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THE MYTH OF EXTRACONSTITUTIONAL FOREIGN AFFAIRS POWER

MICHAEL D. RAMSEY*

Over sixty years ago in *United States v. Curtiss-Wright Export Corp.*,¹ the U.S. Supreme Court posited a peculiar notion of the source of federal power in foreign affairs. Justice Sutherland, speaking for the Court, said that federal power in this area does not arise as federal power is ordinarily understood to arise—namely, from a grant of power by the express or implied terms of the U.S. Constitution. Rather, said Sutherland, federal power in foreign affairs is extraconstitutional: “the powers of external sovereignty . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . [They] exist as inherently inseparable from the conception of nationality.”²

Curtiss-Wright is a striking departure from the usual view of constitutional law, which holds that the federal government is one of enumerated powers and, as Madison said, “delegation alone

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1. 299 U.S. 304 (1936).

2. *Id.* at 318. For an engaging summary of the argument, see LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 16-22 (2d ed. 1996). The theory was not entirely original with Sutherland; something of this sort was suggested with respect to the power over immigration in *Chae Chan Ping v. United States*, 130 U.S. 581, 603-04 (1889) and *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893), and with respect to acquisition of territory in *Jones v. United States*, 137 U.S. 202, 212 (1890). See Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999) (discussing the origins of the idea of extraconstitutional foreign affairs power). Sutherland expressed similar views before joining the Court in *GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS* (1919). See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 46-62 (1999) (discussing the evolution of Sutherland's thought). However, *Curtiss-Wright* was the Court's first assertion of a generalized extraconstitutional foreign affairs power.

warrants the exercise of any power."³ It runs contrary to the plain language of the Tenth Amendment (declaring that the "powers not delegated to the United States by the Constitution" are reserved to the states or to the people⁴) and seems inconsistent with numerous statements to the same effect made during the debates over the ratification of the Constitution.⁵ Not surprisingly, it has invited vigorous dispute. Much academic labor has been devoted to proving *Curtiss-Wright* wrong,⁶ but none of these efforts has met unqualified success: despite its difficulties, the case still has prominent defenders and remains a centerpiece of academic⁷ and

3. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 620 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT, DEBATES] (statement of James Madison to the Virginia Ratifying Convention).

4. U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

5. See, e.g., 2 ELLIOT, DEBATES, *supra* note 3, at 424-25 (statement of James Wilson to the Pennsylvania Convention that the federal government consists only of enumerated powers and that failure to enumerate a power would cause it to be outside the government's authority); 3 *id.* at 620 (statement of James Madison to the Virginia Convention denying that "the general government [could] exercise any power not delegated"); 4 *id.* at 259 (statement of Charles Pinckney to the South Carolina Convention that "no power could be executed, or assumed, [by the federal government] but such as were expressly delegated"); 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 339 (John P. Kaminski & Gaspare J. Saladino eds., 1981) [hereinafter DOCUMENTARY HISTORY] (public address by James Wilson in Philadelphia, 1787, stating that "every thing which is not given, is reserved" to the states).

6. For leading recent criticism of *Curtiss-Wright*, see for example, MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 18-34 (1990) (criticizing the historical and logical foundations of *Curtiss-Wright*); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990) (describing "withering criticism" of *Curtiss-Wright*); Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1659 (1997) (describing *Curtiss-Wright* as "the bête noire of U.S. foreign relations law"). For attacks specifically upon *Curtiss-Wright's* theory of extraconstitutional power in foreign affairs, see David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946) (criticizing Sutherland's historical claims); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973) (same); C. Perry Patterson, *In re The United States v. The Curtiss-Wright Corporation* (pts. 1 & 2) 22 TEX. L. REV. 286, 445 (1944) (same).

7. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1296-97 (1996) (relying on *Curtiss-Wright* to conclude that "[w]hereas the federal government's authority over internal affairs is derived exclusively from the Constitution, 'the powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution.' Rather, such powers are 'vested in the federal government as necessary concomitants of nationality'"); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 940-41 (1995) (relying on *Curtiss-Wright*, rather

judicial⁸ discussions of federal foreign affairs power.

Nonetheless, *Curtiss-Wright* is demonstrably wrong as a historical matter, and it is wrong for reasons that have escaped the central focus of many attacks upon it. As set forth below, whatever else one thinks of *Curtiss-Wright*, it wrongly describes the understanding of the drafters and ratifiers of the Constitution. There was no theory of extraconstitutional power in foreign affairs at the time the Constitution was drafted and ratified. To the contrary, the Constitution's drafters and ratifiers understood the Constitution as the means to give the national government foreign relations power it would otherwise lack.

Surprisingly, no academic study has comprehensively considered the 1787-89 understanding of the source of foreign affairs power. Instead, criticism of *Curtiss-Wright* focuses upon different time periods or broader issues, upon which consensus has proved impossible. As a result, *Curtiss-Wright* has survived despite widespread attacks upon it. Once the focus is narrowed to the 1787-89 understanding of foreign affairs power, however, it should be demonstrable beyond dispute that *Curtiss-Wright* is wrong upon this point. Further, because *Curtiss-Wright's* reasoning depends

than the Constitution, to conclude that "federalism, and all of its attendant implications for reserved powers in the states, is simply an inapposite construct when it comes to the external affairs of the nation. 'Power over external affairs is not shared by the States; it is vested in the national government exclusively'"; Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056, 1060-68 (1974) (explicitly defending *Curtiss-Wright's* theory of extraconstitutional powers on historical grounds); see also HENKIN, *supra* note 2, at 16-22 (giving qualified endorsement of *Curtiss-Wright* on pragmatic grounds); JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 173-74 n.** (1979) (endorsing Professor Morris's historical view).

8. For prominent judicial citations of *Curtiss-Wright*, see *Clinton v. City of New York*, 524 U.S. 417, 445-46 (1998) (citing *Curtiss-Wright* as evidence of the President's broad discretion in foreign affairs); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (same); *Perpich v. Department of Defense*, 496 U.S. 334, 354 n.28 (1990) (quoting with approval *Curtiss-Wright's* assertion of extraconstitutional power in foreign affairs); *Webster v. Doe*, 486 U.S. 592, 605-06 (1988) (citing *Curtiss-Wright* in support of the President's broad role in foreign affairs); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (citing *Curtiss-Wright* as evidence of the federal government's "broad authority over foreign affairs"); *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 50 (1st Cir. 1999) (quoting with approval *Curtiss-Wright's* observations about extraconstitutional power in foreign affairs), *aff'd on other grounds sub nom.*, *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000); see also *Velasquez v. Frapwell*, 160 F.3d 389, 392-93 (7th Cir. 1998) (referring to the inconclusive historical debate over *Curtiss-Wright*), *vacated in part*, 165 F.3d 593 (7th Cir. 1999).

upon the claim that the Constitution was drafted against a background of extraconstitutional powers in foreign affairs, once that claim is rejected *Curtiss-Wright* as a whole becomes indefensible.

Prior criticism of *Curtiss-Wright* has failed to discredit the opinion conclusively, in part because that criticism has claimed too much. First, *Curtiss-Wright's* critics often address not the question of extraconstitutional power, but the opinion's secondary claim that the President (as opposed to Congress) should have a predominant role in foreign affairs.⁹ Proponents of congressional leadership in foreign affairs have made powerful arguments in this regard,¹⁰ but in spite of the attention given it, the matter remains debatable. It is clear, at least as a practical matter, that the President *does* play a leading role in foreign affairs, and has done so since the founding.¹¹ But the case against *Curtiss-Wright* need not turn upon the scope of presidential authority in foreign affairs. The truly radical part of *Curtiss-Wright* is not its emphasis on presidential power, but rather its claim that that power arose outside the Constitution.

Curtiss-Wright's critics have also tried to prove more than necessary in the area of state sovereignty. In so doing, they, as well as those who defend the opinion, focus upon the wrong time period. Specifically, they look not to 1787-89, but to the period surrounding independence more than a decade earlier. Part of *Curtiss-Wright's* theory was that the states were never fully sovereign. They passed, in *Curtiss-Wright's* view, from being colonies to being subnational units in the newly independent Union, and so never had foreign affairs power, which is an attribute of full sovereignty.¹² Attacks on

9. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (discussing presidential power).

10. See, e.g., GLENNON, *supra* note 6, at 16-34; KOH, *supra* note 6, at 94.

11. See, e.g., H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1999) (discussing presidential authority in the years following ratification of the Constitution); H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999) [hereinafter Powell, *Executive Branch Perspective*] (discussing modern scope of presidential authority in foreign affairs).

12. Specifically, *Curtiss-Wright* argued that if the states were never fully sovereign, they never possessed foreign affairs power, and therefore foreign affairs power could not have been delegated to the federal government by the states in the Constitution; because the

Curtiss-Wright argue that the states at one point were full sovereigns, and therefore *Curtiss-Wright* cannot be correct on this point.¹³ But the former proposition is widely disputed, as there are two competing historical theories about what happened at the moment of independence: that the states became independent separately and then created the Union, and that the Union declared independence and so established the collective independence of the states.¹⁴ Moreover, the debate has far-reaching implications in other areas, such as claims of states' rights based on inherent state sovereignty and claims of inherent federal powers in other fields.¹⁵ Because the historical attack on *Curtiss-Wright* has depended upon establishing the historical priority of the states—with consequent implications for state sovereignty—it has proved unpersuasive to those committed to the alternate historical reading; those skeptical of state sovereignty cling to *Curtiss-Wright*, not so much for what it says about foreign affairs powers, but for what it says about state *versus* federal power in general.

A further difficulty is that critics of *Curtiss-Wright* have not gone far enough in one respect: they have not offered a constitutional alternative to the theory of extracostitutional foreign affairs power. *Curtiss-Wright* is attractive, despite its drawbacks, because it appears to answer three difficult questions regarding foreign affairs: the source of federal foreign affairs power, the allocation of

federal government must have foreign affairs power, and this power was not delegated by the states, it must arise from some other source. See *Curtiss-Wright*, 299 U.S. at 317-18; *infra* part I.A (discussing this claim).

13. See, e.g., Levitan, *supra* note 6, at 478-90; Lofgren, *supra* note 6, at 12-20; Patterson, *supra* note 6, at 297-308, 445-56; see also Morris, *supra* note 7, at 1060-68 (taking the opposing view of the history).

14. For a summary of the historical debate, ultimately sympathetic to the nationalist side, see RAKOVE, *supra* note 7, at 173-74.

15. See, e.g., *Alden v. Maine*, 527 U.S. 706, 711-60 (1999) (concluding that states have inherent sovereign immunity in part based on the states' historical status as full sovereigns); *id.* at 760-814 (Souter, J., dissenting) (arguing that states lack sovereign immunity in part because they were never fully sovereign); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802-05 (1995) (concluding that states lack inherent power to impose term limits in congressional elections); *id.* at 845-57 (Thomas, J., dissenting) (concluding that since states were originally fully sovereign they retain this inherent power). On the broader contours of the inherent sovereignty debate, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

federal foreign affairs power, and the extent of the foreign affairs power of the states.

First, where does the federal government get its foreign affairs powers that are not specifically listed in the Constitution? Of course, the Constitution allocates a number of key foreign affairs powers, including the power to declare war, send and receive ambassadors, and enter into treaties.¹⁶ But other foreign affairs powers seem to be missing.¹⁷ *Curtiss-Wright* obviates the need to search constitutional text for additional powers—for if it is correct, those powers are held by the federal government irrespective of the Constitution.

Curtiss-Wright also resolves the *allocation* of federal foreign affairs powers. As the Constitution seemingly fails to mention numerous foreign affairs powers, obviously it gives no immediate clue as to their allocation. In the absence of contrary indications, the President may appear the logical locus of many foreign affairs powers, for numerous practical and structural reasons.¹⁸ The Constitution may not appear to make that allocation in so many words, but if foreign affairs powers are extraconstitutional, we need not be concerned about that omission. Lacking explicit guidance, foreign affairs powers may be allocated where they most logically seem to belong. This is the conclusion reached in *Curtiss-Wright*,¹⁹ and the case continues to be widely cited for this proposition.²⁰

16. See U.S. CONST. art. I, § 8; *id.* art. II, § 2, 3.

17. As Louis Henkin summarizes:

[V]ery much about foreign relations went without or with little saying. . . . Where—for random examples—is the power to recognize other states or governments; to maintain or rupture diplomatic relations; to open consulates in other countries and permit foreign governments to establish consulates in the United States; to acquire or cede territory; to grant or withhold foreign aid; to proclaim a Monroe Doctrine, an Open-Door Policy, or a Reagan Doctrine; indeed to determine all the attitudes and carry out all the details in the myriads of relationships with other nations that are 'the foreign policy' and 'the foreign relations' of the United States? . . . These 'missing' powers, and a host of others, were clearly intended for, and have always been exercised by, the federal government, but where does the Constitution say that it shall be so?

HENKIN, *supra* note 2, at 14-15.

18. See Powell, *Executive Branch Perspective*, *supra* note 11, at 527 (discussing advantages of presidential power in foreign relations).

19. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

20. See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 445 (1998); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993); *Webster v. Doe*, 486 U.S. 592, 606 (1988); see also

Further, it may seem intuitive that

[f]oreign affairs are national affairs. The United States is a single nation-state and it is the United States (not the states of the Union, singly or together) that has relations with other nations; and the United States Government (not the governments of the states) conducts those relations and makes national foreign policy.²¹

But where, exactly, does the Constitution say this? The states are precluded from certain aspects of foreign affairs (such as war and treaty-making) by particular clauses of the Constitution,²² but there is no obvious generalized exclusion of states from matters affecting foreign affairs. True, the Supreme Court held in *Zschernig v. Miller*²³ that there is some sort of generalized preclusion, but *Zschernig* and its defenders have been embarrassed by the inability to point to any actual source of this preclusion beyond structural intuition.²⁴ *Curtiss-Wright* again provides a solution: if foreign affairs powers are "concomitants of nationality"²⁵ then of course they exist only in the federal government, which is the only entity possessing *national* sovereignty. Thus *Curtiss-Wright* provides an easy resolution of threshold questions to which we have an intuitive response but which, based on the Constitution alone, we may find extraordinarily nettlesome in the proof.

KOH, *supra* note 6, at 134-49 (discussing the importance of *Curtiss-Wright* to claims of presidential power in foreign affairs).

21. HENKIN, *supra* note 2, at 13. For leading analyses concluding that the Constitution precludes states from acting in foreign affairs, see Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563 (1993); Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT'L L. 175 (1997). For the opposing view, see Goldsmith, *supra* note 6; Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121 (1994).

22. See U.S. CONST. art. I, § 10.

23. 389 U.S. 429 (1968).

24. See HENKIN, *supra* note 2, at 162-65 (discussing *Zschernig*); Ramsey, *supra* note 21, at 356-69 (same).

25. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

This Article takes a new perspective on *Curtiss-Wright* in each of the foregoing respects. It is not concerned with the extent of the President's power in foreign affairs, and indeed ultimately suggests that *Curtiss-Wright's* view of presidential power may have some constitutional basis. It is not concerned with the historical priority of state and federal sovereignty, nor with the historical existence or nonexistence of the states as sovereign entities (in foreign affairs or otherwise) in the early years of independence. Rather, for purposes of discussion this Article assumes that *Curtiss-Wright's* historical defenders may be correct in their view of what happened at the moment of independence—that is, that the states were never full sovereigns.²⁶ Instead, it is specifically concerned with the 1787-89 understanding of the source of federal foreign affairs power. With the question so narrowed, I argue that *Curtiss-Wright* can be rejected conclusively. Finally, this Article considers the constitutional regime of foreign affairs powers in the absence of *Curtiss-Wright*. As indicated above, much of the allure of *Curtiss-Wright* may be that it provides a framework for foreign affairs law that the Constitution seems to lack. A convincing rejection of *Curtiss-Wright* must also provide an alternative explanation of the source and distribution of foreign affairs power. Although the details of that project are beyond the scope of this Article, I argue that it is possible to make sense of foreign affairs law from the text and structure of the Constitution, and thus we should not unduly fear the demise of the theory of extraconstitutionality.

Part I begins the discussion with an overview of the *Curtiss-Wright* theory and its critics. Parts II-IV examine the constitutional text, the Articles of Confederation, the Constitutional Convention, the ratification debates, and related contemporaneous and near-contemporaneous events to conclude that the thinking of the constitutional generation was based upon the premise that foreign affairs powers, like other powers, were allocated between the state and federal governments by the terms of the nation's governing document. I therefore conclude that there are no easy answers to the Constitution's foreign affairs conundrums: *Curtiss-Wright*, though convenient, is not a defensible solution to the dilemma of constitutionally unallocated foreign affairs powers. Finally, Part V

26. See Morris, *supra* note 7, at 1068-89.

suggests that the general outlines of the allocation of powers in foreign affairs can be discerned from the Constitution itself. Recourse to an extraconstitutional theory, as invited by *Curtiss-Wright*, is not only ahistorical but unnecessary.

