THE NEW FORMALISM IN UNITED STATES FOREIGN RELATIONS LAW

JACK L. GOLDSMITH*

This article analyzes familiar foreign relations law doctrines through the lens of rules and standards. The main but not exclusive focus is the political question doctrine, the act of state doctrine, and dormant foreign affairs preemption. Prior to the 1960s, courts applied these doctrines in a highly formalistic fashion.[1] Beginning in the 1960s, courts embraced a more instrumental and functional approach to these doctrines. Since the end of the Cold War, courts have once again begun to craft the doctrines in formalistic terms, although this "new" formalism differs in justification, and sometimes in content, from the pre–Cold War approach. This article identifies and analyzes this new formalism in United States foreign relations law.

At first glance the political question doctrine, the act of state doctrine, and dormant foreign affairs preemption appear to have little in common. The political question and act of state doctrines implicate horizontal relations between federal courts and the federal political branches. These doctrines contemplate a modest role of abstention for federal courts. They are often criticized as an abdication of the judiciary's constitutional duty "to say what the law is."[2] By contrast, dormant foreign affairs preemption implicates vertical relations between the federal government (most directly, federal courts) and the states. This doctrine contemplates an active role for federal courts in foreign relations cases. Federal courts not only adjudicate the merits of these cases, they also preempt state law and sometimes legislate rules of decision.

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* Associate Professor of Law, University of Chicago. Thanks to Curt Bradley, Beth Garrett, Jill Hasday, Paul Stephan, Cass Sunstein, Adrian Vermeule, and G. Edward White for very helpful comments, Vidya Atre for research assistance, and the Arnold and Frieda Shure Research Fund for financial support.

1. As I make clear below, for purposes of this article I equate formalism with rule-based decision making. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Despite surface differences, these foreign relations doctrines have much in common. They are all judge-made doctrines applied primarily by federal courts. They all have the same ostensible purpose: to ensure political branch hegemony in foreign relations. They all respond to the problem that arises when government officials other than those in the federal political branches cause foreign relations controversy by acts not prohibited by enacted federal law. And, I shall argue, all three doctrines have, until recently, involved a similar functional standard of analysis. I call this standard the *foreign relations effects test*. Under the foreign relations effects test, federal courts in their discretion identify and assess the foreign relations interests of the United States and make predictions about the effects of certain acts (by a federal court or a state) on these interests. They typically do this in the absence of guidance from the political branches. On the basis of such an independent foreign policy analysis, courts accommodate these interests—through abstention, special interpretive canons, or preemption—as they best see fit.

I shall argue that the foreign relations effects test rests on questionable assumptions about the nature of foreign relations law and the proper role of federal courts. The effects test purports to protect political branch prerogatives in foreign relations. But it has the ironic consequence of enhancing the federal courts' power to make foreign relations law at the expense of the political branches. This is easiest to see with dormant foreign affairs preemption, which casts the federal judiciary as an independent source of discretionary federal foreign relations law. It is no less true of the act of state and political question doctrines, which enable courts under the guise of judicial modesty to alter the scope of federal foreign relations law. The political branches cannot plausibly be thought to have authorized these forms of judicial action. There is little reason to think they need such assistance. And in any event, federal courts are not good at providing this assistance under the effects test, which requires them to identify and accommodate U.S. foreign relations interests on a case-by-case basis. Federal court incompetence in this respect explains why the doctrines supported by the effects test are applied in a notoriously inconsistent and (seemingly) unprincipled fashion.

The new formalism in nonconstitutional foreign relations cases seeks to correct these deficiencies. The new formalism is

not a return to conceptualism. Nor is it an attempt to mask value judgments by reference to legal materials. The new formalism is instead best viewed as a pragmatic approach to judicial foreign relations doctrines based on an analysis of comparative institutional competence and likely political branch response to various judicial decision-making strategies. The new formalism rejects the case-by-case, judge-made foreign relations effects test. It aims to protect political branch prerogatives in nonconstitutional foreign relations cases through the use of rules rather than standards. The best of these rules encourage the federal political branches—the branches of the federal government with superior competence and a superior democratic pedigree—to clarify the content of U.S. foreign relations law.

This article identifies and analyzes the new formalism in U.S. foreign relations law. Part I introduces the general problem redressed by the doctrines analyzed in this paper: what to do when federal courts and states take actions not prohibited by enacted federal law that produce foreign relations controversies. Part II describes the antiformalistic approach to this problem that prevailed during the bulk of the Cold War. Part III outlines the many difficulties with this regime as a partial explanation for the recent revival of formalism in the foreign relations context. Part IV describes the new formalism and sketches a framework for analyzing its strengths and weaknesses. A brief conclusion follows.

I. THE GENERAL PROBLEM

Conventional wisdom offers a functional justification for political branch hegemony in foreign relations.[3] The executive branch dominates the conduct of foreign relations because of "the unity of the office, its capacity for secrecy and despatch, and its superior sources of information; to which it should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time."[4] Only the President can continuously, coherently,

3. I do not agree with this conventional wisdom in all its details, but I set it out here as a useful way to understand the special problems that inhere in the judicial foreign relations law doctrines under study.

4. EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 208 (1948).

and definitively represent the nation at all times; only he can act with initiative and secrecy, take risks, and remain flexible. Congress too has national accountability and foreign relations expertise. But it is too diffuse, too public, and too deliberative to perform many foreign relations tasks. It plays a largely reactive role in the conduct of U.S. foreign relations, exercising the most influence when the qualities of legislation (public deliberation, relative immutability, comprehensiveness, and democratic legitimacy) are most appropriate.

This functional justification for political branch hegemony explains why federal courts and the states do not, as a general matter, *conduct* U.S. foreign relations. Both lack the information, expertise, unity, and national political accountability to make foreign relations judgments for the nation. The states suffer the additional problem of not reliably taking national (as opposed to state) interests into account. Federal courts suffer additional problems that inhere in the judicial process. They "tend to establish rules of more-or-less general applicability, which can only relate to the needs of foreign policy grossly, and on the basis of assumptions and generalizations hardly consonant with flexibility, currentness, and consistency."[5] And when they do "differentiate, distinguish, and make exceptions, they—unlike the Executive—must deal in doctrines, must justify in reasoned opinion."[6]

Although federal courts and states do not conduct U.S. foreign relations, they often do things not prohibited by enacted federal law that adversely affect U.S. foreign relations. Federal courts can do this, for example, when they apply a federal statute extraterritorially,[7] or interpret a treaty,[8] or adjudicate the validity of a foreign act of state.[9] States too can cause foreign relations controversy when, for instance, they stop purchasing from disfavored countries,[10] or execute an alien,[11] or

5. Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 826 (1964).

6. *Id.*

7. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

8. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655 (1992).

9. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

10. *See, e.g.*, National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998).

11. *See, e.g.*, Breard v. Greene, 118 S. Ct. 1352 (1998).

tax a multinational corporation pursuant to a controversial methodology.[12] There are many similar examples.

The problem analyzed in this article is how to think about such foreign relations controversies produced by federal court and state acts that are not prohibited by enacted federal law. One view holds that harmonious relations with other countries are not an absolute or overriding goal. Sometimes a judicial decision or a state act that causes foreign relations controversy is consistent with the wishes of the federal political branches, or at least is the best reading of federal law. And even if federal law is underspecified and cannot plausibly be viewed to have addressed the issues that cause the foreign relations controversy, such controversy is no more serious than analogous controversies that arise all the time from underspecification of federal law in domestic contexts. On this view, adverse foreign relations consequences do not justify any change in the usual assumptions of our constitutional order that federal courts interpret federal enactments in cases within their jurisdiction, and that states can act in ways not prohibited by enacted federal law.

A different view suggests that foreign relations controversy produced by federal court adjudications and state acts evidences a problem that requires special redress. The idea here is that such foreign relations controversy is an inherent evil to be avoided unless the controversy-producing acts are specifically authorized by the political branches. On this view, foreign relations controversy is so serious as to justify a modification of the usual constitutional assumptions about judicial review and federalism.

The remainder of the article analyzes these two views. It is important to keep in mind throughout the analysis that *the federal political branches control the ultimate resolution of foreign relations controversies produced by federal courts and the states.*[13] For example, *ex ante* they can specify that a federal

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12. *See, e.g.*, Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994).

13. This sentence is accurate as applied to the doctrines under consideration in this paper. But of course in some respects the Constitution specifies ways that federal courts and states can affect foreign relations that are not revisable by the political branches. This is true, for example, when federal courts affect foreign relations by interpreting constitutional limits on the political branches' power to conduct foreign relations. *See* Boos v. Barry, 485 U.S. 312 (1988) (holding that a statute prohibiting display of certain signs outside foreign embassies

statute does not apply extraterritorially, or they can preempt state efforts to impose sanctions. And *ex post*, they can redress unwanted federal court adjudications or improper exercises of state power by legislation, treaty, or executive directive. The problem is what to make of political branch silence. Should courts view silence to mean that the usual assumptions of our constitutional order with regard to judicial review and federalism apply fully? Or should they view silence as an underspecification of enacted federal law based on ignorance, inertia, inadequate foresight, or inartful drafting? If the latter, do the foreign relations controversies caused by underspecification of enacted federal law require special redress by federal courts? If so, what form of redress best protects political branch prerogatives?

II. THE COLD WAR FOREIGN RELATIONS EFFECTS TEST

Judges have answered these questions differently over the years. Before the Cold War, they did so with doctrines that were highly formalistic. By "formalistic" I simply mean that the doctrines of federal court deference to the political branches and the areas of federal preemption of state foreign relations activities were couched in well-defined rules that did not leave much room for judicial discretion. This regime changed during the Cold War, when courts began to inquire on a case-by-case basis whether the judicial or state act in question harmed U.S. foreign relations. This section describes and seeks to explain this transformation, which forms the background of the new formalism.

