1987

Foreign States and the Constitution

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VIRGINIA LAW REVIEW

VOLUME 73 APRIL 1987 NUMBER 3

FOREIGN STATES AND THE CONSTITUTION

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WHAT rights, if any, do foreign states have under our Constitution? The question deserves a careful answer in light of growing opportunities for judicial confrontation between foreign sovereigns and United States interests.[1] Not surprisingly, foreign sovereign litigants have relied frequently on constitutional jurisprudence in their arguments in United States courts.[2]

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* Associate Professor of Law, Columbia University. B.A., 1973; J.D., 1976, Yale. I am grateful to my colleagues who read drafts of this article and who gave their reactions at a faculty colloquium. Suggestions came from quarters too numerous to acknowledge fully: special thanks are due to Louis Henkin, Gerard E. Lynch, and Henry Monaghan for ideas and advice at more than one phase, and to the late Ted L. Stein, with whom I first discussed these issues. I also am indebted to the Class of 1932 Fund at Columbia Law School, which provided support for summer research, and to Holly Cartner for valuable research assistance.

[1] The Foreign Sovereigu Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982), marked the beginning of a new era for litigation between foreign states and American parties. A principal feature of the Act was to enlarge the role of the judiciary in the resolution of disputes against foreign states and their agencies and instrumentalities. See 28 U.S.C. § 1602; see also H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6606 (principal purpose of the bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch). Moreover, in the decade since enactment of the FSIA, American foreign policy actions concerning Iran, Libya, Nicaragua, and other countries have raised an unprecedented number of questions concerning foreign states and the Constitution. The entanglements in Central America, Africa, and elsewhere guarantee that these questions will continue to be raised in the near future.

[2] Judicial opinions referring to foreign states' constitutional arguments are discussed infra text accompanying notes 24-26 and 59-64. Constitutional issues were raised on behalf of foreign states but were not part of the courts' reasoning in a number of other cases. See, e.g., Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980), vacated, 684 F.2d 1032 (D.C. Cir. 1981) (foreign state argued that due process re-

The Bill of Rights suggests a variety of contexts that raise the issue whether constitutional concepts are applicable to foreign sovereigns on the same basis as other juridical persons. For example,[3]

> Are warrantless wiretaps of foreign embassies constitutionally permissible in situations where the same action against a United States person would violate the fourth amendment?
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> Can Congress authorize the uncompensated seizure of a foreign state's property, in circumstances that would violate the takings clause of the fifth amendment if directed against a private person?
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> Does the due process clause of the fifth amendment entitle a foreign state to the same procedural rights in court proceedings that individuals and corporations enjoy?
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> How, if at all, does the first amendment apply to foreign states' efforts to disseminate information or affect political decisions within the United States? Can Congress provide for regnlation of foreign governmental speech in ways that would be impermissible if aimed at private expression?[4]

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quired dismissal of suit to enforce foreign arbitral award where minimum contacts with United States forum were lacking); Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 486 N.Y.S.2d 939 (1984) (foreign state contended that dismissal of its suit in the absence of an alternative forum would violate fourteenth amendment's due process gnarantee, and that the supremacy clause of article VI required state court to give effect to executive agreement), cert. denied, 469 U.S. 1108 (1985).

[3] These examples are phrased in terms of the foreign state itself, but the issues also need to be considered as to state agencies, state-owned corporations, state representatives such as diplomats or consuls, and indeed a sovereign or head of state personally. See generally Note, Resolving the Confusion over Head of State Immunity: The Defined Right of Kings, 86 Colum. L. Rev. 169 (1986) (comparing head of state immunity to sovereign immunity and other doctrines). Except as otherwise specified, this article uses the terms "foreign sovereign" or "foreign state" to apply to the state and its agencies, instrumentalities, and representatives. Special considerations affecting corporate entities and individuals who represent the state will be discussed infra text accompanying notes 246-302.

[4] Cf. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) (affording constitutional protection to corporate speech). The issue of first amendment protection of foreign states' political activities in the United States became a newsworthy subject in 1986, growing out of the controversy surrounding the employment of former White House adviser Michael Deaver as lobbyist for several foreign governments. Senator Strom Thurmond proposed legislation to restrict high-level government officials from offering such services to foreign governments. See S. 237, 100th Cong., 1st Sess. (1987); S. Rep. No. 396, 99th Cong., 2d Sess. 1 (1986) (discussion of proposed Integrity in Post-Employment Act). Opponents of this legislation contended that the proposals would interfere with the ability of foreign states to engage in activity protected by the first amendment's petition clause. See Integrity in Post-Employment Act of 1986: Hearings on S. 2334 Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 129, 134-38 (1986) (statement of John R. Banzhaf III, Professor of Law,

Other constitutional problems may arise when a foreign state raises a constitutional doctrine that distributes, rather than limits, governmental powers, such as a claim that a United States foreign policy violates the constitutional separation of powers or the principles of federalism. As examples, the foreign state might allege that the President exceeded his constitutional or statutory powers in an action affecting a foreign state's interests, or that a state of the United States erected an unjustifiable burden on foreign commerce through a particular tax or regulation, even though there could be no constitutional challenge to the power of Congress to enact the same measure.

The importance of these issues to United States foreign policy can hardly be overstated. The Iranian hostage crisis of 1979-81 raised the possibility of legislation to seize billions of dollars in frozen Iranian state assets, either to retaliate for the hostage-taking or to ensure satisfaction of the claims of United States nationals against Iran.[5] Such action probably would have led to fifth amendment claims by Iran. Foreign states have objected to certain United States states' use of taxation methods such as the unitary tax,[6] which has been challenged as a burden on foreign commerce, an infringement of the federal foreign relations power, and a violation of due process.[7] Moreover, money is not the only thing at

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[5] Iranian assets were blocked by executive order on November 14, 1979. See Exec. Order No. 12,170, 3 C.F.R. 457 (1980), *reprinted in* 50 U.S.C. § 1701 note at 148 (1982). This order prohibited any unlicensed transfer of assets in which Iran had an interest, pending resolution of the crisis, but did not affect the underlying title to the assets. Legislation would have been needed to expropriate the assets by vesting title in the United States Treasury. If such legislation had gone forward, the amount of Iranian assets affected could have approached $12 billion. See Carswell & Davis, Crafting the Financial Settlement, *in* American Hostages in Iran 201, 205 (W. Christopher ed. 1985).

[6] The approach of the unitary tax is to assess multistate or multinational enterprises not just on in-state activities, but on the basis of a formula that attempts to determine the ratio of in-state payroll, property, and sales to the enterprise's global activities. Foreign states object to the method in part because it requires their enterprises to account to a state for activities occurring entirely out of that state. See Documents Concerning Unitary Taxation of Multinational Corporations, *reprinted in* 25 Int'l Legal Materials 683-714, 734-59 (1986); Note, State Worldwide Unitary Taxation: The Foreign Parent Case, 23 Colum. J. Transnat'l L. 445, 445-47 (1985). Whether foreign states have standing to raise constitutional objections to the tax on behalf of their enterprises is addressed infra text accompanying notes 124-28.

[7] It has been estimated that the unitary tax generated approximately $600 million in increased revenues during a year when twelve states used the method (several have since dis-

stake. The national security and foreign policy of the United States could be seriously affected by judicially enforceable constraints on executive or congressional action with respect to foreign states. Conversely, judicial enforcement of rights and safeguards benefiting foreign states could be an important factor promoting international mutual respect and trust.

The issue of the position of foreign states under the Constitution merits a more thoughtful consideration than it has been given in either case law or commentaries.[8] Part of the problem with the existing treatments is a failure to recognize fundamental differences among claims that draw upon constitutional jurisprudence. One category involves an appeal to constitutional values in circumstances where the federal political branches—Congress and the President—have not directed otherwise. This type of claim can be resolved by relying on constitutional doctrine as an authoritative source of federal law, whether as a federal common law rule or as a backdrop for interpreting ambiguous statutes or treaties. A second category of claims consists of challenges to state and local government actions where the federal political branches have not mandated a different resolution. Constitutional jurisprudence also provides an authoritative basis for resolving these claims. But a third category of claims—constitutionally based attacks on congressional or executive action taken pursuant to the foreign affairs power—requires a fundamentally different analysis. As to such claims it is necessary to determine whether the Constitution affords a basis for foreign states to mount successful challenges to decisions deliberately taken by the branches charged with responsibility for the foreign relations of the United States. This article argues that the Constitution does not permit such judicial action, either to protect the alleged rights of foreign states, to limit the political branches, or to provide rules for judicial application. Rather, the plenary power of the political branches to determine national policy with respect to foreign states forecloses the possibility of judicial interference at the behest of foreign states.

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continued it). A significant, although not readily quantifiable, proportion is attributable to foreign state-owned corporations engaged in commercial activity in the United States. See Note, Standing Under Commercial Treaties: Foreign Holding Companies and the Unitary Tax, 97 Harv. L. Rev. 1894, 1894-95 (1984).

[8] See infra notes 21-43 and accompanying text.

Constitutional claims by foreign states raise significant problems of constitutional theory that have received virtually no attention in the literature. The proposition that the Constitution applies to all exercises of governmental power, even foreign relations,[9] is only a starting point. There remains the vexing question of how to determine what the Constitution requires or prohibits in foreign affairs cases. Yet the constitutional claims of foreign states raise questions of constitutional theory not merely as a subset of foreign affairs cases, but as a set of unusually provocative problems in the application of the Constitution to parties that stand in an ambiguous relationship to the constitutional system. On the one hand, the Constitution expressly contemplates the involvement of foreign states and their representatives in federal judicial proceedings and other federal activities.[10] On the other hand, of course, foreigu states are independent sovereigns and are under no obligation to comply with any aspect of the constitutional compact.

The decision whether to place foreign sovereigns inside, partly inside, or outside the constitutional system illustrates the tension among the differing conceptions of the nature of the Constitution. To the extent that the Constitution is a social contract establishing a system of self-government, permanent outsiders such as foreign states seem to have little claim to invoke constitutional "riglits" against domestic political decisions. But to the extent that at least some constitutional values are universal,[11] it is arguable tliat foreign states deserve some of the constitutional protections granted to United States citizens.

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[9] See generally L. Henkin, Foreign Affairs and the Constitution 252-55, 266-68 (1972) (discussing application of the Constitution in foreign affairs cases, including Reid v. Covert, 354 U.S. 1 (1957)); see also infra note 143; cf. H. Stern, Judgment in Berlin (1984) (criticizing United States government position in case involving alien's right to jury trial in United States occupation court in Berlin).

[10] Article III provides in pertinent part that the federal judicial power shall extend to cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art III, § 2, cl. 1. Other clauses refer directly to foreign states or implicitly acknowledge their interaction with the United States: "The Congress shall have Power . . . To regulate Commerce with foreign Nations," id. art. I, § 8, cl. 3; "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power," id. art. I, § 10, cl. 3; and "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . and . . . shall appoint Ambassadors, other public Ministers and Consuls . . . .", id. art. II, § 2, cl. 2.

[11] For a discussion of constitutional rights of aliens, see infra text accompanying notes 292-98.

In developing a conceptual framework for approaching the problem of foreign states' constitutional claims, the interpretive techniques of linguistic analysis or original intent provide almost no assistance. The words of the Constitution directly relevant to the problem are few indeed. Although article III enumerates foreign states as potential litigants under the federal judicial power,[12] there is no indication that the framers anticipated the possibility of suits by foreign states arising under the Constitution. Some of the most important clauses conferring rights are silent on whether their protections are available to "citizens,"[13] "people,"[14] "persons,"[15] or some other class.[16] Even the cases that use linguistic and historical analysis to establish that the term "person" includes aliens as well as citizens for purposes of the due process, takings, and equal protection clauses of the fifth and fourteenth amendments[17] leave open many questions concerning the applicability of

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[12] See U.S. Const. art. III, § 2.

[13] The privileges and immunities clauses of article IV and the fourteenth amendment both protect "citizens." See U.S. Const. art. IV, § 2; amend. XIV, § 1. The fifteenth amendment's right to vote is also framed in terms of "citizens." Id. amend. XV, § 1.

[14] Clauses defining protections for "the people" are found in the first amendment ("the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"), the second amendment ("the right of the people to keep and bear arms"), the fourth amendment ("[t]he right of the people to be secure in their persons, houses, papers, and effects"), the ninth amendment ("rights . . . retained by the people"), and the tenth amendment ("powers . . . reserved . . . to the people"). See U.S. Const. amends. I, II, IV, IX, X.

It has been suggested that the term "the people" as used in the fourth amendment may correlate to its use in the preamble—"We the People of the United States"—indicating the citizenry as the source from which all constitutional authority flows. See 5 Intelligence Activities—The National Security Agency and Fourth Amendment Rights: Hearings on S. Res. 21 Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong., 1st Sess. 66, 74 (1975) (statement of Edward H. Levi, Attorney General) [hereinafter Levi Testimony]. Support for such a meaning may be found in the provisions of article I concerning election of representatives by "the People," U.S. Const. art. I, § 2, cl. 1, and in the ninth and tenth amendments, by which "the people" retain and reserve rights not enumerated in the Constitution and powers not delegated to the United States. See id. amends. IX, X.

[15] The term "persons" is used, among other places, in the fifth amendment ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law."), U.S. Const. amend. V, and the fourteenth amendment ("nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."), id. amend. XIV, § 2.

[16] Clauses that use none of these terms include the first amendment's free speech and press clauses and the fifth amendment's takings clause.

[17] See infra text accompanying notes 292-93. On the general trend in American jurispru-

these provisions to juridical persons such as foreign states.[18] The problem of constitutional silence in the foreign affairs area is especially vexing, because essential issues concerning the allocation and exercise of governmental power are not mentioned in the text.[19]

Because of the lack of textual or historical evidence, this article seeks to identify the key aspects of constitutional structure that are relevant to each of the three categories of constitutional claims and to analyze the relationship of foreign states to this structure.[20] This method of inference from structure and relationship provides a consistent conceptual framework for analyzing the potential constitutional claims of foreign state claimants. Thus, rather than asking whether a foreign state is a "person" within the meaning of the fifth or fourteenth amendments, or whether the framers intended to include foreign states among the "people" protected by the fourth amendment, this article looks at the relationship of foreign states to the federal courts when the courts make or apply federal law, to the states when they infringe upon foreign states' interests, and, most importantly, to the political branches of the federal government when they exercise their foreign affairs powers. The structural relationships among the three branches of the federal government, and between the federal government and the states, also play an important role in the analysis.

This article does not advocate judicial abstention from deciding the constitutional claims of foreign sovereigns. Rather, the argument is that constitutional claims against the actions of the federal political branches must fail on the merits because of the relationship of foreign states to the federal structure. When, on the other hand, a claim does not directly confront or conflict with the political branches' foreign policy, the federal courts should adjudicate the merits of foreign state claims by applying constitutional jurisprudence to sustain or reject the claim. Part III of this article elaborates upon the relationship between the thesis in Part II and concepts such as the political question doctrine, the application of the thesis to actions in which only the executive branch is involved,

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dence to confer rights on "persons" rather than "citizens," see A. Bickel, Citizen or Person? What Is Not Granted Cannot Be Taken Away, *in* The Morality of Consent 33-54 (1975).

[18] See infra text accompanying notes 252-54.

[19] See generally L. Henkin, supra note 9, at 15-19, 37-44 (discussing problem of lacunae in constitutional treatment of foreign affairs powers).

[20] See C. Black, Structure and Relationship in Constitutional Law (1969).

and the implications of the thesis for corporate and individual representatives of foreign states.

I. The Existing Authorities

The Supreme Court has not directly addressed the question of the rights, if any, of foreign states under the Constitution. Several cases of statutory interpretation and occasional dicta support the notion that foreign sovereigns should, in principle, be treated on the same basis as any other juridical person.[21] These cases establish the relatively uncontroversial proposition that, in the absence of an explicit indication from the political branches, courts will not discriminate against foreign sovereigns in circumstances where the rights of other legal persons have already been established. When one or both of the political branches has clearly expressed its will in the field of foreign affairs, however, the Supreme Court usually either validates the action explicitly,[22] or achieves the same effect by invoking one of the several doctrines militating against judicial interference in the conduct of foreign affairs.[23] Yet no Supreme Court case has definitively decided a constitutional challenge by a foreign state to an exercise of the foreign affairs power.

Lower courts have seemed to assume, without much discussion, that the Constitution confers some rights on foreign states, or at least imposes some limits on the foreign policy actions of the federal government, especially the courts themselves.[24] For example, a

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[21] See, e.g., Pfizer, Inc. v. India, 434 U.S. 308 (1978) (interpreting "person" in § 4 of the Clayton Act (current version at 15 U.S.C. § 18 (1982)) to include foreign states); cf. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (foreign corporation permitted to sue for just compensation under statute authorizing suits against the United States for wartime requisitioning). In *Russian Volunteer Fleet*, the Court noted that the issue presented was "not one of a claim advanced by or on behalf of a foreign government or regime," 282 U.S. at 492, but lower courts have extended the doctrine of that case to include suits by a foreign state, see Swiss Confederation v. United States, 70 F. Supp. 235 (Ct. Cl.), cert. denied, 332 U.S. 815 (1947), and by an agency or branch of a foreign state. See Swiss Fed. Rys. v. United States, 112 F. Supp. 357 (Ct. Cl. 1953).

[22] See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981) (confirming constitutionality of presidential actions suspending domestic litigation against Iran, nullifying attachment of Iranian assets, and sending claims to arbitration).

[23] The most familiar is the "political question" doctrine. See, e.g., Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in a plurality opinion) (a senator's challenge to the President's termination of defense treaty without Senate consent presents a nonjusticiable political question); infra text accompanying notes 209-17.

[24] After World War II, the Court of Claims allowed friendly foreign states and their in-

recent series of cases under the Foreign Sovereign Immunities Act[25] has given an affirmative answer to the question whether a foreign state is a "person" for purposes of the fifth amendment's due process clause.[26] But in light of the clear mandate in the legislative history that the statute should be applied to treat foreign sovereigns at least as favorably as United States persons,[27] the suggestion that the Constitution provides a separate source of rights was not necessary to the decision.

The positions of the executive branch with respect to the constitutional status of foreign sovereigns have reflected two essentially contradictory themes. On the one hand, the President's lawyers have sometimes unequivocally proclaimed that foreign states have no rights to attack foreign policy decisions on constitutional grounds. In correspondence to Congress in 1978 concerning the constitutionality of wiretapping foreign embassies pursuant to the Foreign Intelligence Surveillance Act,[28] for example, the Office of Legal Counsel in the Justice Department concluded that "foreign states as states have no rights against the United States under the Fourth Amendment,"[29] and even suggested that this conclusion

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strumentalities to sue the United States for compensation for property taken during the war. The question, however, was really one of interpretation of the statute under which the United States had authorized such suits, rather than one of constitutional rights. See Swiss Confederation v. United States, 70 F. Supp. 235 (Ct. Cl.), cert. denied, 332 U.S. 815 (1947); see also Swiss Fed. Rys. v. United States, 112 F. Supp. 357 (Ct. Cl. 1953) (branch of foreign state entitled to sue when that state extended reciprocal privilege to United States citizens).

[25] 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982).

[26] See Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982), and cases cited therein; see also Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1352 & n.17 (11th Cir. 1982) (finding objection to personal jurisdiction waived but not resolving whether 28 U.S.C. § 1605 obviates the need for a due process inquiry into the contacts establishing personal jurisdiction); cf. Gilson v. Republic of Ireland, 682 F.2d 1022, 1028 (D.C. Cir. 1982) (statute cannot grant personal jurisdiction over foreign state "where the Constitution forbids it"); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 660 (W.D. Mich. 1985) (minimum contacts requirement of fifth amendment is applicable where the defendant is a foreign state). See infra text accompanying notes 59-73.

[27] See H.R. Rep. No. 1487, supra note 1, at 13-14, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6612 (minimum contacts and adequate notice); cf. Persinger v. Islamic Republic of Iran, 729 F.2d 835, 839 n.5 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984) (government contended that subjecting foreign state to jurisdiction for acts on United States embassy premises abroad "might well create a serious danger of conflict with the Fifth Amendment due process clause.").

[28] See 50 U.S.C. § 1801 note (1982).