I. CURTISS-WRIGHT AND ITS CRITICS

A. *The Theory of Extraconstitutional Foreign Relations Power*

In 1934, President Franklin Roosevelt declared an embargo on arms sales to Bolivia and Paraguay, which were then at war over disputed territory.²⁷ He acted pursuant to a joint resolution of Congress authorizing the President to declare an embargo if in the judgment of the President such action would promote peace between the combatants.²⁸ The United States subsequently prosecuted the Curtiss-Wright Export Corporation for violating the embargo; in its defense the company asserted, among other things, that the embargo was invalid because the Act authorizing it was an unconstitutional delegation of legislative power to the President. This portion of the case reached the Supreme Court in 1936 as *United States v. Curtiss-Wright Export Corp.*²⁹

Only a year before, the Court had overturned congressional legislation in other areas because it gave too much discretion to the President.³⁰ The delegation in *Curtiss-Wright* seemed similarly unconstrained, and to uphold it the Court needed an explanation for why it differed from prior impermissible delegations. Justice Sutherland, writing for the Court, argued that because the President already had broad power in foreign affairs, legislation in that field could grant more discretion than in domestic matters, and thus the Court's prior domestic delegation cases did not apply.³¹ But

27. See *Curtiss-Wright*, 299 U.S. at 311-12.

28. See Joint Resolution of May 28, 1934, 48 Stat. 811 (authorizing the President to declare an embargo "if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries").

29. See *Curtiss-Wright*, 299 U.S. at 311-15 (recounting the history of the case).

30. See *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935) (invalidating a portion of the National Industrial Recovery Act as an unconstitutional delegation of power to the President); *Panama Refining Corp. v. Ryan*, 293 U.S. 388 (1935) (same).

31. See *Curtiss-Wright*, 299 U.S. at 319-20.

this reasoning faced a different problem: nothing in the Constitution said, in so many words, that the President had broad power in foreign affairs, and the powers specifically granted to the President did not seem to encompass the embargo power at issue in *Curtiss-Wright*. To get around this difficulty, Sutherland turned to the theory of extraconstitutional power in foreign affairs. If foreign affairs power arose outside of the Constitution, the Constitution's failure to mention the President's broad power in foreign affairs did not mean that it did not exist. As a result, Sutherland relied heavily upon the idea of extraconstitutionality, even though the case itself concerned a matter (regulation of foreign commerce) quite plainly within the constitutional powers of Congress.³²

Curtiss-Wright was, moreover, an originalist opinion. Sutherland claimed to base his theory of extraconstitutionality upon the understanding of the framers of the Constitution with respect to sovereignty and the structure of the federal government.³³ Accordingly, in presenting an originalist critique of *Curtiss-Wright*, this Article attacks the opinion on its own terms—that is, whether it is indeed a correct interpretation of the understanding of the constitutional generation.

To begin the inquiry, it is appropriate to sketch the theory of extraconstitutionality set forth in *Curtiss-Wright*. Prior to the Declaration of Independence, sovereign power over the colonies of course lay with the British government. Sutherland's first claim in *Curtiss-Wright* relates to what happened at the moment of independence. Upon independence, he said, the power of sovereignty divided: "internal sovereignty"—control over domestic matters—passed to the states; "external sovereignty"—that is, foreign affairs power—passed to the unified entity "the United States."³⁴ In Sutherland's view:

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . . Sovereignty is never held in suspense. When,

32. See *id.* at 317-20.

33. See *id.* at 317-18 (discussing the understanding of the Constitutional Convention).

34. *Id.* at 315-18.

therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.³⁵

Sutherland next claimed that this power of "external sovereignty" passed from the initial, pre-Articles Union to the confederated government under the Articles of Confederation: "[I]t is clear that the Union, declared by the Articles of Confederation to be 'perpetual,' was the sole possessor of external sovereignty."³⁶ Although Sutherland did not directly say so, here he must have meant that the confederation government had those powers inherently—that is, without reference to the actual grants of power contained in the Articles.

Sutherland's third claim is the most important. "The Framers Convention," he asserted, "was called and exerted its powers upon the irrefutable postulate that though the states were several their people in respect of foreign affairs were one."³⁷ This follows from the constitutional generation's understanding of the prior assertions: foreign affairs power was an inherent aspect of national sovereignty automatically located in the national government, which had never been and could never be held by the states.³⁸ The Constitution's theory of delegated powers, in this view, simply did not apply (and logically could not apply) to foreign affairs. The states could not delegate what they never possessed. As Sutherland put it:

[T]he primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. That this doctrine applies only to powers which the states had is self-evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.³⁹

35. *Id.* at 316-17.

36. *Id.* at 317.

37. *Id.*

38. *See id.* at 316-17.

39. *Id.* at 316 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936)).

As a result, when the framers of the Constitution said that the national government had only the powers given to it by the states, that statement was subject to an important caveat: it did not apply to foreign affairs power. The national government already had those powers, as a natural attribute of its status as a national government, inherited from Britain by way of the initial informal Union that followed independence and the formal Union under the Articles of Confederation; and in any event, these powers could not be granted to the national government by the states because the states never had them.

Sutherland's historical discussion focused upon the first point, that is, that the initial Union after independence was the sole repository of external sovereignty. He pointed to the language of the Declaration and the 1783 peace treaty with Britain, executed on behalf of the Union, as evidence that states did not exercise "external" power except through the Union, and more generally referred to the practice during this early period as confirmation that the united government, and not the states, acted in international matters.⁴⁰ As to subsequent periods, he simply asserted that the "external sovereignty" that he believed he had found in the Continental Congress passed to Congress under the Articles of Confederation and to the national government under the Constitution.⁴¹

B. The Debate over Curtiss-Wright

The principal attacks upon Sutherland's theory have also focused on the period immediately following independence, asserting that states did exercise power in international matters at this time and that responsibilities in that field were understood to be shared between the states and the national government.⁴² In this manner, much of the leading academic discussion of *Curtiss-Wright* has been drawn into difficult historical and metaphysical questions about the

40. See *id.* at 316-17 (discussing the Declaration, the peace treaty, and practice under the Continental Congress).

41. See *id.* at 317.

42. See, e.g., Levitan, *supra* note 6, at 478-90; Patterson, *supra* note 6, at 297-308, 445-52. Similarly, *Curtiss-Wright's* academic defenders focus on the early period. See Morris, *supra* note 7, at 1068-88 (primarily discussing events from 1774 to 1780).

nature of sovereignty. By focusing on the early period, the debate becomes inseparable from one of the most fundamental and intractable debates of federalism: as historian Jack Rakove puts it, "Which came first, the Union or the states?"⁴³

To *Curtiss-Wright's* detractors, at independence the states individually became sovereign and thereafter formed a Union by delegation from complete sovereignty.⁴⁴ Some activities of the states (and the statements of some leaders) support this view, and plainly this chronology, if correct, is at odds with Sutherland's theory. If the states created the Union from a position of complete sovereignty, the national government could not "inherit" foreign affairs power directly from Britain. But the early history is ambiguous. Historian Richard Morris, in a careful account of the period before and after independence, has argued that "[t]he federal Union not only preceded the States in time, but initiated their formation."⁴⁵ Accordingly, he concluded, Sutherland's "historical analysis of the inherent foreign affairs powers of the national government would not have seemed alien to the thinking of many, if not all, of the Founding Fathers."⁴⁶ And Professor Rakove, another leading modern historian of the period, concludes that Morris has the better of the argument.⁴⁷ In the words of a third prominent historian, "[t]he authority of the Continental Congress and the Continental Army was in fact so great during the critical years of Independence and the war as to provoke a continuing if fruitless debate . . . over the priority of the Union or the states."⁴⁸

43. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 163 (1996); see also RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* 21 (1987) ("Nation or Sovereign States: Which Came First?"); Patterson, *supra* note 6, at 445 ("Is the Union Older than the States?").

44. As Professor Rakove summarizes, the view was that "the separation from Britain had 'placed the 13 States in a state of nature towards each other,' and that only then had these 'separate sovereignties' formed a federal government for the dual purpose of 'defend[ing] the whole agst. foreign nations' and 'the lesser States agst. the ambition of the larger.'" RAKOVE, *supra* note 43, at 163 (describing and quoting Luther Martin's statements to the Constitutional Convention); see also 1 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 166 (Max Farrand ed., 1911) [hereinafter *FARRAND, RECORDS*] (recording Martin's argument). For historical accounts endorsing Martin's chronology, see BERGER, *supra* note 43, at 21-47; Lofgren, *supra* note 6, at 12-20; Patterson, *supra* note 6, at 445-56.

45. Morris, *supra* note 7, at 1057.

46. *Id.* at 1061-62.

47. See RAKOVE, *supra* note 7, at 173-74 n.*.

48. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 355

This difficult and perhaps unanswerable question of precedence is compounded because quite early on it became the subject of partisan debate in the service of a distinct and far-reaching matter—the question whether the *states* had inherent rights as “sovereigns.”⁴⁹ In the view of states’ rights proponents, “the idea that the states preceded and created the Union proved that they retained certain inherent powers that the Union could never supersede.”⁵⁰ This view arose as early as the debates in the Constitutional Convention, and was opposed energetically by nationalists such as Hamilton and Wilson, who sought to create a strong national government in the drafting of the Constitution.⁵¹ The debate periodically recurred with vehemence: during the crisis preceding the Civil War, for example, southern states asserted a right to secede based on their inherent sovereignty, a matter Lincoln disputed by arguing that the states had never been fully sovereign.⁵² In short, views of the precedence of the states or the Union tended, from the beginning, to be shaped by views of inherent *state* rights and immunities against the federal

(1998). As Professor Wood further observes: “[T]he Continental Congress since 1774 exercised an extraordinary degree of political, military, and economic power over the colonists—adopting commercial codes, establishing and maintaining an army, issuing a continental currency, erecting a military code of law, defining crimes against the Union, and negotiating abroad.” *Id.*; see also *id.* at 356-59 (indicating the difficulty of a clear resolution of the matter, given the Revolutionaries’ own unsettled view of sovereignty in the 1770s and 1780s).

49. See BERGER, *supra* note 43, at 21 (“Whether the States were independent sovereignties before the adoption of the Constitution . . . is fundamental to States’ Rights claims . . .”).

50. RAKOVE, *supra* note 43, at 163. See the exchange between Luther Martin and James Wilson at the Constitutional Convention, recounted in *id.* at 163 and in 1 FARRAND, RECORDS, *supra* note 44, at 166. See also the similar statement of Rufus King in the Constitutional Convention, quoted in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936). On the political implications and motivations for this debate, see RAKOVE, *supra* note 43, at 161-202.

51. See RAKOVE, *supra* note 43, at 163.

52. See generally Amar, *supra* note 15 (discussing the historical debate). Lincoln, for example, argued in terms reminiscent of *Curtiss-Wright*: “The original [states] passed into the Union even *before* they cast off their British colonial dependence The Union is older than any of the States, and, in fact, it created them as States.” *Id.* at 1460 n.153 (quoting Abraham Lincoln, Message to Congress, July 4, 1861); see also JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 138-39 (1833) (concluding that states lacked complete sovereignty); Morris, *supra* note 7, at 1063-67 (tracing this debate from the founding through the nineteenth century).

government—a question tangential at best to the issue in *Curtiss-Wright*, and one upon which consensus has proved impossible to achieve.⁵³ As a result of the scope and ambiguity of the issues with which the *Curtiss-Wright* theory has become enmeshed, its detractors have not been able to make an impermeable case.⁵⁴

Focus upon the initial period of independence, and attempts to develop a comprehensive account of the relationship between state and federal sovereignties, miss the central vulnerability of *Curtiss-Wright's* claim. *Curtiss-Wright* can be conclusively rejected without accepting the broader claims of state sovereignty. The immediate question is not how external sovereignty was distributed in the initial government after the Revolution, but how it was distributed under the Constitution; the question is not whether the state or federal governments *in general* have inherent powers and immunities by virtue of “sovereignty” (however defined), but whether *foreign affairs* powers are inherent in the federal government or derivative of the Constitution.

The critical question, at the appropriate level of generality, is what happened with respect to foreign affairs powers in 1787-89. *Curtiss-Wright* depends upon a showing that the constitutional generation in 1787-89 understood the national government to have inherent extraconstitutional powers in foreign affairs. The

53. See BERGER, *supra* note 43, at 21 n.1 (collecting authorities on both sides of the debate); MORRIS, *supra* note 7, at 1066-67 & 1067 n.71 (same). A related controversy concerns the scope of the states' reserved powers under the Tenth Amendment. In one account, the Tenth Amendment is comprehensive, stating, as it seems to on its face, that *all* powers not delegated to the federal government remain with the states or the people. See U.S. CONST. amend. X. On the other hand, a more limited view holds that the Tenth Amendment applies only to matters actually encompassed by original state sovereignty. Again, the issue is an old one. Joseph Story argued in 1833 that the idea of federal power as purely delegated power is incomplete: “the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.” 1 STORY, *supra* note 52, § 627. For a modern version of this debate, compare U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 801-05 (1995) (Stevens, J.) (adopting Story's view and holding that states inherently lack power to impose term limits in congressional elections) with *id.* at 845-56 (Thomas, J., dissenting) (adopting a comprehensive view of the Tenth Amendment and arguing that power to impose term limits in congressional elections is a power reserved to the states).

54. See HENKIN, *supra* note 2, at 19-20 (assessing the debate); see also MORRIS, *supra* note 7, at 1060-68 (adopting Sutherland's view of the initial period of independence despite academic criticism of *Curtiss-Wright*).

historical inquiry is whether this is true. This question is answerable without addressing the "which came first" debate or taking a position on the larger issues of federalism.⁵⁵

Rather than seeking a solution to abstract questions of sovereignty, the matter can be approached as a straightforward question of constitutional interpretation. Using constitutional text, as interpreted in light of the structure of the document and its history and context, we can inquire whether the Constitution is best understood as a document that contemplates extraconstitutional power in foreign affairs. If the Constitution was adopted upon this understanding, then Sutherland's specific conclusions with respect to foreign affairs powers have a strong basis, whatever the appropriate view of the chronological priority of the states and the national government. Conversely, if the Constitution was adopted upon the understanding that foreign affairs powers were, like other powers, granted to the federal government by that document, Sutherland's view has little to recommend it regardless of the early history of state sovereignty.

Once the question is framed in this manner, it is impossible to defend *Curtiss-Wright's* conclusion. As set forth below, the Constitution itself heavily implies that there was no conception of inherent foreign affairs power, for otherwise much of its text would be largely irrelevant. The framers and ratifiers of the Constitution repeatedly emphasized that the foreign affairs powers of the national government were those delegated in the Constitution. Moreover, the evidence of the Articles of Confederation is decisive against the idea of inherent foreign affairs powers. Like the Constitution, the Articles contained specific grants of foreign affairs powers to the federal government, although these grants were somewhat more limited than those contained in the Constitution. While the Articles were in force, everyone thought that foreign affairs powers not granted to the national government in the

55. Similarly, the narrow focus on foreign affairs proposed here does not address whether the federal government has *any* inherent powers, such as, for example, power over Indian tribes. Compare Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1760-61 (1997) (arguing that federal government's power in tribal affairs is inherent), with Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 542-48 (1996) (arguing that federal power in tribal affairs derives from affirmative grants of power in the Constitution).

Articles themselves were not possessed by the national government. One of the leading motivators for the Constitutional Convention of 1787 was the desire to give the national government additional foreign affairs powers omitted from the Articles. In short, no evidence supports Sutherland's specific view, and there is overwhelming evidence to the contrary.

II. THE CONSTITUTIONAL CASE AGAINST *CURTISS-WRIGHT*

This section examines the Constitution itself for evidence of an understanding of the source of foreign affairs powers. For purposes of this study we may assume that the "nationalist" account of the early years of independence is correct—that is, that the national government emerged prior to (or at least simultaneously with) the states, and that the national government, and not the states, primarily exercised foreign affairs power during this time. Even if this is correct, as discussed below there is little to indicate that the drafters and ratifiers of the Constitution thought that foreign affairs represented a special extraconstitutional category of powers. Rather, foreign affairs powers were allocated in the document and discussed in leading publications and debates in the same tenor as internal matters—namely, upon the understanding that their allocation and exercise arose from the plan of government established by the Constitution.

A. *Affirmative Grants of Foreign Affairs Power*

The Constitution does not read like a document drafted by or for those who believed in inherent foreign affairs powers. Many of its provisions are grants of specific foreign affairs powers to some part of the national government. By Article I, Section 8, Congress has the power to regulate foreign commerce; to declare war; to grant letters of marque; to regulate with respect to piracies, felonies on the high seas and the law of nations; and to regulate the Army and Navy.⁵⁶ By Article II, Sections 2 and 3, the President has the power to receive ambassadors and to command the military, and the President-plus-Senate have the power to make treaties and appoint

56. See U.S. CONST. art. 1, § 8.

ambassadors.⁵⁷ The text contains at least ten separate references to particular core foreign affairs powers.

One might respond that the point of these clauses is not to grant foreign affairs powers to the national government (as the government already had these powers inherently), but to allocate these powers within the branches of the national government.⁵⁸ Thus, on *Curtiss-Wright's* theory the declare-war clause is not superfluous, for even though the national government already had that power it would not be clear, absent the clause, whether Congress or the President had it.