A. Political Question Doctrine

The political question doctrine in the foreign affairs context operated in a settled fashion prior to the 1960s. The Constitution required courts to treat certain well-defined foreign relations decisions by the political branches as final and binding.[14] When the political branches declared war or peace, or

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violates the First Amendment); INS v. Chadha, 462 U.S. 919 (1983) (declaring one-house legislative veto unconstitutional in immigration context); *see also* U.S. CONST. art. I, § 10 (limiting state activities in certain foreign relations contexts, some of which are not subject to congressional revision).

14. *See generally* Edwin D. Dickinson, *International Political Questions in*

asserted jurisdiction over a foreign territory, or when the President recognized a new government, or determined a territorial boundary under a treaty, or decided that a foreign government had the power to ratify a treaty, courts treated these determinations as binding in the course of adjudicating other legal issues in the case.[15] These categories of deference were designed to protect political branch prerogatives in foreign relations and, more generally, to serve U.S. foreign relations interests. But these purposes were served by categorical rules rather than case-by-case judicial inquiries into whether these purposes would be served.

This categorical approach to political questions in the foreign relations context changed after *Baker v. Carr*,[16] an apportionment case. In dicta that subsequently became much more, *Baker* reconceptualized the political question doctrine in functional terms:

> Our cases in [the foreign relations] field seem invariably to show *a discriminating analysis of the particular question posed*, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the *possible consequences of judicial action*.[17]

The *Baker* Court also emphasized "the necessity for discriminating inquiry into the precise facts and posture of the particular case" in determining whether the political question doctrine applied.[18] Consistent with this case-by-case approach, it announced that one of six factors must be present for the doctrine to apply.[19] Three of these factors—the avoidance of embarrassment to the political branches, the absence of judicially manageable standards, and the need to respect coordi-

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National Courts, 19 AM. J. INT'L L. 157 (1925).

15. *See* Jones v. United States, 137 U.S. 202, 212 (1890) (jurisdiction over foreign country); Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) (ratification power of foreign government); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 308-13 (1829) (territorial boundary determination); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 633-34 (1818) (recognition of new government); United States v. One Hundred and Twenty-Nine Packages, 27 F. Cas. 284, 288 (E.D. Mo. 1862) (No. 15,941) (declaration of war).

16. 369 U.S. 186 (1962).

17. *Id.* at 217 (emphasis added).

18. *Id.*; *see also id.* at 211 (emphasizing the need for "case-by-case inquiry").

19. *See id.* at 217.

nate branches of government—have particular relevance for foreign relations cases.

Baker brought radical but largely unnoticed change to the political question doctrine in foreign relations. The doctrine became much more than constitutionally compelled judicial deference to a well-defined category of political foreign relations determinations. It additionally became a discretionary tool for courts to abstain whenever *they decide*, based on an independent analysis of U.S. foreign relations, that an adjudication would harm U.S. foreign relations or the political branches' conduct of those relations. And in another change from the traditional approach, application of the political question doctrine resulted in abstention from adjudication rather than deference to a political branch judgment on a particular issue in a case.

Consider some examples of courts employing the "effects test" rationale for the political question doctrine. One court declined to adjudicate a claim for declaratory and injunctive relief under the War Powers Act arising from President Reagan's 1987 Persian Gulf initiatives because of "the potentiality of embarrassment" and because the adjudication "might create doubts in the international community regarding the resolve of the United States," and because "this Court concludes that the volatile situation in the Persian Gulf demands . . . a 'single-voiced statement of the Government's views.'"[20] Using a similar rationale, courts have declined to adjudicate tort suits arising from nuclear tests,[21] requests for relief under the Hos-

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20. Lowry v. Reagan, 676 F. Supp. 333, 340 (D.D.C. 1987) (quoting in part Baker v. Carr, 369 U.S. 186, 211 (1962)). The court distinguished an earlier decision rejecting the political question doctrine in connection with U.S. intervention in El Salvador, *see* Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), on the basis of its conclusion that "the Persian Gulf is both more volatile and more critical to U.S. economic interests than the situation in El Salvador." *Lowry*, 676 F. Supp. at 340 n.51; *see also id.* (noting that an "affirmative order might well have international ramifications that could affect U.S. policy in the Persian Gulf" and that the "risk of multifarious pronouncements on a sensitive matter of foreign policy is significantly higher" than in the El Salvador case).

21. *See* Antolok v. United States, 873 F.2d 369, 383-84 (D.C. Cir. 1989); *see also* Chaser Shipping Corp. v. United States, 649 F. Supp. 736 (S.D.N.Y. 1986) (dismissing on political question grounds a tort suit for damages to ship from governmental mining of Nicaraguan harbor); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984) (dismissing on political question grounds a complaint seeking an injunction against cruise missile deployment from a town in England), *aff'd*, 755 F.2d 34 (2d Cir. 1985).

tages Act,[22] challenges to the constitutionality of foreign assistance legislation,[23] international human rights suits under the Alien Tort Statute,[24] mandamus suits seeking State Department testimony,[25] munitions list challenges to the Arms Export Control Act,[26] and challenges to the enforcement policies of the Marine Fisheries Service.[27]

The foreign relations effects test is potentially much broader than the traditional formalistic approach. Not surprisingly, although the political question doctrine has fallen into general desuetude since *Baker*, it is frequently applied in the foreign relations field.[28] There have been several dozen political question dismissals in foreign relations contexts.[29] These dismissals are matched by dozens of other cases that have a significant foreign relations quotient, but are nonetheless adjudicated on the merits, often without discussion of the political question doctrine.[30] This apparent lack of principle and consistency—the treatment of similar cases differently—has led scholars to conclude that the political question doctrine in the foreign relations context suffers from "jurisprudential chaos."[31]

B. Act of State Doctrine

Just as the traditional political question doctrine required federal courts to accept as fact certain judgments made by the federal political branches, the traditional act of state doctrine required federal courts to accept without question the validity

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22. *See* Smith v. Reagan, 844 F.2d 195 (4th Cir. 1988), *cert. denied*, 488 U.S. 954 (1988).

23. *See* Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1975).

24. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *cf. id.* at 798 (Bork, J., concurring).

25. *See* Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984).

26. *See* United States v. Martinez, 904 F.2d 601 (11th Cir. 1990).

27. *See* Wood v. Verity, 729 F. Supp. 1324 (S.D. Fla. 1989).

28. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS 19-20 (1992).

29. In addition to the cases cited *supra* notes 20-21, see, for example, the decisions summarized in FRANCK, *supra* note 28, at 45-61.

30. *See, e.g.*, Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986); Dames & Moore v. Regan, 453 U.S. 654 (1981).

31. FRANCK, *supra* note 28, at 8.

of foreign sovereign acts of state performed in that sovereign's territory. For example, in 1897 the Supreme Court declined to question the validity of a Venezuelan official's allegedly unlawful detention of a U.S. citizen in Venezuela, and dismissed the U.S. plaintiff's tort claim on its merits.[32] Like the traditional political question doctrine, the traditional act of state doctrine was based on easily discernible doctrinal categories, was relatively simple to apply, and was relatively determinant in outcome. Although the doctrine served the purpose of "international comity and expediency" and was designed to ensure "amicable relations between governments,"[33] courts appeared to apply it as a rule and did not consider whether these purposes were served in any particular case.

This understanding of the act of state doctrine changed in *Banco Nacional de Cuba v. Sabbatino*.[34] *Sabbatino* held that the act of state doctrine precluded judicial inquiry into the validity of a Cuban expropriation, even if the expropriation violated customary international law.[35] In so ruling, the Court rejected its prior categorical approach and replaced it with a case-by-case analysis in which the key question is the extent to which a judicial inquiry into a foreign act of state adversely affects U.S. foreign relations or the Executive's ability to conduct those relations.[36] Under this regime, the act of state doctrine bars an adjudication if the foreign relations consequences of the adjudication are significant. Most importantly for present purposes, *Sabbatino* made clear that *federal courts*, and not the Executive, are charged with the task of identifying and assessing these foreign relations consequences.[37]

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32. *See* Underhill v. Hernandez, 168 U.S. 250 (1897); *see also* Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

33. *Oetjen*, 246 U.S. at 304.

34. 376 U.S. 398 (1964).

35. *See id.* at 437.

36. *See id.* at 428 ("[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."); *see also* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 520-21 (2d Cir. 1985) (stating that under *Sabbatino*, "the applicability of the [act of state] doctrine depends on the likely impact on international relations that would result from judicial consideration of the foreign sovereign's act").

37. *See Sabbatino*, 376 U.S. at 428, 431-32 (predicting that declaration of invalidity of foreign act of state would "likely give offense to the expropriating country," could "seriously interfere with negotiations being carried on by the Executive," and might endanger "relations with third countries which have engaged

Since *Sabbatino*, the act of state doctrine has been at issue in hundreds of cases. Courts dismissed many of these cases based on the conclusion that U.S. foreign relations interests so required.[38] Many other cases involving foreign acts of state that seemed to implicate significant foreign relations interests were not dismissed.[39] This apparent inconsistency—again, the treatment of seemingly like cases differently—is one reason that commentators have described the act of state doctrine as being in "a state of utter confusion."[40]

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in similar expropriations"); *id.* ("The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law."); *id.* ("Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time . . . when such an impact would be contrary to our national interest."); *id.* at 437 ("[W]e conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of application."). The interpretation of *Sabbatino* in the text follows Professor Henkin:

> The Court claimed no authorization from Congress to elaborate the Act of State doctrine, and seemed carefully to avoid seeking support for it in Executive authority; the Court found, implied in the Constitution, an independent power for federal courts to make such law on their own authority. It was the federal judiciary that decided that the foreign relations of the United States required the Act of State doctrine; and it was the judiciary that was deciding, in *Sabbatino*, that the foreign relations of the United States did not require (or permit) exception for acts of state that violate international law.

LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 139 (2d ed. 1996) (footnotes omitted).

