

A Federal Framework for Regulating the Growing International Presence of the Several States

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*It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.*¹

I. INTRODUCTION

On May 17, 1784, Charles Julian De Longchamps entered the Pennsylvania residence of Francis Barbé Marbois, the Consul General of France to the United States, and threatened violence and bodily harm to the Consul General.² Two days later, De Longchamps called Marbois a “blackguard”³ and struck Marbois’ cane with his own cane, assaulting the Consul General.⁴ The international community quickly became inflamed and demanded that the United States Congress take action to remedy the situation.⁵ Congress, however, lacked any judicial authority in Pennsylvania and could only offer a reward for the capture of De Longchamps.⁶ Pennsylvania eventually detained De Longchamps and found him guilty of the common law crime of assault on a member of the French Embassy.⁷ Throughout the whole incident, Congress acted as a cheerleader to the Pennsylvania courts by stating that it “highly ap-

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1. THE FEDERALIST NO. 3 (John Jay).

2. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111 (1784). Thomas Jefferson described De Longchamps as an “obscure and worthless character.” William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491 (1986) (quoting Letter from Thomas Jefferson to James Madison (May 25, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON 289 (J. Boyd ed. 1953)).

3. A “blackguard” is “a thoroughly unprincipled person, a scoundrel.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 196 (3d ed. 1996).

4. *Respublica*, 1 U.S. (1 Dall.) at 111.

5. Casto, *supra* note 2, at 491-92.

6. *Id.* at 491-92 n.139 (citing 27 J. CONT. CONG. 478-79 (1784)).

7. *Respublica*, 1 U.S. (1 Dall.) at 117 (“You then have been guilty of an atrocious violation of the law of nations; you have grossly insulted gentlemen, the peculiar objects of this law (gentlemen of amiable characters, and highly esteemed by the government of this State) in a most wanton and unprovoked manner: And it is now the interest as well as duty of the government, to animadvert upon your conduct with a becoming severity,—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world.”).

prove[d]” of Pennsylvania’s actions.⁸

The Marbois incident represents one of the foreign affairs dilemmas that America faced in the eighteenth century—determining what roles the states would assume internationally.⁹ The incident stands as a timely reminder of the curious nature of the domestic states’ international obligations. With no national judiciary to address Marbois’ assault,¹⁰ the Continental Congress was powerless to mandate Pennsylvania’s compliance with the law of nations, which condemned assaults on consulars and members of embassies.¹¹ Ironically, 225 years later, America found itself in a similar situation in *Medellín v. Texas*.¹²

In *Medellín*, Texas found itself in the middle of an international dispute regarding its failure to comply with an order from the International Court of Justice (ICJ).¹³ The ICJ opinion, *Case Concerning Avena and Other Mexican Nationals (Avena)*,¹⁴ demanded that the United States institute “review and reconsideration” hearings¹⁵ for fifty-one named individuals due to breaches of the Vienna Convention on Consular Relations (VCCR).¹⁶ Texas refused to comply with the ICJ’s judgment, never instituted a review and reconsideration hearing, and executed one of the individuals named in the *Avena* judgment, José Medellín.¹⁷

After the ICJ issued its judgment, President Bush released a

8. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 HASTINGS INT’L & COMP. L. REV. 220, 229-30 (1996); see Casto, *supra* note 2, at 491-92. The Marbois incident was a “national sensation that attracted the concern of virtually every public figure in America.” Casto, *supra* note 2, at 492 (completing a survey of the number of times the Marbois incident is mentioned in letters of eighteenth century American public figures). For example, George Washington, Thomas Jefferson, John Jay, James Madison, James Monroe, and John Adams all sent correspondence concerning the incident. *Id.* at 492-93 n.143.

9. See Casto, *supra* note 2, at 491-93.

10. Maeva Marcus, *Introduction to ORIGINS OF THE FEDERAL JUDICIARY: ESSAYS ON THE JUDICIARY ACT OF 1789*, at 4 (Maeva Marcus ed. 1992) (noting that Congress passed the Judiciary Act on September 24, 1789—five years after the Marbois incident).

11. See Casto, *supra* note 2, at 490 (noting that international law at the time condemned “infractions of the immunities of ambassadors and other public ministers” (quoting 21 J. CONT. CONG. 1136 (1781) (third resolve))); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (noting that there were three widely accepted violations of international law in the eighteenth century as articulated by Blackstone: right of safe passage, piracy, and intrusion on the rights of ambassadors).

12. 128 S. Ct. 1346 (2008).

13. See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, ¶¶ 152-53 (Judgment of Mar. 31).

14. 2004 I.C.J. 12 (Judgment of Mar. 31).

15. In a review and reconsideration hearing, the United States is required to determine whether the United States’ failure to comply with the Vienna Convention on Consular Relations (VCCR) resulted in any prejudice to the arrested national. *Id.* ¶¶ 121, 131. The International Court of Justice (ICJ) noted that review and reconsideration hearings are required because the VCCR defense is likely not applicable at the appellate level of review due to procedural rules if the defendant did not raise the VCCR defense at trial. *Id.* ¶ 133.

16. Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, [1970] 21 U.S.T. 77, available at 1969 WL 97928. The VCCR provides that when a foreign national “is arrested or committed to prison or to custody pending trial or is detained in any other manner,” the arresting state must notify the defendant of the right to contact his consulate. *Id.*

17. *Texas Executes Mexican Murderer*, BBC NEWS, Aug. 6, 2008, <http://news.bbc.co.uk/2/hi/americas/7542794.stm>.

memorandum requesting that Texas comply with the *Avena* judgment “in accordance with general principles of comity.”¹⁸ In *Medellín*, however, the United States Supreme Court held that the President’s memorandum did not obligate the states to conduct the ICJ-mandated review and reconsideration hearings.¹⁹ Additionally, the Court held that the *Avena* opinion did not create domestic obligations on the courts of the several states.²⁰

While the facts in *Medellín* and the Marbois incident are as different as the periods in which the respective events occurred, it is striking that the federal government apparently served as an international cheerleader in both instances.²¹ Under *Medellín*, the executive is nearly as powerless as the Continental Congress was at the time of the Marbois incident with regard to its ability to enforce federal international obligations domestically.²² However, *Medellín* did seem to reserve a place for Congress to enforce federal international obligations upon the several states, by executing non-self-executing treaties.²³

Under the *Medellín* framework, questions remain as to the federal government’s authority to preempt state action that reaches out into foreign affairs, including the federal government’s ability to “mandate a state’s compliance with an international obligation of the federal government.”²⁴ The question becomes increasingly timely as the several states continue to reach out globally, forming compacts with other nations as well as adopting and implementing international treaties domestically, regardless of federal ratification.²⁵

The current federal foreign affairs doctrine that governs state international activity is unequipped to address situations in which states fail to comply with the international obligations of the federal government.²⁶ However, the foreign affairs doctrine remains applicable to

18. Memorandum from President George W. Bush to the Attorney General (Feb. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>.

19. *Medellín v. Texas*, 128 S. Ct. 1346, 1371 (2008) (“It is only to say that the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect.”)

20. *Id.* at 1361 (“The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and ‘where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.’” (quoting *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006))). Throughout this Note, the terms “several states” and “domestic states” are used interchangeably and refer to the fifty states comprising the United States of America.

21. *See supra* notes 2-11 and accompanying text.

22. *See supra* notes 2-11 and accompanying text.

23. *Medellín*, 128 S. Ct. at 1365 (providing examples in which Congress gave treaties domestic effect).

24. Craig Jackson, *The Anti-Commandeering Doctrine and Foreign Policy Federalism—The Missing Issue in Medellín v. Texas*, 31 SUFFOLK TRANSNAT’L L. REV. 335, 335-36 (2008). Jackson notes that while the Supreme Court held that the executive cannot by itself give a treaty domestic effect, the broader issue of “how far, if at all, the federal government may go in mandating implementation of international obligations at the state level” remains unaddressed and unknown. *Id.* at 338.

25. *See infra* Part II.A.

26. *See infra* Part III.B.2.

situations in which the states reach out impermissibly and interfere with existing federal obligations so long as there is a strong and precise federal interest at stake.²⁷

This Note addresses three interrelated aspects of the current foreign affairs doctrine. First, it describes the current status of the several states' international presence and activity. Second, it surveys the current federal foreign affairs doctrine, which traditionally limits state international economic activity, and discusses the federal government's ability to ensure state compliance with federal foreign treaty obligations. Finally, this Note attempts to provide a framework for the several states' growing foreign policy powers.

II. HISTORY AND BACKGROUND

The several states' growing international personality flows in, through, and around a handful of constitutional and court-created doctrines that simultaneously authorize and limit the several states' international activity. To address these interrelated doctrines, this section will briefly survey the types of state global action and then explore the following doctrines: the Compact Clause, the anti-commandeering doctrine, and the foreign affairs one-voice doctrine. Finally, this section will discuss the role of customary international law in American jurisprudence.

A. State Action in International Law

In February of 2003, Kansas Lieutenant Governor John Moore led a delegation of Kansas agribusinesses to Mexico for a three-day conference to discuss the possible exportation of Kansas wheat and foodstuffs to Cuba.²⁸ Within a year, Cuba and Kansas secretly struck a deal.²⁹ The deal called for Cuba's largest food importer, Empresa Comercializadora de Alimentos, frequently referred to as Alimport, to purchase \$10 million of Kansas agricultural products.³⁰ Although the deal was technically nonbinding, Moore confirmed, a year later, that Kansas had shipped nearly \$4 million of locally grown wheat to the island nation.³¹

27. See *infra* Part III.B.1.

28. *Lt. Gov. Moore to Lead Delegation to Mexico*, TOPEKA CAPITAL J., Feb. 14, 2003, at 3, available at 2003 WLNR 6964966. There are very few details available regarding the actual conference. *Id.*

29. Scott Rothschild, *Kansas Governor Signs Pact with Cuban Food Importer*, LAWRENCE J.-WORLD, Jan. 11, 2004, available at 2004 WLNR 12373779.

30. *Sebelius Ready to Do Business with Cubans*, WICHITA EAGLE, Jan. 13, 2004, at 4B, available at 2004 WLNR 19477524. After striking the deal with Cuba and Alimport, Kansas Governor Kathleen Sebelius did not publicly announce the compact. Rothschild, *supra* note 29. The *Lawrence Journal-World* apparently broke the story after overhearing Cuba's "Radio Rebelde" pronounce the compact over the airwaves. *Id.*

31. See Rothschild, *supra* note 29; Press Release, Kansas Office of the Governor, Lt. Governor Announces Sale of Kansas Wheat to Cuba (Feb. 11, 2005), <http://www.governor.ks.gov/news/>

As the Kansas example demonstrates, the domestic states are active global participants.³² Besides actively entering into “nonbinding” agreements³³—such as memoranda of understanding³⁴—with foreign bodies, states incorporate the language of treaties and international tribunals into their respective domestic codes.³⁵ State governors, city mayors, and national organizations like the National Governors Association are instrumental in shaping both American domestic and foreign policy.³⁶ State international activity largely falls into three distinct, yet related, categories.³⁷ First, as previously mentioned, states enter into “nonbinding” treaties with foreign bodies to increase international trade and secure foreign investment.³⁸ Second, states adopt policies and statutes that follow international treaties.³⁹ Finally, states and state organi-

newsrelease/2005/nr-05-0211a.html. The value of the wheat shipped was estimated to be between \$3.2 and \$3.8 million. *Id.* The shipment went through large agribusiness corporations, including Cargill, and it was all “identity-preserved to Kansas.” *Id.* For a more thorough examination of domestic state-international interaction, see Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007).

32. See generally Resnik, *supra* note 31.

33. See, e.g., Rothschild, *supra* note 29 (discussing Kansas’s agreement to ship wheat to Cuba); Gov. Pawlenty, *Chief Minister Hooda Sign Historic Sister-State Agreement Between Minnesota, Haryana, India*, U.S. STATE NEWS, Oct. 23, 2007, available at 2007 WLNR 20869788 (discussing loosely-worded agreement in which the parties committed to partner together to foster economic development).

34. Tim Bradner, *Murkowski Pushes Taiwan Coal Sales*, ALASKA J. COMMERCE, Nov. 14, 2004, available at http://alaskajournal.com/stories/111404/loc_20041114001.shtml. The Alaska agreement with Taiwan, designed to promote development of Alaska’s coal deposits, was not without controversy. See Paula Dobbyn, *Scrutiny Began in September Embattled Renkes Resigns*, ANCHORAGE DAILY NEWS, Feb. 6, 2005, available at 2005 WLNR 1778667. The memorandum of understanding signed between Alaska and Taiwan fostered a coal deal that embroiled the Attorney General of Alaska, Gregg Renkes, in controversy due to a conflict of interest. See *id.* The agreement between Alaska and Taiwan resulted in Attorney General Renkes’ resignation. See *id.*

35. See generally Resnik, *supra* note 31, at 33-36 (noting that the domestic states model their policies off international treaties regardless of whether the United States is a party to the treaty).

36. *Id.* at 34.

37. The scope of local government-international activity is difficult to categorize, and this article does not purport to entrench or define state activity as expressly limited to the three categories discussed in this section. The imperfect categorization is designed merely to provide a rudimentary framework to understand the frequent types of local government-international interaction. Besides the three categories, states also frequently enter into cultural exchanges with “sister states” that often transform into trading relationships. See NAT’L GOVERNORS ASS’N CTR. FOR BEST PRACTICES, HOW STATES ARE USING ARTS AND CULTURE TO STRENGTHEN THEIR GLOBAL TRADE DEVELOPMENT 5 (2003), <http://www.nga.org/cda/files/040103globaltradedev.pdf> [hereinafter HOW STATES ARE USING ARTS] (noting that Hawaii has established seventy-one sister city, state, and province relationships globally that have resulted in expansive commercial opportunities for the island state). More specifically, border states are highly active internationally and frequently form relationships to encourage cultural dialogue and expand tourism. See *id.* at 9 (“Cultural tourism is an important component of tourism with a significant impact on the national and state economies.”).

38. See *infra* notes 41-48 and accompanying text; see also Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2391-98 (2006). Ku noted that state governors frequently enter into two distinct types of international agreements: bilateral agreements and multilateral agreements. *Id.* at 2392, 2394. Many of the multilateral agreements entered into by state officials are agreements with Canada and involve a joint and several state interest such as the environment. *Id.* at 2396 (“A number of U.S. governors, for instance, have joined with a number of Canadian provinces to set greenhouse gas reduction goals.” (citing COMM. ON ENV’T & NE. INT’L COMM. ON ENERGY, CONFERENCE OF NEW ENG. GOVERNORS & E. CANADIAN PREMIERS, CLIMATE CHANGE ACTION PLAN 7-8 (2001), http://www.scics.gc.ca/pdf/850084011_e.pdf)).

