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## TWO-DIMENSIONAL FEDERALISM AND FOREIGN AFFAIRS PREEMPTION

Michael Aaron Granne\*

### I. INTRODUCTION

The federal government has several explicit grants of foreign affairs powers in the Constitution.<sup>1</sup> States enjoy all powers not delegated to the federal government by the United States Constitution. As the states continue to intertwine themselves in the web of globalization, they seek to act in ever-larger marketplaces. The web of commerce, the environment, migration, and immigration are ready examples of areas of the law and policy that do not respect state or national boundaries. In all of these areas and countless others, however, state actions will butt up against the federal government's largely unfettered power to act in the foreign affairs sphere. How and to what extent these state actions may interfere with federal programs and interests in foreign affairs and diplomacy, or to what extent those exercises of the federal foreign affairs power preempt state actions, are questions that have vexed courts and commentators alike.

Should, for example, a state be able to lengthen its statute of limitations to remedy alleged wrongs done to a group of Mexican migrant workers? Would it matter if their presence in the United States was the result of and governed by agreements between the United States federal government and Mexico?<sup>2</sup> Can a state lengthen a statute of limitations to provide a longer period in which to sue on life insurance policies related to the Armenian Genocide?<sup>3</sup> If there is some limitation on the state government's ability to change its own laws in such a manner because of a federal interest, must the federal government explicitly express that interest and/or its preemptive power? Or can that prohibition be implied from other federal actions?

The courts have struggled to provide a coherent framework for analyzing these questions. Scholars have quite correctly criticized the

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<sup>1</sup> See, e.g., U.S. CONST. art. I, § 8, cl. 3 (regulating foreign commerce); U.S. CONST. art. I, § 8, cl. 4 (providing for naturalization of aliens); U.S. CONST. art. I, § 8, cl. 10 (punishing violations of the law of nations); U.S. CONST. art. I, § 8, cls. 11-13 (declaring war and providing for the army and navy); U.S. CONST. art. II, § 2 (requiring the President serve as commander-in-chief and signing and negotiating treaties).

<sup>2</sup> See *Cruz v. United States*, 219 F. Supp. 2d 1027 (N.D. Cal. 2002).

<sup>3</sup> See *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009).

courts' failures to provide rational doctrinal support even for those incoherent frameworks that have been developed. Those critiques have largely been of two types: (1) historical and originalist analyses, both strict and lenient, on the use of federal foreign affairs prerogatives to preempt otherwise valid state actions<sup>4</sup> and (2) functionalist accounts of the relative merits of the federal and state interests at issue.<sup>5</sup>

This essay follows yet another course. This essay argues that there are principled distinctions to be made among state actions that encroach on the federal government's foreign affairs sphere. Following the recent trend in scholarship to understand federalism in its so-called two dimensions, this essay examines the extent to which federal interests in uniformity, "vertical" federalism, and structural interests in coordination among states, "horizontal" federalism, inform the proper understanding and application of foreign affairs preemption. Analyzing foreign affairs preemption cases through this lens results in a tripartite typology that, this essay concludes, addresses and respects the federal and state interests at stake. This typology provides some order to the chaos that encompasses foreign affairs preemption cases.

Under this typology, a state's action may fall into one of the following three categories: (1) actions that implicate both the federal government's uniformity interest and the sister states' coordination interests and, therefore, lie outside the states' constitutional power to effect; (2) actions that interfere only with the federal government's uniform position in foreign affairs and, therefore, will be displaced if they present an obstacle to a pre-existing federal policy; and (3) the remaining default where neither uniformity nor coordination is a concern and where only a specific conflict with a federal action will preempt the state's authority to act.

## II. THE PARADIGMS OF FOREIGN AFFAIRS PREEMPTION

The constitutional framework for foreign affairs preemption is murky; the constitution has famously been called a "strange, laconic document"<sup>6</sup> regarding the distribution of the foreign affairs powers. While there are notable dissenters, there is broad agreement that the federal government possesses the lion's share of the foreign affairs powers. Congress is granted, for example, the powers to declare war, regulate foreign commerce, punish offenses to the law of nations, and

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<sup>4</sup> See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 403-29 (1999).

<sup>5</sup> See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175.

<sup>6</sup> LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 13 (2d ed. 1996).

establish and support an Army and Navy. The Executive is the Commander-in-Chief of the Armed Forces and has the power to make treaties and appoint ambassadors with the advice and consent of the Senate. Some argue that the President has residual foreign affairs powers under the Take Care and Vesting Clauses.<sup>7</sup> Moreover, there are explicit limitations on the role of the states in foreign affairs; their inability to declare war, maintain armies, enter into treaties, compacts, or agreements with foreign nations without congressional approval, and the limitations on their powers to tax imports and exports. Taken together with the history of the union under the Articles of Confederation, the generally accepted conclusion is that the federal government holds the majority (if not the totality) of the power to act in the international arena.