The framers themselves, however, explained these clauses differently. In *The Federalist*, numbers 41 to 46, Madison presented a comprehensive overview of the powers of the national government. Federalist 41, the beginning of this series, is entitled "General View of the Powers *Proposed to be Vested* in the Union."⁵⁹ It begins:

The Constitution proposed by the convention may be considered under two general points of view. The FIRST relates to the sum or quantity of power which *it* vests in the government. . . . The SECOND, to the particular structure of the government and the distribution of this power among its several branches.

Under the first view of the subject, two important questions arise: 1. Whether any part of the powers *transferred* to the general government be unnecessary or improper? a. Whether the entire mass of *them* [i.e., of the powers transferred to the general government] be dangerous to the portion of jurisdiction left in the several States?⁶⁰

Plainly, by this language Madison is proposing to discuss powers granted to the national government *by the Constitution*.

Madison then divides these powers into six categories of powers "*conferred on the government of the Union*," of which the first two are foreign affairs powers: "Security against foreign danger" and

57. See *id.* art. II, § 2, 3.

58. See HENKIN, *supra* note 2, at 19 (suggesting this argument).

59. THE FEDERALIST NO. 41, at 266 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added).

60. *Id.* (emphasis added).

"[r]egulation of the intercourse with foreign nations."⁶¹ The balance of Federalist 41 is a defense of the *granting* of the powers in the first category, including war, letters of marque, and providing armies and fleets. The claim is that the federal government would be too weak without these powers, and so it is appropriate for the Constitution to grant them. Madison asks rhetorically, for example, "was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE as well as in WAR?"⁶² His answer: it would not have been "prudent" to "chain the discretion" of the national government by failing to grant such powers.⁶³

Federalist 42, the succeeding number, takes up the second class of powers—that is, the powers of intercourse with foreign nations.⁶⁴ Again, Madison describes these as powers "lodged in the general government" by the Constitution.⁶⁵ Under this heading he discusses additional foreign affairs powers: treaties, ambassadors, regulation of foreign commerce, and punishment of piracy, crimes on the high seas and violations of the law of nations.⁶⁶ Again, the background assumption is that if these powers were not granted in the Constitution, the national government would not have them. For example, Madison says the following with respect to "other public ministers and consuls":

[A] power of appointing and receiving 'other public ministers and consuls' is expressly and very properly added to the former provision [of the Articles of Confederation] concerning ambassadors. The term ambassador . . . comprehends the highest grade only of public ministers, and excludes the grades which the United States will be most likely to prefer. . . . [T]he mission of American consuls into foreign countries may *perhaps* be covered under the authority, given by the ninth article of the Confederation, to appoint all such civil officers as may be necessary for managing the general affairs of the United States. But the admission of consuls into the United States, where no

61. *Id.* at 266-67 (emphasis added).

62. *Id.* at 267.

63. *Id.*

64. See THE FEDERALIST NO. 42 (James Madison).

65. *Id.* at 273.

66. See *id.*

previous treaty has stipulated it, seems to have been nowhere provided for. A supply of the omission is one of the lesser instances in which the convention have improved on the model before them.⁶⁷

In similar vein, Madison commends the new Constitution for granting to Congress the power to punish piracies and offenses on the high seas and against the law of nations as a "still greater improvement on the Articles of Confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."⁶⁸ And further, speaking of the very power at issue in *Curtiss-Wright*, he says that "[t]he regulation of foreign commerce . . . has been too fully discussed to need additional proofs here of its being properly *submitted* to the federal administration."⁶⁹ In conclusion, Madison asserts that he has shown "that no one of the powers *transferred to the federal government* is unnecessary or improper. . . ."⁷⁰

All of this is, of course, nonsense if the federal government has inherent foreign affairs power and the constitutional clauses are meant only to allocate that power between the President and Congress. All of Madison's statements assume exactly the opposite—that absent a grant of a foreign affairs power, the power does not exist in the national government. According to Madison, the powers of war, fleets and armies are appropriately included in the Constitution, else the federal government would lack the ability to defend the nation.⁷¹ The drafters show commendable attention to detail, he says, in including a provision for sending and receiving consuls, for otherwise the government would lack the power to send and receive them.⁷² In his view, without the Constitution's grant of power to punish offenses against the law of nations the federal government would have to leave that to the states, and it is obviously appropriate to "submit to" the federal government the

67. *Id.* at 273-74.

68. *Id.* at 274.

69. *Id.* at 275 (emphasis added).

70. THE FEDERALIST NO. 45, at 292 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added).

71. See THE FEDERALIST NO. 41, at 267 (James Madison) (Isaac Kramnick ed., 1987).

72. See THE FEDERALIST NO. 42, at 273-74 (James Madison) (Isaac Kramnick ed., 1987).

power to regulate foreign commerce.⁷³ Yet surely these powers would be included in *Curtiss-Wright's* definition of "external sovereignty." One can only conclude that Madison thought his audience had no concept of inherent extraconstitutional foreign affairs power.

The same is true of Hamilton. In Federalist 23 he argues:

Whether there ought to be a federal government intrusted with the care of the common defense is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow that that government *ought to be clothed with all the powers requisite to complete execution of its trust*.⁷⁴

In Federalist 24, Hamilton discusses "the powers *proposed to be conferred upon the federal government*, in respect to the creation and direction of the national forces. . . ."⁷⁵ His argument tracks Madison's in Federalist 41: it is appropriate for *the Constitution* to give the national government the powers of national defense, rather than leaving them to the states.⁷⁶ Again, this makes no sense if the national government had inherent foreign affairs powers, which would surely include the power of national defense.

The affirmative grants of various foreign affairs powers contained in the Constitution, coupled with the insistence of the Constitution's defenders that these clauses were necessary to vest the national government with foreign affairs powers, argue strongly against an idea that those powers might be extraconstitutional. That might be undercut by a showing of a contrary line of thinking holding these phrases to be relevant only to the distribution of powers already held by the national government. However, that idea is not discernable in surviving discussions of foreign affairs powers among the constitutional generation. Hamilton and Madison may be taken as indicators of a conventional understanding of foreign affairs powers—that the federal government depended on the

73. See *supra* note 69 and accompanying text.

74. THE FEDERALIST NO. 23, at 185 (Alexander Hamilton) (Issac Kramnick ed., 1987) (emphasis added).

75. THE FEDERALIST NO. 24, at 188 (Alexander Hamilton) (Issac Kramnick ed., 1987) (emphasis added).

76. See THE FEDERALIST NOS. 23, 24, 25 (Alexander Hamilton), NO. 41 (James Madison).

text of the Constitution for these powers. As both Hamilton and Madison described it, the foreign affairs powers in the Constitution represent powers "transferred to" or "conferred upon" the national government by the Constitution;⁷⁷ were they not granted in the Constitution, they would adhere in the states and not in the national government. That is flatly inconsistent with the *Curtiss-Wright* theory.

B. Specific Denials of Foreign Relations Power to the States

In addition to affirmative grants of foreign affairs power to the national government, the Constitution contains prohibitions upon the exercise of specific foreign affairs powers by the states. States are prohibited from entering into treaties or granting letters of marque; states are prohibited, without the consent of Congress, from taxing imports and exports, keeping troops or ships of war in peacetime, entering into agreements with foreign powers, or engaging in war unless invaded. These provisions make up much of three long clauses of Article I, Section 10.⁷⁸

The presence of clauses denying important foreign affairs powers to the states further undermines the idea that the framers thought the national government had inherent and exclusive powers in foreign affairs. If the states were extraconstitutionally precluded from engaging in foreign affairs, what was the point of these clauses? *Curtiss-Wright* demands that all of this language be dismissed as surplusage.

The counterargument must be that these clauses were indeed superfluous and intended as insurance. Even if the drafters believed that states lacked foreign affairs powers inherently, perhaps they thought state exercise of such powers would be so dangerous that they should make doubly sure by including in the text specific prohibitions of the worst practices. These clauses had no immediate operative purpose, the argument runs, but ensure that even if the idea of inherent exclusive external sovereignty was

77. See THE FEDERALIST NO. 24, at 188 (Alexander Hamilton), NO. 45, at 292 (James Madison) (Issac Kramnick ed., 1987).

78. U.S. CONST. art. I, § 10.

later abandoned or forgotten states still could not claim foreign affairs powers.

As an initial matter, this does not seem the most natural reading of the text. Had the drafters sought to declare a preexisting limitation, the more natural phrasing would have been to begin with a general statement—that states are precluded from foreign affairs—and then include specific examples of the powers denied to the states. Including clauses merely declaratory of preexisting specific limitations on state governments, without such a general statement, would risk implying that such a list in fact contained all of the preexisting limitations.⁷⁹ Because including the specific restrictions would undercut a general restriction, anyone who believed in the general restriction should have hesitated to include the specifics, at least without a further explanatory statement. Yet there is no record of anyone objecting to Article I, Section 10 on these grounds. That is further suggestive because the Framers were concerned about precisely this problem in other contexts. It is familiar history, for example, that one of the chief objections raised against the Constitution was its lack of a Bill of Rights, and that one of the chief responses was that one could not hope to name all of an individual's rights in a single list, and the inclusion of some rights would imply the nonexistence of others.⁸⁰ Yet surely the same danger was posed by Article I, Section 10, were it merely declaratory: the states would claim that foreign affairs powers not listed were impliedly retained by the states.⁸¹ No one commented upon this problem, further suggesting that there was no common understanding of an inherent exclusion of the states from foreign affairs.

A further objection to the "declaratory" reading is the structure of Article I, Section 10, which includes in the same clause both

79. For further elaboration of this point, see Ramsey, *supra* note 21, at 411-12.

80. See RAKOVE, *supra* note 43, at 288-338 (discussing the debate over the Bill of Rights). It was this concern that gave rise to the Ninth Amendment. See U.S. CONST. amend. IX; 1 ANNALS OF CONG. 441 (Joseph Gales ed., 1789) (statement of James Madison) (describing purpose of Ninth Amendment).

81. See also THE FEDERALIST NO. 32, at 221-22 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (employing similar reasoning to argue that, since states were denied the specific power of taxing imports and exports by Article I, Section 10, they must have the general power of taxation of other items not specifically mentioned).

external and internal powers denied to the states. The first sentence, for example, reads:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.⁸²

By the *Curtiss-Wright* theory, the first two of these powers are inherent and exclusive prerogatives of the national government not within the power of the states even absent a constitutional prohibition. But most of the remaining powers were widely exercised by the states after 1776, and although often opposed on moral and practical grounds, they were not thought beyond the states' sovereign powers. No one doubted, for example, that the states had the power to print paper money (and would continue to have it unless precluded by the Constitution).⁸³ It seems structurally sound, given the equivalent status of treaty-making and printing paper money in Article I, Section 10, to treat them as equivalent powers—that is, things that states might otherwise do, but in the name of good government should be precluded from doing.

Moreover, as with the affirmative grants, the drafters explained their prohibitions of state foreign affairs powers as operative rather than declaratory. Madison, summarizing Article I, Section 10, says "A fifth class of provisions in favor of the federal authority consists

82. U.S. CONST. art. I, §10.

83. For state acts creating paper money, see for example, 5 ACTS AND RESOLVES OF THE PROVINCE OF MASSACHUSETTS BAY, 1769-1780, at 442 (1886) (3rd Session, November 1775); 5 *id.* at 1178 (3rd Session 1780); 10 WILLIAM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL OF THE LAWS OF VIRGINIA 241-42 (1823) (May Session, 1780); 10 *id.* at 430-31 (May Session 1781); 9 JAMES T. MITCHELL & HENRY FLANDERS, STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801 (1903), at 34-35 (Aug. 1, 1776) [hereinafter LAWS OF PENNSYLVANIA]; 10 *id.* at 183 (Mar. 25, 1780). On the controversies surrounding paper money in particular states, see for example, John P. Kaminski, *Rhode Island: Protecting State Interests*, in RATIFYING THE CONSTITUTION 370-75 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (discussing paper money in Rhode Island); Sara M. Shumer, *New Jersey: Property and the Price of Republican Politics*, in *id.* at 71, 79-80 (discussing paper money in New Jersey).

of the following restrictions on the authority of the several States.”⁸⁴ Madison apparently saw Article I, Section 10 as an operative provision that created a “restriction” upon “the authority” the states would otherwise have, rather than a provision declaring a preexisting lack of power on the part of the states. Also, in defending these restrictions on the states he does *not* say that they were simply declarative of preexisting inherent restrictions. That would have been the easiest defense, had it been widely accepted. Instead, Madison gives policy reasons for the restrictions, implying that absent the restrictions, the evils of state involvement in these aspects of foreign affairs would likely occur.⁸⁵ Further, Madison discusses the foreign affairs restrictions on the same terms, and in the same number of *The Federalist*, as other constitutional restrictions on the states that were assuredly *not* merely declaratory of inherent limitations on state sovereignty, such as the limitations on printing paper money or interfering with the obligation of contracts.⁸⁶

As a result, the specific limitations on the states further show an understanding that foreign affairs powers were not extraconstitutional, but had to be granted to the national government and denied to the states in the same manner as any other sort of power. True, the text and commentary show that in general the Framers thought that foreign affairs powers were *more appropriately* exercised by the national government—but they also show that the Framers thought this was a structural choice that needed to be reflected in the nation’s governing document, rather than one that arose automatically from some abstract theory of sovereignty.

III. THE PRECEDENT OF THE ARTICLES OF CONFEDERATION

The most significant precedent for the Constitution in matters of foreign affairs was the Articles of Confederation, the nation’s governing document from 1781 until 1789. Many of the Constitution’s provisions respecting foreign affairs were copied from the Articles, either directly or with minor changes. Moreover, in

84. THE FEDERALIST NO. 44 at 286 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added).

85. *See id.*

86. *See id.*

explaining the Constitution, its drafters often referred to the Articles to justify particular foreign affairs provisions.

An examination of the Articles' theory of foreign affairs power is therefore important to an understanding of the Constitution's theory. This is true in several respects. First, in the *Curtiss-Wright* view, the Articles, like the Constitution and the pre-Articles Union, were based upon a theory of external sovereignty inherently held by the national government. According to Sutherland, that sovereignty—containing the foreign affairs power—passed automatically and without interruption from the British monarchy to the Union, to the government under the Articles, and finally to the government under the Constitution.⁸⁷ Second, it may be conceivable as a theoretical matter that the Constitution adopted a theory of inherent foreign affairs powers even if the Articles did not; however, the historical context makes this unlikely. The framers of the Constitution saw the Articles as a model; although they saw many areas that needed reform, they also repeatedly emphasized that many of the features of the Constitution were simply carried over from the Articles, particularly in foreign affairs.⁸⁸ It seems highly unlikely that they started from a radically different view of the sources of foreign affairs power than existed under the Articles.

A. *Text of the Articles of Confederation*

The text of the Articles of Confederation, like the text of the Constitution, does not appear on its face to contemplate inherent foreign affairs power. First, the Articles, like the Constitution, explicitly grant key foreign affairs powers to the confederation government, including the powers of war and treaty-making.⁸⁹ As

87. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936).

88. See *infra* Part III.D.

89. See ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA AND GEORGIA art. IX, reprinted in JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 171 (1845) [hereinafter ARTICLES OF CONFEDERATION] (declaring that the "United States, in Congress assembled, shall have the sole and exclusive right and power" of, among other matters, war and peace, sending and receiving ambassadors, entering into treaties, establishing prize rules, and granting letters of marque and reprisal in peacetime).

with the Constitution, this suggests that there was no idea of inherent foreign relations power—else why grant these powers in specific terms? Moreover, the rejoinder to this argument under the Constitution—that specification was necessary to show *which branch* of the federal government had the particular power in question—is unavailable with respect to the Articles. Under the Articles, there was only a single branch of government, the Continental Congress.⁹⁰ The only reason for an affirmative grant of power in the Articles, aside from mere redundancy, was that otherwise the power would not be possessed by the confederation government.⁹¹ Second, the Articles, like the Constitution, had specific limitations upon state activity in foreign affairs.⁹² As under the Constitution, these limitations were understood as restrictions upon power that the states would have had absent the restriction. Madison observed, “[the state] constitutions invest the State legislatures with absolute sovereignty in all cases not excepted by the existing Articles of Confederation.”⁹³ Third, the Articles, unlike the Constitution, explicitly limited the Confederation’s power to matters specifically delegated to it in the document: according to Article II, “Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction, and right which is not by this confederation, expressly delegated to the United States, in Congress assembled.”⁹⁴

90. See ARTICLES OF CONFEDERATION art. V.

91. In this regard, see Madison’s comment that because the Articles did not give the Confederation government the power to send and receive consuls and other lesser ministers, the Confederation lacked that power. See Madison, *supra* note 64, at 273.

92. See ARTICLES OF CONFEDERATION art. VI (restricting states, without the consent of Congress, from among other things, sending or receiving foreign embassies, entering into treaties or agreements, imposing a limited class of duties on foreign goods, maintaining an army or navy in time of peace, engaging in war, or granting letters of marque and reprisal in peacetime); *id.* art. IX (declaring that congressional power over various foreign relations activities is “sole and exclusive”).

