Article

Beyond One Voice

David H. Moore[†]

† Professor of Law, J. Reuben Clark Law School, Brigham Young University. For helpful comments on prior versions of this Article, I wish to thank Zachary Clopton, RonNell Andersen Jones, Ryan Scoville, Lisa Grow Sun, and participants in the American Society of International Law, International Law in Domestic Courts, 2012 Annual Workshop, and in the Wake Forest and Brigham Young University Law School Faculty Works-in-Progress Series. I also thank Dustin Cammack, Shalise Conger, Amanda Frost, Haley Jankowski, Rebecca Lambson, Joey Leavitt, Spencer Paul, Eimi Priddis, and Heath Waddingham for helpful research assistance, and Shawn Nevers for excellent library assistance. This Article is dedicated to James Stephen Moore, who was born during its preparation.

INTRODUCTION

The one-voice doctrine is a mainstay of U.S. foreign relations jurisprudence.[1] It has appeared in some of the Supreme Court's most prominent foreign affairs cases—cases addressing the allocation of foreign relations authority among the President, Congress, the courts, and the states.[2] In the 2011 Term alone, the doctrine appeared in two cases: *Arizona v. United States*, in which the Court analyzed the preemption of Arizona's controversial immigration laws,[3] and *Zivotofsky v. Clinton*, in which the Court found justiciable a dispute between the executive and Congress concerning the status of Jerusalem as the capital of Israel.[4]

The doctrine maintains that in its external relations the United States must be able to speak with one voice in order to achieve its interests and avoid negative responses from other nations. The doctrine has both intuitive appeal and constitutional moorings.[5] It seems sensible that in dealing with other

1. *See, e.g.*, Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 979 (2001) (describing "[t]he 'one-voice' doctrine" as "a familiar mantra of U.S. foreign relations jurisprudence").

2. *See, e.g.*, Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) (power of the President, Congress, and states); Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment) (power of the President and courts); Zschernig v. Miller, 389 U.S. 429 (1968) (power of the courts and states); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936) (power of the President).

3. *See* Arizona v. United States, 132 S. Ct. 2492, 2506–07 (2012).

4. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1438 (2012) (Breyer, J., dissenting).

5. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 445 (1998) ("Th[e] one-voice argument has strong intuitive

nations, the United States must be able to formulate and execute a cohesive foreign policy, rather than conflicting policies.[6] Indeed, the Constitution, and especially its allocation of foreign affairs authority, was motivated in significant part by the central government's inability under the Articles of Confederation to speak for the nation with one voice.[7] Consistent with its intuitive and constitutional underpinnings, the one-voice doctrine captures, from certain perspectives, valuable principles.

Nonetheless, the doctrine's contributions are outweighed by its wide-ranging flaws. Given relatively scant scholarly attention to the doctrine, these flaws have gone underappreciated. This Article provides the first comprehensive assessment of the doctrine, exposing the doctrine's several failings.

First, the doctrine is used to address divergent questions concerning the allocation of foreign affairs authority. A failure to recognize the different contexts in which the doctrine applies has led to bleed over from contexts in which the constitutional justification for the doctrine is strong into those in which that justification is weak, shifting authority to actors—namely, the President—whose constitutional claim as the nation's voice in foreign affairs is disputed. Second, the doctrine masks different theories of constitutional interpretation, leading to a lack of transparency in the Court's assessment of the allocation of foreign affairs authority. Third, while the doctrine partially captures constitutional principles, it is in key respects inconsistent with constitutional text, structure, and history. Fourth, the doctrine diverges from actual practice of the President, Con-

appeal."); Ralph G. Steinhardt, *Human Rights Litigation and the "One-Voice" Orthodoxy in Foreign Affairs*, *in* WORLD JUSTICE?: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 23, 44 (Mark Gibney ed., 1991) [hereinafter Steinhardt, *Orthodoxy*] ("The ideal of a unified foreign policy has a powerful hold on the popular mind . . . .").

6. *Cf*. Bradley, *supra* note 5, at 445–46 (discussing reasons for the one-voice doctrine's intuitive appeal while arguing that the appeal decreases when the federal government addresses traditionally domestic matters through the treaty power).

7. *See, e.g.*, MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 32–46 (2007). This inability had both substantive and procedural roots. Substantively, the national government lacked authority to negotiate trade agreements on behalf of the entire U.S. market, to enforce customary international obligations, and to prevent states from violating treaties. *See id.* at 35–45. Procedurally, the national government suffered from the assignment of foreign policy execution to a multi-person, deliberative body—the Continental Congress. *See, e.g.*, Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 52–63 (1979).

gress, Supreme Court, and states. And fifth, the doctrine rests on functional assumptions that are faulty or incomplete. The doctrine fails to account, for example, for prudential reasons why the United States might benefit from more than one voice in foreign affairs.

This Article exposes each of these failings and considers their implications for the future of this conspicuous doctrine.[8] Given these failings, one might argue at the outset that it is inappropriate to apply the label "doctrine" to the one-voice rationale. Clearly, the failings identified in this Article ultimately undermine any notion of a unified, coherent doctrine. At the same time, the prevalent and uncritical employment of the rationale suggests that it has, to date, been treated as a doctrine and that this Article is necessary to demote the doctrine to something less.

The Article begins by discussing in Part I the limited scholarship on the one-voice doctrine. Part II explores the doctrine's history, exposing the many contexts in which the doctrine is used. Part III builds on that history to identify the doctrine's scope. Parts IV through VIII expose each of the abovementioned features of the doctrine. Part IX explains why these features are flaws and explores the implications of these flaws for the future of the one-voice doctrine. The Article concludes that, notwithstanding both its prominence and staying power, the one-voice doctrine should be abandoned. At best, functional arguments based on the need for one voice might survive, but they should be evaluated for what they are—arguments that the particular circumstances of a case call for one voice, rather than the dictates of a compelling doctrine. Even in this downgraded form, the doctrine's value is questionable as the judici-

8. Other, related failings, might also be identified. For example, at least when used to police state action bearing on foreign affairs, the one-voice doctrine arguably lacks clear content, leading to inconsistency of result. *See* Cleveland, *supra* note 1, at 984; Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1150–54 (2000). To illustrate, in *Zschernig*, the Court struck an Oregon statute notwithstanding the executive department's lack of concern that the statute as applied would interfere with foreign affairs. Zschernig v. Miller, 389 U.S. 429, 432, 434–35, 440–41 (1968). By contrast, in *Barclays Bank*, the Court upheld a California tax law notwithstanding executive opposition and outcry from foreign states. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 320, 324 & n.22, 327–31 & n.30 (1994); *see also* Cleveland, *supra* note 1, at 984. *But cf. infra* note 46 (discussing the executive department's inconsistent opposition to the California tax methodology at issue).

ary lacks the competence to evaluate such functional one-voice arguments.

I. PRIOR SCHOLARSHIP ANALYZING THE ONE-VOICE DOCTRINE

Notwithstanding the important issues to which it is addressed, the one-voice doctrine has received little focused attention in the scholarship. No scholar has looked critically at the doctrine as a whole.[9] Only Sarah Cleveland, in a colloquium ar-

9. For passing criticism of the doctrine, see, for example, Bradley, *supra* note 5, at 445–48 (noting empirical and doctrinal weaknesses of the one-voice doctrine); Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 130–34 (2009) (noting the one-voice doctrine's inconsistency with the Constitution and practice and the lack of justification in goals of accountability and avoidance of embarrassment); Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 464, 475–76, 527–29 (2004) (noting that longstanding state participation in compliance with international law undercuts the Supreme Court's one-voice pronouncements both empirically and functionally); Sanford Levinson, *Compelling Collaboration with Evil? A Comment on* Crosby v. National Foreign Trade Council, 69 FORDHAM L. REV. 2189, 2195–200 (2001) (criticizing the doctrine on normative and descriptive grounds); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 964–65 (2004) (criticizing as empirically false "the 'single voiced' rationale" for treating foreign affairs cases as political questions); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 561–64 (2002) [hereinafter Ramsey, *Non-preemptive*] ("The 'one voice' in foreign affairs has always been more of a slogan than a constitutional reality."); Swaine, *supra* note 8, at 1150 (noting the doctrine's unpredictability, lack of textual support in the Constitution, and failure to adequately identify the distribution of federal foreign affairs authority); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 449–50 (2002) (criticizing the one-voice doctrine, among other things, because of historical comfort with federal and state court application of customary international law as general law).

Ralph Steinhardt provides a more in-depth analysis of what he calls the "'one voice' metaphor," which he asserts underlies "doctrines of judicial diffidence" that restrict the judiciary from resolving international human rights claims. Steinhardt, *Orthodoxy*, *supra* note 5, at 23–31. These doctrines include act of state, political question, immunity, self-execution, private right of action, and international comity. *Id.* at 29–31. Ultimately, Steinhardt argues for "[a] qualified version of the 'one-voice' orthodoxy" that would apply "when the political branches have actually committed the United States internationally pursuant to a delegated and exclusive power in the Constitution, when there are no international standards to apply, and when individual rights are not at issue." *Id.* at 44. Steinhardt's focus is at once wider and narrower than that of this Article. On one hand, Steinhardt identifies a broad one-voice metaphor that assertedly underlies an array of doctrines. This Article, by contrast, focuses on the one-voice doctrine and perceives the various doctrines of diffidence that Steinhardt identifies as tending to undercut the one-voice doctrine because they limit, rather than preclude, judicial involvement in foreign af-

ticle, has endeavored anything along those lines.[10] In that piece, Cleveland made two principal contributions. She described the one-voice doctrine's inconsistency with the Constitution.[11] And she documented ways in which the doctrine does not cohere with actual practice.[12] At this point it is clear that, notwithstanding the federal government's claim as the one voice in foreign affairs, states take many actions affecting foreign affairs that are tolerated and sometimes encouraged by the national government.[13] Similarly, although the President is often identified as the one U.S. voice in foreign affairs, Congress and the courts are far from mute.[14] This Article builds on these insights to offer a comprehensive analysis of the failings of the one-voice doctrine that formalizes its multiple dimensions, identifies its conflicting theoretical footings, expands on its constitutional and practical infirmities, documents its functional failings, and ultimately tracks the implications of these failings to the doctrine's demise.

II. CONTEXT AND HISTORY OF THE ONE-VOICE DOCTRINE

The one-voice doctrine applies along multiple axes: it is used to patrol state action bearing on foreign affairs, to decide the propriety of judicial resolution of foreign affairs questions, and to assess the scope of presidential foreign affairs power or

fairs. For example, the act of state doctrine requires the judiciary to presume the validity of only certain acts by foreign governments. *See infra* text accompanying notes 286–89; *cf.* Steinhardt, *Orthodoxy*, *supra* note 5, at 29 (recognizing, for example, that the act of state doctrine does not limit judicial involvement in all foreign affairs cases, while also suggesting that "the contours of the doctrine might be determined by its 'one-voice' purpose"). On the other hand, this Article assesses the one-voice doctrine as it applies across its various dimensions rather than focus, as Steinhardt does, on relations between the judiciary and the political branches. *See infra* Part III.

10. *See generally* Cleveland, *supra* note 1.

11. *See id.* at 984–85, 988–91.

12. *See id.* at 975–76, 979, 985–89, 991–1014. Others have also noted this inconsistency. *See, e.g.*, Bradley, *supra* note 5, at 446 ("It is likely . . . that the one-voice metaphor has never been very accurate."); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1634–39, 1688 (1997) (noting both state action affecting foreign affairs and the fact that "[t]he federal government itself rarely speaks with one voice in foreign relations").

13. *See, e.g.*, Cleveland, *supra* note 1, at 975–76, 979, 989–1014; Goldsmith, *supra* note 12, at 1674–78; Ku, *supra* note 9, at 476–526.

14. *See, e.g.*, Cleveland, *supra* note 1, at 985–89; Goldsmith, *supra* note 12, at 1688–89.

the relative power of Congress and the President. Along these axes, the doctrine surfaces in many contexts. This Part, which provides a brief history of the doctrine[15] and identifies the many contexts in which it is applied, employs the doctrine's main axes (state power, judicial power, and relative power of the political branches) as organizing principles. The next Part explores these and other axes in the course of highlighting a critical, and ultimately troubling, feature of the one-voice doctrine: its many dimensions.

A. STATE POWER

The one-voice doctrine has played the most consistent role in delineating the proper scope of state action bearing on foreign affairs. The doctrine's roots stretch at least as far back as the 1827 case of *Brown v. Maryland*,[16] in which the Supreme Court struck a state law for encroaching on the federal power to regulate foreign commerce.[17] Since that time, the Court has repeatedly emphasized that the states have no role to play in foreign affairs.[18] The Court has stated, for example, that "for national purposes, embracing our relations with foreign na-

15. In exploring that history, the Article focuses, albeit not exclusively, on historical invocation of the doctrine, rather than on the broader history of the three questions the doctrine has been used to answer. A history exploring the foreign affairs powers of the political branches, judiciary, and states is a multivolume project beyond the scope of this Article.

16. 25 U.S. (12 Wheat.) 419 (1827). The Supreme Court's approach to the compatibility of state taxes with the Commerce Clause has changed since *Brown*. *See* Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179–83 (1995); Quill Corp. v. North Dakota, 504 U.S. 298, 309–10 (1992).

17. *Brown*, 25 U.S. (12 Wheat.) at 445–49, 459; *see* Cleveland, *supra* note 1, at 980. In a prior, domestic case addressing the Supreme Court's jurisdiction to hear certain appeals from state courts, the Court noted that "the government which is alone capable of controlling and managing [the American people's] interests in [matters of war, peace, and commerce] is the government of the Union." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 414 (1821).

18. *See* Cleveland, *supra* note 1, at 980–84 (tracing judicial recognition of the federal government's exclusive control of foreign affairs to the early 1800s); Ku, *supra* note 9, at 466–68 (discussing the Supreme Court's frequent endorsement of "a nationalist conception that assumes the exclusion of states from any activities relating to foreign affairs"); Swaine, *supra* note 8, at 1129–30 & n.3, 1221 n.331 (collecting cases noting federal exclusivity in foreign affairs). Until recently, scholars shared the Supreme Court's view. *See, e.g.*, Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1015 (2001) ("[R]evisionist scholars have challenged the previously dominant view that States have no place in foreign affairs."); Swaine, *supra* note 8, at 1129 ("Everyone used to agree that state and local governments had no role to play in U.S. foreign relations.").

tions, we are but one people, one nation, one power";[19] that "in respect of our foreign relations generally, state lines disappear. . . . [and] the State . . . does not exist";[20] and that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."[21]

In making conclusions of this sort, the Court has relied heavily on the one-voice doctrine. The doctrine's prominence is evidenced by the fact that the doctrine surfaces across genres of preemption. For example, in enforcing the Constitution's Import-Export Clause, which generally prohibits states from laying "Imposts or Duties on Imports or Exports,"[22] the Court, since 1976, has asked whether the challenged state law interferes with the national government's ability to "speak with one voice when regulating" foreign commerce.[23] The doctrine has also informed whether state law is preempted by statute[24] or by executive agreement.[25] The doctrine has even led to preemption

19. Chae Chang Ping v. United States, 130 U.S. 581, 606 (1889); *see also* Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (quoting *Chae Chang Ping*, 130 U.S. at 606).

20. United States v. Belmont, 301 U.S. 324, 331 (1937); *see also id.* ("[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.").

21. United States v. Pink, 315 U.S. 203, 233 (1942); *see also id.* at 242 (Frankfurter, J., concurring) ("In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."). *But cf.* Arizona v. United States, 132 S. Ct. 2492, 2514–15 (2012) (Scalia, J., dissenting in part and concurring in part) ("Even in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers.").

22. U.S. CONST. art. I, § 10, cl. 2.

23. Michelin Tire Corp. v. Wages, 423 U.S. 276, 285–86 (1976); *see also* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 853 (1996); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 62, 76–77 (1993); Limbach v. Hooven & Allison Co., 466 U.S. 353, 359–60 (1984); Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 752–54, 758 (1978).

24. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 375, 380–86 (2000). While *Crosby* might be interpreted as preempting state law based solely on conflict with a statutory command that the President speak for the United States in developing a multilateral strategy on Burma, the opinion arguably invokes the President's, or federal government's, role as the nation's voice as well. *See* Cleveland, *supra* note 1, at 1012–13 ("[T]he [*Crosby*] Court's reliance on the 'one-voice' doctrine was sufficiently broad that the Court might have reached the same conclusion in the absence of [a f]ederal . . . [s]tatute.").

25. *See Belmont*, 301 U.S. at 327, 330 (concluding that an executive agreement recognizing the Soviet government and assigning to the United States Soviet claims to nationalized property trumped any conflicting state

based on executive policy derived from executive agreements.[26] And, as discussed more fully below, the doctrine has justified preemption on dormant Foreign Commerce Clause and dormant foreign affairs grounds.[27] In short, the one-voice doctrine has, for years and across preemption categories, played a notable role in the prohibition of state foreign affairs activity.

B. POWER OF THE JUDICIARY VIS-À-VIS THE POLITICAL BRANCHES

The history of the one-voice doctrine's role in fixing the separation of powers between the judiciary and the political branches has unfolded largely in the litigation context. No single type of case captures the history, however. Instead, the doctrine has played a role in two principal categories of cases: (1) cases addressing the political question doctrine or, relatedly, recognizing the need for some level of judicial respect for political branch determinations, and (2) cases addressing dormant preemption under the Foreign Commerce Clause and under federal foreign affairs authority.

---

policy as "the Executive had authority to speak as the sole organ of [the federal] government" in entering the agreement); *see also Pink*, 315 U.S. at 221–23, 226–34. The *Pink* Court affirmed *Belmont* and upheld the same executive agreement in the face of contrary state law and policy based in part on "a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations'" to settle the claims of U.S. nationals in the course of recognizing the Soviet government. *Id.* at 229 (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936)).

26. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003). The *Garamendi* Court struck a state law that "interfere[d] with foreign policy of the Executive Branch, as expressed principally in . . . executive agreements," *id.* at 413, relying on the President's status "as the Nation's organ in foreign affairs," *id.* at 414 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948)), and the law's interference with the President's ability "to speak for the Nation with one voice," *id.* at 424 (quoting *Crosby*, 530 U.S. at 381). *But cf. id.* at 430 (Ginsburg, J., dissenting) (refusing to preempt "[a]bsent a clear statement [supporting preemption] . . . by the 'one voice' to which courts properly defer in matters of foreign affairs").

27. *See infra* Part I.B.2; *see also Garamendi*, 539 U.S. at 413 ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964))); Goldsmith, *supra* note 12, at 1620–23 (summarizing "[t]he conventional view . . . that courts . . . . must invalidate state laws or acts that impermissibly impinge upon the unique federal foreign relations interest" because "[i]n foreign affairs, the nation must speak with one voice, not fifty").

1. Political Question and Related Cases

The one-voice doctrine has, at times, led the Court to conclude that certain foreign relations issues should be left to the discretion of the political branches. This conclusion may lead to a spectrum of deference. On one end of the spectrum, the Court may treat an issue as a political question. In such cases, if the political branches contest how the issue should be resolved, the Court will refuse to hear the dispute.[28] If, by contrast, the authoritative political branches have resolved the issue, the Court may defer to, and decide the case based on, that resolution.[29]

28. *See infra* text accompanying notes 110–13.

29. For example, in *Doe v. Braden*, the Court faced a land dispute that, under a treaty between the United States and Spain, would be resolved against the plaintiff. 57 U.S. (16 How.) 635, 654, 657 (1853). The plaintiff attempted to avoid the force of the treaty by claiming that the King of Spain lacked authority under Spanish law to annul by treaty the grant under which the plaintiff asserted title. *Id.* at 657–58. The Court concluded that this argument presented a political, not judicial, question, based in part on the fact that "it would be impossible for the executive . . . to conduct our foreign relations with any advantage to the country . . . if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its constitution and laws, to [do so]." *Id.* at 657. The U.S. treatymakers had concluded that the Spanish King acted within his authority, and the Court ruled against the plaintiff on that ground. *Id.* at 657–59; *see also* Munaf v. Geren, 553 U.S. 674, 702–03, 705 (2008) (dismissing habeas petitions of U.S. citizens held in Iraq based in part on the executive's assessment of prison conditions in Iraq); Pasquantino v. United States, 544 U.S. 349, 369 (2005) (refusing to second guess the executive's assessment of the likely foreign relations impact of a wire fraud prosecution involving Canada); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 327–31 (1994) (upholding a state tax scheme that had generated foreign and executive opposition "[g]iven . . . indicia of Congress' [sic] willingness to tolerate" the scheme, the political branches' relative preeminence in foreign affairs, and Congress's role as the nation's voice in foreign commerce); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764–70 (1972) (plurality opinion) (concluding that the judiciary need not apply the act of state doctrine if the executive so concludes); New York Times Co. v. United States, 403 U.S. 713, 756–57 (1971) (Harlan, J., dissenting) (concluding "that the scope of the judicial function in passing upon the activities of the Executive . . . in . . . foreign affairs is very narrowly restricted" and generally does not extend to reevaluating the executive's determination of "the probable impact of disclosure [of sensitive data] on the national security"); *cf.* Webster v. Doe, 486 U.S. 592, 605–06 (1988) (O'Connor, J., concurring in part and dissenting in part) (suggesting that the President's sole organ power supports authority to terminate untrustworthy intelligence agents without judicial review of claimed constitutional violations); *id.* at 614–15 (Scalia, J., dissenting) (same); *Sabbatino*, 376 U.S. at 432–33 (finding the act of state doctrine applicable to dictate the outcome of—but not preclude jurisdiction over—a claimed violation of international law because independent judicial resolution of the claim would interfere with the executive's ability to advocate a change in international law). *But cf.* Baker v. Carr, 369 U.S. 186, 282 (1962) (Frankfurter, J., dissenting) ("Where

Under either scenario, the motivation for the Court's refusal to independently adjudicate the question may lie in the one-voice doctrine. The Court has acknowledged that many "questions touching foreign relations . . . . uniquely demand single-voiced statement of the Government's views"[30] and has treated such questions as political. This practice dates to at least 1818,[31]

the [political] question arises in the course of a litigation involving primarily the adjudication of other issues between the litigants, the Court accepts as a basis for adjudication the political departments' decision of it. But where [the question's] determination is the sole function to be served by the exercise of the judicial power, the Court will not entertain the action.").

30. *Baker*, 369 U.S. at 211; *see also Waterman*, 333 U.S. at 104, 111–12, 114 (concluding that decisions made by the President on citizen applications for authorization "to engage in overseas and foreign air transportation" are political and therefore non-justiciable based in part on the President's status "as the Nation's organ for foreign affairs").

31. *See, e.g.*, *Baker*, 369 U.S. at 281 & n.11 (Frankfurter, J., dissenting) (listing these and other "cases concerning war or foreign affairs" that have been dismissed based on "the necessity of the country's speaking with one voice in such matters"); Clark v. Allen, 331 U.S. 503, 514 (1947) ("[T]he question whether a [foreign] state is in a position to perform its treaty obligations is essentially a political question."); *Ex parte* Peru, 318 U.S. 578, 588–89 (1943) (holding that courts are bound by immunity decisions of "the Department of State, the political arm of the Government charged with the conduct of our foreign affairs"); Charlton v. Kelly, 229 U.S. 447, 476 (1913) (recognizing a "plain [judicial] duty" to enforce a voidable extradition treaty after "[t]he executive department . . . elected to waive any right to" void the treaty); Terlinden v. Ames, 184 U.S. 270, 288 (1902) ("[T]he question whether power remains in a foreign State to carry out its treaty obligations is . . . political and not judicial, and . . . the courts ought not to interfere with the conclusions of the political department in that regard."); Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign . . . of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . ."); Kennett v. Chambers, 55 U.S. (14 How.) 38, 51 (1852) (explaining that the judiciary could not recognize a newly independent state "before she was recognized as such by the treaty-making power" as to do so would be to exercise a "political authority . . . which the Constitution has conferred exclusively upon another department"); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839) (reasoning "that when the executive branch of the government, which is charged with our foreign relations," declares that certain territory lies outside the sovereignty of a foreign power, that determination "is conclusive on the judicial department," whether or not the executive is right, as "[n]o well regulated government has ever sanctioned a principle so unwise, and so destructive of national character" as to allow the executive and judiciary to disagree on such important questions); The Divina Pastora, 17 U.S. (4 Wheat.) 52, 63–64 (1819) (citing *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), for the rule that U.S. courts must regard as lawful those acts permitted in war by feuding states when the United States has recognized the war but remained neutral); *Palmer*, 16 U.S. (3 Wheat.) at 634–35 (noting that "[t]hose questions which respect the rights of a part of a foreign empire . . . [that] is contending for its inde-

though the Court did not expressly use one-voice language in these political question cases until the mid-1900s.[32]

This does not mean "that every case or controversy which touches foreign relations lies beyond judicial cognizance."[33] As noted, just recently in *Zivotofsky* the Supreme Court concluded that a dispute between the President and Congress regarding the status of Jerusalem as the capital of Israel was justiciable notwithstanding Justice Breyer's one-voice argument to the contrary in dissent.[34] In light of *Zivotofsky*, the current trajectory is arguably toward a greater judicial role, and thus more voices, in resolving disputes touching on foreign affairs.[35]

In harmony with this trend in cases implicating the political question doctrine, the one-voice doctrine leads to lesser shades of deference in other cases. The *Zadvydas v. Davis*[36] case in the foreign relations area of immigration exemplifies this end of the deference spectrum. The *Zadvydas* Court implied a statutory limitation on the government's ability to detain aliens who had been ordered removed.[37] In so doing, the Court rejected the government's argument that "a federal habeas court would have to accept the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter."[38] Instead, the Court merely recognized the need to

pendence" are generally political and should be addressed not by the courts but by those "to whom are entrusted all [the nation's] foreign relations").

32. *See Baker*, 369 U.S. at 211 (noting that many issues touching on foreign affairs present political questions because they "uniquely demand single-voiced statement of the Government's views"); *id.* at 281 & n.11 (Frankfurter, J., dissenting) (noting "cases concerning war or foreign affairs" that have been dismissed based on "the necessity of the country's speaking with one voice in such matters"); *Waterman*, 333 U.S. at 104, 111–12, 114 (concluding that decisions made by the President on citizen applications for authorization "to engage in overseas and foreign air transportation" are political and therefore non-justiciable based in part on the President's status "as the Nation's organ for foreign affairs"); Hirota v. MacArthur, 338 U.S. 197, 208–09, 215 (1948) (Douglas, J., concurring) (concluding that the Supreme Court could not review decisions of the International Military Tribunal for the Far East because the decision to create the Tribunal was a political one within the President's ultimate authority as Commander in Chief and as "sole organ of the United States in the field of foreign relations").

33. *Baker*, 369 U.S. at 211.

34. Zivotofsky *ex rel.* Zivotosfsky v. Clinton, 132 S. Ct. 1421, 1426–27, 1430 (2012); *id.* at 1438 (Breyer, J., dissenting).

35. *See infra* text accompanying notes 280–84.

36. 533 U.S. 678 (2001).

37. *Id.* at 699.

38. *Id.*

conduct its review with sensitivity to, among other things, "the Nation's need to 'speak with one voice.'"[39] The one-voice doctrine thus extracted only relatively weak deference to the executive's immigration judgments.[40]

2. Dormant Preemption

Just as the one-voice doctrine has supported varying degrees of judicial deference to political branch authority, the doctrine has influenced how aggressively the judiciary polices and preempts state action bearing on foreign affairs in the absence of political branch action. Use of the doctrine for dormant preemption bears both on the division of authority between the federal government and the states (as noted above), and the role of the judiciary vis-à-vis the political branches.[41] The judiciary has principally engaged in dormant preemption informed by the one-voice doctrine under two federal powers: federal commerce authority and federal foreign affairs authority.