There is broader dispute, however, about the extent to which the existence of, or a federal action under, those powers displaces state law. The Supreme Court has varying approaches to preemption. The Court has been careless with its language and rhetoric, its constitutional and policy justifications, and its overall analysis. Indeed, statements from two of the most recent foreign affairs cases are almost completely contradictory.<sup>8</sup> Foreign affairs preemption is built on the idea that there is a realm of foreign affairs that is simply outside the states' competence. What has never been made clear, though, is the extent to which federal government action must divest the state of power by explicit action; indeed, the Court expressly noted that the amount of federal action may vary depending on the type of state action at issue.<sup>9</sup>

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<sup>7</sup> U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”); U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”). The Take Care and Vesting Clauses are more commonly used in arguments supporting an expansive conception of Executive, as opposed to Legislative, control over foreign affairs. Nevertheless, they are relevant to federalism questions regarding the distribution of foreign affairs powers, not only those involving separation of powers.

<sup>8</sup> Compare *Medellín v. Texas*, 128 S. Ct. 1346, 1372 (2008) (“The Executive’s narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the current Presidential Memorandum.”), with *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“Although the source of the President’s power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the ‘executive Power’ vested in Article II of the Constitution has recognized the President’s ‘vast share of responsibility for the conduct of our foreign relations.’”).

<sup>9</sup> See *Garamendi*, 539 U.S. at 420 n.11.

A. *Dormant Foreign Affairs Preemption*

The broadest assertion of the federal foreign affairs power's ability to displace state law is *Zschernig v. Miller*.<sup>10</sup> In *Zschernig*, the Court invalidated an Oregon inheritance statute that required any real or personal property willed to a non-resident alien to escheat to the state unless the alien's home country granted reciprocal rights of inheritance for Oregon legatees. Despite previously upholding a facial challenge to a similar statute in *Clark v. Allen*,<sup>11</sup> the Court found various problems with the statute in *Zschernig*, as applied by the courts of Oregon and other states with similar statutes.<sup>12</sup>

The Court began *Zschernig* with the uncontroversial statement that state courts are routinely called upon to interpret foreign law and that such interpretation poses no constitutional problem. However, the courts had been improperly using the reciprocity statute as a soapbox to proclaim their cold war opinions.<sup>13</sup> Indeed, various state courts had conducted detailed investigations into foreign nations, including their governmental structures, their administration of laws, the enforceability of the rights of aliens generally, and whether these rights are "mere[] dispensations turning upon the whim or caprice of government officials."<sup>14</sup> Moreover, state courts rendered opinions regarding whether government officials in those nations made credible representations of the state of the law or whether those representations were made in bad faith, and the courts engaged in other inquiries that would have "more than 'some incidental or indirect effect'" on the conduct of United States foreign relations.<sup>15</sup> Because of the courts' application of the statute at issue, the Court held that the Oregon statute was an unconstitutional interference with the federal government's foreign relations power, even though that power had not been explicitly exercised and the U.S. government had asserted that the reciprocity statutes did not unduly interfere with its foreign relations activities.<sup>16</sup>

The *Zschernig* approach is often called dormant foreign affairs preemption. Similar to preemption on the basis of the dormant Commerce Clause, dormant foreign affairs preemption displaces state law without regard to congressional (or executive) action or assertions of state interference with federal prerogatives. State laws are preempted by

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<sup>10</sup> 389 U.S. 429 (1968).

<sup>11</sup> 331 U.S. 503 (1947).

<sup>12</sup> *Zschernig*, 389 U.S. at 432-40.

<sup>13</sup> *Id.* at 435.

<sup>14</sup> *Id.* at 434.

<sup>15</sup> *Id.* at 434-35.

<sup>16</sup> *Id.* at 441.

the radiations of authority from the various foreign affairs powers, entrusted solely to the federal government, with which they do not incidentally interfere.<sup>17</sup>

*B. Obstacle Preemption*

Another approach that the Court has occasionally followed when faced with a foreign affairs challenge to a state statute is to ascertain whether the statute in question presents an “obstacle to the accomplishment of Congress’s full objectives.”<sup>18</sup> The courts make this determination by comparing the state action with policies, purposes, and general structure of a pre-existing statute (and occasionally an Executive Order or Agreement). If a sufficient obstacle is found, the state law must fall. This doctrine is referred to as obstacle preemption.

The Court has applied obstacle preemption to foreign affairs enactments several times.<sup>19</sup> In *Crosby v. National Foreign Trade Council*,<sup>20</sup> for example, the Court invalidated a Massachusetts law barring state entities from buying goods or services from companies doing business with Burma. The Court did not reach the question of whether Massachusetts had interfered with the Dormant Foreign Affairs Power. Instead, the Court reasoned that the Massachusetts statute ran afoul of previous congressional mandatory and conditional sanctions against Burma.

