

Winter 2007

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Recommended Citation

Celeste Boeri Pozo, *Foreign Affairs Power Doctrine Wanted Dead or Alive: Reconciling One Hundred Years of Preemption Cases*, 41 Val. U. L. Rev. 591 (2007).

Available at: <https://scholar.valpo.edu/vulr/vol41/iss2/2>

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FOREIGN AFFAIRS POWER DOCTRINE WANTED DEAD OR ALIVE: RECONCILING ONE HUNDRED YEARS OF PREEMPTION CASES

Celeste Boeri Pozo*

I. INTRODUCTION

Though the Constitution does not expressly grant the federal government a general power to direct the Nation's foreign affairs, it specifically vests Congress and the President with the power to conduct particular foreign affairs activities.¹ However, the federal government exercises broad authority over the foreign relations of the Nation. In this sense, the whole of the federal government's foreign affairs power is greater than the sum of all its constitutional parts. The scope of states' constitutional power is limited to what the Tenth Amendment reserves, but Article I, section 10 bars states from engaging in certain foreign affairs activities, such as entering into a treaty, without the consent of Congress.² Exactly how much latitude states have to affect foreign affairs is a question of great contention and one on which the Supreme Court has been remarkably elusive.

The federal government can invalidate state laws affecting foreign affairs in two ways. It can preempt a conflicting state law affecting foreign relations by way of a statute or treaty,³ or, absent legislative or executive acts, federal courts can apply the dormant foreign affairs power to preempt state laws that improperly affect foreign affairs.⁴ This Article focuses on the relationship between these two methods of preemption in order to achieve a more comprehensive understanding of the dormant foreign affairs power. Though the Supreme Court has overtly exercised the dormant foreign affairs power to preempt a state

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¹ See U.S. CONST. art. I, §§ 8, 10; art. II, §§ 2-3.

² See U.S. CONST. amend. X; U.S. CONST. art. I, § 10.

³ See U.S. CONST. art. VI.

⁴ See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 275-76 (1st ed. 2003) [hereinafter BRADLEY & GOLDSMITH, FOREIGN RELATIONS LAW] (defining "dormant foreign affairs preemption" as "the power of federal courts to preempt state activities related to foreign affairs even in the absence of a controlling political branch enactment").

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statute only once,⁵ its other foreign affairs preemption cases seem incongruent with that exercise and have produced much confusion.⁶ The most recent case on the matter resulted in a divided court.⁷

In encouraging further exploration as to the role of states “in a globalized, yet federal, world,” Edward Swaine comments on the lack of guidance current scholarship has to offer: “We no longer know . . . whether there is any real doctrine of dormant foreign relations preemption, or when it applies”⁸ This Article seeks to resolve this uncertainty by offering a conceptualization of the whole federal foreign affairs power through a spectrum that captures the federal government’s varying degrees of authority over the conduct of foreign relations. More specifically, this Article argues that reconciling the Supreme Court cases through the proposed spectrum analysis could provide lower courts with the tools necessary to resolve federal foreign affairs power conflicts with greater consistency.

At one end of the spectrum, where federal authority is weakest, Congress and the President must muster all of their power to enact a conflicting law in order to preempt an existing state law. At the opposite end of the spectrum, federal authority strengthens based on implicit and explicit constitutional authority, hence less congressional or executive action is necessary to preempt a state law. The dormant foreign affairs power occupies the stronger end of the spectrum, whereby state law can be struck down regardless of federal inaction. This Article will show that courts rely on constitutional and historical sources, as well as custom, to determine where on the spectrum to place the state law.

Part II begins by tracing the source of the federal government’s foreign affairs power through an exploration of its constitutional and historical roots, as well as related Supreme Court cases. It then analyzes the cases to find a common thread. Part III proposes viewing the whole of federal foreign affairs powers in terms of a spectrum to achieve a comprehensive understanding of conflict preemption and dormant

⁵ See *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (holding Oregon’s statute unconstitutional because “even in absence of a treaty, a State’s policy may disturb foreign relations”).

⁶ Compare *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down a state law related to foreign affairs with one country), with *Barclays Bank v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (upholding a state law with far reaching international effects).

⁷ See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

⁸ Edward Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT’L L. 337, 340 (2001).

foreign affairs preemption. Part IV concludes that the spectrum analysis can lead to reconciliation of the case law and predictable future outcomes.

II. THE FOREIGN AFFAIRS POWER

The foreign affairs power of the federal government is akin to water: it takes several forms, is not always visible although we know it is present, and is vital to our existence as a unified nation. The federal government can use its foreign affairs power to preempt state laws and policies in two ways: first, by enacting a law or entering into a treaty that conflicts with the state law; or second, by virtue of its exclusive reservation of power in foreign affairs, regardless of whether it has exercised this power. The first method is termed conflict preemption, and the second is called dormant foreign affairs preemption.⁹

To recognize when the Court will invalidate a state act related to foreign affairs, it is necessary to define the limits of the foreign affairs power through an examination of its constitutional and historical sources. Part II.A first reviews the Constitution's explicit and implicit grant of foreign affairs powers to the political branches of the federal government and then turns to supplementary historical documents and Supreme Court cases interpreting the breadth of the foreign affairs power. Part II.B searches for a common thread in the grounds the Court vocalizes as the basis for its holdings and contends that the cases cannot be reconciled on the Court's words alone.

A. *Constitutional Roots and Supreme Court Cases*

The purpose of Part II.A is to demonstrate where in the Constitution the federal foreign affairs power stems from and how it has been applied by the Supreme Court. Parts II.A.1, II.A.2, and II.A.3 divide the cases and related constitutional authority as follows: dormant foreign affairs power, conflict preemption, and the Supreme Court's most recent case on the issue.

1. The Dormant Foreign Affairs Power

The constitutional roots of the dormant foreign affairs power are somewhat convoluted because the Constitution does not directly grant the President and Congress a broad power to conduct all foreign affairs.

⁹ See *infra* Part II.A.1 (discussing the dormant affairs power); *infra* Part II.A.2 (discussing conflict preemption).

However, the Constitution's history and the explicit delegations of powers in matters such as war and diplomacy indicate that its overall design was to endow the federal political branches with almost all foreign affairs powers. For instance, Congress has the power to provide a "common Defense," regulate commerce with other nations, and declare war.¹⁰ Similarly, the President of the United States is entrusted with the authority to "make Treaties" and appoint and receive ambassadors.¹¹ Furthermore, Article I prohibits states from conducting certain forms of foreign affairs without the consent of Congress, such as entering into foreign treaties and engaging in war.¹²

The founders called for the Constitutional Convention of 1787 for two principle reasons.¹³ First, the Articles of Confederation did not provide for a federal government with the authority necessary to effectively control foreign policy and defense. Second, they wished to unify the nation with respect to other nations. Accordingly, the first thirty *Federalist* papers each included at least some discussion of national security and foreign relations.¹⁴ Today courts continue to rely on statements from the founders to preserve the notion that the federal political branches have exclusive power over foreign affairs.¹⁵

Other powers of the federal government may be deduced from its enumerated powers. For instance, some find the President's power to appoint and receive foreign ambassadors implies a power to recognize foreign governments and establish relations with them.¹⁶ Thus, the

¹⁰ U.S. CONST. art. I, § 8.

¹¹ U.S. CONST. art. II, §§ 2-3.

¹² See U.S. CONST. art. I, § 10. *But see* JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW § 6.5 (3d ed. 1986) (citing *Missouri v. Holland*, 252 U.S. 416 (1920)) (noting that the Tenth Amendment does not limit the federal government from using the treaty power to override a state law or policy).

¹³ See ARTHUR M. SCHLESINGER, JR., *Foreword* to DAVID GRAY ADLER & LARRY N. GEORGE, THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY ix (Univ. of Kan. Press 1996).

¹⁴ See *id.* Later *Federalist* papers also emphasized the value of having a federal government with a strong foreign affairs power. See, e.g., THE FEDERALIST NO. 42 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

¹⁵ See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (citing Jefferson and Madison in support of the federal government being "entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties"); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (citing Hamilton and Madison for the proposition that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy").

