

CAUGHT BETWEEN SUPERPOWERS:

ALASKA'S ECONOMIC RELATIONSHIP WITH CHINA AMIDST THE NEW COLD WAR

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ABSTRACT

In recent years, Alaska has developed an increasingly robust economic relationship with China. China is the largest foreign buyer of Alaskan goods and China continues to invest in Alaska and promote Alaskan tourism. Meanwhile, the U.S. federal government's relationship with China has deteriorated over concerns that China poses a danger to U.S. national security. As the U.S. federal government continues to scrutinize Chinese investment and trade with the United States, Alaska's economic relationship with China increasingly hangs in the balance. Alaska's relationship with China thus joins a long history of economic ties between states and foreign nations that pose conflicts of interest for the U.S. federal government. Beginning with the ratification of the U.S. Constitution and leading up to the present, the states have staked out a role as advocates on behalf of their citizens in promoting economic ties with foreign nations. This Note argues that the anti-commandeering doctrine provides constitutional protection for Alaska's promotion of its economic relationship with China from interference by the U.S. federal government. While the federal government may itself regulate commerce between Alaska and China, the federal government may not muzzle the Alaska state government and prevent it from promoting commerce with China. While this state of play might seem like a hollow victory for Alaska, the anti-commandeering doctrine requires the federal government to take action itself – rather than coerce Alaska to take action – and thus forces the federal government to expend greater political capital in passing a law or regulation. The anti-commandeering doctrine thus properly apportions political accountability among the state and federal governments and makes federal intervention less likely.

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I. INTRODUCTION

On June 6, 2018, then-Governor of Alaska Bill Walker celebrated a successful trade mission to China, where delegates from Alaska attended more than twenty-five meetings across China over ten days.¹ Governor Walker stated,

I was honored to lead this trade mission and watch so many Alaskan leaders work to grow their businesses and bring jobs home. Perhaps what impressed me the most was the consistent push to build an Alaska brand that makes the world realize the quality of our fresh seafood, the natural beauty of our state, and our many opportunities for economic growth.²

This trade mission was part of Governor Walker's "Opportunity Alaska" initiative, led by Alaska's Office of International Trade, which seeks to grow Alaska's export and investment relationship with its largest trading partner, China.³ Governor Walker stated,

Throughout 2017, the State of Alaska made significant inroads with [Chinese] companies and government officials, including meeting with President Xi Jinping and Cabinet-level officials.⁴

Alaska's relationship with China, however, comes with complications. On August 16, 2018, only two months after the Alaska delegation's visit to China, cybersecurity firm Recorded Future⁵ released a report detailing a Chinese government-linked hacking group's attempts to penetrate computer servers belonging to the Alaska state government.⁶

1. *Opportunity Alaska: China Trade Mission Delegates Return Home*, BILL WALKER, OFFICE OF THE GOVERNOR (June 6, 2018), <https://gov.alaska.gov/newsroom/2018/06/opportunity-alaska-china-trade-mission-delegates-return-home/> [<https://web.archive.org/web/20181018063905/https://gov.alaska.gov/newsroom/2018/06/opportunity-alaska-china-trade-mission-delegates-return-home/>].

2. *Id.*

3. *Governor Bill Walker: Opportunity Alaska China Trade Mission 2018*, BILL WALKER, OFFICE OF THE GOVERNOR, <https://gov.alaska.gov/services/office-of-international-trade/alaska-china-trade-mission/> [<https://web.archive.org/web/20181020084928/https://gov.alaska.gov/services/office-of-international-trade/alaska-china-trade-mission/>] (last visited Dec. 16, 2018).

4. *Id.*

5. Recorded Future is a private cyber threat intelligence firm that uses proprietary software to gather and analyze vast amounts of data to provide insights about cyber threats to their clients. *Threat Intelligence Machine*, RECORDED FUTURE, <https://www.recordedfuture.com/technology/> (last visited Dec. 15, 2018).

6. Christopher Bing & Jack Stubbs, *Chinese Hackers Targeted U.S. Firms, Government After Trade Mission: Researchers*, REUTERS (Aug. 16, 2018, 8:06 AM), <https://www.reuters.com/article/us-usa-china-cyber/chinese-hackers->

According to Recorded Future, these attempts occurred in the weeks before and after Governor Walker's trade mission to China.⁷ Recorded Future submitted their report to the FBI, but the Alaska Governor's Office seemed unconcerned: "[E]veryday [sic], the State of Alaska, like most state governments, has anonymous activity on the perimeter of our networks that amounts to someone checking if the door is locked. The activity referenced here is not unique."⁸

This incident nevertheless underscores the complex and, at times, adversarial relationship between China and the United States and the conflicts of interest that can arise between the U.S. federal government and the states. Alaska may decide that some Chinese hacking is acceptable if challenging it would threaten the state's robust economic relationship with China. The U.S. federal government, however, may take the position that Chinese hacking is an unacceptable national security threat subject to criminal indictment⁹ and diplomatic repercussions.¹⁰ Indeed, recent trends in U.S.-China relations have stoked tensions between the two superpowers with increased Chinese hacking of American entities, increased economic espionage by Chinese agents in the United States, and a "trade war" involving tariffs and export controls.¹¹

On a broader strategic level, China has been acquiring American technology and other American businesses at a rapid rate to advance its domestic industries as part of its "Made in China 2025" plan.¹² There is also a growing consensus that China is using trade and investment to "manipulate financial networks, political processes, and public debate" in the United States and elsewhere.¹³ Thus, while Alaska and its citizens may welcome the money and jobs that economic engagement with China

targeted-u-s-firms-govt-after-trade-mission-researchers-idUSKBN1L11D2.

Recorded Future uncovered these attempts to hack Alaska state government servers as part of Recorded Future's own research into Chinese government hacking. Sanil Chohan et al., *Chinese Cyberespionage Originating from Tsinghua University Infrastructure*, RECORDED FUTURE (Aug. 16, 2018), <https://www.recordfuture.com/chinese-cyberespionage-operations/>. Recorded Future assessed that China's attempts to hack Alaska government servers after the trade delegation's visit "was likely an attempt to gain insight into the Alaskan perspective on the trip and strategic advantage in the post-visit negotiations." *Id.* Recorded Future found that China had also attempted to conduct cyberespionage on organizations in Kenya, Brazil, and Mongolia related to potential Chinese investment in those countries. *Id.*

7. *Id.*

8. *Id.*

9. See *infra* Section II.B.

10. See *infra* Section II.B.

11. See *infra* Section II.B.

12. Charles Edel, *The China Challenge*, THE AMERICAN INTEREST (Aug. 24, 2018), <https://www.the-american-interest.com/2018/08/24/the-china-challenge/>.

13. *Id.*

brings, the U.S. federal government has legitimate reasons to worry about Alaska's growing relationship with China.

Alaska's growing relationship with China is by no means the first to raise concerns about conflicts of interest with the U.S. federal government, nor is it a state's first foray into foreign affairs.¹⁴ In fact, leading up to the U.S. Constitution's ratification, the colonies were extensively involved in foreign commerce and continued to engage in foreign commerce for some time after ratification.¹⁵ Over the course of the 19th century, the Supreme Court, the President, and Congress fought to wrest control of foreign commerce from the states and, by World War II and the Cold War, foreign commerce was largely within the exclusive realm of the federal government.¹⁶

Nevertheless, since North Carolina Governor Luther Hodges's trade mission to Europe in 1959, states have begun to reclaim their roles in foreign commerce.¹⁷ Over the last sixty years, states have increasingly entered into cooperative agreements with foreign nations and sub-national units, adopted international standards, led trade delegations, opened overseas offices, pursued foreign direct investment, attracted multinational corporations, encouraged the export of goods overseas, and established sister-city and other relationships with foreign cities, among other functions.¹⁸

While the states have recently become more active in foreign commerce, the federal government nonetheless retains several constitutional and statutory powers to control foreign commerce.¹⁹ Indeed, there is a robust debate as to the states' proper place in foreign commerce and the extent to which the states may constitutionally engage in foreign relations if at all.²⁰ Some have argued that the Constitution entirely excludes the states from participation in foreign commerce and

14. See generally EARL H. FRY, *THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS* (1998).

15. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1198-1205 (2000).

16. Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1227-28 (1999).

17. Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 749 (2010).

18. MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM* 38-45 (2016).

19. See *infra* Section IV.A.

20. See *id.*; see generally Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47 (2016); Sarah H. Cleveland, *Crosby and the 'One-Voice' Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); Hollis, *supra* note 17; Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Affairs Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Spiro, *supra* note 16; Swaine, *supra* note 15.

foreign affairs.²¹ Other scholars point out, however, that many of the states' core regulatory activities may implicate foreign commerce.²² These scholars argue that while the states may participate in foreign commerce, Congress may exclude the states from foreign commerce through preemption.²³ Nevertheless, scholars generally agree that state participation in foreign commerce, if allowed at all, is subject to federal regulation.²⁴

Federal regulation of state participation in foreign commerce may, however, conflict with the anti-commandeering doctrine. First developed in *New York v. United States*²⁵ and *Printz v. United States*,²⁶ the anti-commandeering doctrine dictates that "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."²⁷ In 2018, the Court reaffirmed this doctrine, explaining that Congress may not issue "a direct command to the States."²⁸ The anti-commandeering doctrine protects the traditional balance of power between the federal government and the states, ensuring that each level of government is held accountable for its actions.²⁹

This Note will argue that, while Congress may regulate foreign commerce itself under the Foreign Commerce Clause, the anti-commandeering doctrine prevents Congress from prohibiting the Alaska state government's promotion of its economic relationship with China.³⁰

21. See, e.g., *Holmes v. Jennison*, 39 U.S. 540, 572 (1840) (Taney, C.J., plurality opinion) ("[T]he framers of the Constitution . . . anxiously desired to cut off all connection or communication between a state and a foreign power . . .").

22. See, e.g., ERNEST A. YOUNG, *FOREIGN AFFAIRS FEDERALISM IN THE UNITED STATES* 4-11 (2018) (on file with author) (describing the influence that state policies on taxation, criminal law enforcement, and immigration law can have on foreign affairs).

23. See *Cleveland*, *supra* note 20, at 975.

24. As two scholars point out:

No one questions . . . Congress's authority to preempt state initiatives by legislating within the scope of its Article I powers, including those foreign affairs powers it shares with the president. Nor does anyone question executive authority to preempt state measures by the exercise of those constitutional powers vested exclusively in the president by Article II.

GLENNON & SLOANE, *supra* note 18, at xxi.

25. 505 U.S. 144 (1992).

26. 521 U.S. 898 (1997).

27. *New York*, 505 U.S. at 161.

28. *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018). *Murphy* was the first major Supreme Court ruling to rely on the anti-commandeering doctrine since *Reno v. Condon*, 528 U.S. 141 (2000).

29. *Id.* at 1478.

30. This Note defines Alaska's economic relationship with China to include conducting trade missions to China, promoting Alaska exports to China, and

To do so would force Alaska to implement the federal government's foreign policy towards China in violation of the anti-commandeering doctrine. This argument stakes out a constitutionally protected role for states in foreign commerce based on a careful study of the historical and current roles of states in foreign commerce, which have largely been ignored by federalism scholars,³¹ and a recently reaffirmed anti-commandeering doctrine.³²

This Note will proceed in three parts. Section II explains Alaska's economic relationship with China and the conflicts of interest it poses with the U.S. federal government. Section III describes the historical background of the states' participation in foreign commerce against which the China-Alaska relationship is set. Section IV argues that the anti-commandeering doctrine protects Alaska's promotion of its economic relationship with China from the U.S. federal government's power to regulate foreign commerce. Because the Trump administration's relationship with China is constantly fluctuating,³³ an examination of the political and legal status of Alaska's own relationship with China is even more important.

II. THE CHINA CONNECTION: ECONOMIC ADVANTAGES AND NATIONAL SECURITY THREATS

Alaska and China have developed a robust trade, investment, and tourism relationship.³⁴ This relationship is complicated by the U.S. federal government's increasing regulation of Chinese trade and investment as a response to perceived Chinese threats to U.S. national security. This

promoting Chinese investment and tourism in Alaska.

31. See, e.g., Baasch & Prakash, *supra* note 20, at 50 ("The states should stand deaf and mute in the foreign arena because they lack the expertise and knowledge necessary to engage in that arena. States lack a cadre of resident international specialists (State Department bureaucrats) and do not have the benefit of semi-permanent officials stationed abroad (ambassadors and their extensive retinue of experts)"). As this Note explains, the states do in fact have domestic and overseas offices and officials dedicated to foreign commerce. See *infra* Section III.C.

32. *Murphy*, 138 S. Ct. at 1461.

33. Matthew Lee & Rob Gillies, *US, Canada Look to Ease Strains Amid 3-Way Spat with China*, AP NEWS (Dec. 14, 2018), <https://www.apnews.com/c8cab06b7fd94498a7b8b06b2c8ab8a7>; Joe McDonald, *China Suspends Tariff Hikes on U.S. Cars, Auto Parts*, AP NEWS (Dec. 14, 2018), <https://www.apnews.com/87669a6f4b70486fb48c3f5134d18d72>; Christopher Bing, *U.S. to Reveal Charges Against Chinese Hackers: Sources*, REUTERS (Dec. 7, 2018, 3:49 PM), <https://www.reuters.com/article/us-usa-cyber-china/u-s-to-reveal-charges-against-chinese-hackers-sources-idUSKBN1O62D8>.

34. See THE US-CHINA BUSINESS COUNCIL, ALASKA'S EXPORTS TO CHINA 1 (2018), https://www.uschina.org/sites/default/files/uscbc_alaska_state_report_2018_0.pdf.

Section will first discuss Alaska's economic relationship with China, including the Alaska state government's efforts to promote the state's economic relationship with China. This Section will then discuss Chinese threats to U.S. national security and how the federal government has responded by regulating Chinese trade and investment.

A. Alaska's Economic Relationship with China

China was Alaska's largest trading partner in 2017, during which Alaska exported \$1.3 billion worth of goods and \$135 million worth of services to China.³⁵ Alaska's exports to China represented over a quarter of Alaska's overall exports in 2017 and included \$860 million of marine products, \$356 million of mineral ore, \$49 million of oil and gas, and \$48 million of forest products, among other exports.³⁶ By comparison, Alaska exported \$813 million of goods to Japan, \$705 million of goods to Canada, \$669 million of goods to South Korea, and \$182 million of goods to Germany.³⁷ Since 2008, Alaska's exports to China have grown 81%, while Alaska's collective exports to the rest of the world grew an average of only 28%.³⁸ In 2016, Alaskan exports to China supported 6100 American jobs.³⁹

The Alaska state government has gone to great lengths to promote its economic relationship with China, including exports, investment, and tourism. On April 8, 2017, Chinese President Xi Jinping stopped in Anchorage to meet with Alaska Governor Bill Walker on his way home from meeting with U.S. President Donald Trump at Mar-a-Lago in Florida.⁴⁰ In Anchorage, the two leaders discussed Alaskan exports, including seafood and oil and gas, Alaska's service as a hub for air cargo, Chinese tourism in Alaska, and a liquefied natural gas export project that would connect Alaska and China.⁴¹ Following the meeting, Governor Walker stated that "[President Xi] felt that as a result of his coming to Alaska, we will see an uptick of tourism from China."⁴² In 2016, Alaska received approximately 1.2 million Chinese tourists, many of whom

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Jeannette Lee Falsey, *A Surprise Guest: Chinese President Makes Anchorage Stopover, Meets Gov. Walker and Takes in Some Sights*, ANCHORAGE DAILY NEWS (Apr. 8, 2017), <https://www.adn.com/alaska-news/2017/04/07/chinese-president-makes-surprise-visit-to-alaska-following-summit-with-trump/>.

41. Jeannette Lee Falsey, *Gov. Walker Breaks Down His Alaska Meeting with Chinese President Xi Jinping*, ANCHORAGE DAILY NEWS (Apr. 9, 2017), <https://www.adn.com/alaska-news/2017/04/08/gov-walker-breaks-down-his-meeting-with-chinese-president-xi-jinping/>.

42. *Id.*

traveled to Fairbanks to view the aurora borealis.⁴³ On May 25, 2018, Alaska tourism promoter Explore Fairbanks announced that it had signed a deal with Chinese tourism company East West Marketing Corporation to promote Alaskan tourism in China, including establishing an Alaskan presence on Chinese social media.⁴⁴

President Xi's visit to Anchorage led to Governor Walker's 2017 trade mission to China.⁴⁵ The trade mission included Governor Walker and other state officials, as well as representatives of the seafood industry, tourism industry, local economic development organizations, a baby food company, and a craft brewery, among other entities.⁴⁶ The delegation's meetings took place in Chengdu, Beijing, Shanghai, and Hangzhou, where delegates met with businesses including Chinese e-commerce giants JD.com and Alibaba Group.⁴⁷ The delegates also sought to establish direct flights between Alaska and China and even met with China's Sports Minister to discuss having Chinese Olympic athletes train in Alaska.⁴⁸ The Chinese downhill and cross-country ski teams and ice hockey team will all participate in year-long training in Alaska to prepare for the 2022 Winter Olympics.⁴⁹

Another major topic discussed during Governor Walker's trade mission to China was the Alaska Liquefied Natural Gas (LNG) Project.⁵⁰ On November 9, 2017, Governor Walker signed a joint development agreement with Chinese energy company Sinopec, China's sovereign wealth fund China Investment Corporation, and the Bank of China, all owned by the Chinese government.⁵¹ The joint development agreement is a nonbinding agreement to work towards developing a new pipeline in Alaska to carry natural gas from Prudhoe Bay to a liquefaction plant in

43. Wang Guan, *Alaska Eyes Stronger Engagement with China on Tourism, Gas*, CGTN (Sept. 18, 2017, 10:30 AM), https://news.cgtn.com/news/78677a4d35557a6333566d54/share_p.html.

