UC Law Constitutional Quarterly

Volume 51 | Number 4 Article 6

Summer 2024

The Spy in Your Pocket: Montana's TikTok Ban and the Federalism Limits of State-level Foreign Policy

Wei Luo

Follow this and additional works at: https://repository.uclawsf.edu/hastings_constitutional_law_quaterly

Part of the Constitutional Law Commons

Recommended Citation
Wei Luo, *The Spy in Your Pocket: Montana's TikTok Ban and the Federalism Limits of State-level Foreign Policy*, 51 Hastings Const. L.Q. 585 (2024).
Available at: https://repository.uclawsf.edu/hastings_constitutional_law_quaterly/vol51/iss4/6

This Article is brought to you for free and open access by the Law Journals at UC Law SF Scholarship Repository. It has been accepted for inclusion in UC Law Constitutional Quarterly by an authorized editor of UC Law SF Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

The Spy in Your Pocket:

Montana's TikTok Ban and the Federalism Limits of State-level Foreign Policy

WEI LUO*

ABSTRACT

In May 2023, Montana became the first state in America to ban the social media app TikTok. This article proposes a two-prong analytical framework for evaluating the federalism limits of Montana's TikTok ban (SB 419) and similar laws that other states might enact in the future. The first prong is a mandatory constitutional analysis of whether the state law runs afoul of restrictions on states' foreign policy powers. These limits are threefold—Article I, Section 10, preemption, and the dormant Commerce Clause. This article focuses on federalism limits that only the states face and does not explore other constraints that the federal government might face, such as the First Amendment's rights to free speech and association. The second prong is an optional, persuasive policy analysis of whether the state law makes sense based on concepts and data from economics. Applying this framework, SB 419 should fall as a matter of law and policy.

* JD Candidate, Loyola University Chicago School of Law; MPP, Harvard University; BA, University of Chicago; CFA. I would like to thank the *UC Law Constitutional Quarterly*, my family and friends, and Professors Dean Strang, John Dehn, and Sarah Smith. All views expressed and errors made are exclusively my own.

TABLE OF CONTENTS

Introduction 586
I. Background 589
A. History of TikTok Bans 589
B. Overview of Limits on States' Foreign Policy Powers 592
C. Article I, Section 10 593
D. Preemption 594
E. The Dormant Commerce Clause 595
II. Discussion 596
A. Preemption 596
1. Express Preemption 597
2. Implied Preemption 599
B. The Dormant Commerce Clause 602
III. Analysis 604
A. Constitutional Prong: Preemption 605
1. Express Preemption 605
2. Implied Preemption 608
B. Constitutional Prong: The Dormant Commerce Clause 616
C. Policy Prong: At the Intersection of Constitutional Law and Economics 617
1. Externalities 619
2. Specialization 624
IV. Proposal 634
Conclusion 636

INTRODUCTION

"Our mission," proclaims TikTok, "is to inspire creativity and bring joy."[1] With over a billion users worldwide, the social media company has pursued this mission with great zeal and success.[2] However, with great success comes great scrutiny. TikTok has not only inspired creativity and

1. *Our Mission*, TIKTOK, https://www.tiktok.com/about?lang=en [https://perma.cc/49CM-AR72] (last visited Sept. 12, 2023); *see also* John Herrman, *How TikTok Is Rewriting the World*, N.Y. TIMES (Mar. 10, 2019), https://www.nytimes.com/2019/03/10/style/what-is-tik-tok.html [https://perma.cc/AD2L-NGPW] ("TikTok is an app for making and sharing short videos. . . . Imagine a version of Facebook that was able to fill your feed before you'd friended a single person. That's TikTok.").

2. *See Thanks a billion!*, TIKTOK (Sept. 27, 2021), https://newsroom.tiktok.com/en-us/1-billion-people-on-tiktok [https://perma.cc/RV5N-TXAW] (announcing that TikTok had reached a billion users worldwide); *accord* Marisa Dellatto, *TikTok Hits 1 Billion Monthly Active Users*, Forbes (Sept. 27, 2021, 12:18 PM), https://www.forbes.com/sites/marisadellatto/2021/09/27/tiktok-hits-1-billion-monthly-active-users [https://perma.cc/6ZJK-ZAGY] ("TikTok took only five years to reach the 1 billion user mark[.]").

brought joy to users, it has also inspired suspicion and brought legal challenges. TikTok's troubles stem from the collision of two realities. The first reality is TikTok's corporate structure—TikTok "is a wholly owned subsidiary of Chinese technology firm ByteDance Ltd., which appoints its executives."[3] The second reality is the intensifying great-power competition between the United States and the People's Republic of China (PRC).[4] Lawmakers in the U.S. are concerned that the Chinese government or the Chinese Communist Party (CCP) might direct ByteDance to hand over sensitive data on TikTok's 150 million American users.[5]

As TikTok users dance with gusto and broadcast their moves across the Internet, politicians in the White House, Capitol, and statehouses across America have been busy doing their own dance and broadcasting their moves to the electorate. Former President Donald Trump attempted to ban TikTok by executive order, while Congress has mulled over proposed bans of its own.[6] The federal government and around one-half of the states have also banned TikTok on government-issued devices.[7] On May 17, 2023, Montana took things one step further: Montana's Governor signed SB 419, making Montana the first (and thus far only) state in the nation to ban TikTok outright for all users.[8] Scheduled to take effect on January 1, 2024, SB 419 authorizes the state to levy a $10,000 fine, per discrete violation per day, on any entity that allows users to download or access TikTok within the

3. Joe McDonald & Zen Soo, *Why does US see Chinese-owned TikTok as a security threat?*, AP NEWS (Mar. 24, 2023, 2:24 PM), https://apnews.com/article/tiktok-bytedance-shou-zi-chew-8d8a6a9694357040d484670b7f4833be [https://perma.cc/V5QH-K5H7].

4. *See, e.g.*, Chris Anstey, *US-China Rivalry May Shape 2023 for the World*, BLOOMBERG (Dec. 31, 2022, 6:45 AM), https://www.bloomberg.com/news/newsletters/2022-12-31/us-china-rivalry-will-shape-2023-for-the-whole-world-new-economy-saturday [https://perma.cc/J5J2-Q4NS] (describing the intensifying "great competition between the US and China"); *see infra* note 145 (noting the U.S.-China "strategic competition" and "great-power competition").

5. McDonald & Soo, *supra* note 3. The Chinese government could have authority to do so under the country's 2017 National Intelligence Law. *Id.* Additionally, because the CCP—the ruling party in China—has no legal limits on its power, the CCP could use various other policy tools, such as licensing, tax investigations, and penalties, to force ByteDance to comply with the party's requests. *Id.*

6. Darreonna Davis, *Government TikTok Bans: Exploring the Global Impact*, FORBES (June 6, 2023, 3:32 PM), https://www.forbes.com/sites/darreonnadavis/2023/06/06/government-tiktok-bans-exploring-the-global-impact/?sh=22f654d470c0 [https://perma.cc/HQB2-N5CP]; Sanchitha Jayaram & Madeline W. Donley, *Montana's TikTok ban and Pending Legal Actions*, CONG. RSCH. SERV. 3 (June 1, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10972 [https://perma.cc/3425-HVU2].

7. Davis, *supra* note 6; Jayaram & Donley, *supra* note 6, at 1.

8. Davis, *supra* note 6; *see also* Jayaram & Donley, *supra* note 6, at 1 ("To date, no other states have enacted a ban this broad against TikTok or any other social media platform.").

territorial jurisdiction of Montana.[9] TikTok sued to enjoin SB 419, and the U.S. District Court for the District of Montana granted a preliminary injunction on November 30, 2023.[10] Montana has appealed to the Ninth Circuit.[11]

This article lays out a two-prong analytical framework for evaluating the federalism limits of Montana's TikTok ban and similar laws that other states might enact in the future.[12] The first prong is a mandatory constitutional analysis of whether the state law runs afoul of restrictions on states' foreign policy powers. These limits are threefold—Article I, Section 10, preemption, and the dormant Commerce Clause (DCC). The second prong is an optional, persuasive policy analysis of whether the state law makes sense based on concepts and data from economics. For the constitutional prong, this article focuses solely on federalism limits and does not address other constraints, such as the First Amendment's rights to free speech and association. While the First Amendment and related analyses are relevant—and future work may address them—they are beyond the scope of this article. The federal government is not subject to the three aforementioned federalism limits and theoretically could enact its own TikTok ban if it comports with other constitutional constraints that this article does not cover.

Additionally, this article will not address feasibility issues, such as how Montana might be able to enforce its TikTok ban, nor will this article delve deeply into sociological issues such as racism, Sinophobia, and xenophobia—though such issues invariably lurk in the background.[13] The feasibility issues raise a particularly thorny question: how can Montana prevent its residents from using TikTok without erecting a CCP-style surveillance apparatus? That, of course, is the very thing that the TikTok ban was supposed to protect residents from in the first place.[14] If Montana requires entities such

9. Davis, *supra* note 6; An Act banning TikTok in Montana, SB 419, 68th Legislature (Mont. 2023), at 2, 3, https://leg.mt.gov/bills/2023/billpdf/SB0419.pdf [https://perma.cc/DJE2-G4NY] [hereinafter SB 419].

10. Order Granting Plaintiff's Motion for Preliminary Injunction at 48, TikTok Inc. v. Knudsen, No. 9:23-cv-00061-DLC (D. Mont. Nov. 30, 2023).

11. David Shepardson, *Montana appealing ruling that blocked state from barring TikTok use*, REUTERS (Jan. 2, 2024, 7:11 PM), https://www.reuters.com/legal/montana-appealing-ruling-that-blocked-state-barring-tiktok-use-2024-01-03 [https://perma.cc/HA2K-UUBA].

12. This article applies the framework to the facts of Montana's TikTok ban specifically, but the framework is equally applicable to any future TikTok ban from any state.

13. .The Fourteenth Amendment's Equal Protection Clause, which is outside this article's scope, prohibits states from discriminating on the basis of race, ethnicity, and other protected characteristics. U.S. CONST. amend. XIV.

14. *See* Tarah Wheeler, *The Great Firewall of Montana: How Could Montana Implement A TikTok Ban?*, COUNCIL OF FOREIGN RELS. (June 1, 2023, 12:02 PM), https://www.cfr.org/blog/great-firewall-montana-how-could-montana-implement-tiktok-ban [https://perma.cc/KCB6-L8FS] ("The only way to enforce Montana's ban is to . . . begin massive surveillance of all U.S. internet-connected devices, reporting precise location and the contents of all phones to any law enforcement at will. Sound familiar? That's because that is the surveillance

as TikTok, Google, or Apple to turn over data on users who download or access TikTok, this could implicate Fourth Amendment limits on unreasonable searches and seizures; such limits apply to the State of Montana via the Fourteenth Amendment.[15] Furthermore, users in Montana might resort to VPNs to circumvent SB 419, just as users in China do so today to leap over "the Great Firewall" and access such banned platforms as Facebook, X (formerly Twitter), and (yes) TikTok.[16] These issues are endlessly fascinating and deserve an article in their own right.

I. BACKGROUND

A. History of TikTok Bans

The federal government and about half of the states have banned TikTok on government-issued devices.[17] Both the President and Congress have considered or attempted to ban TikTok for private citizens as well. President Trump issued an executive order in 2020 that attempted to prevent Americans from downloading TikTok, but two U.S. District Court judges blocked the executive order.[18] President Biden entered the White House soon

state in China."); *cf.* Riley v. California, 573 U.S. 373, 386 (2014) (finding that the government must generally obtain a search warrant to look inside cellphones); *cf.* Carpenter v. United States, 138 S.Ct. 2206, 2220–21 (2018) (finding that the government must generally obtain a search warrant to obtain cell-site location information from cellphones).

15. *See* U.S. CONST. amend. IV (prohibiting the federal government from conducting unreasonable searches and seizures); *see also Amdt14.S1.4.3 Modern Doctrine on Selective Incorporation of Bill of Rights*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746/ [https://perma.cc/9YDH-E3DG] (last visited Sept. 12, 2023) ("Numerous Supreme Court decisions hold that particular provisions of the Bill of Rights have been applied to the states through the Fourteenth Amendment's Due Process Clause . . . [including] the Fourth Amendment right to be free from unreasonable searches and seizures."); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion [of evidence] as is used against the Federal Government.").

16. *See* Eloise Berry, *These Are the Countries Where Twitter, Facebook and TikTok Are Banned*, TIME (Jan. 18, 2022, 2:08 PM), https://time.com/6139988/countries-where-twitter-facebook-tiktok-banned [https://perma.cc/PK2E-22K5] ("China's restriction of foreign media platforms and censorship of non-governmental material has been dubbed the Great Firewall of China. . . . Although video-sharing app TikTok was developed by Chinese company Bytedance, it is not available in China."); *see also* Rūta Rimkienė, *Best VPNs for TikTok in 2023*, CYBERNEWS (July 25, 2023), https://cybernews.com/best-vpn/vpn-for-tiktok [https://perma.cc/827U-Q7FH] ("TikTok is one of the most popular social media platforms in the world . . . . However, this platform is banned in several countries, including India, China, and others. A reliable VPN . . . is the only way to access TikTok in those countries.").

17. Davis, *supra* note 6; Jayaram & Donley, *supra* note 6, at 1.

18. Bobby Allyn, *U.S. Judge Halts Trump's TikTok Ban, The 2nd Court To Fully Block The Action*, NPR (Dec. 7, 2020, 8:36 PM), https://www.npr.org/2020/12/07/944039053/u-s-judge-halts-trumps-tiktok-ban-the-2nd-court-to-fully-block-the-action [https://perma.cc/6G5M-MAFJ]; *see also Another judge blocks Trump's TikTok ban; app still in limbo*, AP NEWS (Dec. 8, 2020,

thereafter, and in 2021, he issued a new executive order revoking President Trump's ban.[19]

Congress has also considered banning TikTok several times, but thus far has not passed any bill to that effect.[20] For now, Congress has taken other actions to signal to the American people that it is taking the threats related to TikTok seriously. On March 23, 2023, the House Energy and Commerce Committee questioned TikTok's CEO, Shou Zi Chew, over TikTok's possible ties to the CCP and other risks that the app might pose to Americans.[21] Seeking to reassure lawmakers, Mr. Chew explained in his written testimony that "TikTok's parent company, ByteDance, was founded by Chinese entrepreneurs, but has evolved into a global enterprise" and that "ByteDance is not an agent of China or any other country."[22] He repeated this theme throughout his live testimony, asserting that TikTok is "free from any manipulation from any government."[23] At times, the hearing was more of a monologue by Members of Congress against the CCP than a substantive question-and-answer session between Members and Mr. Chew.[24]

3:32 PM), https://apnews.com/article/donald-trump-courts-a526c144fad9f0ebc37bf2d49a97740a [https://perma.cc/7BAH-ZY9W] ("[Judge] Nichols is the second federal judge to fully block the Trump administration's economic sanctions against the app [TikTok.]").

19. Exec. Order No. 14034, 86 Fed. Reg. 31,423 (June 9, 2021). TikTok initially sued President Biden over his predecessor's executive order, but withdrew the lawsuit after President Biden issued his own executive order. TikTok Inc. v. Biden, No. 20-5381, 2021 WL 3082803, at *1 (D.C. Cir. July 14, 2021).

20. Andrew Rice, *How TikTok Beat the Ban (for Now)*, N.Y. MAG. (May 31, 2023), https://nymag.com/intelligencer/article/tiktok-ban-us-congress.html [https://perma.cc/UZF3-K5CB]; Jayaram & Donley, *supra* note 6, at 3. Being "tough on China" is one of the few bastions of bipartisanship remaining in Washington, so Congress may well renew efforts to pass a TikTok ban. *See, e.g.*, Joan E. Greve & Lauren Gambino, *Capitol Hill finds rare bipartisan cause in China - but it could pose problems*, GUARDIAN (Feb. 26, 2023, 1:00 PM), https://www.theguardian.com/us-news/2023/feb/26/chinese-balloon-bipartisan-capitol-hill-risk [https://perma.cc/7PYM-69BJ] ("[M]easures to confront Beijing . . . routinely attract bipartisan support[.]").

21. Dara Kerr, *Lawmakers grilled TikTok CEO Chew for 5 hours in a high-stakes hearing about the app*, NPR (Mar. 23, 2023, 5:34 PM), https://www.npr.org/2023/03/23/1165579717/tiktok-congress-hearing-shou-zi-chew-project-texas [https://perma.cc/79HS-QFHF]; *cf.* Kari Paul & Johana Bhuiyan, *TikTok CEO grilled for over five hours on China, drugs and teen mental health*, GUARDIAN (Mar. 23, 2023, 7:58 PM), https://www.theguardian.com/technology/2023/mar/23/tiktok-shou-zi-chew-congress, [https://perma.cc/TQD2-JTJT] ("The hearing marked the first ever appearance before US lawmakers by a TikTok chief executive[.]").

22. Shou Chew, *Testimony Before the U.S. House Committee on Energy and Commerce: Written Statement of Testimony*, U.S. CONG. (Mar. 23, 2023), https://docs.house.gov/meetings/IF/IF00/20230323/115519/HHRG-118-IF00-Wstate-ChewS-20230323.pdf [https://perma.cc/3KZ9-93FX].

23. Kerr, *supra* note 21; Paul & Bhuiyan, *supra* note 21.

24. *E.g.*, *TikTok CEO Testifies at House Energy and Commerce Committee Hearing*, C-SPAN, at 04:56:27 (Mar. 23, 2023), https://www.c-span.org/video/?526609-1/tiktok-ceo-testifies-house-energy-commerce-committee-hearing# [https://perma.cc/JSF9-92MW] (showing one Congressman proclaiming, "The long-term goal of the Chinese Communist Party is the demise of the

Amid the dearth of decisive action at the federal level, the state of Montana forged ahead on its own. On May 17, 2023, Montana passed SB 419, becoming the first state in the nation to ban TikTok for all users.[25] The ban was scheduled to take effect on January 1, 2024; from that date, Montana would levy a $10,000 fine, per discrete violation per day, on any entity that allows users to download or access the app.[26] This monetary fine effectively operates as a total ban on TikTok. As SB 419 explains, "'Entity' means a mobile application store or tiktok" and "'[d]iscrete violation' means each time that a user accesses tiktok, is offered the ability to access tiktok, or is offered the ability to download tiktok."[27] Hence, if a single user downloads TikTok outside of Montana, returns to the state, and accesses TikTok 20 times a day for 10 days, Montana could fine TikTok or the app store ($10,000 per day per discrete violation) x (20 discrete violations per day) x (10 days of violations) = $2 million for that one user's aggregate transgressions over 10 calendar days.[28] Even the wealthiest of tech companies can ill afford to operate under such onerous conditions, so SB 419 all but bars any and all use of TikTok within Montanan state lines.