As cases from the 1800s and early 1900s reflect, the Court has long justified dormant preemption of state laws regulating foreign commerce on the need for national uniformity.[42] In 1979, the Court expressly adopted a one-voice standard that state taxes bearing on foreign commerce must satisfy to escape

39. *Id.* at 700.

40. *See id.*

41. What dormant preemption says about the role of the judiciary vis-à-vis the political branches may not be consistent. On one hand, dormant preemption might reflect not judicial usurpation of "federal prerogatives," but judicial preservation of those prerogatives "for exclusive exercise by the political branches." *See* Swaine, *supra* note 8, at 1246. On the other hand, at least when courts preempt notwithstanding evidence of political branch acceptance of state action, dormant preemption suggests an independent role for the courts in foreign affairs.

42. *See* Bd. of Trs. v. United States, 289 U.S. 48, 59 (1933) (noting that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power" and concluding that allowing states "to import commodities for their own use" without compliance with federal law "would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create"); Henderson v. Mayor of N.Y., 92 U.S. 259, 273 (1875) (reasoning that issues in foreign commerce that "may be, and ought to be, the subject of a uniform system or plan" do not permit of state regulation, even if there might be other aspects of foreign commerce that could be regulated by the states until addressed by treaty or statute); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319–21 (1851) (upholding a state pilotage law while explaining that Congress's commerce power is exclusive as to subjects that "are in their nature national, or admit only of one uniform system").

preemption.[43] Because "[f]oreign commerce is preeminently a matter of national concern" that requires "federal uniformity," the Court concluded that "a state tax on the instrumentalities of foreign commerce" must not "prevent[] the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'"[44] The Court has struck state taxes, and other burdens on foreign commerce, for violating this one-voice requirement.[45] At the same time, where Congress or the broader federal government has expressed comfort with multiple voices, the Court has allowed state taxes to stand. In *Barclays Bank PLC v. Franchise Tax Board of California*, for example, the Court upheld a state tax scheme under the one-voice standard, notwithstanding executive branch[46] and

43. *See* Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979).

44. *Id.* at 448–51 (quoting, with slight alteration, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)). "[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." Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983).

45. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 84, 92–93 & n.7 (1984) (striking a state regulation requiring partial processing of "timber taken from state lands" before export where Congress had not unmistakably indicated a desire to exempt the regulation from dormant preemption, reasoning that the need "for affirmative [congressional] approval [was] heightened by the fact that" the state provision impacted foreign relations, which calls for "a consistent and coherent federal policy"); *Japan Line*, 441 U.S. at 436, 453–54 (holding unconstitutional a California tax as applied to "foreign-owned instrumentalities (cargo containers) of international commerce" because the tax, among other things, contravened "a national policy to remove impediments to the use of containers" in international trade and thus "prevent[ed] the Federal Government from 'speaking with one voice'"); *see also Container Corp.*, 463 U.S. at 201–05 & n.4 (Powell, J., dissenting) (arguing that California's franchise tax methodology should be preempted under the one-voice standard in light of the threat and occurrence of foreign protest and the executive's position expressed in a related, pending case); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (rejecting a California statute requiring a bond for certain passengers identified by the California Commissioner of Immigration as intruding on, among other things, Congress's foreign commerce power which "belongs solely to the national government" lest states "embroil us in disastrous quarrels with other nations").

46. The executive's opposition to California's tax methodology was not constant. While the executive opposed California's scheme by introducing preemptive legislation, writing letters to California's governor and the Senate Finance Committee Chair, and submitting amicus briefs, the Solicitor General urged the Supreme Court to uphold the tax assessments at issue in *Barclays Bank*, notwithstanding foreign opposition, because "federal officials had not articulated a policy opposing" state use of California's approach "during the years [therein] at issue." *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328–30 & nn.30, 32 (1994); Swaine, *supra* note 8, at 1159.

foreign opposition, because Congress had tolerated the scheme.[47]

The one-voice doctrine has played a role in dormant preemption not only under the Foreign Commerce Clause, but under the federal government's more general foreign affairs power.[48] The Court endorsed dormant preemption of this variety (without expressly using one-voice language) in 1968 in *Zschernig v. Miller*.[49] In *Zschernig*, the Court concluded that an Oregon statute regulating inheritance rights of nonresident aliens[50] was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress" and struck the statute even though the executive was unconcerned by the statute's application to the petitioners and the statute addressed an area of traditional state regulation.[51] The law, the Court found, "illustrate[d] the dangers

47. *See Barclays Bank*, 512 U.S. at 302–03, 320, 324, 326–31 (upholding California's "worldwide combined reporting" method for assessing "the state corporate franchise tax" owed by two multinational enterprises); *see also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 75–76 (1993) (upholding a state tax because the federal government had indicated the tax did not disrupt the nation's capacity to project a uniform voice); Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 9–13 (1986) (upholding a state tax against a one-voice challenge because the federal government had adopted a policy permitting such taxation); *Container Corp.*, 463 U.S. at 193–97 (concluding that California's franchise tax methodology did not violate "the 'one voice' standard" where it did not seriously threaten foreign retaliation or U.S. foreign policy, and did not contravene an express federal directive); *cf.* Ray v. Atl. Richfield Co., 435 U.S. 151, 179 (1978) (upholding a Washington "tug-escort requirement for [certain] vessels" in Puget Sound because the rules for "entering a *particular* body of water" do not demand national uniformity (emphasis added)).

48. *See* Goldsmith, *supra* note 12, at 1637 (noting that the Foreign Commerce Clause's "one-voice test is functionally identical to dormant foreign relations preemption").

49. 389 U.S. 429 (1968). Prior to *Zschernig*, the Court had rejected as "far fetched" the notion that a similar state inheritance law would be deemed facially unconstitutional as a state intrusion on federal foreign affairs power where the state law addressed a matter of traditional state regulation and had only "incidental or indirect effect in foreign countries." *See* Clark v. Allen, 331 U.S. 503, 516–17 (1947).

50. The statute provided that a nonresident alien could inherit Oregon property to the same extent as a U.S. citizen only if the alien could prove that a U.S. citizen would have "a reciprocal right" to inherit under the laws of the alien's country of nationality, that the U.S. citizen would be able to receive the inherited property in the United States, and that the alien's government would not confiscate the inherited property. *Zschernig*, 389 U.S. at 430–31.

51. *Id.* at 430–35, 440; *see also id.* at 442–43 (Stewart, J., concurring) (describing foreign affairs as "a domain of exclusively federal competence," as "an area where the Constitution contemplates that only the National Government

which are involved if each State . . . is permitted to establish its own foreign policy."[52] While *Zschernig*'s dormant preemption has received play in the lower courts,[53] the Supreme Court has cast doubt on its current standing. In *American Insurance Ass'n v. Garamendi*,[54] the majority suggested that the approach endorsed by the two Justices who did not join the *Zschernig* majority might be proper under certain circumstances.[55] And the *Garamendi* dissent noted that the Court had "not relied on *Zschernig* since it was decided," and suggested that *Zschernig*'s "dormant foreign affairs preemption" is most appropriate "when a state action reflect[s] a state policy critical of foreign governments and involve[s] sitting in judgment on them."[56] In light of opinions like *Garamendi* and *Barclays Bank*, the trend in dormant preemption generally appears to be shifting away from judicial policing of state action affecting foreign affairs.[57] The Court thus seems to be moving toward greater involvement in foreign relations in the political question context, but away from such involvement through dormant preemption.

C. RELATIVE POWERS OF THE POLITICAL BRANCHES

In the relationship between the political branches, the one-voice doctrine has largely, though not exclusively, been used to expand presidential power. The Court's most famous invocation of one-voice principles in this context occurred in *United States*

shall operate," and as a project "entrusted under the Constitution to the National Government"); *cf. id.* at 441–42 (noting a willingness to go further than the Court and hold the statute unconstitutional on its face).

52. *Id.* at 441 (majority opinion).

53. *See, e.g.*, Goldsmith, *supra* note 12, at 1638–39 & n.97.

54. 539 U.S. 396 (2003). *Garamendi* concerned the constitutionality of a California statute that required insurance companies doing business in the state to disclose information about European insurance policies that were in effect before and after World War II to facilitate recovery on policies by Holocaust victims. *Id.* at 401, 409–10, 412. The law was successfully challenged as inconsistent with the policy reflected in executive agreements President Clinton entered into to address the problem of Holocaust victim insurance policies that were not properly paid. *See id.* at 401, 405–08, 413.

55. *See id.* at 417–20. That is, the Court suggested that field preemption—the *Zschernig* majority's approach—might be appropriate "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," whereas conflict preemption—the *Zschernig* minority's approach—would govern where the state had acted in an area of traditional state competence. *See id.* at 419 n.11.

56. *Id.* at 439 (Ginsburg, J., dissenting) (alteration in original) (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996)) (internal quotation marks omitted).

57. *See infra* note 301.

v. Curtiss-Wright Export Corp., a case in which Congress had authorized the President to criminalize certain arms sales to the South American states involved in the Chaco War.[58] Citing John Marshall's fabled speech while he was a member of the House of Representatives,[59] the Court in *Curtiss-Wright* designated the President as "the sole organ of the federal government in the field of international relations."[60] Descriptions of the President as the "sole organ" or "nation's organ" in foreign affairs slightly alter the one-voice metaphor but substantively form part of the one-voice doctrine.[61] *Curtiss-Wright* thus energized the doctrine in a powerful way.

Curtiss-Wright has been discredited in many ways, including for its reliance on Marshall's speech.[62] Nonetheless, its sole organ dictum has defied demise.[63] Unsurprisingly, the executive has claimed the sole organ mantle with vigor.[64] In opinion after opinion, the U.S. Office of Legal Counsel, Attorney General, and State Department have justified executive authority

58. 299 U.S. 304, 311–15 (1936).

59. *See* 10 ANNALS OF CONG. 613 (1800); *see also* 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 458–75 (describing Marshall's speech and the Thomas Nash extradition controversy to which it was addressed); Louis Fisher, The Law: *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 140–42 (2007) (same).

60. *Curtiss-Wright*, 299 U.S. at 319–20.

61. *See, e.g.*, United States. v. Belmont, 301 U.S. 324, 330 (1937) (finding that "the Executive had authority to speak as the sole organ of [the federal] government" when recognizing and settling U.S. nationals' claims against the Soviet government); *Curtiss-Wright*, 299 U.S. at 319 (quoting Marshall's sole organ language in support of the proposition that "the President alone has the power to speak or listen as a representative of the nation"); Cleveland, *supra* note 1, at 981 ("That the United States should speak with one voice through the President . . . was the animating principle . . . behind the Court's landmark . . . decision in *Curtiss-Wright*.").

62. *See, e.g.*, HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION 94–95 & nn.121–23, 127 (1990) (describing and citing criticism of *Curtiss-Wright*); Fisher, *supra* note 59, at 140–43 (explaining that, consistent with his later opinions on the Supreme Court, Marshall was not advocating "an independent, [exclusive,] inherent presidential power over external affairs," but that the President could "act as the channel for communicating with other nations" and implement an extradition treaty, absent congressional imposition of a different procedure, under his constitutional duty to execute the law).

63. As Anthony Simones put it, "for every scholar who hates *Curtiss-Wright*, there seems to exist a judge who loves it." Anthony Simones, *The Reality of* Curtiss-Wright, 16 N. ILL. U. L. REV. 411, 415 (1996).

64. This is not to suggest that the executive always prefers to go it alone. *See, e.g.*, *infra* note 245 and accompanying text. In negotiating international agreements, for example, the executive's negotiating strength may improve on the existence of another voice. *See infra* text accompanying notes 367–72.

on one-voice grounds.[65] Likewise, the executive has repeatedly invoked its power as the nation's organ in litigation on a wide range of issues.[66] As Harold Koh put it, "[a]mong government

65. *See, e.g.*, Legal Authorities Supporting the Activities of the National Security Agency Described by the President, 32 Op. O.L.C. 1, 1 (2006), *available at* http://www.justice.gov/olc/2006/nsa-white-paper.pdf (recognizing the presidential power "to conduct[, through the National Security Agency,] warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States"); Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 150–51 (2002), *available at* http://www.justice.gov/olc/2002/milit-force-iraq.pdf (advising that the President has the power to "take military action [against terrorist organizations and the countries that support them] to protect the national security interests of the United States"); Whistleblower Protections for Classified Disclosures, 22 Op. O.L.C. 92, 95 (1998) (recognizing the presidential power to keep national security data from Congress); Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 21–22, 28 (1996), *available at* http://www.justice.gov/olc/gray.11.htm (recognizing the presidential power to control communications with other countries and to decide U.S. policy concerning the "Arab League passport policy"); Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163, 168 (1989) (recognizing the presidential authority to violate customary international law); Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 Op. O.L.C. 238, 238 (1988) (recognizing the presidential power to "extend the [U.S.] territorial sea from three to twelve miles"); International Load Line Convention, 40 Op. Att'y Gen. 119, 123 (1941) (recognizing the presidential authority to declare a treaty inoperative); LOUIS FISHER, STUDY NO. 1: THE "SOLE ORGAN" DOCTRINE 1–2 (2006), *available at* http://loufisher.org/docs/pip/441.pdf (citing additional examples from the Office of Legal Counsel as well as examples from the State Department); Letter from Edward H. Levi, U.S. Attorney Gen., to Nelson A. Rockefeller, U.S. Vice President (June 13, 1975), *in* REPORT OF THE COMMISSION ON THE ORGANIZATION OF THE GOVERNMENT FOR THE CONDUCT OF FOREIGN POLICY 240, 249 (1975) (criticizing proposed legislation that would require the executive to transmit executive agreements to Congress for either House to veto within a certain period as potentially impairing the President's sole organ powers).

66. *See, e.g.*, Brief for the Respondents in Opposition at 19–21, Kiyemba v. Obama, 559 U.S. 1005 (2010) (No. 09-581), 2010 WL 638462, at *19–21 (arguing, on one-voice grounds, against judicial interference with executive management of detainee transfers from Guantánamo); Brief for Petitioners at 26, Dep't of Transp. v. Pub. Citizen, 541 U.S. 752 (2004) (No. 03-358), 2004 WL 250237, at *26 ("[S]ubjecting the President's conduct of international diplomacy to the procedural requirements of [the National Environmental Policy Act] would impair the President's ability to 'speak for the Nation with one voice' . . . ." (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000))); Brief for the United States as Amicus Curiae Supporting Petitioners, Am. Ins. Ass'n v. Garamendi at *10–21, 539 U.S. 396 (2003) (No. 02-722), 2003 WL 721754, at 10–21 (arguing for preemption of a state law that interfered with the President's ability to speak with a single voice); Brief for the United States as Amicus Curiae in Support of Petitioner, Clinton v. Jones, 510 U.S. 681 (1997) (No. 95-1853), 1996 WL 448091, at *8–9 (citing, among other things,

attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right' cite."[67] The Supreme Court has endorsed this line of argument in various cases,[68] strengthening

the President's role as sole organ in foreign affairs in arguing for a stay of civil litigation against the President based on pre-office conduct); Reply Brief for the Petitioners, McNary v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (No. 92-344), 1993 WL 290141, at *2–4 (arguing against judicial review of a presidential "policy of interdiction and repatriation of Haitian migrants on the high seas" in part on the grounds that judicial review would interfere "with the President's ability to speak with one voice" and would "seriously prejudice the national interest"); Brief for the United States at 13–17, New York Times Co. v. United States, 403 U.S. 713 (1971) (Nos. 1873, 1885) (citing the President's sole organ status in asserting that the executive has the power "to protect the nation against publication of [national security] information"); Brief for the United States at 31–57, United States v. Guy W. Capps, Inc., 348 U.S. 296 (1955) (No. 14) (relying on the President's sole organ power in asserting presidential authority to enter a commercial executive agreement). In addition to the executive, other entities have made one-voice arguments in the President's favor. *See, e.g.*, Brief of Amici Curiae American Center for Law and Justice & European Centre for Law and Justice Supporting Respondents at 11–12, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184), 2006 WL 467691, at *11–12 (citing the President's status as sole organ in arguing for judicial deference to the President's interpretation of the Geneva Conventions); Brief of Citizens for the Common Defence as Amicus Curiae in Support of Respondents at 5–6, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 683613, at *5–6 (citing the President's sole organ role to support presidential "authority to detain a [U.S.] citizen as an enemy combatant").

The executive has also made the one-voice claim to Congress. *See, e.g.*, Message to the Senate Returning Without Approval the Bill Prohibiting the Export of Technology for the Joint Japan-United States Development of FS-X Aircraft, 2 PUB. PAPERS 1042, 1043 (July 31, 1989) (asserting that the United States must speak with one voice in foreign negotiations and claiming that "[t]he Constitution provides that that one voice is the President's"); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, 2 PUB. PAPERS 1541, 1541–42 (Dec. 22, 1987) (objecting to certain portions of the Foreign Relations Authorization Act as potentially obstructing the President's sole organ responsibilities); Warren Christopher, U.S. Deputy Sec'y of State, Role of the President's National Security Affairs Assistant, Statement Before the Senate Foreign Relations Committee (Apr. 17, 1980), *in* 80 DEP'T ST. BULL., July 1980, at 32, 32–34 (1980) (recognizing a congressional role in foreign affairs, but opposing, in part on sole organ grounds, a proposal to subject certain national security appointments to Senate advice and consent).

67. KOH, *supra* note 62, at 94 (some internal quotation marks omitted).

68. *See, e.g.*, Pasquantino v. United States, 544 U.S. 349, 369 (2005) (using *Curtiss-Wright*'s sole organ language in the course of deferring to the executive's assessment of the foreign relations impact of a wire fraud prosecution involving Canada (quoting United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936))); Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396, 424 (2003) (recognizing the President's lead role in foreign affairs and striking down a state law that prevented the President from "speak[ing] for the Nation with

one voice" (quoting *Crosby*, 530 U.S. at 381)); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) ("Th[e] presumption [against extraterritoriality] has special force when . . . construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility."); Ludecke v. Watkins, 335 U.S. 160, 173 (1948) (describing the President as "the guiding organ in the conduct of our foreign affairs" in upholding the President's power to remove enemy aliens under the Alien Enemy Act); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) (recognizing that the President has independent constitutional powers "as the Nation's organ in foreign affairs"); United States v. Pink, 315 U.S. 203, 221–23, 226–34 (1942) (upholding an executive agreement in the face of contrary state law and policy based in part on "a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations'" to settle the claims of U.S. nationals in the course of recognizing a foreign government (quoting *Curtiss-Wright*, 299 U.S. at 320)); United States v. Belmont, 301 U.S. 324, 327, 330–32 (1937) (concluding that an executive agreement trumped inconsistent state policy where "the Executive had authority to speak as the sole organ of [the federal] government" when entering into the agreement); *see also* Haig v. Agee, 453 U.S. 280, 289 n.17, 306 (1981) (concluding that the executive's revocation of a passport was authorized by statute so that it was unnecessary to decide the scope of the President's sole organ power); United States v. Nixon, 418 U.S. 683, 710, 715 (1974) (emphasizing the strength of executive privilege claims as to intelligence information that comes to the President because of his role "as Commander-in-Chief and as the Nation's organ for foreign affairs" (quoting *Waterman*, 333 U.S. at 111)); David Gray Adler, *Court, Constitution, and Foreign Affairs*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 25–27 (David Gray Adler & Larry N. George eds., 1996) ("Even when the sole-organ doctrine has not been invoked by name, its spirit, indeed its talismanic aura, has provided a common thread in a pattern of cases that has exalted presidential power above constitutional norms.").

Numerous non-majority Supreme Court opinions have also endorsed this line of argument. *See, e.g.*, *Hamdi*, 542 U.S. at 580–81 (Thomas, J., dissenting) (quoting Marshall's sole organ language to support the President's preeminence in foreign affairs); *Garamendi*, 539 U.S. at 430, 442 (Ginsburg, J., dissenting) (referring to the President as "the 'one voice' to which courts properly defer in matters of foreign affairs," but concluding that the state law in question "would not compromise the President's ability to speak with one voice for the Nation"); Webster v. Doe, 486 U.S. 592, 605–06 (1988) (O'Connor, J., concurring in part and dissenting in part) (concluding that Congress could prohibit federal judicial review of CIA decisions to terminate untrustworthy employees since the power to make those decisions derives primarily from, and judicial review would infringe upon, the President's power as sole organ); *id.* at 614–15 (Scalia, J., dissenting) (noting serious constitutional doubts that Congress could—in light of, among other things, the President's sole organ power—authorize judicial review of all terminations of CIA intelligence employees); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 551–52 & n.6 (1977) (Rehnquist, J., dissenting) (quoting *Curtiss-Wright*'s sole organ language in the course of highlighting the vast scope of the President's responsibilities and the President's corresponding need for confidentiality of advice and instructions); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766–68 (1972) (plurality opinion) (citing *Curtiss-Wright*'s sole organ language in support of executive primacy in foreign affairs); *New York Times Co.*, 403 U.S. at 727 (Stewart, J., concurring) (citing *Curtiss-Wright*, among other cases, in not-

the President's claim to exclusive authority to recognize foreign governments as well as presidential unilateralism in treaty- and war-making.[69] Members of Congress have, at times, voiced support for the President's sole organ status as well.[70]

Interestingly, while *Curtiss-Wright* is the modern engine behind the President's role as the nation's voice in foreign affairs, *Curtiss-Wright* was not merely the resurrection (or, more accurately, the distorted reincarnation) of a historic speech. The concept of the President as the nation's organ in foreign af-

ing the executive's enormous international relations power that is "largely unchecked by" Congress and the courts); *id.* at 741 (Marshall, J., concurring) (citing *Curtiss-Wright*, among other cases, in support of the proposition "that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs"); *id.* at 756 (Harlan, J., dissenting) (citing Marshall's sole organ speech and *Curtiss-Wright* in concluding "that the scope of the judicial function in passing upon the activities of the Executive . . . [in] foreign affairs is very narrowly restricted"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 679 (1952) (Vinson, J., dissenting) (recognizing that the President possesses confidential information "as 'the Nation's organ for foreign affairs'" (quoting *Waterman*, 333 U.S. at 111)); Hirota v. MacArthur, 338 U.S. 197, 208 (1949) (Douglas, J., concurring) (citing *Curtiss-Wright* in endorsing the view that "[t]he President is the sole organ of the United States in the field of foreign relations").

69. *See* Jean Galbraith, *International Law and the Domestic Separation of Powers*, 99 VA. L. REV. 987, 1012–21, 1028–33 & n.113 (2013).

70. For example, in 1906, Senator Spooner defended the President's power as "the sole organ of negotiation and of communication between this country and foreign governments." 40 CONG REC. 2142–43 (1906) (statement of Sen. Spooner). Senator Spooner's words were endorsed by other Senators in the years that preceded *Curtiss-Wright*. *See, e.g.*, 60 CONG. REC. 2171 (1921) (statement of Sen. Connally); 58 CONG. REC. 8011 (1919) (statement of Sen. Robinson); 58 CONG. REC. 7339–40 (1919) (statement of Sen. Connally). Congressional support for the President's role as sole organ also appears after *Curtiss-Wright*. *See, e.g.*, 130 CONG. REC. 9528–30 (1984) (statement of Rep. Gingrich) (citing the President's sole organ status in arguing against congressional interference with the day-to-day conduct of foreign affairs); 118 CONG. REC. 11,839 (1972) (statement of Sen. McGee) (arguing that "more and more of us should drop out of the business of trying to play Secretary of State or President of the United States" as the Constitution places on the President the "awesome responsibility" of being the nation's unified "voice in foreign affairs"); 107 CONG. REC. 1653 (1961) (statement of Sen. Kefauver) (asserting that the Constitution wisely establishes the President as the nation's voice in foreign affairs); 103 CONG. REC. 1157 (1957) (statement of Rep. Udall) (citing Marshall's sole organ speech in resisting congressional limits on the President's power to carry out U.S. foreign policy, including by military force). *But see, e.g.*, 116 CONG. REC. 14,097 (1970) (statement of Sen. Harris) (noting a longstanding dispute regarding the scope of the President's sole organ power and asserting Congress's constitutional role in war making); 87 CONG. REC. 1719–20 (1941) (statement of Sen. Wiley) (asserting a constitutional foreign policy role for Congress notwithstanding *Curtiss-Wright*'s "sole organ" language).

fairs experienced some limited play in the judiciary before *Curtiss-Wright*. For example, in a dissenting opinion in 1852, Justice Nelson relied on Marshall's speech in concluding that an extradition "demand must be made . . . . upon the President, who has charge of all [our] foreign relations, and with whom only foreign governments are authorized, or even permitted, to hold any communication of a national concern."[71]

Occasional reliance on the one-voice doctrine also appeared outside the judiciary. Members of Congress endorsed the President's role as sole organ before *Curtiss-Wright*.[72] The executive likewise asserted the President's unique role in foreign affairs. In 1793, Thomas Jefferson, as Secretary of State, wrote the notorious French ambassador, Citizen Genet, to explain that consular commissions should be addressed to the President.[73] As Jefferson explained, "the President[,] . . . being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation" even if the President exceeded his authority or another branch of the federal government disagrees.[74] This same reasoning surfaced in April

71. *In re* Kaine, 55 U.S. (14 How.) 103, 137 (1852); *see also* Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839) (declaring that "the executive branch of the government . . . is charged with our foreign relations," including determining the U.S. position regarding sovereignty over foreign territory); Brief on the Questions of Law, and Argument on the Facts for the Appellant at 37, La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899) (No. 29) (quoting Marshall's sole organ speech in arguing that the President, not the courts, must decide how to execute an award issued by the United States-Mexico Claims Commission pursuant to a United States-Mexico treaty).

72. *See supra* note 70.

73. Letter from Thomas Jefferson, Sec'y of State, to Citizen Genet, Minister Plenipotentiary from the Republic of Fr., to the U.S. (Nov. 22, 1793), *in* MESSAGE OF THE PRESIDENT OF THE UNITED STATES TO CONGRESS RELATIVE TO FRANCE AND GREAT-BRITAIN 93–94 (1793) [hereinafter Letter from Thomas Jefferson]; *see also* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 321–23 (2001) [hereinafter Prakash & Ramsey, *Executive Power*] (discussing the interaction with Genet in greater detail).

74. Letter from Thomas Jefferson, *supra* note 73; *see also* Alexander Hamilton, Pacificus No. I (June 29, 1793), *in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 37–38 (Harold C. Syrett & Jacob E. Cooke eds., 1969) (asserting, in defending Washington's Neutrality Proclamation, that the executive, not the legislature, is "the *organ* of intercourse between the UStates [sic] and foreign Nations"); Galbraith, *supra* note 69, at 1015 (noting that President

1861, when Jefferson Davis convened the Confederate Congress in response to a de facto declaration of war by President Lincoln in order "to devise the measures necessary for the defence of the country."[75] In addressing the Congress, Davis explained that he "was not at liberty to disregard" President Lincoln's declaration of war against the Confederacy, notwithstanding the fact "that under the Constitution of the United States the President was usurping a power granted exclusively to the congress," because the President "is the sole organ of communication between [the United States] and foreign powers" and international law did not permit "question[ing] the authority of the Executive of a foreign nation to declare war."[76] At least from an external perspective, then, the President possessed power as the nation's organ that went beyond merely relaying policy to making and executing it.