39. See *infra* notes 49-54 and accompanying text.

zations lobby the federal government for support with regard to their international agenda.⁴⁰

As the world marketplace further becomes an intertwined web of collaboration and mutual reliance, states actively seek out international participants to foster the economic development of their constituents.⁴¹ The majority of state international interaction is aimed at promoting economic development.⁴² Usually, the governor of the state spearheads the trade mission.⁴³ State governors frequently serve as facilitators between domestic and foreign corporations,⁴⁴ as well as official government representatives in negotiating and establishing trade treaties between the domestic state and the foreign country.⁴⁵ For example, on a trip to Europe, Delaware Governor Ruth Ann Minner worked with AstraZeneca, Inc.⁴⁶ in an effort to encourage additional business in Delaware.⁴⁷ On the same trip, Governor Minner also met with Swedish officials to encourage “export opportunities for Delaware businesses.”⁴⁸

To become internationally involved, state governments also adopt international treaties as part of their domestic statutes.⁴⁹ For example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a multinational treaty that calls upon its member parties to “condemn discrimination against women in all its

40. See *infra* notes 55-60 and accompanying text.

41. See Peter T. Leeson, *How Important Is State Enforcement for Trade?*, 10 AM. L. & ECON. REV. 61, 62 (2008) (“[I]nternational trade is large and growing rapidly. Today, it accounts for some twenty-five percent of global economic activity.”); NAT’L GOVERNORS ASS’N CTR. FOR BEST PRACTICES, ENHANCING COMPETITIVENESS: A REVIEW OF RECENT STATE ECONOMIC DEVELOPMENT INITIATIVES—2005, at 45-49 (2006) [hereinafter ENHANCING COMPETITIVENESS], <http://www.nga.org/files/pdf/0604ENHANCECOMPIB.pdf> (providing a list of recent domestic state involvement with international nation states).

42. See ENHANCING COMPETITIVENESS, *supra* note 41, at 45-49.

43. See *id.* For example, Alabama Governor Bob Riley led a delegation to foster economic development with Israel. *Id.* at 45. Similarly, Governor Jeb Bush led a Florida delegation to Columbia to increase trade. *Id.*

44. See Governor Minner Celebrates Completion of Blue Ball Properties Project, U.S. STATE NEWS, Aug. 1, 2008, available at 2008 WLNR 14961329.

45. See Alfredo Corchado, *Mexican Leader Visits Arizona, Presses for Immigration Reform: Fox, on Southwest Tour, Says Border Violence Shows Need for Change*, DALLAS MORNING NEWS, Nov. 5, 2003, at 18A, available at 2003 WLNR 16460443 (stating that Arizona Governor Janet Napolitano and Mexican officials discussed the expansion of superhighways and local seaports to increase trade between Arizona and Mexico).

46. AstraZeneca, Inc. is an international pharmaceutical corporation that was the result of a merger between corporations in the United Kingdom and Sweden. AstraZeneca.com, *History*, <http://www.astrazeneca.com/about-us/history/> (last visited Jan. 17, 2009).

47. Gov. Minner Leads Delaware Delegation on Trade Mission to Sweden, Amsterdam, U.S. STATE NEWS, Sept. 23, 2007, available at 2007 WLNR 18757085. The Trade Mission was ultimately successful, and AstraZeneca, Inc. reallocated its North American headquarters to Delaware. See Governor Minner Celebrates Completion, *supra* note 44.

48. See Gov. Minner Leads Delaware Delegation, *supra* note 47.

49. See Resnik, *supra* note 31, at 50-63 (noting that states and cities pass legislation based on foreign treaties that the United States has not ratified, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Kyoto Protocol). The Kyoto Protocol is a multinational agreement that provides a variety of environmental initiatives including emissions restrictions. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 2, Mar. 16, 1998, 37 I.L.M. 22. For a more thorough discussion of the ramification of states’ adoption of different treaties and protocols, see generally Resnik, *supra* note 31.

forms [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”⁵⁰ While the United States federal government has never ratified the treaty, forty-four United States cities and sixteen different states have considered or passed legislation supporting CEDAW.⁵¹ States have also adopted an international tribunal’s definitions of “rape” and gender-based violence.⁵² Outside the realm of human rights, United States cities have also established environmental standards to comply with the Kyoto Protocol, a multinational treaty restricting greenhouse gas emissions to which the United States is not a party.⁵³ The willingness of local governments to implement or codify international law demonstrates that local governments consider multinational treaties important reflections of public policy.⁵⁴

Finally, state governments also serve as federal lobbyists.⁵⁵ The National Governors Association provides a forum for governors to lobby the federal government on a variety of topics including tax and energy concerns,⁵⁶ the recent housing crisis,⁵⁷ and traditional areas of federal exclusivity, like international trade⁵⁸ and cross-border travel.⁵⁹

50. Convention on the Elimination of All Forms of Discrimination Against Women, art. 2, Sept. 3, 1981, 1249 U.N.T.S. 13. As of now, 185 Nation States have ratified the CEDAW. See United Nations Treaty Collection, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=326&chapter=4&lang=en> (last visited Jan. 17, 2009).

51. Resnick, *supra* note 31, at 56-57. CEDAW is not the only treaty that local governments have strived to enforce despite the lack of a federal signature. *Id.* at 62. Currently, over 700 mayors, representing more than 65 million Americans, have endorsed programs that “include[] efforts to ‘meet or beat the Kyoto Protocol targets in their own communities.’” *Id.* at 62 (citation omitted).

52. Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 956 n.74 (2006) (“Incorporating *Akayesu’s* insight, both California and Illinois define gender violence for civil purposes in part to include ‘[a] physical intrusion or physical invasion of a sexual nature under coercive conditions.’” (alteration in original) (quoting CAL. CIV. CODE § 52.4(c)(2) (West 2003); 740 ILL. COMP. STAT. 82/5(2) (2004))). *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998), is an opinion issued by the International Criminal Tribunal for Rwanda that provided definitions of “rape” and gender-based violence. *Id.* ¶ 668.

53. Resnick, *supra* note 31, at 62. Over 700 mayors have endorsed programs that strive to meet the Kyoto Protocol standards for carbon emissions. *Id.* Governors are not the only state executive officials who act globally. *Id.*

54. *Id.* at 57-58 (citing City Council, Res. 980148 (Phila., Pa. Mar. 12, 1998)).

55. See NGA.org, Policy Position EDC-17, Governors’ Principles on International Trade and Investment, Mar. 5, 2007, <http://www.nga.org/portal/site/nga/menuitem.8358ec82f5b198d18a278110501010a0/?vgnnextoid=e1442f9655321110VgnVCM1000001a01010aRCRD> (“Governors strongly support federal trade development programs . . .”).

56. Letter from Natural Res. Comm., Nat’l Governors Ass’n to Senator Harry Reid, Senator Mitch McConnell, Speaker Nancy Pelosi, and Representative John Boehner (July 23, 2008), <http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d18a278110501010a0/?vgnnextoid=3bf0538e9e05b110VgnVCM1000001a01010aRCRD> (encouraging Senate and House majority and minority leaders to extend a five-year tax credit in order to encourage the development of renewable energy).

57. Letter from Econ. Dev. & Commerce Comm., Nat’l Governors Ass’n, to Sec’y Steven C. Preston (Aug. 13, 2008), <http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d8a278110501010a0/?vgnnextoid=53cdfbc0578bb110VgnVCM1000001a01010aRCRD> (applauding the enactment of the Housing and Economic Recovery Act of 2008).

58. NGA.org, Policy Position 11, Governors’ Principles on International Trade Policy, Dec. 11, 2000, <http://www.nga.org/portal/site/nga/menuitem.616f0cf559d998d18a278110501010a0/?vgnnextoid=249a9e2f1b091010VgnVCM1000001a01010aRCRD&vgnnextchannel=4b18f074f0d9ff00VgnVCM1000001a01010aRCRD&vgnnextfmt=print> (encouraging the federal government to expand international

Additionally, the domestic states independently lobby the federal government to sign and ratify treaties to which the states may not be parties.⁶⁰

The international activity of the several states is as diverse as the unique concerns that each state possesses.⁶¹ The domestic states and their government officials have carved out a global place for their constituents that is sometimes at odds with the federal government.⁶² Domestic states' international activity has resulted in what Julian G. Ku labels a "gubernatorial foreign policy,"⁶³ which raises concerns regarding (1) a state's ability to enter into a compact legally with another nation-state and (2) the federal government's power to prohibit or prevent the state's international action.⁶⁴ Finally, concerns exist as to whether domestic state courts may serve as regulatory bodies for states' global interactions.⁶⁵

B. *The Several States' Ability to Compact with Other Nation-States*

In *National Foreign Trade Council v. Natsios*,⁶⁶ the United States Court of Appeals for the First Circuit addressed the constitutionality of a Massachusetts statute that prohibited state entities from purchasing goods or services from companies that did business with Burma.⁶⁷ In order to address the constitutionality of the Massachusetts statute, the court discussed a handful of judicial doctrines, including the foreign affairs doctrine,⁶⁸ the anti-commandeering doctrine,⁶⁹ and the Foreign

trade through participation in free trade agreements similar to the North American Free Trade Agreement).

59. Letter from Econ. Dev. & Commerce Comm., Nat'l Governors Ass'n, to Colleen Manaher, U.S. Dep't of Homeland Sec., and Consuela Pachon, U.S. Dep't of State (Aug. 20, 2007), <http://www.nga.org/portal/site/nga/menuitem.cb6e7818b34088d18a278110501010a0/?vgnnextoid=095341f5d0984110VgnVCM1000001a01010aRCRD> (encouraging the respective federal departments to develop "frequent-border crossing programs" to allow citizens of bordering nations to travel in and out of the United States more easily).

60. Resnick, *supra* note 31, at 57 (citing H. Con. Res. 23, 140th Gen. Assem., 1st Sess. (Del. 1999) (calling for ratification of the CEDAW and referring to America as a "leading advocate for human rights"))).

61. *See supra* notes 28-60 and accompanying text.

62. *See supra* notes 50-54 and accompanying text.

63. Ku, *supra* note 38, at 2384 ("Executive officials of a particular state often take actions that implicate the foreign relations of the United States as a whole. Such actions become a 'gubernatorial foreign policy' when a governor or other state executive official takes that action independent of federal government supervision or control.").

64. *See generally id.*

65. Authors addressing the foreign policy role of states frequently address the issues of foreign exclusivity in international law, the Compact Clause, and the Tenth Amendment, and consider whether state courts can apply customary international law. *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1226 (1999) ("The three doctrinal components of the exclusivity principle—the dormant foreign affairs power, the dormant foreign commerce power, and the inclusion of customary international law as a part of federal common law . . . should be abandoned."); *see also* Ku, *supra* note 38, at 2385 (noting that a variety of doctrines apply).

66. 181 F.3d 38 (1st Cir. 1999).

67. *Id.* at 45-47.

68. *Id.* at 49-55.

69. *Id.* at 60-61.

Commerce Clause doctrine.⁷⁰ As the opinion demonstrates, state international activity triggers a variety of court doctrines. In order to address the legitimacy of state international activity, this Note explores those interrelated doctrines by specifically considering the Compact Clause, anti-commandeering doctrine, and Foreign Commerce Clause doctrine, as well as the foreign affairs preclusion powers of the federal government.

1. The History of the Compact Clause

Article I, section 10 of the United States Constitution states that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power”⁷¹ Literally read, the Compact Clause seemingly forecloses any form of agreement between domestic states or between a state and a nation-state.⁷² In 1893, in *Virginia v. Tennessee*,⁷³ the Court abandoned a literal interpretation of the Compact Clause.⁷⁴ The Court stated that the Compact Clause is applicable only if the compact is designed to “increase [the] political power in the states, which may encroach upon or interfere with the just supremacy of the United States.”⁷⁵ The Court later reaffirmed the *Virginia* decision in *United States Steel Corp. v. Multistate Tax Commission*.⁷⁶

United States Steel Corp. concerned the formation of a Multistate Tax Compact that approximately twenty states entered in an effort to expedite and streamline the state tax collection of multistate businesses and taxpayers.⁷⁷ The Court held that the Multistate Tax Compact withstood Compact Clause scrutiny because the Compact Clause condemns only those compacts that “enhance state power to the detriment of federal supremacy.”⁷⁸ Under the lens of *United States Steel Corp.*, “state

70. *Id.* at 61-71.

71. U.S. CONST. art. I, § 10, cl. 3. The Compact Clause states in its entirety:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Id. The Compact Clause is similar to art. I, § 10, cl. 1, which provides that “[n]o State shall enter into any Treaty, Alliance, or Confederation.” *Id.* art. I, § 10, cl. 1.

72. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 459-60 (1978) (“Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.”).

73. 148 U.S. 503 (1893).

74. *See id.* at 518-20.

75. *Id.* at 519.

76. *U.S. Steel Corp.*, 434 U.S. at 473. In *U.S. Steel Corp.*, the Court completed an exhaustive survey of nearly every judicial opinion applying the Compact Clause and considered the drafters’ intent. *Id.* at 459-73.

77. *Id.* at 455-57.

78. *Id.* at 460, 473 (“But the test is whether the compact enhances state power *quoad* the National Government.”). The Court also disregarded the fact that the Multistate Tax Compact involved

power” concerns the political power of the states.⁷⁹

Seven years later, the Court reaffirmed *United States Steel Corp. in Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*.⁸⁰ In *Northeast Bancorp*, the Court emphasized that an agreement that a state can unilaterally modify or repeal is not a compact.⁸¹ Additionally, the Court emphasized that the Compact Clause is only implicated if a compact “enhance[s] the *political* power” of the states.⁸² Therefore, violations of the Compact Clause occur when the states enter into *binding* agreements that inappropriately enhance the political power of the states.⁸³

2. The One-Voice Doctrine and the Federal Government’s Foreign Affairs Powers

The several states’ expanding international role is a volatile and timely topic.⁸⁴ The federal foreign affairs doctrine provides that states may not “encroach on matters implicating foreign affairs, whether or not the federal government has actually approved a treaty, statute, executive agreement, or declaration with respect to the particular foreign policy issue.”⁸⁵ The foreign affairs doctrine’s roots rest with the *Zscher-nig v. Miller*⁸⁶ opinion.