¹⁶ See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1296 (1996) (noting that federal foreign affairs powers are not limited to those

constitutional foreign affairs powers of the federal government may be conceived in a holistic manner. Furthermore, in addition to the Constitution, the federal government has an inherent sovereign authority as an international actor, which it obtained by virtue of its independence from England.¹⁷

Accordingly, the dormant foreign affairs power derives from the notion that the Constitution resulted from a historical need to grant broad and exclusive powers to the federal government for the effective conduct of the nation's foreign affairs. This notion essentially reserves certain activities to the federal branches alone so that states may not act regardless of whether any federal action has taken place.¹⁸ *Zschernig v. Miller* was the first case of the twentieth century to overtly rely on the dormant foreign affairs power to invalidate a state law.¹⁹ The case involved an Oregon statute that prohibited a nonresident alien from inheriting from an Oregon estate if he or she could not demonstrate that his or her home country would not confiscate the property and that it would grant Americans reciprocal inheritance rights.²⁰ Though descent and distribution of estates is in the power of the several states, the Court found the international effect of Oregon's statute, namely "judicial criticism of nations established on a more authoritarian basis than our own[,]" sufficient to invalidate it.²¹ The Court found the statute's effect to be "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress[,]"²² and conveyed that "even in absence of a treaty" state regulations capable of disturbing foreign relations "must give way if they impair the effective

powers specifically enumerated in the Constitution). *But see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 38 (2d ed. 1996) (noting those powers derived from the power to make treaties and appoint ambassadors at most suggest joint authority between the President and the Senate).

¹⁷ *See* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936). "As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." *Id.*

¹⁸ *See* BRADLEY & GOLDSMITH, FOREIGN RELATIONS LAW, *supra* note 4, at 275-76.

¹⁹ *Zschernig v. Miller*, 389 U.S. 429 (1968).

²⁰ *See id.* at 440-41.

²¹ *Id.* at 440.

²² *Id.* at 430-32.

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exercise of the Nation's foreign policy."²³ These strong statements, written in a short opinion, provoked much controversy.²⁴

No Supreme Court case has had as broad a holding since *Zschernig*. Some scholars believed *Barclays Bank PLC v. Franchise Tax Board of California*,²⁵ curtailed or even ended the precedential value of *Zschernig*.²⁶ In *Barclays*, the Court upheld the constitutionality of California's worldwide combined reporting requirement for calculating corporate franchise tax, notwithstanding its dramatic effect on foreign companies and governments and the Executive branch's express disapproval of it.²⁷ The Court explained that because the issue presented was one of commerce, a power of Congress rather than international relations, only a conflicting federal policy expressed by Congress, rather than the Executive branch, could invalidate the state law.²⁸ It then noted that Congress had studied the issue and chosen not to pass any of the proposed bills that would have barred such a taxing method, and thus Congress gave implicit permission to states to legislate in the area.²⁹ However, not all members of the majority agreed on this implicit

²³ *Id.* at 440-41. *But see id.* at 461-62 (Harlan, J., concurring). Justice Harlan did not feel the majority's expansive holding was necessary and instead grounded his concurrence on a conflict with the United States Treaty of Friendship with Germany. *Id.*

²⁴ *See, e.g.,* Richard B. Bilder, *The Role of State and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 830 (1989) (mentioning "some aspects of the *Zschernig* doctrine of a 'dormant' foreign relations power are troublesome"); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1649 (1997) (noting that Professor Henkin and Hans Linde both believed the dormant foreign affairs preemption doctrine presented by *Zschernig* to be a new constitutional law).

²⁵ *Barclays Bank v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994).

²⁶ *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, 865-66 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law*]; Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 164 (1994).

²⁷ *Barclays*, 512 U.S. at 324 n.22. Seven countries, as well as members of the European Community, strongly disapproved of California's reporting method and all filed amici briefs supporting *Barclays*, in addition to sending diplomatic notes. *Id.* Furthermore, the United Kingdom enacted retaliatory legislation. *Id.*

²⁸ *See id.* at 329 (citing U.S. CONST. art. I, § 8 cl. 3). "The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* Though the statute was scrutinized under the Commerce Clause, the Court noted that "A tax affecting *foreign* commerce" raises an additional two concerns: (1) "the enhanced risk of multiple taxation"; and (2) "the Federal Government's capacity to speak with one voice when regulating commercial relations with foreign governments." *Id.* at 311 (internal quotations omitted). The foreign affairs power was implicated under the "one voice" analysis. *Id.* at 329.

²⁹ Given Congress's purposeful inaction, the Court concluded "Congress implicitly has permitted the States to use the worldwide combined reporting method." *Id.* at 326.

permission theory.³⁰ Justice O'Connor, joined by Justice Thomas, questioned the majority's belief that California was able to impose multiple taxation on foreign corporations given the lack of *express* approval by Congress.³¹

As a result, the Court found California's tax method could not be preempted by an executive policy, let alone a federal dormant power intended to protect "the nation's ability to speak with one voice," despite the risk of imposing multiple taxation on foreign corporations. Unlike *Zschernig*, which outright prohibited enforcement of state legislation affecting foreign policy without the support of Congress and the President, *Barclays* appeared to stand for the proposition that nothing short of a congressionally enacted law could have prevented California from implementing its taxing method worldwide.

2. Conflict Preemption

If Congress enacts a law that conflicts with a state law, the state law may be preempted based on a combination of the Supremacy Clause and the specific constitutional power that granted Congress the authority to enact the law in the first place.³² Such a situation is termed "conflict preemption," and arises when a federal law and state law cannot both be complied with simultaneously.³³ *United States v. Belmont*³⁴ and *United States v. Pink*³⁵ both involved a direct conflict between federal and state government policies over which was entitled to assets of the Soviet Union. The Court held that an executive agreement, even one made

³⁰ See *id.* at 331 (Blackmun, J., concurring) (disapproving of the Court's finding that congressional inaction results in implicit permission); see also *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 19 (1986) (Blackmun, J., dissenting) (disagreeing with the Court's reliance on a "negative implication arising out of more than 70 agreements" and instead finding "what is clear is that the Federal Government has not provided the affirmative approval required to permit States to act").

³¹ *Barclays*, 512 U.S. at 336 (O'Connor, J., dissenting). "In my view, the States are prohibited (absent express congressional authorization) by the Foreign Commerce Clause from adopting a system of taxation that, because it does not conform to international practice, results in multiple taxation of foreign corporations." *Id.*

³² U.S. CONST. art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made . . . shall be the supreme Law of the Land . . ." *Id.*; see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-28, at 1172 (3d. ed. 2000).

³³ See TRIBE, *supra* note 32, at 1176-77.

³⁴ *United States v. Belmont*, 301 U.S. 324 (1937).

³⁵ *United States v. Pink*, 315 U.S. 203 (1942).

without any congressional involvement, had legal authority sufficient to preempt a conflicting state act.³⁶

In *Belmont*, the Court upheld the validity of an assignment of property in New York between the Soviet Union and United States governments made via an executive agreement, despite a conflicting state policy.³⁷ The Court found that a state policy could not prevail over the international compact at issue,³⁸ relying on *United States v. Curtiss-Wright Export Corp.*³⁹ for the proposition that “complete power over international affairs is in the national government and . . . cannot be subject to any curtailment or interference on the part of the several states.”⁴⁰ The opinion contained powerful language exerting the exclusivity of the federal government’s foreign affairs power: “Governmental power over external affairs is not distributed, but is vested exclusively in the national government.”⁴¹ The majority in *Pink*, as in *Belmont*, also found the executive agreement generated by the Soviet Union’s assignment of assets to the United States took precedence over the state policy of New York on a similar set of facts.⁴² Together, *Pink* and *Belmont* paved the way for executive agreements to be treated

³⁶ See *id.* at 230 (citing *Belmont*, 301 U.S. at 331) (holding that “Such international compacts and agreements as the Litvinov Assignment have a similar dignity” to a treaty and thus may be treated as supreme law); *Belmont*, 301 U.S. at 330 (holding that an executive agreement preempted a state act because “the Executive had authority to speak as the sole organ of that government”).

³⁷ The assets at issue became property of the Soviet government in 1918 when it enacted a decree nationalizing and appropriating all Soviet property and assets worldwide. *Belmont*, 301 U.S. at 326. In 1933, pursuant to an executive agreement, consisting of an exchange of diplomatic correspondence and negotiations without congressional consent, the Soviet government assigned the account to the United States government as a final settlement of claims between the two governments. *Id.* New York considered the transaction an act of confiscation contrary to its public policy and thus refused to honor the assignment. *Id.* at 326-27, 330.

³⁸ See *id.* at 330.

³⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

⁴⁰ *Belmont*, 301 U.S. at 331.

⁴¹ *Id.* at 330-31. “In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.” *Id.*

⁴² *United States v. Pink*, 315 U.S. 203, 222-26 (1942) (finding *Belmont* determinative of the extraterritorial effect of the Litvinov Assignment). Despite the similarity of the fact patterns, Justice Stone, who concurred in *Belmont*, dissented in *Pink*, because he felt the relevant diplomatic correspondence simply signified recognition of the Soviet government and thus no conflicting federal policy could be inferred with regard to preferences among creditors. *Id.* at 249 (Stone, J., dissenting). Conversely, the majority found the Litvinov Assignment to be part of a “broad and inclusive” policy of recognition of the Soviet government that should be construed in line with its purpose to eliminate all friction—such as the settlement of claims—between the United States and the Soviets. *Id.* at 224 (majority opinion).

with “similar dignity” as Article II treaties and has led to executive agreements becoming quite powerful against state acts.⁴³ These two cases significantly expanded methods by which the federal government can preempt conflicting state action.

The federal government can also use the Supremacy Clause to invalidate a state law that is “occupying” the same field Congress has enacted a statute within, even if it would be possible to comport with both state and federal laws.⁴⁴ This second form of conflict preemption is referred to as field preemption. Though field preemption is technically a subdivision of conflict preemption,⁴⁵ for purposes of foreign affairs analysis, it is best to distinguish field preemption from conflict preemption. *Hines v. Davidowitz* provides an excellent example of field preemption.⁴⁶

In *Hines*, a Pennsylvania statute requiring all aliens to register annually with the state, where the state would in turn furnish aliens a card they must carry or risk criminal punishment, was invalidated because it interfered with federal action on the same issue and frustrated the uniform policy Congress intended to establish in passing the Alien Registration Act of 1940.⁴⁷ The Court held that unlike states’ broad powers to tax concurrently with the federal government, “the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.”⁴⁸

The majority described the controversy as one of field preemption, whereby Congress fully occupied the field of alien registration and forbade the states from conflicting, interfering, curtailing,

⁴³ See *id.* at 230 (finding the Litvinov Assignment has a “similar dignity” to treaties considered the “Law of the Land” under Article VI of the Constitution); *Belmont*, 301 U.S. at 331.

⁴⁴ See *TRIBE*, *supra* note 32, at 1205.

⁴⁵ *Id.* (citing *English v. Gen. Elec. Co.*, 469 U.S. 72, 79 n.5 (1990)). “[F]ield pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation.” *Id.*

⁴⁶ *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (holding the Alien Registration Act preempted the state law because the power to regulate aliens cannot be concurrently held). *But see id.* at 75, 78-79 (Stone, J., dissenting) (concluding that Congress did not establish an exclusive alien registration system, therefore it has not “occupied the field,” and the state and federal law do not conflict).

⁴⁷ See *id.* at 72-74 (majority opinion).

⁴⁸ *Id.* at 68.

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complementing, or enforcing additional or auxiliary regulations upon the federal scheme.⁴⁹ Congress's "constitutional duty '[t]o establish a uniform Rule of Naturalization'" was noted as further evidence of federal priority on the matter.⁵⁰ The Court was also concerned with Congress's historical role in developing a uniform immigration policy, including establishing the terms and conditions for entry and remedying the harsher, discriminatory requirements of the past.⁵¹

A more recent example of field preemption over a discriminatory state statute is *Crosby v. National Foreign Trade Council*.⁵² In *Crosby*, the Court found that a Massachusetts law prohibiting state entities from purchasing goods or services from any corporation that did business with Burma conflicted with Congress's ability to implement a unified policy under a federal act.⁵³ The United States Court of Appeals for the First Circuit held the Massachusetts statute unconstitutional in part on the ground that it interfered with the federal foreign affairs power as construed in *Zschernig*.⁵⁴ However, the Supreme Court affirmed on the more narrow ground of field preemption based on a federal act Congress passed three months after Massachusetts passed its statute.⁵⁵ The federal act established mandatory and conditional sanctions against Burma and delegated to the President the authority to potentially impose further sanctions.⁵⁶

The Court in *Crosby* focused primarily on Congress's articulation of a national foreign policy over Burma and its delegation of "flexible discretion" to the President to limit or increase the sanctions,⁵⁷ thereby avoiding entirely the much anticipated answer to whether the Massachusetts statute interfered with the federal foreign affairs power

⁴⁹ See *id.* at 66-67.

⁵⁰ *Id.* at 66.

⁵¹ *Id.* at 69-72 (noting Congress's purpose was to protect against the bad practices of prior alien registration systems, which invaded personal liberty and were overly burdensome, and to form a harmonious set of laws on immigration and naturalization).

⁵² *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

⁵³ See *id.* at 388.

⁵⁴ See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999) (holding the Massachusetts Burma Law unconstitutional on three independent grounds: (1) it interfered with the conduct of foreign affairs exclusive to the federal government; (2) it violated the Foreign Commerce Clause; and (3) it was preempted by a similar federal law).

⁵⁵ See *Crosby*, 530 U.S. at 388.

⁵⁶ See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1977, Pub. L. No. 104-208, § 570, 110 Stat. 3009-167 (1977).

⁵⁷ *Crosby*, 530 U.S. at 388.

under *Zschernig*, as was found by the lower courts.⁵⁸ Critics of *Zschernig*'s holding praised the Court's narrow decision in *Crosby*.⁵⁹ However, some commentators found that *Crosby* did not signify a victory for *Zschernig*'s critics, and in fact felt it carried a tone similar to the dormant foreign affairs power.⁶⁰

After *Crosby*, the state of federal foreign affairs power still remained uncertain. *Zschernig* indicated that the dormant foreign affairs power may invalidate a state law absent executive or congressional action. However, *Barclays* demonstrated that the federal government's need to speak with a unified voice on all matters international is not without limits. *Pink* and *Belmont* taught that a conflicting executive agreement can preempt state legislation, while *Hines* and *Crosby* indicated that a congressionally enacted law can occupy the field, thereby invalidating concurrent state legislation. However, the question remained whether a wavering executive policy could occupy a field, despite congressional inaction, thereby preempting a concurrent state law that affected the nation's ability to speak with one voice. The Court answered this question in the affirmative in *American Insurance Ass'n v. Garamendi*.⁶¹

3. The Most Recent Supreme Court Case: *American Insurance Ass'n v. Garamendi*

Garamendi concerned a California statute with the purpose of better enabling Holocaust victims to collect insurance proceeds from policies that were confiscated by European governments and insurance companies during the Nazi era.⁶² The federal government has dealt with the compensation of Holocaust victims and their descendants since

⁵⁸ See *Natsios*, 181 F.3d at 45; *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 290-91 (D. Mass. 1998).

⁵⁹ See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 215 n.152 (noting that the trade group that filed the *Crosby* case stated that the Court's ruling would "help put an end to state and local efforts to make foreign policy"); Carlos Manuel Vazquez, *With(er) Zschernig*, 46 VILL. L. REV. 1259, 1260-61 (2001).

⁶⁰ Vazquez, *supra* note 59, at 1262. Professor Vazquez, of Georgetown University Law Center, stated "Crosby perpetuates foreign affairs exceptionalism" and "thus offers little cause for celebration to the critics of dormant foreign affairs doctrine." *Id.*

⁶¹ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

⁶² In 1999, California passed the Holocaust Victim Insurance Relief Act ("HVIRA"), which required all California licensed insurers to provide information regarding every policy in Europe they, or a "related company," had in effect from 1920 to 1945. CAL. INS. CODE §§ 13800-13807 (West 1999). Failure to provide such information led to suspension of the violating company's insurance license. *Id.* § 13806.