93. THE FEDERALIST NO. 44, at 291 (James Madison) (Isaac Kramnick ed., 1987). Two further provisions of the Articles imply acceptance of a state role in matters affecting foreign affairs. Under Article VI, states could not charge imposts or duties “which may interfere with any stipulations in treaties.” Under Article IX, Congress could not enter into commercial treaties requiring states to impose lower duties on foreigners than upon their own citizens, or preventing states from “prohibiting the exportation or importation of any species of goods or commodities whatsoever.” ARTICLES OF CONFEDERATION arts. VI, IX.

94. ARTICLES OF CONFEDERATION art. II. On the drafting history of this provision, see RAKOVE, *supra* note 7, at 169-74.

In sum, the text of the Articles, standing alone, seems to reject the idea of inherent foreign affairs powers. One would have to view its foreign affairs provisions, particularly those granting war and treaty-making power to the Confederation, as surplusage, and dismiss Article II as inapplicable to foreign affairs. The textual argument is not entirely decisive, however. As discussed, I assume in this study that the Continental Congress prior to the Articles exercised a form of inherent foreign affairs power (at least in the sense of uncontroversially exercising foreign affairs power without clear documentary authorization), and that the historical record is at least ambiguous as to whether the states ever had full sovereignty in some external matters.⁹⁵ Under this view, the Articles may have been drafted against a background of assumed inherent power in foreign affairs. Additionally, although in general the Continental Congress, and not the states, exercised war and treaty-making powers during the revolutionary period, there were controversial exceptions where particular states appeared to claim a role in these matters.⁹⁶ Perhaps it is not absurd to suggest, therefore, that the references to foreign affairs power in the Articles were indeed merely declaratory of a preexisting inherent arrangement, generally agreed upon but occasionally violated (and so making an explicit statement appropriate). Moreover, this would provide a ground for arguing that Article II in fact does not apply to foreign affairs. By its terms Article II only confirms existing state sovereignty—and, by this reasoning, foreign affairs did not make up part of the states' existing sovereignty.⁹⁷

95. See Morris, *supra* note 7, at 1068-88 (taking this position); see also Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 80-81, 91-95 (1795) (Paterson, J., Iredell, J.) (debating the authority of the pre-Articles Congress in foreign affairs).

96. See Levitan, *supra* note 6, at 485-90 (citing examples of external state activity); see also Claude Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1907) (same).

97. See Morris, *supra* note 7, at 1063 (expressly reaching this conclusion). This is evidently not how the author of Article II, Thomas Burke, read his language. See RAKOVE, *supra* note 7, at 170 (quoting Burke's private description of Article II as establishing that "all sovereign power was in the states separately, and that particular acts of it, which should be expressly enumerated, would be exercised in conjunction, and not otherwise; but that in all things else each State would exercise all the rights and power of sovereignty"). But Burke's private reading of Article II was not necessarily representative. See James Wilson, *Considerations on the Bank of North America* (1785), reprinted in 2 JAMES WILSON, THE WORKS OF JAMES WILSON, 824, 829-30 (Robert Green McCloskey ed., 1967) (arguing that

As a result, practice under the Articles is critical to evaluating the correct understanding. Once the Articles were ratified, the formal structure of U.S. government changed dramatically. During the revolutionary period, the Union lacked a governing document, so the practical distribution of powers was, of necessity, somewhat *ad hoc*. Upon ratification of the Articles, the Confederation gained—on paper—a formal charter; the question is whether practitioners under that charter continued to view the distribution of foreign affairs powers as influenced by a supertextual inherent arrangement, or whether they thought it governed by the language of the charter itself.

B. Practice under the Articles of Confederation

With respect to foreign affairs powers, it seems clear that as a matter of practical understanding the distribution of powers under the Articles of Confederation turned upon the document itself. The Confederation exercised the foreign affairs powers granted to it in the document—principally war and treaty-making.⁹⁸ The states, for the most part, did not exercise these powers, and when they did, they were charged with violating the Articles.⁹⁹ More significantly,

Article II applied only to powers held by the states prior to ratification of the Articles).

98. When Congress claimed additional foreign relations powers, it based its claim on specific provisions of the Articles. The Articles, for example, vested no explicit authority in Congress to maintain a navy; during the war, Congress claimed this authority as an aspect of the power over war and peace granted in Article IX. After peace with Britain, the question arose as to whether Congress could maintain a navy in peacetime. Congress claimed that power, not on the basis of inherent sovereignty, but upon the proper interpretation of the document itself—specifically, as a further implication of Article IX. See 25 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 723-24 (Gaillard Hunt ed., 1922) (Oct. 23, 1783) [hereinafter JOURNALS].

99. See James Madison, Vices of the Political System of the United States, in 9 PAPERS OF JAMES MADISON 348, 348-49 (Robert Rutland et al. eds., 1975) (criticizing state activities as contrary to Article IX of the Articles). Some writers have made much of the fact that the states did not exercise war and treaty-making powers under the Articles, arguing that this shows that the states had limited external sovereignty. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 317 (1936) (quoting, in support of its inherent powers theory, a statement made by Rufus King in the Constitutional Convention that the states lacked war and treaty-making powers under the Articles); see also 1 STORY, *supra* note 52, at §138 (concluding that states lacked full sovereignty due to their exclusion from the powers of war and peace). But a lack of these powers is entirely consistent with the idea that the distribution of powers flowed only from the Articles themselves, as the Articles had express provisions on the subject. See Congress's 1782 resolution directing the states not to negotiate

in areas where the Articles did *not* grant foreign affairs powers to the Confederation or deny them to the states, the powers in question were exercised by the states and not by the Confederation. Many of these omissions proved to be serious defects as the Articles were put into practice. But the proposed remedy always was to amend the Articles to add the missing powers, and energetic (though unsuccessful) campaigns were launched to this effect. The argument was not that the Confederation could exercise the missing powers inherently; the common thought was that exercise of these powers depended upon adding to the textual grants. When this proved impossible because of the Articles' requirement of unanimity for amendment,¹⁰⁰ the ultimate remedy was the Constitutional Convention, called in significant part to give the national government additional foreign affairs powers. Finally, in pursuit of that goal, the drafters of the Constitution produced a document that did contain specific grants to the national government of the foreign relations powers sought unsuccessfully during the mid-1780s.¹⁰¹

The foregoing general observations are illustrated by three specific topics: foreign commerce, enforcement of the law of nations, and enforcement of treaties. Each of these seems to be a core foreign relations power. Under the Articles, none of these powers was specifically denied to the states nor granted to the Confederation. One would think that under a theory of inherent foreign affairs powers these would nonetheless inhere in the entity with "external sovereignty" and be denied to entities lacking "external sovereignty." However, under the Articles the states exercised power in each of these areas, and the confederation government was thought to lack the powers not textually granted to it. In moving to the constitutional government, it was understood that these defects would be remedied *by the specific language of the Constitution*, granting federal powers under Articles I, II, and VI, and denying state powers under Article I, Section 10.

a separate peace with Britain, and Virginia's resolution accepting Congress's direction, based on the fact that "*by the articles of confederation and perpetual union the sole and exclusive right of making peace is vested in the United States in congress assembled. . .*" 11 HENING, *supra* note 83, at 546 (Resolution of May 24, 1782) (emphasis added).

100. See ARTICLES OF CONFEDERATION art. XIII.

101. See U.S. CONST. art. I §§ 8, 10, art. II §§ 2, 3.

1. *Foreign Commerce*

From 1781 through 1788, while the Articles were the governing document of the United States, the reality was quite simply that the states taxed and regulated foreign commerce and the confederation government did not. This system proved unworkable in several respects, producing persistent calls for reform, and ultimately leading in part to the Constitutional Convention of 1787. The common understanding of the problem was that the Articles of Confederation did not grant the Confederation power over foreign commerce, and the Convention sought to remedy this by including express grants of power over foreign commerce to the national government. This course of events, though essentially uncontested, is radically inconsistent with the theory of extraconstitutional power expressed in *Curtiss-Wright*.

a. Imposts

Chronologically the first major foreign affairs issue arising under the Articles was taxation of foreign commerce. Most states imposed duties ("imposts" in the language of the day) upon imports (and in some cases exports), either generally or upon particular items.¹⁰² Relatedly, states imposed "tonnage duties"—so called because they were based on the weight of the ship taxed—upon ships landing at their ports. As a general matter state imposts excepted U.S. products, and so were quite directly a tax upon foreign nations. Conversely, from the nation's outset there was no national tax on foreign commerce.

102. See, e.g., 1 LAWS AND RESOLVES OF THE COMMONWEALTH OF MASSACHUSETTS 62 (1801) [hereinafter LAWS OF MASSACHUSETTS] (impost duties in Massachusetts); *id.* at 96 (1783) (impost); *id.* at 196 (impost); *id.* at 245 (impost and tonnage duties); 12 HENING, *supra* note 83, at 83-84 (1785) (imposing tonnage duties in Virginia); *id.* at 289 (1786) (impost and tonnage duties); *id.* at 412-15 (1787) (impost); 11 *id.* at 66-71, 112-29 (1782) (impost); *id.* at 299-306 (1783) (impost and tonnage); 10 *id.* at 501 (1781) (impost); 9 LAWS OF PENNSYLVANIA, *supra* note 83, at 252 (1780) (imposts in Pennsylvania, excepting U.S. goods); 11 *id.* at 68 (1782) (impost); *id.* at 188 (1783) (impost); *id.* at 262 (1784) (impost); 12 *id.* at 99 (1785) (impost and tonnage duties). Although some of these duties went to pay the costs of administering ports and related facilities, they also served as a source of general revenue. See, e.g., 12 HENING, *supra* note 83, at 412 (1787) (describing the impost as a measure "to provide for the support of civil government").

This system led to three difficulties. Tariffs were a primary source of revenue during that period, so under this system the states (particularly the port states) controlled much of the nation's revenue potential. Theoretically that should not have been a problem because the Congress had the power to impose financial requisitions on the states.¹⁰³ In practice, states proved delinquent in paying their obligations to the Confederation, and as a result the Confederation was chronically short of money, unable to pay its debts, and unable to attract additional lenders.¹⁰⁴ Second, states without major ports, such as New Jersey and North Carolina, in effect paid import duties to the states—New York and Virginia respectively—where their imports were first landed.¹⁰⁵ This bred interstate hostility, as the port states declined to provide compensation and the portless states retaliated as best they could.¹⁰⁶ Third, despite various efforts at coordination, collective action among the states with respect to tariffs proved impracticable. As a result, the diplomats of the Confederation lacked leverage to negotiate reciprocal tariff arrangements and other commercial agreements with foreign powers.¹⁰⁷

These difficulties—particularly the first—became apparent almost immediately. Robert Livingston initially proposed a nationwide five percent duty on imports in early 1781—even before the Articles officially took effect—to end the national government's dependence on unreliable state remittances.¹⁰⁸ Other proposals for a national impost appeared in 1783 and 1785-86.¹⁰⁹ No one thought, however, that the confederation government had the power to impose an impost under the Articles as written.¹¹⁰ The campaign for a national impost throughout the 1780s took the form of proposed

103. See ARTICLES OF CONFEDERATION art. VIII.

104. See RAKOVE, *supra* note 7, at 275-329.

105. See *id.* at 341-42. New York, for example, levied an impost on all cargo landed in the state. New Jersey shippers, lacking a port in their own state, had no choice but to ship goods through New York and pay the impost. See *id.*

106. See *id.* at 341-42. New Jersey, for example, refused to pay the requisition amount owed to the Confederation government in 1785 to protest New York's state impost. See *id.*; Shumer, *supra* note 83, at 86.

107. See 25 JOURNALS, *supra* note 98, at 617-20 (Sept. 25, 1783); Madison, *supra* note 99, at 349; RAKOVE, *supra* note 7, at 342-46.

108. See RAKOVE, *supra* note 7, at 282.

109. See *id.* at 337-42.

110. See *id.* at 306.

amendments to the Articles to grant such a power. Amendments required unanimity, and although support for the impost was broad, amendment was blocked at each juncture by opposition from one or two states—initially Rhode Island and Georgia, then Virginia, and ultimately New York.¹¹¹ Although Congress repeatedly urged the states to grant it the power of impost, no amendment ever passed, and no national impost was ever levied.¹¹²

Critically, the debate over the impost was phrased entirely as a need to grant *additional* powers to Congress. The original Livingston proposal, as approved by Congress in 1781, asked the states to “vest . . . in Congress . . . a power” to levy the impost.¹¹³ Although the states for the most part approved the impost, they did so in terms unmistakably reflecting a grant of a power not previously existing. Pennsylvania, for example, tracked the language of Congress’s request in passing an Act “to vest in the Congress of the United States a Power to Levy Duties.”¹¹⁴ Massachusetts and Virginia, where the issue was seriously contested, attached conditions to authorization.¹¹⁵ In Rhode Island, which refused to approve the initial impost proposal, the matter was opposed as giving too much additional power to Congress.¹¹⁶ Rhode Island’s rejection of the impost, along with Georgia’s failure to act and Virginia’s withdrawal of its approval in 1782,¹¹⁷ defeated the proposal. Congress did not establish an impost, ascribing its inability to act to the failure to receive state approval.¹¹⁸

Subsequent proposals scaled back the extent of the impost power in an attempt to mollify the dissenting states. Congress approved

111. *See id.* at 282-342.

112. *See id.*

113. 21 JOURNALS, *supra* note 98, at 1199.

114. 10 LAWS OF PENNSYLVANIA, *supra* note 83, at 296 (Apr. 5, 1781).

115. *See* 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 107 (Oct. 20, 1783); RAKOVE, *supra* note 7, at 313. Virginia specified that the actions of Congress in imposing the impost could not be “repugnant to the constitution and laws of this state.” 10 HENING, *supra* note 83, at 410 (1781).

116. *See* RAKOVE, *supra* note 7, at 314-17 (describing the debate in Rhode Island). When Rhode Island appeared unlikely to assent, Rhode Island congressional delegate David Howell congratulated his state for preventing an inappropriate expansion of the powers of Congress. *See id.*

117. *See* 11 HENING, *supra* note 83, at 171 (1782) (resolving that approval of the impost power would “contraven[e] the spirit of the confederation”).

118. *See* 24 JOURNALS, *supra* note 98, at 10.

a new recommendation in 1783, again phrased as a grant of power ("to invest the United States in Congress assembled with a power of levy . . ."), but this time limited to twenty-five years' duration with actual collection to be done by state officers.¹¹⁹ Again, most states enacted measures granting the requested power, although the matter was closely contested in Massachusetts, Virginia, and Connecticut;¹²⁰ Rhode Island refused to approve until 1785, and New York imposed a series of conditions such that its approval amounted to a rejection.¹²¹ Again, the debate was phrased in terms of the imperative of granting *additional* powers to Congress: as one supporter of the impost argued, "Congress must either be vested . . . with the Impost . . . or cease to be a Congress of any Consequence. . . ."¹²² Again, the failure of unanimity (this time occasioned by New York) doomed the plan, no amendment to the Articles passed, and Congress did not enact an impost.¹²³ A third effort was made in 1786, further scaled back so that the proceeds of the duties would accrue, in the first instance, to the states, but this proposal was never even approved by the full Congress.¹²⁴ In 1787, the issue became a central point in the proposed revisions of the Articles that culminated in the Philadelphia Convention where, it was argued, the new plan of government needed to give Congress the power to levy imposts.¹²⁵

119. *Id.* at 257-58.

120. Approval in Massachusetts, for example, has been credited to the personal intervention of Congress's superintendent of finance, Robert Morris. See RAKOVE, *supra* note 7, at 323.

121. See *id.* at 338.

122. *Id.* at 341 (quoting Samuel Osgood). See also the resolve of the Massachusetts assembly, noting the course of state approvals of the imposts and requesting that the "United States in Congress assembled . . . carry [the impost] into effect . . . so soon as it shall be acceded to [by the states]." 1 LAWS OF MASSACHUSETTS, *supra* note 102, ch. 17 (Feb. 15, 1786). On the critical condition of Confederation finances, see RAKOVE, *supra* note 7, at 275-329; see also THE FEDERALIST NO. 12 (Alexander Hamilton) (recounting financial difficulties of the Confederation government).

123. See RAKOVE, *supra* note 7, at 342.

124. See *id.* at 371.

125. See 1 FARRAND, RECORDS, *supra* note 44, at 18-19 (recording speech of Edmund Randolph proposing the Virginia plan). Once textually vested with the power of levying imposts by Article I, Section 8 of the new Constitution, Congress promptly enacted a national impost.

b. Commercial Regulation

As with imposts, the states and not Congress regulated foreign commerce during the confederation period. This quickly proved unworkable. As set forth in greater detail below, the issue essentially evolved as follows. Foreign nations, particularly Britain, France, and Spain, discriminated against U.S. goods and shipping, seriously impeding U.S. foreign trade. The United States needed a credible retaliatory threat to convince these nations to adopt a more accommodating trade regime. It soon became apparent that a coordinated response could not be developed at the state level.¹²⁶ Accordingly, there was widespread agreement that Congress should regulate at least some aspects of foreign commerce. Because the Articles did not grant this power, there was also general agreement that amendment was necessary. But because unanimous agreement of the states could never be achieved on any particular amendment, nothing was ever accomplished, and no regulation of foreign trade was imposed at the national level until after the ratification of the Constitution.¹²⁷

Early state regulations largely concerned local matters, plus specifically anti-British measures adopted during and after the revolution.¹²⁸ In the mid-1780s, a new generation of regulations emerged in response to the economic downturn of that period. Especially in New England, cheap imports and foreign restrictions on exports were thought to be the source of the commercial malaise.¹²⁹ Massachusetts, for example, under the administration

126. See THE FEDERALIST NO. 22 (Alexander Hamilton) (discussing problems of coordination during the confederation period); Madison, *supra* note 99, at 349 (same); see also John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution and the Original Understanding*, 99 COLUM. L. REV. 1955, 2013-14 (1999). On Massachusetts's failed attempt at coordination among the states, see *infra* notes 176-77 and accompanying text.