In *Zscher-nig*, the Court struck down an Oregon, Cold War-era statute that prevented a foreigner from inheriting real property in Oregon if the foreigner’s home country did not grant United States citizens comparable rights.⁸⁷ The Court noted that the statute, as construed by

over a third of the states as *per se* evidence that the compact stripped powers away from the federal government. *Id.* at 472. Furthermore, the Court dismissed the argument that the existence of administrative board oversight revealed that the compact increased state power at the expense of the federal government. *Id.* at 472-73.

79. *Id.* at 472.

80. 472 U.S. 159 (1985). In *Northeast Bancorp, Inc.*, several New England states enacted reciprocal agreements that had the effect of allowing a bank in one state to acquire a bank in another state. *Id.* at 163-64. Previously, the federal government passed the Bank Holding Company Act, which forbade a bank in one state from acquiring a bank in another state unless the state in which the acquired bank is located specifically authorized the transaction. *Id.* at 162-63. In response to the Bank Holding Company Act, Massachusetts passed a law authorizing banks in other states to acquire Massachusetts banks so long as the other state reciprocated and granted Massachusetts banks the authority to acquire banks within the other state. *Id.* at 164. The Federal Reserve System challenged the local statutes, arguing that they violated the Compact Clause. *Id.* at 162-64.

81. *Id.* at 175.

82. *Id.* at 176.

83. See *supra* notes 77-82 and accompanying text.

84. See generally Ku, *supra* note 38, at 2398-2407; Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832 (1989).

85. Ku, *supra* note 38, at 2399 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 163-65 (2d ed. 1996)).

86. 389 U.S. 429 (1968).

87. *Id.* at 440. The Oregon statute targeted the countries of the former Soviet Union. *Id.* at 435 (noting that the Oregon statute specifically precluded a foreigner’s rights if the foreigner’s home country routinely “confiscate[d]” the value of the property). The Court noted that “confiscation” of

the Oregon Supreme Court, essentially foreclosed any possibility that a Soviet-bloc foreigner could inherit real property in Oregon.⁸⁸ While the Court noted that the statute was not a “gross [] intrusion” into foreign affairs, it nonetheless struck the statute down because it had “a direct impact upon foreign relations [that] may well adversely affect the power of the central government.”⁸⁹ The Court ultimately invalidated the Oregon statute because it “impair[ed] the effective exercise of the nation’s foreign policy.”⁹⁰ In other words, the statute impaired the federal government’s power to conduct foreign affairs *in general*, as opposed to interfering with an existing federal foreign affairs interest.⁹¹ The *Zschernig* foreign affairs framework, therefore, is not a positive or preemptive framework, but is dormant.⁹²

The Court has never directly affirmed *Zschernig*.⁹³ In *American Insurance Ass’n v. Garamendi*,⁹⁴ however, the Court considered *Zschernig* and the dormant status of the federal foreign affairs doctrine.⁹⁵ *Garamendi* involved a challenge to a California statute that required life insurance companies to disclose information regarding their policies enacted during the era of Nazi Germany.⁹⁶ The statute was aimed at recovering the missing life insurance policies of Holocaust-era European Jews.⁹⁷ Before California enacted the statute, the federal government was actively involved in addressing the missing life insur-

property is a term used to describe the practice of communist nations. *Id.* at 435, 440 (“The statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.”).

88. *Id.* at 440 (noting that the statute’s construction invoked a state and judicial criticism of communist countries or countries that readily confiscated property).

89. *Id.* at 441.

90. *Id.* at 440.

91. *Id.* at 440-41.

92. *See id.*

93. *Ku, supra* note 38, at 2400 (“Since the *Zschernig* decision, the Court has not reaffirmed the federal exclusivity approach despite having had several opportunities to do so.”).

94. 539 U.S. 396 (2003).

95. *Id.* at 417-19.

96. *Id.* at 409.

97. *Id.* at 410-11. Nazi Germany confiscated and stole many of the life insurance policies of European Jews. *Id.* at 402. After World War II, insurance companies frequently denied the existence of life insurance policies that escaped confiscation, arguing that the policies lapsed due to failure to pay premiums or lack of verification that the policyholders passed away. *Id.* The insurance policies quickly became an international issue of reparations and, eventually, the repayment of lost insurance policies became the obligation of Western Germany. *Id.* at 404-05. However, Western Germany was only willing to shoulder the reparations load if it would in turn receive protection from American lawsuits in American courts. *Id.* at 406. The United States agreed that whenever a German company was sued on a Holocaust-era claim that the

Government of the United States would submit a statement that “it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II.”

Id. (quoting Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-Ger., July 17, 2000, 39 I.L.M. 1298, 1303). As Germany and America continued to work on reparations, California passed a statute “designed to force payment by defaulting insurers” to Holocaust-era victims. *Id.* at 408-09. The Court held that the statute interfered with the Executive’s work with Germany and struck it down. *Id.* at 420.

ance capital and had formed a bilateral executive agreement with Germany,⁹⁸ which required Germany to cooperate with an international organization established to address the missing insurance funds.⁹⁹ The Court struck down the California statute because it was preempted by executive action.¹⁰⁰ The executive agreements between Germany and the United States demonstrated an “express federal policy” and the conflict “raised by the state statute” required the “state law to yield.”¹⁰¹

Garamendi noted that *Zschernig* presented two distinct views of the federal foreign affairs preemption doctrine.¹⁰² The Court noted that the *Zschernig* majority recognized that even a state’s “incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict.”¹⁰³ In *Zschernig*, Justice Harlan wrote a concurring opinion in which he noted that “the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations,” absent any positive federal action in the area.¹⁰⁴ The *Garamendi* Court viewed Justice Harlan’s concurrence as a legitimate interpretation of the federal preemption doctrine and explained that his opinion raised a “fair question” as to what standard the Court should apply in determining whether state action is preempted.¹⁰⁵ The Court refused to resolve the disparity between the differing *Zschernig* viewpoints and elected to invalidate the California statute due to the existing executive action in the field.¹⁰⁶

Importantly, *Garamendi* established a balancing test that considers the “strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.”¹⁰⁷ Under *Garamendi*, therefore, the Court arguably abandoned the broad approach established in *Zschernig*,

98. *See generally* Agreement Concerning the Foundation “Remembrance, Responsibility and the Future” U.S.-Ger., July 17, 2000, 39 I.L.M. 1298, 1303. The United States formed several similar agreements with Austria, France, and other European nations. *See, e.g.*, Agreement Between the Government of France and the Government of the United States of America Concerning Payments for Certain Losses Suffered During World War II, Fr.-U.S., Feb. 5, 2001, 2156 U.N.T.S. 281.

99. *Garamendi*, 539 U.S. at 406-07 (“As for insurance claims specifically, both countries agreed that the German Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization formed in 1998 by several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners, the organization of American state insurance commissioners.”).

100. *Id.* at 424-25.

101. *Id.*

102. *Id.* at 417-19.

103. *Id.* at 418.

104. *Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Harlan, J., concurring).

105. *Garamendi*, 539 U.S. at 419-20 (“It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here.”).

106. *Id.* at 420.

107. *Id.* The Court stated that California had very little interest in “European Holocaust-era insurance policies,” especially when compared to the federal government who was an active player in World War II restitution policies dating back to Nuremberg. *Id.* at 425.

which seemingly provided for a thick blanket of federal foreign affairs powers.¹⁰⁸ Additionally, the Court in *Medellín* arguably curtailed the legitimacy of *Garamendi*'s reliance on the executive as the source of federal affairs preemption.¹⁰⁹

While the full impact of *Medellín* is still unknown, the opinion debatably truncated the executive's power to preempt state action that *Garamendi* endorsed.¹¹⁰ *Garamendi* invalidated the California statute because it interfered with an existing executive agreement.¹¹¹ *Medellín*, on the other hand, foreclosed the executive from obligating the states to comply with treaties or executive agreements.¹¹² While the facts underlying the two opinions are clearly distinct,¹¹³ *Medellín*, if nothing else, limited the *Garamendi* opinion to executive agreements that exist to "settle civil claims between American citizens and foreign governments or foreign nationals."¹¹⁴ Additionally, *Medellín* noted that state governments preserve a strong and independent interest in their criminal procedure and law.¹¹⁵ *Medellín*, therefore, seemingly endorsed the *Garamendi* balancing test, which weighs state interests against federal interests to determine whether a state impermissibly interfered with foreign affairs.¹¹⁶ In *Medellín*, the Court seemingly tolerated a high degree

108. See Ku, *supra* note 38, at 2400-01 ("The Court's opinion thus avoided adopting *Zschernig*'s exclusivity view, at least in its broadest formulation.").

109. *Medellín v. Texas*, 128 S. Ct. 1346, 1371 (2008). This Note does not purport to address the *Medellín* self-executing treaty framework. See *id.* at 1361. For a more thorough discussion of the *Medellín* opinion and its academically contested holding, see Jordan J. Paust, *Medellín, Avena, The Supremacy of Treaties, and Relevant Executive Authority*, 31 SUFFOLK TRANSNAT'L L. REV. 301 (2008); Ilya Shapiro, *Medellín v. Texas and the Ultimate Law School Exam*, 2008 CATO SUP. CT. REV. 63 (2008).

110. Compare *Medellín*, 128 S. Ct. at 1372 (holding that the President could not obligate Texas to comply with federal treaty obligations), with *Garamendi*, 539 U.S. at 424-25 (invalidating the California statute because it interfered with an existing executive agreement).

111. *Garamendi*, 539 U.S. at 424-25.

112. *Medellín*, 128 S. Ct. at 1372.

113. At an elementary level, *Garamendi* involved a situation in which a state impermissibly reached "up" and out into foreign affairs through a domestic statute. *Garamendi*, 539 U.S. at 420. In *Medellín*, on the other hand, the executive reached "down" to the state, attempting to enforce an international treaty on a traditional area of state concern—criminal law and procedure. *Medellín*, 128 S. Ct. at 1372; cf. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law."). However, in terms of interference with the Executive's foreign affairs power, Texas' refusal to grant José Medellín a review and reconsideration hearing arguably outweighed the minimal interference present in both *Garamendi* and *Zschernig*. See Jackson, *supra* note 24, at 361 (stating that "however neutral the Texas state criminal law is, the implementation of the law is anything but neutral"). The several states' failures to comply with the obligations of the VCCR continue to result in additional proceedings in the ICJ. See generally Request for the Indication of Provisional Matters in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Order of July 16, 2008). Furthermore, the ICJ previously addressed cases involving states' failures to comply with the obligations under article 36 of the VCCR. See *LaGrand Case (F.R.G. v. U.S.)*, 1999 I.C.J. 9 (Order of Mar. 3); *Case Concerning Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248 (Order of Apr. 9).

114. *Medellín*, 128 S. Ct. at 1371 ("The claims-settlement cases involve a narrow set of circumstances; the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.").

115. *Id.* at 1372.

116. Compare *id.* (considering Texas' interest in its criminal procedure), with *Garamendi*, 539 U.S. at 420 (establishing a balancing test that weighs state and federal interests in foreign affairs).

of interference with foreign affairs, because the United States' use of the death penalty remains far more controversial than the California statute at issue in *Garamendi*.¹¹⁷ However, the state conduct at issue in *Medellín* was a single criminal sentence¹¹⁸ as opposed to the general applicability of a state statute.¹¹⁹

a. The Dormant Foreign Commerce Clause

Article I, section 8 of the Constitution states that Congress possesses the authority to “regulate Commerce with foreign Nations.”¹²⁰ Like the foreign affairs preemption doctrine, the dormant Foreign Commerce Clause rests on the one-voice policy—the need for the United States to act unitarily internationally.¹²¹ The dormant Foreign Commerce Clause finds its roots in modern Supreme Court precedent.¹²²

In *Japan Line, Ltd. v. County of Los Angeles*,¹²³ the Supreme Court struck down a California tax statute, which authorized state property taxation of foreign shipping containers that were used exclusively in foreign commerce.¹²⁴ Since the shipping containers were taxed in Japan, the appellants were subject to double taxation.¹²⁵ The Court invalidated the statute on two grounds: double taxation concerns¹²⁶ and the one-voice policy.¹²⁷ Since the double taxation concern is likely limited to state foreign taxation schemes, this Note will only focus on the one-voice policy.¹²⁸

The Court presented two rationales for the one-voice policy. First, the Court was concerned that other states would follow California's

117. See, e.g., Davison M. Douglas, *Death Penalty and International Law*, 13 WM. & MARY BILL RTS. J. 305 (2004).

118. See *Medellín*, 128 S. Ct. at 1353.

119. See *Garamendi*, 539 U.S. at 401.

120. U.S. CONST. art. I, § 8, cl. 3.

121. *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 446-48 (1979). *Japan Line* also provided another policy justification of the dormant Foreign Commerce Clause: the elimination of the double taxation of foreign entities operating on American soil. *Id.* at 446-47.

122. See *id.*; *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

123. 441 U.S. 434 (1979).

124. *Id.* at 436.

125. *Id.* at 436-37.

126. *Id.* at 446-48. The Court noted that double taxation is offensive to the Commerce Clause. *Id.* at 446. Under the Commerce Clause, a state is only allowed to impose apportionment property taxes. *Id.* However, in a foreign context, the Court is inadequately equipped to ensure equal apportionment property taxes since the foreign property may be subject to taxation on its full value abroad. *Id.* at 446-47 (stating that “neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign”). Therefore, the Court invalidated the statute. *Id.* at 451.

127. *Id.* at 450-51.

128. See Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 755 (2007) (“Because [the Court's first ground] is specifically limited to the taxation context, it has not been given as much attention as the second factor, the need for federal uniformity, which has been applied in all subsequent dormant Foreign Commerce Clause cases.”).

lead, resulting in asymmetric taxation of foreign goods.¹²⁹ Additionally, the Court was worried that California's tax statute would provoke retaliation in the form of taxation of American goods or, specifically, shipping containers in foreign jurisdictions.¹³⁰ The Court hypothesized that the retaliation would likely be imposed on all American shipping containers and not simply those containers registered to the offending state.¹³¹ Therefore, "the Nation as a whole would suffer."¹³² Importantly, the Court refused to base its opinion on any positive federal action.¹³³

The United States had entered into an agreement with Japan that allowed temporary shipping containers to be admitted free of "all duties and taxes whatsoever chargeable by reason of importation."¹³⁴ While the California statute directly conflicted with the international agreement, the Court ignored the conflict and focused on the "dormant aspects"¹³⁵ of the Foreign Commerce Clause and invalidated the statute because it would "frustrate attainment of federal uniformity."¹³⁶

In *Container Corp. of America v. Franchise Tax Board*,¹³⁷ the appellants challenged a California "unitary business" income tax that taxed corporations based on the amount of worldwide income attributable to California.¹³⁸ Writing for the Court, Justice Brennan clarified *Japan Line* and provided that a state statute infringes the dormant Foreign Commerce Clause if it "*either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive."¹³⁹ Ultimately, the Court concluded that the statute withstood dormant Foreign Commerce Clause scrutiny.¹⁴⁰

The Court continues to follow the *Container Corp.* framework.¹⁴¹ However, because the regulation of foreign commerce is reserved to Congress, "Executive Branch communications that express federal pol-

129. *Japan Line*, 441 U.S. at 450-51.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 452-53.