44. Elwood Brehmer, *Explore Fairbanks Signs Deal on Gov's China Trade Trip*, ALASKA J. OF COM. (May 30, 2018, 10:24 AM), <http://www.alaskajournal.com/2018-05-30/explore-fairbanks-signs-deal-govs-china-trade-trip#.W8jkFxtKiUk>.

45. *Id.*

46. *Alaska Businesses Selected for Opportunity Alaska: China Trade Mission*, BILL WALKER, OFFICE OF THE GOVERNOR (Apr. 18, 2018), <https://gov.alaska.gov/newsroom/2018/04/alaska-businesses-selected-for-opportunity-alaska-china-trade-mission/> [<https://web.archive.org/web/20181020183936/https://gov.alaska.gov/newsroom/2018/04/alaska-businesses-selected-for-opportunity-alaska-china-trade-mission/>].

47. BILL WALKER, OFFICE OF THE GOVERNOR, *supra* note 1.

48. *Id.*

49. *Id.*

50. Falsey, *supra* note 41.

51. Elwood Brehmer, *AK LNG Leaders Navigate Trade Battle with China*, ALASKA J. OF COM. (July 18, 2018, 10:29 AM), <http://www.alaskajournal.com/2018-07-18/ak-lng-leaders-navigate-trade-battle-china#.W8jsYXtKiUk>.

southern Alaska, from which the LNG could be shipped overseas.⁵² Under the joint development agreement, Sinopec would receive 75% of the LNG from the new pipeline in exchange for the Chinese Investment Corporation and the Bank of China financing the \$43 billion pipeline and liquefaction plant project.⁵³ While trade relations with China and the U.S. federal government have deteriorated since the original joint development agreement was signed in 2017, the Alaska Gasline Development Corporation and three Chinese entities signed a supplemental agreement on October 2, 2018, reaffirming their “willingness to advance” the Alaska LNG Project.⁵⁴

B. The Threat from China to U.S. National Security

As China and Alaska forge ahead in strengthening their economic bond, the relationship between China and the U.S. federal government continues to deteriorate.⁵⁵ As discussed in the Introduction, Recorded Future reported that Chinese government-linked hackers probed Alaska state-owned computer servers for vulnerabilities following Governor Walker’s trade mission to China in 2017.⁵⁶ In 2015, then-U.S. president Barack Obama and China’s President Xi reached a verbal agreement that, among other things, China would stop hacking U.S. companies to conduct economic espionage.⁵⁷ Although the “Obama-Xi Agreement” did not stop all Chinese hacking, “we witnessed about [a] 90% drop in Chinese nation-state sponsored intrusions against [the] Western

52. Sean Maguire, *BP Alaska Signs onto the Alaska LNG Project in a “Historic Milestone”*, KTUU (Sept. 10, 2018, 12:18 PM), <https://www.ktuu.com/content/news/Gas-line-corporation-BP-make-progress-on-Alaska-gas-deal-481981671.html>.

53. Ashley Feng & Sagatom Saha, *China’s Arctic Ambitions in Alaska*, DIPLOMAT (Apr. 20, 2018), <https://thediplomat.com/2018/04/chinas-arctic-ambitions-in-alaska/>.

54. *China and Alaska Reaffirm Willingness to Advance Alaska LNG*, ALASKA GASLINE DEV. CORP. (Oct. 2, 2018), <http://agdc.us/wp-content/uploads/2018/10/Press-Release-China-and-Alaska-Reaffirm-Willingness-to-Advance-Alaska-LNG.pdf>. The Alaska Gasline Development Corporation has since reaffirmed its intent to carry out the joint development agreement in the wake of the latest friction between Washington and Beijing. Elwood Brehmer, *Tariff Pause Doesn’t Alter Talks with China on Alaska LNG, Officials Say*, ANCHORAGE DAILY NEWS (Dec. 5, 2018), <https://www.adn.com/business-economy/2018/12/05/tariff-pause-doesnt-alter-talks-with-china-on-alaska-lng-officials-say/>.

55. Julian Borger & Lily Kuo, *US-China Tensions Soar as ‘New Cold War’ Heats Up*, GUARDIAN (Oct. 16, 2018, 6:03 PM), <https://www.theguardian.com/world/2018/oct/16/us-china-new-cold-war-tensions>.

56. Bing & Stubbs, *supra* note 6.

57. Robert Farley, *Did the Obama-Xi Cyber Agreement Work?*, DIPLOMAT (Aug. 11, 2018), <https://thediplomat.com/2018/08/did-the-obama-xi-cyber-agreement-work/>.

commercial sector,” a few months after they reached the agreement.⁵⁸ On October 10, 2018, however, Dmitri Alperovitch, co-founder of preeminent cybersecurity firm CrowdStrike,⁵⁹ announced on Twitter that “China is back (after a big dropoff in activity in 2016) to being the predominant nation-state intrusion threat in terms of volume of activity against Western industry.”⁶⁰

Alperovitch’s statement followed the FBI’s arrest of Yanjun Xu, a Chinese intelligence officer working for China’s Ministry of State Security.⁶¹ Yanjun Xu was extradited from Belgium to the United States on charges of economic espionage and theft of trade secrets from GE Aviation and other American aerospace companies.⁶² While China’s Ministry of State Security currently leads China’s international hacking efforts,⁶³ the Department of Justice alleges that Xu targeted experts who worked at aerospace companies around the world and recruited these experts to travel to China to conduct economic espionage and steal trade secrets.⁶⁴ This case joins countless other cases of Chinese operatives conducting economic espionage of U.S. companies.⁶⁵ As Assistant Attorney General for the Department of Justice’s National Security Division John Demers noted in announcing Xu’s arrest, “[t]his case is not an isolated incident. It is part of an overall economic policy of developing China at American expense,” often through illegal means.⁶⁶

Trade and investment relations between China and the U.S. federal government have become a battleground over the balance of trade, trade in specific goods, and investment in specific businesses. As part of President Trump’s “trade war,” the federal government has imposed 25% tariffs on \$250 billion worth of imports from China, which amount to about half of the United States’ overall imports from China.⁶⁷ The Trump

58. Borger & Kuo, *supra* note 55.

59. CrowdStrike, like Recorded Future, is a private firm providing cyber threat intelligence to its clients, as well as conducting its own research into cyber threat actors, such as China. CROWDSTRIKE, <https://www.crowdstrike.com/> (last visited Dec. 14, 2018).

60. Dmitri Alperovitch (@DALperovitch), TWITTER (Oct. 10, 2018, 11:54 AM), <https://twitter.com/DALperovitch/status/1050097354869788673>.

61. *Chinese Intelligence Officer Charged with Economic Espionage Involving Theft of Trade Secrets from Leading U.S. Aviation Companies*, DEP’T OF JUSTICE (Oct. 10, 2018), <https://www.justice.gov/opa/pr/chinese-intelligence-officer-charged-economic-espionage-involving-theft-trade-secrets-leading>.

62. *Id.*

63. Alperovitch, *supra* note 60.

64. DEP’T OF JUSTICE, *supra* note 61.

65. *Id.*

66. *Id.*

67. *Trump Slaps Tariffs on US\$200b of Chinese Goods in Sharp Escalation of Trade War*, STRAITS TIMES (Sept. 28, 2018, 1:15 PM), <https://www.straitstimes.com/>

administration has further threatened to impose tariffs on another \$267 billion worth of Chinese imports.⁶⁸ China, by contrast, has imposed 25% tariffs on \$110 billion worth of U.S. goods, out of the \$130 billion worth of goods China imports from the United States.⁶⁹ China has also filed a complaint with the World Trade Organization protesting the U.S. tariffs.⁷⁰ Alaska itself has been caught up in the trade war, with China imposing a 25% tariff on Pacific Northwest seafood.⁷¹ This could have “devastating” impacts on Alaska’s largest export to its largest trading partner.⁷²

With specific exports to and investments from China, the federal government has been especially concerned with high technology developed in the United States. On the export side, the federal government recently imposed export controls on forty-four Chinese companies, allowing the federal government to control whether certain technology is exported to those companies.⁷³ U.S. Trade Representative Robert Lighthizer explained that “China’s government is aggressively working to undermine America’s hi-tech industries and our economic leadership through unfair trade practices and industrial policies like Made in China 2025.”⁷⁴

On the investment side, U.S. policymakers have been concerned that “China is weaponizing its investment in the U.S. to exploit national security vulnerabilities, including the back-door transfer of dual-use U.S. technology and related know-how, aiding China’s military modernization and weakening the U.S. defense industrial base.”⁷⁵ As of 2017, China has invested in 7–10% of American startup companies

world/united-states/trump-announces-10-tariffs-on-us200b-in-chinese-goods-from-sept-24.

