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**American Insurance Association v. Garamendi
and Executive Preemption in Foreign Affairs**

Michael D. Ramsey and Brannon P. Denning

***American Insurance Association v. Garamendi* and Executive Preemption in Foreign Affairs**

Brannon P. Denning** & *Michael D. Ramsey**

In *American Insurance Association v. Garamendi*,¹ the U.S. Supreme Court invalidated California's Holocaust Victim Insurance Relief Act (HVIRA), which required insurance companies doing business in California to disclose all policies they or their affiliates sold in Europe between 1920 and 1945. According to the Court, the state's law unconstitutionally interfered with the foreign affairs power of the national government. The decision was easily overlooked in a Term of landmark cases addressing affirmative action and sexual privacy.² What coverage the case did receive emphasized its federalism aspects, and excited little reaction because the result seemed intuitively appropriate: the Court overturned a state law that, in the words of one account, "amounted to unconstitutional meddling in foreign affairs by a state."³

We argue here, however, that *Garamendi* is more important and problematic from the perspective of separation of powers. We argue that the decision improperly expands presidential control over foreign affairs, not only at the expense of the states, but more importantly at the expense of Congress and the Senate. The *Garamendi* Court invented a novel constitutional power of "executive preemption" – that is, an independent presidential power to override state laws that interfere with executive branch foreign policy. Previously, displacement of state laws implicating foreign affairs could be done principally by Congress and the Senate through the preemptive power

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¹ 123 S. Ct. 2374 (2003).

² The Court announced *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) and *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) on the same day as *Garamendi*, and *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), three days later. News coverage of the Court's term predictably emphasized those cases.

³ Mark Sherman, *Court Strikes Calif. Law on Nazi-era Claims*, PHILA. INQUIRER, June 24, 2003, at A10 ("Siding with the Bush administration and insurers, the court ruled 5-4 that the law amounted to unconstitutional meddling in foreign affairs by a state."). See also Jessie Mangaliman, *Court Voids State Law Aiding Nazi Victims*, SAN JOSE MERCURY NEWS, June 24, 2003, at 14 (writing that the "court, in effect said California . . . exceeded its authority by seeking to address a foreign-policy issue meant for the federal government"); Henry Weinstein, *Holocaust Insurance Law Negated*, L.A. TIMES, June 24, 2003, at B1 (writing that the Bush Administration's argument that the state law interfered with the ability to conduct foreign affairs as "critical" to the Court's decision); but see Charles Lane, *Court Rejects Law Aiding Survivors of Holocaust*, WASH. POST, June 24, 2003, at A11 (discussing implications for executive power).

of Article VI of the Constitution.⁴ In unusual cases state laws might be displaced by the judiciary,⁵ or by the President pursuant to executive agreements with foreign nations.⁶ But until *Garamendi*, no one had thought that a mere executive branch policy, unsupported by the formal or even tacit approval of any other branch, could have the effect of preemptive law.⁷

As a result, one need not be a defender of foreign policy federalism⁸ nor a critic of executive foreign affairs powers⁹ to have grave reservations about the decision's implications for separation of powers, federalism and constitutional theory. It is uncontroversial that ordinarily state laws and policies must give way to the foreign affairs objectives of the national government: indeed, establishing that proposition was one of the Constitution's principal advances over the Article of Confederation that preceded it. The critical question, though, is how these overriding federal goals are developed and identified. We argue that the *Garamendi* decision has at least three separate and substantial ill-effects upon this process.

First, the *Garamendi* decision conveys to the President the power to decide which state laws affecting foreign affairs survive and which do not. This executive preemption concentrates foreign affairs power in the President in a way not countenanced by the Constitution's text nor contemplated by its Framers, who emphasized the importance of separating executive power from legislative power. Previously, if the executive branch wished to pursue a foreign policy with which a state law interfered, the usual course was for the President to seek the support of Congress (or the Senate via a treaty) to override the competing state law through Article VI of the Constitution. This procedure assured that state laws would not stand as obstacles to federal foreign policy (as they

⁴ U.S. CONST. Art. VI ("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, under the authority of the United States, shall be the supreme Law of the Land. . ."). See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (statutory preemption); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (statutory preemption); *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999) (treaty preemption).

⁵ *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (displacing state law under dormant foreign commerce clause doctrine); *Zschernig v. Miller*, 389 U.S. 429 (1968) (displacing state law under dormant foreign affairs doctrine).

⁶ *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

⁷ See *Barclays Bank plc v. Franchise Tax Board of California*, 512 U.S. 298, 329-30 (1994) (rejecting, in the context of the dormant foreign commerce clause doctrine, the contention that a mere executive policy could cause the Court to invalidate a state law).

⁸ We have previously disagreed over the scope of the states' constitutional authority in foreign affairs. See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999) (defending a foreign affairs role for the states); Brannon P. Denning & Jack H. McCall, Jr., *The Unconstitutionality of State and Local Sanctions Against Foreign Countries: Affairs of States, States' Affairs or a Sorry State of Affairs?*, 26 HASTINGS CONST. L. Q. 307 (1999) (arguing that many state foreign policy activities are unconstitutional).

⁹ One of us has previously defended a relatively broad account of the President's foreign affairs powers. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001).

had, to the nation's great detriment, under the Article of Confederation);¹⁰ but it also assured that federal foreign policy would be developed cooperatively, as the policy of the whole of the federal government, and not merely as the policy of the executive branch. Under the post-Garamendi system, the President has no incentive to pursue a cooperative approach to foreign policy, and Congress must assemble a veto-proof majority to intervene.

Second, the Court in *Garamendi* relied in part upon two executive agreements that seemed in some tension with California's law, although the Court made clear that the preemption it found exceeded anything accomplished by the executive agreements alone.¹¹ Nonetheless, the Court's opinion contains broad and unreflective language endorsing executive agreements – which, prior to the *Garamendi* decision, had always been described in cautious and guarded language reflecting such agreements' uncertain constitutional status. By abandoning its earlier caution and apparently giving executive agreements unconstrained preemptive effect, *Garamendi* threatens the constitutional role of the Senate. So long as the constitutional status of executive agreements was uncertain, the President was circumspect about their use. The Court's apparent unqualified endorsement of them may hasten the decline of the treaty.

Third, the decision's dilution of separation of powers in foreign affairs undermines structural protections the Constitution affords to the states. It centralizes preemptive power in a single branch, and one which is institutionally more disposed to value international objectives over local ones. And in an era of globalization, it is increasingly likely that foreign policy objectives will trench upon areas of traditional state interests. Whatever one thinks of *judicial* protections of federalism interests, in the past the difficult balance between local interests and international ones received its evaluation in Congress (or the Senate) – the so-called “political safeguards of federalism.”¹² But *Garamendi*, despite gestures toward the idea of traditional state interests, appears to say that even in such traditional areas state law must give way to *presidential* foreign policy objectives in the case of a direct conflict.

The Court did not discuss, nor indeed even seem aware of, the novelty of executive preemption or its implications, which highlights the degree that the link between federalism and separation of powers in foreign affairs remains unacknowledged. The Court's failure to engage the separation of powers implications of the case also underscores the extent to which the Court's methodology, which we describe as a casual constitutional common law, allows the Court to reach intuitively comfortable results without seriously grappling with the important structural issues that underlie them.

Part I of this Article discusses the factual setting of the Holocaust-era insurance claims that formed the background of the case. Part II outlines the constitutional law of federal-state

¹⁰ On the tension between state laws and federal foreign policy under the Articles, see FREDERICK MARKS, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000).

¹¹ *Garamendi*, 123 S.Ct. at 2388.

¹² See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L.REV. 1321 (2001).

relations in foreign affairs as it stood before the *Garamendi* decision. Part III describes the Supreme Court's decision, and points out its discontinuity with prior decisions. In Part IV we turn to the troubling structural implications of *Garamendi*, which we regard as occurring primarily in the field of separation of powers. As outlined above, we conclude that the Court ended up far from the text, structure and history of the Constitution. In Part V we address the decision's implications for federalism, particular the dangers of concentrating preemptive power over traditional state functions in the federal executive branch.

Part VI relates the *Garamendi* case to wider theoretical debates of modern foreign affairs law. One of the deeper divides lies between those who would ground foreign affairs law in the text, structure and history of the Constitution, and, on the other hand, those who see foreign affairs law (even more than domestic constitutional law) as an exercise in "common law constitutionalism" that owes more to doctrinal and practical evolution than to the textual starting point.¹³ We argue that the *Garamendi* decision should satisfy neither camp. As outlined in Parts IV and V, it cannot rest comfortably upon constitutional text, structure and history. In contrast to other federalism and separation of powers cases,¹⁴ the *Garamendi* Court paid little attention to text or structure in analyzing the constitutional questions presented. But neither is *Garamendi* a true exercise in common law doctrinal evolution, because it owes essentially nothing to prior cases or practice, except as rhetorical cover (as elaborated in Part III). *Garamendi*'s near-exclusive attention to loose interpretations of prior case law and its lack of sensitivity to text, history, and structure, suggest to us a danger in "common law constitutional interpretation" as a preferred approach to constitutional interpretation and adjudication in foreign affairs controversies.

In sum, we argue that the Court's lack of attention to constitutional text, history and structure, and its casual use of prior decisions without proper attention to their specific facts or limitations, allowed the Court to reach an intuitively comfortable result that is wrong both as a matter of federalism and, perhaps more importantly, as a matter of separation of powers. Centrally, the Court's failure to begin with constitutional first principles caused it to overlook the critical relationship between federalism and separation of powers in foreign affairs. A robust foreign affairs federalism promotes a cooperative approach to foreign affairs, since the President will need the support of Congress to oust disruptive state laws; as a result, more foreign affairs decisionmaking will be done by Congress (or the Senate). In contrast, allowing the President unilaterally to oust states from foreign affairs, as the Court did in *Garamendi*, means that foreign affairs disputes may be decided only by the President, through a concentration of executive and legislative power that is contrary to the first principles of separation of powers. This re-allocation harms both the states and the legislative branch of the federal government.

¹³ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 677 (1996).

¹⁴ See, e.g., *United States v. Printz*, 521 U.S. 898 (1997); *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1996); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

I. The Holocaust-Era Insurance Claims

A. California and the Claims

Millions of people throughout Europe lost lives and property during the Nazi campaigns against civilian populations in the 1930s and 1940s. Many of these victims carried life, casualty and other insurance policies issued by Europe's major insurance companies, and the losses inflicted by the Nazis in many cases would have obligated the insurance companies to pay the beneficiaries of these policies. By the end of the twentieth century, however, relatively few payments have been made by leading insurers with respect to Holocaust-era losses.¹⁵

Of the array of Holocaust-era claims,¹⁶ as a practical matter insurance claims posed particular problems of proof, as they depend upon evidence of the policies in question, and Holocaust survivors who only barely escaped with their lives could hardly be expected to have salvaged their insurance documentation. Of course, the insurance companies might have records, but the companies themselves had been affected by the war and its aftermath and plausibly contended that many of their documents had been lost. Moreover, claimants came to suspect that the companies might not be fully forthcoming in providing documents that could require the companies to pay substantial claims.¹⁷ In any event, the reality was that the insurance claimants had little documentation and for the most part were not able to obtain any from the insurers.¹⁸

As of the late 1990s, thousands of Holocaust survivors and beneficiaries of Holocaust victims lived in California, and they brought the matter to the attention of the California Department of Insurance. As a partial response, in 1998 the Department, together with insurance regulators from other states, several European insurance companies, European regulators and nongovernmental organizations, and the government of Israel, founded an organization called the International Commission for Holocaust Era Insurance Claims (ICHEIC). The idea of ICHEIC was to invite insurance companies to pursue a cooperative approach to resolving the claims.¹⁹ But claims resolution continued to founder on the issue of documentation. ICHEIC was a voluntary

¹⁵ See Hearings before the United States House of Representatives Government Reform Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, September 24, 2002 (Testimony of Leslie Tick, California Department of Insurance), *reprinted in* Respondent's Brief in Opposition, *American Insurance Association v. Garamendi*, No. 02-722, app. D, at 23-34 [hereinafter 2001 Hearings].

¹⁶ Other Holocaust claims included, for example, allegations of slave labor and forced relocation against German and other European companies that cooperated with the Nazis. See *Burger-Fischer v. Degussa AG*, 65 F.Supp.2d 248 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F.Supp. 2d 424 (D.N.J. 1999).

¹⁷ These concerns were highlighted by events in an insurance claim filed in California state courts. See *Stern v. Assicurazioni Generali, S.p.A.*, 1999 WL 167546 (Cal. Super. Ct.) (Jan. 25, 1999). That case involved a claim by the beneficiaries of Mor Stern, a Jewish civilian who died at Auschwitz. The Stern heirs believed he had purchased insurance from Generali, a leading Italian insurer, but they lacked documentation. Generali claimed that its files had been destroyed in the war and that it had no evidence of a policy. During the course of the dispute, an anonymous Generali employee faxed the Stern heirs a copy of Mor Stern's life insurance policy, which Generali apparently had in its warehouse in Trieste, Italy. See Exhibit 2 to Commissioner's Opposition Brief, *Gerling Global Reins. Co. of America v. Quackenbush*, 2000 WL 777976 (E.D. Cal. 2000).

¹⁸ See 2001 Hearings, *supra* note 15, at 23-27.

¹⁹ See *American Insurance Association v. Low*, 230 F.3d. 739 (9th Cir. 2001) (describing ICHEIC).

organization without means to compel disclosure, and without access to the insurers' records claimants found that ICHEIC did little to improve their position.²⁰

This difficulty attracted the attention of the California legislature. At the behest of state Assemblyman Wally Knox, the California legislature in 1998 passed a series of measures to facilitate recovery on the Holocaust-era insurance claims.²¹ First, the legislature authorized a cause of action permitting “any Holocaust victim, or heir or beneficiary of a Holocaust victim” residing in California and having “a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer” covered by the statute to “bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides” until December 31, 2010 – in effect providing a cause of action and eliminating the statute of limitations for the claims.²² Further, responding to the evidentiary problems, the legislature required that all insurance companies doing business in California that had sold insurance in Europe during the Holocaust era (or had an affiliate that did so) to provide a list of their insureds during that period, together with relevant policy information.²³ The disclosure provision, known as the Holocaust Victim Insurance Relief Act (HVIRA), became the focus of the *Garamendi* litigation.

As finally enacted, the HVIRA established a “central registry containing records and information relating to insurance policies . . . of Holocaust victims, living and deceased.”²⁴ The law required insurers doing business in California that sold insurance policies “directly or through a related company, to persons in Europe . . . in effect between 1920 and 1945” to report to the state insurance commissioner the number of any such policies; “[t]he holder, beneficiary, and current status of those policies”; and “[t]he city of origin, domicile, or address for each policyholder listed in the policies.”²⁵ The HVIRA also required insurers to declare that the proceeds of such policies had been paid to the beneficiaries or their heirs, if any; that any unclaimed proceeds were donated to charities for Holocaust survivors; that the proceeds are being distributed in accordance with a

²⁰ See Henry Weinstein, *Insurers Reject Most Claims in Holocaust Cases*, LOS ANGELES TIMES, May 9, 2000, at A-3 (reporting that the ICHEIC insurers had rejected three out of four of the early cases submitted to them, often for lack of documentation, even though the initial cases were specifically selected by the claimants as being those with the best documentation); 2001 Hearings, *supra* note 15, at 25-27 (reciting problems with disclosure and claims settlement at ICHEIC)

²¹ See Weinstein, *supra* note 20, at A-3 (describing the enactment of the legislation).