127. See FREDERICK W. MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 52-95 (1973); RAKOVE, *supra* note 43, at 342-47.

128. See, e.g., 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 51 (Mar. 3, 1781) (limitation on British commerce); *id.* at 196 (July 1, 1784) (regulation of export of various commodities); 11 HENING, *supra* note 83, at 101-03 (1782) (law limiting trade in British goods); *id.* at 136-38 (1782) (same, enacted on recommendation of U.S. Congress); *id.* at 329-31 (1783) (regulation of foreign shipping); 10 LAWS OF PENNSYLVANIA, *supra* note 83, at 417 (Apr. 10, 1782) (limitations on British commerce); *id.* at 497 (Sept. 20, 1782) (same); 11 *id.* at 149 (Sept. 20, 1783) (tonnage duties and quarantine).

129. See VANBECKHALL, POLITICS WITHOUT PARTIES: MASSACHUSETTS, 1780-1791, at 122-

of Governor Bowdoin enacted an array of commercial regulations, including a ban on imports of certain goods, a ban on exports in British and other foreign ships, and limits on the places where foreign ships could unload.¹³⁰ Several other states, some in explicit coordination with Massachusetts, enacted similar regimes.¹³¹ But, as with tariffs, no national coordinated action among the states could be achieved, and as a result little leverage with foreign powers could be had.¹³²

At the national level, the economic threat of the closed British and European trading systems was quickly perceived.¹³³ Confederation diplomats such as John Adams sought commercial treaties with Britain and the European powers largely without success. Adams in particular argued that national action on navigation and other import restrictions was essential to the U.S. bargaining position.¹³⁴ By 1783, Congress was prepared to act. But as no one thought Congress had the requisite power, the result was a campaign to amend the Articles. As the congressional committee with responsibility for the matter reported: "Your Committee therefore consider it of the highest importance to counteract these systems [of Britain and France] so injurious to the United States, which can only be done by delegating a general Power for regulating its commercial interests."¹³⁵ Recognizing that a broad delegation

64 (1972); RAKOVE, *supra* note 7, at 346.

130. See 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 99, 439 (June 23, 1785); HALL, *supra* note 129, at 122-64.

131. See 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 724, 726 (July 2, 1785) (recording Governor's message on coordination with New Hampshire legislature); *id.* at 768 (Nov. 14, 1785) (recording Governor's message on coordination with Rhode Island).

132. See generally RAKOVE, *supra* note 7, at 342-52 (discussing weakness of national government in addressing foreign commercial threats). On the problems of coordination among the states, see MARKS, *supra* note 127, at 82-83. As Professor Marks notes in describing a failed attempt at regulation of foreign commerce in Virginia, "[t]here was simply no answer to the argument that whatever goods might be barred from Norfolk and Alexandria would be admitted to Maryland and North Carolina and smuggled from there into Virginia." *Id.* at 83.

133. See 25 JOURNALS, *supra* note 98, at 589 (Sept. 19, 1788) (discussing problems of British system); RAKOVE, *supra* note 7, at 345 (same, noting that British restrictions became an issue as early as the summer of 1783).

134. See 25 JOURNALS, *supra* note 98, at 617-18 (Sept. 25, 1783) (reporting on communications of John Adams to Continental Congress).

135. *Id.* at 618 (September 25, 1783); see also *id.* at 619 (Sept. 26, 1783) (reflecting comments from U.S. ambassadors amplifying the national government's commercial difficulties with Europe in the absence of commercial power).

would be difficult to achieve from the states, the following year Congress considered more limited proposals for a national navigation act and for legislation limiting the ability of foreign nationals to trade in imported goods.¹³⁶ Even so limited, these took the form of a request for additional powers. As a further committee report noted:

It will certainly be admitted, that unless the United States can act as a nation and be regarded as such by foreign powers, and unless Congress for this purpose *shall be vested* with powers competent to the protection of commerce, they can never command reciprocal advantages in trade; and without such reciprocity, our foreign commerce must decline and eventually be annihilated.¹³⁷

Accordingly, the report continued, "it seems necessary that the States should be explicit, and fix on some particular mode by which foreign commerce not founded on principles of reciprocity, may be restrained."¹³⁸ In pursuit of this goal, the committee recommended and Congress approved two resolutions:

That it be recommended to the Legislatures of the several States, to vest the United States in Congress assembled, for the term of fifteen years, with power to prohibit any goods, wares or merchandise from being imported into or exported from any of the States in vessels belonging to or navigated by the subjects of any power with whom these States shall not have formed Treaties of Commerce. . . . [and]

That it be recommended to the legislatures of the several States, to vest the United States in Congress assembled, for the term of fifteen years, with the power of prohibiting the subjects of any foreign state, kingdom or empire . . . from importing into the United States, any good wares or merchandize which are not the produce or manufacture of the Dominions of the Sovereign or whose subjects they are.¹³⁹

136. See RAKOVE, *supra* note 7, at 345-46.

137. 26 JOURNALS, *supra* note 98, at 270 (Apr. 22, 1784) (emphasis added).

138. *Id.*

139. *Id.* at 271 (setting forth resolutions); see *id.* at 321-22 (reflecting final approval of resolutions).

In short, Congress sought limited powers—essentially, only to regulate the activities of certain foreign ships entering or leaving U.S. waters, and certain trading activities of aliens. Yet this was thought beyond the existing powers of Congress, and Congress was sufficiently concerned about its ability to obtain the needed powers that it further limited the proposed power to fifteen years' duration and provided that, if granted, no action would be taken pursuant to these powers without the consent of nine states.¹⁴⁰ But even with this proviso, unanimous approval of the states proved unobtainable. A second proposal, involving broader commercial powers, was made by committees in 1785 and 1786 but could not even secure the approval of the full Congress.¹⁴¹

As with the impost, the debate over commercial regulations was framed as a question whether Congress should be given *additional* powers. As noted, Congress's resolutions to the states asked that the state legislatures vest it with additional powers. States that did approve the new powers phrased their approval as a grant of additional powers.¹⁴² Proponents urged the need for the granting of additional powers. Massachusetts Governor Bowdoin, for example, in an address to the state legislature stated:

[Britain and the European powers] have an undoubted right to regulate their trade with us, and to admit into their ports on their own terms, the vessels and cargoes that go from the United States, or to refuse all admittance. . . . The United States have the same right, and can and ought to regulate their foreign trade on the same principles. But it is a misfortune that the Congress have not yet been authorized for that purpose by all the States. . . .

140. *See id.* at 322.

141. *See* 28 JOURNALS, *supra* note 98, at 201 (Mar. 28, 1785); *see also* MARKS, *supra* note 127, at 87-90.

142. *See, e.g.*, 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 41 (July 1, 1784) (labeling legislation as "An act vesting certain powers in Congress," resolving that "the United States in Congress assembled be, and they hereby are vested with full power" to enact specified regulations of foreign trade); 11 HENING, *supra* note 83, at 388 (May session, 1784) (describing act as "[a]n act to invest the United States in congress assembled, with additional powers for a limited time," by which Congress "empowered" to prohibit certain foreign commerce); 11 LAWS OF PENNSYLVANIA, *supra* note 83, at 391 (Dec. 17, 1784) (describing legislation as "An act to vest Congress with certain powers for the protection of commerce").

Bowdoin continued:

It is of great importance . . . that Congress should be vested with all the powers necessary to preserve the Union, to manage the general concerns of it, and secure and promote its common interest. That interest, so far as it is dependent on a commercial intercourse with foreign nations, the confederation does not sufficiently provide; and this state, and the United States in general, are now experiencing by the oppression of their trade with some of these nations, particularly Great Britain, the want of such provision. This deficiency of power may be the result of a just principle, a caution to preserve to each state all the powers not necessary to be delegated; with respect to which, as there was room for a variety of opinions concerning them, they could not all be certainly known at the time of forming the confederation. Experience, however, has shown the necessity of delegating to Congress further powers¹⁴³

Similarly, opponents contended that the proposals constituted new powers that would unduly expand congressional authority.¹⁴⁴ Despite the importance of the issue and the continued frustration in failing to obtain a relatively modest power most people thought appropriate, neither Congress nor the regulations' proponents asserted that Congress had any inherent powers in this regard. When by 1786 amendment appeared hopeless, Congress simply abandoned the project, and no commercial regulations were passed at the national level until after ratification of the Constitution.

The resulting impasse played a substantial role in prompting the 1787 Constitutional Convention. By the mid-1780s, the need for national power over, at minimum, imposts and navigation was widely embraced but blocked by a few states—providing general

143. Governor Bowdoin, speech to the Massachusetts Legislature (May 31, 1785), reprinted in 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 706.

144. See RAKOVE, *supra* note 7, at 346-49. For example, Abraham Yates, later a delegate from New York to the Constitutional Convention, wrote that he was "rather Suspicious that the advocates for augmenting the powers of Congress will try to Effect their Scheme under the Cloak of investing Congress with power to make Commercial Regulations." *Id.* at 347 (quoting letter from Yates to Rhode Island delegate David Howell). George Mason, in opposing the new proposal, wrote that "Congress should not even have the appearance of such a power." NORMAN K. RISJORD, CHESAPEAKE POLITICS 1781-1800, at 253 (1978).

disenchantment with the unanimity requirements of the Articles.¹⁴⁵ Following the failure of the proposed amendments in both areas in 1785, delegates met in Annapolis in 1786 to discuss the need for reform generally and the desirability of amendments relating to navigation in particular. Though inconclusive because of poor attendance, this convention issued the call for a second convention the following year in Philadelphia—and that convention in turn specifically addressed the problems with foreign commerce under the articles by giving Congress power over imposts and foreign commerce.¹⁴⁶

Importantly, the constitutional generation saw the issues surrounding regulation of foreign commerce, as well as the impost, as key components of the United States' international influence. It was not merely a matter of providing Congress with revenue and keeping out injurious foreign products (although these points were important as well). It was, more broadly, a matter of foreign policy. A central point of both the impost and the proposed commercial regulations was to enhance the U.S. bargaining position with other nations. That was what Massachusetts Governor Bowdoin sought through his plan to coordinate regulations at the state level; it was what diplomats like Adams thought they needed to support their missions, and it was what supporters of the amendments to the Articles—and ultimately, supporters of the replacement of the Articles—sought to convey to the national government.¹⁴⁷ In short, both the impost and the commercial regulations fundamentally were about foreign affairs; the conventional thinking, both then and now, about the failures of Congress under the Articles, was and is that it had not been granted enough power in these areas.¹⁴⁸

145. See MARKS, *supra* note 127, at 52-95; RAKOVE, *supra* note 7, at 369-70.

146. See MARKS, *supra* note 127, at x (noting that the foreign affairs problems of the Confederation were of "overwhelming significance" in prompting the convention); RAKOVE, *supra* note 7, at 368-98 (describing events leading to Philadelphia Convention); 1 FARRAND, RECORDS, *supra* note 44, at 19 (recording discussion at opening of convention as to the need to give Congress additional commercial powers).

147. See *supra* Part IV.B.1.b.; Madison, *supra* note 99, at 348-53.

148. See Madison, *supra* note 99, at 348-53; MARKS, *supra* note 127, at 52-95; RAKOVE, *supra* note 7, at 347-70. As a leading commentator summarizes:

Inability to command compliance with its foreign policy virtually ensured Congress's failure [under the Articles]. Congress could not raise revenue, bargain effectively [or] enforce a common commercial policy Foreign nations, notably Britain and Spain, refused to agree to lower trade barriers

c. *Embargoes*

A third controverted category of foreign commerce power concerned embargoes. Unlike trade and imposts, this issue did not centrally occupy the debates of the mid-1780s, as its immediacy dissipated after the conclusion of the Revolution. In the early months of government under the Articles, however, it briefly emerged as a major issue. During the Revolution, states imposed embargoes on the export of particular products, and upon trade with Britain in general.¹⁴⁹ However, in a familiar pattern, the lack of national coordination rendered these measures largely ineffectual. In 1781, while hostilities were continuing, a committee of Congress met to consider changes to the Articles. Ultimately, the committee recommended seven additional articles, including one granting power to Congress to impose embargoes in wartime.¹⁵⁰ As with the other foreign trade powers, no one thought of this as an inherent power. Rather, the posture of the committee was providing recommendations to Congress as to *additional* powers it should solicit from the states.¹⁵¹

Congress never acted on the committee's recommendation, perhaps—at least with respect to embargoes—because hostilities

because they knew that Congress could not prevent the states from closing off or taxing trade. States would not cooperate to win trade concessions from foreign nations, Congress could not guarantee that states would change their laws to comply with trade treaties, and neither the states nor Congress could impose meaningful sanctions.

Yoo, *supra* note 126, at 2013-14.

149. See, e.g., 10 HENING, *supra* note 83, at 105 (1779) (act authorizing governor to impose embargoes); 11 *id.* at 101-03 (1782) (law limiting trade in British goods); *id.* at 136-38 (1782) (same, enacted on recommendation of U.S. Congress); 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 1114-15 (Sept. 8, 1779) (embargo on certain items); 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 51 (Mar. 3, 1781) (limitation on British commerce); 9 LAWS OF PENNSYLVANIA, *supra* note 83, at 272 (Sept. 7, 1778) (embargo of specified items); *id.* at 288 (Sept. 10, 1778) (embargo on trade with Britain); 10 *id.* at 417 (Apr. 10, 1782) (limitations on British commerce); *id.* at 497 (Sept. 20, 1782) (same).

150. See 20 JOURNALS, *supra* note 98, at 469-70.

151. See RAKOVE, *supra* note 7, at 290. In contrast, the same committee also proposed a revision giving Congress an explicit power to coerce states to abide by the Articles (chiefly directed at states failing to pay money requested by Congress). See *id.* at 289-90. As to this power, the committee argued that Congress already had "a general and implied power . . . to enforce and carry into effect all the Articles of the said Confederation against any of the States. . . ." but recommended that the power nonetheless be made explicit. 20 JOURNALS, *supra* note 98, at 469-70 (Mar. 12, 1781).

seemed near conclusion by the end of 1781. As a result, however, Congress was thought not to have the power of embargo. The decline in de facto hostilities brought a reemergence of trade with Britain, still nominally an enemy; because Congress lacked power to suppress this trade, it had to rely upon the uneven efforts of the states.¹⁵² Similarly, when the Confederation encountered hostilities from the piratical state of Algiers in the mid-1780s, Foreign Secretary Jay recommended that an embargo upon countries friendly to Algiers might be an appropriate response. Congress took no action on the matter, presumably because it assumed that it lacked direct power over the matter and coordination of embargoes at the state level had proved futile.¹⁵³ As with commercial regulations and the impost, the matter of embargoes shows that Congress under the Articles simply did not have the power necessary to respond effectively to foreign threats.

2. *Enforcement of the Law of Nations*

Another troublesome issue under the Articles of Confederation was the enforcement of the law of nations. The Constitution declares that Congress has power "[t]o define and punish . . . Offenses against the Law of Nations."¹⁵⁴ The Articles contained no comparable language, which gave rise to the danger during the confederation period that states' refusal to enforce the law of nations would subject the Union to international reprisals. As Madison described the problem: "The[] articles contain no provision for the case of offenses against the law of nations; *and consequently* leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."¹⁵⁵

That view is consistent with historical practice under the Articles. At various times during the 1780s, foreign countries

152. See 25 JOURNALS, *supra* note 98, at 585, 589 (Sept. 19, 1783) (discussing difficulties with British trade); see also 11 HENING, *supra* note 83, at 101-03 (1782) (act suppressing trade with Britain, made conditional upon all other states passing similar laws); *id.* at 136 (1782) (same, enacted on recommendation of U.S. Congress); 10 LAWS OF PENNSYLVANIA, *supra* note 83, at 497 (1782) (act suppressing trade with Britain).

153. See 29 JOURNALS, *supra* note 98, at 842-44 (Oct. 20, 1785).

154. U.S. CONST. art. I, § 8.

155. THE FEDERALIST NO. 42, at 274 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added).

appealed to Congress to protect rights under the law of nations. Congress perceived at least some of these appeals as quite serious and threatening matters. However, Congress also thought it lacked power to act, and in each instance referred the matter to the relevant state government.

