

UNIVERSITY OF COLORADO LAW REVIEW

Volume 70, Number 4

1999

A NEW AMERICAN FOREIGN AFFAIRS LAW?

CURTIS A. BRADLEY*

The 1999 University of Colorado Law Review Symposium considers the state of American foreign affairs law at the end of the twentieth century. This is a propitious time for such an assessment, and not just because of the centennial (and millennial) marker. In recent years, the world has seen dramatic changes in international relations. These changes include the end of the Cold War and the attendant breakup of the Soviet Union; a rapid expansion of international trade, along with a formalization of the international trading system; the proliferation of multilateral treaties covering a wide range of subjects, perhaps most notably human rights; and efforts to develop and apply a body of international criminal law. In light of these and other changes, it is especially important at this time to step back and assess the past, present, and future of American foreign affairs law.

In the articles that follow, a number of distinguished scholars present their views on various aspects of this topic. These articles are grouped into four panels. The first panel considers the history of American foreign affairs law, with special emphasis on the changes in this law that were taking place during the early parts of this century. The second panel considers the role of the states in foreign affairs, as well as the overall relevance of federalism to foreign affairs law. The third panel considers a variety of contemporary separation of powers issues relating to foreign affairs law. Finally, the fourth panel considers the relationship between the United States and in-

* Associate Professor, University of Colorado School of Law. For their helpful comments and suggestions, I would like to thank Jack Goldsmith, Hiroshi Motomura, and Phil Weiser.

ternational organizations, as well as the changing nature of international lawmaking.

Although the articles in this Symposium reflect a variety of viewpoints concerning foreign affairs law, one theme that runs through many of the articles is that foreign affairs law today is in a state of change. Indeed, I suggest in this introductory essay that, as we approach the end of the century, there may be emerging a "new" American foreign affairs law. I begin by sketching the principal components of the "old" law, which, for the sake of temporal clarity, I refer to as the "twentieth-century view." I next describe several ways in which this twentieth-century view has come under pressure in recent years. Finally, I consider some of the reasons for this pressure and whether we should fear or embrace the resulting shifts in foreign affairs law.

I. THE TWENTIETH-CENTURY VIEW

Ted White has given us an illuminating account of the transformation in American foreign affairs law that occurred during the early parts of the twentieth century.¹ As he explains, this transformation arguably represented a substantial departure from the "orthodox" view prevalent in the late nineteenth century.² Under the orthodox view, the exercise of foreign affairs power was perceived "as a constitutional exercise, one controlled by the enumerated and reserved powers parceled out in the Constitution's text."³ In addition, it was "assumed that the principal mechanism for entering into international obligations was the treatymaking process."⁴ And it was understood that "the exercise of any foreign relations

1. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999); see also G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109 (1999).

2. But cf. Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999) (suggesting that the twentieth-century view was not as sharp a departure from nineteenth-century understandings as might first appear); Richard B. Collins, *Nineteenth-Century Orthodoxy*, 70 U. COLO. L. REV. 1157 (1999) (same).

3. White, *The Transformation of the Constitutional Regime of Foreign Relations*, *supra* note 1, at 8.

4. *Id.*

powers by the federal government needed to respect the reserved powers of the states.”⁵

These and other strands of nineteenth-century thinking were largely abandoned in the early twentieth century, giving rise to a new orthodoxy, which I call the twentieth-century view of American foreign affairs law. There are a number of overlapping components of this twentieth-century view. In this section, I briefly describe three: domination by the Executive in foreign affairs matters; the irrelevance of federalism to these matters; and judicial lawmaking to protect federal prerogatives in foreign affairs.

A. *Executive Domination*

The first component of the twentieth-century view, and the one that has been received least favorably by academic commentators, is executive domination in foreign affairs matters. Under the twentieth-century view, the U.S. foreign affairs powers are centered in the Executive. In order for the United States to speak with “one voice” in foreign affairs, courts defer heavily to the Executive’s views and exercise little scrutiny of executive action.⁶

Perhaps the most famous endorsement of this view is the Supreme Court’s 1936 *United States v. Curtiss-Wright Export Corp.* decision.⁷ In that case, Congress purported to confer on the President by joint resolution the authority to implement a criminal prohibition on the sale of arms in the United States to countries engaged in a Latin American conflict. The resolution was challenged on the ground that it constituted an unlawful delegation of legislative authority to the President, a plausible argument at that time in light of the Court’s precedent.⁸ In rejecting this challenge, the Court held that the usual constitutional limitations on delegations of power to the Executive do not apply in the area of foreign affairs. The Court reasoned

5. *Id.* at 9.