TikTok has sued Montana, alleging that SB 419 violates various constitutional provisions, including the First Amendment, the Supremacy Clause (and thus federal preemption), the dormant Commerce Clause, and

American Power, and that starts with our youth."). To be clear, Mr. Chew is himself a Singaporean—not Chinese—national, and Singapore is a U.S. ally that carefully balances its economic relationship with China and its security relationship with America. Stu Woo, *Who Is Shou Zi Chew, the TikTok CEO Trying to Reassure America?*, WALL ST. J. (Mar. 24, 2023, 5:49 AM), https://www.wsj.com/articles/tiktok-ceo-shou-zi-chew-congress-8ed38010 [https://perma.cc/KPJ8-743R]; Mercedes Ruehl, *Singapore deepens US defence ties despite Chinese financial inflows*, FIN. TIMES (Apr. 30, 2023), https://www.ft.com/content/0c20823d-2d5f-435e-aec4-269dbe5dafb4 [https://perma.cc/YA3C-QE3M].

25. Davis, *supra* note 6; Jayaram & Donley, *supra* note 6, at 1.

26. SB 419, *supra* note 9, at 2, 3; *accord* Dani Anguiano, *Montana becomes first US state to ban TikTok*, GUARDIAN (May 17, 2023, 11:57 PM), https://www.theguardian.com/us-news/2023/may/17/tiktok-ban-montana [https://perma.cc/AJ8V-DJSS] ("Montana's new law, which will take effect 1 January, prohibits downloads of TikTok in the state and would fine any 'entity' – an app store or TikTok – $10,000 per day for each time someone 'is offered the ability' to access the social media platform or download the app.").

27. SB 419, *supra* note 9, at 2; *cf.* Anguiano, *supra* note 26 ("The penalties would not apply to [TikTok] users.").

28. TikTok users access the app an average of 19 times per day. Tanya Dua, *Never-before-seen TikTok stats from leaked sales presentations show how it's trying to lure advertisers to the platform*, INSIDER (Apr. 13, 2021, 12:36 PM), https://www.businessinsider.com/tiktok-pitch-deck-shows-new-e-commerce-ads-2021-4?r=US&IR=T [https://perma.cc/NZW2-KED8]. *See also* Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, PEW RSCH. CTR. (Aug. 10, 2022), https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022 [https://perma.cc/527J-TYKG] (showing that 16 percent of U.S. teens use TikTok "almost constantly").

Bills of Attainder.[29] Thus far, Montana is the only state to enact a total ban on TikTok, but other states have enacted separate laws regulating social media platforms. For example, on March 23, 2023, Utah passed a law requiring persons under age 18 to get parental permission to use TikTok, Instagram, Facebook, and similar platforms.[30]

B. Overview of Limits on States' Foreign Policy Powers

When Montana enacted SB 419 to protect its residents from the CCP, the state may have engaged in an act of foreign policy. The Analysis part of this article explores this contention in greater depth. Under the U.S. Constitution, individual states have a limited ability to conduct their own foreign policy. These limits are threefold—first, Article I, Section 10; second, preemption under the Supremacy Clause; and third, the DCC.[31] Despite these limits, states have engaged in certain activities that touch on foreign relations, including sending trade and diplomatic delegations abroad and imposing economic sanctions.[32] Some of these state actions may not have triggered legal challenges and therefore did not undergo judicial scrutiny; other actions may have passed constitutional muster.[33] SB 419 is a different matter, as

29. Complaint for Declaratory and Injunctive Relief at 5–6, TikTok Inc. v. Knudsen, No. 9:23-cv-00061-DLC (D. Mont. filed May 22, 2023). The U.S. District Court has granted a preliminary injunction, but Montana has appealed to the Ninth Circuit. Order Granting Plaintiff's Motion for Preliminary Injunction at 48, TikTok Inc. v. Knudsen, No. 9:23-cv-00061-DLC (D. Mont. Nov. 30, 2023); Shepardson, *supra* note 11.

30. Maanvi Singh, *Utah bans under-18s from using social media unless parents consent*, GUARDIAN (Mar. 24, 2023, 1:20 AM), https://www.theguardian.com/us-news/2023/mar/23/utah-social-media-access-law-minors [https://perma.cc/ZD8K-CRYU]. Utah also passed another law prohibiting social media companies from using techniques that could cause minors to become addicted. *Id.*

31. Stephen P. Mulligan, *Constitutional Limits on States' Power over Foreign Affairs*, CONG. RSCH. SERV. 1 (Aug. 15, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10808 [https://perma.cc/4FFY-KNEQ]; *but cf.* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 346 (1999) ("There is no generalized, non-Article VI [Supremacy Clause] preemption in foreign policy matters, and under the original understanding of the Constitution, state laws interfering with federal foreign policy should stand despite that interference, unless preempted in the ordinary constitutional manner.").

32. Mulligan, *supra* note 31, at 1; *e.g. Illinois governor embarks on mission trip to Japan and China*, AP NEWS (Sept. 9, 2017, 7:30 PM), https://apnews.com/fc916ba786cf4184949b9430d23d915b [https://perma.cc/KM9X-7QY4] ("Gov. Bruce Rauner has departed [for] an eight-day visit to Japan and China for his administration's first international trade mission . . . to work on attracting foreign job creators to the state and to help Illinois businesses enhance competitiveness.").

33. *E.g.*, Matt Bloom, *Polis issues state-level economic sanctions against Russian government, businesses,* COLO. PUB. RADIO (Feb. 25, 2022, 11:33 AM), https://www.cpr.org/2022/02/25/polis-sanctions-russian-government-businesses [https://perma.cc/EX8S-9KAE] (explaining Colorado's severing of economic ties with Russia

TikTok is directly challenging its constitutionality. As a general rule, the Constitution does not bar all state-level foreign policy, but any such foreign policy must pass through three separate filters. Invoking its power of judicial review, the Supreme Court may strike down any federal or state law that violates the Constitution.[34]

C. Article I, Section 10

The three clauses of Article I, Section 10 of the Constitution detail several foreign policy powers denied to the States. First, Clause 1 provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation."[35] Next, Clause 2 provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws[.]"[36] Finally, Clause 3 provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[37] Together, these three clauses serve as an express, textual limit on the ability of states to engage in independent foreign policy. However, none of the three clauses of Article I, Section 10 appear to be directly applicable to SB 419. For example, SB 419 does not involve Montana entering into a treaty or compact with a foreign nation, levying an impost or duty, or engaging in war.[38] Hence, this article does not delve further into Article I, Section 10 as a basis for limiting SB 419.

following the latter's invasion of Ukraine). Neither President Putin nor the Russian Federation filed suit against Colorado, so the constitutionality of Colorado's sanctions remains untested. *Id.*

34. *See The Court and Constitutional Interpretation*, U.S. SUP. CT., https://www.supremecourt.gov/about/constitutional.aspx [https://perma.cc/EG9K-KKJW] (last visited Sept. 12, 2023) (explaining judicial review); *see also* Marbury v. Madison, 5 U.S. 137, 177–78 (1803) (confirming the Supreme Court's power to conduct judicial review and declaring "[i]t is emphatically the province and duty of the judicial department to say what the law is"); *see also* Martin v. Hunter's Lessee, 14 U.S. 304, 342–43 (1816) (extending the Supreme Court's judicial review power to cover state laws).

35. U.S. CONST. art. I, § 10, cl. 1.

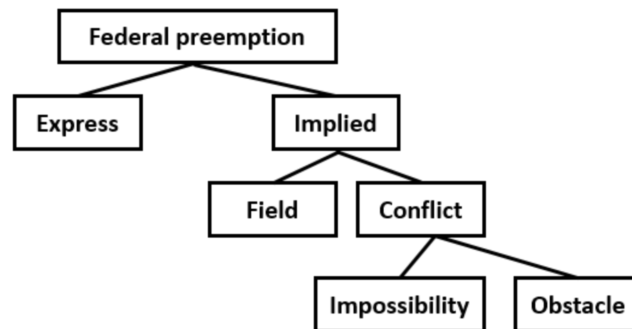
36. U.S. CONST. art. I, § 10, cl. 2.

37. U.S. CONST. art. I, § 10, cl. 3; *but cf.* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2267 (1998) ("The most natural inference from these provisions and the enumerated powers structure of the Constitution is that all foreign relations power not denied to the states by Article I, Section 10 falls within the concurrent authority of the state and federal governments.").

38. The U.S. District Court's opinion granting TikTok a preliminary injunction of SB 419 also did not use Article I, Section 10 as a basis for barring SB 419. *See generally* Order Granting Plaintiff's Motion for Preliminary Injunction, TikTok Inc. v. Knudsen, No. 9:23-cv-00061-DLC (D. Mont. Nov. 30, 2023).

D. Preemption

The doctrine of federal preemption also restricts states' foreign policy powers. Under the Supremacy Clause in Article VI of the Constitution, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[39] Over the years, the Supreme Court has developed the doctrine of federal preemption to give effect to the Supremacy Clause.[40] The basic premise of preemption is that when federal law conflicts with state law, federal law supersedes (preempts) the state law per the Supremacy Clause.[41] Preemption itself can take many forms; the following diagram illustrates the various types of preemption that the Supreme Court has recognized.[42]



First, **express preemption** occurs when federal laws contain explicit language precluding states from enacting their own laws on point. Second, **implied preemption** occurs when federal laws implicitly preclude states from enacting their own laws on point. Implied preemption can take one of two forms—field or conflict. **Field preemption** occurs when federal laws so pervasively occupy a certain field of regulation that states are deemed unable to supplement federal laws with state laws. Separately, **conflict preemption**

39. U.S. CONST. art. VI, cl. 2.

40. Bryan L. Adkins et al., *Federal Preemption: A Legal Primer*, CONG. RSCH. SERV. 1 (May 18, 2023), https://crsreports.congress.gov/product/pdf/R/R45825 [https://perma.cc/734K-R4DP]; *see infra* Section II.0 (discussing a relevant sample of Supreme Court cases underlying the preemption doctrine).

41. Adkins et al., *supra* note 40, at 1. For purposes of preemption, a "federal law" could be a statute, an executive order, or an agency regulation. *See, e.g.*, Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 273 n.5 (1974) ("[W]e have no difficulty concluding that the Executive Order [in this case] is valid and may create rights protected against inconsistent state laws through the Supremacy Clause.").

42. Recreated from Adkins et al., *supra* note 40, at 3. *See also id.* at 2 (explaining each component of the diagram).

occurs when federal and state laws clash. This conflict can take one of two forms—impossibility or obstacle. **Impossibility preemption** occurs when state laws actually conflict with federal laws, making it impossible to comply with both sets of laws. By contrast, **obstacle preemption** occurs when state laws pose an obstacle to carrying out the federal government's policy goals. The Analysis part of this article evaluates each type of preemption in turn.

A single state law—especially a law with multiple parts—can run afoul of several types of preemption. For example, the Supreme Court might invalidate some parts of a state law based on field preemption and other parts based on obstacle preemption.[43]

E. The Dormant Commerce Clause

A third limit on states' foreign policy powers is the DCC. Article I, Section 8, Clause 3 of the Constitution—known as the Commerce Clause—vests Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[44] The Supreme Court has developed the DCC doctrine to safeguard congressional interests that the Commerce Clause impliedly guarantees, such as the need to enact a uniform set of regulations to govern cross-border commercial activity.[45] Under the DCC, even if Congress has not legislated on a matter—and thus its Commerce Clause powers remain "dormant"—individual states cannot enact their own laws that discriminate against out-of-state economic actors or impose an undue burden on interstate or international commerce.[46] For example, states may attempt to enact laws that shield domestic firms from competition; the DCC checks for such economic protectionism.

43. *E.g.*, Arizona v. United States, 567 U.S. 387, 403, 410 (2012) (invalidating different parts of Arizona's S.B. 1070 on the basis of field preemption and obstacle preemption).

44. U.S. CONST. art. I, § 8, cl. 3.

45. *ArtI.S8.C3.7.8 Facially Neutral Laws and Dormant Commerce Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-7-8/ALDE_00013314 [https://perma.cc/J7KT-6CXG] (last visited Sept. 12, 2023) [hereinafter *Facially Neutral Laws and DCC*]; *but cf.* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1177 n.156 (1986) ("[E]ven though there is no national interest in uniformity as such when we are talking about state regulation or taxation of interstate commerce, there could still be such an interest where state regulation or taxation of *foreign commerce* is involved.") (emphasis added).

46. *See, e.g.*, Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434, 453–54 (1979) ("Because California's ad valorem tax . . . results in multiple taxation of the instrumentalities of foreign commerce, and because it prevents the Federal Government from 'speaking with one voice' in international trade, the tax is inconsistent with Congress' power to 'regulate Commerce with foreign Nations.' We hold the tax, as applied, unconstitutional under the Commerce Clause."); *cf.* Pittsburgh & S. Coal Co. v. Bates, 156 U.S. 577, 587 (1895) ("The power to regulate commerce among the several states was granted to congress in terms as absolute as is the power to regulate commerce with foreign nations. . . . in the absence of congressional action, the states may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce[.]").

A patchwork of Supreme Court cases provides a roadmap for analyzing DCC issues.[47] First, state laws that plainly discriminate against out-of-state goods or economic actors "are considered per se invalid and are generally struck down absent a showing that they are narrowly tailored to advance a legitimate local purpose."[48] This heightened scrutiny applies to facially discriminatory laws, as well as to facially neutral laws that nevertheless have a discriminatory purpose or effect.[49] However, if a state law regulates in- and out-of-state commerce evenhandedly and its effects on interstate commerce are only incidental, the Court will apply a balancing test and uphold the law unless its burdens on interstate commerce clearly exceed its local benefits.[50]

In concluding this background, the takeaway is that the Constitution imposes three independent limits on a state's ability to conduct foreign policy. If Montana's TikTok ban is essentially an act of foreign policy, the ban must meet the requirements of Article I, Section 10, preemption, and the DCC to survive constitutional scrutiny. Because Article I, Section 10 does not seem to be at issue, the remainder of this article will only evaluate preemption and the DCC.

II. DISCUSSION

A. Preemption

Preemption "may be either expressed or implied," and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."[51] The Supreme Court has decided various cases that delineate the parameters of each type of preemption; the following preemption sub-sections explore a sample of these cases.

47. *See infra* Section II.0 (discussing a relevant sample of Supreme Court cases underlying the DCC doctrine); *see also* Regan, *supra* note 45, at 1091–92 (discussing facets of the Court's contemporary DCC jurisprudence).

48. *ArtI.S8.C3.7.4 Modern Dormant Commerce Clause Jurisprudence Generally*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S8-C3-7-4/ALDE_00013310 [https://perma.cc/65J6-6GRP] (last visited Sept. 12, 2023) [hereinafter *Modern DCC Jurisprudence Generally*]; *cf.* Regan, *supra* note 45, at 1270 ("Explicit export embargoes, we know, are virtually per se illegal[.]").

49. *Facially Neutral Laws and DCC*, *supra* note 45; *cf.* Regan, *supra* note 45, at 1216 (noting instances in which the Court found "[t]here was no question of mere protectionist effect from a facially neutral ('evenhanded') statute.").

50. *Facially Neutral Laws and DCC*, *supra* note 45; *but see* Regan, *supra* note 45, at 1106 (interpreting this balancing test as one of "'weak' protectionist effect balancing").

51. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); *accord* Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 4–5 (1995) ("Preemption of state law by federal law may be either explicitly stated in the language of the federal statute or viewed by the courts to be implicitly contained in the statute's structure or purpose[.]").

Sometimes the Supreme Court employs a "presumption against preemption," but the Court invokes this presumption inconsistently.[52] The Court mentioned this presumption in *Rice v. Santa Fe Elevator Corp.*, saying that if Congress legislates "in [a] field which the States have traditionally occupied. . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[53] Conversely, the Court held in *United States v. Locke* that this presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence."[54]

When analyzing preemption, the Court should take into account the totality of the circumstances. In *Malone v. White Motor Corp.*, for example, the Court noted that if Congress does not clearly express its intention to preempt state laws, "courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from *the totality of the circumstances* that Congress sought to occupy the field to the exclusion of the States."[55]

1. Express Preemption

A cornerstone of express preemption is that the federal law uses language indicating that states should not supplement with their own laws. For example, if a federal law bars states from imposing requirements "different from, or in addition to" federal labeling requirements on certain medical devices, the federal law thereby expressly preempts state labeling requirements for the same class of medical devices.[56] However, even a federal law that expressly preempts state law can have a savings clause that allows the state law to survive under certain conditions.[57]

52. Adkins et al., *supra* note 40, at 4; *cf.* Stabile, *supra* note 51, at 72–73 (expressing doubts about the applicability and value of the presumption against preemption).

53. 331 U.S. 218, 230 (1947); *see also* Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 718 (1985) (invoking the "presumption that state and local regulation related to matters of health and safety can normally coexist with federal regulations").

54. 529 U.S. 89, 108 (2000). For example, if a state regulates in an area such as "national and international maritime commerce . . . there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Id.*

55. 435 U.S. 497, 504 (1978) (emphasis added).

56. Riegel v. Medtronic, Inc., 552 U.S. 312, 316 (2008). Relatedly, if a federal law stipulates that it governs all regulations "with respect to the advertising or promotion of any cigarettes," the federal law expressly preempts states from imposing their own regulations that govern both the location and content of cigarette advertisements. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 526–27 (2001).

57. *See, e.g.*, Chamber of Com. v. Whiting, 563 U.S. 582, 587 (2011) (involving a federal immigration law that expressly preempted states from imposing civil or criminal sanctions "other

Congress and the President share foreign policy powers under the U.S. Constitution, so arguably either of them could ban TikTok as a foreign policy matter and thereby expressly preempt the states from enacting their own bans. Congress has the power, inter alia, to declare war, regulate commerce with foreign nations, and—in the case of the Senate—provide advice and consent for ratifying treaties and appointing ambassadors.[58] On the flip side, the President is commander-in-chief of the armed forces and has the power to ratify treaties and appoint ambassadors subject to the Senate's advice and consent.[59] If the President's authority to act in domestic or foreign affairs is in dispute, the Supreme Court will typically evaluate the matter using the *Youngstown* framework, which comes from the concurring opinions of Justices Black, Frankfurter, and Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[60]

First, per Justice Black, "[t]he President's power, if any, . . . must stem either from an act of Congress or from the Constitution itself."[61] This is an expression of first principles—the President cannot act unless he has constitutional authority from Congress or from the Constitution. Second, per Justice Frankfurter, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power[.]'"[62] This is an expression of deference to the historical course of dealings between the legislative and executive branches—if Congress has repeatedly allowed the President to take certain actions in the past, the President is more likely to have authority to take comparable actions in the future. Third, per Justice Jackson, the Court may categorize and scrutinize the President's actions using a three-tier schema.[63]

than through licensing and similar laws" on employers who hire undocumented aliens). Arizona passed its own statute to revoke or suspend the licenses of state employers who knowingly or intentionally employ undocumented aliens. *Id.* The Supreme Court upheld the Arizona law because the state law's sanctions (revoking and suspending employers' licenses) fell within the ambit of the federal law's savings clause. *Id.* at 611.