²² CAL. CODE CIV. PROC. § 354.4(b), (c)). The provision also allowed suit against any “related company” – basically an affiliate – of a Holocaust-era insurer, responding to the jurisdictional difficulty that many of the companies that actually issued the policies did not do business directly in California. *Id.*, Sec. 354.5(a)(3).

²³ Holocaust Victim Insurance Relief Act, Cal. Ins. Code § 13800-13807 (1999). See also Cal. Code Regs. Title 10, § 2278-2278.5 (implementing regulations). The disclosure provisions that became the HVIRA were originally enacted in 1998 along with the other insurance-related statutes, but then-Governor Pete Wilson vetoed that part of the 1998 enactments. After Gray Davis replaced Wilson as governor, the legislature re-passed the disclosure provisions as the HVIRA in 1999.

²⁴ Cal. Ins. Code § 13803.

²⁵ *Id.* § 13804(a)(1)-(3). A “related company” was defined in the Act as “any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.” *Id.* § 13802(b). Many European insurers operated in California through affiliates that purported to be largely independent of the European operations, so in many cases California sought to regulate not the company that actually had Holocaust claims against it, but a distant corporate relative.

court-approved plan; or that the proceeds have not been distributed and their amount. The HVIRA directed the Commissioner of Insurance to revoke the business license of an insurer that failed to comply with it.²⁶

According to its preamble, the HVIRA sought to “ensure that closure” on the question of unpaid insurance proceeds was “swiftly brought to pass” for California’s Holocaust survivors.²⁷ It spoke of insurers’ “responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state” to ensure “rapid resolution” of these issues for victims and their families.²⁸ The legislature deemed the Act “necessary to protect the claims and interests of California residents” in light of the “active negotiations” underway through ICHEIC to “resolve all outstanding insurance claims issues,” and sought to “encourage the development of a resolution to these issues through the international process or through direct action by the State of California”²⁹

B. The United States and the Claims

While these developments proceeded in California (and in other states),³⁰ the U.S. government began to take an interest in Holocaust insurance claims.³¹ The U.S. Congress held hearings on the matter in 1998, roughly contemporaneously with the formation of ICHEIC and the enactment of the HVIRA. At first it seemed that the initiative would remain at the state level. That was consistent with U.S. practice, where – despite insurance’s multi-state and indeed multinational character – regulation had been conducted principally by the states. Congress had a long-standing policy of endorsing state insurance regulatory activities, reflected in the McCarran-Ferguson Act, which broadly authorized states to regulate the industry despite its interstate character.³² As the Chair of the House committee observed to the Insurance Commissioners of California and Washington State, when they testified before the committee on efforts at the state level:

[L]et me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one

²⁶ *Id.* §§ 13804 (b)(1)-(4), 13806. Knowingly making false statements to the commissioner was a misdemeanor, punishable by a civil penalty of \$5,000. *Id.* § 13805.

²⁷ *Id.* § 13801(d).

²⁸ *Id.* § 13801(e).

²⁹ *Id.* § 13801(f).

³⁰ Florida, Maryland, Minnesota, New York, and Washington enacted legislation similar to the HVIRA. *See, e.g.*, FLA. STAT. § 626.9543 (Cum.Supp.2003); MD. INS.CODE ANN. §§ 28-101 to 28-110 (2002); Minn.Stat. § 60A.053 (Cum.Supp.2003); N.Y. INS. LAW §§ 2701-2711 (Consol.2000); WASH. REV.CODE §§ 48.104.010-48.104.903 (2003); *see also* ARIZ.REV.STAT. ANN. § 20-490 (West Cum.Supp.2003); TEXAS INS.CODE ANN. Art. 21.74 (2003); Mass. Senate Bill No. 843 (Jan. 1, 2003).

³¹ *See generally* STUART EIZENSTAT, IMPERFECT JUSTICE (2003). For some of the background narrative here, we have drawn on Brannon P. Denning, *Recent Cases*, 97 AM. J. INT’L L. 950 (2003).

³² McCarran-Ferguson Act, 15 U.S.C. § 1012. As we discuss below, *infra* part I.B.2, Congress passed the McCarran Act principally to shield state insurance regulation from constitutional attack under the dormant commerce clause doctrine. *See* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) (describing purposes of the McCarran Act).

relates to the Federal nature of America, particularly in the insurance arena, [where] the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation . . . gives the States as significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices.³³

The Washington state commissioner had previously testified that states were trying to get the matter worked out cooperatively (referring in particular to ICHEIC), but that “[i]f our requests for cooperation are not satisfied, then the states may begin to exercise [regulatory] powers.” The California commissioner added that he was “prepared to revoke [the] certificate of authority, which allows a company to sell insurance in California” for companies that did not provide appropriate disclosure.³⁴ Congress was well aware, therefore, of the developing initiatives at the state level to compel disclosure of policy information. Several months later Congress passed the U.S. Holocaust Assets Commission Act of 1998, which established a commission “to examine issues pertaining to the disposition of Holocaust-era assets in the United States.”³⁵ The section of the Act relating to insurance policies stated among other things that:

In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of Insurance Commissioners [the association of state regulators] with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-era claims practices of all insurance companies, both foreign and domestic, doing business in the United States at any time after January 30, 1933, that issued any individual life, health or property-casualty insurance policy to any individual on any list of Holocaust victims³⁶

Congress thus seemed willing to let the states continue to work towards a solution to the disclosure problem. But the insurance claims were soon overtaken by other events. Insurance was only a small piece of the larger puzzle of claims based on Nazi atrocities. The largest set of claims arose from allegations of slave labor used by companies cooperating with the Nazis, and from banking-related matters.

The broader question of compensation for victims of the Third Reich and its accomplices arose immediately after the end of World War II, and by century's end it still had not been resolved. The Cold War had caused the Western allies to defer the question of post-war reparations because of worries that “continued reparations would cripple the new Federal Republic of Germany economically,” so responsibility for compensating victims of the Nazis shifted to West

³³ Hearings Before the House Comm. on Banking and Financial Services, 105th Cong. 131, 157 (Feb. 12, 1998). The Chair, in noting the states' role in insurance regulation, was no doubt thinking principally of the McCarran Act.

³⁴ *Id.* at 134, 142. The California commissioner was likely a little premature here, because the HVIRA, which allowed revocation of business licences, had not yet taken effect.

³⁵ Pub. L. 105-186, 112 Stat. 611 (1998).

³⁶ *Id.*, § 3(a)(4)(A).

Germany, which compensated its citizens and signed a number of international agreements settling claims by other countries' nationals against the German government.³⁷ Once the reunification of Germany occurred and a final settlement with the German government was effected, German courts held that a previous moratorium on claims by foreign nationals against private parties had been lifted. This ruling unleashed a torrent of litigation against insurance companies, banks, manufacturers, and others by Holocaust survivors seeking compensation for financial losses inflicted by the Nazi regime.³⁸

On the diplomatic front, the U.S. executive branch sought to negotiate a settlement with the German government to provide some measure of relief for Holocaust-era claims, hoping to head off massive litigation that would, in all likelihood, never be concluded in time to benefit most of the survivors.³⁹ In October 1998, German Chancellor Schroeder invited the United States to facilitate negotiation of a "foundation" to compensate slave labor victims. Although the German companies ultimately won the first round of the slave labor litigation,⁴⁰ additional claims (including the insurance claims) were forthcoming, and the German companies and the German government were willing to provide financial contribution in return for, as they put it, "legal peace." Accordingly negotiation proceeded despite the dismissal of the first round of slave labor litigation, and the proposed foundation ultimately expanded to include insurance and other financial and property claims as well.⁴¹

These efforts resulted in an agreement among the United States, Germany and a range of German companies, signed in July, 2000. The agreement established a fund, to be administered by a German foundation called "Remembrance, Responsibility and the Future," to which the German government and German corporations would contribute a total of approximately 10 billion marks, and which would compensate victims of a wide range of Nazi crimes, most prominently slave labor.⁴²

In return for the contributions, the German companies pressed their interest in, as the preamble put it, an "all-embracing and enduring legal peace in this matter" which was "fundamental to the establishment of the Foundation. . . ." The preamble further recognized "that German business, having contributed substantially to the Foundation, should not be asked or expected to contribute again, in court or elsewhere, for the use of forced laborers or for any wrongs asserted

³⁷ Garamendi, 123 S.Ct. at 2380-81.

³⁸ For accounts of the litigation, see Michael J. Bazylar, *Nuremburg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000); Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795 (2002).

³⁹ See EIZENSTAT, *supra* note 31, at 205-278 (recounting the author's experiences as chief U.S. negotiator).

⁴⁰ See Burger-Fischer, 65 F.Supp. 2d at 248 (dismissing slave labor claims on the basis of the statute of limitations); Iwanowa, 67 F.2d at 424 (same).

⁴¹ EIZENSTAT, *supra* note __, at 205-278.

⁴² Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-Germany, 39 I.L.M. 1298 (2000) [hereinafter Foundation Agreement"]. See generally EIZENSTAT, *supra* note 31, at 229-258 (recounting the author's experiences as chief U.S. negotiator). The United States reached a similar agreement with Austria, *id.* at 279-314, and an informal arrangement with Switzerland.

against German companies arising from the National Socialist Era” and that “it is in the interest of both parties to have a resolution of these issues that is non-adversarial and non-confrontational, outside of litigation.”⁴³

To this end, the agreement imposed three obligations upon the United States. First, Article 1 stated that “[t]he parties agree that the Foundation . . . covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims arising from the national Socialist Era and World War II.” Second, according to Article 2:

The United States shall . . . inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest.⁴⁴

Finally, Article 2 further required that “The United States, recognizing the importance of the objective of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objective with state and local governments.”⁴⁵

In the effort leading up to the Foundation Agreement, the insurance claims were not the central focus. The settlement allocated only about 300 million of its 10 billion mark budget for insurance claims.⁴⁶ Moreover, the Foundation itself had no mechanism for resolving the factual and documentary aspects of Holocaust insurance claims, which experience in California and elsewhere had shown to be critical. The Agreement said only that “The Federal Republic of Germany agrees that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission of Holocaust Era Insurance Claims (“ICHEIC”) and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures . . .” and that “[t]he Foundation legislation will provide

⁴³ Foundation Agreement, *supra* note 42, preamble, para.5, 8-9.

⁴⁴ *Id.*, arts. 1(1), 2(1). Annex B of the Agreement set forth the language of the “statement of interest” referred to in Section 2(2), which the United States agreed to file in any case where “a claim has been asserted against German companies.” That “statement” provided, in its chief operative section, that “the United States believes that all asserted claims should be pursued . . . through the Foundation instead of the courts” but went on to say that “The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground.” Annex B, para. 2, 7.

This language represented a watered-down version of what Germany originally sought: an agreement that the United States government state that the agreement *required* the court to dismiss the action. *See* EIZENSTAT, *supra* note 31, at 257-58, 268-74 (describing the negotiations on this point). Eizenstat recounts that “we [the U.S. negotiators] would not take a formal legal position barring U.S. citizens from their own courts.” *Id.* at 269.

⁴⁵ Foundation Agreement, *supra* note 42, Arts. 1(1), 2(1), 2(2). The United States also agreed to “take appropriate steps” to oppose any challenge to Germany’s sovereign immunity. *Id.* art. 3(4).

⁴⁶ *See* EIZENSTAT, *supra* note 31, at 266-68. According to Eizenstat, the United States originally did not understand the 10 billion mark cap on the Foundation funding to include insurance claims.

that all eligibility decisions will be based on relaxed standards of proof.”⁴⁷

During the negotiation of the Foundation agreement, executive branch officers contacted state agencies, including the insurance commissioners, urging states like California to rethink their efforts against Holocaust-related firms, and pleading that state involvement risked derailing the entire settlement enterprise.⁴⁸ The California Department of Insurance pressed ahead under the HVIRA, directing the insurers to provide policy information by April 10, 2000, or face suspension of their business licences.⁴⁹

That threat in turn produced the suit that became the *Garamendi* case, filed as a declaratory judgment action in federal court in Sacramento by the American Insurance Association (an industry association) and three leading European insurance groups: Gerling of Germany, Winterthur of Switzerland, and Generali of Italy. Among other claims, the plaintiffs contended that the HVIRA represented an unconstitutional interference by the state in foreign affairs, a field reserved to the federal government.⁵⁰

II. Foreign Affairs Federalism before *Garamendi*

To show how the Court’s decision reconfigured foreign affairs law, we begin with an overview of the law that preceded it. Prior to *Garamendi*, one could identify three general ways courts might invalidate state laws as incompatible with the foreign affairs powers of the federal government. In descending order of common application and acceptance, these were: (i) Article VI preemption; (ii) exclusions arising directly from the Constitution; and (iii) non-Article VI executive branch preemption, chiefly by executive agreement.

A. Article VI Preemption

A basic tenet of U.S. constitutional law is that federal laws and treaties displace (preempt) state laws with which they conflict. Article VI of the Constitution provides in part: “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, under the authority of the United States, shall be the supreme Law of the Land. . . .” The natural effect of making federal law supreme is that it overrides inconsistent state law. Indeed, preemption – and particularly foreign affairs preemption – was a central purpose of the clause, as explained in the founding era. Prior to the Constitution, under the Articles of Confederation, the national government lacked power to displace state laws that interfered with its treaties and foreign policy objectives, with the result that the nation could not

⁴⁷ *Id.*, art 1(4) & annex A, para.9.

⁴⁸ See Bazylar, *supra* note 38, at 65-68, 127-34, 156-59.

⁴⁹ 2001 Hearings, *supra* note 15, at 28. Some insurers complied with the statute. See *id.* at 35-42 (statement of David S. Waldman regarding activities of MONY Life Insurance Company).