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World War II,⁶³ and in 1999 signed an executive agreement with Germany designating the International Commission on Holocaust Era Insurance Claims (“ICHEIC”) with the responsibility of maintaining a claims handling procedure.⁶⁴ Though Congress was aware of the issue, its only involvement was requesting the Presidential Commission to promote the National Association of Insurance Commissioners to report on insurance companies’ Holocaust-related claims practices in their respective states.⁶⁵ The Supreme Court invalidated California’s statute, holding that it was implicitly preempted despite the absence of congressional action in this area because it interfered with an established executive policy on repayment of insurance proceeds to Holocaust victims articulated in a series of executive agreements with Germany and Austria.⁶⁶

After *Garamendi*, it remains unclear why an executive policy alone could preempt state law in *Garamendi*, *Belmont*, and *Pink*, yet not in *Barclays*, or why congressional inaction was interpreted as acquiescence in *Barclays*, but not in *Garamendi*. It is also uncertain how pivotal the existence of an act of Congress was in *Crosby*; *Crosby* may instead have affirmed the First Circuit’s dormant foreign affairs power holding. The distinction between matters that are commercial or political in nature in these cases is opaque, as is the division separating when concurrent legislation is permissive, as in *Barclays*, and when it is not, as in *Hines*, *Crosby*, and *Garamendi*. Finally, the vitality of *Zschernig* remains an open question because, though it has been cited in subsequent cases, its influence is difficult to discern.

⁶³ In 1999, President Clinton and German Chancellor Gerhard Schröder negotiated the establishment of the Foundation, “Remembrance, Responsibility and the Future.” The German government and German corporations contributed 10 billion Deutschmark (\$5 billion) to the Foundation for the repayment of Holocaust-era claims. In return, President Clinton offered to take measures such as filing statements of interest in related United States litigation, in order for the Foundation to be regarded as “the exclusive remedy for all claims against German companies arising out of the Nazi era.” Brief of Petitioner at 4, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (No. 02-722).

⁶⁴ The Bush administration also facilitated German negotiations concerning claims procedures and reiterated its policy in support of ICHEIC as the “exclusive remedy” to such claims in 2002. Brief of Petitioner, *supra* note 63, at 7.

⁶⁵ See *Garamendi*, 539 U.S. at 428.

⁶⁶ See *id.* at 421-23 (citing the German Foundation Agreement and the Agreement Relating to the Agreement of October 24, 2000 Concerning the Austrian Fund “Reconciliation, Peace and Cooperation”).

B. *The Search for a Common Thread*

The Supreme Court has generated a diverse body of case law concerning whether a state law affecting foreign affairs should be invalidated. The Court traditionally prefers to use the route of statutory or treaty preemption rather than invoke constitutional powers, even when finding such preemption is a stretch.⁶⁷ In fact, *Zschernig* is the only contemporary case in which the Court expressly relied on the foreign affairs power to invalidate a state law.⁶⁸ When presented with the controversy over whether a state statute interfered with foreign affairs, the Court considered the following three factors in every case: (1) whether there was a conflicting federal action; (2) the source of this federal action; and (3) the international effects of the state law. Individually, each case appears to soundly evaluate these factors. However, as will be discussed below, when the cases are studied as a whole, it is evident that these factors were not uniformly evaluated. Thus, none of these commonly identified factors serves as the common thread connecting the case law.

The Court's quest for a federal act that directly conflicts with the state action, and has the force of law, such as a statute or treaty, has at times been only halfway successful. For example, a state act was preempted by a conflicting executive agreement in *Pink and Belmont* and a concurrent federal statute in *Hines and Crosby*, yet a conflicting executive policy was deemed insufficient to preempt the state statute in *Barclays*. What made *Garamendi* remarkable—and *Zschernig* even more outstanding—was that despite the lack of both a direct conflict and a federal statute or treaty, the state law was still preempted. The Court in *Garamendi* found conflict in a way that resembled field preemption, but relied on a different distribution of halfway success: a concurrent executive agreement.⁶⁹ The conflict found in *Zschernig* can best be described as an intrusion upon an area of the foreign affairs field reserved exclusively to the federal government, rather than an intrusion on a federal act taking place in this area. This indicates that conflict is a loose concept and it is not necessarily determinative of preemption.

⁶⁷ See *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (quoting *Liverpool, N.Y. & Phila. Steamship Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)). "The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it.'" *Id.*

⁶⁸ However, recall Justice Harlan concurred separately because he would have preferred to invalidate the state statute on the basis of a conflicting treaty. See *Zschernig v. Miller*, 389 U.S. 429, 461-62 (1968) (Harlan, J., concurring).

⁶⁹ See *supra* Part II.A.3 (discussing *Garamendi*).

Under conflict preemption analysis, the Court may find conflict when either the state act directly conflicts with a federal act so that compliance with both would be impossible,⁷⁰ or where the two overlap and, as such, the state act “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷¹ The latter reasoning—a subcategory of conflict preemption referred to as field preemption—was used to preempt state statutes in *Hines* and *Crosby*.⁷² The dormant foreign affairs preemption analysis used in *Zschernig* indicates that state acts conflicting with an area of foreign affairs delegated solely to the federal political branches will be struck down, though neither Congress nor the Executive branch have fully exercised their power in this area. *Garamendi* lies somewhere in between the two forms of analysis because there had been a partial exercise of federal power through executive negotiations and agreements.⁷³ However, unlike *Hines* and *Crosby*, which relied on a federal statute to occupy the foreign affairs field, *Garamendi* uncommonly relied on a policy behind an executive agreement alone without Congress’s involvement. This brings us to the Court’s second inquiry: the source of the federal act.

The source of the federal act, in terms of the amount of involvement Congress and the President had in generating the conflicting policy, varied widely from case to case. In *Crosby*, both branches of government were involved, whereas only the Executive branch was active in *Belmont*, *Pink*, *Garamendi*, and *Barclays*. Only Congress was active in *Hines*, and neither branch had acted at all in *Zschernig*. In fact, congressional silence was interpreted as implicit approval of California’s statute in *Barclays* and the executive policy was disregarded, whereas *Garamendi* brushed aside Congress’s purposeful silence on the issue and instead focused on the executive policy. In a sense, *Garamendi* is in line with *Belmont* and *Pink* for its sole reliance on an executive agreement, which contradicts *Hines*, *Crosby*, and *Barclays*⁷⁴ due to its lack of Congressional consent, but

⁷⁰ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (citing *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)) (finding preemption when it is impossible for private parties to both comply with state and federal law).

⁷¹ *Id.* at 373 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁷² See *supra* notes 46-51 and accompanying text (discussing *Hines*); *supra* notes 52-60 (discussing *Crosby*).

⁷³ See *supra* Part II.A.3.

⁷⁴ The Court distinguished *Barclays* as a commerce case which requires congressional action. 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

is slightly more grounded than *Zschernig* because there is an affirmative federal act on which to rely. This hodgepodge of reasoning indicates that the source of federal authority is not the common thread, and perhaps is not as initially controlling as one is otherwise led to believe.

Finally, the Court gave varying degrees of attention to the gravity of international effects presented by state laws. Concern over “incidental or indirect effect in foreign countries”⁷⁵ is a subjective inquiry with unique applicability, which could easily vary according to the size and influence of the state’s economy. Consequently, there is little consistency amongst the cases from this perspective as well. Enforcement of the executive agreement in *Belmont* and *Pink* had critical political implications because the agreement was related to recognition of the new Soviet government.⁷⁶ In both *Garamendi*⁷⁷ and *Barclays*, California’s act threatened far reaching international economic effects, yet the Court found preemption in the former, but not the latter case.⁷⁸ Moreover, *Barclays* brushed aside foreign actors’ complaints.⁷⁹ Only Justice O’Connor, in her dissent, raised concern over the tax method’s international effects.⁸⁰

Conversely, the effect on foreign relations of the statutes at issue in *Crosby*, *Hines*, and *Zschernig* were more questionable than in former

imagine scenarios where this line is more difficult to draw. Thus, the distinction between commercial and political alone is not a satisfactory basis for resolving future cases.

⁷⁵ See *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968) (citing *Clark v. Allen*, 331 U.S. 503 (1947)) (finding the state act must have more than “some incidental or indirect effect in foreign countries” to be preempted).

⁷⁶ See *United States v. Belmont*, 301 U.S. 324, 330 (1937) (“[C]oincident with the assignment set forth in the complaint, the President recognized the Soviet government, and normal diplomatic relations were established . . .”); see also *United States v. Pink*, 315 U.S. 203, 211 (1942).

⁷⁷ In *Garamendi*, the severe punishment of California’s statute—suspension of insurance license—would either cause plaintiffs to forego their ability to conduct business in California, or provide information which would in some cases violate European privacy law, disrupt federal negotiations, and perhaps mark the end of the ICHEIC voluntary claims system.

⁷⁸ Given the size of California’s economy, it is able to substantially affect the world economy and international relations through such acts unlike other less influential states.