58. U.S. CONST. art. I, § 8, cls. 3, 11; *id.* art. II, § 2, cl. 2.

59. *Id.* art. II, § 2, cls. 1–2.

60. *ArtII.S1.C1.5 The President's Powers and Youngstown Framework*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artII-S1-C1-5/ALDE_00013794 [https://perma.cc/AV47-7ZU5] (last visited Sept. 12, 2023); *see generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *contra* Patricia L. Bellia, *Executive Power in Youngstown's Shadows*, 19 CONST. COMMENT. 87, 91 (2002) ("It is a mistake to assume that *Youngstown* carries a doctrinal weight equal to its rhetorical or symbolic power. . . . Jackson's tripartite framework for evaluating executive action is not a framework at all, nor did he necessarily intend it to be.").

61. *Youngstown*, 343 U.S. at 585 (Black, J., concurring).

62. *Id.* at 610–11 (Frankfurter, J., concurring).

63. *Id.* at 635–38 (1952) (Jackson, J., concurring). In the first tier, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Id.* at 635

2. Implied Preemption

Implied preemption may take the form of either field preemption or conflict preemption.

First, under field preemption, the Supreme Court has held that federal law pervasively occupies several fields of regulation, including alien registration.[64] In *Zschernig v. Miller*, the Supreme Court established a possible dormant foreign affairs doctrine; this was the only time the Court invoked such a doctrine, and the Court did not clarify whether the doctrine is a subset of field preemption or a standalone doctrine.[65]

In *Zschernig*, an Oregon law blocked aliens from inheriting personal property in the state unless the country they lived in provided reciprocal rights to U.S. citizens.[66] The law did not appear to conflict with federal law, so express preemption and implied conflict preemption did not apply.[67] However, the Court struck down the Oregon law because "foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the [state law's] real desiderata . . . [these] are matters for the Federal Government, not for local probate courts."[68] Noting its discomfort with states passing laws based on anti-communist sentiment, the Court said that Oregon's law marked

(Jackson, J., concurring). In the second tier, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637 (Jackson, J., concurring). In the third tier, "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* (Jackson, J., concurring). However, even in this third tier, the President still possesses residual executive powers and may take certain independent actions that Congress cannot disable. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1, 2 (2015) (holding that the President may independently recognize foreign states via the Reception Clause).

64. *E.g.*, Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (striking down Pennsylvania's Alien Registration Act based on field preemption because Congress "has provided a standard for alien registration in a single integrated and all-embracing system in order to obtain the information deemed to be desirable in connection with aliens"); *accord* Truax v. Raich, 239 U.S. 33, 42 ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government.").

65. Mulligan, *supra* note 31, at 4 (citing Zschernig v. Miller, 389 U.S. 429, 441 (1968)). Despite this ambiguity, the Supreme Court has never overruled *Zschernig*, and lower federal courts continue to apply the case. *Id. See, e.g.*, Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 52 (1999) (citing *Zschernig* "for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed").

66. *Zschernig*, 389 U.S. at 430–31; Mulligan, *supra* note 31, at 4.

67. *Zschernig*, 389 U.S. at 443 (Stewart, J., concurring); Mulligan, *supra* note 31, at 4.

68. *Zschernig*, 389 U.S. at 437–38; *cf.* Ramsey, *supra* note 31, at 356 ("The [Oregon] inheritance statute was, at the least, a negative comment upon the communist system of property rights, and in the view of some a wartime measure to prevent resources from accruing to the enemy.").

an "unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[69]

Separately, under conflict preemption, Supreme Court cases have illustrated two distinct types of conflict preemption—impossibility preemption and obstacle preemption.

Impossibility preemption occurs when state law and federal law actually conflict, making it impossible to comply with both state and federal law. For example, in *PLIVA, Inc. v. Mensing*, FDA regulations required generic drug manufacturers "to use the same safety and efficacy labeling as their brand-name counterparts."[70] By contrast, several state tort laws "required the Manufacturers to use a different, safer label."[71] So, the federal and state laws actually conflicted.

Conversely, obstacle preemption occurs when it is possible to comply with both state and federal law, but the state law would pose an obstacle to a federal policy objective. A key case here is *Arizona v. United States*, in which the Supreme Court invalidated different sections of Arizona's S.B. 1070—which targeted undocumented aliens—based on field preemption and obstacle preemption.[72] Justice Scalia penned a noteworthy dissent in this case, arguing that "[a]s a sovereign, Arizona has the inherent power to exclude persons from its territory, subject only to those limitations expressed in the Constitution or constitutionally imposed by Congress. That power to exclude has long been recognized as inherent in sovereignty."[73] However, Justice Scalia's thesis that states retain a residual power to police their own borders does not sit well with *United States v. Flores-Montano*, a unanimous decision that Scalia himself joined and Chief Justice Rehnquist—a fellow conservative jurist—delivered.[74] There, the Court held that the federal

69. *Zschernig*, 389 U.S. at 440. The Court further elaborated that "even in absence of a treaty, a State's policy may disturb foreign relations. . . . The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy." *Id.* at 441.

70. 564 U.S. 604, 610 (2011).

71. *Id.* at 612. The Supreme Court concluded "it was impossible [for the manufacturers] to simultaneously comply with both federal law and any state tort-law duty that required them to use a different label." *Id.* at 610. Invoking impossibility preemption, the Court said, "We find impossibility here . . . If the Manufacturers had independently changed their labels to satisfy their state-law duty, they would have violated federal law." *Id.* at 618.

72. 567 U.S. 387, 403, 410 (2012). For example, § 6 of S.B. 1070 empowered Arizona police officers to make warrantless arrests if they have "probable cause to believe that an individual is 'removable' by reason of a public offense." *Id.* at 426. The Court struck down § 6 based on obstacle preemption, reasoning that "Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. . . . § 6 creates an obstacle to the full purposes and objectives of Congress." *Id.* at 410.

73. *Id.* at 417 (Scalia, J., dissenting).

74. 541 U.S. 149, 150 (2004); *cf. United States v. Flores-Montano*, OYEZ, https://www.oyez.org/cases/2003/02-1794 [https://perma.cc/6WZL-9SA5] (last visited Sept. 12,

government (not states) may "conduct suspicionless inspections at the border" without violating the Fourth Amendment's prohibition on unreasonable searches and seizures.[75] Invoking history and original intent, the Court explained that "Congress, since the beginning of our Government, 'has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country.'"[76]

Although the Supreme Court has found conflict preemption (impossibility or obstacle) in many cases, the Court has also found non-conflict in others.[77]

Crosby v. National Foreign Trade Council is a pivotal case in the area of conflict preemption in foreign affairs.[78] In *Crosby*, Massachusetts passed a law "restricting the authority of its agencies to purchase goods or services from companies doing business with Burma[.]"[79] Later, "Congress passed a statute imposing a set of mandatory and conditional sanctions on Burma."[80] The Supreme Court struck down the Massachusetts law on conflict

2023) (showing that *Flores-Montano* was a unanimous decision); *see also Biography: Chief Justice William Rehnquist*, PBS NEWSHOUR (Sept. 4, 2005, 12:55 PM), https://www.pbs.org/newshour/politics/law-july-dec05-rehnquist_09-04 [https://perma.cc/M7BY-78UK] (explaining that "Rehnquist was easily the most conservative member of the court").

75. *Flores-Montano*, 541 U.S. at 149–50. The Court said, "It is axiomatic that the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity." *Id.* at 153. Indeed, "[t]he [federal] Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." *Id.* at 152.

76. *Id.* at 153 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 537); *but see* Sean O'Grady, Note, *All Watched Over by Machines of Loving Grace: Border Searches of Electronic Devices in the Digital Age*, 87 FORDHAM L. REV. 2255, 2282 (2019) (proposing that "all digital [device] border searches should be categorized as nonroutine—and thus should require reasonable suspicion.").

77. *E.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 133–34, 142–43 (1963) (holding that a state law that sets standards for avocado maturity based on oil content does not conflict with federal regulations on avocado maturity that are based on criteria other than oil content; *see also* Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 222–23 (1983) (holding that federal regulations on nuclear safety did not conflict with state regulations that touched on safety but were primarily based on economic concerns). Even in drug labeling, a topic discussed earlier, the Court has found instances of non-conflict. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 558–59, 581 (2009) (holding that FDA-approved labels for certain drugs did not set an absolute standard, so states could supplement the federal standards by enacting their own failure-to-warm tort claims).

78. *See generally* 530 U.S. 363 (2000).

79. *Id.* at 366; *see also id.* n.1 (explaining why the Court chose to use the term "Burma" instead of "Myanmar").

80. *Id.* at 368. The federal law "impose[d] three sanctions directly on Burma," "authorize[d] the President to impose further sanctions subject to certain conditions," and directed the President to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." *Id.* at 368–69 (citing Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 570(c), 110 Stat. 3009 (1996)).

preemption grounds, holding the law "undermines the intended purpose and 'natural effect'" of various provisions of the federal statute, including "its delegation of effective discretion to the President to control economic sanctions against Burma . . . [and] its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma."[81] Beyond *Crosby*, the Court has decided few cases involving conflict preemption in foreign affairs.[82]

B. The Dormant Commerce Clause

To assess whether a state law has violated the DCC, the Supreme Court must first determine if the state law facially discriminates against out-of-state economic actors. A facially discriminatory law "overtly blocks the flow of interstate commerce at a State's borders" and is subject to heightened scrutiny—"a virtually *per se* rule of invalidity."[83] Even if a state law is facially neutral, it may nevertheless have a discriminatory purpose or effect, for "the evil of protectionism can reside in legislative means as well as legislative ends."[84] When a state law is facially discriminatory or facially neutral (but still has a discriminatory purpose or effect), "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means."[85] Additionally, the state law should be "narrowly tailored," manifesting a close fit between the means (regulatory measures) chosen and the ends (local interests) served.[86]

81. *Id.* at 373–74.

82. *Cf.* Ramsey, *supra* note 31, at 350 ("The Supreme Court has addressed state foreign affairs power relatively infrequently in a series of decisions dating to the late nineteenth century."). Another modern case involving conflict preemption in foreign affairs is *American Insurance Association v. Garamendi*. *See generally* 539 U.S. 396 (2003). There, California passed a law requiring in-state insurers to gather and analyze information about Holocaust survivors' unpaid, Nazi-era life insurance policies. *Id.* at 408–09. However, the U.S. and Germany had entered a separate agreement in which an international commission would hear Nazi-era insurance claims. *Id.* at 396–97. Finding conflict preemption, the Supreme Court struck down the California law because it "compromise[s] the very capacity of the President to speak for the Nation with one voice in dealing with other governments[.]" *Id.* at 424 (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)).

83. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also* Regan, *supra* note 45, at 1269 n.463 (analyzing reasons for why the Court qualified its language with the word "virtually").

84. *City of Philadelphia*, 437 U.S. at 626–27; *but cf.* Regan, *supra* note 45, at 1157 ("Whether courts engage in motive review or not, legislators will not often avow bad motives[.]").

85. Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)); *cf.* Regan, *supra* note 45, at 1227 (arguing that the nondiscriminatory alternatives analysis is rooted in a concern about discriminatory purpose, not effect).

86. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019); *see also* Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997) ("To be narrowly tailored, there

Recently, the Supreme Court struck down a facially discriminatory law in *Tennessee Wine & Spirits Retailers Association v. Thomas*.[87] There, Tennessee passed a law imposing long residency requirements on "individuals and businesses seeking to obtain or renew a license to operate a liquor store."[88] The law was facially discriminatory because it overtly hindered out-of-state residents from getting liquor licenses in Tennessee.[89] The Court held that the Tennessee law was unconstitutional under the DCC because it failed to overcome the heightened scrutiny standard—the law was not narrowly tailored to serve a legitimate interest, and less-discriminatory alternatives were readily available.[90]

Facially neutral laws also face heightened scrutiny if they have discriminatory purpose or effect. A classic example here is *Hunt v. Washington State Apple Advertising Committee*, which involved a North Carolina law that banned non-USDA labels on apples sold in the state.[91] The law was facially neutral in that it did not overtly block the flow of out-of-state apples, but the Court found that the law had a discriminatory effect (and perhaps also a discriminatory purpose) of hurting out-of-state apple producers, particularly those from Washington State who sold superior-grade apples that had special labels and commanded a market premium.[92] In applying the heightened scrutiny standard, the Court found that the North Carolina law fell short of that standard, and struck down the law for violating the DCC.[93]

By contrast, if a facially neutral law does not have a discriminatory purpose or effect, and its impact on interstate commerce is only incidental, the Court will apply the less-rigorous *Pike* balancing test in lieu of the heightened scrutiny standard.[94] The eponymous case here is *Pike v. Bruce Church,*

must be a sufficient nexus between the stated government interest and the classification created by the [local law].").

87. *Thomas*, 139 S. Ct. at 2456–57.

88. *Id.* at 2456; *cf.* Gregory S. Toma, Note, *License to Sell: The Constitutionality of Durational Residency Requirements for Retail Marijuana Licenses*, 47 FORDHAM URB. L.J. 1439, 1458 (2020) (discussing similar state residency requirements for retail marijuana licenses).

89. *Thomas*, 139 S. Ct. at 2462.

90. *Id.* at 2476. *But see* Maine v. Taylor, 477 U.S. 131 (1986) (illustrating a rare counterexample in which a facially discriminatory state law survived heightened scrutiny). *Taylor* involved a state law prohibiting the importation of live baitfish. *Id.* at 132. The Supreme Court upheld the law because it "serves legitimate local purposes [of protecting the state's environment] that could not adequately be served by available nondiscriminatory alternatives," so "[t]his is not a case of arbitrary discrimination against interstate commerce." *Id.* at 151.

91. 432 U.S. 333, 335 (1977).

92. *Id.* at 352–54; *see also* Regan, *supra* note 45, at 1221 ("The effect of the statute was to deny Washington State apple growers the use in North Carolina of their highly respected state grades[.]").

93. *Hunt*, 432 U.S. at 353–54; Regan, *supra* note 45, at 1221.

94. *Facially Neutral Laws and DCC*, *supra* note 45; *cf.* Regan, *supra* note 45, at 1155 n.107

Inc., which involved an Arizona law that required cantaloupes sold in Arizona to be packed in-state.[95] This law was facially neutral because it did not overtly bar the flow of out-of-state cantaloupe, and the facts did not support finding that the law had a discriminatory purpose or effect.[96] In such situations, the Court articulated a different standard that balances competing interests—"[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[97] Applying this balancing test to the facts in *Pike*, the Court held that Arizona's law imposed burdens on interstate commerce that clearly exceeded the putative local benefits, so the law was unconstitutional under the DCC.[98]

Finally, the Supreme Court has carved out two limited exceptions to the DCC; state laws that meet one of these exceptions are constitutional, even if they would otherwise violate the DCC.[99]

III. ANALYSIS

This part begins with the mandatory constitutional prong of the proposed analytical framework and evaluates each federalism limit in turn. This

("The famous *Pike* test itself requires that a state law have 'a legitimate local purpose,' with the strong implication that protectionism is not such a purpose.").

95. 397 U.S. 137, 138 (1970).

96. *Id.* at 143. Instead, the law's primary purpose was "to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging," and the law's effects on interstate commerce were only incidental. *Id.* at 143, 146.

97. *Id.* at 142. Furthermore, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id. But cf.* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 377–78 (2023) (holding that the "burden" analysis in *Pike* merely serves the "discrimination" analysis).

98. *Pike*, 397 U.S. at 146. However, many other cases have survived the *Pike* balancing test. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471–73 (1981) (holding that a state law "prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers" passed the *Pike* test and met DCC scrutiny).

99. One exception is the market participant exception—if a state acts as a "market participant" rather than as a "market regulator," it may discriminate among buyers and sellers because "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Reeves, Inc. v. Stake, 447 U.S. 429, 436–37 (1980). Another exception is if Congress expressly permits the discrimination, for "Congress may 'confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal. 451 U.S. 648, 652 (1981) (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 44 (1980)). Hence, "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to [dormant] Commerce Clause challenge." *Id.* at 652–53. An example here is the McCarran-Ferguson Act, in which "Congress removed all [dormant] Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance." *Id.* at 653.

part then transitions to the persuasive policy prong of the proposed analytical framework and brings in concepts and data from economics.

A. Constitutional Prong: Preemption

1. Express Preemption

Either Congress or the President could ban TikTok and expressly preempt Montana's law. First, with respect to presidential actions, President Trump did in fact try to ban TikTok outright while he was in office, so express preemption may have applied at one point. On May 15, 2019, President Trump issued Executive Order No. 13873, which declared a national emergency based on the "unrestricted acquisition or use in the United States of information and communications technology or services . . . supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries."[100] Then, on August 6, 2020, President Trump issued Executive Order No. 13942, which invoked the earlier Executive Order's national emergency declaration and directed the Secretary of Commerce to identify transactions with ByteDance or its subsidiaries that should be prohibited.[101] Pursuant to this authority, the Secretary published five prohibitions for the federal government to implement in phases.[102]

President Trump arguably had authority to ban TikTok under the *Youngstown* framework. First, per Justice Black's expression of first principles that the President's power must stem from an act of Congress or the Constitution, President Trump could have pointed to the International Emergency Economic Powers Act (IEEPA) of 1977. The IEEPA authorizes the President in peacetime "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."[103] The Constitution itself also vests the President with a wide range of foreign policy

100. Exec. Order No. 13873, 84 Fed. Reg. 22,689 (May 15, 2019); TikTok Inc. v. Trump, 490 F. Supp. 3d 73, 76 (D.D.C. 2020).

101. Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); *Trump*, 490 F. Supp. 3d. at 77.

102. *Trump*, 490 F. Supp. 3d. at 77. The first prohibition would "stop new U.S.-based users from downloading TikTok and block existing U.S. users from updating the app[.]" *Id.* at 79. The final prohibition would amount to a total ban, covering "[a]ny utilization . . . of the TikTok mobile application's constituent code, functions, or services in the functioning of software or services developed and/or accessible within the land and maritime borders of the United States and its territories[.]" *Id.* at 78 (quoting Identification of Prohibited Transactions To Implement Executive Order 13942 and Address the Threat Posed by TikTok and the National Emergency With Respect to the Information and Communications Technology and Services Supply Chain, 85 FR 60,061-01 (Sept. 24, 2020)).