6. For a comparative perspective on the relationship between the Executive and Congress, in the context of impeachment, see Lori Fisler Damrosch, *Impeachment as a Technique of Parliamentary Control over Foreign Affairs in a Presidential System?*, 70 U. COLO. L. REV. 1525 (1999).

7. 299 U.S. 304 (1936).

8. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

that, "as the sole organ of the federal government in the field of international relations," the Executive requires special flexibility and discretion in foreign affairs matters.⁹ The Court also expressed the view that some foreign affairs powers do "not depend on the affirmative grants of the Constitution," but rather derive from this country's status "[a]s a member of the family of nations."¹⁰

This executive domination component of the twentieth-century view further underlies judicial acceptance of the President's broad use of "executive agreements" to create international obligations. Although the Treaty Clause of the Constitution could be read as requiring two-thirds Senate consent in order for the United States to make international commitments,¹¹ the vast majority of such commitments since the 1930s have been in the form of less formal executive agreements.¹² The Supreme Court has to date approved the use of executive agreements, emphasizing the President's role as "sole organ of the federal government in the field of international relations," as well as the practical need for flexibility in addressing "the delicate problems of foreign relations."¹³

Another example of executive domination is the way in which courts addressed questions of foreign governmental immunity from suit prior to the enactment in 1976 of the Foreign Sovereign Immunities Act ("FSIA").¹⁴ From the late 1930s through the enactment of the FSIA, courts gave conclusive weight to the Executive's views regarding sovereign immunity, even when those views were politically motivated and inconsistent. The Supreme Court explained that "the courts should not so act as to embarrass the executive arm in its conduct of for-

9. 299 U.S. at 320.

10. *Id.* at 318.

11. See U.S. CONST. art. II, § 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur").

12. See LAWRENCE MARGOLIS, EXECUTIVE AGREEMENTS AND PRESIDENTIAL POWER IN FOREIGN POLICY 30-31, 105-06 (1986). Most executive agreements are concluded with the involvement of a majority of both houses of Congress ("congressional-executive agreements"), but some are concluded by the President alone ("sole executive agreements"). See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 201 (2d ed. 1995).

13. *United States v. Pink*, 315 U.S. 203, 229 (1942) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

14. 28 U.S.C. §§ 1330, 1602-11 (1994 & Supp. II 1996).

eign affairs" and that, as a result, "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."¹⁵

B. Irrelevance of Federalism

Another component of the twentieth-century view is the perceived irrelevance of federalism to foreign affairs matters. Unlike the executive domination component, this component has been widely embraced by foreign affairs law commentators.¹⁶ Under this view, the reserved powers of the states do not limit the federal government's exercise of foreign affairs powers, and states are broadly prohibited from engaging in foreign affairs activities. These conclusions are justified by the belief that foreign affairs concern the interests of the entire nation and thus are not the province of the constituent states.

A leading example of this view is the Supreme Court's 1920 *Missouri v. Holland* decision.¹⁷ In that case, the Court upheld a federal statute that regulated the hunting and capturing of migratory birds, which in turn implemented a treaty between the United States and Great Britain. The Court said that even if such a statute ordinarily would violate the powers reserved to the states under the Tenth Amendment, the existence of the treaty rendered the statute constitutional. The opinion was written by Justice Holmes and, as was typical for him, the reasoning is brief and cryptic and therefore open to a

15. *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); see also *Ex parte Peru*, 318 U.S. 578, 588-89 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938). This regime still exists to some extent with respect to head-of-state immunity, which is not expressly covered by the FSIA. See, e.g., *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994). See generally Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. (forthcoming 1999).

16. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149-50 (2d ed. 1996); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 304; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1831-35 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 384-86 (1997).

