

3-15-2011

## Beyond the Executive Agreement: The Foreign Policy Preference Under Movsesian and the Return of the Dormant Foreign Affairs Power in Norton Simon

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### Recommended Citation

Amir M. Tikriti *Beyond the Executive Agreement: The Foreign Policy Preference Under Movsesian and the Return of the Dormant Foreign Affairs Power in Norton Simon*, 38 Pepp. L. Rev. Iss. 3 (2011)  
Available at: <https://digitalcommons.pepperdine.edu/plr/vol38/iss3/4>

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# **Beyond the Executive Agreement: The Foreign Policy Preference Under *Movsesian* and the Return of the Dormant Foreign Affairs Power in *Norton Simon***

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## I. INTRODUCTION

When asked why the twentieth century was called the century of the common man, Winston Churchill replied “because in it the common man has suffered most.”<sup>1</sup> In August 1915, a thirteen-year-old girl recounted the following: A mob of Turkish police officers, soldiers, and civilians, descended upon her city, Sungurlu, in modern-day Turkey.<sup>2</sup> The Turks first marched the adult males out of the town to torture and kill them.<sup>3</sup> The women and children were next; they were caravanned to a valley by a bridge an hour and a half away.<sup>4</sup> “[W]ith axes, hatchets, shovels, and pitchforks,” the Turks slaughtered and raped the women, and “dashed the little children against the rocks.”<sup>5</sup> After nightfall, the young girl, half-alive, awoke among the naked corpses.<sup>6</sup> She searched through the bodies for her mother and two sisters, calling them out by name, but only found their lifeless bodies crushed beside each other.<sup>7</sup> She “began to shake and sob uncontrollably.”<sup>8</sup> “At dawn, a few . . . cowherds crossing the bridge saw [her body] moving” among the corpses and took her in.<sup>9</sup>

Between 1915 and 1923, one and one-half million Armenians, roughly three-fourths of Ottoman Armenians, were killed by Ottoman Turks.<sup>10</sup> “The greatest torment,” writes Richard Hovannisian, “was reserved for the women and children,” who were forced on a “death march” over mountains and across the desert that lasted several months.<sup>11</sup> Those who survived were herded into open-air concentration camps.<sup>12</sup> Another half-million were forcibly displaced from their historic homeland of twenty-five hundred years.<sup>13</sup> Many argue that this mass-murder and displacement was part of a

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1. 1 MARTIN GILBERT, *A HISTORY OF THE TWENTIETH CENTURY, 1900–33*, at 2 (1997).

2. GRIGORIS BALAKIAN, *ARMENIAN GOLGOTHA: A MEMOIR OF THE ARMENIAN GENOCIDE, 1915–1918*, at 88 (Peter Balakian & Aris Sevag trans., 2009) (survivors’ accounts of the Armenian Genocide); see also Martin Gilbert, *Twentieth-Century Genocides, in AMERICA AND THE ARMENIAN GENOCIDE OF 1915* (Jay Winter ed., 2003) (historical background of the Armenian Genocide).

3. BALAKIAN, *supra* note 2, at 88.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Peter Balakian, *Introduction to BALAKIAN, supra* note 2, at xvii.

11. See Gilbert, *supra* note 2, at 17.

12. *60 Minutes: Turkey and Armenia’s Battle over History*, CBSNEWS.COM (Feb. 28, 2010), <http://www.cbsnews.com/stories/2010/02/26/60minutes/main6246574.shtml%3CBR%3E>. In the desert region of Deir Zor, for example, roughly 450,000 corpses lay in a mass graveyard just a finger’s scratch beneath the surface of the sand. *Id.*

13. See H.R. Res. 596, 106th Cong. § 2(1) (2000); see also TANER AKÇAM, *A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY 5–6* (2006). For a list of websites on the Armenian Genocide, see THE GENOCIDE EDUC. PROJECT, *ARMENIAN GENOCIDE ONLINE RESOURCES FOR TEACHERS*, [http://www.teachgenocide.org/files/GenEd\\_WebSite\\_List.pdf](http://www.teachgenocide.org/files/GenEd_WebSite_List.pdf)

campaign intended to exterminate the Armenian race.<sup>14</sup> However, Turkey, to this day, denies that such a campaign ever occurred.<sup>15</sup>

A half-continent away and less than a decade later, in parts of Europe under German control, the Nazis methodically murdered and enslaved an estimated six million Jewish people.<sup>16</sup> Concurrently, the Nazis looted art from across Europe on an unparalleled scale, creating the “greatest displacement of art in human history.”<sup>17</sup> When the Nazis invaded the Netherlands, Jacques Goudstikker, along with a number of other Jewish people, abandoned his belongings and fled for safety.<sup>18</sup> En route,

(last visited February. 13, 2011).

14. See, e.g., AKÇAM, *supra* note 13, at 7 (“Taken in their entirety, these [international archival sources] leave us in no doubt that the scale of the operations would have been impossible without planning at the political center.”). For example, in 1915, the Great Powers—England, France, and Russia—issued a joint declaration in regards to the Armenian Genocide: “In view of these crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.” *Id.* at 2. This promise, however, went unfulfilled because there were no institutions in place to try foreign government leaders, and international law did not recognize crimes committed by a state against its own people. *Id.* at 2–3. In fact, if another nation were to criticize the treatment of the Armenians, this “would have constituted intervention in the domestic affairs of the other state, which was deemed to be a violation of international law.” Thomas Buergenthal, *International Law and the Holocaust, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 20 (Michael J. Bazylar & Roger P. Alford eds., 2006).

15. See *60 Minutes: Turkey and Armenia's Battle over History*, *supra* note 12. Turkey does not deny that Armenians were killed, only that there was no preconceived plan to eliminate the Armenian people. *Id.* The distinction is important because the UN defines genocide as the “intent to destroy” a racial, ethnic, or religious group. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. If there was no intent, then there was no Armenian Genocide. See *id.* As of March 2010, more than twenty countries recognize the Armenian Genocide, including Argentina, Belgium, Canada, France, Italy, Russia, Sweden, and Uruguay. See *Q&A: Armenian Genocide Dispute*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/6045182.stm> (last updated Mar. 5, 2010); *Turkey Protests Sweden Armenia 'Genocide' Vote*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/8563483.stm> (last updated Mar. 11, 2010). The United States, United Kingdom, and Israel use different terminology to describe the Armenian Genocide. See *Q&A: Armenian Genocide Dispute*, *supra*.

16. Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 6 n.4 (2000).

17. Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243, 243 (2006). The amount of artwork stolen was approximately one-fifth of all Western art in existence. *Id.* at 244. Further, the value of the art at that time was about \$2.5 billion (\$20.5 billion currently), exceeding the value of all the artwork in the United States in 1954. *Id.*; see also HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* 23 (1997) (“In twelve years . . . as many works of art were displaced, transported, and stolen as during the entire Thirty Years War or all the Napoleonic Wars.”).

18. Benjamin Genocchio, *Seized, Reclaimed and Now on View*, N.Y. TIMES, Apr. 27, 2008, <http://www.nytimes.com/2008/04/27/nyregion/nyregionspecial2/27brucect.html>. In total, seventy-three percent of Dutch Jews were killed by the Nazis. *Id.*

Goudstikker broke his neck and died when he fell into the cargo hold of the boat taking him and his family to England.<sup>19</sup> Groudstikker, then the most prominent art dealer in the Netherlands, left behind over a thousand pieces of art, many of which were never properly restituted to his heirs.<sup>20</sup> Among these pieces included a 500 year old diptych oil painting by Lucas Cranach the Elder, a German Renaissance painter, entitled “Adam and Eve” (the Cranachs).<sup>21</sup> The Cranachs are currently on display at the Norton Simon Museum in Pasadena.<sup>22</sup>

The California legislature sought to assist the victims and heirs of both the Armenian Genocide and the Jewish Holocaust to obtain restitution by extending the statute of limitations for their time-barred claims.<sup>23</sup> The California legislature found that many of the victims of the Armenian Genocide and their heirs residing within the state had been intentionally denied the benefits to their life insurance claims by their insurers.<sup>24</sup> In response, California enacted section 354.4 of the California Code of Civil Procedure, which extended the statute of limitations until 2010 for these victims and their heirs to bring suit against insurers for unpaid life insurance claims.<sup>25</sup> Based upon section 354.4, Father Vazken Movsesian, Pastor of the St. Peter Armenian Church in Glendale, California, brought a class-action lawsuit against German insurers Victoria Versicherung AG and Ergo Versicherungsgruppe, as well as their parent company, Münchener

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19. *Id.*

20. *Id.* After the war, only about 400 pieces were returned to the Dutch government. *Id.* Mrs. Goudstikker attempted to have these paintings returned to her, but the Dutch government claimed they legally belonged to the Dutch people. *Id.* Mrs. Goudstikker was able to buy back more than a hundred, but the rest were either distributed to Dutch museums or sold to private parties. *Id.* In 2006, Dutch law had changed, and Mrs. Marie von Saher, Goudstikker’s daughter-in-law, sued for recovery of the paintings. *Id.* After years of legal battles, the Dutch government agreed to return 200 old master paintings to von Saher. *Id.*

21. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1020–21 (9th Cir. 2009). A “diptych” is a “picture or series of pictures (as an altarpiece) painted or carved on two hinged tablets.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 353 (11th ed. 2004).

22. *Norton Simon*, 578 F.3d at 1020–21; Mike Boehm, *Woman Seeking Return of Looted Art from Norton Simon Museum Loses Appeal*, L.A. TIMES, Jan. 16, 2010, <http://articles.latimes.com/2010/jan/16/entertainment/la-et-cranach16-2010jan16>.

23. *See, e.g., Movsesian v. Versicherung AG*, 578 F.3d 1052, 1054 (9th Cir. 2009); *Norton Simon*, 578 F.3d at 1020–21.

24. *Movsesian*, 578 F.3d at 1054; *see also* CAL. CIV. PROC. CODE § 354.4(a)–(c) (West 2006). Lawsuits from genocide victims have yielded a combined total of \$37 million in settlements from two firms, New York Life Insurance Co. in 2004, and AXA S.A. in 2005. *See* Press Release, New York Life, Agreement Is Reached to Settle Armenian Insurance Policies from 1915 (Jan. 28, 2004), <http://www.newyorklife.com/nyl/v/index.jsp?vnextoid=3597e62f139d2210a2b3019d221024301cacRCRD>; AXA, Annual Report (Form 20-F), at 153 (June 6, 2007); Harry Weinstein, *Insurer Settles Armenian Genocide Suit*, L.A. TIMES, Jan. 29, 2004, <http://articles.latimes.com/2004/jan/29/local/me-genocide29> (New York Life Insurance Co. agreed to pay \$20 million to settle a lawsuit filed by heirs of Armenian genocide victims who accused the company of failing to honor valid claims).

25. CIV. PROC. § 354.4.

Rückversicherungs-Gesellschaft.<sup>26</sup> Likewise, California Code of Civil Procedure section 354.3 extended the statute of limitations until 2010 for victims of the Jewish Holocaust and their heirs to bring claims against museums to recover artwork stolen by the Nazis.<sup>27</sup> Marei Von Saher, Groudstikker's daughter-in-law and only surviving heir, sued the Norton Simon Museum in Pasadena, California under section 354.3 for recovery of the Cranachs, which were then valued at \$24 million.<sup>28</sup>

The Ninth Circuit decided both cases, *Movsesian v. Versicherung* and *Von Saher v. Norton Simon*, on the same day and held that both section 354.4 and section 354.3 were preempted.<sup>29</sup> Section 354.4, the panel held, was in conflict with the "foreign policy preference" of the Executive Branch against using the words "Armenian Genocide."<sup>30</sup> The panel based this decision on an expansive reading of *American Insurance Ass'n v. Garamendi* and its progeny.<sup>31</sup> Section 354.3 was invalidated on the grounds that California encroached on the federal authority to make and resolve war.<sup>32</sup> This decision was based upon a "relic of the cold war," the dormant foreign affairs power, a doctrine similar to the dormant Commerce Clause but used by the Supreme Court only once in 1968.<sup>33</sup>

The purpose of this Comment is to determine whether states in the twenty-first century have the power to enact laws which encourage and empower their citizens to press their rights. Part II of this Comment will summarize the methods by which a state law can be preempted when it affects foreign affairs.<sup>34</sup> Part III traces the historical development of the

26. Carol J. Williams, *Federal Appeals Court Rejects Armenian Genocide Case*, L.A. TIMES, Aug. 21, 2009, <http://articles.latimes.com/2009/aug/21/local/me-armenian-suit21>; Vazken Movsesian, *Genocide Decision—08/21/09*, FR VAZKEN'S BLOG (Aug. 22, 2009), <http://www.mychurch.org/frvazken/blog?PID=2>.

27. CIV. PROC. § 354.3; *Norton Simon*, 578 F.3d at 1020. Section 354.3 had two sister statutes, section 354.5 (extending statute of limitations for insurance policy claims by Holocaust victims or their heirs until 2010) and section 354.6 (creating a cause of action and extending the statute of limitations for slave labor claims arising out of WWII until 2010), both of which were found unconstitutional under the foreign affairs doctrine. See *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 34 Cal. Rptr. 3d 944, 953 (Ct. App. 2005) (finding section 354.5 unconstitutional); *Deustch v. Turner Corp.*, 324 F.3d 692, 716 (9th Cir. 2003) (finding section 354.6 unconstitutional).

28. Boehm, *supra* note 22.

29. *Movsesian*, 578 F.3d 1052; *Norton Simon*, 578 F.3d 1016.

30. *Movsesian*, 578 F.3d at 1059; see *infra* notes 225–49 and accompanying text.

31. *Movsesian*, 578 F.3d at 1059; see *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

32. *Norton Simon*, 578 F.3d at 1027; see *infra* notes 259–85 and accompanying text.

33. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 146–47 (2d ed. 1996); see also JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) (discussing dormant foreign affairs power generally). See also *infra* notes 290–308 for a discussion of the dormant Commerce Clause.

34. See *infra* notes 39–73 and accompanying text.

foreign affairs power held by the Executive Branch and determines how states are affected when they enact regulations either within or outside their areas of traditional competence.<sup>35</sup> Part IV examines the twin Ninth Circuit decisions, *Movsesian* and *Norton Simon*, in light of Supreme Court precedent.<sup>36</sup> This Part also searches for limitations to the dormant foreign affairs power by drawing comparisons to limitations to the dormant Commerce Clause proposed by several Supreme Court justices. Part V considers the impact of *Movsesian* and *Norton Simon*, as they stand, on federalism and separation of powers.<sup>37</sup> Part VI concludes this Comment.<sup>38</sup>

## II. PREEMPTION UNDER THE DOCTRINE OF FOREIGN AFFAIRS

The foreign affairs powers are the full range of international powers exercised by a sovereign nation needed to interact with other nations.<sup>39</sup> For the United States, they are either expressed in Articles I and II of the Constitution, or, in most instances, implied as inherent in the concept of nationhood.<sup>40</sup> These powers are generally wielded entirely by the federal government to the exclusion of the states because they are “necessary concomitants of nationality.”<sup>41</sup>

### A. Express Preemption

The principle of preemption is found in Article VI of the Constitution, which makes the federal Constitution, federal statutes, and treaties “the supreme Law of the Land.”<sup>42</sup> State judges are “bound” to apply federal law, regardless of “Laws of any State to the Contrary.”<sup>43</sup> In domestic cases, if a power is not obviously delegated to the national government, concurrent jurisdiction will be presumed.<sup>44</sup> In the realm of foreign affairs, however,

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35. See *infra* notes 74–224 and accompanying text.

36. See *infra* notes 225–338 and accompanying text.

37. See *infra* notes 339–57 and accompanying text.

38. See *infra* note 358 and accompanying text.

39. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 6.1 (7th ed. 2004).

40. See *id.*; see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

41. *Curtiss-Wright*, 299 U.S. at 318; see *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–14 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941).

42. U.S. CONST. art. VI, cl. 2; *Missouri v. Holland*, 252 U.S. 416 (1920) (treaties are the supreme law of the land).

43. U.S. CONST. art. VI, cl. 2. To ensure that federal authority is enforced, Article III entrusts “judicial Power” over all cases “arising under” federal law to the U.S. Supreme Court. U.S. CONST. art. III, § 2.

44. See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1642 (1997) (“[T]he most natural inference [from the text of the Constitution] is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty.”); THE FEDERALIST NO. 32, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“State Governments would clearly retain all the rights of sovereignty which they before had and which were not . . . exclusively

this presumption may be reversed “because of the federal government’s naturally predominant role.”<sup>45</sup>

A “central purpose” of the Founders was to give the federal government the authority necessary to displace inconsistent state law, especially in the realm of foreign affairs.<sup>46</sup> Under the Articles of Confederation, it was nearly impossible for the Congress of the Confederation to establish “a coherent national foreign policy” because the states had the independent power to implement contradictory state policy.<sup>47</sup> As a result, the Founders incorporated the Supremacy Clause into the Constitution to ensure that treaties had merit.<sup>48</sup>

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delegated to the United States.”).

45. Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 846–47 (citing *Hines v. Davidowitz*, 312 U.S. 52, 66–68 (1941)).

46. D. A. Jeremy Telman, *Medellin and Originalism*, 68 MD. L. REV. 377, 415 (2009) (“The Supremacy Clause embodied the Framers’ response to the more general problem of enforcing federal law. The Framers adopted the more radical language of the New Jersey plan [Small-State plan], declaring treaties to be ‘the supreme Law of the Land,’ rather than giving Congress the power to ‘negative’ state legislation as proposed in the rival Virginia Plan [Large-State plan], thus incorporating U.S. treaties into domestic law with no requirement for congressional implementation.”).

47. Denning & Ramsey, *supra* note 45, at 843 (“The inclusion of treaties, as well as statutes, in the Supremacy Clause shows the extent to which the Constitution’s framers focused upon state interferences in foreign affairs under the Articles.”); *see also id.* at 843 n.64 (“Madison had wanted the Constitution to give Congress a ‘negative’ over state legislation that it believed contrary to ‘the articles of Union or any treaties subsisting under the authority of the Union.’ His proposal encountered opposition on various grounds; the Supremacy Clause was the resulting compromise.” (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27–29 (Max Farrand ed., 1937))); THE FEDERALIST NO. 42, *supra* note 44, at 279 (James Madison) (the power to make treaties is “disembarrassed by the plan of the Convention of an exception, under which treaties might be substantially frustrated by regulations of the States”).

48. *See* Telman, *supra* note 46, at 414 (“The purpose of the Supremacy Clause was to prevent U.S. treaty violations ‘by empowering the courts to enforce treaties at the behest of affected individuals without awaiting authorization from state or federal legislatures.’”); Ben Geslison, *Treaties, Execution, and Originalism in Medellin v. Texas*, 128 S. Ct. 1346 (2008), 32 HARV. J.L. & PUB. POL’Y 767, 776 (2009) (“It is critical to understand that the Supremacy Clause is a federalism clause and not a separation-of-powers clause. In other words, the Supremacy Clause deals with the relationship between federal and state enactments, not with the relationship between different types of federal enactments, and the limitations on each.”).