103. *Id.* at 76 (quoting 50 U.S.C. § 1701(a)).

powers. Second, per Justice Frankfurter's idea of a gloss on longstanding executive practice, President Trump could have pointed to his May 15, 2019 executive order, which set the stage for banning Huawei, a Chinese telecommunications company.[104] This earlier executive order also invoked the President's emergency powers under the IEEPA, and Congress did not oppose it.[105] Third, per Justice Jackson's three-tier schema, President Trump could have argued that he was operating in the first tier—where he possessed maximum presidential power—because he had implied congressional authority to ban TikTok pursuant to the IEEPA.

As it turned out, TikTok sued the Trump Administration, alleging among other things that the President lacked the authority to ban the social media app under the IEEPA.[106] A few days after filing suit, TikTok moved for a preliminary injunction.[107] Judge Carl Nichols of the U.S. District Court for the District of Columbia reasoned that the "IEEPA contains a broad grant of authority to declare national emergencies and to prohibit certain transactions with foreign countries or foreign nationals that pose risks to the national security of the United States."[108] However, Judge Nichols said that the IEEPA contains limitations that applied in this case.[109] Judge Nichols thereby granted the preliminary injunction on September 27, 2020 and effectively blocked President Trump's TikTok ban.[110] In the language of Justice Jackson's three-tier *Youngstown* framework, Judge Nichols effectively held that President Trump was operating in the second tier—Congress had not granted express or implied authority to the President to ban TikTok, so the President

104. Exec. Order No. 13873, *supra* note 100; *see also* Eric Geller, *Trump signs order setting stage to ban Huawei from U.S.*, POLITICO (May 15, 2019, 7:05 PM), https://www.politico.com/story/2019/05/15/trump-ban-huawei-us-1042046 [https://perma.cc/87UG-MZMK] (explaining President Trump's Executive Order No. 13873, which paved the way to ban Huawei).

105. *Trump*, 490 F. Supp. 3d. at 76; Exec. Order No. 13873, *supra* note 100.

106. *Trump*, 490 F. Supp. 3d. at 79. Neither side formally applied the full *Youngstown* framework. *See generally id.* (showing that the *Youngstown* opinion did not appear anywhere in either party's arguments).

107. *Id.* at 79.

108. *Id.* at 80.

109. *Id.* The first limitation is that the President's authority "does not include the authority to regulate or prohibit, directly or indirectly" the importation or exportation of "information or informational materials." *Id.* (quoting 50 U.S.C. § 1702(b)(3)). The second limitation is that the President lacks authority to regulate "personal communication[s], which do[ ] not involve a transfer of anything of value." *Id.* (quoting 50 U.S.C. § 1702(b)(1)).

110. *Id.* at 85. Judge Nichols' ruling came on the heels of a similar ruling by U.S. District Court Judge Wendy Beetlestone in Pennsylvania; the Pennsylvania lawsuit stemmed from TikTok users, not TikTok Inc. Bobby Allyn, *Trump's Ban On TikTok Suffers Another Legal Setback*, NPR (Oct. 30, 2020, 8:21 PM), https://www.npr.org/2020/10/30/929656794/trumps-ban-on-tiktok-suffers-another-legal-setback [https://perma.cc/QU7N-75KA]. TikTok later renewed its motion for an injunction, and Judge Nichols granted it on December 7, 2020. TikTok Inc. v. Trump, 507 F. Supp. 3d 92, 115 (D.D.C. 2020).

could only act pursuant to his own independent constitutional powers, which likely did not suffice here.

President Trump soon had other things on his mind—namely, claiming that his November 2020 loss to President-elect Biden was the product of widespread election fraud.[111] Despite these claims and the January 6 attack on the Capitol, President Biden took the oath of office on January 20, 2021.[112] President Biden issued a new executive order on June 9, 2021 revoking President Trump's Executive Order No. 13942 (the August 6, 2020 TikTok ban).[113] To date, President Biden "has not expressly banned TikTok, nor has he expressly said states can't ban TikTok," and his administration has "declined to offer any substantive comment about TikTok."[114] Therefore, when Montana banned TikTok in May 2023, Montana did not face express preemption stemming from the President.

Alternatively, if the President does not ban TikTok and expressly preempt state laws from doing so, Congress may be able to do so. Thus far, Congress has banned TikTok on federal government devices, engaged in negotiations with TikTok's corporate management, and questioned TikTok's CEO in a committee hearing.[115] Congress has also mulled over various bills—such as the No TikTok on American Devices Act—that would ban TikTok for private citizens.[116] Yet, Congress has not passed any of these bills

111. *See, e.g.*, Lauren Aratani, *Donald Trump releases video statement repeating baseless vote fraud claims*, GUARDIAN (Dec. 3, 2020, 1:00 PM), https://www.theguardian.com/us-news/2020/dec/02/donald-trump-video-statement-baseless-vote-fraud-claims [https://perma.cc/6EUR-8LL2] (describing a video statement that President Trump released on December 2, 2020 in which he repeatedly made claims of election fraud); *see also President Trump posts 46-minute speech on election despite no evidence of voter fraud*, ABC7 CHI. (Dec. 4, 2020), https://abc7chicago.com/trump-speech-today-2020-election-donald-46-minute-video/8448575 [https://perma.cc/L7H4-JZCQ] (discussing Trump's election fraud claims).

112. *U.S. Capitol riot*, HISTORY, https://www.history.com/this-day-in-history/january-6-capitol-riot [https://perma.cc/CE2H-N6HR] (last visited Sept. 12, 2023); *Joe Biden inauguration: 46th US president takes oath of office*, BBC (Jan. 20, 2021), https://www.bbc.co.uk/news/av/world-us-canada-55740014, [https://perma.cc/9VT5-AJ95].

113. Exec. Order No. 14034, *supra* note 19; *accord* Lauren Feiner, *Biden revokes and replaces Trump executive orders that banned TikTok*, CNBC (June 9, 2021, 7:12 PM), https://www.cnbc.com/2021/06/09/biden-revokes-and-replaces-trump-executive-orders-that-banned-tiktok.html [https://perma.cc/7WVY-H3HU] ("Biden revoked and replaced the three executive orders by then-President Donald Trump . . . . One of the orders also sought to ban TikTok, resulting in a prolonged court battle.").

114. Rice, *supra* note 20. President Biden and his team are likely balancing national security and partisan electoral interests. On the one hand, the president has "his national-security advisers, who are expressing concern about what China could do with a technology in the pockets of 150 million Americans"; on the other hand, "the president has his political advisers, who are . . . eager to use TikTok as a messaging vehicle[.]" *Id.*

115. *Id.*; *see also* Kerr, *supra* note 21 (discussing the congressional hearing with TikTok's CEO).

116. Jayaram & Donley, *supra* note 8, at 3; No TikTok on United States Devices Act, H.R. 503, 118th Cong. (2023).

and sent them to the President.[117] Currently, neither the President nor Congress has enacted a total ban on TikTok for private citizens. Therefore, express preemption does not constrain Montana from implementing its own TikTok ban.

2. Implied Preemption

If express preemption does not stop Montana's TikTok ban, implied preemption—field preemption and/or conflict preemption—might still apply.

First, with respect to field preemption, if *Zschernig v. Miller* established a standalone dormant foreign affairs doctrine, Montana's TikTok ban would fall in a straightforward manner. SB 419 is fundamentally an act of foreign policy. Like the Oregon law in *Zschernig*, Montana's TikTok ban is based on "criticism of nations established on a more authoritarian basis than our own."[118] Indeed, SB 419 could fan the flames of a new Red Scare-cum-Yellow Peril, which is a high-level foreign policy matter that states have no business conducting.[119] Montana would counter that it is merely legislating to protect domestic digital consumers, and this lies squarely within the state's traditional police powers. For example, in the past, states have banned online gambling.[120] Montana could also analogize SB 419 to Utah's social media law.

However, the two sets of laws are of a different nature. Utah's law does not implicate foreign policy because it targets not only TikTok, but also similar American social media platforms. Utah's law is more consistent with a state exercising its traditional police powers. As Utah's Governor Spencer

117. Rice, *supra* note 20; Jayaram & Donley, *supra* note 8, at 3.

118. Zschernig v. Miller, 389 U.S. 429, 440 (1968); *cf.* Ramsey, *supra* note 31, at 356 (explaining that the state law in *Zschernig* was "a negative comment upon the communist system of property rights").

119. *See* Ronald Martin, *Red Scare*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Red-Scare-politics [https://perma.cc/EA88-YA5G] (last visited Sept. 12, 2023) (explaining "red scare"); *see also Asian Immigration: The "Yellow Peril,"* BOWLING GREEN STATE UNIV., https://digitalgallery.bgsu.edu/student/exhibits/show/race-in-us/asian-americans/asian-immigration-and-the—yel [https://perma.cc/GWR5-RXAK] (last visited Sept. 12, 2023) (explaining "yellow peril"); *see also* Brian Fung, *Asian Americans are anxious about hate crimes. TikTok ban rhetoric isn't helping*, CNN (Mar. 27, 2023, 9:49 AM), https://edition.cnn.com/2023/03/26/tech/asian-americans-tiktok/index.html [https://perma.cc/7XNR-S4Q3] (warning that U.S. "policymakers' choice to use inflammatory rhetoric [to attack TikTok and its CEO] — in some cases, language tinged with 1950s-era, Red Scare-style McCarthyism — endangers countless innocent [East Asian] Americans by association").

120. Joel Thayer, *The legal case for Montana's TikTok ban*, THE HILL (June 4, 2023, 2:00 PM), https://thehill.com/opinion/technology/4032379-the-legal-case-for-montanas-tiktok-ban [https://perma.cc/UD3C-LQY9]; *but cf.* Bruce P. Keller, *The Game's the Same: Why Gambling in Cyberspace Violates Federal Law*, 108 YALE L.J. 1569, 1607 (1999) (discussing the federal government's authority to regulate online gambling as well).

Cox announced on Twitter, "We're no longer willing to let social media companies continue to harm the mental health of our youth. Today we signed two key bills in our fight against social media companies into law[.]"[121] First, "SB152 requires social media companies to verify that users in the state are 18 or older to open an account. Minors will need parental consent to create an account."[122] Second, "HB311 prohibits social media companies from using a design or feature that causes addiction for a minor to the company's social media platform. This bill also makes it easier for people to sue social media companies for damages."[123] Neither these bills nor Governor Cox's tweet contains any language remotely related to the CCP, the PRC, or foreign policy.

By contrast, Montana's TikTok ban is teeming with foreign policy overtones. Montana's governor and legislature have been very vocal on this matter, making it easy to deduce their policy agenda. On the day he signed SB 419, Governor Gianforte tweeted, "To protect Montanans' personal and private data from the Chinese Communist Party, I have banned TikTok in Montana."[124] That was the full tweet, the full message that Governor Gianforte wished to convey to Montanan voters and the world. Unlike Governor Cox's tweet, Governor Gianforte's tweet made no mention of protecting minors from the risks of social media; the tweet was all about countering the CCP. Governor Gianforte struck a similar tone in his office's official announcement on SB 419—"To protect Montanans' personal, private, and sensitive data and information from intelligence gathering by the Chinese Communist Party, Governor Greg Gianforte today banned TikTok from operating in Montana."[125] The announcement continued, "Today, Montana takes the most decisive action of any state to protect Montanans' private data and sensitive

121. Utah Gov. Spencer J. Cox (@GovCox), X (Mar. 23, 2023, 9:27 PM), https://twitter.com/GovCox/status/1639015949964840960 [https://perma.cc/DXM3-QU9N] [hereinafter Cox Twitter post]; *see also* Hannah Murdock & Sarah Gambles, *Montana signs into law first complete TikTok ban. Will other states follow?*, DESERET NEWS (May 18, 2023, 8:19 AM), https://www.deseret.com/2023/5/18/23728249/montana-tiktok-ban [https://perma.cc/7XMK-62GS] (reporting that Cox also applauded Montana's TikTok ban).

122. Cox Twitter Post, *supra* note 121; *see generally* Social Media Regulation Amendments, S.B. 152, 2023 Gen. Sess. (Utah 2023)).

123. Cox Twitter Post, *supra* note 121; *see generally* Social Media Usage Amendments, H.B. 311, 2023 Gen. Sess. (Utah 2023)).

124. Governor Greg Gianforte (@GovGianforte), X (May 17, 2023, 4:30 PM), https://twitter.com/GovGianforte/status/1658948119285964802 [https://perma.cc/Y7SG-E98N] [hereinafter Gianforte Twitter Post]. Utah's Governor Cox applauded Gianforte, but has yet to follow in Gianforte's footsteps and enact a ban on TikTok specifically. Murdock & Gambles, *supra* note 121.

125. *Governor Gianforte Bans TikTok in Montana,* STATE OF MONT. NEWSROOM (May 17, 2023), https://news.mt.gov/Governors-Office/Governor_Gianforte_Bans_TikTok_in_Montana [https://perma.cc/RWP3-KXUP] [hereinafter MONT. NEWSROOM].

personal information from being harvested by the Chinese Communist Party."[126]

The plain text of SB 419 evinces a similar intention to engage in foreign policy. The very first sentence in SB 419 declares, "WHEREAS, the People's Republic of China is an adversary of the United States and Montana and has an interest in gathering information about Montanans, Montana companies, and the intellectual property of users to engage in corporate and international espionage[.]"[127] SB 419 then repeats these foreign policy themes multiple times, and only further down mentions topics that implicate traditional state police powers—"WHEREAS, TikTok fails to remove, and may even promote, dangerous content that directs minors to engage in dangerous activities" and "WHEREAS, TikTok's allowance and promotion of dangerous challenges threatens the health and safety of Montanans."[128] The order of these "whereas" clauses in SB 419 speaks volumes about the statute's core objectives.

The sum total of this evidence evinces an intention, on the part of Montana's Governor and legislature, to conduct independent, state-level foreign policy. Therefore, the dormant foreign affairs doctrine under *Zschernig* bars the Montanan law. To make SB 419 more challenge-proof, Montana could have considered enacting a law similar to Utah's, which does not target only one app and does not primarily hinge on foreign policy rationales. That is not the path Montana took.

Alternatively, if *Zschernig* did not establish a standalone dormant foreign affairs doctrine and instead espoused a form of field preemption, Montana has a stronger argument that SB 419 should survive constitutional scrutiny. Montana could contend that cyber policy is rapidly-evolving and that the federal government has not crafted a comprehensive regulatory scheme to cover the field, unlike with the field of alien registration in *Hines v. Davidowitz*.[129] Neither Congress nor President Biden has taken a definitive stance on TikTok. Amid this federal regulatory vacuum, Montana may exercise its police powers to protect its citizens in cyberspace.

126. *Id.* In a letter to his Chief Information Officer about expanding the TikTok ban, Governor Gianforte further declares, "Together, we will defend the State of Montana and its people against threats to our security, privacy, and way of life." Memorandum from Greg Gianforte, Governor, Mont., to Kevin Gilbertson, Chief Info. Officer, Mont. 2 (May 17, 2023), https://governor.mt.gov/Governors-Memo-to-CIO-Agency-Directors-Prohibiting-the-Use-of-Apps-Tied-To-Foreign-Adversaries.pdf [https://perma.cc/7W7N-86SJ] [hereinafter Gianforte Memo]. Here, "threats" refer to those from "foreign adversaries," a theme repeated throughout the letter. *Id.*

127. SB 419, *supra* note 9, at 1; *accord* Jayaram & Donley, *supra* note 6, at 1 (discussing SB 419's labeling of the PRC as "an adversary").

128. SB 419, *supra* note 9, at 1–2.

129. *See generally* 312 U.S. 52 (1941); *cf.* Stabile, *supra* note 51, at 6 n.6 (discussing other field preemption cases).

Furthermore, Montana can cite *Lorillard Tobacco Co. v. Reilly* (an express preemption case) to argue that if state regulations implicate "powers that lie at the heart of the States' traditional police power—[such as] the power to regulate land usage and the power to protect the health and safety of minors—our precedents require that the Court construe the pre-emption provision 'narrow[ly].'"[130] Montana could say that this logic of construing express preemption narrowly should logically extend to implied preemption (including field preemption) as well. Construing preemption narrowly is consistent with the essence of federalism under the Tenth Amendment, that "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."[131]

As Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[132] Montana is now stepping up as one such courageous state, serving as a laboratory in the cutting-edge field of cyber policy to the benefit of Montanans and all Americans. State-level experiments in cyber policy are necessary because many sitting members of Congress barely understand TikTok or cyber issues more generally.[133] By contrast, Montana's governor is a former tech startup founder and may well possess a deeper mastery of cyber issues than many national-level lawmakers.[134]

The problem with this argument is that Montana is not merely "try[ing] novel social and economic experiments without risk to the rest of the

130. 533 U.S. 525, 591 (Stevens, J., concurring) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)); *but cf.* Stabile, *supra* note 51, at 73 ("Once Congress has spoken, the Supremacy Clause does not require a narrow or broad construction, but rather, an interpretation in accordance with the express terms of the preemption provision.").

131. U.S. CONST. amend. X.

132. New State Ice Co. v. Liebmann, 285 U.S. 262, 386–87 (1932) (Brandeis, J., dissenting); *cf.* Stabile, *supra* note 51, at 10 ("[P]reempting state law without adequate federal justification limits the ability of states to act as innovators of change.").

133. *See, e.g.*, Ramishah Maruf, *TikTok users are making fun of Congress members for their questions to app CEO Shou Chew*, CNN (Mar. 25, 2023, 10:16 AM), https://edition.cnn.com/2023/03/25/tech/tiktok-user-reaction-hearing/index.html [https://perma.cc/KZD2-TSKH] (expressing surprise that one Member of Congress asked Tik Tok's CEO, "So if I have a TikTok app on my phone and my phone is on my home WiFi network, does TikTok access that network?").

134. *See Meet Governor Greg Gianforte*, OFF. OF GOVERNOR, MONT., https://governor.mt.gov/About [https://perma.cc/6G35-KAXT] (last visited Sept. 12, 2023) (describing Governor Gianforte as an "entrepreneur and job creator" who "founded RightNow Technologies in 1997"); *see also* Alexander Burns, *Who Is Greg Gianforte?*, N.Y. TIMES (May 25, 2017), https://www.nytimes.com/2017/05/25/us/greg-gianforte-facts.html [https://perma.cc/MGY6-H5F5] ("[Gianforte] founded a software company, RightNow Technologies, that he later sold to Oracle for about $1.5 billion.").

country."[135] As analyzed earlier, SB 419 is quintessentially an act of foreign policy that jeopardizes the nation's ability to speak with one voice to the outside world. Thus, SB 419 is not without risk to the rest of the country. Notwithstanding this risk, Montana could still put forth a persuasive argument that the federal government does not occupy the field of cybersecurity, or at least aspects of the field related to TikTok. If a court ruling on this matter is inclined to construe implied preemption narrowly, field preemption likely would not bar SB 419.