⁵⁰ See *Gerling Global Reinsurance Corp. of America v. Quackenbush*, 2000 WL 777976 (E.D. Cal.) (June 9, 2000) (unpublished).

develop a coherent national foreign policy. Article VI's "supremacy clause" conveyed that power, in material part to protect the federal government's foreign affairs prerogatives.⁵¹

The inclusion of treaties, as well as statutes, within the supremacy clause shows the extent to which the Constitution's framers focused upon state interferences in foreign affairs under the Articles. Perhaps the single greatest foreign affairs challenge under the Articles was that states refused to implement and abide by treaties negotiated by the national government. In particular, key states like Virginia and Pennsylvania refused to implement controversial provisions of the peace treaty with Britain ending the revolutionary war, even though that settlement as a whole greatly favored the United States. State intransigence in turn provoked Britain to drag its feet in its own implementation of crucial clauses of the treaty. Further, states failed to follow provisions of commercial treaties negotiated by Congress, and once it became clear to potential treaty partners that Congress had no effective enforcement mechanism, further treaty-making became impossible.⁵²

Of course, the Constitution could have left it to Congress, in the new system, to pass laws implementing treaties and overriding inconsistent state law through the preemptive effect of statutes. This would have been closest to the British system, where treaties did not override existing laws, and instead required parliamentary implementation. But the Constitution's drafters wanted immediate implementation, and presumably saw no reason to allow the House to block or delay the preemptive effect of treaties already approved by the Senate. In any event, no one objected to adding treaties to the supremacy clause (which made sense, since the representation of the states in the Senate presumably alleviated any federalism concerns).⁵³

Article VI, then, set the basic relationship between the federal government and the states: unlike under the Articles of Confederation, the states are obliged not to erect legal regimes in conflict with federal legislative enactments – treaties and statutes. Modern doctrine goes a bit beyond what might seem absolutely required by the clause's plain language, in applying preemption

⁵¹ On the origins of the supremacy clause, see JACK L. RAKOVE, *ORIGINAL MEANINGS* 171-77 (1996); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000). 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. See 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand, ed., 1966 rev. ed.) [hereinafter *FARRAND, RECORDS*], at 27-29. Among other things, the change limited Congress' "veto" to matters within Congress' enumerated powers.

⁵² See MARKS, *supra* note 10, at 52-95; Ramsey, *Myth*, *supra* note 10, at 422-24 & nn. 161-173, and sources cited therein. As Hamilton described the problem: "The treaties of the United States under the [Articles] are liable to the infractions of the thirteen different legislatures. . . . The Faith, the reputation, the power of the whole Union are thus continuously at the mercy of the prejudices, the passions and the interests of every member of which it is composed." *THE FEDERALIST*, No. 22 (Hamilton) (Isaac Kramnick, ed., 1987), at 183.

⁵³ See *FARRAND, RECORDS*, *supra* note 51, at 22, 28-29 (recording no opposition to the supremacy of treaties, and reflecting unanimous approval of the supremacy clause).

not only in cases of direct conflict,⁵⁴ but also when courts feel a state law (or treaty)⁵⁵ “stands as an obstacle” to the desired result of a federal act, even if technically the two could exist in parallel. And in unusual cases, federal legislation may be so comprehensive as to occupy the entire “field” of regulation, and thus (in the modern view) exclude state laws that may not seem obstacles in any tangible sense.⁵⁶

These principles are familiar in domestic constitutional law, and apply without serious dispute to foreign affairs. In its most recent foreign affairs preemption case, the Supreme Court in *Crosby v. National Foreign Trade Council* concluded unanimously that a federal statute prescribing limited economic sanctions against Burma displaced a similar, though more restrictive, regulation by Massachusetts.⁵⁷ That was so even though both laws sought the same ultimate object (lessening of repression in Burma) and one could comply with both the state law and the federal law at the same time. It was sufficient for preemption, the Supreme Court pointed out, that Congress intended a material but limited and flexible sanctions regime, whereas the state’s restriction was both further-reaching and fixed.⁵⁸

⁵⁴ Preemption seems absolutely required by Article VI when a statute explicitly directs it, or when state and federal law irreconcilably conflict such that it is impossible to obey both of them. Whether Congress must draft laws in such a way to create conflict expressly, or whether courts may find conflict by implication, does not seem directly addressed by the text.

⁵⁵ In treaty preemption cases the Court has for the most part not suggested that different rules apply. See, e.g., *Ware v. Hylton*, 3 U.S. 199 (1796); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938); *El Al Israel Airlines Ltd. v. Tseng*, 525 U.S. 155, 175 (1999). We assume here that preemption based on statutes and preemption based on treaties operate similarly. A threshold question is whether the treaty is “self-executing”: that is, whether the treaty intends its provisions to have direct domestic effect. The Court has held that, notwithstanding the unqualified language of Article VI, some treaties require domestic implementation (and hence are not preemptive of their own effect). *Foster v. Neilson*, 27 U.S. 253 (1829); Carlos Manuel Vazquez, *Four Doctrines of Self-Executing Treaties*, 92 AM. J. INT’L L. 695 (1995). In speaking of treaty preemption, we refer only to the effect of self-executing treaties.

⁵⁶ *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 98 (1992), quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (preemption found when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”). The conventional account refers to “conflict preemption,” “obstacle preemption” and “field preemption.” See BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.06 (1999 & 2003 Supp.); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1174-75 (3rd ed. 2000).

⁵⁷ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). For details on *Crosby*, see Brannon P. Denning & Jack H. McCall, Jr., *Recent Decisions*, 94 AM. J. INT’L L. 750 (2000).

⁵⁸ *Crosby*, 530 U.S. at 373-82. The court first noted the long-standing rule preempting state laws that pose an obstacle to federal statutory objectives even in the absence of a direct conflict, and identified three ways the state law posed such an obstacle: (1) “Congress clearly intended the federal act to provide the President with flexible . . . authority over economic sanctions against Burma” whereas the state law did not permit any relaxation of sanctions in response to good behavior; (2) “Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range” whereas the state law penalized activities that Congress had decided to exempt from sanction; and (3) Congress had directed the President to speak for the nation in developing “a comprehensive, multilateral strategy” toward Burma, whereas the state law prevented the President from having full control over the range of economic sanctions to which Burma was exposed. *Id.*

Indeed, there was not much judicial dispute on the matter. All thirteen judges who heard the *Crosby* case thought the federal law preempted the state sanctions.⁵⁹ At the Supreme Court, Justice Scalia concurred separately to chide his colleagues for writing such a long opinion delving into the federal statute's legislative history, since, Scalia said, the statute's preemptive effect was perfectly obvious on its face.⁶⁰

To the extent one might look for judicial debate in the area, the best one could turn up would be a mild one: whether there should be a presumption for or against preemption in foreign affairs related matters (however that might be defined). In domestic preemption cases, the Court purports to apply a presumption that state laws are valid unless the federal law's preemptive effect is clear.⁶¹ In an early foreign affairs case, *Hines v. Davidowitz*, the Court suggested that this presumption might be reversed in foreign affairs because of the federal government's naturally predominant role;⁶² in *Crosby*, the Court declined to consider whether a presumption might lie, since it found the preemption clear in any event.⁶³

In sum, one could find no serious dispute on core principles: that Article VI is the principal way the federal government displaces state laws it thinks interfere with its foreign policy objectives, and that federal legislative acts which intend to preempt state laws through Article VI will almost always be successful (even if that intent can be found only by implication). It was also plain that Article VI preemption could not be claimed in *Garamendi*: no statute or treaty even arguably

⁵⁹ See *National Foreign Trade Council v. Natsios*, 181 F. 3d 38 (1st Cir. 1999) (unanimously affirming decision of district court invalidating Massachusetts law).

⁶⁰ *Crosby*, 530 U.S. at 388-91 (Scalia, J., concurring). Curiously, academic commentary found the case more difficult, with some commentators arguing that the federal statute afforded little basis for preemption. See, e.g., Sarah H. Cleveland, *Crosby and the One Voice Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001); Edward Swaine, *Crosby as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000); Carlos Vazquez, *W[h]ither Zschernig?*, 46 VILL. L. REV. 1259, 1261 (2001); see also Sanford Levinson, *Compelling Collaboration with Evil? A Comment on Crosby v. National Foreign Trade Council*, 69 FORDHAM L. REV. 2189 (2001) (criticizing the Court's outcome). Given the Court's embrace of "obstacle" preemption in domestic cases, we see no reason to view *Crosby* as anomalous: the Court's explanation of how the state law frustrated the purpose of the federal law seems wholly plausible and consistent with domestic cases such as *Gade*. Notably, the Justices and academic commentators most sensitive to federalism issues did not find *Crosby* objectionable. See Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2001 SUP. CT. REV. 175; Ernest Young, *Dual Federalism, Concurrent Jurisdiction and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001).

⁶¹ E.g., *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963) ("Federal regulation. . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.").

⁶² See *Hines v. Davidowitz*, 312 U.S. 52 (1941) (emphasizing importance of national government's role in foreign affairs and indicating that "In [determining preemption], it is of the utmost importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits.").

⁶³ *Crosby*, 520 U.S. at 374 n.8. See also *United States v. Locke*, 529 U.S. 89, 108-09 (2000) (declining to apply any presumption in an area of "national and international maritime commerce").

conflicted with California's HVIRA. Thus *Garamendi* lacked the critical factor that made its Supreme Court predecessor, *Crosby*, an easy case.

B. Constitutional Exclusions

Even absent Article VI preemption, the Constitution itself might exclude states from foreign affairs activities, without the need of preemptive federal action. Given the lack of a treaty or statute in *Garamendi*, this is where the HVIRA's challengers turned. The Constitution and the Court's prior cases offered three possibilities. First, the Constitution's plain language might exclude states from foreign affairs. Second, states might be excluded by the negative implication of clauses granting foreign affairs power to the national government. And third, and more controversially, there might be a structural exclusion of states from foreign affairs matters, not arising from any particular constitutional clause. The question whether these methods might supplement Article VI preemption became the central issue in the *Garamendi* case – at least at its outset.

1. Specific Exclusions

The Constitution's plain text excludes states from some specific foreign affairs activities. Article I, Section 10, declares among other things that no state shall make treaties, make other agreements without the consent of Congress, engage in war unless actually invaded, nor issue letters of marque and reprisal. To the Framers, these exclusions were obvious and non-controversial: for the most part they were carried over, with mild enhancements, from parallel provisions of the Articles of Confederation.⁶⁴ None of them, of course, was implicated in *Garamendi*. The question, rather, was whether Article I, Section 10 was an exhaustive list. One might suppose, as some commentators have suggested, that the very existence of a list of exclusions in the Constitution's text implies that the list is complete, and that others should not be created by implication.⁶⁵ As of the early twenty-first century, however, the matter could not be resolved so easily.

2. The Dormant Commerce Clause Doctrine and Exclusions by Implication

A broad spectrum of opinion – supported by substantial judicial authority – holds that clauses granting a specific power to the federal government can by implication deny that power to the states, even if the federal government has not acted and even if the Constitution does not exclude

⁶⁴ Specifically, with respect to foreign affairs, Article I, Section 10, provides: "No state shall enter into any Treaty, Alliance or Confederation; grant letters of Marque and Reprisal . . . No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . . . No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." Corresponding provisions (except respecting imports and exports) existed in Articles VI and IX of the Articles of Confederation. See Articles of Confederation and Perpetual Union, reprinted in JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 171 (1845).

⁶⁵ See Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1652 (1997) (the "natural inference . . . 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 states in so many words. The most familiar manifestation of this principle, and the most relevant to *Garamendi*, is the so-called “negative” or “dormant” commerce clause doctrine, which according to the Court excludes states from certain regulations affecting interstate commerce even absent federal action, based upon a negative implication from Article I, Section 8’s grant to Congress of the authority to regulate interstate commerce.⁶⁶ Some Justices and academic commentators have attacked the dormant commerce clause doctrine at its very foundations,⁶⁷ but the sheer volume of cases the Court has devoted to it seems to leave it firmly entrenched.

The doctrine, as the Court now applies it, does not exclude states from all regulations of interstate commerce. Although at times in the nineteenth century the Court flirted with the idea of mutually exclusive state and federal commerce powers,⁶⁸ it ultimately abandoned that idea and settled upon an intermediate approach that excluded states only from what it felt to be the most unjustifiable regulations of interstate commerce: in general, laws that discriminate against out-of-state commerce either on their face or in their effects, and laws whose putative local benefits are “clearly exceeded” by their burdens on interstate commerce.⁶⁹

Presumably, then, Congress’ section 8 power to regulate “Commerce with foreign Nations” implies a similar “dormant” exclusion of the states from regulating matters of international commerce.⁷⁰ Indeed, the Court indicated in *Japan Line Ltd. v. County of Los Angeles* in 1979 that this “dormant” exclusion of states from foreign commerce was broader than the corresponding exclusion of states from domestic interstate commerce, due to special federal concerns in international commerce. Specifically, the Court held that, in addition to traditional dormant commerce clause categories, state regulations of foreign commerce would be displaced if they interfered with the foreign government’s ability to “speak with one voice” in foreign affairs.⁷¹

At first blush that would seem to pose serious trouble for the HVIRA, which (at least according to the executive branch) interfered with the federal government’s ability to speak with one voice on the settlement of Holocaust-era claims. And to be sure, *Japan Line* figured prominently

⁶⁶ BITTKER, *supra* note 56, at §§ 6.01-6.06; 1 TRIBE, *supra* note 56, § 6-2; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

⁶⁷ E.g., Julian Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Richard Friedman, *Putting the Dormant Commerce Clause out of Its Misery*, 12 CARDOZO L.REV. 1745 (1991); Martin Redish & Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987); *Tyler Pipe Indus. v. Washington State Dep’t of Revenue*, 496 U.S. 167, 202 (1990) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).

⁶⁸ See *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829); *The Passenger Cases*, 48 U.S. 283 (1849).

⁶⁹ E.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (facial discrimination); *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) (discrimination in effect); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (undue burden).

⁷⁰ The constitutional clauses are parallel: “The Congress shall have power . . . To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.” U.S. CONST., Art. I, Sec. 8.

⁷¹ 441 U.S. 434, 448 (1979). See BITTKER, *supra* note 56, § 8.14.

in the insurers' opening arguments.⁷² But two substantial factors cautioned against too much *Japan Line*-based optimism. First, the Court had retreated from its *Japan Line* holding in a series of cases culminating in *Barclays Bank v. Franchise Tax Board* in 1994. In *Barclays*, the Court upheld California's scheme of taxing the world-wide operations of foreign corporations doing business in California, rejecting a *Japan Line* challenge. The Court pointed out that the law was neither discriminatory nor an undue burden on foreign commerce; whatever further restrictions *Japan Line* had intended did not apply because Congress appeared to endorse (or at least not to oppose) the California tax. Congress, said the Court, is the "voice of the nation" in foreign commerce, and so long as its "voice" is not compromised, the Court should not undertake to police state foreign commerce regulations. While not repudiating *Japan Line* outright, *Barclays* seemed almost to require *active* preemption by Congress (in effect, Article VI preemption) to displace a state law.⁷³

Even more problematic for the insurers' dormant commerce clause arguments, though, was the McCarran Act, the federal law authorizing states to regulate interstate insurance transactions.⁷⁴ A leading theory of the dormant commerce clause doctrine (and presumably the dormant foreign commerce clause doctrine) is that Congress is assumed not to endorse certain categories of state commercial regulation. Congressional silence, then, is construed to reflect congressional intent that these laws be displaced. Hanging the matter on congressional intent, however, implies that Congress can manifest a contrary intent to affirmatively allow state commercial regulations that would otherwise be excluded by the dormant commerce clause doctrine – as the Court in fact has held.⁷⁵

This was the point of the McCarran Act. In the post-New Deal period of commerce clause expansion, the Court held for the first time that insurance was a matter of interstate commerce.⁷⁶ Although the case concerned Congress' powers over insurance, one corollary of the decision might have been that *state* insurance regulation would be exposed to dormant commerce clause attack even in the absence of congressional regulation. To protect state insurance regulations, Congress passed the McCarran Act, which explicitly reversed the dormant commerce clause

⁷² In addition to the "one-voice" argument, the insurers also argued that the HVIRA violated the dormant commerce clause because it regulated extraterritorially, and that the McCarran Act did not protect extraterritorial regulation. Cf. *Brown-Forman Distillers Co. v. New York*, 476 U.S. 573 (1986); *Federal Trade Comm'n v. Travelers' Health Ass'n*, 508 U.S. 491 (1993).