## B. Implied Preemption Under the Modern Approach

The modern approach recognizes implied preemption—preemption that is outside “the Supremacy Clause’s plain language.”<sup>49</sup> Implied preemption comes in two forms: field preemption and conflict preemption.<sup>50</sup> The threshold inquiry to determine which form of preemption to apply is whether the state is acting within an area of “traditional competence.”<sup>51</sup> If it is, the state law must conflict with federal law in order to be displaced.<sup>52</sup> If the area is not traditionally regulated by the states, then the state regulation can be excluded outright.<sup>53</sup>

The leading case on the subject of implied foreign affairs authority is *United States v. Curtiss-Wright*.<sup>54</sup> Justice Sutherland, writing for the majority, held that it was within the federal government’s authority to place an embargo on the sale of arms to the warring nations of Bolivia and Paraguay, even though the Constitution did not explicitly grant this power.<sup>55</sup> The Court reasoned that the limitations imposed by the Constitution—that the federal government could only exercise those powers explicitly enumerated and those implied powers necessary and proper to effectuate the enumerated powers—were a condition upon which the colonies granted sovereignty to the United States.<sup>56</sup> This grant of power, however, did not apply to the foreign affairs powers because the colonies, “severally[,] never possessed” them.<sup>57</sup> When the colonies dissolved their political bands with

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49. Denning & Ramsey, *supra* note 45, at 844; see Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 932–64 (2003) (discussing arguments for and against preemption).

50. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003).

51. *Id.* (quoting *Zschernig v. Miller*, 389 U.S. 429, 459 (1968) (Harlan, J., dissenting)).

52. *Id.* (citing *Zschernig*, 389 U.S. at 459 (Harlan, J., dissenting)); see, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (registration of alien residents is not a field reserved to the federal government); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (assuming 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. *Garamendi*, 539 U.S. at 419 n.11 (citing *Zschernig*, 389 U.S. at 459 (Harlan, J., dissenting)); see, e.g., *United States v. Locke*, 529 U.S. 89, 115 (2000) (regulation of oil tanker ships is a field reserved to the federal government); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–05 (1988) (displacing state tort law imposing liability on government contractors for design defects in military equipment).

54. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

55. *Id.* at 311–13, 333. Congress, through a joint resolution, authorized President Franklin D. Roosevelt to place this embargo if he found that doing so “may contribute to the reestablishment of peace between those countries.” *Id.* at 311–12. In this situation, as President Roosevelt acted “pursuant to an express . . . authorization of Congress, his authority [was] at its maximum, for it include[d] all that he possesse[d] in his own right plus all that Congress [could] delegate. In th[is] circumstance[], . . . may he be said . . . to personify the federal sovereignty.” See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952) (Jackson, J., dissenting).

56. *Curtiss-Wright*, 299 U.S. at 315.

57. *Id.* at 316. For example, the Supreme Court has long held that the federal government possesses “[t]he power to acquire territory by discovery and occupation, the power to expel undesirable aliens, [and] the power to make such international agreements as do not constitute

Great Britain, the “powers of external sovereignty passed from the Crown” to the colonies collectively, not individually.<sup>58</sup> Therefore, the limitations imposed by the Tenth Amendment’s reservation of powers “to the States . . . or to the people” did not apply to the foreign affairs powers because they were never theirs to begin with.<sup>59</sup>

*Curtiss-Wright* is not without its critics.<sup>60</sup> The problem with the *Curtiss-Wright* approach is its non-textual, sweeping language. This proves problematic for states because, even if there is a limit on this implied federal foreign policy authority, it is not concrete and thus subject entirely to the Court’s discretion. As a result, states have considerably less leeway to enact

treaties in the constitutional sense.” *Id.* at 318 (citations omitted). These powers, however, cannot be found “in the provisions of the Constitution, but in the law of nations” and are “inherently inseparable from the conception of nationality.” *Id.*

58. *Id.* at 316.

59. U.S. CONST. amend. X; see *Curtiss-Wright*, 299 U.S. at 315–18. “[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.” *Id.* at 318; see, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920) (the Tenth Amendment does not limit the federal government from using the treaty power to override a state law or policy); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1296–97 (1996) (“The constitutional structure strongly suggests that the states conferred all rights of external sovereignty on the federal government and retained none for themselves. Unlike power over domestic matters, power over foreign affairs cannot be shared without substantially impairing its effective exercise.”); Karl Manheim, *State Immigration Laws and Federal Supremacy*, 22 HASTINGS CONST. L.Q. 939, 940–41 (1995) (“State and local governments have no constitutional power to regulate foreign affairs. It is not merely that such power is specifically denied to them by the Constitution; they would be impotent even without such proscriptions.”); Richard B. Morris, *The Forging of the Union Reconsidered: A Historical Refutation of State Sovereignty over Seabeds*, 74 COLUM. L. REV. 1056, 1060–68 (1974) (arguing that Justice Sutherland’s “historical analysis of the inherent foreign affairs powers of the national government would not have seemed alien to the thinking of many, if not all, of the Founding Fathers”).

60. See, e.g., MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 17 (2007) (“[T]he Tenth Amendment . . . appears categorically to deny the idea of inherent national powers. By its language, powers of government fall into only two categories, reserved and delegated. Powers not delegated by the Constitution are reserved. Delegated powers are national powers; reserved powers are state powers, or powers of the people. There is no third category.”); see also James Wilson Speech in the State House Yard, Philadelphia (Oct. 6, 1787), in 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 167–68 (Merrill Jensen ed., 1976) (Speech in the State House Yard, Oct. 6, 1787) (“[E]verything which is not given, is reserved.”); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland’s Theory*, 55 YALE L.J. 467, 493–94 (1946) (“[The *Curtiss-Wright* decision was] the most extreme interpretation of the powers of the national government. It is the furthest departure from the theory that [the] United States is a constitutionally limited democracy.”); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: A Historical Reassessment*, 83 YALE L.J. 1, 32 (1973) (“If good history is a requisite to good constitutional law, then *Curtiss-Wright* ought to be relegated to history.”); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 323–24 (2009) (“Sutherland’s description of the President’s foreign affairs power tracks almost precisely Blackstone’s description of the royal prerogative of the King. . . . A poorer candidate for plenary presidential power could hardly be found.”).

legislation to provide for their own citizenry where the legislation has some international effect.

### 1. Conflict Preemption

If the state is regulating a traditional state responsibility, preemption requires “a conflict, of a clarity or substantiality that would vary with the . . . importance of the state concern asserted.”<sup>61</sup> Under conflict preemption, a state law is void when it is impossible to “comply with both state and federal law” simultaneously,<sup>62</sup> or when the state law interposes an obstacle to the achievement of the federal activity.<sup>63</sup> In this scenario, “it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.”<sup>64</sup> In the absence of a conflict, field preemption analysis would be appropriate.<sup>65</sup>

### 2. Field Preemption

When states act outside of their traditional areas of competence, their laws can be preempted without a need to show conflict.<sup>66</sup> Essentially, a state law can be displaced if the federal regulatory scheme is so pervasive as to “occupy the field” such that Congress left no room for the states to supplement the regulation.<sup>67</sup> Even in the absence of any federal activity, however, if a specific power is vested in the federal government, by negative implication, states are excluded.<sup>68</sup> For example, Article I, Section 8 gives Congress the authority “[t]o regulate Commerce . . . among the several

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61. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003) (“Where . . . a State has acted within . . . its ‘traditional competence,’ but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.” (quoting *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (Harlan, J., dissenting))).

62. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000). See *infra* note 214 for a discussion of *Crosby*.

63. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (state regulation of occupational safety and health issues where a federal standard was already in effect conflicted with full purposes and objectives of federal act).

64. *Garamendi*, 539 U.S. at 420.

65. *Id.* at 419 n.11.

66. *Id.* (“If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government.”).

67. *Crosby*, 530 U.S. at 372; *Gade*, 505 U.S. at 98.

68. See *Denning & Ramsey*, *supra* note 45, at 849; see also *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

States.”<sup>69</sup> Therefore, states are excluded from “enacting certain regulations affecting interstate commerce even absent federal action.”<sup>70</sup> Under Article I, Section 10, states are specifically excluded from entering “into any Treaty, Alliance, or Confederation,” and they are not allowed to “enter into any Agreement or Compact with . . . a foreign Power” without the consent of Congress.<sup>71</sup> Therefore, the argument goes, states are also generally excluded from enacting regulation that affects foreign affairs.<sup>72</sup>

In summation, state laws are generally excluded when they come into conflict with federal law, or, even in the absence of a conflict, when the state law infringes upon the federal government’s exclusive power to regulate the field of foreign affairs. It should be noted, however, that conflict and field preemption are not “rigidly distinct” categories and that courts will occasionally use one approach while calling it another.<sup>73</sup>

### III. THE PRESIDENT AS THE SYMBOL OF SOVEREIGNTY ABROAD

In terms of domestic law, the powers of the federal government are generally divided so that the policies of the United States are created by the laws of Congress, and the President executes those laws.<sup>74</sup> However, in the

69. U.S. CONST. art. I, § 8.

70. Denning & Ramsey, *supra* note 45, at 849. See *infra* notes 290–318 and accompanying text for a discussion on the dormant Commerce Clause.

71. U.S. CONST. art. I, § 10.

72. See Denning & Ramsey, *supra* note 45, at 849; see also *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“[I]n respect of our foreign relations generally, state lines disappear.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (stating that the federal government, “representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”).

73. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)) (internal quotation marks omitted). “Because a variety of state laws and regulations may conflict with a federal statute, whether because a private party cannot comply with both sets of provisions or because the objectives of the federal statute are frustrated, ‘field pre-emption may be understood as a species of conflict pre-emption.’” *Id.* at 372 n.6 (quoting *English*, 496 U.S. at 79–80 n.5); *accord Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (using conflict preemption in place of field preemption); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1179 (E.D. Cal. 2007) (“Thus, foreign policy preemption, whether expressed in terms of conflict or field preemption should be understood as a species of conflict preemption.”); Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2215 (2003) (stating that this area of vague federalism construed by the Supreme Court is termed “implied conflict preemption”).

74. See U.S. CONST. art. I, § 8; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (“The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.”). However, the meaning of “executive Power” is subject to debate. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47–48 (1994) (Article II, Section 1 “says *who has the executive power; not what that power is*”). The “prefatory” argument states that the “executive Power” lacked substantive meaning in the

realm of foreign affairs, this power is divided differently because most of the foreign affairs powers are vested in the President.<sup>75</sup>

The powers of the Executive Branch are articulated in Article II, Section 2.<sup>76</sup> The President is commander-in-chief and has the power to make treaties (with the advice and consent of the Senate) and to appoint ambassadors.<sup>77</sup> These enumerated powers, on their face, reasonably cannot be the full spectrum of powers required to participate in the international arena.<sup>78</sup> Therefore, by necessity, there must be additional powers that are implicit in the concept of nationhood.<sup>79</sup> These powers, then, are rightfully held by the “sole organ” of foreign affairs: the President.<sup>80</sup> Essentially, the

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eighteenth century, and instead referred generally to the powers exercised by a chief magistrate. See RAMSEY, *supra* note 60, at 122. However, Professor Ramsey argues that the more natural reading is that “at minimum Section 1 grants (‘vests’) power to enforce the laws (‘executive power’), and Sections 2 and 3 clarify specific instances of that power or add additional powers and duties not obviously encompassed by it.” *Id.* at 125.

75. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (“[I]n foreign affairs the President has a degree of independent authority to act.”). This statement, of course, relies upon the assumption that the “executive Power” includes a foreign affairs power. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 47, at 65 (at the Convention, drafter Roger Sherman said that “the Executive magistracy is nothing more than an institution for carrying the will of the Legislature into effect”); see also RAMSEY, *supra* note 60, at 125–26 (“Almost all the evidence [regarding ‘executive’ foreign affairs power] is indirect: comments that the President would have (some) foreign affairs powers, comments that (some) foreign affairs powers such as treaty-making were called ‘executive.’ The direct associations of executive power and foreign affairs power belong mostly to the post-ratification period, when perhaps those who spoke had institutional reasons for doing so.”). Furthermore, there is an argument to be made that the specific powers granted by Article II, Sections 2 and 3 relate to foreign affairs, and thus make redundant a general grant of foreign affairs authority in Section 1. See *id.* However, one “cannot overcome [the] historical evidence” that, even though the founding-era Americans may have disagreed over the precise definition of “executive Power,” the writings they studied and their own discussion demonstrate that they generally associated “executive Power” with foreign affairs powers. *Id.* at 126.

76. U.S. CONST. art. II, § 2; see also Reinstein, *supra* note 60, at 263–71 (arguing that the “massive transfer” of power from the executive branch to the legislative branch under Articles I and II was a response to the use of the royal prerogatives to establish dominance over Parliament). See generally THE FEDERALIST NOS. 67–77, *supra* note 44 (Alexander Hamilton).

77. U.S. CONST. art. II, § 2.

78. See *supra* note 57 for other foreign affairs powers not listed in the Constitution, but which the Court has held are reserved to the federal government. See also Robert Ahdieh, *The Fog of Certainty*, 119 YALE L.J. ONLINE 41, 49 (2009) [hereinafter Ahdieh, *The Fog of Certainty*] (“Broadly, one might plausibly see the contrast between the ‘formidable list of enumerated powers under Article I’ and the ‘very general language’ of executive power in Article II to suggest a reading of the latter as something less than a complete and exclusive statement of the parameters of presidential power.” (internal footnote omitted) (quoting Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. 595, 657 (2008))); Clark, *supra* note 59, at 1296 (noting that the federal foreign affairs powers go beyond the enumerated powers). Professor Sloss argues that this constitutional design may have more to do with the national security concerns than anything else, namely keeping the United States out of France’s ongoing wars with England and Spain. See David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145, 146–48 (2008).

79. See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–18 (1936).

80. *Id.* at 319. This “sole organ” language, which originated in *Curtiss-Wright*, is the single greatest justification for an expansive approach to executive foreign affairs power. See RAMSEY, *supra* note 60, at 14 (“Not surprisingly, the case is favored by Presidents and presidential advocates,

President's foreign affairs powers are implied from the aggregate of his enumerated powers.

A. *Evaluating the President's Independent Authority to Act: The Youngstown Framework*

The scope of the Chief Executive's independent authority to act is assessed in the *Steel Seizure* case, *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>81</sup> In 1952, the United States was struggling to end the Korean conflict, then in its third year.<sup>82</sup> Concurrently, a number of major steel mills were on the verge of striking as wage negotiations between the United Steel Workers and the mills were deadlocked.<sup>83</sup> President Harry S. Truman, fearful that a stoppage of steel production for any length of time would undermine the national defense and be detrimental to the efforts in South

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who see it as authority for independent presidential action in foreign affairs without the need for explicit constitutional justification . . . ."); H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS 23 (2002) (*Curtiss-Wright* is "a mainstay in the executive-branch lawyer's kit"); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990) ("Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right' cite . . . ."); see also Pasquantino v. United States, 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is 'the sole organ of the federal government in the field of international relations,' and has ample authority and competence to manage 'the relations between the foreign state and its own citizens' and to avoid 'embarrass[ing] its neighbor[s].'" (citations omitted)); *Garamendi*, 539 U.S. at 414 ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring))); *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring) (quoting Napoleon, Justice Jackson wrote, "[t]he tools belong to the man who can use them"); THE FEDERALIST NO. 64, *supra* note 44, at 434–35 (John Jay) (the Executive Branch has inherent advantages over the Legislative Branch in the area of foreign affairs because of its ability to act quickly and, if need be, in secret). *But see* Reinstein, *supra* note 60, at 298 ("Although the President is given three elements of the foreign affairs power related to diplomacy . . . , Article II does not state that the President holds a *general* power over foreign affairs. It does not, for example, incorporate Blackstone's language that the chief executive is the 'delegate or representative' of the nation in conducting foreign affairs, or that his action is that 'of the whole nation.'"). In the alternative, Professor Ramsey suggests that the textual basis for the President's foreign affairs power may be the Article II, Section 1 "executive power." See RAMSEY, *supra* note 60, at 51–73. Though the word "executive" is associated with law enforcement in modern times, it may have been associated with foreign affairs powers in the eighteenth-century. See *supra* note 75 for a discussion on the term "executive."

81. *Youngstown*, 343 U.S. 579.

82. *Id.* at 582–83.

83. *Id.* at 583.

Korea, issued Executive Order 10340 to take possession of and operate the mills.<sup>84</sup>

Justice Hugo Black's majority opinion disagreed with the government's argument that this seizure was within the President's "inherent power . . . supported by the Constitution, by historical precedent, and by court decisions."<sup>85</sup> Justice Black wrote that the President's authority to issue the executive order "must stem either from an act of Congress or from the Constitution itself."<sup>86</sup> As Congress did not "expressly authorize[]" the President to seize the mills by way of statute, the Court evaluated whether this authority was found in the Constitution itself.<sup>87</sup> The Court rejected the United States' argument that this "power should be implied from the aggregate" of the President's constitutional powers, particularly the Article II provision that he "shall take Care that the Laws be faithfully executed," on the grounds that power to take private property is not a military authority and, more importantly, that the President is not a lawmaker.<sup>88</sup>

Justice Robert H. Jackson's renowned concurrence,<sup>89</sup> often used by

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84. *Id.* at 584; Exec. Order No. 10340, 17 Fed. Reg. 3139 (1952), reprinted in *Youngstown*, 343 U.S. at 673–76 (Vinson, C.J., dissenting) ("The Secretary of Commerce is hereby authorized and directed to take possession of all or such of the plants, facilities, and other property of the companies named in the list attached hereto, or any part thereof, as he may deem necessary in the interests of national defense; and to operate or to arrange for the operation thereof and to do all things necessary for, or incidental to, such operation. . ."). President Truman announced his intentions to the nation during a national radio address while concurrently signing the executive order. See MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 80–84 (1977).

85. *Youngstown*, 343 U.S. at 584 (internal quotation marks omitted).

86. *Id.* at 585. Contrast this view with Justice Sutherland's view in *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936), discussed *supra* notes 54–60 and accompanying text.

87. *Youngstown*, 343 U.S. at 585–87.

88. *Id.* at 587–88 ("The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." (quoting U.S. CONST. art. II, § 3) (internal quotation marks omitted)).

89. See *Medellín v. Texas*, 552 U.S. 491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action . . ."); *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) ("[W]e have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful . . ."). In total, five Justices, including Justice Jackson, wrote separate, concurring opinions. The others were Justices Felix Frankfurter, William O. Douglas, Harold H. Burton, and Thomas C. Clark (concurring in judgment). See Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373, 406–21 (2002). These opinions range from formalistic (Justice Black) to relatively functional (Justice Jackson). See Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1523, 1527–28 & nn.55, 59 (1997) (labeling Justice Black's majority opinion as formalistic and Justice Jackson's as functionalist); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 691 & n.28 (1991) (describing Justice Black's opinion as being an "exaggerated" and "stark" example of formalism). *But see* Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 215, 217 (2002) (arguing that Justice Black's opinion is compatible with Justice Jackson's concurrence). The difference between "formalism" and "functionalism" is that "formalism" requires that each branch of government can only act based upon a "firm textual basis in the Constitution," whereas "functionalism" allows each branch to share

courts and scholars to assess the powers of the Executive Branch, divided these powers into three categories and ranked them in descending order based upon the degree of congressional involvement:

(1) When 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. . . .<sup>90</sup>

(2) When 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. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . .<sup>91</sup>

(3) When the President takes measures incompatible with the expressed 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. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.<sup>92</sup>

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authority as long as they do not “interfere[] with one of the core functions of another” branch. *See Brown, supra*, at 1523, 1527.

90. *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring) (“In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”); *see Dames & Moore*, 453 U.S. at 675; *Zemel v. Rusk*, 381 U.S. 1 (1965) (executive order prohibiting travel to Cuba was within presidential authority because Congress delegated its authority to the Executive Branch under Passport Act of 1926 and the Immigration and Nationality Act of 1952).

91. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”); *see Medellín*, 552 U.S. at 531 (“[I]f pervasive enough, a history of congressional acquiescence can be treated as a ‘gloss on “Executive Power” vested in the President by § 1 of Art. II.’” (quoting *Dames & Moore*, 453 U.S. at 686)).

92. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the



Justice Jackson determined that the authority of the President to seize “strike-bound industries” could only be defended under the third category, and only if doing so was “within his domain and beyond control by Congress.”<sup>93</sup> He ultimately concluded that it was not.<sup>94</sup>

### B. Executive Agreements

Although the Executive Branch cannot make domestic law, this does not limit the President’s authority to establish foreign policy.<sup>95</sup> The general rule is that, in order for a state law to be displaced, the Constitution requires that it must come into conflict—expressly or impliedly—with a “supreme law,” namely the Constitution, a federal law, or a treaty.<sup>96</sup> However, the Court has carved out an exception to the Treaty Clause and has generally held that conflicts with executive foreign policy, embodied in an executive agreement, receive the same result as those state laws in conflict with a valid treaty.<sup>97</sup>

An executive agreement is an international compact between the President, acting independently of Congress, and a foreign government or nationals.<sup>98</sup> Like a treaty, executive agreements bind the United States.<sup>99</sup>

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equilibrium established by our constitutional system.”); see Michael J. Turner, *Fade to Black: The Formalization of Jackson’s Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. 665, 669 (2009) (arguing that *Hamdan* establishes Congress’s “disabling” power in the third category); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers after Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 933, 960–61 (2007) (arguing that the majority opinion in *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), “skipped a few steps” by assuming that Congress automatically wins in the third category).

93. *Youngstown*, 343 U.S. at 640 (Jackson, J., concurring); see also Ahdieh, *The Fog of Certainty*, *supra* note 78, at 49 (“Congress constrains presidential power all the time, in ways that go well beyond the text of Article II. Justice Jackson’s tripartite scheme . . . might even be read to endorse as much, with its recognition that presidential authority expands and contracts in ways beyond the bare outline of executive power offered in Article II, as Congress variously acts and fails to act.” (citation omitted)).

94. *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

95. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 413–14 (2003) (“There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy . . . . Nor is there any question generally that there is *executive authority* to decide what that policy should be.” (emphasis added)).

96. See U.S. CONST. art. VI, cl. 2.

97. See *Garamendi*, 539 U.S. at 429. “To paraphrase the *Medellin* majority, some treaties delegate power to the president and some do not, depending on the treaty.” Carlos Manuel Vázquez, *Less than Zero?*, 102 AM. J. INT’L L. 563, 567 (2008) [hereinafter Vázquez, *Less than Zero?*] (citing *Medellin v. Texas*, 552 U.S. 491, 519–21 (2008)); see also Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1578–80 (2007) (“[I]n resolving cases involving sole executive agreements, courts need only decide whether such agreements qualify as ‘the supreme Law of the Land’ under the Supremacy Clause.”).

98. *Medellin*, 552 U.S. at 530–31; Michael Stokes Paulsen, *The Constitutional Power to Interpret International Law*, 118 YALE L.J. 1762, 1787 (2009) [hereinafter Paulsen, *Constitutional Power*]. There are two types of executive agreements: “[1] congressional-executive agreements, which require participation by both houses of Congress; and [2] sole executive agreements, in which the President unilaterally reaches an agreement with another nation in areas of his plenary executive authority.” John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive*

However, unlike a treaty, which is only effective when ratified by “two thirds of the Senators present,”<sup>100</sup> an executive agreement requires only that the President and the head of the other government sign the document.<sup>101</sup> Otherwise, the difference between a treaty and an executive agreement in the realm of foreign affairs is unclear.<sup>102</sup>

This power has been criticized because of its inconsistencies with a textual reading of the Constitution.<sup>103</sup> For example, why would the

*Agreements*, 99 MICH. L. REV. 757, 765 (2001); see also HENKIN, *supra* note 33, at 215 (“[T]here are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate, . . . but neither Justice Sutherland nor anyone else has told us which are which.”). When the term “executive agreement” is used in this Comment, it will be in reference to the latter.

99. See U.S. CONST. art. VI, cl. 2; Paulsen, *Constitutional Power*, *supra* note 98, at 1787 (“An executive agreement is an international compact, or deal, made by the President alone, without the two-thirds majority Senate consent required for Article II treaty formation.”). However, some presidents, like Theodore Roosevelt, considered them binding only on the administration which signed them. Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664, 679 (1944) [hereinafter Borchard, *Executive Agreement*].

100. See U.S. CONST. art. II, § 2.

101. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 4.6.2 (3d ed. 2006).

102. *Id.* (“[E]xecutive agreements can be used for any purpose; that is, anything that can be done by treaty can be done by executive agreement.”); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1238 (2008) (noting that the United States makes binding international agreements through two separate processes, one of which is laid out in the Constitution and one that is not); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. I & II), 54 YALE L.J. 181, 534 (1945) (supportive); JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM D. AMAR, CONSTITUTIONAL LAW: CASES AND MATERIALS 408 (13th ed. 2009). But see Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945) (critical); Yoo, *supra* note 98, at 765 (sole executive agreements “are not considered to be interchangeable with treaties”). “Although there is no Supreme Court holding on point, it appears, then, that a federal statute would prevail if it were in conflict with an executive agreement.” CHERMERINSKY, *supra* note 101, § 4.6.2 n.21 (citing *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff’d on other grounds*, 348 U.S. 296 (1955)).

103. See Borchard, *Executive Agreement*, *supra* note 99, at 677–78 (criticizing executive agreements as (1) “permit[ting] the President to involve the country in secret agreements,” (2) being “of uncertain duration,” (3) “may be terminated unilaterally by any future President at any time,” (4) “unsafe for the United States or any foreign country” because “they can be congressionally disapproved at any time,” (5) not having “the constitutional dignity and force of a treaty, since the Constitution makes no mention of them, but specifically mentions treaties,” and (6) “their conscious use as a substitute for treaties gives rise to the charge of constitutional ‘evasion’”); Michael D. Ramsey, *Executive Agreements and the (Non) Treaty Power*, 77 N.C. L. REV. 133, 219 (1998) (arguing that the justifications for the executive agreement points strongly against giving them the force of law); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1964–75 (2003) (“There is a strong case for judicially enforced federalism limitations on sole executive agreements because the process for concluding sole executive agreements provides very weak political safeguards for the states.”); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT’L L.J. 1, 4

Constitution explicitly state that treaties are a supreme law of the land, yet remain silent about executive agreements, which purportedly have just as much preemptive weight, yet are more easily attained because they do not require Senate approval?<sup>104</sup> Nevertheless, the Court has permitted them in large part because they have been in use, without dispute from Congress, since the Adams Administration.<sup>105</sup> As a result, the Court has never held one to be unconstitutional because it lacked Senate approval.<sup>106</sup>

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(2003) [hereinafter Wuerth, *Dangers of Deference*] (“Sole executive agreements terminating domestic litigation stand in significant tension with the Treaty and Supremacy Clauses.”).

104. The “federalist position” argues that, because these “other agreements” are not specifically mentioned in the Supremacy Clause, they cannot have preemptive effect. Anne E. Nelson, *From Muddled to Medellin: A Legal History of Sole Executive Agreements*, 51 ARIZ. L. REV. 1035, 1038–39 (2009). For example, in Article I, Section 10, Clause 3, the Constitution specifically excludes states from entering into “any Agreement or Compact with . . . a foreign Power” without Congress’s consent. U.S. CONST. art. I, § 10, cl. 3. “The Framers knew that countries entered into agreements other than treaties. Yet the President’s power to enter into executive agreements with foreign countries is not enumerated in Article II, nor is this power specifically given to Congress.” Reinstein, *supra* note 60, at 298; see Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741 (2010). The “nationalist position,” by contrast, takes a broader stance and holds that the President has implied powers necessary to carry out the enumerated powers, including the power to enter into executive agreements. See Sloss, *supra* note 103, at 1967–68; THE FEDERALIST NO. 64, *supra* note 44, at 436 (John Jay) (“[C]onstitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceed from the Legislature . . .”).

105. See *Dames & Moore v. Regan*, 453 U.S. 654, 679 n.8 (1981). During the first fifty years of U.S. history, Presidents entered into only twenty-seven executive agreements. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION: ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 108-17, at 516 (2002), available at <http://www.gpoaccess.gov/constitution/pdf2002/012.pdf>. The first executive agreement was entered into in 1799 between President John Adams and the Dutch Government to resolve all claims concerning the cargo of an American schooner that was seized by a Dutch Privateer and taken to the island of St. Martin. 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1079, 1099 (Hunter Miller ed., 1931–1937). In the past fifty years, the use of executive agreements has multiplied to almost 15,000. Nelson, *supra* note 104, at 1040 (providing a thorough history of the use of the sole executive agreement).

106. CHEMERINSKY, *supra* note 101, § 4.6.2. Congress considered eliminating executive agreements in a few instances, however, these efforts proved to be unsuccessful. S.J. Res. 1, 83d Cong., 1st Sess., 99 CONG. REC. 6777 (1953); NOWAK & ROTUNDA, *supra* note 39, at 251; CHEMERINSKY, *supra* note 101, at 361. In the 1950s, Senator John W. Bricker of Ohio and his supporters campaigned to overturn dicta made by Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433 (1920), which stated that “Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.” NOWAK & ROTUNDA, *supra* note 39, at 251 n.17. Concerned that this statement could be interpreted by courts to mean that treaties were not subject to the same constitutional limitations as acts of Congress, Senator Bricker proposed an amendment, the Bricker Amendment, which “would have provided that a treaty could become effective as internal law only through legislation that would be valid in the absence of a treaty.” *Id.* at 251; see Arthur E. Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281, 281–83 (1953). Eventually, the Bricker Amendment was defeated by Congress, and the movement waned, partly because the concerns surrounding it were alleviated by the Supreme Court’s decision in *Reid v. Covert*, 354 U.S. 1, 16 (1957), where the Court ruled that the Constitution was supreme over international treaties ratified by the United States Senate. See HENKIN, *supra* note 33, at 146–47; Bert B. Lockwood, *The United Nations Charter and United States Civil Rights*

1. The Litvinov Agreement: *Belmont & Pink*

The extent to which the President can use executive agreements to unilaterally act was first raised in *United States v. Belmont*<sup>107</sup> and *United States v. Pink*.<sup>108</sup> In 1933, President Franklin D. Roosevelt entered into an executive agreement, the Litvinov Agreement, with the Soviet Union.<sup>109</sup> After the Russian Revolution, the Soviets nationalized a number of Russian corporations and appropriated their assets,<sup>110</sup> including money deposited by a metal works company with a New York City private banking firm<sup>111</sup> and by an insurance company with the New York Superintendent of Insurance.<sup>112</sup> In exchange for recognition of this newly formed Soviet Government by the United States, the Union of Soviet Socialist Republics assigned all of its claims against Americans for those assets deposited in the United States to the Federal government.<sup>113</sup> In both cases, New York courts refused to enforce this assignment by the Litvinov Agreement, holding that they were contrary to New York policy against the confiscation of property.<sup>114</sup>

The Supreme Court upheld the agreement even though it was not a formal treaty approved by the Senate.<sup>115</sup> In *Belmont*, the Court declared that “no state policy can prevail against the international compact here involved.”<sup>116</sup> Justice William Douglas reiterated this opinion in *Pink*, concluding that even though the executive agreement did not require approval by the Senate, it had “a similar dignity” as a treaty, and thus had

*Litigation: 1946–1955*, 69 IOWA L. REV. 901 (1984). Recently, this movement has seen a slight resurgence. Professor Randy Barnett, in association with the Nationwide Tea Party Coalition, has proposed a similar amendment to the Constitution, the fourth of ten proposed amendments, called the Bill of Federalism. See Randy Barnett, *Resolution for Congress to Convene a Convention to Propose Amendments Constituting a Bill of Federalism*, FORBES.COM (May 20, 2009), [http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett\\_2.html](http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett_2.html) (“No treaty or other international agreement may enlarge the legislative power of Congress granted by this Constitution, nor govern except by legislation any activity that is confined within the United States.”).

107. 301 U.S. 324 (1937).

108. 315 U.S. 203 (1942).

109. *Pink*, 315 U.S. at 211–13; *Belmont*, 301 U.S. at 326.

110. *Pink*, 315 U.S. at 211–13; *Belmont*, 301 U.S. at 326–27.

111. *Belmont*, 301 U.S. at 325–26.

112. *Pink*, 315 U.S. at 213.

113. *Id.* at 211–13; *Belmont*, 301 U.S. at 326–27. The United States acquired these assets to provide a method of settling claims that various Americans claimants had against the Soviet government. *Id.* at 326–27.

114. *Pink*, 315 U.S. at 211; *Belmont*, 301 U.S. at 327.

115. See *Belmont*, 301 U.S. at 331–32.

116. *Id.* at 327.

the same preemptive effect over state law and policy.<sup>117</sup> Furthermore, “[t]he powers of the President in the conduct of foreign relations include[] the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.”<sup>118</sup> Therefore, the President, as the “sole organ of the federal government in the field of international relations,” certainly had the “modest implied power” to settle such claims.<sup>119</sup>

## 2. The Algiers Accords: *Dames & Moore*

Almost forty years later, in *Dames & Moore v. Regan*,<sup>120</sup> the Court again upheld the preemptive effect of an executive agreement entered into between President Jimmy Carter and Iran.<sup>121</sup> On November 4, 1979, the American Embassy in Tehran was seized by Iranian revolutionaries and many American diplomatic personnel were taken hostage.<sup>122</sup> In exchange for the release of these hostages by Iran, the United States agreed to: (1) nullify the attachments and liens on Iranian assets in the United States and order the transfer of these assets to Iran; and (2) terminate all legal claims made by American nationals against Iran, requiring that they instead be presented to an independent claims tribunal for binding arbitration.<sup>123</sup> *Dames & Moore, Inc.*, a civil engineering corporation with a claim pending against Iran, the Atomic Energy Organization of Iran, and Iranian banks for breach of contract worth almost \$3.5 million, argued that the agreement was beyond the executive’s authority.<sup>124</sup>

In a unanimous opinion penned by Justice Rehnquist, the Supreme Court relied heavily upon Justice Jackson’s concurrence in *Youngstown* to hold that the executive agreement was constitutional.<sup>125</sup> In regards to

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117. *Pink*, 315 U.S. at 230; see also *Belmont*, 301 U.S. at 330 (“That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. . . . Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Article II, § 2), require the advice and consent of the Senate.”).

118. *Pink*, 315 U.S. at 229.

119. *Id.* (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)); see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 424 n.14 (2003) (“[T]he President possesses considerable independent constitutional authority to act on behalf of the United States on international issues, and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.” (citations omitted)).

120. 453 U.S. 654 (1981).

121. *Id.* at 663.

122. *Id.* at 662.

123. *Id.* at 662–66.

124. *Id.* at 663–64, 666–69.

125. *Id.* at 674 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952))

whether the President had the authority to nullify the attachments on Iranian assets and direct the transfer of these assets to Iran, the Court concluded that, as Congress enacted the International Emergency Economic Powers Act (IEEPA),<sup>126</sup> President Carter's actions fell within the first category of the *Youngstown* scheme because he was acting "pursuant to specific congressional authorization."<sup>127</sup> Therefore, they were "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."<sup>128</sup> To hold otherwise "would mean that the Federal Government as a whole lacked the power exercised by the President, and that we are not prepared to say."<sup>129</sup>

In regards to the second question, whether the President had the authority to terminate American legal claims against Iran, the Court found that President Carter was acting within the second category, the "zone of twilight," in the *Youngstown* framework.<sup>130</sup> Because Congress granted the President general authority to act during times of emergency through the IEEPA and Hostage Act,<sup>131</sup> Congress had a "history of acquiescence in executive claims settlement[s]," thus giving the President implicit authority to implement the claim settlement by way of an executive agreement.<sup>132</sup>

Justice Rehnquist was careful to note the narrowness of the Court's

(Jackson, J., concurring)). In this regard, the Court was cautious not to use the "sole organ" reasoning from *Belmont* and *Pink* and instead used Justice Jackson's taxonomy for the first time. See Thomas A. O'Donnell, *Illumination or Elimination of the "Zone of Twilight"?: Congressional Acquiescence and Presidential Authority in Foreign Affairs*, 51 U. CIN. L. REV. 95, 99 (1982) (stating that the Supreme Court had "ignored" Justice Jackson's tripartite scheme until *Dames & Moore*); Mark D. Rosen, *Revisiting Youngstown: Against the View that Jackson's Concurrence Resolves the Relation Between Congress and the Commander-in-Chief*, 54 UCLA L. REV. 1703, 1711 n.22 (2007) (arguing that *Dames & Moore* did not undermine Justice Jackson's reasoning).

126. 50 U.S.C. § 1702(a)(1)(B) (2006). The President was authorized to "nullify, void, prevent or prohibit . . . any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." *Id.*

127. *Dames & Moore*, 453 U.S. at 675.

128. *Id.* at 674 (quoting *Youngstown*, 343 U.S. at 637).

129. *Id.*

130. *Id.* at 668 (quoting *Youngstown*, 343 U.S. at 637).

131. 22 U.S.C. § 1732. The President was authorized to "demand the release" of a U.S. citizen who "ha[d] been unjustly deprived of his liberty by or under the authority of any foreign government. . . . [I]f the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war and not otherwise prohibited by law, as he may think necessary and proper to obtain or effectuate the release. . . ." *Id.*

132. *Dames & Moore*, 453 U.S. at 686. *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1165 (2008) (stating that the Court did not show previous instances of "presidential suspension of pending lawsuits").

holding, stating that “[p]ast practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . .”<sup>133</sup> Essentially, this ruling “seemed to confirm the need to read *Pink* and *Belmont* narrowly.”<sup>134</sup> Thus, the proper standard for determining the validity of executive agreements is not the “sole organ” language employed by *Belmont* and *Pink*, but the *Youngstown* tripartite framework.<sup>135</sup> The greater implication of this holding is that when analyzing the second “zone of twilight” category of *Youngstown*, any congressional action or inaction may be deemed as approval of the presidential action.<sup>136</sup>

### 3. The German Foundation Agreement: *Garamendi*

In *Garamendi*,<sup>137</sup> a 5–4 majority held that a state statute in “clear conflict” with the express Executive Branch *policy* goals would also be preempted.<sup>138</sup> For decades after World War II, the proceeds of many life insurance policies held by victims of the Holocaust remained unsettled because European insurers refused to recognize Holocaust-era policies, claiming they had either lapsed or that their documentation had been destroyed.<sup>139</sup> In the late 1990s, class-action lawsuits initiated by Holocaust survivors and their heirs against European insurers “poured into United States courts.”<sup>140</sup> In response, President Clinton and German Chancellor

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133. *Dames & Moore*, 453 U.S. at 686 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)).

134. See Denning & Ramsey, *supra* note 45, at 860.

135. Nelson, *supra* note 104, at 1050.

136. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons from the Iran-Contra Affair*, 97 YALE L.J. 1255, 1310–11 (1988); see O’Donnell, *supra* note 125, at 111 (arguing that Justice Frankfurter’s concurrence in *Youngstown* was used by the Court in *Dames & Moore* to define Justice Jackson’s “zone of twilight”). Other scholars have criticized *Dames & Moore* for betraying the very purpose of the *Youngstown* taxonomy by muddling the categories by “allowing congressional opposition . . . to be interpreted as congressional silence; or allowing congressional silence . . . to be interpreted as congressional approval.” Patricia L. Bellia, *Executive Power in Youngstown’s Shadows*, 19 CONST. COMMENT. 87, 145 (2002).

137. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

138. *Id.* at 425.

139. *Id.* at 401–03. Many of these European insurers were not as “fully forthcoming” as to the identities of unsettled policyholders as they claimed to be. Denning & Ramsey, *supra* note 45, at 833.