[29] Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R.

should extend to diplomats and other individual agents in their official conversations on diplomatic premises.[30]

On the other hand, where a constitutional argument can supplement other arguments in *support* of the Executive's policy, executive branch lawyers often have suggested the relevance of constitutional concerns. One such instance arose in connection with the Taiwan Relations Act of 1979,[31] where Congress sought to validate a questionable transfer of the Chinese embassy to a pro-Taiwanese group on the eve of recognition of the People's Republic of China and to prevent the People's Republic from obtaining the return of the property through the judicial process. The Executive opposed this disposition[32] and sought to preserve the possibility of a constitutional challenge by the People's Republic to the statutory provision. Although the executive branch's statements stopped short of taking a direct position on the constitutional question, they clearly were aimed at giving the People's Republic the necessary basis for presenting its own constitutional arguments if it so chose.[33] On an-

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7308, H.R. 5632 Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence, 95th Cong., 2d Sess. 23 (1978) (letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, to Edward P. Boland, Chairman, House Permanent Select Comm. on Intelligence, Apr. 18, 1978) [hereinafter Harmon letter]; see also Memorandum Opinion for the Attorney General on the Presidential Authority to Settle the Iranian Crisis, *reprinted in* 4A Op. Off. Legal Counsel 248, 260 n.9 (1980) [hereinafter Legal Counsel] ("A foreign nation, however, unlike a foreign national, does not have rights under the Fifth Amendment."); Levi Testimony, supra note 14, at 74 (fourth amendment may not have been meant to apply to foreign nations). For varying executive branch perspectives on related issues, see infra text accompanying notes 288-91.

[30] See Harmon Letter, supra note 29, at 26.

[31] Pub. L. No. 96-8, 93 Stat. 14 (codified at 22 U.S.C. §§ 3301-3316 (1982)).

[32] The State Department maintained that the embassy property was "in legal contemplation in our view the rightful property of the People's Republic of China." Taiwan Legislation: Hearings Before the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 22 (1979) (testimony of Deputy Secretary of State Warren Christopher). The State Department opposed the amendment to the administration's proposed legislation that was ultimately enacted as part of the Taiwan Relations Act, 22 U.S.C. § 3303 (b)(3)(B) (1982), confirming the Taiwan authorities' disposition of the embassy property. For background and source materials on the controversy, see 1979 Dig. U.S. Prac. Int'l Law 146-62.

[33] In the view of the Department of Justice, a constitutional challenge to the Taiwan Relations Act would have been unlikely to succeed on the merits. See Memorandum for the Attorney General, May 3, 1979, *reprinted in* 1979 Dig. U.S. Prac. Int'l Law 160. Nonetheless, the President in signing the Act said that his action was "without prejudice to any subsequent adjudication of the legal status of these properties," thereby leaving open the possibility of a constitutional challenge by the People's Republic to recover the property notwithstanding the congressional decision. See Taiwan Relations Act, 15 Weekly Comp. Pres. Doc. 640, 641 (April 10, 1979). The People's Republic eventually decided not to initi-

other occasion the executive branch concluded that the Shah of Iran had constitutionally protected property rights which limited United States' flexibility in responding to the Iranian demand for return of the wealth that the Shah had allegedly embezzled from Iran.[34] This position was consistent with a policy of protecting the Shah but not with other legal opinions from the same office that viewed officials who personified a foreign state's sovereignty as having no greater constitutional status than the foreign state itself.[35]

Congressional attitudes toward foreign states have occasionally favored the application of constitutional standards. The prevailing assumption behind the Foreign Sovereign Immunities Act,[36] the principal statute dealing with foreign sovereigns as a class, is that due process constraints do and should apply.[37] In other enactments, however, Congress has not shown the constitutional inhibitions in dealing with foreign states that it might show if comparable legislation were directed at United States citizens. In a recent amendment to the antitrust laws, Congress explicitly placed foreign sovereigns in a worse position than other litigants,[38] and many statutes have singled out the property or interests of particular foreign states for discriminatory treatment.[39] Moreover, Con-

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ate such a lawsuit. See Memorandum for the Attorney General, May 3, 1979, *reprinted in* 1979 Dig. U.S. Prac. Int'l Law 160, 162.

[34] See Legal Counsel, supra note 29, at 260-61.

[35] See Harmon Letter, supra note 29, at 25.

[36] 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982).

[37] For a discussion of the congressional intent with respect to the relationship between the constitutional and statutory standards, see H.R. Rep. No. 1487, supra note 1, and cases discussed infra text accompanying notes 59-66.

[38] For example, after the decision in Pfizer, Inc. v. India, 434 U.S. 308 (1978), Congress revised the antitrust laws to prevent foreign states from recovering treble damages except under certain restrictive conditions. See 15 U.S.C. § 15(b) (1982).

[39] An example is the seizure and sale of a steel mill owned by Czechoslovakia as a reaction to the lack of progress on resolving United States claims against Czechoslovakia. See 22 U.S.C. §§ 1642a-1642p (1982) (amending International Claims Settlement Act and directing the Secretary of the Treasury to hold net proceeds of sale in a fund for satisfaction of claims).

The Foreign Assistance Acts, 22 U.S.C. §§ 2151-2429 (1982), as well as trade legislation and other statutory programs, see, e.g., 19 U.S.C. §§ 2431-2441 (1982), show a consistent congressional policy to exclude foreign states allied with the Soviet Union from benefits under United States law. Specific denials for different purposes and varying periods of time have been aimed at, among others, Turkey, Argentina, Uganda, and Rhodesia. See, e.g., 22 U.S.C.A. § 2370(x) (West 1979) (suspension of military assistance to Turkey; omitted from subsequent codifications pursuant to International Security Assistance Act of 1978, Pub. L.

gress has not feared that legislation penalizing a named foreign state would constitute an impermissible bill of attainder.[40]

Commentary on the status of foreign sovereigns under the Constitution is distinguished more by its sparsity than by its diversity. One of the few authorities to express a direct view on the issue is Louis Henkin, who has stated without further elaboration that foreign states have no constitutional rights.[41] With Professor Henkin as chief reporter, the recent revision of the Restatement of Foreign Relations Law of the United States asserts that foreign states and international organizations are generally treated as "persons" for most statutory purposes, but not for constitutional purposes.[42] This article essentially affirms this approach to confrontations between foreign states and federal political authority, but explores both the theoretical underpinnings and the outer reaches and implications of this approach.[43]

II. A Three-Part Analysis

Both the arguments favoring complete constitutional rights for foreign sovereigns and those rejecting the idea of any protection fail to recoguize the different shapes and sizes of constitutional problems. Courts that have uncritically considered foreign sover-

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No. 95-384, 92 Stat. 737); 22 U.S.C.A. § 2372 (West 1979) (prohibition against assistance and sales to Argentina; repealed 1981); Exec. Order No. 12,117, 3 C.F.R. § 362 (1980), *reprinted in* 22 U.S.C. § 2151 note at 339 (1982) (import restrictions against Uganda); Exec. Order No. 12,183, 3 C.F.R. 472 (1980), *reprinted in* 22 U.S.C. § 287c note at 110 (1982) (revoking sanctions against Rhodesia).

Even if tbe equal protection component of the fifth amendment's due process clause were applicable to foreign states, statutes discriminating against foreign states would likely survive constitutional scrutiny under a rational basis test. This article contends that *any* foreign relations rationale would suffice to uphold the constitutionality of any such statute.

[40] See U.S. Const. art. I, § 9, cl. 3.

[41] According to Louis Henkin, foreign governments and foreign diplomats in their official capacity "have no constitutional rights, and there are no constitutional obstacles, say, to tapping wires of foreign embassies." L. Henkin, supra note 9, at 254; see also id. at 258 (no equal protection questions arise where statutes distinguish among nations because foreigu governments have no constitutional rights); cf. id. at 416 n.126 (foreign government might have standing to sue to protect an economic interest protected by a treaty, but there is some question whether it could sue to vindicate a political interest).

[42] Restatement (Revised) of Foreign Relations Law of the United States § 453 reporter's note 3 (Tent. Draft No. 2 1981); § 721 comment *l* (Tent. Draft No. 6; Vol. 1 1985).

[43] This article's general agreement with the positions Professor Henkin has taken does not imply that he would necessarily agree with this article's analysis or explanations of these positions.

eigns to be "persons" entitled to full constitutional protections under the fifth amendment's due process clause probably did so without considering whether the necessary implication of this reasoning would be to allow foreign states to challenge congressional or presidential actions with national security ramifications. Similarly, the argument that foreign sovereigns have "no rights" under the Constitution would seem to leave foreign states remediless even against unjustifiable intrusions by state or local authorities. A more refined analysis is therefore necessary. This article thus differentiates among three categories of constitutionally based claims that foreign states could raise:

> 1. Courts should assume the applicability of constitutional jurisprudence when the political branches have taken no action, when deciding a case according to federal common law, or when interpreting an ambiguous statute or treaty.
> 2. Courts should enforce constitutional restrictions on states by nullifying state or local government actions that impinge upon the federal foreign relations interest to the detriment of foreign states.
> 3. Courts may not invalidate unambiguous decisions of the federal political branches taken pursuant to the foreigu affairs power. The Constitution does not provide a basis for foreigu states to obtain judicial review of congressional or presidential decisions in the area of foreign affairs.

A. Application of Constitutional Values

The courts have applied familiar constitutional norms to foreign state litigants in numerous contexts, often without paying much attention to the jurisprudential reasons for doing so. This section demonstrates that, despite the use of constitutional concepts and vocabulary, these cases reflect a federal common law that draws on constitutional values for guidance, rather than applying the Constitution as a constraint on Congress or the President. This common law supplies rules of decision where there is no controlling statute, treaty, or executive act[44] and serves as a source of interpretive jurisprudence when the courts construe written texts. The use of constitutional principles in these circumstances is a judicial re-

[44] The concept of a "controlling executive act" poses somewhat more difficult problems than statutes and treaties. These special problems will be discussed infra text accompanying notes 218-45.

sponse to silence or ambiguity from the political branches, rather than an imposition of constitutional restrictions on congressional or executive action.

The basis for this aspect of the federal judicial role may be simply stated. In foreign affairs cases, as elsewhere, the federal courts have forged a doctrine favoring consistent application of constitutional norms even when the claimant is nontraditional—a foreigner rather than a citizen, or a juridical person rather than a natural one.[45] This is not to say that the Constitution forbids Congress or the Executive from making distinctions between classes of "persons," but only that the courts will not readily create such distinctions or find them implicit in ambiguous federal actions. Just as a statute will be construed to avoid conflict with constitutionally derived principles when it does not explicitly require a contrary interpretation,[46] judges will not draw lines excluding potential claimants from the benefits of judge-made constitutional doctrines.

There are strong considerations favoring judicial application of constitutional values to foreign states when the political branches have given no contrary direction.[47] In ordinary cases, judicial development of federal law drawing on constitutional values promotes observance of these values worldwide, fosters good relations with foreign states, and is consistent with the trend in executive, legislative, and judicial actions to assimilate the treatment of foreign sovereigns to that of private persons. The "Tate Letter" of

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[45] For cases extending constitutional protections to corporations, see infra text accompanying notes 252-54, and to aliens, see infra text accompanying notes 292-99. Cases involving claimants who were both foreign and juridical persons include Pfizer, Inc. v. India, 434 U.S. 308 (1978) (holding that the fact that plaintiff was a sovereign nation would not defeat the claim to comparable treatment with other plaintiffs); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931); Swiss Fed. Rys. v. United States, 112 F. Supp. 357 (Ct. Cl. 1953); Swiss Confederation v. United States, 70 F. Supp. 235 (Ct. Cl.), cert. denied, 332 U.S. 815 (1947). These cases involved the application of ambiguous statutes against the backdrop of constitutional concerns.

[46] See, e.g., Kent v. Dulles, 357 U.S. 116 (1958) (construing Passport Act of 1926 in light of constitutional right to travel); see also A. Bickel, The Least Dangerous Branch 164-66 (1962) (application of principle in area of passport denial). But see Edgar & Schmidt, *Curtiss-Wright* Comes Home, Executive Power and National Security Secrecy, 21 Harv. C.R.-C.L. L. Rev. 349 (1986) (criticizing Supreme Court for not adhering to this approach in recent cases).

[47] The exceptional cases involving an explicit contrary foreign policy decision by Congress or by the President raise special constitutional problems that are dealt with in Section II.C.

1952[48] and the Foreign Sovereign Immunities Act of 1976[49] expressed the executive and legislative policy that foreign sovereigns must accept the same responsibilities and liabilities as private persons when they enter the economic marketplace. Symmetry and sound policy suggest that they should likewise enjoy the judicially implemented rights and protections available to private parties in connection with commercial and financial activities.

Furthermore, foreign governments' perceptions of the legal protections they enjoy in the United States may shape their decisions concerning commercial ties, investment of reserve assets, and the treatment of United States interests in their own territory. The long-term United States objectives of stability and improvement of commercial and financial relationships with foreign states are enhanced by judicial treatment in accordance with constitutional traditions. By applying constitutional values through federal law, United States courts encourage foreign states to accord to the United States the sorts of protections that the Constitution guarantees to persons and property here. With respect to specific rights, such as just compensation for property taken for a public purpose, there is a plausible connection between the willingness of the United States to afford such a right to foreign states and the willingness of foreign states to give comparable treatment to the United States.[50]

Prompted by these sorts of concerns, United States courts have given foreign sovereigns treatment that accords with constitutionally based concepts such as the due process and takings clauses of the fifth amendment. Cases taking this position are surveyed in

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[48] See Letter from Jack B. Tate, Acting Legal Adviser, to Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984 (1952). The Tate Letter marked the end of the era in which the United States granted absolute sovereign immunity to foreign state defendants in United States courts and began the era in which, as a matter of executive policy, foreign sovereigns received immunity for their public but not for private acts.

[49] 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982).

[50] The proposition in the text relates to the desirability of affording specific substantive rights, rather than to the value of any particular legal technique for their enforcement. A specific right can be conferred by treaty, legislation, custom, or a variety of informal devices. See infra text accompanying notes 74-87. There is little to suggest, however, that elevating the right to constitutional status in one country would have any effect on another country's willingness to accord the right. Nor is there any reason to suppose that the United States would have anything to gain from pressing for reciprocal recognition of foreign states' rights to sue in each other's courts on "constitutional" claims. Foreign constitutional systems vary widely in both their substantive provisions and the extent of judicial review.

the following subsections. These cases are not constitutional precedents in the sense of establishing norms from which Congress and the President may not deviate, but rather reflect the application of constitutionally inspired values as a source of federal law.

1. The Foreign State as Plaintiff

A solid line of cases establishes the principle that foreign states may sue as plaintiffs in United States courts.[51] But what is the jurisprudential foundation of this principle, and when can a foreign state be denied access to United States courts? There are possible analogies to the first amendment's right to petition for redress of grievances or the fifth amendment's right to due process.[52] Close examination suggests, however, that the doctrine of foreign state access to United States courts, far from being constitutionally compelled, has been developed by the judiciary in express recognition of the power of the political branches to change the rule at any time.

Justice Harlan's opinion in *Banco Nacional de Cuba v. Sabbatino*,[53] the most detailed explanation of this principle, offers essentially policy and pragmatic reasons for allowing foreign states to sue in United States courts: promotion of good relations with foreign states, encouragement of equal access elsewhere, and the prohlems entailed in trying to apply a test of reciprocity under which United States courts would need to evaluate foreign states' judicial systems. These reasons are persuasive where the political branches have not spoken, but nothing in the Court's approach

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[51] See, e.g., Pfizer, Inc. v. India, 434 U.S. 308 (1978); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and cases cited therein.

[52] The citizen's right to seek judicial redress of wrongs can be viewed as an element of first and fifth amendment protections. One line of authority reflecting a constitutional dimension of the rigbt to pursue judicial remedies has evolved under the antitrust laws as the so-called *Noerr-Pennington* doctrine, under which persons whose anticompetitive conduct would otherwise be subject to antitrust liability enjoy a defense (subject to a sbam exception) to the extent that tbey seek to further their aims througb judicial processes. See 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad § 8.11 (2d ed. 1981 & Supp. 1986). For applications in foreign commerce, with particular reference to the constitutional dimension of seeking judicial or other recourse in foreign states, see id. §§ 8.12-.13.

[53] 376 U.S. 398 (1964). The case is best known for its treatment of tbe act of state doctrine, see infra notes 86, 243, but it also considered and rejected tbe argument that a Cuban governmental instrumentality should be denied access to United States courts because United States litigants were allegedly barred from Cuban courts.

suggests an intention to elevate the presumption of foreign state access to United States courts to the constitutional level. To the contrary, a foreign state's entitlement to sue has long been conditioned on recognition by the Executive.[54] An unrecognized government has been called "a republic of whose existence we know nothing"[55] and has been denied access to United States courts.[56] In confirming a *statutory* right of access, the Supreme Court recently indicated that a foreign state would have no corresponding right over a contrary position of the Executive:

> It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue. Nothing we decide today qualifies this established rule of complete deference to the Executive Branch.[57]

The use of terms like "privilege" and "comity"[58] rather than "right" in referring to foreign state access suggests that the doctrine is policy-based rather than constitutionally based. If the political branches were to determine that foreign policy interests require a different approach, the Supreme Court should give effect to that determination.

2. *The Foreign State as Defendant: Due Process and "Minimum Contacts"*

In the rapidly proliferating cases involving a foreign state as defendant, judicial application of constitutional norms is now commonplace. Unfortunately, an analytic confusion marks many of the recent judicial opinions under the Foreign Sovereign Immunities

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[54] Numerous cases hold that the President's power to recognize or not to recognize is hoth exclusive and nonreviewable. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); United States v. Pink, 315 U.S. 203 (1942); Guaranty Trust Co. v. United States, 304 U.S. 126 (1938); United States v. Belmont, 301 U.S. 324, 328 (1937).

[55] Baker v. Carr, 369 U.S. 186, 212 (1962).

[56] See Republic of Vietnam v. Pfizer, Inc., 556 F.2d 892 (8th Cir. 1977) (suit similar to Pfizer, Inc. v. India, 434 U.S. 308 (1978), dismissed after the fall of South Vietnam, in the absence of recognition of successor government), and cases cited therein.

[57] Pfizer, Inc. v. India, 434 U.S. 308, 319-20 (1978).

[58] Id. at 319. "To deny [the foreign state] this privilege would manifest a want of comity and friendly feeling." Id. at 319 (quoting The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1871)).

Act.[59] At least part of the blame for the confusion belongs to the drafters of the statute.[60] Clearly the congressional intent was to incorporate minimum constitutional norms into the statute itself by requiring each action against a foreign state to satisfy defined criteria of a nexus between the forum, the defendant, and the claim sufficient to satisfy the due process standards of the *International Shoe* line of cases.[61] But the drafters dealt with the nexus criteria somewhat ambiguously, leaving room for an arguable disjunction between the statutory criteria and the constitutional standard under *International Shoe*.[62] Accordingly, a line of cases has evolved under which the "statutory" and the "constitutional" criteria have been evaluated separately, although the outcome under each has been the same.[63] The possibility of a case that would satisfy the "statutory" criteria but run afoul of the "constitutional" ones seems farfetched.[64]

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[59] 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982).

[60] See Smit, The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery, 1980 Proc. Am. Soc'y Int'l L. 49. One perplexed court referred to the Act as a "remarkably obtuse" document and a "statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary." Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107 (5th Cir. 1985). Another judge termed it "a peculiarly twisted exercise in statutory draftsmanship." Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part).

[61] See, e.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (reasonable anticipation of suit in forum state).

[62] The problem that courts have grappled with derives in part from the Act's linking subject matter jurisdiction, see 28 U.S.C § 1330(a) (1982), with personal jurisdiction, see 28 U.S.C § 1330(b); Smit supra note 60. Moreover, passages in the legislative history seem to confuse international law standards for the extraterritorial reach of jurisdiction with constitutional standards for the exercise of long-arm jurisdiction over the defendant's person. See Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 n.9 (5th Cir. 1985); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). Criteria for the exercise of subject matter jurisdiction or the prescription of substantive standards include whether commercial conduct outside the United States forum "causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2) (1982). On the other hand, the criteria for the exercise of personal jurisdiction and constitutional concepts of fairness focus on whether the defendant could reasonably have expected to be sued in the United States. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). Despite the analytical differences between these sets of criteria, they do not necessarily produce a difference in result.

[63] The leading case on this point is *Texas Trading*. Its bifurcated analysis of which has been followed in a number of cases. See, e.g., Wyle v. Bank Melli of Tehran, 577 F. Supp. 1148, 1155 n.3 (N.D. Cal 1983) (noting that separate consideration of the two sets of criteria is analytically helpful even though the "same result is reached in the end").

