *supra* note 86, at 12–13.

181. This assumption facilitates discerning the importance of aligned powers, however, the actual circumstances in *Bond* are not “purely” local in the usual sense of the term. *Bond* conceded that some of the chemicals used were obtained via the internet and thus crossed state boundaries. See *United States v. Bond*, 681 F.3d 149, 151 (3d Cir. 2012).

182. U.S. CONST. art. II, § 2, cl. 2. In cases dealing with statutory execution of a non-self-executing treaty provision, the Article II treaty power is inextricably intertwined with Congress’s power under the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” its other powers).

183. U.S. CONST. art. I, § 8, cl. 3. The United States did not seek to justify the statute as a regulation of commerce in the lower courts but changed course. Its subsequent discussion

these authorities was made at different stages and through different players.<sup>185</sup> Consistent with current doctrine each is considered independently and the combined significance of aligned powers has not been considered.

The arguments that each of the three powers apply is strong.<sup>186</sup> The treaty power argument is buttressed by *Holland*, federal exclusivity in treaties, and historically based textual arguments evidencing that the Founders contemplated, and rejected, many subject matter limitations.<sup>187</sup> The Commerce Clause argument demonstrates an unmistakable commercial purpose embedded in the treaty and statute and, despite being adulterated through the lens of the interstate power, explains how the statute furthers a comprehensive regulatory regime.<sup>188</sup> As amici, Professors Sarah Cleveland and William Dodge view § 229 as a straightforward exercise in which Congress “defines” and “punishes” a violation of treaty law through the criminal code as authorized by the Define and Punish Clause.<sup>189</sup>

It is also the case that each of these arguments was presented with ambiguities or doctrinal holes. As for the Define and Punish Clause, it is not a foregone conclusion that the power was intended to apply to treaties and not just customary international law.<sup>190</sup>

The functional and historical arguments proffered under each of the above doctrines show distinct, interdependent, but often overlapping powers designed to act both in coordination and conjunction to craft a comprehensive regime for conducting foreign affairs.

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invokes questions of “free trade in chemicals” but the doctrine it applies that the “Commerce Clause” question was filtered through doctrines established under the interstate power.

184. The Define and Punish Clause authorizes Congress to “define and punish . . . Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. It is also known as the “Offenses Clause.”

185. The vast majority of the attention in the case was given to the treaty power. Meaningful attention was made regarding potential “Commerce Clause” authority at the Supreme Court level, but the United States declined to argue that position until after remand to the Third Circuit in 2011. *See Bond*, 681 F.3d at 162 n.14 (noting “we express no opinion as to the merits of the Government’s newly-discovered Commerce Clause argument.”). A detailed Define and Punish Clause argument was made by Professors Sarah Cleveland and William Dodge in an amicus brief on behalf of the respondent. *See* Brief of Professors Sarah H. Cleveland and William S. Dodge as Amici Curiae Supporting Respondent, *Bond v. United States*, 134 S. Ct. 2077 (2014) (No. 12-158) [hereinafter Amicus Brief], *available at* [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-158\\_resp\\_amcu\\_prof-shc-wsd.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-158_resp_amcu_prof-shc-wsd.authcheckdam.pdf).

186. The brief description regarding the basic moving parts of each argument is provided for context and is not intended to rehash the validity of each claim, but rather to contextualize the potential applicability of aligned powers and how in circumstances such as in *Bond*, resolution of all of the substantive questions deepens understanding of the appropriateness of the depth of regulation.

187. *See supra* Part II.

188. *See* Russell L. Weaver, *Administrative Searches, Technology and Personal Privacy*, 22 WM. & MARY BILL RTS. J. 571, 577–80 (2013).

189. Amicus Brief, *supra* note 185.

190. *Compare* HENKIN, *supra* note 39, at 69–70 (asserting treaties were covered), *with* Kontorovich, *supra* note 10, at 1689 n.58 (arguing that the “Treaty and Offenses Clauses” should be viewed separately as ensuring U.S. compliance with “the two primary sources of international law”).