The crucial point for the Court was that the state act “undermine[d]” the detailed scheme that Congress had devised to sanction Burma and to improve its human rights record.<sup>21</sup> First, by enacting specific, automatic sanctions against Burma, the Massachusetts law constrained the discretion that Congress had delegated to the President.<sup>22</sup> Second, Congress had decided that a certain range of sanctions was appropriate and Massachusetts’s approach fell outside that range.<sup>23</sup> Finally, Congress directed the President to reach out to the international community to create a cohesive, multilateral approach in order to get Burma to improve its human rights record. By limiting the President’s ability to negotiate with Burma and the rest of the international community, the Massachusetts act unduly interfered with congressional

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<sup>17</sup> See Goldsmith, *supra* note 5, at 204–05.

<sup>18</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

<sup>19</sup> See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Hines v. Davidowitz*, 312 U.S. 52, 60–66 (1941).

<sup>20</sup> *Crosby*, 530 U.S. at 366.

<sup>21</sup> *Id.* at 373.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 377–79.

intent.<sup>24</sup> It was an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” therefore conflicting with the congressional mandate and running afoul of the Supremacy Clause.<sup>25</sup>

More controversially, in *American Insurance Association v. Garamendi*, the Supreme Court invalidated the Holocaust Victim Insurance Relief Act (hereinafter “HVIRA”) passed by the State of California, which mandated the disclosure of all policies sold in Europe between 1920 and 1945 by any insurance company (or any of its affiliates) doing business in California.<sup>26</sup> According to the Court, HVIRA unconstitutionally interfered with the federal government’s foreign affairs power even though the expression of the federal government’s interest came from a sole executive agreement that did not explicitly preempt contrary state action.<sup>27</sup> Indeed, the various executive agreements with France, Germany, and Austria implied that the agreements would not prevent litigation in state courts.<sup>28</sup> Nevertheless, the Court held that state law must bow to federal foreign policy and that “generally” the Executive has the authority to determine what foreign policy should be.<sup>29</sup> In a rhetorical flourish, the Court held that “[t]he basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves” and such conflict required the state approach to give way.<sup>30</sup>

### C. Other Options?

The remaining preemptive approaches—express preemption, requiring an explicit statement from Congress to preempt the state law, and conflict preemption, requiring preemption if the provisions of the two laws directly conflict or if compliance with both is impossible—may also be appropriate in certain circumstances. *Crosby* noted that express statements of congressional intent were not required given the facts of that case, but it left open the door to its use in the foreign affairs sphere. Moreover, some foreign affairs statutes do contain express preemption clauses, perhaps indicating congressional belief that it may be at times

<sup>24</sup> *Id.* at 380–81.

<sup>25</sup> *Id.* at 373 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>26</sup> 539 U.S. 396 (2003).

<sup>27</sup> A “sole executive agreement” is an agreement between the United States and a foreign nation(s) executed without the intended or actual participation of the Senate or House of Representatives.

<sup>28</sup> *Garamendi*, 539 U.S. at 407–08. In the executive agreements, the United States agreed to submit a statement in any litigation in U.S. courts that the maintenance of any suits against French, Austrian, and German companies based on Holocaust-related activities would interfere with the foreign policy interests of the United States. *Id.*

<sup>29</sup> *Id.* at 413.

<sup>30</sup> *Id.* at 428.

necessary for Congress to explicitly preempt state interference (or, of course, it may be simply an abundance of congressional caution).<sup>31</sup> It remains to be seen, however, where either of these preemption paradigms would be appropriate.

### III. TWO-DIMENSIONAL FEDERALISM

This Article presents a framework that courts can use to decide which of the competing preemption paradigms should apply to a given state action. Even after the putative demise of the “one voice” conception of the federal/state balance,<sup>32</sup> under which the Executive had to be free to conduct foreign affairs and anything interfering with his or her ability to speak as the nation’s “one voice” must fall, none seriously contend that the states can speak for the United States in matters of foreign policy. Thus, the question becomes: when does state action that purports to merely legislate actually interfere with the federal government’s interest in a uniform expression of foreign policy? And, in the case of peripheral entanglements with the federal government’s interest, how explicit must the federal government be to preempt the offending state act? This essay seeks to answer those questions by considering how the concepts of horizontal and vertical federalism apply to foreign affairs preemption. Recent scholarship has explored the difference between these two different types of federalism and federalism’s effects.<sup>33</sup> Vertical federalism refers to the balance of power

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<sup>31</sup> See, e.g., War and National Defense Act, 50 U.S.C. app. § 2407(c) (2006) (explaining the term “preemption” to mean:

The provisions of this section and the regulations issued pursuant thereto shall preempt any law, rule, or regulation of any of the several States or the District of Columbia, or any of the territories or possessions of the United States, or of any governmental subdivision thereof, which law, rule, or regulation pertains to participation in, compliance with, implementation of, or the furnishing of information regarding restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries.)

