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COOPERATIVE FEDERALISM IN INTERNATIONAL TRADE: ITS CONSTITUTIONAL PARAMETERS

By Harold G. Maier*

I. Introduction

Traditionally, governmental activity to encourage and facilitate export trade and to encourage direct investment in the United States by foreign entrepreneurs has been the responsibility of the national government, especially the Departments of State and Commerce. During the last five years, however, a significant and growing role is being played by the governments of the several states in developing their own programs and policies to stimulate international trade and investment. This activity includes not only the more traditional advertising of opportunities but the active on-the-spot solicitation of business opportunities abroad. This solicitation is carried on by direct contact between state governments and both private and governmental officials of foreign countries with the active cooperation of the United States Department of Commerce and of American embassies and other consultants overseas. The introduction of state government into this field has resulted in a much more dynamic and effective operation than was ever achieved by the federal government acting alone. The recognition of coordinate interests and of the possibilities of effective cooperation between the state and the national governments illustrates how cooperative federalism can provide effective government participation in an activity which neither the states nor the national government could carry out as effectively acting independently. On the other hand, the introduction of state governments into an area heretofore almost exclusively reserved to the national government is not without its potential problems. A diversity of views and approaches, a strong competition between the states to attract foreign investment, and the direct contact between high state officers and foreign governmental officials and diplomats, creates the possibility, as this activity expands, of requiring control or regulation by the federal government in order to prevent interference with United States foreign policy which increasingly is tied to questions of economic policy rather than to questions turning on conflicting political ideologies.

It is the purpose of this essay to examine the constitutional relationships between the states and the national government which may become important as state activity increases in this field. The following material is divided into three general segments: a short survey of the activities of the

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state governments in the international area and a description of the cooperative activities currently being carried on between the states and the nation; a summary of the constitutional law which permits direct national control over any state activity in the international commercial field; and a more intensive discussion of the extent to which the constitutional structure limits state activities which conflict with national policy, even when that policy has not been reduced to positive law.

II. COOPERATIVE FEDERALISM

To clarify both the tremendous benefits to be derived from cooperation with the national government and the potential difficulties which could result when state and federal officials begin to act at cross purposes, an understanding of the nature and scope of both state and federal activities in the international area is important. Traditional economic wisdom holds that a nation must strive to maintain a favorable balance of international trade. If exports exceed imports, the economy will prosper; if they do not, the economy weakens. With an insufficiently favorable balance of trade comes an unfavorable balance of payments, reduced purchasing power abroad, and a lowered standard of living. Furthermore, increased investment of foreign capital not only strengthens the domestic industrial base, but tends to encourage additional export of finished products while reducing the need to import. It was on the basis of this economic theory that the United States government, during the balance of payments crisis of the early sixties, began major efforts to stimulate export trade and to encourage reverse investment by foreign entrepreneurs in the United States. President Kennedy called for intensive involvement of the national government in this promotional activity in his "Balance of Payments and Gold Message" of February 6, 1961. In that message, the President ordered the Department of Commerce to provide energetic leadership to American industry in a drive to develop export markets by encouraging firms and industries to increase their exporting efforts. Also, the Commerce Department was instructed to initiate new programs to bring investment opportunities in the United States to the attention of foreign investors in the industrialized countries. During the years that followed, the Department of Commerce stepped up its program of trade missions to foreign countries and began major efforts to emphasize abroad that the United States was an attractive environment for investment. Until 1967,

1. Throughout this article, the term "reverse investment" is used to refer to direct investment in the production and distribution of goods or services. Neither the states nor the federal government have directed much affirmative effort to attract portfolio investment. This is so primarily because the internal economic benefits to be derived from portfolio investments by foreigners are negligible. Also, foreign takeovers of existing companies sometimes create political difficulties with the public.
these federal programs involved primarily federal officials and representatives of the private sector. Beginning in 1967, however, the Department of Commerce began attempts to formally involve state governments in both export promotion and reverse investment efforts. By 1970, state governments were cooperating with the federal government through existing state economic development agencies. In 1970, the states organized an international division of the National Association of State Development Agencies (NASDA) and began active intergovernmental coordination of state activities in this field at the national level. Currently, a close working relationship exists between the Department of Commerce and NASDA which results from a mutual recognition of the need for cooperation as a means toward the achievement of a common goal.3

Federal programs, operated through the Department of Commerce, include extensive assistance through field offices to state operations in the international commercial development field and federally sponsored trade missions to stimulate exports. These missions are often organized at the state level through contacts made by state development agencies. The Commerce Department's "Invest in USA" Program makes use of cooperative efforts between the state agencies to sponsor seminars and meetings abroad concerning the investment climate in the United States. In addition, of course, are the continuing operations of the Export-Import Bank and the good offices of the Department of State in providing assistance in making necessary arrangements with foreign governments. The result of the active entry by state governments into the field of promoting international trade and reverse investment has been to create a new force in this area which is exerting its own influence upon federal activities in this field.

Promotion of exports attracted initial state governmental interest in the foreign commercial field.4 This was so partly because its benefits to local commercial enterprise were most obvious. Exporting represented merely the international extension of existing markets. During the 1960's, while many state development agencies made some attempts to carry on programs designed to encourage export activity, few had special programs for this purpose. Today, at least thirty states have special international divisions within their state development agencies and at least forty-two states employ one or more international trade specialists. State activities to stimulate exports can be divided into two general categories: efforts to educate local manufacturers concerning export opportunities and to alleviate fears

3. For an excellent resume of the background of state activities in this field, see J. Harwell, *The States Go International*, 1975 *State Government* 2 (Winter).

4. The following material, concerning the activities of the states, was collected from various sources. The author received helpful information from 29 states in response to inquiries by letter and, in addition, carried out personal interviews with state development officers and with officials in the federal departments of State and Commerce. No effort has been made to cite to individual sources unless the nature of the source is especially pertinent to the utility of the information which it provided.
of entering upon an unfamiliar activity; and efforts aimed at potential foreign purchasers to stimulate interest and provide information concerning the products available for export from manufacturers within the state. The state agencies engage in heavy advertising in several languages and many issue regular publications listing export opportunities. Stressing the importance of personal contact between local businessmen and foreign trading partners, state agencies regularly participate in overseas trade fairs and, more recently, have sent abroad trade missions, composed of state trade representatives and businessmen, to identify markets and confer with foreign purchasers and government officials. In most states, representatives from the private sector, banks, chambers of commerce, trade councils, etc., are heavily involved at the state level in this cooperative effort to stimulate exports.

It is in stimulating reverse investment that the greatest increase in state government activity has occurred and it is in this connection that official and unofficial contact between state officials and officials of foreign governments is increasing. In addition to missions abroad to stimulate exports, many states send missions specifically aimed at stimulating reverse investment by foreign firms. These missions often result in visitations to the states by foreign government personnel and by foreign businessmen seeking plant sites or joint venture opportunities.\(^5\)

A major development during the past five years has been the tendency of state development agencies to open their own foreign trade offices in foreign countries. As of August, 1975, seventeen states plus Puerto Rico were operating a total of 24 different offices in seven foreign countries.\(^4\) In addition, some states operate through foreign offices previously established to represent port authorities. Additional states have plans to open foreign offices\(^7\) and some wistfully view the prospect as useful but have yet to request funding from the state legislature.\(^8\) Some states, unable to finance

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5. In response to my inquiries, some state officials tended to be sensitive concerning their activities in stimulating reverse investment. In part, this attitude may have been caused by the inordinate publicity given to certain attempted purchases by Arab oil interests.