The most important distinction between the Foreign Commerce Clause and the treaty power might be of sequencing and emphasis. Both powers are aimed at securing national uniformity for the purpose of maximizing American leverage in foreign affairs. The Foreign Commerce Clause enables uniform unilateral action to drive foreign partners to the bargaining table. The treaty power, by definition can only be exercised with an international partner, with a national uniformity prerogative that flows from the consummation of an agreement.

The Foreign Commerce Clause can be used as a tool for international cooperation as a foundation for international agreements relating to anything crossing international borders. Unilaterally, it represents the federal government's most potent non-military tool to influence the behavior of other states through sanctions and importation requirements. Aimed extraterritorially, the Clause operates to regulate the acts of U.S. entities and nationals (including persons both natural and legal) to extend U.S. influence on commercial and non-commercial national interests. Domestic uniformity throughout the states, and the ability to bind all U.S. entities, is required to meaningfully accomplish these goals.

The treaty power empowers the United States to bind foreign nations, and the states in the Union, to obligations within and beyond the commercial realm, a prospect consistent with early national practices following the Constitution's ratification.<sup>191</sup> The Foreign Commerce Clause's power to exert influence on foreign states would be incomplete without the treaty power's ability to bind those influenced states (as well as the United States) to international legal instruments.<sup>192</sup> Once at the bargaining table, the United States' negotiating leverage would be inconsequential without an ability to ensure national uniformity regarding any potential agreement. By the time of the Constitution, state intransigence in the face of U.S. treaties was rendering the nation "contemptible in the sight of all other nations [with a] power to promise but none to perform."<sup>193</sup> This independent power, once validly executed, gives rise to a fully uncabined statutory authority (both as to foreign and domestic affairs) enshrined in Congress's power to promulgate legislation "necessary and proper" to the fulfillment of the treaty power.<sup>194</sup>

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191. See Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 922 (2004) (describing treaty practice in the early post-Constitutional era as including "such diverse fields as commercial law, criminal law, property law, tax law, civil procedure, administrative law, and family law").

192. THE FEDERALIST NO. 22 (Alexander Hamilton) (Gary Wills ed., 1982) (Under the Articles of Confederation, treaties "are liable to the infractions of thirteen different Legislatures, and as many different courts of final jurisdiction . . . The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government?").

193. GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 159 (1919).

194. See Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 256 (2013).

The Offenses Clause is concerned with ensuring international law compliance regardless of whether its source is treaty or custom.<sup>195</sup> As the Constitution's treaty power came from failing to regulate consistent with U.S. obligations, the Offenses Clause was animated by the unwillingness of states to punish *individual* conduct that international law prohibits.<sup>196</sup> The only individual punishment within the Articles of Confederation was for piracy, a fact that caused increasing international difficulties.<sup>197</sup> Even in circumstances where states possess parallel laws providing for individual punishment, the federal ability to punish is crucial.<sup>198</sup>

As the foreign affairs powers align, the founding principles and policies counseling federal government control as to how to exercise that authority should likewise be viewed as deepening.

Other relevant doctrines also justify and counsel in favor of deepened federal authority in circumstances of aligned foreign affairs power. Inherent to all of the general foreign affairs powers outlined above are discretionary acts of enforcement. The manner in which that discretion is exercised—as to regulating commerce, means, and methods of enforcing treaties, and the choice to punish (or not punish) individuals for international law violations—reflects policy.<sup>199</sup>

As the Supreme Court recognized in 2012, the “dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation’s foreign policy.”<sup>200</sup> As foreign affairs powers align, the number and potential foreign policy

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195. See Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 449 & n.1 (2000); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 41 (1987) (“[T]he law of nations, [was] later referred to as international law.”).

196. See Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT’L L.J. 1, 17 (2013) (“The Define and Punish Clause contributed to that goal, cementing America’s place in the global system and deterring individuals at home and abroad whose short-sighted actions could undermine America’s global standing.”).

197. ARTICLES OF CONFEDERATION of 1781, art IX, § 1, cl. 6. This regime left Congress powerless to punish other international law violations and the states individually unconcerned with such enforcement. A report to the Continental Congress in 1781 found “[t]hat the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations.” 21 J. CONTINENTAL CONGRESS 1136 (1912).

198. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 87 (1833) (Because “the United States are responsible to foreign governments for all violations of the law of nations” including the individual acts of its citizens “Congress ought to possess the power to define and punish all such offenses, which may interrupt our intercourse and harmony with and our duties to them.”).

199. See *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012) (holding that the amount, type, and quality of federal enforcement of immigration law reflected federal policy and could not be “supplemented” by the states without offending federal power).

200. *Id.*

consequences of discretionary acts intensify.<sup>201</sup> Likewise, the legitimate “local” interests of the state will tend to decrease.<sup>202</sup>

Finally, the alignment of foreign affairs powers serves as a strong indicator that the federal action is lawful, possessing a “nexus to a legitimate federal interest.”<sup>203</sup> The division between that which is “foreign” or “domestic” has proven an exercise for which the judiciary is especially ill-suited. However, the interpretation and application of the Constitution is at the heart of its expertise. An aligned powers doctrine enables the judiciary to stop attempting to forecast the foreign effects of its decision. Instead, it acknowledges foreign policy concerns embedded in the Constitution’s powers and enables the expression of them through determining their applicability or inapplicability.

### B. Avoiding Presumptions and Effects

An irony of the current Foreign Commerce Clause doctrine is that its affirmative authority is far outstripped by conceptions of its dormant effects.<sup>204</sup> Current doctrine holds that state laws violate the dormant foreign commerce power when they “threaten” national uniformity, despite the fact that such laws would be valid under an interstate examination.<sup>205</sup> That dormant authority has bled into a presumptive preclusion of state action when the judiciary perceives latent foreign affairs consequences embedded in a facially neutral federal act.

#### 1. Make No Presumptions

Recognizing the Foreign Commerce Clause as expansive because of the permeation of foreign commerce and uniform economic regulation in conducting foreign affairs does not mean that state acts potentially or actually touching upon the federal authority are precluded.<sup>206</sup>

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201. Naturally, an alignment of foreign affairs powers is likely to correlate with the depth of foreign relations effects that will accrue relative to the resolution of the underlying policy question.

202. Although it should be noted that, under the decision in *Arizona v. United States*, even a strong and legitimate state interest is not definitive on issues touching foreign affairs. See *Arizona*, 132 S. Ct. at 2500 (invalidating multiple state law provisions despite acknowledging that “federal regulation does not diminish the importance of immigration policy to the States” and that “Arizona bears many of the consequences of unlawful immigration.”).

203. Brief for Petitioner at 12, *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012) (No. 08-2677).

204. See Colangelo, *supra* note 51, at 967–68 (describing stricter limits on states under the dormant Foreign Commerce Clause than under the dormant Interstate Commerce Clause because of the need for federal uniformity and influence of the “one voice” doctrine).

205. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (observing “the negative implications of Congress’ power to ‘regulate Commerce with foreign Nations’” (quoting U.S. CONST. art. I, § 8, cl. 3)); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 320 (1994).

206. This view was powerfully suggested by the Supreme Court in *United States v. Belmont*, in which the Court stated, “[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.” 301 U.S. 324, 331 (1937).

Collectively, the vast majority of judicial precedent in the last several decades has invoked the Foreign Commerce Clause in its dormant form. *Japan Line Ltd. v. County of Los Angeles*<sup>207</sup> serves as the preeminent example, in which the Court invalidated a state property tax on shipping, as it risked multiple taxation.<sup>208</sup> The reach of the Foreign Commerce Clause's dormant power has meant the deletion of limiting principles in other dormant Commerce Clause contexts.<sup>209</sup> Unlike the interstate context, with the Foreign Commerce Clause, a state regulation is invalid "even if the State's own economy is not a direct beneficiary."<sup>210</sup> Perhaps most important, the Foreign Commerce Clause dormancy analysis abandons the directive to balance the local benefits of the state action relative to its effect on interstate commerce. Instead, the state action is precluded "if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive."<sup>211</sup>

While the Constitution specifically precludes some state actions,<sup>212</sup> it does not generally preclude state action when the federal government is silent. However, given the preeminence of foreign affairs at the time of the Founding, the need for uniform regulation in foreign commerce, and the permeation of such commerce within the United States today, a reasonable argument could be made for such preclusion.<sup>213</sup>