⁷⁹ See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 320 (1994) (countering O’Connor’s finding that foreign corporations’ concerns should be addressed because they lack access to the political process of the United States by pointing to the “battalion of foreign governments” that came to their aid in “deploring worldwide combined reporting in diplomatic notes, *amicus* briefs, and even retaliatory legislation”).

⁸⁰ See *id.* at 337 (O’Connor, J., concurring in part, dissenting in part). “These adverse consequences, which affect the Nation as a whole, result solely from California’s refusal to conform its taxing practices to the internationally accepted standard.” *Id.*

cases.⁸¹ In *Crosby*, a state law imposing barriers on trade with one small country was found to be “an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy.”⁸² The Court’s finding in *Zschernig*, that Oregon’s probate law “affects international relations in a persistent and subtle way,” when even the Justice Department did not find it problematic, is dubious at best.⁸³ *Hines* arguably did not present any substantial foreign relations problems in that it did not have incidental or indirect effects in foreign countries.⁸⁴ Rather, its concern was over how the United States should document aliens once they have already arrived, not on how aliens should be treated based on the laws of their nation of origin—an assessment which could produce the judicial criticism contemplated in *Zschernig*.

In view of the panorama of international effects and methods of review employed by the Court, the gravity of the international impact of the state statutes does not form the nucleus of the case law either. Furthermore, it would be odd to allow a less influential state to engage in an act prohibited to more influential states simply because it is not able to produce more than incidental international effects. This analysis reveals that those factors most prominently discussed—mainly the existence of a conflicting federal act, the source of the act, and the international effects of the state statute—simply do not shed light on the incongruity between the cases. Part III suggests that redefining the scope of the foreign affairs power in a manner that captures all forms of preemption—conflict preemption and dormant foreign affairs preemption—provides a clearer picture of this diverse legal landscape.

III. THE FOREIGN AFFAIRS POWER SPECTRUM

It is not immediately clear when an affirmative federal act, or what type of federal act, is necessary to preempt a state law affecting foreign

⁸¹ See *supra* notes 19-24 and accompanying text (discussing *Zschernig v. Miller*, 389 U.S. 429 (1968)); *supra* notes 46-51 and accompanying text (discussing *Hines v. Davidowitz*, 312 U.S. 52 (1941)); *supra* notes 52-60 and accompanying text (discussing *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000)).

⁸² *Crosby*, 530 U.S. at 385. Note that the obstacles presented by Massachusetts’s statute affected the Executive, not Congress. “[T]he Executive has consistently represented that the state Act has complicated its dealing with foreign sovereigns . . .” *Id.* at 383.

⁸³ *Zschernig*, 389 U.S. at 440; see also *Bilder*, *supra* note 24, at 825.

⁸⁴ However, the Court pointed to reciprocal international agreements, whereby the United States agreed to treat aliens in the same manner as its own citizens would be treated in that country, which may have been violated by the Massachusetts statute. See *Hines*, 312 U.S. at 65.

affairs. The cases discussed above leave many questions open: Would Massachusetts's sanctions have been invalidated in *Crosby* absent a federal statute? If Congress had enacted a federal Holocaust victim repayment act, would the *Garamendi* Court have instead based its decision on the act and ignored related executive agreements? Since these questions have been left unanswered, the scope of the federal foreign affairs power is uncertain, making it difficult to predict when a state act involving foreign affairs will be invalidated.

Given such confusing precedent, it is not surprising that the lower courts have fared no better and tend to have more extreme holdings.⁸⁵ For instance, the First Circuit Court and the district court in *Crosby* both held that the Massachusetts statute interfered with the foreign affairs power.⁸⁶ However, as discussed above, the Supreme Court managed to skirt the dormant power question by solely focusing on preemption by a federal statute.⁸⁷ Though the Court came closer to directly relying on the foreign affairs power in *Garamendi*, its treatment of the executive agreement as a quasi-treaty more closely resembled field preemption, rather than an affirmation of the foreign affairs power finding made by the district court.⁸⁸

Part III.A suggests 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 the cases. Part III.B analyzes the method by which the Court determined where the contested state statute fell on the spectrum. The state law's position on the spectrum indicates the amount of federal action needed to preempt it. Part III.C applies the spectrum analysis to lower court cases to demonstrate its efficacy.

⁸⁵ See, e.g., *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 305 (Ill. 1986) (holding a tax amendment purposefully excluding South Africa was "an impermissible encroachment upon a national prerogative").

⁸⁶ See *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 51-52 (1st Cir. 1999) (holding the Massachusetts Burma Law unconstitutional partly because it interferes with the conduct of foreign affairs exclusive to the federal government); *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 291 (D. Mass. 1998) (holding Massachusetts's statute "unconstitutionally impinges on the federal government's exclusive authority to regulate foreign affairs").

⁸⁷ See *Crosby*, 530 U.S. at 388.

⁸⁸ See *Gerling Global Reinsurance Corp. v. Quackenbush*, Nos. Civ. S-00-0506WBSJFM, Civ. S-00-0613-WBSJFM, CIV S-00-0779WBSFJM, CIV S-00-0875WBSJFM, 2000 WL 777978, at *10 (E.D. Cal. June 9, 2000) (holding plaintiffs proved probability of success on claim that California's statute interferes with federal control over foreign affairs).

A. *Reconceptualizing the Foreign Affairs Power*

There has been a fair amount of debate over the virtues of conflict preemption.⁸⁹ The reality is that the Court has engaged in several forms of preemption.⁹⁰ Conversely, the dormant foreign affairs power has been treated as something far removed from conflict preemption; in fact the estranged dormant power is even thought by some scholars to have perished after *Zschernig*.⁹¹ However, the lower courts have evidently not shared this view,⁹² and *Garamendi* may properly be interpreted as a revival of the dormant power.⁹³

This Article argues the dormant foreign affairs power—the notion that certain areas of foreign affairs are exclusively reserved for federal action—is akin to conflict preemption, specifically, its subcomponent termed “field preemption.” Though conflict preemption only contemplates conflicting or concurrent federal acts, it is based on the notion that the federal government has priority to control certain areas of foreign affairs. The dormant foreign affairs power similarly controls an area of the foreign affairs field—one within which states are prohibited

⁸⁹ Justice Stone strictly believed the federal law must directly conflict with the state law for preemption to occur, whereas the majority trend favored a broader concept of conflict, including field preemption. See *United States v. Pink*, 315 U.S. 315, 255 (1942) (Stone, J., dissenting) (“Treaties . . . have hitherto been construed not to override state law or policy unless it is reasonably evident from their language that such was the intention.”); *Hines v. Davidowitz*, 312 U.S. 52, 77 (1941) (Stone, J., dissenting) (“This Court has consistently held that treaties of the United States for the protection of resident aliens do not supersede such legislation unless they conflict with it.”); see also Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 932-65 (2003) (discussing arguments for and against preemption).

⁹⁰ See, e.g., *Pink*, 315 U.S. at 222-26 (overriding a state policy because it conflicted with an executive agreement); *Hines*, 312 U.S. at 68-74 (preempting a state law that occupied the same field as a federal law); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937) (holding that an executive agreement preempted a state act based on the Executive’s authority to speak as the sole voice of the government).

⁹¹ See Bradley & Goldsmith, *Customary International Law*, *supra* note 26, at 865 (“[T]here are reasons to think that *Zschernig*’s dormant foreign relations preemption retains little, if any, validity.”); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 688-92 (2002) (arguing America is past the high point of federal exclusivity over foreign affairs and in light of globalization should allow for more state activity in foreign affairs).

⁹² See *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300, 306 (Ill. 1986) (citing *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)). The court relied on *Zschernig* for the proposition that even laws in areas traditionally controlled by the states “must give way if they impair the effective exercise of the Nation’s foreign policy.” *Id.*

⁹³ See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 395, 439 (2003) (Ginsburg, J., dissenting). “The Court’s analysis draws substantially on *Zschernig v. Miller*.” *Id.* (citations omitted).

from acting. The difference between the two is whether the federal government has chosen to exercise its priority in the field.