A leading example was the assault on a French diplomat accredited to Congress in Philadelphia. France demanded that Congress surrender the assailant, De Longchamps, to French authorities. Congress asked Foreign Secretary John Jay to

explain to [the French representative] the difficulties that may arise on this head from the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them [i.e., Congress] only that of advising in many of those cases in which other governments decree.¹⁵⁶

Congress further directed Jay to suggest that the French apply instead to the Pennsylvania government, and for itself merely recommended that the states pass laws "for punishing the infractions of the laws of nations, and more especially for securing the privileges and immunities of public Ministers from foreign powers."¹⁵⁷ Similar incidents occurred, for example, with respect to unlawful seizures of foreign ships in Massachusetts in 1783 and South Carolina in 1784; in both cases the foreign nation appealed to Congress, and Congress referred the matter to the relevant state.¹⁵⁸ As a result, the states and not Congress dealt with foreign powers in matters concerning the law of nations during the confederation period. Although this was seen as a dysfunctional system, it was thought inevitable given the limited grants of foreign relations power in the Articles.¹⁵⁹

156. 28 JOURNALS, *supra* note 98, at 308, 314 (Apr. 27, 1785).

157. 29 *id.* at 655 (Aug. 24, 1785). Although Pennsylvania refused to surrender the assailant to French authorities, a major diplomatic incident was averted when the Pennsylvania courts imposed a substantial penalty upon him under Pennsylvania law. *See* *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

158. *See* 24 JOURNALS, *supra* note 98, at 227-28 (Apr. 4, 1783) (directing, in response to application of Spanish minister, that appropriate recourse was to the government of Massachusetts); 27 *id.* at 509-11 (June 2, 1784) (referring complaint of Netherlands government to the governor of South Carolina).

159. *See* 1 FARRAND, RECORDS, *supra* note 44, at 19 (recording Randolph's criticisms of the

Again, it is difficult to reconcile this view with a theory of inherent foreign affairs power. Matters relating to the laws of nations plainly concern external sovereignty. If Congress had inherent foreign affairs powers in the mid-1780s, that at least should have been considered as a basis for congressional action. Yet the confederation government was thought not to have the power to act in support of the law of nations, and at the Convention the delegates thought that this should be remedied by a grant of such powers to the federal government in the Constitution.¹⁶⁰

3. *Enforcement of Treaties*

Relatedly, serious problems arose under the Articles from state violations of U.S. treaty obligations. The leading difficulties arose from two provisions of the 1783 Treaty of Peace with Britain.¹⁶¹ A number of states had passed laws during the Revolution confiscating or discharging debts owed by their citizens to British creditors.¹⁶² Britain insisted that these be repealed, and the Confederation, in the peace treaty, agreed that "no lawful impediment" should be met by British debtors in collecting pre-war debts.¹⁶³ In addition, Britain requested and the Confederation agreed that following the peace, Loyalists should have the ability

Articles to the Constitutional Convention, including the fact that state violations of the law of nations could not be controlled by the national government). In addition to the De Longchamps incident and the ship seizures, another leading law of nations controversy of the Confederation period involved New York's authorization of claims against British merchants for using abandoned revolutionary property during the occupation of New York City. The British claimed the law of nations permitted such use, but New York appeared to reject that defense. Congress again found itself entirely on the sidelines as the matter came to trial in New York state court as *Rutgers v. Waddington* in 1784. See *Arguments and Judgment of the Mayor's Court of the City of New-York, in A CAUSE BETWEEN ELIZABETH RUTGERS AND JOSHUA WADDINGTON* (1784), reprinted in *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 393 (Julius Goebel Jr. ed., 1964). Again, a major diplomatic incident was avoided by a judicious decision of the state court (in this instance deciding that New York law should be interpreted in conformity with the law of nations). On the *Rutgers* litigation, see WOOD, *supra* note 48, at 457-59, and Yoo, *supra* note 126, at 2016-18.

160. See U.S. CONST. art. I, §8, cl. 10.

161. Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, Sept. 4, 1783, U.S.-Gr. Brit., art. IV, 8 stat. 80, 82 [hereinafter Treaty of Paris].

162. See, e.g., RISJORD, *supra* note 144, at 75, 106 (Maryland); *id.* at 109-114 (Virginia); *id.* at 119, 129 (North Carolina).

163. See Treaty of Paris, *supra* note 161, art. IV, at 82.

to return to the United States without punishment or discrimination.¹⁶⁴

Despite the treaty, several states—notably Virginia with respect to debts and Pennsylvania and New York with respect to returning Loyalists—refused to comply.¹⁶⁵ Britain argued, threatened, and ultimately refused to surrender military posts in U.S. territory whose evacuation had been promised, causing considerable unease in the confederation government.¹⁶⁶ Congress took Britain's side, and requested that the states comply with the treaty.¹⁶⁷ The states continued to refuse.¹⁶⁸ This unfortunate circumstance prompted the drafters of the Constitution to include treaties as supreme law of the land under Article VI, and as an element of federal jurisdiction under Article III, so that the federal courts could enforce treaties despite state law.¹⁶⁹

164. See *id.* art. VI, at 83 (declaring that "there shall be no future confiscations made, nor any prosecutions commenced against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property").

165. On Pennsylvania, see ROBERT L. BRUNHOUSE, *THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790*, at 140-41 (1942) (discussing Pennsylvania's restrictions against returning Loyalists settling in the state). On Virginia, see RISJORD, *supra* note 144, at 109-16 (discussing unsuccessful attempts to modify Virginia's debt cancellation statutes to conform to the treaty). On New York, see A Letter from Phocion to the Considerate Citizens of New York, in 3 PAPERS OF ALEXANDER HAMILTON, 1782-1786, at 483 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (opposing New York's antiloyalist legislation); see also 24 JOURNALS, *supra* note 98, at 373-74 (May 30, 1783) (recording objections of Virginia and Pennsylvania to provisions of treaty).

166. See MARKS, *supra* note 127, at 5-11 (linking Britain's refusal to evacuate the posts with states' intransigence on the matter of the debts); see also BRUNHOUSE, *supra* note 165, at 140-41 (noting that the British initially refused to evacuate New York City after the peace treaty, partly in response to Pennsylvania's antiloyalist legislation).

167. See 32 JOURNALS, *supra* note 98, at 177-84 (Mar. 21, 1787).

168. As Hamilton described the situation prior to the Constitution:

The treaties of the United States under the present Constitution [i.e., the Articles] are liable to the infractions of thirteen different legislatures . . . The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.

THE FEDERALIST NO. 22, at 183 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

169. See Jack N. Rakove, *Solving a Constitutional Puzzle: The Treaty-making Clause as a Case Study*, in 1 PERSPECTIVES ON AMERICAN HISTORY 233, 264 (1984); see also THE FEDERALIST NO. 3, at 95-96 (John Jay) (Isaac Kramnick ed., 1987):

Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in

This well-known sequence of events seriously undercuts the *Curtiss-Wright* theory. Obviously, the debt confiscation issue and the treatment of returning Loyalists were substantial matters of foreign affairs, nearly provoking renewed war with Britain. Yet under the Confederation the states played a major role in it, and the Congress seemed to lack any recourse against state obstruction.¹⁷⁰ It is true that some prominent figures, including Hamilton and Jay, thought the states lacked the right (though not the practical ability) to violate confederation treaties. But in arguing against the states, they appealed not to an inherent distribution of foreign affairs power, but to the language of the Articles, in terms that made clear their understanding that any power held by Congress in this regard was power given to Congress by the states in the document itself. Hamilton, for example, asked:

Does not the act of confederation place the exclusive right of war and peace in the United States in Congress? . . . Are not these among the first rights of sovereignty, and does not the delegation of them to the general confederacy, so far abridge the sovereignty of each particular state?¹⁷¹

He went on to argue that the delegation of the treaty power implied a cession by the states of the power to obstruct treaties.¹⁷² Similarly Jay argued that the states "by express delegation of power, formed and vested in Congress perfect though limited sovereignty" including powers of war and peace, and this "express delegation" implied an agreement to be bound by congressional treaties.¹⁷³ In short, the argument against state power in this area assumed that the issue turned on the extent of delegation in the Articles. Inherent foreign affairs power simply was not a consideration.

thirteen [S]tates . . . will not always accord or be consistent . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended. (emphasis added).

170. See Madison, *supra* note 99, at 349; 1 FARRAND, RECORDS, *supra* note 44, at 316 (statement of Madison).

171. Letter from Phocion to the Considerate Citizens of New York, *supra* note 165, at 489.

172. See *id.* In the *Waddington* case, discussed *supra* at note 159, Hamilton pressed this argument to the New York courts, which decided the case in his favor, but on other grounds.

173. 31 JOURNALS, *supra* note 98, at 847 (Oct. 13, 1786) (report by Jay on the issue of treaty violations by the states).

C. The Inherent Powers Theory Revisited

The foregoing practice makes it difficult to argue that there was a widespread understanding of inherent powers in foreign affairs under the Articles. It is essentially incontestable that everyone during the relevant period thought that (a) the Confederation lacked power over foreign commerce and navigation, and matters arising under treaties and the law of nations; (b) the state governments had power over these matters; (c) this was a problem; and (d) that the problem should be fixed by including these powers in further *grants* of power to the national government, ultimately in Article I, Section 8 of the Constitution.¹⁷⁴

The only way this could be consistent with the *Curtiss-Wright* theory is if matters relating to foreign commerce, treaties, and the law of nations were not attributes of "external sovereignty," or, in Sutherland's phrase, not powers that concern our relations with other nations. This seems implausible: many of the foreign commerce powers at issue seem purely external—for example, the power to limit the ability of foreign nationals to import goods, or the ability of foreign ships to enter U.S. waters. The claim is also inconsistent with *Curtiss-Wright* itself, for power over foreign commerce was the matter at issue in *Curtiss-Wright*. Obviously, Sutherland and the *Curtiss-Wright* Court thought it was a matter of external sovereignty. Indeed, the specific issue in *Curtiss-Wright* is arguably less "external" in that it concerned exports and thus represented a regulation of U.S. goods within the United States; by

174. See, for example, Hamilton's discussion in Federalist 22, in which he observes that "[t]he want of a power to regulate commerce [on the part of the confederation government]. . . has already operated as a bar to the formation of beneficial treaties with foreign powers" and further notes that

Several states have endeavored by separate prohibitions, restrictions, and exclusions to influence the conduct of [Great Britain] in this particular, but the want of concert, arising from the want of a general authority and from clashing and dissimilar views in the States, has hitherto frustrated every experiment of the kind. . . .

THE FEDERALIST NO. 22, at 177 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Significantly, historians Morris and Rakove, the leading advocates of a "nationalist" interpretation of the revolutionary period, are fully in accord with the foregoing picture of foreign affairs powers under the Articles. See RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781-89, at 130-61, 194-219 (1987); RAKOVE, *supra* note 7, at 331-95; cf. *supra* notes 43-47 (discussing these authors' endorsement of the view that the Union preceded the states).

contrast, the regulations debated in the 1780s concerned whether goods would be allowed into the United States in the first instance. Moreover, treaties and the law of nations, by definition, involve relationships between the nation and external powers, and they relate at their core to matters of "war and peace," which have always been at the center of external sovereignty.¹⁷⁵ If the power of "external sovereignty" does not extend to matters of foreign commerce and matters governed by treaties and the laws of nations, it would seem to have an almost contentlessly narrow meaning. As a result, practice under the Articles is entirely inconsistent with Sutherland's theory.

I note three potential, but ultimately unsustainable, objections. First, it might be argued that all of the foregoing matters on which the states legislated (and Congress did not) during the confederation period were ultimately domestic internal matters, though concededly having international implications. Thus, although these matters did affect foreign affairs, they were not direct aspects of the Union's relationship with foreign nations. Perhaps, therefore, *Curtiss-Wright* could be defended more narrowly as ascribing to "external sovereignty" not all matters with foreign affairs implications, but only actual attempts to influence the conduct of foreign nations.

The difficulty with this argument is that many of the key issues on which the states legislated (and Congress did not) were purely matters of influencing foreign nations. Most obviously, the key issue in the campaign for broader commercial powers was the need to gain leverage against foreign nations in pursuit of open access to foreign markets. While Congress unsuccessfully sought such powers, many of the states enacted legislation specifically designed to pressure foreign nations—particularly Britain—to lower trade barriers. Massachusetts's elaborate trade regulations of 1785 were an example: among other things, they enhanced duties and severely curtailed the navigation rights of countries establishing trade barriers against U.S. commerce, singling out Britain in particular for adverse treatment.¹⁷⁶ Massachusetts then attempted to

175. See THE FEDERALIST NO. 3 (John Jay) (discussing relationship between treaties and matters of war and peace).

176. See 1 LAWS OF MASSACHUSETTS, *supra* note 102, at 99 (Act of June 23, 1785); see also *id.* at 439 (Act of Nov. 29, 1785) (continuing discriminatory duties on Britain but ending them

coordinate similar action in other states, meeting some success in New England but ultimately failing nationwide.¹⁷⁷ Other states, notably Virginia and Pennsylvania, independently enacted laws singling out for adverse treatment nations that did not give open access to U.S. commerce and granting special privileges to nations favoring the United States.¹⁷⁸ Nor was this practice limited to commercial regulations. In the context of treaty enforcement, for example, Virginia attempted to coerce Britain into compliance with the Treaty of Paris by conditioning repeal of its anti-British legislation upon Britain's surrender of the western military posts in accordance with the treaty.¹⁷⁹ In short, even in matters in which the United States directly sought to influence foreign nations, the initiative lay at the state level rather than with Congress.

A second objection might be that Congress was thought to lack power to act in these areas for a different structural reason: most, if not all, of these matters involved the exercise of legislative power, whereas Congress under the Confederation was thought to be, as one member described it, "a deliberating Executive assembly."¹⁸⁰ Though commentators have generally concurred in describing Congress's power as generally executive,¹⁸¹ Congress did exercise

against other nations).

177. See 1 *LAWSON OF MASSACHUSETTS*, *supra* note 102, at 726, 768 (1785) (recounting efforts at coordination with New Hampshire and Rhode Island); *id.* at 36 (1786) (suspending state navigation act due to lack of nationwide cooperation).

178. See 12 *HENING*, *supra* note 83, at 32 (1785) (enacting discriminatory duties on "every ship or vessel trading to this commonwealth, owned wholly or in part by a British subject"); *id.* at 289-90 (1786) (varying import duties depending upon whether country of origin had a commercial treaty with United States); 11 *id.* at 494 (1784) (act directing that arms purchases be made from France); 10 *id.* at 202 (1779) (act granting commercial privileges to nations recognizing the independence of the United States); 11 *LAWSON OF PENNSYLVANIA*, *supra* note 83, at 182 (Apr. 2, 1785) (act granting commercial privileges to nations recognizing the independence of the United States); 12 *id.* at 99 (Sept. 20, 1785) (act imposing discriminatory duties on countries without commercial treaties with United States); *id.* at 103 (Sept. 20, 1785) (act imposing discriminatory duties on Portugal "to continue for so long as the flour of America is prohibited from being imported into the kingdom and territories [of Portugal]").

179. See 12 *HENING*, *supra* note 83, at 528 (1787).

180. *RAKOVE*, *supra* note 7, at 202 (quoting North Carolina delegate Thomas Burke); see also *id.* at 381-83 (noting that some opponents of giving Congress taxing and regulatory power argued that these were legislative powers not properly delegated to an executive body such as Congress).

181. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *CAL. L. REV.* 167, 235-41 (1996) (concluding that Congress

legislative powers in areas it thought appropriate.¹⁸² For example, Congress promulgated military regulations, passed laws with respect to the territories (most notably the Northwest Ordinance of 1787), and developed laws with respect to the mail.¹⁸³ If Congress had thought it had general foreign affairs power (as it did believe it had power over the continental army, the territories and the mail), surely these instances of congressional legislative power would have served as models for foreign affairs-related ordinances. This seems particularly true in areas in which Congress could have imposed legislative authority without infringing the territorial integrity of any state—as it could have, for example, in regulating what ships and cargoes would be permitted to enter U.S. waters. The failure to act in foreign affairs matters seems to reflect a lack of foreign affairs powers in particular, not a lack of legislative power in general.

Third, it may be argued that, whatever the practice, a theory of inherent, extratextual powers existed during the confederation period. As a leading example, Congress in 1781 chartered a national bank, although nothing in the Articles appeared to give it such a power.¹⁸⁴ James Wilson, among other defenders of congressional action, explicitly relied on a theory of inherent powers, arguing that the delegated powers limitation of Article II applied only to powers that could be possessed by the states. Because the power over a national bank was unavoidably a national power unexercisable by any state in isolation, he argued, it could not be a delegated power but was, rather, a power existing inherently in the Union.¹⁸⁵

was primarily an executive body).

182. See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095, 2117 (1999) (noting that "historians of the era conventionally point out that the Confederation Congress possessed a jumble of all three powers [i.e., legislative, executive and judicial]").

183. See 27 JOURNALS, *supra* note 98, at 582-85 (1784) (discussing enforcement of congressional postal regulations); Ordinance for the Government of the Territory of the United States North-West of the River Ohio (July 13, 1787), *reprinted in* 1 DOCUMENTARY HISTORY, *supra* note 5, at 168 (providing governing rules for the Northwest Territory); see also WOOD, *supra* note 48, at 355 (commenting on extent of congressional regulatory activity).