As one state development officer put it:

We make no effort to seek foreign capital for investments in nonmanufacturing business enterprises, or in real estate or in tourist attractions as recently happened when Arab oil interests endeavored to purchase the Alamo, an almost sacred historical attraction in Texas.


7. E.g., Arkansas and Kentucky.

8. For example, The Division of Economic Development of Florida, in its formal descrip-
foreign trade and development operations by themselves, have plans for regional groupings which would permit coordinated activities abroad, as well as domestically.

These state foreign trade offices are more than mere information centers; they are charged with actively seeking out commercial possibilities in behalf of their home states. While they engage heavily in trade promotion, their principal activity is the stimulation of reverse investment. Typically, the offices are two- or three-person operations in buildings prominently displaying the name of the state represented. State representatives in these offices are not accredited diplomats since they have no formal relationships with the United States government. Much of their time is spent in running down leads, in calling on foreign businessmen and government officials, and in staying in contact with the local United States embassy or consulate, particularly with the commercial attache. In addition, they assist in the preparation of foreign trade and reverse investment missions. There is little doubt that, as competition among the states for reverse investment continues to grow, more and more states will be forced to open formal offices abroad or to accept a continuing competitive disadvantage in relation to their more aggressive sisters.

It is generally apparent that increased state activity in this field has been of enormous mutual benefit to both the states and to the federal agencies charged with stimulating United States international trade and investment. Much more than the federal government, state development agencies are able to bring home to businessmen located within the state borders the benefits of entering an export market and are better able to marshall local commercial expertise in efforts to attract foreign investors. This is true because of the limited focus of the state agencies' activities, not because of lack of expertise or initiative at the federal level. The focus of the state development officer's effort is on benefiting the economy of the state for which he works. His success depends, not upon the general impact which his activities have on the economic welfare of the United States as a whole, but upon the economic benefits which he can develop for his own state. Thus, a major competition has developed among the states, particularly in seeking to attract foreign investment. The result has been a substantial stimulus to state activity nation-wide. That competitive stimulus is naturally not present at the federal level. Furthermore, intimate knowl-

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Florida, too, has a real future in this area as its potential for winning foreign manufacturing investment is significant and offers a chance for considerable return in the long run. However, given insufficient funds and the fact that these activities are not readily reconciled to the required budget format of workload standards, effectiveness and efficiency because of the uncertainties and delays inherent in achieving successful results, such an aggressive Bureau program has not yet been realized.
edge of local business conditions and, more important, personal contacts within the banking and industrial communities provide a mechanism through which state international trade specialists can employ maximum leverage in their trade promotion programs. The element of constructive self-interest plays a major role in state activities in this field and that element is a natural and desired result of a federal structure which presupposes the value of local self-government.

Currently, the combination of state activities in this field with those of the federal government seems to have resulted in a healthy and productive working relationship. There is a continuing close contact between the Department of Commerce and NASDA in Washington which stimulates exchange of advice and information. Department of Commerce field offices appear to make a special effort to use contacts and materials provided by state development agencies and state agencies seek assistance from Commerce personnel. Most state development officers contacted by the author complimented the work of the field offices in their regions and expressed concern for a possible diminution of federal funds which might inhibit their cooperative efforts. Some state development agencies have been officially designated associate offices for the Department of Commerce and, in some instances, Department of Commerce representatives are housed in state office buildings for which the federal government pays rent. It is not unusual for state international trade specialists to have had experience in the same field at the federal level and, consequently, to have developed personal contacts in Washington and elsewhere which are invaluable in carrying out their tasks.

It is of principal importance to understand, however, that the state agencies acting in this field do not view themselves as merely adjuncts to the federal effort in the trade and investment field. While they happily take advantage of federal programs and approve of their existence, the state agencies develop and control their own policies concerning the nature and scope of their activities under the aegis of the state legislative and executive branches. When a federal program is useful to the states, they endorse it; when it is not, they tend to develop their own. One illustration of this is the reaction in some states to the Commerce Department’s Industry-Organized Government-Approved Trade Missions (IOGA). These missions, unlike the United States Specialized Trade Missions which are planned, organized, and led by Department of Commerce officers, are organized by trade associations, chambers of commerce, or agencies of state governments. Government approved status of IOGA missions is conditioned upon the proposed mission fulfilling certain requirements. Those requirements in part stipulate: that the mission’s prime

9. See also Hearings, Proposed Reductions in the Export Promotion Budget and Changes in Fees for Commerce Department Services, Subcommittee on Foreign Commerce and Tourism of the Committee on Commerce, United States Senate, 94th Cong., 1st Sess. (1975).
objective be the export of United States produced goods or services; that
the mission include only one “product theme” which the Commerce De-
partment believes offers “substantial market opportunities;” that the mis-
sion be approved by the relevant Foreign Service Posts; and that only
United States made products or those with a stated percentage of compo-
nents of United States manufacture be included in the mission. In return
for meeting these and other requirements, the IOGA mission receives offi-
cial designation, receives advice and assistance in planning from a formally
designated Department project officer, benefits from formal arrangements
for contacts at the relevant United States embassy or consulate abroad,
and gets a briefing in Washington prior to its departure. Some states
appear to view the restrictions which they must meet in order to be granted
IOGA status as hardly worth the benefits. Consequently, they have often
set up their own trade missions without seeking formal government ap-
proval. In these instances, the Departments of Commerce and State are
informed that the mission will take place and the state agency sets up its
own contacts, either through its own foreign office or by direct contact with
the relevant United States embassies or consulates. A letter from a state
governor or his representative to a United States ambassador will not be
ignored. Furthermore, political realities make it unlikely that a state mis-
sion will be slighted by American diplomatic personnel in foreign coun-
tries, whether the mission is federally approved or not.

Several reasons prompt this independent attitude on the part of some
state development agencies. Some feel that there is no point in introducing
an additional layer of bureaucracy between their own efforts and their
foreign contacts when they can do the job just as well themselves. In some
instances, state officials seem to have taken the very realistic attitude that
trade is a “two-way street” and that, therefore, limiting trade mission
activity to promoting exports is self-defeating in the long run. The
existence of state foreign trade offices and of state personnel with back-
grounds and training in the foreign trade and investment field has created
a pool of expertise and an independent capability which permits state
activity without reliance upon support services from the federal govern-
ment. Furthermore, while the “Invest in USA” reverse investment mis-
sions are generally federally sponsored joint activities of several states,11
individual states have organized their own reverse investment missions not
under federal aegis. There is no evidence that the development of indepen-
dent state capabilities in this field has had any adverse effects upon na-
tional policy. The fact that such a capability is developing, however, raises
some questions for the future in connection with a possible need to coordi-
nate or control state activity at the federal level.