⁷³ *Barclays Bank v. Franchise Tax Board of California*, 512 U.S. 298 (1994); see also *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983); *Wardair Canada Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986).

⁷⁴ 15 U.S.C. § 1012. See *supra* part I.B.

⁷⁵ E.g., *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946). See William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387 (1983); Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 397-99 (2003); BITTKER, *supra* note 56, § 9.03, 9.04. This power of congressional "redelegation" goes back to the Wilson and Webb-Kenyon Acts of the late nineteenth and early twentieth century, in which Congress used its positive commerce power to disable the dormant commerce clause doctrine with respect to interstate shipments of alcohol. Previously, the dormant commerce clause doctrine had prevented states from enforcing their liquor laws. See *In re Rahrer*, 140 U.S. 545 (1891); *Clark Distilling Co. v. W. Md. Rwy Co.*, 242 U.S. 311 (1917); BITTKER, *supra* note 56, § 9.02.

⁷⁶ *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 544-46 (1944).

assumption. As the Act stated, silence by Congress should not be construed as disapproval of state regulation⁷⁷ – a clear reference to the dormant commerce clause.⁷⁸

The McCarran Act cast a substantial pall upon the insurers’ dormant commerce clause claim, and thus more generally on the idea that the HVIRA might be displaced by the negative implication of a specific clause in the Constitution. Although other negative implications presumably exist, the dormant commerce clause is the only one that has received much judicial development, and the only one of immediate application to the HVIRA.⁷⁹ As a result, while the dormant commerce clause doctrine was a material issue in the case, quite a bit more attention focused on the idea of a structural exclusion of states from foreign affairs matters in general – a matter taken up in the next subsection.

3. *Zschernig v. Miller* and Structural Exclusions

Far more controversial than the dormant commerce clause doctrine is the proposition that there is a “dormant” preemption of state activity not tied to any particular clause, but arising (apparently) from a constitutional structure that envisions material foreign affairs decisions being made at the federal level. As one of us has argued, “[T]he various provisions related to foreign affairs can be read to contain a structural or ‘penumbral’ restriction on state actions affecting foreign affairs, even in the absence of a congressional enactment.”⁸⁰ That seemed, at any rate, to be the basis for the Supreme Court’s decision in *Zschernig v. Miller* in 1968⁸¹ – a case which appeared to be at the center of the *Garamendi* arguments.

Prior cases had hinted at the idea of such an exclusion by describing foreign affairs as exclusively a federal concern, but did not explore the matter because a decision could be founded on more conventional propositions such as Article VI preemption or the dormant commerce clause doctrine. For example, in *Hines v. Davidowitz* the Court had observed that

[t]he Federal Government, representing as it does the collective interests of [all] states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. . . . Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign affairs be left entirely free from local interference.⁸²

⁷⁷ 15 U.S.C. § 1012.

⁷⁸ The Court discussed and upheld this aspect of the McCarran Act in *Benjamin*, 328 U.S. at 434, and *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985).

⁷⁹ For the suggestion, not endorsed by judicial authority, of a broad negative implication from the treaty-making clause, see Edward Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000).

⁸⁰ Denning & McCall, *The Constitutionality of State and Local Sanctions*, *supra* note 8, at 337. *But see* Ramsey, *Power of the States in Foreign Affairs*, *supra* note 8, at 429-432 (rejecting, at least as a matter of original understanding, the existence of a structural limit on state foreign affairs activities).

⁸¹ 389 U.S. 429 (1968).

⁸² *Hines*, 312 U.S. at 63.

But this language was embedded within a paragraph that emphasized the Article VI supremacy of statutes and treaties, and the case's actual holding was that the state law in question conflicted with the federal Alien Registration Act.⁸³ *Hines*, like the Court's subsequent decision in *Crosby*, did not consider what would happen when a state statute affected foreign affairs but did not conflict with a statute or treaty.⁸⁴

Zschernig faced that issue directly, invalidating an Oregon statute despite the lack of a preemptive federal act and the lack of any applicable constitutional clause. The case challenged a state probate law allowing foreign citizens to inherit property only if their governments gave reciprocal rights to Americans. Twenty years before *Zschernig*, in *Clark v. Allen*, the Court had upheld a similar state statute, rejecting arguments that (i) the statute conflicted with a treaty; and (ii) that the statute was "an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government."⁸⁵ In rejecting the second claim, *Clark* seemed to hold that when a state legislated on "local" matters, only "an overriding federal policy, as where a treaty makes different or conflicting arrangements," would operate to restrain the states. Since there was "no treaty governing the right of succession to personal property," and the state had neither impermissibly negotiated with a foreign nation nor made a compact in violation of Article I, Section 10, it had not "cross[ed] the forbidden line" though its law "will have some incidental or indirect effect in foreign countries."⁸⁶

The statute challenged in *Zschernig* closely resembled the one upheld in *Clark*. Nevertheless, the Court invalidated the Oregon law in *Zschernig*, while declining "the invitation to re-examine our ruling in *Clark v. Allen*."⁸⁷ Justice Douglas (the author of both *Clark* and *Zschernig*) defended the result in *Clark* by noting the distinct posture of the challenge in *Zschernig*. "It now appears," he wrote, that

the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, whether there is in the actual administration in the foreign system of law any element of confiscation.⁸⁸

Such "state involvement in foreign affairs," Douglas continued, was not approved by *Clark v. Allen*. Unlike the "incidental or indirect" effects found in *Clark*, "the type of probate law

⁸³ *Id.* at 62-64

⁸⁴ For similar broad language coupled with narrow holdings, see *Chy Lung v. Freeman*, 92 U.S. 275 (1875); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). A possible early suggestion of a structural exclusion is *Holmes v. Jennison*, 39 U.S. 540 (1840).

⁸⁵ 331 U.S. 503, 516-17 (1947).

⁸⁶ *Id.* at 517.

⁸⁷ *Zschernig*, 389 U.S. at 432.

⁸⁸ *Id.* at 433-34.

that Oregon enforces affects international relations in a persistent and subtle way.” Oregon’s law, while “not as gross an intrusion in the federal domain” as a conflict with a statute or treaty, had “a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems” – and so was unconstitutional.⁸⁹

Zschernig thus announced a rule of constitutional exclusion limiting states’ involvement in foreign affairs, much as the dormant commerce clause doctrine limits states’ regulation of interstate commerce even in the absence of congressional legislation. 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,⁹⁰ 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.

The Court’s basis for its rule was difficult to discern from Justice Douglas’ opinion. While the Court purported to rely on *Hines v. Davidowitz*, *Hines* involved Article VI statutory preemption and not the “dormant” exclusion of *Zschernig*. “This was,” Louis Henkin commented, “new constitutional doctrine.”⁹¹ And it was not well received by commentators. Henkin continued: “The Court did not build sturdy underpinnings for its constitutional doctrine or face substantial arguments against it. . . . What the Constitution says about foreign affairs . . . provides little basis for the Court’s doctrine. . . . Nor is the *Zschernig* doctrine the natural inference from the expressed grants to the federal branches or from ‘the Constitution as a whole’ Nor is there support for *Zschernig* in the history of the Constitution in practice.”⁹² Harold Maier wrote that Douglas’s opinion was “murky” and that only Justice Stewart’s structural analysis adequately explained the result in the case.⁹³ Recent scholars have expressed even sharper criticisms.⁹⁴

⁸⁹ *Id.* at 437, 440-41. Justices Stewart and Brennan would have gone further, to overrule *Clark* and rest the outcome on “the basic allocation of the power between the States and the Nation,” which, according to Justice Stewart, excluded states from matters concerning the conduct of foreign relations. *Id.* at 443 (Stewart, J., concurring). Justice Harlan disagreed with the majority’s analysis, preferring to provide “full relief sought by the appellants” by “overruling the construction of the 1923 treaty, rather than the constitutional holding, in *Clark v. Allen*” *Id.* at 445 (Harlan, J., concurring). Only Justice White dissented, writing that he was not persuaded “that the Court’s construction of the 1923 treaty in *Clark v. Allen* . . . and of similar treaty language in earlier cases should be overruled at this late date.” *Id.* at 462 (White, J., dissenting).

⁹⁰ The Executive Branch had the Court that nothing in the Oregon probate laws interfered with its conduct of foreign policy. *Id.* at 434. The Court replied that the “Government’s acquiescence in the ruling of *Clark v. Allen* certainly does not justify extending the principle of that case . . . for [the application of Oregon’s law] has more than ‘some incidental or indirect effect in foreign countries,’ and has great potential for disruption or embarrassment” *Id.* at 434-35.

⁹¹ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 163 (2nd ed. 1996).

⁹² *Id.* at 464.

⁹³ Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT’L L. 832, 836 (1989) (“Justice Stewart, in classic common law decision-making tradition, applied the general organizational principles of U.S. federalism to the facts before him to arrive at his conclusion. Reiterating that the sole foreign affairs voice of the nation lies in the national Government, he concluded that the [state law was] outside the realm of state competence” because the state had trespassed on an area reserved for the federal government).

⁹⁴ See, e.g., Goldsmith, *Federal Courts*, *supra* note 65, at 1661 (“Contrary to conventional wisdom, the federal common law of foreign relations announced by . . . *Zschernig* marked a sharp departure from prior law.”); Ramsey, *The Power of the States in Foreign Affairs*, *supra* note 8, at 357 & n.61 (terming *Zschernig* “revolutionary”

While academic commentary as a whole expressed doubt about the opinion's reasoning (or lack thereof), commentators divided over the correct response. In the decades following *Zschernig*, that opinion's cryptic rationale produced at least three divergent views. Some academic commentators flatly rejected it as lacking any basis in the Constitution's text and history.⁹⁵ These commentators were comforted by the fact that *Zschernig* lay dormant in the courts, not clearly forming the basis of any decision for some 30 years after it was rendered;⁹⁶ no doubt they harbored hopes that *Garamendi* would be the occasion to strike *Zschernig* off the books altogether.⁹⁷

Others thought, as suggested above, that *Zschernig* might be defended on the basis of constitutional structure and intent, even though the Court itself had not made much of a case.⁹⁸ For those accepting at least some version of *Zschernig*, the question was whether to emphasize its broad language or its specific facts. The Court had said, among other things, that state laws with more than an incidental affect on foreign affairs were unconstitutional, without explaining what that meant. But taking that observation as the case's core holding suggested a fairly broad application, depending on how one viewed "more than incidental." Professor Maier, for example, proposed in an influential article that courts undertake a balancing of federal and state interests and exclude states from areas in which federal foreign affairs interests clearly predominated.⁹⁹

Zschernig, though, was an unusual case on its facts, and to some this suggested that it could be reserved to specific and fairly narrow categories of state acts. The principal problem in *Zschernig* had been that courts applying the state law made intrusive and inflammatory investigations into the good faith of foreign governments. The Court's focus on these facts in its opinion – and its insistence that it was not overruling its prior precedent of *Clark v. Allen* – indicated that the Court might not have intended as wide-ranging an exclusion as Maier proposed. Professor Carlos Vazquez, for example, suggested essentially confining *Zschernig* to its facts: state laws that displayed overt hostility toward foreign governments would be invalid.¹⁰⁰ One merit of this proposal was that it would be relatively easy to apply: Maier's balancing test, in contrast, invited courts to make policy judgments in an area where judicial expertise was conventionally suspect.

and noting that its "constitutional basis . . . remains unexplained").

⁹⁵ See, e.g., Goldsmith, *Federal Courts*, *supra* note 65, at 1661-62; Ramsey, *Power of the States in Foreign Affairs*, *supra* note 8, at 429-32.

⁹⁶ That desuetude led still other commentators to suggest it might lack continuing force. See HENKIN, *supra* note 91, at 165 (noting courts' lack of reliance on *Zschernig* and suggesting that *Zschernig* might be "a relic of the Cold War"); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L.REV. 1223, 1242, 1264-66 (1999).

⁹⁷ See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999) (suggesting that *Barclays* had overruled *Zschernig* sub silentio).

⁹⁸ For defenses of some aspects of *Zschernig*, with varying degrees of enthusiasm, see Richard Bilder, *The Role of Cities and States in the Foreign Relations*, 83 AM. J. INT'L L. 821 (1989); Howard Fenton, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563 (1993); Spiro, *supra* note 96; Maier, *supra* note 93, at 838-39; Denning & McCall, *The Constitutionality of State and Local Sanctions*, *supra* note 8, at 337; Vazquez, *W[h]ither Zschernig?*, *supra* note 60, at 1259.

⁹⁹ Maier, *supra* note 93, at 838-39.

¹⁰⁰ Vazquez, *W[h]ither Zschernig*, *supra* note 60, at 1321.

As one might expect, the battle lines in *Garamendi* formed largely on these grounds. According to the insurers, the dormant commerce clause doctrine invalidated the HVIRA under *Japan Line*, but in any event it fell under a broad reading of *Zschernig* that excluded state laws with more than “incidental” effects on foreign affairs.¹⁰¹ According to California, Congress’ McCarran Act answered the commerce clause argument by authorizing the interstate regulation of insurance at the state level, and *Zschernig* should be read narrowly (much in the manner advocated by Professor Vazquez) to exclude only insults to foreign governments.¹⁰² As the Supreme Court took up the case, these debates appeared to be the focus of its attention.

C. Preemption by Executive Acts

There remained one substantial category of limits on state foreign affairs activities beyond pure Article VI preemption and the “dormant” exclusions: executive agreements.¹⁰³ Despite three Supreme Court cases directly on point, executive agreements remained perhaps the least understood of the three categories. And there was (at least) one executive agreement directly implicated in *Garamendi* – though it did not fit easily into either side’s view of the case.

The modern President commonly concludes agreements with foreign nations independently (that is, without the approval of Congress or the Senate). Some academic commentators take violent issue with that practice as inconsistent with the treaty clause of Article II: since treaties require approval of two-thirds of the Senate, if all agreements with foreign nations are treaties, it would seem that the President lacks unilateral power to agree to anything on the nation’s behalf.¹⁰⁴ Perhaps (as others have argued) Congress also has the power to approve international agreements¹⁰⁵ – but that would not support the common practice of Presidents making them alone. Nonetheless, in all three cases in which the Court has considered the matter – *United States v. Belmont*, *United States v. Pink*, and *Dames & Moore v. Regan* – it had little difficulty in approving the executive agreements in question, and various academic and historical arguments have been made in their support.¹⁰⁶

¹⁰¹ Gerling Global Reinsurance Co. v. Quackenbush, 2000 WL 777978 (E.D. Cal.) (June 9, 2000) (unpublished), at *9-*10.