134. Customs Convention on Containers arts. 1(a), 2, May 18, 1956, 20 U.S.T. 301, 338 U.N.T.S. 103.

135. Wilson, *supra* note 128, at 756.

136. *Japan Line*, 441 U.S. at 453.

137. 463 U.S. 159 (1983).

138. *Id.* at 163.

139. *Id.* at 194. The Court noted that if the state statute violates a "clear federal directive," the statute is preempted and is therefore arguably not subject to the dormant Foreign Commerce Clause because the field is inherently not dormant. *Id.* ("Thus, a state tax at variance with federal policy will violate the 'one voice' standard if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive. The second of these considerations is, of course, essentially a species of preemption analysis.")

140. *Id.* at 194-95. The Court provided three justifications: (1) the statute, unlike the statute at issue in *Japan Line*, did not automatically result in asymmetrical taxation; (2) the tax imposed on a domestic corporation; and (3) the effects of the taxation were likely not offensive to foreign nations. *Id.*

141. See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327 (1994).

icy but lack the force of law cannot render unconstitutional” otherwise valid state statutes.¹⁴² The dormant Foreign Commerce Clause, therefore, is inconsistent with the general foreign affairs preemption doctrine since executive communications are enough to invalidate state action under the foreign affairs doctrine.¹⁴³ Additionally, the dormant Foreign Commerce Clause has debatably fallen out of favor with the Court because it refused to apply it in *Crosby v. National Foreign Trade Council*¹⁴⁴ despite the clear opportunity to do so.¹⁴⁵

b. The Federal Government’s Power to Prevent States from Entering into International Agreements: Commandeering and the Tenth Amendment

At least one commentator has noted that the *Medellín* Court, while refusing to require a state to follow an ICJ opinion, did not root its decision on commandeering or Tenth Amendment grounds, thus leaving unsettled the issue of whether a state is required to follow the “national government’s international obligations.”¹⁴⁶ The modern anti-commandeering doctrine began with *New York v. United States*.¹⁴⁷

In *New York*, the federal government passed regulations requiring the states to dispose of low-level radioactive waste.¹⁴⁸ While the regulatory scheme consisted primarily of interstate regulations and spending-based incentives, one tier of the program required the states to either take title of the radioactive waste generated by businesses within the state’s boundaries or be liable for the businesses’ costs of disposing of the waste.¹⁴⁹ Both options required affirmative legislative action on behalf of the states to comply with federal regulations.¹⁵⁰ Ultimately, be-

142. *Id.*

143. See Wilson, *supra* note 128, at 764-66 (discussing in detail the contradiction between *Barclays* and *Garamendi*). Compare *Barclays Bank*, 512 U.S. at 329-30 (refusing to consider executive communications in determining whether the California statute violated the dormant Foreign Commerce Clause), with *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421 (2003) (considering executive communications in determining whether the California statute violated the foreign affairs preemption doctrine). While the factual circumstances are strikingly different, the Court’s refusal to consider executive communications in *Barclays Bank* is similar to the Court’s refusal to consider the executive memorandum in *Medellín*. Compare *Barclays Bank*, 512 U.S. at 329-30, with *Medellín v. Texas*, 128 S. Ct. 1346, 1368-72 (2008).

144. 530 U.S. 363 (2000).

145. *Id.* at 371 (not considering the dormant foreign affairs doctrine in deciding whether the Massachusetts statute was constitutional); see Wilson, *supra* note 128, at 762 (discussing in detail the Court’s refusal to address the dormant Foreign Commerce Clause in *Crosby*).

146. Jackson, *supra* note 24, at 339. The anti-commandeering argument was before the Court as Texas argued that the President’s memorandum violated the State’s Tenth Amendment rights. *Id.* at 362.

147. 505 U.S. 144 (1992); see Ku, *supra* note 38, at 2402.

148. *New York*, 505 U.S. at 149-54.

149. *Id.* The Court stated, “In this provision, Congress has not held out the threat of exercising its spending power or its commerce power: it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction.” *Id.* at 176.

150. *Id.* (“A choice between two unconstitutionally coercive regulatory techniques is no choice at

cause “the Act commandeered the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program,” the Court invalidated the federal program on Tenth Amendment grounds.¹⁵¹

Shortly after deciding *New York*, the Court “extended these anti-commandeering protections to state executive officials”¹⁵² in *Printz v. United States*.¹⁵³ *Printz* involved a federal handgun regulation act commonly known as the Brady Bill.¹⁵⁴ The Brady Bill required state officials to help implement and oversee the sale of handguns by “mak[ing] a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law.”¹⁵⁵ The Court considered the requirements that the Brady Bill placed on state officials to be constitutionally significant and voided that provision of the act.¹⁵⁶

Neither *New York* nor *Printz* limited the subject area of federal regulations.¹⁵⁷ Additionally, neither case provides significant insight as to whether the anti-commandeering doctrine applies to the federal government’s traditional foreign affairs powers.¹⁵⁸ The issue of whether the foreign affairs powers, specifically the federal treaty power, are subject to the constitutional limitations of the Tenth Amendment remains academically contested.¹⁵⁹

C. Whose Law Is It? Does Customary International Law Belong Exclusively to the Federal Courts?

The federal government’s apparent monopoly over customary international law (CIL) is occasionally considered an impediment to the

all.”).

151. *Id.* (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

152. *Ku*, *supra* note 38, at 2402.

153. 521 U.S. 898 (1997).

154. *Id.* at 902.

155. *Id.* at 902-04 (quoting 18 U.S.C. § 922(s)(2) (1994)).

156. *Id.* at 930 (“The Brady Act, the dissent asserts, is different from the ‘take title’ provisions invalidated in *New York* because the former is addressed to individuals—namely, CLEOs—while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one.”).

157. *Ku*, *supra* note 38, at 2402.

158. *See id.* at 2403 (“Neither *New York* nor *Printz* discussed whether the constitutional prohibition on commandeering also applies to the federal government’s power to conduct foreign affairs.”); *see also* Carlos Manuel Vázquez, Breard, *Printz*, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1354 (1999) (“To apply the anticommandeering principle to the treaty power would be to hold that the federal government not only has the power to implement non-self-executing treaties, but also, as a constitutional matter, the sole and exclusive duty to do so—a duty that may not be delegated to the states.”).

159. *Compare* *Ku*, *supra* note 38, at 2404-05 (“The fact that the President or Congress has some power to implement treaties, for instance, does not mean that either institution’s implementing actions are free of constitutional constraints imposed by either federalism or separation of powers.”), *with* Jackson, *supra* note 24, at 358 (“[T]he treaty power is not limited by the Tenth Amendment, the ability to require that states not interfere with these treaty obligations is similarly not subject to that amendment’s limitations . . .”).

states' collective power to act abroad.¹⁶⁰ CIL is a significant and independent aspect of international law.¹⁶¹ CIL "results from a general and consistent practice of states followed by them from a sense of legal obligation."¹⁶² State practice is determined by a variety of actions including diplomatic statements, statements of policy, and perhaps most importantly, international conventions and treaty ratification.¹⁶³ United States courts utilize CIL to decide issues of international law.¹⁶⁴

Historically, CIL was part of the general common law that was applied by both state courts and the federal judiciary.¹⁶⁵ However, in the 1980s, the Alien Torts Claim Act (ATCA) and the landmark *Filartiga v. Pena-Irala*¹⁶⁶ decision significantly altered CIL's jurisdictional application.¹⁶⁷

In *Filartiga*, the United States Court of Appeals for the Second Circuit addressed whether an individual may bring a private action under the ATCA for violations of CIL.¹⁶⁸ The ATCA is a federal statute that provides federal courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁶⁹ *Filartiga* held that international law, including CIL, was "part of the federal common law" and that the ATCA therefore provides a federal court with not only subject matter jurisdiction to hear a claim, but also a substantive cause of action under

160. See Spiro, *supra* note 65, at 1226 ("The three doctrinal components of the [federal] exclusivity principle [are] the dormant foreign affairs power, the dormant foreign commerce power, and the inclusion of customary international law as a part of federal common law . . .").

161. See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060. The ICJ decides its opinions based on the four sources of international law: treaties and conventions, customary international law (CIL), the general principles of law, and the works of respected scholars and publicists. *Id.* The *Restatement (Third) of the Foreign Relations Law of the United States* provides that a "rule of international law is one that has been accepted as such by the international community of states" in the form of treaties, CIL, or general principles of law. § 102(1) (1987).

162. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 102(2).

163. *Id.* § 102 cmt. b. The state action must stem from a sense of legal obligation referred to internationally as *opinio juris*. *Id.* at cmt. c.

164. See, e.g., *The Paquete Habana*, 175 U.S. 677, 688, 700 (1900).

165. Louis Henkin, *International Law As Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984); see RESTATEMENT (THIRD) OF FOREIGN RELATIONS *supra* note 161, at pt. I, ch. 2 (Introductory Note) ("State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the federal courts.").

166. 630 F.2d 876 (2d Cir. 1980).

167. See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 201-04 (2004).

168. *Filartiga*, 630 F.2d at 878. *Filartiga* sued Americo Norberto Pena-Irala for the wrongful death of his son. *Id.* Pena-Irala was the Inspector General of Paraguay's police department. *Id.* *Filartiga* alleged that Pena-Irala was responsible for the kidnapping and torturing of his son. *Id.* For a more thorough discussion regarding *Filartiga's* factual background, see Steve Kuan, *Alien Tort Claims Act—Classifying Peacetime Rape As an International Human Rights Violation*, 22 HOUS. J. INT'L L. 451, 468-71 (2000).

169. 28 U.S.C. § 1350 (2006). For a more thorough explanation of the history and scope of the Alien Tort Claims Act (ATCA), see generally THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999); GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (2003); Casto, *supra* note 2; Dodge, *supra* note 8.

the common law.¹⁷⁰ Twenty-four years later, the Supreme Court addressed *Filartiga* in *Sosa v. Alvarez-Machain*.¹⁷¹ In *Sosa*, the Court held that although the ATCA is a jurisdictional statute that fails to create any new causes of action, the ATCA's "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations."¹⁷² While some commentators have found *Sosa*'s statement that CIL is federal law to mean that CIL is exclusively federal common law,¹⁷³ the states' general preclusion from applying CIL is more logically rooted in *Banco Nacional de Cuba v. Sabbatino*¹⁷⁴ and the *Erie* doctrine established in *Erie Railroad v. Tompkins*.¹⁷⁵

The *Erie* doctrine famously eliminated the federal common law "[e]xcept in matters governed by the Federal Constitution or by acts of Congress."¹⁷⁶ *Sabbatino* established the Act-of-State doctrine¹⁷⁷ in American courts, and in doing so, stated that the Act-of-State doctrine falls outside the scope of *Erie*.¹⁷⁸ The Court relied heavily on the prudential concerns raised by Philip C. Jessup.¹⁷⁹ Those concerns included a fear that if international law became state law, then international law would be subject to "divergent and perhaps parochial . . . interpretations."¹⁸⁰ Consequently, under *Sabbatino*, CIL is generally considered federal law, thus making Supreme Court interpretations of CIL binding on state courts.¹⁸¹

170. *Filartiga*, 630 F.2d at 885, 887.

171. 542 U.S. 692 (2004).

172. *Id.* at 724. The *Sosa* Court listed prudential concerns for federal courts to consider in adopting a new common law cause of action under the ATCA. *Id.* at 725-28. The Supreme Court provided the following five considerations: (1) common law changes since 1789 "counsel[] restraint in judicially applying internationally generated norms"; (2) due to the *Erie* doctrine, courts should be careful in recognizing new common law causes of action without legislative guidance; (3) the legislature is usually in a better position than the courts to recognize private rights of action; (4) courts should consider collateral consequences of adopting a new cause of action; and (5) there is no congressional mandate to seek out new causes of action. *Id.*

173. See Ku & Yoo, *supra* note 167, at 200 (noting that *Sosa* considered CIL as federal law); see also Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2259, 2274 (2004).

174. 376 U.S. 398 (1964).

175. 304 U.S. 64 (1938).

176. *Id.* at 78.

177. *Sabbatino*, 376 U.S. at 401 ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.").

178. *Id.* at 425 (citing Phillip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939)) ("It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*. Soon thereafter, Professor Phillip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers [if *Erie* were] extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.").

179. See generally Jessup, *supra* note 178, at 740.

180. *Sabbatino*, 376 U.S. at 425.

181. *Id.*

The majority of scholars today consider CIL to be exclusively federal law.¹⁸² The justifications for CIL as exclusively federal law follow the same lines that support the court doctrine of foreign affairs preemption—mainly, the need for the United States to speak with one voice internationally to prevent international conflict.¹⁸³

The combination of the interpretation of CIL as exclusively federal law, the Compact Clause, and the foreign affairs preemption doctrine has significantly limited the ability of state officials to act internationally.¹⁸⁴ Despite the constitutional and court-created doctrines that hinder state global activity, state officials continue to work internationally.¹⁸⁵ The states' international activity creates a tension between the federal structure of the United States and the need for the federal government to implement foreign policies without state interference.¹⁸⁶ The rise of state international activity has led some commentators to call for an increase in the “constitutional space” for the several states to act in order to accommodate the growing demands of globalization.¹⁸⁷ However, many commentators still recognize the ability of the executive to occasionally preempt or alter state action.¹⁸⁸ Since *Medellín* curtailed the ability of the executive to enforce federal international obligations domestically, more discussion is needed on the “constitutional space” through which the states may act internationally.¹⁸⁹

III. ANALYSIS

Justice Stevens concluded his concurrence in *Medellín* by stating that Texas' refusal to comply with the *Avena* judgment “will jeopardize the United States' ‘plainly compelling’ interests in ‘ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law.’”¹⁹⁰ The Supreme Court's refusal to enjoin Texas from executing *Medellín*, combined with the growing power of the states,

182. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 111 cmt. d (“Interpretations of international agreements by the United States Supreme Court are binding on the States. Customary international law is considered to be like common law in the United States, but it is federal law.”).