68. *Id.*

69. *Id.*

70. *Donald Trump’s Many Trade Wars: A Summary*, STRAITS TIMES (Sept. 18, 2018, 8:33 AM), <https://www.straitstimes.com/world/united-states/donald-trumps-many-trade-wars-a-summary>.

71. Yereth Rosen, *Alaska Seafood Industry Braces for China Tariff Pain*, REUTERS (Aug. 12, 2018, 7:00 AM), <https://www.reuters.com/article/us-usa-trade-china-alaska/alaska-seafood-industry-braces-for-china-tariff-pain-idUSKBN1KX0CQ>.

72. *Id.* (“‘This isn’t an easily replaced market,’ [Frances Leach, executive director of Alaska’s largest commercial fishing trade group] said, ‘[w]hat’s going to happen is China is just going to stop buying Alaska fish.’”).

73. Sarah Zheng, *U.S. Slaps Export Controls on Dozens of Chinese Firms Over ‘Threat to National Security’ as Trade Tensions Escalate*, SOUTH CHINA MORNING POST (Aug. 2, 2018, 1:10 PM), <https://www.scmp.com/news/china/diplomacy-defence/article/2157932/us-slaps-export-controls-dozens-chinese-firms-over>.

74. *Id.*

75. Jonathan Wakely & Andrew Indorf, *Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment*, 9 HARV. NAT’L SEC. L.J. 1, 26 (2018), http://harvardnsj.org/wp-content/uploads/2018/06/WakelyIndorf_CFIUS_05.28.18.pdf.

through venture capital financing and is specifically investing in startups expected to be “foundational to future innovation in the U.S.: artificial intelligence, autonomous vehicles, augmented/virtual reality, robotics and blockchain technology.”⁷⁶ These concerns drove Congress in August 2018 to pass the Foreign Investment Risk Review Modernization Act, which will strengthen the Committee on Foreign Investment in the United States (CFIUS).⁷⁷

Alaska’s economic relationship with China is thus set against this increasingly contentious relationship between the U.S. federal government and China. While the federal government has not yet intervened to block or regulate any of Alaska’s direct relations with the Chinese government, the U.S. has begun to do so in Israel, where the federal government has pressured the Israeli government to curtail its economic relationship with China based on national security concerns.⁷⁸ Like the China-Alaska relationship, Israel’s mutually beneficial relationship with China has grown in recent years.⁷⁹ Further, like Alaska, Israel has embraced increased Chinese investments in local industries and increased Israeli exports to China.⁸⁰ While Israel is not a state like Alaska, this situation nonetheless evidences the U.S. federal government’s

76. MICHAEL BROWN & PAVNEET SINGH, DEFENSE INNOVATION UNIT EXPERIMENTAL, CHINA’S TECHNOLOGY TRANSFER STRATEGY: HOW CHINESE INVESTMENTS IN EMERGING TECHNOLOGY ENABLE A STRATEGIC COMPETITOR TO ACCESS THE CROWN JEWELS OF U.S. INNOVATION 2 (2018), [https://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_\(1\).pdf](https://admin.govexec.com/media/diux_chinatechnologytransferstudy_jan_2018_(1).pdf).

77. Mercy A. Kuo, *CFIUS and China: The FIRRMA Factor*, DIPLOMAT (Oct. 17, 2018), <https://thediplomat.com/2018/10/cfius-and-china-the-firma-factor/>. CFIUS is an interagency group chaired by the Secretary of the Treasury which is empowered to block or mitigate corporate transactions that may lead to foreign control of American businesses implicating U.S. national security. Wakely & Indorf, *supra* note 75, at 7. President Trump recently blocked an attempted Chinese takeover of a U.S. semiconductor manufacturer on the recommendation of CFIUS. Seth Fiegerman & Jackie Wattles, *Trump Stops China-Backed Takeover of U.S. Chip Maker*, CNN (Sept. 14, 2017, 12:47 AM), <https://money.cnn.com/2017/09/13/technology/business/trump-lattice-china/index.html>. China itself has begun to respond to the U.S. federal government’s increasing vigilance against Chinese investment by blocking U.S. chipmaker Qualcomm’s purchase of Dutch chipmaker NXP. Don Clark, *Qualcomm Scraps \$44 Billion NXP After China Inaction*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/technology/qualcomm-nxp-china-deadline.html>.

78. David Rosenberg, *Israel Will Have to Choose Between America and China*, HAARETZ (Jan. 8, 2019, 3:31 PM), <https://www.haaretz.com/israel-news/.premium-israel-will-have-to-choose-between-america-and-china-1.6822921>.

79. Omree Wechsler, *Caught Between Giants: How Will Israel Navigate the U.S.-China Tech Cold War?*, COUNCIL ON FOREIGN REL. (Feb. 5, 2019), <https://www.cfr.org/blog/caught-between-giants-how-will-israel-navigate-us-china-tech-cold-war>.

80. *Id.*

willingness to intervene in the economic relations between two other sovereigns to protect national security.

The Alaska LNG Project, moreover, has become a bargaining chip in ongoing U.S.-China trade discussions.⁸¹ The project has been seen as an “olive branch” in trade talks between the U.S. federal government and China,⁸² but it could be destroyed if trade relations continue to deteriorate or concerns about Chinese involvement in energy projects increase. Energy, as critical infrastructure, is both a part of China’s “Made in China 2025” initiative⁸³ and subject to CFIUS oversight as part of its mandate to protect U.S. national security.⁸⁴ Congress’s passage of the Foreign Investment Risk Review Modernization Act of 2018 was a direct response to the perceived threat of Chinese investment and was intended to give CFIUS greater power to scrutinize such transactions.⁸⁵

As the LNG project progresses and Alaska’s economic ties with China grow stronger, the U.S. federal government may begin to pressure Alaska in the same way that it has pressured Israel to reduce ties with China. Alaska’s interests in the LNG project are thus on a potential collision course with the U.S. federal government’s interest in protecting U.S. national security. This situation makes the anti-commandeering doctrine especially relevant because it prevents the federal government from forcing Alaska to act, requiring instead that the federal government itself regulate or block the LNG project, for example, to accomplish its national security goals.

III. A LONG HISTORY OF STATE INVOLVEMENT IN FOREIGN COMMERCE

The current tension between Alaska, China, and the United States hardly represents the first time that a state’s interest in foreign commerce has run counter to the interests of the federal government. The conflict between the commercial interests of the individual states and the nation as a whole under the Articles of Confederation in large part led to the adoption of the U.S. Constitution in 1788, drafted to empower the federal government to exert greater control over foreign affairs and foreign

81. Yereth Rosen, *Alaska Officials Still Bullish on China Nat Gas Partnership*, REUTERS (July 11, 2018, 10:14 PM), <https://www.reuters.com/article/us-china-lng-alaska/alaska-officials-still-bullish-on-china-nat-gas-partnership-idUSKBN1K2060>.

82. *Id.*

83. Scott Kennedy, *Made in China 2025*, CTR. FOR STRATEGIC & INT’L STUDIES (June 1, 2015), <https://www.csis.org/analysis/made-china-2025>.

84. 50 U.S.C. § 4565 (2018).

85. Kuo, *supra* note 77.

commerce.⁸⁶ Despite this constitutional intent, the states have continued to participate in foreign commerce even when the states' interests conflict with those of the federal government. To provide context, this Section will address several key episodes in U.S. history that demonstrate the states' ongoing roles in foreign commerce. It will also describe the relatively recent reemergence of the states' roles in foreign commerce as a response to globalization.⁸⁷ This balance of power protects Alaska's full-throated advocacy of its economic stake in the LNG project and would require the federal government to expend costly political capital to scuttle the project directly.

A. The Embargo Act of 1807

The events surrounding the implementation of the Embargo Act of 1807 and its effects in the United States elucidate the relationship between the states and the federal government with regard to foreign commerce in the early Republic. In 1803, the Peace of Amiens dissolved and Britain and France resumed their war against each other.⁸⁸ Beginning in 1803, as part of the war effort, Britain began the practice of impressment of American sailors, which involved stopping U.S. ships in international waters and forcing American sailors to join the Royal Navy.⁸⁹ The *Chesapeake-Leopard* affair, in which the HMS *Leopard* attacked and boarded the unsuspecting USS *Chesapeake*, nearly brought Britain and the United States to war in 1807.⁹⁰

Later that year, Britain instituted a wartime policy requiring all U.S. ships to pass through Britain and obtain a license to trade with Europe, effectively blockading Europe.⁹¹ France responded by ordering that any ship securing a British license to trade would be seized.⁹² Thus, U.S. ships could no longer trade across the Atlantic without being seized by either Britain or France.⁹³ U.S. President Thomas Jefferson and Congress responded by enacting the Embargo Act of 1807, which prohibited all U.S. ships from leaving port to trade with foreign countries.⁹⁴ The Act's goal

86. YOUNG, *supra* note 22, at 1–2.

87. This Note considers "globalization" to be the growing interconnectedness and interdependence of world economies and economic activities, including trade, investment, and tourism, across national borders.

88. GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 114 (2008).

89. *Id.* at 117.