10. BUREAU OF INTERNATIONAL COMMERCE, DOMESTIC AND INTERNATIONAL BUSINESS ADMINIS-
11. For a complete description of the program, see UNITED STATES DEPARTMENT OF COM-
The entry of the state governments into the international trade and investment field creates the potential for increased contact between state officials and officials of foreign governments. In addition to state representation abroad through foreign trade offices, high state officials often legitimate state activity by personally leading trade and reverse investment missions to foreign countries. For example, Governor David Pryor of Arkansas led a one week tour of 35 state businessmen, legislators, and others to Europe on a reverse investment mission in October, 1975. This fall, Governor Raymond Blanton of Tennessee traveled to the Middle East where he conferred with six heads of state concerning trade opportunities. He also conferred with Volkswagen officials concerning reverse investment possibilities in Tennessee. Persons representing the private sector have always engaged in foreign trading activities abroad. However, the opening of official contacts between state officials and foreign government personnel creates a new forum for officials of foreign governments and opens the possibility that the competitive atmosphere in which state trade missions operate could be subtly used by foreign governments to further their own ends or, at least, to obtain a sympathetic ear which may not be currently available through the normal channels of diplomacy. Most state officials appear to be aware of the difficulties which their activities could cause and are quite conscious of the need to avoid creating political difficulties for the United States. Thus, several have emphasized that state missions avoid political discussions with foreign government personnel or businessmen and confine their meetings to matters of trade and commerce. In view of the close relationship between economic and political considerations in developing national foreign policy, that line may be somewhat difficult to draw.

The proliferation of state foreign trade offices, particularly in Brussels, could lead to the creation of a nuisance, both for American diplomatic personnel and for foreign governments, unless there is some coordination of their activities. According to Department of Commerce and NASDA officials, efforts are made at the federal level, both through the American embassy in Brussels and the Department of Commerce representatives, to play an even-handed role in disseminating information to the various state offices. However, there is little if any control, other than persuasion exercised at home, to limit or direct state activities on foreign soil.

Less significant, perhaps, is the fact that increased contact on the state

12. Illustrative of the awareness of foreign officials of the usefulness of establishing contacts directly with state officials is the manner in which Governor Blanton's visit to the Middle East came about. In May, 1974, Tennessee held a conference on International Trade and Investment in Nashville. A principal speaker at the conference was Clovis Maksoud, Ambassador at Large representing the Arab League of Nations. Following his talk, Ambassador Maksoud extended an invitation to the then Governor Winfield Dunn to visit the Middle East. Governor Blanton, who replaced Governor Dunn in 1975, arranged the visit based on this invitation.
level might contribute to an increased incidence of "ugly Americanism." This could have some impact upon the image of the United States internationally, even though the state missions are not official representatives of the United States government. This effect is likely to be negligible in Europe where the populace is used to dealing with the special foibles and attitudes of Americans. In the Middle East, the Far East, or Africa, however, the impact could be considerably more harmful. It is not clear to what extent foreigners not used to dealing with Americans are likely to distinguish between those Americans who carry official federal diplomatic passports and those who are elected or appointed officials of state governments.

Lastly, some seeds of potential conflict may exist in contacts between state or even federal officials primarily concerned with commercial activity, and foreign policy activities of the Department of State. It is not unknown for a potential foreign investor to specifically ask that his initial inquiries, at least, not be made known to the Department of State or to his own government. Some foreign governments, despite the absence of legal prohibitions on the export of capital, may take a dim view of efforts to find a more favorable investment climate in the United States rather than investing at home. Some state officials have indicated that, especially in Europe, government policies requiring extensive fringe benefits for industrial workers have been a major stimulus to European investors to seek a cheaper labor market in the United States. State export trade missions may create difficulties with foreign competitors and, consequently, with foreign governments, especially in those countries in which the formal separation between government and private trade policy and activity is not emphasized to the same extent as it is in the United States.

III. The Constitutional Parameters

A. National Power To Regulate

It was made absolutely clear, during the formation of the federal union, that ultimate power to regulate and control foreign commercial activity was to reside in the national government. Much of the struggle which accompanied the development of this country from a collection of "Free and Independent States" under the Declaration of Independence, through the difficulties of attempting to survive as a "confederacy" and "a firm league of friendship" under the Articles of Confederation, to its status as a "more perfect union" under the Constitution, involved a growing recognition of the need to centralize and strengthen national control over commercial activities, both domestic and international.13 No concern was as important in generating enthusiasm for an effective central government as the difficulties which arose from the early division of authority between the

states and the national government under the Articles of Confederation concerning the power to regulate interstate and international trade and commerce. As a result, many of the most important centralizing clauses of the Constitution are those which assign authority over commercial matters to the national government.

In the field of international relations, including international trade relations, the states of the Union have neither a formal international voice, nor do they bear any international responsibility. The commerce clause, the import-export clause, and the compact clause, together with several other enumerated powers assigned to the national government, permit the exercise of all necessary and proper central authority over international trade relations. That authority is supreme under article VI. Together with the general power over foreign affairs which inherently resides in the national government, there is no doubt that national legislative power exists to regulate, limit, or even forbid the activities presently being carried on by the state governments in their efforts to stimulate international trade and reverse investment. Thus, the national government has the power to require the reporting by all states of their activities devoted to the stimulation of foreign trade or reverse investment. The national government could clearly prevent the establishment of trade offices abroad by states; it could regulate and confine their activities, or require the establishment of a clearing house of information to make activities or information available in one state office routinely available to others.

The mere existence of federal power to control does not mean that state activities in this field are inherently unconstitutional. The central government remains one of delegated powers. Therefore, where there is no direct constitutional prohibition and no exercise of the delegated national powers to regulate or disapprove, the states are free to engage in and affect commercial activities between themselves and foreign nations to the same extent that they are free to engage in and affect commercial activities between each other. Traditionally, states have engaged in many activities

15. See H. Stone, Fifty Years Work of the United States Supreme Court, 14 A.B.A.J. 428, 430 (1928).
18. U.S. Const. art. I, §10, cl.3.
21. Some steps toward gathering such information have already been taken, although there appears to be no present intention to create a general reporting requirement. See U.S. Dept. of Commerce, Interim Report to Congress, Foreign Direct Investment in the United States (1975).
which have international effects. State laws govern foreigner and national alike. Localized business interests which are foreign-owned are subject to the same regulation which may be applied to economic interests centered in sister states. State courts regularly adjudicate cases involving foreign elements, and federal courts apply state law in diversity cases even when one of the parties or the subject matter is foreign in origin.22 Many treaties specifically recognize the applicability of state law to the activities of foreign nationals.22 Both political and practical realities make it highly unlikely that the activities of state governments in this area will be prohibited, or become subject to any stringent national regulation. It would be exceedingly difficult for any general regulatory measure to exercise meaningful control without stifling exactly the kind of dynamism and competitive drive which has made the state programs a useful and meaningful force in stimulating export and reverse investment in support of general federal policy in this field.

The fact that neither Congress nor the Constitution explicitly prohibits current state activities in this field, does not mean that the states are entirely free to pursue their present course without reference to the constitutional structure. Historically, the courts and the other branches of the national government have derived principles of separation of state and federal power not only from specific commands of the Constitution or from identifiable legislative or administrative acts controlling under the supremacy clause, but from the principles which are the underpinnings of the constitutional structure itself. If there are implicit constitutional controls, apart from potential congressional regulation of state activities to stimulate international commerce, they must be derived from an examination of the assumptions on which the constitutional structure is based, not solely from an analysis of its text in an effort to identify specific prohibitions.