17. 252 U.S. 416 (1920).

variety of interpretations.¹⁸ Nevertheless, many commentators have interpreted the decision to stand for the proposition that the treaty power is not subject to federalism limitations.¹⁹

Another important example of this component of the twentieth-century view is the Supreme Court's 1968 *Zschernig v. Miller* decision.²⁰ This decision, issued during the height of the Cold War, concerned the validity of an Oregon inheritance statute, which, in effect, denied inheritance to nonresident aliens in Communist countries.²¹ Although neither Congress nor the Executive objected to Oregon's application of the statute, the Court held that the statute unconstitutionally interfered with the federal government's power over foreign affairs because it had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."²² The Court acknowledged that the states traditionally have regulated inheritance, but it said that "those regulations must give way if they impair the effective exercise of the Nation's foreign policy."²³

18. In one place, the Court suggests that the treaty power might not be subject to any constitutional limitations. *See id.* at 433. In another place, the Court suggests that the treaty power is subject only to the limitations imposed by the "prohibitory words" of the Constitution. *Id.* In still other places, the Court suggests that the treaty power is simply broader in some respects than federal legislative powers. *See id.* at 433, 435. In considering the proper reading of *Holland*, as well as its continued vitality, it is important to remember that it was decided at a time when the federal government's domestic powers, especially Congress's commerce power, were substantially narrower than they are today. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 459 (1998).

19. *See, e.g.*, HENKIN, *supra* note 16, at 191; 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 6.5, at 509 (2d ed. 1992); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 227 (2d ed. 1988).

20. 389 U.S. 429 (1968).

21. The Oregon statute provided, among other things, that aliens residing in foreign countries could not inherit property in the state of Oregon if the property would be confiscated "in whole or in part, by the governments of such foreign countries." OR. REV. STAT. § 111.070 (1951), *repealed by* 1969 Or. Laws ch. 591, § 305.

22. 389 U.S. at 441. This decision shows that the various components of the twentieth-century view do not always work in harmony. As discussed above, one component is executive domination. In *Zschernig*, however, the Court chose not to defer to the Justice Department's view that the Oregon statute did not, in that case, "unduly interfere[] with the United States' conduct of foreign relations." *Id.* at 434.

23. *Id.* at 440. Although concurring in the result (because of his reading of a treaty obligation), Justice Harlan disagreed with the Court's reasoning. He noted that "[p]rior decisions have established that in the absence of a conflicting federal

C. *Judicial Lawmaking to Protect Federal Prerogatives*

A third component of the twentieth-century view is the notion that federal courts should make law when necessary to protect the national government's prerogatives in foreign affairs. Under this view, courts should formulate national rules to foster uniformity in, and state compliance with, foreign affairs law.

The principal example of this view is the Court's 1964 decision in *Banco Nacional de Cuba v. Sabbatino*.²⁴ There, the Court held that the act of state doctrine, pursuant to which courts will not review the validity of foreign government acts carried out in the foreign government's own territory, is a rule of federal common law binding on the states.²⁵ The Court stated that, even though the result in that case might have been the same under state law, the Court was "constrained to make clear that [the act of state doctrine] . . . must be treated exclusively as an aspect of federal law."²⁶ The Court explained that the "problems surrounding the act of state doctrine are . . . intrinsically federal"²⁷ and "should not be left to divergent and perhaps parochial state interpretations."²⁸

Another somewhat related example is the view that federal courts should play an active and independent role in this country's incorporation and enforcement of customary norms of international law. Under this view, even if the political branches refuse to ratify a treaty or incorporate its provisions into domestic law, the courts nevertheless should apply equivalent customary rules as federal common law. Philip Jessup made the earliest argument for this judicial role in a short article published in 1939,²⁹ one year after the Supreme Court declared in *Erie Railroad v. Tompkins* that "[t]here is no

policy or violation of the express mandates of the Constitution the states may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." *Id.* at 458-59 (Harlan, J., concurring). Justice White, in dissent, agreed with Justice Harlan on this point. *See id.* at 462 (White, J., dissenting).

24. 376 U.S. 398 (1964).

25. *See id.* at 425-27.

26. *Id.* at 425.

27. *Id.* at 427.

28. *Id.* at 425.

29. *See* Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).

federal general common law" and that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."³⁰ Jessup reasoned that, notwithstanding *Erie*, it "would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."³¹ Although his argument lay dormant for many years, it received a boost when the Supreme Court referred to it favorably in *Sabbatino*,³² and when it subsequently was endorsed by academic commentators³³ and the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States*.³⁴ It also has been relied upon by a number of courts to justify their exercise of jurisdiction over international human rights cases.³⁵

These are, in brief, some of the principal components of the twentieth-century view. Underlying each of these components is a commitment to something I have in other articles called "foreign affairs exceptionalism." Foreign affairs exceptionalism is the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.³⁶ The Supreme Court stated in *Curtiss-Wright*, for example, that "the federal power over external affairs [is] in origin and essential character *different* from that

30. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

31. Jessup, *supra* note 29, at 743.

32. See 376 U.S. at 425.

33. See, e.g., Brilmayer, *supra* note 16, at 301-04; Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 343-47 (1986); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984).

34. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

35. See, e.g., *Trajano v. Marcos*, 978 F.2d 493, 502 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-86 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162, 181-83 (D. Mass. 1995). For a more detailed discussion of the rise of this "modern position" view, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

36. See Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 539 n.51, 555-56 (1999); Bradley, *supra* note 18, at 461. Exceptionalism also has relevance to immigration law. See Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361 (1999).

over internal affairs.”³⁷ As this statement makes clear, foreign affairs exceptionalism rests on the assumption that there is a sharp and manageable distinction between domestic and foreign affairs.

II. PRESSURES ON THE TWENTIETH-CENTURY VIEW

In recent years, the twentieth-century view of foreign affairs law has come under pressure. This pressure is the result of, among other things, increased subnational involvement in foreign affairs, the Supreme Court’s revival of federalism restrictions in domestic matters, and heightened skepticism by the Court and the legal academy regarding broad judicial law-making. Although the signs are mixed, I want to suggest that, in response to these developments, we may be seeing the emergence of a new American foreign affairs law.

A. Increased Subnational Involvement in Foreign Affairs

State and local governments are becoming increasingly involved in foreign affairs.³⁸ They are, for example, more actively seeking out international trade and investment.³⁹ They also are increasingly expressing opinions on foreign policy, a recent example of which is the opposition by a number of cities to the proposed Multilateral Agreement on Investment (“MAI”).⁴⁰ Perhaps most dramatically, state and local governments have

37. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis added). For an argument that the Court’s reasoning in *Curtiss-Wright* had roots in earlier cases involving Indian land rights, immigration, and acquisition and governance of territories, see Cleveland, *supra* note 2.

38. See generally Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L L. 821 (1989); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

39. See EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* 68-72 (1998).

40. See Karen Auge, *Boulder Opposes International Investment Treaty; Threat to Local Authority Seen*, DENV. POST, Aug. 2, 1998, at A33; Edward Epstein, *Trade Treaty Opposed by S.F. Supervisors Panel*, S.F. CHRON., Apr. 10, 1998, at A22. Negotiations on the MAI have been conducted under the auspices of the Organization for Economic Co-operation and Development in Paris. For a draft text of the MAI, see Org. for Econ. Co-operation & Dev., Directorate for Fin., Fiscal, and Enter. Affairs, *The Multilateral Agreement on Investment: The MAI Negotiating Text (as of 24 April 1998)* (visited Mar. 10, 1999) <<http://www.oecd.org/daf/cmisi/mai/maitemtext.pdf>>.

in some instances threatened or imposed economic sanctions on foreign governments or entities through, for example, selective purchasing laws. Recently, a number of states and cities have imposed such sanctions on companies doing business with Myanmar (formerly Burma) because of human rights abuses occurring there.⁴¹

Some of these subnational activities, especially the sanctions measures, have generated significant controversy, both at home and abroad.⁴² Nevertheless, the federal political branches in most instances have not attempted to preempt them. This is true even when there has been substantial foreign protest. For example, the European Union and Japan have gone so far as to challenge the subnational Burma sanctions in the World Trade Organization,⁴³ yet neither Congress nor the President has attempted to override these sanctions measures.⁴⁴

There are a number of possible explanations for this lack of political branch action. One possibility is that the political branches disapprove of the subnational activities but are prevented from preempting them due to limitations on their time and political resources.⁴⁵ Another possibility is that, although the political branches do not necessarily approve of the subnational activities, they also do not believe that preemption is

41. See API, *Burma Law Ruling May Affect 46 States*, BOSTON GLOBE, Nov. 6, 1998, at C3.

42. See, e.g., Robert S. Greenberger, *States, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners*, WALL ST. J., Apr. 1, 1998, at A20.