<sup>32</sup> *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994). In *Barclays*, the Court conducted a close examination of a California tax policy that required “worldwide combined reporting,” in contrast to the federal government’s “‘separate accounting’ method.” *Id.* at 307-10. After examining similar tax cases dealing with whether the federal interest in uniformity justified preemption of the state tax, it held that Congressional inaction (and the occasional refusal to act) on similar past matters indicated a willingness to allow the tax and that its ability to speak in one voice had not been compromised. *Id.* at 324-30. “[P]recatory” Executive assertions of the interference with foreign relations were immaterial because the Constitution gave Congress, and not the Executive, control over foreign commerce. *Id.* at 330.

<sup>33</sup> See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185 (2008); Allan Erbsen, *Horizontal Federalism*, 93 MINN.



between the states and the federal government; in the case of the United States, the vertical federalism structure is imposed by the Supremacy Clause.<sup>34</sup> The foreign affairs area is often cited as the quintessential example of and argument for vertical federalism.<sup>35</sup> Vertical federalism largely concerns itself with uniformity, and the foreign affairs field is no exception in that regard. Preemption, in a vertical federalist analysis, enforces the federal determination over specific experiments taken at the state level because the field at issue has been entrusted to federal safekeeping. As Professors Issacharoff and Sharkey recently noted:

When what is at stake is a national, integrated scheme for employee benefits, labor law, carrier liability, or arbitration, for example, the vertical dimension to the federalism interest points to the central role of national power in solving the autarchic impulses that doomed the Articles of Confederation and prompted the creation of the modern federal state.<sup>36</sup>

Horizontal federalism, on the other hand, addresses the allocation and distribution of authority and power among the several states.<sup>37</sup> Horizontal federalism concerns itself with coordination problems between and among states, rather than uniformity concerns.<sup>38</sup> The poster child for horizontal federalism is environmental law, though convincing arguments are made for many other commercial areas of the law, such as product liability. Despite scholars' branding foreign affairs and, more specifically, foreign affairs preemption as vertical federalism analyses, horizontal federalism concerns are also often present. In this context, "[p]reemption is a way of arresting [the several states'] perennial quest for a free lunch."<sup>39</sup> In other words:

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L. REV. 493 (2008); Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289 (2003); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007).

<sup>34</sup> Erbsen, *supra* note 33, at 501.

<sup>35</sup> Issacharoff & Sharkey, *supra* note 33, at 1370.

<sup>36</sup> *Id.*

<sup>37</sup> Erbsen, *supra* note 33, at 501; Ahdieh, *supra* note 33, at 1218.

<sup>38</sup> Ahdieh, *supra* note 33, at 1187-88.

<sup>39</sup> Michael S. Greve, *Subprime, but not Half-Bad*, AEI FEDERALIST OUTLOOK, Sept. 2003, [http://www.aei.org/publications/pubID.19271/pub\\_detail.asp](http://www.aei.org/publications/pubID.19271/pub_detail.asp).

So long as the costs of regulation accrue principally within each regulating state, states should generally be free to do as they please. Overregulated citizens and businesses tend to leave, and that threat will at some point discipline the politicians setting the rules. In contrast, when states impose the costs of their regulatory experiments on citizens in *other* states, the folks who foot the bill can neither run away nor vote the bums out of office. For that reason, state politicians are extremely creative in exporting the costs of their schemes.<sup>40</sup>

While the federal concern for uniformity in matters addressing relations with foreign nations will (almost) always be present, such horizontal concerns for coordination also frequently occur. Horizontal federalism problems can take several forms relevant to foreign affairs.<sup>41</sup> Of primary concern are state acts in the foreign affairs realm that create negative externalities for other states. The risk, for example, is that an Illinois law sanctioning the Sudan could cause a citizen of New Jersey, to whom the legislators of Illinois are neither responsible nor owe any allegiance, to have goods seized or to experience other negative treatment by the government of Sudan. Similarly, state laws that favored (or disfavored) products from a given foreign state or, for example, required certain human rights certifications, might ultimately raise costs for citizens of other states, who would have little direct recourse.<sup>42</sup> Finally, competition among states for foreign investment could raise similar concerns if tax breaks or other benefits would prejudice other sister-state interests.<sup>43</sup>

This essay argues that courts should evaluate the vertical and horizontal federalism concerns that are implicated by the state law in question. In so doing, courts can draw a better picture of the relative interests of the state individually, any interested sister state, the collective of states generally, and the federal government. Those interests will determine the appropriate approach to adopt in considering whether the state law is preempted.

