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Legal Sidebar

# Constitutional Limits on States' Power over Foreign Affairs

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The Constitution gives the federal government the primary power to manage the United States' foreign relations. Article I, Section 10 prohibits states from engaging in a set of activities that implicate international affairs, while the Supremacy Clause, Foreign Commerce Clause, and other constitutional provisions place key elements of this power with the federal government. Interpreting these provisions, the Supreme Court has described the United States' foreign affairs power not only as *superior* to the states but residing *exclusively* in the national government. With respect to foreign relations, the Supreme Court said that "state lines disappear" and the "purpose of the State ... does not exist."

Despite this sweeping language, states and other subnational entities (e.g., cities and counties) play a more prominent role in international relations than may be generally recognized. States have offices overseas and send trade and diplomatic delegations to foreign countries. They have imposed economic sanctions for human rights abuses and military aggression—most recently on Russia for invading Ukraine. States regularly enter into written pacts with foreign governments on issues ranging from trade to the environment to tourism. Some of these international pacts address potentially sensitive subjects, such as border security with Mexico and technology transfers with the People's Republic of China (PRC). A recent rise in pacts with PRC-based bodies led U.S. intelligence officials to warn state and local governments about PRC efforts to exploit its relationships with subnational governments to promote its geopolitical interests in the United States.

The Supreme Court has held that the Constitution constrains states' ability to act on the global stage, but much of the state-driven international activity is not publicized or presented to Congress. Because Congress may have an interest in optimizing and overseeing states' actions in this area, this Sidebar discusses constitutional limits on states' role in international affairs and potential avenues for congressional involvement.

## Article I, Section 10

Article I, Section 10 of the Constitution contains a catalog of prohibitions and limitations on states' power. Many of these restrictions relate to foreign relations. In particular, Clause 1 prohibits the states from entering into any "Treaty, Alliance, or Confederation." Clause 3—commonly called the Compact Clause—requires Congress to approve any state's "Agreement or Compact" with a "foreign Power," i.e.,

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a foreign government. (The Compact Clause also governs interstate agreements and compacts, discussed in this Sidebar). Whereas Clause 1 categorically prohibits every treaty, alliance, and confederation, the Compact Clause conditionally allows states to make agreements and compacts, provided Congress consents. These clauses create a clearly bifurcated structure, yet the founding documents do little to explain how to distinguish between the treaties banned by Clause 1 versus the agreements and compacts that may be approved under the Compact Clause.

The Founders apparently believed the distinctions were self-explanatory, but that is no longer the case. In *The Federalist No. 44*, James Madison wrote that the "particulars" of Article I, § 10 "are either so obvious, or have been so fully developed, that they may be passed over without remark." Despite Madison's confidence, the meaning of these terms of art were "lost" within a generation, according to the Supreme Court. Jurists and scholars have debated several theories of how to distinguish Clause 1's treaties from the Compact Clause's agreements and compacts, but no authoritative approach has emerged. Other than stating that the Civil War Confederacy violated Clause 1, the Supreme Court has provided little guidance on what constitutes a treaty, alliance, or confederation. By contrast, the Supreme Court has developed a body of jurisprudence interpreting the Compact Clause, which may inform the constitutional limits on states' power to make commitments to foreign governments.

### *Holmes v. Jennison*

Several Justices concluded in an 1840 case that the Compact Clause covers *every* agreement between state and foreign governments regardless of the agreement's form or content. In *Holmes v. Jennison*, the governor of Vermont ordered a resident of Quebec (then part of Great Britain) arrested and returned to Quebec to stand trial for murder even though the United States did not have an extradition treaty with Britain at the time. A crucial legal issue—whether the Supreme Court had jurisdiction—turned on whether the governor of Vermont had arrested the fugitive under an informal "agreement" with Canadian authorities within the meaning of the Compact Clause. The case ultimately ended with an equally divided court, but four Justices found that the governor made an agreement that should have been submitted to Congress for consent. This four-Justice opinion, written by Chief Justice Taney, was based on a literal interpretation of the Compact Clause that would require congressional approval for "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."

Although not a majority opinion, Chief Justice Taney's reasoning has been influential, and the Supreme Court cited it positively in later cases. At the same time, historical practice does not support the view that *all* agreements between states and foreign governments require Congress's consent. Scholars have shown that states rarely seek congressional approval for pacts with foreign governments. Moreover, in the context of interstate compacts, the Supreme Court developed a new line of cases that more narrowly interpreted the congressional consent requirement than Chief Justice Taney's *Jennison* opinion.

## Applying Interstate Compact Cases

Beginning with *Virginia v. Tennessee* in 1893, the Supreme Court declined to adopt Chief Justice Taney's literal reading of the Compact Clause. Instead, the Court used a functional interpretation that limited the congressional consent requirement. Under *Virginia* and later interstate compact cases, only interstate compacts that have the potential to increase states' political power at the expense of federal sovereignty require congressional consent. In a 1985 case, the Supreme Court stated that only state commitments that have certain "classic indicia of a compact" require congressional approval.

The Supreme Court has not said whether this *interstate* compact jurisprudence applies to states' *international* compacts. Some observers argue that the two types of compacts raise different concerns and should not share the same standard. The greater weight of authority, however, suggests that the Court's interstate compact cases apply in both scenarios. Several courts and the executive branch have applied

*Virginia*'s functional test to states' engagement with foreign governments. For example, a federal district court in 2020 applied *Virginia* and its progeny in rejecting a Compact Clause challenge to a California carbon cap-and-trade agreement with Quebec. Thus, under the current state of the law, only a select set of state agreements with foreign powers that satisfy the Supreme Court's interstate compact jurisprudence require congressional consent.