[64] See Note, Foreign Sovereign Immunities Act—The Second Circuit Construes the Act's

Even if the statute and its legislative history had been silent on whether to apply due process norms, it is reasonable to expect that the courts would have done so of their own accord. Just as the courts allow foreign states the full range of procedural protections in courtroom proceedings,[65] courts can be expected to use familiar guideposts of fairness in determining whether to exercise jurisdiction at all. Whether or not the reasoning is couched in phrases resounding of the Constitution,[66] it is unlikely that the judiciary would on its own initiative transgress the limits applicable in comparable cases involving private parties.

But suppose the political branches expressly direct the courts to dispose of cases involving foreign sovereigns in a manner inconsistent with constitutional norms. The Iranian crisis of 1979-81 could have provided a plausible scenario for such a directive from the political branches; the crisis also suggests sound reasons why it would be improper to assume that foreign sovereigns have constitutional rights from which Congress may not derogate. The hostage crisis coincided with mounting claims by American companies against the Islamic Republic of Iran involving uncompensated expropriations, breaches of contract, and repudiation of valid debts.[67]

Provisions and Considers the Constitutional Limitations upon Its Application, 13 J. Mar. L. & Com. 105, 110 (1981) (any future case meeting tests under Act but not satisfying minimum contacts standard required by due process "would be based on a particularly unusual set of circumstances").

[65] See Restatement (Revised) of Foreign Relations Law of the United States § 721 comment *l* (Tent. Draft No. 6; Vol. 1 1985). The *Texas Trading* court noted that due process analysis had been applied to suits against foreign states even prior to the Foreign Sovereign Immunities Act. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982) (citing Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103, 110 (2d Cir. 1966), cert. denied, 385 U.S. 931 (1966), and Purdy Co. v. Argentina, 333 F.2d 95, 98 (7th Cir. 1964)).

[66] An alternative to constitutional or statutory reasoning is to handle cases with few links to the United States on the basis of the doctrine of forum non conveniens. This approach has been followed or suggested in various cases against foreign state defendants. See Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205, 209 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part); Transamerican S.S. Corp. v. Somali Democratic Republic, 590 F. Supp. 968, 977-78 (D.D.C. 1984); Gibbons v. Udaras Na Gaeltachta, 549 F. Supp. 1094, 1118-23 (S.D.N.Y. 1982).

[67] More than 400 suits against Iran were pending in federal courts by the end of the period. See Hertz, The Hostage Crisis and Domestic Litigation: An Overview, *in* The Iran-United States Claims Tribunal 1981-83 at 136, 140 (R. Lillich ed. 1984).

Typical cases involved contracts to construct public works in Iran, with all elements of performance occurring in Iran and the only link to the United States being the nationality of the plaintiff.[68] Under traditional "minimum contacts" criteria, Iran might have been able to obtain dismissal of many such cases[69] and the claimants would have been remitted to the empty remedy of the courts of Iran. An important objective of the United States in resolving the crisis was to provide for the eventual satisfaction of United States claims against Iran, not only for the sake of the claimants but also as a pressure point with Iran in attempting to achieve the release of the hostages. The relationship between the claims against Iran and the release of the hostages was made explicit in several presidential orders,[70] including one that instructed executive branch lawyers to begin preparation of contingency legislation to use the blocked Iranian assets to satisfy the claims against Iran.[71]

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[68] Such contracts frequently provided that they were to be governed by Iranian law with any resulting disputes to be resolved by courts or arbitral bodies in Iran. For a discussion of contract clauses designating Iranian law or an Iranian forum, see Stein, Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal, 78 Am. J. Int'l L. 1 (1984).

[69] The "minimum contacts" standard is not satisfied when the only link to the United States forum is the nationality or residence of the plaintiff. See, e.g., Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1253-55 (9th Cir. 1980) (plaintiff's California residence could not supply basis for jurisdiction over foreign state instrumentality that had not had requisite minimum contacts with California forum); Walker v. Newgent, 583 F.2d 163, 168 (5th Cir. 1978) ("unilateral activity by the plaintiff cannot produce the minimum contacts necessary to satisfy due process" in case brought by Texas resident involving activity occurring wholly in Germany (quoting Great W. United Corp. v. Kidwell, 577 F.2d 1256, 1268 (5th Cir. 1978), rev'd on other grounds sub. nom. Leroy v. Great W. United Corp., 443 U.S. 173 (1979))), cert. denied, 441 U.S. 906 (1979).

[70] See Exec. Order No. 12,170, supra note 5. The accompanying report to Congress, Blocking Iranian Government Property, 15 Weekly Comp. Pres. Docs. 2118 (Nov. 14, 1979), referred to Iran's threat to repudiate lawful claims owed to Americans as one justification for blocking what was then estimated to be about $8 billion in Iranian assets subject to United States jurisdiction. As noted supra note 5, the actual amount was closer to $12 billion. See Exec. Order No. 12,205, 3 C.F.R. § 248 (1981); Exec. Order No. 12,211, 3 C.F.R. § 253 (1981), *reprinted in* 50 U.S.C. § 1701 note (1982)).

[71] President Carter announced in 1980 that he would ask Congress for discretionary authority to pay reparations to the hostages and to their families out of the more than $8 billion in frozen Iranian assets in the United States. These assets would have been available to satisfy contract and other commercial claims of United States firms against Iranian government entities and to reimburse claims of the United States for military and other costs incurred because of Iran's actions. The President's News Conference on the Situation in Iran, 16 Weekly Comp. Pres. Docs. 704, 705 (April 17, 1980).

Legislation for a comprehensive claims program under the federal judiciary would have had to take into account the likelihood that many of the claims would be dismissed under the *International Shoe* criteria. A possible solution would have been to amend the Foreign Sovereign Immunities Act to eliminate both the defense of sovereign immunity and the nexus criteria, and to confer a clear mandate on the courts to decide on the merits any case between a United States national and an Iranian state entity, without regard to whether the transaction in dispute involved "minimum contacts" with the United States. With amounts in the billions of dollars at stake, Iran would doubtless have challenged such a federal court claims program as a deprivation of due process.

Negotiations between the United States and Iran eventually resulted in accords that established an arbitral mechanism and terminated the federal court litigation against Iran.[72] The illustration suggests, however, that situations may arise in which the President and Congress might determine that a deviation from otherwise applicable standards would be desirable, or even critical, to United States national security and foreign policy, as well as in accord with the interests of all affected United States parties.[73]

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[72] The settlement agreements with Iran are collectively referred to as the Algiers Accords, *reprinted in* 20 Int'l Legal Materials 223 (1981). General Principle B of the first of the declarations constituting the Accords provides for termination of all legal proceedings in United States courts involving claims against Iran and its state enterprises and the settlement of such claims by binding arbitration. 20 Int'l Legal Materials at 224. Accordingly, the contingency planning for a judicially administered claims program was superseded and the expansion of the jurisdiction of the federal courts was not needed.

[73] The position of the petitioners in Dames & Moore v. Regan, 453 U.S. 654 (1981), is indicative of the claimants' strong preference for United States federal remedies over those of any other forum.

A different constitutional problem would arise if the issue were not a due process "right" of the defendant but a nonwaivable objection to the subject matter jurisdiction of the federal courts under article III, § 2 of the Constitution. An article III court would presumably refuse, sua sponte, to exercise a purported grant of jurisdiction going beyond the limits of article III, whether or not the foreign state had an interest in the constitutional issue. But such an issue is not likely to arise, since the Supreme Court has taken an expansive approach to the interpretation of article III in a case implicating the federal interest in the rules of decision in suits against foreign states. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

3. Foreign States as Claimants to Treaty-Based or Customary International Law Rights

The United States has drawn on its constitutional values as a source of objectives for the progressive development of international law. Many treaties to which the United States is a party contain provisions similar to constitutional standards. Examples are found in the treaties of friendship, commerce, and navigation that are in force with many allies and trading partners.[74] The United States position on expropriation embodied in the standard clauses in these treaties[75] reflects fifth amendment jurisprudence in the principles that a taking of property must be for a public purpose[76] and must be accompanied by the payment of just compensation.[77] The same treaties also provide safeguards for rights generally corresponding to provisions in the Bill of Rights.[78] Even in the absence of a formal treaty, the United States approach is to insist that customary international law requires adherence to comparable minimum standards.[79]

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[74] See Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 Minn. L. Rev. 805, 823 (1958).

[75] A typical expropriation provision from such a treaty reads in part: "Property of nationals and companies of either Party shall not he taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation." Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, art. vi, 12 U.S.T. 110, 113, T.I.A.S. No. 4683, at 4 [hereinafter Pakistan treaty]. Most such treaties continue with more specific provisions to give content to the "just compensation" standard, including that such compensation "shall he in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision sball have been made at or prior to the time of taking for the determination and payment thereof." Id.

[76] Compare Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (government does not itself have to use the property taken to legitimate the taking) with Restatement (Revised) of the Foreign Relations Law of the United States § 712 comment (e) and reporter's note 4 (Tent. Draft No. 7 1986) ("public purpose" requirement under domestic and international law).

[77] On the "just compensation" requirement in international law, see Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); Clagett, The Expropriation Issue Before the Iran-United States Claims Tribnnal: Is "Just Compensation" Required by International Law or Not?, 16 Law Pol'y Int'l Bus. 813 (1984); Editorial Comment, Compensation for Expropriation, 78 Am. J. Int'l L. 121 (1984).

[78] Typical provisions, again from the Pakistan treaty, supra note 75, include clauses aimed at ensuring equitable and nondiscriminatory treatment similar to the equal protection clause for nationals of either party in the territory of the other, clauses on access to courts and other tribunals similar to the rights of petition and due process, clauses on security and protection of persons and property similar to the fourth and fifth amendments, and provisions for free expression and free exercise of religion by nationals of each party in the other's territory similar to the first amendment. See Pakistan Treaty, supra note 75, arts. i-iii, v-xii, 12 U.S.T. at 111-16, T.I.A.S. No. 4683, at 2-7.

[79] For the United States position that customary international law requires "just," de-

The overlap among the standards prescribed under treaties, customary international law, and the Constitution fosters confusion about the jurisprudential foundations for claims of right made by foreign parties. Where a treaty is in force, it supplies the clearest basis for the claim. Yet even without a treaty United States courts have generally given effect to the substantively similar customary or constitutional norm and have rejected the position that entitlement to the right should be conditioned on a showing that the foreign state affords United States interests reciprocal treatment.[80] At least with regard to foreign individuals and foreign corporations, the twentieth-century cases take the approach of affirming the right to compensation for property appropriated by the United States government,[81] the right of access to United States courts,[82] and other comparable rights, regardless of the existence of a treaty or other assurance of reciprocity.[83] The principle seems to be that in the absence of any contrary indication from the political branches, the courts will follow constitutional concepts and will consider reciprocity unnecessary and possibly counterproductive.[84]

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fined as "prompt, adequate and effective," compensation, see authorities cited supra note 77. On the protection under customary international law of personal rights, see Restatement (Revised) of the Foreign Relations Law of the United States §§ 701-703, 711 (Tent. Draft No. 6; vol. 1 1985).

[80] See, e.g., Russian Volunteer Fleet v. United States, 282 U.S. 481, 491-92 (1931).

[81] See *Russian Volunteer Fleet*; Swiss Confederation v. United States, 70 F. Supp. 235 (Ct. Cl.), cert. denied, 332 U.S. 815 (1947).

[82] See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411-12 (1964); cf. Pfizer, Inc. v. India, 434 U.S. 308, 318-20 (1978) (foreign nation can sue on same basis as domestic plaintiff). Congress partially overruled *Pfizer* by legislation limiting foreign states to single rather than treble damages, see supra note 38, but did not take the more drastic approach of denying foreign states all access to United States courts on antitrust claims.

[83] But cf. Hilton v. Guyot, 159 U.S. 113, 227-28 (1895) (doctrine of reciprocity applied to enforcement of foreign judgments). *Hilton* was given a limited reading by *Sabbatino*, 376 U.S. at 411-12, and most courts in the United States will now enforce foreign judgments without proof of reciprocity. See Restatement (Revised) of the Foreign Relations Law of the United States § 491 reporter's note 1 (Tent. Draft No. 4 1983) (§ 481 in Tent. Final Draft 1985).

[84] In responding to *Pfizer*, Congress did not require proof of reciprocity. Witnesses from the executive branch and the private sector testified persuasively that a judicial inquiry into whether a foreign state offered a reciprocal antitrust remedy would undermine antitrust enforcement, cause foreign relations frictions, and saddle the courts with burdens that they would be ill-equipped to handle. See H.R. Rep. No. 476, 97th Cong., 2d Sess. 7-12 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 3495, 3501-06.

There is no reason to read these cases as limiting the flexibility of the political branches should they decide to require that a foreign state adhere to minimum or reciprocal standards in order to receive favorable treatment under United States law. As examples of such decisions, Congress has insisted upon payment of prompt, adequate, and effective compensation for expropriated property as a test of foreign states' eligibility under foreign aid programs and trade legislation and has delegated to the President a wide range of powers to induce foreign states to comply with these standards, including the power to block the assets of the foreign state or its nationals until the issue is resolved.[85] When the intention and objectives of the political branches unambiguously require denial of favorable treatment to a foreign state, the courts should and do implement that policy.[86]

Where the political branches have taken no position, or where a statute, treaty, or customary rule overlaps with the constitutional norms, the courts have rightly taken the approach of looking to constitutional standards in cases involving the interests of foreign states. In so doing, they have developed a body of federal law that draws inspiration from the Constitution but is not constitutionally compelled.[87]

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[85] See, e.g., 19 U.S.C. § 2462(b)(4) (1982) (denying access to duty-free treatment program to developing countries that have expropriated United States property without taking steps toward the payment of prompt, adequate, and effective compensation); 22 U.S.C. § 2370(a)(2) (1982) (no statutory benefits to Cuba until it provides "equitable compensation" for expropriated property); 22 U.S.C. § 2370(e)(1) (requiring suspension of foreign assistance to any government that has failed to make "speedy compensation" for the "full value" of expropriated property); 50 U.S.C. §§ 1701-1706 (1982) (authorizing the President to continue exercising emergency economic powers even after the termination of the emergency if necessary on account of claims against a foreign country).

[86] After the Supreme Court's decision in *Sabbatino*, Congress changed the rule of decision with respect to the Court's application of the act of state doctrine. On remand, the courts gave effect to what has become known as the "Second Hickenlooper Amendment" or "Sabbatino Amendment," 22 U.S.C. § 2370(e)(2) (1982). When the Second Circuit considered the *Sabbatino* case following both the Supreme Court's remand and the subsequent enactment of the Sabbatino Amendment, it applied the rule of law set forth in the Amendment and found for the former owners of the expropriated property rather than for the Cuban instrumentality that had prevailed in the Supreme Court. See Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968).

[87] The reasons why this constitutionally inspired jurisprudence cannot serve as a basis for judicial nullification of congressional or presidential foreign affairs decisions are developed in Part II.C.

B. Protection of Foreign States Against Actions of State and Local Governments

Foreign states may appropriately turn to the courts to obtain judicial relief from unconstitutional intrusions by state and local governments. This position entails three analytically distinct points: the constitutionally based prohibition against state actions that interfere with relations between the United States and foreign states; the judicial role in enforcing this prohibition at the instance of litigants aggrieved by the state's actions, even without affirmative support from the political branches; and the consistency of a foreign state's suit against a state with article III of the Constitution. Each of these points is based on the structure established for handling foreign relations by the 1787 Constitution, not on the post-Civil War amendments or the incorporation of the Bill of Rights through the fourteenth amendment's due process clause.[88] There is thus no need to inquire whether a foreign state is a "person" within the meaning of the fourteenth amendment. The answers to the problems concerning the interaction between states and foreign states are found in the nature of the federal system and the relations of foreign states to the various elements of that system.

The restriction against states' infringing on the federal foreign affairs powers is firmly established in the history, structure, and text of the 1787 Constitution. It is beyond dispute that a key objective of the framers of the Constitution was to consolidate foreign relations authority in the newly constituted federal government.[89] The Constitution ensures a centralized and exclusive federal foreign affairs power both by conferring ample enumerated powers on Congress and the President and by specifying express limitations on the powers of the states. The affirmative grants to Congress of the power to regulate commerce with foreign nations[90] and to declare war,[91] and to the President of the powers to appoint

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[88] The Constitution prohibits the states from unduly burdening foreign states' commercial or property interests or discriminating against them without resort to the fourteenth amendment's due process and equal protection clauses. For comparable arguments in other areas concerning inferences from structure and relationship to limit state incursions even in the absence of the fourteenth amendment, see C. Black, supra note 20, at 12, 33-66.

[89] See L. Henkin, supra note 9, at 227-48.

[90] U.S. Const. art. I, § 8, cl. 3.

[91] Id. art. I, § 8, cl. 11; see also id. art. I, § 8, cls. 12-16 (maintenance and regulation of the

and receive ambassadors and other ministers,[92] to make treaties with the advice and consent of the Senate,[93] and to serve as the Commander in Chief of the armed forces,[94] might be sufficient of themselves to preempt any competing exercise of state power,[95] but, to remove any doubt, article I, section 10 explicitly prohibits the states from entering those spheres.[96]

Regardless of how one approaches the chronic competition between Congress[97] and the President[98] for primacy in foreign affairs, the states are not permitted to infringe upon the federal power.[99] Indeed, the cases establish that matters traditionally subject to state jurisdiction must yield not only to affirmative federal action but also to a dormant federal power. The idea of a dormant commerce power is familiar from nineteenth-century interstate commerce cases,[100] but the cases involving state impact on foreign nations go beyond the dormant interstate commerce power in several respects.

First, the Supreme Court has declared that state restraints on foreign commerce may well be subjected to a "more rigorous"[101] scrutiny than those affecting only interstate commerce because it

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armed forces and militia).

[92] Id. art. II, §§ 2, 3.

[93] Id. art. II, § 2, cl. 2.

[94] Id. art. II, § 2, cl. 1.

[95] See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-18 (1936).

[96] Under article I, section 10, "No state shall enter into any Treaty, Alliance, or Confederation . . . ." U.S. Const. art. I, § 10, cl. 1. Moreover, "No state shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: . . . and all such Laws shall be subject to the Revision and Control of Congress." Id. art. I, § 10, cl. 2. Also,

> No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Id. art. I, § 10, cl. 3.

[97] Both congressional and presidential powers are frequently described as "plenary." See, e.g., Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904) (Congress has plenary power with respect to the exclusion of merchandise brought from foreign countries).

[98] See, e.g., id.; *Curtiss-Wright*, 299 U.S. at 320 (mentioning "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.").

[99] See Hines v. Davidowitz, 312 U.S. 52, 62-68 (1941).

[100] See Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).

[101] South-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 96 (1984) (quoting Reeves, Inc. v. Stake, 447 U.S. 429, 438 n.9 (1980)).

is "crucial to the efficient execution of the Nation's foreign policy that 'the Federal Government . . . speak with one voice when regulating commercial relations with foreign governments.' "[102] This "more rigorous scrutiny" means exactly what the phrase suggests: a state measure affecting foreign commerce may be invalid even though a comparable measure affecting only domestic commerce would be valid.[103] Moreover, state infringements upon foreign relations are prohibited even though commerce as such is not involved. Thus in the field of inheritance, not normally considered within the commerce power or otherwise a matter of federal concern, the Supreme Court in *Zschernig v. Miller*[104] invalidated a state law that had been applied to deny an inheritance to a resident of a communist country. The Court held that the state's examination of the operation of the foreign country's laws governing inheritance and receipt of property constituted "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[105]

The judicial vindication of a dormant federal foreign relations power in *Zschernig* deserves special note, not only because Congress had been silent on the subject, but also because the Executive had declined to take the position that the state statute unduly hampered the federal conduct of foreign affairs.[106] The Court itself determined the likely foreign relations impact of the state scheme. Federal judicial involvement in policing state infringements on for-

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[102] Id. at 100 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)); see also Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448-50 (1979) (citing authorities for the proposition that, in foreign commerce, the need for uniformity may require greater scope for the negative implications of the commerce clause).

[103] In *Japan Line*, 441 U.S. at 444-54, the Supreme Court struck down the application of an ad valorem property tax on foreign-owned instrumentalities of international commerce, assuming but not deciding that the same tax would be upheld in a mere interstate context.