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<sup>40</sup> *Id.*

<sup>41</sup> Erbsen, *supra* note 33, at 512–28. Allan Erbsen’s thorough exegesis of various types of horizontal federalism concerns outlines eight separate sources of interstate friction: Dominion, Havens, Exclusions, Favoritism, Externalities, Rogues, Competition, and Overreaching. *Id.*

<sup>42</sup> *See id.* at 516–20. These would be examples of “havens” and/or “exclusions” under Erbsen’s typology. *Id.*

<sup>43</sup> *See id.* This is an example of Erbsen’s “competition” friction. *Id.*

IV. FOREIGN AFFAIRS PREEMPTION ACROSS TWO DIMENSIONS

This essay proposes a framework for choosing an appropriate preemption paradigm. This framework first separates state actions that create foreign affairs problems into three categories. The following sections set out the typology of the three categories and provide examples of state actions that would fall into those categories. The framework then assigns the appropriate preemption paradigm to each of these categories, addressing the vertical and horizontal federalism concerns of each category, as well as the realities of our political and legal system.

A. *The Tripartite Typology*

Applying these concepts of horizontal and vertical federalism and viewing the tensions created by the relevant state action reveals three types of foreign affairs controversies. The first category includes those cases that implicate neither vertical nor horizontal federalism concerns. The second consists of state actions that implicate only vertical federalism/uniformity concerns, and the third and final category contains state actions that raise problems across both federalism dimensions.<sup>44</sup>

1. Tall and Skinny State Actions: Neither Vertically nor Horizontally Challenged

State actions fall into this category where the state statute/action causes only incidental effects on the conduct of foreign relations and raises negligible or positive externality concerns. Statutes of general application applied evenhandedly to a foreign party or interest will often fall into this category. Other examples of the many state actions that would fall into this category include: (1) sister-city arrangements (agreements between a municipality in the United States with a geographically- and culturally-diverse municipality in order to expand on historical or cultural ties, and to create and develop commercial relationships);<sup>45</sup> (2) trade office and chamber of commerce

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<sup>44</sup> This essay leaves out the obvious fourth possibility where horizontal concerns are implicated, without vertical/uniformity concerns, as food for other work—in the foreign affairs preemption world, this option is not relevant.

<sup>45</sup> See Sister Cities International, <http://www.sistercities.org/index.cfm> (last visited Oct. 20, 2009) (noting that these arrangements are increasingly common and are the result of a program started by President Eisenhower in 1956).

arrangements;<sup>46</sup> and (3) study abroad and other academic exchanges between states, state universities, and foreign parties.<sup>47</sup>

One increasingly common example is a bilateral arrangement between a state government and a foreign sovereign to promote investment in a certain industry between the two constituencies. California has entered into several such agreements<sup>48</sup> with Israel, with the following stated purposes:

1. To seek enhanced trade relationships and facilitate cooperation between companies[;]
2. To encourage bilateral investment[;]
3. To support industrial research and development between companies, particularly in high technology[;]
4. To promote the exchange of ideas between various businesses, trade associations, business agencies and commercial institutions as well as visits of company representatives, engineers, Scientists and other specialists[; and]
5. To notify of trade fairs and exhibitions, investment seminars and other business related conferences.<sup>49</sup>

There have also been recent efforts in California to create a bilateral agreement/memorandum of understanding in the technology sector.<sup>50</sup> A final example is the municipal adoption of the substantive provisions of the United Nations Convention on the Elimination of all Forms of Discrimination Against Women (hereinafter "CEDAW").<sup>51</sup> Despite President Carter's signature, CEDAW has languished for decades

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<sup>46</sup> See, e.g., ESD Locations, [http://www.empire.state.ny.us/Contacts\\_and\\_about\\_us/locations.asp](http://www.empire.state.ny.us/Contacts_and_about_us/locations.asp) (last visited Feb. 5, 2010). New York has offices of the Empire State Development Corporation in the United Kingdom, Germany, Japan, China, Canada, Israel, Mexico, and France and has offices with the Council of Great Lake Governors in Brazil, Chile, and South Africa. *Id.* See also Enterprise Florida, *International Advantages*, <http://www.eflorida.com/ContentSubpage.aspx?id=348> (last visited Feb. 5, 2010). Florida has fourteen international offices. *Id.*

<sup>47</sup> See, e.g., University International Council, <http://www.ohio.edu/uic/agreements.cfm>. For example, The Ohio State University has agreements with departments of the governments of Swaziland and Malaysia, among others. *Id.*

<sup>48</sup> These are generally termed Memoranda of Understanding or Intent, likely designed to avoid creating a Constitutional problem under the Compact Clause.

<sup>49</sup> California-Israel Cooperation Agreements, May 27, 1998, available at <http://www.jewishvirtuallibrary.org/jsource/US-Israel/calmous.html>.

<sup>50</sup> See Press Release, California State Assembly Member Bob Blumenfield, California-Israel Cooperative Agreement on Renewable Energy Approved by Assembly Committee (April 29, 2009), available at [http://democrats.assembly.ca.gov/members/a40/News\\_Room/Press/20090429AD40PR01.aspx](http://democrats.assembly.ca.gov/members/a40/News_Room/Press/20090429AD40PR01.aspx).

<sup>51</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378.