140. *Garamendi*, 539 U.S. at 405; see also Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 796 n.2, 813–14 (2002) (providing a chronological list of major decisions from Holocaust-era class-action litigation between 1998 and 2002). The reason for this flood of Holocaust related litigation was that, after World War II, the western Allies, who were responsible for reparations, deferred restitution because they feared that if the new Federal Republic of Germany was economically weak, it would not be able to withstand the expansion of the Soviet Union. *Id.* at 403; see also *Forced Transfers of Property in Enemy-Controlled Territory*, Jan. 5, 1943, 3 Bevans 754 (granting to Allied Forces the right to invalidate wartime transfers of property); REPORT OF THE AMERICAN COMMISSION FOR THE

Schröder signed the German Foundation Agreement in 2002,<sup>141</sup> which established a voluntary foundation to serve as a forum for claims against German companies operating during the Nazi regime.<sup>142</sup> The Foundation Agreement also stated that, whenever a Holocaust restitution suit was brought against a German company in the United States, the Federal Government would file a statement with the court stating that the case *should* be dismissed on any valid legal ground because foreign policy interests of the United States favor the Foundation as the exclusive forum and remedy for these claims.<sup>143</sup> Further, the Federal Government would “use its ‘best efforts’ . . . to get state and local governments to respect the foundation as the exclusive mechanism” because “the United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal.”<sup>144</sup>

Meanwhile, the California legislature enacted the Holocaust Victim Insurance Relief Act of 1999 (HVIRA).<sup>145</sup> The purpose of HVIRA was to

PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, (June 30, 1946) (providing procedures in regards to looted artwork found within the United States zone of occupation); Seymour J. Rubin, *The Washington Accord Fifty Years Later: Neutrality, Morality, and the International Law*, 14 AM. U. INT’L. L. REV. 61, 61–66 (1998). The reunification of East and West Germany on October 3, 1990, signaled the end of this moratorium on reparations. See *Garamendi*, 539 U.S. at 405. In 1998, several of these European insurers, along with Holocaust survivor organizations, the State of Israel, and the U.S. National Association of Insurers, created the International Commission on Holocaust Era Insurance Claims (ICHEIC), to serve as a vehicle to settle unpaid claims out of court. *Garamendi*, 539 U.S. at 406–07. The ICHEIC, however, is an independent claims administrator and is not supervised by any governmental agency or court order. ICHEIC, Holocaust Era Insurance Claims Processing Guide 1, 8 (June 22, 2003), [http://icheic.org/pdf/ICHEIC\\_CPG.pdf](http://icheic.org/pdf/ICHEIC_CPG.pdf).

141. Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-Ger., July 17, 2000, 39 I.L.M. 1298 (2000) [hereinafter Foundation Agreement]. Similar agreements were entered into with Austria and France. *Garamendi*, 539 U.S. at 408.

142. See Foundation Agreement, *supra* note 141, at 1298; *Garamendi*, 539 U.S. at 405–06.

143. See Foundation Agreement, *supra* note 141, at 1303; *Garamendi*, 539 U.S. at 406–07. The Foundation would work with the ICHEIC to negotiate the settlement of these claims with European insurers. See Foundation Agreement, *supra* note 141, at 1303; *Garamendi*, 539 U.S. at 406–07.

144. *Garamendi*, 539 U.S. at 406, 436 (quoting Foundation Agreement, *supra* note 141, at 1304). In this regard, *Garamendi* is outside of Article VI preemption precedent because there was no express congressional delegation of authority to the President. See *id.* at 429. The rationale behind prior cases like *Crosby* was that, since the President was acting under the authority of Congress, his authority was therefore at a “maximum.” See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000). Unlike previous cases, the *Garamendi* Court argued that a lack of affirmative congressional disapproval of the President’s policy gave the President complete freedom to act. See *Garamendi*, 539 U.S. at 429.

145. CAL. INS. CODE §§ 13800–07 (West 2005 & Supp. 2009). In addition, California passed a series of measures extending the statute of limitations on Holocaust-era insurance claims. *Von Saher v. Norton Simon Museum of Arts*, 578 F.3d 1016 (2009); CAL. CIV. PROC. CODE § 354.5(b)–(c) (West 2004).



enable the roughly 5,600 documented Holocaust survivors residing in California to seek restitution for unpaid life insurance claims by providing a disclosure mechanism whereby insurers doing business within the state would be required to make public the names of all holders of such policies sold by the company itself, or any “related” entity,<sup>146</sup> in Europe between 1920 and 1945.<sup>147</sup> Noncompliance with HVIRA would result in a suspension of the insurance company’s license and possibly lead to criminal sanctions.<sup>148</sup>

Justice Souter, writing for the majority in *Garamendi*, began with the proposition that, when a state law “touches on foreign relations,” it can be displaced if that law is in conflict with a federal foreign policy.<sup>149</sup> Next, the President has the independent “authority to decide what that policy should be” by entering into executive agreements with foreign governments.<sup>150</sup> Here, however, because there was “no preemption clause” in the executive agreement, the issue was whether similar preemptive effect could be decrypted through inference.<sup>151</sup> Justice Souter, relying upon Justice

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146. A “related” company, according to HVIRA, included “any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer,” even if the companies were not “related during the time when the policies subject to disclosure were sold.” HVIRA § 13802(b).

147. See *Garamendi*, 539 U.S. at 408–10; HVIRA § 13803–04(a). Essentially, HVIRA sought to overcome the difficulty that Holocaust survivors and their heirs were having in settling insurance claims because European insurers were simply not releasing their records on which claims remained unfulfilled. See *Garamendi*, 539 U.S. at 410; *supra* note 139 and accompanying text.

148. See HVIRA § 13806; *Garamendi*, 539 U.S. at 410.

149. *Garamendi*, 539 U.S. at 413 (“There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.” (citations omitted)). But see *infra* note 255 for a district court’s interpretation of the policies at issue in *Garamendi*, *Crosby*, and *Zschernig*.

150. *Garamendi*, 539 U.S. at 414–15. This power to settle claims with foreign governments, the Court argued, naturally extended to settlements of claims with foreign corporations because “untangling government policy from private initiative during wartime is often so hard” that a prohibition against settling private claims would impair the President’s diplomatic objectives. *Id.* at 416.

151. *Id.* at 417. Not only was there no preemption clause, but the Foundation Agreement itself disclaimed any preemptive influence. See Foundation Agreement, *supra* note 141, at 1304; *supra* text accompanying note 144. Though the Court’s initial premise may be correct, see *supra* note 149, the idea that preemptive effect could be accomplished by inference not only expands the power of the Executive Branch to preempt a valid state law *without* going through the normal constitutional channels, but also makes the judiciary the arbiter of that very policy; this is a role that the Constitution simply does not assign to judges. Professor Paulsen, in regards to Justice Souter’s “inference,” wrote:

*Garamendi* does this absurdity one better, finding that there need not be an “executive agreement” at all, but merely an executive branch policy or practice, or mere discussions or negotiations involving foreign nations. Not only could the existence of an executive agreement preempt state law, but the *nonexistence* of an executive agreement apparently could do so too.

Paulsen, *Constitutional Power*, *supra* note 98, at 1790.

Harlan's minority opinion in *Zschemig v. Miller*,<sup>152</sup> concluded in the affirmative.<sup>153</sup>

Where a state law has more than an "incidental effect" on express federal foreign policy, Justice Souter reasoned, the first question is whether the state is acting "within 'areas of . . . traditional competence.'"<sup>154</sup> If not, then field preemption applies.<sup>155</sup> If so, then conflict preemption applies, and "it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."<sup>156</sup>

Justice Souter concluded that restitution of "victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy," and not an area traditionally regulated by the states.<sup>157</sup> Therefore, California's attempt to use "an iron fist" was in "clear conflict" with the express presidential policy of merely using "kid gloves,"<sup>158</sup> thus "compromis[ing] the very capacity of the President to speak for the Nation with *one voice* in dealing with other governments' to resolve claims against European companies arising out of World War II."<sup>159</sup> This "national position," which gave "express endorsement" to voluntary settlement through the ICHEIC, was "expressed unmistakably" in the executive agreements signed by President Clinton and reiterated by high-level members of the Executive Branch.<sup>160</sup>

In her passionate dissent, Justice Ginsberg disagreed with the majority's assessment that there was a clear conflict between the state and federal foreign policy largely because of the "absence of express preemption."<sup>161</sup>

152. *Zschemig v. Miller*, 389 U.S. 429 (1968). See *infra* notes 201–19 and accompanying text for a discussion of *Zschemig*.

153. *Garamendi*, 539 U.S. at 417–20. Note, in *Zschemig*, unlike *Garamendi*, the executive branch policy did not conflict with Oregon's statute; the Oregon statute was preempted "as a matter of constitutional exclusion, not statutory preemption." Denning & Ramsey, *supra* note 45, at 878; *Zschemig*, 389 U.S. at 436; see also *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 330 (1994).

154. *Garamendi*, 539 U.S. at 420 (quoting *Zschemig*, 389 U.S. at 459 (Harlan, J., dissenting) (omission in original)).

155. See *id.* at 420 n.11.

156. *Id.* at 420.

157. *Id.* at 420–21. Justice Souter also argued that the state interest in providing restitution for about 5,600 documented Holocaust survivors living in California was outweighed by the same interest for roughly 100,000 survivors nationwide. *Id.* at 420, 426.

158. See *id.* at 421, 427.

159. *Id.* at 424 (emphasis added) (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

160. See *id.* at 421–22, 423 n.13.

161. *Id.* at 439 (Ginsburg, J., dissenting); see also *id.* at 442 ("[W]e have never premised foreign

Justice Ginsberg was troubled with the particular emphasis placed upon evidence of Executive Branch foreign policy, namely the letters written by Under Secretary of State Stuart E. Eizenstat to the insurance commissioner of California and to California Governor Gray Davis expressing his concern that California's efforts would undermine the ICHEIC.<sup>162</sup> Justice Ginsburg, stated that she "would not venture down that path."<sup>163</sup> In addition, Professors Denning and Ramsey criticized the lack of limiting language employed by the Court in previous decisions like *Dames & Moore*.<sup>164</sup> Arguably, this language was later supplied by the Court in *Medellin v. Texas*.<sup>165</sup>

#### 4. The Bush Memorandum: *Medellin v. Texas*

In 1993, José Ernesto Medellín and several other gang members viciously raped and murdered two teenage girls in Austin, Texas.<sup>166</sup> Medellín was arrested five days later and confessed within a few hours.<sup>167</sup> He was found guilty of capital murder and sentenced to death, a conviction which the Texas Court of Criminal Appeals affirmed.<sup>168</sup>

Medellín filed for state habeas relief based on a claim that, because he told the arresting officer that he was born in Mexico, Texas violated his rights under the Vienna Convention on Consular Relations (VCCR) because

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affairs preemption on statements of that order. . . . We should not do so here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch." (citation omitted)).

162. See *id.* at 411–12 (majority opinion).

163. *Id.* at 439 (Ginsburg, J., dissenting).

164. Denning & Ramsey, *supra* note 45, at 869 ("Garamendi furnishes an excellent example of 'doctrine creep,' whereby entirely new principles of law are justified on the basis of prior cases, while ignoring important facts or limiting language that were important—perhaps decisive—in the previous cases."); see also *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007) ("So far as this court can discern, *Garamendi*'s holding that the California law is preempted represents the high-water mark in the reach of the doctrine of foreign policy preemption."). See *infra* notes 285–86 and accompanying text for a brief discussion of "doctrine creep."

165. 552 U.S. 491 (2008). One should note that two justices that were part of the majority in *Garamendi* were no longer serving when *Medellin* was decided. Paulsen, *Constitutional Power*, *supra* note 98, at 1795 ("First, Judge John Roberts had become Chief Justice, replacing Chief Justice William Rehnquist. Second, Judge Samuel Alito had become an Associate Justice, replacing Justice Sandra Day O'Connor."); see also Ingrid Wuert, *Medellin: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 5–6, & n.30 (2009) ("Justice Kennedy is the only Justice who joined the majority opinions in both *Garamendi* and *Medellin*."). Since Chief Justice Rehnquist and Justice O'Connor's departure, the Court has made a few other "recent decisions adverse to the President's position in the high-profile cases of *Hamdi v. Rumsfeld*, [542 U.S. 507 (2004)], and *Rasul v. Bush*, [542 U.S. 466 (2004)] . . ." Paulsen, *Constitutional Power*, *supra* note 98, at 1793.

166. *Medellin*, 552 U.S. at 500–01.

167. *Id.*

168. *Id.*

Texas failed to notify the Mexican consulate of his arrest.<sup>169</sup> The Texas court denied the writ, finding that Medellín was procedurally barred from raising this claim because he failed to do so at his criminal trial.<sup>170</sup> While Medellín's application for a certificate of appealability was being considered by the Fifth Circuit, the International Court of Justice (ICJ), in a fourteen-to-one decision, held that the United States violated Article 36(1)(b) of the VCCR.<sup>171</sup> Specifically, the ICJ directed the United States to "review and reconsider[]" the conviction and sentencing to determine whether the violation prejudiced Medellín, irrespective of any procedural default for failure to raise the Vienna Convention claim in a timely fashion.<sup>172</sup>

The Fifth Circuit denied Medellín's appeal,<sup>173</sup> and the Supreme Court granted certiorari.<sup>174</sup> Before the Court could hear oral arguments, President George W. Bush issued a memorandum to the Attorney General providing "that the United States [would] discharge its international obligations" by requiring that state courts "give effect" to the ICJ decision.<sup>175</sup> The Supreme Court dismissed the case to allow the Texas state court to determine whether Medellín should be granted the "review and reconsideration he requested" in light of the Bush Memorandum.<sup>176</sup> The Texas Court of Criminal Appeals, however, dismissed Medellín's second application for habeas relief as abuse of the writ and held that the Bush Memorandum and the ICJ judgment could not displace Texas's procedural default rules.<sup>177</sup> The Supreme Court again

169. *Id.* at 501–02. In 1969, with Senate approval, the United States ratified the VCCR and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol). Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Under Article 36(1)(b), whenever foreign nationals are arrested, the host country has three working days to notify the foreign national of their right to alert their consulate. *Id.* By ratifying the Optional Protocol, the United States also consented to the specific jurisdiction of the International Court of Justice (ICJ) for all "disputes arising out of the interpretation or application of the Vienna Convention." *Id.* at 100; *Medellin*, 552 U.S. at 499–502 & n.1.

170. *Medellin*, 552 U.S. at 500–01.

171. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 53–55 (Mar. 31).

172. *Id.*; see also *Medellin*, 552 U.S. at 502–03. Though the means by which the ICJ decision was to be implemented was left to the discretion of the United States, "such review was required without regard to state default rules." *Id.* at 503.

173. The Fifth Circuit relied upon the Supreme Court's decision in *Breard v. Greene*, 523 U.S. 371, 375 (1998), which held that a Paraguayan citizen was procedurally barred from raising VCCR claims, despite a contrary ICJ decision. *Medellin*, 552 U.S. at 503.

174. *Medellin*, 552 U.S. at 503.

175. *Id.* (quoting George W. Bush, Memorandum for the Attorney General, Alberto R. Gonzales (Feb. 28, 2005), reprinted in Telman, *supra* note 46, at 379 n. 4); see also Vázquez, *Less than Zero?*, *supra* note 97, at 565.

176. *Medellin*, 552 U.S. at 503.

177. *Id.* at 504.

granted Medellín's petition for certiorari.<sup>178</sup>

Among the issues before the Court was whether President Bush could implement the *Avena* decision as binding domestic law by requiring state courts to comply with the ICJ decision.<sup>179</sup> Though the Bush Memorandum was not an executive agreement, the Court nevertheless considered the validity of the President's actions based upon the jurisprudence of the executive agreement contemplated by *Garamendi* and its progeny and concluded that the Bush Memorandum did not have preemptive effect over the Texas procedural bar to successive habeas petitions.<sup>180</sup> President Bush could not, the Court found, unilaterally convert a non-self-executing treaty, made by the President and consented to by the Senate, into a self-executing one.<sup>181</sup> Here, the Court took what some scholars consider a formalistic approach by emphasizing the Constitution's specific treaty-making procedures.<sup>182</sup> The Court held that, as the President's efforts were in direct conflict with the "implicit understanding" of the Senate, his actions fell within the third category of Justice Jackson's *Youngstown* tripartite framework and, therefore, he could not unilaterally bypass these procedures.<sup>183</sup>

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178. *Id.*

179. *Id.* at 523. Though beyond the scope of this Comment, the bulk of *Medellin* addressed the issue of whether the ICJ opinion was binding on domestic law. *Id.* at 506–31. The Court ultimately held that the treaty on which Medellín's claim was based was non-self-executing, and thus not binding on domestic law. *Id.* at 506. This decision, the most important one on the subject since *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), was the first time the Court denied relief solely on the ground that the treaty was non-self-executing. Compare Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 600 (2008) (arguing that the Supremacy Clause establishes a default rule that treaties are self-executing and directly enforceable in the courts like other laws, rebuttable only by a clear statement that the obligations imposed by the treaty are subject to legislative implementation), with David H. Moore, *Law(makers) of the Land: The Doctrine of Treaty Non-Self-Execution*, 122 HARV. L. REV. F. 32, 32 (2009) (arguing that "a treaty may itself, by means short of a clear stipulation that the treaty requires legislative implementation, indicate that it is domestically unenforceable"). Note, the Court did not dispute that "the ICJ's judgment in *Avena* create[d] an international law obligation on the part of the United States," but to secure this obligation required joint action by the President and Congress. *Medellin*, 552 U.S. at 522.

180. *Medellin*, 552 U.S. at 532. This outcome was surprising to some scholars, see Paulsen, *Constitutional Power*, *supra* note 98, at 1795 ("A betting man might well have predicted that the Supreme Court would reverse the Texas courts on the basis of *Garamendi*."), and was a "welcome change from *Garamendi*." Wuerth, *Dangers of Deference*, *supra* note 103, at 5–6.

181. *Medellin*, 552 U.S. at 530.

182. Wuerth, *Dangers of Deference*, *supra* note 103, at 1. See *supra* note 89 for a discussion on the differences between formalism and functionalism.

183. *Medellin*, 552 U.S. at 527. This reliance upon *Youngstown* was criticized by Professor Wuerth as being misplaced because *Youngstown* was "a case about constitutional review of executive actions," whereas this portion of *Medellin* deals with "the claim that 'the relevant treaties . . . give the President the authority to implement [the *Avena* judgment].'" See Wuerth, *Dangers of Deference*, *supra* note 103, at 6. Professor Wuerth also questioned the "expansive application" of Justice Jackson's third category, especially since this was "only the first time a majority of the Court has explicitly categorized an action of the President" in such a manner. *Id.* After the publication of Professor Wuerth's article, the Court in *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006),

Alternatively, the United States and Medellín argued that the Bush Memorandum was issued pursuant to the executive authority to resolve disputes with foreign nations.<sup>184</sup> The Court also rejected this argument and, in so doing, Chief Justice Roberts repeatedly emphasized that the executive agreement exception was a preemptive mechanism that applied only to “a narrow set of circumstances . . . to settle civil claims between American citizens and foreign governments or foreign nationals.”<sup>185</sup> To trigger this independent authority, there must be a “pervasive . . . history of congressional acquiescence” to the practice asserted by the President.<sup>186</sup> Unlike the claims-settlement cases,<sup>187</sup> which were “based on the view that ‘a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, [could] raise a presumption that the [action] had been [taken] in pursuance of its consent,’” President Bush’s memorandum was an “unprecedented action.”<sup>188</sup>

Chief Justice Roberts also reiterated the limiting language found in *Dames & Moore* that “the Court has been careful to note that ‘[p]ast practice does not, by itself, create power.’”<sup>189</sup> The effect of *Medellin*, however, goes beyond this simple statement.<sup>190</sup> In effect, *Medellin* narrowed the scope of

suggested that the President’s actions in that case also fell within Justice Jackson’s third category.

184. *Medellin*, 552 U.S. at 530.

185. *Id.* at 531–32 (“The Executive’s narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement cannot stretch so far as to support the [Bush] Memorandum.”).

186. *Id.* at 531.