90. *Id.* at 118.

91. *Id.* at 119.

92. *Id.*

93. *Id.*

94. LOUIS MARTIN SEARS, *JEFFERSON AND THE EMBARGO* 59–60 (1927).

was to protect American ships and coerce Britain and France to rescind their wartime policies through a single, coherent American stance.⁹⁵

At the time of the embargo, the United States had been exporting one million tons of goods overseas.⁹⁶ Of this total, Massachusetts controlled about one-third, equaling an estimated \$38.2 million in 1807.⁹⁷ In New England, “[n]ot only would shipowners and their dependent seaman face severe loss and privation, but [sic] farmers would be deprived of their customary market for lumber and potash, butter, grain, etc. . . .”⁹⁸ New England vigorously opposed the embargo to protect its economic relationship with Europe, especially Britain.⁹⁹ As President Jefferson lamented,

the ascendancy which Great Britain exercises over us through. . . her omnipotence over our Commercial men, is most deplorable. In the existing difficulties she has proved that these circumstances aided by her intrigues and money have enabled her to shake our Union to its center, to control its legislative and Executive authorities, to force them from the measures which their judgment would have approved . . .¹⁰⁰

Of importance to the anti-commandeering doctrine, President Jefferson at first did not require the states to enforce the embargo.¹⁰¹ Instead, Jefferson sent letters to the governors of Georgia, the Territory of Orleans, South Carolina, Massachusetts, and New Hampshire, merely requesting that they help enforce the embargo.¹⁰² As economic conditions worsened in New England and the Mid-Atlantic states, the state governments began publicly rejecting the federal government’s power to require their enforcement of the embargo.¹⁰³ Massachusetts, Connecticut, New Hampshire, Rhode Island, Delaware, Pennsylvania, and New York

95. *Id.*

96. *Id.* at 145.

97. *Id.*

98. *Id.*

99. *Id.* at 298. (“American commerce had long been the mainstay of British foreign exchange. Under normal conditions, the direct American trade supplied Great Britain with cotton, lumber, flax, and tobacco. But America was still more important as a market, and the balance of trade was high in favor of Great Britain.”).

100. Letter from Thomas Jefferson to Alexander McRae (Feb. 8, 1809), <https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-01-02-9746>.

101. Dennis James Palumbo, *The States and American Foreign Relations 40–41* (1960) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

102. *Id.* at 41.

103. *Id.* at 43–46.

all passed resolutions refusing to enforce the embargo on the basis of state sovereignty.¹⁰⁴

The Connecticut General Assembly's proclamation regarding the Embargo Act drew important distinctions with regard to the Act's enforceability:

The members of the General Assembly . . . have . . . decided, that in such a crisis of affairs, it is right, and has become the duty of the legislative and executive authorities in the State, to withhold their aid, and co-operation from the execution of the act, passed to enforce more effectually the embargo system. . . . While it is the duty of the Legislature to guard the sovereignty of the State, and your rights from encroachment, it continues to be your duty, as peaceable citizens, to abstain from all resistance, against acts, which purport to be laws of the United States. Be advised to seek none but constitutional relief.¹⁰⁵

Connecticut did not declare the embargo itself unconstitutional, nor did Connecticut tell its citizens that they could disregard the embargo. Instead, the Connecticut General Assembly explained that the state government itself could not be compelled to enforce the federal law, even though the Embargo Act regulated Connecticut's citizens individually. The Connecticut state government refused to allow the federal government to commandeer it. In 1809, under mounting pressure from the states, Congress voted to repeal the Embargo Act.¹⁰⁶

This episode from the early Republic demonstrates two key points. First, the states played significant roles in foreign commerce at the country's founding, when the Framers of the U.S. Constitution staked out the sovereign powers of the states and the federal government. Second, while the federal government could regulate the flow of goods in foreign commerce through the embargo, the states retained—at least in their view¹⁰⁷ and in their practice¹⁰⁸—a measure of sovereignty. While the

104. *Id.*

105. SEARS, *supra* note 94, at 185–86.

106. *Id.* at 46–47. The Embargo Act was replaced with a non-intercourse act which only barred trade with Britain and France, allowing American ships to leave U.S. ports for other foreign countries. *Id.* at 47. The non-intercourse act, however, was easily circumvented by U.S. ships and thus did not raise the same protests between New England and the Mid-Atlantic states. *Id.*

107. SEARS, *supra* note 94, at 185–86. Recall the Connecticut General Assembly's proclamation discussed in the preceding paragraph.

108. Palumbo, *supra* note 101, at 43–46. Recall that Massachusetts, Connecticut, New Hampshire, Rhode Island, Delaware, Pennsylvania, and New York all refused to enforce the Embargo Act as an unconstitutional violation of state sovereignty.

federal government could enact its own foreign economic policy, it could not make the states its agents in implementing that policy.

B. From the Early Republic to the Modern Era¹⁰⁹

The Embargo Act failed to influence the wartime economic policies of Britain and France¹¹⁰ and irreparably harmed U.S. shipping interests by preventing trade with Latin America, allowing Britain to monopolize the market.¹¹¹ The Embargo Act, however, spurred the growth of manufacturing in the United States.¹¹² Further, westward expansion in North America opened new domestic markets to U.S. commercial interests, reducing the need to export and import goods from overseas.¹¹³ Following the U.S. Civil War, the U.S. federal government became the “predominant force” in U.S. foreign policy.¹¹⁴ World Wars I and II and the Cold War further solidified this position.¹¹⁵

C. The Reemergence of the States in Foreign Commerce

In the 1960s and 1970s, the states became more involved in foreign commerce.¹¹⁶ This reemergence began with North Carolina Governor Luther Hodges’s trade mission to Europe in 1959.¹¹⁷ Governor Hodges led a delegation to Western Europe seeking foreign direct investment in North Carolina and “explored potential economic opportunities in the Soviet Union.”¹¹⁸ In 1969, Virginia placed a trade officer in Brussels in an attempt to attract European business to the state.¹¹⁹ Jimmy Carter, as governor of Georgia from 1971 to 1975, estimated that he spent nearly one quarter of his time in office promoting Georgia’s exports and soliciting investment in the state from overseas.¹²⁰ By 1986, the states had opened sixty-six trade offices overseas.¹²¹ By 1994, that number had grown to 162

109. This Section necessarily glosses over roughly 150 years of U.S. history. As this Note is not a treatise on U.S. commercial history, this Section will simply describe several key points about the time period between the early Republic and the reemergence of the states in foreign commerce in the 1950s.

110. HERRING, *supra* note 88, at 119–21.

111. SEARS, *supra* note 94, at 192.

112. *Id.* at 197.

113. Palumbo, *supra* note 101, at 98.

114. FRY, *supra* note 14, at 58.

115. *Id.*

116. *See id.* at 67–69 (discussing the increase in the number of states seeking involvement in international business).

117. *Id.* at 67.

118. *Id.*

119. *Id.* at 68.

120. *Id.*

121. *Id.* at 69 tbl.4.1.

offices.¹²² In 1993, governors from twenty-seven U.S. states and territories sent eighty-one trade and investment missions abroad.¹²³

Currently, forty states operate a total of 199 trade offices abroad.¹²⁴ China is the most popular country in which states open trade offices, where states currently operate twenty-seven such offices.¹²⁵ Moreover, nearly every state has a home office devoted to promoting trade abroad.¹²⁶ These trade offices facilitate trade missions and trade shows and counsel local businesses on exporting goods.¹²⁷ Most of these trade offices are also responsible for soliciting foreign direct investment in their states.¹²⁸ Further, states have entered into over 340 agreements with foreign countries and political sub-units.¹²⁹ The states have entered into sixty-one agreements with China or Chinese political sub-units, the second most after Canada.¹³⁰ Overall, the states have entered into at least 128 agreements that concern trade and technology.¹³¹ Alaska's joint development agreement with China to develop the liquid natural gas project represents just one of these agreements. Alaska also entered into a memorandum of understanding with Taiwan, in which Alaska agreed to expand development of its coal production in return for Taiwanese state-owned energy companies purchasing the coal produced.¹³²

While most of the states' promotion of economic engagement abroad comports with the U.S. federal government's interests, a few notable instances show where these interests may conflict. In the late 1970s, the regime of Muammar el-Qaddafi in Libya sought the help of U.S. politicians from Idaho to re-open a deal to sell C-130 troop-transport planes to the Libyan government that the State Department had blocked.¹³³ The Qaddafi regime hosted Idaho farmers, businessmen, and even a U.S. senator in Libya, and Colonel Qaddafi himself met with

122. *Id.*

123. *Id.*

124. Jennifer Burnett, *Beyond Borders: State International Trade Offices*, THE COUNCIL OF STATE GOV'TS, http://www.csg.org/pubs/capitolideas/2015_nov_dec/beyond_borders.aspx (last visited Dec. 14, 2018).