¹⁰² Gerling Global Reinsurance Corp. of America v. Low, 240 F.3d 739, 752-53 (9th Cir. 2001).

¹⁰³ We use the term “executive agreements” to mean international agreements concluded on the sole authority of the President, as opposed to “congressional-executive agreements”, which are approved by Congress but not by a supermajority of the Senate.

¹⁰⁴ Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L.REV. 1, 55 (1972); David Gray Adler, *Court, Constitution and Foreign Affairs*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 27-32 (David Gray Adler & Larry George, eds., 1996).

¹⁰⁵ Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

¹⁰⁶ *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*; 315 U.S. 203 (1942); *Dames & Moore v. Regan*, 453 U.S. 654 (1981). See HENKIN, *supra* note 91, at 219-230.

It is a somewhat larger step to conclude that executive agreements are not only constitutional but preemptive.¹⁰⁷ After all, they are not mentioned in Article VI, the usual source of preemption. (An executive agreement approved by Congress would presumably be preemptive in the same way as a statute, but the issue here is an agreement based solely upon the President's power.) Nonetheless, the Court's three cases gave preemptive effect to the agreements they approved without elaborate discussion.

There was, of course, at least one executive agreement in the *Garamendi* case.¹⁰⁸ If the state law posed an obstacle to the implementation of an executive agreement, the Court's precedents suggested that this could be a basis for preemption – and the insurers did make this claim, albeit somewhat indirectly. But several obstacles prevented an easy resolution on this ground. First, the scope and extent of executive agreement preemption remained hazy despite the Court's precedents. As noted, executive agreements stand outside the traditional methods of preemption by statute or treaty. Perhaps in recognition of this, the Court's prior cases – and commentators' evaluations of them – had been fairly cautious. The *Pink* and *Belmont* cases had as their subject matter an area of unique presidential competence: recognition of a foreign government. Both concerned an executive agreement Franklin Roosevelt concluded with the Soviet Union, as part of Roosevelt's recognition of the Soviet government in 1934. The Court made some mention of that context, and it was surely plausible to argue (as a number of commentators did) that their relationship to recognition gave the executive agreements particular constitutional force despite the fact that they rested on presidential power alone.¹⁰⁹ One could almost think of this as a negative implication of the President's power to receive ambassadors: states could not do anything that would interfere with the President's ability to establish diplomatic relations with another government.

The Court's third and most important executive agreement case, *Dames & Moore v. Regan*, seemed to confirm the need to read *Pink* and *Belmont* narrowly. *Dames & Moore* involved a challenge to actions taken pursuant to President Carter's executive agreement ending the Iran hostage crisis in 1980. In upholding the President's action, the Court proceeded extremely cautiously, emphasizing the emergency nature of the international situation and the implicit consent it found Congress had given to Carter's settlement. The Court carefully avoided a blanket holding that executive agreements were either constitutional or preemptive, cautioning that it was deciding only the facts of the immediate case.¹¹⁰ *Dames & Moore* seemed to signal that not all executive agreements were preemptive (else it would have been a much easier case than the Court appeared to believe), yet without identifying their constitutional limit.

¹⁰⁷ For elaboration of this point, plus the observation that the two issues are usually not viewed separately, see Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998). Leading recent academic discussions of executive agreements include Ingrid Wuerth, *The Dangers of Deference: International Claims Settlement by the President*, 44 HARV. J. INT'L L. 3, 14-41 (2003); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L.REV. 671 (1998) (recounting twentieth century history of executive agreements).

¹⁰⁸ See *supra* notes 41-47 and accompanying text (discussing agreements with Germany and Austria).

¹⁰⁹ *Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 330. See HENKIN, *supra* note 91, at 219-229, 226-230; Wuerth, *supra* note 107, at 12-13.

¹¹⁰ *Dames & Moore*, 453 U.S. at 680, 688.

A second problem with relying too heavily on executive agreements in *Garamendi* was that the principal agreement, the German Foundation Agreement, itself seemed to disclaim preemptive effect. It did not contain any language specifically overriding inconsistent state laws, especially not disclosure laws. Instead, it contained puzzlingly tepid language: the United States agreed that in any case in which a claim was asserted against a German company, the United States would submit a brief saying that it was in the “policy interests” of the United States for the Foundation Agreement to be the exclusive remedy. But the Agreement also said that these “policy interests” do not “in themselves provide an independent legal basis for dismissal” even with respect to actual claims.¹¹¹ That was, moreover, exactly how the United States read the agreement in its amicus brief to the court of appeals: the U.S. brief made the statement contemplated by the agreement, but went on to say that the insurers erred in calling the agreement preemptive of its own force.¹¹²

A third factual difficulty stood in the way of deciding the case itself on the basis of the executive agreements: they did not apply to all the plaintiffs. The German Foundation Agreement affected only German companies. There was also an agreement with Austria and an informal arrangement with Switzerland, in each case covering those government’s nationals. But the HVIRA applied to all insurance companies doing business in California (and their affiliates), and some of them were based in countries other than Germany, Austria and Switzerland. Generali, for example, was an Italian company, and no agreement existed (or was even in the works) with Italy or Italian companies. So at best the executive agreements could have supported a decision invalidating the HVIRA as applied to some of the insurers, but not others.

While the executive agreements were not an obvious winner for the insurers, they posed conceptual difficulties for the state. The state wanted to argue that the only categories of exclusion were (i) Article VI preemption; (ii) the clause-based exclusions of Article I, Section 10 and negative implications of specific clauses like the dormant commerce clause doctrine; and (iii) a narrow version of *Zschernig*. Executive agreements did not fit comfortably within this constitutional universe. Even if executive agreements could not win the day (or at least the whole day) for the insurers, the state lacked a good explanation for how they (or at least some of them) achieved their preemptive effect.

One possibility is that executive agreements are enough like treaties to draw their preemptive effect from Article VI, even though they are not mentioned in the Article’s text. That

¹¹¹ Foundation Agreement, *supra* note 42, art. 2(1) & Annex B. *See supra* part I.B.

¹¹² *See* Brief for the United States as Amicus Curiae in support of affirmance, Gerling Global Reinsuranc Co. v. Kelso (9th Cir.), *reprinted in* Respondents’ Brief in Opposition in American Insurance Ass’n v. Garamendi (No. 02-722), app. 44, 47-48 (noting that the “agreements do not, of their own force, extinguish any claims that Holocaust victims or their families might assert in court against foreign insurance companies” but that they “make clear, however, that United States policy disfavors the imposition of further obligations on companies subject to the agreements, whether through regulation or litigation, beyond the obligations contemplated by the agreements themselves.”); *id.* at 48 (“Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court. . . . [Appellee] is mistaken . . . if [it] means to suggest that the Agreement by its terms preempts the California statute.”).

claim finds support in at least one of the Court's executive agreement cases, *Belmont*, where the Court directly analogized the executive agreement to treaties made preemptive by Article VI.¹¹³ A second possibility is that executive agreements depend to some extent upon the approval, or at least acquiescence, of Congress, and that they draw their preemptive effect from the fact that, like statutes but less formally, they reflect the will of Congress. *Dames & Moore* supports this view, for the Court in that case emphasized Congress' acquiescence as a key component of its decision.¹¹⁴ Neither possibility worried the state in *Garamendi*, as recognition was not involved and if anything Congress seemed to endorse the state's actions.

A third possibility is that executive agreements draw their preemptive power from the President's independent power in foreign affairs.¹¹⁵ This was obviously the most troubling to the state in *Garamendi*, since it might suggest that other executive policies might be preemptive as well. But the court had never explained executive agreements on this ground. And more to the point, essentially no judicial or academic authority hinted that presidential policies could have preemptive effect. Several lower court opinions (and perhaps one Supreme Court opinion) suggested that state law causes of action that interfered with presidential policies might be barred, although the courts attributed their decisions to "federal common law" rather than anything explicitly constitutional.¹¹⁶ Beyond this, the idea that a presidential policy could, in itself, displace a state law seemed barely to

¹¹³ See *Belmont*, 301 U.S. at 330 (holding that "the Executive had authority to speak as the sole organ of [the federal] government" in settling claims with the Soviet Union and that "[t]he assignment and agreements in connection therewith did not, as in the case of treaties . . . require the advice and consent of the Senate"); *id.* at 331 ("the external powers of the United States are to be exercised without regard to state laws or policies"; the Supremacy Clause operates "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); see also *Pink*, 315 U.S. at 230-31 ("state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement").

¹¹⁴ *Dames & Moore*, 453 U.S. at 680. See Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS. L. REV. 321, 371 (2003) (suggesting that *Dames & Moore* could be read as a non-statutory delegation of congressional power to the President).

¹¹⁵ See *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936) (describing the President's power in foreign affairs as including, among other things, executive agreements). See also *Pink*, 315 U.S. at 229 ("The powers of the President in the conduct of foreign relations include the power, without the consent of the Senate, to determine the public policy of the United States with respect to Russian nationalization decrees. . . . That authority . . . includes the power to determine the policy which is to govern the question of recognition. . . . Power to remove such obstacles to full recognition as settlement of our nationals . . . certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations.'"). See also Prakash & Ramsey, *The Executive Power over Foreign Affairs*, *supra* note 9, at 252-56, 262-65 (providing a textual basis for the President's independent power in foreign affairs but denying that the power is preemptive).

¹¹⁶ *E.g.*, *Torres v. Southern Peru Copper Co.*, 113 F.3d 540 (5th Cir. 1997); *Pravin Banker Associates Ltd. v. Banco Popular del Peru*, 109 F.3d 850 (2d Cir. 1997). Some academic commentators suggested that these decisions really amounted to using executive policy to override state law, and found this to be constitutionally inappropriate. Goldsmith, *Federal Courts*, *supra* note 65, at 1637-39; Michael D. Ramsey, *Escaping International Comity*, 83 IOWA L. REV. 893, 937-951 (1998). The possible Supreme Court case is *Boyle v. United Technologies Co.*, 487 U.S. 500 (1987), where the Court invalidated a state tort claim against a defense contractor who followed a design submitted by the military. For varying views of *Boyle*, see Ramsey, *Power of the States in Foreign Affairs*, *supra* note 8, at 395-400; Bradford Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1368-75 (1996); Vazquez, *W[h]ither Zschernig?*, *supra* note 55, at 1302-03.

have be contemplated. It was not even mentioned in the leading foreign affairs law casebook, published only months before the Court's decision.¹¹⁷ Moreover, the Court seemed firmly opposed, at least in commercial cases: in *Barclays*, the President had pointed to executive branch opposition to California's tax law as a reason for invalidating it; the Court took this as a claim that executive policies could preempt state law, and rejected it in strong terms.¹¹⁸

The matter of executive agreements, therefore, clouded the *Garamendi* case but did not squarely help either side. The insurers needed to claim something broader than executive agreement preemption, because neither the existing law of executive agreements nor the agreements actually at issue seemed strong enough to carry their case. The state, however, had a difficult explanatory problem; its essential argument was that preemption of state law could only arise from Article VI, from a negative implication of a specific clause (like the dormant commerce clause doctrine), or from a narrow interpretation of *Zschernig*. Executive agreements did not fit into any of these categories, yet at least some of them were clearly preemptive.

As a result, the parties' arguments focused on the dormant commerce clause doctrine and upon *Zschernig*, not upon preemptive effects of executive action. To be sure, the insurers emphasized the President's actions, especially in seeking the German settlement, and the degree to which the state law (supposedly) interfered with them. But their principal thrust was to argue that the matter implicated foreign affairs (as shown by the President's involvement with foreign governments over it), and thus that *Zschernig* and *Japan Line* invalidated the HVIRA.

D. The HVIRA and Foreign Affairs Federalism in the Lower Courts

The decisions in the lower courts followed the sketch of the law set forth above. While the facts were novel, in general the courts' approach was not. At the outset, the insurers had their way on both of the closely contested federalism issues. The district court took the broad view of *Zschernig*, highlighting its broad "no more than incidental effect on foreign affairs" language. Reciting the foreign policy objectives of the President, and the executive branch statements as to HVIRA's perverse effect upon negotiations, the district court thought it evident that the state law had more than an incidental effect on foreign affairs. The court made clear that it was relying on a constitutional exclusion of the states from foreign affairs, as suggested by *Hines* and related cases and confirmed by *Zschernig*. On the dormant commerce clause doctrine, the district court took the *Japan Line* approach (ignoring *Barclays* altogether) and emphasizing the imperative to "speak with

¹¹⁷ See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN AFFAIRS LAW: CASES AND MATERIALS 275-335 (2003) (discussing state power in foreign affairs under four heads: statutory preemption, treaty preemption, "dormant" preemption – meaning *Zschernig* and related matters – and the federal common law of foreign affairs). Prior to *Garamendi*, the only academic article of which we are aware that alluded to the idea of executive preemption was by one of the current authors. See Ramsey, *Power of the States in Foreign Affairs*, *supra* note 8, at 390-429 (considering and rejecting, as a matter of original understanding, the idea that the President's executive power in foreign affairs might have a negative implication preempting inconsistent state laws).

¹¹⁸ *Barclays*, 512 U.S. at 302-03.

one voice” in foreign affairs. The court accordingly entered a preliminary injunction against enforcement of the HVIRA in June 2000.¹¹⁹

The court of appeals did not differ fundamentally in its vision of foreign affairs law, but in reversing simply adopted the opposite view of the critical cases. With respect to *Zschernig*, the court followed California’s suggestion to essentially confine *Zschernig* to its facts: the court emphasized that the HVIRA was not a regulation of – and certainly not an insult to – Germany or any other European government, but rather a regulation of private European companies. Noting that it was “rarely invoked by the courts” and that “the Supreme Court has not applied it in more than 30 years,” the court declined to take the insurers’ broad view of *Zschernig*. “HVIRA regulates insurance companies that do business in California No plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses.” Further, the HVIRA did not target a particular country, nor did it raise—according to the court—the sensitive diplomatic concerns mentioned in the *Zschernig* case, specifically the risk of state actions giving offense to a particular foreign regime.¹²⁰

On the dormant commerce clause doctrine, the appeals court thought the McCarran Act shielded the state law: “Congress has expressly delegated to the states the power to regulate insurance, free from the constraints of the dormant Commerce Clause. . . . HVIRA is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly.” Therefore, “the McCarran Act applies and the dormant Commerce Clause does not.”¹²¹

But in any event, while conceding that the HVIRA did “touch on” foreign commerce “indirectly,” the court emphasized the extent to which *Barclays* had undercut *Japan Line*. The court observed that under *Barclays*, Congress is the “voice” of the nation in foreign commerce, and found that “Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA” by passing the Holocaust Commission Act.¹²² The court acknowledged that the HVIRA might be in some tension with the Foundation Agreement and executive policy more generally – although it downplayed the extent of direct conflict. But it pointed out that there was no preemptive act under Article VI, that the executive agreement itself did not claim preemptive effect, and that neither *Zschernig* nor *Japan Line* (the principal methods of constitutional exclusion it recognized) required reversal.¹²³

¹¹⁹ See *Gerling*, 2000 WL 777978, at *5-*14. The court threw out the insurers’ challenge to California’s other Holocaust-related statutes as unripe (since no one had actually filed suit under them yet).