187. *E.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1947); *United States v. Belmont*, 301 U.S. 324 (1937).

188. *Medellin*, 552 U.S. at 531–32 (quoting *Dames & Moore*, 453 U.S. at 686).

189. *Id.* (quoting *Dames & Moore*, 453 U.S. at 686).

190. With respect to Medellín personally, despite pleas to Texas Governor Rick Perry by President Bush, Mexico, and the United Nations’ Secretary General to stay the execution, the State of Texas executed Medellín on August 5, 2008. James C. McKinley, Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 6, 2008, <http://nytimes.com/2008/08/06/us/06execute.html>; Mary D. Hallerman, *Medellin v. Texas: The Treaties That Bind*, 43 U. RICH. L. REV. 797, 813 (2009). By adhering to its own laws and refusing to be swayed by international pressure, some have argued that Texas was better able to secure the rights and needs of its citizens. *Ex Parte Medellin*, 280 S.W.3d 854, 862, 865 (Tex. Crim. App. 2008) (Cochran, J., concurring) (“Although we accord the greatest respect to, and admiration for, the [ICJ] and its judgments, we, like the Supreme Court, cannot trample on our own fundamental laws in deference to its judgment. . . . [I]f we cut down our laws to suit another sovereign that operates under a different system of justice, we could not stand upright in the lawless winds that would then blow. If we violate our state and federal procedural rules for this particular applicant, we should violate them for all American defendants as well. And then we would have no rules and no law at all. . . . Some societies may judge our death penalty barbaric. Most Texans, however, consider death a just penalty in certain rare circumstances. Many Europeans may disagree. So be it.”).

the *Garamendi* decision despite the fact that “*Medellin* was a much stronger case . . . for the invalidation of a state law.”<sup>191</sup> The Roberts Court “effectively stripped” the “sole organ” language from *Belmont*, *Pink*, and *Garamendi* in relation to executive agreements and, by doing so, demonstrated a higher degree of deference to the legislature by requiring that executive agreements must either be based upon some “independent constitutional authority or explicit congressional authorization.”<sup>192</sup> The *Medellin* decision also constricted Justice Jackson’s “zone of twilight” category by requiring that, where the President takes action without congressional approval, but still based upon some independent constitutional authority, that action must be a part of a “systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned.”<sup>193</sup> By contrast, Justice Jackson’s standard was more flexible and was largely dependent on “the imperatives of events and contemporary imponderables.”<sup>194</sup> However, despite the limitations made by *Medellin* in regards to executive agreements, the Court did not address the portion of the

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191. See, e.g., Reinstein, *supra* note 60, at 333. *Medellin* was a stronger case for preemption because “(1) the state law was in direct (not indirect) conflict with (2) a treaty obligation (as opposed to an executive agreement), and (3) the President instructed Texas to comply with the treaty obligation.” *Id.*; see also Geslison, *supra* note 48, at 783 (“The originalists [on the Court] were in fact more disciplined in determining original understanding than advocates of presumed self-execution because a presumption of non-self-execution preserves constitutionally mandated separation of powers while not undermining the primacy of federal law.”); Paulsen, *Constitutional Power*, *supra* note 98, at 1798 (“The Supreme Court rightly rejected that argument, and in so doing may have started down the road away from the unsound reasoning of *Dames & Moore* and *Garamendi*.”); Wuerth, *Dangers of Deference*, *supra* note 103, at 2 (“[T]he *Medellin* opinion reads in places like a breath of formalist fresh air, emphasizing both the importance of the Constitution’s specific law-making procedures in the context of treaties and a text-based interpretation of treaties aimed to vest control over foreign relations with the political branches, not the courts.” (citations omitted)). Some scholars, however, argue *Medellin* did not go far enough. Professor Paulsen wrote that Chief Justice Robert’s opinion “consign[s] [the claims-settlement cases] to a small corner,” distinguishing *Garamendi*, *Dames & Moore*, *Pink*, and *Belmont*, without quite overruling them. Paulsen, *Constitutional Power*, *supra* note 98, at 1799 n.98. By not overturning the claims-settlement cases, the danger remains that a future Court might show less judicial restraint and revive these cases. See *id.* (“[I]n principle the constitutional rule that the President cannot alone make domestic law cannot be so narrowly and strictly limited, and this suggests that the *Dames & Moore-Garamendi* power should not merely be thought ‘strictly limited’ but should be repudiated entirely.”); Vázquez, *Less than Zero?*, *supra* note 97, at 564 (“[T]he majority’s analysis of the president’s memorandum in *Medellin* tells us little about the president’s power to displace state law to promote foreign policy interests unrelated to non-self-executing treaties. (The majority itself disclaimed broad implications for its presidential power holding by inserting a this-day-and-train-only footnote reminiscent of its similar disclaimer in *Bush v. Gore*, [531 U.S. 98 (2000)].)”).

192. Nelson, *supra* note 104, at 1062–63.

193. *Medellin*, 552 U.S. at 531. It is arguable that the Court in *Medellin*, by requiring a pervasive history of congressional acquiescence to enable the President to act, either severely restricted this category beyond the flexible standard contemplated by Justice Jackson or eliminated it outright by extending the first category to eclipse the zone of twilight. See, e.g., Nelson, *supra* note 104, at 1039 (arguing that *Medellin* restricted the second category); Turner, *supra* note 92, at 669 (arguing that *Medellin* eliminated the second category).

194. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

*Garamendi* decision relying upon the doctrine of the dormant foreign affairs power.

### C. *The Dormant Foreign Affairs Power*

In the area of foreign policy, the role of the federal government is said to be so pervasive that, even in the absence of a federal regulatory scheme, state action is precluded.<sup>195</sup> The Constitution specifically forbids states from “enter[ing] into any Treaty, Alliance, or Confederation,” or “grant[ing] Letters of Marque and Reprisal.”<sup>196</sup> Without congressional consent, states are further excluded from “lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws” or “keep[ing] Troops, or Ships of War in time of Peace, enter[ing] into any Agreement or Compact . . . with a foreign Power, or engage[ing] in War,” unless imminent danger requires otherwise.<sup>197</sup> Further, “all Treaties made, or which shall be made” are the “supreme Law of the Land.”<sup>198</sup> According to the Supreme Court, this text, taken in light of the overall structure and history of the Constitution, along with the Framers’ very understanding of the concept of nationhood, implies that states are forbidden from encroaching on foreign affairs.<sup>199</sup> The rationale behind this

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195. See *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990); *Clark v. Allen*, 331 U.S. 503, 516–17 (1947); *Hines v. Davidowitz*, 312 U.S. 52, 62–64 (1941); see also *Clark*, *supra* note 59, at 1295 (“Exclusive federal authority over the conduct of foreign affairs is well established. The Constitution contains no single clause vesting exclusive authority over this area in the federal government. But the sum of its parts, considered in light of the constitutional structure, leaves little doubt in this regard.”); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1228–29 (1999) (“The constitutional architecture itself evinces a norm of federal exclusivity in foreign affairs, on the one hand granting expansive foreign relations power to the federal government, on the other hand denying them to the states. . . . [A]gainst the landscape of foreign relations as they were conducted at the time of the Founding, the allocation seems decisively to have established a principle of federal exclusivity. War, trade, treaties, and the maintenance of diplomatic relations—arguably the foreign relations of the Founding era consisted of nothing else.”). But see Goldsmith, *supra* note 44 (arguing that the federal common law of foreign relations as currently practiced by courts and understood by scholars lacks justification).

196. U.S. CONST. art. I, § 10, cl. 1.

197. *Id.* cl. 2–3.

198. *Id.* art. VI, cl. 2.

199. See, e.g., 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, 317–24 (1999) (describing origins of the dormant foreign affairs power); HENKIN, *supra* note 33, at 162 (“Until 1968 there was no hint of such a principle [as the dormant foreign affairs power].”), 40–42 (“[B]y constitutional exegesis, by inferences and extrapolations small and large . . . Presidents have achieved and legitimated an undisputed,



doctrine is the need for the federal government to be able to speak with “one voice” when addressing foreign nations.<sup>200</sup>

This reasoning is manifest in the holding of *Zschemnig v. Miller*,<sup>201</sup> which established the dormant foreign affairs power. In 1968, when Cold War anxiety was at its apex, an Oregon resident died intestate, and his sole heirs, residents of East Germany, sought to inherit his estate.<sup>202</sup> Under Oregon law, however, nonresident aliens were prohibited from inheriting property without first demonstrating that, among other things, an American heir had a reciprocal right of inheritance without confiscation.<sup>203</sup> The East

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extensive, predominant . . . ‘foreign affairs power,’ though . . . its scope and content remain less than certain.”); Goldsmith, *supra* note 44, at 1641–42 (arguing that the dormant foreign affairs power is a federal common law doctrine and not supported by the text of the Constitution); RAMSEY, *supra* note 60, at 346 (arguing that the dormant foreign affairs power has little textual basis in the Constitution, except perhaps in regards to the presidential powers). The rationale behind “dormant” powers generally is that, when the Constitution grants power to one entity, by negative implication it limits the power of another entity. *See id.* at 273; THE FEDERALIST NO. 32, *supra* note 44, at 200 (Alexander Hamilton) (the Constitution should be read to deny power to the states “where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory and repugnant*”). For example, expressly granting Congress the power “to declare War” (art. I, § 8) “implicitly limits the President’s executive war power” (art. II, § 1) and excludes the President from being able to declare war. *Id.* In regards to federalism, an explicit grant of authority to the federal government may, by negative implication, prohibit the states from exercising that power. *Id.* The most famous example of this power is the dormant Commerce Clause. *See infra* notes 290–308 and accompanying text for further discussion on this doctrine. A “negative implication” should be contrasted with what Hamilton called a “negative pregnant,” whereby “denying specific state powers would likely confirm state power in related areas not specifically denied.” RAMSEY, *supra* note 60, at 276. *See generally* THE FEDERALIST NO. 32, *supra* note 44 (Alexander Hamilton).

200. *See Zschemnig v. Miller*, 389 U.S. 429, 442 (1968); *United States v. Pink*, 315 U.S. 203, 233–34 (1947) (“No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to State laws or State policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.”); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference.”); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (“In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the state of New York does not exist.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 306 (1936); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (“For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575–76 (1840) (“It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several stat[e] [sic] authorities.”); THE FEDERALIST NO. 42, *supra* note 44, at 279 (James Madison) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”). However, this view, according to some, has not evolved to keep pace with the modern shift away from the concept of dual federalism in the United States. *See infra* note 328.

201. 389 U.S. 429 (1968).

202. *Id.* at 430; *see also* Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1879 (2006).

203. *Zschemnig*, 389 U.S. at 430–32; OR. REV. STAT. § 111.070 (1957) (repealed 1969).

German heirs challenged the Oregon state board petition, which requested that the property be escheated to the state.<sup>204</sup>

Justice Douglas, writing for the Court, saw a “persistent and subtle” effect on international relations because the statute encouraged probate judges to engage in the “notorious” practice of using their benches as soapboxes to criticize “nations established on a more authoritarian basis than our own.”<sup>205</sup> The Court cited a number of cases which had required local probate courts to weigh evidence submitted by foreign dignitaries, including taking into consideration the interest these foreign governments had in acquiring the property and “the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts.”<sup>206</sup> The “real desiderata” of these probate decisions was the “foreign policy attitudes, the freezing or thawing of the ‘cold war,’” which “are matters for the Federal Government, not for local probate courts.”<sup>207</sup> The fact that “States . . . have traditionally regulated the descent and distribution of estates”<sup>208</sup> and that the Justice Department filed an *amicus curiae* contending that the Oregon statute does not “unduly interfere[]” with foreign policy is irrelevant.<sup>209</sup> A state law that “impair[s] the effective exercise of the Nation’s foreign policy,” even in the absence of a supreme law of the land, will be excluded.<sup>210</sup>

*Zschernig* is controversial largely because the Court did not provide a

204. *Zschernig*, 389 U.S. at 430.

205. *Id.* at 440.

206. *Id.* at 436 (quoting *State Land Bd. v. Pekarek*, 378 P.2d 734, 738 (Or. 1963) (internal quotation marks omitted)). For example, a New York probate judge stated, “If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia.” Austin Heyman, *The Nonresident Alien’s Right to Succession Under the “Iron Curtain Rule”*, 52 NW. U. L. REV. 221, 234 (1957). In regards to a Soviet probate claimant, a Pennsylvania judge said, “If you want to say that I’m prejudiced, you can, because when it comes to Communism I’m a bigoted anti-Communist.” Harold J. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 257 (1962). Another exclaimed, “I am not going to send money to Russia where it can go into making bullets which may one day be used against my son.” *Zschernig*, 389 U.S. at 437 n.8.

207. *Zschernig*, 389 U.S. at 437–38.

208. *Id.* at 440.

209. *Id.* at 434. Justice Stewart, in his concurrence, argued that “[r]esolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department.” *Id.* at 443 (Stewart, J., concurring).

210. *Id.* at 440 (majority opinion). Although not stated, Justice Douglas’s opinion seems to rest on “the logic of the federal system.” Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832, 835 (1989); see also, e.g., *Chy Lung v. Freeman*, 92 U.S. 275, 279–80 (1875) (invalidating a California law which established a state Commissioner of Immigration who could require a bond to admit supposedly undesirable Chinese immigrants).

textual basis for this new dormant foreign affairs power.<sup>211</sup> Essentially, Justice Douglas spent a great deal of time arguing how the Oregon law implicated foreign affairs, but he “did not say *why* [it] ‘must give way.’”<sup>212</sup> For example, the prohibitions against the states listed in Article I would be redundant if the Framers had intended a more general power. Other scholars defended *Zschernig* as intuitively arriving at the correct result because “[i]n the tinderbox world of superpower competition, the potential consequences of giving offense were obviously profound.”<sup>213</sup> Yet, for whatever reason, the Court has largely ignored *Zschernig*, only addressing it twice in dicta: once in *Crosby*,<sup>214</sup> and then again in *Garamendi*, which expanded upon it.<sup>215</sup>

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211. Justice Harlan criticized the majority opinion for its “untenable” analysis, which “turned its back on a cardinal principal of judicial review.” *Zschernig*, 389 U.S. at 443–44 (Harlan, J., concurring); see also, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting) (“We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here.”); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007) (courts generally “have shown reluctance to extend *Zschernig*’s reach further”); *Cruz v. United States*, 387 F. Supp. 2d 1057, 1075 (N.D. Cal. 2005) (declining to apply *Zschernig* to a California law that extended the statute of limitations for Mexican nationals participating in labor importation programs and their heirs seeking to recover withheld wages from Mexico, Mexican banks, the United States, and American banks); HENKIN, *supra* note 33, at 239 (the dormant foreign affairs power is a “new constitutional doctrine” that “will take many years and many cases” to work out its application); Goldsmith, *supra* note 44, at 1649 (noting that Professor Henkin and Hans Linde both believe that the dormant foreign affairs power was a new constitutional doctrine); Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L L. 821, 830 (1989) (“[S]ome aspects of the *Zschernig* doctrine of ‘dormant’ foreign relations power are troublesome . . . .”); Denning & Ramsey, *supra* note 45, at 855, (“The key proposition for which it appears to stand—and which makes it controversial—is that in the absence of a treaty provision, a law, or even an executive branch policy, a state law may still be struck down if it has ‘more than some incidental or indirect effect in foreign countries’ or carries ‘great potential for disruption or embarrassment to’ the Government’s conduct of foreign affairs.” (footnotes omitted) (quoting *Zschernig*, 389 U.S. at 434–35)); Spiro, *supra* note 195, at 1232, 1264–66 (arguing that the dormant foreign affairs power, along with the dormant foreign commerce power, and the inclusion of customary international law as a part of federal common law, should be abandoned).

212. See RAMSEY, *supra* note 60, at 261 (quoting *Zschernig*, 389 U.S. at 440).

213. Spiro, *supra* note 195, at 1242 (explaining the federal exclusivity argument); see also Maier, *supra* note 210, at 832–33; Bilder, *supra* note 211, at 827 (“[T]he vital national interest in the effective and efficient achievement of U.S. foreign relations objectives requires that other nations perceive our foreign policy as unified and coherent . . . . Consequently, state and local involvement in international issues, particularly if not in accord with administration policy, may undermine the conduct of U.S. foreign relations and the credibility of our negotiating posture by conveying the appearance of disagreement, confusion, uncertainty and weakness in our Government’s stated foreign policy positions.”); David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma (Myanmar)*, 30 VAND. J. TRANSNAT’L L. 175, 204 (1997) (“[C]arrying parochial concerns to the international stage could have repercussions well beyond the localities themselves. No harm is done when Boston’s large population of Irish politicians gathers to sing Irish songs on St. Patrick’s day; there may be harm done, however, if Boston is allowed to instigate a skirmish with the United Kingdom over Northern Ireland in which the rest of the country is not inclined to participate.”). For further discussion, and a partial defense, see Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259, 1262–66, 1304–21 (2001) [hereinafter Vázquez, *W(h)ither Zschernig?*].

214. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (“Because our conclusion that the state Act conflict[ed] with federal law [was] sufficient to affirm the judgment

In neither case did the majority of the Court apply the dormant foreign affairs power, relying instead on conflict preemption to displace the state laws.<sup>216</sup>

#### *D. Summary of the President's Authority to Determine Foreign Policy*

In sum, the analytical steps required to determine whether a state law affecting foreign affairs should be preempted can be summarized as follows: When a state law has more than an incidental effect on federal foreign policy, that law can be preempted under the doctrine of implied

below, we decline to speak to field preemption as a separate issue . . ."). In *Crosby*, the state of Massachusetts passed a law which prohibited state entities from "doing business with Burma." *Id.* at 366–67. Three months later, Congress passed an act which imposed sanctions on Burma, and authorized the President to impose further sanctions, as well as to diplomatically develop a comprehensive strategy for bringing democracy to Burma. *Id.* at 368–69. The Court found the Massachusetts statute preempted by the Supremacy Clause under the theory of conflict preemption because the "entire scheme of the statute . . . [was] an obstacle to the accomplishment of Congress's full objectives" under its sanctions, *id.* at 373, and undermined the "intended purpose and 'natural effect'" of Congress's act. *Id.* at 373–74, 388. Justice Scalia concurred with the majority's verdict, but wrote separately because he believed the majority opinion to be not only "wasteful" in terms of length, but "harmful" to future litigants who would have to research legislative record "even when a statute is clear on its face, and its effects clear upon the record." *Id.* at 391 (Scalia, J., concurring). Critics of *Zschernig* praised the Court's narrow decision in *Crosby*. Compare Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 215 n.152 (noting that the National Foreign Trade Council would "help put an end to state and local efforts to make foreign policy"), with Vázquez, *W(h)ither Zschernig?*, *supra* note 213 ("*Crosby* perpetuates foreign affairs exceptionalism [and] thus offers little cause for celebration to the critics of dormant foreign affairs doctrine.").

215. *Garamendi*, 539 U.S. at 419–20 ("It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here. For even on Justice Harlan's view, the likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." (footnote omitted)). *Zschernig* and *Garamendi*, however, are distinguishable. See *id.* at 439 (Ginsburg, J., dissenting). Under *Zschernig*, the structure of the Constitution excluded the state from enacting a foreign affairs policy, irrespective of whether or not the federal government had enacted its own contradictory policy. See *Zschernig v. Miller*, 389 U.S. 429, 434–35 (1968). *Garamendi*, on the other hand, prevented the state from pursuing a domestic policy that conflicted with the President's foreign policy of encouraging settlements. See *Garamendi*, 539 U.S. at 420–21.