[104] 389 U.S. 429 (1968).

[105] 389 U.S. at 432 (1968). Professor Henkin notes that this case broke new constitutional ground and that its precedential value could not be predicted. See L. Henkin, supra note 9, at 238-41. Nonetheless, nothing in almost two decades of subsequent Supreme Court opinions casts doubt on the *Zschernig* approach.

[106] "The government does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." Zschernig v. Miller, 389 U.S. 429, 434 (1968) (quoting the brief for the United States as amicus curiae). For a discussion of the weight to be given to expressions of the executive branch's position on foreign policy matters, see infra text accompanying notes 242-45.

eign relations is consistent with the Supreme Court's emphasis on the "self-executing" nature of the Constitution's limitation on state powers.[107] The federal courts thus will intercede to protect the federal interest whether or not the political branches have taken a position on the issue.[108]

There is no doubt that the federal interest in such a controversy is sufficient to justify federal judicial jurisdiction over the foreign state's claim under article III.[109] To protect the federal interest, the federal courts may fashion substantive rules of decision to implement the constitutional restrictions on state action until the political branches definitively decide whether the state action conforms with federal foreign policy.[110] Because the prohibition on state interference is a substantive rule of federal law, it is binding on state judges under article VI's supremacy clause.

The only remaining question is whether the Constitution contemplates judicial enforcement of a limitation on state action in a suit brought by a foreign state in federal court. Article III gives the federal judiciary power over "Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . .

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[107] See South-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984). See also C. Black, Jr., supra note 20, at 75 (In policing the actions of the states for their conformity to federal constitutional guarantees, "the Court represents the whole nation, and therefore the whole nation's interest in seeing those guarantees prevail, in their spirit and in their entirety. The Court is in all practical effect the delegate of Congress to do this work.").

[108] Undoubtedly if Congress had permitted the state practice, the courts would have given effect to that expression of federal policy. See Wardair Canada, Inc. v. Florida Dep't of Revenue, 106 S. Ct. 2369 (1986) (federal acquiescence in state sales taxes on purchases of fuel used in international aviation found both in Federal Aviation Act and in pattern of international agreements). Where Congress has not acted but the President has, the Supreme Court has given effect to the President's foreign relations policy over contrary state laws. See United States v. Pink, 315 U.S. 203 (1942) (policy established in executive agreements prevails over state law); United States v. Belmont, 301 U.S. 324 (1937). Presumably an authoritative presidential endorsement of state law as consistent with federal foreigu policy would also be given effect. The brief for the United States in *Zschernig* apparently fell short of the type of action that the Supreme Court will treat as controlling in the area of foreign relations. See L. Henkin, supra note 9, at 239-41; infra text accompanying notes 237-45.

[109] Cf. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) (claim brought by alien against foreign state under Foreign Sovereign Immunities Act is within article III judicial power).

[110] See supra note 108; Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024 (1967); Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 10-11, 17 (1975).

under their Authority,"[111] and over "Controversies . . . between a State, or the Citizens thereof, and foreign States."[112] The grant of judicial power over constitutional and other federal questions provides a straightforward basis for suits to enforce the constitutional limitations on state infringements of foreign state interests.[113] Furthermore, a suit by a foreign state to abate or redress infringements of the sort prohibited to the states under the Constitution falls within the provision on suits between states or their citizens and foreign states, subject to the eleventh amendment,[114] which would not be applicable in a suit to restrain a state officer from unconstitutional action or a suit against a local government.[115]

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[111] U.S. Const. art. III, § 2, cl. 1; see also 28 U.S.C. § 1331 (1982) (statutory grant of federal jurisdiction over federal questions).

[112] U.S. Const. art. III, § 2, cl. 1; see also 28 U.S.C. §§ 1330-1332 (1982) (statutory grants of federal jurisdiction pursuant to this constitutional provision). With respect to federal jurisdiction under § 1330 in a suit brought by an alien against a foreign state, see Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

[113] There should be no difficulty in characterizing a claim of state intrusion on foreign relations as arising directly under the Constitution since the Constitution itself requires the states to refrain from such infringements. When a foreign state claims that a state's actual or threatened action would impermissibly interfere with relations between the United States and the foreign state, the forum jurisdiction (state or federal) will have to determine whether the effect on the foreign state's interest falls within the probibition. For example, a nondiscriminatory ruling against a foreign state in a petition for a zoning variance or a routine breach of contract case would raise no substantial constitutional question even if the foreign state claimed to be "offended" by the action. In contrast, a foreign state could challenge a state tax unduly burdening its commerce, an uncompensated confiscation of foreign state property, discriminatory treatment of the foreign state's interests, or politically motivated actions such as state efforts to prevent unpopular foreign states from engaging in the same kinds of activities in the state that are open to foreigners generally.

[114] The effect of the eleventh amendment in a case brought by a foreign state against a state was considered in Monaco v. Mississippi, 292 U.S. 313 (1934), a suit on defaulted state bonds. See infra text accompanying notes 158-60. The Court sustained the eleventh amendment defense, stating:

> We perceive no ground upon which it can be said that any waiver or consent by a State of the Union has run in favor of a foreign State. As to suits brought by a foreign State, we think that the States of the Union retain the same immunity that they enjoy with respect to suits by individuals whether citizens of the United States or citizens or subjects of a foreign State.

292 U.S. at 330. Some modern state statutes do waive state sovereign immunity as to certain kinds of claims, including those arising under the federal or state constitution. Such waivers should be construed to put foreign states in the same position as other claimants against the state.

[115] The eleventh amendment may be avoided in constitutional claims by bringing suit to enjoin the responsible state officer from unconstitutional action. See L. Tribe, American Constitutional Law 132-36 (1978); cf. Edelman v. Jordan, 415 U.S. 651 (1974) (distingnishing between prospective injunctive relief and remedy tantamount to award of damages).

Both of the article III grants presuppose the existence of a "case" or "controversy" between the foreign state and the state or local authorities. Under the doctrines that have evolved from the "case or controversy" requirement,[116] threshold objections could sometimes be raised to a foreign state's constitutional claim against a state,[117] but these objections may be overcome in cases where a foreign state's claim involves direct injury to its own interests. One objection might be that a foreign state lacks standing to enforce the Constitution's exclusion of the states from foreign relations because the intended beneficiary of the constitutional plan is the federal government rather than the foreign state. But this objection would equally apply to any suit involving the federal foreign commerce or foreign relations powers. The history of litigation involving both the commerce power and the foreign relations power demonstrates that lawsuits initiated by parties directly harmed by the state restraint are the most effective mechanism for protecting the public interest in intercourse with foreign nations unfettered by state restrictions.[118] Thus, although the United States could presumably sue to eliminate an unconstitutional state or local interference with relations between the United States and a foreign nation,[119] there is no reason to limit the remedy to suits

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This method has been followed in some of the leading cases on the exclusion of the states from foreign affairs. See, e.g., Hines v. Davidowitz, 312 U.S. 52 (1941) (affirming injunction granted by three-judge district court against operation of unconstitutional state statute). No eleventh amendment concerns arise where the state initiates the proceeding and the defendant resists on constitutional grounds. Eleventh amendment immunity does not extend to units of local government. See Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 279-81 (1977).

[116] See generally G. Gunther, Constitutional Law 1532-90 (11th ed. 1985) (discussing Supreme Court standing, mootness, and ripeness doctrines).

[117] This objection is most likely in a case involving a foreign state as plaintiff. Under current law a suit by a state against a foreign state is governed by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982), which, in addition to establishing a standard for the exercise of jurisdiction comparable to fifth amendment standards, discussed supra text accompanying notes 59-66, confers upon foreign states the right to invoke any defenses available to private parties, including constitutional defenses. See 28 U.S.C. § 1606.

[118] See, e.g., Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 450 (1979) (noting that if foreign nations were to retaliate for disadvantages placed on them by a single state, the United States as a whole would suffer).

[119] For a discussion of the authority of the United States to bring suit in its own name to vindicate a foreign relations or national security interest, see Memorandum for the Att'y General, Jan. 18, 1979, *reprinted in* 1979 Dig. U.S. Prac. Int'l Law 152; see also United States v. County of Arlington, 669 F.2d 925, 928-29 (4th Cir.) (upholding the authority of

by the United States. Such a limitation would inevitably result in a considerable number of state infringements going unchallenged, either because of lack of federal resources to litigate them or because of political considerations militating against bringing particular suits.[120] Such a limitation would be inconsistent with the teaching of *Zschernig* and other cases that have invalidated state restraints even in the absence of a determination from the political branches concerning the federal foreign relations interest. A concrete injury to the foreign state's interests, stemming from the sort of action that the Constitution prohibits to the states, is sufficient to satisfy article III's requirements of standing and adverseness.

Not every grievance of a foreign state will satisfy these requirements, however. A constitutional claim by a foreign state as parens patriae for its citizens would not necessarily pass muster under the "case or controversy" doctrine. In *Zschernig*[121] the claims were properly raised by the intended beneficiary of the estate, not by the offended foreign state. But examples of claims where the foreign state is directly injured are easy to envision. Foreign states can and do own property in the United States in their own right.[122] They may insist that state and local authorities observe all constitutional requirements with regard to taxation, zoning, eminent domain, or other exercises of governmental power. The same is true of actions affecting the commercial activities that foreign states carry on in the states. When state and local authorities discrimi-

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the United States to sue for a declaration of invalidity of a county tax on certain foreign state-owned property), cert. denied, 459 U.S. 801 (1982).

[120] Both resource limitations and domestic political considerations constrain the federal government from participation in much litigation that involves serious foreign relations concerns. For example, the executive branch declined to file an amicus curiae brief in Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983), an important case involving the constitutionality of the unitary tax (see supra notes 6-7). In an unfortunate passage, 463 U.S. at 195-96, the Supreme Court inferred from the absence of a federal amicus brief that the tax in question did not seriously threaten United States foreign policy interests. Subsequent amicus filings on behalf of the United States have attempted to repair the damage done by this mistaken inference. See, e.g., Brief for the United States as Amicus Curiae, Alcan Aluminum Ltd. v. Franchise Tax Bd., Civ. Act. No. 84-C-6932 (N.D. Ill. 1986), *reprinted in* 25 Int'l Legal Materials 683, 697, 701-02 (1986). For a discussion of the significance of executive statements or executive silence generally, see infra text accompanying notes 237-45.

[121] 389 U.S. 429 (1968).

[122] See, e.g., 22 U.S.C. § 4305 (Supp. III 1985) (property owned by foreign states for use as foreign missions).

nate against a foreign state for political or other reasons, the foreign state may have a valid claim to the extent that it suffers concrete injury from the adverse action, even though no economic or commercial interest is involved.

Recent events suggest possible applications of this approach. When a local government barred Soviet nationals affiliated with the United Nations from using public beaches,[123] or when the Port Authority of New York and New Jersey refused to permit the Soviet foreign minister to disembark at the New York area airports,[124] the Soviet Union suffered direct injury of a noneconomic character and could have sued to abate the objectionable conduct. On some such claims a treaty or other international obligation may provide one basis for the cause of action, but even where there is no applicable international agreement, the foreign state may challenge the state's unconstitutional interference with the federal foreign relations power.

The posture of South Africa with respect to current state and local divestment legislation is more complex.[125] State and local actions against South Africa are difficult to reconcile with the approach of *Zschernig*,[126] although prohibitions on investment in light of the possibilities of a breakdown of public order or suspension of normal economic relations are probably valid, in light of the state's interest in protecting the integrity of its own investments.[127] State actions in support of a federal foreign relations strategy would also be presumptively valid. On the other hand, state and local actions lacking such a purpose might be constitutionally troublesome, although South Africa may lack standing to bring suit. For example, a state prohibition on investment of pension funds in American companies doing business with South Africa might be intended to have either a symbolic political impact or an indirect effect on South Africa's financial interests. In a suit by

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[123] See N.Y. Times, Aug. 26, 1983, at A1, col. 1.

[124] See Recent Development, Acts by State Governments Affecting Foreign Relations, 25 Harv. Int'l L.J. 200 (1984).

[125] For a discussion of the constitutionality of state and local actions directed against South Africa, see Note, State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs, 72 Va. L. Rev. 813 (1986).

[126] The Illinois Supreme Court relied on Zschernig v. Miller, 389 U.S. 429 (1968), in striking down a state tax statute which singled out South Africa for unfavorable treatment. See Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 503 N.E.2d 300 (1986).

[127] Examples of such restrictions are given in Note, supra note 125, at 823-24.

South Africa, however, the actual effects would not satisfy article III requirements, because no court could determine whether the American companies would actually continue to invest there.[128]

The next Section develops the position that foreign states cannot succeed on claims that acts of the political branches violate the Constitution. This position is fully compatible with foreign states' ability to challenge actions of state and local authorities. The different results reflect the Constitution's distribution of foreign relations authority among the branches of the federal government and between the federal and state levels. An unambiguous action by the political branches could validate state actions, but until the political branches act, the federal courts may appropriately develop constitutionally based federal law to protect foreign states from discriminatory or burdensome actions by the states. When the political branches have spoken in a manner affecting foreign states, courts must accept that position as definitive.

C. *Foreign States, The Political Branches, and the Courts: The Constitutional Design for Foreign Relations*

The thesis that courts should not hold unconstitutional any action of the political branches at the instance of foreign sovereigns involves inquiries into the constitutional structure for decisionmaking affecting foreign affairs and the relationship of foreign states to that structure. Three power centers exist in such a foreign policy confrontation: the federal political branches taken as a unity,[129] the federal judiciary, and the foreign state.[130] After a review of the roles of the political branches and the courts in the area of foreign policy, this Section shows why foreign states are in a qualitatively different position from other constitutional claimants. The Section then returns to the problem of judicial review at

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[128] Cf. Warth v. Seldin, 422 U.S. 490, 502-08 (1975) (plaintiffs lacked standing in absence of specific allegations to show personal benefit from judicial intervention).

[129] Questions concerning conflicts between these two branches or actions attempted by one without the concurrence of the other are reserved until Section III.B. See infra text accompanying note 245.

[130] Also reserved are questions concerning applicability of the thesis to corporate and individual persons who represent the foreign state in the United States. See infra text accompanying notes 246-302. For the present, the thesis will be developed with respect to foreign states in the pure sense: sovereign subjects of international law that are conceptually coequal with the United States.

the instance of foreign states to illustrate why certain concrete constitutional claims should fail on the merits, even if a United States citizen or other potential claimant might succeed on a comparable claim.

1. The Foreign Affairs Power and the Courts

The Supreme Court typically characterizes the foreign affairs power of the federal political branches as "plenary."[131] While the distribution of the power between Congress and the President may be uncertain or disputed, there can be no dispute that the federal power reaches every aspect of United States relations with foreign states.[132] Any subject matter that touches a foreign state's interests in the United States, United States interests in a foreign country, or the interrelationship between the United States and a foreign state in the broader international community is a proper subject for action by the federal political branches under the foreign affairs power.[133]

The counterpart to the Supreme Court's definitive establishment of plenary foreign affairs powers in the political branches is its sharp limitation of the federal judicial role in the same sphere. In a well-known passage, Justice Jackson set forth the reasons for judicial self-restraint in the foreign affairs area:

> It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret . . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly re-

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[131] See cases cited supra notes 97-99.

[132] See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

[133] It has been settled since Missouri v. Holland, 252 U.S. 416, 432-35 (1920), that the foreign affairs power allows the federal government to regulate by treaty even with respect to subjects that traditionally fall within state jurisdiction. Any matters of "international concern" fall indisputably within this federal power. Cf. L. Henkin, supra note 9, at 151-56 (questioning what matters would *not* be of "international concern"). In any event, a matter that involves a foreign state in litigation in United States courts is surely a matter of "international," and thus federal, concern. *Verlinden*, 461 U.S. at 493. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-22 (1936) is indicative of the reach of the power, at least when Congress and the President act in concert.

> sponsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[134]

Although the context of this passage was statutory judicial review of agency action rather than constitutional review of presidential action, the passage has frequently been cited as expressing concepts of constitutional dimension.[135] The judicial reluctance to become involved in essentially political foreign relations matters is consistent with the repeated emphasis, in cases concerning allocation of constitutional powers, on the need for the nation to "speak with one voice" with respect to foreign nations.[136] Just as the Supreme Court does not permit cacophony from the states, it will not allow the federal judicial branch to become a discordant instrument. Accordingly, the Supreme Court has considered matters concerning foreign relations to be "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[137]

Of course, "largely immune" implies that the area is not entirely immune from judicial cognizance. In the familiar words of *Baker v. Carr*,[138] "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[139] Although *Baker*'s examples of appropriate cases for judicial action in the foreign affairs area stopped short of suggesting that the courts could nullify congressional or presidential foreign policy,[140] there is undoubtedly a residual category of cases in which courts will assert

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[134] Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

[135] See, e.g., Harisiades v. Shaughnessy, 342 U.S. 580, 589 n.16 (1952). The quoted passage draws heavily on *Curtiss-Wright*, which rejected a constitutional challenge to presidential action pursuant to delegated authority.

[136] The notion of the President as that sole voice is repeatedly confirmed, usually by reference to John Marshall's statement in the House of Representatives: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800); see also *Curtiss-Wright*, 299 U.S. at 319 (quoting Marshall statement).

[137] *Harisiades*, 342 U.S. at 589.

[138] 369 U.S. 186 (1962).

[139] Id. at 211.

[140] *Baker* reviewed a series of foreign affairs cases in which the Court either had acted in the absence of a controlling legislative or executive act, or had determined the consequences flowing from such an act. Id. at 211-14.

constitutional limitations against certain kinds of political actions with foreign policy significance. The claim of a national defense emergency did not immunize President Truman's steel mill seizure from judicial review,[141] nor would the Court allow a prior restraint on publication to escape first amendment scrutiny simply because of a political branch's determination of national security or foreign relations need.[142] The twin concepts that all exercise of government authority is subordinate to the Constitution[143] and that the Supreme Court is the authoritative interpreter of that Constitution[144] are too firmly established to allow complete insulation of the political branches' foreign affairs actions from judicial review, especially when the political branches' action directly affects United States citizens.[145] Defining the category of cases in which the courts may properly block congressional or executive foreign affairs decisions will remain one of the most intriguing problems in the constitutional law of foreign relations.

It is not necessary to elaborate a general theory of judicial review in foreign affairs cases in order to answer the question whether foreign states can succeed on constitutional claims against the action of the political branches. My position is that they cannot. In addition to the usual reluctance of courts to intrude into matters of foreign policy, there are special considerations inherent in the nature of foreign sovereignty and the relationship of foreign sovereigns to the constitutional structure that foreclose the possibility

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[141] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[142] See New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). In *New York Times*, the fact that Congress had not provided for the prior restraint was critical to some justices, see id. at 727-48 (Stewart, White, and Marshall, J.J., concurring), but others would have invalidated even a congressionally authorized restraint on constitutional grounds. See id. at 714-24 (Black and Douglas, J.J., concurring).

[143] Speaking of the treaty power, Justice Field said: "It would not be contended that it extends so far as to authorize what the Constitution forbids." Geofroy v. Riggs, 133 U.S. 258, 267 (1890). Justice Black in Reid v. Covert, 354 U.S. 1, 17 (1957), confirmed in his plurality opinion: "The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." See also L. Henkin, supra note 9, 251-70 (discussing the treaty power and constitutional limitations).

[144] See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); Cooper v. Aaron, 358 U.S. 1 (1958).

[145] See L. Henkin, supra note 9, at 208, 447 n.16 (examples of federal foreign affairs actions struck down as violations of individual rights in the areas of jury trial, denationalization, and travel control).

of judicial review in favor of foreign states. The following questions are essential in understanding the reasons why foreign states' constitutional challenges to foreign policy decisions taken by the federal political branches must fail:

> What is a foreign state and how does it differ from other potential constitutional claimants?
> What is the political relationship of a foreign state to the United States body politic and how does it interact with the political branches of the United States government?

2. *Foreign States and Their Relationship to the United States Political Community*

On one level, foreign states possess many of the legal attributes of other "persons" that have been held entitled to constitutional protections. Foreign states can sue[146] and be sued,[147] hold property,[148] enter into contracts,[149] and engage in other activities suggestive of juridical personality. But these juristic attributes are not dispositive of the constitutional issue. Qualitative differences between foreign states and other juridical persons put foreign sovereigns in a fundamentally different constitutional position.