State activities in this field are programmatic, not regulatory, in nature. Thus, legal questions concerning these state activities are not as clearly defined as they have been in other instances in which state action has been invalidated because of conflict with national law. Most judicial decisions dealing with conflicting rights of the state and the national government to affect foreign affairs have involved situations in which the states have attempted to prohibit or require certain actions on the part of private parties subject to their jurisdiction. The activities of the state development agencies in stimulating international trade and reverse investment, while they clearly involve commerce, just as clearly do not involve regulation, even within the relatively broad meaning given to that characterization by

22. This principle was recently reaffirmed by the United States Supreme Court in Chal-loner v. Day & Zimmermann, Inc., 512 F.2d 77 (5th Cir. 1975), rev'd per curiam, Day & Zimmerman, Inc., ___ U.S. ___, 96 S.Ct. 167, 46 L.Ed. 2d 3 (1975).

23. For a more extensive analysis of the correlative roles of state and federal law in private international cases, see E. Cheatham and H. Maier, Private International Law and Its Sources, 22 VAND. L. REV. 27 (1968).
the courts in construing the commerce clause. If prohibitions or restrictions are imposed by the Constitution upon this state activity, they will likely be found on a case-by-case basis, not as a matter of general prohibition or restriction. Thus, the remainder of this article seeks to determine the scope of the doctrine of federal preemption, growing out of the inherent structure and assumptions of the constitutional allocation of powers and the manner in which that doctrine could serve as a vehicle for effectively limiting the implementation of state programs which might conflict with national interests in the field of international commercial policy.

B. Federal Common Law Preemption

Federal power to control state foreign relations activities need not find its source in any specific textual reference or command of the Constitution. Since the beginning of the republic, courts have emphasized the divisions of power inherent in the governmental structure as the touchstone for determining when state action was inappropriate. These decisions have, as often as not, involved situations in which there was no explicit federal positive law directly foreclosing state activity.

The most explicit statement of the preemptive effect of the general constitutional structure in the realm of foreign affairs is found in *Zschernig v. Miller.* In *Zschernig,* the United States Supreme Court had to decide the constitutionality of an Oregon statute which made the right of foreign heirs to inherit from an Oregon intestate (under the state statute of descent and distribution) dependent upon both the existence of a reciprocal right of United States citizens to take property on the same terms as a citizen or inhabitant of the foreign country, and the right of the foreign heirs to receive in fact the proceeds of Oregon estates. The Oregon courts had found that no reciprocal right of inheritance had been proved by the heirs and that, in any event, the communist East German government was unlikely to permit the proceeds of the estate to pass to them. Justice Douglas' opinion, striking down the Oregon statute because it was "unconstitutional as applied," was considerably muddled. Three principles can be derived from the opinion, no one of which was specifically selected as the basis for the result. Those three principles were: (1) that a state law was unconstitutional if it had an adverse affect upon international relations; (2) that a state could not constitutionally interfere with the national government in carrying out an existing foreign policy; and (3) that the statute revealed an intent and purpose on the part of the state which was appropriate only for the national government. The facts of the case revealed neither an adverse effect upon international relations nor an adverse effect upon an existing foreign policy. Furthermore, at least as evidenced by the state court decisions cited in that case, there was no state legislative intent

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appropriate only for the national government. Thus, the true basis of the majority decision must be found in the more general statement that there was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." Much more accurate and specific was Justice Stewart's concurring opinion in which he forthrightly described the decision as one based upon the assumptions of the constitutional structure, rather than upon any specific evils which the state legislation might have accomplished. Stewart felt that the decision of the Court in fact turned on "the basic allocation of powers between the states and the nation" in matters touching foreign affairs.

The fact that the Court in Zschernig addressed the non-textual basis for its decision directly has led some writers to conclude that the case represents a new constitutional doctrine. If the doctrine was, in fact, a new one, cases which followed Zschernig suggest that the opinion may have been only an aberration. Most of those cases have viewed Zschernig as a more limited decision prohibiting states from giving effect in state legislation to their own evaluations of foreign governmental systems. Zschernig, however, does not represent a new doctrine. In fact, it represents only a more explicit verbalization of an approach to constitutional interpretation in foreign affairs cases which has been implicit and, sometimes, explicit for almost 200 years.

In Gibbons v. Ogden, Chief Justice Marshall ascribed "the genius and character of the whole government" to the fact that national law governed all external concerns. The theme that the constitutional structure itself, rather than any specific text or legislation, supplies the basic rationale supporting federal preemption has recurred regularly since. The Court applied this principle to both interstate and foreign commerce questions in Cooley v. Board of Wardens when it ruled that some subjects of the commerce power were "in their nature national" and would therefore admit only of a uniform system of regulation.

One of the most forthright structural analyses of the role of the states in foreign affairs cases is found in Chy Lung v. Freeman. In that case, a California statute required the posting of a special bond as a condition of

27. 389 U.S. at 432, 88 S.Ct. at 666, 19 L.Ed. 2d at 683.
28. Id. at 443, 88 S.Ct. at 672, 19 L.Ed. 2d at 693.
29. See, e.g., Henkin, supra note 20 at 239.
30. See Maier, supra note 26 at 141-51.
31. 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).
32. Id. at 86, 6 L.Ed. at 43.
33. 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851).
35. 92 U.S. 275, 23 L.Ed. 550 (1875).
debarkation of immigrants by the master of a vessel when those immi-
grants were determined by the state commissioner to be "lewd and de-
bauched women." 3 Plaintiff was so characterized and was held in custody
when the master refused to post the bond for her. She had no funds with
which to post it herself. Justice Field of the United States Supreme Court
issued a writ of habeas corpus, requiring plaintiff's release. The State of
California appealed. Technically, the Supreme Court reasoned that the
California statute was unconstitutional under the commerce clause. The
decision did not, however, turn upon a conflict with any specified piece of
national legislation nor upon any specific interference with United States
policies. Rather, the Court emphasized the impropriety of state legislation
of this kind because it was contrary to the general divisions of responsibil-
ity for foreign affairs between the states and the national government. The
Court wrote:

[If this plaintiff . . . had been [a] subject of the Queen of Great Brit-
ain, can any one doubt that this matter would have been the subject of
international inquiry, if not of a direct claim for redress? Upon whom
would such a claim be made? Not upon the State of California; for, by
our Constitution, she can hold no exterior relations with other nations. It
would be made upon the government of the United States. If that govern-
ment should get into a difficulty which would lead to war, or to suspension
of intercourse, would California alone suffer, or all the Union? If we should
conclude that a pecuniary indemnity was proper as a satisfaction for the
injury, would California pay it, or the Federal government? If that govern-
ment has forbidden the States to hold negotiations with any foreign na-
tions, or to declare war, and has taken the whole subject of these relations
upon herself, has the Constitution, which provides for this, done so foolish
a thing as to leave it in the power of the States to pass laws whose enforce-
ment renders the general government liable to just reclamations which it
must answer, while it does not prohibit to the States the acts for which it
is held responsible? . . . The Constitution of the United States is no such
instrument. 37

In Holmes v. Jennison,38 Chief Justice Taney discussed extensively the
implications of the constitutional structure before holding an order by the
governor of Vermont (that a fugitive be extradited to Canada) to be a
forbidden agreement with a foreign power within the meaning of the con-
stitutional prohibition. In Missouri v. Holland,39 upholding the power of
the United States to enforce legislation to implement a treaty to protect
migratory birds, the Court interpreted the term "under the authority of the
United States" contained in the supremacy clause, 40 not by referring to

36. Id. at 276, 23 L.Ed. at 550.
37. Id. at 279-80, 23 L.Ed. at 551-52.
38. 39 U.S. (14 Pet.) 540, 10 L.Ed. 579 (1840). The Court's interpretation of the "compact
clause" in this case is discussed infra, text at note 78.
40. U.S. Const. art. VI.
specific grants of authority to the national government by the people or the states, but rather by reference to structural principles that underlie the creation of a nation. Based on the principle that the power in question was one “which must belong to and somewhere reside in every civilized government,” the Court searched not for a grant of authority but, rather, for the prohibition of an authority which must otherwise be presumed from the national governmental structure. Finding no such prohibition, it held the treaty and its implementing statute valid.