Treatise writers, contemporary to Davis, likewise described the President as the sole organ for foreign affairs. John Norton Pomeroy, for example, divided the foreign affairs power "into two distinct branches: the power of intercourse, intercommunication, and negotiation . . . and the power of entering into . . . international compacts."[77] As to the first power, "[t]he President is the sole organ of communication between our own and all other governments. . . . [and] Congress has absolutely no control."[78] While this power to communicate was not, in Pomeroy's view, as important as the power to make treaties,[79] it was far from ministerial. As sole organ, "the President [could], without any possibility of hindrance from the legislature, so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war," so that as a result of this power

Grant "vetoed two trivial joint resolutions by Congress—resolutions that simply responded to congratulations sent by foreign nations—on the ground that . . . the President [is] the agent to represent the national sovereignty in its intercourse with foreign powers").

75. Message of Jefferson Davis (Apr. 29, 1861), *in* 1 THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS 166, 167 (Frank Moore ed., 1861).

76. *Id.* at 172.

77. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 446 (1868).

78. *Id.* at 446–47; *see also* JOEL PARKER, THE DOMESTIC AND FOREIGN RELATIONS OF THE UNITED STATES 36 & n.* (1862) (explaining that "the intercourse of foreign nations with the United States is through the Executive, and they are not authorized to go behind his acts, and to allege that they are nugatory," and citing Davis as someone who understood this); POMEROY, *supra* note 77, at 446–48 (describing the President's "untrammeled" power as sole organ).

79. POMEROY, *supra* note 77, at 446–48.

"the Executive Department . . . holds in its keeping the safety, welfare, and even permanence of our internal and domestic institutions."[80]

III. SCOPE OF THE ONE-VOICE DOCTRINE

The foregoing Part illustrates both the historical roots of the one-voice doctrine and the contexts in which it appears. But what does it mean to say that an organ of the government is the nation's voice? From its name, one might mistakenly assume that the one-voice doctrine merely supports authority to communicate for the United States in international affairs.[81] Language from Supreme Court precedent nurtures that mistake. *Curtiss-Wright* spoke of "the President alone [having] the power to *speak or listen* as a representative of the nation."[82] Similarly, *Baker v. Carr* cited the need in certain circumstances for a "single-voiced *statement* of the Government's views."[83] Of course, even if the one-voice doctrine only supported a power to speak, that power might well involve a measure of policy-making discretion. As historical commentators saw it, the power to speak included the power to take positions that could lead the nation to war.[84] Consistent with this understanding, the doctrine has been understood and used in its different dimensions to support more than mere authority to present the United States's position.

80. *Id.* at 447–48; *see also* CLARENCE ARTHUR BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 25–42 (1921) (citing Pomeroy, Marshall, and historical evidence in support of the principle that the President's sole organ power relating to war "gives the President the whole power of initiating and formulating the foreign policy of the government, and virtually of committing the nation to its execution").

81. *Cf.* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1984, at 207–15, 255 (5th rev. ed. 1984) (discussing the question whether the President's role as sole organ of the United States in foreign affairs extends only to communicating for the United States or to making policy as well); Prakash & Ramsey, *Executive Power*, *supra* note 73, at 243 (noting that "many scholars argue that the President is only a spokesperson" with few, enumerated foreign affairs powers).

82. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (emphasis added); *see also* Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (emphasizing the listening function by noting that "[i]t is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States").

83. Baker v. Carr, 369 U.S. 186, 211 (1962) (emphasis added).

84. *See supra* text accompanying note 80.

Three cases illustrate. In addition to referencing the President's authority to speak and listen for the United States, *Curtiss-Wright* noted that the President "alone negotiates" with other countries[85] and "manages our concerns with foreign nations."[86] *Curtiss-Wright* further suggested that the President designs how we will interact with other countries[87]—that is, makes foreign policy—and perhaps dispositively assesses how certain acts will impact our foreign relations.[88]

Zschernig likewise perceived the one-voice doctrine as involving more than oratory. In *Zschernig*, the Court rejected an Oregon statute governing nonresident alien inheritance rights because the statute, though addressing a matter of traditional state regulation,[89] led to state court assessment and criticism of foreign governments;[90] produced "more than 'some incidental or indirect effect in foreign countries,'" creating "great potential for disruption or embarrassment";[91] and generated decisions grounded in foreign policies (especially Cold War opposition to

85. *Curtiss-Wright*, 299 U.S. at 319.

86. *Id.* (quoting 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 24 (1901)).

87. *See id.* (noting, in discussing the President's preeminence in foreign affairs, the need for "unity of design" in relations with other nations (quoting 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 24 (1901))).

88. *See id.* at 321 (noting that how or whether the President acts in foreign affairs may depend "upon the effect which his action may have upon our foreign relations," something Congress may not be able to anticipate); *see also* Pasquantino v. United States, 544 U.S. 349, 369 (2005) (suggesting that the President's role as sole organ includes determining potential foreign relations consequences); Adler, *supra* note 68, at 26 ("[*Curtiss-Wright*] infused a purely communicative role with a substantive policymaking function and thereby manufactured a great power out of the Marshallian sole-organ doctrine.").

89. Zschernig v. Miller, 389 U.S. 429, 440 (1968).

90. *Id.* at 433–37 & nn.6–7, 440; *see also id.* at 442 (Stewart, J., concurring) (concluding that the provisions of the state law "necessarily involve the Oregon courts in an evaluation . . . of the administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments").

91. *Id.* at 433–35 (majority opinion) (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)); *see also id.* at 440–41. *But cf. id.* at 459 (Harlan, J., concurring in the result) (concluding that, if Oregon could "deny inheritance rights to all nonresident aliens," the Oregon statute seemed "wisely designed to avoid any offense to foreign governments . . . : a foreign government [could] hardly object to the denial of rights which it does not itself accord to the citizens of other countries").

authoritarian states) and conditions.[92] The statute, in the Court's words, "illustrate[d] the dangers which are involved if each State . . . is permitted to establish its own foreign policy."[93] *Zschernig* thus indicated that the federal government's position as the nation's voice meant that it had exclusive authority to formulate policy,[94] criticize other states, and affect foreign relations in any significant way. States were precluded from adopting foreign policy even if that policy did not, as in *Zschernig*, cause concern to the executive or conflict with a federal treaty.[95]

Finally, in *Japan Line, Ltd. v. County of Los Angeles* the Court noted that states might improperly "prevent[] the Federal Government from 'speaking with one voice'" by provoking international disputes, triggering retaliation against the entire country, and creating a patchwork of divergent regulations.[96] Status as the nation's one voice entailed "the *achievement* of federal uniformity."[97] Other opinions similarly indicate that the

92. *See id.* at 435–39 & n.8 (majority opinion); *see also id.* at 442 (Stewart, J., concurring) (noting that Oregon's law was "framed . . . to the prejudice of nations whose policies it disapproves").

93. *Id.* at 441 (majority opinion).

94. Similarly, the Court in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.* concluded that the President had power to make unreviewable, *substantive decisions* concerning citizen applications "to engage in overseas or foreign air transportation," in part given the President's status "as the Nation's organ in foreign affairs." 333 U.S. 103, 109–12, 114 (1948); *see also* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766–67 (1972) (plurality opinion) (citing sole organ language and cases "emphasiz[ing] the lead role of the Executive in foreign policy").

95. *See Zschernig*, 389 U.S. at 434 (noting the executive's position that application of the Oregon statute to the plaintiffs in *Zschernig* did not "unduly interfere[] with the United States' conduct of foreign relations" (quoting Brief for the United States as Amicus Curiae, *Zschernig*, 389 U.S. 429 (No. 21), 1967 WL 113577, at *6 n.5)); *id.* at 441 ("[E]ven in absence of a treaty, a State's policy may disturb foreign relations."); *id.* at 460 (Harlan, J., concurring) (further describing the executive's position).

96. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 450–51, 453 (1979) (quoting, with slight alteration, Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)). *But cf., e.g.*, Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 327 (1994) (refusing to strike California's approach to taxation "[g]iven [certain] indicia of Congress' [sic] willingness to tolerate" the approach).

97. *Japan Line*, 441 U.S. at 450 (emphasis added); *see also id.* at 449–52 & n.14 (speaking of the need for uniformity "in *regulating* foreign commerce" (emphasis added)); *id.* at 453 (noting that a state statute was constitutionally infirm because it would "frustrate attainment of federal uniformity"); *cf.* Wardair Can. Inc. v. Fla. Dep't. of Revenue, 477 U.S. 1, 20 (1986) (Blackmun, J., dissenting) (condemning state interference with the federal government's ability to speak with one voice and the resulting interference with the achievement of federal tax policy).

need for one voice in foreign affairs justifies authority to make foreign policy.[98] Thus, the one-voice doctrine bears on important questions regarding authority to make and pursue foreign policy, not simply power to speak or even to negotiate.

Because the doctrine reaches and influences the resolution of these important questions concerning control of U.S. foreign affairs, the doctrine's soundness is of critical concern. As evidenced above, the doctrine has some historical support.[99] As noted below, the doctrine comports to some degree with the Constitution's text, structure, and history, especially in its federalist dimension; under certain conditions, the doctrine also makes functional sense.[100] Notwithstanding these virtues, the doctrine is fatally flawed.

The next five Parts identify features of the one-voice doctrine that ultimately render the doctrine untenable. The reasons that some features are problematic will be obvious; the defectiveness of other features will be less so. The primary objective of these Parts is to expose the critical features of the doctrine, not to convince that they are failings. Part IX takes up

98. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2506–07 (2012) (reasoning that the federal government may decide "whether it is appropriate to allow a foreign national to continue living in the United States," as "[d]ecisions of this nature touch on foreign relations and must be made with one voice"); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–14 (2003) (stating that in light of the need for uniformity in dealing with other countries that motivated the Constitution's allocation of foreign affairs authority, state action bearing on foreign affairs "must yield to the National Government's policy" and there is no "question generally that there is executive authority to decide what that policy should be"); *Barclays Bank*, 512 U.S. at 311 (speaking of the need for federal uniformity in regulating foreign commerce); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76 (1993) (concluding that a Tennessee sales tax did "not infringe the Government's ability to speak with one voice when regulating commercial relations with other nations"); Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983) (discussing when "a state tax at variance with federal policy will violate the 'one voice' standard"); *id.* at 205 (Powell, J., dissenting) ("[A state] tax that is flatly inconsistent with federal policy. . . . prevents the Federal Government from speaking with one voice in a field that should be left to the Federal Government."); Ray v. Atl. Richfield Co., 435 U.S. 151, 187–89 (1978) (Stevens, J., concurring in part and dissenting in part) (citing "[t]he federal interest in uniform regulation of commerce on the high seas" to justify state law preemption).

Justices O'Connor and Scalia went so far as to suggest that the President's sole organ power supports authority to terminate untrustworthy intelligence agents without judicial review of alleged constitutional violations. *See* Webster v. Doe, 486 U.S. 592, 605–06 (1988) (O'Connor, J., concurring in part and dissenting in part); *id.* at 614–15 (Scalia, J., dissenting).

99. *See supra* Part II.

100. *See infra* text accompanying notes 324–25, 361–64.

the task of demonstrating why these features are flaws and ultimately support abandonment of the one-voice doctrine.

IV. THE ONE-VOICE DOCTRINE'S MULTIPLE DIMENSIONS

As the history of the one-voice doctrine suggests, the doctrine is invoked along multiple dimensions. On the one hand, the one-voice doctrine uniformly addresses structural questions concerning the distribution of foreign affairs authority. On the other hand, the issues the doctrine is used to resolve are several. Thus, notwithstanding its name, the one-voice doctrine has multiple faces. Cleveland observed that the one-voice doctrine "has emerged from two related lines of doctrine: the principle that states are excluded from international relations, and the assumption that the President speaks as a soloist for the United States."[101] This observation merits two addendums. First, the one-voice doctrine has not escaped its provenance; it continues to address varying structural questions. Second, the doctrine has more than two dimensions.[102] The doctrine has three fairly discrete dimensions as well as hybrids. Of its discrete dimensions, one sounds in federalism and two in separation of powers.

A. FEDERALIST DIMENSION

In its federalist, or vertical, dimension, the one-voice doctrine serves to police state involvement in foreign relations on the ground that the federal government alone may speak in foreign affairs. The doctrine has been most prominent along this dimension. "[A] long line of [Supreme Court] decisions . . . has applied the 'one-voice' doctrine to address the validity of state activities impinging on foreign relations."[103] As noted in the history provided above, these cases involve the Foreign Commerce Clause, Import-Export Clause, the federal foreign affairs power, federal statutes, executive agreements, and executive policies.[104] In all these areas, the preeminence or exclusivity of federal powers touching on foreign affairs result in the preemption of state law.

101. Cleveland, *supra* note 1, at 982.

102. *Cf.* Bradley, *supra* note 5, at 448–49 (describing a political question argument as "[a] variation of [the related] one-voice argument").

103. Cleveland, *supra* note 1, at 975; *see also id.* at 979.

104. *See supra* Part II.A.

B. SEPARATION OF POWERS DIMENSIONS

In its horizontal—or federal separation of powers—posture, the one-voice doctrine applies to two questions: the foreign affairs role of courts vis-à-vis the political branches,[105] and the allocation of foreign affairs power between the President and Congress.[106] As noted above, with regard to the courts' role in foreign affairs, the Supreme Court has reasoned that some foreign affairs issues present political questions, in part because they "uniquely demand single-voiced statement of the Government's views."[107] Indeed, Justice Frankfurter noted that the Court's political question decisions in the area of war and foreign affairs "are usually explained by the necessity of the country's speaking with one voice in such matters."[108] In applying the political question doctrine, the Court judges that the political branches are the nation's one voice or at least that the judiciary is not.[109]

105. *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1256 n.139 (1999) [hereinafter Spiro, *Federalism*] ("[D]ecisions involving judicial demurral (including the political question cases) can all be justified on a variation of the 'one-voice' rule."); Steinhardt, *Orthodoxy*, *supra* note 5, at 28 (noting the one-voice metaphor's relevance to the separation of foreign affairs powers between the judiciary and political branches).

106. The question whether the President or Congress is authorized to engage in certain foreign affairs acts involves something of a false dichotomy since the President participates with Congress in lawmaking. *See* U.S. CONST. art. I, § 7, cls. 2–3 (describing bicameralism and presentment). At the same time, the Constitution casts Congress as the primary lawmaker, as illustrated by the fact that Congress may enact law on its own through a bicameral, supermajority override of a presidential veto. *See id.* art. I, § 1 (vesting Congress with the legislative power delegated to the federal government); *id.* art. I, § 7, cl. 2 (detailing Congress's authority to override a veto).

107. Baker v. Carr, 369 U.S. 186, 211 (1962); *see also* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1438 (2012) (Breyer, J., dissenting) (finding the political question doctrine applicable and reasoning that "where foreign affairs is at issue, the practical need for the United States to speak 'with one voice and ac[t] as one,' is particularly important" (alteration in original) (quoting United States v. Pink, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring))); Bradley, *supra* note 5, at 448–49 (describing a political question argument as "[a] variation of [the related] one-voice argument").

108. *Baker*, 369 U.S. at 281 (Frankfurter, J., dissenting). That does not mean that all such decisions rest on the one-voice doctrine. *See id.* "[C]ertain of the Court's [political question] decisions have accorded scant weight to the consideration of unity of action in the conduct of external relations," *id.* at 281 n.11, focusing instead on the fact that certain issues have historically been decided by the political branches on political criteria thus depriving the judiciary of standards by which to decide the matter, *id.* at 281–83.

109. Of course, as *Goldwater v. Carter*, 444 U.S. 996 (1979), hints, the political branches may be divided, such that dismissal on political question grounds prevents the addition of a judicial voice but does not produce a single

Justice Rehnquist's opinion in *Goldwater v. Carter*[110] illustrates. Several members of Congress challenged President Carter's termination of a mutual defense treaty with Taiwan.[111] Justice Rehnquist concluded that where the Constitution was silent regarding the power to terminate a treaty, and the answer might depend on the nature of the treaty, the issue ought to be left to the political branches, "each of which has resources available to protect and assert its interests."[112] That conclusion, he thought, was bolstered by the fact that the question sounded in foreign relations, where the political question doctrine is particularly appropriate.[113]

The second horizontal dimension of the one-voice doctrine concerns the distribution of authority between the President and Congress. As mentioned, *Curtiss-Wright* provides the paradigmatic example here.[114] Although the case concerned the constitutionality of a joint congressional resolution giving the President discretion to criminalize certain conduct to achieve foreign policy objectives, the Court emphasized the President's role "as the sole organ of the federal government in the field of international relations."[115] Designation of the President as the one voice in foreign affairs resulted in part from the need for "unity of design," which the President is well suited to achieve.[116]

C. HYBRID DIMENSIONS

In addition to these purely horizontal and vertical dimensions, the one-voice doctrine operates along diagonal, or hybrid, dimensions. On these dimensions, questions of state law preemption might be resolved by reference to the allocation of power among the branches of the federal government.[117] Both

voice. *See infra* text accompanying notes 110–13; *see also* Steinhardt, *Orthodoxy*, *supra* note 5, at 35.

110. 444 U.S. 996.

111. *Id.* at 997–98 (Powell, J., concurring in the judgment).

112. *Id.* at 1004 (Rehnquist, J., concurring in the judgment); *see id.* at 1002–05 & n.1; *see also Zivotofsky*, 132 S. Ct. at 1441 (Breyer, J., dissenting) (noting that the political branches "have nonjudicial methods of working out their differences").

113. *See Goldwater*, 444 U.S. at 1003–05.

114. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

115. *Id.* at 320; *see also id.* at 319–22.

116. *Id.* at 319 (quoting 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 24 (1901)).

117. *Cf.* Goldsmith, *supra* note 12, at 1680 (noting the relevance of federal separation of powers to federalism questions regarding the preemption of state

majority and dissenting opinions in *Garamendi* involve hybrid applications of the doctrine.[118] The majority relied on the President's need to speak with one voice in foreign relations in deciding to preempt a California law bearing on foreign relations.[119] That law required insurers doing business in California to disclose "'insurance policies' issued 'to persons in Europe, which were in effect between 1920 and 1945.'"[120] In the majority's view, the law conflicted with an executive policy—reflected in several sole executive agreements—that favored voluntary cooperation with an international commission designed to facilitate the settlement of Holocaust related insurance claims.[121] In finding the California provision preempted, the Court did not merely focus on the national government's preeminence in our federalist system but on the President's[122] preeminence in foreign affairs.[123] The Court found that the California law "'compromise[d] the . . . capacity of the President to speak for the Nation with one voice in dealing with other governments' to resolve"[124] Holocaust-era claims as "California [sought] to use an

law); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 374–79, 401–02, 429 (1999) [hereinafter Ramsey, *Original Understanding*] (reasoning that preemption of state law based on presidential policy is "an issue of intrafederal separation of powers" as such preemption expands presidential power).

118. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

119. *See id.* at 413–17, 420–21, 423–24.

120. *Id.* at 409 (quoting CAL. INS. CODE ANN. § 13804(a) (West Cum. Supp. 2003)).

121. *See id.* at 405–08, 413, 420–25.

122. The Court also briefly touched on the allocation of foreign relations authority between the President and Congress. The Court explained that while it had not "give[n] policy statements by Executive Branch officials conclusive weight as against an opposing congressional policy" concerning foreign commerce, it relied on executive policy statements regarding Holocaust-era claims because "in the field of foreign policy the President has the 'lead role,'" while Congress leads in regulating foreign commerce. *Id.* at 422 & n.12 (citing Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328–30 (1994); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (plurality opinion)).

123. *See id.* at 401, 413–21. The Court's focus on not just the national government's, but the President's, authority resulted from the Court's refusal to decide whether field or conflict preemption was necessary to protect the executive's foreign affairs authority from state intrusion. *Id.* at 419–20. Rather, the Court concluded that both field and conflict preemption rendered California's law unconstitutional because it conflicted with a valid exercise of executive foreign policy power. *See id.* at 419–25.

124. *Id.* at 424 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)).

iron fist where the President ha[d] consistently chosen kid gloves."[125] Thus, while the case concerned the federalist distribution of foreign affairs power, the Court resolved it in part on separation of powers grounds—that the President can and must be able to speak with one voice in foreign affairs.[126]

Justice Ginsburg in dissent similarly invoked separation of powers concerns to argue that the California law should stand.[127] Like the majority, Justice Ginsburg described the President as "the 'one voice' to which courts properly defer in matters of foreign affairs."[128] She argued, however, that because the President had not directly or formally addressed information disclosure (the subject of the California provision),[129] the judiciary improperly assumed the role of "expositor[] of the Nation's foreign policy" in "preempt[ing] state law[] on foreign affairs grounds."[130] Upholding the law, by contrast, "would not compromise the President's ability to speak with one voice for the Nation" when he decided to address the issue.[131] For the dissent, then, the distribution of power between the judiciary and political branches foreclosed preemption of the state law.[132]

The hybrid use of the one-voice doctrine is also apparent in contrasting two cases concerning the Foreign Commerce Clause. In the older of the two, *Japan Line*, the Court considered a California tax that resulted in multiple taxation on "foreign-owned instrumentalities (cargo containers) of international commerce."[133] While the Court noted that the power to regulate foreign commerce is Congress's,[134] the opinion heavily emphasized the California tax's fatal interference with the need for *federal* uniformity in regulating commerce with other states.[135] In other words, the Court focused on the federalist dimension of foreign commerce authority rather than on its

125. *Id.* at 427.

126. *Id.*

127. *See id.* at 442–43 (Ginsburg, J., dissenting).

128. *Id.* at 430.

129. *See id.* ("Absent a clear statement aimed at disclosure requirements by the 'one voice' to which courts properly defer in matters of foreign affairs, I would leave intact California's enactment."); *see also id.* at 438–43 & n.4.

130. *Id.* at 442–43.

131. *Id.* at 442.

132. *Id.* at 430–42.

133. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 436, 451–52 (1979).

134. *See id.* at 444, 446, 453–57.

135. *See id.* at 448–54 (repeatedly referencing the need for national uniformity).

separation of powers component. In *Barclays Bank*, by contrast, the Court emphasized the separation of powers dimension.[136]

Like *Japan Line*, *Barclays Bank* involved California taxation: California's use of a "worldwide combined reporting" method to assess "the state corporate franchise tax due" from multinational entities.[137] Relying on *Japan Line*, the Court and petitioners emphasized the need for national uniformity in regulating foreign commerce.[138] Moreover, there were grounds for concluding that California's approach prevented that uniformity. California's approach differed from the approaches of both other states and the federal government.[139] A "battalion of foreign governments . . . marched to [foreign petitioner's] aid, deploring [California's approach] in diplomatic notes, *amicus* briefs, and even retaliatory legislation."[140] And the executive had opposed California's approach through nonbinding "actions, statements, and *amicus* filings," including introducing preemptive legislation.[141] Nonetheless, the Court upheld California's approach as applied,[142] reasoning that Congress's "voice, in this area, is the Nation's"[143] and Congress had indicated a "willingness to tolerate" California's methodology.[144] In

136. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 330–31 (1994).

137. *Id.* at 302.

138. *See id.* at 302–03, 311, 320–31.

139. *See id.* at 303–07.

140. *Id.* at 320; *see also id.* at 324 & n.22, 328; *id.* at 337 (O'Connor, J., concurring in the judgment in part and dissenting in part).

141. *Id.* at 328–30 & n.30 (majority opinion). *But cf.* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 75–76 (1993) (relying on "various conventions, statutes, and regulations" adopted by the federal government as well as an amicus brief from the United States to conclude that a state tax did "not infringe the Government's ability to speak with one voice when regulating commercial relations with other nations"); Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 195–96 (1983) (interpreting perceived executive silence as suggesting that a state tax did "not seriously threaten[]" U.S. foreign policy, and upholding the state tax); *supra* note 46 (explaining that the executive's opposition to California's tax methodology was not constant).

142. *Barclays Bank*, 512 U.S. at 303, 327.

143. *Id.* at 331; *see also id.* at 324 (describing Congress as "the branch responsible for the regulation of foreign commerce"); *id.* at 329 (describing Congress as "the preeminent speaker" with regard to the regulation of foreign commerce).

144. *Id.* at 327; *see also id.* at 326 (concluding "that Congress implicitly has *permitted* the States to use" California's methodology); *id.* at 330 (describing California's law as "congressionally condoned"); *cf. Huddleston*, 507 U.S. at 85 (Blackmun, J., dissenting) (rejecting the majority's reliance on an amicus brief from the executive because "the power to regulate commerce with foreign na-

reaching this conclusion, the Court also noted that it was not for the judiciary to strike California's law in the face of congressional acquiescence.[145] The Court thus relied primarily on the separation of foreign relations authority among the federal branches to uphold California's foreign affairs–related action.[146] As these cases illustrate, one of the key features of the one-voice doctrine is that it applies along many dimensions. Part IX will address why this feature is problematic, but first to the doctrine's other critical features.

V. THE ONE-VOICE DOCTRINE'S DIFFERENT THEORIES

In addition to addressing questions concerning the allocation of constitutional power along multiple dimensions, the one-voice doctrine reflects different theoretical approaches to these questions. The first approach relies on sources such as constitutional text, structure, and history to discern the allocation of foreign relations authority. Under this approach, the one-voice

tions is textually delegated to Congress alone"). Halberstam argues that *Japan Line* and *Barclays Bank* cohere when viewed as examples of the Court's zealousness "to preserve positive federal policy," including policy derived from scant evidence. Halberstam, *supra* note 18, at 1063–66. The difference in outcomes results from state law conflict with such a policy in *Japan Line* and consistency with such a policy in *Barclays Bank*. *Id.*

145. *Barclays Bank*, 512 U.S. at 330 ("The Constitution does 'not make the judiciary the overseer of our government.'" (quoting Dames & Moore v. Regan, 453 U.S. 654, 660 (1981))); *see also id.* at 334 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("Congress, not the Executive or the Judiciary, has been given the power to regulate commerce."); *cf. Container Corp.*, 463 U.S. at 194 (noting, among other things, the judiciary's limited "competence [to] determin[e] precisely when foreign nations will be offended by particular acts" in deciding whether state action "violate[s] the 'one voice' standard").

146. Justice O'Connor's partial concurrence and dissent took a similar approach, noting Congress's, rather than the executive's or judiciary's, preeminence in foreign commerce and rejecting reliance on "statements made and briefs filed by officials in the Executive Branch" in assessing preemption when Congress is silent. *Barclays Bank*, 512 U.S. at 334 (O'Connor, J., concurring in the judgment in part and dissenting in part). *Chy Lung* also takes somewhat of the hybrid approach. The Court in that case rejected a California statute in light of the national government's—but specifically Congress's—foreign commerce power. *See* Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

A variation of this hybrid approach appears in *Sabbatino*. There the Court concluded that whether state courts may decide the validity of acts of foreign sovereigns within their own territory turns on whether it is appropriate as a matter of separation of powers for federal courts to do so. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423–28 (1964); *see also* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 835 (1989) (noting that *Sabbatino* grounded the act of state doctrine's preemptive effect in "federal separation of powers principles").

doctrine generally appears as a conclusion.[147] Based on text, structure, and history, one branch of government is identified as the authoritative voice. *Barclays Bank* illustrates this approach in simple form. Based on the Constitution's textual assignment of the foreign commerce power to Congress, the Court concluded that Congress is "the Nation's" voice "in [the foreign commerce] area,"[148] and upheld, notwithstanding executive opposition, a state statute that Congress appeared "willing[] to tolerate."[149]

The other approach to constitutional interpretation reflected in the one-voice doctrine is functional.[150] Under this ap-

147. *But cf. Sabbatino*, 376 U.S. at 427 & n.25 (concluding that the act of state doctrine is a matter of federal, not state, law based in part on "constitutional and statutory provisions . . . reflecting a concern for uniformity in this country's dealings with foreign nations").