Foreign states exist with the United States as coequal sovereigns on the international plane. International law recognizes the juridical equality of each member of the international community,[150]

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[146] See, e.g., Colombia v. Cauza Co., 190 U.S. 524 (1903); see also cases cited supra note 21.

[147] Suits against foreign states may proceed only to the extent that the foreign state is not immune pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982).

[148] See supra note 122.

[149] Cases involving foreign state contracts are numerous. See, e.g., Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). Congressional recognition of the contracting capacity of foreign states is most evident in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982).

[150] See U.N. Charter art. 2, para. 1 ("sovereign equality"); Convention on Rights and Duties of States, Dec. 26, 1933, art. 4, 49 Stat. 3097, T.I.A.S. No. 881, 165 L.N.T.S. 19; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc A/8082 (1970) [hereinafter Friendly Relations Declaration] ("All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature . . . . States are juridically equal.").

and establishes for all states a series of rights and duties flowing from this principle. States have the right to choose and develop their own economic, social, and cultural systems and the duty not to interfere with the exercise of that right by any other state.[151] Each state is left free to determine its own internal political organization through whatever constitutional or other vehicles are appropriate to its own circumstances. Under these basic international law concepts, foreign states lack any legal interest in whether another state has a constitution, what it says, or whether constitutional provisions are applied according to their terms. The most a foreign state can demand is that other states observe *international* law, not that they enforce provisions of domestic law.[152]

The fact that foreign states have no right in international law to enforce the provisions of another state's domestic constitution does not necessarily foreclose the possibility that the Constitution itself confers such a right. To answer the question as a matter of United States domestic law, one must look to sources of constitutional interpretation. The answer cannot be found either in semantic analysis of the constitutional text or in a quest for the "intent of the framers" on an issue they never considered.[153] Rather, the method of inference from structure and relationship[154] leads in productive directions for the present inquiry, as for other problems in the constitutional law of foreign affairs. An exploration of the relationship of foreign states to the United States polity confirms the tentative conclusion derived from international law that foreign states have

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[151] See the principles of the Friendly Relations Declaration, supra note 150, entitled "The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;" "The principle of equal rights and self-determination of peoples;" and "The principle of sovereign equality of States." In a separate work in progress, I am exploring the applicability of these principles to transnational political activity.

[152] In some cases a governing rule of international law may refer to domestic law. For example, if a treaty or customary international law rule requires State A to accord to State B's nationals treatment in legal proceedings no less favorable than State A grants to its own nationals, then State B has grounds for protest if State A does not comply with the provisions of its own law that define the minimum standard of treatment. Or a treaty may require that the parties adopt specific domestic legislation to implement it. But in general, if the international law rule itself sets the standard, then the concern of each state is whether other states' conduct meets the standard, not how it goes about achieving that result through its domestic processes.

[153] See supra text accompanying notes 12-20, 88.

[154] See supra note 20.

no legal interest in the enforcement of the Constitution.

From Chief Justice Marshall's day onward, the recognition that foreign states and the United States interact as juridical equals on the level of international law and diplomacy outside the constitutional system, with rights and duties on the international plane not deriving from the Constitution, has shaped the Supreme Court's approach to various problems of domestic law. In a landmark opinion that served for a century and a half as the source for the rule of immunity of foreign states from the jurisdiction of United States courts,[155] Chief Justice Marshall referred to the "perfect equality and absolute independence of sovereigns" as logically linked to the principles that one sovereign is "in no respect amenable to another," and that each one enjoys "full and absolute territorial jurisdiction" except to the extent that "the unanimous consent of nations" has given rise to an international practice of allowing foreign sovereigns certain implied exemptions from the territorial state's jurisdiction.[156] This approach places the legal relationship between the United States and foreign sovereigns squarely on the plane of international diplomacy, even when the foreign sovereign acts within United States territory.[157] For so long as Chief Justice Marshall's conception that one sovereign "is in no respect amenable" to another's jurisdiction retained its dominant position, it would have been inconceivable for foreign states to

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[155] See Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812), which established the immunity of a foreign state's public vessels in United States territory. In Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926), the Supreme Court extended the doctrine of *Schooner Exchange* to apply absolute immunity to government-owned merchant ships engaged in private trade. Beginning with the 1952 Tate Letter, supra note 48, the executive branch moved to a policy of restrictive rather than absolute immunity, and with the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1 note, 1330, 1332, 1391, 1441, 1602-1611 (1982), the restrictive approach was codified. It is significant that the shift originated with the executive branch for policy reasons in 1952 and that the courts unhesitatingly adopted the Executive's new position.

[156] *Schooner Exchange*, 11 U.S. at 136-38.

[157] See id. at 146 (giving "great weight" to the general inability of the judicial power to enforce its decisions in cases of this description because "the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion."); see also Ex parte Peru, 318 U.S. 578, 588-89 (1943) (stressing "the policy, recognized both by the Department of State and the courts, that our national interest will be better served . . . if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.").

claim entrenched rights under a constitutional law to which they were in no way subject.

A century later, the Supreme Court attributed great significance to the fact that "the foreign state lies outside the structure of the Union" in rejecting a foreign state's claim concerning the relationship between article III and the eleventh amendment in a suit against a state involving defaulted state bonds.[158] The foreign state claimed that its suit fell within article III's grant of federal judicial power over cases "between a State . . . and foreign states, Citizens or subjects," and that this grant was not affected by the eleventh amendment, which by its terms limits the federal judicial power only with respect to suits by "Citizens of another State, or by Citizens or Subjects of any Foreign State." The foreign state argned that its suit should be treated in the same manner as a suit by the United States or one of the states, to which the defendant state would not enjoy eleventh amendment immunity. Yet the Supreme Court was not willing to construe the textual discrepancy between article III and the eleventh amendment in the foreign state's favor. Rather, it accorded dispositive significance to the structural consideration that foreign states, unlike the United States or the several states, have not "accept[ed] the constitutional plan."[159] The proper method for resolving the foreign state's grievance, according to the Court, was not through a suit against a state, which like the foreign state enjoys sovereign immunity, but rather for the foreign state and the federal government "to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement of arbitration, or otherwise."[160]

The view that foreign states are outsiders to the constitutional compact is not just a metaphor or an abstraction but a functional reality. Foreign states have undertaken no general obligation to abide by the constitutional norms to which the federal government and the several states are subject, nor are there any effective means to place them on a parity with the United States or the states for purposes of enforcement of particular norms.[161] In this

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[158] See Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[159] Id.

[160] Id. at 331.

[161] See infra text accompanying notes 170-71, 184-207, for a discussion of political means

respect their relationship to the United States polity is quite different from that of aliens in United States territory, who, although they do not vote, can be compelled to comply with United States law and who enjoy a considerable measure of constitutional protection.[162]

Another theme in understanding the legal relationship of foreign states to the United States is the absolute deference that the courts have shown to the federal political branches in the determination whether a particular foreign entity is a "state" and whether a government that purports to represent it can act on its behalf here. United States courts will not take cognizance of a foreign state here unless the Executive recognizes it,[163] and the prerogative to grant or decline recognition is constitutionally committed to the Executive's exclusive, nonreviewable discretion.[164] Presidential power extends not only to the fact of recognition but to policy decisions attendant upon recognition, such as the settlement of claims against the state being recognized.[165] Furthermore, the Executive's decisions concerning which of two competing govern-

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of influencing foreign states' behavior, including economic sanctions. A trenchant illustration of the irony of efforts to "constitutionalize" what are essentially nonlegal power relationships may be found in the anecdote told of General Washington's reaction to a proposal at the Constitutional Convention to place a limit on the size of the United States' standing armed forces. Washington purportedly suggested satirically that we should likewise put a provision in the Constitution prohibiting foreign powers from invading the United States with more than that number. See C. Warren, The Making of the Constitution 483 (1937).

[162] In contrast to the immunity that foreign states enjoy for most noncommercial acts, aliens have no immunity from enforcement of United States law. For a description of the constitutional rights of aliens in the United States, see infra text accompanying notes 292-99.

I concur with Professor Black's assessment of the political status of aliens lawfully present in the United States:

> The decision by Congress that an alien may live here is an acceptance of a political relationship with him. It is our traditional expectation that aliens may one day be voters. They are our eyes to the rest of the world. Their discontents have been a subject of active federal interest. They are counted in the enumeration for apportioning representatives in Congress. The state of opinion among them is a part of that political life with which the nation deals.

C. Black, Jr., Perspectives in Constitutional Law 92 (1970); see also C. Black, Jr., supra note 20, at 50 (1969) (lawful aliens are a part of the United States polity). I would go further and acknowledge a political relationship, for at least some purposes, with aliens *illegally* present in United States territory, for many of the same reasons Professor Black cites.

[163] See supra text accompanying notes 54-57.

[164] See supra note 54.

[165] See United States v. Pink, 315 U.S. 203, 227-30 (1942); United States v. Belmont, 301 U.S. 324, 328-33 (1937).

ments has legal control over foreign territory[166] or which is entitled to exercise dominion over foreign state property located in the United States[167] are conclusive on the courts. The courts' acceptance that all of these important policy decisions are constitutionally committed to the political branches[168]—including the decision whether a foreign state can bring suit here even on the most trivial cause of action, let alone on a constitutional claim[169]—illustrates the unique status of foreign states in relation to the constitutional system.

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[166] See Jones v. United States, 137 U.S. 202, 212 (1890); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839).

[167] See, e.g., Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938); Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438, 441-44 (2d Cir. 1940); Bank of China v. Wells Fargo Bank, 104 F. Supp. 59 (N.D. Cal. 1952), modified, 209 F.2d 467 (9th Cir. 1953).

[168] The discussion in the text stresses presidential power because most of the cases have arisen in that context. Comparable deference would be accorded to decisions taken by Congress pursuant to its constitutional foreign affairs powers. For example, there is no doubt of the constitutionality of the provisions of the Taiwan Relations Act, 22 U.S.C. §§ 3301-3316 (1982), in which Congress (with the support of the executive branch) resolved the problem of the juridical capacity of Taiwan. Notwithstanding its nonrecognized status, Taiwan may sue and be sued, hold property, and exercise various other legal rights in the United States. 22 U.S.C. § 3303(b)(7). A contrary congressional resolution of Taiwan's status would have been equally binding on the courts. But see supra notes 31-32 for a discussion of the Executive's objections to another provision of the Taiwan Relations Act and infra text accompanying notes 231-33 for an analysis of the case in which Congress might attempt to intrude upon the exclusive powers of the President with respect to recognition of foreign states.

[169] The paradigmatic cases of nonaccess by nonrecognized governments are those in which the President does not extend recognition to a new government in de facto control of territory but rather continues to deal with representatives of a predecessor government. A different issue is the Executive's power to deny access to the judiciary by a recognized regime with which we have broken diplomatic relations or are otherwise on hostile terms. Two diplomatic confrontations that might have, but did not, raise this issue are those involving Cuba and Iran (In the Taiwan situation, noted supra note 169, judicial access was explicitly preserved after the change in recognition.). In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), the Supreme Court noted that "none of the acts of our Government have been aimed at closing the courts of this country to Cuba." 376 U.S. at 411. The complicated litigation situation during the Iran hostage crisis included hundreds of suits with Iran as defendant and at least one with the Islamic Republic of Iran as plaintiff. See Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 486 N.Y.S.2d 939 (1984), cert. denied, 469 U.S. 1108 (1985). The Executive did not try to stop Iran's suit against the former Shah. In time of declared national emergency, the Executive has statutory power to block all property interests of a foreign state or its nationals and has interpreted this power as giving it authority to grant or deny licenses for litigation for or against a foreign state. See Dames & Moore v. Regan, 453 U.S. 654 (1981) (president orders suspension of litigation against Iran).

Even as parties "outside the structure of the Union,"[170] foreign sovereigns can influence the making of United States national policies. Foreign states that object to action against them have numerous political weapons at their disposal: they can retaliate, withdraw diplomats, sever relations, expel American personnel from their territories, mobilize international public opinion, call upon the United Nations to adopt resolutions or other actions, curtail or boycott trade with the United States, freeze or seize assets, or resort to force. The United States political branches act and react with similar tools to influence foreign behavior. In the struggle between the United States political branches as one power center and foreign states as another, the judiciary prudently stands aside. The Supreme Court has shown considerable sensitivity to the need of the political branches for room to maneuver in foreign affairs. The Court recognizes that enlistment of the judiciary by foreign states in order to equalize their political power with the United States is fraught with grave risks to the ability of the United States to achieve its foreign policy objectives.[171]

With due regard for the circumstances that make the analogies somewhat less than perfect,[172] it is instructive to consider how the Supreme Court has treated efforts by the states and other governmental entities within the United States constitutional system to litigate claims asserted against Congress or the President under the Constitution. Since the states *are* parties to the constitutional compact, one might expect the federal courts to be willing to hear such claims and grant relief on the merits in appropriate cases. In general, however, the judiciary has not been so willing, either because the Constitution establishes the plenary authority of the federal government to deal with the matter at issue[173] or because the

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[170] Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[171] See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430-33 (1964) (expropriations should be dealt with by the executive, not the judicial branch; judicial interference could harm foreign policy).

[172] For a discussion of ways in which the states of the United States differ from true "sovereigns" (the United States and foreign states) see Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 Sup. Ct. Rev. 341.

[173] Cf. Massachusetts v. Laird, 400 U.S. 886 (1970) (denying state's motion for leave to file bill of complaint challenging constitutionality of Vietnam War); Lee v. Humphrey, 352 U.S. 904 (1956) (denying state's motion for leave to file original proceeding to prevent expenditures for defense and foreign affairs); Massachusetts v. Mellon, 262 U.S. 447 (1923) (denying state the power to contest a federal act as beyond the constitutional grant of con-

states are considered to have adequate means to protect their interests through the political leverage they can exercise over federal processes.[174] In *South Carolina v. Katzenbach*,[175] a state sought to invalidate portions of the Voting Rights Act on the grounds that the federal government had exceeded its power and violated the state's due process rights. The Supreme Court gave short shrift to the latter argument, using the shorthand formulation that the "word 'person' in the context of the Due Process Clause of the fifth amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the states of the Union, and to our knowledge this has never been done by any court."[176] Efforts by local governments to bring constitutional challenges against states have likewise been rejected.[177] When asked to consider such cases, the federal courts have tended to dismiss the claims as ones that must be resolved through political processes, since the disputants are politically constituted entities with political remedies at their disposal.

3. The Courts and Foreign States' Potential Constitutional Claims

Courts should respond to the constitutional claims of foreign states against the background of the constitutional structure for foreign affairs decisionmaking and the relationship of foreign states to the American polity. The primary examples in this subsection will be actions by the federal political branches that impair an economic or property interest of a foreign state in a context

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gressional power); Missouri v. Holland, 252 U.S. 416 (1920) (state unsuccessfully challenged Migratory Bird Treaty Act as violative of tenth amendment, alleging a pecuniary interest as owner of wild birds within its borders as well as its "quasi sovereign rights").

[174] See Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). These safeguards include state control over electoral qualifications, participation in the electoral college, and representation in the Senate; see also Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("[S]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.").

[175] 383 U.S. 301 (1966).

[176] Id. at 323-24.

[177] See Trenton v. New Jersey, 262 U.S. 182 (1923) (city cannot invoke the fourteenth amendment or contract clause against state); Newark v. New Jersey, 262 U.S. 192 (1923) (city cannot invoke the equal protection clause against state).

that would give an American citizen or other constitutionally protected "person"[178] a claim under the due process or takings clause of the fifth amendment. The focus on these property clauses is deliberate: pressure on United States-based financial holdings, commercial ties, and other proprietary or economic interests is a tool invoked with increasing frequency to induce foreign states to change not only their economic policies but their political behavior as well.[179]

Although the property clauses of the fifth amendment provide the illustrations in this section, the same method of analysis applies to nonmonetary constitutional claims as well. The reasoning of this article is based on cross-cutting themes, not on the parsing of a particular word or phrase in the Constitution. Thus, rather than asking whether a foreign state is a "person" for fifth amendment purposes or whether its property is "private" within the meaning of the takings clause, the relevant inquiry is whether courts should intervene in the structure of foreign policy decisionmaking at the instance of parties whose relation to that structure is one not just of an outsider but of a sovereign equal. Similarly, if the constitutional claim challenges a restriction on foreign states' lobbying activities or an interception of their electronic communications, the question whether foreign states are included within "the people" protected by the first amendment's petition clause or the fourth amendment's search and seizure clause is meaningful only if understood as something more than a semantic exercise in defining a term. Resolution of these potential constitutional claims can be found only in an appreciation of political structures and relationships affecting all foreign states. The approach of stressing the claimant rather than the claim does not preclude separate consideration of constitutional theories underlying the various clauses foreign states might invoke,[180] but it does provide an additional

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[178] Concerning the constitutional term "person," see supra text accompanying notes 13-19 and infra text accompanying notes 246-71.

[179] Recent examples are given infra text accompanying notes 187-92. For general perspectives on the use of economic sanctions to achieve political purposes, see D. Baldwin, Economic Statecraft (1985); A. Lowenfeld, Trade Controls for Political Ends (1983).

[180] For an example in the context of fifth amendment theory, see infra text accompanying notes 194-98.

First amendment theory provides important insights for assessing the constitutionality of restraints on foreign governmental speech. A court considering a ban on importation of foreign governmental publications, for example, could hardly avoid addressing such issues as

dimension for thinking about how such clause-based theories should be applied in particular cases.

There are various reasons why the political branches might mandate a seizure of foreign governmental property, thereby potentially giving rise to a fifth amendment claim. The easiest cases involve wartime confiscations of enemy property, either to deprive the enemy of resources for its own war effort, to aid the United States in waging war, or to provide a fund for postwar reparations. During time of declared war between the United States and the foreign state, there is no doubt of the constitutionality of the confiscation and sale of enemy assets in United States territory. The Supreme Court has repeatedly confirmed that, in wartime, "property of alien enemies, theretofore under the protection of the Constitution, [can be] seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term."[181] In both World Wars elaborate programs were set up for vesting in the United States government the United States-based property not just of enemy states, but of

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whether the first amendment comprehends the receipt as well as the expression of information and opinion, or how to apply the first amendment to problems involving ingress and egress across the United States territorial boundary. In Kleindienst v. Mandel, 408 U.S. 753, 760-70 (1972), American scholars argued that the Executive's refusal to allow a Marxist scholar to enter the country violated their first amendment rights to hear his views and debate with him in person. The Court acknowledged that first amendment values were implicated but declined to balance them against the Government's facially legitimate reason for excluding the alien. See also Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (first amendment right to receive information from abroad). It is possible that application of a comprehensive first amendment theory to certain restrictions on access to foreign government information might result in a holding of unconstitutionality if a suit were brought by members of the United States polity seeking to vindicate their interests in informed political debate. But a parallel claim asserted by the foreign governmental speaker would have to be denied, assuming that the restrictions resulted from a deliberate foreigu policy decision.

Preserving the analytical distinction between foreign state claimants and other claimants is of more than theoretical significance. It could have important remedial consequences, particularly if the foreign state seeks monetary damages. Nevertheless, the cases in which the rights of persons indisputably protected by the Constitution are adversely affected in common with foreign state interests are likely to be exceptional. A typical fourth or fifth amendment claim would arise out of United States governmental action targeted specifically at the foreign state, with little or no negative spillover effect on protected parties.

[181] United States v. Macintosh, 283 U.S. 605, 622-23 (1931); see also Uebersee Finanz-Korp. v. McGrath, 343 U.S. 205, 210-13 (1952); Silesian Am. Corp. v. Clark, 332 U.S. 469, 475-77 (1947); Brown v. United States, 12 U.S. (8 Cranch) 110, 122-23 (1814). Where an American citizen or nonenemy alien has a claim to the property, the taking of that interest may require the payment of just compensation. See Cities Serv. Co. v. McGratb, 342 U.S. 330 (1952); Guessefeldt v. McGrath, 342 U.S. 308 (1952).

nationals of those states as well. Since World War II, although the United States has been involved in costly conflicts and has used the authority of the Trading With the Enemy Act[182] to block assets of and prevent funds transfers to adversaries including North Korea and North Vietnam,[183] there has been no program of outright confiscation of enemy assets. If such a program were to be implemented during hostilities but in the absence of a formal declaration of war, it is not clear whether the Supreme Court would consider the precedents from the two World Wars concerning enemy aliens to be directly applicable. In any event, the approach to the use of economic sanctions for political purposes described below can resolve the cases involving foreign *state* property in favor of the position of the political branches.