In two important cases involving the Litvinov Assignment, the Court specifically declared that in matters concerning foreign affairs, national policy was supreme, even in those instances in which that policy had not been reduced to a treaty, statute, or constitutional text. In arriving at this conclusion, the Court stressed, in both cases, that the decision turned upon the needs of a nation to be able to conduct foreign policy without reference to political or legal decisions made by its constituent parts: “[T]he policies of the States become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere seeks enforcement of its foreign policy in the courts.” Nowhere does the Constitution provide that federal policy, not reduced to a statute or international agreement shall be supreme. The Court did not address the fact that the Litvinov Assignment, even if treated as an international agreement binding upon the United States, made no reference to the question whether state or federal law should determine title to the property rights assigned. To the extent that the assignment operated at all, it did so only to indicate that these property rights were a matter of international concern and that, therefore, conflicting state laws must yield.

In Hines v. Davidowitz, the Court struck down a Pennsylvania statute requiring the registration of aliens on the grounds that federal alien registration laws had “occupied the field.” Although the Court spent much of its opinion attempting to identify a congressional intent to preclude state legislation, its citations to committee reports are unconvincing. As Justice

41. 252 U.S. at 433, 40 S.Ct. at 383, 64 L.Ed. at 648.
43. 315 U.S. at 233-34, 62 S.Ct. at 567, 86 L.Ed. at 819-20. “In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications...of political power between the national government and the individual states.” Id. at 242 (Frankfurter, J. concurring.)
44. See A. Miller, The Corporation as a Private Government in the World Community, 46 VA. L. REV. 1539, 1544-45 (1960); Professor David Engdahl reaches the same conclusion after analysing Missouri v. Holland.
45. 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).
Stone pointed out in dissent, nothing in any of the legislative history indicated an intent to supercede some nineteen state registration statutes which were already on the books and in operation when the national act was passed in 1940. The majority opinion asserts an intention on the part of Congress to provide a nationally uniform system for alien registration. Far from any demonstrated intent of Congress, the need for national uniformity was one correctly perceived by the Court and that perception was based on structural assumptions which supported that policy.

Only four years before Zschernig, the Supreme Court had relied on structural considerations to conclude that the act-of-state doctrine was a doctrine of federal common law, binding upon the states. In that opinion, Justice Harlan made it clear that decisions concerning the distribution of competence of the various branches of the federal government to decide whether the act of a foreign government should be given effect in United States courts were a matter of federal law because the question of interbranch competence was constitutional in nature.

These cases are illustrative, not exhaustive. They demonstrate the truth of two propositions. The first is that the courts will always seek a textual justification, in treaty, statute, or the Constitution itself, to support a finding of federal preemption of state activity affecting the foreign affairs field and will often articulate their opinions in terms of that text, whether logically justified or not. The second proposition is that the principles upon which decisions such as these are in fact based, and which much more effectively explain the results reached, are general structural principles derived from the basic assumptions of the Constitution which determine "the basic allocation of power between the states and the federal government." Thus, the constitutional principle described by the Court in Zschernig is not, in fact, a new one. It is one which has always been a part of the very fabric of constitutional law in the foreign affairs field and will continue to be so barring a basic change in the structure of our federation.

The failure of the courts to articulate clearly the bases for these decisions does not lie in any inherent distrust of the structural principles on which the cases are in fact based. Rather, it lies in the tradition of the judicial process which American courts bring to constitutional interpretation. It was emphasized by the constitutional framers that the judiciary were to be the servants of the Constitution and that the Constitution represented

46. Id. at 79, 61 S.Ct. at 410, 85 L.Ed. at 593.
47. The Court quoted extensively from Chy Lung v. Freeman, 92 U.S. 275, 23 L.Ed. 550 (1875), and devoted the entire first half of its opinion to demonstrating the importance of national control over alien registration, without any reference at all to congressional intent.
49. For a more extensive comparison of Zschernig and Sabbatino, see Maier, supra note 26, at 159-62.
50. I have suggested elsewhere a three part test designed to consolidate and clarify the functional bases of decisions such as these. See Maier, supra note 26 at 168.
The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. . . . [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the constitutional laws, rather than by those which are not fundamental.51

Consequently, the judiciary feels duty bound to "apply" the constitutional text rather than its own notions of the way in which government should operate. More important, perhaps, is the symbolic value to the public of judicial decisions tied to specific textual references. Although all lawyers should realize that courts make policy determinations, including constitutional policy determinations, a blatant failure to tie such decisions to a text may create insecurity for the public which has a strong psychological stake in perceiving the Constitution as final and immutable except by the amendment process. The courts, too, have a similar psychological stake in retaining the form of textual analysis as a rationale for decision-making.52

The difficulty is, of course, that neither the constitutional text nor its legislative history provide answers to all of the situations which arise and must be adjudicated under it. Thus, the court must play its common law role as decider of individual cases, but its preexisting duty to follow the constitutional command cannot be disavowed, even where no such command can actually be ascertained. The late Karl Llewellyn described the results of this dilemma in an extremely perceptive article in the early 1930's.

The present need is thus served as if by ancient meaning; more recent wisdom clothes itself in ancient words; the road over fiction has begun. More, and worse: it is not conscious fiction. Clothed as it is in the language of the original intent and language of the Document, the newer method of dealing does not overthrow or displace the old. Rather does it creep in silently, alongside, but leave the old still nominal master of the house. By its own phrasing it invites confusion. By its own verbal expression it invites its own inventors, in any subsequent case, to overlook it, or to throw it out.53

The failure to articulate explicitly the principle that constitutional structure and form as well as text are valid bases for judicial interpretation

may obscure the development of constitutional theory, but it has not prevented it.\footnote{See C. Black, Structure and Relationship in Constitutional Law ch. 1 (1969).} This lack of clarity causes lawyers, appearing before courts in cases of this type, to couch their arguments in terms of specific textual references and the lines of cases built upon them, rather than in terms of the structural significance of state versus national action. That effect is illustrated in a case currently pending\footnote{See Text of a Joint Statement Following Meetings Between Prime Minister Tanaka and President Richard Nixon at Kuilima, Oahu, Hawaii, White House Press Release (Sept. 1, 1972), reproduced in 8 COMP. PRES. Docs. 1332, (Sept. 9, 1972) [hereinafter cited as Joint Statement].} before the Tennessee Assessment Appeals Commission of the State Board of Equilization concerning the power of the state to tax certain enriched uranium belonging to several Japanese utility companies. The background of this case is of considerable relevance to the constitutional legal issues raised.