216. *Crosby*, 530 U.S. at 374 n.8; *Garamendi*, 539 U.S. at 419–20. As a result, some scholars thought *Zschernig* was a dead doctrine. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 865 (1997) ("[T]here are reasons to think that *Zschernig*'s dormant foreign relations preemption retains little, if any, validity."); Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT'L L. 337, 340 (2001) ("We no longer know . . . whether there is any real doctrine of dormant foreign relations preemption, or when it applies . . .").

preemption.<sup>217</sup> To determine which type of implied preemption to apply—field/dormant foreign affairs preemption or conflict preemption—the threshold question that courts ask is whether the state is acting within an area of traditional competence.<sup>218</sup>

If the state regulation is not addressing a traditional state responsibility, then the state can be excluded outright under implied field/dormant foreign affairs preemption because generally the federal government is solely responsible for conducting foreign affairs.<sup>219</sup>

If, on the other hand, the state was acting within an area traditionally regulated by the state, then there must be a “conflict, of a clarity or substantiality” to be determined by balancing the state concern with the federal concern.<sup>220</sup> If this conflict comes in the form of executive branch activity, then the President’s authority must be analyzed under the tripartite *Youngstown* framework.<sup>221</sup> Whether or not the President has independent authority to act will determine whether the President needs congressional acquiescence, either implicitly or explicitly.<sup>222</sup> Under *Medellin*, the President has the authority to enter into executive agreements where he has independent authority to act under Article II and Congress has either expressly authorized the President to act or there is a pervasive history of congressional acquiescence.<sup>223</sup> The settlement of civil claims between Americans and foreign entities, for example, is an area in which Congress has historically allowed the President to act unilaterally.<sup>224</sup>

#### IV. BEYOND THE EXECUTIVE AGREEMENT

In 2009, the Ninth Circuit confronted the validity of two California statutes in light of the precedent established by *Garamendi* and *Medellin*. The first statute referenced the Armenian Genocide, despite a purported executive branch foreign policy preference to the contrary. The other provided Holocaust victims with a means to reclaim stolen art hanging on California museum walls, allegedly in violation of the federal government’s dormant foreign affairs power. The panel invalidated both statutes and, in doing so, expanded upon the precedent established by *Garamendi*.

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217. Denning & Ramsey, *supra* note 45, at 844.

218. *Garamendi*, 539 U.S. at 420 (quoting *Zschemig*, 389 U.S. at 459 (Harlan, J., dissenting)).

219. *Id.* at 419 n.11. Even though the Court in *Garamendi* referred to this as “field” preemption, “it would apply whether or not the federal government had acted and so more closely resembles the dormant preemption of *Zschemig*.” See Note, *supra* note 202, at 1880.

220. See *Garamendi*, 539 U.S. at 419 n.11.

221. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 524 (2008); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

222. See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

223. *Medellin*, 552 U.S. at 531–32.

224. See *id.*

A. *Movsesian and the Foreign Policy Preference*

In *Movsesian v. Victoria Versicherung AG*,<sup>225</sup> the Ninth Circuit held that an Executive Branch “foreign policy preference” could preempt a state law in conflict with that policy.<sup>226</sup> The California legislature enacted section 354.4 to extend the statute of limitations for victims of the Armenian Genocide and their heirs who were denied the benefits to their life insurance policies.<sup>227</sup> The legislature’s use of the words “Armenian Genocide” brought the statute under the scrutiny of the Ninth Circuit.<sup>228</sup>

A majority of the Ninth Circuit, in a decision modeled after the *Garamendi* decision, held that legislative recognition of the Armenian Genocide was contrary to, and therefore preempted by, clearly expressed executive branch foreign policy.<sup>229</sup> *Movsesian* principally relied on two conclusions from *Garamendi*: first, “that ‘presidential foreign policy’ itself may carry the same preemptive force as a federal statute or treaty;” and second, this policy need not be “contained in a single executive agreement.”<sup>230</sup>

To demonstrate this “express federal policy,” the panel relied on three abandoned congressional resolutions using the words “Armenian Genocide.”<sup>231</sup> In all three instances, the Executive Branch expressed

225. *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052 (9th Cir. 2009).

226. *See id.* at 1059.

227. CAL. CIV. PROC. CODE § 354.4(a)–(c) (West 2006); “Section 354.4 was modeled after §§ 354.5 and 354.6, which extended the statute of limitations until 2010 for Holocaust-era insurance claims and World War II slave labor claims, respectively.” *Movsesian*, 578 F.3d at 1054. Both sections 354.5 and 354.6 were found unconstitutional. *See supra* note 27.

228. *See Movsesian*, 578 F.3d at 1054, & 1063 (Pregerson, J., dissenting). “‘Armenian Genocide victim’ means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.” § 354.4(a)(1).

229. *Movsesian*, 578 F.3d at 1063.

230. *Id.* at 1056 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421–23 (2003)).

231. *Movsesian*, 578 F.3d at 1057–59; H.R. Res. 106, 110th Cong. (2007) (“Calling upon the President to ensure that the foreign policy of the United States reflects appropriate understanding and sensitivity concerning issues related to human rights, ethnic cleansing, and genocide documented in the United States record relating to the Armenian Genocide, and for other purposes.”); H.R. Res. 193, 108th Cong. (2003) (“Whereas the enactment of the Genocide Convention Implementation Act marked a principled stand by the United States against the crime of genocide and an important step toward ensuring that the lessons of the Holocaust, the Armenian Genocide, and the genocides in Cambodia and Rwanda, among others, will be used to help prevent future genocides.”); H.R. Res. 596, 106th Cong. (2000) (“Calling upon the President to ensure that the foreign policy of the United States reflects appropriate understanding and sensitivity concerning issues related to human rights, ethnic cleansing, and genocide documented in the United States record relating to the Armenian Genocide, and for other purposes.”).

opposition to these resolutions.<sup>232</sup> President Clinton urged the Speaker of the House, Congressman J. Dennis Hastert of Illinois, “in the strongest terms not to bring [House Resolution 596] to the floor.”<sup>233</sup> President George W. Bush expressed similar opposition to House Resolution 193, through a letter sent by a member of the State Department to the Chairman of the Judiciary Committee,<sup>234</sup> and Resolution 106, during a press conference on the south lawn of the White House.<sup>235</sup> In each instance, the resolutions died in committee.<sup>236</sup> By stitching together these statements as examples of “specific action” undertaken by the Executive Branch to defeat these measures, the panel concluded that, just as in *Garamendi*, an express “foreign policy preference” could be inferred.<sup>237</sup> The panel dismissed the

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232. *Movsesian*, 578 F.3d at 1057–59. According to the *Movsesian* panel, the Executive Branch’s purpose in opposing these resolutions was to not “provoke Turkey’s ire,” considering that the United States had a significant military presence in that country and an interest in the Middle East altogether. *See id.* Turkey had the second largest army in NATO and, as an ally of the United States, Turkey allowed the United States to use its airfields. *60 Minutes: Turkey and Armenia’s Battle over History*, *supra* note 12. Seventy percent of U.S. supplies to the wars in Iraq and Afghanistan went through Turkey. *Id.* Finally, Turkey’s opposition to recognition of the Armenian Genocide was at least partly influenced by its interest in joining the European Union, which had been stalled by alleged human rights violations. *Id.*

233. *Movsesian*, 578 F.3d at 1057. President Clinton was “deeply concerned” that H.R. Res. 596 could negatively impact the United States’ “significant interests in this troubled region of the world: containing the threat posed by East and Central Asia, stabilizing the Balkans, and developing new sources of energy.” Letter to the Speaker of the House of Representatives on a Resolution on Armenian Genocide, 3 PUB. PAPERS 2225–26 (Oct. 19, 2000), available at <http://www.anca.org/596-hastert.html>. Several senior-level Administration officials also sent letters. *Movsesian*, 578 F.3d at 1057; H.R. REP. NO. 106-933, at 16–19 (2000), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_reports&docid=f:hr933.106.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:hr933.106.pdf).

234. H.R. REP. NO. 108-130, at 5–6 (2003), available at [http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1\(hr130\)](http://www.congress.gov/cgi-bin/cpquery/R?cp108:FLD010:@1(hr130)) (“[The Administration] oppose[s] HR 193’s reference to the ‘Armenian Genocide.’ Were this wording adopted, it could complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation. We continue to believe that fostering a productive dialogue on these events is the best way for Turkey and Armenia to build a positive and productive relationship. Declarations such as this one, however, hinder rather than encourage that kind of dialogue. We want to work with Turkey and Armenia to achieve our common objectives, including improving relations between the two countries. Such declarations do nothing to help the process.”). The letter was written by Assistant Secretary of Legislative Affairs, Paul V. Kelly and addressed to the Chairman of the Judiciary Committee, Jim Sensenbrenner, Jr. *Id.*

235. Press Release, White House Office of the Press Secretary, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007), available at <http://www.justice.gov/archive/ll/docs/bush-disc-fisal.pdf>.

On another issue before Congress, I urge members to oppose the Armenian genocide resolution now being considered by the House Foreign Affairs Committee. We all deeply regret the tragic suffering of the Armenian people that began in 1915. This resolution is not the right response to these historic mass killings, and its passage would do great harm to our relations with a key ally in NATO and in the global war on terror.

*Id.*

236. *See Movsesian*, 578 F.3d at 1057–59.

237. *See id.* at 1059. *But see* *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329–30 (1994) (“The Executive Branch actions—press releases, letters, and *amicus* briefs—on which [defendant] here relies are merely precatory. Executive Branch communications that express federal

argument that there was no executive agreement embodying this foreign policy because, in *Garamendi*, the Foundation Agreement “did not apply to all of the claims at issue.”<sup>238</sup> More specifically, because HVIRA (the statute at issue in *Garamendi*) required only the *disclosure* of Holocaust-era insurance claims, whereas the Foundation Agreement established a method for settling those unpaid claims, this disparity between the requirements of HVIRA and those of the Foundation Agreement “could not have been central to the Court’s finding of preemption in that case.”<sup>239</sup>

Having thus established that an “express” foreign policy existed, the panel next determined that this policy could preempt contrary state law if the “executive authority [was] validly exercised” under the tripartite *Youngstown* framework.<sup>240</sup> The panel distinguished the executive authority used in *Movsesian* from that of *Medellin* and *Barclays Bank PLC v. Franchise Tax Board of California*.<sup>241</sup> In *Medellin*, the executive foreign policy was directed at state criminal law, an area traditionally regulated by the states.<sup>242</sup> Likewise, in *Barclays Bank*, the executive branch’s policy, expressed in a “series of Executive Branch actions, statements, and *amicus* filings,” which proscribed the use of a “worldwide combined reporting” method to determine how much a multinational corporation doing business in the state should pay in corporate franchise tax, was directed at foreign commerce, “an area delegated by the Constitution to Congress.”<sup>243</sup>

policy but lack the force of law cannot render unconstitutional California’s otherwise valid, congressionally condoned, [state law].”).

238. *Id.* (“[T]he preemptive power of the federal policy is not derived from the form of the policy, but rather from the source of the executive branch’s authority to act.”).

239. *Id.* at 1059 (citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421 (2003)); *see also Garamendi*, 539 U.S. at 435 (Ginsburg, J., dissenting).

240. *Movsesian*, 578 F.3d at 1059; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Though not stated, this would place the President’s authority in the second category of the *Youngstown* scheme, the “Zone of Twilight,” in which case the President would have to “rely upon his own independent powers” to act. *See Movsesian*, 578 F.3d at 1059; *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (“In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”).

241. *Movsesian*, 578 F.3d at 1059; *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994). *See infra* notes 332–38 for further discussion of *Barclays Bank*.

242. *Movsesian*, 578 F.3d at 1059; *Medellin v. Texas*, 552 U.S. 491, 527–32 (2008).

243. *Barclays Bank*, 512 U.S. at 328–29; *Movsesian*, 578 F.3d at 1059; *see also* U.S. CONST. art. I, § 8, cl. 3. Like the Ninth Circuit, the Court in *Garamendi* also distinguished *Barclays Bank* as a case involving the Commerce Clause and thus required congressional action. *See Garamendi*, 539 U.S. at 423. Regulation of the insurance industry, though arguably commercial in nature, was held to be a political matter. *Id.* This distinction between political and commercial may not be a satisfactory basis for resolving future claims where the facts do not as readily support one category over the other. *See Celeste Boeri Pozo, Foreign Affairs Power Doctrine Wanted Dead or Alive: Reconciling One Hundred Years of Preemption Cases*, 41 VAL. U. L. REV. 591, 604–05 n.74 (2006)



The presidential statements in *Movsesian*, on the other hand, “concern[ed] national security, a war in progress, and diplomatic relations with a foreign nation,” areas where the President has the lead role.<sup>244</sup> Therefore, the *Movsesian* panel concluded, the President was acting within his independent authority by “developing and enforcing the policy refusing to provide official recognition to an ‘Armenian Genocide.’”<sup>245</sup> In the alternative, the panel argued that, even if the President did not have the independent authority to preempt state law, “Congress’s documented deference,” evidenced by its failure to pass the aforementioned House Resolutions, placed the President’s authority within the first category of the *Youngstown* framework and therefore empowered the President to act as he saw fit.<sup>246</sup>

Just as in *Garamendi*, the panel in *Movsesian* concluded that, on its face, section 354.4 was in clear conflict with this express foreign policy preference against using the phrase “Armenian Genocide.”<sup>247</sup> Because “the Executive Branch vehemently opposed” the language employed by failed House Resolutions 596 and 106, and section 354.4 “closely parallel[ed]” that language, it is logical that the president would be equally opposed to section

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(“However, the defendants in both *Crosby* and *Garamendi* argued that trade and insurance regulations are commercial in nature and should be left as matters for Congress to decide. While the Court was understandably comfortable deeming a tax regulation as a commercial matter, and sanctions and war repayment claims as political matter, one can imagine scenarios where this line is more difficult to draw.”); Denning & Ramsey, *supra* note 45, at 882 (“This distinction seems unsatisfactory. Even if one accepts the President’s ‘lead role’ in foreign policy, Justice Souter did not explain why the HVIRA was not a regulation of foreign commerce. After all, California’s disclosure requirements applied to entities doing business in the state, and made compliance a condition of continued licensing. In other words, the HVIRA set conditions under which private companies did business in California. It is hard to see it as anything other than a commercial regulation.”).

244. *Movsesian*, 578 F.3d at 1059; *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972).

245. *Movsesian*, 578 F.3d at 1060. This conclusion leads to the following question: If the California legislature had used a phrase other than “Armenian Genocide”—for example “massacre,” as President Clinton had done; “annihilation,” as President George W. Bush had done; or even used the Armenian word for genocide, “Meds Yeghern,” as President Obama had done—would the panel have given the executive branch documents the same effect? Brief for Human Rights Orgs. as Amici Curiae Supporting Plaintiffs-Appellees and Rehearing at 15–17, *Movsesian*, 578 F.3d 1052 (No. 07-56722). Whether or not the purpose of the act was to recognize the “Armenian Genocide” as occurring, its practical effect was to extend the statute of limitations on life insurance claims taken out between 1915 and 1923, which insurers refused to fulfill. Simply striking out the offending language should have alleviated the panel’s concerns, and indeed there was a severability clause, but the panel disagreed, stating that “[e]ven assuming subsection (c) could be separated from the constitutional deficiencies underlying the rest of the statute, the subsection would still conflict with the federal policy at issue.” *Movsesian*, 578 F.3d at 1060.

246. See *Movsesian*, 578 F.3d at 1060; *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”).

247. *Movsesian*, 578 F.3d at 1056–57. “By choosing to use the words ‘Armenian Genocide,’ § 354.4 directly contradicts the President’s express foreign policy preference.” *Id.* at 1061.

354.4.<sup>248</sup> If section 354.4 were allowed to stand, the panel concluded, California would undermine the diplomatic efforts of the Executive Branch and “provoke[] Turkey’s ire,” leaving the nation as a whole to suffer.<sup>249</sup>

Finally, as the Court in *Garamendi* had done, the panel balanced California’s interest in enacting section 354.4 against the federal interest.<sup>250</sup> The panel concluded that the true intent of the California legislature, its “real desiderata,” was not “a procedural rule extending the statute of limitations and reviving previously barred claims,” as it purported to do, but to “express[] its dissatisfaction with the federal government’s chosen foreign policy path. *Garamendi* and *Deutsch v. Turner Corp.* clearly hold that this is not a permissible state interest.”<sup>251</sup>

The panel’s analysis is subject to much criticism. First, regulating the insurance industry has long been acknowledged as a traditional state interest.<sup>252</sup> Second, for conflict preemption to be implied, as the name

248. *Id.* at 1060–61 (“California has done what Congress declined to do: it has defied the President’s foreign policy preferences, and has undermined the President’s diplomatic power.”).

249. *Id.* at 1061; see *Zschernig v. Miller*, 389 U.S. 429, 432–33 (1968). However, President Bush did not specifically express any objection to section 354.4 when it was passed. See Brief for Human Rights Orgs., *supra* note 245, at 10–11. Further, Congress itself has twice recognized the Armenian Genocide. Pet. from Interlocutory Appeal of the U.S. Dist. Ct., Cent. Dist. of Cal. at 12 n.3, *Movsesian*, 578 F.3d 1052 (No. 07-56722). As a practical matter, forty-three states have officially acknowledged the Armenian Genocide in Official Statements or State Resolutions, or both. Pet. from Interlocutory Appeal, *supra* at 8 n.2.

250. *Movsesian*, 578 F. 3d at 1062.

251. *Id.* at 1062–63; see *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003); *Deutsch v. Turner Corp.*, 324 F.3d 692, 712 (9th Cir. 2003) (invalidating a state law that extended the statute of limitations for individuals forced into slave labor during World War II where there was an express federal policy stemming from a series of treaties and international agreements entered into by the United States and foreign nations to end World War II and to resolve disputes stemming from the war). This “real desiderata” language closely parallels the language in *Zschernig* and *Garamendi*.

252. See *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653–55 (1981); *Movsesian*, 578 F.3d at 1063 (Pregerson, J., dissenting); *Garamendi*, 539 U.S. at 434 n.1 (Ginsburg, J., dissenting) (“States have broad authority to regulate the insurance industry, and a State does not exceed that authority by assigning special significance to an insurer’s treatment of claims arising out of an era in which government and industry collaborated to rob countless Holocaust victims of their property.” (citation omitted)). In fact, Congress itself has stated as much by passing the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–12 (2006), which put an end to a dormant Commerce Clause presumption that insurance was a matter of interstate commerce. See *W. & S. Life Ins. Co.*, 451 U.S. at 653 (“Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act . . .”); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219 n.18 (1979); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962); *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 319 (1955). Under this Act, regulation of the insurance industry is left generally to the states, and “silence on the part of the Congress shall not be construed” as disapproval of state regulation. See 15 U.S.C. § 1011. Essentially, this Act gave states broad authority to regulate the insurance industry, “despite its interstate character.” *Denning & Ramsey*, *supra* note 45, at 837. “Whether California has, while acting within its authority to regulate the insurance industry, intruded upon the

entails, there must be a conflict between a state law and the Constitution, the laws of the United States, ratified treaties, or an executive agreement.<sup>253</sup> Though *Garamendi* relied upon statements made by high-level officials of the Executive Branch, there the Court only did so as an “exemplar[]” of the policy embodied within an actual executive agreement.<sup>254</sup> At no time did the *Garamendi* Court suggest that such statements, in lieu of an actual executive agreement, have similar preemptive weight. Thus, the presidential statements in *Movsesian* are not evidence of “policy,” as used by *Zschernig* and its progeny,<sup>255</sup> but rather a “statement of intent” to persuade Congress not to officially recognize the Armenian Genocide.<sup>256</sup>

#### B. Norton Simon and the Return of the Dormant Foreign Affairs Power

On the same day that *Movsesian* was decided, the same Ninth Circuit panel also invalidated section 354.3. The California legislature enacted section 354.3 to extend the statute of limitations until 2010 for victims of the

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province of the federal government has no bearing on the existence of, or conflict with, an express federal policy applicable to the states.” *Movsesian*, 578 F.3d at 1063 (Pregerson, J., dissenting).