148. *Barclays Bank*, 512 U.S. at 331.

149. *Id.* at 327; *see id.* 321–22, 324–30 & nn.22–23, 30. *But cf. supra* note 46.

150. The two theories mix in the federalist context when functional reasons that motivated the Framers (for example, the need to prevent a single state from triggering retaliation against the United States) are cited in order to ascertain the structure reflected in the text actually adopted. Justice Souter relies on this hybrid in *Garamendi* when he says:

> There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National Government in the first place.

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413 (2003) (quoting *Sabbatino*, 376 U.S. at 427 n.25); *see* Michelin Tire Corp. v. Wages, 423 U.S. 276, 282–83, 285–86, 293–94 (1976) (reasoning that the one-voice rationale motivated the Import-Export Clause such that state taxes that do not interfere with the federal government's ability to regulate foreign commerce "with one voice" are not, absent other defects, subject to the Clause's prohibition); *see also* Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 752–54 (1978) (relying on *Michelin* for the same); *id.* at 762 (Powell, J., concurring) (describing the *Michelin* approach as "a functional analysis based on [a state] exaction's relationship to the . . . policies that underlie the [Import-Export] Clause"); *infra* note 416. This mix arguably also appears in *Japan Line*, where the Court indicated that the Foreign Commerce Clause was animated in part by the need for uniformity in regulating commerce with foreign states. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448–50 & n.14 (1979). Where the Court concludes that the Constitution as adopted mandates a functional analysis, the line between the two principal theories also blurs.

In a similar vein, a court might invoke functional reasons that motivated the Framers without knowing or relying on that fact, in which case the court's theory would be functional notwithstanding the coincidence of reasoning between the two approaches. *Zschernig* likely fits within this category. *See* Zschernig v. Miller, 389 U.S. 429, 441 (1968) (holding an Oregon law unconsti-

proach, the doctrine may appear not only as a conclusion but also as a justification. It is in its functional form that Mike Ramsey describes the doctrine when he says that "[t]he 'one voice' invocation is . . . ultimately a policy prescription" that is deemed so "overriding . . . given the acute danger of missteps in foreign affairs, that it gains constitutional dimensions" even though it is inconsistent with constitutional text.[151] Justice Sutherland's opinion for the Court in *Curtiss-Wright* is perhaps the best example of the functional manifestation of the one-voice doctrine.[152] After concluding that federal foreign affairs power derives from U.S. sovereignty rather than from the states,[153] Justice Sutherland identified various prudential reasons why the President is the sole federal organ in foreign affairs.[154] Among these was the need for "unity of design" in interacting with foreign states.[155] National need to speak with one voice led to the conclusion that the President is that voice.[156]

The functional version of the doctrine is the most common version[157] and appears in recent opinions.[158] For example, Jus-

tutional as applied, citing the danger U.S. states may produce if they may adopt their "own foreign policy"); *see also infra* note 171 and accompanying text.

151. RAMSEY, *supra* note 7, at 8; *see also* Ramsey, *Original Understanding*, *supra* note 117, at 370–79 (arguing that the case for dormant foreign affairs preemption is ultimately based on policy not compelled by constitutional structure).

152. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–22 (1936).

153. *See id.* at 315–19.

154. *See id.* at 319–22. In *Pink*, the Court similarly relied on functionalism in identifying the scope of the President's authority as the one voice in foreign affairs. "Effectiveness in handling the delicate problems of foreign relations[, the Court reasoned,] requires no less" than the "modest implied [presidential] power" to settle claims of U.S. nationals against foreign governments in the course of recognizing those governments. United States v. Pink, 315 U.S. 203, 229 (1942).

155. *Curtiss-Wright*, 299 U.S. at 319 (quoting 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 24 (1901)).

156. *See id.* at 319–20.

157. *See* Ramsey, *Original Understanding*, *supra* note 117, at 367–69 (noting that the principal rationale for dormant preemption of state action bearing on foreign affairs is functional).

158. In addition to the opinions discussed in text, see *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (plurality opinion) (emphasizing that state regulations burdening foreign, rather than merely interstate, commerce are more readily subject to dormant preemption because "[i]t is crucial to the efficient execution of the Nation's foreign policy that 'the Federal Government . . . speak with one voice when regulating commercial re-

tice Breyer's dissent in *Zivotofsky* concluded that the case presented a political question as a result of "[f]our sets of prudential considerations," including the fact that "the issue before [the Court arose] in the field of foreign affairs."[159] "The Constitution[, he reasoned,] primarily delegates the foreign affairs powers 'to the political departments of the government, . . .' not to the Judiciary."[160] While he may have been relying on the Constitution's text or the founding generation's motivations for adopting that text in making this statement, he did not turn to either of those sources explicitly.[161] Instead, he noted that the Constitution's allocation of foreign affairs authority is unsurprising in light of a variety of functional considerations. Among these was the presumption that "where foreign affairs is at issue, the practical need for the United States to speak 'with one voice and ac[t] as one,' is particularly important."[162] Functional considerations, including the one-voice rationale, informed Justice Breyer's sense of the judiciary's role in foreign affairs.

Functional considerations likewise informed the Supreme Court's conclusion in *Munaf v. Geren* that the judiciary should not second-guess the executive's assessment of the likelihood of torture if American citizens held by the United States in Iraq were transferred to Iraqi keeping.[163] Judicial involvement was improper because it "would require . . . pass[ing] judgment on foreign justice systems and undermine the Government's ability to speak with one voice."[164] Unlike the judiciary, "the political branches [were] well situated to consider [and adopt policies regarding] sensitive foreign policy issues,"[165] at least in part be-

lations with foreign governments'" (alteration in original) (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976))); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 179 (1978) (finding no dormant preemption of state law where there was no need for "a uniform national rule" on the matter); and *id.* at 186 (Marshall, J., concurring in part and dissenting in part) (finding no dormant preemption of state law where variable local conditions made local regulation "appropriate, and perhaps even necessary").

159. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1437 (2012) (Breyer, J., dissenting).

160. *Id.* (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

161. *See id.* at 1437–38.

162. *Id.* at 1438 (alteration in original) (quoting United States v. Pink, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring)).

163. *See* 553 U.S. 674, 702–03 (2008).

164. *Id.* at 702.

165. *Id.*

cause they "possess significant diplomatic tools and leverage the judiciary lacks."[166]

The choice between the functional and what might be termed the structural approach to the constitutional allocation of foreign affairs authority is significant. On the one hand, a structural approach might handicap efforts of the President or states to respond to foreign affairs problems. On the other hand, a functional approach might lead to excessive executive authority in foreign relations. The Court in *Dames & Moore v. Regan* suggested as much when it noted "the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances."[167]

Perhaps as a result of the pros and cons of each approach, some cases emphasize one theory, while shades of both theories appear in others. The opinion in *Zschernig* presents a subtle example.[168] In *Zschernig*, the Court started from the assumption, presumably grounded at least in part in constitutional text, that "the Constitution entrusts [the field of foreign affairs] to the President and the Congress."[169] Yet, among other things, the Court cited functional considerations in determining

166. *Id.* at 703 (quoting Omar v. Harvey, 479 F.3d 1, 20 n.6 (D.C. Cir. 2007) (Brown, J., dissenting)).

167. 453 U.S. 654, 662 (1981).

168. For another example, see *Chy Lung v. Freeman*, 92 U.S. 275 (1875). In that case, the Court cited both the textual commitment of foreign commerce authority to Congress and the need to prevent one state from "embroil[ing the United States] in disastrous quarrels with other nations" in concluding that Congress, not the states, possesses the authority to regulate immigration. *Id.* at 279–80. Similarly, in *United States v. Pink*, the Court relied on the President's power to recognize other governments, "the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs," and the functional need for the President to have certain powers to effectively "handl[e] the delicate problems of foreign relations" in upholding the President's settlement of claims against the Soviet Union in conjunction with recognition of the new Soviet government. 315 U.S. 203, 229–30 (1942). In *Banco Nacional de Cuba v. Sabbatino*, the Court relied primarily on functional considerations but also on "constitutional and statutory provisions . . . reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions," 376 U.S. 398, 427 n.25 (1964), in concluding that the act of state doctrine is a matter of federal law, *id.* at 423–27 & n.25.

169. Zschernig v. Miller, 389 U.S. 429, 432 (1968).

whether Oregon had intruded into that federal trust.[170] The Court looked at the state law's "potential for disruption or embarrassment" in foreign affairs.[171] Justice Ginsburg's dissent in *Garamendi* followed the same pattern. Justice Ginsburg began describing the executive as "the 'one voice' to which courts properly defer in matters of foreign affairs,"[172] a conclusion about the President's foreign affairs authority apparently grounded in constitutional history and precedent;[173] she then argued, however, that "[s]ustaining [the state law at issue] would not compromise the President's ability to speak with one voice for the Nation,"[174] arguably a functional reason for upholding the law.

VI. THE ONE-VOICE DOCTRINE'S INCONSISTENCY WITH THE CONSTITUTION

Even if the one-voice doctrine solely reflected a structural approach to constitutional questions, the doctrine would be flawed. Whether in its federalist or separation of powers dimensions, the doctrine is only partially supported by the Constitution.[175]

A. FEDERALIST DIMENSION

The one-voice doctrine derives greatest support from constitutional text, structure, and history in its federalist dimension.[176] The Constitution's text grants the federal government foreign affairs powers, such as the authority to make treaties

170. The Court considered more formal arguments as well, categorizing policymaking as within the federal foreign affairs domain and concluding that the states were making policy. *See id.* at 435–39 & n.8.

171. *Id.* at 435; *see also id.* at 441 (noting how "a State's policy may disturb foreign relations" and "the dangers which are involved if each State . . . is permitted to establish its own foreign policy").

172. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 430 (2003) (Ginsburg, J., dissenting).

173. *See id.* at 436–38 (citing *id.* at 415 (majority opinion)).

174. *Id.* at 442.

175. *See, e.g.*, RAMSEY, *supra* note 7, at 8 ("Whatever one thinks of the 'one voice' idea as a policy matter, it is fundamentally opposed to the constitutional design. The Constitution's text divides foreign affairs power among multiple independent power centers[, a]nd . . . it is plain that this did not occur by accident. The Constitution deliberately fosters multiple voices in foreign affairs . . . .").

176. *See* Cleveland, *supra* note 1, at 979–80 ("The principle that authority over foreign relations vests exclusively in the national government, to the exclusion of the states, has strong constitutional roots . . . ."); *id.* at 990–91.

and to regulate foreign commerce,[177] while prohibiting the states from foreign affairs activities such as treaty and alliance making.[178] These provisions are consistent with a broader structure in which federal lawmaking is supreme and the states retain "powers not delegated to the United States by the Constitution, nor prohibited by it to the States."[179] Both text and structure reflect a pre-constitutional history in which federal inability to regulate foreign commerce and to enforce treaties and customary international law led to efforts to provide the national government supremacy over foreign affairs.[180]

At the same time, the Constitution does not exclude the states from having some voice in foreign affairs.[181] In the highly unlikely event that a state is "actually invaded, or in such imminent Danger as will not admit of delay," a state may go to war without Congress's approval.[182] More relevant, with Congress's permission, states may "lay . . . Imposts or Duties on Imports or Exports," impose "Dut[ies] of Tonnage, keep Troops, or Ships of War in time of Peace, enter into . . . Agreement[s] or Compact[s] . . . with a foreign Power, [and] engage in War."[183] Since 1955, forty-one states have entered over 340 agreements,

177. U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2.

178. *Id.* art. I, § 10.

179. *Id.* amend. X; *see id.* art. VI, cl. 2; Cleveland, *supra* note 1, at 990.

180. *See, e.g.*, RAMSEY, *supra* note 7, at 36–46; Cleveland, *supra* note 1, at 990 & n.112. This does not mean that constitutional history lacks any support for state involvement in foreign affairs. The fact that the Articles of Confederation prohibited states from sending ambassadors but the Constitution does not might support the conclusion that states have some room to send representatives to other countries (for example, on trade missions). *See* Goldsmith, *supra* note 12, at 1707. The general history of the Constitution, however, is one of strengthening federal over state foreign affairs authority.

181. *See* David H. Moore, *The President's Unconstitutional Treatymaking*, 59 UCLA L. REV. 598, 623 (2011) [hereinafter Moore, *Unconstitutional Treatymaking*]; *see also* CORWIN, *supra* note 81, at 203–04 ("[S]ection 10 of Article I quite clearly recognizes the states as retaining a certain rudimentary capacity in [foreign affairs] . . . ."); Cleveland, *supra* note 1, at 1012 (briefly asserting that "the Framers' primary concern [was] ensuring that the national government had *authority* to prevent states from interfering in the foreign affairs area" rather than that the states never engage in behavior affecting foreign affairs, even behavior tolerated by the national government).

182. U.S. CONST. art. I, § 10, cl. 3. A state may also, without congressional approval, "lay . . . Imposts or Duties on Imports or Exports . . . [as] absolutely necessary for executing it's inspection Laws" but "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress." *Id.* art. I, § 10, cl. 2.

183. *Id.* art. I, § 10, cls. 2–3.

both binding and not, with other countries and their subdivisions; over two hundred of these have been concluded in roughly the last decade.[184] Yet "Congress has reviewed fewer than a dozen [such agreements] in the last century, consenting to just six and rejecting only one outright."[185] Many of these agreements are mundane, addressing issues such as transboundary highways, bridges, and firefighting.[186] Yet some are more substantive and controversial.[187] In 2003, for example, Kansas apparently entered, without congressional authorization, a nonbinding agreement with Cuba under which "Cuba . . . committed to buy $10 million in Kansas agricultural products" and Kansas agreed to "encourage the repeal of federal trade and travel sanctions against Cuba."[188] In short, states are engaged in making international agreements on a significant scale.[189] Further, even if the Constitution universally required congressional approval of even non-binding agreements,[190] states would still play a role in initiating these agreements before, and carry them out after, congressional approval. Implementation of an agreement or compact with another nation undoubtedly involves discretion and policy choices that may affect foreign affairs. As a result, even state action that requires federal approval may result in more than *de minimus* involvement in foreign affairs.

184. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 744 (2010) [hereinafter Hollis, *Compact Clause*]; *see also id.* at 749–54, 759, 769, 790–93. Moreover, "these numbers certainly undercount the actual practice, since no formal mechanisms exist for collecting or monitoring" these agreements. *Id.* at 744.

185. *Id.* at 742; *see also id.* at 742 n.12.

186. *See id.* at 742 & nn.10–12, 750, 754–55.

187. *See id.* at 741–42 & n.3, 754–59, 787–88.

188. *Id.* at 741; *see also id.* at 741–42 & n.3, 759, 788.

189. *Cf.* Michael H. Shuman, *Dateline Main Street: Courts v. Local Foreign Policies*, FOREIGN POL'Y, Spring 1992, at 158, 158 ("The explosive growth of municipal foreign policy in the past decade has been impressive . . . .").

190. In the interstate compact context, the Supreme Court has recognized a "category of interstate agreements that states can make free from any congressional oversight or approval." Hollis, *Compact Clause*, *supra* note 184, at 759–60; *see also id.* at 743, 759–66, 769–70. Moreover, it is widely believed that the Court's interstate compact jurisprudence applies to compacts with foreign states. *See id.* at 743, 759–60, 766–69, 805. *But see id.* at 743 n.17, 744–46, 769–801, 805–06 (noting limited opposition to, and arguing against, this position). Thus, there may be agreements that states may enter with foreign states that do not trigger the need for congressional approval. *Cf.* Cleveland, *supra* note 1, at 994 ("[S]tate and local governments have entered agreements without congressional consent on local matters such as police cooperation, border control and road construction.").

Further, as a structural matter, the Constitution "reserve[s] to the States . . . or to the people" powers not delegated to the federal government.[191] While the conventional wisdom is that the states did not retain exclusive foreign affairs powers, the Constitution might be understood as delegating, or prohibiting to the states, only certain foreign affairs powers.[192] Moreover, even if the federal foreign affairs power is comprehensive, it may not be exclusive.[193] For example, even if Article III could be read as extending federal judicial power to all justiciable foreign affairs controversies, Article III does not make the federal power exclusive.[194] Indeed, it does not create any lower federal courts that might exercise the federal judicial power.[195] The Constitution thus leaves open the possibility that cases bearing on foreign affairs will be heard not only by federal courts, but

191. U.S. CONST. amend. X. This argument, of course, disregards Justice Sutherland's discredited theory that the federal government's foreign affairs authority, unlike its domestic authority, derived from Britain upon independence and not from the states. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–18 (1936) (developing Justice Sutherland's theory of extraconstitutional federal foreign affairs authority); RAMSEY, *supra* note 7, at 13–48 (summarizing and discrediting Justice Sutherland's theory); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379–82, 386–437 (2000) (same).

192. *Cf., e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 100 (2000) (summarizing the argument that the treaty power should be understood to "allow the treatymakers the ability to conclude treaties on any subject but . . . limit their ability to create supreme federal law to the scope of Congress's power to do so"). The possibility that the states retained some foreign affairs–related leeway grows if the vesting of executive power in the President does not include otherwise unenumerated foreign affairs powers. *See* Ramsey, *Original Understanding*, *supra* note 117, at 348, 396–432 (noting, but ultimately rejecting, the argument that the Vesting Clause "gives the President a general foreign policy power" that supports preemption of state action affecting presidential foreign policy).

193. *See* Goldsmith, *supra* note 12, at 1618–25, 1641–98 (arguing that while federal foreign affairs authority is plenary, the federal political branches generally must act to preempt state action bearing on foreign affairs); Ramsey, *Original Understanding*, *supra* note 117, at 347–48, 370, 379–90, 403–32 (arguing that while the Constitution sought "to strengthen the national government's foreign affairs powers," statements by the Framers combined with constitutional text and pre- and post-ratification history support the conclusion that state foreign affairs activity is only limited by "the express or implied [constitutional] limitations directed at particular subjects such as war and treatymaking and the general preemptive power of [adopted] federal statutes and treaties under" the Supremacy Clause).

194. U.S. CONST. art. III, § 1.

195. *Id.*

by the state courts.[196] In short, notwithstanding the historical goal to invest the federal government with foreign affairs power, under the text adopted there is some room for state involvement in foreign affairs.

B. SEPARATION OF POWERS DIMENSIONS

The Constitution is more enigmatic when it comes to the horizontal distribution of foreign affairs authority and, in particular, to the scope of the President's foreign affairs power.[197] This uncertainty arises, in large part, from the Vesting Clause, which states that "[t]he executive Power shall be vested in a President of the United States of America."[198] James Madison and Alexander Hamilton debated the significance of this clause, with Hamilton arguing that it gave the President broad power subject only to express constitutional limitations that were to be strictly construed.[199] Under this view, for example, Congress's power to declare war, with its attendant authority to decide whether any treaties of alliance obligate the United States to declare war, would not displace the President's "similar right of Judgment" with regard to the same treaties under his "du-

196. *See* Young, *supra* note 9, at 425–32, 449 n.423 (describing in greater detail the role the Constitution leaves to state courts). *But cf.* Goldsmith, *supra* note 12, at 1636 (describing cases in which federal courts have found federal question jurisdiction over state law claims that implicate foreign affairs).

197. *See* Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (noting, in assessing the scope of presidential foreign affairs power, "that '[t]he great ordinances of the Constitution do not establish and divide fields of black and white'" (alteration in original) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring), as quoting Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting))); CORWIN, *supra* note 81, at 201 (describing the Constitution as "an invitation to struggle for the privilege of directing American foreign policy"). *But cf.* Prakash & Ramsey, *Executive Power*, *supra* note 73, at 356 ("propound[ing] a . . . textual theory that finds in the Constitution a complete division and allocation of foreign affairs authority").

198. U.S. CONST. art. II, § 1, cl. 1.

199. Hamilton, *supra* note 74, at 39, 42; *see also* James Madison, "Helvidius" Number 1 (Aug. 24, 1793), *in* 15 THE PAPERS OF JAMES MADISON 66, 67, 80 (Thomas A. Mason et al. eds., 1985) [hereinafter Madison, "Helvidius" Number 1] (summarizing Hamilton's argument in the course of responding to it). The Supreme Court leaned toward Hamilton's position when it stated in *Garamendi* that "[a]lthough 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.'" Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring)).

ty . . . to preserve Peace till war is declared."[200] Madison took a narrower view of the Vesting Clause, contending that the executive power is not as broad as Hamilton suggested. In particular, he argued that the powers to declare war and to make treaties are not executive in nature, such that constitutional exceptions to the vesting of these powers in the President should be construed against, not in favor of, the President.[201] Madison likewise rejected the notion that the President retains concurrent authority to do what has been assigned to Congress (or the judiciary).[202] Debates over the proper interpretation of the Vesting Clause and the resulting scope of presidential power continue to this day.[203]

Whatever the ultimate scope of presidential power over foreign affairs, there is no plausible argument that executive power is exclusive.[204] As I and others have noted, "[t]he Consti-

200. Hamilton, *supra* note 74, at 40.

201. *See* Madison, "Helvidius" Number 1, *supra* note 199, at 67–73; James Madison, "Helvidius" Number 2 (Aug. 31, 1793), *in* 15 THE PAPERS OF JAMES MADISON, *supra* note 199, at 80, 80–82 [hereinafter Madison, "Helvidius" Number 2].

202. *See* Madison, "Helvidius" Number 2, *supra* note 201, at 81–87; *id.* at 83 ("A concurrent authority in two independent departments to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory.").

203. *Compare, e.g.*, Prakash & Ramsey, *Executive Power*, *supra* note 73, at 234, 252–54, 256–58 (arguing that the Vesting Clause provides the President "a 'residual' foreign affairs power"), *and* Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591 (2005) [hereinafter Prakash & Ramsey, *Defense*] (same), *with* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551–52 (2004) (discounting "the Vesting Clause Thesis" on textual and historical grounds).

204. *See* Prakash & Ramsey, *Executive Power*, *supra* note 73, at 238 (noting that even a constitutional theory of presidential primacy "is fatally incomplete," since "it lacks a textual basis"). Indeed, Prakash and Ramsey have argued that it is hard to find constitutional support even for presidential status as "sole organ of communication," *id.* at 244, without relying on the Vesting Clause, *id.* at 243–44 & n.47, 251, 258 & n.108, 262, 323–24; *see also* Prakash & Ramsey, *Defense*, *supra* note 203, at 1674 (same); Ryan M. Scoville, *Legislative Diplomacy*, 112 MICH. L. REV. 331, 357–64 (2013) (discussing the diplomatic powers the President possesses under the executive's discrete enumerated powers and under the Vesting Clause, noting that it is harder to derive broad diplomatic authority from the President's discrete powers than from the Vesting Clause); *cf.* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 206–15 (2009) [hereinafter Hathaway, *Presidential Power*]; *id.* at 210 ("[T]he President has a unilateral . . . power to communicate with foreign nations. . . . [But] there are limits on the President's power to communicate and hence to make international legal commitments . . . .").

tution distributes foreign relations authority among all three branches of the federal government."[205] Thus, even if Hamilton is correct that the President's executive power properly includes concurrent, though ultimately subordinate, power over matters assigned to Congress, the fact remains that Congress possesses certain foreign affairs powers. Indeed, Congress receives the lion's share of enumerated foreign affairs powers.[206] Congress may regulate foreign commerce[207] and U.S. territories;[208] impose "Taxes, Duties, Imposts and Excises";[209] borrow money and pay debt;[210] "regulate the Value" of U.S. and foreign money;[211] create naturalization rules;[212] admit new states (for example, Puerto Rico);[213] oversee certain foreign relations initiatives of U.S. states;[214] "define and punish" violations of international law as well as "Piracies and Felonies committed on the high Seas";[215] create and vest in federal courts jurisdiction over certain foreign relations cases;[216] "declare War, grant Letters of

205. Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 616; *see also, e.g.*, Bestor, *supra* note 7, at 34 ("Far from placing matters connected with foreign affairs exclusively in executive hands, the Constitution carefully parcels them out among the three branches. This fact is obvious on the very face of the document."); Cleveland, *supra* note 1, at 984–85, 989 ("[I]t is clear that the Framers guaranteed, as a matter of constitutional design, that the United States would *not* 'speak with one voice' in foreign relations. The foreign affairs powers are carefully divided among the three branches of the national government."); Goldsmith, *supra* note 12, at 1689 ("The Constitution does not purport to limit activity that affects foreign affairs to a single person or voice . . . ."). For an extensive, though nonexhaustive, chart of the distribution of foreign affairs authority among the three branches of the federal government, see Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 617–19.

206. *See* Adler, *supra* note 68, at 19–20, 47; Cleveland, *supra* note 1, at 984; Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 619. *But see* CORWIN, *supra* note 81, at 201 ("The verdict of history . . . is that the power to determine the substantive content of American foreign policy is a *divided* power, with the lion's share falling usually, though by no means always, to the President.").

207. U.S. CONST. art. I, § 8, cl. 3.

208. *Id.* art. IV, § 3, cl. 2.

209. *Id.* art. I, § 8, cl. 1; *see also id.* art. I, § 7, cl. 1 (requiring that "[a]ll Bills for raising Revenue . . . originate in the House of Representatives").

210. *Id.* art. I, § 8, cls. 1–2.

211. *Id.* art. I, § 8, cl. 5.

212. *Id.* art. I, § 8, cl. 4.

213. *Id.* art. IV, § 3, cl. 1.

214. *Id.* art. I, § 10, cl. 3.

215. *Id.* art. I, § 8, cl. 10.

216. *See id.* art. I, § 8, cl. 9; *id.* art. III, § 2, cl. 1; 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3526 (3d ed.

Marque and Reprisal, and make Rules concerning Captures on Land and Water";[217] "provide for the common Defence,"[218] including by raising, supporting, and regulating an Army and Navy as well as regulating in certain ways and "calling forth the Militia";[219] appropriate funds;[220] and enact laws "necessary and proper" to carry out both its own, and other branches', powers.[221] The President, by contrast, is "Commander in Chief" and exercises authority over executive agencies like the State and Commerce Departments.[222] The President may enter treaties and appoint ambassadors and consuls with Senate approval;[223] may "receive Ambassadors and other public Ministers; . . . [and must] take Care that the Laws be faithfully executed."[224] The federal judiciary's constitutional authority extends, among other things, to "Cases . . . arising under . . . Treaties"; "Cases of admiralty and maritime Jurisdiction"; and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[225] The Supreme Court possesses original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls."[226] As a result of its jurisdictional reach, the judiciary "may disrupt U.S. foreign relations policies in a variety of ways," including by "refus[ing federal] extradition requests" and hearing "politically sensitive suits . . . against foreign states."[227]

Not only does foreign affairs authority thus reach beyond the presidency to the other two branches (and particularly the legislative branch), but the President's specific foreign affairs

2008) (discussing the "orthodox view [that] Congress is free to grant or withhold" federal subject matter jurisdiction).

217. U.S. CONST. art. I, § 8, cl. 11.

218. *Id.* pmbl.

219. *Id.* art. I, § 8, cls. 12–16; *see also id.* art. I, § 8, cl. 17 (authorizing Congress to purchase with state consent, and enact laws for, property "for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings").

220. *Id.* art. I, § 9, cl. 7.