¹²⁰ *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 752-53 (9th Cir. 2001). See Vazquez, *W[h]ither Zschernig*, *supra* note 55, at 1324 (arguing that the Court should “interpret[] *Zschernig* to bar state laws that single out a state or group of states for unfavorable treatment.”).

¹²¹ *Id.* at 746.

¹²² *Id.* at 741; see the discussion of the Holocaust Act *supra* Part I.B.

¹²³ The panel was unimpressed by the “letters in which executive branch officials argue that HVIRA does conflict with the federal government’s policy concerning Holocaust-era claims,” writing that the Supreme Court had in the past (particularly in *Barclays*) rejected arguments that such executive branch declarations should be determinative. *Id.* at 751.

Thus as the case headed for the Supreme Court, it appear to pose two central questions about the scope of two key lines of cases.¹²⁴ First, how broadly should one read *Zschernig* (assuming *Zschernig* did not meet the fate its harshest academic detractors wished upon it)? And second, did *Barclays* leave anything of the enhanced dormant commerce clause doctrine envisioned by *Japan Line* (and if so, did the McCarran Act nonetheless protect the state law)?¹²⁵ Looming above both questions was the broader matter of whether *Zschernig* and *Barclays* could be reconciled, or if one would have to give way – *Zschernig* with its direction that states stay out of foreign affairs controversies and *Barclays* with its approval of a state law that infuriated most of the nation’s major trading partners.¹²⁶ These were important questions, to be sure, but not new ones: they had been debated in academic literature on more or less these exact terms, and as discussed these were the questions that divided the district court from the court of appeals, and the insurers from the state.

As we discuss in the next section, the outcome in the Supreme Court was, in contrast, quite novel. The Court did not answer either of the questions seemingly posed to it, but instead

¹²⁴ For the sake of simplicity, the text’s summary of the lower court proceedings is abbreviated. In its initial opinion, the court of appeals disagreed with the district court’s reasoning, but left the preliminary injunction in place to allow the district court to consider the insurers’ further argument that the HVIRA violated the due process clause by taking “away the licenses of California insurers for failure to perform tasks that are literally impossible.” 240 F.3d at 753-54. On remand, the district court granted summary judgment for the insurers on the ground that the HVIRA violated the requirements of procedural due process. *Gerling Global Reinsurance Corp. of America v. Low*, 186 F. Supp.2d 1099, 1113 (E.D. Cal. 2001). The Ninth Circuit again reversed. *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832, 835-36 (9th Cir. 2002). The court of appeals found that the district court had “conflate[d] the analytically distinct concepts of procedural and substantive due process” because regulated parties “generally have a right to meaningful hearing only with respect to those defenses actually allowed under a given statute. Thus, if a particular defense is deemed irrelevant under the statute, a party has no *procedural* due process right to a hearing” The question was whether the state’s denial of defenses violated *substantive* due process – a question properly analyzed under the rational basis test. The court then found that the state law had a rational basis. As a result, the insurers had no constitutional right to “raise defenses premised on their lack of control over the required information or the illegality under foreign law of their disclosure of the information,” and the HVIRA was not “unconstitutional on its face because it makes no provision for a hearing prior to revocation of an insurance company’s license.” *Id.* at 845-49. The court of appeals also reaffirmed its conclusions on the *Zschernig* and *Japan Line* issues.

In the ensuing discussion, we do not consider the due process aspects of the case, and express no opinion on the appropriate outcome. Although the Supreme Court granted certiorari on the due process question as well as the foreign affairs and commerce clause issues, it did not address that part of the case in its decision. We return briefly to the due process aspects of the case in part VII *infra*.

¹²⁵ Petitioners’ “Questions Presented” were “Whether the HVIRA, which the United States government has called an ‘actual interference’ with U.S. foreign policy, and which affected foreign governments have protested as inconsistent with international agreements, violates the foreign affairs doctrine of *Zschernig v. Miller*, 389 U.S. 429 (1968)”; “Whether the HVIRA, which regulates on an extraterritorial basis in an area where the United States must speak with one voice, violates the Foreign Commerce Clause and exceeds the scope of legitimate state regulation under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015”; and “Whether the HVIRA, which regulates insurance transactions that occurred overseas between foreign parties more than half a century ago, exceeds California’s legislative jurisdiction under the Due Process Clause.” See Brief for the Petitioners, *American Insurance Ass’n v. Garamendi* (No. 02-722), available at 2003 WL 834719, at *1. The Respondents’ formulation was essential the same. Brief for Respondents, *American Insurance Ass’n v. Garamendi* (No. 02-722), available at 2003 WL 554499, at *1.

¹²⁶ See Goldsmith, *Federal Courts*, *supra* note 65, at 1705 (finding the two cases irreconcilable).

found a new basis for preempting the state law outside both *Zschernig* and the dormant commerce clause doctrine. It was that shift, we argue, that converted *Garamendi* from an important case to, potentially, a landmark one.

III. The Supreme Court Decision: Reinventing Foreign Affairs Federalism

In *American Insurance Association v. Garamendi*, the Supreme Court reversed the Ninth Circuit on foreign affairs grounds. As it did three years earlier in *Crosby*, the Court invoked preemption analysis to avoid larger questions about *Zschernig*'s dormant foreign affairs power and the dormant foreign commerce clause doctrine.¹²⁷ But instead of *Crosby*'s unanimity, the Court managed only a 5-4 majority. And it would be a mistake to conclude that, like *Crosby*, *Garamendi* is a narrow decision. Unlike *Crosby*, *Garamendi* did not involve the routine application of preemption analysis, despite the Court's contrary suggestions. Rather, the language of preemption used in *Garamendi* masks profound implications for separation of powers and federalism.

This Part describes the Court's analysis in *Garamendi*, and shows that it did not follow from prior law. We argue that, if taken at face value, *Garamendi*'s embrace of broad executive branch lawmaking power exceeds that previously recognized by the Court's prior, carefully-qualified decisions, and by relying on those opinions without acknowledging their limiting language and distinguishable facts, the Court expanded executive power without grappling with the serious constitutional questions that such expansion raises. The sections that follow consider whether the Court's new rule is structurally sound, from the distinct but inextricably related perspectives of foreign affairs federalism and separation of powers.

Our criticisms of *Garamendi*'s handling of the federalism and separation of powers issues have a common element. In both areas, the Court presented its conclusions as following ineluctably from its own precedents. However, as we demonstrate, *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. This criticism furnishes the basis for a larger theoretical point in Part VI. *Garamendi*, we argue, calls into question the desirability of privileging "common law constitutional interpretation" – in which precedent, as opposed to text, history, or structure, does the heavy lifting of constitutional decisionmaking – as a mode of constitutional interpretation.

¹²⁷ Compare *Garamendi*, 123 S. Ct. at 2385 n.7 ("Our grant of certiorari . . . encompassed three of the questions addressed by the Ninth Circuit: whether HVIRA intrudes on the federal foreign affairs power, violates the self-executing element of the Foreign Commerce Clause, or exceeds the State's 'legislative jurisdiction.' . . . Because we hold that HVIRA is preempted under the foreign affairs doctrine, we have no reason to address the other questions.") (citation omitted) with *Crosby*, 530 U.S. at 374 n.8 ("Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue . . . or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause."). On the narrowness of the *Crosby* decision, see *supra* notes 57-63 & accompanying text; Denning & McCall, *Recent Decisions*, *supra* note 57, at 750-57; Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 60, at 177-78, 215-21.

Common law constitutional interpretation, we argue, can easily devolve into an expedient way to legitimize intuitive reactions to difficult cases while avoiding important constitutional questions raised by text, history, and structure.

A. Overview of the *Garamendi* Opinion

Justice Souter’s analysis for the majority began with several premises claimed to be “beyond dispute.”¹²⁸ First, “an exercise of state power that touches on foreign relations must yield to the National Government’s policy” at some point, given the interest in uniformity that necessitated the grant of that power to the federal government in the first place. Second, “there is executive authority to decide what the policy should be” stemming from the President’s independent foreign affairs authority, as grounded in history, custom, and usage.¹²⁹ The President, moreover, could exercise that authority (including the settlement of claims) through executive agreements with foreign nations, which, unlike treaties, did not require Senate ratification.¹³⁰ And like treaties, these agreements could preempt state law expressly or by implication. The Court thus presented a simple syllogism: national foreign policy preempted inconsistent state acts; the President has the power to determine national foreign policy; so the President’s foreign policy preempts inconsistent state laws.

Applying these principles to the HVIRA, the Court concluded that though California and the federal government pursued common ends, the means used by the state conflicted with policies of the federal government. First, the Court said that “resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive’s responsibility for foreign affairs” since settling claims is important to the maintenance of cordial relations among nations. Because of this important interest, “state law must give way where, as here, there is evidence of a clear conflict between the policies” adopted by the state and the federal government. Federal policy, “expressed unmistakably” in the agreements concluded with Germany and Austria, “has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions,” and included provisions for developing policy disclosure procedures.¹³¹

¹²⁸ 123 S. Ct. at 2386. Our description of the Court’s decision here draws on Denning, *supra* note 31, at 950-56.

¹²⁹ *Id.* (“While Congress holds express authority to regulate public and private dealings with nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act.”).

¹³⁰ *Id.* at 2386-87 (“[O]ur 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, this power having been exercised since the early years of the Republic.”). The Court dismissed the objection that the settlement involved claims against purely private parties rather than governments. “Historically,” he wrote, “wartime claims against even nominally private entities have become issues in international diplomacy,” adding that “[a]cceptance of this historical practice is supported by a good pragmatic reason for depending on executive agreements to settle claims against foreign corporations associated with wartime experience,” *viz.*, “untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments.” *Id.* For a challenge to this conclusion see Wuerth, *supra* note 107, at 14-41.

¹³¹ *Id.* at 2390.

Specifically, the path pursued by the federal government sought to balance competing interests: the maintenance of “amicable relationships with current European allies”; survivors’ interests in recovery; and companies’ interests in removing the cloud of potential liability that remained as long as claims went unresolved. Procedures for the disclosure of information established by the United States and the Europeans, moreover, sought to secure “the companies’ ability to abide by their own countries’ domestic privacy laws limiting disclosure of policy information.”¹³² California, on the other hand, chose to compel disclosure, using its power to revoke business licenses as a lever. Despite the common goals of both California and the federal government—“obtaining compensation for Holocaust victims”—“[t]he basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves.” California’s aggressive approach, the Court said, threatened to undermine the federal government’s efforts to encourage both voluntary disclosure and contributions to the foundations established through the executive agreements described above.¹³³

Even if the conflict was not as sharp as the evidence suggested, “it would have to be resolved in the National Government’s favor, given the weakness of the State’s interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.” The Court pointed out that only a fraction of the nation’s 100,000 living Holocaust survivors resided in California. “As against the responsibility of the United States of America,” it noted, “the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy.”¹³⁴

In short, the Court’s analysis made the case sound like *Crosby*: while the state and federal objectives were similar, one was flexible and measured, while the other adopted a hard line to the point of overreaching. As in *Crosby*, there was not a direct conflict (in the sense of the two being irreconcilable), but the one-sided nature of the state approach interfered with the balanced, cooperative federal approach and thus stood as an obstacle to the accomplishment of federal objectives. As a result, the HVIRA was preempted, much as the state law in *Crosby* had been.

Finally, the Court rejected arguments that Congress had implicitly authorized the HVIRA, either through the McCarran Act or the Holocaust Commission Act. In the Court’s estimation, “Congress has not acted on the matter addressed here,” and significantly, “Congress has done nothing to express disapproval of the President’s policy,” though federal HVIRA-like statutes had been proposed. Absent congressional disapproval, the Court concluded, the President was free to act in the area of foreign policy, and conflicting state laws had to yield.¹³⁵

¹³² *Id.* at 2391.

¹³³ *Id.* at 2392-2393.

¹³⁴ *Id.*

¹³⁵ The McCarran Act’s purpose, the Court wrote, “was to limit congressional preemption under the commerce power, whether dormant or exercised,” and “a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.” 123 S. Ct. at 2394. As to the Holocaust Act, “[t]he Commission’s focus,” the Court found, was “limited to assets in the possession of the Government”; references in the act encouraging the state commissioners to assist by collecting information on foreign and domestic insurers doing business in the United States were limited “to the degree the

Justice Ginsburg, joined by Justices Stevens, Scalia and Thomas, dissented. Absent a clear expression of intent to displace state authority, the dissenters would have upheld the HVIRA.¹³⁶ While conceding the majority’s premises—the President may conclude executive agreements with foreign countries that settle claims, and those agreements may displace otherwise valid state laws or state litigation—the dissenters pointed out that here “no executive agreement before us expressly preempts the HVIRA. Indeed no agreement so much as mentions the HVIRA’s sole concern: public disclosure.” Even “[i]f it is uncertain whether insurance *litigation* may continue given the executive agreements on which the Court relies,” Justice Ginsburg wrote, “it should be abundantly clear that those agreements leave *disclosure* laws like the HVIRA untouched.”¹³⁷

The dissent gave little weight to executive branch statements that the HVIRA interfered with the policy of the national government “lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the executive branch.” Though officials no doubt accurately represented the President’s policy, “no authoritative text accords such officials the power to invalidate state law simply by conveying the Executive’s views on matters of federal policy. The displacement of state law . . . requires a considerably more formal and binding federal instrument.” Justice Ginsburg would have reserved foreign affairs preemption “for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand,” and she counseled the judiciary to resist establishing national foreign policy predicated “on no legislative or even executive text, but only on [the] inference and implication” that state law is preempted “when the President himself has not taken a clear stand.”¹³⁸

B. *Garamendi* and Its Precedents

1. *Crosby*: The Irrelevant Precedent

The Court’s first sleight-of-hand was its invocation of the phrase “preemption” for more than that phrase properly should bear. The Court adopted preemption as its theme, enabling it to make bootstrapping references to the Massachusetts’ sanctions invalidated in *Crosby*. “The situation created by the California legislation,” Justice Souter wrote, “calls to mind the impact of the Massachusetts Burma law on the effective exercise of the President’s power, as recounted in the statutory preemption case, *Crosby v. National Foreign Trade Council*.” As in *Crosby*, “HVIRA’s economic compulsion to make public disclosure, of far more information about far more policies . . . undercuts the President’s diplomatic discretion and the choice he has made exercising it.”¹³⁹ The Court then discussed how the threat of litigation and sanctions posed obstacles to the federal

information is available.” This proviso, the Court concluded, “can hardly be read to condone state sanctions interfering with federal efforts to resolve such claims.” 123 S. Ct. at 2394. On the McCarran Act and the Holocaust Act, *see infra* part III.C.

¹³⁶ *Id.* at 2395 (Ginsburg, J, dissenting) (“Absent a clear statement aimed at disclosure requirements by the ‘one voice’ to which courts properly defer in matters of foreign affairs, I would leave intact California’s enactment.”).

¹³⁷ *Id.* at 2398-2400 (Ginsburg, J., dissenting).