253. *Garamendi*, 539 U.S. at 416; see also U.S. CONST. art. VI, § 2; *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373, 381 (2000) (invalidating a state law in conflict with a congressional act and express delegation to the President because the “entire scheme of the [state] statute . . . [was] an obstacle to the accomplishment of Congress’s full objectives”); *Deutsch*, 324 F.3d at 711–14 (invalidating a California law that extended the statute of limitations on WWII slave labor claims because it was in conflict with federal policy expressed in a number of treaties and international agreements entered into by the United States to resolve the war and disputes arising from it); *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (Even “plainly compelling” Presidential foreign policy “do[es] not allow [the Court] to set aside first principles. The President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952))). Thus, central to the Court’s finding in *Medellin* was the lack of either a ratified treaty or an independent source of executive power allowing the President to displace state law. *Medellin*, 552 U.S. at 525–32. No authority grants executive branch officials “the power to invalidate state law simply by conveying the Executive’s views on matters of federal policy.” See *Garamendi*, 539 U.S. at 442 (Ginsburg, J., dissenting) (the majority opinion in *Garamendi* does not conflict with this statement); *Wyeth v. Levine*, 129 S. Ct. 1187, 1194–95 (2009) (the Supreme Court recognized that preemption of traditional state powers can only be imposed upon the existence of a “clear and manifest” contrary purpose); *S. Pac. Transp. Co. v. Pub. Util. Comm’n*, 9 F.3d 807, 812 n.5 (9th Cir. 1993); *Wabash Valley Power Ass’n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (“We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication.”).

254. See *Garamendi*, 539 U.S. at 422.

255. See, e.g., *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1186 (E.D. Cal. 2007) (“The ‘policy’ in evidence in *Garamendi* was evinced by the results of the President’s negotiations and was embodied in an agreement; in *Crosby*, the ‘policy’ was embodied in an act of Congress setting forth specific limited sanctions against a country; in *Zschernig*, the ‘policy’ was evinced by a negotiated treaty that covered the same subject as the state law.”).

256. See *id.* (“The President’s commitment to engage in negotiations that include developing nations does not set any particular goals or means, does not guide the actions of any actors with respect to greenhouse gas reduction, and imparts no information to guide future actions that may increase or decrease greenhouse gas production. It is merely a statement of an intent to negotiate on the terms specified.”).

Holocaust and their heirs to bring claims against California museums to recover artwork stolen by the Nazis.<sup>257</sup> In *Von Saher v. Norton Simon*, the panel held that section 354.3 was preempted under the doctrine of foreign affairs.<sup>258</sup>

In May of 1940, when the Nazis invaded the Netherlands, Jacques Goudstikker fled his home, leaving behind his world-class art collection, which included the Cranachs painted by Cranach the Elder.<sup>259</sup> The Allied Forces found the Cranachs outside of Berlin, in the country estate of a Nazi Reichsmarschall.<sup>260</sup> After the war ended, the Allied Forces were in charge of restituting the looted art, and President Truman adopted a policy of “external restitution,” where looted art was returned to its country of origin rather than to individual owners.<sup>261</sup> The Allied Forces returned the Cranachs to the Netherlands, which transferred ownership to George Stroganoff-Scherbatoff, who claimed they belonged to his family of Russian nobles.<sup>262</sup> Stroganoff-Scherbatoff then sold the Cranachs in 1971 to the Norton Simon Museum in Pasadena, California.<sup>263</sup> Von Saher, Goudstikker’s daughter-in-law, filed suit against the Norton Simon under section 354.3 to have the Cranachs returned.<sup>264</sup>

The panel affirmed the district court’s holding that section 354.3 was preempted under the doctrine of foreign affairs.<sup>265</sup> The *Norton Simon* panel first analyzed whether section 354.3 was in conflict with the Executive Branch policy of external restitution.<sup>266</sup> Based on the panel’s reading of *Garamendi*, that a foreign policy preference can be implied from the other Executive Branch documents relating to an executive agreement, the panel found that three documents were relevant: the London Declaration,<sup>267</sup> a memorandum from a State Department official, and a policy statement

257. CAL. CIV. PROC. CODE § 354.3 (West 2006).

258. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1029 (9th Cir. 2009), amended by 592 F.3d 954 (9th Cir. 2010).

259. *Norton Simon*, 578 F.3d at 1020–21.

260. *Id.* at 1021.

261. *Id.* at 1019 (quoting American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Report, 148 (1946)).

262. *Norton Simon*, 578 F.3d at 1021; Boehm, *supra* note 22.

263. *Norton Simon*, 578 F.3d at 1021.

264. *Id.* at 1020; CAL. CIV. PROC. CODE § 354.3(a)–(c) (West 2006).

265. *Norton Simon*, 578 F.3d at 1018.

266. *Id.* at 1022–25.

267. The London Declaration “explicitly reserved [to the Allies] the right to invalidate wartime transfers of property.” *Id.* at 1023. The Declaration “ha[d] been credited by some with laying the foundation for the United States’[s] postwar restitution policy,” even though it “does not explicitly address restitution or reparations.” *Id.*

approved by President Harry S. Truman in 1945 entitled the “Art Objects in U.S. Zone.”<sup>268</sup> However, as U.S. involvement in the restitution process ended on September 15, 1948, the panel concluded that there was no current policy in place to conflict with section 354.3.<sup>269</sup> “[H]ad the California statute been enacted immediately following WWII,” the panel added, “it undoubtedly would have.”<sup>270</sup>

Next, the panel determined whether section 354.3 was nonetheless preempted under the doctrine of field preemption.<sup>271</sup> Relying on *Garamendi dicta*,<sup>272</sup> the panel determined that “a traditional statutory ‘field’ preemption analysis” was appropriate when a state, by enacting a regulation outside of its traditional area of responsibility, interfered with the federal government’s conduct of foreign affairs.<sup>273</sup>

The panel proceeded into a two-part inquiry: first, whether section 354.3 regulated a traditional state responsibility,<sup>274</sup> and second, whether it intruded into an area vested in the federal government.<sup>275</sup> The panel determined that, even though property is traditionally regulated by the states, section 354.3 was not “a garden variety property regulation” because the statute’s real purpose “was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state.”<sup>276</sup> The panel reached this conclusion by observing that section 354.3 was amended prior to its enactment to remove the language “museums and galleries in California” from the definition of entities against whom suit could be brought.<sup>277</sup> California’s real *desiderata*

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268. *See id.* at 1023–24. Under the Art Objects in U.S. Zone policy statement, President Truman “set[] forth the standard operating procedures governing the looted artwork found within the U.S. zone of occupation.” *Id.* at 1024. Rather than restituting directly to individuals, this policy required that looted artwork was to be restituted to the “country of origin,” which had the duty of returning the art to its rightful owner. *Id.* The rationales for this policy, as stated in a State Department memorandum, were the “complexities of the sham transactions,” the impossibility of finding some of the owners and their heirs, and the “recogn[ition] that the liberated countries themselves had a stake” in the process. *Id.*

269. *Id.*

270. *Id.* at 1025.

271. *Id.* at 1025–29.

272. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003).

273. *Norton Simon*, 578 F.3d at 1025.

274. *See id.* at 1025–27.

275. *See id.* at 1027–29.

276. *Id.* at 1025–26 (citing *Garamendi*, 539 U.S. at 426).

277. *Id.* at 1026–27 (quoting section 354.3(a)); *see also Limitations of Actions: Holocaust Victims: Hearing on AB 1758 Before Assembly Comm. on Judiciary*, 2001–2002 Leg., Reg. Sess. (Cal. 2002) (statements of attorney E. Randol Shoenberg) (“For some reason, the proposed legislation is limited in application to museums or galleries ‘located in the State of California.’ This territorial limitation . . . should be eliminated. Jurisdiction over defendants in California courts is already restricted by the Constitution of California and of the United States, as set forth in the Code of Civil Procedure section 410.10 [stating that California courts may exercise jurisdiction on any basis not inconsistent with the Constitutions of California or of the United States]. None of the other statute of limitation sections have jurisdictional limits on the location of defendants to whom the

in enacting section 354.3, according to the panel, was to express its dissatisfaction with the federal government's method of restitution "[b]y opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against 'any museum or gallery' whether located in the state or not . . . ."<sup>278</sup> Thus, "California can make no serious claim to be addressing a traditional state responsibility."<sup>279</sup>

Next, the panel concluded that the Constitution expressly reserved the power to make and resolve war in the federal government.<sup>280</sup> Even though section 354.3 was directed against museums and galleries, not "former wartime enemies," its purpose, the panel argued, was to "establish[] a remedy for wartime injuries."<sup>281</sup> Therefore, there was "no room" for California to legislate.<sup>282</sup> Holding otherwise would "require California courts to review acts of restitution made by foreign governments."<sup>283</sup>

### 1. In Search of Limits: The Dormant Commerce Clause

*Norton Simon* illustrates the dangers of non-textual principles such as the dormant foreign affairs power. The Ninth Circuit enlarged the *Zschernig* doctrine without regard to its context; specifically, the statute at issue in *Zschernig* was "aimed directly at," and provoked the sensitivities of, foreign nations.<sup>284</sup> Professors Denning and Ramsey argue that this area of the law is

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limitations rule applies. Mr. Schoenberg goes on to give the example of a Holocaust survivor living in California who has discovered a piece of his family's artwork at the Metropolitan Museum in New York. Existing law allows California courts to exercise jurisdiction under the 'minimum contacts' test, so long as the contacts of the non-resident and the state are such that the exercise of such jurisdiction does not offend 'traditional notions of fair play and substantial justice.' (*International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.) Thus existing law would allow a suit against the Metropolitan Museum to be brought in California, as the Museum does business and is licensed by the Secretary of State to do business in California." *But see id.* at 1032 (Pregerson, J., dissenting) ("A reasonable reading of 'any museum or gallery' would limit section 354.3 to entities subject to the jurisdiction of the State of California. Because California has a 'serious claim to be addressing a traditional state responsibility,' it is clear that *Garamendi* requires us to apply conflict preemption, not field preemption." (citations omitted)).

278. *Norton Simon*, 578 F.3d at 1027.

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.* at 1029.

283. *Id.* at 1028. *But see* *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (action to recover six Klimt paintings from Austrian Gallery which allegedly had either been seized by the Nazis or expropriated by the Austrian Republic after World War II required the Ninth Circuit to review restitution made by Republic of Austria).

284. *See* *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1188 (E.D. Cal. 2007) ("In *Zschernig*, *Garamendi*, and *Crosby*, conflict was found because the preempted state law was aimed directly at a foreign country, and because the state law was aimed directly at some aspect

prone to a concept they call “doctrine creep.”<sup>285</sup> Doctrine creep occurs when new principles of law are justified by precedent, yet the important facts or limiting language utilized in those cases are ignored.<sup>286</sup> For example, in her dissent in *Garamendi*, Justice Ginsburg suggested that the dormant foreign affairs power should be limited in a manner generally consistent with the facts which gave rise to Justice Souter’s holding in *Zschernig*.<sup>287</sup> Preemption under the dormant foreign affairs power, Justice Ginsberg declared, “resonates most audibly when a state action ‘reflect[s] a state policy critical of foreign governments and involve[s] ‘sitting in judgment’ on them.’”<sup>288</sup> Justice Ginsberg also expressed a more general concern over judges becoming “the expositors of the Nation’s foreign policy.”<sup>289</sup> Whether or not Justice Ginsberg’s recommendation—limiting the dormant foreign affairs power to *Zschernig*’s facts—is sufficient to prevent judicial overreaching and to preserve the ability of states to legislate in favor of their citizens is debatable. After all, *Zschernig* itself has historically been the subject of judicial and scholarly criticism because of the lack of textual underpinnings to support its holding. This Comment will explore another

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of that foreign country’s conduct that was the subject of United States foreign policy activity. Here, that is not the case. The [disputed regulations] are aimed internally at the state’s traditional role in the regulation of what may be sold in the state and at corporations, not nations, that manufacture items for the state’s market.”); *Zschernig v. Miller*, 389 U.S. 429, 433 (1968) (“State courts, of course, must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility that any holding may disturb a foreign nation—whether the matter involves commercial cases, tort cases, or some other type of controversy.”).

285. Denning & Ramsey, *supra* note 45, at 869.

286. *Id.* For example, Professors Denning and Ramsey argue that the *Garamendi* decision calls into question the “common law constitutional interpretation” method, where case law, rather than constitutional text, history, or structure, “does the heavy lifting of constitutional decisionmaking.” *Id.*

287. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsberg, J. dissenting). Other scholars have proposed their own limitations to the dormant foreign affairs power. *See, e.g.,* Pozo, *supra* note 243 (suggesting that the dormant foreign affairs power should be reconceptualized as part of a broad foreign affairs power spectrum, which includes conflict preemption, as a way of comprehensively uniting precedent). Professor Reinstein proposes that the scope of the implied presidential powers raised by *Youngstown* cannot be greater than the historical limits of prerogative power imposed on the King of England. Reinstein, *supra* note 60, at 312–23. First, he argued that Chief Justice Marshall’s structural approach in *McCulloch v. Maryland* should be employed by tying the implied powers of the President to those specifically enumerated in Article II. *Id.* Second, the implied powers are subject to the following limitations: (1) the President can neither change domestic law nor create or alter existing legal obligations without congressional authorization; (2) the President’s implied powers are subject to regulation by Congress; and (3) a conflict between implied presidential power and congressional legislation should be resolved in favor of Congress. *Id.* In regards to the foreign affairs powers, Professor Reinstein stated that “the President may establish and implement the nation’s foreign policy and effectuate that policy through a broad range of methods, including executive agreements with other countries,” however, this power should be subject to the aforementioned limitations as well. *Id.* at 264–65.

288. *Garamendi*, 539 U.S. at 439 (Ginsberg, J., dissenting) (quoting HENKIN, *supra* note 33, at 164).

289. *Id.* at 442.

option.

The “negative” or “dormant Commerce Clause” doctrine is a reasonable place to turn to for sensible limitations because it parallels the dormant affairs power.<sup>290</sup> The dormant Commerce Clause, like the dormant foreign affairs power, is a power implicitly withheld from states as a “negative implication” to a positive grant of power to the federal government.<sup>291</sup> Furthermore, two of the principal reasons the Founders called for the Constitutional Convention of 1787 was because, under the Articles of Confederation Congress, there was a lack of federal authority “to effectively control foreign policy and defense,”<sup>292</sup> and because commerce between the states “had become chaotic as many states had erected barriers to interstate trade in an effort to protect business enterprise for [their] own citizens.”<sup>293</sup> Further, when the majority in *Garamendi* adopted its balancing test—that “it would be reasonable to consider the strength of the state interest” to determine how great a conflict is needed to preempt state law—the Court looked to dormant Commerce Clause precedent<sup>294</sup> and scholarship which suggested the implementation of “a test that ‘balance[s] the state’s interest in a regulation against the impact on U.S. foreign relations.’”<sup>295</sup> Practically speaking, the dormant Commerce Clause has been litigated more than the dormant foreign affairs power; therefore, the Court has been better able to

290. See Denning & Ramsey, *supra* note 45, at 849; RAMSEY, *supra* note 60, at 273–81 (drawing comparisons to the dormant Commerce Clause in his search for the text and historical meaning behind the dormant foreign affairs power); THE FEDERALIST NO. 42, *supra* note 44 (James Madison) (comparing foreign commerce and foreign affairs); Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2005) (providing a historical defense for the dormant Commerce Clause).

291. See RAMSEY, *supra* note 60, at 273.

292. See Pozo, *supra* note 243, at 594. In fact, the first thirty-three *Federalist* papers included at least some discussion of foreign affairs. See *id.*

293. Peter A. Lauricella, *The Real “Contract with America”: The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, 1397 (1997).

294. *Garamendi*, 539 U.S. at 420 (citing *S. Pac. Co. v. Ariz. ex rel. Sullivan*, 325 U.S. 761, 768–79 (1945) (under the negative Commerce Clause, “reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved”).

295. *Id.* (quoting HENKIN, *supra* note 33, at 164); see also Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 220–21 (1959) (“[T]he Court has adopted the same weighing of interests approach in pre-emption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the pre-emption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the pre-emption argument and allowed state regulation to stand.”).



interpret its proper scope.<sup>296</sup>

The basis for the dormant Commerce Clause is Article I of the Constitution, which expressly grants Congress the “Power . . . To regulate Commerce . . . among the several States.”<sup>297</sup> By negative implication, states are excluded from enacting legislation that improperly burdens or discriminates against interstate commerce, even in the absence of a conflicting federal statute.<sup>298</sup> The rationale for this doctrine is “to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”<sup>299</sup>

If a state regulation burdens interstate commerce, the regulation is subject to scrutiny under the dormant Commerce Clause.<sup>300</sup> In this situation, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”<sup>301</sup> If the purpose or effect of a discriminatory law is “simple economic protectionism,” it is subject to a “virtually *per se* rule of invalidity,”<sup>302</sup> which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.<sup>303</sup> Conversely, “evenhanded” statutes that only impose “incidental” burdens on interstate commerce will also be struck down if, under the *Bruce Church* balancing test, “the burden imposed on such commerce is clearly excessive in relation to the putative local

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296. Note, however, that the only interpretation of the dormant Commerce Clause on which all the Justices appear to agree is found in *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (state statutes discriminating against interstate commerce will normally be unconstitutional). See VARAT, COHEN & AMAR, *supra* note 102; see also Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43 (1988) (citing the criticisms of the Court’s use of the commerce clause and largely defending the Court).

297. U.S. CONST. art. I, § 8, cl. 3.

298. See *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 189 (1824) (the power to regulate interstate commerce “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant”); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (“We do not think that the [state] act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”).

299. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994); see also *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (“[The Commerce Clause is] framed upon the theory that . . . [as to economics] the several states must sink or swim together . . .”).

300. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007); *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433 (2005); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353 (1992).

301. *United Haulers Ass’n*, 550 U.S. at 338; *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

302. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); see also *Hunt v. Wash. State Apple Adv. Comm’n*, 432 U.S. 333 (1977); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349 (1951).

303. *Maine v. Taylor*, 477 U.S. 131 (1986); see also *Brown-Forman Distillers v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

benefits.”<sup>304</sup> The degree of the burden will “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.”<sup>305</sup> The threshold question is whether the burden created by the statute is “clearly excessive in relation to the putative local benefits.”<sup>306</sup>

Thus, for example, a state regulation which banned the intrastate sale of milk in plastic non-returnable, non-refillable containers, yet allowed the sale of nonreturnable, non-refillable containers made from other products to continue was not facially invalid because it prohibited all retailers, whether or not they were from outside the state.<sup>307</sup> The benefit of minimizing waste was significant and the burden imposed by this statute was minimal because milk could still be distributed throughout the state by out-of-state retailers.<sup>308</sup>

## 2. An Argument Against the Balancing Test

A number of justices have argued that courts should abandon the balancing test altogether when resolving dormant Commerce Clause disputes and allow even-handed state regulations to exist unless or until Congress says otherwise.<sup>309</sup> This notion is first stated as a principle in *Sproles v. Binford* by Chief Justice Charles Evans Hughes when he wrote that “in matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.”<sup>310</sup> Later, this principle is invoked apologetically by Justice Douglass in *Bibb v. Navajo Freight Lines, Inc.*:

This is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce. This conclusion is especially underlined by the deleterious effect which the Illinois law will have

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304. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *But see* *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (“This process is ordinarily called ‘balancing,’ . . . but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.” (citation omitted)).

305. *Bruce Church*, 397 U.S. at 142.

306. *Id.*

307. *Clover Leaf Creamery Co.*, 449 U.S. at 471–72.

308. *Id.* at 472.