Here, this Article's view aligns with more recent Court decisions that (as part of a broader contraction of Commerce Clause power) require clearer statements on behalf of the state or federal authorities before applying the dormant authority of the Foreign Commerce Clause. On the federal side, recent decisions suggest that without "specific indications of congressional intent" the validity of state law should be presumed.<sup>214</sup> Similarly, state actions facially discriminating as to foreign commerce are considered to directly invoke the Foreign Commerce Clause in a manner counseling invalidation.<sup>215</sup> This current trend toward something akin to a "clear statement rule" would shift the presumption underlying the existing preemption doctrine away from the states and toward federal authorities.

Beyond dormancy, recognizing a broader affirmative Foreign Commerce Clause power also could effectuate changes in statutory preemption

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207. 441 U.S. 434 (1979).

208. *Id.* at 451 (holding that a state tax would prevent "the Federal Government from 'speak[ing] with one voice when regulating commercial relations with foreign governments'").

209. See Garrick B. Pursley, *Dormancy*, 100 GEO. L.J. 497, 552–61 (2012).

210. *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 79 (1992).

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

212. See U.S. CONST. art. I, § 10. One could logically conclude the opposite, that the specific prohibitions suggest that, absent such a prohibition, state action within the enumerated federal powers is appropriate.

213. See Pursley, *supra* note 209, at 556 ("[G]iven the stakes in [the foreign affairs] context, a reasonable intuition would be that state action with *any* effect on foreign affairs is impliedly precluded. It is perhaps surprising then that courts do *not* accept such a broad constitutional preclusion.").

214. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 324 (1994).

215. See *Kraft*, 505 U.S. at 81.

analysis. There is no reason to believe that a broader affirmative Foreign Commerce Clause power requires any doctrinal shift as to statutory preemption analysis. However, expansion of the Foreign Commerce Clause would likely lead to more frequent invocation of that power and, as a result, more circumstances in which the justification for federal law (regulating foreign commerce) would call into question overlapping state action.<sup>216</sup>

There are potential negative consequences associated with the existing, incoherent preemption doctrine.<sup>217</sup> A broader Foreign Commerce Clause would provide the opportunity to shift the existing preemption doctrine in a manner consistent with judicial intuition.

Current statutory preemption doctrine regarding questions of foreign affairs has led to a problem of presumptions. Specifically, the judiciary has seemed to jump between presumptions in favor of and opposed to the validity of a state statute dependent on the court's assessment of whether the federal act feels sufficiently "foreign" in nature.<sup>218</sup> The resulting presumption in favor of validity or invalidity subsequently exerts substantial influence on the ultimate outcome.<sup>219</sup>

Statutes made pursuant to the Foreign Commerce Clause are best examined without any presumption related to foreign affairs. Instead, the

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216. To be clear, this should not be understood as a suggestion that the absolute number of federal laws generally would increase or that there would be an increase in the amount of federal regulation of currently unregulated areas. More simply, this is a recognition that a stronger foundation for the Foreign Commerce Clause could very well increase the invocation of that power explicitly, thus inviting more analysis of statutory preemption relative to foreign affairs.

217. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 [hereinafter Goldsmith, *Preemption*] (noting that the "Supreme Court's preemption jurisprudence is famous for its incoherence"); see also Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1622 (1997) [hereinafter Goldsmith, *Federalism*].

218. See Goldsmith, *Preemption*, *supra* note 217, at 180; see also Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723 (2013); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); 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).

219. This issue has most recently manifested itself relative to an Arizona statute—the Support Our Law Enforcement and Safe Neighborhoods Act—that created several new state criminal offenses and law enforcement obligations relating to immigration status. *Compare* *Arizona v. United States*, 132 S. Ct. 2492, 2501–09 (2012) (writing for the majority, Justice Kennedy applied presumption against state law and invalidated several components of Arizona law), *with id.* at 2511 (Scalia, J., dissenting) (applying presumption of "inherent authority" of state that applies unless contradicting express limitations by federal government). The split between Justices Kennedy and Scalia is consistent with similar presumptions applied throughout the judiciary. See *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) (upholding California regulation of alien employment); *Hines v. Davidowitz*, 312 U.S. 52, 74 (1941) (invalidating Pennsylvania Alien Registration Act); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (invalidating state imposed sanctions on companies dealing with Burma); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (striking down an Oregon statute regulating the manner in which aliens could acquire property in Oregon as an intrusion into the field of foreign affairs—"matters which the Constitution entrusts solely to the federal government").