43. These challenges are described on the World Trade Organization's web site. See World Trade Org., *Overview of the State-of-Play of WTO Disputes* (visited Mar. 10, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>>. This is not the only example of an international challenge directed at the actions of a subnational government. Recently, a Canadian company initiated an international arbitration suit against the United States, pursuant to the North American Free Trade Agreement, seeking damages for the unfair treatment it allegedly received in state court proceedings in Mississippi. See William Glaberson, *Nafta Invoked to Challenge Court Award*, N.Y. TIMES, Jan. 28, 1999, at C4.

44. The federal government does have the statutory power to sue states to enforce WTO orders, see 19 U.S.C. § 3512 (1994), and the House of Representatives recently rejected a proposal to eliminate this power. See Michael S. Lelyveld, *Anti-Sanctions Forces Win Key Vote*, J. COM., Aug. 7, 1998, at 1A. The significance of this power is unclear, however, given that the federal government has never sued a state to compel compliance with a ruling by an international organization.

45. For reasons to be skeptical regarding this first possibility, see Goldsmith, *supra* note 38, at 1681-90.

appropriate. Under this view, the subnational activities might be considered the "price we pay" for having a federal system of government. A third possibility is that the political branches affirmatively agree with some of these activities (perhaps even when they halfheartedly criticize them).⁴⁶ One reason for taking this third possibility seriously is that subnational activity in many instances appears to provide the federal government with additional leverage in addressing foreign policy issues. For example, it is quite possible that threatened state sanctions helped pressure Swiss banks into agreeing last August to pay over one billion dollars to survivors of the Holocaust.⁴⁷ The story is somewhat less clear with respect to the Burma sanctions, although it is worth noting that not only has the federal government not attempted to preempt the state measures, it has proceeded to impose its own sanctions.⁴⁸

Given these uncertainties regarding the meaning of political branch inaction, it often is difficult for courts to discern appropriate national policy when confronted with subnational activities. Such uncertainty helps explain the 1994 decision by the Supreme Court in *Barclays Bank PLC v. Franchise Tax Board*.⁴⁹ In that case, California's method of taxing foreign multinational corporations was challenged on the ground that it impaired federal uniformity and prevented the federal government from speaking with one voice in connection with international trade. The taxation method had drawn extensive international protest, and numerous countries filed *amicus curiae* briefs urging the Supreme Court to invalidate it. The Court nevertheless rejected the challenge because it could "discern no 'specific indications of congressional intent' to bar the state action."⁵⁰ Emphasizing that "[t]he Constitution does 'not make the judiciary the overseer of our government,'" the Court

46. A fourth possibility might be that the political branches expect that the courts will preempt the subnational measures. Both the rarity of judicial application of the dormant foreign affairs preemption doctrine and the general judicial tolerance of subnational involvement in recent years would seem to weigh against this possibility.

47. See, e.g., John J. Goldman & Henry Weinstein, *2 Swiss Banks to Pay 1.25 Billion in Holocaust Suits*, L.A. TIMES, Aug. 13, 1998, at A1; Amy Waldman, *Holocaust Accord Ends Plan for Sanctions*, N.Y. TIMES, Aug. 14, 1998, at A1.

48. See, e.g., Exec. Order No. 13,047, 3 C.F.R. 202 (1997-1998) (prohibiting new investment in Burma).

49. 512 U.S. 298 (1994).

50. *Id.* at 324.

decided to "leave it to Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy."⁵¹

To be sure, the twentieth-century view of the judicial role in foreign affairs matters is still influential. Such influence is evident in a recent decision by the federal district court in Massachusetts invalidating that state's Burma sanctions law.⁵² Relying heavily on *Zschernig*, the court held that the state law was "an unconstitutional infringement of the federal government's power over foreign affairs."⁵³ The court reasoned that, because the Burma law had the potential to disrupt or embarrass the national government's conduct of foreign affairs, it was preempted by the federal Constitution. Interestingly, the court failed even to cite *Barclays Bank*.

B. Revival of Federalism Restrictions

In the last decade, the Supreme Court has shown a willingness to impose federalism restrictions on the national government, both in the form of limitations on the scope of the federal government's delegated powers and in the form of independent sovereignty restraints on the exercise of these powers.⁵⁴ To date, these restrictions all have occurred in the domestic context. But these decisions at least raise the question of whether similar restrictions might apply in the area of foreign affairs. More generally, these decisions have revived the importance of the exceptional treatment of foreign affairs powers called for under the twentieth-century view. Thus, for

51. *Id.* at 330-31 (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981)).

52. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 292 (D. Mass. 1998). This suit was brought not by the federal government, but rather by a coalition of private companies. In addition, after internal debate, the federal government decided not to intervene in the appeal. See Michael S. Lelyveld, *Clinton Refrains from Intervening in Myanmar Case*, J. COM., Mar. 11, 1999, at 3A.

53. *Baker*, 26 F. Supp. 2d at 293. The court did not express judgment on other challenges to the law, including a challenge based on the dormant foreign commerce clause.

54. See *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992). For criticism of this revival of federalism restrictions, see Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999).

example, academic commentators recently have resurrected the debate, largely dormant since the 1950s, over whether the treaty power is in fact immune from federalism restrictions.⁵⁵

There is at least one recent sign that this revival of federalism restrictions will indeed spill over to foreign affairs. In April 1998, the Commonwealth of Virginia executed Angel Breard, a citizen of Paraguay.⁵⁶ It did so notwithstanding its admitted failure to provide Breard, at the time of his arrest, with the consular notice specified in the Vienna Convention on Consular Relations, to which the United States is a party.⁵⁷ It also did so notwithstanding an order by the International Court of Justice ("ICJ") stating that the United States was to "take all measures at its disposal" to delay the execution.⁵⁸ The influence of federalism is evident in the Supreme Court's opinion denying a stay of execution. The Court explained that it was the Governor of Virginia's "prerogative" whether to stay the execution and that "nothing in our existing case law allows us to make that choice for him."⁵⁹ Even more telling was the position of the executive branch in the case. The Justice Department and the State Department filed an *amicus curiae* brief in the Supreme Court stating that, even if the ICJ's order were binding on the United States, the federal government lacked the constitutional power to compel Virginia's compliance with it because "our federal system imposes limits on the federal government's ability to interfere with the criminal justice system of the states."⁶⁰ This is a dramatic statement, es-

55. See, e.g., Bradley, *supra* note 18; Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33 (1997); Thomas Healy, Note, *Is Missouri v. Holland Still Good Law?: Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998). For discussions of that issue in this Symposium, see Flaherty, *supra* note 54; Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317 (1999).

56. See David Stout, *Clemency Denied, Paraguayan Is Executed*, N.Y. TIMES, Apr. 15, 1998, at 18.

57. See Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261.

58. Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. No. 99 (Apr. 9), reprinted in 37 I.L.M. 810, 819 (1998).

59. Breard v. Greene, 118 S. Ct. 1352, 1356 (1998).

60. Brief for the United States as Amicus Curiae at 51, Breard v. Greene, 118 S. Ct. 1352 (1998) (No. 97-1390). For additional discussion of the Breard case, see the articles in the recent Breard "agora" published in 92 AM. J. INT'L L. 666 (1998); see also Bradley, *supra* note 36.

pecially from an administration not known for being particularly wedded to states' rights.⁶¹

C. *Skepticism Regarding Judicial Lawmaking*

Another development that has placed pressure on the twentieth-century view is heightened skepticism in both the legal academy and the courts regarding broad judicial lawmaking. Many scholars have taken the view, for example, that federal common law is legitimate only if it stems from a delegation by the Constitution or a federal statute.⁶² Similarly, the Supreme Court in recent years has questioned what it has called the "runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."⁶³ It also has made clear that "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts."⁶⁴

More broadly, in the domestic arena, the "public law litigation" model so popular in decades past has begun to wane.⁶⁵ It

61. Carlos Vázquez has suggested that the Clinton Administration either "misspoke" or was "disingenuous" in making this statement. Carlos Manuel Vázquez, *Agora: Breard, Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683, 688, 690 (1998).

62. See, e.g., Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1251 (1996); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116-17 (1998); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 887 (1986); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 268-88 (1992); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 16-17 (1985).

63. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994).

64. *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). The Court in *Atherton* included *Sabatino* in its list of the "few and restricted instances" in which the Court has created federal common law. *Id.* at 225 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981)).