221. *Id.* art. I, § 8, cl. 18. Moreover, Congress can, through legislation, trump a prior treaty as a matter of domestic law. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987).

222. U.S. CONST. art. II, § 2, cl. 1.

223. *Id.* art. II, § 2, cl. 2.

224. *Id.* art. II, § 3.

225. *Id.* art. III, § 2, cl. 1. *But cf. id.* amend. XI (restricting federal judicial power to hear lawsuits by foreign nationals against U.S. states).

226. *Id.* art. III, § 2, cl. 2.

227. Cleveland, *supra* note 1, at 988–89.

powers are all, in some sense, joint.[228] While the President is Commander in Chief and receives ambassadors, "no less than six of the eighteen clauses in the eighth section of article I are grants *to Congress* of various specific powers crucial to the making of war" and "[t]he power to *appoint* ambassadors"—the other, and more important, leg of the power to conduct foreign relations—"is a power that the President is required to exercise in conjunction with the Senate."[229] Similarly, the President may enter Article II treaties only "with the Advice and [supermajority] Consent of the Senate."[230] The Constitution thus makes clear that federal foreign affairs authority reaches beyond the President.

VII. THE ONE-VOICE DOCTRINE'S DIVERGENCE FROM PRACTICE

The one-voice doctrine's departure from constitutional text, structure, and history might be tolerable if it reflected how the Constitution has been understood in practice.[231] However, neither the President nor Congress, the Supreme Court nor the states has consistently followed the doctrine in practice.[232] The historical description of the doctrine above noted ways in which these actors have endorsed the doctrine; this Part exposes ways in which these actors' practices diverge from the doctrine.

228. *See, e.g.*, Bestor, *supra* note 7, at 33–34 (noting that of the four specific foreign relations powers given to the President, two are shared and two are half powers that "depend for [their] effectiveness upon the exercise of a complementary power specifically vested elsewhere").

229. Bestor, *supra* note 7, at 34.

230. U.S. CONST. art. II, § 2, cl. 2; *see also* Bestor, *supra* note 7, at 33. These days, the United States enters most international agreements through the congressional-executive, rather than Article II, process. *See, e.g.*, Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 606 & n.38 (citing Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1254 n.45, 1258–60 & n.53 (2008) [hereinafter Hathaway, *Treaties' End*]). Similar to Article II treaties, these agreements require approval from a majority in both houses of Congress. *See* Hathaway, *Treaties' End*, *supra*, at 1255.

231. *See, e.g.*, Medellín v. Texas, 552 U.S. 491, 531–32 (2008) (noting that "[p]ast practice does not, by itself, create power"; nevertheless "if pervasive enough, a history of congressional acquiescence can be treated as a gloss on 'Executive Power' vested in the President" (alteration in original) (quoting Dames & Moore v. Regan, 453 U.S. 654, 686 (1981)) (some internal quotation marks omitted)).

232. *See* Goldsmith, *supra* note 12, at 1688 ("Foreign relations law is replete with struggles between the statute-makers, the treaty-makers, the President, and sometimes the courts, for control of the federal foreign relations voice.").

A. PRACTICE OF THE POLITICAL BRANCHES

As Edward Corwin famously put it, the Constitution's allocation of foreign affairs powers among the federal branches "is an invitation to struggle for the privilege of directing American foreign policy."[233] The political branches frequently accept that invitation.[234] The President and Congress often speak with differing voices in matters of foreign affairs.[235] The President negotiates and signs treaties only to have them languish in the Senate, sometimes for decades.[236] Some of the modern era's most prominent treaties, such as the International Covenant on Economic, Social and Cultural Rights[237] and the Kyoto Protocol,[238] have been signed by the executive but remain unratified.[239] Presidential nominations of ambassadors have met with foreign policy–based resistance in the Senate. In recent years, members of the Senate opposed the nomination of John Bolton

233. CORWIN, *supra* note 81, at 201; *see also id.* at 255.

234. *See, e.g.*, Goldsmith, *supra* note 12, at 1688–89 ("The federal government . . . rarely speaks with one voice in foreign relations.").

235. *See, e.g., id.* at 1688–89 n.287 (noting foreign policy disagreements between federal actors as well as within the executive); Nzelibe, *supra* note 9, at 965 (providing examples of how "Congress and the President routinely joust for power in foreign affairs matters"); Steinhardt, *Orthodoxy*, *supra* note 5, at 34 (noting disagreements between the President and Congress on human rights policy); *id.* at 35 ("[I]t seems unrealistic and ahistorical, even vaguely romantic, to maintain the 'one-voice' ideal in the face of the near-constant struggle between Congress and the President on foreign policy."). Moreover, regardless whether Congress disagrees with the President on any particular issue, it is clear that Congress actively participates in international relations. As Ryan Scoville has recently documented, members of Congress frequently travel (including under a permanent appropriation) to other countries to meet with a wide range of foreign officials and to address a wide range of issues. *See* Scoville, *supra* note 204, at 339–50, 355–56. Members of Congress likewise meet with, and are lobbied by, representatives of other nations at home. *Id.* at 350–51, 355.

236. *See* Cleveland, *supra* note 1, at 985–87; Levinson, *supra* note 9, at 2195–96; Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 600, 608–09, 660–61. Once ratified, treaties may be preempted as a matter of domestic law by a later in time statute. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 & cmt. a (1987); Ramsey, *Non-preemptive*, *supra* note 9, at 562.

237. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (signed by United States Oct. 5, 1977), *available at* http://treaties.un.org/doc/publication/UNTS/Volume%20933/v933.pdf.

238. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 (signed by United States Nov. 12, 1998), *available at* http://treaties.un.org/doc/publication/UNTS/Volume%202303/v2303.pdf.

239. *See* Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 600.

as Permanent Ambassador to the United Nations in light of Bolton's previously expressed antipathy to the U.N.[240] Legislative and executive disagreement on the distribution of war powers has been ongoing.[241] The President and Congress have likewise repeatedly disagreed on specific issues, such as the proper U.S. position on the status of Jerusalem.[242] In the 2011 Term, the Supreme Court faced (and remanded) a claim arising from the executive's refusal to implement "a statute providing that Americans born in Jerusalem may elect to have 'Israel' listed as the place of birth on their passports."[243] Moreover, not only do Congress and the President disagree, but successive Congresses and administrations, and actors within Congress or the executive may disagree.[244] For example, the House and Senate or the Department of Defense and the Department of State may disagree on the correct foreign policy. Even the President at times has been reluctant to fully embrace the one-voice role, preferring for strategic or political reasons to involve Congress in foreign policy decisions and treaty negotiations.[245]

240. *See, e.g.*, Julian Borger, *Democrats Try to Block Bush's Man for UN Job*, GUARDIAN, Apr. 11, 2005, http://www.theguardian.com/world/2005/apr/12/usa.unitednations; Elisabeth Bumiller & Sheryl Gay Stolberg, *President Sends Bolton to U.N.; Bypasses Senate*, N.Y. TIMES, Aug. 2, 2005, http://www.nytimes.com/2005/08/02/politics/02bolton.html.

241. *See, e.g.*, Cleveland, *supra* note 1, at 988.

242. *See, e.g.*, Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, §§ 3(a)(3)–(b), 7, 109 Stat. 398, 399–400 (1995) (declaring U.S. policy that "the United States Embassy in Israel should be established in Jerusalem" and prohibiting the State Department from using certain funds "until the Secretary of State . . . reports to Congress that the United States Embassy in Jerusalem has officially opened" absent presidential waiver for national security reasons); *id.* § 2(13)–(14), 109 Stat. at 399 (describing past congressional support for "relocation of the United States Embassy to Jerusalem"); Cleveland, *supra* note 1, at 987 (noting successive presidents' refusal "to honor Congress' [sic] effort to move the U.S. embassy from Tel Aviv to Jerusalem").

243. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1424, 1431 (2012).

244. *See* James M. Lindsay & Randall B. Ripley, *How Congress Influences Foreign and Defense Policy*, *in* CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 17, 18 (Randall B. Ripley & James M. Lindsay eds., 1993); Steinhardt, *Orthodoxy*, *supra* note 5, at 34. Steinhardt adds that Supreme Court separation of powers case law has undermined the notion "of a coherent and self-contained executive branch." *Id.* at 35–36.

245. *See, e.g.*, BERDAHL, *supra* note 80, at 33–34 (discussing President Jackson's hesitance to recognize Texas's independence without support from Congress); James M. Lindsay, *Congress and Diplomacy*, *in* CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL, *supra* note 244, at 261, 266–68, 271–73 (discussing situations in which the President has consulted with, or included in treaty negotiations, members of Congress); Peter

B. SUPREME COURT PRACTICE

1. Separation of Powers

Supreme Court practice has also diverged from the one-voice doctrine. Even as it continues to employ the doctrine, the Court recognizes the shared nature of federal foreign affairs power.[246] In *Zschernig* the Court struck a state statute as "an

Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES, Aug. 31, 2013, http://www.nytimes.com/2013/09/01/world/middleeast/syria.html (noting President Obama's decision to seek congressional support for missile strikes on Syria).

246. For additional opinions recognizing that federal foreign affairs authority is shared, see, for example, *Zivotofsky*, 132 S. Ct. at 1441 (Breyer, J., dissenting) ("The Executive and Legislative Branches frequently work out disagreements through ongoing contacts and relationships . . . [which] ensure that, in practice, Members of Congress as well as the President play an important role in the shaping of foreign policy."); *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 414, 424 n.14, 427 (2003) (emphasizing the President's independent foreign affairs power, while also recognizing, among other things, that "Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers"); *Zadvydas v. Davis*, 533 U.S. 678, 700 (2001) (recognizing "Executive Branch primacy in foreign policy matters" while asserting a role for judicial review of executive alien detention decisions); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 374–76, 381 (2000) (invoking Justice Jackson's framework and recognizing the strength of the President's authority in light of a statute delegating authority to the President); *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 327 (1994) (noting that the nuances of U.S. foreign policy "are much more the province of the Executive Branch and Congress than of [the Supreme] Court" (quoting *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 196 (1983))); *Itel Containers International Corp. v. Huddleston*, 507 U.S. 60, 85 (1993) (Blackmun, J., dissenting) ("The constitutional power over foreign affairs is shared by Congress and the President . . . ."); *Dames & Moore v. Regan*, 453 U.S. 654, 662, 668–88 (1981) (noting "the never-ending tension between the President exercising the executive authority . . . and the Constitution . . . which no one disputes embodies some sort of system of checks and balances," and ultimately upholding the constitutionality of presidential acts pursuant to an executive agreement in light of congressional support for the acts); *Goldwater v. Carter*, 444 U.S. 996, 1004–05 n.1 (1979) (Rehnquist, J., concurring in the judgment) ("Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters. . . . [and] thus retains a strong influence over the President's conduct in treaty matters." (quoting *Goldwater v. Carter*, 617 F.2d 697, 716 (D.C. Cir. 1979) (Wright, C.J., concurring in the result))); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 427–28 (1964) (noting that "[t]he act of state doctrine [has] 'constitutional' underpinnings" and that the doctrine's "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs"); *id.* at 461–62 (White, J., dissenting) (noting that while "political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch . . . . this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs" to the exclusion of the judiciary);

intrusion by the State into the field of foreign affairs *which the Constitution entrusts to the President and the Congress*."[247] More systematically, in evaluating the constitutionality of "executive action in [foreign affairs]," the Court applies "the accepted framework" provided by "Justice Jackson's familiar tripartite scheme."[248] That scheme, which originated in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[249] builds on the principle that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[250] "When the President acts"

Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 109, 111 (1948) (describing the President "as the Nation's organ for foreign affairs" while recognizing that Congress possesses "power over foreign commerce" and that foreign policy "decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative"); *Hines v. Davidowitz*, 312 U.S. 52, 62–74 (1941) (recognizing that "regulation of aliens" is an issue of foreign relations that both Congress and federal treatymakers can address); and *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of [foreign affairs] is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government . . . .").

247. Zschernig v. Miller, 389 U.S. 429, 432 (1968) (emphasis added); *see also id.* at 436 ("[T]he Constitution entrusts [foreign affairs and international relations] solely to the Federal Government . . . ."); *id.* at 438 (noting that foreign policy positions and conditions "are matters for the Federal Government, not for local probate courts").

248. Medellín v. Texas, 552 U.S. 491, 524 (2008); *see also Dames & Moore*, 453 U.S. at 661 (describing Justice Jackson's concurrence as "bring[ing] together as much combination of analysis and common sense as there is in this area").

249. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

250. *Id.* at 635. The other opinions in *Youngstown* likewise emphasized Congress's power in deciding the constitutionality of the President's actions. *See id.* at 585–89 (majority opinion) (asserting that "[t]he President's power [to seize domestic steel mills threatened with closure by a labor dispute] must stem either from an act of Congress or from the Constitution itself," and concluding that Congress had rejected a presidential seizure power and that the Constitution assigned the legislative power to Congress); *id.* at 597–614 (Frankfurter, J., concurring) (agreeing that the President's seizure was unlawful where Congress had rejected rather than approved or acquiesced in a presidential seizure power); *id.* at 630–33 (Douglas, J., concurring) (concluding that the President's seizure was an exercise of legislative power entrusted to Congress); *id.* at 655–60 (Burton, J., concurring) (explaining that "[t]he validity of the President's [action] turns upon its relation to the constitutional division of governmental power between Congress and the President," and concluding that the President acted unconstitutionally where "Congress, within its constitutionally delegated power, . . . prescribed for the President specific procedures . . . . [and] reserved to itself" whether to take the action the President unilaterally elected); *id.* at 662–66 (Clark, J., concurring in the judgment) (concluding that the President acted illegally in failing to follow the "specific

with congressional approval, "his authority is at its maximum, for it includes all that he possesses . . . plus all that Congress can delegate."[251] When the President contravenes Congress's will, "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[252] When Congress is silent, the President must "rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain" such that the President's actions may or may not be constitutional.[253] This framework not only recognizes that foreign affairs authority is shared between the President and Congress, but recognizes a role for the courts in deciding how that authority is shared.[254]

The framework is foundational in foreign affairs jurisprudence and has provided the controlling analysis in recent foreign affairs cases, including war on terror cases.[255] In *Hamdi v. Rumsfeld*, in which the Court assessed the President's ability to detain "a United States citizen on United States soil as an 'enemy combatant,'"[256] the plurality and Justice Thomas both upheld the detention after concluding that Congress, through the

procedures [Congress had dictated] to deal with the type of crisis" at issue); *id.* at 672, 683, 700–04, 708–10 (Vinson, C.J., dissenting) (asserting that the President acted constitutionally because the seizure served "to preserve legislative programs [for military procurement and wage stabilization] from destruction until Congress could act").

The Court in *Dames & Moore* acknowledged the tension between *Youngstown*'s limitation of presidential power and *Curtiss-Wright*'s emphasis on presidential primacy. *See Dames & Moore*, 453 U.S. at 661–62. *See generally* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

251. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). Justice Jackson suggests (a) that *Curtiss-Wright*'s perspective on presidential power was so broad because the case involved a situation where the President acted pursuant to congressional authorization (and thereby "personif[ied] the federal sovereignty"), and (b) that *Curtiss-Wright* is precedent only for such cases. *See id.* at 635–36 & n.2, 638.

252. *Id.* at 637.

253. *Id.*

254. *See* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 110–13 (2002) (discussing *Youngstown*'s import for judicial review of actions of the political branches).

255. *See* Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 621–22. *But cf.* Stephen I. Vladeck, *Foreign Affairs Originalism in* Youngstown*'s Shadow*, 53 ST. LOUIS U. L.J. 29, 35–37 (2008) (arguing that the Court in *Medellín* and *Hamdan* "invoked Justice Jackson's framework, even while appearing to deviate from it").

256. 542 U.S. 507, 509 (2004) (plurality opinion); *see also id.* at 516.

Authorization for Use of Military Force (AUMF), had authorized the President to detain.[257] Justice Souter, on the other hand, found that the AUMF did not satisfy an earlier statute that prohibited the detention of U.S. citizens in the absence of congressional authorization.[258] Notwithstanding their divergent conclusions, the opinions consistently looked to both the President and Congress to assess the legality of the President's detention of a U.S. citizen. The Court in *Hamdan v. Rumsfeld* likewise looked to congressional action to determine the constitutionality of a presidential plan to use military commissions to try war-on-terror detainees.[259] The Court rejected the plan because Congress in the Uniform Code of Military Justice prohibited the President's resort to military commissions.[260] As Justice Breyer highlighted in his concurring opinion, "[t]he Court's conclusion ultimately rest[ed] upon a single ground: Congress ha[d] not issued the Executive a 'blank check.'"[261] Instead, "Congress ha[d] denied the President the legislative authority to create military commissions of the kind at issue."[262]

As this case law demonstrates, the President does not stand alone in foreign affairs. Foreign affairs power is shared with Congress. There is obvious tension, however, between the-

257. *See id.* at 509, 517–19; *id.* at 587 (Thomas, J., dissenting). At the same time, Justice Thomas disagreed with limitations the plurality placed on "the President's authority to detain enemy combatants." *Id.* at 587–88.

258. *Id.* at 541–45, 547–51 (Souter, J., concurring). Justice Souter expressly relied on the separation of powers between Congress and the executive in reaching this conclusion. *Id.* at 545.

259. *See* 548 U.S. 557, 593 & n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))); *id.* at 636 (Breyer, J., concurring) ("The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here." (citation omitted)); *id.* at 636–37 (Kennedy, J., concurring) ("[This] is a case where Congress, in the proper exercise of its powers as an independent branch of government . . . has considered the subject of military tribunals and set limits on the President's authority."); *see also id.* at 613, 627–28 (majority opinion); *id.* at 642–43 (Kennedy, J., concurring); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 931–32 (2007).

260. *See Hamdan*, 548 U.S. at 567, 592–95, 613–33; *see also id.* at 636 (Breyer, J., concurring); *id.* at 636–53 (Kennedy, J., concurring).

261. *Id.* at 636 (Breyer, J., concurring).

262. *Id.*

se cases and the cases invoking the one-voice doctrine in allocating authority between the political branches. Arguably, the tension does not rise to the level of outright conflict because the Court relies in part on the one-voice doctrine in cases that also recognize a place for Congress in foreign affairs.[263] For example, despite what it has come to stand for, *Curtiss-Wright* itself recognized a foreign affairs role for Congress. *Curtiss-Wright* concerned the constitutionality of *legislative* delegation of discretion to the President.[264] The Court upheld the statute, noting that it was "here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the [independent,] very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations."[265] Justice Sutherland, the author of *Curtiss-Wright*, in a later case similarly recited precedent holding "that the conduct of foreign relations was committed by the Constitution to the political departments" and held, more narrowly, that "the Executive had authority to speak as the sole organ of that government" with

263. *See, e.g.*, *Hamdi*, 542 U.S. at 580–82 (Thomas, J., dissenting) (quoting Marshall's "sole organ" language to support the President's primacy in foreign affairs, while also acknowledging that "Congress . . . has a substantial and essential role in . . . foreign affairs"); Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396, 414 (2003) (reciting language concerning the President's role "as the Nation's organ in foreign affairs," while recognizing Congress's foreign commerce and war powers (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948))); Dames & Moore v. Regan, 453 U.S. 654, 661–62, 668–88 (1981) (quoting, without overruling, *Curtiss-Wright*'s "sole organ" language, but also highlighting "[t]he tensions present in any exercise of executive power under the [Constitution's] tripartite system of Federal Government," recognizing the paucity and inconsistency of precedents addressing executive power, and both noting *Youngstown*'s preeminence among these precedents and applying its shared-powers framework); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 766–68 & n.2 (1972) (plurality opinion) (citing both the President's "sole organ" status and constitutional commitment of foreign affairs to the legislative and executive branches on the way to recognizing executive primacy in foreign relations).

264. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 314–15, 319–20 (1936); *see also* Perez v. Brownell, 356 U.S. 44, 57 (1958) (citing *Curtiss-Wright* for the proposition that "[a]lthough there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation"), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253, 255–57, 263, 267–68 (1967) (rejecting the congressional power, recognized in *Perez*, to strip someone of U.S. citizenship, without denying an implied congressional power to regulate foreign affairs).

265. *Curtiss-Wright*, 299 U.S. at 319–20.

respect to "what was done" in the particular case.[266] Moreover, the Court has recognized that Congress is the one voice in certain subject areas, including foreign commerce.[267]

Nonetheless, the one-voice doctrine suggests, and has been used to conclude, that the President possesses an exclusive role in foreign affairs.[268] One might attempt to harmonize the one-voice doctrine with the Court's broader foreign relations jurisprudence by asserting that the one-voice doctrine only means that the President is the sole communicator with foreign states. However, the one-voice doctrine has not been so limited.[269] The conclusion that the President is the one voice has been used to justify more than an exclusive authority to communicate. As noted above, it has supported authority to set foreign policy.[270] As a result, it is hard to fully reconcile the doctrine with Supreme Court case law recognizing that both political branches play a role in foreign affairs.

The doctrine is likewise hard to square with case law that recognizes room for the judiciary in foreign affairs. The courts employ a number of doctrines—some generic, some unique to foreign relations law—to police judicial involvement in foreign affairs. Among the generic doctrines are standing,[271] ripeness,[272]

266. United States v. Belmont, 301 U.S. 324, 328, 330 (1937).

267. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310, 324, 329, 331 (1994); *cf.* Brief Amicus Curiae for Cochise County Sheriff Larry A. Dever in Support of Petitioners at 21, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 506637, at *21 (arguing that Congress is the nation's voice regarding immigration). Congress is also often described as "the sole organ for levying taxes." Nat'l Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974).

268. BERDAHL, *supra* note 80, at 25 ("[T]he power of intercourse, intercommunication, and negotiation . . . . belongs exclusively to the President.").

269. Moreover, even if the one-voice doctrine simply meant that the President was the sole communicator, it would not square with practice in which the states and congresspersons engage in missions to foreign countries. *See supra* note 235; *infra* text accompanying note 320.

270. *See supra* Part I.

271. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 821–24 (1997) (rejecting legislative standing of congresspersons challenging the Line Item Veto Act because their votes had not been completely nullified and they did not suffer a personal or particularized injury).

272. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 997–98 (1979) (Powell, J., concurring) (voting to dismiss on ripeness grounds the challenge of several congresspersons to President Carter's unilateral termination of a treaty, reasoning that for prudential reasons "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority").

mootness,[273] personal jurisdiction,[274] *forum non conveniens*,[275] *Chevron* deference,[276] and political question.[277] While in many cases these doctrines serve to limit judicial involvement in foreign affairs matters, in other cases they do not. Thus, in its seminal political question opinion, the Court explained that, while there are issues the judiciary will not decide, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[278] The Court listed a variety of issues that fit within judicial cognizance, such as whether a treaty preempts particular state laws and whether, in the absence of executive clarity, a foreign war exists that triggers statutes securing U.S. neutrality.[279] The Court's recent opinion in *Zivotofsky* reaffirmed the judiciary's role over certain

273. *See, e.g.*, Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1431, 1435 n.3 (D.C. Cir. 1996) (concluding that a constitutional challenge to a regulation requiring "[e]mployees of the State Department, the United States Information Agency[,] . . . and the Agency for International Development . . . to submit [for prepublication review] all speaking, writing, and teaching material on matters of," among other things, foreign policy, was not moot where the regulation "remain[ed] in force").

274. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 115 (1987) (concluding that California's exercise of jurisdiction over a Japanese defendant facing a claim by a Taiwanese corporation would be unreasonable, in part due to federal foreign policy concerns).

275. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 238–40, 246–61 (1981) (dismissing a suit concerning a plane crash in Scotland in favor of a Scottish forum on *forum non conveniens* grounds).

276. *See, e.g.*, Gonzalez v. Reno, 212 F.3d 1338, 1347–54 (11th Cir. 2000) (applying *Chevron* deference to uphold the Immigration and Naturalization Service's interpretation of an asylum statute in the Elian Gonzalez case). In this case, the Eleventh Circuit suggested that *Chevron* deference is particularly appropriate in cases involving foreign affairs. *See id.* at 1351, 1353. As a result, *Chevron* deference may take on a unique form in the foreign affairs context.

277. *See, e.g.*, *Goldwater*, 444 U.S. at 1002–05 (Rehnquist, J., concurring in the judgment) (arguing that the challenge of several congresspersons to President Carter's termination of a treaty presented a political question).

278. Baker v. Carr, 369 U.S. 186, 211 (1962); *see also* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring in part) ("A court may not refuse to adjudicate a dispute merely because a decision 'may' . . . affect 'the conduct of this Nation's foreign relations . . . .'" (quoting Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986))); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (noting that while the Constitution commits foreign affairs to the political branches, it does not prohibit the judiciary from hearing any case "which touches foreign relations," and in particular "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state" (quoting *Baker*, 369 U.S. at 211)).

279. *Baker*, 369 U.S. at 212–13.

foreign affairs issues[280] and may signal a retreat from the political question doctrine in foreign affairs. As discussed previously, the question presented was whether Congress could statutorily require the executive to list Israel on the passport of someone born in Jerusalem notwithstanding the President's "power to recognize foreign sovereigns"[281] and the State Department's "longstanding policy of not taking a position on the political status of Jerusalem."[282] The Court rejected the lower courts' dismissal of the case on political question grounds.[283] The judiciary could properly resolve the question.[284] Just as the Court found room for the judiciary in deciding the separation of powers question in *Zivotofsky*, the Court has asserted a role in policing state action even when the executive is unconcerned about that action.[285]

Other foreign affairs doctrines similarly calibrate, rather than eliminate, the judiciary's involvement in foreign affairs.[286] Under the act of state doctrine, U.S. courts "will generally refrain from . . . sitting in judgment on . . . acts of a governmental character done by a foreign state within its own territory and applicable there."[287] However, if there is clear international law that governs the foreign state's conduct or if the concerns motivating the doctrine are not implicated even though the doctrine technically applies, courts will disregard the doctrine and inde-

280. *Zivotofsky*, 132 S. Ct. at 1428.

281. *Id.* at 1426.

282. *Id.* at 1424.

283. *Id.* at 1424–27; *see also id.* at 1434–35 (Sotomayor, J., concurring in part) (same); *id.* at 1436–37 (Alito, J., concurring in the judgment) (same).

284. *See id.* at 1425, 1427–30 (majority opinion); *id.* at 1434–35 (Sotomayor, J., concurring in part); *id.* at 1436–37 (Alito, J., concurring in the judgment). Justice Powell reached a similar conclusion in *Goldwater v. Carter*, which involved a challenge by members of Congress to the President's termination of a treaty with Taiwan. *See* Goldwater v. Carter, 444 U.S. 996, 997, 999 (1979) (Powell, J., concurring in the judgment). In his view, "the question presented . . . concern[ed] only the constitutional division of power between Congress and the President," a question that could be resolved using "normal principles of [constitutional] interpretation" and thus did not present a political question. *Id.* at 999; *see also id.* at 1001–02.

285. *See* Goldsmith, *supra* note 12, at 1620–21 (noting, while opposing, "[t]he orthodox view . . . that judge-made federal foreign relations law constitutes [the nation's voice to the preemption of state law] until the federal political branches say otherwise"); *supra* text accompanying note 51.

286. *See* Steinhardt, *Orthodoxy*, *supra* note 5, at 23–26 (identifying judicial actions that bear on foreign affairs).

287. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443(1) (1987).

pendently assess the legality of the foreign sovereign's acts.[288] Similarly, courts exercise ultimate discretion to decide whether to apply the act of state doctrine when the executive has represented that the doctrine need not apply.[289] Under principles of international comity, courts may abstain from exercising jurisdiction in cases involving the executive, legislative, or judicial acts of foreign states.[290] Pursuant to jurisdiction provided by the Alien Tort Statute, federal courts hear limited claims based on customary international law.[291] Invoking the *Charming Betsy*

288. *See* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 409 (1990) (reiterating the Court's prior suggestion "that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . ."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987) (indicating that the act of state doctrine does not apply in the face of "a treaty or other unambiguous agreement regarding controlling legal principles"); *id.* § 443, cmt. b (noting the argument "that the doctrine was not intended to preclude review of an act of a foreign state challenged under principles of international law not in dispute," but recognizing that "no such case had been decided" prior to the Restatement); *id.* § 443, rep. note 5 (discussing "the treaty exception to the act of state doctrine"). Four Justices of the Supreme Court have also advocated a commercial activity exception to the act of state doctrine. *See id.* § 443, rep. note 6 (citing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695–706 (1976) (plurality opinion)).

289. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 772–73 (1972) (Douglas, J., concurring in the result); *id.* at 773 (Powell, J., concurring in the judgment); *id.* at 776–78, 780–93 (Brennan, J., dissenting) (rejecting the notion that the act of state doctrine would not apply if the executive indicated that it need not, and noting that the four dissenting and two concurring Justices endorse that rejection); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443, rep. note 8 (1987).

290. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797–99 & n.24 (1993) (suggesting, without deciding, that a court might be able to abstain from exercising jurisdiction based on international comity, but indicating that the circumstances in which that would be appropriate are narrow); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101, cmt. e (1987) ("Comity, in the legal sense . . . . 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." (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895))).

291. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25, 732 (2004) (recognizing some federal court authority to hear claims based on customary international law norms that are as well defined and widely accepted as the norms Congress contemplated in enacting the Alien Tort Statute); *see also* David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV.

canon, courts work to interpret federal statutes to avoid infractions of international law unless Congress has manifested intent to violate.[292] Similarly, in applying the presumption against extraterritoriality, courts interpret federal statutes to apply only domestically absent clear evidence of congressional intent to the contrary.[293] And under the range of deference given to the executive in the realm of foreign affairs, courts give more or less weight to the executive's position in foreign affairs cases.[294] The result is that while the courts recognize limits to their participation in foreign affairs matters,[295] those limits fall well short of outright exclusion. Many doctrines recognize a role for the judiciary in foreign relations.

The room left for the judiciary results in disagreements between the political branches and the courts.[296] Even recently, the Court has rejected foreign relations–related positions taken by both the President and Congress. For example, in *Zivotofsky*, the Court rejected the executive's claim that a challenge to the executive's refusal to follow a statute endorsing Jerusalem as the capital of Israel presented a political question.[297] In *Medellín v. Texas*, the Court concluded that the President lacked unilateral authority to execute an otherwise non-self-

1, 38–39 (2006) [hereinafter Moore, *Emerging Uniformity*] (discussing the same); Steinhardt, *Orthodoxy*, *supra* note 5, at 24–25 (identifying ways in which Alien Tort Statute litigation might harm U.S. foreign affairs and violate the one-voice rationale).

292. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (noting that the *Charming Betsy* canon is "a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate"); *Hartford*, 509 U.S. at 815 (Scalia, J., dissenting) ("Though it clearly has constitutional authority to do so, Congress is generally presumed [under the *Charming Betsy* canon] not to have exceeded . . . customary international-law limits on jurisdiction to prescribe.").

293. *See Morrison*, 130 S. Ct. at 2877–78, 2881–83.

294. *See, e.g.*, CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 116–29 (4th ed. 2011) (discussing and illustrating the degree of deference courts give the executive on varying foreign relations matters); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1192–93 & n.375 (1990) [hereinafter Steinhardt, *Canon*] (noting that cases rejecting the executive's interpretation of treaties depart from the one-voice rationale).

295. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412 (1964) ("The courts['] . . . powers to further the national interest in foreign affairs are necessarily circumscribed as compared with those of the political branches . . . .").

296. *See* Steinhardt, *Orthodoxy*, *supra* note 5, at 36–38, 42–43 (noting examples of disagreement between the courts and political branches).

297. *See* Zivotofsky *ex rel*. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1424–25 (2012).

executing International Court of Justice (ICJ) judgment.[298] And in *Boumediene*, the Court concluded that Congress had unconstitutionally attempted to deny the writ of habeas corpus to detainees at Guantánamo.[299] In its separation of powers dimensions, then, the one-voice doctrine contends with a practice that involves multiple federal players.

2. Federalism

Just as Supreme Court practice recognizes foreign affairs authority beyond the President in Congress and the courts, Court precedent leaves room for state action bearing on foreign affairs.[300] The Court has made room for such action, in part, by increasingly leaving preemption decisions to the political branches.[301] In 1979, the Court struck a California property tax

298. *See* Medellín v. Texas, 552 U.S. 491, 499–500 (2008).

299. *See* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008).

300. *Cf.* Bradley, *supra* note 5, at 447 ("[T]he Court's one-voice statements have always been broader than the Court's actual decisions, which have not in fact allowed the federal government unfettered power in foreign affairs.").

301. *Compare* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456–57 (1979), *with* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 330–31 (1994) (evidencing a trend away from dormant preemption in foreign commerce arena); *compare* Zschernig v. Miller, 389 U.S. 429, 440–41 (1968), *with* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 428–29 (2003) (evidencing a trend away from dormant preemption in foreign affairs preemption arena); *compare* Hines v. Davidowitz, 312 U.S. 52, 73–74 (1941), *with* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000) (arguably evidencing a trend away from dormant preemption in statutory preemption arena). The Supreme Court's recent decision in *Arizona v. United States*, 132 S. Ct. 2492 (2012), might be read as interrupting the trend away from dormant preemption in the statutory preemption context. In the historic *Hines* case, the Court stated in deciding whether state "law stands as an obstacle to the accomplishment and execution of the full purposes . . . of Congress," that "it is of importance that [the state] legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority." *Hines*, 312 U.S. at 67–68. In other words, obstacle preemption analysis in the area of foreign affairs was stacked against the state with a dormant component. In *Crosby*, by contrast, the Court expressly declined to comment on dormant preemption, relying instead on the conclusion that a state purchasing law designed to promote human rights in Burma stood as an obstacle to the accomplishment of the similar goals of a federal statute. *See Crosby*, 530 U.S. at 371, 372–86 & n.8. *But cf.* BARRY R. CARTER ET AL., INTERNATIONAL LAW (5th ed. 2007) (noting widely divergent interpretations of *Crosby*, including interpretations that read *Crosby* as essentially a case of dormant preemption). In *Arizona*, the Court cited *Hines* in emphasizing immigration policy's connection to the nation's foreign affairs and foreign standing. *Arizona*, 132 S. Ct. at 2498–99. Moreover, as to one of the three state law provisions the Court found preempted, the Court noted that "decisions of [the type addressed by the state provision (that is, re-

because it interfered with a generic need for federal uniformity in regulating foreign commerce.[302] This same need was coupled with executive branch and foreign opposition in the 1994 *Barclays Bank* suit,[303] but the Court upheld the California tax scheme in *Barclays Bank* on the ground that Congress has the power to regulate foreign commerce and Congress had demonstrated a "willingness to tolerate" California's methodology.[304] Since it is arguably more difficult for the political branches to create preemptive statutes, international agreements, or even policies than it is for the judiciary to preempt state action on dormant constitutional grounds, the trend toward political preemption leaves more space for the states to engage in foreign affairs–related behavior.[305]

In addition to expecting more involvement from the political branches in preemption matters, the Court has resisted the immediate judicial enforcement of the primary sources of international law—treaties and customary international law[306]—absent congressional execution or incorporation of these

movability decisions)] touch on foreign relations and must be made with one voice." *Id.* at 2506–07. While this point appears to be cumulative rather than dispositive in the Court's obstacle preemption analysis, it arguably partakes of dormant preemption in a way that parallels *Hines* more closely than *Crosby*. For additional discussion of the trend away from dormant preemption, see, for example, Bradley, *supra* note 5, at 447–48; Cleveland, *supra* note 1, at 983; Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 624.

302. *See Japan Line*, 441 U.S. at 448–54 (repeatedly referencing the need for national uniformity). Halberstam reads *Japan Line* differently, and consistent with *Barclays Bank*, by emphasizing the Court's reliance, not on the general need for uniformity, but on a national policy to preempt California's law. *See* Halberstam, *supra* note 18, at 1063–66.

303. *See Barclays Bank*, 512 U.S. at 302–03, 311, 320–31 (referencing the need for national uniformity); *id.* at 328–30 & n.30 (noting executive branch opposition); *id.* at 320, 324 & n.22, 328 (noting foreign opposition). *But cf. supra* note 46.

304. *Barclays Bank*, 512 U.S. at 327; *see id.* at 303, 324, 326–27, 329–31; *see also* Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 9–13 (1986) (upholding state taxation because "the Foreign Commerce Clause [does not] *insist*[] that the Federal Government speak with any particular voice" and the federal government had adopted a policy permitting state taxation). As recognized by the Court in *Crosby*, *Barclays Bank* stands for the proposition that Congress can exercise its authority in ways inconsistent with executive or foreign preferences. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 385 (2000).

305. *See* Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 624.

306. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (identifying sources of international law); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (same).

sources.[307] The Court in *Medellín*[308] endorsed a broad notion of non-self-execution that will render more treaties non-self-executing.[309] Such treaties do not preempt state law until executed through legislation, preserving state law unless and until such legislation is passed.[310] Similarly, in *Sosa v. Alvarez-Machain*[311] the Court suggested that federal courts may enforce customary international law to preempt state law only when authorized to do so by the Constitution or Congress.[312] These cases reduce preemption of state laws affecting foreign relations. Thus, even as constitutional text, structure, and history provide significant (though not complete) support for the one-voice doctrine in its federalist dimension, Supreme Court practice leaves room for state actions affecting foreign affairs.

C. STATE PRACTICE

Not only do states possess significant leeway to affect foreign affairs as a matter of doctrine, but state (and other local) practice includes a wide range of behaviors that impact foreign relations, often with federal acquiescence or encouragement.[313]

307. *See* Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 624–25 (discussing a trend away from direct judicial enforcement of international law).

308. Medellín v. Texas, 552 U.S. 491 (2008). *Medellín* considered whether a judgment of the International Court of Justice was judicially enforceable federal law. *See id.* at 498–99. The Court concluded that it was not. *See id.*

309. *See* David H. Moore, *Do U.S. Courts Discriminate Against Treaties?: Equivalence, Duality, and Non-Self-Execution*, 110 COLUM. L. REV. 2228, 2264–65, 2286–89 (2010) [hereinafter Moore, *Equivalence*]; David H. Moore, Medellín*, the Alien Tort Statute, and the Domestic Status of International Law*, 50 VA. J. INT'L L. 485, 490–91 (2010).

310. Then, technically, "it is the implementing legislation, rather than the agreement itself, that is given effect as [U.S.] law." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. h (1987).

311. 542 U.S. 692 (2004).

312. *See* Bradley, Goldsmith & Moore, *supra* note 259, at 873, 892, 902–09, 935–36 (arguing that following *Sosa*, customary international law becomes enforceable federal law on constitutional or congressional authorization); Moore, *Emerging Uniformity*, *supra* note 291, at 1, 8, 31–37, 48–49 (arguing that under *Sosa*, customary international law is enforceable by federal courts when the political branches so authorize).

313. Many scholars have documented this phenomenon. *See, e.g.*, Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 821–22, 826–27 (1989) (identifying foreign relations activities in which states participate); Cleveland, *supra* note 1, at 991–1006 (discussing historical and current state involvement in foreign affairs and federal response to the same); Goldsmith, *supra* note 12, at 1634–39, 1674–78 (discussing state actions bearing on foreign affairs and federal acceptance of such actions); Halberstam, *supra* note 18, at 1027–47 (canvassing a range of state activities

In the arena of international economic policy, the federal government has been particularly inclusive of states—keeping states informed, soliciting their advice, and including them in international negotiation and dispute resolution—and has done so not just informally but through statutory or other formal mechanisms.[314] States have been influential in affecting federal policy in this arena.[315] States also affect foreign affairs outside the federal framework. To cite but a few examples, states sometimes go further than the federal government in trying to achieve international goals, such as decreasing greenhouse gas emissions.[316] States adopt laws or resolutions implementing international law or taking positions on foreign policy issues on the one hand,[317] and commit their own international law violations on the other.[318] States enact "Buy American" statutes requiring use of domestic over foreign products, and at the same time adopt procurement and divestment laws designed to

bearing on foreign affairs, some of which have been embraced by the federal government); Ramsey, *Original Understanding*, *supra* note 117, at 374–75 ("[T]he category of state laws having *some* potential effect upon foreign policy is unmanageably broad."); Swaine, *supra* note 8, at 1130–34 (noting that "the orthodoxy of a federal monopoly[over foreign affairs] . . . never really existed" as "[s]tates have always had an effect on U.S. foreign relations"); Young, *supra* note 9, at 415–23 (2002) (dismissing the assertion that states do not exist in foreign affairs as silly and excessively formal in light of states' current and increasing relevance in foreign affairs); *cf.* Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, 922–25, 930–32 (2006) (discussing cities' involvement in international relations). *But cf.* Spiro, *Federalism*, *supra* note 105, at 1258 (rejecting the "suggestion that state-level activity may now be unproblematic because in some cases Congress may 'agree' with it").

314. *See* Halberstam, *supra* note 18, at 1040–44 & nn.143, 153. The federal government has also included states "in the negotiation of international wildlife treaties" given the states' "superior knowledge of implementation issues." *Id.* at 1046 n.163.

315. *See id.* at 1040–41 & n.136, 1046.

316. *See, e.g.*, Ku, *supra* note 9, at 500–01 (noting state adoption of uniform laws that implement provisions of treaties the United States has not ratified); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 34–35, 60–62 (2007) (discussing the role of state and local officials in incorporating international norms, including norms of the Kyoto Protocol); Felicity Barringer & Kate Galbraith, *States Aim to Cut Gases by Making Polluters Pay*, N.Y. TIMES, Sept. 16, 2008, at A17 (discussing several states' actions to reduce emissions of greenhouse gases notwithstanding federal failure to pursue such efforts).

317. *See* Bilder, *supra* note 313, at 822, 826–27; Cleveland, *supra* note 1, at 993 & n.125; Halberstam, *supra* note 18, at 1033 & nn.97–98, 1039 n.130; Ku, *supra* note 9, at 461, 463, 481–85, 490; Resnik, *supra* note 316, at 45–51, 56–62.

318. *See* Cleveland, *supra* note 1, at 998–1001.

achieve foreign policy goals like the historic dismantling of apartheid.[319] Alone and in combination with each other and with foreign entities, states work to attract foreign trade and investment through incentives, missions, and foreign offices.[320] They likewise engage in cultural and educational exchanges.[321] State courts hear cases involving foreign states, foreign officials, and international law.[322] And states apply their laws, including their capital punishment law, to foreign or even U.S. nationals with international repercussions.[323] Thus, notwithstanding the arguably strong footing of the federalist dimension of the one-voice doctrine, it remains inconsistent, at least at the

319. *See, e.g.*, Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990) (upholding a Pennsylvania Buy American statute); Cleveland, *supra* note 1, at 995–98 (discussing state spending efforts motivated by foreign policy, including Buy American laws); Halberstam, *supra* note 18, at 1033 & n.98, 1039 n.130 (noting procurement and divestment efforts aimed at Burma and Northern Ireland as well as Buy American laws); Elizabeth Trachy, Comment, *State & Local Economic Sanctions: The Constitutionality of New York's Divestment Actions and the Sudan Accountability & Divestment Act of 2007*, 74 ALB. L. REV. 1019, 1019–22, 1030–32, 1038–40 (2011) (describing state divestment efforts motivated by foreign affairs concerns).

320. *See, e.g.*, Bilder, *supra* note 313, at 822, 826; Cleveland, *supra* note 1, at 994; Goldsmith, *supra* note 12, at 1674 & n.230; Halberstam, *supra* note 18, at 1028–32 & nn.73–74; Spiro, *Federalism*, *supra* note 105, at 1248–49; Nick Miroff & William Booth, *Middle-class Mexicans Snap Up More Products 'Made in the USA'*, WASH. POST, Sept. 9. 2012, http://www.washingtonpost.com/world/the_americas/middle-class-mexicans-snap-up-more-products-made-in-usa/2012/09/09/27c9d1b4-f212-11e1-892d-bc92fee603a7_story.html (noting a trade mission of the Colorado governor to Mexico and lucrative exports to Mexico from U.S. states); *see also* Swaine, *supra* note 8, at 1239 (noting that "states have competed for overseas business since they were colonies"). Halberstam identifies "international economic development . . . [as] perhaps the most significant area of state foreign policy activity." Halberstam, *supra* note 18, at 1028.

321. *See, e.g.*, Bilder, *supra* note 313, at 822, 826; Halberstam, *supra* note 18, at 1032–33. These exchanges include sister-city relationships that have at times "preceded formal diplomatic ties at the national level" and have brought "into focus human rights and social justice issues otherwise neglected at the federal level." *Id.* at 1032–33 & nn.92–93.

322. Cleveland, *supra* note 1, at 993. Indeed, Professor Ku asserts that state courts (and other bodies) have played a significant role in developing principles of international law. *See, e.g.*, Ku, *supra* note 9, at 461 & n.13, 476–81, 484, 486.

323. *See* Bilder, *supra* note 313, at 826; Cleveland, *supra* note 1, at 991–92, 999–1000; Goldsmith, *supra* note 12, at 1634–36, 1672–73; Ku, *supra* note 9, at 491; Spiro, *Federalism*, *supra* note 105, at 1251–52 & n.130, 1264.

margins, with the Constitution and, more deeply, with precedent and practice.[324]

VIII. THE ONE-VOICE DOCTRINE'S FUNCTIONAL FAILINGS

The one-voice doctrine likewise rests on functional presumptions that are faulty or incomplete. In identifying this failing, the goal is not to prove that functional arguments invariably favor the designation of another player or multiple players to exercise the nation's voice—undoubtedly, there remains value, for example, in preventing state action that shifts foreign affairs costs to the nation as a whole—but to identify significant cracks in the one-voice doctrine's functional footing in both its federalist and separation of powers dimensions.

A. ALONG THE FEDERALIST DIMENSION

The one-voice doctrine in its federalist dimension maintains that "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference."[325] This reasoning is most compelling in the traditional areas of foreign affairs: military matters and "diplomatic issues" such as treaty making.[326] As foreign relations has expanded to include new issues and actors and globalization has eroded the distinction between foreign and domestic, state "interest in the regulation of foreign relations" has justifiably increased.[327] The imperative that federal foreign authority remain "free from [local] interference"[328] has correspondingly softened.[329]

324. *But cf.* Swaine, *supra* note 8, at 1237 (characterizing as "overstated" the notion that "[t]he federal government has . . . yielded its international role to the states").

325. Hines v. Davidowitz, 312 U.S. 52, 63 (1941); *see also* Zschernig v. Miller, 389 U.S. 429, 442–43 (1968) (Stewart, J., concurring) (quoting same).

326. Goldsmith, *supra* note 12, at 1670; *cf.* Ku, *supra* note 9, at 527–28 (asserting that "the states have more often than not been responsible for fulfilling . . . international obligations" that "intersect[] directly with areas of traditional state control" and that federalist and separation of powers values may outweigh the interest in national responsibility for insignificant international obligations).

327. *See* Goldsmith, *supra* note 12, at 1671–78.

328. *Id.* at 1620.

329. *See id.* at 1677. With regard to international obligations that are not particularly significant, allowance of state participation may have always been

The imperative derives in part[330] from the presumption that if a state takes action in foreign affairs, the results will be detrimental,[331] and not just for the state but for the United States as a whole.[332] This presumption falters on several

high. *See* Ku, *supra* note 9, at 527–28.

330. *See* Swaine, *supra* note 8, at 1237 (noting that "[t]he exclusive federal authority to control foreign relations was premised on several simple propositions," including the principle that "multiple entreaties robbed the nation of the uniformity, credibility, and critical bargaining mass necessary to achieve advantageous treaties and stave off adverse actions," that "separate state action risked retaliation against the nation as a whole," and that "uniformity would enhance national pride and dignity, thus indirectly assisting in foreign relations, and serve as a bulwark against internal collapse due to conflicting interests").

331. *See, e.g.*, Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 578 (1840) (plurality opinion) (noting that differing state approaches to extradition "would not be well calculated to preserve respect abroad or union at home"); Bilder, *supra* note 313, at 827 (noting the argument that the "achievement of U.S. foreign [policy] requires that other nations perceive our foreign policy as unified and coherent" and that state involvement in foreign affairs "may undermine the conduct of U.S. foreign relations and the credibility of our negotiating posture by conveying the appearance of disagreement, confusion, uncertainty and weakness in our Government's stated foreign policy positions").

332. As the Court reasoned in *Chy Lung*:

> [If an international claim resulting from California law be made on the United States, u]pon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal government? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?
>
> The Constitution of the United States is no such instrument.

Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1875). Many cases repeat this theme. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2498 (2012) (noting that "[i]mmigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation"); Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 8 (1986) (explaining that a presumption in favor of uniformity prevails in foreign commerce cases where "the Federal Government has remained silent" in order to "ensur[e] that the conduct of individual States does not work to the detriment of the Nation as a whole"); *id.* at 20 (Blackmun, J., dissenting) (decrying state action that might interfere with the achievement of federal international tax policy by triggering retaliation that will be suffered by the broader nation); Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983) (noting, in assessing whether a California tax "violate[d] the 'one voice'

grounds. First, as Judith Resnik has observed, "[d]espite the ideology of each state acting alone . . . the practice is increasingly coordinated."[333] Externalities felt by the nation as a whole due to acts taken by many states may be less troubling than externalities produced by a single state. Second, as Peter Spiro has argued, the emergence of sub-state actors in foreign affairs who are "dependent on the global economy"[334] has created a world in which foreign countries can identify and target the U.S. state that is the source of a foreign affairs offense, rather than target the United States as a whole.[335] Moreover, if "undifferentiated retaliation" occurs in a post-Cold War world, it is likely to be less severe than in prior times.[336] The reduced risk

standard," that "a state tax . . . [risks] offending our foreign trading partners and leading them to retaliate against the Nation as a whole"); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449–50 & n.16, 453 (1979) (quoting *Chy Lung*, 92 U.S. at 279); United States v. Pink, 315 U.S. 203, 232 (1942) ("If state action could defeat or alter our foreign policy, serious consequences might ensue[; t]he nation as a whole would be held to answer if a State created difficulties with a foreign power."); Hines v. Davidowitz, 312 U.S. 52, 63–64 (1941) (quoting *Chy Lung*, 92 U.S. at 279); *see also* Halberstam, *supra* note 18, at 1021–27 (documenting this theme in the Supreme Court's foreign affairs jurisprudence).

333. Resnik, *supra* note 316, at 42.

334. Spiro, *Federalism*, *supra* note 105, at 1261.

335. *See e.g.*, Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 692–94 & nn.170–71 (2002); Spiro, *Federalism, supra* note 105, at 1224–26, 1259–70, 1275. *But cf.* Goldsmith, *supra* note 12, at 1679 n.253 (noting that the two examples of offending state polices cited by Spiro produced "national as well as local protests" and acknowledging Spiro's concession that such examples are "a slim basis on which to discern a trend" (quoting Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 166 (1994))); Ramsey, *Original Understanding*, *supra* note 117, at 372–73 (stating that "it remains difficult to build an affirmative case for state interference in foreign policy" on Spiro's assertion); Swaine, *supra* note 8, at 1240–42 (questioning the prevalence "of 'targeted retaliation,'" noting, for example, that even when countries target offending states, they also pressure the national government). This disaggregation of the state may also have separation of powers implications. First, Jean Galbraith argues that designation of the President as sole organ derives in part from international law's "need for a single representative" of each nation. *See* Galbraith, *supra* note 69, at 1012–15 & n.62. As international law looks less for a single representative, the President's claim as sole organ likewise weakens. *See id.* at 1043–44 & n.169. Second, Robert Knowles asserts that, as "America's current structure of government has existed for" more than two hundred years, foreign officials ought to understand that the federal branches may reach different conclusions. Knowles, *supra* note 9, at 132. *See also id.* at 151.

336. *See* Spiro, *Federalism*, *supra* note 105, at 1226, 1242, 1246–47, 1258–59.

of retaliation against the United States as a whole reduces the need to ensure federal exclusivity in foreign affairs.[337]

Third, state action does not inevitably produce detrimental effects.[338] It can produce the opposite result as well, and not just for the individual state. State action may improve the standing of the whole United States in international affairs. Consider the potential foreign relations effects of some of the state practices described above.[339] State exchange and similar programs can foster friendly relations.[340] State efforts to attract foreign business and investment, which may be more effective than federal efforts to do so, can strengthen the U.S. economy.[341]

States can also serve U.S. interests by furthering, or influencing, U.S. foreign policy for the better.[342] For example, state procurement or divestiture measures targeting foreign regimes or human rights practices may secure beneficial results until Congress enacts a federal scheme, which may or may not replace the state regimes.[343] State efforts may even spur enactment of federal schemes or other federal responses.[344] Alternatively, the federal government may wish to rely solely, and

337. *See id.* at 1226 ("In the new model, there is no justification for the courts to enforce a default rule protecting federal exclusivity in the face of contrary state-level preferences.").

338. *See* Goldsmith, *supra* note 12, at 1677–78 (briefly noting ways in which state involvement in modern foreign affairs can benefit the United States); Halberstam, *supra* note 18, at 1016–17, 1027–47 (developing the theme that state foreign affairs activity can benefit the United States).

339. *See supra* Part VII.C.

340. *See supra* note 320 and accompanying text.

341. *See supra* note 320 and accompanying text; *see also* Goldsmith, *supra* note 12, at 1676–78; Halberstam, *supra* note 18, at 1031.

342. This, of course, assumes that actions that might benefit the United States are not defined exclusively by actions the federal government is willing to take.

343. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 387 & nn.25–26 (2000); Cleveland, *supra* note 1, at 995–98, 1001–02, 1010–12, 1014; Goldsmith, *supra* note 12, at 1677.

344. *See* Cleveland, *supra* note 1, at 995 (describing state responses to apartheid that "mobilize[d] U.S. support for sanctions against South Africa"); Halberstam, *supra* note 18, at 1034–38, 1040 (describing state responses to the Arab League boycott, apartheid, and Nazi-era abuses that generated federal action). Interestingly, sometimes the federal government does not adopt a statutory regime but mediates between the states and localities who threaten sanctions on the one hand and the foreign entities threatened on the other, as has occurred in the context of Holocaust claims. *See id.* at 1036–37. Whatever the form of the federal response, Halberstam argues that the greatest benefit of state participation in foreign relations is in "challenging the Nation to action." *Id.* at 1057.

perhaps coyly, on state efforts, thereby achieving foreign relations goals without taking federal action that might produce a more strident response from targeted countries.

States may also produce international goodwill by taking steps to comply with international law norms to which the federal government has not consented—for example, climate change standards.[345] States can likewise assist in complying with international obligations the United States has assumed, including obligations more easily fulfilled at the state level.[346] Indeed, it is not uncommon for the United States to leave aspects of treaty compliance to the states.[347] Congress has not chosen to give the federal judiciary exclusive jurisdiction over treaty claims, so treaties may be enforced in state courts.[348] Similarly, the United States ratifies various treaties pursuant to reservations,[349] understandings, and declarations that maintain that compliance with certain obligations—for example, obligations within areas of traditional state regulation—will be carried out by state (or local) governments.[350] To illustrate, the

345. *See supra* note 316 and accompanying text. State compliance with such norms may also "contribute to the formation of [CIL]." Ku, *supra* note 9, at 465, 530, 532.