In the absence of a state of war, a frequent motivation for freezing or seizing foreign state property is to provide for the satisfaction of claims of United States nationals against the foreign state arising out of uncompensated expropriations of American-owned property. In the 1950's Czechoslovakian assets blocked during World War II were vested and sold to create a fund for the partial satisfaction of claims arising out of expropriations that followed the postwar Communist takeover.[184] Cuban assets frozen in response to Castro's nationalization program are still blocked.[185] Iranian assets were blocked ten days after the taking of American hostages in Tehran and remained blocked for the duration of the hostage crisis, not only in reaction to those events but also to provide security for the payment of billions of dollars in claims of United States nationals, including repudiated debts, broken commercial contracts, uncompensated takings, and other claims.[186]

Apart from retaliation for prior uncompensated expropriations, sanctions against property have been adopted to achieve more purely political objectives. The Iranian sanctions obviously had multiple motivations, but the foremost was to apply pressure to achieve the safe release of the hostages. In recent years various forms of economic sanctions have been placed against a number of

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[182] 50 U.S.C. app. §§ 1-44 (1982 & Supp. III 1985).

[183] See 31 C.F.R. § 500 (1985).

[184] See supra note 39.

[185] See Cuban Assets Control Regulations, 31 C.F.R. § 515 (1986).

[186] See supra notes 5, 70-73.

countries, including the Soviet Union because of its human rights practices, invasion of Afghanistan, intimidation of Poland, and destruction of a civil aircraft in flight;[187] against Libya because of its support of international terrorism;[188] against Nicaragua because of its threat to the stability of Central American countries friendly to the United States;[189] and against South Africa because of its practice of systematic racial discrimination.[190] Both the President and Congress have initiated the use of economic pressure in recent years.[191] To date the programs of economic sanctions against these countries have stopped short of confiscation of assets, but the possibility of legislation to take such a step in the future remains open.[192]

A court considering a foreign state's constitutional objections to actions of this type would undoubtedly begin with fifth amendment precedent and might resolve the claim against the foreign state on this basis alone. For example, a number of cases hold that a temporary restriction on the use of property is not a "taking," even if the "temporary" period continues for many years.[193] Where such precedents are not dispositive, fifth amendment theory might provide guidance and result in a denial of the claim on the merits. Thus, a United States action constituting a prima facie taking, such as the vesting and sale of foreign state assets in response to prior expropriations, might be held compatible with the "just compensation" standard, on the theory that the antecedent appropria-

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[187] See, e.g., 15 C.F.R § 385.2 (1986).

[188] See 15 C.F.R. § 385.7 (1986).

[189] See Nicaraguan Trade Control Regulations, 31 C.F.R. § 540 (1986).

[190] See Exec. Order No. 12,532, 3 C.F.R. § 387 (1985); Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1086.

[191] Congress took the initiative to link most-favored-nation trade treatment for the Soviet Union and other nonmarket economy countries with progress toward the goal of free emigration through a provision commonly referred to as the Jackson-Vanik Amendment, 19 U.S.C. § 2432 (1982). The Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1086, was passed over the President's veto.

[192] New legislation would be required because the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982 & Supp. III 1985), does not authorize the President to vest foreign nationals' property. See infra note 225.

[193] On this basis claims of Cuban nationals seeking recovery of blocked property have been repeatedly denied, see, e.g., Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 113 (2d Cir.), cert. denied, 385 U.S. 898 (1966), and a fortiori the Cuban government would fail on a comparable claim.

tion of valuable American-owned property in the foreign state's territory amounted to implicit in-kind compensation.

But the present thesis is intended to give the courts an analytical framework for approaching any constitutional claim of a foreign state, including those where jurisprudence applicable to other categories of claimants might point to a resolution favorable to the claimant. As an example, consider the Supreme Court case that found that a Russian corporation, as "an alien friend," was entitled to the protection of the fifth amendment[194] and could thus claim compensation for property requisitioned in World War I, even though the Soviet regime in power at the time of the suit had engaged in widespread confiscation of the property of American citizens.[195] The takings clause, said the Court, "establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments."[196] In so holding, the Court specifically noted that the claim was not advanced "by or on behalf of a foreign government or regime"[197] and thus left open the issue addressed in this article.[198] My position is that such a claim by a foreign government should be denied, provided only that the political branches' reason for the taking has a deliberate foreign policy basis, either because of the foreign government's own program of uncompensated expropriations or because of some other activity. A foreign policy rationale of achieving redress for foreign expropriations provides the simpler example and will be considered first.

The United States has long insisted that international law requires the payment of just compensation to United States nationals for any property taken by a foreign government.[199] Both Congress and the Executive have deployed a range of tools to hold foreign states to the just compensation standard.[200] Unfortunately for American investors overseas, Justice Harlan's characterization

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[194] See Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931).

[195] Id. at 491-92.

[196] Id. at 492.

[197] Id.

[198] Additionally, as noted supra note 21 and text accompanying note 24, *Russian Volunteer Fleet* and its progeny in the Court of Claims technically involved an interpretation of the statute authorizing compensation for wartime requisitioning against the hackdrop of constitutional norms. See 282 U.S. at 488-92.

[199] See supra notes 74-87 and accompanying text.

[200] See supra note 85.

of the state of the law remains correct: there are "few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[201] Given this division, how should the courts handle a confrontation between a foreign state and the United States political branches over deviation from presumptively applicable fifth amendment standards in order to bring pressure on the foreign state to comply with analogous standards that the political branches contend are required by international law? A rule of judicial deference to the foreign policy decision of the political branches is the only plausible response. Otherwise, the ability of the United States to advance its international objectives would be seriously undermined.[202] If the Supreme Court were to construe the fifth amendment's takings clause to give foreign states that reject the United States position on just compensation the right to that standard in United States courts over the objection of the political branches, it would deprive the United States of an important tool of leverage in foreign relations: the power to insist on reciprocal treatment.

The position of a foreign state pressing such a claim should be rejected for the reason stated with terse eloquence by Justice Frankfurter in a case where a foreign state as plaintiff sought to invoke sovereign immunity on defendant's counterclaim: "It wants our law, like any other litigant, but it wants our law free from the claims of justice."[203] In this respect a foreign *state* litigant is quite different from a foreign *private* corporation: the foreign state is in a position to ensure justice for American corporations in foreign territory, while the foreign private corporation does not necessarily have the means to do so.[204]

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[201] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

[202] Id. at 431-33 (stressing the importance of diplomatic leverage, including bilateral and multilateral negotiations and economic and political sanctions, as opposed to piecemeal judicial involvement, in resolving international disagreements over compensation for expropriated property).

[203] National City Bank of New York v. Republic of China, 348 U.S. 356, 361-62 (1955).

[204] For the special considerations affecting foreign corporations controlled by foreign states, see infra text accompanying notes 254-71. In Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir.), cert. denied, 385 U.S. 898 (1966), Judge Friendly suggested that the principle of reciprocity might justify confiscation even of foreign private property. The "unquestioned right" of a state to protect its nationals in their persons and property while in a foreign country, he wrote, "must permit initial seizure and ultimate

Now consider the case where the political branches' foreign policy reason for confiscating foreign state property is to achieve some purpose unrelated to compensation for prior confiscations, such as to undermine the foreign state's ability to finance international terrorism or to pressure it to change its racially discriminatory practices. Under ordinary fifth amendment jurisprudence the government would not be able to confiscate a person's property simply because it objected to some unrelated aspect of his behavior. To induce him to desist from the undesirable activity, the government would have to resort to appropriate techniques for adopting and enforcing legal norms. It could make participation in terrorism or foreign civil wars criminally punishable; it could establish criminal penalties and civil remedies for discrimination on the grounds of race. But the foreign state, which stands outside the structure of our legal system, can easily avoid the application of such domestically generated norms. Thus the United States must exercise its influence over foreign behavior on the international plane. In order to be able to contribute effectively to the evolution and enforcement of international norms of behavior, the United States must be able to do more than just talk. It must preserve the flexibility to exert meaningful pressure against those financial, commercial, or other interests of the foreign state over which the United States has some control.

This approach to the claims of foreign governments recognizes that leverage against property and economic relations is almost the only effective weapon left in the arsenal of the political branches for influencing the behavior of foreign states. What once could have been obtained by application of military power—which clearly would have been immune from judicial review—is now left for achievement through peaceful techniques, including the application of economic pressure. As the legitimacy of the use of force for political ends has dwindled, the emphasis on pressure points

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expropriation of assets of nationals of that country in its own territory if other methods of securing compensation for its nationals should fail." Id. at 113 (citations omitted). In Legal Counsel, supra note 29, at 261 n.10, the Justice Department questioned the consistency of the *Sardino* dictum with *Russian Volunteer Fleet* if applied to the vesting of assets of foreign *nationals*. The same memorandum, however, opined that a foreign *nation*, "unlike a foreign national, does not have rights under the Fifth Amendment." Legal Counsel, supra note 29, at 260 n.9.

such as bank accounts,[205] purchases of vital commodities,[206] facilities of transportation,[207] and other economic interests has increased.

A concluding comment to distinguish the judicial role when the political branches have exercised their foreign relations power from when they have not is in order. Courts should accept as authoritative those actions explicitly grounded in the federal power to regulate relations with foreign nations—the area where the power of the federal political branches is at its maximum—but they need not accord such a high degree of deference where the federal action incidentally impinges on a foreign state's interests in the course of effecting some other governmental objective. If the claim entails an incidental detriment to a foreign state arising out of governmental action without an explicit foreign relations rationale, it is appropriate for courts to apply constitutional concepts, at least as an aid to statutory interpretation, on the theory that the political branches should not be presumed to intend a derogation from otherwise applicable norms.[208] For example, a foreign state that owns a piece of property standing in the way of a plan to widen a federally financed road should be able to obtain compensation on the same basis as private landowners. Because condemnation of the property has no foreign affairs rationale, ordinary fifth amendment jurisprudence should be presumptively available. But if the federal government impounds a piece of state-owned property to serve a national objective in bilateral or geopolitical relations, such as to induce the foreign state to allow the United States to acquire land in its territory for an embassy or to cease support for international terrorism, the foreign state cannot expect the federal courts to limit the means for attainment of that objective.

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[205] See infra note 225 for a discussion of the present statutory framework for blocking foreign assets in peacetime and vesting them in wartime.

[206] Various statutes authorize the President to control exports to foreign countries for national security or foreign policy reasons. See, e.g., Export Administration Act, 50 U.S.C. app. §§ 2401-2420 (1982), amended by Export Administration Amendments Act of 1985, 50 U.S.C.A. app. §§ 2401-2420 (West Supp. 1986); see also Arms Export Control Act, 22 U.S.C. §§ 2751-2796 (1982).

[207] Denial of landing rights to foreign state-owned airlines as an economic sanction is within the authority of the executive branch under the Federal Aviation Act. See, e.g., 49 U.S.C. § 1514 (1982). Congress prohibited air transportation with South Africa in section 306 of the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1086, 1100.

[208] See supra Section II.A.

III. Comments on the Application of the Thesis

This section puts in context some of the issues relevant to the thesis that have been mentioned but not fully explored. First is the relationship between the doctrine of adjudicating foreign sovereigns' claims on the merits and threshold issues, such as the political question doctrine, which avoid decisions on the merits. Second is whether unilateral executive actions should be dispositive of foreign states' claims when the foreign state argues that the President has acted outside the scope of his constitutional powers. The final issue concerns the applicability of the main thesis to foreign state-owned corporations or individuals who act on behalf of the state.

A. Adjudication or Abstention?

There is some overlap between the considerations often invoked to justify application of the political question doctrine in foreign affairs cases and the reasons why foreign states should not be able to obtain judicial invalidation of actions of the political branches. Both approaches take into account the constitutional commitment of certain kinds of issues to the political branches of government, the relative capabilities of the federal judiciary and other arms of government to resolve the issues, and the need for the federal government to be able to formulate and implement a unified policy toward foreign states.[209] Yet the thesis advocated in the present article is not, strictly speaking, an application of the political question doctrine, at least to the extent that the doctrine is understood as a rule of abstention. Rather, this article argues that the courts should resolve the claims of foreign states on the merits, even though the decision on the merits must give effect to the declared position of the political branches. The relationship of this argument to the political question doctrine deserves fuller explanation.

The concept of political questions has provoked much controversy and not a little confusion,[210] in part because courts have not

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[209] See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448-57 (1979); Baker v. Carr, 369 U.S. 186, 217 (1962).

[210] See L. Henkin, supra note 9, at 208-16; Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976).

always made clear why they refuse to decide certain questions instead of deciding them in favor of the position established by the political branches. In the majority of so-called political questions in foreign affairs cases, courts accept determinations of the political branches as conclusive on such issues as recognition,[211] territorial sovereignty,[212] or the existence of treaty relations.[213] Relatively few foreign affairs cases involve true refusals to decide. Of these, the predominant theme seems to be the judiciary's reluctance to take sides in disputes involving the distribution of political power between the legislative and executive branches. For example, some justices used the political question doctrine to justify refusing to decide Senator Goldwater's challenge to presidential termination of the mutual defense treaty with Taiwan.[214] The cases questioning the adequacy of congressional authorization of military action in Indochina and Central America are possibly examples of judicial abstention, but at least some can also be read as determinations that the congressional and presidential actions met constitutional standards.[215] Under either approach, the presidential or congressional action proceeds without judicial interference, satisfying the concerns expressed in political question cases about an "unusual need for unquestioning adherence to a political decision already made," and the "potentiality of embarrassment from multifarious pronouncements by various departments on one question."[216]

Nondecision is not, however, the appropriate response to the kinds of claims addressed in this article. Because foreign states' claims may involve any of three separate categories of constitutional issues—leading to outcomes potentially in *favor* of the foreign state in the first and second categories and *against* the foreign

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[211] See cases cited supra note 54.

[212] See cases cited supra note 166.

[213] See Charlton v. Kelly, 229 U.S. 447 (1913); cf. Goldwater v. Carter, 444 U.S. 996 (1979) (no majority opinion).

[214] See *Goldwater*, 444 U.S. at 1002-06. The plurality opinion taking this approach was written by Justice Rehnquist and joined by Chief Justice Burger and Justices Stewart and Stevens.

[215] See, e.g., Holtzman v. Schlesinger, 484 F.2d 1307, 1312 n.3 (2d Cir. 1973) (listing cases determining that Congress had sufficiently authorized the war, as well as cases dismissed on threshold grounds such as political question or standing), cert. denied, 416 U.S. 936 (1974); see also Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 476 U.S. 1251 (1984) (challenge by members of Congress to United States presence in and military assistance to El Salvador presented a nonjusticiable political question).

[216] Baker v. Carr, 369 U.S. 186, 217 (1962).

state in the third category—the court seised of the claim must in the first instance determine which kind of claim is at issue. This determination entails a legal analysis that is conceptually a decision on the merits rather than an abstention from decision. For example, a foreign state may question the applicability of a statutory scheme to its property in the United States on the dual grounds that Congress should not be presumed to have derogated from the otherwise applicable constitutional norms, and that if Congress did so intend, its action was unconstitutional. The court's statutory analysis is clearly a determination on the merits: if the court concludes that Congress did intend a deviation from ordinary constitutional standards, the court should decide on the merits that the congressional decision is itself constitutionally proper. Similarly, if a foreign state claims that a state of the United States has impermissibly infringed upon foreign commerce or foreign relations and the state in turn asserts that its action is consistent with federal policy, the federal court must engage in an analysis of the merits of the claim to determine where the federal interest really lies. In a claim of the third type, where there is no ambignity concerning the purpose and intended effect of the federal foreign affairs action, the court's task is simply to dismiss the foreign state's claim on the merits or, if the issue arises in the context of a foreign state's constitutional defense, to reject that defense as a matter of law because the Constitution does not limit the political branches in their choice of policies toward foreign states.

Adjudication on the merits rather than abstention is more than just an inevitable byproduct of determining the appropriate category of constitutional claim. If a court were to invoke the political question doctrine to refuse to adjudicate a foreign state's challenge to an act of the political branches, the act would go forward, but it might carry some residual taint because the constitutional issue would remain unresolved. When the reason for considering the matter as "political" is that the Constitution establishes the plenary authority of the political branches to dispose of the matter, judicial affirmation that the political branches have acted consistently with the Constitution serves a legitimating function and disperses any possible cloud over the legality of the foreign policy decision.[217]

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[217] See A. Bickel, The Least Dangerous Branch, 183, 189 (1962). In an atmosphere of

B. Sole Executive Actions

The discussion thus far has referred to actions of the "political branches" without attempting to distinguish between action by both branches and action by one branch alone. What should be the disposition of a foreign state's constitutional challenge to action taken by the President without congressional participation? Under the taxonomy of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[218] when Congress and the President act conjointly[219] federal power is at its maximum[220] and a foreign state's constitutional attack must fail. But can a foreign state challenge the constitutionality of an exercise of independent presidential authority in the "zone of twilight" where "the President acts in absence of either a congressional grant or denial of authority"?[221] Or can a foreign state maintain a claim that presidential action is unconstitutional because it is "incompatible with the expressed or implied will of Congress" where the President's power "is at its lowest ebb"?[222]

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foreign relations crisis, this could be an important judicial function. Consider the differences between a Supreme Court opinion that says, in effect, "the President and Congress have established a valid and constitutional policy in seizing Country X's bank accounts as a response to Country X's failure to protect the American Embassy from terrorist attack," and an opinion that says "we decline to decide whether this policy is constitutional." A decision on the merits assures the citizenry that its leaders' action is consistent with the fundamental law of the land, while a refusal to decide could have negative ramifications for domestic and international public opinion and conceivably even for the foreign state's behavior. A foreign state might derive some psychological or propaganda value from being able to boast that even the Supreme Court was not prepared to confirm the validity of United States policy. It might also take advantage of the lingering doubt over the legality of the United States response as a justification for persisting in the course of action that the political branches sought to influence.

[218] 343 U.S. 579, 634 (1952) (Jackson, J. concurring).

[219] This term connotes presidential action pursuant to express or *implied* congressional authorization. See *Youngstown*, 343 U.S. at 635 (Jackson, J. concurring).

[220] In Justice Jackson's words, presidential action pursuant to congressional authorization "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637. This portion of Justice Jackson's concurrence, 343 U.S. at 635 n.2, confirms the distinction made in *Curtiss-Wright*, 299 U.S. 304 (1936), between actions in internal and external affairs, with a broader scope for inferences of presidential power in purely external affairs. Arguably any action taken against a foreign state for a foreign affairs reason falls into the purely external category, but this position would not be as strong if the action affected foreign state interests located within United States territory.

[221] 343 U.S. at 637.

[222] Id.

The issue of sole executive actions can arise in still another way. Since federal courts develop constitutionally inspired federal law, their rule-oriented and presumably principled approach to foreign affairs matters may clash in specific cases with the Executive's result-oriented, politically motivated preferences. Stark examples of such clashes might arise in instances where the federal courts have established a constitutionally inspired rule of decision in cases of relatively low visibility or low controversy, but the application of that rule to a particular foreign state could disrupt the Executive's strategy for dealing with that foreign state. For example, if the preexisting legal framework holds that foreign states can obtain just compensation for takings of their property,[223] does the Executive have the power to abort a foreign state's suit by means of executive order in order to promote an important foreign policy goal, such as inducing the foreign state to stop supporting terrorist groups?

Phrased in the abstract, these are difficult questions and, in Justice Jackson's words, their resolution may "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[224] But a few comments on how courts should approach the questions may be in order. First, there is little difficulty with a judicial determination that Congress has expressly authorized or impliedly acquiesced in the exercise of executive power. Pure cases involving nothing but the President's inherent power will be rare. Indeed, even in the hypothetical case suggested above, it is likely that the President could structure his action in a way that would combine his own powers with those delegated by Congress, either by acting pursuant to a preexisting legislative framework[225] or by seeking confirmatory legislation.[226] In such

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[223] See Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) and cases cited supra note 21.

[224] *Youngstown*, 343 U.S. at 637.

[225] Currently, the principal peacetime statutory authority for broad presidential powers against foreign states is the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982 & Supp. III 1985). IEEPA has provided the legal basis for presidential economic sanctions against Iran, see, e.g., Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), Exec. Order 12,205, 45 Fed. Reg. 24,099 (1980), Exec. Order No. 12,211, 45 Fed. Reg. 26,685 (1980); Nicaragua, see Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985); South Africa, see Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985); and Libya, see Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986). Upon declaration of a national emergency, IEEPA permits the President, among other things, to block any transfer of property in which any

event, the judicial task is to validate the presidential action and reject the foreign state's claim.