During meetings held between President Nixon and Prime Minister Tanaka of Japan in late August, 1972, the two leaders agreed that both countries would endeavor to move towards a better equilibrium in their balance of payments and trade positions.\footnote{Announcement of Talks Between Ambassador Robert Ingersoll and Deputy Vice Minister for Foreign Affairs Kiyohiko Tsurumi, State Dept. Press Release, \textdagger (Sept. 1, 1972).} At the time, the United States balance of payments vis-a-vis Japan was in serious disequilibrium. Contemporaneously with the Nixon-Tanaka communique, Robert Ingersoll, United States Ambassador to Japan, and Kiyohiko Tsurumi, Japan’s Deputy Vice Minister for Foreign Affairs, released a statement in which, among other items, it was agreed that “the Japanese power companies will purchase $320 million in uranium enrichment services from the United States with payment to be facilitated by the Government of Japan.”\footnote{Minutes of Japan-US Discussions on Availability of Enrichment Services in Japan, in the author’s files.} The general details of this agreement had already been worked out during late August, 1972, between United States and Japanese government representatives meeting in Washington, D.C. That agreement specified that the United States Atomic Energy Commission and the Government of Japan “or a Japanese entity acceptable to the AEC and Japan” would enter into a contract for the purchase by Japan of 10 million separative work units of enrichment services “in order that Japan obtain delivery of and transfer of title to the associated enriched uranium.” Title to the uranium was to pass to Japan upon delivery but the AEC was to retain custody of the enriched uranium until a stated amount of feed material (unenriched uranium) had been supplied by the Japanese to the AEC.\footnote{This body has been in existence for only a short period. Due to this fact and the small caseload before it thus far, there is no formal styling of cases nor case numbers. The most recent hearing on this case occurred on January 15, 1976.} The projected arrangement was mutually beneficial to both countries. Although the Japanese did not foresee extensive beginnings in the nuclear generation of electric power until the early 1980’s, it was apparent to them
that the price of enriched uranium would continue to increase on the world market as demand for power generation facilities increased world-wide. The United States, on the other hand, could sell enriched uranium at a time when the sale would have an optimum effect on the then-existing balance of payments difficulties. It appears that the arrangement was suggested by the United States government. 59

Pursuant to the intergovernment agreements, ten private Japanese utility companies entered into purchase and storage agreements with the AEC. Those agreements provided that title would pass to the Japanese utilities following payment of the contract price but that they would not be permitted to remove the enriched uranium from the United States until the feed material had been supplied. Both the purchase and the storage agreements contained statements that the purchasers would "comply with all applicable laws, regulations and ordinances of the United States and of any State, territory, or political subdivisions." 60

The State of Tennessee and its subdivisions are prohibited from taxing property belonging to the United States government. Consequently, all property at the AEC's Oak Ridge facility is exempt from state or local taxation. But when the City of Oak Ridge and Roane County discovered that the enriched uranium sold to the Japanese private utility companies was stored at Oak Ridge, they assessed a property tax against it and attached the uranium to ensure payment. Payment of back taxes was also assessed. The tax bills were mailed directly to the Japanese utilities' home offices in Japan.

The United States Department of State faced a dilemma. The Japanese government and the Japanese utility companies became extremely upset. Apparently, they felt that they had agreed to purchase the enriched uranium in an effort to assist the United States and had not contemplated that they would have to pay local taxes on it during the storage period. Furthermore, the Japanese have stocks of enriched uranium held under similar conditions in at least two other states. The Japanese asked the Department of State to file a suggestion that sovereign immunity should be granted to the property. At this writing, no such suggestion has been made. 60.1 The city and county officials, on the other hand, view the Japanese position as unreasonable, not only because the purchase and storage contracts were made with private firms, not government entities, but because the uranium has greatly increased in value since the date of purchase

60.1 At a hearing on January 15, 1975, the Japanese government, through its attorney, asked the Tennessee Assessment Appeals Commission to delay a decision in the case until after the United States Department of State could hold a hearing on the immunity question in mid-March. The Appeals Commission has taken this request under advisement.
and the Japanese purchasers have already benefitted substantially from that increase. The United States government saw the Japanese arrangement as a beginning to the development of an international market for enriched uranium. The economic importance of the arrangement was, therefore, long-term in that it would give the United States a competitive leg up vis-a-vis other countries that are currently beginning construction of uranium enrichment facilities. The Japanese, on the other hand, may become dubious concerning future arrangements if they feel that the United States has not made a complete effort to avoid the local taxation of the uranium.

The facts of this case illustrate the applicability of a federal preemption doctrine derived from structural analysis of the Constitution in a situation in which no other rule appears logically to be applicable. The arrangement between the AEC and the Japanese utilities was concluded in furtherance of a joint intergovernmental policy designed to affect relations between the United States and Japan. There is a continuing national interest in retaining Japanese good will, and particularly the good will of the Japanese utilities, if the development of a future market for enriched uranium is contemplated.

Counsel representing the Japanese utilities at the initial hearing argued that the property was to be treated as sovereign property and was therefore immune, that Tennessee was attempting to tax an export, and that the Tennessee tax amounted to a burden on interstate and foreign commerce. No one of these arguments appears particularly persuasive in the light of past State Department policy concerning sovereign immunity, or existing judicial decisions concerning the import-export clause or the commerce clause. A decision by the courts in favor of the Japanese utility companies based on any of these arguments would create difficult precedents for later cases. On the other hand, if it is held that state taxation of this uranium, because of the special circumstances under which the agreements were entered into, would amount to an unconstitutional interference with the foreign policy of the United States, such a ruling would have no long term effects. A decision on that basis would preserve the existing rules in regard to the general rights of the state concerning exports and the commerce clause, and would avoid future difficult situations for the State Department concerning potential sovereign immunity claims. I am not here suggesting that this would necessarily be the best result. What I am suggesting is that any holding voiding the state tax must, of necessity, be based on these considerations regardless of the textual or precedential grounds which might actually be cited by the court. Ample precedent for a decision designed to prevent adverse state impact on an ongoing foreign policy decision by the federal government exists in the cases discussed above.

These cases make it clear that where vital external concerns may force

61. See note 55, supra.
a decision preemptioning state authority as a matter of national necessity, the courts will find such preemption whenever state activity seriously conflicts with the legitimate needs of the national government in the foreign affairs field. Consequently, the fact that there is currently no existing federal legislation dealing with state activities in stimulating international trade and investment, nor any international agreement which is being contravened by those activities, does not mean that all such state activities are safe from constitutional prohibition. If the state promotional activity creates effects which run counter to principles which can be derived from the constitutional structure or counter to an expressed and operative international policy of the federal government, then those state activities are unconstitutional.

C. The Compact Clause

It is conceivable that a state could engage in activities to stimulate international trade and reverse investment that so directly affected the rights of private parties that a judicially cognizable case or controversy could arise. However, the programmatic nature of the activities of state development agencies in this field makes this unlikely. In view of that fact, the constitutional relationship between the state and the national government in this area is likely to be tested by political means, rather than by judicial decision. The prohibition against state agreements or compacts with foreign nations is the most likely ground upon which such an issue might arise.