309. *See, e.g.*, Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

310. *Sproles v. Binford*, 286 U.S. 374, 390 (1932).

on the “interline” operation of interstate motor carriers. The conflict between the Arkansas regulation and the Illinois regulation also suggests that this regulation of mudguards is not one of those matters “admitting of diversity of treatment, according to the special requirements of local conditions,” to use the words of Chief Justice Hughes in *Sproles v. Binford*.<sup>311</sup>

This approach was later articulated by Justice Scalia in his concurrence in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*<sup>312</sup> In *Bendix*, Ohio enacted a law which tolled the statute of limitations, normally four years, for breach of contract or fraud claims against entities that were not “present” within the state.<sup>313</sup> For a foreign corporation to be present in Ohio, it must have “appoint[ed] an agent for service of process.”<sup>314</sup> The majority opinion, penned by Justice Kennedy, “might have” concluded the statute as per se invalid but instead decided to apply the *Bruce Church* balancing test and found the statute unconstitutional nonetheless.<sup>315</sup>

Justice Scalia concurred in judgment but argued that the *Bruce Church* balancing test should be abandoned.<sup>316</sup> Justice Scalia wrote that he could not understand how the “exposure to the general jurisdiction of Ohio’s courts [was] ‘a significant burden’ on commerce.”<sup>317</sup> After all, the number of parties affected by Ohio’s statute was not before the Court, and even Midwesco was subject to Ohio’s long-arm statute.<sup>318</sup> As a practical matter, Justice Scalia doubted that the degree of the burden was as large as the majority contemplated, considering the risks of death and dissolution of prospective defendants, the lack of prejudgment interest, and the “staleness of evidence.”<sup>319</sup> Nevertheless, Scalia conceded that in reality both he and

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311. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959).

312. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988); see also *Camps Newfound/Owatonna Inc. v. Town of Harrison, ME.*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Scalia, J., concurring); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in judgment).

313. *Bendix*, 486 U.S. at 898.

314. *Id.*; OR. REV. STAT. § 111.070 (2009), repealed by 1969 Or. Laws ch. 591 § 305.

315. *Bendix*, 486 U.S. at 891. Under this test, according to the majority, the burden on foreign corporations was significant because it forced them to “choose between . . . forfeiture of the limitations defense” or subjecting them “to the general jurisdiction of Ohio courts” in all transactions, “including those in which [the foreign corporations] did not have the minimum contacts necessary for supporting personal jurisdiction.” *Id.* at 893. Further, the benefit provided by the regulation was negligible considering that “the Ohio long-arm statute would have permitted service on Midwesco throughout the period of limitations.” *Id.* at 894. As the majority found no significant benefit to offset the inconsistent standards to which in-state and out-of-state corporations were exposed, the Ohio statute was invalidated. *Id.*

316. *Id.* at 897 (Scalia, J., concurring).

317. *Id.* at 895.

318. *Id.* at 895–96.

319. *Id.* at 896.

the majority were simply speculating and “an opinion could as persuasively have been written coming out the opposite way.”<sup>320</sup>

Justice Scalia placed the blame on the unpredictable nature of balancing tests.<sup>321</sup> “[T]he essence of the courts’ function as the nonpolitical branch” is to engage in balancing tests “when determining how far the needs of the State can intrude upon the liberties of the individual.”<sup>322</sup> However, when it comes to balancing state interests against “the needs of interstate commerce,” courts are “ill suited to the judicial function.”<sup>323</sup> Scalia urged that the *Bruce Church* test should be abandoned and “essentially legislative judgments” should be left to Congress.<sup>324</sup> The benefit of adopting such an approach, Scalia argued, would do no damage to *stare decisis*, as the current system is unpredictable anyway, and therefore “no expectations can possibly be upset.”<sup>325</sup> Instead, Scalia proposed the following rule:

In my view, a state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce in a respect not required to achieve a lawful state purpose. When such a validating purpose exists, it is for Congress and not us to determine it is not significant enough to justify the burden on commerce.<sup>326</sup>

Applying this test, the Ohio statute would have been invalidated because it was facially discriminatory; it only applied to out-of-state corporations and a more narrowly tailored statute could have been construed to reach the same objectives by tolling the claims of only those entities “beyond the reach of Ohio’s long-arm statute, or against all persons that could not be found for mail service.”<sup>327</sup>

### 3. *Norton Simon* Revisited

The reasoning employed by Chief Justice Hughes and Justices Douglass

320. *Id.* at 896–97.

321. *Id.* at 897.

322. *Id.*

323. *Id.* (quoting *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in judgment)).

324. *Id.*

325. *Id.* at 898.

326. *Id.* Justice Scalia’s statement is made without attribution to Justice Hughes primarily because the law invalidated in *Bendix* was discriminatory. However, it clearly belongs to the principle announced by Justice Hughes.

327. *Bendix*, 486 U.S. at 898 (Scalia, J., concurring).

and Scalia is equally persuasive in the realm of the dormant foreign affairs power. Rather than embarking on an imperfect inquiry into whether or not the state is acting in an area of traditional competence and balancing those interests against those of the national government, courts should only preempt state laws if they interfere with the federal government's conduct of foreign affairs in a manner not required to achieve a lawful state purpose.<sup>328</sup> When such a validating purpose exists, Congress and the President can either individually enact a law or sign an executive agreement, or collectively enter into a treaty to preempt the law. An argument can be made that, as the federal government has the authority to speak with one voice on matters of foreign affairs, it should also be able to remain silent if it so chooses. While this may be true, if courts are forced to interpret congressional silence, there is a great danger that courts will misconstrue "evidence that the preeminent speaker decided to yield the floor to others" as evidence of an affirmative display of federal foreign policy.<sup>329</sup> Finally, as

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328. This approach is consistent with recent scholarship which has shifted away from the line-drawing of dual federalism to the recognition of a multiplicity of voices by way of overlapping jurisdiction in foreign and international affairs. See Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1219 (2008) [hereinafter Ahdieh, *Foreign Affairs*] (questioning the notion that effective engagement in foreign affairs requires that a nation speak with a single, national-level voice and, instead, advocates "horizontal coordination"—a group standard-setting, network organization—among sub-national actors); see also T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004) (examining the relationship of international law to the U.S. constitutional system and arguing that recourse to international sources is the natural development of a maturing legal system that is becoming increasingly interconnected to transnational legal relations); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1177 (2007) (Professor Berman has arguably gone the furthest in exploring the nuances of these patterns, under the rubric of "legal pluralism"); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006) (arguing that a static allocation of authority between the state and federal government is inconsistent with the process of policymaking in our federal system and deprives citizens of the benefits of overlapping jurisdiction); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (arguing that the Eighth Amendment's interpretive history supports the use of foreign and international law in deciding what is "cruel and unusual" punishment); Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004) (arguing against complete preemption of state corporate law because state-level regulation may provide some advantages over federal regulation); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) (arguing that the role played by trans-local organizations of public officials is underappreciated by current federalism scholarship). Beginning the preemption inquiry by determining which roles states traditionally play deprives states of the opportunity to provide for the constantly evolving needs of their citizens. Instead, the analysis should be framed as whether the state is infringing in an area enumerated to the federal government.

329. See, e.g., *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329 (1994); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring in part and concurring in judgment) ("[The President] is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 577 (2004) (Scalia, J., dissenting) ("The problem with this approach is not

with the dormant Commerce Clause cases, adapting this rule would not damage *stare decisis*, as the current system is unpredictable regardless.<sup>330</sup>

Had the Ninth Circuit in *Norton Simon* adopted an analogous rule to the approach articulated in *Bendix* by Justice Scalia, the California law undoubtedly would not have been preempted because, as the panel stated, there was no conflicting supreme law or executive agreement currently in place.<sup>331</sup> Indeed, this analysis is comparable to the approach taken by the Court in *Barclays Bank Plc v. Franchise Tax Board*,<sup>332</sup> a dormant foreign commerce power case. In *Barclays Bank*, California adopted a “worldwide combined reporting” method to determine how much a multinational corporation doing business in the state should pay in corporate franchise tax.<sup>333</sup> Even though California’s method was different from the federal method, which employed a “separate accounting method,” Justice Ginsberg, writing for the majority, held that this did not “prevent the Federal Government from speaking with ‘one voice’ in international trade.”<sup>334</sup> Justice Ginsburg concluded that Congress was aware that states were employing the taxation scheme adopted by California and knew that foreign nations “deplor[ed]” its use, yet Congress neither passed any law nor enacted any treaty.<sup>335</sup> As Congress had “refrained from exercising its authority,” the Court determined that the presidential statements aimed at influencing an unreceptive Congress were “not evidence that the practice interfered with the Nation’s ability to speak with one voice, but is rather evidence that the preeminent speaker decided to yield the floor to others.”<sup>336</sup> The argument that California’s method of taxation was “unconstitutional because it [was] likely to provoke retaliatory action by foreign governments,” Justice Ginsburg wrote, was “directed to the wrong forum.”<sup>337</sup> More importantly, statements, actions,

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only that it steps out of the courts’ modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.”).

330. See *Bendix*, 486 U.S. at 898 (Scalia, J., concurring).

331. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1024 (9th Cir. 2009).

332. 512 U.S. 298 (1994).

333. *Barclays Bank*, 512 U.S. at 301–03 (internal quotation marks omitted).

334. *Id.* at 302–03 (internal quotation marks omitted).

335. *Id.* at 320, 324–25.

336. *Id.* at 329.

337. *Id.* at 316–17, 327–28. Seven countries expressed their disapproval by sending diplomatic notes and filing amici briefs supporting *Barclays Bank*. *Id.* at 324 n.22. The United Kingdom even enacted retaliatory legislation. *Id.* Nevertheless, the Court held that only Congress, not the President or the judiciary, has the authority “to evaluate whether the national interest is best served by . . . uniformity, or state autonomy.” *Id.* at 328–29, 331. Noting that “[t]he judiciary is not vested with the power” to decide how to balance the competing concerns involved, *id.* at 328, the Court

and *amicus* filings made by the President were not sufficient to unilaterally preempt state law because “Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California’s otherwise valid, congressionally condoned” scheme.<sup>338</sup>

## V. THE PERILS OF NON-TEXTUAL FOREIGN AFFAIRS POWERS

Absent sensible limitations to the non-textual doctrines of the executive agreement and the dormant foreign affairs power, the ability of courts to preempt otherwise valid state laws will have negative effects on both federalism and on separation of powers concerns.

### A. *The Supremacy Clause*

As they stand, the Ninth Circuit’s decisions in both *Movsesian* and *Norton Simon* are deleterious to states’ rights because they lack any of the democratic procedural safeguards required of the “supreme Law[s] of the Land.”<sup>339</sup> For example, before the Constitution can be amended, the Constitution requires a ratification process similar to the original ratification of the Constitution.<sup>340</sup> Before a federal statute can be enacted, the Constitution requires a vote by a majority of both Houses and approval by the President or a two-thirds vote by the Senate.<sup>341</sup> Further, before a treaty can become law, the President must submit it for approval by the Senate.<sup>342</sup> Under *Medellin*, the Court imposed a requirement that the Executive Branch can independently preempt state law only while settling a civil claim with foreign entities. By absolving the requirement for the existence of an actual executive agreement, the *Movsesian* panel effectively circumvents *Medellin* and its safeguards entirely. Essentially, equal weight—in terms of preemptive effect—is given to a few speeches as to a treaty deliberated and compromised by both houses of Congress and signed by the President.

Thus, the Ninth Circuit has revived the post-*Garamendi* fear that, where the Executive was acting absent any independent authority or congressional direction, the executive agreement would make the treaty irrelevant.<sup>343</sup> Prior to *Medellin*, the Court in *Dames & Moore* and *Garamendi* only required

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presumed that a lack of “specific indications of congressional intent to bar” state law affecting foreign commerce indicates “Congress’[s] willingness to tolerate” such law. *Id.* at 324, 327; *see also id.* at 332 (Scalia, J., concurring) (noting that the Court’s decision “requires no more than legislative inaction to establish that ‘Congress implicitly has *permitted*’ state’s law (quoting *id.* at 326) (majority opinion)).

338. *Id.* at 330 (majority opinion).

339. *See* U.S. CONST. art. VI, cl. 2; Clark, *supra* note 97, at 1597.

340. *See* U.S. CONST. pmbll.; U.S. CONST. art. V.

341. *See* U.S. CONST. art. I, § 7.

342. *See* U.S. CONST. art. II, § 2, cl. 2.

343. Denning & Ramsey, *supra* note 45, at 908–10.

evidence of congressional acquiescence to the independent executive action. After *Medellin*, the Court required proof of “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.”<sup>344</sup> *Movsesian* effectively favors the more relaxed approach outlined in *Garamendi*, absent the more stringent *Medellin* standard, leaving states with no “clear, confident expectation[.]” of what types of laws a state could enter into.<sup>345</sup> For example, if a state were to enact environmental legislation using the words “climate change,” should these statutes be preempted merely because the Executive Branch had a policy against using such words, yet had no treaty or executive agreement in place stating so?<sup>346</sup> Or, in the alternative, if a state chose not to acknowledge “climate change,” could a speech by the President preempt that state’s law?<sup>347</sup>

In *Norton Simon*, the same conclusions hold true. The structure of the federal system and states’ involvement in the political process protect states

344. See *Medellin v. Texas*, 552 U.S. 491, 531 (2008).

345. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988) (Scalia, J., concurring). For example, the United States Court of Appeals for the First Circuit held that the Massachusetts law prohibiting state entities from purchasing goods or services from corporations doing business with Burma was unconstitutional in part on the ground that it interfered with the dormant foreign affairs power. See *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999); *Nat’l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998). The Supreme Court affirmed on the narrower ground of field preemption based on a congressional law enacted three months after the Massachusetts statute was passed. See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 388 (2000); *Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1977*, Pub. L. No. 104-208, § 570, 110 Stat. 3009-167; *Pozo*, *supra* note 243, at 600.

346. Cf. *Cent. Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359 (E.D. Cal. Sept. 25, 2006) (suit alleging that regulation of motor vehicle greenhouse gas emissions is preempted by the Energy Policy and Conservation Act and under the implied federal foreign affairs power; the District Court denied defendant’s 12(c) motion, finding that plaintiffs had stated a claim); *Green Mountain Chrysler-Plymouth-Dodge v. Torti*, No. 2:05CV00302 (D.V.T. filed Nov. 18, 2005) (suit alleging that regulation of motor vehicle greenhouse gas emissions is preempted by the Energy Policy and Conservation Act and under the implied federal foreign affairs power). To what degree is a state acting within an area of traditional competence, for example, when California joined several Canadian provinces, the European Union, France, Germany, New Zealand, Norway, the United Kingdom, and others to establish the International Carbon Action Partnership, “a group seeking to promote a ‘cap-and-trade’ regime for carbon emissions.” See *Ahdieh, Foreign Affairs*, *supra* note 328, at 1186; *Judith Resnik, Joshua Civin & Joseph Frueh, Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Transnational Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008). Other states and municipalities across the United States have also taken action independent of the federal government to address climate change. See *Ahdieh, Foreign Affairs*, *supra* note 328, at 1186; *Resnik, supra* note 328, at 62. Over 800 mayors have endorsed the Kyoto Protocol after the federal government refused to do so. See *Resnik, Civin & Frueh, supra*, at 719–20.

347. See H.J.R. Res. 12, 2010 Gen. Sess. (Utah 2010); *Suzanne Goldberg, Utah Delivers Vote of No Confidence for “Climate Alarmists,” THE GUARDIAN*, Feb. 12, 2010, <http://www.guardian.co.uk/environment/2010/feb/12/utah-climate-alarmists>.



from overreaching by the federal government.<sup>348</sup> Essentially removing the minimal restrictions placed on the dormant foreign affairs power by *Zschernig*—the state law must encourage criticism of a foreign nation that would be deleterious to federal interests to be preempted—unnecessarily expands an already expansive doctrine. In an ever-globalizing world, if states are completely barred from pressing any interest that touches upon foreign affairs, their power to provide for their citizens will be severely undermined. Thus, these citizens are effectively left voiceless because of the greater hurdle of petitioning a federal official to redress the concerns of a relative few. As a result, the Supremacy Clause itself becomes superfluous.<sup>349</sup>

### 1. Separation of Powers

The panel's decisions also affect the concept of separation of powers. If the President can overturn state law unilaterally, then the executive in a sense becomes a law maker.<sup>350</sup> As preemptive weight implies legislative authority, giving preemptive weight to the foreign policy preferences of the Executive Branch incorrectly places mere policy statements on the same level as the Constitution, treaties, and acts of Congress.<sup>351</sup> Thus, these statements are elevated to the status of law without any of the procedural safeguards mandated by the Constitution to secure the democratic process.

As a result, the need to acquire the cooperation of Congress disappears.<sup>352</sup> If states are removed from the legislative process, if their statutes could be displaced without the cooperation of the federal government, then an important check on the President's authority is removed. It is easier for individuals to "get the ear of some state governments" than it is to get federal attention.<sup>353</sup> Therefore, individuals are less likely to get their agendas passed. Where the President disapproves of

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348. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1990); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985) ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.").

349. See Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 688–92 (2002) (arguing that states should be permitted to participate to a greater degree in foreign affairs).

350. Denning & Ramsey, *supra* note 45, at 908. James Madison addressed this concern in Federalist No. 47 when he wrote, "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, *supra* note 44, at 324, 326 (James Madison). The Constitution, he argued, would not be susceptible to such pitfalls because "[t]he magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law, nor administer justice in person, though he has the appointment of those who do administer it." *Id.*

351. Denning & Ramsey, *supra* note 45, at 908.

352. *Id.* at 903–05.

353. *Id.* at 906.

the policy employed by the state, he can secure the consent of the majority of Congress to preempt this law. However, under the rules furthered by the Ninth Circuit, the President can act alone, and Congress is “reduced to the difficult position of assembling a blocking supermajority.”<sup>354</sup> This places an extremely powerful weapon in a “branch that is much more likely to wield it aggressively.”<sup>355</sup> As Justice Jackson stated in *Youngstown*: “The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.”<sup>356</sup>

By sidestepping the limitations imposed by *Medellin*, the panel interferes with the ability of the legislature to maintain what James Madison calls a “will of its own” by reducing its ability to maintain the “necessary constitutional means . . . to resist encroachment[.]” by the Executive Branch.<sup>357</sup>

## VI. CONCLUSION

It is difficult to know exactly what the Founders had in mind when they drafted the Constitution, and the further removed each generation is from the impetus of the American Revolution increases this difficulty. Any interpretation of these documents must be “divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question.”<sup>358</sup>

For decades, the Court has addressed the question of whether in the absence of an explicit federal foreign policy, states are emboldened to provide for their citizens or are simply constrained by the Executive’s predominant role in this field. Relying at various times upon the

354. *Id.*

355. *Id.* at 937; William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 510 (2008) (arguing that the other two branches of the federal government receive more judicial inquiry); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1732–33 (1996) (stating that, in separation of powers cases, the Court generally rules in favor of the executive branch); O’Donnell, *supra* note 125, at 96 (arguing that the Supreme Court is “reluctant to examine the President’s implied powers vis-à-vis Congress” because it fears touching on “political questions”).

356. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

357. See THE FEDERALIST NO. 51, *supra* note 44, at 348–49 (James Madison).

358. *Youngstown*, 343 U.S. at 634–35 (Jackson, J., concurring).

Constitution, other texts by the Founders, and concepts of nationhood that is said to be implicit in these documents, the Court has created an amorphous standard that ebbs and flows depending upon the demographic of the Court. This is the inherent danger of relying upon extra-constitutional doctrines because they have no limitation.

As states become more and more involved with international affairs, the extent of their permissible authority needs to be clearly delineated. The Roberts Court provided such a rule in its interpretation of the executive agreement in *Medellin*. However, without a similar limitation on the dormant foreign affairs power, this limitation is essentially meaningless.

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