¹³⁸ *Id.* at 2401 (Ginsburg, J., dissenting). *See id.* at 2390-91, 2392 (relying on executive statements).

¹³⁹ *Id.* at 239.

government's attempt to encourage voluntary participation with the Foundation and the insurance commissions. Though Souter admitted that *Crosby* could be distinguished because "the President in this case is acting without express constitutional authority . . . we were careful to note [in *Crosby*] that the 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."¹⁴⁰

As one of us commented at the time, "the ultimate outcome of *Crosby* seems to have hinged not on any *inherent* powers of the presidency or on any presumed expertise uniquely possessed by the executive branch, but rather on the powers delegated to the president by *Congress* through statute."¹⁴¹ Indeed *Crosby*'s entire decision was premised on the notion that the President, *acting pursuant to statutory authorization*, was exercising maximum power under our Constitution. As for *Crosby*'s supposed discussion of the President's "considerable independent authority," the Court merely cited a page of the *Crosby* opinion listing the President's foreign affairs powers enumerated in Article II and making a reference to "the capacity of the President to speak for the Nation with one voice in dealing with other governments."¹⁴² Of course no one doubts *these* powers – but to the extent the citation suggested that *Crosby* discussed the President's preemptive power absent congressional delegation (a matter not the least at stake in *Crosby*), it is entirely misleading.

The Court's invocation of *Crosby*, then, was pure misdirection. In *Crosby*, everyone assumed that presidential authority, based upon a congressional enactment, would override conflicting state law; the whole question was *whether* the state law posed a conflict.¹⁴³ The reason everyone assumed conflict would result in preemption was Article VI of the Constitution, which declares that rule. In *Garamendi*, the question was whether presidential authority, *not* based upon a congressional enactment, would override conflicting state law. As the Court itself said later in the opinion, the case was a matter of "preemption by executive conduct in foreign affairs."¹⁴⁴ Since Article VI – the entire basis of *Crosby* – says nothing on this question, *Crosby* was essentially irrelevant. Invoking it only obscured the question posed in *Garamendi*: whether an executive branch policy could override a state law, when Article VI did *not* apply.

2. *Zschernig*: The Misstated Precedent

The Court's second disingenuous move involved *Zschernig v. Miller*. Justice Souter's opinion reads as if *Garamendi* is an easier case than *Zschernig*, and follows *a fortiori* from it. But comparison of the opinions shows that *Garamendi* not only does not follow from *Zschernig* but in fact brushes it aside, creating an entirely new way of looking at the matter.

¹⁴⁰ *Id.* at 2392 & n.14.

¹⁴¹ Denning & McCall, *Recent Decisions*, *supra* note 57, at 757. *See also* Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 60, at 218-220.

¹⁴² *Crosby*, 530 U.S. at 381.

¹⁴³ *See supra* notes 57-63 & accompanying text.

¹⁴⁴ 123 S.Ct. at 2394.

As discussed above, *Garamendi* seemed to present the Court with the opportunity to clarify which of the three leading approaches to *Zschernig* was the correct one – and, along the way, to either provide the constitutional grounding that *Zschernig*'s opinion lacked, or effectively abandon it. Despite doubts expressed about the continuing viability of *Zschernig* by a range of commentators,¹⁴⁵ *Garamendi* invoked it prominently to support its decision, but clarified neither its constitutional basis, nor its scope. Instead, *Garamendi* relied on *Zschernig* in an indirect way that did not require the Court to defend or explain it.

Garamendi began with assertion that “valid executive agreements are fit to preempt state law, just as treaties are”¹⁴⁶ Citing *Pink* and *Belmont*, in which the Court held that an executive agreement with the Soviet Union establishing diplomatic relations preempted state policies regarding the legality of Soviet expropriation of private property, the Court continued: “if the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward.”¹⁴⁷ As described below,¹⁴⁸ we think this statement in itself was a serious oversimplification of existing law. The majority, however, then conceded that, unlike the agreement in *Pink* and *Belmont*, “the [agreements] include no preemption clause” and that petitioners’ preemption claim must “rest on asserted interference with the foreign policy those agreements embody.”¹⁴⁹ Thus the Court seemed to concede that the executive agreements in themselves did not resolve the matter.

The Court then turned to *Zschernig*. Justice Souter simply ignored the problems scholars have identified with *Zschernig*'s rule of constitutional preemption, and instead recharacterizing *Zschernig* as something like a statutory preemption case. As Souter wrote, the Court did not need to choose between “the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions” of Justices Douglas and Harlan, respectively, because “even on Justice Harlan’s view, the likelihood that state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law.”¹⁵⁰ This made it sound as if *Garamendi* was an easier case than *Zschernig*, since the issues that troubled Harlan were not present in *Garamendi*. It also allowed the Court to avoid explaining what *Zschernig* meant, and yet retain it as a purported basis for its opinion.

But there are several problems with this approach. First, Douglas’s *Zschernig* opinion was not rooted in field preemption. Field preemption is a type of implied preemption in which either “a federal regulatory scheme [is] ‘so pervasive’ as to imply that ‘Congress left no room for the States to supplement it’” or the federal interest in the field is “‘so dominant’ that federal law ‘will be

¹⁴⁵ HENKIN, *supra* note 91, at 165 (calling *Zschernig* “a unique statement and a sole application of constitutional doctrine”); Goldsmith, *Federal Courts*, *supra* note 65, at 1705 (suggesting that *Barclays* implicitly overruled *Zschernig*); Spiro, *supra* note 96, at 1242, 1264-66 (suggesting that doctrine and the end of the Cold War have operated to sap *Zschernig* of its vitality); *but see* Vazquez, *W(h)ither Zschernig?*, *supra* note 55, at 1266-78 (arguing on the basis of *Crosby* that *Zschernig* retained doctrinal force); Ramsey, *Power of the States in Foreign Affairs*, *supra* note 8, at 358-65 (warning that announcements of *Zschernig*'s demise were premature).

¹⁴⁶ 123 S. Ct. at 2387 (footnote omitted).

¹⁴⁷ *Id.* at 2387-88.

¹⁴⁸ *Infra* part IV.E.

¹⁴⁹ 123 S.Ct. at 2388.

¹⁵⁰ *Id.*

assumed to preclude enforcement of state laws on the same subject.”¹⁵¹ It arises, like other kinds of preemption, from the intent of Congress. Since there was no claim in *Zschernig* that the state law conflicted with any congressional enactment or even with executive policy, it is wrong to discuss Justice Douglas’s analysis using statutory preemption terms. *Zschernig* made clear that Oregon’s statute involved state officials “in foreign affairs and international relations—matters which *the Constitution* entrusts solely to the Federal Government” Despite the bootstrapping citations to *Hines v. Davidowitz*, Douglas’s opinion barred Oregon’s statute as a matter of *constitutional exclusion*, not statutory preemption.¹⁵²

Second, the Court misstated Harlan’s position. Justice Souter wrote that Harlan would preempt state law if there is a “likelihood that state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government”¹⁵³ That description implied that Harlan endorsed preemption where *any* federal policy existed, regardless of the branch from which it emanated. Harlan stated, without elaboration, that “in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.”¹⁵⁴ But he concurred on the ground that a treaty preempted the Oregon law; all of the cases he cited as examples of “federal policy” preempting state law involved statutes or treaties, and he made no reference to preemption by executive policy.¹⁵⁵ Harlan seemed to regard “federal policy” as being that policy expressed in either a treaty or congressional statute, which would, *by operation of the supremacy clause*, preempt contrary state law. It is unlikely that he would have endorsed the result in *Garamendi* – that state laws not in conflict with any express language in a law, treaty, or executive agreement, were nevertheless preempted on the strength of executive branch statements that the state law interfered with its conduct of foreign affairs. In any event, plainly Harlan did not mean to decide the matter; it was not presented by *Zschernig* nor established by any prior case.

Again, the rhetorical force of the discussion depends upon a misleading invocation of statutory preemption. Justice Souter’s “synthesis” of the two *Zschernig* opinions did nothing to advance his central claim that executive action alone can have preemptive effect.¹⁵⁶ Approaching the

¹⁵¹ Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 60, at 206 (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) and *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947)); *see also* BITTKER, *supra* note 56, at sec. 5-51 to 5-52 (1999) (“State statutes can also be preempted . . . because the federal rules are so pervasive that they ‘occupy’ the field, leaving no room for additional or supplemental state regulations.”) (footnote omitted).

¹⁵² 389 U.S. at 436 (emphasis added); *see also id.* at 432 (“[T]he history and operation of this Oregon statute makes clear that [it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”).

¹⁵³ 123 S. Ct. at 2388.

¹⁵⁴ 389 U.S. at 458-59 (Harlan, J., concurring).

¹⁵⁵ *Id.* at 459 n.25 (Harlan, J., concurring).

¹⁵⁶ Even had the Court correctly characterized Justice Douglas’s opinion, it is incoherent for the Court to talk of “synthesizing” Douglas and Harlan’s opinions, since they embody two distinct (and irreconcilable) types of preemption. Field preemption operates regardless of the presence of an actual, or even a potential, conflict between federal and state statutory schemes. Conflict preemption, on the other hand, permits complementary state regulation,

case in this way, however, allowed the Court to avoid answering the two critical questions about *Zschernig*: (i) did it remain good law, despite its lack of clear constitutional foundation and lack of judicial citation, and (ii) if so, what was its scope – the relatively broad formulation of “all but incidental effects” adopted by the district court or the narrower “insults and hostility” version preferred by the court of appeals? Put another way, Souter made it appear that if there had been a contrary executive policy in *Zschernig* that would have solved everyone’s objections (including Justice Harlan’s). The principal effect was to make *Zschernig* a precedent for executive policy preemption, which it assuredly was not: the executive branch had expressly disclaimed any desire to see Oregon’s statute displaced.¹⁵⁷ Douglas for the majority was talking about a “dormant” constitutional exclusion, and Harlan in concurrence was talking about Article VI preemption.

3. *Barclays*: The Missing Precedent

The conflict the *Garamendi* Court identified depended heavily upon statements by the executive branch that the HVIRA represented an obstacle to the goals set out in the executive agreements. Even with respect to the insurers covered by the Foundation Agreement, the conflict was a bit of a stretch: though the Agreement called for resolution of claims through ICHEIC rather than litigation, it had little enough to say about disclosure (which was needed for any sort of claims resolution). And in any event, many of the insurers in *Garamendi* were not covered by the Foundation Agreement, or any other agreement. What seemed critical was that the executive branch saw the HVIRA as an interference (and had said so repeatedly).

But with no congressional approval for the executive agreements, and with no intent to preempt expressed in the agreements themselves, the facts in *Garamendi* seem much closer to those of *Barclays Bank PLC v. Franchise Tax Board* than to cases like *Crosby*.¹⁵⁸ At least, if the Court believed the executive policy in *Garamendi* was preemptive, one would think it would need a fairly strong explanation for why the executive policy in *Barclays* was *not* preemptive.

The issue in *Barclays* was whether California’s method for computing taxes for multinational corporations violated the *Japan Line* principle that state taxation of foreign commerce cannot inhibit the ability of the federal government to “speak with one voice” in the regulation of international trade. Because the Court found evidence of congressional intent to permit state tax structures like California’s, it found that California’s requirement did not violate the “one voice” requirement of the dormant foreign commerce clause doctrine. Arguments that the method of taxation was “unconstitutional because it was likely to provoke retaliatory action by foreign governments,” the Court wrote, were “directed to the wrong forum.”¹⁵⁹

as long as it does not render compliance with both impossible, or pose an “obstacle” to the stated goals of congressional legislation. The degree to which a state statute does or does not conflict with or obstruct the federal legislation is simply irrelevant under field preemption analysis, since the very action of Congress is said to “occupy the field” and leave no room for states to act.

¹⁵⁷ See *Zschernig*, 389 U.S. at 434-35.

¹⁵⁸ 512 U.S. 298 (1994).

¹⁵⁹ *Id.* at 316-17, 327-28. The “one voice” formulation arose from the Court’s prior decision in *Japan Line*, as explained *supra* notes 70-71 & accompanying text.

Barclays specifically refused to give effect to executive branch representations that California's tax laws interfered with the foreign policy interests of the country. Noting that Congress, not the President, possessed the power to regulate foreign commerce, the Court remarked "[t]hat the executive branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress is 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."¹⁶⁰ The Court concluded that the communications from the executive branch "express[ing] federal policy but lack[ing] the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting."¹⁶¹

This seemed directly relevant to *Garamendi*, which appeared similarly to turn on the effect of executive branch communications "express[ing] federal policy but lack[ing] the force of law." The *Garamendi* majority declined to apply *Barclays*, explaining in a brief footnote that *Barclays* involved the regulation of foreign commerce, which is vested in Congress, not the President. But, the Court said without further discussion, "in the field of foreign policy the President has the 'lead role.'"¹⁶² Even if one accepts the President's "lead role" in foreign affairs, 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, arising from state concerns about the way insurance companies did business in the past. It is hard to see this as anything other than a commercial regulation.¹⁶³

To be sure, the HVIRA was a commercial regulation that implicated foreign affairs, so perhaps Souter meant that *Barclays* could be distinguished on that ground. But California's taxation methods in *Barclays* also affected foreign affairs, as the executive branch in that case pointed out.¹⁶⁴ This only confirms the obvious: regulations of "commerce" can also impact "foreign affairs." *Garamendi* provided no intelligible principle to distinguish between the two categories, and it seems obvious that they overlap.¹⁶⁵ This strongly suggests that Souter's distinction does not aid

¹⁶⁰ *Id.* at 329.

¹⁶¹ *Id.* at 330.

¹⁶² 123 S. Ct. at 2391 n.12.

¹⁶³ Indeed, the Court in *Southeastern Underwriters* had previously held that regulation of insurance was a matter of interstate commerce, and one of the central issues in the *Garamendi* litigation from its inception was that the HVIRA violated the dormant commerce clause doctrine. *See supra* part II. In three years of litigation no one had argued that the HVIRA was not a regulation of commerce.

¹⁶⁴ *See* 512 U.S. at 329; *see also* Keith Highet, George Kahale III & Peter J. Spiro, *International Decision*, 88 AM. J. INT'L L. 766, 769 (1994) (discussing foreign opposition to California's taxing scheme). California's tax evidently still rankles, *see* Jacqueline R. Fields, *The Need for a Uniform United States Separate Accounting Policy: The After Effects of the Barclays Bank Case and How It Hinders International Business Transactions*, 2 RICH. J. GLOBAL L. & BUS. 75, 79-83 (2001).

¹⁶⁵ As with Souter's focus on traditional and non-traditional state regulations, his distinction between commerce and foreign policy is surprising coming from a Justice who excoriated the *Lopez* and *Morrison* majorities for "categorical formalism" in making an inquiry into the commercial or non-commercial nature of activity a central feature of its inquiries into the scope of congressional power over interstate commerce. *See Morrison*, 529 U.S. at 652 (Souter, J., dissenting); *Lopez*, 514 U.S. at 608-09 (Souter, J., dissenting).

to distinguish *Barclays*, which looks even more relevant when one considers the existence of two federal statutes suggesting that Congress consented to the passage of statutes like the HVIRA.