The meaning of the compact clause of the Constitution is far from clear. Courts, the Congress, and legal scholars have sought vainly for the elusive distinction between "treaties," which are absolutely prohibited to the states, and "agreements" or "compacts" with foreign powers into which the states may enter with the consent of Congress. It is difficult to determine whether the Constitution in fact intends a distinction between treaties and other kinds of agreements with foreign nations and, if such a distinction is intended, what its nature and legal impact might be. The framers of the Constitution had nothing to say concerning a distinction

62. Such an issue could conceivably arise out of state government dealings with Arab countries in the Middle East. If, for example, a state should decide to open a trade office in one of the Arab states under an informal agreement not to staff it with Jewish persons, a case or controversy could arise which would create a court test of the state's activities. See, e.g., American Jewish Congress v. Carter, 190 N.Y.S.2d 218 (Sup. Ct. 1959), modified, 10 App. Div. 2d 833, 199 N.Y.S. 2d 157 (1960). That case did not deal with state activity, but the issues are closely related. See generally, Miller, supra note 44.

63. U.S. Const. art. I, §10 provides:

No State shall enter into any Treaty, Alliance, or Confederation.

No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State, or with a foreign power.
between “treaties” and “agreements or compacts.” Nothing in the records of the constitutional convention reveals the intent of the framers on this point, or that the topic was even discussed. Only two short and unenlightening comments pertaining to this provision appear in The Federalist. It may have been that the absence of debate on the distinction indicates that its meaning was so clear to the drafters of the clause that debate was superfluous.

An attempt to determine the meaning of this language from contemporary usage in other fields in 1787 is not much more helpful. In a letter written in 1775, Benjamin Franklin acknowledged receipt of three copies of Emeric de Vattel’s new treatise on natural law. Vattel was a forceful exponent of the work of Christian L.B. de Wolff. De Wolff had defined two categories of agreements between international states as “federa” and “pactiones.” Vattel had preserved this distinction in his treatise. According to this distinction, treaties required on-going action, while compacts dealt with problems of only temporary interest. Professor Engdahl suggests that the distinction be described as one between dispositive agreements—those which determine a one-time problem, perhaps in perpetuity—and non-dispositive agreements—those which may require on-going negotiation or adjustment, such as Treaties of Friendship, Commerce, and Navigation. It may have been that the agreements and compacts clause was designed merely to facilitate the settlement of boundary disputes and other minor interstate controversies, and that to read it more broadly is to reinterpret its intent. Two other writers suggest that no meaningful legal distinction was intended by either de Wolff or Vattel. If these words were

64. See D. Engdahl, Characterization of Interstate Arrangements: When is a Compact not a Compact?, 64 Mich. L. Rev. 63, 75 (1965).
65. See, e.g., 2 J. Story, Commentaries on the Constitution §1402 (2d ed. 1851); Weinfeld, What did the Framers of the Federal Constitution Mean by “Agreements or Compacts?” 3 U. Chi. L. Rev. 453 (1936).
66. The Federalist No. 44 at 193, 195 (Beard ed. 1948) (J. Madison).
67. Engdahl, supra note 64 at 75.
68. This hypothesis has been suggested and pursued by previous commentators. Id. at 75-81; Weinfeld, supra note 65.
69. 2 Wharton, United States Revolutionary Diplomatic Correspondence 64 (1889).
70. E. Vattel, Le Droit des gens ou principes de la loi naturelle (1758). Also, at least one early colonial commentator, George Tucker, mentioned Vattel’s treatise in describing the distinction between treaties and compacts. I Tucker, Blackstone’s Commentaries, 309-10 (1803).
71. C. de Wolff, Jus Gentium, Methodo, Scientifica Pertractatum, ch. iv, §369 (1749).
72. Weinfeld, supra note 65 at 460.
73. Engdahl, supra note 64 at 77.
terms of art used in a precise and technical sense by the framers, the art, and most certainly the precision, have been forever lost.

What remains clear is that the framers of the Constitution intended to preclude the possibility of unlimited state freedom to hold intercourse with foreign powers. The use of the dual characterization in the compact clause suggests that some modes of agreement between state governments and foreign powers are in absolute conflict with the policies underlying the constitutional structure, and some may be appropriate as long as they are subjected to national control or regulation. It is to custom, practice, and structural constitutional assumptions, rather than to textual analysis, that the modern analyst must look to determine the contemporary relevance of this distinction. It does not appear that state governments, in carrying out their trade promotion programs, have entered into formal agreements with foreign governments. Even the state foreign trade offices, although established after consultation or at least notification to the foreign host government, operate under the same legal regime as would the office of an American private corporation establishing a branch office in a foreign nation. Therefore, for purposes of this discussion, the most important question is to what extent does general intercourse between state governments and the governments of foreign countries require the consent of Congress as a precondition of constitutionality.

The most significant case to come before the United States Supreme Court, challenging the right of a state to enter into an agreement or compact with a foreign power, was Holmes v. Jennison. In that case, Holmes, who had been indicted for murder in Quebec, Canada, had fled to Vermont where he was apprehended. Jennison, the Governor of Vermont, ordered Holmes turned over to the Canadian authorities at the Vermont-Canadian border. Holmes sought a writ of habeas corpus which was denied by the Supreme Court of Vermont. An equally divided United States Supreme Court affirmed. Arguing that Jennison's extradition order violated the compact clause of the Constitution, Justice Taney characterized the scope of the compact clause in very broad language. He wrote:

[The framers] anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word "agreement" its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.

Justice Taney went on to find that the very act of extradition implied an "agreement" with a foreign power within the meaning of article I, §10.

76. See Weinfeld, supra note 65 at 457.
77. McDougal and Lans, supra note 75 at 229-30.
78. 39 U.S. (14 Pet.) 540, 10 L.Ed. 579 (1840).
79. Id. at 572, 10 L.Ed. at 595.
Basing his analysis upon the structural principles of the Constitution, he wrote:

Now, how is a state to hold communications with these nations? The states neither send nor receive ambassadors to or from foreign nations. That power has been expressly confided to the federal government. How, then, are negotiations to be carried on with a state, when a fugitive is demanded? Are they to treat upon this subject with the ambassador received by the United States? And is he, after being refused by the general government, to appeal to the state to reverse that decision? . . . Every part of [the Constitution] shows, that our whole foreign intercourse was intended to be committed to the hands of the general government. . . . It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, one nation; and to cut off all communications between foreign governments, and the several state authorities.80

The view that the compact clause was intended to prevent all official contact between the state governments and foreign governments is given substantial support by emphasis in The Federalist that, above all, the new nation should not provide any opportunity for divisive activity on the part of the states in foreign affairs.81 That this was the real policy basis of Justice Taney’s decision becomes clear when his efforts to characterize the extradition order as some sort of mutual agreement are scrutinized.

The record gave no evidence that the Canadian government had ever requested Jennison to deliver Holmes. To find an “agreement or compact,” Justice Taney stretched the meaning of the terms to include unilateral activity by a state which was accepted by the foreign power. He indicated that if Jennison in fact delivered up Holmes, and if the Canadian authorities took custody of him at the Canadian border, then this amounted to an agreement which was prohibited by the Constitution.82 More important to the result was Justice Taney’s correct analysis of the nature of the decision to extradite.