38. *See, e.g.*, International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981) (holding that adverse foreign relations consequences preclude antitrust suit against OPEC); O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449 (2d Cir. 1987) (holding that foreign relations consequences preclude adjudication of antitrust action against instrumentality of Colombian government).

39. *See, e.g.*, Airline Pilots Ass'n v. TACA Int'l Airlines, S.A., 748 F.2d 965 (5th Cir. 1984) (holding that foreign relations consequences do not preclude court from invoking Railway Labor Act to bar relocation of El Salvadoran airline to El Salvador); Sage Int'l Ltd. v. Cadillac Gage Co., 534 F. Supp. 896 (E.D. Mich. 1981) (holding that foreign relations consequences do not preclude adjudication of antitrust action implicating the validity of orders of foreign government agents).

40. Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 7 (1990). Disagreements about the foreign relations consequences of adjudication are not the only reason for the confusion. Another reason is uncertainty in the application of the traditional rule. For example: What counts as an act of state? Where is the situs of the act?

C. *Dormant Foreign Affairs Preemption*

Prior to the 1960s, courts also used a rule-based, categorical approach in assessing the validity of state acts not prohibited by enacted federal law that nonetheless adversely affected U.S. foreign relations. Such cases arose frequently.[41] In these cases courts asked only whether the state acts violated enacted federal treaties and statutes, or were prohibited by constitutional text. If they were not, the fact that they had profound collateral effects on foreign relations was not viewed as a justification for federal judicial intervention.[42] This was true even though during much of this period the Supreme Court exercised dormant preemption powers in other contexts.[43]

Two decisions in the 1960s changed this understanding. The first was *Sabbatino*. Before determining the content of the act of state doctrine, the *Sabbatino* Court explained that the doctrine, though not governed by a federal enactment, involved a "uniquely federal" foreign relations issue that "must be treated exclusively as an aspect of federal law."[44] The Court made clear that state power was excluded not because the Constitution itself so required, but rather because *the Court* decided that U.S. foreign relations interests so required.[45] The Court determined both what the foreign relations interests of

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41. *See, e.g.*, DENNIS PALUMBO, THE STATES AND AMERICAN FOREIGN RELATIONS (1960); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1632-39 (1997).

42. *See* Goldsmith, *supra* note 41, at 1632-39; *see also* Henkin, *supra* note 5, at 806.

43. *See, e.g.*, Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1872) (dormant Commerce Clause); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 435 (1819) (power to tax federal instrumentalities); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 622-25 (1842) (power to enact fugitive slave legislation); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) (power to naturalize).

44. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 424-25 (1964); *see also id.* at 427 ("[P]roblems surrounding the act of state doctrine are . . . intrinsically federal.").

45. *See id.* at 423-24. Congress overruled the decision in *Sabbatino*. *See* 22 U.S.C. § 2370(e)(2) (1994) (stating that the act of state doctrine shall not prevent U.S. courts presented with "a claim of title or other rights to property" from inquiring into the validity of foreign expropriations of such property under international law); *see also* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967) (upholding constitutionality of the statute).

the United States were, and what those interests required in terms of preemption of state law.[46]

The Court applied essentially the same logic four years later in *Zschernig v. Miller*.[47] That case involved an Oregon statute that denied inheritance to an East German because East Germany did not provide reciprocal rights to U.S. citizens.[48] The executive branch, as *amicus curiae*, stated that the Oregon scheme did not adversely affect U.S. foreign relations.[49] But the Supreme Court disagreed. In striking down the Oregon scheme, it determined that the statute had a "direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems"[50] and concluded that the statute was an "intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[51] As in *Sabbatino*, the Court performed an independent assessment of the foreign relations requirements of the United States as a basis for preemption of state law.

Since *Zschernig* and *Sabbatino*, federal courts have applied the foreign relations effects test as a basis for preemption of state law in a variety of foreign relations contexts not governed by enacted federal law. They have preempted state law in quasi-procedural contexts like the enforcement of forum selection clauses and in more substantive private-law contexts involving torts, contracts, and property.[52] They have also invoked the foreign relations effects test to preempt state foreign relations activities, such as "buy-American" statutes, interna-

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46. *See* Henkin, *supra* note 5, at 815-16.

47. 389 U.S. 429 (1968).

48. *See id.* at 430-31.

49. *See id.* at 434; *see also id.* at 460 (Harlan, J., concurring) ("The Department of State has advised . . . that state reciprocity laws, including that of Oregon, have had as little effect on the foreign relations and policy of this country." (quoting U.S. Memorandum at 5)); *id.* ("[A]ppellant's apprehension of deterioration in international relations [is] unsubstantiated by experience.").

50. *Id.* at 441; *see also id.* at 435 (holding that the statute's "great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle"); *id.* at 441 ("State's policy may disturb foreign relations.").

51. *Id.* at 432.

52. *See, e.g.*, Torres v. Southern Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997) (tort law); TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc., 915 F.2d 1351, 1353 (9th Cir. 1990) (forum selection clause); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1355-57 (E.D. Tex. 1993) (contract law).

tional tax schemes, and international sanctions.[53] The many cases in which judges federalize an issue under a dormant foreign affairs rubric are matched by identical cases with seemingly no less of a foreign relations quotient that do not involve judicial preemption.[54]

D. Why the Foreign Relations Effects Test in the 1960s?

Baker, *Sabbatino*, and *Zschernig* were decided within a six-year period in the 1960s. Each decision reflects the same pattern. Each rejected a categorical, rule-like approach to the accommodation of political branch prerogatives in foreign affairs.[55] And each embraced the identical foreign relations effects standard: abstention or preemption turned on a judicial assessment of whether the adjudication or the state activities adversely affected U.S. foreign relations or unduly impeded the political branches' conduct of foreign relations.

This is not the place for a comprehensive historical analysis of the reasons for this identical change in judicial approach across such different judicial foreign relations doctrines in the 1960s. Several converging trends during this period permit some preliminary speculations, however. Between the beginning of the First World War and the end of the Second, the United States had moved from a peripheral isolationist to one of two world superpowers in a dangerous world marked by the Cold War and the possibility of nuclear destruction. The opportunities and dangers of the modern world were thought by just about everyone to require a much more centralized and flexible foreign relations apparatus.[56] Against this back-

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53. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451 (1979) (state international tax scheme); National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998) (state sanctions); Bethlehem Steel Corp. v. Board of Comm'rs, 80 Cal. Rptr. 221 (Cal. Ct. App. 1969) (buy-American law).

54. For a few of many examples, see Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 905-06 (3d Cir. 1990) (holding that Pennsylvania's buy-American statute was not preempted); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1013-14 (E.D. Ark. 1973) (applying state law to find that reciprocity is not a condition to giving conclusive effect to a foreign judgment in Arkansas).

55. With respect to the political question doctrine, it is more accurate to say that the effects test supplements rather than replaces the traditional categorical analysis, which courts still sometimes perform.

56. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999), for the best account of the pre-World War II period. For a continuation of the story after World War II, see Joel

ground, the Supreme Court facilitated a dramatic change in constitutional understanding that expanded executive foreign relations power significantly and, more generally, centralized foreign relations power in the federal government at the expense of the states.[57]

The rise of the foreign relations effects test during the Cold War makes sense against this background. The Court's traditional rule-like approach to the judicial foreign relations doctrines might have seemed unsatisfactory because any errors of under- or overinclusiveness were thought to be unacceptably costly in the Cold War world. The foreign relations effects test might have seemed to allow the Court more flexibility in avoiding costly foreign relations errors and in shaping its judgments to the wishes of the Executive in crisis.[58] In addition, the effects test was consistent with both the larger move in constitutional law from a category-based analysis to an interest-balancing approach,[59] and with the Court's unprecedented confidence in its policymaking ability in the 1960s.

E. The Spread of the Foreign Relations Effects Test

The foreign relations effects test has been applied most extensively in the contexts in which it was born—the political question and act of state doctrines, and dormant foreign affairs preemption. But it has spread to many other contexts as well. Whether a treaty is self-executing and thus a domestic source of law sometimes depends on a judicial determination as to whether the domestic application of the treaty would "have serious foreign policy implications."[60] Courts have also considered foreign relations effects in judging the legal standing of

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R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998).

57. The leading cases are *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Pink*, 315 U.S. 203, 229 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

58. It is thus perhaps no accident that the first use of the foreign relations effects test in a holding of the Court came in *Sabbatino*, a case involving a Cuban expropriation of American property that was decided less than two years after the Cuban Missile Crisis. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 403 (1964).

59. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949-52, 966-67 (1987).

60. Frolova v. USSR, 761 F.2d 370, 375 (7th Cir. 1985).

foreign governments,[61] the reasonableness of agency action,[62] the extraterritorial reach of federal law,[63] the appropriateness of habeas relief and discovery in extradition proceedings,[64] the availability of federal question and pendent jurisdiction,[65] and the extraterritorial enforcement of a grand jury subpoena.[66]

III. A CRITIQUE OF THE FOREIGN RELATIONS EFFECTS TEST

Courts employ the foreign relations effects test to ensure that the normal operation of our constitutional order—that federal judges interpret federal enactments within their jurisdiction, and states are free to act in ways that do not violate enacted federal law—does not create controversy unwanted by the political branches. Several assumptions underlie judicial use of the effects test. One is that the political branches need assistance from federal courts in identifying and accommodating U.S. foreign relations interests in federal law. Another is that courts will do a good job of applying the foreign relations test in the minimal sense that the effects test contributes to rather than detracts from a coherent U.S. foreign relations law. A final assumption is that the effects test is a legitimate judicial function. This section questions these assumptions.

A. The Questionable Need for Judicial Assistance

The political branches often delegate lawmaking functions to federal courts. Sometimes they delegate these functions expressly, but more often they enact vague statutes that implic-

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61. *See* National Coalition Gov't of Burma v. UNOCAL, Inc., 176 F.R.D. 329, 339 (C.D. Cal. 1997).