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without Senate ratification. The City of San Francisco, however, adopted substantive provisions of CEDAW as a matter of municipal law, beginning with a self-study of public departments leading to recommendations to the departments on how to best implement CEDAW's principles.<sup>52</sup>

## 2. The Old Suit: Traditional Foreign Affairs Uniformity Issues

The second category is that of the classic foreign affairs preemption case. In these situations, the state action creates non-trivial interference with the uniform position of the United States (regardless of whether that position has been expressed), but there is no concern about inter-state coordination. One example of such a state action would be a Buy American Statute.<sup>53</sup> California's Buy American Act, for example, requires that contracts for public buildings or materials for public use be given to persons or companies that agree to use materials manufactured in the United States from materials produced in the United States.<sup>54</sup> Missouri similarly limits the purchase of goods and services by public agencies and subdivisions to those produced in the United States, subject to certain exceptions.<sup>55</sup> Many other states have similar restrictions on the spending of public funds.<sup>56</sup>

These statutes, of course, raise uniformity concerns. The federal government has an interest in uniform standards for the import of and trade in foreign goods. However, there is no significant coordination problem; rather, the interests of other states are unlikely to be significantly and negatively affected, unless there was evidence that the Buy American Statute at issue was intended to affect one specific foreign state or was being applied in that manner. Indeed, generally speaking, Buy American Statutes in one state would reduce demand for foreign goods and services and render those goods cheaper in other states. Thus, under normal circumstances, they would raise only uniformity concerns.

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<sup>52</sup> Resnik, *supra* note 33, at 58; see S.F. COMM'N ON THE STATUS OF WOMEN, CEDAW ACTION PLAN (2003), available at [http://www.sfgov.org/site/cosw\\_page.asp?id=17146](http://www.sfgov.org/site/cosw_page.asp?id=17146).

<sup>53</sup> See *Trojan Techs., Inc. v. Pennsylvania*, 916 F.2d 903, 913 (3d Cir. 1990); *K.S.B. Technical Sales Corp. v. N.J. Dist. Water Supply Comm'n*, 381 A.2d 774, 782-84 (N.J. 1977); *N. Am. Salt Co. v. Ohio Dep't of Transp.*, 701 N.E.2d 454, 462 (Ohio Ct. App. 1997).

<sup>54</sup> CAL. GOV'T CODE § 4303 (West 2008).

<sup>55</sup> MO. REV. STAT. § 34.353 (2001).

<sup>56</sup> *E.g.*, MINN. STAT. § 16.073 (2005); MO. REV. STAT. § 34.353 (2001); N.J. STAT. ANN. § 40A:11-18 (West 2009); N.J. STAT. ANN. §§ 52:32-1, 52:33-2 (West 2001); N.Y. GEN. MUN. LAW § 103 (McKinney Supp. 2009); OHIO REV. CODE ANN. § 125.09(C) (West 2002); OKLA. STAT. tit. 61, § 51 (2001).

### 3. Short, Squat State Statutes: Those That Raise Both Horizontal and Vertical Federalism Concerns

The final category of state actions are those that interfere with the federal government's interest in uniformity vis-à-vis the international community and a sister-state's (or several sister-states') individualized interests. Generally speaking, these are state statutes that single out a foreign government or set of governments for specific negative treatment or condemnation.<sup>57</sup> *Garamendi*, *Zschernig*, and *Crosby* would all fit into this category.<sup>58</sup> Taking *Crosby* as an example, one can see how the federalism interests would play out. The uniformity concerns are, as is often the case, straightforward. The federal government has an interest in a singular and integrated approach to Burma, its government, and its human rights record.<sup>59</sup> The Massachusetts law both affected the efficacy of that effort and created the potential for interference with U.S. relations with the international community more generally.<sup>60</sup> The state law interfered with the ability of the federal government to negotiate with Burma and to work with the rest of the international community.<sup>61</sup> It also, however, creates potential negative externalities, which raise horizontal federalism concerns. In passing additional sanctions against Burma, Massachusetts created a risk of altering Burmese behavior toward residents of any other state. For example, a traveler from another state who happened to be in Burma (perhaps unwisely, given the climate) would be potentially subject to reprisals as a result of the Massachusetts action and would have had no input in, or recourse against, the Massachusetts government that passed the sanctions bill. Importantly, this possibility of reprisal would have been present regardless of federal action.

#### *B. The Advantages of the Tripartite Typology*

Classifying state actions in this manner provides a helpful framework for analyzing foreign affairs preemption cases for several reasons. First, this typology, by exploring the federalism tensions created by the state action, reflects the constitutional allocation of power between the federal government and the states, and among the several states as well. Any preemption analysis is, at its heart, a balancing act

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<sup>57</sup> See *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009).

<sup>58</sup> See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Zschernig v. Miller*, 389 U.S. 429 (1968).

<sup>59</sup> See *Crosby*, 530 U.S. 363.

<sup>60</sup> *Id.* at 381-82.

<sup>61</sup> *Id.* at 382.

and the identification and separation of the distinct federal and state interests and effects allows the court to achieve a more desirable and stable equilibrium.