184. See 2 WILSON, *supra* note 97, at 828-29 (discussing the National Bank controversy).

185. See *id.* at 829-30; see also Letter of George Mason to Thomas Jefferson (Sept. 27, 1781), *in* 2 THE PAPERS OF GEORGE MASON, 1725-1792, at 697-99 (Robert A. Rutland ed., 1970) (referring to and criticizing arguments based on inherent sovereignty of the national

As noted, this study attempts no conclusion with respect to the general theory of inherent powers. It is debatable to what extent Wilson's theory of inherent powers was representative, but whatever the correct outcome of that debate it does not support the specific idea of inherent power in foreign affairs. Indeed, the more fully articulated the idea of inherent powers in *some* areas, the more striking it is that inherent powers were *not* claimed in foreign affairs. As discussed, the need for additional congressional activity in foreign affairs was, as a policy matter, generally agreed. Congress failed to act largely because it was thought to lack power, and the specific proposals for granting Congress additional power foundered upon the extreme procedural difficulty of amending the Articles.¹⁸⁶ If there was an idea of inherent power in foreign affairs, it should have been deployed to address this impasse. It was not. Whether this was because the theory of inherent powers in general was not widely shared, or because inherent powers, though accepted in theory, were thought inapplicable to foreign affairs, is of no consequence to the specific inquiry posed in this Article. In either event, there was no acceptance of a theory of inherent power *in foreign affairs* under the Articles of Confederation.

D. Reliance upon the Articles by the Drafters of the Constitution

None of the foregoing discussion is automatically determinative of the proper view of the government under the Constitution: in adopting the Constitution the ratifiers were not merely building upon the Confederation, but were adopting an entirely new system. It is theoretically possible, as Louis Henkin suggests,¹⁸⁷ that even if the confederation government did not have inherent power in foreign affairs the new government might. However, it seems clear that in drafting the foreign affairs provisions of the Constitution the drafters in fact had the precedent of the Articles very much in

government).

186. See *supra* Part III.B.

187. See HENKIN, *supra* note 2, at 19:

Even if it were assumed, contrary to Justice Sutherland, that the states were each independently sovereign up to (and even during) the regime of the Articles of Confederation, the crux of Sutherland's theory might yet stand: the states irrevocably gave up external sovereignty, and the United States became one sovereign nation, upon adopting the Constitution but outside its framework. . . .

mind, and while altering the allocations of power, adopted the same essential structure of powers derived solely from the document itself.

As noted, many of the provisions of the Articles were adapted with detailed modifications into the new Constitution. For example, the power of appointing and receiving ambassadors was carried over from the Articles, but the power of appointing and receiving consuls was added.¹⁸⁸ The treaty power was carried over but modified so that states were not able to violate treaty obligations.¹⁸⁹ The restriction on states sending ambassadors was dropped, but provisions against states entering into international agreements were strengthened: under the Articles states could make treaties with congressional assent, and there was no restriction on their making lesser international agreements; under the Constitution, state treaties were banned outright, and states could make lesser international obligations only with the consent of Congress.¹⁹⁰ Under the Articles, states could issue letters of marque only during wartime; under the Constitution they could not issue them at all.¹⁹¹

Moreover, the drafters of the Constitution explicitly described their project as carrying over the foreign relations powers and restrictions of the Articles into the new document, with modifications to remedy the Articles' defects. For example, in Madison's description:

The powers to make treaties and to send and receive ambassadors speak their own propriety. Both of them are comprised in the Articles of Confederation, with this difference only, that the former is disembarrassed by the plan of the convention, of an exception under which treaties might be substantially frustrated by regulations of the states.¹⁹²

Similarly, with respect to restrictions on the states, Madison observed that "[t]he prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and

188. See U.S. CONST. art. II, § 2, cl. 2; ARTICLES OF CONFEDERATION art. IX, § 1.

189. See U.S. CONST. art. II, § 2, cl. 2, art. VI, cl. 2; ARTICLES OF CONFEDERATION art. IX, § 1.

190. See U.S. CONST. art. I, § 10; ARTICLES OF CONFEDERATION art. VI, § 1.

191. See U.S. CONST. art. I, § 10 cl. 1; ARTICLES OF CONFEDERATION art. VI, § 5.

192. THE FEDERALIST NO. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987).

for reasons which need no explanation, is copied into the new Constitution."¹⁹³ With respect to letters of marque and reprisal, he continued:

The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers, and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.¹⁹⁴

In short, the drafters thought about foreign affairs powers as they did other powers. Foreign affairs powers were granted to the national government, or denied to the states, by the terms of the national government's governing document. Careful attention to detail was required to achieve the best allocation of powers between the national government and the states. This is confirmed by the language of both the Articles and the Constitution, by practice under the Articles and by the drafters' own explanation of what they had written. They had no idea of an inherent division of powers into "external sovereignty" and "internal sovereignty" that automatically governed which powers would be held by the national government and which by the states, but were groping for the right balance in a very real, practical manner—carrying over allocations from the Articles to the Constitution where they seemed to work, and making adjustments where problems had arisen. *Curtiss-Wright's* abstract and artificial theory of sovereignty simply does not describe what was actually happening.

IV. RATIFICATION AND THE TENTH AMENDMENT

Foreign affairs powers went largely unaddressed in the debates over ratification of the Constitution. There was broad consensus

193. THE FEDERALIST NO. 44, at 286 (James Madison) (Isaac Kramnick ed., 1987).

194. *Id.* at 286.

that the national government should, in general, be the representative of the United States in foreign affairs.¹⁹⁵ Even opponents of the Constitution generally agreed that the national government's power should extend to "causes arising on the seas, to commerce, imports, armies, navies, Indian affairs, [and] peace and war."¹⁹⁶ The specific foreign affairs powers discussed in the Constitution did not go much beyond the Articles, with the addition of the proposed revisions to the Articles that had received broad (though less than unanimous) approbation in the mid-1780s.¹⁹⁷ Because of this broad consensus, the Federalists and Anti-Federalist, in the course of debating the Constitution, had little occasion to discuss foreign affairs powers. As a result, there is little direct evidence from the ratifying debates affirming or denying the specific claim of extraconstitutional power in foreign affairs.¹⁹⁸

Rather, the difficulty for proponents of extraconstitutional power in foreign affairs is that the theory seems inconsistent with the broader understanding—widely advanced during the debates—that the federal government is a government of enumerated powers in which "every thing which is not given, is reserved."¹⁹⁹ That

195. See MARKS, *supra* note 127, at 167-206. For representative views, see, for example, Letter from George Washington to the Executives of the States (Mar. 15, 1783), in 13 DOCUMENTARY HISTORY, *supra* note 5, at 60; 2, Letter in Philadelphia Freeman's Journal (May 16, 1787), in 13 *id.* at 98 (arguing that Congress ought to have exclusive power over foreign affairs); Madison, *supra* note 99, at 248-53.

196. Letter from the Federal Farmer to the Republican, I (Oct. 8, 1787), reprinted in 14 DOCUMENTARY HISTORY, *supra* note 5, at 18, 24. On the Anti-Federalist acceptance of the national government's power in foreign affairs, see Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local Sanctions Against Foreign Countries: Affairs of State, States Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307, 318 n.56 (1999) (collecting authorities).

197. See THE FEDERALIST NOS. 42, 43 (James Madison) (comparing Constitution and Articles of Confederation with respect to foreign affairs powers); see also 1 FARRAND, RECORDS, *supra* note 44, at 242-45 (reporting the so-called "New Jersey plan" presented at the Constitutional Convention by William Paterson as a proposal for limited revision of the Articles).

198. The one controversial provision was the clause in Article VI making treaties supreme over state law of their own force. See 2 ELLIOT, DEBATES, *supra* note 3, at 187, 215 (N.C. Convention); 3 *id.* at 215, 500-03 (Va. Convention). However, it was assumed that Congress would appropriately have power to enforce treaties by Article I, Section 8, even in the absence of this provision. See Yoo, *supra* note 126, at 2055.

199. 13 DOCUMENTARY HISTORY, *supra* note 5, at 339 (address by James Wilson in Philadelphia); see also 2 *id.* at 454-56 (statements of James Wilson to Pennsylvania Convention) (stating that federal government consists only of enumerated powers, and that

understanding, of course, was a centerpiece of the Federalist defense of the Constitution. The Anti-Federalist feared national power and accordingly sought rhetorically to invest the proposed national government with broad and ill-defined powers.²⁰⁰ In reply, the Federalists insisted first that the new national government could exercise only the powers given it by the constitutional text, and second, that those powers had limited scope. "The powers delegated . . . to the federal government," said Madison in *The Federalist*, "are few and defined."²⁰¹ As Madison further argued at the Virginia Convention, echoing Wilson, the principle of the Constitution was that "every power not granted thereby remains with the people. . . . Can the general government exercise any power not delegated? . . . The reverse of the proposition holds. The delegation alone warrants the exercise of any power."²⁰²

These assertions did not entirely convince the Anti-Federalist. Various state conventions proposed amendments which, among other things, would declare the principle explicitly. In Massachusetts, for example, Governor Hancock proposed to add language "that all powers not expressly delegated by the aforementioned Constitution are reserved to the several states"²⁰³ Samuel Adams, in support, argued that the provision was appropriate as confirming that "if any law[s] made by the federal government shall extend beyond the power granted by the proposed Constitution," they would be invalid.²⁰⁴ In subsequently drafting the Tenth

failure to enumerate a power would cause it to be outside the government's authority).

200. See, e.g., 2 ELLIOT, *DEBATES*, *supra* note 3, at 398-99 (statement of Thomas Tredwell that all rights not specifically reserved by the people are transferred to the national government).

201. THE FEDERALIST NO. 45, at 296 (James Madison) (Isaac Kramnick ed., 1987).

202. 3 ELLIOT, *DEBATES*, *supra* note 3, at 620; see also 4 *id.* at 259 (statement of Charles Pinckney to the South Carolina Convention that "no powers could be executed, or assumed, but such as were expressly delegated"). For additional discussion and quotation on this point, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 315-22 (1993).

203. 2 ELLIOT, *DEBATES*, *supra* note 3, at 177 (Mass. Convention).

204. 2 *id.* at 131 (Feb. 1, 1788); see also Letter from the Federal Farmer to the Republican, No. 16 (Jan. 20, 1788), reprinted in 17 DOCUMENTARY HISTORY, *supra* note 5, at 342 (describing federal government as "possessing only enumerated power" but proposing early form of the Tenth Amendment as a way of quieting Anti-Federalist fears on this subject). On the Anti-Federalist skepticism of the enumerated powers reading, see, for example, 2 ELLIOT, *DEBATES*, *supra* note 3, at 396 (statement of Thomas Tredwell to the New York Convention) (arguing that absent an express statement the usual interpretation of a constitution would

Amendment, whose purpose, the Supreme Court later said, was "to allay fears that the new national government might seek to exercise powers not granted,"²⁰⁵ Madison substantially tracked the proposals of the state conventions in this regard: "The powers not delegated to the United States by the constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people."²⁰⁶

These events, which are not seriously in dispute, seem conclusively to reject any idea of extraconstitutional federal power. If, as Madison said, "delegation alone warrants the exercise of any power"²⁰⁷ then obviously there is no basis for claims of inherent power, and the history of the Tenth Amendment shows that it was, at a minimum, designed specifically to confirm that Madison's statement was a correct description of the constitution system. Indeed, the difficulty is to understand how any coherent theory of extraconstitutional power could survive the Tenth Amendment.

The rejoinder is as follows. First, although no one seriously challenges the idea of enumerated powers as the basic framework of the Constitution, there may be particular exceptions to it. Despite the unqualified statements of the Tenth Amendment and much contemporaneous commentary, there is some evidence that the concept was not wholly comprehensive. Second, because of the obvious national characteristics of foreign affairs, it is likely that foreign affairs power was one of the exceptions. As *Curtiss-Wright* asserted:

The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. . . .

be that it granted a general power).

205. *United States v. Darby*, 312 U.S. 100, 124 (1941).

206. U.S. CONST. amend. X; see also 1 ANNALS OF CONG., *supra* note 80, at 441 (statement of James Madison) (introducing the proposal that became the Tenth Amendment and stating "I find, from looking into the amendments proposed by the State conventions, that several [states] are particularly anxious that it should be declared in the Constitution, that the powers not therein delegated should be reserved to the several States. . . . [T]here can be no harm in making such a declaration, if gentlemen will allow that the fact is as stated. I am sure I understand it so, and do therefore propose it").

207. 3 ELLIOT, DEBATES, *supra* note 3, at 620.

[T]he powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution.²⁰⁸

On the more general point, the ratification debates provide at least some support. For example, some Federalists qualified the reserved powers of the states to include only powers traditionally exercised by the states.²⁰⁹ Wilson, for one, seemingly acknowledged a (limited) view of inherent powers in describing the federal government as one where “powers are particularly enumerated, and where nothing more is intended to be given than what is so enumerated, *unless it results from the nature of the government itself*.”²¹⁰

The *Curtiss-Wright* argument fails, however, on the second point. Even if some ratifiers had some notion of inherent powers, there is no evidence to suggest that anyone thought foreign affairs powers were inherent powers. First, nothing in the ratifying debates lends any direct support to an understanding of foreign affairs powers as inherent powers. It can be defended only as a background understanding so fundamental and commonly shared that it remained unstated. But background understandings must arise from some source. In the constitutional context, I can identify only two plausible candidates. First, the Constitution itself might imply that a subject matter was beyond its purview. For example, if the Constitution does not mention an entire set of powers, one might plausibly assume that the Constitution simply was not addressed to such matters. Second, common practice prior to the Constitution might give rise to an assumption that the Constitution did not contemplate a fundamental change in the area. If Congress under the Articles was thought to have an inherent power in a particular area, that power might be assumed to carry over to the new government even in the absence of a statement to that effect; if the states did not exercise a power under the Articles one might think that was not a power “reserved” to the states by the Tenth

208. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 515-16, 318 (1936); see also Clark, *supra* note 7, at 1296-97 (quoting this language from *Curtiss-Wright*).

209. See 3 ELLIOT, DEBATES, *supra* note 3, at 419 (statement of John Marshall).

210. 2 *id.* at 436 (statement of James Wilson to Pennsylvania Convention) (emphasis added). I offer no opinion here as to the merits of these observations, as I think the *Curtiss-Wright* claim fails on its specific application to foreign affairs.

Amendment, despite that Amendment's seemingly comprehensive language.

Whatever one thinks of these arguments as a general matter, it should be clear from the discussion above that neither applies to foreign affairs powers. The Constitution is not silent on foreign affairs matters; rather, it specifically allocates most of the important foreign affairs powers between the states and the federal government, and among the branches of the federal government. A person having no previous idea of inherent powers in foreign affairs would not derive such an idea from the constitutional language. Further, the context of the Constitutional Convention undercuts such a claim, for the Convention was called, in large part, to remedy the foreign affairs difficulties of the government under the Articles.²¹¹ Foreign affairs power, far from being outside the purview of the Constitution, is one of the central points of the Constitution.

In addition, as demonstrated above, no concept of inherent foreign affairs power was reflected in the text of the Articles or in practice under the Articles. Congress, while operating under the Articles, did not exercise inherent foreign affairs powers. In situations where a foreign affairs power was not granted to Congress by the text of the Articles, Congress thought it lacked that power, and refrained from exercising it even when action by Congress seemed the only effective system.²¹² Where a foreign affairs power was not denied to the states by the text of the Articles, the states thought they possessed the power (and frequently exercised it) even where its exercise by the states seemed unwise. This pattern was repeated with respect to the impost, navigation acts, and other restraints of international trade, embargoes and enforcement of the law of nations and of treaties—in short, the major foreign affairs powers unmentioned by the Articles.²¹³ The ratifiers of the Constitution would not have imported into their reading of the constitutional text a preconceived idea of inherent power in foreign affairs, and nothing in the text or surrounding context would have suggested such an idea as an

211. See MARKS, *supra* note 127, at x; Rakove, *supra* note 169, at 267-68; Yoo, *supra* note 126, at 2013-14.

212. See *supra* Part III.

213. See *id.*

initial matter. It seems, therefore, implausible to assert a background understanding of extraconstitutional power in foreign affairs. Lacking clear evidence of such a background understanding there seems no justification for reading the Tenth Amendment not to apply to foreign affairs.

V. THE CONSTITUTIONAL ALLOCATION OF FOREIGN AFFAIRS POWER

As argued above, *Curtiss-Wright* is historically indefensible. It rests on a theory of inherent powers not held by any prominent member of the constitutional generation and contrary to the text and history of both the Articles of Confederation and the Constitution. However, as Louis Henkin has written, "[s]tudents of the Constitution may have to accept Sutherland's theory, with its difficulties, or leave constitutional deficiencies unrepaired."²¹⁴ Specifically, in the absence of *Curtiss-Wright* how do we resolve three central dilemmas of constitutional foreign relations: the incomplete allocation of foreign affairs power to the federal government, the incomplete division of foreign affairs powers among the branches of the federal government and the incomplete denial of foreign affairs power to the states?