Even if field preemption does not apply, conflict preemption (impossibility or obstacle) might still apply. With respect to impossibility preemption, at present it is possible to comply with both federal law and state law on TikTok. The federal government lacks its own law on TikTok, so this situation is unlike that in *PLIVA, Inc. v. Mensing*.[136] Therefore, impossibility preemption does not bar SB 419. However, obstacle preemption might bar SB 419 because Montana's law arguably frustrates federal objectives, like in *Arizona v. United States*[137] and *Crosby v. National Foreign Trade Council*.[138] The federal objective with respect to TikTok is unclear; neither Congress nor President Biden has not taken a final stance on the app. However, federal objectives with respect to the broader foreign and cyber policy goals that the TikTok ban implicates are more definitive. Per *Malone v. White Motor Corp.*, a court evaluating preemption should account for the totality of the circumstances.[139] Under the totality of the circumstances, SB 419 frustrates the federal government's objectives in managing America's long term strategic competition with China and dealing with cyber threats from foreign state actors.

First, with respect to federal objectives on China, Montana unequivocally labels China an "adversary," whereas the Biden Administration

135. *Liebmann*, 285 U.S. at 387 (Brandeis, J., dissenting); *cf.* Stabile, *supra* note 51, at 10 ("'Experiments' conducted at the state level may lead to solutions to social problems that may later be adopted at a national level.").

136. *See generally* 564 U.S. 604 (2011). In this case, existing FDA regulations required generic drug manufacturers "to use the same safety and efficacy labeling as their brand-name counterparts." *Id.* at 610.

137. *See generally* 567 U.S. 387 (2012). There, the Court struck down § 6 of Arizona's S.B. 1070 because "§ 6 creates an obstacle to the full purposes and objectives of Congress" with respect to warrantless arrests of aliens. *Id.* at 410.

138. *See generally* 530 U.S. 363 (2000). In this case, the Court held that a Massachusetts law sanctioning Burma frustrated Congress's and the President's foreign policy objectives with respect to Burma. *Id.* at 373–74.

139. 435 U.S. 497, 504 (1978). In *Malone*, the Court said that if Congress does not clearly express its intention to preempt state laws, "courts normally sustain local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from *the totality of the circumstances* that Congress sought to occupy the field to the exclusion of the States." *Id.* at 504 (emphasis added).

employs more measured language. SB 419 declares that TikTok will be banned as long as TikTok is owned by "a foreign adversary."[140] The term "adversary" is linked to a federal regulation, 15 CFR § 7.4, which in turn stems from President Trump's Executive Order No. 13873 (issued on May 15, 2019); this is an executive order that President Biden has not revoked.[141] 15 CFR § 7.4 authorizes the Secretary of Commerce to designate foreign nations as "adversaries." Thus, Montana is proclaiming that China is an "adversary" based on an esoteric regulation under the Commerce Department—not State or Defense Department—authorized by the previous presidential administration.

The current presidential administration, however, prefers to proceed more cautiously with respect to its official language on China. For example, the White House's October 2022 National Security Strategy does not directly call China an "adversary"; instead, the Strategy refers to China as a "competitor" and "pacing challenge."[142] Words matter in international affairs, and the federal government treads a fine line between maintaining economic ties with China and deterring armed hostilities.[143] At the May 2023 G-7 Summit in Hiroshima, President Biden and his counterparts adopted another ambiguous term—"de-risking"—with respect to their approach to China.[144] The

140. SB 419, *supra* note 9, at 3; Jayaram & Donley, *supra* note 6, at 1.

141. 15 C.F.R. § 7.4 (2023); Exec. Order No. 13873, *supra* note 100; *see also* Exec. Order No. 14034, *supra* note 19 (revoking Exec. Order. No. 13942, but not 13873).

142. WHITE HOUSE, NATIONAL SECURITY STRATEGY 22–23 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf [https://perma.cc/M4S6-R2E9] [hereinafter NATIONAL SECURITY STRATEGY]; Julian Borger, *Competitor or adversary? West struggles to define relationship with Beijing*, GUARDIAN (Feb. 16, 2023, 4:00 AM), https://www.theguardian.com/world/2023/feb/16/competitor-or-adversary-the-west-struggles-to-define-its-relationship-with-beijing [https://perma.cc/9NK2-Z8WK].

143. *Cf.* Paul Gewirtz, *Words and policies: "De-risking" and China policy*, BROOKINGS INST. (May 30, 2023), https://www.brookings.edu/articles/words-and-policies-de-risking-and-china-policy [https://perma.cc/F5EF-76D7] ("Governments use ambiguous words all the time for multiple reasons — to build consensus, to create wide leeway in interpretation and thus a wide range to make policy, sometimes even to deceive the public and other countries."); *cf.* Raymond Kuo, *'Strategic Ambiguity' Has the U.S. and Taiwan Trapped*, FOREIGN POL'Y (Jan. 18, 2023, 2:40 PM), https://foreignpolicy.com/2023/01/18/taiwan-us-china-strategic-ambiguity-military-strategy-asymmetric-defense-invasion [https://perma.cc/8K5D-87WQ] (explaining that even with respect to Taiwan, a major geopolitical fault line, the U.S.'s official policy is one of "strategic ambiguity," neither officially recognizing Taiwan as an independent state nor committing to Taiwan's defense in the event the PRC invades).

144. Gewirtz, *supra* note 143; *accord* Agathe Demarais, *What Does 'De-Risking' Actually Mean?*, FOREIGN POL'Y (Aug. 23, 2023, 10:18 AM), https://foreignpolicy.com/2023/08/23/derisking-us-china-biden-decoupling-technology-supply-chains-semiconductors-chips-ira-trade [https://perma.cc/T5QB-GWWL] ("De-risking [between the U.S. and Chinese economies] is the new buzzword in Washington. . . . Decoupling suggests a radical separation, whereas de-risking—a term that initially comes from the financial sector—implies curbing risks while avoiding a clean break.").

international relations intelligentsia and the policy makers they influence have also preferred such terms as "strategic competition" and "great-power competition" to describe Sino-American relations.[145] Thus, the Biden Administration's measured, and at times ambiguous, language on China is intentional.[146]

Montana's outright labeling of China an "an adversary of the United States and Montana" improperly presumes to speak for the nation and jeopardizes the Biden Administration's official messaging and posture toward China.[147] This is the very kind of situation that conflict preemption is designed to safeguard against. As the Supreme Court noted in *Arizona v. United States*, conflict preemption helps protect U.S. nationals and companies from retaliation, for "[p]erceived mistreatment of aliens in the United States [by state laws] may lead to harmful reciprocal treatment of American citizens abroad."[148] Likewise, SB 419 penalizes a corporate entity because of its foreign ownership and declares that a foreign regime is an "adversary" of America and Montana, counter to official U.S. policy. State laws like SB 419 could increase the risk of retaliation against Americans visiting and living in China.[149]

145. *See, e.g.*, Paul Heer, *Understanding US-China strategic competition*, MIT CTR. FOR INT'L STUD. (Oct. 20, 2020), https://cis.mit.edu/publications/analysis-opinion/2020/understanding-us-china-strategic-competition [https://perma.cc/P8FG-MPQV] (employing the phrase "strategic competition" to describe the relationship between China and America); *see also* ALI WYNE, AMERICA'S GREAT-POWER OPPORTUNITY: REVITALIZING U.S. FOREIGN POLICY TO MEET THE CHALLENGES OF STRATEGIC COMPETITION 4 (2022) (describing "great-power competition" between America, China, and Russia as "a construct that could orient US foreign policy" in the coming years).

146. The Biden Administration is also careful to avoid stoking racism against Chinese-Americans and others of East Asian descent. *See* NATIONAL SECURITY STRATEGY, *supra* note 142, at 25 ("While we have profound differences with the Chinese Communist Party and the Chinese Government, those differences are between governments and systems – not between our people. . . . Racism and hate have no place in a nation built by generations of immigrants to fulfill the promise of opportunity for all."). The Administration likewise seeks to avoid discrimination on the basis of national origin against Russians. *See id.* at 26 ("The United States respects the Russian people and their contributions to science, culture and constructive bilateral relations over many decades.").

147. SB 419, *supra* note 9, at 1; *cf.* Jayaram & Donley, *supra* note 6, at 1 (discussing SB 419's labeling of the PRC as "an adversary").

148. 567 U.S 387, 395 (2012).

149. *See, e.g.*, Janis Mackey Frayer & Jennifer Jett, *How the U.S.-China clash is being felt on campus*, NBC NEWS (June 2, 2023, 11:21 AM), https://www.nbcnews.com/news/world/americans-study-china-university-tensions-rcna87203 (explaining that the U.S. State Department estimates only about 350 American students are studying abroad in China in the current academic year, compared to almost 15,000 students per academic year a decade ago). Despite fewer Americans going to China, Americans still visit or live in the country and are exposed to the risks of worsening bilateral relations. *See China Travel Advisory*, U.S. DEP'T OF STATE (June 30, 2023), https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/china-travel-advisory.html [https://perma.cc/UC9R-NQJB] (warning that China has "interrogated, detained, and

Additionally, in the cyber realm, the Biden Administration already has a National Cybersecurity Strategy that lays out federal objectives for countering cyber threats from foreign state actors.[150] The Strategy contains a section on "malicious actors" that—although does not specifically name TikTok or similar apps—covers emerging threats from China.[151] The National Cybersecurity Strategy is internally consistent with the National Security Strategy. For example, in the section related to China, the National Cybersecurity Strategy says that the PRC has "become our most advanced strategic competitor with the capacity to threaten U.S. interests and dominate emerging technologies critical to global development . . . the PRC is exporting its vision of digital authoritarianism, striving to shape the global Internet in its image and imperiling human rights beyond its borders."[152] Again, the National Cybersecurity Strategy employs the term "strategic competitor" rather than "adversary" to refer to China, which is consistent with the Biden Administration's official diplomatic posture—and inconsistent with SB 419 and its invocation of more-attenuated Commerce Department regulations.

In defense of SB 419, Montana could argue that plenty of other states have banned TikTok on government-issued devices, and no one has argued those bans frustrate federal objectives on China or cybersecurity. Montana could also invoke the presumption against preemption from *Rice v. Santa Fe Elevator Corp.*[153] However, these arguments are likely unconvincing. First, no other state has banned TikTok for private citizens. Banning TikTok on state-issued devices is an internal information technology or human resources matter; a state may set rules for its own workforce like any other employer. Banning TikTok across all devices, on the other hand, implicates larger constitutional issues and must pass through the numerous layers of scrutiny detailed in this article. Second, *United States v. Locke* explained that

expelled U.S. citizens living and working in the PRC"—including for "alleged violations of PRC national security laws").

150. *See generally* WHITE HOUSE, NATIONAL CYBERSECURITY STRATEGY (Mar. 1, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf [https://perma.cc/N42W-E38U] [hereinafter NATIONAL CYBERSECURITY STRATEGY] (detailing the U.S.'s cybersecurity strategy to counter foreign state actors). The policy contains specific language about protecting private citizens' data at the national level. *See id.* at 20 ("The Administration supports legislative efforts to impose robust, clear limits on the ability to collect, use, transfer, and maintain personal data and provide strong protections for sensitive data like geolocation and health information. This legislation should also set *national* requirements to secure personal data consistent with standards and guidelines developed by NIST.") (emphasis added).

151. *Id.* at 3; *see also id.* at 19 ("[T]hefts of personal data make clear that market forces alone have not been enough . . . . We will use Federal purchasing power and grant-making to incentivize security.").

152. *Id.* at 3.

153. 331 U.S. 218, 230 (1947); *accord* Maryland v. Louisiana, 451 U.S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.").

the presumption against preemption is not triggered when a state law regulates an area with a history of significant federal presence, such as "national and international maritime commerce."[154] Now, replace the word "maritime" with "cyber"—for TikTok is arguably an article of international cyber-commerce—and the presumption against preemption loses its pertinence.

Therefore, obstacle preemption—a form of implied conflict preemption—likely bars Montana's TikTok ban.

B. Constitutional Prong: The Dormant Commerce Clause

Relative to the foregoing preemption analysis, the DCC analysis is fairly straightforward. Congress has not yet passed its own law banning TikTok, so Congress's Commerce Clause power remains dormant. In the meantime, Montana has taken independent action, passing a law that effectively prohibits TikTok within the state. This law is facially discriminatory—the plain text of the statute targets a specific out-of-state economic actor (TikTok Inc.), denying this actor the ability to operate freely in Montana. Because SB 419 is facially discriminatory, it faces a virtually per se rule of invalidity.[155] To survive this heightened level of judicial scrutiny, the law must be narrowly tailored to serve a legitimate local purpose, and that purpose cannot be as well served by nondiscriminatory alternatives.[156]

Montana presumably will argue it has a legitimate interest in protecting its citizens from the CCP and other dangerous content on TikTok. The law is narrowly tailored to serve that interest because other social media platforms like Facebook and Instagram are domestically-owned, so they pose a lower risk of exposing user data to the CCP. A less-discriminatory alternative is not available because users will not voluntarily abstain from TikTok; also, TikTok Inc. will not voluntarily change its ownership structure. Finally, Montana's core goal is to safeguard domestic digital consumers, not to engage in economic protectionism. For example, Montana is not seeking to incubate its own social media app and shield it from external competition.

However, the facts on the ground do not lend much support for these arguments. As already discussed, SB 419 was first and foremost an act of foreign policy and only secondarily an act of domestic consumer protection. Montana's Governor and legislature do not have a legitimate interest in

154. 529 U.S. 89, 108 (2000). Parties in later cases have attempted to analogize their facts to the historical federal presence found in *Locke*. *See, e.g.*, Brief for Petitioner at 51 n.23, Wyeth v. Levine, 555 U.S. 555 (2009) (no. 06-1249) ("Regulation of drug labeling has now been the domain of the federal government for more than a century.")

155. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also* Regan, *supra* note 45, at 1098 (arguing that the Court's per se rule of invalidity is "justified by a [discriminatory] purpose-based theory").

156. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019); *Modern DCC Jurisprudence Generally*, *supra* note 48.

conducting their own foreign policy. They do have a legitimate interest in protecting Montanans' data privacy and shielding youth from dangerous content, but the weight of the evidence from the Governor's tweet, the plain text of SB 419, and other sources shows that SB 419 was mostly about standing up to the CCP. Furthermore, less-discriminatory alternatives to an all-out ban are available. For example, Montana could have limited the ban to private sector individuals in sensitive occupations. The data from such persons may be of material value to foreign state actors; the data from a high school student who watches viral dance videos all day, perhaps less so. If protecting youths is a major policy goal, Montana should have expanded the ban to cover other social media platforms, as Utah has done. This would be a less-discriminatory alternative from TikTok's perspective because other companies would face similar sanctions. Accordingly, SB 419 fails to overcome the virtually per se rule of invalidity attached to facially discriminatory laws and likely runs afoul of the DCC.

Even if SB 419 is assumed to be facially neutral, it still has a discriminatory purpose and effect. The discriminatory purpose is apparent from the text of the statute—SB 419 singles out TikTok and proudly boasts of protecting Montanans from the CCP. The discriminatory effect is also obvious—only a single foreign app faces sanctions under SB 419. Given that a discriminatory purpose and a discriminatory effect are present, the same heightened scrutiny standard for facially discriminatory laws applies. Again, SB 419 fails to meet that standard and the DCC analysis never progresses to the *Pike* balancing test.

However, Montana may regulate TikTok on state-issued devices without running afoul of the DCC because such an action would fall under the market participant exception.[157] When Montana sets requirements for its own employees, the state is acting as a market participant, not a market regulator. On the other hand, when Montana sets requirements for its private citizens' use of TikTok, the state is acting as a market regulator rather than as a market participant, and thus faces DCC scrutiny. The other DCC exception—congressional authorization—does not apply here because Congress has authorized neither itself nor the states to ban TikTok.

C. Policy Prong: At the Intersection of Constitutional Law and Economics

Beyond black letter constitutional doctrine, economic theory also supplies abundant policy arguments for striking down Montana's TikTok ban.

157. *See generally* Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (explaining that if a state acts as a "market participant" instead of as a "market regulator," it may discriminate among buyers and sellers without violating the DCC); *see also* Regan, *supra* note 45, at 1193 (arguing the market participant exception exists because "[t]he state is spending money" and "state spending are less coercive than regulatory programs or taxes with similar purposes").

These arguments form the persuasive policy prong of this article's analytical framework. This article emphasizes policy arguments from economics because economics effectively explains and supports constitutional mandates, including federalism limits.[158] A law based on bad economics can still be constitutional, but a law grounded in good economic principles that were known in the Founding Era and embedded in the logic of the Constitution would be more faithful to the Constitution. Therefore, although the economic analysis proposed here is persuasive (and optional), the economic analysis buttresses the constitutional analysis if both prongs of analyses reach the same result.

Furthermore, the Framers extensively applied economics when they wrote the Constitution, and their economic logic is apparent in such provisions as the Commerce Clause. Alexander Hamilton, America's first Treasury Secretary and primus inter pares among Washington Administration officials, was intimately familiar with economics and was well-versed in Adam Smith's 1776 magnus opus, *The Wealth of Nations*.[159] Economics permeates constitutional law and policymaking as much today as it did in the 18th century. Indeed, President Trump directed his Commerce Secretary, rather than the national security apparatus, to ban TikTok via economic sanctions; Montana has likewise linked its TikTok ban to a Commerce Department regulation.[160]

---

158. Economic analysis of the law is not a novel idea; Richard Posner launched the "law-and-economics" movement 50 years ago. *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014); *cf. How Chicago school economists reshaped American Justice*, ECONOMIST (Sept. 7, 2023), https://www.economist.com/finance-and-economics/2023/09/07/how-chicago-school-economists-reshaped-american-justice [https://perma.cc/STQ4-RGBM] (quoting Posner as saying that "it may be possible to deduce the basic formal characteristics of law itself from economic theory"). In the ensuing decades, judges have applied economic theory in such areas of law as antitrust and criminal sentencing. *Id.*

159. Alexander DeConde, *Hamilton's financial program*, ENCYC. BRITANNICA, https://www.britannica.com/biography/Alexander-Hamilton-United-States-statesman/Hamiltons-financial-program [https://perma.cc/R5W6-A2MK] (last visited Sept. 12, 2023); *see also Alexander Hamilton and his Patron, George Washington*, PBS, https://www.pbs.org/wgbh/americanexperience/features/hamilton-and-his-patron-george-washington [https://perma.cc/EWE5-EHX5] (last visited Sept. 12, 2023) ("Hamilton acted as de facto prime minister for the new government, running both the Treasury and Customs Service and convincing the president [Washington] to approve ideas, like a national bank, that were bitterly opposed by other Cabinet members."). Adam Smith—a Scottish contemporary of America's Framers—is a founding father in his own right who helped catapult economics into a separate discipline from its beginnings as a subset of philosophy. Robert L. Heilbroner, *Adam Smith*, ENCYC. BRITANNICA (July 13, 2023), https://www.britannica.com/biography/Adam-Smith [https://perma.cc/7N4E-2SBR]; *Philosophy of Economics*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 4, 2018), https://plato.stanford.edu/entries/economics [https://perma.cc/Z6UJ-R7XR]. Philosophers as far back as Aristotle wrote about economic matters. *See* ARISTOTLE, NICOMACHEAN ETHICS (Fourth Century BCE), *reprinted in* EARLY ECONOMIC THOUGHT 27–28 (Arthur Eli Monroe ed., 2006) (showing Aristotle writing about money as a medium of exchange and measure of value).