Second, the typology allows courts to more easily identify the various interests of the players and separate out the parties who represent those interests. Parsing out protectionism from concerns about the United States' policies on human rights violations in Sudan can help a court in considering the level of interference with the federal government's uniformity interest. Moreover, isolating those ideas from the interstate effect, regardless of whether intentional or incidental, allows for easier measurement and evaluation.

Third, the typology and the separation of those interests reflect the realities of our federal structure. Congress and the President excel at identifying challenges to the federal government's interest in unimpeded power to communicate, negotiate, and otherwise undertake the foreign relations business of the United States as a whole. They can be depended on to remedy incursions into that sphere, challenges along the vertical/uniformity axis, as they deem in the best interests of the United States.

Conversely, inter-state coordination issues and externalities or disequilibria among the states are less well protected by Congress. Indeed, if several states act together in a certain manner to the detriment of a single other state, it may be difficult or even impossible for that aggrieved state to achieve the consensus necessary for congressional action. The interests of that state, therefore, must be protected in another manner. Finally, because this typology establishes default rules, it serves to enhance the predictability and flexibility of the application of foreign affairs preemption. It is predictable because a state seeking to enact a law knows whether it may do so by itself, without regard to federal action, or whether it must go to Congress first for permission. The ability of Congress to allow states to invade its prerogatives provides the flexibility. Just as the federal government can explicitly preempt certain actions that states otherwise would be able to undertake, it can explicitly allow others that it deems are worth the problems that they may create.

### C. *Applying the Preemption Paradigm*

Preemption is, at its heart, an invasion into the sovereignty of the states. As such, when choosing among the numerous options,<sup>62</sup> the

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<sup>62</sup> There are other preemption paradigms not discussed in this Article. See generally CHRISTOPHER R. DRAHOZAL, *THE SUPREMACY CLAUSE: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 89-125 (2004) (discussing preemption analysis).

proper preemption paradigm affects that sovereignty only so far as necessary to protect the offended and constitutionally superior (or at least equal) interest. The less invasive a state action is into other sovereigns' spheres, be they sister-state or federal, the more deferential a court should be to that state action. On the other hand, the farther outside its borders and limits a state ventures, the more searching the preemption analysis should be. Armed with the typology created above, the preemption paradigms fall naturally into place along their continuum of invasiveness, from explicit to dormant preemption, thereby respecting as much as possible the balance between federal and state interests.

For the first archetype, where the state statute presents neither vertical nor horizontal concerns, it does not, by definition, challenge the federal expression of foreign policy nor does it impinge on any other state's interests. Rather, the state acts, within its authority, as it sees fit to maintain public order or serve the public good. Thus, under these circumstances, it is appropriate to require either explicit or conflict preemption of state law; that is, the state law is preempted only if the federal statute (or treaty) contains explicitly preemptory language or compliance with both the federal and state enactments would be impossible.<sup>63</sup> Direct conflict or explicit preemption is warranted in these circumstances because the state's interest is strongest in laws of general application and the state does not directly implicate the federal interest in uniformity or the other states' interests in remaining free from interference. If the peripheral interference with other states or the federal government is sufficiently grave, the federal government will, no doubt, be able to legislate and explicitly preempt the state statute at issue, if the area is within its constitutional powers.<sup>64</sup>

In the second category, with vertical but no horizontal federalism concerns present, obstacle preemption is the best approach.<sup>65</sup> The federal government and state governments have largely overlapping authority, although these actions directly implicate foreign affairs, as they do not threaten the interests of other states. In these situations, by definition, the state action has created a non-trivial interference with the federal government's conduct of foreign relations; thus, any valid federal action, by either the executive or legislative branch, should preempt state law.<sup>66</sup>

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<sup>63</sup> See *supra* Part II.C (defining express preemption).

<sup>64</sup> Cf. *Missouri v. Holland*, 252 U.S. 416 (1920) (displacing contrary state law due to a treaty regarding migratory birds even though Congress's power to enact similar measures in the absence of a treaty was questioned).

<sup>65</sup> See *supra* Part II.B (discussing foreign affairs examples of obstacle preemption).

<sup>66</sup> This Article does not decide the complicated question of what the appropriate balance is between the Executive and Legislative branches in foreign affairs. There has been



Nevertheless, as Congress and the President are well able to protect their own power and interests, one can require some action, whether by statute or executive order, on their part to establish the general policy of the United States. If the state statute presents an obstacle to the fruition of that policy, it must bow before it.

The final category of state statutes contains those that raise both vertical and horizontal federalism concerns. This is the type of action that states can be said to lack the constitutional power to effect. Not only is their interest limited in the international sphere generally, but each state holds that limited power equally. One state should not be allowed to impinge upon another state's authority in this manner.<sup>67</sup> Thus, dormant foreign affairs preemption is an appropriate way to block this type of state action.