65. The "public law litigation" model was first discussed in detail by Professor Abram Chayes. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). As Chayes has explained, the public law litigation model has the following characteristics:

First, the party structure and the matter in controversy are both amorphous, defined ad hoc as the proceedings unfold rather than exogenously determined by legal theories and concepts. Second, the temporal orientation of the lawsuit is prospective rather than historical. Third, because the relief sought looks to the future and is corrective rather than

is no longer a point of uniform pride that courts have been running our prisons, schools, and other institutions.⁶⁶ Commentators increasingly have questioned both the competence and authority of the courts to engage in such broad and ongoing structural reform.⁶⁷ The Supreme Court, emphasizing separation of powers values, also has backed away from the public law litigation model in various ways.⁶⁸ And Congress in recent years has sought to limit the courts' structural reform efforts.⁶⁹

This skepticism regarding judicial lawmaking has become evident in a number of areas of foreign affairs law.⁷⁰ The Supreme Court has made clear, for example, that the policies underlying the act of state doctrine are not "a doctrine unto themselves" and that courts are not free to expand the doctrine

compensatory, it is not derived logically from the right asserted. Instead, it is fashioned ad hoc, usually by a quasi-negotiating process. Fourth, prospective relief implies continuing judicial involvement. And because the relief is directed at government or corporate policies, it will have a direct impact that extends far beyond the immediate parties to the lawsuit.

Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5 (1982).

66. Ironically, some international law scholars began pushing for the application of the public law litigation model to international law issues just as the model was fading. See, e.g., Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

67. See, e.g., Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265; Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579 (1994); Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683 (1992); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (questioning the ability of courts to bring about social change).

68. Examples include the Court's generally more restrictive approach to standing, implied rights of action, and federal common law. Admittedly, it is possible that the recent Supreme Court has simply shifted to different forms of lawmaking, such as structural constitutional lawmaking. See Flaherty, *supra* note 54. Putting aside the question whether all forms of judicial lawmaking are equally problematic, my point here simply is that the Court in recent years has expressed greater concern than in the past regarding the legitimacy of judicial lawmaking. This concern, in turn, places pressure on the twentieth-century view.

69. For example, the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626 (1994 & Supp. III 1997), limits the prospective relief that courts may award in prison conditions litigation and allows for the termination of some prospective relief already ordered.

70. As Jack Goldsmith explains, these and other developments can also be seen as a turn towards judicial formalism. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999).

"into new and uncharted fields."⁷¹ Similarly, as discussed above, the Court has held that preemption of state laws affecting foreign relations ordinarily is a matter for Congress, not the courts.⁷² A third example is the presumption against extraterritoriality. In its 1991 *EEOC v. Arabian American Oil Co.* decision,⁷³ the Court reaffirmed a strong presumption against the extraterritorial application of federal statutes. It did so on the theory that extraterritorial application raises difficult policy questions best resolved by Congress, which is "able to calibrate its provisions in a way that we cannot."⁷⁴

For all of these reasons, the twentieth-century view of American foreign affairs law can no longer be taken for granted. Its fundamental assumptions and justifications are now contestable. As a result, the law in this area appears ripe for change.

III. THE SHIFT AWAY FROM FOREIGN AFFAIRS EXCEPTIONALISM

As we approach the end of the century, we may be seeing the emergence of a new American foreign affairs law. The precise contours of this emerging law are far from certain. In general, the new law appears more tolerant of state involvement in foreign affairs, more willing to impose limits on the national government's exercise of power, and less reliant on the judiciary to maintain foreign affairs uniformity.⁷⁵

71. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l*, 493 U.S. 400, 409 (1990).

72. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 330-31 (1994); *supra* text accompanying notes 49-51.

73. 499 U.S. 244 (1991).

74. *Id.* at 259; *see also Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993); *Smith v. United States*, 507 U.S. 197, 204 (1993). For a discussion of the history and policies underlying the presumption against extraterritoriality, *see* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 510-19, 550-61 (1997).

75. It is also possible that the law will become less receptive to executive agreements, although there is little sign of such a change to date. For recent scholarship questioning the breadth of the modern executive agreement power, *see* Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

More broadly, the law appears to be shifting away from foreign affairs exceptionalism. There are many possible reasons for this shift. The most likely and important reason is the erosion in recent years of the distinction between domestic and foreign affairs. Nations have become interconnected economically, politically, and culturally, such that events abroad increasingly have local consequences.⁷⁶ And the scope of international law has broadened substantially, both covering many areas that were formerly regulated only by domestic law and governing the rights and duties not only of nation-states, but also of individuals.⁷⁷ In addition, international institutions increasingly are assuming regulatory functions similar to those of domestic lawmaking bodies.⁷⁸ The end of the Cold War era also is a likely factor in the shift away from foreign affairs exceptionalism, since there is now a reduced need for the national government to speak with one voice in international relations, and because many of the exceptionalism decisions, such as *Zschernig* and *Sabbatino*, clearly seem to be a product of the Cold War era.⁷⁹

In addition, there may be some recognition today that exceptionalism has a tendency to expand beyond its intended

76. See generally Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994).

77. For a useful discussion of some of the ways that international law has changed in recent years, see Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999); see also Bradley & Goldsmith, *supra* note 35, at 838-42 (discussing the “new” customary international law).