In the case where the President claims authority to act on the basis of his own constitutional powers and Congress has not spoken on the issue one way or the other, it remains difficult to see why the foreign state should be able to challenge the action as beyond the scope of *presidential* power. From the point of view of the foreign state, the President is indeed the "sole organ" of United States foreign relations.[227] The processes by which the President determines whether his foreign policies enjoy domestic political support and the choice whether to seek congressional endorsement are internal matters in which the foreign state has no legal interest.[228] United States courts have been reluctant to take sides on issues concerning the distribution of the federal foreign affairs power between the President and Congress, even when the party alleging the usurpation is a member of Congress or a directly injured citizen.[229] If parties to the constitutional compact have been unable to enlist the courts to alter the political balance of

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foreign national has any interest. See 50 U.S.C. § 1702(a)(1)(B) (1982). The corresponding wartime statute is the Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44 (1982 & Supp. III 1985), which confers upon the President not only all the sweeping authorities available under IEEPA, but also the power to confiscate enemy assets without compensation. See 50 U.S.C. app. § 5 (1982).

[226] Seeking such legislation would entail some risk that if Congress did not act favorably on the request, a court might infer that the exercise of executive power is "at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). On the other hand, the Executive may seek legislation to confirm or clarify a power that the Executive already claims to possess without impairing its position that it already enjoys the power. In Haig v. Agee, 453 U.S. 280 (1981), although the State Department had sought new legislation to make explicit the powers it believed to be implicit in existing law, the Court found that Congress had in effect adopted the administrative construction by reenacting the former provisions of the passport laws. See id. at 301 & n. 50; id. at 317 & n. 7 (Brennan, J., dissenting).

[227] See supra notes 98, 136.

[228] As a matter of international law, statements or actions by a head of state, head of government, or foreign minister are considered to be authoritative expressions of a state's position. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, arts. 7(2), 46-47, *reprinted in* 63 Am. J. Int'l L. 875, 877-78, 890 (1969) (United States not a party).

[229] See Goldwater v. Carter, 444 U.S. 996 (1976); see also Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (affirming dismissal of a congressman's challenge to military assistance to El Salvador). In DaCosta v. Laird, 448 F.2d 1368 (2d Cir. 1971), cert. denied, 405 U.S. 979 (1972), and other cases summarized in Holtzman v. Schlesinger, 484 F.2d 1307, 1312 n.3 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974), draftees being sent to Southeast Asia were not able to obtain judicial rnlings on the legality of United States conduct there.

power in foreign affairs cases, then there is no reason for foreign states to succeed.[230]

The issue becomes more difficult when the foreign state claims that the President's action is inconsistent with the express or implied will of Congress. In such a case the court may have no alternative but to examine the allegedly conflicting policies, to harmonize them if possible, or to determine which should control.[231] Cases in which the executive action might prevail over a contrary statutory enactment are difficult to imagine; however, it is possible that a foreign state's claim that the president acted unconstitutionally by violating a congressional mandate could result in a judicial decision that the statute was an unconstitutional infringement on powers constitutionally committed to the President. For example, if a statute purported to compel the President to recognize a government or to open diplomatic relations, a foreign state's suit seeking to force the President to execute the statute might result in a determination that the statute unconstitutionally transgressed on the President's exclusive powers under article II of the Constitution.[232] This outcome would be both a rejection of the foreign state's claim on the merits and a vindication of the President's

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[230] I believe that claims by foreign states that the President has exceeded his constitutional powers in the "zone of twilight" with respect to actions affecting foreign states should be decided on the merits, in view of the President's position as the sole organ of United States policy toward foreign nations. Whether one or both houses of Congress, or individual members, could challenge the same actions on the grounds that their own prerogatives had been invaded raises separate problems of standing, ripeness, and the application of the political question doctrine in interbranch litigation. The propositions in the text concerning judicial reluctance to resolve separation of powers claims in the foreign affairs area merely describe how formidable these threshold questions have proven to be in recent cases; they are not intended to prejudge the possibility that a party to the constitutional compact might be able to overcome the objections and prevail on the merits in a certain case, but this outcome seems more likely in a case under Justice Jackson's third, rather than second, category. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); supra note 218.

In any event, since the political branches also interpret the Constitution, especially in the field of foreign affairs, it would certainly be appropriate for the President to pay careful attention to his advisors concerning the scope of his powers in the "zone of twilight," as well as to take into account congressional views, even those which are not formal enough to move the presidental action into Jackson's third category.

[231] Cf. Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860 (1986) (court performs a proper judicial function in determining whether executive foreign policy expressed in international agreement is consistent with statute).

[232] See cases cited supra note 54.

constitutional position.[233]

It is somewhat easier to imagine suits where the foreign state might be able to demonstrate executive noncompliance with a valid law, especially where lower level executive officers have misinterpreted or failed to carry out the congressional intent.[234] In such cases, the courts perform a proper judicial function by ascertaining what Congress meant and ordering the Executive to conform its practices to the correct reading of the statute.[235] Assuming that the claims meet the usual tests for the exercise of judicial power under article III and that Congress intended enforcement of the statutory scheme through litigation,[236] foreign states should be no worse off than private parties when it comes to obtaining enforcement of the laws as Congress has passed them. For the reasons discussed above, it is appropriate for courts to construe congressional enactments in light of constitutionally derived standards and to assume that Congress intended for foreign states to be treated in accordance with constitutional norms unless a contrary intention is clearly expressed.

The final problem of unilateral executive action involves the case where a constitutionally inspired rule of federal common law would support the foreign state's position but the Executive urges the opposite result. There are several types of executive acts or

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[233] By analogy to the plurality opinion by Justice Rehnquist in Goldwater v. Carter, 444 U.S. 996, 1002-06 (1979), some justices might view such a suit as entailing a political question that the courts should not decide. Justice Powell's concurring opinion in *Goldwater*, 444 U.S. at 997-1002, seems a more appropriate way to approach the hypothetical in the text. He would have proceeded to the merits of the constitutional issue if some unequivocal congressional action had made the case ripe for judicial review. In the hypothetical in the text there is no ripeness objection because of the direct impasse resulting from the statute and the President's refusal to enforce it. Abstention pursuant to the political question doctrine would leave the parties in status quo (i.e., the President would not be ordered to change his position), but for the reasons given a decision on the merits to reject the foreign state's claim is preferable.

[234] See Jean v. Nelson, 472 U.S. 846 (1985) (directing district court to consider whether immigration officials properly exercised their discretion); American Airways Charters, Inc. v. Regan, 746 F.2d 865 (1984).

[235] See *Japan Whaling Ass'n*, 106 S. Ct. at 2867 (Secretary of Commerce "may not act contrary to the will of Congress when exercised within the bounds of the Constitution").

[236] A private right of action may be explicit or implicit in the particular statute or may be found in another enactment, such as the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-703 (1982 & Supp. III 1985). The APA provided the basis for a private suit challenging the Executive's enforcement of a foreign affairs statute in *Japan Whaling Ass'n*. The Executive's policy was held to be in conformity with the statute.

statements with potentially different legal effects. On the one hand are those sorts of "controlling executive acts"[237] that operate of their own force to supply rules of decision for courts in the United States. These kinds of executive pronouncements may be considered "performative" in the sense that their very utterance works a change in legal relationships. In this category are executive orders and regulations,[238] executive agreements,[239] and such instruments as executive "suggestions of immunity" that have been held to be binding on the courts.[240] In addition to taking a favorable attitude toward enforcing these manifestations of executive desire to enhance the United States relationship with a foreign state, the Supreme Court has suggested that an executive determination to deny a benefit to a foreign state should also be given effect.[241]

Distinct from performative executive acts are executive statements that may change legal relationships only to the extent that they *persuade*. The decision of a court to give legal effect to statements of persuasive character entails independent judicial scrutiny of the merits of the Executive's position. For example, a statement of the Government's position in a brief is only effective to the extent that it persuades the court to adopt that position as its own. Depending on the nature of the issue, the court may be strongly disposed to defer to the Executive's position. In the case of interpretation of treaties, for example, the usual approach is to afford "great weight" to the Executive's view.[242] Even in these cases, how-

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[237] Cf. The Paquete Habana, 175 U.S. 677 (1900) (courts will apply international law if there is no treaty and no controlling executive or legislative act or judicial decision to the contrary).

[238] See Dames & Moore v. Regan, 453 U.S. 654 (1981) (giving effect to change in substantive rules of law through executive order).

[239] See id.; United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

[240] See Mexico v. Hoffman, 324 U.S. 30 (1945) (executive's refusal to grant immunity results in no immunity); Ex parte Peru, 318 U.S. 578 (1943).

[241] "It is therefore not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." Mexico v. Hoffman, 324 U.S. at 35.

[242] See Kolovrat v. Oregon, 366 U.S. 187, 194 (1961). But see Damrosch, Application of Customary International Law by U.S. Domestic Tribunals, 1982 Proc. Am. Soc'y Int'l L. 251, 252 (noting treaty interpretation cases where the courts did *not* find the Executive's position persuasive). The Supreme Court was not convinced by the executive branch's position in a recent case where the Solicitor General argued as amicus curiae that a state sales tax on aviation fuel was inconsistent with various international agreements and interfered with the ability of the federal government to "speak with one voice" in international relations. Wardair Canada v. Florida Dep't of Revenue, 106 S. Ct. 2369, 2373 (1986).

ever, the ultimate determination whether to give effect to the executive policy turns on whether the court is persuaded of its soundness.

There also are categories of cases where an executive intervention is neither clearly dispositive nor merely persuasive. The most controversial and well known are executive assertions to apply the act of state doctrine in particular cases.[243] Other examples include the effect to be given to an executive statement or executive silence concerning foreign relations interests where the judicial task entails determining how to accommodate that interest to statutory and other policies.[244]

When a court faces an apparent inconsistency between a constitutionally inspired federal rule and a unilateral executive action that purports to alter the application of that rule in the pending case, the court must first determine what kind of executive act is involved. If the act is of the nature that courts have traditionally treated as conclusive, the foreign state's constitutional attack should fail on the merits. If the act is of the type to which the courts generally defer, the degree of deference could appropriately be even higher than usual, since the challenger is a foreign state seeking to upset a policy choice made by the "sole organ" of United States foreign relations. On the other hand, since courts are

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[243] The Supreme Court has not followed a consistent approach concerning the effect of the Executive's position in act of state cases. The last time the Court mustered a majority for any opinion in an act of state case was Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[244] It is frequently difficult for courts to gauge the significance of executive silence in foreign affairs cases. A common but not always correct assumption is that the executive branch has no particular foreign relations concerns with the outcome of the case if it does not bring those concerns to the court's attention. See, e.g., Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 195-96 (1983); In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980). Courts do not always recognize that the inability of the executive branch to take a position in specific cases may he due to bureaucratic impasse or domestic political pressures which may be especially acute when the foreign relations concern intersects with a competing domestic policy. From time to time the executive branch has tried to explain to both foreign states and federal courts that executive silence in a particular case should not be taken to mean a lack of foreign relations significance to the disposition of the issues. See Nash, Contemporary Practice of the United Statcs Relating to International Law, 74 Am. J. Int'l L. 657, 665-67 (1980); Nash, Contemporary Practice of the United States Relating to International Law, 73 Am J. Int'l L. 669, 678-79 (1979); Letter from Davis R. Robinson to Rex E. Lee (Nov. 19, 1982) (discussing Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984)), *reprinted in* 22 Int'l Legal Materials 207, 207-08 (1983).

understandably reluctant to yield either the law-declaring or the outcome-determining judicial functions to executive officers, it may be appropriate for the courts to treat executive branch assertions in briefs, letters in the record, and other litigation documents as having no greater effect than their persuasive force warrants under the circumstances. If the matter is truly critical to the achievement of national policy, there are sufficient means for the President to transform the litigating policy into a legally controlling executive or joint congressional and executive act.[245]

C. *Foreign States and the "Persons" That Represent Them*

Since the "persons," individual and juridical, who represent foreign states' interests in the United States may become involved in constitutional disputes, it is important to consider how to approach their claims to constitutional protection. The question of the relationship of foreign sovereigns to constitutionally protected "persons" cannot be lightly dismissed. Since corporations, including those organized under foreign law, are generally entitled to most constitutional protections,[246] what is the status of corporations owned or controlled by a foreign state? On the assumption that individuals present in United States territory are "persons" under the Constitution, how does the Constitution apply to persons who represent foreign states in the United States? How much flexibility do Congress or the Executive have in defining these categories?

The purpose of this discussion is not to arrive at a unified interpretation of the term "person" as used in the Constitution,[247] but rather to analyze the treatment of the kinds of "persons" whose constitutional claims have a bearing on the claims of foreign sover-

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[245] For example, instead of having the State Department Legal Adviser request the Solicitor General to inform the Supreme Court of what United States foreign policy requires, the President could if necessary trigger his powers under statutes such as the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (1982 & Supp. III 1985). The IEEPA entails broad substantive authority pursuant to an established procedural framework.

[246] See, e.g., Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

[247] See supra text accompanying notes 12-16. Such an inquiry would need to consider the applicability of the Constitution to potential "persons" different in character from foreign states, such as fetuses, members of future generations, animals, and inanimate objects. See B. Ackerman, Social Justice and the Liberal Stato 70-80, 111-13 (1980); C. Stone, Should Trees Have Standing? (1977).

eigns and their representatives. The attributes of "persons" who embody a foreign state's interests in the United States could include either juridical personality, foreignness, or political character.[248] The principles affecting the application of the Constitution to such persons are also relevant to international organizations such as the United Nations, unions of states such as the European Economic Community, organizations that hold themselves out as the representatives of groups seeking national status such as the Palestine Liberation Organization,[249] associations such as the Organization of Petroleum Exporting Countries,[250] and other entities, including "international public corporations," that are constituted by more than one state for purposes of transnational commercial activities.[251]

1. Juridical Persons

The constitutional jurisprudence concerning corporations has evolved since the nineteenth century to the point that, now, corporations enjoy most but not all constitutional protections.[252] A num-

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[248] The term "political" in this sense describes either an entity that is politically constituted, such as a subdivision or ministry of a foreign state, or an individual such as a diplomat, who acts in an official rather than personal capacity.

[249] Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (dismissing per curiam a suit with the Palestine Liberation Organization as codefendant), cert. denied, 470 U.S. 1003 (1985).

[250] Cf. International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd on other grounds, 649 F.2d 1354 (9th Cir. 1981) (dismissing antitrust suit against OPEC because of lack of means for service of process), cert. denied, 454 U.S. 1163 (1982).

[251] See Friedmann, International Public Corporations, 6 Mod. L. Rev. 185, 186 (1942) (defining international public corporations as "international corporate bodies established for purposes of international government but constituted as commercial corporations"); Parry, The International Public Corporation, *in* The Public Corporation 495 (W. Friedmann ed. 1954). These and other authorities are analyzed and brought up to date by Yokota, How Useful is the Notion of 'International Public Corporation' Today?, *in* Essays in International Law in Honour of Judge Manfred Lachs 557 (J. Makarczyk ed. 1984).

[252] Businesses in corporate form were among the prime beneficiaries of the Court's application of the fifth and fourteenth amendments to invalidate economic regulatory legislation. See, e.g., Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886) ("The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment . . . which forbids a State to deny any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."). By the early twentieth century, corporations had been given some criminal procedure safeguards but were denied others. See, e.g., Hale v. Henkel, 201 U.S. 43 (1906) (granting corporation a right against unreasonable searches and seizures but denying a right

ber of commentators have proposed theories and models that account for granting corporations some constitutional protections and denying them others.[253] For present purposes, it is enough to draw attention to some features of the problem that may be relevant to the constitutional status of corporations owned or controlled by foreign sovereigns. In particular, this Subsection will discuss whether the jurisprudence of corporate constitutional rights insulates foreign entities organized in corporate form from actions the political branches might wish to take against foreign states. If either the fact of incorporation or the place of incorporation were sufficient to establish constitutional rights, foreign sovereigns could simply conduct their dealings with the United States through corporations and would thereby be able to limit the scope of congressional or executive action against them.[254]

It also is necessary to put in constitutional perspective the statutes and regulations by which Congress and the Executive have crafted definitions to place the corporate and other agents of foreign states under special regimes. The Foreign Agents Registration

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against self-incrimination). More recently, the Court has extended first amendment protection not only to corporations whose raison d'etre is communication, see, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964), but also to ordinary business corporations. See First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). Under current law, corporations enjoy the protections of the first amendment's speech and press clause, see id.; the fourth amendment's search and seizure clause, see Hale v. Henkel, 201 U.S. 43, 76 (1906); the fifth amendment's double jeopardy clause, see United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); the fifth amendment's due process and takings clauses, see Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931); the fourteenth amendment's due process clause, see Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26 (1889); and the fourteenth amendment's equal protection clause, see Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886). They have been denied the protections of the fifth amendment's self-incrimination clause, see Hale v. Henkel, 201 U.S. 43, 70 (1906), and miscellaneous other constitutional provisions, see, e.g., Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839) (corporations are not citizens under privileges and immunities clause of U.S. Const. art IV, § 2, cl. 1).

[253] See, e.g., Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 Yale L.J. 235 (1981); O'Kelley, The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after *First National Bank v. Bellotti*, 67 Geo. L.J. 1347 (1979); Note, Constitutional Rights of the Corporate Person, 91 Yale L.J. 1641 (1982).

[254] Indeed, for a combination of legal and political reasons some foreign sovereigns have already adopted a strategy of structuring their United States transactions through locally incorporated subsidiaries, as in the case of the Soviet-owned Amtorg Trading Corporation, which has operated under a New York state charter since 1924, when the Soviet government was not recognized by the United States. See "Limits Sought on Soviet Business Agencies in U.S.," N. Y. Times, Aug. 16, 1985, at Al, col. 3, A14, col. 3.

Act[255] requires detailed control of speech originating with foreign states.[256] The Foreign Intelligence Surveillance Act[257] established different standards for the authorization of national security wiretaps against "United States persons" and for those against "agents of a foreign power,"[258] with the effect of sharply curtailing fourth amendment protections for persons acting on behalf of foreign powers.[259] Regulations pursuant to the Trading With the Enemy Act[260] and the International Emergency Economic Powers Act[261] have blocked property in which foreign states such as Cuba[262] and Iran[263] have interests, including property held by American or foreign corporations controlled by those states. Each of these and other regulatory schemes entails a somewhat different definition of the entities that will be treated as agents of a foreign state. Although a test of majority shareholding is sometimes used,[264] a lower or more flexible threshold for determining control is possible.[265] Whatever the definition, the assumption behind these statutes and regulations is that the political branches act within constitutional bounds when they treat juridical persons controlled by a foreign state on the same basis as the foreign state itself.

The Supreme Court in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*[266] considered, in a suit brought by a state-owned Cuban bank, whether an American bank could set off

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[255] 22 U.S.C. §§ 611-620 (1982 & Supp. III 1985).

[256] Id. at § 614.

[257] 18 U.S.C. §§ 2511, 2518, 2519, 50 U.S.C. §§ 1801-1811 (1982 & Supp. III 1985).

[258] 50 U.S.C. § 1801.

[259] One way to view this statutory framework is as a way to give differential content to the fourth amendment's "reasonahleness" standard. It has been suggested, however, tbat the constitutional basis for doing so is the nonentitlement of foreign powers to claim rights of "the people" under the fourth amendment. See Levi Testimony, supra note 14, and Harmon Letter, supra note 29.

[260] 50 U.S.C. app. §§ 1-44 (1982 & Supp. III 1985).

[261] 50 U.S.C. §§ 1701-1706 (1982 & Supp. III 1985).

[262] See Cuban Assets Control Regulations, 31 C.F.R. § 515 (1986).

[263] See Iranian Assets Control Regulations, 31 C.F.R. § 535 (1986).

[264] Majority ownership by a foreign state is the test for determining whether a foreign entity is an "agency or instrumentality of a foreign state" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(b)(2) (1982).

[265] The Iranian Assets Control Regulations refer to any "partnership, association, corporation, or other organization *substantially owned or controlled*" by the foreign state, 31 C.F.R. § 535.301(a)(2) (1986) (emphasis added), thus allowing case-by-case administrative determinations of the status of particular entities.