80. Id. at 575-76, 10 L.Ed. at 596-97.
81. See, e.g., The Federalist No. 3 at 14-15 and No. 4 at 18-19 (Random House ed. 1937) (J. Jay); Id. No. 11 at 62 (A. Hamilton).
82. 39 U.S. at 577, 10 L.Ed. at 597.
sion of one may stand in direct opposition to the decision of the other. How can there be a concurrent jurisdiction in such a case?83

An apparently contrasting view in the purely interstate situation is given in *Virginia v. Tennessee.*84 That case involved a dispute over the boundary between the two states. The boundary line had been set by a commission representing both states and had been approved by both state legislatures. The Court held that the arrangement amounted to a compact or agreement within the meaning of the constitutional requirement. It went on to indicate that Congress, by failing to take negative action and by passing legislation assuming the boundary line established by the commission, had impliedly given its consent. The Court made it clear that it was the continued implied recognition of the boundary over a long period of years which created the implication of assent. A single act implying such recognition might not be sufficient.85

Clearly, there is no support in the structure of the Constitution for the proposition that all official contact between state governments was to be abolished.86 Such a decision would have been unworkable and would, in fact, have created a de facto centralized Government which would have denied the basic assumption of federalism—that the various political units were responsible for local self-government but were required to work together to make the national system effective.

In dicta, the Court suggested that the true distinction between compacts and agreements which required congressional consent, and those which did not, was one based on the nature and effect of the agreement. Were the agreement "political" in nature, congressional consent was required; if non-political, then consent was not required. Based on this distinction, the Court found that the agreement to appoint the boundary commission did not require the consent of Congress; but that the implementation of the commission's findings by the states did require such consent.87 This distinction appears to be a recognition of a political reality rather than a "legal" one based on the intent of the framers or even upon constitutional structure.

In arriving at the political/non-political dichotomy, Justice Field relied upon Joseph Story's Commentaries to the Constitution.88 But Story had

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83. *Id.* at 575, 10 L.Ed. at 596.
84. 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893).
85. *Id.* at 522, 13 S.Ct. at 735, 37 L.Ed. at 544.
86. *Id.* at 517-18, 13 S.Ct. at 733-34, 37 L.Ed. at 542-43.
87. *Id.* at 519-20, 13 S.Ct. at 734-35, 37 L.Ed. at 543.
88. 2 J. Story, *Commentaries on the Constitution* §1403 (2d ed. 1851).

Perhaps the language of the former clause may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and upon the ground, that the sense of each is best known by its association (noscitur a sociis) to apply to treaties of a political character. . . . The latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed more private rights of sovereignty; such as questions of boundary. . . .
reasoned that agreements and compacts may be entered into with the consent of Congress precisely because they are non-political. Justice Field, instead, found that only those agreements or compacts of a political nature required congressional consent—but according to Story any agreement of a political nature is absolutely prohibited and would be unconstitutional even with consent of Congress. Furthermore, Justice Field reasoned that non-political agreements or compacts do not require congressional consent—but Story had said that all agreements and compacts are non-political (otherwise they are treaties, alliances, or confederations) and for that reason, Congress may consent to them. By following Justice Field’s opinion, courts have removed state agreement: and compacts of a “non-political” nature (all agreements and compacts according to Story) from congressional supervision. Thus, if the distinction is taken literally, the only agreements and compacts that must be notified to Congress and to which Congress may consent are those absolutely prohibited to states and to which Congress may not constitutionally agree.

The political/non-political dichotomy, like all legal dichotomies, describes results; it does not provide a predetermined guide to a correct decision. In this sense, the dichotomy is no more helpful than those others which have been regularly used to “determine” whether a given activity is permitted or proscribed to the states when their acts touch international affairs. In these cases, courts have spoken of domestic affairs versus foreign affairs, private international law versus public international law, domestic concerns versus foreign relations. In each instance, however, the courts used these terms to describe results more accurately described on the basis of true policy decisions, related to the federal governmental structure. Correctly analysed, Justice Field’s opinion in Virginia v. Tennessee is really the converse of Justice Taney’s opinion in Holmes v. Jennison. In the latter case, Justice Taney based his holding on the proposition that where there is a strong national interest in regulating intercourse between state governments and foreign nations, congressional consent is required to legitimize such state activities. Justice Field, on the other hand, made it clear that his ruling that the initial creation of the commission did not require congressional consent was based on the proposition that where there is little national interest in the type of intercourse being carried out between the states, congressional consent is not required. Justice Field’s discussion of the political/non-political dichotomy was designed to explain those situations in which a sufficient national interest was present to re-

89. See, e.g., Stearns v. Minnesota, 179 U.S. 223, 21 S.Ct. 73, 45 L.Ed. 162 (1900); Wharton v. Wise, 153 U.S. 155, 14 S.Ct. 783, 38 L.Ed. 669 (1894); McHenry County v. Brady, 37 N.D. 59, 163 N.W. 540 (1917).
90. For vehement criticism of this anomalous position, see Engdahl, supra note 64 at 88-89.
91. For a discussion of these dichotomies, see Maier, supra note 26 at 164-65.
92. 148 U.S. at 518, 13 S. Ct. at 734, 37 L.Ed. at 542.
quire congressional consent as a condition of constitutionally acceptable state intercourse. The true rule of Virginia v. Tennessee seems to be, therefore, that congressional consent is required whenever the national government has an interest in supervising or controlling state operations under the agreement. This test is much more meaningful than the dichotomy stated by Justice Field because it focuses upon important structural concerns, rather than upon an attempt to solve a constitutional problem by semantic legerdemain. More importantly, recognition that this was the actual test applied in both Holmes and Virginia makes it possible to harmonize the two cases without seeking to adopt purely verbal distinctions. Furthermore, it places those cases dealing with the compact clause in direct and proper relationship with those other cases in which the Court has had to decide between state and national power in the foreign affairs field. Thus, the intercourse of state governments with foreign governments is more likely to require congressional consent than interstate agreements, since matters of international concern are always of principal interest to the national government under a correct structural constitutional analysis.

IV. Conclusion

Comparatively few cases involving the compact clause have ever reached the courts. In fact, many interstate and foreign agreements involving states have never sought nor received the consent of Congress. Many of these arrangements, like those situations of state and foreign governmental contact in the trade and investment field, are not of the kind which are likely to raise a case or controversy. Nevertheless, the bases for the judicial determinations outlined above retains constitutional relevance, even in nonjusticiable situations. When state activities raise sufficient concern about their affect upon the national interest, then it is likely that Congress will involve itself, perhaps both as a facilitator and as a regulator. In this sense, it may be concluded that the constitutional rule involved is political, but nonetheless constitutional. The Congress has the power to define the national interest and to control state contacts with foreign governments under the compact clause as soon as it perceives the need for such action. Until that time, the validity of state action is, in effect, self-defining. Within the principles of structural constitutional interpretation, and in the light of the utility of cooperative federalism in this, as well as in other fields, this is as it should be.

93. Id. at 518-19, 13 S. Ct. at 734, 37 L.Ed. at 542-43.
94. See text at notes 25 through 50.
95. See Frankfurter and Landis, supra note 74 at 749-54; R. Rodgers, Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments, 61 A.J.I.L. 1021 (1967).