160. TikTok Inc. v. Trump, 490 F. Supp. 3d 73, 77 (D.D.C. 2020); SB 419, *supra* note 9, at 3.

Accordingly, economics supplies a powerful tool for understanding constitutional law. When applied to the issue of limits on states' foreign policy powers, economic theory can generate valuable insights, help tackle novel questions, and promote interdisciplinary advancement. The following sub-sections present two foundational economic concepts—externalities and specialization—that the Framers understood and are reasonably accessible to modern judges, lawyers, and laypersons. These concepts put a different spin on the earlier legal analyses and help explain why constitutional doctrines such as preemption and the DCC also produce economically-sensible results. The concepts covered here do not represent an exhaustive list of relevant points of intersection between economics and the constitutional law issues surrounding SB 419; they are only a starting point.

1. Externalities

Externalities is one concept from economics that helps explain why the federal government is in a better position than Montana to conduct foreign policy. When a state like Montana acts alone in foreign affairs, it can create negative externalities for other states and for society as a whole. In economics, a negative externality is a cost that third parties must bear because an economic actor does not fully account for those third parties' interests when making their own decisions.[161] For example, a polluter might consider only the private costs to itself when deciding whether to expand output and emissions; the polluter will thereby ignore the much larger social costs that the community and environment will bear as a result of the polluter's decision.[162] The difference between the social costs and private costs is the negative externality—the unaccounted-for damage that the factory's decision has on others.[163] Negative externalities are pernicious because the actor creating the externality does not bear the full consequences of their actions; either specific third parties with no control over the actor or, often, society collectively

161. Thomas Helbling, *What Are Externalities?*, 47 FIN. & DEV. 48 (2010), https://www.imf.org/external/pubs/ft/fandd/2010/12/basics.htm [https://perma.cc/H6Y6-8RHH]; *see also* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 196 (7th ed. 2015) ("An **externality** arises when a person engages in an activity that influences the well-being of a bystander but neither pays nor receives compensation for that effect. If the impact on the bystander is adverse, it is called a *negative externality*.") (emphasis in original).

162. Helbling, *supra* note 161, at 48; *cf.* MANKIW, *supra* note 161, at 196 ("The release of dioxin into the environment, for instance, is as negative externality. Self-interested paper firms will not consider the full cost of the pollution they create in their production process[.]").

163. Helbling, *supra* note 161, at 48; *cf.* MANKIW, *supra* note 161, at 198 ("The social-cost curve is above the [private] supply curve because it takes into account the external costs imposed on society by aluminum production. The difference between these two curves reflects the cost of the pollution emitted.").

bears the burden.[164] Hence, negative externalities are a classic example of a "market failure" that requires government intervention to correct.[165]

Montana's TikTok ban arguably produces a negative externality that harms other states and the United States. When Montana enacted its TikTok ban, the legislature and Governor did not evince any intention of taking other states' interests into account. The text of the statute focuses on protecting Montanans from the CCP, and the Governor's official announcement and personal tweet reinforce these themes.[166] However, Montana did not account for possible damage that its TikTok ban may inflict on fellow states. Some states are heavily dependent on trade with China. For example, Washington State's biggest trade partner is China; 20 percent of its exports goes to China.[167] Compare this to Montana, a landlocked state close to Washington State; Montana barely trades with China.[168] Thus, Montana is not as worried about provoking the PRC and damaging commercial ties. The U.S. overall trades heavily with China as well, and Montana is not fully taking these national economic interests into account.[169] Therefore, Montana's actions have the potential to hurt the economies of other states like Washington, as well as the broader American economy. Montana would not bear the full consequences of its actions because it barely trades with China, so it does not consider these consequences in its decision-making. This is a classic case of social costs exceeding private costs, thus resulting in a negative externality. China is unlikely to single out Montana for retribution because once goods and dollars flow into the U.S., China lacks reliable tools to prevent those goods and dollars from entering Montana. Realistically, the most China could do to punish Montana—but not the rest of the U.S.—is to sanction individuals such as the Governor. But, given his hawkish rhetoric, Governor

164. Helbling, *supra* note 161, at 48; *accord* MANKIW, *supra* note 161, at 196 ("Because buyers and sellers neglect the external effects of their actions . . . . the equilibrium fails to maximize the total benefit to society as a whole.").

165. Helbling, *supra* note 161; *see also* MANKIW, *supra* note 161, at 196 ("Externalities come in many varieties, as do the [government's] policy responses that deal with the market failure.").

166. SB 419, *supra* note 9, at 1–3; MONT. NEWSROOM, *supra* note 125; Gianforte Twitter Post, *supra* note 124.

167. *Washington*, OFF. OF U.S. TRADE REPRESENTATIVE, https://ustr.gov/map/state-benefits/wa [https://perma.cc/D55V-3EUJ] (last visited Sept. 12, 2023).

168. *Montana*, OFF. OF U.S. TRADE REPRESENTATIVE, https://ustr.gov/map/state-benefits/mt [https://perma.cc/YW8G-EQ74] (last visited Sept. 12, 2023).

169. *The People's Republic of China*, OFF. OF U.S. TRADE REPRESENTATIVE, https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china [https://perma.cc/6Q7U-RJR2] (last visited Sept. 12, 2023); *see also* Thomas Monteiro, *Mexico Steps Up As Largest US Trading Partner*, GLOB. FIN. (May 2, 2023), https://gfmag.com/economics-policy-regulation/mexico-overtakes-china-us-trade-partner-2 [https://perma.cc/2NMX-A4MQ] (reporting that China was the U.S.'s second largest trade partner in 2023).

Gianforte does not seem very keen on traveling to or doing personal business with China anyway.

So far, China has not taken specific steps to retaliate against Montana's TikTok ban, but it is a distinct possibility that the TikTok ban—in conjunction with other events that have recently soured Sino-American relations—will result in economic damage. According to Nicholas Burns, the U.S. Ambassador to China, relations between the two countries are at their lowest point since Washington and Beijing re-established diplomatic ties in 1972, when President Nixon made a surprise visit to China.[170] SB 419 has not helped to alleviate bilateral tensions. The PRC was evidently displeased with Montana's TikTok ban—China's Foreign Ministry publicly called Montana's law "an abuse of state power."[171] In these sensitive times, individual states provoking China could, at some point, become the proverbial straw that breaks the camel's back. Montana's actions possibly risking retaliation is speculative. However, that risk is far from zero, and the federal government is in a better position than the states to set a risk tolerance for such matters.

In economics, correcting a negative externality requires government intervention to induce the errant actor to "internalize" the externality—that is, account for the full social costs of their actions, thus aligning the actor's private interests with those of society's.[172] The government can accomplish this task by levying a Pigouvian tax or allocating property rights among parties and allowing them to bargain freely for those rights (per the Coase Theorem).[173] Translating this to constitutional law, government intervention to

170. Iain Marlow & Ana Monteiro, *China Ties at 'Lowest Moment' Since 1972, US Ambassador Says*, BLOOMBERG (June 9, 2022, 7:52 PM), https://www.bloomberg.com/news/articles/2022-06-09/china-ties-at-lowest-moment-since-1972-us-ambassador-says [https://perma.cc/YV5W-YGRQ]; *cf.* Michael Goodier & Amy Hawkins, *US-China cultural exchange at low point after tensions and Covid, data shows*, GUARDIAN (July 22, 2023, 8:00 AM), https://www.theguardian.com/world/2023/jul/22/us-china-cultural-exchange-at-low-point-after-tensions-and-covid-data-shows [https://perma.cc/2KH6-SLVA] (reporting historically low cultural links between the U.S. and China).

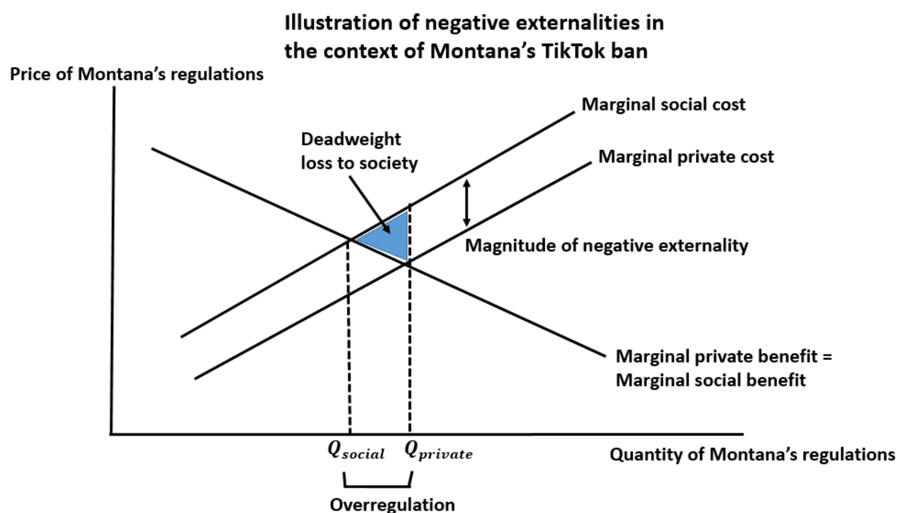
171. Clare Duffy, *TikTok sue Montana over new law banning the app*, CNN (May 23, 2023, 5:31 AM), https://www.cnn.com/2023/05/22/tech/tiktok-montana-lawsuit/index.html [https://perma.cc/AK2W-BNTL].

172. Helbling, *supra* note 161, at 48; *accord* MANKIW, *supra* note 161, at 199 (defining "internalizing the externality" as "altering incentives so that people take account of the external effects of their actions").

173. Helbling, *supra* note 161, at 48–49; *see also* MANKIW, *supra* note 161, at 203 ("[T]he government can internalize the externality by taxing activities that have negative externalities . . . . Taxes enacted to deal with the effects of a negative externality are called **corrective taxes**. They are also called *Pigouvian taxes* after economist Arthur Pigou (1877-1959), an early advocate of their use.") (emphasis in original); *see also* Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON 1, 44 (1960) (explaining the Coase Theorem, which holds that one way of correcting externalities is to have private parties bargain among themselves for the right to generate such

remedy and prevent negative externalities is an implicit rationale for preemption and the DCC. Here, the individual economic actors are the states, and the "government" regulating their conduct is the federal government. The federal government, two branches of which are popularly elected from among all the states, considers the interests of the entire nation—the full social costs. The federal government is therefore in the best position to set ground rules for interactions among states and foreign countries. If one state passes a law that creates a negative externality for other states, the federal judiciary can strike down the law as unconstitutional. Thus, the federal government eliminates the externality by fiat rather than by changing incentives, as is the case under standard economic theory.

The following is a stylized diagram that illustrates how Montana's TikTok ban could lead to a negative externality that reduces societal welfare.[174]



In this diagram, the y-axis depicts the price of Montana's regulations, such as a loss of business, residents, tax revenue, and reputation. The x-axis depicts the quantity of Montana's regulations. This quantity could be a binary measure (ban TikTok—yes/no), or it could be a sliding scale (the scope of the restrictions, the severity of the penalty, etc.).

externalities—i.e. "the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.)").

174. Original graph by author, adapted from Stefanie Stantcheva, *Lecture 7: Externalities* 5 (Fall 2017), HARV. UNIV., https://scholar.harvard.edu/files/stantcheva/files/lecture7.pdf [https://perma.cc/8XYQ-L4RZ]. *Cf.* MANKIW, *supra* note 161, at 198 (depicting a similar graph).

The marginal private benefit is the incremental benefit accruing to Montana from enacting a TikTok ban or increasing the scope of restrictions or severity of penalties. By contrast, the marginal social benefit is the incremental benefit accruing to the rest of society (other states and the United States) from Montana enacting a TikTok ban or increasing the scope of restrictions or severity of penalties. Ostensibly, only Montana stands to benefit from banning TikTok from its territory, so the marginal social benefit equals the marginal private benefit.

The marginal private cost is the incremental cost (price) that Montana will bear from enacting a TikTok ban or increasing the scope of restrictions or severity of penalties. Separately, the marginal social cost is the incremental cost (price) that other states and the United States will bear from Montana enacting a TikTok ban or increasing the scope of restrictions or severity of penalties. The marginal social cost is higher than the marginal private cost because Montana's TikTok ban has the potential to impose a burden on society at large, but Montana did not fully take social costs into account when it weighed the private costs and benefits to itself of enacting the law. Thus, the difference between the (larger) marginal social cost and the (smaller) marginal private cost is the magnitude of the negative externality.

$Q_{private}$ is the quantity of regulations if Montana only considers its own interests. Montana will maximize its own utility (wellbeing) by setting marginal private cost equal to marginal private benefit. Q_{social} is the quantity of regulations if Montana internalizes the externality and considers society's interests, as well as the state's own interests. Montana will maximize its own utility (wellbeing) by setting marginal social cost equal to marginal private benefit. Here, $Q_{private}$ is sub-optimal because it exceeds Q_{social}. Thus, if Montana only accounts for its own interests and ignores the negative externality, overregulation will result, thus producing a deadweight loss to society (a wasteful and entirely avoidable lowering of societal welfare).

If Montana's TikTok ban does in fact create a negative externality, the U.S. Constitution provides a ready remedy to correct the externality and eliminate the deadweight loss. The remedy is to strike down the state law as unconstitutional under any of the legal theories discussed earlier—Article I, Section 10, preemption, or the DCC. By invoking any of these theories, the federal government, acting through the judiciary, could mandate Montana to align its marginal private cost with its marginal social cost, thereby producing a welfare-maximizing quantity of state-level regulations (Q_{social}). In this case, Q_{social} may well be zero, as the federal government—rather than state governments—is in a better position to craft foreign policy.

Alexander Hamilton understood these concepts, even if he used different words. In Federalist No. 22, he wrote, "Several States have endeavored, by separate prohibitions, restrictions, and exclusions, to influence the conduct of [Britain] . . . but the want of concert, arising from the want of a

general authority and from clashing and dissimilar views in the State, has hitherto frustrated every experiment of the kind[.]"[175] Hamilton continued, "The interfering and unneighborly regulations of some States . . . have, in different instances, given just cause of umbrage and complaint to others" and "if not restrained by a national control," the states' piecemeal regulations "would be multiplied and extended till they became . . . injurious impediments to the intercourse between the different parts of the Confederacy."[176] Translated into 21st century economics parlance, "clashing and dissimilar views" arise from the states accounting only for their marginal private costs rather than marginal social costs, "injurious impediments" represent negative externalities, and "national control" is the sole means of correcting the negative externality. Economics and constitutional law are not hermetically sealed silos, and Hamilton's pen eloquently drives home this point.

2. Specialization

Specialization, another salient concept from economics, also helps explain why the federal government is in a better position than Montana to conduct foreign policy. This concept goes back to the earliest days of economics as a discipline. In the *Wealth of Nations*, Adam Smith wrote, "The greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity, and judgment with which it is any where directed, or applied, seem to have been the effects of the division of labour."[177] The division of labor is synonymous with specialization, and it improves productivity and output for all. David Ricardo further refined these concepts and introduced the idea of absolute advantage and comparative advantage in the context of cross-border trade between countries.[178] Absolute advantage

175. THE FEDERALIST NO. 22 (Alexander Hamilton)) [Hereinafter *Fed. No. 22*]; *cf.* 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, 317 (1999) ("If there is one thing that all delegates to the Philadelphia Convention of 1787 could have agreed upon had a poll been taken, it would likely have been the necessity for national uniformity in the conduct of relations with other countries.").

176. *Fed. No. 22*, *supra* note 175; *cf.* Ramsey, *supra* note 31, at 386 n.167 ("No. 22 contains Hamilton's observations about interstate rivalries, justifying the grant of interstate commerce power to the federal government.").

177. ADAM SMITH, WEALTH OF NATIONS 9, 13 (Prometheus Books 1991) (1776). Smith explained that specialization boosts efficiency in production for several reasons, including "the increase of dexterity in every particular workman" and "the saving of the time which is commonly lost in passing from one species of work to another."

178. *Comparative Advantage*, WTO, https://www.wto.org/english/res_e/reser_e/cadv_e.htm [https://perma.cc/GXL7-MQ9K] (last visited Sept. 12, 2023); *see also* Joseph J. Spengler, *David Ricardo*, ENCYC. BRITANNICA, https://www.britannica.com/biography/David-Ricardo [https://perma.cc/8JJE-5SBL] (last visited Sept. 12, 2023) (providing biographical details on Ricardo). People sometimes speak of individuals, companies, and nations having a "competitive advantage" over their peers. However, "competitive advantage" is an imprecise term that tends to

means Country X can produce a good or service more efficiently than Country Y in *absolute* terms, whereas comparative advantage means Country X can produce a good or service more efficiently than Country Y in *relative* terms—by sacrificing fewer other goods or services it could have produced.[179] Countries X and Y can mutually gain from specializing and trading with each other as long as they each have a comparative advantage in a different good or service.[180]

Translating the Ricardian model to the issue of SB 419, simply replace "Country X and Country Y" with "federal government and state government," and replace "good or service" with "national security and related foreign policy." Although economic theory traditionally attributes the gains from specialization to comparative advantage, absolute advantage still matters immensely in the context of geopolitics. If individual states cannot efficiently produce a large enough *absolute* amount of national security for themselves, all the comparative advantage in the world will not save them from external threats. Hence, this article will explore both absolute advantage and comparative advantage as possible bases for why the federal government should specialize in foreign policy.