Although each of these difficulties requires its own complete treatment, it is possible to sketch the beginnings of an answer to each. My point here is not to be definitive, but rather to suggest that there are alternatives to the convenient but manifestly inaccurate theory of *Curtiss-Wright*.

The first problem is the dilemma of unallocated foreign relations powers. Although the Constitution grants to the federal government all of the leading foreign affairs powers (war, treaties, ambassadors, etc.), a number of lesser powers are omitted. One of these is what I have elsewhere called the "foreign policy power"—that is, the power to "direct the moral and diplomatic force of the United States" with respect to a particular subject.²¹⁵ To take one early example, what constitutional provision authorized President Monroe to announce the Monroe Doctrine? It does not seem

214. HENKIN, *supra* note 2, at 20.

215. Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 133, 220-25 (1998).

ancillary to any of the enumerated powers of Congress or the President: it did not involve war or military force; it was not done pursuant to an agreement with another nation; it did not involve commerce, or naturalization, or national defense. It was not even announced through ambassadors, but rather in a message from the President to Congress. Nothing in the Constitution seems to encompass the Monroe Doctrine, yet it is unthinkable that the United States would not have the power to set its own foreign policy, or that foreign policy pronouncements of this kind could be made only by the states.²¹⁶

Likewise, consider the power to make lesser international agreements that do not rise to the level of treaties. I have elsewhere argued that the constitutional generation understood "treaties" to form only a subset of international agreements, namely those involving significant issues and intended for a long duration.²¹⁷ Minor, temporary undertakings were called compacts, accords, or in more modern times protocols or understandings. Yet, the Constitution assigns only the power to make treaties. Surely the national government could not have the power to make major agreements but *not* have the power to make minor ones.

Though Professor Henkin despairs of resolving these problems, there is a textual solution. Article II, Section 1 of the Constitution states that "[t]he executive Power shall be vested in a President. . . ."²¹⁸ There are various ways of reading "the executive Power" in this Section. One might say that this includes only the power to "execute" the laws—that is, to act pursuant to a specific congressional law—plus the other powers specifically given to the President by the Constitution (pardons, commander-in-chief, etc.).²¹⁹ Alternatively, one might say that "executive Power" includes other powers of traditional chief executives with which the Framers were familiar. The latter is more consistent with the common

216. See James Monroe, Message to Congress, December 2, 1823, in 41 ANNALS OF CONG. 11, 22-23 (1856) (warning European powers not to interfere with newly independent South American republics); Ramsey, *supra* note 215, at 210-12 (discussing the allocation of this power).

217. See Ramsey, *supra* note 215, at 160-83.

218. U.S. CONST. art. II, § 1.

219. See James Madison, Letters of Helvidius (1793), in 1 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 607, 614-15 (J.B. Lippincott & Co. ed., 1865) (taking this position).

eighteenth-century understanding, for Blackstone, Montesquieu, Locke, and other writers spoke of "executive" power as encompassing more than merely acting pursuant to enactment.²²⁰ Specifically, these writers thought that foreign affairs powers were an aspect of executive power (and that view is confirmed in practice, for in Britain the Crown, identified with the executive power, exercised most foreign affairs powers).²²¹ Moreover, leading members of the constitutional generation identified "executive power" in the Constitution with foreign affairs power early in the postconstitutional period. Then-Secretary of State Thomas Jefferson, in a written opinion to President Washington in 1790, stated that: "The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, *except* as to such portions of it as are specially submitted to the Senate."²²² Similarly Hamilton, in defending Washington's 1793 unilateral declaration of neutrality, identified it as an unenumerated part of the "executive power" arising from the executive's responsibilities in foreign affairs.²²³

If we accept the Hamilton/Jefferson view, the first *Curtiss-Wright* difficulty is resolved. The "lesser" foreign affairs powers, though apparently unallocated, are encompassed within the "executive power," and granted to the federal government by Article II, Section 1. Moreover, this reading solves at least part of the second problem raised in *Curtiss-Wright*: even assuming the federal government has the "unallocated" foreign affairs powers, to which branch do they belong? *Curtiss-Wright*, in a separate but equally controversial part of the opinion, argued that all of these powers were Executive powers, because foreign affairs powers inhered naturally not only

220. See 1 WILLIAM BLACKSTONE, COMMENTARIES *257; JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 145-47, at 383-84 (P. Laslett ed., 1988) (1698); CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS 6K XI, ch. 6, at 69 (R. Hutchins ed., 1952) (1748).

221. See Ramsey, *supra* note 215, at 206-10 (discussing eighteenth-century usage of executive power); Yoo, *supra* note 181, at 197-204 (same).

222. Thomas Jefferson, Opinion of Thomas Jefferson (Apr. 24, 1790), in 5 GEORGE WASHINGTON, THE PAPERS OF GEORGE WASHINGTON 342, 343 (Dorothy Twohig et al. eds., 1996).

223. See Alexander Hamilton, Letters of Pacificus, No. 1 (1793), in 4 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 432, 436-39 (Henry Cabot Lodge, ed., 1904).

in the federal government, but specifically in the Executive.²²⁴ In this respect perhaps *Curtiss-Wright* reached something like the right result, albeit for the wrong reasons. As argued above, the framers did not believe in extraconstitutional grants of foreign affairs power, nor did they believe in extraconstitutional allocations of foreign affairs power. But perhaps they did allocate matters roughly as *Curtiss-Wright* suggested: the residual, "unallocated" foreign affairs powers are executive powers under Article II, Section 1. Of course Congress can legislate in support of these powers, under the Necessary and Proper Clause, but the ultimate authority in these areas belongs to the President, so long as the powers are those traditionally exercised by chief executives and are not allocated elsewhere in the Constitution.²²⁵

Significantly, in many respects this solution accords with constitutional practice. *Curtiss-Wright* was not an impractical opinion: it fairly described constitutional practice. From the beginning, interpreters of the Constitution assumed that the lesser unallocated foreign affairs powers were held by the national government, and specifically were held by the President.²²⁶ Thus, Presidents have set foreign policy (such as the Monroe Doctrine), entered into lesser "nontreaty" agreements with foreign nations, and exercised various other unallocated powers, essentially without constitutional objection.²²⁷

The third structural difficulty supposedly resolved by *Curtiss-Wright* is the role of the states in foreign affairs. Although the Constitution specifically denies certain foreign affairs powers to the states, there is no obvious generalized preclusion. Consequently, the states would seem to have considerable latitude to interfere with federal foreign policy. To many, this is troubling. The framers

224. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

225. This reasoning is consistent with the views of Hamilton and Jefferson cited above. See *supra* notes 222-23 and accompanying text. In both cases, the issue was not whether the national government had the requisite foreign relations power, but whether the President, as opposed to some other part of the national government, had the power. See Hamilton, *supra* note 223, at 437 (discussing the proclamation of neutrality); Jefferson, *supra* note 222, at 343 (discussing the appointment of diplomatic officers). But see Madison, *supra* note 219, at 614-15 (arguing that power to declare neutrality belongs to Congress, not the President).

226. See Ramsey, *supra* note 215, at 173-83, 210-16.

227. See HENKIN, *supra* note 2, at 20.

emphasized unity in foreign affairs. Madison wrote: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations."²²⁸ In Hamilton's view: "[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable . . . for the conduct of its members."²²⁹ Would such thinkers have designed a system admitting of a multiplicity of foreign policies formulated at the state and local level, in which a national policy of, for example, constructive engagement with regimes such as South Africa in the 1980s or Burma and China today could be frustrated by state and local policies urging (or directing) disengagement from those countries?²³⁰

The answer to this question depends upon what one thinks of negative implications. If the Jefferson/Hamilton view discussed above is correct, the unallocated foreign affairs powers of the United States are vested in the President. Perhaps this implies a corresponding preclusion of state foreign policy, by negative implication. It is widely believed that the grant of power over interstate commerce in Article I, Section 8, creates by negative implication a "dormant" Commerce Clause precluding some state regulations of interstate commerce.²³¹ Likewise, because the power to raise and support armies is granted to Congress and because the President is made Commander-in-Chief, one would be constitutionally suspicious of state laws purporting to regulate the U.S. military.²³² Perhaps the negative implication of the President's foreign affairs powers has a similar effect.²³³

On the other hand, perhaps it does not. The Constitution already contains a method for invalidating state laws interfering with federal policy: the Supremacy Clause of Article VI.²³⁴ Federal policy

228. THE FEDERALIST NO. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987).

229. THE FEDERALIST NO. 80, at 446 (James Madison) (Isaac Kramnick ed., 1987).

230. See generally Fenton, *supra* note 21; Schmahmann & Finch, *supra* note 21.

231. See, e.g., *Cooley v. Board of Wardens*, 53 U.S. 299 (1851).

232. See Ramsey, *supra* note 21, at 390-95, 429-32.

233. See *id.* (suggesting but ultimately rejecting this argument). For a related argument that the President's power to negotiate with foreign governments creates a "dormant" exclusion of state activities designed to influence foreign governments, see Edward Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

234. See U.S. CONST. art. VI (making federal statutes and treaties supreme over state law).

reflected in a law or treaty overrides state law. If a state law interferes with executive policy, Congress, pursuant to its "necessary and proper" power, generally would appear to have the ability to pass a law preempting that state policy. True, Congress may decline to do so, but perhaps that is a salutary check upon executive policymaking. If Congress does not find a state law troubling, perhaps that law is not really a problem. As a historical matter, states have passed laws with substantial impact on foreign affairs without provoking foreign affairs crises.²³⁵ Courts have very rarely, and only relatively recently, struck down state laws as conflicting with unenacted federal policy.²³⁶ It may be the case that the third structural "problem" identified in *Curtiss-Wright* is not really a problem: the framers clearly understood the problem of state interference in foreign affairs, and created a remedy through Article VI of the Constitution.²³⁷

VI. CONCLUSION: WHY THE REJECTION OF *CURTISS-WRIGHT* MATTERS

This Article concludes that *Curtiss-Wright's* theory of extraconstitutional foreign affairs powers is both ahistorical and unnecessary. Contrary to *Curtiss-Wright's* historical assertions, the Constitution was not drafted with a background assumption of inherent powers in foreign affairs. This is clear for three reasons. First, the constitutional text itself delegates and allocates core foreign affairs powers directly, which would be unusual if inherent powers were widely assumed.²³⁸ Second, the drafters explained the foreign affairs powers of the national government under the new Constitution as *grants* of power, not as confirmations of existing inherent powers.²³⁹ No one suggested that the Constitution's grants

235. See Goldsmith, *supra* note 6, at 1655-58 (discussing such laws, including California's anti-alien acts in the late nineteenth and early twentieth centuries and the Negro Seamen Acts enacted by several southern states between 1822 and 1860).

236. See *id.* at 1643-63 (discussing history of judicial activities in this regard).

237. See generally Goldsmith, *supra* note 6 (making this argument on the basis of history and practice); Ramsey, *supra* note 21 (making this argument on the basis of the original understanding of the Constitution); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999) (making this argument on the basis of modern practicalities).

238. See *supra* Part II.A.

239. See *supra* Part II.B.

of foreign affairs powers were superfluous, although members of the constitutional generation were quick to point out superfluous provisions in other contexts. Third, the Articles of Confederation—an important model for the Constitution in the foreign affairs area—had no concept of inherent foreign affairs powers.²⁴⁰ The text of the Articles did not grant Congress certain key foreign affairs powers—such as the power to regulate foreign commerce and the power to enforce treaties and the law of nations—and Congress therefore thought it lacked these powers.²⁴¹ No one suggested that Congress had these powers inherently. The only remedy for Congress's lack of textual foreign affairs powers was thought to be amendment, a strategy pursued piecemeal and without success in the mid-1780s, and ultimately accomplished by the Constitution's grant of broader textual powers.²⁴² Thus, without entering into the broad debates about state and federal sovereignty that have often obscured discussion of *Curtiss-Wright*, it can be said with confidence that the *Curtiss-Wright* theory simply does not describe the constitutional generation's understanding of foreign affairs power.

Resort to a theory of extraconstitutional power in foreign affairs is, moreover, unnecessary to make sense of the Constitution. Although the Constitution's treatment of foreign affairs power has been described as sparse and incomplete, that does not seem to be an accurate characterization. If the executive-vesting clause of Article II, Section 1²⁴³ is construed to give residual foreign affairs power to the President, as both Hamilton and Jefferson construed it, a fairly complete picture of the allocation of foreign affairs power can be developed without reference to extraconstitutional sources.²⁴⁴

A theory of foreign affairs power based on the executive-vesting clause results in a system not unlike that of *Curtiss-Wright*: the "unallocated" foreign affairs powers are powers of the federal government, and within the federal government they are, at least in the first instance, powers of the President.²⁴⁵ One might wonder,

240. See *supra* Part III.

241. See *supra* Part III.A.

242. See *supra* Part II.B.

243. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President . . .").

244. See *supra* Part V.

245. See *id.*

therefore, whether the debate over the *Curtiss-Wright* theory has any practical consequences. Does it matter whether the source of power is the executive-vesting clause or something outside the Constitution? Those who defend broad presidential power under the *Curtiss-Wright* theory will, upon reconceptualization, defend it upon a broad theory of the executive-vesting clause. Those who think that the President's inherent power is limited will, on reconceptualization, think that the executive-vesting clause has limited scope.

The shift from *Curtiss-Wright* to the executive-vesting clause matters for two reasons. First, the debate over inherent powers and state sovereignty reaches beyond foreign affairs. This study does not seek to resolve these broader matters, but it is relevant to them in one important respect. The supposed existence of inherent foreign affairs power may be used as support for the existence of other inherent powers, and as evidence that state sovereignty has other inherent limitations. Although I take no position on the existence of other inherent powers or limitations, I do argue that there are no inherent powers or limitations *in foreign affairs*—and that arguments for other inherent powers or limitations must be judged upon their own merits, without reference to foreign affairs analogies.

Second, the theory of the executive-vesting clause, although superficially similar to the theory of *Curtiss-Wright*, is in application less hospitable to open-ended presidential powers. Consider two examples that I have discussed at greater length elsewhere. First, does the President have the power to make executive agreements preemptive of state law? Under a *Curtiss-Wright* theory, it is easy to argue that the President's inherent foreign affairs power includes the power to make executive agreements *and* the power to give them preemptive status.²⁴⁶ Under an executive-vesting clause theory, the second part of the claim is much more difficult. The traditional power of the chief executive, as exemplified to the constitutional generation by the British monarch, did not include the power of domestic lawmaking by executive

246. See *United States v. Belmont*, 301 U.S. 324, 330-32 (1937) (reaching this conclusion in part on the basis of *Curtiss-Wright*).

agreement.²⁴⁷ If the executive-vesting clause reflects the power of the traditional chief executive, that power would not be included. Moreover, once the power to make executive agreements is thought of as a *constitutional* power, it is much more difficult to explain how it could be preemptive even though not included in Article VI, which is the way that other constitutional powers are made preemptive.²⁴⁸ As a result, the executive-vesting clause theory—but not the *Curtiss-Wright* theory—appears to preclude a presidential lawmaking power by executive agreement.²⁴⁹

A related example is the question of state power in foreign affairs. Under a *Curtiss-Wright* theory, it is easy to say that state interference in presidential foreign policy is precluded by the idea of national sovereignty.²⁵⁰ Under an executive-vesting clause theory, the claim is more difficult. If presidential power in foreign affairs arises from the executive-vesting clause, and there is no other constitutional provision generally excluding the states from foreign affairs, the exclusion—if there is one—must arise from a negative implication from the executive-vesting clause.²⁵¹ As I have argued elsewhere,²⁵² however, this theory is subject to various objections, not the least of which is the constitutional generation's disfavor of negative implications against state power.²⁵³ In short, as with

247. See James Wilson, *Lectures on Law* (1790-91), reprinted in 1 WILSON, *supra* note 97, at 440 (discussing traditional understanding of executive power and concluding that “[t]he person at the head of the executive department had authority, not to make, or alter, or dispense with the laws”); Ramsey, *supra* note 215, at 218-29.

248. See Ramsey, *supra* note 215, at 219-21.

249. See *id.* at 235-40 (concluding that the executive-vesting clause gives the President power to make executive agreements, but that executive agreements do not have the status of domestic law).

250. See Clark, *supra* note 7, at 1296.

251. See Ramsey, *supra* note 21, at 390-403.

252. See *id.* at 403-32.

253. See 3 ELLIOT, *DEBATES*, *supra* note 3, at 391 (statement of George Nicolas to the Virginia Convention)

[I]n every instance where the Constitution intends that the general government shall exercise power any exclusively of the state governments, words of exclusion are particularly inserted. Consequently, in every case where such words of exclusion are not inserted, the power is concurrent to the state governments and Congress, unless where it is impossible that the power should be exercised by both.

Id.; THE FEDERALIST NO. 32 (Alexander Hamilton) (arguing that a negative implication against state power would arise from an affirmative grant of federal power only where “a similar authority in the States would be absolutely and totally *contrary* and *repugnant*”).

executive agreements, it is much more difficult to claim a broad presidential power when that power is based on a specific constitutional provision than if it is based on the inherent (and intangible) "necessary concomitants of nationality."²⁵⁴

254. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).