346. *See* Ku, *supra* note 9, at 528–29 ("[S]tate institutions may be the most effective mechanisms for achieving compliance with[, for example,] . . . . obligations to guarantee statutory notice in probate proceedings or exempt[] consuls from property taxes.").

347. *See, e.g.*, Breard v. Greene, 523 U.S. 371, 374, 378 (1998) (per curiam) (concluding that the Virginia governor, but not the Supreme Court, could stay an execution in light of an International Court of Justice order requesting postponement); United States v. Pink, 315 U.S. 203, 230 (1942) (noting that "[f]requently the obligation of a treaty will be dependent on state law" and citing *Prevost v. Greneaux*, 60 U.S. (19 How.) 1 (1856), a case involving a treaty that secured rights to French nationals to the extent permitted by state law); Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL. L. REV. 1327, 1360–63, 1370–86 (2006) [hereinafter Hollis, *Executive Federalism*] (discussing various ways in which the federal government leaves treaty compliance to the states); Ku, *supra* note 9, at 486–87, 489–90, 501–04, 506–15, 520–26 (discussing federal reliance on states to implement both treaties and CIL). The federal government has supported state involvement in foreign affairs in other ways as well. *See* Goldsmith, *supra* note 12, at 1674–77. For example, in adopting the Foreign Sovereign Immunity Act, Congress generally retained state law as the rule of decision in suits against foreign states. *See id.* at 1675.

348. *See, e.g.*, Cleveland, *supra* note 1, at 993.

349. Such reservations may prevent Congress "from passing implementing legislation that would override state law" pursuant to the treaty. Ku, *supra* note 9, at 462.

350. *See, e.g.*, Cleveland, *supra* note 1, at 993, 1003–04 & n.180, 1008–09 (discussing this practice and citing examples); Hollis, *Executive Federalism*,

United States ratified the International Covenant on Civil and Political Rights,[351] one of two treaties forming the international bill of rights, pursuant to the understanding that the "Covenant [would] be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments."[352] Leaving room for the states may have been essential to U.S. ratification of the treaty,[353] and makes the states critical to the nation's compliance with its treaty commitments.[354]

Not only does national treaty compliance sometimes fall to the states, but state compliance can be important in resolving international problems. For example, the United States faced international pressure when the ICJ found that the United States violated the Vienna Convention on Consular Relations by failing to notify certain Mexican nationals on death row of their Convention rights and ordered the United States to review and reconsider these nationals' convictions and sentenc-

supra note 347, at 1378–81 (same). Similarly, in the trade arena, "[t]he federal government . . . negotiated for a limitation of the [GATT procurement] code to cover only the thirty-seven States that had declared their willingness to participate. . . . and negotiated for the inclusion of an annex listing specific procurement decisions exempted even in the case of participating States." Halberstam, *supra* note 18, at 1042. It is unclear whether, on balance, "concessions to states in recent treaties and implementing legislation outweigh parallel incursions into state sovereignty." *See* Swaine, *supra* note 8, at 1237–38 & n.381.

351. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

352. 138 CONG. REC. 8071 (1992); *see also* 140 CONG. REC. 14,326 (1994) (including a similar federalism understanding in the Senate's resolution of advice and consent to ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195); 136 CONG. REC. 36,192 (1990) (including a similar federalism reservation in the Senate's resolution of advice and consent to ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted by the General Assembly of the United Nations* Dec. 10, 1984, 1465 U.N.T.S. 85).

353. *Cf.* Ku, *supra* note 9, at 530–32 (asserting that "[b]y leaving much of the incorporation, implementation, and execution of international law to the states, the federal government can confer the greatest amount of political legitimacy on the new international law," which addresses "a nation-state's interactions with its own nationals").

354. *See, e.g.*, BRADLEY & GOLDSMITH, *supra* note 294, at 553; Ku, *supra* note 9, at 525–26. For examples of federal reliance on state implementation of treaty (and CIL) obligations, even in the absence of a federalism reservation or treaty provision, see *id.* at 491–98, 501–04.

es.[355] In *Medellín*, the Supreme Court concluded that neither the ICJ judgment nor a presidential memorandum attempting to implement it could displace state procedural default laws that might stand in the way of the mandated review and reconsideration.[356] Justice Stevens, though agreeing with the majority, noted "that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation" and urged Texas to provide reconsideration notwithstanding its procedural law.[357] While Texas did not respond, Oklahoma took steps consistent with that counsel.[358] Oklahoma courts reviewed the conviction and sentence of a death row inmate in light of the Vienna Convention violation he suffered, and the Governor independently commuted the inmate's sentence to life without parole.[359] Oklahoma's actions served to deflect foreign affairs problems. Of course, just as states may effect compliance with U.S. obligations, states may serve as a scapegoat for noncompliance as well. The overall point is that state action in foreign affairs certainly can,[360] but does not inevitably, generate negative consequences that will be suffered by the nation as a whole.

B. ALONG THE SEPARATION OF POWERS DIMENSIONS

Just as there are functional reasons for allowing states a voice in foreign affairs, there are reasons for favoring, at times, Congress or a multiplicity of federal voices in foreign affairs. The one-voice doctrine assumes that U.S. interests are best served through a unitary federal voice in international interactions. As recently summarized by Justice Breyer, "where foreign affairs is at issue, the practical need for the United States

355. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, ¶¶ 90, 106(1), 121, 153(4), 153(9) (Mar. 31).

356. *See* Medellín v. Texas, 552 U.S. 491, 498–99 (2008).

357. *Id.* at 536 (Stevens, J., concurring in the judgment); *see id.* at 536–37.

358. *See id.* at 537 & n.4.

359. *See id.* at 537 n.4. This example admittedly cuts two ways. On the one hand, Texas law enforcement and Texas law generated both the breach of international law and the hurdle to enforcement of the ICJ mandate that produced foreign affairs problems. On the other hand, Oklahoma's actions demonstrate how states can remedy international problems.

360. *See* Spiro, *Federalism*, *supra* note 105, at 1249–50 ("[T]here continue to be instances in which state-level action may undermine the national interest.").

to speak 'with one voice and ac[t] as one,' is particularly important."[361]

It is undoubtedly true that in certain circumstances U.S. interests are served by a unified position.[362] The *Banco Nacional de Cuba v. Sabbatino* Court, for example, believed that the executive's diplomatic efforts to address foreign expropriations of American citizens' property could easily be undercut by court judgments on the expropriations' legality.[363] Especially if the expropriating state were a party to the suit, a judgment that the expropriation is illegal could offend the state;[364] a judgment of legality would undercut the executive's claim to the contrary or intentional ambivalence on the question.[365] Yet, the presence of multiple U.S. voices in foreign relations can advance U.S. interests as well.

361. Zivotofsky *ex rel*. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1438 (2012) (Breyer, J., dissenting) (alteration in original) (quoting United States v. Pink, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring)).

362. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 711–12 (2001) (Kennedy, J., dissenting) (predicting that the United States will fare worse in repatriation negotiations with other countries in light of Court-authorized "judicial orders requiring release of removable aliens"); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381–82 (2000) (assuming that the President will fare better in interacting with other countries if he has broad authority and presents a coherent policy); POMEROY, *supra* note 77, at 447 (asserting that in treaty negotiations "one mind and will must always be more efficient . . . than a large deliberative assembly"); Swaine, *supra* note 8, at 1242–43 (discussing "the Framers' argument that a federal monopoly is necessary in order to maximize and apply American bargaining power"); *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (noting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere").

363. *See Sabbatino*, 376 U.S. at 430–33. *But see id.* at 462–68 & nn.25–26 (White, J., dissenting) (discounting these concerns and noting concerns for undercutting the executive that result from the Court's approach to the act of state doctrine—in particular, its conclusion that lack of clarity in international law supports application of the doctrine and that the doctrine is a rule of decision rather than merely a basis for abstention).

364. *See id.* at 431–32, 437 (majority opinion).

365. *See id.* at 432, 437. Judicial determinations of legality might likewise undercut executive efforts to alter international law norms. *See id.* at 432–33. Even judicial uncertainty regarding legality might hamper the executive. *Id.* at 433. Relatedly, judicial doctrines requiring the executive to take a position on the appropriateness of judicial resolution of a case could interfere with the executive's diplomatic strategy. *Id.* at 436. *But see id.* at 462, 468–72 (White, J., dissenting) (rejecting this contention and instead expressing willingness to abstain from adjudication, at least temporarily, if the executive so petitions).

The participation of other domestic actors may correct flaws or excesses in presidential policy.[366] Participation may also help to secure U.S. interests. Game theorists and negotiation analysts agree that negotiation strength can be increased if the negotiator must obtain domestic approval for any proposed agreement.[367] Such an arrangement produces a two-level game.[368] In one game the negotiator interacts with the negotiator of the other states; in the other she interacts with the domestic forces that must ratify any agreement formed.[369] Under these conditions, game theory "predicts that while domestic constraints may decrease the likelihood of a mutually satisfactory [and efficient] accord . . . they increase the likelihood that any agreement actually achieved will favor the constrained side."[370] The President, for example, may be able to secure concessions from other countries on the threat that the Senate or

366. Adler, *supra* note 68, at 23–24 ("The structure of shared powers in foreign relations serves to deter the abuse of power, misguided policies, irrational action, and unaccountable behavior.").

367. *See* Frederick W. Mayer, *Managing Domestic Differences in International Negotiations: The Strategic Use of Internal Side-Payments*, 46 INT'L ORG. 793, 796–805, 809–17 (1992) (employing a negotiation analysis lens); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 437–41, 443–44, 448–50, 452 (1988) (employing a game theory lens); *see also* R.B. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, 69 AM. J. INT'L L. 837, 839 (1975) (noting the argument of a U.S. Senator that encouraging the executive to obtain Senate approval of certain claims settlement agreements with other countries "should appreciably strengthen the hand of our Government in all such negotiations" (quoting 109 CONG. REC. 25,149 (1963))).

368. *See* Putnam, *supra* note 367, at 434; Robert J. Schmidt, Jr., *International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission*, 26 ENVTL. L. 95, 108 (1996).

369. *See* Putnam, *supra* note 367, at 434–37; *see also* Schmidt, *supra* note 368, at 108–09. The requirement of domestic buy-off can delay and complicate the treatymaking process. *See, e.g.*, HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 166, 170–81 (1982) (providing an example from the negotiation of the Panama Canal treaties).

370. Swaine, *supra* note 8, at 1243; *see* Putnam, *supra* note 367, at 437–41, 443–44, 448–50, 452; Schmidt, *supra* note 368, at 117, 119–20; *see also* Mayer, *supra* note 367, at 804 (employing a negotiation analysis lens). At the same time, uncertainty regarding the prospect of ratification by one state may lead the other negotiating state to "demand more generous side-payments" on other issues. Putnam, *supra* note 367, at 453. And providing accurate information about the prospects of ratification may be beneficial "when the negotiators are seeking novel packages that might improve both sides' positions." *Id.*

Congress will not approve certain obligations.[371] Thus, in negotiating the Panama Canal Treaty, "Secretary of state Vance warned the Panamanians several times . . . that the new treaty would have to be acceptable to at least sixty-seven senators," and "[President] Carter, in a personal letter to [Panamanian leader] Torrijos, warned that further concessions by the United States would seriously threaten chances for Senate ratification."[372] Parallel American and foreign examples might be cited.[373]

371. *See, e.g.*, THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 19 (1980) ("[T]he power of a negotiator often rests on a manifest inability to make concessions and to meet demands."); Hathaway, *Presidential Power*, *supra* note 204, at 147, 233–36 (arguing that if U.S. negotiators "can demonstrate to their negotiating partners that they are constrained by the need to obtain congressional approval, they may be able to refuse to make concessions that they would otherwise need to make to secure a deal"); Mayer, *supra* note 367, at 796 ("U.S. negotiators . . . have long used the threat of congressional rejection as a device for leveraging concessions at the bargaining table."); Putnam, *supra* note 367, at 440, 448 ("The difficulties of winning congressional ratification are often exploited by American negotiators."); Swaine, *supra* note 8, at 1244 (noting that the Constitution's assignment of "negotiation to a substantially independent President, while simultaneously liberating the Senate's advice-and-consent function, meant that the President could reasonably assert that agreements under discussion would have to satisfy a third party"). *But cf.* Hollis, *Executive Federalism*, *supra* note 347, at 1395 (noting that attempts to accommodate state interests in treaty negotiation can impair U.S. interests by "depriving [the United States] of negotiating capital" or eliciting demands from other states to treat federal and nonfederal states the same); Lindsay, *supra* note 245, at 278–80 (discussing how congressional opposition can both strengthen and weaken the President in international negotiations); Swaine, *supra* note 8, at 1243–45 (explaining why adding state voices to negotiation would undercut national interests).

372. WM. MARK HABEEB & I. WILLIAM ZARTMAN, THE PANAMA CANAL NEGOTIATIONS 40, 42 (1986); *see also Panama Canal—Defending the Canal*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/facility/panama-canal-defense.htm (last visited Nov. 30, 2013) (noting favorable treaty amendments regarding preferential passage of U.S. vessels through the Panama Canal secured by the Senate).

373. *See, e.g.*, Lillich, *supra* note 367, at 837, 839–44 & n.34, 846 (cheering Congress's blocking of an "unsatisfactory lump sum agreement" negotiated by the executive "to settle the claims of U.S. nationals" whose property was nationalized by Czechoslovakia after World War II); Mayer, *supra* note 367, at 797 (postulating "that the power held by extreme factions in Israel's domestic political system . . . limits Israel's ability to make territorial concessions and thereby empowers Israel in its dealings with its Arab neighbors"); *id.* at 806, 810 (noting that a domestic agreement "to support production of the new Trident submarine with multiple warhead missiles. . . . blunt[ed] military objections to the [Salt I] deal . . . [but] may have weakened the U.S. bargaining position").

Similarly, the President might be able to invoke the position of Congress (or, returning to the previous section, states' rights) to avoid participation in undesirable treaty regimes or provisions.[374] The United States arguably did so to evade efforts at international private lawmaking grounded in civil as opposed to common law.[375]

The United States might gain not only from the existence of multiple governmental voices, but also from the efforts of private actors to further international negotiations in what has been called track two diplomacy.[376] Indeed, technological advancements have made it virtually impossible to prevent private actors from having a voice in U.S. foreign relations, as evidenced by the fatal anti-American protests that erupted abroad over a Florida pastor's Koran burning or by the private video coverage of Iranian protests that escaped Iran during the Arab Spring.[377]

The contrary notion that unity of position is best has its roots in the view that foreign affairs are complex, unpredictable, and rife with risk of reprisal.[378] In discussing the Presi-

374. *See* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1241–42 & nn.551–52 (2000) (discussing invocations of states' rights to avoid treaty-making).

375. *See id.* at 1242 n.551.

376. *See, e.g.*, DALIA DASSA KAYE, RAND NAT'L SEC. RESEARCH DIV., TALKING TO THE ENEMY: TRACK TWO DIPLOMACY IN THE MIDDLE EAST AND SOUTH ASIA 105–06 (2007) (discussing the benefits of track two diplomacy), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG592.pdf; Charles Homans, *Track II Diplomacy: A Short History*, FOREIGN POLICY, Jul.–Aug. 2011, http://www.foreignpolicy.com/articles/2011/06/20/track_ii_diplomacy (last visited Nov. 30, 2013) (noting briefly the history of track two diplomacy, including instances of its use in U.S. foreign relations).

377. *See* Taimoor Shah & Rod Nordland, *Violence Continues in Afghanistan Over Koran Burning in Florida*, N.Y. TIMES, Apr. 3, 2011, at A5; Matthew Weaver, *Iran Protests: One-Man Video Channel That Is a Thorn in Tehran's Side*, GUARDIAN, June 11, 2010, http://www.theguardian.com/world/2010/jun/11/iran-protest-videos-youtube-mehdi; WSJ Staff, *Protest Videos Trickle Out of Iran*, WALL ST. J. DISPATCH BLOG (Feb. 14, 2011, 3:03 PM), http://blogs.wsj.com/dispatch/2011/02/14/protest-videos-trickle-out-of-iran/; *see also* Steinhardt, *Canon*, *supra* note 294, at 1192 ("[P]rivate initiatives add to the implausibility of a univocal foreign policy . . . ."); David Nakamura, *White House Denounces Dennis Rodman's Trip to North Korea*, WASH. POST POL. BLOG (Mar. 4, 2013, 1:41 PM), http://www.washingtonpost.com/blogs/postpolitics/wp/2013/03/04/white-house-denounces-dennis-rodmans-trip-to-north-korea/ (providing an example of private travel affecting foreign affairs).

378. *See* Knowles, *supra* note 9, at 90–93, 111–27 (arguing that the claim that "foreign affairs demand that the executive enjoy vast discretion" rests on a classical realist view of international relations).

dent's preeminence in foreign affairs, for example, the Court in *Curtiss-Wright* described the President's foreign affairs power as "very delicate" and described foreign affairs as a "vast external realm, with . . . important, complicated, delicate and manifold problems."[379] The Court has also warned "that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[380] This sort of environment, the Court has noted, requires discretion.[381] The nation must be able to speak with one voice and that voice

379. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936); *see also id.* at 319 ("The nature of transactions with foreign nations . . . requires caution . . . ." (quoting 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 24 (1901))); *id.* at 320 ("The nature of foreign negotiations requires caution . . . ." (quoting Letter from George Washington to the House of Representatives, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 193, 194 (James D. Richardson ed., 1896))); *see also* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1437–38 (2012) (Breyer, J., dissenting) (describing decisionmaking in the area of foreign affairs as "'delicate' and 'complex'" in the course of explaining that "[t]he Constitution primarily delegates the foreign affairs powers 'to the political departments of the government'" (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948))); Haig v. Agee, 453 U.S. 280, 291 (1981) (noting that *Curtiss-Wright* underscored "the volatile nature of problems confronting the Executive in foreign policy and national defense"); *Waterman*, 333 U.S. at 111 (stating that foreign policy decisions "are delicate, complex, and involve large elements of prophecy"); United States v. Pink, 315 U.S. 203, 232 (1942) (observing that issues of foreign policy "are delicate matters"); *id.* at 241 (Frankfurter, J., concurring) (noting that "diplomatic negotiations so easily founder" if the negotiators are explicit).

380. Hines v. Davidowitz, 312 U.S. 52, 64 (1941); *see also* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 (1979) ("[A] slight overlapping of tax[by multiple sovereigns] . . . might be deemed *de minimis* in a domestic context[but] assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."). *But cf.* Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 189 (1983) (rejecting the suggestion that *Japan Line* produces "an absolute rule" prohibiting any overlapping taxation in foreign commerce and stating instead that "[a]lthough double taxation in the foreign commerce context deserves to receive close scrutiny, that scrutiny must take into account the context in which the double taxation takes place and the alternatives reasonably available to the taxing State").

381. *See Curtiss-Wright*, 299 U.S. at 320 ("[I]f, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

must be sufficiently powerful to deal with the contingencies that arise.[382]

This reasoning fails to acknowledge that many foreign affairs decisions are routine and do not require haste or unbounded discretion.[383] Moreover, the view of foreign affairs on which this reasoning is based, though perhaps justified historically, arguably has less traction today. Technological advances have made it easier (though by no means costless or fail proof) to assess what is happening abroad, to understand the characteristics of other countries, and to communicate regarding problems. The development of international law and international and nongovernmental organizations has likewise facilitated communication, but perhaps more importantly has trained expectations and behavior. As a result, foreign affairs may be less wild, unpredictable, and capricious than previously.[384] Even if foreign affairs have not changed in these ways, the threat of repercussions from missteps or multiple voices in foreign af-

382. *See id.* at 319–22; *see also* Dames & Moore v. Regan, 453 U.S. 654, 662 (1981) ("[The] world . . . presents each day some new challenge with which [the President] must deal . . . ."); *cf.* Perez v. Brownell, 356 U.S. 44, 57 (1958) (finding a congressional power to regulate foreign affairs based, in part, on the need for national power to respond to "the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests"), *overruled in part by* Afroyim v. Rusk, 387 U.S. 253, 255–57, 263, 267–68 (1967) (rejecting the congressional power, recognized in *Perez*, to strip someone of U.S. citizenship, without denying an implied congressional power to regulate foreign affairs).

383. *See* Adler, *supra* note 68, at 24.

384. *See, e.g.*, Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT'L L. 1, 7 (2013) (noting scholarship that at least implicitly suggests that "[t]he proliferation of international organizations and tribunals, the increasing supply and demand for international law, and the declining utility of classical realist thinking, lead to the conclusion that lower levels of deference to the President and a greater role for courts are preferable") (footnotes omitted); Knowles, *supra* note 9, at 138–45 (arguing that the claim for executive discretion rests on a classical realist view that is no longer accurate in today's "U.S.-led international order [that] is unipolar, hegemonic, and, in some instances, imperial"); *id.* at 93, 152–58 (making similar arguments); *id.* at 105–06, 146 (noting liberal theory critiques of the need for judicial deference in foreign affairs); Steinhardt, *Orthodoxy*, *supra* note 5, at 44 (referencing a State Department assertion "that changes in international law . . . exclude some matters from the untrammeled discretion implied by the term 'foreign affairs' and thereby narrow[] the proper reach of the 'one-voice' orthodoxy"). *But see* Abebe, *supra*, at 31–35 (questioning the constraint imposed by international and nongovernmental organizations and international law on great powers).

fairs is arguably reduced for the United States as a result of its hegemonic status.[385]

Moreover, because the President and Congress each represents and answers to the nation as a whole,[386] it is less troubling when the President or Congress triggers foreign relations problems than when the states, who speak for only a subset, do. As between the President and Congress, there are clearly functional reasons for treating the President as the nation's voice in foreign affairs: the President's ability to obtain information about foreign countries, to form a unified policy, and to act with speed and secrecy.[387] Yet there are competing reasons to favor Congress as the one voice. Congress, it is generally understood, has authority to violate international law.[388] In light of the Take Care Clause,[389] the President's authority to violate is more contested.[390] If only one branch must act as the nation's voice in formulating and implementing foreign policy, arguably the branch with the broader discretion ought to do so. Similarly, given the importance of foreign affairs, perhaps the branch with the greatest democratic legitimacy ought to take the lead and responsibility. The President is elected every four years through a single national election generally presenting only

385. *See* Abebe, *supra* note 384, at 39 ("When the United States is the superpower, the threat environment changes; states are reluctant to challenge the United States. The kind of diplomatic skill required to achieve U.S. foreign policy goals in a [multipolar world] is not as uniquely important . . . .").

386. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984) ("[W]hen Congress acts, all segments of the country are represented . . . ."); *cf.* Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

387. *See, e.g.*, *Curtiss-Wright*, 299 U.S. at 319–21.

388. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (noting that Congress "clearly has constitutional authority to" violate the customary international law of prescriptive jurisdiction); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."); *id.* § 115(1) (noting that a federal statute may domestically supersede a prior treaty or provision of customary international law even if the result is a violation of international law).

389. *See* U.S. CONST. art. II, § 3.

390. *See, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. 1795, 1796–98 (2010) (noting that "[m]ost scholars agree that courts must uphold acts of *Congress* that depart from the law of nations" but several scholars cite the Take Care Clause to "argue[] that customary international law is judicially enforceable against the President").

two competitive candidates. By contrast, members of Congress are elected from smaller geographic regions and *each region* generally boasts two viable candidates. Representatives are also elected more frequently. Again, if one branch must be chosen, from a democratic perspective, that branch should be Congress.

A final reason for depriving the other federal branches of a voice in foreign affairs appears in *Curtiss-Wright*. There the Court quoted favorably from a report of the Senate Committee on Foreign Relations asserting that "the interference of the Senate in the direction of foreign negotiations [is] calculated to diminish [the President's] responsibility [to the Constitution] and thereby to impair the best security for the national safety."[391] That is, the Senate might divert the President from faithfully following the Constitution, and the President's own sense of loyalty to the Constitution is the greatest check on misuse of the treaty power. This reasoning borders on the ludicrous. The Constitution is famous not for its reliance on each branch's own restraint, but on checks and balances. The system of checks and balances operates not only in the context of domestic powers, but in relation to foreign affairs authority as well.[392] One need not look beyond the treaty power for support. The history of the Treaty Clause reveals a strong preference for legislative involvement in treatymaking.[393] Indeed, in convention, the power to make treaties was originally vested in the Senate.[394] While some desired to shift that power to the President, others feared abuse from the concentration of power in the President alone.[395] To protect against abuse, some even proposed a role for the House of Representatives.[396] The ultimate text, of course, gave treatymaking to the President and Senate.[397] The Senate's role was not limited, however, to approving treaties, but to providing "Advice and Consent."[398] And the Senate could only

391. *Curtiss-Wright*, 299 U.S. at 319 (quoting 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 24 (1901)).

392. *See, e.g.*, Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 616–22, 626–32.

393. *Id.* at 626–32.

394. *Id.* at 626–27.

395. *Id.* at 627.

396. *Id.* at 628.

397. *See* U.S. CONST. art. II, § 2, cl. 2.

398. *See id.*; Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 628–29.

approve by supermajority.[399] The Senate thus serves as a check on the abuse of power by the President. The judiciary similarly can serve as a check on abuse by both the political branches.[400] In short, functional considerations do not uniformly favor the one-voice doctrine's concentration of foreign affairs power in the federal government or the President.

IX. IMPLICATIONS

Having exposed the above features of the one-voice doctrine, it remains to emphasize that these features are flaws and to consider the implications of these flaws for the future of this prominent doctrine.

A. MULTIPLE DIMENSIONS

The fact that the one-voice doctrine is employed along multiple dimensions is not itself problematic. This feature of the doctrine arguably would not be troubling (a) if the different contexts in which the doctrine is used were governed by the same law, or (b) if the Court recognized that the doctrine applies in multiple contexts and applied the doctrine with sensitivity to the unique nature of the context at issue. Neither of these contingencies prevails, however.

The dimensions along which the doctrine is applied all present questions of constitutional structure.[401] However, the answers to these questions are governed by different constitutional principles. To illustrate, the general role of the states in foreign affairs is governed by the structure reflected in the Tenth Amendment that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people";[402] by the delegations made to the President, Congress, and

399. *See* U.S. CONST. art. II, § 2, cl. 2; Moore, *Unconstitutional Treatymaking*, *supra* note 181, at 629.

400. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–89 (1952) (holding that the President lacked authority to seize domestic steel mills in connection with the Korean War).

401. This is the case, at least, if one accepts that federal foreign affairs supremacy derives from the Constitution. *But see* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–18 (1936) (claiming that federal foreign affairs supremacy results not from the Constitution, but from the transfer of sovereignty from Britain to the national government of the United States).

402. U.S. CONST. amend. X; *see* Missouri v. Holland, 252 U.S. 416, 432–35 (1920) (invoking both the Tenth Amendment and "invisible radiation from the

judiciary in Articles I–III;[403] and by the prohibitions on state involvement in foreign affairs in Article I, section 10.[404] Specific questions of state authority in foreign affairs may turn on different provisions from within this group.[405] By contrast, the allocation of authority between the President and Congress is governed by the provisions of,[406] and interaction between,[407] Articles I and II.