183. See Jessup, *supra* note 178, at 743; see also Spiro, *supra* note 65, at 1244-45.

184. See *supra* Part II.

185. See *supra* Part II.A.

186. See *Ku*, *supra* note 38, at 2413 (noting the balancing act between the foreign affairs preemption doctrine and federalism); Vázquez, *supra* note 158, at 1320-21 (discussing the tentative balance between federalism, commandeering, and the power of the federal government to enforce state compliance with treaty obligations).

187. See generally *Ku*, *supra* note 38, at 2398-2410.

188. See *id.* at 2414 (stating that the “federal government will retain the right to preempt” state action); *Ku & Yoo*, *supra* note 167, at 220 (arguing that the federal executive should govern state court interpretation of CIL). But see Spiro, *supra* note 65, at 1226 (arguing for abolition of the foreign affairs preemption doctrine).

189. See *Medellín v. Texas*, 128 S. Ct. 1346, 1361 (2008).

190. *Id.* at 1375 (Stevens, J., concurring).

seems to have introduced a new era in American foreign policy.¹⁹¹

*A. Rise of the States as “Demi-Sovereigns”*¹⁹²

Nearly a decade ago, Peter Spiro argued that the traditional framework of federal foreign affairs exclusivity was anachronistic because its policy foundation was rooted in the Cold War.¹⁹³ Spiro argued that the rise of the states as international personalities presents fewer concerns now than in the Cold War era because nation-states consider the domestic states separately and, if need be, can seek accountability measures through sanctions or similar proceedings directly against the individual states.¹⁹⁴ Spiro noted that the predecessor to the *Avena* judgment, the *LaGrand Case*,¹⁹⁵ clearly stated that Arizona was accountable for its failure to notify the German Consulate of the arrest and subsequent detention of German nationals.¹⁹⁶ According to Spiro, the *LaGrand Case* demonstrates “an international understanding of our federal system and a willingness to treat subnational actors directly.”¹⁹⁷

Spiro’s notion of the “demi-sovereign” is particularly well-suited for addressing the rising international economic role of the domestic

191. See *Medellin v. Texas*, 129 S. Ct. 360, 361-62 (2008) (refusing to enjoin Jose Medellin’s execution); see generally Milena Sterio, *The Evolution of International Law*, 31 B.C. INT’L & COMP. L. REV. 213 (2008) (discussing the effects of globalization on international law).

192. The term “demi-sovereigns” is adopted from Spiro, *supra* note 65, at 1226.

193. *Id.* at 1223-24 (“But the context that once rationalized the foreign relations differential is itself now changing in a way that demands reassessment. The world is no longer so neatly divided into sovereign boxes, locked in a zero-sum conflict that was buffered by few institutional restraints. The Cold War is over, and a democratic peace now prevails; survival is no longer so clearly at stake in foreign relations decision making.”).

194. *Id.* at 1226-27 (“The devolution of foreign relations power to the states would not undermine the rule of international law, as some have feared; indeed, by making states directly accountable to the international community (a community that now enjoys powerful economic levers against subnational economies), the shift would likely further the incorporation of international law in the United States.”). Spiro relies heavily on a handful of instances, including the Massachusetts sanctions on Burma, that brought about significant backlash from the World Trade Organization and the European Community. *Id.* at 1250-51.

195. 2001 I.C.J. 466 (Judgment of June 27). In *LaGrand*, Arizona arrested German nationals and sentenced them to be executed without notifying them of the right to contact their German Consulate under Article 36 of the VCCR. *Id.* at 475, ¶ 15. The ICJ issued an order directly asking the United States to stay the execution and requested the order be transmitted to the Arizona governor, who possessed the authority to issue the stay. *LaGrand Case* (F.R.G. v. U.S.), 1999 I.C.J. 9, 16, ¶ 29 (Order of Mar. 3); see also Marshall J. Ray, Comment, *The Right to Consul and the Right to Counsel: A Critical Re-Examining of State v. Martinez-Rodriguez*, 37 N.M. L. REV. 701, 705-06 (2008). Arizona refused and the defendant, Walter LaGrand, was executed. Ray, *supra*, at 705-06.

196. Spiro, *supra* note 65, at 1264-65 n.161 (“Though the order affirms the international responsibility of the United States for Arizona’s action, it also states the Court’s understanding that ‘implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona’” (quoting *LaGrand*, 1999 I.C.J. at 16, ¶ 28 (Order of Mar. 3))). However, after Arizona refused to issue the stay, the ICJ placed significant weight on the fact that the United States Supreme Court rejected any opportunity to stay the execution and noted that the United States federal government failed in its obligation to “take all measures at its disposal to ensure that Walter LaGrand [was] not executed.” *LaGrand*, 2001 I.C.J. at 508, ¶¶ 111-15 (Judgment of June 27). Additionally, Spiro’s use of the word “directly” is misplaced considering the ICJ never issued what would obviously be an extra-jurisdictional order to Arizona. See *LaGrand*, 1999 I.C.J. at 16, ¶ 29 (Order of Mar. 3).

197. Spiro, *supra* note 65, at 1265.

states.¹⁹⁸ However, it does little to address the treaty violations of the several states, specifically the failure of the states to comply with the VCCR.¹⁹⁹

Nation-states are well-suited to fight fire with fire.²⁰⁰ If a domestic state passes legislation with negative international economic impact, then it is possible for other nation-states to retaliate with similar unfriendly economic legislation.²⁰¹ Domestic states, on the other hand, lack the same accountability for violations of human rights treaties, since one of the predominant consequences of a treaty breach is a proceeding before the ICJ, to which a domestic state cannot be a party.²⁰² International presence and personality are rooted in a concept of accountability, and under the *Medellín* decision, states lack accountability for certain treaty violations.²⁰³ In *LaGrand*, the ICJ specifically requested that Arizona comply with its order.²⁰⁴ However, in the same way *Avena* did very little to remedy Mexico's complaint, the ICJ's order in *LaGrand* did little to remedy Germany's grievance.²⁰⁵

B. An International Role for the Several States Under the Current Foreign Affairs Framework

The several states are international actors in two broad senses. First, they "reach out" into the realm of foreign affairs by forming bilateral and multilateral agreements.²⁰⁶ Predominantly, these agreements are economic in nature.²⁰⁷ Second, international law "reaches into" the

198. *See id.* at 1264-65.

199. Ray, *supra* note 195, at 705-09 (discussing the outcomes of several Vienna Consular Relations actions brought internationally and in American courts).

200. *See Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 450 (1979) (noting the policy concern of retaliation by foreign nations in response to an unpopular California tax statute).

201. Spiro provides the timely example of the proposed California tax statute, which would tax subsidiary banks based off of a percentage of their parents' income as opposed to the subsidiaries' own corporate income. *See Spiro, supra* note 65, at 1265-66. The proposed California tax statute would have a disproportionate impact on larger wealthy British banks with smaller subsidiaries in California. *Id.* As a result, Great Britain passed legislation that would eliminate "tax credits for companies based in a 'province, state or other part of a territory outside the United Kingdom'" that used the California tax method. *See id.* at 1265 n.164 (quoting Finance Act, 1985, pt. II, c. I, § 54, sched. 13 (Eng.)). The California Legislature repealed the statute. *Id.* Prior to its repeal, the statute was upheld as constitutional by the United States Supreme Court in *Barclays Bank, Id.* at 1264-65.

202. *See* U.N. Charter art. 93 (stating that only nation states that are members of the United Nations (UN) or that have otherwise received permission from the UN Security Council and General Assembly may be parties before the ICJ, neither of which applies to any of the domestic states); *see also* *Medellín v. Texas*, 128 S. Ct. 1346, 1393-96 app. B (2008) (Breyer, J., dissenting) (listing treaties to which the required remedy is a proceeding in the ICJ).

203. *See Medellín*, 128 S.Ct. at 1353.

204. *LaGrand Case* (F.R.G. v. U.S.), 1999 I.C.J. 9, 16, ¶ 29 (Order of Mar. 3).

205. *See Medellín*, 128 S. Ct. at 1353; *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 358 (2006); *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 70, ¶ 152 (Judgment of Mar. 31); *LaGrand*, 1999 I.C.J. at 16, ¶ 29 (Order of Mar. 3); Ray, *supra* note 195, at 705.

206. *See supra* Part II.A.

207. While the majority of the agreements are the result of globalization and are designed to increase trade, a few of the agreements deal with other political topics such as environmental concerns. *See Resnick, supra* note 31, at 50-62 (using the Kyoto Protocol and CEDAW as a framework for discussing state global activity); *see generally* Ku, *supra* note 38.

states through domestic treaty obligations or a state's adoption of, either, principles of CIL or treaties that the federal government refused to ratify.

1. Reaching Out: State International Economic Legitimacy

The domestic states' international economic presence is largely legitimate. First, there is little reason to believe that state international compacts, like Kansas' compact with Cuba, raise any Compact Clause concerns.²⁰⁸ Second, nation-states possess an adequate remedy to address "unfair" state legislation that disproportionately affects their vested interests.²⁰⁹ Finally, the federal government possesses safeguards to strike down state statutes that impermissibly interfere with express federal legislation.²¹⁰

a. State International Activity Withstands Compact Clause Scrutiny

The Compact Clause, as interpreted by the Supreme Court, is only applicable in situations where state compacts increase state political power at the expense of the federal government.²¹¹ Under this framework, a court will not invalidate a compact that only increases a state's international power.²¹² To be invalid, the state compact must also decrease the federal power in the same field.²¹³

The majority of state international interaction involves economic measures sought out by governors or other state officials aimed at increasing foreign investment.²¹⁴ The states are far better equipped than the federal government to address their individual situations, and border states, in particular, possess a significant interest in forming harmonious relationships with their neighbors.²¹⁵ Historically, the Court has recognized the incentives for states to strike agreements that affect their local interests, such as negotiating territorial boundaries.²¹⁶ Additionally, many of the compacts formed by state actors are "non-binding"

208. See *supra* Part II.A.; see also Rothschild, *supra* note 29.

209. See *infra* Part III.B.1.ii.

210. See *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 473 (1978) ("But the test is whether the Compact enhances state power *quoad* the National Government.").

211. *Id.*

212. *Id.* at 460, 473.

213. *Id.*

214. See ENHANCING COMPETITIVENESS, *supra* note 41, at 45-49.

215. See, e.g., Bradner, *supra* note 34.

216. *Virginia v. Tennessee*, 148 U.S. 503, 518-20 (1893). Many of the state international compacts stem from areas of high interest that are particularly localized to the state. Cf. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 417-19 (2003) ("[T]he States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." (quoting *Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Stewart, J., concurring))). For example, Kansas entered into an agreement to export wheat to Cuba. Rothschild, *supra* note 29. Furthermore, Hawaii's international focus centers on its objective to increase tourism. See HOW STATES ARE USING ARTS, *supra* note 37, at 5.

resolutions that call upon the parties to use their best efforts to facilitate trade.²¹⁷ The Court previously held that an agreement must require the parties to act in a particular manner to be a compact.²¹⁸ The majority of state international agreements, therefore, likely withstand any Compact Clause scrutiny.²¹⁹

b. The Foreign Nation Retaliation Concerns Are Overstated

As previously mentioned, nation-states may retaliate against “unfriendly” compacts.²²⁰ The Court noted in *Japan Line* that foreign nations could retaliate against the California tax statute by imposing additional taxation on all American shipping containers.²²¹ Therefore, the California statute could indirectly injure citizens of other domestic states.²²² The Court assumed that foreign states would not give credence to the federal structure of the United States and would not retaliate against California alone, but would impose an additional tax on all American shipping containers.²²³ However, foreign nations are clearly aware of the federal nature of the United States,²²⁴ and therefore possess an ability to hold specific states accountable for their actions without resorting to formal proceedings that the domestic states lack standing to attend.²²⁵ For example, when presented with an unfriendly California tax statute, the United Kingdom retaliated against California specifically rather than against the United States in general.²²⁶ Addi-

217. See *supra* notes 33-34 and accompanying text.

218. *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 163 (1985) (noting that statutes that do not require reciprocal action are probably not compacts at all).

219. *Id.*

220. See Spiro, *supra* note 65, at 1265-66; see also *supra* note 201.

221. *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 450 (1979).

222. See *id.*

223. See *id.*

224. See International Covenant on Civil and Political Rights art. 50, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Spiro, *supra* note 65, at 1265-66 (noting that Great Britain passed legislation that specifically targeted a California statute). Nearly twenty years ago, the European Court of Human Rights demonstrated an intricate knowledge of the federal nature of the United States as well as the structure and operation of state criminal courts. See *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶¶ 39-70 (1989) (discussing “relevant domestic law in the Commonwealth of Virginia”). In *Soering*, Jens Soering, a German National, was detained in England pending extradition to the United States for a murder trial that could have resulted in the application of the death penalty. *Id.* ¶¶ 11-12. Soering argued that extradition by the United Kingdom would violate article 3 of the European Union Convention on Human Rights, which provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” *Id.* ¶ 80. Soering successfully argued that the “death row phenomenon”—the mental illness that occurs when a convicted man waits for his impending execution and is often manifested by depression, anxiety, and suicidal intent—is inhuman under Article 3 of the European Union Convention on Human Rights. See *id.* ¶¶ 80-84. The court surveyed the federal structure of the United States, even considering the prison conditions of Virginia, and held that the extradition of Soering to the United States to stand trial for murder and possibly risk a death sentence violated the Convention. *Id.* ¶¶ 107, 111. The *Soering* case exemplifies intricate foreign knowledge of the United States federal system. See *id.* ¶¶ 39-70.

225. Cf. U.N. Charter art. 93 (stating that only nation-states that are members of the UN or nation-states that have otherwise received permission from the UN Security Council and General Assembly may be parties before the ICJ); Spiro, *supra* note 65, at 1265-66.

226. See *supra* note 201. The United Kingdom’s retaliatory finance statute directly contradicted

tionally, there is no reason to believe that foreign governments are confused or unsure about the nature of the “non-binding” agreements into which many of them enter.²²⁷ By entering into “non-binding” agreements with the several states, the foreign nations inherently recognize both the federal nature of the United States and the lack of formal enforcement mechanisms, such as international tribunal or arbitral proceedings, that usually accompany binding international agreements.²²⁸

Historically, commercial international activity between businesses was largely unregulated yet highly successful.²²⁹ The commercial success was the result of innovations, including irrevocable letters of credit between foreign and domestic banks that ensured performance of payment obligations.²³⁰ When businesses entered into state-regulated agreements, the increase in compliance was surprisingly minimal.²³¹ In short, the success of international business agreements owes more to the parties’ mutual benefits than to formal enforcement mechanisms.²³²

c. The Federal Government Still Possesses Adequate Preemption Powers

The federal government can still preempt and invalidate state statutes that impermissibly interfere with the federal government’s foreign policy.²³³ However, courts should recognize the federal government’s power to invalidate state statutes or compacts with foreign repercussions only if there is a *strong, precise, and express federal interest at stake*.²³⁴

In *Crosby v. National Foreign Trade Council*,²³⁵ the Court overturned a Massachusetts statute that imposed sanctions on Burma be-

the Court’s concern that a foreign nation would retaliate against America as a whole. *See* *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 450 (1979).