62. *See* Pan Am World Airways v. Civil Aeronautics Bd., 684 F.2d 31, 40 (D.C. Cir. 1982); Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981).

63. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976); Greenpeace USA v. Stone, 748 F. Supp. 749 (D. Haw. 1990).

64. *See* Plaster v. United States, 720 F.2d 340, 350 (4th Cir. 1983) (habeas); *In re* Extradition of Singh, 123 F.R.D. 108, 115 (D.N.J. 1987) (discovery).

65. *See* Rendall-Speranza v. Nassim, 107 F.3d 913, 917 (D.C. Cir. 1997) (pendent jurisdiction); Phllipines v. Marcos, 806 F.2d 344, 352-53 (2d Cir. 1986) (federal question jurisdiction); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62-63 (S.D. Tex. 1994) (same).

66. *See* United States v. Bank of Nova Scotia, 691 F.2d 1384, 1391 (11th Cir. 1982).

itly invite case-specific judicial lawmaking.[67] The foreign relations effects test, however, cannot realistically be viewed as a response to gaps or vagueness in the federal scheme. Courts applying the effects test do not take federal enactments as their jumping-off point. Rather, these courts, with no hint of political branch approval and with no consideration of extant enactments, invoke their own conception of the foreign relations requirements of the United States to abstain from an adjudication in which there is federal jurisdiction and substantive federal law to apply, or to preempt state law in the absence of any suggestion that this is the desire of the political branches. This practice is akin to a federal court abstaining from adjudicating an enormous CERCLA suit based on a determination that the adjudication would harm the domestic economy, or preempting a state punitive damages regime on a similar ground.

The standard explanation for why effects-based doctrines of abstention and preemption are warranted in the foreign relations context but not the CERCLA or punitive damages contexts is that more is at stake in the foreign relations context. The belief here is that the consequences of an unwanted federal court adjudication or an unwanted state action are worse (from some unarticulated normative perspective) in the foreign relations than in the domestic context. This position is typically asserted rather than explained or defended. To the extent it makes any sense, it does so only with respect to traditional "high" agenda foreign relations issues, such as war, peace, and diplomacy. At the time of the Founding, as today, these functions were considered essential aspects of sovereignty.[68] Interference in these functions by federal courts and states can plausibly be viewed to make it difficult for the federal political branches to participate effectively in international relations. Not surprisingly, these are the very functions that the traditional political question doctrine left to the discretion of the political branches and that the text of the Constitution bars states from performing.[69] They are also functions

67. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996).

68. *See* JERRILYN GREENE MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-1776, at 206-23 (1987).

69. *See* U.S. CONST. art. I, § 10. Article I, section 10 does not expressly prohibit the sending and receiving of ambassadors. But its prohibitions against

that the political branches have comprehensively regulated, thus alleviating the need for supplemental judicial judgments about the proper role of federal courts and states.[70]

There are two reasons to question the need for supplemental judge-made doctrines of abstention or preemption outside of these traditional "high" foreign relations contexts. First, to the extent that the federal court or state acts in question collaterally touch on these traditional concerns, the adverse consequences of these acts are not so significant as to warrant a reversal of the usual assumptions of our constitutional order. The foreign relations effects test was born at the height of the Cold War, and its reversal of traditional constitutional assumptions was justified, if at all, by the exigencies of the period. It was plausible to think in 1964—less than two years after the Cuban missile crisis—that the adjudication of a Cuban expropriation of American property might produce a foreign relations crisis that literally threatened the nation's existence.[71] It is easy to understand a similar reaction to Oregon's retaliatory legislation against East Germany in 1968.[72] When formally analogous situations arise in our post–Cold War world—for example, when a court adjudicates the validity of a Russian act of state, or when Massachusetts sanctions Myanmar for human rights violations—the consequences for U.S. foreign relations and for the survival of the nation cannot be compared to the Cold War period. They are from any perspective much less significant. Certainly they do not justify to nearly the same degree the reversal of traditional constitutional assumptions about judicial review and state autonomy to act until preempted by the political branches.[73]

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states entering into treaties or making compacts or waging war attenuates the possibility that states will send and receive ambassadors in a manner that interferes with federal diplomatic prerogatives. In any event, the federal political branches through enacted law have ensured that the sending and receiving of ambassadors is an exclusive federal prerogative.

70. *See, e.g.*, Diplomatic Relations Act, 22 U.S.C. § 254 (1994); Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994); Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

71. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

72. *See* Zschernig v. Miller, 389 U.S. 429 (1968).

73. Peter Spiro makes a similar point in the federalism context in his contribution to this symposium. *See* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

The second reason to question the need for supplemental judge-made doctrines of abstention or preemption is that the effects test in fact rarely applies in contexts resembling traditional foreign relations concerns. The test is instead generally applied to an expanded set of "new" foreign relations issues. Increasing global interdependence and the dissolution of the distinction between public and private international law mean that almost any issue with a foreign element can now be viewed to "affect" foreign affairs. The foreign affairs category is further blurred by its expansion to include matters such as crime, commerce, the environment, health and social issues, human rights, private law matters, and much more.[74] As the categories of "foreign relations" and "foreign relations effects" expand, the justification for a judicial foreign relations effects test diminishes. The new foreign relations issues are not significantly different from domestic issues. They have a foreign element, to be sure, but they are not as central to the federal government's conduct of foreign relations as the traditional foreign relations functions. At the very least, courts exaggerate the extent to which foreign relations controversies in these contexts implicate special concern.

Another reason to think that the federal political branches do not need the special assistance provided by the judicial foreign relations effects test is that the likelihood of political branch action is at its height when the nation is faced with a genuine foreign relations threat. All things equal, we would expect the likelihood of a targeted congressional response to increase in step with the clarity and extent of a genuine foreign relations harm.[75] And the executive branch—which is primarily responsible for U.S. foreign relations, which monitors these relations closely, and which is not burdened by collective action problems to nearly the same degree as Congress—has both inherent and delegated legislative powers in the foreign relations field and unique abilities to influence the judicial process and states through informal means.[76]

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74. Many commentators have made these points. For my elaboration, see Goldsmith, *supra* note 41, at 1670-80.

75. Reliance on expert political rather than inexpert judicial bodies to identify genuine foreign relations threats is also justified by the fact, analyzed below, that it is ever more difficult to identify foreign relations harm.

76. *See* Goldsmith, *supra* note 41, at 1684-87; Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and Na-*

Under the judicial foreign relations effects test, the likelihood of judicial action (abstention or preemption) increases with the threat of the foreign relations harm. But as this threat increases, so too does the likelihood of political branch action. As Julian Eule has noted in a different context, "There is something fundamentally wrong with a judicial framework that prompts judicial intervention by the same trigger that induces political response."[77] This is especially true when the judicial framework seeks to protect political branch prerogatives in foreign relations. By requiring special forms of judicial action when we would most expect political action, the effects test undermines this goal.

Of course, to say that the political branches have extraordinary powers to respond to foreign relations harm is not to say that they exercise perfect control in the sense of redressing all unwanted foreign relations harms that result from the exercise of traditional federal court or state prerogatives. But the lack of such control in domestic contexts does not justify a domestic judicial effects test for abstention or preemption. The claim that it does in the foreign relations context rests on the just-questioned assumption that foreign relations are special and that foreign relations controversies demand special rules of avoidance. It also rests on the further assumption that federal courts can adequately, and at an acceptable cost, identify and redress unwanted foreign relations harms in those cases in which the federal political branches do not act. This assumption is questioned in the next two parts.

B. Judicial Competence and the Effects Test

The foreign relations effects test requires federal courts to identify and, through abstention or preemption, accommodate U.S. foreign relations interests. This part questions whether courts are well suited to perform this task. It is important to first note, however, that courts applying the effects test rarely take the test seriously. They do not consult pertinent foreign relations enactments or attempt to assess the content of perti-

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tional Security Law, 26 INT'L LAW. 715 (1992).

77. Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 436 (1982) (footnote omitted); *cf.* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 47-67 (1993).

nent U.S. foreign policy. Rather, they usually make a simple intuitive judgment about the foreign relations consequences of the adjudication. If the consequences seem sufficiently bad from a usually unarticulated normative perspective, the courts abstain or preempt, again usually without informed analysis of how such a decision actually affects U.S. foreign relations.

This criticism suggests that courts do not engage in the tasks necessary to legitimate the foreign relations effects test. But could they, even in theory? Could federal courts, in the absence of guidance from the political branches, accurately determine when and how foreign relations interests require abstention or preemption? Note that the problem is more severe than the usual theoretical difficulties associated with judicial attempts to divine congressional intent. For with the foreign relations effects test, courts attempt to divine and accommodate U.S. foreign relations interests disembodied from any particular federal enactment.

The first difficulty comes in identifying the foreign relations interests of the United States. The identification and proper accommodation of such interests is in fact an enormously complex endeavor. Consider the complexities of the controversy that arose when the State of Virginia convicted Angel Breard, a Paraguayan citizen, of a capital crime after failing to notify him of his Vienna Convention right to consult a Paraguayan consul.[78] Before Breard's execution, the International Court of Justice ("ICJ") issued a provisional order urging the United States to take all feasible measures to stay Breard's execution. The Supreme Court, at the urging of the executive branch, declined to issue a stay.[79] Setting aside for now the difficult *legal* issues and *domestic* interests implicated by the case,[80] the failure to issue a stay seemed to many to be contrary to U.S. *foreign policy* interests.[81] It angered Paraguay and many others in the world community for the disrespect it appeared to show to international law and the ICJ; and it por-

78. *See* Breard v. Greene, 118 S. Ct. 1352 (1998).

79. *See id.* at 1356.

80. For discussions of these issues, see the articles from the recent *Breard* symposium published at *Agora:* Breard, 92 AM. J. INT'L L. 666 (1998).