First, in terms of absolute advantage, the federal government has an undisputed absolute advantage in producing national security (including cybersecurity) and related foreign policy compared to the states. This is one reason why Montana should refrain from conducting its own foreign policy via SB 419 and should instead let the federal government specialize in such tasks. Alexander Hamilton implicitly understood the value of absolute advantage in the context of national security and federalism, writing that "[a] navy of the United States, as it would embrace the resources of all, is an object far less remote than a navy of any single State or partial confederacy, which

confound the two distinct economic concepts of absolute advantage and comparative advantage. *See, e.g.*, Michael E. Porter, *The Competitive Advantage of Nations*, HARV. BUS. REV. (Mar. 1990), https://hbr.org/1990/03/the-competitive-advantage-of-nations [https://perma.cc/BN4W-ME6N] (using the phrase "competitive advantage" loosely in a manner that could indicate absolute advantage in some contexts and comparative advantage in others).

179. WTO, *supra* note 178; *accord* ROBERT C. FEENSTRA & ALAN M. TAYLOR, INTERNATIONAL ECONOMICS 30–31 (2008) ("When a country has the best technology for producing a good, it as an **absolute advantage** in the production of that good. . . . [By contrast], a country has a comparative advantage in producing those goods that it produces best *compared with* how well it produces other goods.") (emphasis in original).

180. WTO, *supra* note 178; *accord* MANKIW, *supra* note 161, at 54 ("Trade can benefit everyone in society because it allows people to specialize in activities in which they have a comparative advantage."); *cf.* DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 93 (Prometheus Books 1996) (1817) ("Under a system of perfectly free commerce, each country naturally devotes its capital and labor to such employments as are most beneficial to each . . . . It is this principle which determines that wine shall be made in France and Portugal, that corn shall be grown in America and Poland, and that hardware and other goods shall be manufactured in England.").

would only embrace the resources of a single part."[181] In other words, individual states have difficulty assembling enough resources to establish a navy; states are inefficient at producing such resource-intensive manifestations of national security, so they are at an absolute disadvantage relative to the national government.

When a government "produces" national security and related foreign policy, the "output" can be expressed as a function of power—specifically, hard power; soft power can supplement hard power, but this article does not analyze soft power because it is more amorphous and difficult to measure.[182] Furthermore, cyber capabilities like those that SB 419 implicates likely fall under hard power, not soft power.[183] With these concepts in mind, this article proposes engaging in a simple thought experiment—ceteris paribus, if Montana were a standalone nation, what would be its hard power on the world stage, and how would it stack up against that of China and the U.S.? The results of this thought experiment will help to quantify who has an absolute advantage in producing national security and who should specialize in that task. This is not a Western-centric exercise, as Chinese scholars have also sought to measure hard power and have developed different versions of a Comprehensive National Power (CNP) index.[184] Measuring power is as old as warfare, for as Sun Tzu wrote, "He who knows himself and knows others

181. THE FEDERALIST NO. 11 (Alexander Hamilton); *cf.* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1389 (1987) (explaining that in Federalist No. 11, Hamilton "links his discussion of the commerce power with the need to have an American navy to police and protect the seas").

182. *See, e.g.*, Eric Li, *The Rise and Fall of Soft Power*, FOREIGN POL'Y (Aug. 20, 2018, 1:25 PM), https://foreignpolicy.com/2018/08/20/the-rise-and-fall-of-soft-power [https://perma.cc/WEJ4-TJV3] (explaining hard power, soft power, and the relative ease of measuring hard power); *see also* Joseph S. Nye, Jr., *Soft Power*, FOREIGN POL'Y, Autumn 1990, at 166 (defining "soft power" as "when one country gets other countries to *want* what it wants" and "hard power" as when a country "*order[s]* others to do what it wants") (emphasis in original).

183. Jennifer Kavanagh, *The Ukraine War Shows How the Nature of Power Is Changing*, CARNEGIE ENDOWMENT FOR INT'L PEACE (June 16, 2022), https://carnegieendowment.org/2022/06/16/ukraine-war-shows-how-nature-of-power-is-changing-pub-87339 [https://perma.cc/X43D-UNXP]; *but see* Joseph S. Nye, Jr., *Cyber Power*, HARV. KENNEDY SCH. 7 (May 2010), https://www.belfercenter.org/sites/default/files/legacy/files/cyber-power.pdf [https://perma.cc/A722-JMDT] (introducing the phrase "cyber power" and its interaction with hard *and* soft power).

184. *How China measures national power*, ECONOMIST (May 11, 2023), https://www.economist.com/briefing/2023/05/11/how-china-measures-national-power [https://perma.cc/RW7N-JHDK]; *accord* Sven Bernhard Gareis, *Taking off as a Global Power? China's Foreign Policy "Grand Strategy"*, GEORGE C. MARSHALL EUR. CTR. FOR SEC. STUD. (Apr. 2013), https://www.marshallcenter.org/en/publications/occasional-papers/taking-global-power-chinas-foreign-policy-grand-strategy [https://perma.cc/3JST-3HJ5] ("China adheres to the concept of a state's comprehensive national power (*zonghe guoli* 综合国力) as a framework that expresses hard factors, such as the military or economic and technological strength as well as the cultural appeal of a civilization in quantifiable terms.").

shall be victorious in every battle . . . he who knows neither shall be defeated in every battle."[185]

The Economist, a British newspaper, has developed a hard power index based on "economic heft, productive efficiency and military might."[186] *The Economist* explains that "[o]ur hard-power index therefore uses GDP per person to stand for efficiency, military expenditure for might, and non-military GDP for economic heft. These are multiplied [to create a geometric mean], so that countries suffer for their deficiency in any one of them."[187] This hard power index draws inspiration from political science professor Michael Beckley's work, and it will be the basis of the following thought experiment.[188] Applying *The Economist*'s hard power index, it is possible to approximate the extent to which the United States (inclusive of Montana) has an absolute advantage in producing national security compared to Montana as a standalone entity.

	Hard Power Index	Relative to China
United States	11.81 billion	3.17
Montana	79.53 million	0.02
China	3.72 billion	-

The inputs underlying the hard power index calculations are as follows. First, for the United States, nominal GDP per capita in 2022 was (a) $76,398.60.[189] Military spending in 2022 was (b) $877 billion.[190] Total

185. *How China measures national power*, *supra* note 184. Sun Tzu under Wade-Giles romanization (aka Sunzi under Pinyin romanization) was an ancient Chinese military strategist who authored *The Art of War*. *Sunzi*, ENCYC. BRITANNICA (Jun. 24, 2023), https://www.britannica.com/biography/Sunzi [https://perma.cc/V7RT-EE5Y].

186. *How China measures national power*, *supra* note 184.

187. *Id.*

188. *Id.*; Michael Beckley, *The Power of Nations: Measuring What Matters*, 43 INT'L SEC. 7 (2018), https://direct.mit.edu/isec/article/43/2/7/12211/The-Power-of-Nations-Measuring-What-Matters [https://perma.cc/H9YQ-F745].

189. *GDP per capita (current US$)*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD [https://perma.cc/P98H-8HRK] (last visited Sept. 12, 2023) [hereinafter *GDP per capita*]. Adam Smith and the American Framers who read Smith's work understood the difference between nominal and real figures. *See, e.g.*, SMITH, *supra* note 177, at 36 (distinguishing between the "Real and Nominal Price of Commodities").

190. *World military expenditure reaches new record high as European spending surges*, STOCKHOLM INT'L PEACE RSCH. INST. (Apr. 24, 2023), https://www.sipri.org/media/press-release/2023/world-military-expenditure-reaches-new-record-high-european-spending-surges [https://perma.cc/UD35-W2UQ].

nominal GDP in 2022 was $25.46 trillion.[191] Non-military GDP equals the total nominal GDP of $25.46 trillion minus the $877 billion in military spending; this equals (c) $24.58 trillion. The geometric mean of a, b, and c ($\sqrt[3]{a \times b \times c}$) is the value of the hard power index for the U.S.

Second, for Montana, total nominal GDP in 2022 was $65 billion.[192] Population in 2022 was 1.12 million.[193] So, nominal GDP per capita was (a) $57,901. Montana's 2022 budget for the Department of Military Affairs was (b) $134 million, which includes generous amounts of federal funding.[194] Non-military GDP equals the $65 billion total nominal GDP minus the $134 million military budget; this equals (c) $64.87 billion. The geometric mean of a, b, and c ($\sqrt[3]{a \times b \times c}$) is the value of the hard power index for Montana.

Third, for China, nominal GDP per capita in 2022 was (a) $12,720.20.[195] China's military budget in 2022 was (b) $229 billion.[196] Total nominal GDP in 2022 was $17.96 trillion.[197] Non-military GDP equals the total nominal GDP of $17.96 trillion minus the $229 billion military budget; this equals (c) $17.73 trillion. The geometric mean of a, b, and c ($\sqrt[3]{a \times b \times c}$) is the value of the hard power index for China.

Note that all figures here are based on nominal GDP, which uses current U.S. dollars. If the hard power index had instead used real, inflation-adjusted figures, the index would likely show a stronger China. China is on the cusp of deflation, with an annualized rate of inflation of 0.3 percent, while the U.S. is grappling with inflation at an annualized rate of four percent.[198]

---

191. *GDP (current US$)*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD [https://perma.cc/T5M5-BLPD] (last visited Sept. 12, 2023) [hereinafter *GDP*].

192. *GDP by State*, BUREAU OF ECON. ANALYSIS (June 30, 2023), https://www.bea.gov/data/gdp/gdp-state [https://perma.cc/ED7G-NW4S].

193. *Quick Facts: Montana*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/MT/PST045222 [https://perma.cc/SE6X-ENRH] (last visited Sept. 12, 2023).

194. MONT. STATE LEGISLATURE, DEPARTMENT OF MILITARY AFFAIRS (DMA) 1 (NOV. 30, 2021), https://leg.mt.gov/content/publications/fiscal/2023-Interim/FY22-Dec/DMA.pdf [https://perma.cc/TK88-GRJP].

195. *GDP per capita*, *supra* note 189. This figure does not include the special administrative regions of Hong Kong and Macau. *Id.*

196. Liu Xuanzun, *China's 2023 defense budget to rise by 7.2%, a 'reasonable, restrained' increase amid global security tensions*, GLOBAL TIMES (Mar. 5, 2023, 10:09 AM), https://www.globaltimes.cn/page/202303/1286643.shtml [https://perma.cc/ZD2U-AXKC]; *but cf.* Vincent Ni, *Outspoken editor of Chinese state tabloid Global Times retires*, GUARDIAN (Dec. 16, 2021, 8:05 AM), https://www.theguardian.com/world/2021/dec/16/editor-of-chinese-state-tabloid-global-times-retires [https://perma.cc/6AED-QHTV] (cautioning that the Global Times is "owned by the ruling [Chinese] Communist party's flagship newspaper the People's Daily").

197. *GDP*, *supra* note 191. This figure does not include Hong Kong and Macau. *Id.*

198. *Can China escape deflation?*, ECONOMIST (Aug. 9, 2023), https://www.economist.com/leaders/2023/08/09/can-china-escape-deflation [https://perma.cc/6KQ8-B2RX]; *Investors must prepare for sustained higher inflation*, ECONOMIST (June 22, 2023),

Based on these results, the U.S. is three times stronger than China, but Montana is only about two percent as strong as China—so China is almost 50 times stronger than Montana if Montana were a standalone nation that still received all the benefits of federal Department of Defense funding. The asymmetry in hard power, as quantified by *The Economist*'s hard power index, is staggering. Montana's Governor has cast himself in a David versus Goliath role, announcing, "Together, we will defend the State of Montana and its people against threats to our security, privacy, and way of life."[199] However, the data make clear that this is one fight David cannot win. The federal government, tapping into the resources of all 50 states, has an absolute advantage in producing national security and related foreign policy. If anyone is to "stand up to China"—itself a unitary state with centralized power—it will have to be the United States, not the state of Montana acting solo.[200] Montana, therefore, could benefit from specializing in state-level policymaking more in accord with its traditional police powers.

Next, in terms of comparative advantage, the federal government again likely has an edge over the states in producing national security and related foreign policy, including in the cyber realm. Under absolute advantage, the question is "who can more efficiently produce a greater absolute amount of national security and related foreign policy, as measured by hard power?" Under comparative advantage, the question instead is "who can produce national security and related foreign policy (in cyberspace or otherwise) by sacrificing relatively fewer other goods, services, or public policies it could have been producing?" Put another way, "[c]omparative advantage reflects the relative opportunity cost" to an economic actor of producing good X versus good Y, where the "opportunity cost measures the trade-off between the two goods" that the economic actor could be producing.[201]

Once again, the federal government likely has a comparative advantage in producing national security and related foreign policy, including cybersecurity, compared to the states—especially the State of Montana. The federal government can already tap into the most highly-trained workforce and the

https://www.economist.com/leaders/2023/06/22/investors-must-prepare-for-sustained-higher-inflation [https://perma.cc/B4SU-UQM6].

199. Gianforte Memo, *supra* note 126, at 2.

200. *See, e.g.*, *China's Legislative System*, STATE COUNCIL, CHINA (Aug. 25, 2014, 5:13 PM), http://english.www.gov.cn/archive/china_abc/2014/08/23/content_281474982987230.htm [https://perma.cc/VD64-ZVVL] ("China is a unified multiethnic country with a unitary political system."); *cf.* Scott Moore, *The United States of China*, N.Y. TIMES (Mar. 11, 2014), https://www.nytimes.com/2014/03/12/opinion/the-united-states-of-china.html [https://perma.cc/Y29C-H3ZH] ("China is by far the world's largest and most populous country not to use a federal system of government. Beijing tightly controls all political power and major decision making.").

201. MANKIW, *supra* note 161, at 52–53; *accord* FEENSTRA & TAYLOR, *supra* note 179, at 31 (introducing the Ricardian model of comparative advantage).

latest technologies (including classified research) from across the entire nation, whereas Montana is not particularly well-known for its cyber prowess.[202] The federal government can leverage these resources to produce abundant cybersecurity while sacrificing relatively few other policy outputs. States, by contrast, would face a steep trade-off (high opportunity cost) if they were to shift from producing traditional state-level policy—such as education and policing—to producing their own foreign policy and cybersecurity. Historically, states have stayed out of such policymaking; venturing into this novel policy arena would entail paying high costs of entry and sacrificing a relatively large quantity of other policy outputs. Furthermore, in the context of TikTok, the federal government has the option of negotiating an agreement with China—or with TikTok directly (and China indirectly) on data privacy.[203] Montana lacks this option, as states may only enter into agreements or compacts with foreign nations if Congress consents, and states cannot enter into treaties full stop.[204] So, the U.S.—but not Montana—might be able to protect TikTok users' data without setting up a security apparatus that diverts monies away from other policy outputs. Montana is at a comparative disadvantage relative to the federal government here.

Around the world, cyber policy is primarily a national-level affair, and many countries are actively regulating foreign digital platforms to protect

202. The nation's (and perhaps the world's) preeminent hub for technology is in Silicon Valley, California, not Montana. Gabrielle Athanasia, *The Lessons of Silicon Valley: A World-Renowned Technology Hub*, CTR. FOR STRATEGIC & INT'L STUD. (Feb. 10, 2022), https://www.csis.org/blogs/perspectives-innovation/lessons-silicon-valley-world-renowned-technology-hub [https://perma.cc/5M2E-LPF7]. Chicago, not Montana, may well become the hub for the next generation of supercomputing, known as quantum computing. *University of Chicago joins global partnerships to advance quantum computing*, UNIV. OF CHI. (May 21, 2023), https://news.uchicago.edu/story/university-chicago-joins-global-partnerships-advance-quantum-computing [https://perma.cc/DY2H-P5P5]. Quantum computing has the potential to crack existing encryption technology, with immense national security implications. Paul Lipman, *How Quantum Computing Will Transform Cybersecurity*, FORBES (Jan. 4, 2021, 10:10 AM), https://www.forbes.com/sites/forbestechcouncil/2021/01/04/how-quantum-computing-will-transform-cybersecurity [https://perma.cc/MZ28-P4LF]. *But cf.* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 821 (2001) (explaining that state-level regulations of the Internet could be desirable because "[e]xperimentation is especially important with respect to regulation of fast-changing new technologies").

203. *See, e.g.*, Liza Lin & Raffaele Huang, *TikTok's Talks With U.S. Have an Unofficial Player: China*, WALL ST. J. (Feb. 14, 2023, 5:45 AM), https://www.wsj.com/articles/tiktoks-talks-with-u-s-have-an-unofficial-player-china-f5fec4ec [https://perma.cc/LA8U-QFYW] (reporting that TikTok has tried negotiating with U.S. officials, and "an unofficial force at the negotiating table is the Chinese government"); *see also* Drew Harwell, *TikTok and U.S. rekindle negotiations, boosting app's hopes for survival*, WASH. POST (Sept. 15, 2023, 7:00 AM), https://www.washingtonpost.com/technology/2023/09/15/tiktok-ban-us-negotiations [https://perma.cc/HJ79-CTRE] ("TikTok's China-based parent company and the U.S. government are back at the negotiating table over the fate of the immensely popular video app in the United States.").

204. U.S. CONST. art. I, § 10, cl. 1, 3. In addition, TikTok has only signaled a desire to negotiate with the U.S. federal government, not individual states. Lin & Huang, *supra* note 203.

their citizens.[205] This empirical evidence supports the notion that national governments have an absolute advantage or comparative advantage (or both) in regulating the Internet and producing cybersecurity relative to sub-national units of government.[206] Control over the Internet is a perilous, double-edged sword—it can foster democratic discourse as well as snuff out dissent.[207] Given the high stakes, authoritarian and democratic countries alike craft cyber policy at the national level; this is an assertion of "cyber sovereignty."[208]

In authoritarian countries, central governments take full control of cyber policy. China—the target of Montana's law—conducts its own cyber policy at the national level, spreading its digital influence globally through data infrastructure projects and social media platforms.[209] This is a sophisticated, top-down strategy straight from Beijing. China has a unitary political system, so individual provinces cannot supplement with their own laws or policies.[210] Russia has also "embraced digital sovereignty as official policy, even seeking to create an entirely separable Russian internet, dubbed the 'Runet.'"[211] Unlike China, Russia is a federation in which regional and local

205. .Anupam Chandera & Haochen Sun, *Sovereignty 2.0*, 55 VAND. J. TRANSNAT'L L. 283, 284–87 (2022); *see also* Ganesh Sitaraman, *The Regulation of Foreign Platforms*, 74 STAN. L. REV. 1073, 1085–86 (2022) (discussing national-level regulations of Internet companies in the U.S., EU, and PRC).

206. *Contra* Goldsmith & Sykes, *supra* note 202, at 796–97 ("[T]he benefits that a local citizenry derives from a particular regulation, and its willingness to bear the costs, will commonly differ across jurisdictions. The optimal regulatory policy will differ across jurisdictions as well. . . . This is the essence of the case for decentralized regulation, and it seems to us to have no less force in the Internet context than elsewhere.").