These are cases that single out, in a negative or derogatory manner, a particular state or specific group of states. The federal government has a clear interest in uniform relations with given states, just as it does with the international community generally. It is certainly capable of protecting that interest by itself, without resorting to dormant preemption. However, where a state denigrates or seeks to punish a distinct foreign nation, it exports the burden created to other states as well. Nor is Congress the place to which those other offended states can look for recourse; the nature of the republican system is that smaller groups can often block the efforts of larger groups of states, to say nothing of the case where it is one state that bears the brunt of a larger minority.

It bears noting that there is nothing stopping Congress from allowing state actions of the latter two types to persist. Indeed, recent state incursions into the federal foreign affairs sphere regarding the Sudan have led to just that.<sup>68</sup> Various states passed *Crosby*-like statutes condemning the atrocities committed in Darfur.<sup>69</sup> A suit was brought to

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extensive debate on this point, all well beyond the scope of this Article. See generally MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 165-91 (1990) (discussing Presidential policy and Executive Agreements); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995); Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573 (2007); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N. CAROLINA L. REV. 133 (1998).

<sup>67</sup> See Erbsen, *supra* note 33.

<sup>68</sup> See Resnik, *supra* note 33, at 80-81.

<sup>69</sup> See Resnik, *supra* note 33, at 80-81; SUDAN DIVESTMENT TASK FORCE, THE STATE OF SUDAN DIVESTMENT: AN OVERVIEW OF STATES, CITIES, UNIVERSITIES, COMPANIES, AND PRIVATE PENSIONS CURRENTLY WORKING ON SUDAN DIVESTMENT, [http://www.sudandivestment.org/docs/state\\_of\\_sudan\\_divestment.pdf](http://www.sudandivestment.org/docs/state_of_sudan_divestment.pdf) (presenting a snapshot as of August 1, 2008).

enjoin the enforcement of the Illinois statute<sup>70</sup> and, on the basis of foreign affairs preemption, the court granted the injunction.<sup>71</sup> Within the year, however, Congress passed the Sudan Accountability and Divestment Act of 2007 (hereinafter “SADA”), which allows states to enact prohibitions on debt financing for companies doing business in the Sudan, essentially authorizing the states to enact economic sanctions against the Sudan.<sup>72</sup> Thus, the states were able to enact measures that were suspect under our conceptions of vertical and horizontal federalism.<sup>73</sup> This ability of Congress to allow state interference combined with the use of dormant preemption, and to a lesser extent obstacle preemption, results in an effective switch of the default rules. Where neither federalism axis is challenged, the default is that Congress must act explicitly to preempt the state action; where both are implicated, the default is that Congress must act explicitly to allow the state action. This default presumption further supports the delicate balance that the framework developed above imposes on foreign affairs preemption.

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<sup>70</sup> The Illinois Act to End Atrocities and Terrorism in the Sudan is codified at 15 ILL. COMP. STAT. 520/22.5 (2008); 15 ILL. COMP. STAT. 520/22.6 (2008) (repealed 2007); 40 ILL. COMP. STAT. 5/1-110.6 (2008).

<sup>71</sup> Nat'l Foreign Trade Council v. Giannoulis, 523 F. Supp. 2d 731, 751 (N.D. Ill. 2007).

<sup>72</sup> SADA also eased certain sales restrictions on sales by private pension and mutual funds to sell their investments, allowing their compliance with the state statutes as well as allowing them to follow any moral compulsion they might feel. See Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (2007) (codified as amended at 15 U.S.C. § 80a-13, 50 U.S.C. § 1701 nt). It also required certifications from companies seeking federal government contracts to certify their lack of involvement with the Sudan. *Id.*

<sup>73</sup> While President George W. Bush signed SADA, he did so issuing a signing statement in which he stated:

This Act purports to authorize State and local governments to divest from companies doing business in named sectors in Sudan and thus risks being interpreted as insulating from Federal oversight State and local divestment actions that could interfere with implementation of national foreign policy. However, as the Constitution vests the exclusive authority to conduct foreign relations with the Federal Government, the executive branch shall construe and enforce this legislation in a manner that does not conflict with that authority.

Statement on Signing the Sudan Accountability and Divestment Act of 2007, 43 WEEKLY COMP. PRES. DOC. (Dec. 31, 2007). In other words, the President was retaining the authority to unilaterally strike down specific state statutes if he felt they unduly interfered with the conduct of foreign affairs. The constitutionality of signing statements is extremely unclear as is the principle that the President could undertake this type of unilateral veto of a state statute.

V. CONCLUSION

Foreign affairs preemption and the Supreme Court's application and justification thereof have been rightly questioned as lacking any sort of rigor or method. The twin lenses of two-dimensional federalism provide a framework that allows the tailoring of the preemption doctrines to the specific state action at issue. Under the framework developed above, states know what to expect when passing statutes with the potential to impinge upon the foreign affairs powers of the federal government and the federal government is aware of when it needs to act to prevent such interference and when action by Congress is unnecessary.