81. *See* Statement *Amicus Curiae* of International Law Professors at 9, Breard v. Greene, 118 S. Ct. 1352 (1998) (No. 97-1390) (warning that failure to stay execution might "cause incalculable and irreparable damage on the international plane").

tended retaliation against U.S. nationals abroad seeking protection under the Vienna Convention.

Nonetheless, it does not follow that the refusal to stay the execution did not best serve U.S. foreign relations interests. For if the United States had issued a stay in apparent obedience to the ICJ, it would almost certainly have angered key congressional officials who are suspicious of international organizations and thus threatened much more important foreign relations priorities, such as the payment of United Nations dues and the establishment of the International Criminal Court.[82] The political branches clearly thought that this combination of domestic political realities and foreign relations priorities weighed in favor of going forward with the execution, for both the Secretary of State and the Solicitor General urged the Supreme Court not to issue a stay.[83] But the decision was open to serious question on policy grounds as being contrary to U.S. foreign relations interests.

Breard exemplifies how difficult the identification and proper accommodation of U.S. foreign relations interests can be, even for experts. The difficulty is exacerbated by the waning of the distinction between domestic and foreign affairs, and the related expansion of matters viewed to implicate foreign relations controversy. In truth there is no definitive way of divining *the* U.S. foreign relations interest in a particular context or *the* manner in which this interest would be best accommodated. The Constitution gives these tasks primarily to the political branches that have the expertise and structure to perform them relatively well. The best we can hope for is that an institution with relative expertise will be able to make such decisions with finality.[84]

It is against this background that one must assess federal court competence to determine whether the federal court adjudications or state acts adversely affect U.S. foreign relations or

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82. *Cf.* Anne-Marie Slaughter, *On a Foreign Death Row*, WASH. POST, Apr. 14, 1998, at A15.

83. *See* Brief for the United States as Amicus Curiae, *Breard* (No. 97-1390).

84. This is what our Constitution aims to do, although it is not always precise about the allocation among the political branches of final decision-making authority in foreign affairs. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957, at 171 (1957) (describing U.S. Constitution as "an invitation [to the political branches] to struggle for the privilege of directing American foreign policy").

otherwise impede the political branches' conduct of foreign relations. The always-difficult competence inquiry is exacerbated here by the fact that we lack an independent conception of which adverse foreign relations effects the political branches would want to eliminate. This means that we cannot measure judicial outputs against an agreed-upon standard of correctness. We must instead proceed by an indirect analysis, asking whether the types of inquiries demanded by the effects test are the types that the institution of federal courts are well suited to answer.

The effects test is a quintessential standard. Terms like "adversely affect," "impede," and "foreign relations interest" obviously lack precise content. Courts have wide discretion to determine the content of these terms at the moment of application. A standard is supposed to gain accuracy at the price of predictability by forcing the decision maker to make a fine-grained contextual assessment of the values at issue. But the success of the standard depends on the legal decision maker's ability to make these judgments intelligently and accurately.[85] For well-known reasons summarized above,[86] courts lack the tools to make accurate and intelligent judgments in this context. Even without a clear notion of what accurate and intelligent judgments look like in this context, there is reason to think judges will often err in applying the effects test to determine whether abstention or preemption is appropriate.[87]

Once one views the foreign relations effects test as a standard applied by incompetent decision makers, the apparent incoherence in the judicial foreign relations doctrines noted above is unsurprising. Because federal courts lack the expertise and the information to make such foreign relations judgments, there is every reason to believe that the judgments would often be erroneous. And because the standard calls for a

85. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995).

86. *See supra* text accompanying notes 5-6.

87. I should emphasize here that I am not claiming that courts lack competence to interpret federal enactments related to foreign relations. Judicial competence is at its height in interpreting enacted law, regardless of the content of the law. My claim is, rather, that courts lack competence to identify, assess, and accommodate U.S. foreign relation interests not embodied in a federal enactment.

case-by-case inquiry into the foreign relations consequences of adjudication, there is every reason to expect (as we know is the case) that their decisions would be nonuniform. The fact that the primary decision makers—lower federal courts—are spread horizontally compounds the problem by, contrary to the aims of the judicial foreign relations doctrines, fostering *decentralization* of the foreign relations process. The Supreme Court's certiorari practice ensures that this process remains decentralized, further exacerbating the problem. Consistent with these concerns, foreign sovereigns increasingly participate in the federal courts as *amici*, stating their interest in, or offense at, the action in question.[88] The expansion in the category of acts perceived to "affect" U.S. foreign relations makes it even harder for courts to identify, weigh, and accommodate these interests accurately and coherently.

So the inconsistency and incoherence in the judicial foreign relations doctrines do not result from lack of principle. To the contrary, they result from a principled application of the effects test, which requires courts to make decisions that they are unsuited to make and that invariably produce erroneous and systematically inconsistent results. There is an irony here. Many of the judicial foreign relations doctrines—especially the political question and act of state doctrines—are premised on the fact that the courts lack competence to make foreign relations judgments. The irony is that during the Cold War, federal courts acting on this premise and attempting to ensure political branch hegemony in foreign relations chose a standard of analysis that required them to make the very judgments they hoped to avoid.[89]

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88. For recent examples, see Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315 (5th Cir. 1997); Torres v. Southern Peru Copper Corp., 113 F.3d 530 (5th Cir. 1997).

89. There is a related point. The foreign relations literature treats the horizontal deference and vertical preemption doctrines as distinct. The literature is typically very critical of the horizontal deference doctrines, often on lack-of-necessity and institutional competence arguments like the ones sketched above. By contrast, the literature tends to be supportive of the vertical preemption doctrines, apparently blind to the fact that both the deference and preemption doctrines involve the same judicial analysis that implicates the same concerns. This is not to say that the costs of the foreign relations effects test have the same significance in both contexts. But those who criticize the horizontal deference doctrines and support the vertical preemption doctrines must recognize that similar lack-of-necessity and institutional incompetence arguments apply *prima facie* in both contexts.

C. *Possible Asymmetry in Political Branch Responses*

The fact that federal courts are likely to do a bad job applying the effects test does not, by itself, undermine the test's efficacy. The validity of the test ultimately depends on the efficacy of alternate arrangements. One might think that the effects test produces fewer problems than its absence would produce. For example, one might think that the bad consequences of plenary adjudication of all foreign relations cases is worse than the bad consequences of an effects-based political question or act of state doctrine. And even more plausibly, one might think that the adverse foreign relations of state-by-state regulation might be worse than less-than-ideal federal judicial regulation.

These are complicated tradeoffs. Here I want to focus on only one aspect of the complexity: the efficacy of political branch responses to judicial errors. As discussed above, the content of all the foreign relations doctrines discussed in this essay is ultimately subject to political branch control.[90] This means that the political branches can in theory redress the errors created by federal court adjudications and state activity, as well as the errors that inhere in judicial attempts to redress these problems via the effects test.

These errors, however, are not equally likely to induce a political branch response. Scores of factors influence political branch responsiveness, although there is little conceptual or empirical analysis of this issue, especially in the foreign relations context.[91] I want to focus here on political branch responsiveness to just one of many facets of judicial errors in the application of the effects test: whether the error *overprotects* or *underprotects* U.S. foreign relations interests. An overprotection error occurs when courts abstain or preempt on the basis of a judicial foreign relations calculation, but the political

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90. The statement in the text does not apply to the political question doctrine as traditionally practiced, which involved a constitutional judgment about the allocation of foreign relations decision-making power to the political branches. *See supra* pp. 1400-01.

91. The best general account is William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). For a consideration of some of these issues in the foreign relations context, see James Lindsay & Randall Ripley, *Foreign and Defense Policy in Congress: A Research Agenda for the 1990s*, 17 LEGIS. STUD. Q. 417 (1992).

branches would not have wanted abstention or preemption. An underprotection error occurs when courts do not believe that the foreign relations calculus requires abstention or preemption, but the political branches would have wanted these results. An underprotection error is functionally identical to having no effects test whatsoever; it occurs when courts follow their usual interpretive practices in a way that causes unwanted foreign relations controversy.

These two types of judicial errors in the application of the judicial foreign relations doctrine seem likely to provoke asymmetrical political branch responses. As I argued above, the political branches are most likely to redress judicial underprotection errors; political branch responsiveness is at its height when a gap in federal law harms U.S. foreign relations interests.[92] This is probably not generally the case when federal courts overprotect U.S. foreign relations interests, because judicial errors of this type do not typically have adverse affects on U.S. foreign relations. To the extent this is true, the political branches' special means of monitoring and control will not be implicated, and the usual hurdles to congressional override are more likely to be present.

Consider, as an example, how this analysis plays out in the context of dormant foreign affairs preemption. The analysis suggests that the political branches are more likely to intervene when courts err in not preempting state law than when courts err in preempting state law, for the latter case is less likely to create foreign relations controversy, and thus less likely to provoke a political branch response. Of course, there are many other factors at work, even in this context, that might affect political branch responsiveness. For example, when courts err in preempting state law, the states as an interest group have unusual power to influence a congressional response. That said, states still face the burden of inertia, and in our modern interdependent global society federal lawmakers have independent incentives to federalize and internationalize previously local issues that implicate international affairs.[93]

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92. Professor Henkin's 35-year-old assessment has even greater force today: "The foreign relations of the United States do not cry for the courts to fill an obvious lack of law left for them by the Constitution or by necessary implication from the words or the silences of the political branches." *See* Henkin, *supra* note 5, at 817-18.

93. *See* Barry Friedman, *Federalism's Future in the Global Village*, 47

These complicating factors make clear that the analysis of judicial error along the dimension of over- and underprotection of U.S. foreign relations interests is not comprehensive. It merely suggests a tendency in the likelihood of congressional response.