articulation of a Foreign Commerce Clause basis should reflect normal principles of preemption without resort to a presumptive starting point based solely on an articulated justification.<sup>220</sup>

This “no-presumption” proposal, first articulated by Professor Jack Goldsmith, results in a move toward classic statutory interpretation principles.<sup>221</sup> The no-presumption proposal possesses many attributes. Forcing the judiciary to fully engage in the interpretive question, rather than to fall back on a presumption, ought to lead to more careful analysis of what is, after all, a statutory interpretation question at its core. It also acknowledges the difficulty in disentangling the “foreign” or “domestic” characterization that typically leads to a presumption of invalidity.<sup>222</sup> This approach recognizes and respects state interests and the reality that state action will inevitably regulate (even if entirely inadvertently) foreign commercial interests given the merger of foreign, interstate, and intrastate commercial interests.<sup>223</sup>

An absence of presumption also provides due respect to the animating principles of national uniformity underlying the Foreign Commerce Clause by eschewing a presumption in favor of validity present with other federal-state interactions.<sup>224</sup> Finally, it places the responsibility of preemption into the hands of the political branches by encouraging preemption of “policy choices traceable” to the federal branches and their articulation of their regulatory intent.<sup>225</sup>

## 2. Identify Relationships and Not Effects

The same tools we might utilize in avoiding excessive state law presumption can also serve as the foundation for defining the outer scope of Congress’s use of the Foreign Commerce Clause.

As a factual matter, a rule that Congress could regulate any activity rationally related to effectuating its foreign commerce power would leave only the most insular, isolated intrastate activity beyond the reach of federal authority. Nearly every product purchased by Americans was made by a foreign company or a company using foreign workers, made by a company partially or wholly owned by foreigners, was partially or wholly financed by a foreign entity, or contains materials or parts from a foreign nation.<sup>226</sup>

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220. See Goldsmith, *Preemption*, *supra* note 217, at 176.

221. *Id.*

222. See Goldsmith, *Federalism*, *supra* note 217, at 1670–80 (discussing how the characterization of a case or issue as “foreign” or “domestic” is often artificial but doctrinally significant).

223. *Id.*

224. See Goldsmith, *Preemption*, *supra* note 217, at 177 (asserting that statutory interpretive method will lead to decisions to “preempt state law only on the basis of policy choices traceable to the political branches in enacted law”).

225. *Id.*

226. A humorous example of this phenomenon came from an attempt to buy only American-made products for a week. During the process, a woman found that she cannot find any toilet paper that was not made “with domestic and imported parts.” See, e.g., Joey Fortman, *One Mom’s Challenge: Buy Only “Made in USA” for One Week*, *TODAY PARENTS*

With such a vast area potentially implicating foreign affairs generally and foreign commerce specifically, drawing an appropriate boundary differentiating “appropriate” and “inappropriate” regulation is challenging.<sup>227</sup>

Courts have found the Foreign Commerce Clause as justifying the prosecution of individuals having sexual relations with a juvenile prostitute abroad as relating to the broader problem of sex-trafficking and attempting to reduce the demand for such services.<sup>228</sup> The asserted relationship is true. But it is no less true than if the federal government were to criminalize the same conduct within the United States—even if both parties are U.S. nationals. After all, the United States is a major market for the importation of juvenile sex trafficking victims and providing a federal criminal punishment seems a reasonable means to try to depress both supply and demand. It would be odd to assert that it is appropriate for federal legislation to seek to affect the U.S. demand for juvenile prostitutes, but only when that U.S. demand engages in the prohibited act while abroad.