The federal government has varying degrees of authority within the broad foreign affairs field. Thus, how the federal government can use its foreign affairs power to preempt state acts is best described in terms of a spectrum. At the end where federal power is weakest, the political branches must exercise their power to the fullest to preempt explicitly conflicting state law. At the opposite end, where federal power is strongest, the federal government's exclusive authority is already reserved, and it therefore need not fully exercise its power. In the middle, there is a range of areas where the states may or may not act concurrently with the federal government, and therefore, the degree of federal action required for preemption varies accordingly. To preempt a state act, the foreign affairs power must be exercised with different levels of force according to which portion of the spectrum the state act occupies. The closer a state's act moves towards the conflict pole, the more federal action will be necessary to preempt it. As a state's act approaches the exclusive pole, less substantive federal action, such as loose executive policies, will suffice to preempt it. Accordingly, where the federal government's foreign affairs power is weakest, conflict preemption is necessary to invalidate the state law. Where its foreign affairs power is the strongest, the courts can rely on dormant foreign affairs preemption.

The spectrum implies that foreign affairs power is a zero sum calculation; the more power the federal government has over foreign affairs, the less the states have. From the perspective of the states, the spectrum is reminiscent of Justice Jackson's categorical separation of powers analysis—between Congress and the President—in *Youngstown Sheet & Tube Co. v. Sawyer*.⁹⁴ Jackson categorized the President's lowest ebb of power as the point in which the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."⁹⁵ Similarly, the foreign affairs power of the states, which is quite limited to begin with, is weakest at the exclusive pole where it is diminished by the federal dormant foreign affairs power. Jackson's second category is represented by a "zone of twilight" where the President, acting without either a grant or denial of congressional authority, may in some instances have concurrent power.⁹⁶ The middle

⁹⁴ 343 U.S. 579, 634-38 (1952) (Jackson, J., concurring).

⁹⁵ *Id.* at 637.

⁹⁶ *See id.*

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of the spectrum also presents uncertainty for states and their ability to act concurrently, which similarly depends on “contemporary imponderables,” such as whether Congress occupied the field.⁹⁷ Finally, Jackson noted, the President enjoys maximum authority when acting pursuant to express or implied authorization of Congress.⁹⁸ States also have the greatest amount of power over matters affecting foreign affairs when, in addition to their constitutional powers, they are acting pursuant to federal authority as well.⁹⁹

The area of the spectrum a state has attempted to occupy correlates to the area of the foreign affairs field affected. The “incidental or indirect effect[s]” to which the Court often referred are relevant insofar as they identify the type of foreign affairs activity the state is engaging in.¹⁰⁰ The magnitude of the effects is much less important and the category of the state law—whether it is tax or insurance—is not necessarily determinative. For instance, the Oregon statute at issue in *Zschernig* occupied an area of the foreign affairs field involving criticism of a foreign government, not probate. Once the area of the foreign affairs field the state is acting within is identified, it is placed on the spectrum according to the amount of power the federal government has in that area. Accordingly, Part III.B discusses how to determine what area of foreign affairs the state was engaged in.

B. *Defining the Foreign Affairs Spectrum*

The Court has relied on the Constitution, historical sources, and custom to identify which areas of foreign affairs belong exclusively to the federal government, but how these divisions were determined requires one to reconsider the factors motivating the Court’s decision in light of the spectrum analysis described above. For instance, discussions in the opinions regarding the effect of a state act on foreign affairs helps to determine what area of the foreign affairs power spectrum the state is occupying. On the other hand, while the federal source of authority—whether it be Congress or the President—is important, it is a misleading starting point for an analysis of the federal government’s foreign affairs power because the government may in some cases have done more than

⁹⁷ See *id.*

⁹⁸ See *id.* at 635.

⁹⁹ In *Barclays*, California’s statute was upheld, despite its international effects, partly because the Court concluded that Congress had implicitly authorized it. *Barclays Bank v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 326 (1994). “Congress implicitly has *permitted* the States to use the worldwide combined reporting method.” *Id.*

¹⁰⁰ See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003); *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968).

it needed to in order to preempt a state law.¹⁰¹ In fact, one article suggests that *Crosby* would have had the same outcome regardless of whether or not Congress had passed a concurrent statute.¹⁰² Over the course of history, the political branches have enacted legislation, entered treaties, and developed policies on nearly every conceivable issue. Thus, the Court will almost always be able to point to some federal action for preemption purposes should it choose to do so. Therefore, understanding the distribution of federal power over the foreign affairs field in terms of a spectrum helps to determine when state acts will be preempted.

The Constitution provides some clear parameters of the foreign affairs power. For instance, states cannot declare war nor appoint ambassadors.¹⁰³ Other federal powers, such as the power to recognize foreign governments, may be derived from the Constitution and implicitly mark federally exclusive boundaries.¹⁰⁴ Other constitutional clauses allude to certain topic areas the federal government has greater authority over. For instance, the Naturalization Clause points in favor of greater federal authority over immigration.¹⁰⁵ Based on the Constitution, as well as custom and historical sources, the Court has thus far delineated the following boundaries for what constitutes an impermissible effect on foreign affairs for the several states. Immigration registration is the province of Congress.¹⁰⁶ International claims settlement is the province of the Executive.¹⁰⁷ The federal political branches have priority in establishing sanctions against other

¹⁰¹ Conflict analysis becomes more important as the federal foreign affairs power weakens because as the state law moves closer to the conflict pole, it requires the Court to determine whether the tension between a state and federal act is sufficient to merit preemption.

¹⁰² See Vazquez, *supra* note 59, at 1261-62. "*Crosby's* approach to preemption was so extraordinary that it would have yielded the same conclusion with respect to the Massachusetts Burma Law even if there had been no Federal Burma Law." *Id.*

¹⁰³ Article I, § 8 of the United States Constitution delegates the power to declare war to Congress and Article II, § 2 delegates the power to appoint ambassadors to the President.

¹⁰⁴ See Clark, *supra* note 16, at 1296.

¹⁰⁵ U.S. CONST. art. I, § 8 (authorizing Congress "To establish an uniform Rule of Naturalization").

¹⁰⁶ See *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (finding that federal power over immigration, naturalization, and deportation is supreme).

¹⁰⁷ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (citing *Dames & Moore v. Regan*, 453 U.S. 654, 679, 682-83 (1981)); *United States v. Pink*, 315 U.S. 203, 223, 230 (1942); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937) (finding "our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress . . . Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice . . .").

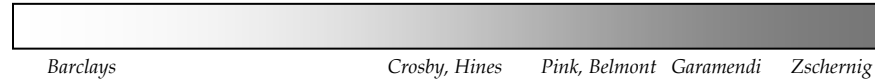
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countries.¹⁰⁸ States may not be critical of other countries' systems of governance.¹⁰⁹ Taxes, however, can be concurrently legislated.¹¹⁰ The following diagram illustrates where the cases fall within the spectrum analysis.

Spectrum Diagram

Weak Federal Power

Strong Federal Power



The Court mentioned the Naturalization Clause in *Hines* to support the supremacy of the Alien Registration Act.¹¹¹ There, Pennsylvania clearly attempted to occupy the area of foreign affairs related to immigration. Historical sources and custom were also contributing factors in concluding that “the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law.”¹¹² Given the constitutional base and historical practice of federal regulation over immigration, the Court placed the state statute off-center on the spectrum—slightly closer to the dormant power pole—because of its intolerance for concurrent legislation. As such, the Court found the congressional action in this area sufficient to trump the state law.

Crosby clarified that declaring sanctions against foreign countries is also an area in which the federal government has priority, and therefore, concurrent legislation is not permitted.¹¹³ Clearly, Massachusetts was

¹⁰⁸ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366-68, 372 (2000) (finding that a state law barring the purchase of goods from a particular foreign country is preempted because Congress intended to occupy that area of the foreign affairs field).

¹⁰⁹ See *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968).

¹¹⁰ See *Barclays Bank v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 327 n.28 (1994) (internal citations omitted). “Concurrent federal and state taxation of income, of course, is a well-established norm.” *Id.*

¹¹¹ *Hines*, 312 U.S. at 66. “[S]pecialized regulation of the conduct of an alien before naturalization is a matter which Congress must consider in discharging its constitutional duty ‘To establish an uniform Rule of Naturalization.’” *Id.*

¹¹² *Id.* at 68; see also *id.* at 62 n.9 (citing *Federalist* papers to find supremacy of national power over foreign affairs); *id.* at 64-65 (recounting history and tradition of federal involvement in protecting and recognizing rights of aliens on U.S. soil).