D. Legitimacy Concerns

I have thus far focused on what might be thought of as the functional difficulties with the foreign relations effects test. I have suggested that in the hands of federal courts, the foreign relations effects test does not contribute to coherent federal foreign relations law and does not well serve the aim of protecting political branch prerogatives in foreign relations. Each step of the argument has rested on plausible but certainly-not-proven quasi-empirical claims. And in any event such functional arguments, even if convincing, would not explain all of what is wrong with the judicial foreign relations effects test. For example, most of the problems outlined above would remain even if Congress expressly authorized the foreign relations effects test. Relatedly, if Article III commanded the foreign relations effects test, functional arguments against its validity would have less weight.

These examples show that a functional analysis of the effects test must be bolstered by an analysis of its legitimacy from a more traditional constitutional perspective. This analysis faces the objection that structural constitutional limits apply with less rigor in the foreign relations context.[94] This is not a view that I accept, although I lack space to explain why here. I will instead simply assume that structural constitutional limits apply to federal courts even in the foreign relations context.

Consider first the legitimacy of the horizontal abstention doctrines such as act of state and political question. Here abstention masks the exercise of extraordinary judicial power, for courts on which Congress has conferred jurisdiction are decid-

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VAND. L. REV. 1441, 1473-78 (1994).

94. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Missouri v. Holland, 252 U.S. 416, 432-35 (1919); LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 211 (2d ed. 1988) ("[T]he Constitution's separation of powers and its arrangement of checks and balances are less precise in [the area of foreign affairs] than a survey of the text might suggest.").

ing which cases to adjudicate on the basis of their own analyses of U.S. foreign relations.[95] To see the problem, consider the relationship between the executive branch and the federal courts implicated by the effects test. One might conclude from the Executive's constitutional responsibility to conduct U.S. foreign relations and its superior competence to do so that courts should defer to the Executive's formal or informal representation about the best outcome in a case.[96] But with respect to the foreign relations effects test, courts are careful not to defer to the Executive's analysis of U.S. foreign relations.[97] Why? One answer is that the Executive has no authority to make law on a case-by-case basis. This answer is not wholly adequate, for courts have no more apparent authority—indeed, from any perspective they have less. Another answer is that courts do not want to be "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others."[98] This response also points to the lawlessness of the effects test as applied by both the Executive and federal courts.

The point is that judges applying the effects test in the political question and act of state doctrine contexts are doing precisely what everyone thinks is illegitimate when done by the executive branch, which has more competence and arguably more constitutional authority because of its unique role in foreign relations. What courts are doing is illegitimate because it is not grounded in an authoritative source of law. To be sure, courts and scholars invoke "structural" constitutional considerations in support of an effects-based political question and act of state doctrine. But such structural arguments are really nothing more than a mask for the effects test itself, since the "structural" need for the effects test is itself based on a judicial

95. *See* FRANCK, *supra* note 28; ELY, *supra* note 77.

96. Courts do in fact almost always agree with the Executive's views about *outcomes* in foreign relations cases, although they do not always embrace the Executive's suggested legal arguments.

97. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (majority of Justices reject the view that Court must defer to Executive suggestion regarding application of act of state doctrine); Zschernig v. Miller, 389 U.S. 429 (1968) (disagreeing with the government's foreign policy calculus); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 431-32, 437 (1964) (emphasizing that act of state doctrine does not depend on foreign relations assessment of the Executive).

98. *First Nat'l City Bank*, 406 U.S. at 773 (Douglas, J., concurring).

assessment of U.S. foreign relations interests. This bootstrap argument for the effects test is no more legitimate—and indeed, is almost certainly less so—than an effects-based discretionary foreign relations lawmaking power in the Executive.

A similar analysis applies to dormant foreign affairs preemption. In this context, it seems like structural constitutional arguments have greater force because of the widespread belief that the Constitution's structure makes foreign affairs an exclusive federal concern. But there is little constitutional justification for this view. If anything, Article I, section 10's express checks on state power in select foreign relations contexts suggest that in other areas there is no self-executing realm of exclusive federal foreign relations power.[99] And indeed this was the settled practice for the first 175 years of our nation's history until matters changed with the adoption of the effects test in *Sabbatino* and *Zschernig*.[100]

At bottom, the ostensible structural constitutional argument for dormant foreign affairs preemption is, once again, little more than the effects test in action. Courts infer the need for an effects-based federal exclusivity based on naked judicial determinations about the needs of U.S. foreign relations. This bootstrap argument provides no independent constitutional justification for an effects-based judicial preemption in the foreign relations context. The "structural" preemption argument is especially illegitimate when applied to issues that, despite the foreign affairs patina, involve traditional state prerogatives such as criminal law, private law, health and social issues, and the like.[101] These issues are not exclusive federal concerns. Standard tenets of American federalism suggest that the decision to regulate such issues by federal law must be made by the national political branches where state interests are represented, and not by federal courts.[102]

An additional problem with such preemption is that it ignores pertinent separation of powers objections. Recall that courts applying the effects test make federal law in an area that is a central prerogative of the federal political branches

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99. *See* U.S. CONST. art. I, § 10.

100. *See* Goldsmith, *supra* note 41, at 1641-64.

101. *See supra* p. 1413.

102. *See* Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 17 (1985); *see also* Friedman, *supra* note 93, at 1473-78 (making related point in treaty context).

without any apparent authorization from those branches. This form of "prerogative" federal common law intrudes on political branch prerogatives by circumventing the various constitutional hurdles to the making of federal foreign relations law, thereby lowering the costs of federal lawmaking and diminishing the goals promoted by such costs.[103] One cannot ignore these separation of powers objections by reference to the supposed federal exclusivity in foreign affairs, for by hypothesis *both* intrude on political branch prerogatives.

* * *

In sum, the assumptions that underlie the foreign relations effects test are all open to question. The political branches have unique incentives and means to calibrate U.S. federal foreign relations law, and thus have relatively little need for an extra layer of judicial assistance. Judges are in any event not well suited to provide such assistance, at least not via the foreign relations effects test, especially in the post–Cold War world where the category of foreign relations has expanded dramatically and no longer implicates the same concerns. In addition, all things equal, an asymmetry in likely political branch response to judicial errors in applying the effects test cuts against the test's application. Finally, the effects test contemplates a role for the federal judiciary that exceeds the usual limitations on federal common lawmaking.

IV. THE NEW FORMALISM IN UNITED STATES FOREIGN RELATIONS LAW

Since the end of the Cold War, the Supreme Court and lower federal courts have begun to adopt a more formalistic approach to the judicial foreign relations doctrines under consideration here. The Court's decisions embrace—sometimes explicitly, sometimes implicitly—many of the criticisms of the foreign relations effects test sketched above. They all reject the foreign relations effects test and replace it with an approach that narrows judicial discretion by specifying the content of federal law prior to the point of judicial decision. This

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103. *See* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 349-50 (1992).

section describes the new formalism and sketches a framework for its analysis.

A. *The New Formalism*

1. Act of State Doctrine

Recall that *Sabbatino* made the act of state doctrine's applicability turn on a judicial assessment of the foreign relations implications of examining the validity of foreign acts of state, and that act of state jurisprudence during the quarter century following *Sabbatino* was viewed as confused and inconsistent.

In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*,[104] the Supreme Court significantly curtailed the relevance of inquiries into the foreign relations implications of judicial decisions, and instead embraced a rule-like approach. At issue in *Kirkpatrick* was whether the act of state doctrine barred the adjudication of a suit between Americans that involved bribes to Nigerian officials.[105] Both lower courts had engaged in fine-grained inquiries into the foreign relations consequences of the adjudication, and had reached different conclusions.[106] In the Supreme Court, the Solicitor General argued for a similar case-by-case analysis.[107]

The Court expressly rejected this effects-test approach to the doctrine's applicability. It acknowledged that "the policies underlying our act of state cases—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations"—are implicated by the case.[108] But it rejected the view that "those underlying policies are a doctrine unto themselves."[109] The Court held that these fine-grained policy judgments were relevant, if at all, only in the exceptional case where the *validity of the act of state* was at issue.[110] This approach significantly narrows the scope of judicial foreign relations inquiries in the act of state

104. 493 U.S. 400 (1990).
105. *See id.* at 401-04.
106. *See id.* at 403-04.
107. *See id.* at 408.
108. *Id.*
109. *Id.* at 409.
110. *See id.* at 405, 409.

context by establishing a scope-limiting, rule-like preliminary inquiry—is the validity of an act of state in issue?—as a prerequisite to even theoretical consideration of foreign relations effects.

2. Dormant Foreign Affairs Preemption

A similar move from a case-by-case effects test to a more rule-like approach has taken place in the dormant foreign affairs preemption context. Beginning in the 1960s, opponents of California's "worldwide combined reporting" tax for multinational corporations had tried, unsuccessfully, to convince the federal political branches to preempt the tax.[111] Their failure in the political process prompted suit in the case of *Barclays Bank PLC v. Franchise Tax Board*.[112] The essential issue in the case was whether the California tax should be invalidated under a dormant foreign affairs preemption rationale. The plaintiffs claimed that the statute "impair[ed] federal uniformity in an area where federal uniformity is essential"[113] by preventing "the Federal Government from 'speaking with one voice' in international trade."[114] In support of this claim, they relied heavily on *Zschernig*, the enormous diplomatic controversy provoked by the California scheme, and *amicus* filings from foreign nations alleging offense at the California law.

The Court rejected this legal challenge and, with it, the foreign relations effects test. It made clear that courts had no authority to identify foreign relations effects and weigh them against the competing legitimate interests of states.[115] And it emphasized that it was the job of "*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."[116] What mattered for the Court was whether a federal law validly enacted by one of the political branches had preempted the

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111. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 302 (1994).

112. *Id.*

113. *Id.* at 320 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979)).

114. *Id.* (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)).

115. *See id.* at 328 ("The judiciary is not vested with power to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'" (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983))).