125. *Id.*

126. FRY, *supra* note 14, at 72.

127. STATE INT'L DEV. ORG., SIDO WASH. FORUM 2018 (2018), http://knowledgecenter.csg.org/kc/system/files/2018%20SIDO%20Washington%20Binder%20K_C.pdf.

128. *Id.*

129. Hollis, *supra* note 17, at 750.

130. *Id.* at 753 fig.3.

131. *Id.* at 755 fig.4.

132. Memorandum of Understanding Between the State of Alaska and the Ministry of Econ. Affairs of China, Alaska-U.S.-China., Sept. 16, 2004, <http://www.secinfo.com/d14D5a.15Z75.b.htm>.

133. William Safire, *Libya and Idaho*, N.Y. TIMES (Feb. 15, 1979), <https://www.nytimes.com/1979/02/15/archives/essay-libya-and-idaho.html>.

Idaho's congressman Representative Steven Symms.¹³⁴ The trade talks between Idaho and Libya reportedly led to \$30 million in wheat deals, but Libya never received the planes.¹³⁵

In 2003, Kansas governor Kathleen Sebelius reached an agreement with Cuba's food trade agency that Cuba would purchase \$10 million worth of Kansas agricultural products in exchange for Kansas advocating for the removal of federal trade and travel sanctions against Cuba.¹³⁶ In 2005, Kansas's lieutenant governor announced the sale of \$3 million worth of wheat to Cuba and his support for a bill introduced by a Kansas congressman in the U.S. House of Representatives to repeal sanctions against Cuba.¹³⁷ The bill, however, went nowhere.¹³⁸ Nevertheless, interest groups in Kansas and members of Kansas's congressional delegation continue to advocate for trade with Cuba.¹³⁹

IV. FEDERAL POWER OVER FOREIGN COMMERCE AND THE ANTI-COMMANDEERING DOCTRINE

Due to the states' increasing role in foreign commerce, state and federal policies regarding China are on a potential collision course. Thus, it is important to understand what constitutional and statutory power the federal government has to control foreign commerce. This Section will first discuss these powers over foreign commerce. This Section will then describe the anti-commandeering doctrine and how it may protect certain state activities in foreign commerce from federal control.

A. Federal Power to Control Foreign Commerce

The Supreme Court's doctrinal view, which has been criticized as legally unsound and ignorant of the states' and the federal government's historical practice,¹⁴⁰ has long been that the federal government exercises

134. *Id.*

135. *Id.*

136. Hollis, *supra* note 17, at 741.

137. *Id.* at 741 n.4.

138. *Id.* at 741 n.3.

139. *Engage Cuba & Kansas Farmers Launch State Council to Lift the Cuban Embargo*, ENGAGE CUBA COALITION (Sept. 19, 2016), <https://www.engagecuba.org/press-releases/2016/9/19/engage-cuba-kansas-farmers-launch-state-council-to-lift-the-cuban-embargo?rq=kansas> (citing support from Kansas's two U.S. senators and a past chairman of the Kansas Wheat Commission).

140. See Cleveland, *supra* note 20, at 975 ("The 'one-voice' doctrine is a myth. It finds little support in the constitutional framework, which divides foreign relations powers among the three federal branches, and even less in the practice of government."); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 954 (2014) ("[W]hile the doctrine partially captures constitutional principles, it is in

total control over foreign affairs and may prohibit state participation therein.¹⁴¹ In 1840, the Court explained, “It was the main object of the Constitution to make us, so far as regarded our foreign relations, one people, one nation.”¹⁴² In 1937, the Court reiterated, “[I]n respect of our foreign relations generally, state lines disappear. As to such purposes, the state . . . does not exist.”¹⁴³ In 1942, the Court stated, “Power over external affairs is not shared with the States; it is vested in the national government exclusively.”¹⁴⁴

This principle of exclusive federal control over foreign affairs is known as the “one-voice” doctrine.¹⁴⁵ The one-voice doctrine does not accurately describe the state of affairs in U.S. foreign relations, either historically or currently. Moreover, scholars have frequently asserted that the one-voice doctrine conflicts with the text of the Constitution and the constitutional principles of the separation of powers and federalism.¹⁴⁶ The text of the Constitution and Congress’s actual enactments provide a more accurate picture of federal power over foreign commerce.

Textually, Congress is empowered to regulate commerce with foreign nations¹⁴⁷ and to give advice and consent on treaties,¹⁴⁸ among other powers relating to foreign affairs. The Constitution grants the President the powers to make treaties,¹⁴⁹ appoint ambassadors,¹⁵⁰ receive ambassadors,¹⁵¹ and take care that the laws be faithfully executed.¹⁵² The Constitution also explicitly prohibits the states from entering into “any treaty, alliance, or confederation”¹⁵³ and requires Congress’s consent before a state may “enter into any agreement or compact . . . with a foreign power.”¹⁵⁴ Nevertheless, the Constitution does not grant the

key respects inconsistent with constitutional text, structure, and history.”).

141. GLENNON & SLOANE, *supra* note 18, at xviii–xix.

142. *Holmes v. Jennison*, 39 U.S. 540, 575 (1840).

143. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

144. *United States v. Pink*, 315 U.S. 203, 233 (1942).

145. See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 214 (2012) (“[W]here foreign affairs is at issue, the practical need for the United States to speak ‘with one voice and ac[t] as one,’ is particularly important.”).

146. See *Cleveland*, *supra* note 20, at 975; Moore, *supra* note 140 at 991–99.

147. U.S. CONST. art. I, § 8, cl. 3.

148. *Id.* art. II, § 2, cl. 2.

149. *Id.*

150. *Id.*

151. *Id.*, § 3.

152. *Id.*

153. *Id.* art. I, § 10.

154. *Id.* The Court has interpreted the Compacts Clause to require congressional approval of compacts or agreements where the compact or agreement encroaches on federal supremacy. *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976). Yet, the Supreme Court has only ever reviewed one alleged compact between a state and a foreign country, despite the existence of over 340

federal government a blanket “foreign affairs power” and does not prohibit the states from promoting their economic relations with foreign countries. Moreover, the Tenth Amendment to the Bill of Rights reserves to the states all powers not specifically granted to the federal government.¹⁵⁵

Congress has enacted several statutory schemes under its constitutional powers to control foreign commerce for national security reasons. First, under the Exon-Florio Act and subsequent legislation, CFIUS has jurisdiction to review foreign direct investment in the United States that results in foreign control of a U.S. business.¹⁵⁶ CFIUS may “enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the . . . transaction.”¹⁵⁷ Second, under the Export Administration Regulations (EAR), the Department of Commerce’s Bureau of Industry and Security has authority to control the export of “any goods or technology” the export of which would “prove detrimental” to U.S. national security.¹⁵⁸ Finally, under the International Traffic in Arms Regulations (ITAR), the State Department’s Directorate of Defense Trade Controls has the authority to control the export or import of weapons.¹⁵⁹

Outside of Congress’s powers to control foreign commerce, the Supreme Court has developed its own doctrines regarding state participation in foreign commerce. Chief among these doctrines is the

agreements between states and foreign countries. Hollis, *supra* note 17, at 779.

155. U.S. CONST. amend. X.

156. Wakely & Indorf, *supra* note 75, at 7-9.

157. *Id.* at 9 (internal quotations omitted).

158. *Id.* at 11. The EAR include a list of goods that may only be exported subject to licensing by the Department of Commerce. *Id.* at 11-12. These goods are typically “dual-use” goods, meaning that they “have both commercial and military” applications. *Id.* at 12 (internal quotations omitted). Such goods include nuclear materials, electronics, and avionics, among others. *Id.* The EAR also include a list of countries to whom exporting requires a special license. *Id.* Congress recently passed the Export Control Reform Act of 2018, which authorizes the Department of Commerce to identify “emerging” and “foundational” technologies to add to the EAR list. *Commerce Requests Comment on Criteria for Identifying Emerging Technologies That Are Essential to U.S. National Security*, COVINGTON & BURLING (Nov. 20, 2018), https://www.cov.com/-/media/files/corporate/publications/2018/11/commerce_requests_comment_on_criteria_for_identifying_emerging_technologies_that_are_essential_to_us_national_security.pdf. The Department of Commerce is considering adding technology categories including biotechnology, artificial intelligence, and robotics. *Id.*

159. Wakely & Indorf, *supra* note 75, at 12-13. Under the ITAR, the State Department maintains a list of weapons that require a license to export. *Id.* This list also includes defense services and technical data related to listed weapons. *Id.* at 13.

dormant Foreign Commerce Clause. Early in the 19th century, the Court ruled that the states may not impose burdensome regulations on foreign commerce even where Congress has not passed relevant legislation.¹⁶⁰ Here, however, Alaska is not regulating foreign commerce, but instead seeking to promote it. More relevant, then, is the Supremacy Clause, under which a federal statute, treaty, or congressional-executive agreement may displace conflicting state law that affects foreign commerce.¹⁶¹ For example, if Alaska passed its own export regulations, those regulations would be unconstitutional to the extent that they conflicted with the U.S. Department of Commerce's Export Administration Regulations. This Note, however, argues that the anti-commandeering doctrine protects Alaska's promotion of its economic relationship with China, as opposed to its regulation thereof. The principal distinction between regulation and promotion is that, in promoting foreign commerce, Alaska acts as a political representative of its citizens, whereas, in regulating foreign commerce, Alaska would enact and enforce the law.