[266] 462 U.S. 611 (1983).

the value of its property seized by Cuba. The Court acknowledged sound reasons for adhering to a presumption of separate legal status for entities established by foreign states,[267] but identified circumstances under which the presumption may be overcome. Applying "principles . . . common to both international law and federal common law, which . . . is necessarily informed both by international law principles and by articulated congressional policies,"[268] the Court held that the corporate form may not be "interposed to defeat legislative policies"[269] or to permit a foreign state "to reap the benefits of our courts while avoiding the obligations of international law."[270] In light of the Court's treatment of the issues under federal common law, there seems little doubt that the Court would give effect to statutory or regulatory definitions of "foreign state" or "foreign power" in order to effectuate the foreign policy of the political branches. If the mere fact of incorporation could erect constitutional barriers to the exercise of otherwise plenary congressional and executive foreign relations powers, then some measure of control over United States foreign policy would have shifted out of the hands of Congress and the President into the hands of foreign states. A classification of corporations by some indicia of foreign state control, such as percentage of share ownership, ability to appoint managers, or control through binding directives, should thus survive constitutional challenge.[271]

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[267] Id. at 623-28.

[268] Id. at 623.

[269] Id at 630.

[270] Id. at 634.

[271] The power of the political branches to determine which entities to treat as foreign states can be understood from the cases on the power to decide whether an Indian tribe is a foreign state, see, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), or whether congressional power over Indians could be abused. See Baker v. Carr, 369 U.S. 187, 216-17 (1961) (" '[I]t is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . .' [The courts] will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power." (quoting United States v. Sandoval, 231 U.S. 28, 46 (1913))). It would be an appropriate use of the judicial function to ensure that executive applications of a promulgated standard are procedurally regular and in compliance with applicable statutory law.

In American Airways Charters, Inc. v. Regan, 746 F.2d 265 (D.C. Cir. 1984), the D. C. Circuit overturned a Treasury Department action in administrative proceedings directed at the question whether a Florida corporation was controlled by Cuba for purposes of the Cuban Assets Control Regnlations, 31 C.F.R. § 515 (1983). In an administrative step unparalleled for its arrogation of bureaucratic power, the Treasury Department's Office of Foreign

2. Individual Foreign State Representatives

Foreign states speak and act through individuals. Although some of a foreign state's individual representatives, such as lobbyists, lawyers, public relations advisers, business consultants, honorary consuls, or local national employees of its diplomatic or consular missions, may be American citizens, typically a foreign state will have a number of its own nationals in United States territory in various capacities at any given time. In general, the foreign nationals who represent a foreign state's interests in the United States will be individuals whose status is governed by special regimes under international law. These include diplomatic agents,[272] consular officers,[273] representatives to the United Nations,[274] persons affiliated with international organizations,[275] and foreign officials in the United States on special missions.[276]

The legal regimes covering such individuals are in some ways more favorable than the Bill of Rights. A diplomat, for example, is entitled to full inviolability of his person, premises, and papers[277] and is immune from all criminal and most forms of civil jurisdic-

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Assets Control contended that the corporation's action in retaining a lawyer to contest its designation as Cuban-controlled was itself subject to the Treasury Department's licensing controls. The D. C. Circuit found no statutory authorization for the notion that the Treasury could regulate the attorney-client relationship in the agency's administrative proceedings.

[272] See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

[273] See Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

[274] See, e.g., U. N. Charter art. 105, para. 2; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15; Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 756, T.I.A.S. No. 1676.

[275] The charters of most international organizations provide for privileges and immunities for the employees of the organization, representatives to it, experts, and other persons while on official business. See, e.g., Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39.

[276] The United States is not a party to the Vienna Convention on Special Missions, Dec. 8, 1979, G.A. Res. 2530, 24 U.N. GAOR Supp. (No. 30) at 99, U.N. Doc. A/7630 (1970), but the United States Department of State has considered that customary international law requires treating members of special missions as immune from the jurisdiction of the receiving state during their visit. See Restatement (Revised) of the Foreign Relations Law of the United States § 461 comment i and reporter's note 13 (Tent. Draft No. 4 1983) (§ 462 in Tent. Final Draft 1985).

[277] See Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 29-31, 23 U.S.T. 3227, 3240-41, T.I.A.S. No. 7502, at 13-14, 500 U.N.T.S. 95, 110, 112.

tion.[278] But a diplomat who is the subject of a breach may be worse off under the treaty framework than under the Constitution because the protections of the treaties may be waived at any time by the sending state.[279] The sending state may redress a breach of privileges and immunities under international law by a retaliatory expulsion of the breaching state's diplomatic personnel, a demand for expression of regret or apology, or a presentation of a claim for reparation through diplomatic channels or to the International Court of Justice.[280] Since the litigation to date concerning such personnel has principally involved disputes over criminal defendants' entitlement to immunity,[281] there has been little occasion for courts to consider the legal effect of divergence between international and constitutional standards.

Recent developments have increased the possibility that federal courts might be called upon to consider the applicability of the Constitution to persons whose status had previously been left for resolution on the international plane. The Foreign Intelligence Surveillance Act of 1978 has created a new legal framework for national security wiretaps.[282] Although the existence and details of specific surveillance will be kept under strict controls,[283] the new procedures could enhance opportunities for the targets of such surveillance to learn of the taps and to try to litigate issues of compliance with constitutional requirements.[284] Press disclosures of wire-

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[278] See id. art. 31, 23 U.S.T. at 3241, T.I.A.S. No. 7502 at 14, 500 U.N.T.S. at 112. Another indication of preferential treatment for diplomats is U.S. Const. art. III, § 2, cl. 1, giving the Supreme Court original jurisdiction over cases "affecting Amhassadors, other public Ministers and Consuls," though this jurisdiction is not exclusive. See 28 U.S.C. § 1351 (1982) (conferring jurisdiction on the district courts over actions against diplomats and consuls).

[279] See, e.g. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 32, 23 U.S.T. at 3241, T.I.A.S. No. 7502 at 14, 500 U.N.T.S. at 112; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, arts. 4-5, 21 U.S.T. 1418, 1430, 1434, T.I.A.S. No. 6900, at 12, 16, 1 U.N.T.S. 15, 22, 26. Though a sending state has the legal right to waive its representatives' international privileges and immunities, it may not waive any protections to which these individuals are entitled under the Constitution in a personal capacity.

[280] See Case Concerning United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3 (May 24, 1980).

[281] See, e.g., United States v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

[282] See 18 U.S.C. §§ 2511, 2518, 2519, 50 U.S.C. §§ 1801-1811 (1982 & Supp. III 1985).

[283] See 18 U.S.C. § 2519; 50 U.S.C. §§ 1803(c), 1806, 1809(a)(2) (1982 & Supp. III 1985).

[284] The Act's provision for civil liability allows an "aggrieved person, other than a foreign power or an agent of a foreign power," to maintain a civil action for statutory violations. 50 U.S.C. § 1810. This limitation does not necessarily foreclose the possibility that an agent of

taps against diplomats and comparable activities could provoke lawsuits on behalf of affected individuals. Furthermore, a change in the statutory law of diplomatic immunity both altered the absolute shield that diplomats enjoyed from 1790 to 1978,[285] and explicitly authorized the President to deviate from otherwise applicable standards in response to foreign states' conduct.[286] This change enhanced the possibility of judicial claims by a former diplomat or other state representative as a defense in proceedings against him or in an affirmative civil suit. Finally, former foreign government officials have taken refuge in the United States under circumstances where it is unlikely that the successor governments would claim any international immunities on their behalf.[287] Such officials might look to the Constitution and laws of the United States to enforce their claims of protection of personal and property interests. These developments, coupled with an increasing sophistication of foreign governments and their officials in using legal techniques for political ends, point in the direction of greater prospects for litigation in United States courts of constitutional claims by foreign state representatives in this country.

The Justice Department's position in 1978 with respect to the constitutional framework for foreign intelligence surveillance was that foreign officials in the United States are agents of a foreign state, which itself enjoys no constitutional rights, and that the legal aspects of those officials' presence in the United States are gov-

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a foreign power might attempt a claim directly under the Constitution.

[285] See Act of Apr. 30, 1790, ch. 9, §§ 25-27, 1 Stat. 117-18, replaced by Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified at 22 U.S.C. §§ 254a-254e (1982 & Supp. III 1985)).

[286] The Diplomatic Relations Act states that "[t]he President may, on the basis of reciprocity and under such terms and conditions as he may determine, specify privileges and immunities . . . which result in . . . more favorable treatment or less favorable treatment than is provided under the Vienna Convention." 22 U.S.C. § 254c.

[287] Two recent examples are the former Shah of Iran and former President Marcos of the Philippines. In the case of the Shah, the issue of the scope of constitutional protection available to him was directly raised by the demand of the Islamic Republic of Iran that any property he might have in the United States be surrendered to Iran in exchange for the release of the American hostages held in Iran. The Justice Department opined that the Shah's property rights were protected by the Constitution. See supra note 34. Former President Marcos has challenged the action of the United States taken at the request of the new Philippines government to impound the property accompanying him on his arrival in the United States. The Ninth Circuit reversed a district court ruling ordering the property to be released to Marcos. See Azurin v. Von Raab, 792 F.2d 914 (9th Cir. 1986).

erned by international, rather than constitutional, law.[288] Under this approach, freedom from search and seizure is a treaty right which the President may deny either on the basis of reciprocity or as the national interest may require,[289] and any claim for violation of that right must be presented by the official's government on the international plane rather than in a United States court. This has not been the consistent executive branch position, however. In testimony on the same issue in 1975, the Attorney General defended the constitutionality of measures short of traditional judicial warrants for wiretaps of foreign government representatives, on the ground that whether or not such individuals are among "the people" protected by the fourth amendment, the application of that amendment's reasonableness standard may appropriately differentiate between foreign officials and other individuals.[290] The latter approach at least accepts the applicability of the Constitution to United States government actions affecting foreign individuals present here, although the substantive standard under the Constitution gives the government more latitude in authorizing foreign intelligence searches and seizures than in ordinary domestic cases. A third approach surfaced only a few years later, when the Justice Department's Office of Legal Counsel thought it obvious that a former foreign head of state who was alleged to hold property in the United States was a "person" for purposes of the fifth amendment, without any suggestion that a flexible or differential application of the due process clause might be justifiable.[291] Under this last approach, a foreign official's relationship to his government and the elements of international and foreign law governing his status and property would be irrelevant: such an official would receive no less constitutional protection than any other alien temporarily and legally present in the United States.

The approach that best accords with constitutional traditions treats the relationship between a foreign individual and the United

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[288] See sources cited supra note 29-30.

[289] The Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (1982 & Supp. III 1985), specifically authorizes the President to derogate from the treaty standard.

[290] According to Levi Testimony, supra note 14, at 74, "The Fourth Amendment guards the right of 'the people' [referring to the phrase 'We the People' in the Preamble] and it can be urged that it was not meant to apply to foreign nations, their agents and collaborators. Its application may at least take account of that difference."

[291] See sources cited supra note 34 and accompanying text.

States government as subject to the Constitution, but also takes account of the foreign official's role in relation to the foreign state. This approach is consistent with a line of cases going back almost a century in which aliens in the United States have been held entitled to ask for judicial review of the compatibility of government action with the Bill of Rights.[292]

Before considering the ways in which the Constitution might apply with respect to federal government actions, it is important to point out the constitutional limitations on state actions affecting foreign states' individual representatives. Consistent with the position taken in Section II.B, the federal courts should strike down state measures that harm foreign state representatives, even without a showing of explicit conflict with affirmative federal regulation. Such state measures are presumptively suspect,[293] and even the argument that a measure might assist in the implementation of some federal policy will not necessarily save it from being invalidated under the Constitution.[294] The federal courts perform a

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[292] See, e.g., Wong Wing v. United States, 163 U.S. 228, 238 (1896) (illegal alien is "person" entitled to invoke fifth and sixth amendment protections); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (aliens are "persons" under fourteenth amendment's equal protection clause). It has long heen established, for example, that aliens within the territorial jurisdiction of the United States or of a state are entitled to the safeguards of the Bill of Rights in criminal proceedings. See *Wong Wing*, 163 U.S. at 238. The Court has declined to find a constitutional requirement for comparable safeguards in deportation proceedings, even though the consequences to an alien of deportation can be more onerous than criminal sanctions. See Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Galvan v. Press, 342 U.S. 522 (1952). Even aliens whose presence is unlawful enjoy a considerable measure of constitutional protection. See Plyler v. Doe, 457 U.S. 202 (1982); Mathews v. Diaz, 426 U.S. 67 (1976); Wong Wing v. United States, 163 U.S. 228 (1896). Nevertheless, the scope of that protection is not necessarily coextensive in all areas with the rights of citizens, permanent residents, or other lawfully present aliens.

[293] Compare Graham v. Richardson, 403 U.S. 365 (1971) (states may not deny welfare benefits to aliens under equal protection clause) with Mathews v. Diaz 426 U.S. 67 (1976) (federal five-year residence requirement for receipt of benefits does not violate due process). See also C. Black, Jr., supra note 20, at 64-65 (There are "few relational inferences better warranted than the inference that the national power over aliens as such is paramount, and that the states may not in general take any action against them as aliens.").

[294] In Hines v. Davidowitz, 312 U.S. 52 (1941), the Court invalidated a Pennsylvania alien registration act that was asserted to serve the same purposes as a federal alien registration act. In Plyler v. Doe, 457 U.S. 202 (1982), Texas argued that it could constitutionally deny free public education to children whose presence in the United States violated federal law. The Court found no indication of congressional policy that children whose illegal presence was no fault of their own should suffer such a disability. Id. at 224-26. The Court did, however, advert to De Canas v. Bica, 424 U.S. 351 (1976), which sustained a California law prohibiting knowing employment of illegal aliens if such employment would adversely affect

proper function in enforcing the paramount federal interest concerning state actions affecting relations with foreign states.[295]

With regard to federal authority, the presumptions are inverted. Just as state measures against foreigners are presumptively invalid, federal measures are presumptively valid. The cases dealing with the rights of aliens against federal actions confirm the broad scope of the federal power over the conditions for aliens' admission to and departure from the United States, as well as the terms of their presence here. The Supreme Court has stated that the power over aliens is "to be exercised exclusively by the political branches of government"[296] and that "over no conceivable subject is the legislative power of Congress more complete" than it is over aliens.[297] Yet despite the frequent characterization of the federal power over aliens as plenary, the power is not beyond judicial scrutiny. In extraordinary cases the courts will hold the political branches to judicially prescribed standards. As an example, the Supreme Court has held that Congress may not condemn even illegal aliens to hard labor without the procedural safeguards of the fifth and sixth amendments.[298] Such cases reflect a view of the federal courts' role

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legal residents. In *Plyler* the Court cited *De Canas* for the proposition that "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." 457 U.S. at 225.

[295] See United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938). In finding state infringements unconstitutional, the rhetoric of the "discrete and insular minority" has proved convenient, since the courts are thereby cast in the role of shielding powerless castes from the prejudices and hostilities of narrow-minded state legislatures. On the applicability of the concept of "discrete and insular minority" to aliens, see Ely, Democracy and Distrust 148-62 (1980); Ackerman, Beyond *Carolene Products*, 98 Harv. L. Rev. 713, 729 n.27 (1985). Despite this rhetoric, it is clear from the attendant reasoning that the real interest being vindicated is usually federal supremacy. The courts generally do not take the approach of identifying an interest of the individual or minority group which must be shielded even from the exercise of federal authority. To the contrary, a number of cases that refer to aliens as a disadvantaged group in the state context confirm that the alien would have no constitutional claim against a similar measure adopted by Congress as federal policy. See, e.g., Plyler v. Doe, 457 U.S. at 224-26.

[296] Kleindienst v. Mandel, 408 U.S. 753, 765 (1972); see also Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[297] Kleindienst v. Mandel, 408 U.S. at 766 (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)). The different standards for judicial review of state and federal regulations mean that the courts will strike down a state measure while confirming that Congress has ample power to adopt a similar measure as federal policy. See, e.g. Hines v. Davidowitz, 312 U.S. 52 (1941).

[298] See Wong Wing v. United States, 163 U.S. 228 (1896).

as the last line of defense of the dignity of the human person.[299]

There is more than a symbolic significance in acknowledging the authority of the Constitution over all United States governmental actions affecting individuals present in the United States. In times of crisis, such as those involving confrontations with foreign states, the courts should be the ultimate guardians of the values of human liberty embodied in our Constitution. As an example of the kind of case where judicial intervention might be appropriate, one could hypothesize a future hostage-taking situation in which the President might yield to political pressure to retaliate by incarcerating representatives of the offending government here and subjecting them to treatment corresponding to the degree of degradation inflicted on the United States hostages abroad. The fact that demands for such a response repeatedly surfaced during the Iran hostage crisis indicates that this hypothetical circumstance is not at all farfetched.[300] In such an event, the courts should have the authority to affirm basic constitutional values through the traditional writ of habeas corpus or other appropriate remedies.[301] In more typical cases, such as embassy wiretaps, where the constitutional principle in question embodies a standard of reasonableness or other flexible elements, its application should properly reflect such considerations as the activities in which the representative is engaged on behalf of his government, that government's treatment of United States personnel in its territory, and the position of the political branches on the justification for the challenged measure.

There is nothing anomalous about taking a more flexible ap-

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[299] Although the discussion deals here with claims directed at federal rather than state actions, language from cases striking down state restrictions vividly expresses the Court's attitude toward its special role in protecting the human rights of aliens: "And it is also of importance that this legislation deals with the rights, liherties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating labels on cans." Hines v. Davidowitz, 312 U.S. 52, 60 (1941); see also Plyler v. Doe, 457 U.S. 202 (1982) (affording constitutional protection to illegal alien children who challenged their exclusion from public education).

[300] See Owen, Final Negotiation and Release in Algiers, *in* American Hostages in Iran 300 n. 2 (W. Christopher ed. 1985); Schachter, International Law in the Hostage Crisis, *in* American Hostages in Iran 357 (W. Christopher ed. 1985).

[301] Habeas corpus is the traditional remedy for challenging the legality of detention, or in some cases restraints other than detention that impair the petitioner's liberty. It is also a method by which persons facing extradition or aliens facing exclusion, expulsion, or deportation can obtain a federal court ruling on their constitutional claims if they have not been successful in proceedings before a committing magistrate or administrative agency.

proach to judicial review in cases involving *individuals* who represent foreign states than in decisions concerning foreign states as juridical entities. A view of the courts as the guarantors of last resort of individual liberties is far more justifiable than a view that would permit courts to supervise economic or political policies toward foreign states as sovereigns. This does not mean that individual foreign representatives could claim all the personal liberties to which citizens, resident aliens, or even other categories of nonimmigrant aliens, are entitled. To the contrary, there is no question that foreign state representatives may be subjected to restrictions on their activities that would be impermissible as regards other individuals.[302] But despite the high degree of deference that the courts should generally afford the political branches in regulating the status of foreign representatives, it is important to preserve the accountability of the political branches in judicial proceedings when human liberty is at stake.

IV. Conclusion

Foreign sovereigns are "persons" for most legal purposes, including relationships governed by private law as well as federal statutory law. With respect to the application of constitutional values, it is usually appropriate for courts and other decisionmakers to treat foreign sovereigns at least as favorably as other "persons." But at the fundamental level of how our Constitution allocates responsibility for external relations, no reading of the term "person" or any comparable constitutional term can diminish the plenary power of Congress and the President to establish United States policy toward foreign states.

The federal courts should continue the trend of giving foreign sovereigns the benefit of constitutional jurisprudence in every case except where to do so would present an irreconcilable conflict with the explicit foreign policy of the political branches. To judge from the growing amount of litigation in this area, there will be many

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[302] As an example, it is accepted that the President may limit the freedom of travel of diplomatic representatives in the United States, and he has frequently done so in response to restrictions placed on American diplomats by other states. See Memorandum Opinion for the Att'y General on Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission, Jan. 8, 1980, *reprinted in* 4A Opinions of the Off. of Legal Couns. 174 (1980) (distinguishing between travel restrictions and more drastic measures such as house arrest).

opportunities for the federal courts to develop common law and apply statutory law founded on principles inspired by the Constitution. The occasions when the political branches seek to deviate from those principles will be rare but important. When these occasions result in litigation, the courts should not fall into the error of confusing constitutionally inspired rules of judicial decision with constitutional limitations on the diplomatic, political, economic, and other means of influence in United States relations with foreign sovereigns.