227. *See supra* note 33; ENHANCING COMPETITIVENESS, *supra* note 41, at 45-49 (discussing the international activity of numerous state governors).

228. *See supra* note 33. International conventions generally provide a forum for dispute resolution, including formal international arbitration or established international tribunals. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Dec. 9, 1948, 78 U.N.T.S. 277. Article 9 of the Convention states:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Id.

229. Leeson, *supra* note 41, at 83. (“The evidence suggests that the source of state contract enforcement in international trade has enhanced this trade—though not in the impressive way one would expect from a function considered essential for trade to flourish. The modest impact of formal enforcement in conjunction with international trade’s considerable success strongly suggests that, in addition to formal enforcement, some private mechanisms of enforcement are also at work supporting international trade.”).

230. *Id.*

231. *Id.*

232. *Id.*

233. *See infra* notes 235-243 and accompanying text.

234. *See infra* text accompanying notes 245-258.

235. 530 U.S. 363 (2000).

cause the statute interfered with a federal foreign affairs program designed to address the human rights atrocities in Burma.²³⁶ *Crosby* is a unique opinion in that it placed no reliance on *Zschernig*, or the dormant Foreign Commerce Clause despite the opportunity to do so.²³⁷ The Court relied heavily on the *Youngstown* framework²³⁸ and placed great import on Congress' specific authorization to the President to address the Burmese situation.²³⁹

The *Zschernig* and *Garamendi* frameworks may allow the federal courts to invalidate state action that impermissibly interferes with international affairs.²⁴⁰ While *Garamendi*, *Crosby*, and even *Medellin* largely disregarded the *Zschernig* framework, courts may invalidate state statutes that "reach out" into foreign affairs and are preempted either by congressional or executive action.²⁴¹ However, such preemption should only apply if there is a precise federal interest in the program.²⁴² Specifically, under *Crosby*, the executive may need express congressional authorization in order to demonstrate an adequate federal interest in the program.²⁴³

Crosby should guide court decisions in determining the validity of state international compacts because the opinion provides a congruent

236. *Id.* at 383 (stating "[T]he EU and Japan have gone a step further in lodging formal complaints against the United States in the World Trade Organization (WTO), claiming that the state Act violates certain provisions of the Agreement on Government Procurement, and the consequence has been to embroil the National Government for some time now in international dispute proceedings under the auspices of the WTO") (citations omitted).

237. The United States Court of Appeals for the First Circuit overturned the Massachusetts statute on three separate grounds: (1) the statute interfered with the foreign affairs of the federal government under the *Zschernig* analysis; (2) the statute was invalid under the dormant Foreign Commerce Clause; and (3) the statute was preempted by a congressional act. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 52-55, 61-77 (1st Cir. 1999). Although the Supreme Court considered all three grounds, it chose to decide the matter only on the basis of the preemption doctrine. *Crosby*, 530 U.S. at 371, 388. Arguably, the Supreme Court's limited rationale demonstrates a preference for invalidating state action using doctrines that consider express, positive federal action rather than dormant federal powers. *See id.*; Wilson, *supra* note 128, at 773-74. In *Crosby*, Congress specifically authorized the Executive to address the Burmese situation. *Id.* at 374 ("Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma."). The Court relied heavily on the *Youngstown* framework and concluded that the Executive possessed broad power to address the Burmese situation and that the state statute impeded the congressionally supported Executive. *Id.* at 375-77 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring)). The Court went as far as to note that it was the congressional delegation of authority that controlled the issue of preemption. *Id.* at 376. Therefore, it is possible that the Massachusetts statute would have passed constitutional muster had Congress not authorized the President to address the matter. *See id.*

238. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

239. *Crosby*, 530 U.S. at 375-76 (stating that it was "plenitude of Executive authority that we think controls the issue of preemption").

240. *See Medellin v. Texas*, 128 S. Ct. 1346, 1375 (2008) (Stevens, J., concurring); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424-25 (2003); *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968).

241. *See Garamendi*, 539 U.S. at 420; *Crosby*, 530 U.S. at 376-77, 383.

242. *Garamendi*, 539 U.S. at 425; *Crosby*, 530 U.S. at 376-77, 383; *Zschernig*, 389 U.S. at 440-41.

243. *See Crosby*, 530 U.S. at 376.

and consistent structure for addressing state international activity.²⁴⁴ Under *Crosby*, state international compacts and statutes are legitimate unless a congressionally supported executive program directly occupies the field and thereby demonstrates and articulates a specific federal interest.²⁴⁵

As earlier noted, the *Crosby* Court refused to apply the *Zschernig* framework and instead elected to invalidate the statute at issue because it was expressly preempted by the federal act.²⁴⁶ At a minimum, *Crosby* establishes a hierarchy that places positive federal actions above the dormant doctrines of the *Zschernig* foreign affairs powers and the Foreign Commerce Clause.²⁴⁷ The *Zschernig* framework is simply too broad to provide any guidance to state governors and legislatures that seek to promote state interests overseas.²⁴⁸ While the *Garamendi* framework is arguably more positive, its sole reliance on executive statements, agreements, and communications as demonstrating a of federal interest is problematic when weighed against the Court's frameworks in *Barclays Bank*²⁴⁹ and *Medellín*.²⁵⁰

In *Barclays Bank*, the Court expressly refused to accept executive communications as evidence of an "express federal policy."²⁵¹ Additionally, in *Medellín*, the Court refused to recognize the executive memorandum as creating a binding federal foreign obligation on the several states.²⁵² While neither *Barclays Bank* nor *Medellín* addressed the issue of the foreign affairs doctrine raised in *Garamendi*, all three decisions addressed the same one-voice policy concern and only *Garamendi* concluded that executive communications alone are enough to foreclose state international activity.²⁵³ Additionally, *Barclays Bank*, *Medellín*, and *Crosby* all required some form of positive congressional

244. See *infra* text accompanying notes 245-258.

245. See *Crosby*, 530 U.S. at 376.

246. See *supra* note 237.

247. Wilson, *supra* note 128, at 766 ("[I]n the foreign affairs context, preemption through some kind of positive action is preferred to dormancy.").

248. See *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 439-40 (Ginsburg, J., dissenting) (stating that *Zschernig* should be limited to its particular factual circumstances).

249. 512 U.S. 298 (1999).

250. See *infra* note 254.

251. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 328-30 (1994).

252. *Medellín v. Texas*, 128 S. Ct. 1346, 1372 (2008).

253. Compare *Medellín*, 128 S. Ct. at 1372 ("Indeed, the Government has not identified a single instance in which the President has attempted (or Congress has acquiesced in) a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws."), *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374 (2000) ("Congress clearly intended the federal Act to provide the President with flexible and effective authority over economic sanctions against Burma."), and *Barclays Bank*, 512 U.S. at 329-30 ("Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting."), with *Garamendi*, 539 U.S. at 419-21 (focusing solely on the Executive's ability to conduct foreign policy).

support for the executive before the state action would be invalidated.²⁵⁴ Finally, the Court's refusal to decide *Crosby* or *Garamendi* on dormant Foreign Commerce Clause grounds reveals that the dormant Foreign Commerce Clause is not an impediment to state international compacts.²⁵⁵

The Court's hesitance to rely on *Zschernig*, and *Garamendi*'s inconsistency with other Court precedent, indicates that unless there is an express federal program that occupies the field of the specific several state interests, the state international compact, program, or statute should survive judicial review.²⁵⁶ Because many of the state compacts address areas of specific state interest²⁵⁷ and do not raise any Compact Clause or dormant Foreign Commerce Clause concerns, much of the state international economic activity is legitimate under the current foreign affairs doctrine.²⁵⁸

2. Reaching In and the Seemingly Irrelevant Lack of State Accountability Under Federal Treaties

Medellín is essentially the culmination of previous disputes concerning consular rights between various domestic states and foreign

254. In *Barclays Bank*, the Court addressed whether a California income tax statute violated the dormant Foreign Commerce Clause. *Barclays Bank*, 512 U.S. at 302-03. The appellants argued that the President's policy statements and amicus briefs demonstrated that the California statute violated the one-voice policy concern of the dormant Foreign Commerce Clause. *Id.* at 302-03, 328. The Court held that, because the power to regulate foreign commerce rests with Congress, the executive's communications were irrelevant. *Id.* at 328-30. In *Garamendi*, four Justices dissented, arguing that the majority opinion was inconsistent with the existing precedent. *Garamendi*, 539 U.S. at 430, 442 (Ginsburg, J., dissenting). Justice Ginsburg noted that *Garamendi* stretched the *Crosby* opinion and was inconsistent with the *Barclays Bank* opinion, which held that executive communications are not enough to preempt state statutes. *Id.* at 440 n.4. Justice Ginsburg stated:

We should not do so here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch. Executive officials of any rank may of course be expected "faithfully [to] represent [t]he President's chosen policy," but no authoritative text accords such officials the power to invalidate state law simply by conveying the Executive's views on matters of federal policy. The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.

Id. at 442 (citation omitted). Additionally, the *Medellín* Court carefully distinguished *Garamendi* by noting that the executive frequently conducts foreign policy through the use of executive communications but has rarely, if ever, sent a memorandum to a state requesting compliance with federal international obligations. *Medellín*, 128 S. Ct. at 1372. At a minimum, the opinions demonstrate the interconnectivity of the issues present in *Barclays Bank*, *Garamendi*, and *Medellín*.

255. See Wilson, *supra* note 128, at 789 (pronouncing the dormant Foreign Commerce Clause dead because of the Court's refusal to decide *Garamendi* or *Crosby* on dormant Foreign Commerce Clause principles). Wilson notes that the *Crosby* Court provided a preference for deciding cases based on express preemption. *Id.* at 773-74. Therefore, a court should consider executive and congressional foreign policy when considering whether a state statute is preempted. *Id.* Thus, when a court addresses whether a state statute violates the dormant Foreign Commerce Clause, the policy considerations of the one-voice doctrine become irrelevant because under the preemption analysis the court already concluded there is no particular federal voice in the field. *Id.* A court would be forced then to "find the need for federal uniformity based solely on its own assessment of the foreign affairs consequences of the challenged state measure." *Id.* at 774.

256. See *supra* notes 235-243 and accompanying text.

257. See *supra* note 216.

258. See *supra* notes 214-219 and accompanying text.

states, including Mexico, Germany, and Paraguay.²⁵⁹ Since *Medellín*, Oklahoma is the only domestic state that has complied with the ICJ's order to institute review and reconsideration hearings.²⁶⁰ Under *Medellín*, the prudential concerns that form the policy foundation for the foreign affairs preemption doctrine are now tenuously justified at best.²⁶¹

Commentators who argue for an increase in “constitutional space”²⁶² for the domestic states to act internationally are routinely critiqued under the one-voice doctrine for undermining a consistent international presence by the United States.²⁶³ However, *Medellín* arguably removed much of the foreign affairs preemption power from the executive by considering the presidential memorandum irrelevant in determining whether the *Avena* judgment was domestically binding.²⁶⁴

Medellín was the fourth opportunity for the Court to address the domestic effects of the VCCR.²⁶⁵ In *Breard v. Greene*,²⁶⁶ a Paraguayan national filed a petition for a writ of habeas corpus alleging for the first time that Virginia's failure to notify him of his consular rights violated his rights under Article 36 of the VCCR.²⁶⁷ In denying the writ of certiorari, the Court stated that Breard's motion was properly denied because he procedurally defaulted on his Article 36 consular rights by failing to raise the Article 36 defense at trial.²⁶⁸ Eight years later, the exact issue appeared before the Court again in *Sanchez-Llamas v. Oregon*.²⁶⁹

259. See generally *Medellín v. Texas*, 128 S. Ct. 1346 (2008); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Breard v. Greene*, 523 U.S. 371 (1998); Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31); *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27); Case Concerning Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Order of Apr. 9).

260. Request for the Indication of Provisional Matters in the Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Order of July 16, 2008, at ¶ 2) (noting *Torres v. State*, 120 P.3d 1184, 1186 (Okla. Crim. App. 2005) (instituting a review and reconsideration hearing that is likely consistent with the ICJ's *Avena* judgment)).

261. *Ku & Yoo*, *supra* note 167, at 220 (arguing for an increase of state action internationally checked by the authority of the executive—essentially giving the executive the power to determine what is CIL and when it should be applied). Since *Medellín* significantly curtailed the executive's ability to police the states under the foreign affairs preemption doctrine, the Court effectively rejected Julian Ku's and John Yoo's argument for an increased role of the states in foreign affairs as policed by the executive. Compare *Medellín*, 128 S. Ct. at 1371, with *Ku & Yoo*, *supra* note 167, at 212-13, 220.

262. See *Ku*, *supra* note 38, at 2398-2410.

263. See *id.* at 2413-14.

264. *Medellín*, 128 S. Ct. at 1371.

265. See *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, 540 U.S. 1035 (2003); *supra* note 259.

266. 523 U.S. 371 (1998).

267. *Id.* at 374. The federal appellate court denied Breard's habeas motion under the procedural default rule, which provides that a defendant may not allege an error in criminal procedure for the first time in a habeas proceeding. *Id.* at 375 (“It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas.”).

268. *Id.* at 375-76 (noting that Article 36 of the VCCR is to be exercised “in conformity with the laws of the United States”).

269. 548 U.S. 331 (2006).