207. Chandera & Sun, *supra* note 205, at 287; *cf.* Anqi Wang, *Cyber Sovereignty at its Boldest: A Chinese Perspective*, 16 OHIO ST. TECH. L.J. 395, 455 (2020) ("Guided by a goal of maintaining social order, it [the Chinese government] represses online information that has the potential to trigger offline collective actions[.]").

208. *See* Wang, *supra* note 207, at 396–97 ("Cyber sovereignty has become synonymous with [nation-]states endeavoring to impose control over the intangible cyberspace within territorial borders. [National] Governments, whether democratic or nondemocratic, imbue the Internet with regulatory law and policies."); *see also* Chandera & Sun, *supra* note 205, at 294–95 ("In 2015, President Xi [of China] explained that 'respecting cyber-sovereignty' meant 'respecting each country's right to choose its own internet development path, its own internet management model, its own public policies on the internet, and to participate on an equal basis in the governance of international cyberspace—avoiding cyber-hegemony, and avoiding interference in the internal affairs of other countries.'").

209. Matthew S. Erie & Thomas Streinz, *The Beijing Effect: China's Digital Silk Road as Transnational Data Governance*, 54 N.Y.U. J. INT'L L. & POL. 1, 4–5 (2021); *cf.* NATIONAL CYBERSECURITY STRATEGY, *supra* note 150, at 3 ("[T]he PRC is exporting its vision of digital authoritarianism, striving to shape the global Internet in its image and imperiling human rights beyond its borders.").

210. STATE COUNCIL, CHINA, *supra* note 200; Moore, *supra* note 200.

211. Chandera & Sun, *supra* note 205, at 300; *accord* Gavin Wilde & Justin Sherman, *Putin's internet plan: Dependency with a veneer of sovereignty*, BROOKINGS INST. (May 11, 2022),

governments retain significant power over policing, taxing, and other matters.[212] Yet, Russia also conducts its cyber policy at the national level.[213]

In democratic countries, cybersecurity also tends to be a top-down affair. For example, Germany conducts its cyber policy primarily at a national or even a transnational level (via the European Union), although the latter is more aspiration than reality right now. When it was Germany's turn to assume the Presidency of the Council of the European Union, Germany said it would strive "to establish digital sovereignty as a leitmotiv of European digital policy . . . [to] increase our prosperity, protect our security and uphold our values."[214] Germany itself is a federal republic; like American states, "Germany's 16 states hold considerable political power."[215] These powers span "health care, education, policing, cultural policy, construction planning — each state even has its own independent domestic intelligence service."[216]

Despite reserving abundant rights for its states, Germany does not encourage states to conduct fully autonomous cyber policy. Germany's 2021 cybersecurity strategy called for "[c]ooperation between the Federation and the states."[217] The strategy explained that "the broad range of government

---

https://www.brookings.edu/articles/putins-internet-plan-dependency-with-a-veneer-of-sovereignty [https://perma.cc/6V8T-2Q4X] ("Over the past decade, the Russian government has attempted to achieve a measure of sovereignty over digital technology. By building a domestic technology industry and controls over internet traffic, the Kremlin has tried to gain independence from the Western technology industry and influence over the information available to Russian citizens.").

212. *Russia: Government and Society*, ENCYC. BRITANNICA, https://www.britannica.com/place/Russia/Government-and-society [https://perma.cc/62JA-59SN] (last visited Sept. 12, 2023); Martin Russell, *Russia's Constitutional Structure*, EUROPEAN PARLIAMENTARY RSCH. SERV. 1 (Oct. 2015), https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/569035/EPRS_IDA(2015)569035_EN.pdf [https://perma.cc/PRQ3-87LC].

213. Chandera & Sun, *supra* note 205, at 300; *see generally* Wilde & Sherman, *supra* note 211.

214. GER'S PRESIDENCY OF COUNCIL OF EUR. UNION, TOGETHER FOR EUROPE'S RECOVERY 8 (July 2020), https://www.eu2020.de/blob/2360248/e0312c50f910931819ab67f630d15b2f/06-30-pdf-programm-en-data.pdf [https://perma.cc/CWF4-D3NP]; Chandera & Sun, *supra* note 205, at 299.

215. Matthias von Hellfeld, *German federalism: How does it work?*, DW (Dec. 13, 2021), https://www.dw.com/en/german-federalism-covid-challenges-the-system/a-57042552 [https://perma.cc/K4VJ-U7GL]; *accord A constitutional body within a federal system*, Bundesrat, https://www.bundesrat.de/EN/funktionen-en/funktion-en/funktion-en-node.html [https://perma.cc/RZ58-VJ8K] (last visited Nov. 12, 2023) ("[T]he individual [German] federal state governments participate directly in the decisions taken by the national state, i.e. the Federation. This is done through the Bundesrat.").

216. Hellfeld, *supra* note 215. Germany's federalism stems from hard-won lessons from WWII. *See supra* note 215. (noting that "[T]he founding fathers of the German Federal Republic attached great importance to the rights of the states" because they were "keen to avoid a complete concentration of power in the hands of any central government").

217. FED. MINISTRY OF INTERIOR, BLDG. AND CMTY., CYBER SECURITY STRATEGY FOR GERMANY 2021, at 21 (Aug. 2021), https://www.bmi.bund.de/SharedDocs/downloads/EN/themen/it-digital-policy/cyber-security-strategy-for-germany2021.pdf?__blob=publicationFile&v=4 [https://perma.cc/EH6R-VBVT].

tasks required in cyberspace can only be carried out with a joint effort by the Federation and the states. Activities at federal and state level must be closely interlinked with the aim of ensuring cooperation and complementary efforts."[218] Hence, to the extent that German states conduct their own cyber policy, those policies should be part of a joint federal-state effort. India—another democracy with a federal structure—also conducts its cybersecurity policy at the national level; for example, following a border clash with China in 2020, India imposed a countrywide ban on 59 Chinese apps, including TikTok.[219]

Montana could contend that, even if it does not have an absolute advantage in producing national security and foreign policy, it does not fall short in terms of comparative advantage, especially in the cyber domain. Montana's TikTok ban may be characterized as a novel form of *cyber-foreign policy* that any state may produce efficiently, without sacrificing a lot of alternative policy outputs like education and policing. Unlike traditional foreign policy, cyber-foreign policy can be unilateral, instantaneous, and low-cost, as it does not require the exchange of handshakes and communiqués among dignitaries. Thus, *cyber-foreign policy* differs from *cyber diplomacy,* which still utilizes traditional tools of diplomacy to effectuate cyber policy goals.[220] The high costs that states would incur to produce traditional foreign policy fade away when they opt for cyber-foreign policy, so states can produce cyber-foreign policy efficiently and need not let the federal government specialize in this area. This is a fair contention, as the distinctive characteristics of cyber-foreign policy help to reduce the comparative disadvantage of the states. However, the federal government still has an

218. *Id.* Germany's national government is also shoring up its offensive cyber capabilities to better protect the entire country. *See* Matthias Schulze & Sven Herpig, *Germany Develops Offensive Cyber Capabilities Without A Coherent Strategy of What to Do With Them*, COUNCIL ON FOREIGN RELS. (Dec. 3, 2018, 10:00 AM), https://www.cfr.org/blog/germany-develops-offensive-cyber-capabilities-without-coherent-strategy-what-do-them [https://perma.cc/L3ZD-2FSL] ("[T]he German military (Bundeswehr) centralized its cyber capacity by consolidating around 14,000 soldiers and IT personnel into a unified cyber command (CIR), loosely modelled on U.S. Cyber Command.").

219. *Governance & Administration*, NAT'L PORTAL OF INDIA, https://www.india.gov.in/topics/governance-administration [https://perma.cc/67TY-BKRG] (last visited Sept. 12, 2023); *Why has TikTok been banned in India?*, BBC (July 3, 2020), https://www.bbc.co.uk/newsround/53266068 [https://perma.cc/B9ZN-VLZF].

220. *See* Mark B. Manantan, *Defining Cyber Diplomacy*, AUSTL. INST. OF INT'L AFFS. (Nov. 10, 2021), https://www.internationalaffairs.org.au/australianoutlook/defining-cyber-diplomacy [https://perma.cc/FEC4-4W33] ("Cyber diplomacy is broadly defined as the use of diplomatic tools and initiatives to achieve a state's national interest in cyberspace[.]"); *cf.* Tania Lațici, *Understanding the EU's approach to cyber diplomacy and cyber defence*, EUROPEAN PARLIAMENTARY RSCH. SERV. 1 (May 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651937/EPRS_BRI(2020)651937_EN.pdf [https://perma.cc/5J7J-HZGL] ("Cyber diplomacy aims to secure multilateral agreements on cyber norms, responsible state and non-state behaviour in cyberspace, and effective global digital governance.").

overwhelming absolute advantage, and the states may or may not have any comparative advantage because the federal government can also engage in efficient cyber-foreign policy of its own. Additionally, Montana would still need to redirect valuable resources to establish a surveillance apparatus to enforce its TikTok ban, whereas the federal government has the option of negotiating an agreement with China or TikTok. On balance, economic theory and empirical evidence militate in favor of the federal government specializing in national security and related foreign policy, including cyber policy.

Now, the question is, what should courts, the U.S. government, scholars, and other interested parties do with respect to SB 419 and the issues that the law implicates?

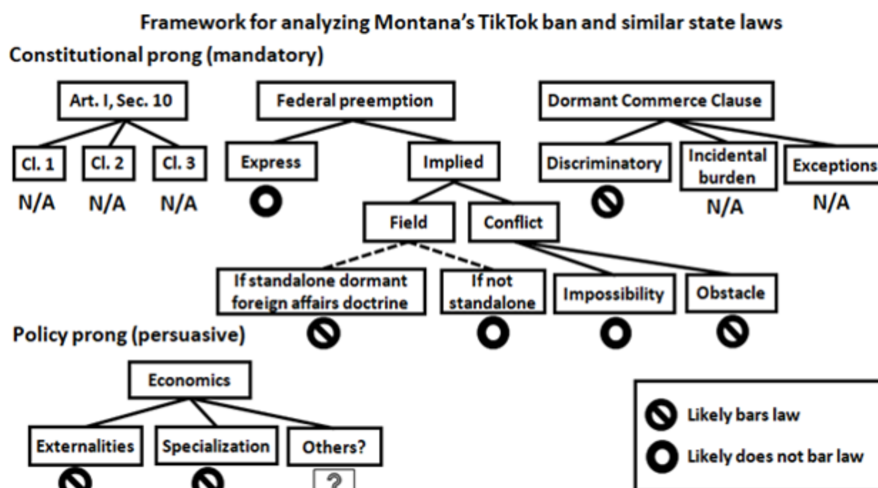
IV. PROPOSAL

First, plaintiffs challenging Montana's TikTok ban and similar state laws that might arise in the future should consider incorporating the preceding arguments. Even if plaintiffs also choose to raise First Amendment and other constitutional challenges, the federalism limits that this article presents will supply powerful ammunition for striking down SB 419 and its progeny.

Second, courts reviewing lawsuits related to Montana's TikTok ban and similar state-level bans in the future should consider applying the analytical framework presented in this article. The current version of the framework is not exhaustive, as its policy prong has ample room for further enhancement. However, the existing framework will provide a rigorous and structured process for tackling state-level TikTok bans from a federalism perspective. If a state law does not pass muster under federalism principles, the law is unconstitutional, full stop. The federalism analysis can thereby obviate the need for an additional, protracted First Amendment analysis.

Again, the framework proposed here is split into a mandatory constitutional prong and an optional, persuasive policy prong. Under the constitutional prong, courts should analyze Article I, Section 10, preemption, and the DCC. Under the policy prong, courts may consider concepts and empirical data from economics to buttress conclusions reached in the constitutional prong. Lawsuits similar to the one involving SB 419 will likely become more common as the great-power competition between China and the U.S. heats up and state-level officials seek to score political points by appearing tough on China. Such actions not only risk inflaming a new Red Scare-cum-Yellow Peril, they might also run afoul of constitutional doctrine and public policy.

The following diagram depicts the full analytical framework, as applied to the Montanan TikTok ban; the diagram also serves as a summary of the conclusions in this article.



Third, the Supreme Court should consider confirming whether *Zschernig* established a standalone dormant foreign affairs doctrine, or whether *Zschernig* merely represented a subset of implied field preemption. This unresolved issue is reflected in the dashed lines under field preemption in the previous diagram. A standalone dormant foreign affairs doctrine would provide an elegant tool for analyzing cases like the one discussed here, which involves state-level foreign policy. In the meantime, *Zschernig* is still good law, and distilling a dormant foreign affairs doctrine from *Zschernig* is reasonable. Hence, lower courts can continue to cite *Zschernig* and leverage the dormant foreign affairs doctrine as one facet of their analysis.[221]

Fourth, additional interdisciplinary scholarship in this area could be fruitful. This article applied economic theories and empirical data to view constitutional law doctrines from a different angle. The two topics discussed here—externalities and specialization—are by no means exhaustive. Other foundational concepts from economics which were generally known in the Founding Era could be worth exploring in future research on state-level foreign policy. One such concept is public goods, which includes the provisioning of national defense.

221. *Compare* Cassirer v. Thyssen-Bornemisza Collection Found., 737 F.3d 613, 617, 619 (2013) (applying *Zschernig* to find that a California law setting a statute of limitations for recovering fine art, including those taken by the Nazis, was "silent on matters of foreign affairs" and did not "establish [the State's] own foreign policy") *with* Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1069, 1077 (2012) (applying *Zschernig* to find that another California law giving courts jurisdiction over insurance claims brought by "Armenian Genocide victim[s]" was unconstitutional because it "intrudes on the federal government's exclusive power to conduct and regulate foreign affairs").

CONCLUSION

Using the analytical framework that this article suggests, Montana's TikTok ban (SB 419) should fall as a matter of law and policy.

The analytical framework begins with a mandatory constitutional prong rooted in black letter constitutional law. First, SB 419 does not appear to trigger the federalism limits in Article I, Section 10, so this part of the Constitution likely does not bar SB 419. Second, SB 419 is likely preempted by federal law. Preemption comes in many forms, and SB 419's main weakness lies in obstacle preemption, a species of implied conflict preemption. Furthermore, if *Zschernig* established a standalone affairs doctrine, this doctrine would bar SB 419 as well. Finally, SB 419 likely violates the DCC because SB 419 facially discriminates against an out-of-state economic actor and cannot survive heightened scrutiny. The analytical framework also features an optional policy prong that supplies persuasive arguments to supplement the mandatory constitutional prong. The policy prong is open to interdisciplinary ideas from economics. This article discussed two pertinent concepts from economics—externalities and specialization—that also favor striking down SB 419.

Ultimately, this article supports the notion that geopolitics is not an appropriate playground for sub-national units of government in America. In spite of their police powers, states should not be acting as mini-nations and governors should not be acting as mini-presidents as they did under the scrapped Articles of Confederation.[222] Perhaps when they passed SB 419, Montana's Governor and state legislators envisioned themselves modern-day Spartans; their land and cyberspace, a new Thermopylae.[223] Drawing

---

222. *See Policies and Problems of the Confederation Government*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/new-nation-1783-1815/policies-and-problems-of-the-confederation-government [https://perma.cc/JZ7C-RAX3] (last visited Sept. 12, 2023) (explaining that the Articles of Confederation "created a loose alliance of the states," each of which was "sovereign").

223. *See Thermopylae*, ENCYC. BRITANNICA, https://www.britannica.com/place/Thermopylae [https://perma.cc/ZPU2-KGC8] (last visited Sept. 12, 2023) (explaining the Battle of Thermopylae, in which "Leonidas remained to delay the Persians with 300 Spartans . . . . This battle became celebrated in history and literature as an example of heroic resistance against great odds."). Although Governor Gianforte has not publicly compared himself to Leonidas, the story of the Spartan king repelling a powerful foreign foe is popular on the Trumpian right. *See* Myke Cole, *The Sparta Fetish Is a Cultural Cancer*, NEW REPUBLIC: THE SOAPBOX (Aug. 1, 2019), https://newrepublic.com/article/154563/sparta-myth-rise-fascism-trumpism [https://perma.cc/JYN3-NQFW] ("[T]he Spartan myth is a powerful catalyst, both for racist vanguards and the political machines that cater to them. Laconophilia [admiration for Sparta] alone cannot fully explain the Trumpist vision of a sealed, homogenized, and militarized America, but it explains a lot."). Perhaps channeling his inner hoplite, the Trump-endorsed Governor Gianforte has been known to use physical force to get his way in politics; he allegedly body-slammed a reporter in 2017 and broke the reporter's glasses. Julia Carrie Wong & Sam Levin, *Republican candidate charged with assault after 'body-slamming' Guardian reporter*, GUARDIAN (May 25, 2017, 6:07 AM),

lessons from this stretch of antiquity, Alexander Hamilton cautioned, "Sparta, Athens, Rome, and Carthage were all republics."[224] Individually, however, they were not powerful enough to safeguard their liberty, for "[h]ad Greece . . . been united by a stricter confederation, and persevered in her union, she would never have worn the chains of Macedon; and might have proved a barrier to the vast projects of Rome."[225] History provides valuable lessons, lessons that the Framers understood well and embedded into America's constitutional architecture.

The Constitution intentionally restricts the ability of states to engage in foreign policy—whether to promote their in-state interests or to further their politicians' personal ambitions. These restrictions matter as much today as ever amid rapidly advancing technology and deteriorating relations between the U.S. and China. War with the PRC in this century is not inevitable, and this article argues that any such decision on war and peace should be a national decision.[226] At this critical juncture, America should speak with one voice to the outside world. That would be good law. It would be good policy. And, it would honor the Constitution.

https://www.theguardian.com/us-news/2017/may/24/greg-gianforte-bodyslams-reporter-ben-jacobs-montana [https://perma.cc/N5QD-3TEZ].

224. THE FEDERALIST NO. 6 (Alexander Hamilton).

225. THE FEDERALIST NO. 18 (Alexander Hamilton).

226. *See* Graham Allison, *The Thucydides Trap: Are the U.S. and China Headed for War?*, ATLANTIC (Sept. 24, 2015), https://www.theatlantic.com/international/archive/2015/09/united-states-china-war-thucydides-trap/406756 [https://perma.cc/7ND3-ZLZY] (explaining that war between a rising power and an established power is not inevitable; nations can escape this "Thucydides Trap," but the historical track record shows that more often than not, war ensues between the rising and established powers); *see also* GRAHAM ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES'S TRAP? viii (2017) ("[W]ar between the US and China is not inevitable. Indeed, [the ancient Greek historian] Thucydides would agree that neither was war between Athens and Sparta.").

***