## Supremacy Clause Preemption

Apart from the limitations in Article I, Section 10, the federal government's preemption power may limit states' role in foreign affairs. Under the Supremacy Clause, federal statutes and self-executing international agreements preempt (i.e., render unenforceable) conflicting state laws. As discussed in this CRS Report, federal law can expressly preempt state law—or it can impliedly do so—when the preemptive intent can be inferred from the federal law's structure and purpose. These preemption principles can invalidate state statutes that undermine the federal government's diplomatic and foreign policy goals.

In *Crosby v. National Foreign Trade Council*, the Court addressed whether federal law sanctioning Burma preempted a Massachusetts law that restricted state agencies' ability to contract with companies doing business with Burma. Although the laws shared similar foreign policy objectives of addressing human rights issues in Burma, the Supreme Court held that the Massachusetts law frustrated federal aims by using stronger economic restrictions and not providing the President the same waiver authority as the federal statute. The *Crosby* court reasoned that because the President could not waive the Massachusetts restrictions even if Burma yielded to the full slate of the United States' demands in its diplomatic negotiations, the state law undermined the United States' ability to present a unified negotiating position. As a result, the Court held that federal law preempted the Massachusetts statute.

Preemption can also apply when state law undermines the United States' foreign policy expressed in its treaties and executive agreements. In *American Insurance Association v. Garamendi*, the Supreme Court struck down a California law that required in-state insurers to disclose information about Nazi-era life insurance policies. In the late 1990s, survivors of the Holocaust and their heirs filed a large number of lawsuits in U.S. courts seeking to recover the value of insurance policies held in Germany that were never collected because of Nazi persecution and policies in the 1930s and 1940s. The California law was part of a broader effort to allow Holocaust survivors and their heirs to make claims related to those Nazi-era policies in California courts. The United States and Germany, by contrast, believed those claims were best resolved outside of litigation. The two countries concluded an international agreement designed to allow Nazi-era insurance claims to be heard before an international claims commission. Because the California law frustrated the United States' objectives, the *Garamendi* Court held it was preempted.

## Dormant Commerce Clause

Whereas preemption arises when federal and state law cannot coexist, the Commerce Clause can limit states' power even in the absence of a conflict. The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" The Supreme Court has interpreted the Commerce Clause both as a positive grant of power to Congress and as an implied restriction on states' authority to interfere with interstate and foreign commerce. This inferred, negative limitation is call the "Dormant" Commerce Clause. Under this limitation, states may not discriminate against, or impose excessive burdens on, interstate or foreign commerce unless Congress authorizes them to do so.

In Dormant Commerce Clause challenges, the Supreme Court more heavily scrutinizes state laws that implicate foreign commerce rather than interstate commerce. According to the Supreme Court, the federal government sometimes has a "special need for federal uniformity" that requires it to "speak with one

voice" and present a unified foreign policy in foreign commerce cases. A state law impermissibly burdens foreign commerce under the "one voice" standard if the law violates an express federal directive or implicates foreign policy issues that the Constitution assigns to the federal government.

### *Zschernig v. Miller*

In a 1968 decision, *Zschernig v. Miller*, the Supreme Court described another constitutional principle, called the dormant foreign affairs doctrine or foreign affairs field preemption, which can limit states' power to act on the global stage. In *Zschernig*, an Oregon resident died without a will, and his sole heirs were residents of East Germany that sought to inherit the estate's property. The dispute arose because Oregon law blocked nonresident aliens from inheriting personal property unless the country where the alien lived provided reciprocal inheritance rights to U.S. citizens. The Oregon law did not conflict with a federal statute or international agreement, and the United States submitted a brief saying the law did not interfere with its foreign affairs. Even with no conflict, the Court scrutinized the Oregon statute to see if it intruded into a broader "field of foreign affairs" that the Constitution entrusts to the federal government.

The *Zschernig* Court expressed concern that the Oregon law invited probate courts to examine the internal affairs of foreign nations—particularly those governed by authoritarian and communist regimes—to see if the countries allowed free transfer of private property. The Supreme Court cited evidence that probate courts were motivated by foreign policy beliefs and anti-communist sentiment, which the Court held were "matters for the Federal Government, not for local probate courts." The law made judicial criticism of foreign governments unavoidable, the Court reasoned, and therefore unconstitutionally intruded on the federal government's foreign affairs power.

*Zschernig*'s scope and continuing relevance is the subject of debate. The Supreme Court discussed the case at length in its 2003 *Garamendi* opinion, but the *Garamendi* Court relied on traditional principles of implied preemption rather than reinvigorating *Zschernig*'s "field of foreign affairs" concept. Still, the Supreme Court has never overruled *Zschernig* directly, and the decision has ongoing validity as U.S. courts of appeals continue to address and apply it.

## Considerations for Congress

Congress has multiple avenues to influence and oversee states' role in foreign affairs. As a result of courts' tapered interpretation of the congressional consent requirement in the Compact Clause, states often conclude pacts with foreign governments without notifying Congress or seeking its approval. Some Members of Congress have proposed improving transparency by requiring the Department of State to track or maintain a database of subnational engagements. Congress could also consider legislation aimed at requiring states to proactively seek its approval before concluding pacts. If Congress disapproves of particular pacts or classes of pacts, it could consider legislation that seeks to preempt or restrict the state action.

Some observers contend that the federal government should better integrate subnational governments in the United States' diplomatic efforts. The Biden Administration announced new initiatives designed to foster engagement between U.S. cities and foreign countries. Some commentators and Members of Congress have called for the Department of State to go further by creating a new office dedicated to coordinating state and local foreign policy.

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