This sex trafficking example demonstrates the problem that has plagued the judiciary’s decisions in foreign affairs generally in crafting ad hoc doctrine relative to judicial assessment of the foreign relations “effects” of its decisions.<sup>229</sup>

There is no magic bullet to ensure the optimal boundaries at which the Foreign Commerce Clause should settle. Problems with resolving such boundaries are found throughout the legal system and it would be foolhardy to assert that ideal boundaries are immediately apparent in the Foreign Commerce Clause while they have bedeviled its interstate counterpart for centuries.

The impossibility of a definitive boundary, however, does not mean that all line-drawing processes are equal. Much of the incoherence of existing foreign relations doctrines flows from a tendency within the judiciary to assess foreign relations effects rather than the underlying law.<sup>230</sup> To avoid doctrinal conflation and ensure meaningful *ex ante* limits on congressional regulation, the consideration of the outer boundaries of Foreign Commerce

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(July 2, 2012), <http://www.today.com/parents/one-moms-challenge-buy-only-made-usa-one-week-857929>.

227. Arguments opposing broad federal powers in foreign affairs are often rooted in an exceedingly narrow construction of the Framers’ purposes.

228. See *United States v. Clark*, 435 F.3d 1100, 1103 (2006).

229. Articulated by Professor Goldsmith in 1999, the “foreign relations effects test” has been thoroughly chronicled by Professor Goldsmith and others as a test for which the judiciary is particularly ill-suited. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1936 (1999); see also Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1244 (2007).

230. Sadly, this often feeds into a cycle. As judicial precedent becomes increasingly unmoored from fixed principles suited to the institutional advantages inherent to the judiciary, the doctrine becomes more confused. As the doctrine becomes more confused, attempting to decipher and apply it faithfully becomes more difficult. As the spray chart of decisions grows more complex, even the most diligent jurist would find it impossible to decipher, further undermining the system.

Clause needs to avoid judicial determinations of “effect” in favor of identifying U.S.-foreign relationships embedded in the laws asserted under the Foreign Commerce Clause.

There are two types of foreign relationships most relevant for this analysis. First is the relationship between the statute promulgated by Congress and the foreign commercial goal it intends to accomplish. Requiring an expression of this “statute-market” relationship would provide the judiciary with a touchstone for considering the appropriate breadth of application. A clear statement regarding statutory purposes would give effect to federal authorities with a specific foreign commerce purpose in mind. Further, requiring a clear expression at the time of the statute’s creation, coupled with the knowledge that the expression will shape the judicial view of enforcement, should discourage Congress from attempting to utilize the Foreign Commerce Clause’s broad power as a cloverleaf for broad-based domestically minded legislation.

The clear statement rule embedded within the judicial presumption against extraterritoriality proves instructive here. The presumption is based on the recognition that when U.S. law is applied extraterritorially, the sovereignty of foreign nations is implicated. Presuming that textually neutral language was not intended to be applied extraterritorially assumes that when Congress implicates such sovereignty issues it “does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.”<sup>231</sup>

Providing legal significance to the oft-ignored stated paradigm in which Congress intends to operate is not about following discerning congressional intent as much as it is about forcing it. The presumption against extraterritoriality does not require that the law applies abroad, but provides sufficient context as to how the law is intended to be applied abroad.<sup>232</sup> In that sense, the congressional statement envisioned here is about identifying how the regulation is intended to relate to international trade, affecting the international market, punishing foreign actors, protecting domestic actors competing abroad, or whatever the universe of regulation seeks to cover. This approach provides substantive flexibility to Congress as they can articulate broad or narrow regulatory regimes to fit their desired reach. At the same time, simple jurisdictional invocation of the Foreign Commerce Clause as the basis for statutory authority is of no relevance as it does not provide the touchstone needed to assist coherent judicial interpretation.

#### CONCLUSION

The diminution of the federal government’s power to act via treaty and regulate interstate commerce reignites a fundamental question as to the

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231. *Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 139 (2005).

232. *See Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 264–65 (2010) (discussing the contextual importance in presumption against extraterritorial application of law); *see also Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *United States v. Plummer*, 221 F.3d 1298, 1304–06 (11th Cir. 2000) (criminal prohibition on smuggling applied extraterritorially).

division of functional authority over the nation's foreign policy. While the United States engages in a robust array of foreign policy actions that would have been unthinkable in the Founding era, globalization has created legal and political problems that current doctrine is ill-equipped to handle.