¹¹³ See *Crosby*, 530 U.S. at 374-80 (finding Congress intended to control economic sanctions against Burma by delegating flexible authority to the President and therefore a state law attempting to do the same could not exist).

attempting to occupy a portion of the foreign affairs field related to economic reprisals against foreign governments. Congress's constitutional authority to enact sanctions against Burma and delegate power to the President to manage the sanctions is so clearly established, it did not require ample discussion in the opinion. Sanctions therefore fall on a similar part of the spectrum as do immigration regulations, where concurrent legislation is not permitted and federal action just short of congressional enactment may arguably suffice to preempt the state law.

The Court's finding that the settlement of international claims is the occupation of the Executive branch is also derived from the Constitution and traditional practice. *Garamendi*, *Pink*, and *Belmont* all found the President's ability to settle claims to be an indisputable power that has been exercised since the Constitution's inception, and has historically received congressional acquiescence.¹¹⁴ "Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice. . . ."¹¹⁵ This places international claims settlement closer to the dormant foreign affairs preemption pole, where a reduced amount of federal activity in the form of an executive agreement is sufficient to preempt state law.

Taxation, on the other hand, is an area that has traditionally been concurrently legislated. However, a levy that causes multiple taxation, or prevents the federal government from speaking with one voice over commercial regulation matters, is unconstitutional.¹¹⁶ Thus, while the threshold for preempting a tax law—even one with dramatic international effects—is higher, it is not unsurpassable.¹¹⁷ *Barclays* held that Congress is the voice of the Nation charged with evaluating "whether the national interest is best served by tax uniformity, or state autonomy."¹¹⁸ Tax laws and policies therefore generally occupy the

¹¹⁴ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003); *United States v. Pink*, 315 U.S. 203, 240 (1942); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937).

¹¹⁵ *Garamendi*, 539 U.S. at 415 (citing *Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981)); see also *id.* at 414 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 610-11 (1952)). "[T]he 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.'" *Id.* at 415.

¹¹⁶ See *Japan Line, Ltd. v. Los Angeles*, 441 U.S. 434, 450-51 (1979).

¹¹⁷ Taxes affecting foreign commerce raise two additional concerns, above and beyond the usual Commerce Clause test. See *supra* note 28.

¹¹⁸ *Barclays Bank v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 331 (1994).

conflict end of the spectrum, which requires federal enactment of a law in direct conflict with the state policy.¹¹⁹

Zschernig is the most difficult to place on the spectrum because it is not self-evident what area of the foreign affairs spectrum the Oregon statute occupied. Though probate is traditionally an occupation of the state, the Court was not as concerned with the administration of probate as it was with judicial criticism of foreign governments.¹²⁰ Therefore, the Oregon statute's incidental effects on foreign affairs consisted of discrimination and political criticism of a different political system.¹²¹ The fact that it was a probate statute that provoked such criticism, rather than a tort statute for example, is likely irrelevant. Accordingly, *Zschernig* indicated that state statutes criticizing, and perhaps even discriminating against aliens based on their home country's form of government, fall into the extreme dormant foreign affairs preemption end of the spectrum, which will automatically invalidate state statutes regardless of federal action. Hence, the spectrum analysis provides a coherent method, in line with the Court's findings, of assessing whether the federal foreign affairs power may preempt a state law.

C. Application of the Spectrum Analysis

The spectrum analysis is useful to gauge whether there has been sufficient federal action to preempt a state law affecting foreign affairs. The absence of a clear dormant foreign affairs power doctrine, combined with the Supreme Court's broad application of conflict preemption, has resulted in lower courts developing multiple tests and standards and narrowly focusing on elements of *Garamendi* without considering the larger body of case law within which it falls.¹²² By applying the spectrum analysis to four lower court cases, this Part will demonstrate how the analysis can provide uniformity and clarity.

¹¹⁹ See *Hines v. Davidowitz*, 312 U.S. 53, 68 (1941) (explaining the state's power to concurrently legislate over alien registration is "not bottomed on the same broad base as is its power to tax").

¹²⁰ See *Zschernig v. Miller*, 389 U.S. 429, 440 (1968). "The statute as constructed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.*

¹²¹ A more narrow reading of *Zschernig* interprets the case to mean that state statutes provoking inquiry and judicial criticism of a foreign country's form of government are impermissible. See HENKIN, *supra* note 16, at 240. It may prove that "*Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments . . ." *Id.*

¹²² See Chiang, *supra* note 89, at 967-68. "It is difficult to ascertain whether the lower courts are even consciously applying a particular doctrinal test . . . or whether they are instead making ad hoc determinations . . ." *Id.*

In *Springfield Rare Coin Galleries, Inc. v. Johnson*, the Supreme Court of Illinois held an amendment to the state tax statutes, which purposely excluded South African coins and currency from a tax exemption, was unconstitutional because it intruded upon the federal foreign affairs power.¹²³ Yet, the Court of Appeals of Maryland upheld an ordinance requiring city pension funds to divest their holdings in any companies conducting business in or with South Africa or Namibia.¹²⁴ Though the courts attempted to create a meaningful distinction between these two cases, it was hardly accomplished.¹²⁵ Both cases involved a local government's attempt to restrict its business dealings with a foreign government of which it disapproved.¹²⁶ To add to the confusion, in a more recent case, the United States District Court of the Central District of California relied on *Garamendi* to dismiss state law tort claims against United States corporations for torts allegedly committed in Columbia based on the effect such litigation could have on general United States sovereign relations with the Columbian government. In contrast, the United States District Court of the District of Columbia had upheld state law tort claims brought by Indonesian citizens against a United States corporation for torts it allegedly committed in Indonesia.¹²⁷

The spectrum analysis would have reached the same conclusion in *Springfield* without having to balance innumerable considerations on how the Illinois statute would possibly affect the Nation's foreign policy-making power.¹²⁸ The decisive characteristic is not that it was a tax statute, but rather, as the court correctly noted, that it was a form of

¹²³ 503 N.E.2d 300 (Ill. 1986).

¹²⁴ Bd. of Trs. of the Employees' Ret. Sys. of Baltimore v. Mayor & City Council of Baltimore City, 562 A.2d 720 (Md. 1989).

¹²⁵ See *id.* (distinguishing itself on the basis that *Springfield* involved state efforts to "structure relationships between its residents" and South Africa, whereas the Baltimore ordinance was "primarily an attempt by the City to structure its own financial affairs").

¹²⁶ See *id.* The purpose of the ordinance was "simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents . . ." *Id.*; *Springfield*, 503 N.E.2d at 307 (noting "the exclusion's sole motivation is disapproval of a nation's policies").

¹²⁷ See *Mujica v. Occidental Petroleum Corp*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005). *But see Doe v. Exxon Mobil Corp*, No. Civ. A. 01-1357(LFO), 2006 WL 516744, at *3 n.2 (D.D.C. Mar. 2, 2006) ("*Mujica* misconstrues and misapplies the foreign affairs doctrine.").

¹²⁸ See *Springfield*, 503 N.E.2d at 307. The court's reasoning for invalidating the state amendment was multifaceted and included: demonstrating disapproval of a foreign government, targeting a particular country, disrupting the Nation's ability to speak with one voice, limiting national foreign policy choices, and implementing an economic boycott. *Id.* The latter is a power states are not authorized to exercise independently. *Id.*

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international economic boycott.¹²⁹ The Illinois tax amendment fell between *Zschernig* and *Crosby* on the foreign affairs spectrum because, though there tends to be federal exclusivity over international boycotts, the tax amendment was not as extreme as *Zschernig* in that it did not provoke judicial criticism of a foreign government. Yet, it was slightly closer to the exclusive pole than *Crosby*, because it was not limited to state government purchases and could influence private parties' purchasing decisions. This placement on the spectrum requires some, albeit limited, federal action to preempt a state statute, which is found here in the form of an executive order.¹³⁰ In light of the statute's placement on the spectrum, this partial occupation of the field by the Executive branch was sufficient for preemption and thus would not change the court's conclusion.

The same cannot be said for the decision in *Baltimore*, where the court split hairs to distinguish the case from *Springfield*.¹³¹ The court found that the city ordinance forcing divestment of pension funds related to South Africa did not intrude on the federal foreign affairs power because it only had an "incidental or indirect effect in foreign countries."¹³² However, Baltimore's economic ability to impact foreign relations should not be a determinant of the legality of its acts. The divestment statute at issue was similar in many respects to Massachusetts's statute in *Crosby*, thereby placing it on the same point on the spectrum.¹³³ In the aftermath of *Crosby*, it is evident that there was sufficient federal activity concerning South Africa to find field preemption in *Baltimore*.¹³⁴ Accordingly, in *Baltimore*, the court should have invalidated the Baltimore ordinance.