More troubling, it is not clear the Court has noticed the uniqueness of the questions it is addressing when invoking the one-voice doctrine. As mentioned, in *Garamendi* the Court addressed the constitutionality of a California statute that required insurance companies doing business in the state to disclose information about European insurance policies that were in effect before and after World War II to facilitate recovery on policies by Holocaust victims.[408] The law was challenged as inconsistent with the policy reflected in executive agreements President Clinton entered to address the problem of Holocaust victim insurance policies that were not properly paid.[409] There is a sense in *Garamendi* that the strength of the national government's claim to foreign affairs authority vis-à-vis the states strengthened the majority's perception of the scope of executive

general terms of the Tenth Amendment" in assessing the validity of a treaty the United States had entered).

403. Articles I–III delegate, for example, the power to regulate foreign commerce to Congress, the power to receive ambassadors to the President, and the power to resolve controversies arising under treaties to the courts. U.S. CONST. art. I, § 8, cl. 1; *id.* art. II, § 3; *id.* art. III, § 2, cl. 1.

404. *Id.* art. I, § 10.

405. *Compare, e.g.*, Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) (Import-Export Clause), *with* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) (Foreign Commerce Clause).

406. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 11 (authorizing Congress "[t]o declare War"); *id.* art. II, § 2, cl. 1 (naming the President Commander in Chief).

407. Hamilton and Madison, in their famous Pacificus-Helvidius debate, disagreed on the interaction between Article I and II. While Madison believed that Articles I and II's enumerated grants of foreign affairs authority to the President and Congress controlled the allocation of foreign affairs authority, Hamilton maintained that Article I's Vesting Clause located foreign affairs power in the President with limited, express exception as enumerated in Articles I and II. *Compare* Madison, "Helvidius" Number 1, *supra* note 199, at 69–72 (Madison as Helvidius), *and* Madison, "Helvidius" Number 2, *supra* note 201, at 81–84 (Madison as Helvidius), *with* Hamilton, *supra* note 74, at 36–42 (Hamilton as Pacificus).

408. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401, 409–10 (2003).

409. *See id.* at 401, 405–08, 413.

power, leading to the conclusion that mere policies reflected in sole executive agreements could preempt state law.[410]

410. *See id.* at 401 (holding the state law preempted). For example, the Court alternates between speaking of executive power and policy, and national power and policy. *Compare id.* at 413 (referring to "foreign policy of the Executive"), *and id.* at 414 (referring to "executive authority to decide what [foreign] policy should be"; "the President's power to act in foreign affairs"; and the scope of the President's "independent authority to act" in foreign affairs), *and id.* at 415 (citing to the President's lead foreign affairs role, the President's unique responsibility to conduct foreign affairs, and presidential control over foreign affairs), *and id.* at 419 (citing to executive conduct of foreign affairs and to "the executive foreign relations power"), *and id.* at 420 (referring to "the Executive's responsibility for foreign affairs" and "the national Executive['s] . . . responsibility to maintain the Nation's relationships with other countries"), *and id.* at 421 (referring to "Executive Branch diplomacy"), *and id.* at 423 (referring to "effective exercise of the President's power"), *and id.* at 424 n.14 (referring to "the President['s] . . . considerable independent constitutional authority to act on behalf of the United States on international issues"), *and id.* at 427 (referring to "the President . . . consistently [choosing] kid gloves" in response to a foreign policy matter, the President's foreign relations objectives, "Executive Branch foreign policy," and "Presidential foreign policy"), *and id.* at 429 (referring to "the President's policy"), *with id.* at 401 (referring to "the National Government's conduct of foreign relations"), *and id.* at 411 (referring to "the National Government's concern"), *and id.* at 413 (referring to "the National Government's policy" and "the foreign relations power [allocated] to the National Government"), *and id.* at 419 (referring to the effective conduct of the foreign policy of the Nation), *and id.* at 419 n.11 (referring to "federal foreign policy interest[s]" and to the established principle "that the Constitution entrusts foreign policy exclusively to the National Government"), *and id.* at 420 (referring to "express foreign policy of the National Government"), *and id.* at 421 (referring to a foreign policy issue "the National Government has addressed" and "the national position" reflected in executive agreements), *and id.* at 425 (referring to "a [foreign policy] goal espoused by the National Government"; "the National Government's" force calibration "in dealing with" a foreign policy issue; "express federal policy"; and resolving conflict with state law "in the National Government's favor"), *and id.* at 426 (referring to "the National Government['s interest] in devising its chosen mechanism for" addressing a foreign policy problem and to "the responsibility of the United States"), *and id.* at 427 (referring to "conflict with national policy" and "the National Government's policy"). Of course, "national" is a proper descriptor of presidential power exercised and policy adopted for the federal government, but reference to national power and policy may reflect reliance on the strength of national authority vis-à-vis the states to uphold the executive's authority in making foreign policy. Relatedly, the Court considers the import of *Zschernig*—a case regarding federalism in foreign affairs—for the protection of executive foreign relations authority. *See id.* at 419–20 (declining to decide whether "a categorical choice between the" conflict and field preemption approaches manifest in the opinions in *Zschernig* was necessary to secure "respect for the executive foreign relations power"). The Court also acknowledges that, given the absence of congressional authorization, the President did not act with the plenary authority he had exercised in other preemption scenarios, but that "conflict with the exercise of [the President's considerable independent] authority is a comparably good reason to find preemption of state law." *Id.*

A similar blending of issues addressed by the one-voice doctrine is evident in *Munaf*, where the Court rejected the habeas petitions of two American citizens held in Iraq who sought to avoid transfer to Iraqi authorities.[411] In that case, the Court refused to second guess the executive's assessment that transfer did not present a risk of torture.[412] Independently evaluating that assessment, the Court reasoned, "would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area."[413] In support of this invocation of the one-voice doctrine, the Court cited Madison's oft-quoted statement from Federalist 42: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations."[414] However, this statement was made to defend the Constitution's transfer of authority from the states to the federal government.[415] It concerned the vertical distribution of authority, not the horizontal distribution between the political branches or between the political branches and the courts. Yet the Court relied on the statement to support its conclusions concerning political

at 424 n.14. Finally, the majority perceives executive authority more broadly than Justice Ginsburg in dissent, who is unwilling to derive preemptive policy from executive agreements that do not address the precise issue or from the statements of subordinate executive officials. *See id.* at 430, 438–43 & n.4 (Ginsburg, J., dissenting).

411. *See* Munaf v. Geren, 553 U.S. 674, 679–81, 683–84 (2008) (describing the facts of the case).

412. *See id.* at 700–02 (2008).

413. *Id.* at 702.

414. *Id.* (quoting THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961)).

415. *See* THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961) (addressing "powers lodged in the General Government"); *id.* (asserting that powers "which regulate the intercourse with foreign nations . . . . form[] an obvious and essential branch of the f[e]deral administration"); *id.* (noting that the Constitution removes the impediment to the treaty power "under which treaties might be substantially frustrated by regulations of the States"); *id.* at 280–81 ("The power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, belongs with equal propriety to the general government; and is a still greater improvement on the articles of confederation. . . . [which] leave it in the power of any indiscreet member to embroil the confederacy with foreign nations."); *id.* at 281 ("The regulation of foreign commerce . . . has been too fully discussed to need additional proofs here of its being properly submitted to the federal administration."); *see also* Ramsey, *Original Understanding*, *supra* note 117, at 383–84 (explaining that in making this oft-quoted statement "Madison was justifying the grant of *particular* foreign relations powers *to* the federal government" and was "not suggesting a generalized constitutional preclusion of the states").

branch, and particularly executive, primacy in relation to the judiciary.[416]

Curtiss-Wright manifests a similar, though more subtle, conflation of issues. The question in *Curtiss-Wright* was whether Congress had abdicated its responsibilities and unconstitutionally delegated lawmaking authority to the President through a joint resolution empowering the President to criminalize U.S. arms sales to the countries engaged in the Chaco War.[417] In building to the conclusion that the President acted constitutionally in executing the resolution, the Court noted the unique nature of federal foreign affairs authority and the fact that that authority rests on "the irrefutable postulate that though the states were several[,] their people in respect of foreign affairs were one."[418] The strength of federal foreign affairs authority vis-à-vis the states was again used to lay the groundwork for a finding of presidential authority.

These examples suggest that the Court has not consistently recognized the different questions to which the one-voice doctrine has been applied. Again, this might not be troubling if the Court nonetheless answered the question presented based on reasoning relevant to that question. However, the above cases suggest that the one-voice doctrine in its strong, federalist dimension has been used horizontally to expand the scope of presidential power.[419] Carelessness concerning the different dimensions of the doctrine has arguably produced a serious second generation problem—the aggrandizement of executive authority. Given the protean nature of the one-voice doctrine, the

416. *See Munaf*, 553 U.S. at 702–03. In *Garamendi*, the Court rightly cited this and similar statements from the Federalist Papers in noting why the Constitution allocated "foreign relations power to the National Government in the first place." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 413–14 (2003) (citing Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 n.16 (2000) (quoting THE FEDERALIST NO. 80, at 535–36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART.")); THE FEDERALIST No. 44, at 299 (James Madison) (Jacob E. Cooke ed., 1961) (identifying "the advantage of uniformity in all points which relate to foreign powers"); THE FEDERALIST No. 42, at 279 (James Madison) (Jacob E. Cooke ed., 1961); *see also* Hines v. Davidowitz, 312 U.S. 52, 62–63 & nn.9, 11 (1941) (quoting Madison and other Founding-era sources to establish the federalist division of foreign affairs authority).

417. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 314–15 (1936).

418. *Id.* at 317; *see id.* at 315–19 (asserting that federal foreign affairs powers, unlike federal domestic powers, did not derive from the states); *id.* at 329 (upholding the discretion vested in the President).

419. *See supra* notes 408–18 and accompanying text.

risk remains that errors of this type will not only continue but expand.

B. MULTIPLE THEORIES

Greater care in recognizing the different issues the one-voice doctrine addresses might solve this problem and justify continued use of the doctrine if it were not for another of the doctrine's features: its reflection of varying approaches to constitutional interpretation.[420] The fact that a doctrine straddles multiple theories of constitutional interpretation may be a virtue rather than a vice. A doctrine might be hailed for capturing the outcome or the core analysis of multiple theories. The one-voice doctrine straddles multiple theories in a more problematic way, however. The Court's one-voice jurisprudence does not achieve theoretical accord but, as noted above, alternates between competing theories.[421] At a minimum, then, the one-voice doctrine obscures the Court's theoretical approach. The result is that the Court invokes the doctrine, not only without acknowledging the different contexts in which it is used, but without acknowledging or justifying the varying theoretical perspectives motivating the doctrine. Indeed, sometimes the theory motivating the doctrine is simply left unclear.[422]

The Court has done better in other contexts at making transparent its approach to constitutional interpretation. Take, for example, the issue of the extraterritorial reach of Bill of Rights limitations on federal action. In *United States v. Verdugo-Urquidez*, the Court considered "whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country."[423] Justice Rehnquist for the majority relied primarily on constitutional text,[424] history,[425] and precedent,[426] and secondarily on functional considerations,[427] in

420. *See supra* Part V.

421. *See supra* Part V.

422. *See* Baker v. Carr, 369 U.S. 186, 211 (1962) (citing the need for "single-voiced statement of the Government's views" evidently as a functional reason for treating an issue as a political question, rather than as shorthand for a judgment that the Constitution designates the President or Congress as the nation's sole voice).

423. 494 U.S. 259, 261 (1990).

424. *See id.* at 265–66, 269, 274.

425. *See id.* at 266–68, 274.

426. *See id.* at 268–74.

427. *See id.* at 273–74.

concluding that the Fourth Amendment did not apply.[428] Justice Kennedy, while fundamentally agreeing with the majority, wrote separately to discount the Court's textual analysis and emphasize the importance of functional considerations in calibrating the extraterritorial reach of Bill of Rights guarantees.[429] Justice Kennedy's functional approach became the majority's in *Boumediene*, which concerned the constitutional rights of alien detainees at Guantánamo.[430] Whatever the merits of the shift in *Boumediene*, it was, at a minimum, apparent.

The Court could, of course, be more transparent regarding the theoretical approach reflected in the one-voice doctrine in future cases. Yet the doctrine's theoretical multiplicity combined with its multiple dimensions make it difficult to conceive of a unitary one-voice doctrine going forward.

C. INCONSISTENCY WITH THE CONSTITUTION

Not only does the one-voice doctrine obscure the varying constitutional methodologies employed and conflate the constitutional questions presented, the doctrine can lead to unconstitutional results. As explained above, the Constitution nowhere vests foreign affairs power in one branch of the federal government nor utterly precludes its exercise by the states.[431] When the doctrine suggests otherwise it lacks constitutional footing and points toward unconstitutional results. The Court's actual practice, of course, reveals that the Justices have not followed the one-voice doctrine to its broadest conclusions. Even while retaining the one-voice doctrine, the Court has recognized the shared nature of foreign affairs power.[432] This is comforting as it suggests that the most flagrantly unconstitutional conclusions that might result from the doctrine might not materialize in the Court. The level of comfort declines, however, upon the realization that the most one can say is that these results may not materialize. The expansiveness and staying power of the doctrine generate risk that the doctrine will yet be used to exceed constitutional limits. Moreover, even if the risk does not materialize in the Supreme Court, the doctrine invigorates the executive to claim broad authority outside the courts and may

428. *See id.* at 261, 274–75.

429. *See id.* at 275–78 (Kennedy, J., concurring).

430. *See* Boumediene v. Bush, 553 U.S. 723, 732, 766–71, 793–97 (2008); *see also* Moore, *Equivalence*, *supra* note 309, at 2258–64.

431. *See supra* Part VI.

432. *See supra* Part VII.B.

provide Congress cover for accepting those claims.[433] It might also dissuade constitutional action by the states or more critical review by lower courts.[434]

The constitutional risks posed by the broadest version of the one-voice doctrine might not persist if the doctrine were trimmed. It might be appropriate, based on a review of constitutional text, structure, and history, to label the President the one voice for certain purposes—perhaps deciding which ambassadors to receive. A cropped version of the doctrine along these lines, however, would not be particularly helpful. First, there would be no need to invoke the one-voice metaphor in support of this conclusion. The Court could simply hold, for reasons of text, structure, and/or history, that the President possesses exclusive power to accredit ambassadors. Second, there are likely few, if any, foreign affairs powers that are exclusively assigned to a single actor. Even in reliance on express textual grants like the assignment of foreign commerce power to Congress, it may be misleading to describe Congress as the nation's foreign commerce voice. The President can certainly negotiate treaties governing foreign commerce,[435] and the courts might preempt state action unconstitutionally interfering with Congress's power[436] so that Congress is ultimately not alone in this area. Third, if there are contexts in which the one-voice label is accurate, the label now carries sufficient baggage that it may lead to inaccurate assumptions or extensions. As a result, even the retention of a much narrower version of the one-voice doctrine is problematic.

433. *See supra* notes 65, 70 and accompanying text.

434. *See, e.g.*, Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1075–77 (9th Cir. 2012) (relying on *Zschernig*—notwithstanding the Supreme Court's failure to do so since *Zschernig* was decided—to preempt a California statute facilitating insurance claims by "Armenian Genocide victim[s]" because the statute did not "address[] an area of traditional state responsibility" and "intrude[d] on the federal government's exclusive power to conduct and regulate foreign affairs"); *In re* Assicurazioni Generali, S.P.A., 592 F.3d 113, 117–20 (2d Cir. 2010) (relying on *Garamendi* and its one-voice rationale to dismiss state law Holocaust claims against an Italian insurer as inconsistent with federal policy notwithstanding the absence of an executive agreement with Italy).

435. *See* U.S. CONST. art. II, § 2, cl. 2 (granting the President the authority to enter into treaties).

436. *See supra* notes 42–47 and accompanying text.

D. INCONSISTENCY WITH PRACTICE

The problems that arise from the one-voice doctrine's inconsistency with constitutional text, structure, and history are, of course, grounded in the assumption that the Constitution is properly interpreted by reference to those sources. The Supreme Court has recognized that while historical practice does not create constitutional power in the President,[437] "'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,' can 'raise a presumption'" of congressional consent which can in turn "be treated as a 'gloss on Executive Power vested in the President.'"[438] The principle that practice may influence constitutional meaning, however, holds out little hope for the future viability of the one-voice doctrine. Even if the principle might, as would be necessary to fully retain the doctrine, also affect constitutional understanding of congressional, judicial, and state power, and even if the principle could trump contrary constitutional text, structure, and history, practice does not provide sufficient support for the one-voice doctrine. As the history at the outset of this Article demonstrates, the one-voice doctrine is not entirely a recent invention, even if it has been strengthened by key twentieth-century precedents.[439] At the same time, the doctrine has not met a consistent reception in the Supreme Court, let alone in Congress, the political branches generally, or the states.[440] As a result, it would be exceedingly difficult to argue that the one-voice doctrine should survive as a reflection of actual practice.

Practice is relevant to the doctrine's fate for another reason as well. Practice provides empirical evidence that arguably weakens any presumption that the political branches prefer preemption of state action bearing on foreign affairs or that national uniformity is best.[441] As these presumptions fade, it is

437. *See* Medellín v. Texas, 552 U.S. 491, 531–32 (2008) ("[T]he Court has been careful to note that '[p]ast practice does not, by itself, create power.'" (alteration in original) (quoting Dames & Moore v. Regan, 453 U.S. 654, 686 (1981))).

438. *Id.* at 531 (quoting *Dames & Moore*, 453 U.S. at 686) (some internal quotation marks omitted).

439. *See supra* Part II.

440. *See supra* Part VII.

441. I say arguably, because the import of political branch failure to quash state action turns on the ability and will of the political branches to police and preempt such action. Scholars are divided as to the political branches' preemptive ability and will. *Compare* Goldsmith, *supra* note 12, at 1666–67, 1680–89

less clear that the judiciary should engage in dormant preemption.[442] If national uniformity is not consistently ideal, for example, it is easier to conclude that while the Constitution generally allocates the nation's voice to the federal government, it does not through that allocation "*insist*[] that the Federal Government speak with any particular voice," uniform or otherwise.[443]

E. FUNCTIONAL FAILINGS

Having failed to accurately capture the Constitution either as a matter of text, structure, and history or as a matter of practice, the one-voice doctrine might yet survive in its functional form. Unfortunately, even from a functional perspective, the one-voice doctrine is flawed. As evidenced above, whether along separation of powers or federalist dimensions the one-voice doctrine in its functional form does not always lead to the right answer. Functional considerations may favor one voice in some circumstances but multiple voices in others.[444] State action or the threat of rejection by a coordinate voice may advance U.S. foreign policy interests in certain contexts.[445] The solution might be to downgrade the one-voice doctrine to a rationale whose strength the courts might evaluate under the circumstances of each case. Yet this solution quickly crumbles. Once the doctrine is reduced to a rationale that may or may not prevail in any given case, courts are left without consistent direction regarding whether to require, or secure, one-voiced action.[446] Courts must make functional judgments regarding

(rejecting the notion that the political branches lack the will and capacity to police state actions bearing on foreign affairs), *with* Swaine, *supra* note 8, at 1246–50 (arguing that Congress may under-protect foreign policy interests out of solicitousness to the states).

442. *See* Goldsmith, *supra* note 12, at 1666–67 (noting that the need for dormant preemption rests on the assumption that "the federal political branches desire exclusive control in" foreign affairs matters).

443. Wardair Can. Inc. v. Fla. Dep't of Revenue, 477 U.S. 1, 13 (1986).

444. *See* Goldsmith, *supra* note 12, at 1679–80 (noting that "the values to be attached to the competing federalism and foreign relations interests appear increasingly contested" such that the political branches preempt state law in some contexts but not in others).

445. *See supra* text accompanying notes 338–59, 367–75.

446. *Cf.* Steinhardt, *Orthodoxy*, *supra* note 5, at 32–34 & n.58 (recognizing that the one-voice rationale does not provide courts with guidance—nor suggest judicial competence—to decide whether adjudicating or abstaining from human rights litigation will embarrass the United States in its foreign affairs, though also noting that courts have made such judgments in the past, especially on jurisdictional matters).

whether a one-voice approach is best. The rationale does not dictate whether those judgments should be made on a case-by-case basis or for categories of cases.[447]

Moreover, the rationale can serve multiple ends—the protection of U.S. foreign relations and the protection of the political branches' power to conduct foreign relations[448]—exacerbating the lack of guidance for the judiciary in evaluating one-voice arguments.[449] These goals do not always point toward a one-voice solution, nor always point in the same direction. For example, in some cases accommodating state voices might further national goals without forcing the political branches to expressly endorse the states' course of conduct, potentially securing both U.S. foreign affairs interests and political branch discretion. In other cases, preempting state voices might protect political branch discretion to formulate foreign policy but ultimately undermine national foreign affairs interests. Similarly, allowing a court to resolve an international law dispute as to which the political branches are divided might further U.S. foreign policy interests, but improperly elevate one of the political branches.[450] And the consequences might combine in additional ways. Courts are ill suited to decide on their own the mix of goals that should prevail, not the least because judicial fixing of goals infringes on political branch lawmaking power, circumvents lawmaking procedures that protect state interests, and "lacks democratic legitimacy."[451]

447. *See id.* at 32–33.

448. *See* Goldsmith, *supra* note 12, at 1632–33 (discussing briefly the difference between these two ends). *But cf.* Steinhardt, *Orthodoxy*, *supra* note 5, at 43 (identifying "the potential for embarrassment" as "the *sine qua non* of 'one-voice' deference").

449. *But cf.* Abebe, *supra* note 384, at 49–50 (noting that courts make judgments about "the consequences of their decisions on U.S. foreign policy and the potential dangers of interfering with the political branches' foreign affairs prerogatives" in, for example, applying prudential doctrines like act of state, political question, and comity). The judiciary is likely better suited to decide one-voice arguments grounded in protecting political branch prerogatives than U.S. foreign policy interests as the former are guided in part by judgments concerning the constitutional distribution of foreign affairs authority. However, protection of political branch power may also turn on an assessment of the course that would best preserve political branch discretion to pursue particular policies, in which case the distinction between the two goals begins to fade.

450. *See* Steinhardt, *Orthodoxy*, *supra* note 5, at 35.

451. Goldsmith, *supra* note 12, at 1667, 1678; *see also* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (noting that foreign policy decisions "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil"). *But cf.* Spiro, *Federalism*, *su-*

Furthermore, once goals are chosen, courts lack competence to conduct the balancing required to reach those goals, especially if the goals chosen include furthering substantive U.S. foreign policy.[452] By their own admission, courts are inferior to the political branches in deciding matters of foreign policy.[453] Among other things, courts "generally lack foreign relations information and expertise."[454] Judges typically are generalists with no particular training in foreign relations.[455] On the information front, courts receive, from adverse parties during the limited duration of a lawsuit, information gathered and presented under restrictions imposed by discovery and evidence rules.[456] Further, in light of their number as well as the delay and limited reach of appellate and especially Supreme Court review, even federal courts are unlikely to achieve con-

pra note 105, at 1258 ("[S]tate interests of any magnitude are unlikely to justify the potentially high national costs of a disrupted foreign policy . . . .").

452. *But see* Spiro, *Federalism*, *supra* note 105, at 1256 & n.139 ("[A] finding that state activity has crossed the constitutional line does not involve the crafting of a federal rule or policy, but rather only the insulation of a rule developed by the political branches . . . .").

453. *See, e.g.*, *Waterman*, 333 U.S. at 111 (explaining that foreign policy decisions "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility"); *see also* Pasquantino v. United States, 544 U.S. 349, 369 (2005) (quoting *Waterman* in noting the danger in having the judiciary predict foreign affairs consequences); Goldsmith, *supra* note 12, at 1701–03 (discussing cases in which the Supreme Court has acknowledged incompetence to make, and has retreated from making, foreign policy judgments). *But cf.* Knowles, *supra* note 9, at 127–38, 148–58 (arguing that courts can and should engage foreign affairs issues in essentially the same way they engage domestic issues); Spiro, *Federalism*, *supra* note 105, at 1253–58 & n.139 (arguing that judicial competence is a concern in deciding separation of powers, but not federalism, questions in foreign affairs; that the courts are competent to decide when state action "is likely to disrupt national foreign policy"; and that the political branches require judicial assistance in policing state foreign affairs activity).

454. Goldsmith, *supra* note 12, at 1668.

455. *See, e.g.*, Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 543–44 (2011); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 186–87.

456. *See, e.g.*, FED. R. CIV. P. 26(b)(1) (limiting discovery generally to "nonprivileged matter that is relevant to any party's claim or defense"); *id.* at 60(b)(2), (c)(1) (limiting the time and circumstances under which a court may alter a judgment based on "newly discovered evidence"); FED. R. EVID. 401 (restricting relevant evidence to evidence regarding a "fact . . . of consequence in determining the action"); Ku & Yoo, *supra* note 455, at 183, 194–95 (discussing information limits of the judiciary).

sistency, at least with any speed.[457] And court decisions "must deal in doctrines" justified by reasoning that is sensitive to precedent such that decisions may not provide flexibility or remain current with altered circumstances.[458]

Notwithstanding judicial incompetence to evaluate functional one-voice arguments, the prospect of foreign relations doctrine moving to a place where these arguments are treated as political questions is slim.[459] Whatever the prospects, it is clear that at most the functional one voice is a rationale to be assessed case-by-case and not a doctrine to be applied reflexively. As a result, even the functional version of the one-voice doctrine cannot survive.

CONCLUSION

The one-voice doctrine is a frequent player in foreign relations law, having been invoked to answer critical questions regarding the foreign affairs powers of the President, Congress, courts, and states. Until now, the doctrine has escaped comprehensive evaluation. Filling that void, this Article demonstrates that the doctrine cannot withstand scrutiny. Not only is the doctrine inconsistent with constitutional text, structure, and history, as well as actual practice, but the doctrine applies along various dimensions that present divergent questions, masks different theories of constitutional interpretation, and ignores functional reasons for other or multiple voices in for-

457. *See* Abebe & Posner, *supra* note 455, at 542; Goldsmith, *supra* note 12, at 1668, 1694–95; Ku & Yoo, *supra* note 455, at 187–89, 192–93; *see also* Goldsmith, supra note 12, at 1695–98 & n.319 (providing examples of judicial inconsistency in making foreign affairs judgments).

458. Goldsmith, *supra* note 12, at 1668 (quoting Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 826 (1964)); *see* Ku & Yoo, *supra* note 455, at 183, 197.

459. From a historical perspective, this result might not be revolutionary. Goldsmith argues that for much of U.S. history, judicial preemption in the absence of political branch action in foreign affairs—which would include preemption based on one-voice arguments—was unknown. *See* Goldsmith, *supra* note 12, at 1641–61, 1664, 1713. Nor does he find that changed circumstances warrant departure from this historical practice, or that judicial preemption is a better option than leaving states to their own devices until the political branches act to preempt. *See id.* at 1661–98. To the extent that abandonment of one-voice arguments and reasoning is perceived as too extreme, the functional one-voice rationale in the federalism context might at least be recast to require an analysis that courts are more competent to perform, such as assessing whether state law is motivated by a foreign affairs goal. *See id.* at 1711. However, it is far from clear that such an assessment would identify those state actions that merit preemption and only those actions.

eign affairs. In light of these flaws, the one-voice doctrine should be abandoned. At most it may be appropriate to argue for a single federal voice in individual cases, but such arguments must be evaluated on their own. They cannot masquerade as part of a one-voice doctrine, for it is too much to believe that there is or that we should retain such a thing.