The stakes resting on the conclusion of this question cannot be overstated and will impact important issues across the political spectrum. National security enthusiasts are invested in the federal government's ability to robustly prosecute those connected to the use of chemical weapons and to maximize pressure on other nations to do the same, a power under assault in *Bond*.<sup>233</sup> Politicians, NGOs, and citizens fearing catastrophic climate change emphasize the necessity of U.S. participation in a broad multilateral treaty regulating the production of natural resources, a notion considered beyond federal authority by many legal scholars.<sup>234</sup> Businesses have been pressuring the federal government to find avenues through diplomacy, legal instruments or otherwise, to stem cyber threats that cost the private sector economy billions each year and that routinely compromise U.S. governmental interests.<sup>235</sup>

At the time of the Constitution's drafting, the costs of the nation's hamstringed foreign policy were borne entirely by internal constituencies as the country's negotiating position was undermined by its inability to negotiate desirable trade policy and defense policies.<sup>236</sup> While there remain significant internal harms flowing from the federal governments' limitations in foreign affairs, much of those harms are offset by United States' world hegemony.<sup>237</sup> Now, much of the costs of our current disjointed doctrine and its resulting policy instruments (or lack thereof) are borne by foreign states that have little reason to accept U.S. promises as valid currency in foreign relations or with whom the United States is incapable of ensuring its domestic compliance of certain obligations. Examples populate multiple substantive realms. In human rights, the

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233. *United States v. Bond*, 681 F.3d 149 (3d Cir. 2012), *rev'd*, 134 S. Ct. 2077 (2014).

234. *See, e.g.*, Blake Hudson, *Climate Change, Forests, and Federalism: Seeing the Treaty for the Trees*, 82 U. COLO. L. REV. 363 (2011) (arguing that current conceptions of the Commerce Clause and treaty power are likely insufficient to enable U.S. participation in environmental treaties governing natural resources); Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT'L L. 265, 302–05 (2004) (discussing limitations in implementation of human rights treaties).

235. *See generally* Natasha Solce, *The Battlefield of Cyberspace: The Inevitable New Military Branch*, 18 ALA. L.J. SCI. & TECH. 293, 309 (2008) (noting that a single virus costs commercial users billions of dollars); Brian B. Kelly, Note, *Investing in a Centralized Cybersecurity Infrastructure: Why "Hacktivism" Can and Should Influence Cybersecurity Reform*, 92 B.U. L. REV. 1663, 1674 n.46 (2012) (noting that cyberattacks cost the private sector \$114 billion annually).

236. *See* Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 868 (noting that "[t]he major concern of the Framers that led to the commerce clause was rational regulation of trade, and allowing the new nation to present a unified front in negotiations with foreign powers").

237. The existence of offsetting factors is relevant to any assessment of the depth of the problem. Of course, there is good reason to believe that U.S. hegemony is steadily decreasing and there should be certainty that such hegemony is not eternal.

federal government was incapable of staying an execution to enable the completion of a case before the International Court of Justice.<sup>238</sup> In environmental treaty negotiations, the United States is hampered as to the types of promises it can undertake due to state prerogatives.<sup>239</sup> These examples are united by the fact that abstract federalism principles render the national government powerless to effectuate—or create—international obligations within its own territory.

On its face, the reinvigorated Foreign Commerce Clause authority outlined above runs counter to efforts to restrict federal power. At its core, this understanding of the Foreign Commerce Clause suggests that when the federal government acts pursuant to the Foreign Commerce Clause it can reach even deeper than currently contemplated under the interstate power. However, the recognition of this expansive power under the Foreign Commerce Clause has the potential to tie that power more tightly to the functions it—and other foreign affairs powers—sought to address.

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238. See, e.g., LaGrand case (Ger. v. U.S.), 2001 I.C.J. 104 (June 27), available at <http://www.icj-cij.org/docket/files/104/7736.pdf>.

239. See Michael G. Faure & Jason Scott Johnston, *The Law and Economics of Environmental Federalism: Europe and the United States Compared*, 27 VA. ENVTL. L.J. 205 (2009).