In *Mujica v. Occidental Petroleum Corp.*, a series of mostly tort claims were filed against two defendants, a United States corporation located in

¹²⁹ See *id.* "[T]he practical effect of the exclusion is to impose . . . an economic boycott," which is "outside the realm of permissible State activity." *Id.*

¹³⁰ See *id.* at 302-04 (discussing scope of Executive Order 12535 banning future importation of South African gold coins known as Krugerrands).

¹³¹ See *Employees' Ret. Sys. of Baltimore v. Mayor & City Council of Baltimore City*, 562 A.2d 720, 748 (Md. 1989).

¹³² *Id.* at 749.

¹³³ *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 56 (1st Cir. 1999). "[*Baltimore*], whether rightly or wrongly decided, does not alter our decision that the Massachusetts Burma Law . . . goes far beyond the limits of permissible regulation under *Zschernig*." *Id.*

¹³⁴ *Baltimore*, 562 A.2d at 740. The Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5051-5060 (2000), contained several restrictions, such as a prohibition against the importation of certain South African products, including Krugerrands, uranium, and coal, and limitations on American loans to the South African government. *Id.*

California that operated a joint venture with the Columbian government over an oil production facility in Columbia, and a United States corporation located in Florida that provided security services for the protection of the oil pipeline, for injuries caused by a bombing raid the defendants allegedly conducted against civilians in Santo Domingo, Columbia, in connection with their protection of the oil pipeline.¹³⁵ Though the entire case was dismissed because the court found it was not justiciable under the political question doctrine, earlier in the opinion the court incorrectly dismissed the remaining state law tort claims *pursuant to* the foreign affairs doctrine. The court held that “strong federal foreign policy interests outweigh[ed] the weak state interests involved”¹³⁶ by narrowly relying on language in *Garamendi* referring to Justice Harlan’s concurrence in *Zschernig*.¹³⁷ The court misapplied this preemption analysis because there was no conflicting state law for federal law or foreign policy to preempt.¹³⁸ Instead, the issue addressed by the court was whether the pursuit of certain state law tort claims would interfere with the foreign policy of the United States.

Under the spectrum analysis, this case would fall at the end of the pole where federal power is weakest because under any constitutional, historical, or customary analysis, absent any targeted scheme to

¹³⁵ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1183-88 (C.D. Cal. 2005). The plaintiffs, Columbian citizens who were civilian residents of Santo Domingo injured by the bombing raid, brought various actions under the Alien Tort Statute, Torture Victim Protection Act, and state law. *Id.* However, for purposes of applying the spectrum analysis, only the court’s review of the state law claims of wrongful death, intentional infliction of emotional distress and negligent infliction of emotional distress were considered. *Id.*

¹³⁶ *Id.* at 1188.

¹³⁷ *See id.* at 1186-87 (citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419-20 (2003)). In describing Justice Harlan’s view in *Zschernig*, the *Garamendi* Court explained that in evaluating a conflicting state law, one aspect that it would be reasonable for courts to consider before declaring preemption is the strength of the state interest weighed against whether the state law will cause more than an incidental effect in conflict with express United States foreign policy. *Id.* Interestingly, the court in *Mujica* noted that *Garamendi* had not “explicitly adopt[ed] this two-tiered approach in its opinion” which it used as the basis for its holding. *Id.* at 1187.

¹³⁸ Even if there had been a conflicting state law to consider, the court did not fully review California’s state interest. The court simply found California’s interest to be weak because the plaintiffs were not residents of California and the torts did not take place in California. The Court did not consider potential effects the defendants’ behavior and actions abroad could have on California. *See Doe v. Exxon Mobile Corp.*, No. Civ. A. 01-1357(LFO), 2006 WL 516744, at *2 (D.D.C. Mar. 2, 2006) (finding that the United States “has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries”).

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influence United States foreign affairs, basic state tort laws are well within the “traditional competence” of the states.¹³⁹ Therefore, in order to preempt claims under such laws there would have to be a directly conflicting federal law or treaty that specifically prohibited such tort cases under similar circumstances. Here, no such conflicting federal law, treaty, or express United States foreign policy existed, nor was there a substantial element of judicial criticism (as in *Zschernig*) or international boycotting (as in *Crosby*) directed at the Columbian government. Instead, the court relied on loose standards of possible effects such litigation could have on diplomatic relations with the Columbian government as described in the United States State Department’s Supplemental Statement of Interest.¹⁴⁰ While courts must give weight to statements of interest, they do not have sufficient authority to serve as the sole basis on which to invalidate a state law claim. Given the placement of this case on the end of the spectrum where federal power is weakest, a general foreign policy of cooperation is an insufficient basis on which to discredit otherwise valid state law tort claims, and, as such, these claims should not have been dismissed on these grounds.

Exxon would fall in the same place on the spectrum analysis as *Mujica* because it also involved basic state law tort claims brought by foreign nationals against a United States corporation.¹⁴¹ There was also no conflicting state law, and therefore, the court rightly concluded that the *Garamendi* analysis was not applicable.¹⁴² Absent any federal law or

¹³⁹ See *Mujica*, 381 F. Supp. 2d at 1187. The *Mujica* court also contends that the claims are within the “traditional competence” of the state. *Id.*

¹⁴⁰ The conflicting foreign policy the court points to is broad and vague and could apply in any case involving any foreign country that has an international component. For example, the court stated that an important U.S. foreign policy is the encouragement of foreign governments to establish proper legal mechanisms to resolve alleged human rights controversies. See *id.* at 1188. The court also stated that there is a possibility that Columbian courts may resolve the dispute differently and thereby risk creating the perception that Columbian judicial institutions lack legitimacy, which could have potentially “negative consequences for our bilateral relationship with the Columbian government.” *Id.* However, there is no specific mention within the case of a conflicting express U.S. foreign policy, nor of a conflict with the United States government’s involvement in establishing or relying upon a mechanism for resolving this dispute.

¹⁴¹ For purposes of applying the spectrum analysis, only those state law claims that were upheld in *Exxon* were considered.

¹⁴² See *Exxon*, 2006 WL 516744, at *3. “Here . . . there is [sic] no encroachments by any state on to the federal field of foreign affairs.” *Id.*; see also *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28-29 (D.D.C. 2005) (finding that the claims against Exxon do not generally interfere with U.S. foreign policy).

treaty prohibiting such actions, the court rightly concluded that the state law claims were permitted to go forward.¹⁴³

IV. CONCLUSION

Just as “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress”; so too do the powers of state governments to affect foreign affairs fluctuate depending upon the level of power the federal government has on the matter.¹⁴⁴ Though at first glance, the Supreme Court cases provide little insight as to the status of the dormant foreign affairs power, further analysis reveals a connection between conflict preemption and dormant foreign affairs preemption in the form of a spectrum. Thus, dormant foreign affairs preemption serves as one pole of a broad spectrum encompassing all federal foreign affairs related powers, where conflict preemption serves as the opposite pole. Most cases fall somewhere in between.¹⁴⁵

The international incidental effects findings made by the Court helped determine in which area of foreign affairs the state was engaging. Constitutional and historical sources, as well as custom, defined the amount of power the federal government has over particular areas of the foreign affairs field. The more power the federal government has over an area of foreign affairs, the closer it approaches the dormant foreign affairs power pole, and thus, less federal action is needed to preempt the state law. The weaker the federal power over an area of foreign affairs, the further along the conflict pole of the spectrum the area will fall within, and thus, more federal action—in the form of an explicitly conflicting statute—will be necessary to preempt the state law. The differences between the aforementioned Supreme Court cases can therefore be reconciled within the spectrum because it accounts for variations in level of conflict, federal source, and international effects.

¹⁴³ The court did caution that it would carefully manage the discovery process in consideration of the sensitivities of the government of Indonesia. See *Exxon*, 393 F. Supp. 2d at 29. “These [state law tort] claims are allowed to proceed, with the proviso that the parties are to tread cautiously. Discovery should be conducted in such a manner so as to avoid intrusion into Indonesian sovereignty.” *Id.*

¹⁴⁴ *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁴⁵ While extreme, as *Zschernig*-like reasoning may no longer be invoked because currently there are few, if any, matters remaining on which the federal government has not legislated or formed policy, *Zschernig* is not ineffectual in that it serves as an anchor for the dormant foreign affairs preemption pole of the spectrum.