116. *Id.* at 331 (emphasis added).

state action; foreign relations effects were not an independent basis for preemption.[117] And the Court went on to establish a presumption that congressional inaction in the face of adverse state foreign relations activity indicates "Congress' willingness to tolerate" the state practice.[118]

Barclay's Bank marks a return to a pre-*Sabbatino*, pre-*Zschernig* approach to state activities that cause foreign relations controversy. This regime is rule-like for courts because it rejects a foreign relations effects standard and directs courts to apply state law that adversely affects U.S. foreign relations unless preemption can be traced to a political branch's enactment. Of course whether the political branches have preempted state law in any particular case is not always a determinant inquiry. But it is much more determinant, and involves much less judicial discretion, than a regime that permits preemption under both enacted-law and foreign-relations-effects rationales.

3. Political Question Doctrine

A similar though less distinct move away from the effects test has occurred in the political question context. In *Japan Whaling Ass'n v. American Cetacean Society*,[119] the Supreme Court held that the political question doctrine did not preclude it from reviewing the Executive's decision not to sanction Japan for noncompliance with a whaling treaty. Consistent with the new formalism, the Court acknowledged that it lacked competence or authority to make naked foreign policy judgments.[120] Also consistent with the new formalism, it rejected the view that it should abstain from interpreting treaties and

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117. *See id.* at 328-30.

118. *Id.* at 327; *see also id.* at 326 ("Congress implicitly has *permitted* the States to use the worldwide combined reporting method."); *id.* at 331 (Blackmun, J., concurring) (stating that majority opinion relies on "congressional inaction to conclude 'that Congress implicitly has *permitted* the States to use the worldwide combined reporting method'"). The Court did not specify whether this inference is limited to cases, like *Barclays Bank*, in which Congress had expressly considered and rejected federalization of the state activity in question.

119. 478 U.S. 221 (1986).

120. *See id.* at 230 (noting that the "[j]udiciary is particularly ill suited to make [foreign policy decisions because] courts are fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature" (citations omitted)).

executive agreements because of foreign relations effects.[121]

It is unclear whether *Japan Whaling* represents a broad retreat from an effects-based political question doctrine. Several lower federal courts have invoked the decision as a basis for rejecting the political question doctrine on the basis of the adverse foreign relations consequences of an adjudication.[122] To the extent these decisions represent a trend, it is one that narrows judicial discretion by directing courts to apply federal law without recourse to a safety valve of abstention based on a judicial determination of foreign relations effects. The federal enactments themselves of course might be couched in terms of standards rather than rules, and their interpretation thus might not be determinate. But the additional level of discretion and thus indeterminacy provided by the effects test is eliminated.

4. Extraterritoriality

Another recent example of a shift to formalism can be found in the Supreme Court's decision in *EEOC v. Arabian American Oil Co.*,[123] which considered the extraterritorial scope of Title VII. Most federal statutes do not specify whether or not they apply abroad. As a policy matter, the appropriate extraterritorial scope of a statute depends on a complex balance of domestic and foreign relations concerns, including the domestic goals served by the statute and the possibility of offending a foreign sovereign by applying American notions of regulation to activities that take place abroad. In addition, even if a statute should apply abroad to some extent, difficult questions remain as to the circumstances of its extraterritorial application. For example, should Title VII require a U.S. employer in Saudi Arabia to hire someone in violation of local religious restrictions? Rather than making these and numerous

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121. *See id.* at 230 (invoking *Baker v. Carr*'s dictum that it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance" and concluding that "under the Constitution, 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" (citation and internal quotation omitted)).

122. *See, e.g.*, Earth Island Inst. v. Christopher, 6 F.3d 648 (9th Cir. 1993); Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991); Chiles v. Thornborough, 865 F.2d 1197 (11th Cir. 1989).

123. 499 U.S. 244 (1991).

other judgments on a case-by-case basis, as the Supreme Court and especially the lower courts had done in earlier cases,[124] the *Arabian American Oil Co.* Court embraced a broader rule-like presumption that federal statutes do not apply extraterritorially unless Congress plainly states otherwise in the statute.[125]

5. Self-Executing Treaties

In recent years courts attempting to determine whether a treaty is self-executing have begun to eschew a multi-factored approach that includes the effects test as a central component. They have instead opted for a more rule-like approach, akin to the presumption against extraterritoriality, that presumes that a treaty is non-self-executing.[126]

B. The Promise and Uncertainty of the New Formalism

The new formalism can be viewed as a judicial response to the many problems with the foreign relations effects standard. The move from rules to standards to rules clearly reduces judicial decision costs associated with the prior regime.[127] Whether it reduces the error costs—in other words, whether it better serves the purposes of the judicial foreign relations doctrines previously serviced by the foreign relations effects test—depends on several factors. It depends on the purposes of the doctrines. And it depends on the content of the new rules, the validity of which depends on the quality of the judgments—sometimes conceptual, often empirical—that support them.

There are two related problems here. First, not just any rule will do. A directive that requires courts to apply the political question doctrine only in cases filed on Tuesday would shrink decision costs but would not well serve the goal of pro-

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124. *See generally* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

125. *See* 499 U.S. at 248.

126. For decisions suggestive of this trend, see Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992); More v. Intelcom Support Servs., Inc., 960 F.2d 466 (5th Cir. 1992); United States v. Noriega, 808 F. Supp. 791 (S.D. Fla. 1992). *See generally* Curtis A. Bradley, Breard, *Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 541 (1999) (discussing trend toward a non-self-executing treaty presumption).

127. But of course it increases the decision costs on political actors, a point discussed *infra* Part IV.B.2.

tecting political branch prerogatives in foreign relations. A related difficulty is that the presumptive rule crafter, the Supreme Court, might be relatively incompetent to craft intelligent rules for the same reasons it is unsuited to apply the foreign relations effects standard. Since there are other factors that point toward a rule-based approach, this need not be the death-knell for a rule-based approach. It depends on whether less-than-perfect rules designed by the Supreme Court better serve the underlying goals than the current standard-like regime. Even if the Supreme Court is relatively inexpert in identifying and accommodating U.S. foreign relations interests, it might be relatively well suited to make broader judgments that enable it to better serve the goals of the judicial foreign relations doctrines.

With these caveats in mind, this section aims to sketch a framework for analyzing whether a new rule-based approach might better serve the purposes of the judicial foreign relations doctrines than the foreign relations effects standard.

1. The Functional Case

The functional strengths and weaknesses of the new formalism can profitably be analyzed by analogy to the literature on default rules in contracts.[128] The term "rule" suggests a directive that narrows judicial discretion by specifying the directive's content prior to application; the term "default" suggests that the directive is subject to revision by certain parties. In the contracts literature, default rules are the background rules that govern contractual relations in the absence of a different specification by the contracting parties.[129] Like default rules for contracts, the judicial foreign relations doctrines are designed to help judges give content to political branch wishes in the face of political branch unclarity, unless and until the political branches specify otherwise. Although default rules can

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128. *See* Elizabeth Garrett, *Legal Scholarship in an Age of Legislation*, 34 TULSA L.J. (forthcoming 1999); Cass Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. (forthcoming 1999); Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. (forthcoming 1999).

129. For an overview, see Richard Craswell, *Contract Law: General Theories*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS (forthcoming).

take many forms,[130] I shall focus on two: majoritarian defaults and information-forcing defaults.

If a judicial foreign relations doctrine takes the form of a majoritarian default, it aims to mimic what the political branches would have done had they addressed the issue.[131] Notice that in some sense this is the same aim of the foreign relations effects standard. But a rule-like approach eschews a fine-grained case-by-case analysis. In the face of uncertainty about the scope of federal foreign relations law, it seeks instead to make wider, and hopefully more informed, predictions about the aims of the political branches. Such broader rules are bound to be over- and underinclusive with respect to the purposes of the foreign relations doctrines. The hope is that on balance they will do a better job of tracking these purposes than a case-by-case approach.

The new formalism decisions might be justified on majoritarian default grounds. For example, rejection of an effects-based political question doctrine appears to accord with congressional wishes in conferring jurisdiction on courts to adjudicate cases involving treaties and foreign relations statutes. Similarly, the judicial refusal to preempt state law because of foreign relations effects arguably tracks political branch wishes more closely than does preemption, for political branch inaction is meaningful in light of the political branches' special means and incentives to preempt offending state law in the foreign relations context. This is especially true in those contexts, such as *Barclay's Bank*, where the offending state activity has been thoroughly examined by Congress.

The Supreme Court has invoked the majoritarian default rationale most explicitly in the context of the presumption against extraterritoriality. As noted above, the decision whether and to what extent to apply an otherwise-silent fed-

130. *See id.*

131. By phrasing the inquiry in this way, I hope to side-step the well-known difficulties with any attempt to discern the "intent" of the legislature. In applying a majoritarian default in the context of the judicial foreign relations doctrines, federal courts are not attempting to divine the intent of Congress. Because these doctrines have no basis in enacted federal law, there is nothing from which to divine such intent, even assuming the notion made sense. Courts instead estimate how the political branches would resolve a particular issue had they addressed it. This analysis is far from determinate, but, as I suggest below, it is not indeterminate either, and it attenuates the conceptual pitfalls of determining congressional intent.

eral statute abroad involves difficult policy choices. The Court has justified its use of a rule-like presumption against extraterritoriality rather than a case-by-case inquiry on the basis of its judgment that "Congress *generally* legislates with domestic concerns in mind."[132] The Court thus recognizes that the presumption will sometimes result in error, at least from the perspective of capturing general congressional wishes. But the Court presumably thinks this class of errors is less troublesome than the potential costs of a case-by-case judicial approach, which include: (1) errors that inhere in a direct judicial analysis of whether and how particular statutes should be construed to apply extraterritorially; (2) high judicial decision costs of such an approach; and (3) costs of uncertainty—to political actors and affected individuals—that inhere in this approach.