B. The Anti-Commandeering Doctrine

The anti-commandeering doctrine delineates the outer bounds of Congress's constitutional powers.¹⁶² Thus, while Congress has broad powers to regulate foreign commerce,¹⁶³ the anti-commandeering doctrine recognizes that those powers have limits.¹⁶⁴ Congress does not have the power "to issue direct orders to the governments of the States."¹⁶⁵ The anti-commandeering doctrine enforces the respective sovereignties of the federal government and the states, with the federal government possessing the powers enumerated in the Constitution and all residual powers reserved to the states.¹⁶⁶ The anti-commandeering doctrine, moreover, reflects the constitutional structure in which the federal government and the state governments regulate individuals, but in which the federal government does not regulate the state governments themselves as it had under the Articles of Confederation.¹⁶⁷

The Supreme Court first developed the anti-commandeering doctrine in *New York v. United States*.¹⁶⁸ *New York* involved a federal

160. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

161. *See generally* *Amer. Ins. Assoc. v. Garamendi*, 539 U.S. 396 (2003).

162. *Murphy v. NCAA*, 138 S. Ct. 1461, 1475-76 (2018).

163. *See supra* Section IV.A.

164. *Murphy*, 138 S. Ct. at 1476.

165. *Id.*

166. *Id.* at 1475.

167. *New York v. United States*, 505 U.S. 144, 166 (1992).

168. *Id.*

statute that required states to provide for the disposal of low-level radioactive waste generated within their borders or to take title to that waste and become liable for any damages resulting from the failure to dispose of it.¹⁶⁹ The Court ruled that this provision commandeered the state legislatures in violation of the anti-commandeering doctrine.¹⁷⁰ The Court reasoned that

[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.¹⁷¹

In other words, Congress may directly regulate individuals, but Congress may not force the states to regulate individuals.

In *Printz v. United States*,¹⁷² the Court expanded the anti-commandeering doctrine to apply not only to state legislatures, but also to state executive officials.¹⁷³ *Printz* concerned a federal law that required local law enforcement officers to conduct background checks on handgun purchasers.¹⁷⁴ The Court ruled that, under the anti-commandeering doctrine, “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”¹⁷⁵ The Court cited the absence in the historical record of federal statutes imposing obligations on state officials as support for the anti-commandeering doctrine.¹⁷⁶ Thus, where Congress could not force state legislatures to enact policies, neither could it force state executive officials to enforce federal policies.

Most recently, in *Murphy v. NCAA*,¹⁷⁷ the Court expanded the anti-commandeering doctrine to apply to negative prohibitions on state actions.¹⁷⁸ In *Murphy*, the Court addressed a federal statute that prohibited state legislatures from authorizing sports gambling.¹⁷⁹ The Court reasoned that “[i]t was a matter of happenstance that the laws

169. *Id.* at 174–75.

170. *Id.* at 175.

171. *Id.* at 166.

172. 521 U.S. 898 (1997).

173. *Id.* at 928.

174. *Id.* at 902–04.

175. *Id.* at 935.

176. *Id.* at 907–08.

177. 138 S. Ct. 1461 (2018).

178. *Id.* at 1478.

179. *Id.* at 1468.

challenged in *New York* and *Printz* commanded ‘affirmative’ action as opposed to imposing a prohibition. The basic principle – that Congress cannot issue direct orders to state legislatures – applies in either event.”¹⁸⁰ Congress may neither force a state legislature to enact a certain policy, nor may Congress prohibit a state legislature from enacting a certain policy.

Under the Court’s jurisprudence, the anti-commandeering doctrine reflects three principles of the Constitution’s structure of dual-sovereignty. First, divided sovereignty between the federal and state governments promotes the liberty of individuals.¹⁸¹ Second, the anti-commandeering doctrine promotes political accountability, so that “[v]oters who like or dislike the effects of regulation know who to credit and who to blame” for that regulation.¹⁸² And third, the anti-commandeering doctrine “prevents Congress from shifting the costs of regulation to the States” from the federal government.¹⁸³ The Court uses these principles to help determine where the anti-commandeering doctrine applies.¹⁸⁴ Therefore, where a statute conflicts with these principles, the anti-commandeering doctrine is more likely to apply.

The anti-commandeering doctrine has important limits. *Reno v. Condon*¹⁸⁵ involved a statute prohibiting states from disclosing certain information collected through driver’s license applications.¹⁸⁶ South Carolina challenged the statute as violating the anti-commandeering doctrine because it directed the states not to take a certain action.¹⁸⁷ The Supreme Court nevertheless ruled that, where a federal statute “does not require the States in their sovereign capacity to regulate their own citizens,” Congress does not violate the anti-commandeering doctrine.¹⁸⁸ The Court thus concluded that the anti-commandeering doctrine did not prevent Congress from prohibiting states from disclosing information collected through driver’s license applications.¹⁸⁹ *Condon* may thus

180. *Id.* at 1478.

181. *Id.* at 1477 (“A healthy balance of power between the States and the Federal Government reduces the risk of tyranny and abuse from either front.”) (quoting *New York v. United States*, 505 U.S. 144, 181–82 (1992)).

182. *Id.* at 1477 (“By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.”).

183. *Id.* (“If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weight the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.”).

184. *See id.*

185. 528 U.S. 141 (2000).

186. *Id.*

187. *Id.* at 147.

188. *Id.* at 151.

189. *Id.*

suggest that the anti-commandeering doctrine does not apply where the state is not regulating its citizens.

The Court, moreover, has ruled that Congress may regulate state bond issuance, reasoning that such regulation does not “seek to control or influence the manner in which States regulate private parties.”¹⁹⁰ The Court in *Murphy* affirmed that “even if [the bond regulation] was tantamount to an outright prohibition of the issuance of bearer bonds . . . the law would simply treat state bonds the same as private bonds. The anti-commandeering doctrine does not apply when Congress evenhandedly regulates an activity in which the States and private actors engage.”¹⁹¹ Thus, the anti-commandeering doctrine does not prohibit federal statutes that regulate state governments in the same way that Congress normally regulates private individuals.

The question is thus whether the anti-commandeering doctrine protects a state’s promotion of its economic relationship with a foreign country as within the state’s residual sovereignty or whether the regulation of a state’s economic relationship would simply be Congress’s permissible regulation of a state as a private party.

C. The Anti-Commandeering Doctrine Would Likely Protect Alaska’s Promotion of its Economic Relationship with China

Whether the anti-commandeering doctrine applies in a particular instance involves two complementary inquiries.¹⁹² First, whether the Constitution has authorized Congress to act.¹⁹³ And, second, whether Congress’s action “invades the province of state sovereignty reserved by the Tenth Amendment.”¹⁹⁴ Regarding the first inquiry, the Supreme Court has held that the Constitution does not authorize Congress to issue direct orders to state governments.¹⁹⁵ Here, a federal statute prohibiting the government of Alaska from promoting its economic relationship with China through trade missions and other intergovernmental relations with

190. *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988).

191. *Murphy*, 138 S. Ct. 1461, 1478 (2018).

192. *New York v. United States*, 505 U.S. 144, 155 (1997). The Court in *New York* explained that these two inquiries were “mirror images of each other,” meaning that, if Congress did not have the constitutional authority to act, Congress would necessarily invade a state’s sovereignty. *Id.* at 156. This analysis was refined in *Condon*, however, in which the Court explained that Congress may regulate state governments directly so long as Congress regulates states as private actors rather than in the states’ sovereign capacity. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

193. *New York*, 505 U.S. at 155.

194. *Id.*

195. *Murphy*, 138 S. Ct. at 1476.

the Chinese government would constitute a direct order to the government of Alaska.¹⁹⁶

Regarding the second inquiry, the Supreme Court has held that a state acts in its sovereign capacity for the purposes of the anti-commandeering doctrine when the state regulates its citizens.¹⁹⁷ The Court has not held, however, that a state *only* acts in its sovereign capacity when it regulates its citizens.¹⁹⁸ Indeed, the Court has recognized that a state may act in its sovereign capacity when it protects “public or governmental interests that concern the state as a whole,” including “when the ‘substantial impairment of the health and prosperity of the towns and cities of the state’ are at stake.”¹⁹⁹ This aspect of state sovereignty is referred to as “*parens patriae*.”²⁰⁰ Notably, the Court has recognized that a state may act as *parens patriae* to protect the commercial interests of its citizens.²⁰¹ The Court described the state’s role as *parens patriae* as the “trustee, guardian, or representative of all her citizens.”²⁰²

While the Court has not had the opportunity to rule on whether a state acting as *parens patriae* satisfies the second inquiry under the anti-commandeering doctrine, this Note argues that it would satisfy the inquiry here. The Supreme Court’s historical and policy rationales underlying its application of the anti-commandeering doctrine in previous cases support the doctrine’s protection of Alaska’s role as *parens patriae* in the context of its economic relationship with China. The state of Alaska acts as *parens patriae* when it promotes its economic relationship with China on behalf of its citizens, protecting the wealth and prosperity of the state as a whole. To require the Alaska state government to enforce the federal government’s policy of non-intercourse with China would

196. See *id.* at 1478 (holding that the anti-commandeering doctrine applies where Congress imposes a prohibition on a state’s action).