78. See Stephan, *supra* note 77, at 1556-62. For a suggested framework for evaluating the proper level of U.S. commitment to international institutions, see Michael J. Glennon, *A Madisonian Perspective on International Institutions: Overcommitment, Undercommitment, and Getting It Right*, 70 U. COLO. L. REV. 1589 (1999).

79. Under a controversial theory most prominently associated with Professor Bruce Ackerman, changes in conditions and attitudes such as these might themselves qualify as a constitutional amendment. Cf. David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491 (1999) (relying on this theory to argue that the ratification of the United Nations Charter changed the Constitution with respect to war powers); see also Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 576 & n.32 (1997) (referring to this theory and suggesting that the practices of the political branches in recent years concerning human rights treaties may have “assumed some constitutional significance”). For a very different perspective on constitutional meaning, which emphasizes text and ratification history, see John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999).

scope and corrupt the constitutional treatment of other legal issues. It is now apparent, for example, that the same cases and dicta that are used to support broad application of customary international law by U.S. courts, something favored by many academics, also are used to support broad deference to the Executive, something disfavored by the same academics.⁸⁰ Similarly, exceptionalism has been invoked in immigration law not only to reduce the role of the states—again something favored by many academics—but also to limit judicial protection of individual rights.⁸¹ In short, exceptionalism is hard to contain.⁸²

This description of a new American foreign affairs law invites the question whether this emerging regime is something we should fear or embrace. Various aspects of this question are explored by participants in this Symposium, and I will not attempt an answer here. I do, however, want to emphasize one point: there is nothing inherently “conservative” or “liberal,” or “regressive” or “progressive,” about the new regime I have sketched, at least as those terms are commonly used. For example, although this regime may seem politically conservative in that it allows more state involvement in foreign affairs activities, some state activities are likely to be more liberal than federal government regulation with respect to issues such as environmental protection and human rights.⁸³ Similarly, al-

80. See, e.g., David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999).

81. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); see also Motomura, *supra* note 36.

82. An analogy can be made to the “political process” rationale for judicial abstention with respect to federalism limitations on the national government’s exercise of power, a rationale endorsed by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In part because this rationale has been perceived as a threat to judicial review of non-federalism issues, it has been questioned in recent years by a wide array of academic commentators. See Bradley, *supra* note 18, at 441 n.297 (listing articles). The Supreme Court, too, has backed away from this rationale. See John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

83. For a recent example, see *International Ass’n of Independent Tanker Owners v. Locke*, 148 F.3d 1053 (9th Cir. 1998), which involved the imposition by Washington State of oil tanker regulations that were more environmentally protective than federal law. The court there rejected the claim that the regulations were subject to dormant foreign affairs preemption. See *id.* at 1069. In this Symposium, Peter Spiro also explains how the possibility of “targeted retaliation” might lead to stronger compliance with international human rights law at the lo-

though this regime may seem conservative in that it involves the reduction of a certain type of policymaking role for the federal courts, it also may involve a reduction of certain forms of judicial abstention, such as the act of state doctrine and the political question doctrine.⁸⁴ Thus, the new American foreign affairs law, if one is indeed emerging, may leave no political group entirely satisfied. That fact, of course, may be its greatest validation.

cal level than at the national level. See Spiro, *supra* note 38, at 1261-65. And Hiroshi Motomura notes that many states have treated immigrants more generously than has the federal government. See Motomura, *supra* note 36, at 1368.

84. See generally THOMAS M. FRANCK, POLITICAL QUESTIONS, JUDICIAL ANSWERS (1992) (criticizing foreign affairs exceptionalism as a basis for judicial abstention). For a good example of a rejection of foreign affairs exceptionalism with respect to judicial review, see *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986). In that case, the Court rejected the argument that the Executive's decision not to apply a sanctions statute to Japan presented a nonjusticiable political question. Acknowledging that the case implicated foreign relations, the Court nevertheless reasoned that "one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.* at 230.