The presumption against extraterritoriality reveals the virtues and vices of a majoritarian default-rule approach. On the virtue side of the ledger are the usual benefits of rules—namely, ease of application, reduction of judicial discretion (and a related reduction in the decentralization of federal foreign relations lawmaking), increase in predictability, and attenuation of inconsistency. To understand the vice side of the ledger, one need only recognize that these virtues would be realized by *any* rule, including a presumption *in favor of* extraterritoriality. This shows that a majoritarian default depends heavily on the accuracy of the Court's judgment about the general wishes of the political branches (not to mention the coherence of the idea of such general wishes). In the face of uncertainty, the Court needs to be able to make such general judgments in order to avoid the many problems of a fine-grained case-by-case assessment.

The hope of the majoritarian default approach is that courts are in a better position to make a relatively accurate judgment about Congress's general aims even when they cannot make accurate, context-specific ones. This is not an implausible claim. Consider the presumption against extraterritoriality. Courts are ill-prepared to determine

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132. Smith v. United States, 507 U.S. 197, 204 n.5 (1993) (emphasis added); *see also* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (stating that presumption against extraterritoriality is a "valid approach whereby unexpressed congressional intent may be *ascertained*" (emphasis added)).

whether and to what extent particular statutes should apply abroad; but they encounter the full range of federal statutes, and thus are relatively well positioned to answer the question whether Congress usually legislates with domestic issues in mind or with extraterritorial issues in mind. Ultimately, of course, this issue is a largely empirical one laced with conceptual questions about the coherence of predicting what the political branches would have done. The modest point here is that courts are likely better suited to answer this general question than the more fine-grained ones required by the effects test.

A majoritarian default rule works best when courts have confidence in the accuracy of their general judgment about how Congress would have addressed the issue.[133] If a court lacks confidence in its ability to make this determination, it should perhaps instead design default rules that encourage the political branches to specify their wishes.[134] This is the aim of an information-forcing default rule. In contract theory, an information-forcing default rule is one that burdens the party who is theoretically best positioned to clarify a contractual issue in the hope of creating an incentive for that party to address the issue in the contract.[135] In the context of the judicial foreign relations doctrines, an information-forcing default rule encourages the political branches to make their intentions clear about the content of the federal foreign relations law in question. It tries to give the political branches incentives to clarify the content of federal law. It does this by self-consciously acting *contrary* to congressional intent in the hopes of spurring an accurate congressional response.

At first glance, the foreign relations context seems like an ideal one in which to apply information-forcing default rules. Judges are relatively incompetent in this context to determine the appropriate content of federal law, so perhaps they should act to urge the officials with superior competence—the political branches—to do so. For example, we might justify the presumption against extraterritoriality as the rule best designed to encourage the political branches to decide whether and to what extent federal statutes apply abroad. *Arabian American*

133. *See* Sunstein, *supra* note 128 (manuscript at 11-13).
134. *See id.*
135. *See* Craswell, *supra* note 129.

Oil Co. might be viewed to support this view.[136] For the Court in that case noted that if its general presumption as applied to Title VII were wrong, Congress could "calibrate [Title VII's] provisions in a way that we cannot."[137] And this is exactly what Congress did. It amended Title VII the next year to specify the complex circumstances in which the statute would apply abroad—circumstances that essentially split the difference between a purely domestic application and a full-throttled extraterritoriality.[138] Professor Curtis Bradley concludes from these events that "[t]he presumption thus appears to have had the effect of *forcing* Congress to focus specifically on the political problems and uncertainties raised by extraterritoriality."[139]

This conclusion at first glance seems plausible, but a closer analysis of the *Arabian American Oil Co.* overruling reveals the difficulty with information-forcing strategies. The essential problem is that information-forcing rules only work if there is independent reason to think that the rule actually reveals information. This is less likely to be the case in the separation of powers context than in the contracts context because Congress faces significantly greater collective action and inertia hurdles to rational action in the face of an information-forcing default than do individuals and firms. Congress is usually silent in response to judicial invocation of the presumption against extraterritoriality.[140] Without much more information about when and why congressional silence is meaningful, courts cannot know whether silence by itself represents legislative inertia or legislative agreement with the presumption.[141]

Moreover, there is little reason to think that Congress will systematically respond to errors in application of the presumption against extraterritoriality. This is because error in this context—interpreting U.S. law to apply domestically when Congress would prefer extraterritorial application—is not an

136. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

137. *Id.*

138. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e(f) (1994)).

139. Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 553 (1997) (emphasis added).

140. *See* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); Smith v. United States, 507 U.S. 197 (1993).

141. Nor, of course, does this silence necessarily mean that the presumption reflects general congressional intent.

overprotection error (in other words, it does not provoke foreign relations controversy) and thus, all things equal, is not likely to provoke a congressional response. *Arabian American Oil Co.* is not necessarily a counterexample, for it was overruled as part of a package of amendments to Title VII that overruled a series of higher-profile and more controversial Supreme Court Title VII rulings.

There are other difficulties with information-forcing strategies. If the Court were seeking a true information-forcing default rule in the extraterritoriality context, it should have established one *contrary* to the majoritarian rule—perhaps a presumption *in favor* of violating international law. Such a presumption would likely run against congressional wishes and provoke angry responses from foreign nations; in this way it would better encourage Congress to specify *ex ante* whether a statute violates international law, or to give a meaningful response *ex post*.[142] This points to an additional constraint on courts' ability to play the information-forcing game. Unless they are perfectly confident that the default will induce congressional action, they might end up with the worst of both worlds: a federal rule that goes against congressional wishes but that Congress will not override. And even if they did have perfect confidence in the default's efficacy, crafting rules contrary to Congress's wishes is a heavy-handed and probably illegitimate judicial function. This is perhaps why courts never engage in pure information-forcing strategies.

I do not mean to suggest that an information-forcing default regime has no place in the foreign relations context. For sometimes a majoritarian default will have information-forcing qualities as well. This is likely to happen when a majoritarian default rule systematically leads to underprotective errors. Recall that underprotection errors produce foreign relations controversy unwanted by the political branches. For reasons outlined above, these situations are ones in which we would expect political branch intervention to be most likely. A relatively accurate majoritarian default rule that produces errors that are systematically information-forcing is the best combi-

142. In this respect, it is not even clear that rules do a better job of promoting congressional response than standards. It might be that the randomness that inheres in incompetent judicial applications of standards will most likely provoke a congressional response.

nation of majoritarian and information-forcing regimes. For it reduces judicial decision and error costs, and the errors that are committed are—all else equal—systematically likely to be redressed by the political branches.

With the exception of the presumption against extraterritoriality, the new formalism decisions can be viewed as majoritarian defaults that produce errors, if at all, with information-forcing qualities. That is, errors in their application are most likely to produce unwanted foreign relations controversy. Consider *Barclay's Bank*, which rejected the effects test in the dormant preemption context. By offering no judicial protection for state acts that produce unwanted foreign relations harm, this regime's errors will all produce unwanted foreign relations controversy of the type most likely to induce a political branch response. The same is true of *Kirkpatrick*'s "validity" prerequisite, which again narrowed the scope of judicial protection and is thus likely to lead to errors, if at all, in the direction of underprotection. Finally, a presumption against a treaty's self-execution is also likely to produce underprotection errors. This is because foreign countries are much more likely to complain about the nonenforcement of a treaty norm in the U.S. domestic system than its enforcement.

2. The Legitimacy Case

In both the federalism and separation of powers contexts, the Supreme Court's rejection of the effects test and its embrace of the new formalism appear to be driven by the concerns about the legitimate scope of judicial power outlined above.[143] For example, the *Barclay's Bank* Court noted that the petitioner's complaints about the adverse foreign relations consequences of the California tax were "directed to the wrong forum" because *"[t]he judiciary is not vested with power* to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'"[144] The *Kirkpatrick* Court's act of state decision emphasized that "[c]ourts in the United States

143. *See supra* Part III.B.

144. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328 (1994) (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)) (emphasis added).

have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them,"[145] and that the act of state was "not some vague doctrine of abstention."[146] Finally, the *Arabian American Oil Co.* Court's presumption against extraterritoriality was premised on the inappropriateness of federal courts making the foreign policy judgments that inhere in the determination of extraterritoriality.[147]

The new formalism appears more consistent with our traditional understanding of the role of the judiciary than the foreign relations effects test. Courts have a long tradition of crafting general interpretive rules based on their assessment of the general wishes of the political branches and on general considerations about the proper function of courts and the proper incentives courts should give Congress to carry out its constitutional duties.[148] At bottom, the new formalism aims to minimize unauthorized judicial foreign policy judgments and to tie the judicial foreign relations doctrines more closely to the aims of the political branches as embodied in enacted federal law. It also eliminates the paradoxical relationship that existed under the effects test between federal courts and the Executive. The Executive still retains significant authority to influence the content of federal foreign relations law through the same means it does in purely domestic contexts by making legal arguments about the content of federal law to which courts give great weight. Finally, to the extent that a regime of contracted judicial activity imposes additional decision costs on political actors in the foreign relations context, these are precisely the types of costs that they should absorb under the Constitution.[149]

CONCLUSION

The Cold War foreign relations effects test had the ostensible purpose of protecting political branch prerogatives in for-

145. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990).

146. *Id.* at 406.

147. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 250-51 (1991); *see also* Bradley, *supra* note 126 (elaboration of this reading of the decision).

148. For an overview, see Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

149. *Cf.* ELY, *supra* note 77.

eign relations. In fact it produced the opposite effect. By giving federal courts the discretionary power to affect the content of federal foreign relations law on the basis of an independent judicial assessment of the requirements of U.S. foreign relations, the test set up federal courts as an independent federal lawmaking competitor to the federal political branches. This is ironic because the test required federal courts to do precisely what they consistently disclaimed competence or authority to do—namely, make foreign policy judgments. The test exceeded the legitimate lawmaking powers of federal courts and detracted from the coherence of federal foreign relations law. The new formalism is a response to these problems. Viewed in its best light, it seeks to capture the political branches' general wishes about the scope of federal foreign relations law in ways that minimize judicial foreign policy judgments and induce the political branches to fine tune the scope of federal foreign relations law.