197. See *id.* at 1479 (describing the states’ regulation of their own citizens as the states’ “sovereign authority”).

198. See *New York*, 505 U.S. at 155 (explaining that the determination hinges on “state sovereignty reserved by the Tenth Amendment,” without limiting the sovereignty determination to whether a state is regulating its own citizens).

199. *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (citing *Missouri v. Illinois*, 180 U.S. 208, 240–41 (1901)).

200. *Id.* at 520 n.17. *Parens patriae*, literally meaning “parent of his or her country,” refers to the state in its sovereign capacity as protecting its citizens. *Parens patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014).

201. *Louisiana v. Texas*, 176 U.S. 1, 19 (1900); see also *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 602 (1982) (explaining that the *Louisiana* Court “labeled Louisiana’s interest in the litigation as that of *parens patriae*”). The Court ultimately dismissed the suit because Louisiana’s dispute was with the Texas health officer rather than Texas itself, thus falling outside of the Court’s original jurisdiction. *Id.* at 22–23.

202. *Louisiana*, 176 U.S. at 19.

thus vitiate Alaska's sovereign prerogative to represent its citizens in violation of the anti-commandeering doctrine.

Historical practice also supports the anti-commandeering doctrine's protection of Alaska's economic relationship with China from federal interference. According to the Court in *Printz*, "early congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning. Indeed, such contemporaneous legislative exposition of the Constitution, acquiesced in for a long term of years, fixes the construction to be given its provisions."²⁰³ In the events surrounding the Embargo Act of 1807, President Jefferson did not initially demand that the states enforce the Embargo Act on behalf of the federal government, but instead *requested* that certain state governments do so.²⁰⁴ When the President did demand that the states enforce the Act, the states declared such demands unconstitutional.²⁰⁵ Thus, Congress could require that individual citizens obey the Embargo Act, but Congress could not require the state governments to enforce the Act on its behalf.²⁰⁶ Indeed, the anti-commandeering doctrine polices the line between federal and state sovereignty, apportioning political accountability between the two sovereigns, rather than entirely prohibiting the federal government from achieving its ultimate policy goal.

The balance of power between the federal government and the states resulting from the Embargo Act episode represents an early understanding of the federal government's and the states' dual sovereignty. At the dawn of the Republic, the federal government could not force the states to enforce federal economic policy and the states were free to politically advocate their own economic policies.²⁰⁷ Indeed, the federal government has acquiesced to this balance of power at least since the late 1950s as the states' roles in foreign commerce have reemerged.²⁰⁸ The federal government has not attempted to regulate the states' economic relationships with foreign sovereigns, even where those relationships are directly at odds with federal foreign policy.²⁰⁹ This acquiescence, both in the early Republic and over the last 60 years,

203. *Printz v. United States*, 521 U.S. 898, 905 (1997) (internal brackets removed).

204. *See supra* Section III.A.

205. *Id.*

206. *Id.*

207. *Id.*

208. *See supra* Section III.C.

209. *See id.* (describing relations between Idaho and the Qaddafi regime and between Kansas and Cuba); *see also* Hollis, *supra* note 17, at 2 ("Kansas's agreement received no constitutional scrutiny whatsoever. Congress did not disavow the deal. The Executive did nothing to oppose it.").

supports a constitutional construction that protects the states' roles in foreign commerce.

Alaska's economic relationship with China also promotes the three principles of dual sovereignty that underlie the anti-commandeering doctrine.²¹⁰ First, the anti-commandeering doctrine promotes Alaskans' economic freedom by protecting the state government's role in advancing economic ties with China. Second, a federal statute prohibiting Alaska from promoting an economic relationship with China would blur political accountability for the success (or failure) of Alaska's economy. Alaskan exports to China bring nearly \$5 billion into the state,²¹¹ supporting over 6000 jobs.²¹² The state government's efforts to promote Alaskan exports—by conducting trade missions and hosting Chinese government officials in the state—are presumably responsible for much of this success. When federal regulations harm Alaskan exports, as when the Trump administration's tariffs on China trigger retaliatory measures,²¹³ the citizens of Alaska know whom to blame—the federal government—and may take appropriate action by voting federal policymakers out of office.²¹⁴ However, if the federal government prohibits the Alaskan government from conducting trade missions and promoting Alaskan exports, the political burden may shift to Alaskan policymakers, who would not be responsible for their own inaction. While one might argue that the citizens of Alaska will still know to blame the federal government and could still vote federal policymakers out of office, the Supreme Court has accepted this rationale as underpinning its anti-commandeering decisions.²¹⁵

Furthermore, a federal statute barring Alaska's promotion of its economic relationship with China would improperly shift the cost of regulation from the federal government to Alaska. In much the same way that a prohibition on economic relations between Alaska and China would impose political costs, so too would such a prohibition impose monetary costs. Not only would the state, and therefore its citizens, lose tax dollars, but Alaska would also be responsible for the harm to its overall economy. For example, where the federal government, through the Trump administration's trade war, has cost farmers in the Midwest

210. See *supra* text accompanying notes 181–184.

211. THE US-CHINA BUSINESS COUNCIL, *supra* note 34.

212. *Id.*

213. Rosen, *supra* note 71.

214. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018) (“When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulation only because it has been commanded to do so by Congress, responsibility is blurred.”).

215. See *id.*

billions of dollars due to retaliatory tariffs, the federal government has been forced through political pressure to provide billions of dollars in farm subsidies.²¹⁶ In this instance, the system of dual sovereignty has worked correctly, as the same sovereign that harmed its constituents reaped the political costs. A federal prohibition on Alaska's economic relationship with its largest trading partner, however, could impose similar costs on Alaska through political pressure to provide subsidies, even though Alaska would not be responsible for the prohibition itself.

The argument that the anti-commandeering doctrine protects Alaska's economic relationship with China from federal interference does face challenges. The anti-commandeering doctrine has only been interpreted to protect state actions where the federal government has sought to direct the states to regulate in a certain way.²¹⁷ While Alaska's promotion of its economic relationship with China is not regulation, Alaska nonetheless acts within its sovereign capacity when it promotes the welfare of its citizens.²¹⁸ The anti-commandeering doctrine thus protects Alaska's promotion of its economic relationship with China because the anti-commandeering doctrine protects state sovereignty, of which regulation is only one part.

Relatedly, the Supreme Court has approved federal regulation of state governments where those governments are regulated in the same manner as private parties.²¹⁹ Private businesses, too, conduct trade missions, open offices overseas, promote their exports and tourism, and solicit foreign direct investment. As already stated, however, the Alaska state government represents its citizens in its capacity as sovereign when promoting its economic relationship with China. The anti-commandeering doctrine thus protects Alaska's promotion of its economic relationship with China as part of Alaska's sovereignty under the Constitution.

V. CONCLUSION

As globalization proceeds apace, Alaska finds itself caught between two superpowers. While Alaska seeks to expand its economic relationship with China, the U.S. federal government seeks to prevail in a

216. Tara Golshan, *Trump: "Tariffs Are the Greatest." Also Farmers Need \$12 Billion in Aid Because of Tariffs*, VOX (July 24, 2018, 1:00 PM), <https://www.vox.com/2018/7/24/17607484/trump-tariff-farmers-emergency-aid>.

217. *New York v. United States*, 505 U.S. 144, 166 (1992).

218. *See Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (dismissing the dissent's argument that the Court created a new state standing doctrine in finding the state could act as *parens patriae* while protecting quasi-sovereign interests).

219. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

trade war and to ensure its national security against increasing Chinese economic espionage. So far, the U.S. federal government has not attempted to drag Alaska directly into its foreign policy by prohibiting Alaska from promoting its economic relationship with China. As relations between the U.S. federal government and China sour, however, Alaska's economic vitality increasingly hangs in the balance.

It is, therefore, more important than ever for Alaska to be prepared to defend its sovereign prerogative to advance the welfare of its citizens through foreign economic engagement, as the New England states did during the embargo of 1807. While Alaska cannot stop the federal government from regulating foreign commerce itself, Alaska can ensure, through the anti-commandeering doctrine, that political accountability is properly apportioned under the constitutional structure of dual sovereignty and that the correct political actor is held responsible for any economic fallout from the regulation of foreign commerce. The anti-commandeering doctrine would thus be the proper approach for resolving this conflict between Alaska and the U.S. federal government, as the conflict would go to the heart of the constitutional boundary between sovereignties enforced through the anti-commandeering doctrine.