The significant difference between *Sanchez-Llamas* and *Breard* was that after *Breard*, the ICJ issued an opinion stating that a court's refusal to hear an Article 36 claim on the basis of procedural default rules violates the United States' obligations under the VCCR because it does not give "full effect" to the Convention.²⁷⁰ The Court disregarded the ICJ's treaty interpretation and upheld *Breard*.²⁷¹

The VCCR cases, like the foreign affairs cases, address the one-voice policy.²⁷² Under the foreign affairs framework, the Court possesses some tools to invalidate state statutes that "reach out" and interfere with precise federal international policies.²⁷³ Under the VCCR case framework, on the other hand, the Court refuses to require states to make a "positive act" to alter existing procedural rules and carry out a review and reconsideration hearing, despite the minimal burdens that would accompany such a hearing.²⁷⁴ Currently, the Court is *occasionally* willing to overturn statutes that reach out into foreign affairs; however, the Court is not willing to force state compliance with federal international obligations.²⁷⁵ The foreign affairs preemption doctrine, therefore, is only applicable to situations where the states enact a positive law that interferes with express United States foreign policy.²⁷⁶ *Medellín* and the other VCCR cases, therefore, reduced the foreign affairs doctrine to a true preemptory doctrine in which state law is only invalidated if it impermissibly reaches out into the federal foreign domain.²⁷⁷

The Court's refusal to require the states to act positively stems largely from the *Sanchez-Llamas* decision.²⁷⁸ In *Sanchez-Llamas*, Chief

270. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 497-98, ¶¶ 90-91 (Judgment of June 27) (quoting VCCR art. 36, ¶ 2, Apr. 24, 1963, [1970] 21 U.S.T. 77, 1969 WL 97928).

271. *Sanchez-Llamas*, 548 U.S. at 358.

272. Compare *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 395, 425 (2003) (noting the one-voice policy concern), *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376-77, 383 (2000) (same), and *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) (same), with *Medellín v. Texas*, 128 S. Ct. 1346, 1367-68 (2008) (addressing the executive's ability to conduct foreign affairs), *Sanchez-Llamas*, 548 U.S. at 355-56 (noting the ICJ judgments), and *Breard*, 523 U.S. at 378 (noting the pending ICJ judgment).

273. See *Garamendi*, 539 U.S. at 425 (invalidating a state statute based on executive agreements); *Crosby*, 530 U.S. at 376-77, 383 (invalidating a state statute based on congressional preemption); *Zschernig*, 389 U.S. at 440-41 (invalidating a state statute because it impaired the federal government's power to conduct foreign affairs in general, regardless of whether there was an existing federal foreign affairs interest).

274. See *Medellín*, 128 S. Ct. at 1374-75 (Stevens, J., concurring); *Sanchez-Llamas*, 548 U.S. at 358; *Breard*, 523 U.S. at 374.

275. Compare *Garamendi*, 539 U.S. at 425, *Crosby*, 530 U.S. at 376-77, 383, and *Zschernig*, 389 U.S. at 440-41, with *Medellín*, 128 S. Ct. at 1361, *Sanchez-Llamas*, 548 U.S. at 358, and *Breard*, 523 U.S. at 374.

276. See *supra* Part III.B.1.

277. See *Medellín*, 128 S. Ct. at 1361; *Sanchez-Llamas*, 548 U.S. at 358; *Breard*, 523 U.S. at 374.

278. In *Sanchez-Llamas*, the Court addressed whether a petitioner, who was not notified of his VCCR Article 36 rights, may raise the state's failure to comply with Article 36 as a defense for the first time on appeal. *Sanchez-Llamas*, 548 U.S. at 355-59. The Court held that the state procedural rules, which bar new arguments in post-conviction proceedings, apply equally to an Article 36 claim under the VCCR. *Id.* at 358-60 ("We therefore conclude, as we did in *Breard*, that claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.").

Justice Roberts rooted the holding in the text of the VCCR.²⁷⁹ The VCCR rights provided for in Article 36 “shall be exercised in conformity with the laws and regulations of the receiving State” so long as the receiving state gives “full effect” to the purposes of the Convention.²⁸⁰ In *LaGrand*, the ICJ interpreted the several states’ refusal to set aside the procedural default rules as a violation of Article 36 because the states were not giving the treaty “full effect.”²⁸¹ The Court rejected the ICJ interpretation and focused on the requirement that Article 36 be “exercised in conformity” with state laws.²⁸² Importantly, however, the Court recognized that the question of state compliance is, at a minimum, governed by the text of the treaty itself.²⁸³ Because the Court focuses on the text of the treaty to determine the enforceability of federal international obligations, the president still maintains some limited enforcement authority.²⁸⁴

The president is not powerless to continue to enact treaties that are likely enforceable at a domestic level.²⁸⁵ For example, the International Covenant on Civil and Political Rights (ICCPR) requires all local and state governments to adopt the covenant.²⁸⁶ Additionally, Article 50 of the ICCPR provides that “provisions of the present Covenant shall extend to all parts of the federal States without any limitations or exceptions.”²⁸⁷ *Medellín* and *Sanchez-Llamas* put the world on notice that existing treaties, especially those without specific implementation clauses effective on all layers of government, are likely not enforceable against the several states.²⁸⁸ Therefore, if the United States’ treaty partners wish to ensure that their treaties are enforced domestically, perhaps the treaties could be amended to include “federal obligation” provisions similar to ICCPR Article 50.²⁸⁹ Since treaties are rarely amended, however, *Medellín* better serves as notice on how to construct future treaties with “federal obligation” clauses.²⁹⁰ The executive, consequently, needs to refrain from enacting any exemptions or limitations on these clauses

279. *Id.* at 353-54; see Alex Glashauser, *Treaties as Domestic Law in the United States*, in *PROGRESS IN INTERNATIONAL LAW* 238 (Russell A. Miller & Rebecca M. Bratspies eds., 2008) (noting that the Court “rel[ie]d on textualism”).

280. See VCCR, *supra* note 16, at art. 36(2).

281. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 497-98, ¶¶ 90-91 (Judgment of June 27) (“Under these circumstances, the procedural default rule had the effect of preventing ‘full effect [from being] given to the purposes for which the rights accorded under this article are intended’, and thus violated paragraph 2 of Article 36.”).

282. *Sanchez-Llamas*, 548 U.S. at 355-60.

283. *Id.* at 357. While addressing the first issue in *Sanchez-Llamas*, whether suppression was an appropriate remedy for a violation of Article 36 of the VCCR, the Court noted that its authority to impose judicial remedies on the state courts “must lie, if anywhere, in the treaty itself.” *Id.* at 346.

284. See *infra* notes 285-298 and accompanying text.

285. See Paust, *supra* note 109, at 327-28.

286. See *id.* (citing ICCPR, art. 50, 999 U.N.T.S. 171 (Dec. 9, 1966)).

287. *Id.* at 328 (citing ICCPR, art. 50, 999 U.N.T.S. 171 (Dec. 9, 1966)).

288. See *Medellín v. Texas*, 128 S. Ct. 1346, 1363 (2008); *Sanchez-Llamas*, 548 U.S. at 355-60.

289. See ICCPR, *supra* note 224, at art. 50.

290. See *id.*

in order to ensure their enforceability.²⁹¹

Finally, the Court removed commandeering concerns by focusing on the text of the treaty to determine whether it was enforceable on the several states.²⁹² In *New York* and *Printz*, the Court invalidated statutes implementing federal programs because the statutes required positive legislation by the states.²⁹³ Similarly, in *Sanchez-Llamas* and *Medellín*, the Court refused to require the states to alter their judicial procedures.²⁹⁴ However, the Court in *Sanchez-Llamas* focused on whether the text of Article 36 of the VCCR demanded state compliance with the Convention.²⁹⁵ If the Court had found that the text of the VCCR required states to alter their procedural rules, the states would have been obligated to comply.²⁹⁶ Therefore, while some of the policy concerns surrounding the application of federal treaties on the domestic states are similar to the policy concerns of commandeering,²⁹⁷ the Court's decision to focus on treaty textualism removes the possibility that the states could rely on the Tenth Amendment to avoid compliance with federal treaty obligations.²⁹⁸

Under the Court's *Medellín* framework, any federal enforcement of federal international obligations upon the several states is difficult. Pre-*Medellín*, the Court's *Garamendi* and *Zschernig* opinions provided a basis to demand Texas' compliance with the ICJ's *Avena* opinion based on the foreign affairs doctrine and President Bush's memorandum.²⁹⁹ However, *Medellín* removed significant executive power to en-

291. Paust, *supra* note 109, at 326-28 (citing ICCPR, art. 50, 999 U.N.T.S. 171 (Dec. 9, 1966)).

292. See *supra* notes 279-283 and accompanying text. *Contra* *Ku*, *supra* note 38, at 2405 ("[W]hen the federal government implements (as opposed to makes) a treaty, it is almost certainly limited by the same Tenth Amendment principles that limit its activities in the domestic sphere.").

293. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 176 (1992).

294. See *supra* notes 278-291 and accompanying text.

295. See *id.* In *Sanchez-Llamas*, the Court noted that its power to supervene and alter state judicial proceedings stems from either constitutional authority or possibly from the text of the treaty itself under the Supremacy Clause. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346-47 (2006) ("And where a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law."); see also *Dickerson v. United States*, 530 U.S. 428, 438 (2000) (noting the supervisory authority of the federal courts over the states regarding constitutional interpretations).

296. See *Sanchez-Llamas*, 548 U.S. at 355-60. It is possible that *Medellín* added another layer of interpretation that requires that the treaty be self-executing in addition to the *Sanchez-Llamas* textual requirement that the treaty be binding on the several states. See *Medellín v. Texas*, 128 S. Ct. 1346, 1362 (2008) (describing the Court's approach as looking at the treaty's text for evidence of self-execution).

297. See *Ku*, *supra* note 38, at 2405 (noting that the policy concerns of commandeering and of federal treaty implementation are similar).

298. See *Sanchez-Llamas*, 548 U.S. at 355-60.

299. See *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003). *Garamendi* and *Zschernig* provide a framework for Texas's compliance only under the foreign affairs doctrine because neither opinion squarely addressed the role of self-executing treaties or non-self-executing treaties on the several states' courts. See *Zschernig*, 389 U.S. at 440-41; *Garamendi*, 539 U.S. at 425. Many commentators have already noted that the *Avena* judgment should be binding on the state courts under the Supremacy Clause because, as part of the UN Char-

sure state compliance with federal international obligations, thereby leaving the regulation of existing treaties solely within the powers of comity,³⁰⁰ Congress, and the textual interpretations of treaty language by the courts.³⁰¹

Comity is likely an inapplicable principle because ICJ decisions rarely bind domestic courts of other countries.³⁰² Therefore, the question of how to enforce executive international requirements also falls on state legislatures.³⁰³ The legislatures should enact legislation that demands state compliance with ICJ judgments.³⁰⁴ Additionally, state legislatures should pass legislation to ensure that states comply with additional treaties that carry significant domestic obligations, like the VCCR.³⁰⁵

The general power of the federal government to preempt inappropriate state international activity existed to protect the nation from being embroiled in international disputes due to inconsistent and often parochial concerns of state legislatures and courts.³⁰⁶ The preemption doctrine has proven ineffectual, however, under the VCCR cases.³⁰⁷ The current foreign affairs doctrine is tentatively based on a handful of contradictory doctrines stemming from largely inconsistent Supreme Court case law.³⁰⁸ The inconsistencies of the current foreign affairs doctrine are causing commentators to call for Congress to enact statutes that mandate state compliance with U.S. treaty obligations³⁰⁹ or, in the alternative, demand that the Court reverse its *Medellín* opinion and

ter, the *Avena* judgment is a treaty and therefore binding on the several states. See Paust, *supra* note 109, at 332 (stating that “under an express and unavoidable mandate of the Constitution ‘all’ treaties . . . are supreme law of the land binding on the states”).

300. The Court defines “comity” in the following manner:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). While principles of comity, if consistently practiced, may morph into CIL, see for example *The Paquete Habana*, 175 U.S. 677, 686 (1900), there is no argument that comity demands that states domestically enforce ICJ opinions since there is a lack of evidence that nations generally treat ICJ opinions as binding law. See Shapiro, *supra* note 109, at 97 (“This is one of the rare instances where it is fully appropriate to query how foreign polities look at the law; in the case of the Vienna Convention, not one member nation (out of 171) treats ICJ judgments as binding law.”).

301. *Medellín v. Texas*, 128 S. Ct. 1346, 1363 (2008) (“The point of a non-self-executing treaty is that it ‘addresses itself to the political, *not* the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”) (citation omitted).

302. See Shapiro, *supra* note 109, at 97.

303. See *Medellín*, 128 S. Ct. at 1363.

304. See *id.*; cf. Jackson, *supra* note 24, at 372.

305. Cf. Jackson, *supra* note 24, at 372.

306. See Jessup, *supra* note 178, at 743; THE FEDERALIST NO. 3 (John Jay).

307. Jackson, *supra* note 24, at 338 (describing the current foreign affairs doctrine as a failure because “without the ability of the federal government to intervene at the state level, it will not be possible to consistently fulfill U.S. treaty obligations in such matters”).

308. See *supra* notes 116-147 and accompanying text.

309. Jackson, *supra* note 24, at 372.

grant the executive broad power to execute treaties domestically.³¹⁰ However, since the Court chose to base its decisions on the text of the VCCR, the executive still maintains some authority over treaty interpretation.³¹¹

C. The Several States' Codification and Application of International Treaties and Norms

The several states continue to internalize international norms and treaties,³¹² aligning themselves with prevailing international norms.³¹³ Consequently, the need for state courts to apply CIL increases so that the state judiciaries remain equipped to address the growing international presence of the states' other governmental branches.

The debate over whether CIL belongs exclusively to the federal courts was a heated topic roughly a decade ago.³¹⁴ The academic debate hinged on whether CIL is incorporated wholesale into the federal common law or whether specific executive or legislative authorization is required in order for CIL to become federal common law.³¹⁵ If CIL is federal common law, then under the Supremacy Clause of the United States Constitution,³¹⁶ CIL is federal law and therefore trumps and invalidates inconsistent state law.³¹⁷

In 2004, the Supreme Court held in *Sosa* that, at a minimum, CIL is federal common law with regard to the ATCA, which provides federal courts with jurisdiction to consider violations of international law.³¹⁸

310. See Paust, *supra* note 109, at 332 ("The Court should also revisit the question concerning relevant Executive power to execute treaties in view of several other cases that were not addressed in *Medellín*, including seven Supreme Court cases.").

311. See *supra* notes 285-291 and accompanying text.

312. See *supra* notes 49-54 and accompanying text.

313. Obviously, not all states are willing to align their policies with international norms. See Request for the Indication of Provisional Matters in the Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Order of July 16, 2008, at ¶ 2) (noting the general lack of domestic state compliance with the *Avena* judgment).

314. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (adopting what is referred to as the "revisionist position"), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (adopting the "modern position").

315. See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 870, 870-71 (2007) (briefly describing the opposing views on CIL and the federal common law).

316. U.S. CONST. art. VI.

317. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 111(1); see also *supra* note 315.

318. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The specific statute was the ATCA that provides federal courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000). The Supreme Court stated in *Sosa* that the ATCA is a jurisdictional statute only whose "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Sosa*, 542 U.S. at 724. Most commentators took the position that *Sosa* effectively held that CIL is federal common law regardless of executive action. See William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 19 (2007); Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation*

The issue of whether CIL exists outside the realm of the ATCA is still academically contested.³¹⁹ This debate, however, provides a logical starting point for acknowledging that state courts should be able to apply CIL when directly authorized by the state legislature or executive.³²⁰

The understanding of CIL as exclusive federal common law works to avoid the undesirable consequence that the several states could independently decide issues of CIL, such as head-of-state immunity, which could present serious implications in foreign affairs because of the possibility of conflicting state court interpretations.³²¹ The policy concerns of domestic state court use of CIL, therefore, are nearly identical to the concerns of the foreign affairs preemption doctrine: the concern that states will impermissibly interfere with the federal government's foreign relations.³²² Spiro challenged the validity of these concerns by noting that state use of CIL will likely not bring serious repercussions into foreign relations because (1) the likelihood of serious consequences has dissipated with the end of the Cold War³²³ and (2) the federal executive branch possesses the ability to correct the threat.³²⁴ Additionally, Julian Ku and John Yoo argued that state courts should be able to apply CIL so long as the president possesses the power to guide and correct the state courts.³²⁵ Neither critique provides a workable framework.

Julian Ku and John Yoo's critique fails largely due to the Court's

in U.S. Courts, 57 VAND. L. REV. 2241, 2259 (2004). *Sosa*, disturbingly, had little effect on the views of both the modern position and the revisionists, as both parties claimed victory after *Sosa*, thereby calling into question the legitimacy of both camps' interpretations of the seminal case. Earnest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 28 (2007). Currently, there is significant debate regarding the alleged "type" of CIL that is implemented, or at least allowed, by *Sosa*. For example, Bradley, Goldsmith, and Moore contend that *Sosa* requires a certain type of special CIL that is limited and more stringent than normal run-of-the-mill CIL. Bradley, Goldsmith & Moore, *supra* note 315, at 896, 910 tbl.II. Their argument is without merit. The standards established by the *Sosa* Court are better read as consistent with the long-standing rule that CIL is "consistent state practice" as articulated by both the ICJ and the *Restatement (Third) of the Foreign Relations Law of the United States*. See *infra* note 346. The *Sosa* requirement of a specific definition should not be considered an additional CIL requirement, but, instead, congruent with the long-standing international law practice of *nullum crimen, nulla poena sine lege* (no crime without fixed and predetermined laws). While this Note argues for the introduction of CIL into state law, it does so on the basis that where CIL is authorized, such as the ATCA, its authorization must not be unduly handcuffed.

319. Compare Steinhardt, *supra* note 318, at 2259 (representing the modern position), with Bradley, Goldsmith & Moore, *supra* note 315, at 870-71 (representing the revisionist position).

320. See *infra* notes 321-336 and accompanying text. The lack of authoritative cases on the matter necessitates the use of academia as a starting point.

321. See Bradley & Goldsmith, *supra* note 314, at 827-31 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)) (using the example of foreign sovereign immunity as a typical example of the concerns presented with state court use of CIL). *Sabbatino* is the classic case that addresses whether states can apply the Act-of-State doctrine. See *supra* notes 174-178 and accompanying text.

322. See *supra* notes 87-90 and accompanying text.

323. Spiro, *supra* note 65, at 1259 ("[T]he rule of federal exclusivity no longer presents an imperative in the way that it once arguably did.").

324. See *id.*

325. Ku & Yoo, *supra* note 167, at 220 ("If federal courts are divested of their jurisdiction over ATS litigation, CIL litigation may still be entertained as part of the common law of the states. We believe this system is superior to the existing one because unlike current ATS litigation, the President has the independent authority to preempt state law interpretations of CIL.").

new jurisprudence established in *Medellín*.³²⁶ *Medellín* effectively foreclosed any argument that the executive possesses the power to instruct or guide state courts with respect to the appropriate interpretation of an international treaty.³²⁷ If the executive cannot direct state courts in interpreting treaties, there is little reason to believe that the executive can direct state courts in interpreting CIL, since the need to avoid conflicting interpretations of international law by the several states is the same with treaties as they are with CIL.³²⁸

Spiro's argument, simply stated, is that because it is unlikely that state interference with foreign affairs will bring about an armed response from other nations, the interference is largely irrelevant.³²⁹ Spiro's policy justifications are untenable. The fact that the United States is currently without the tension of the Cold War should be irrelevant in determining whether state courts can apply CIL. Under Spiro's framework, if the United States is plunged into another Cold War or any other period of high diplomatic tension, the state courts should lose their ability to apply CIL.³³⁰ The ability of state courts to apply CIL should not hinge on the diplomatic time period but instead should rest on the foundations of common law. Therefore, Bradley and Goldsmith's framework provides a better construction for understanding a state's ability to incorporate and apply CIL.³³¹

Pre-*Sosa*, Curtis Bradley and Jack Goldsmith argued that CIL is part of the general common law under the *Erie* doctrine and is available both to the several states and to the federal courts so long as the respective executive or legislative body authorized its use.³³² However, *Sosa*'s holding that the federal common law provides a cause of action through the ATCA foreclosed a significant portion of their argument.³³³ As Bradley and Goldsmith note, the Court in *Sosa*, relying on the historical underpinnings of the ATCA, stated that "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."³³⁴ Through the Bradley and Goldsmith lens, CIL is federal common law in specifically authorized situations such as the

326. *Medellín v. Texas*, 128 S. Ct. 1346, 1371 (2008) ("It is only to say that the Executive cannot unilaterally execute a non-self-executing treaty by giving it domestic effect.")

327. Compare *id.*, with *Ku & Yoo*, *supra* note 167, at 220.

328. See *supra* notes 87-90 and accompanying text.

329. See Spiro, *supra* note 65, at 1259.

330. See *id.*

331. Bradley, Goldsmith & Moore, *supra* note 315, at 873-74 (describing the elements of their framework which generally starts as a critique of the modern position).

332. Bradley & Goldsmith, *supra* note 314, at 817, 870.

333. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (stating that the ATCA's "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations").

334. Bradley, Goldsmith & Moore, *supra* note 315, at 895 (quoting *Sosa*, 542 U.S. at 730).

ATCA.³³⁵ Therefore, according to Bradley and Goldsmith, the several states maintain some ability to apply CIL so long as they are specifically authorized by their respective legislatures to do so.³³⁶

State courts frequently address issues of international law, specifically treaty law, under the Supremacy Clause.³³⁷ Decisions of the highest state court are reviewable by the United States Supreme Court pursuant to 28 U.S.C. § 1257(a).³³⁸ Through § 1257(a), the Court may review any state action that is “repugnant to the Constitution, treaties, or laws of the United States.”³³⁹ Therefore, under the Supremacy Clause, state courts may apply treaty law as applicable under the Supreme Court’s guidance.³⁴⁰

State courts should be able to apply CIL only in the limited circumstances where the state legislature or executive specifically authorizes its use.³⁴¹ The several states continue to reach out internationally to adopt and ratify human rights treaties, like CEDAW, into their domestic codes.³⁴² Because the federal government has not ratified many of the human rights treaties that states continue to adopt, the treaties do not become state law by means of the Supremacy Clause.³⁴³ There is little doubt that if a state chooses to adopt the language from a treaty into its domestic code, a state court has jurisdiction to consider the legitimacy of the statute with or without the use of CIL. However, a court should

335. *Id.* at 910 (beginning discussion on a post-*Erie*, post-*Sosa* approach to CIL). Bradley and Goldsmith’s initial argument in 1997 that the ATCA did not provide authorization for the utilization of CIL was arguably foreclosed by the *Sosa* opinion. Compare Bradley & Goldsmith, *supra* note 314, at 870, with *Sosa*, 542 U.S. at 724. The argument that the ATCA authorized the use of CIL is largely undisputed if the plaintiff gains subject matter jurisdiction through the ATCA. See Dodge, *supra* note 318, at 19. Whether CIL is federal common law outside of the ATCA and absent a congressional or executive act is still debated. See *supra* note 318.

336. See *supra* note 332 and accompanying text. The *Restatement (Third) of Foreign Relations* opposes Bradley and Goldsmith’s framework. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 111 cmt. d (“International agreements of the United States other than treaties (see § 303), and customary international law, while not mentioned explicitly in the Supremacy Clause, are also federal law and as such are supreme over State law.”).

337. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 111 cmt. d (“Questions under international law or international agreements of the United States often arise in State courts. As law of the United States, international law is also the law of every State, is a basis for the exercise of judicial authority by State courts, and is cognizable in cases in State courts, in the same way as other United States law.”).

338. 28 U.S.C. § 1257(a) (2000). Section 1257(a) states in full:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id.

339. *Id.*

340. See Bradley & Goldsmith, *supra* note 314, at 822-26 (discussing the historic application of CIL in state courts before *Erie*).

341. See *infra* notes 348-354 and accompanying text.

342. See *supra* notes 49-54 and accompanying text.

343. See *supra* note 337.

consider the customary status of the non-ratified treaties in considering the scope and purpose of the adopted treaty.

For example, CEDAW, while not a United States treaty, has been ratified by over 185 other nation-states.³⁴⁴ Assume that a state adopts CEDAW either directly into its statutes or by passing a law requiring all statutes to be consistent with the purposes and principles of CEDAW.³⁴⁵ Under the modern view that CIL is exclusively federal law, a state court is hamstrung in reviewing the new legislation if it could not consider the customary status that accompanies the federally moot treaty.³⁴⁶ Bradley and Goldsmith's view of CIL provides constitutional space for the state courts to consider CIL when specifically authorized by their legislatures.³⁴⁷

Allowing state courts the space to consider CIL when specifically authorized by their legislatures raises fewer interference concerns than broad authorizations for state courts to apply CIL at will.³⁴⁸ State legislatures rarely have any interest in considering the rules of head-of-state immunity or other CIL doctrines that could pose a significant risk to the federal executive's ability to conduct foreign policy.³⁴⁹ Additionally, state courts rarely possess the opportunity to consider CIL issues that present concerns internationally, such as issues of foreign sovereign immunity.³⁵⁰ By limiting state courts' applications of CIL to areas specifically authorized by state legislatures, state courts will likely construe CIL in areas of traditional state interest such as the definitions of crimes³⁵¹ and discrimination against women.³⁵² State interests, there-

344. See United Nations Treaty Collection, *supra* note 50. The United States Federal Government has never ratified CEDAW. See *id.*

345. CEDAW is an important example because nearly a third of the several states have adopted or considered legislation based on the treaty. See Resnik, *supra* note 31, at 56-57 ("As of 2004, sixteen states, forty-four cities, and eighteen counties have passed or considered legislation relating to CEDAW . . ."). Additionally, although CEDAW is not a United States treaty, considering that it has been ratified by nearly every other nation in the world, the text of the treaty likely embodies CIL. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 102(2).

346. It is possible for a treaty to be ineffectual as a treaty but effective as CIL. See *North Sea Continental Shelf Cases* (F.R.G. v. Den. & F.R.G. v. Neth.) 1969 I.C.J. 3, ¶ 37 (Feb. 20); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 102 cmt. i. Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 161, § 102(2). State practice is determined by a variety of actions including diplomatic statements, statements of policy, and, perhaps most importantly, international convention and treaty ratification. *Id.* § 102 cmt. b.

347. See *supra* notes 332-336 and accompanying text.

348. *Contra* Spiro, *supra* note 65, at 1226.

349. See *Ku & Yoo*, *supra* note 167, at 218 ("It is true that states have historically interpreted CIL as part of their common law, but such interpretations or applications of CIL have never been considered strong candidates for protection under principles of federalism. For instance, state interpretation of the CIL respecting foreign sovereign immunity may implicate some traditional state interests, but very weak ones, if at all.").

350. See Bradley & Goldsmith, *supra* note 314, at 827-28 (noting that historically, "the issues still governed by CIL, such as foreign sovereign immunity, rarely arose in state courts and rarely involved divergent interpretations by state and federal courts").

351. MacKinnon, *supra* note 52, at 956 (noting that at least two states have codified the International Criminal Tribunal for Rwanda's definition of rape).

352. See Resnik, *supra* note 31, at 56-57.

fore, are significantly higher when construing CIL relating to their own domestic codes.³⁵³ Finally, under the existing *Garamendi* balancing test, states possess more authority internationally so long as the issue is traditionally domestic.³⁵⁴

As states continue to become more significant international actors, the state courts need a valid space to apply international law while balancing the states' needs with the needs of the federal government in foreign affairs. Since there is clearly space for state legislatures to adopt international law as their domestic law, there needs to be space for state courts to apply CIL. By ensuring that state courts apply CIL only in situations in which they are specifically authorized by their legislatures, concerns about the states' divergent and parochial interests are largely diminished, thereby reducing the policy concerns raised by state international activity.

IV. CONCLUSION

The several states continue to become more prominent international actors and gain international personality. Concerns still exist, however, regarding their international accountability, as demonstrated by the VCCR opinions. As this Note demonstrates, the current federal foreign affairs doctrine that governs state international activity is ill-equipped to address situations in which states fail to comply with federal obligations. However, the foreign affairs doctrine remains applicable to situations in which the states impermissibly reach out and interfere with existing federal obligations so long as there is a *strong and precise federal interest at stake*.

States will continue to act internationally due to overarching economic and political considerations. Because of this continued growth, the states should be able to carve out constitutional space for their global interaction by keeping their global activities largely economic. Additionally, states that wish to comply with CIL and non-United States-ratified treaties should be able to do so by authorizing their

353. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (stating that "the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted").

354. *Id.* One likely objection to the existing framework is raised by *Medellín*, since *Medellín* involved a traditional state interest in criminal procedure that did result in international controversy. See *Medellín v. Texas*, 128 S. Ct. 1346, 1353 (2008). However, *Medellín* involved a state court deciding issues of international law that were federal obligations imposed on the states. *Id.* The type of state use of CIL that should be authorized is the ability of the courts to decide issues of CIL that the states impose on themselves. Julian Ku and John Yoo argue that a state court should be subject to the executive's power to decide issues of CIL because the state legislature could codify the CIL, thereby rendering its need to apply CIL irrelevant. See Ku & Yoo, *supra* note 167, at 218-19. However, as Ku and Yoo note, such an approach limits a legislature to merely codifying CIL in domestic statutes and provides no place for court action on legislative acts that effectively adopt CIL but conflict with existing state statutes. See *id.* (providing the juvenile death penalty as an example).

courts to apply CIL in limited but appropriate circumstances. By finding some limited constitutional space, states can continue to grow globally without risking international conflict as long as the federal government retains the authority to restrain contradictory state global action.