Barclays construed the failure of Congress explicitly to *disapprove* of California's tax as an implicit endorsement of the state's tax structure.¹⁶⁶ Whatever the merits of construing the failure of congressional proposals as an endorsement of the opposite position, the Court's conclusion is in keeping with its employment of "clear statement rules" designed to protect federalism by requiring Congress to be explicit when altering the allocation of responsibilities between the federal government and the states.¹⁶⁷ In *Garamendi*, as in *Barclays*, neither Congress nor the President had formally disapproved of the HVIRA, except through executive policy statements of the sort *Barclays* found insufficient to preempt state law. Rather than applying a similar clear statement rule, however, Justice Souter discussed the lack of congressional disapproval of the *President's* actions in signing the executive agreements (which were not preemptive on their own terms and did not affect all of the parties). Despite the fact that "[l]egislation along the lines of HVIRA has been introduced in Congress," he noted that "none of the bills has come close to making it into law."¹⁶⁸ Because of the President's "independent authority" in foreign affairs, he wrote, Congress's silence should not be equated with disapproval.¹⁶⁹ Though it went unremarked, the Court seemed to suggest that clear statement rules do not apply when the executive branch is reallocating responsibilities between federal and state governments. In any event, none of this distinguishes *Barclays*, which also implicated the President's authority in foreign affairs. The only distinction that seems relevant to what the Court was saying is that in *Barclays* legislation to override the states had been introduced in Congress but had failed to pass, whereas in *Garamendi* no such legislation had even been introduced. We cannot imagine how the second situation places the executive in a better position in terms of congressional assent than the first, at least so long as Congress was aware of the state activities.

C. Congressional Authorization in *Garamendi*

The Court's endorsement of extravagant preemptive intent of the executive's policy in *Garamendi* contrasts markedly with its parsimonious reading of congressional statutes that strongly suggested Congress approved of, or at least did not oppose, the HVIRA. Two congressional statutes—the McCarran Act and the Holocaust Commission Act—indicated congressional acquiescence in the state's disclosure requirement.¹⁷⁰ Employing scanty analysis, the majority rejected both as a source of authorization for the HVIRA.

Of course, the commercial/non-commercial distinction might serve to distinguish *Zschernig* from *Barclays*, since *Zschernig* was not a commercial case. Cf. Goldsmith, *Federal Courts*, *supra* note 65, at 1705 (discussing tensions between *Zschernig* and *Barclays*). Looking at the case in this way, though, suggests that *Garamendi* was more like *Barclays* than like *Zschernig*.

¹⁶⁶ 512 U.S. at 324-26.

¹⁶⁷ See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotation marks omitted).

¹⁶⁸ 123 S. Ct. at 2394.

¹⁶⁹ *Id.*

¹⁷⁰ 123 S. Ct. at 2393.

1. The McCarran Act

The McCarran Act “redelegates” to states the ability to regulate the business of insurance, and was intended to disable the dormant commerce clause doctrine as to those state regulations. The Act begins with a declaration that “the continued regulation and taxation by the several States of the business of insurance is in the public interest” and instructs that “silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States.”¹⁷¹ The operative part of the statute states without qualification that the business of insurance “shall be subject to the laws of the several States which relate to the regulation or taxation of such business. . . .”¹⁷²

The Court simply sidestepped the Act. Assuming that the “HVIRA would qualify as regulating the ‘business of insurance’ given its tangential relation to present-day insuring in the State,” the Court wrote, “a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.”¹⁷³ There are several problems with Souter’s conclusion. First, nothing in the McCarran Act provides judicial authority to inquire into the “real” purpose of an insurance regulation and to refuse to apply the Act to regulations that were “tangentially related” to insurance regulation. The HVIRA was a “regulation” of the business of insurance, which the Act says quite clearly “*shall* be subject to the laws of the several States”¹⁷⁴

Second, and more important, the Court provided no explanation for its assertion that the Act “cannot sensibly be construed to address” preemption by the executive branch. This comment confirms what we have suggested—that *Garamendi* is about executive preemption. And of course the Act did not directly address executive preemption; prior to *Garamendi* it likely never occurred to Congress that there *was* such a thing as executive preemption, at least as Justice Souter’s opinion formulated it. Moreover, the text of the McCarran Act is comprehensive—it says that congressional silence should *never* be construed to invalidate a state insurance law. But Souter then argued that there had been no congressional disapproval of the executive’s action,¹⁷⁵ so that silence supports executive preemption of state law—in other words, doing exactly what the Act says not to do.

¹⁷¹ 15 U.S.C. § 1011-1012. See 123 S. Ct. at 2394 (“[T]he point of McCarran-Ferguson’s legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised.”); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946); BITTKER, *supra* note 56, § 9.04.

¹⁷² 15 U.S.C. § 1012(a), (b). The Act also disables implied statutory preemption, requiring Congress to clearly state an intention to regulate insurance and that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance”

¹⁷³ 123 S. Ct. at 2394.

¹⁷⁴ 15 U.S. C. § 1012(a) (emphasis added).

¹⁷⁵ 123 S. Ct. at 2394.

Finally, Justice Souter’s unhelpful divide between “foreign affairs” and “foreign commerce” that furnished the basis for the Court’s clumsy attempt to distinguish *Barclays* reappeared here. When he wrote that the McCarran Act applied to forestall preemption by “domestic commerce legislation” as opposed to executive branch conduct in “foreign affairs,” Justice Souter apparently thought that the Act had nothing whatever to do with foreign affairs as contrasted with domestic commercial matters. But we are not aware that anyone has suggested that the Act does not apply to state regulation of *foreign* insurance companies. As *Garamendi* illustrates, such “commercial” regulations often have important foreign policy overtones. Trying to demarcate a line of separation between the two areas is bound to fail; the Court’s own inability to explain where the line is, even roughly, illustrates the difficulty and provides no useful yardstick for lower courts or state policy makers to gauge the constitutionality of future state legislation.

2. The Holocaust Commission Act

The Holocaust Commission Act created a federal commission to study and report on the disposition of Holocaust-era assets controlled or possessed by the federal government. Section 3 of the Act instructed the commission to “take note of” the efforts of the National Association of Insurance Commissioners, the association of state regulators, “with regard to Holocaust-era insurance issues.” Moreover, the Act instructed the commission specifically to encourage the state commissioners “to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims . . .,” and further specified that the Commission’s report should include—“to the degree the information is available”—the number of policies issued by companies; the value of each policy when issued; the total number and amount of claims paid; and the present-day value of assets of each insurance company held in the United States.¹⁷⁶ California claimed that this statute showed congressional awareness of the actions of the state insurance commissioners in trying to secure information on Holocaust-era policies and, far from disapproving of these efforts, encouraged them in order to aid the work of the federal Holocaust Commission.

The Court disagreed. Justice Souter wrote that the “Commission’s focus was limited to assets in the possession of the Government, that if anything, the federal Act assumed it was the National Government’s responsibility to deal with returning those assets” and that the Act’s language limiting collection of information to that which was available “can hardly be read to condone state sanctions interfering with federal efforts to resolve such claims.”¹⁷⁷

That seems a hasty conclusion. When Congress passed the Act, it obviously knew of state plans to compel disclosure: this is evident from the face of the statute, and from the fact that the state commissioners had testified about those plans just prior to enactment of the law. The Act instructed the Commission, then, to undertake its work against the backdrop of on-going state-level

¹⁷⁶ Holocaust Commission Act, Pub. L. No. 105-186, 112 Stat. 611 (codified at 22 U.S.C. § 1621), § 3(a)(4)(A), § 3(a)(4)(A), (B).

¹⁷⁷123 S. Ct. at 2394.

research into the disposition of Holocaust-era assets, including insurance policies. That the Commission focused on assets owned or possessed by the federal government does not cut against the argument that state efforts to compile information (and because of Souter's reference to "sanctions" it is important to emphasize again that disclosure is all the HVIRA mandated) were tacitly approved.¹⁷⁸ It is true that Congress, in 1998, did not know much about the executive's impending effort to settle claims, or the executive's subsequent concerns about interference by the states. But it seems clear that Congress had no objection to the state actions at the time, and that it did not subsequently do anything to show a different view.

Justice Souter concluded with the observation that Congress has not acted to *disapprove* of the President's actions in entering into the executive agreements or formulating the executive policy with which the HVIRA supposedly conflicted. "Legislation along the lines of HVIRA has been introduced in Congress . . . but none of the bills has come close to making it into law," he wrote, and because of the President's "independent authority" in foreign affairs, Congress's silence should not be equated with disapproval.¹⁷⁹

Souter's observation here is a non sequitur. While the lack of congressional disapproval may be relevant to an inquiry into the President's authority to enter into the executive agreements or formulate policy in the first place, it sheds little light on the intended preemptive effects of those agreements and policies—the question the Court purported to be addressing. Given that the executive agreement itself never indicated that it was to have preemptive effects, and explicitly disclaimed such effects,¹⁸⁰ and that the HVIRA's disclosure requirement does not address the subject of those agreements—resolution of claims—why would Congress have thought it had to express disapproval of anything? Further, since members of Congress presumably saw the HVIRA as a regulation of insurance companies, they would have thought Congress *had* spoken, in the McCarran Act, and could not have foreseen the distinction the Court invented between "real" insurance regulations and those whose foreign affairs implications pushed them outside the scope of the Act.

* * *

In sum, it is difficult to believe that the Court thought the result in *Garamendi* was required by its precedents, or even that it followed from a reasoned elaboration of them. Perhaps the clearest evidence of the Court's re-invention of foreign affairs law is that its opinion bore little relationship to the course of argument and decision in the lower courts. In the lower courts, matters turned upon the scope of *Zschernig* and its relationship to *Barclays*; the Court deflected both opinions almost without analysis to seize upon a discourse of preemption that had played essentially no role in the lower courts. That does not mean it was wrong – only that it demands justification in some way other than reliance on precedent.

¹⁷⁸ Pub. L. 105-186, 112 Stat. 611, § 3(a)(3). This seems particularly clear taken in conjunction with the legislative history, recounted *supra* Part I.B., which shows that Congress was aware of the activities of the state insurance commissioners, especially in California.

¹⁷⁹ 123 S. Ct. at 2394.

¹⁸⁰ See *supra* notes 41-47 and accompanying text.

IV. *Garamendi* and Separation of Powers

If *Garamendi* does not follow inevitably, or even comfortably, from its precedents, it should be evaluated instead by its fit with the Constitution's text, structure and history. *Garamendi* is on its face a federalism case, and as we discuss in the next section there are reasons to believe it erred in its assessment of the federalism values at stake. Nonetheless, we think *Garamendi* is fundamentally a case about separation of powers, and that it is open to its most serious criticisms on that ground. Accordingly, we begin with its separation of powers problems, and argue that it cannot be defended on the basis of the Constitution's text, structure and history.

A. *Garamendi* as a Case of Executive Preemption

In saying that the state law must give way to the "National Government's policy"¹⁸¹ in foreign affairs, the Court really meant that the state law must give way to the foreign policy *of the executive branch*. No congressional act authorized the executive policy, even implicitly. Nor did the executive branch negotiate the Foundation Agreement as a treaty and present it to the Senate for its advice and consent. Had either course been followed, no one would have doubted the federal policy's superiority over the state law. The doubt arose only because the President asserted an independent power to oust the state law, based solely upon a policy formulated within the executive branch. In this sense, then, the case was not about *whether* the state law should be preempted, but rather about *which branch* of the federal government could do the preempting.¹⁸²

As discussed, in the lower courts the central foreign affairs question was the scope of the Court's *Zschernig* decision, involving the so-called "dormant" foreign affairs power. The theory of *Zschernig* was that certain foreign affairs-related activities are simply off-limits to states, regardless of what the federal government might be doing. The question (so the lower courts thought) was the breadth of that category: the district court thought that it broadly included matters that touched upon foreign affairs in general, whereas the court of appeals read it more specifically to involve principally state activities that insulted or showed hostility toward foreign governments.¹⁸³

The Supreme Court instead disclaimed any need to identify an area of "dormant" federal foreign affairs power, since (it said) that federal government had acted and thus made the case one of "active" preemption.¹⁸⁴ For this reason, the Court said that it did not decide whether the HVIRA would be valid in isolation, and we assume for purposes of discussion that it would have been. As a result, the case (as the Supreme Court saw it) depended upon identifying a preemptive federal action.

¹⁸¹ *Garamendi*, 123 S.Ct. at 2386.

¹⁸² Thus, while the Court declared that "an exercise of state power that touches on foreign relations must yield to the National Government's policy," *id.*, its actual holding was that an exercise of state power that touches on foreign relations must yield to the *executive branch's* policy – which is a fundamentally distinct proposition.

¹⁸³ *Supra* part II.B & D.

¹⁸⁴ *Garamendi*, 123 S.Ct. at 2388.

At first glance one might suppose that this preemptive federal action arose from the executive agreements discussed above. Indeed, prior cases had said that some executive agreements were preemptive,¹⁸⁵ a matter we discuss at greater length below.¹⁸⁶ But, as the Court seemed to appreciate, there were several problems with relying on the executive agreements alone. There was, as the dissent pointed out, the problem that the agreements themselves seemed to disclaim preemptive effect.¹⁸⁷ Assuming that the law of preemptive executive agreements parallels the law of preemptive statutes, the central question should have been the intent of the agreements,¹⁸⁸ so if the agreements reflected a non-preemptive intent, that was a serious difficulty. But in fact, as discussed above,¹⁸⁹ the problems were even more intractable. The agreements with Germany and Austria, on which the Court relied, covered claims against German and Austrian insurance companies. Those companies did not make up all, or even most, of the insurance companies affected by the California statute, or of the companies party to the suit. Yet the Court purported to invalidate the HVIRA across the board, not merely as applied to insurers covered by an executive agreement.¹⁹⁰ Therefore, the Court must have been relying on a source of preemption beyond the executive agreements, as the Court itself conceded.¹⁹¹

Nor did the Court rely on an action or acquiescence of Congress. To the extent Congress had done anything in the field, it seemed to have endorsed state activity.¹⁹² The Holocaust Act had directed the President to collect information and give a report to Congress, but did not appear to authorize executive settlement. Although the Court acknowledged the Holocaust Act, it did so mainly in the context of arguing that Congress had *not* authorized the HVIRA.¹⁹³ Little language in the opinion supports any inference that Congress had authorized the President to act.

If the preemption did not come from Congress, and it did not come from the executive agreements (or, obviously, a treaty), then the only possible source is the President's power in foreign affairs. This conclusion seems amply supported by the Court's language. According to the Court, the executive agreements showed a wider executive policy that Holocaust-era insurance claims should be settled through cooperative means – specifically ICHEIC – rather than through litigation. Relatedly, the executive's policy was (according to the Court) to seek disclosure through cooperative means, not through coercive measures like the HVIRA.¹⁹⁴ These were policies produced wholly within the executive branch. If they were preemptive (and apparently they were), that means that

¹⁸⁵ See *supra* Part II.C.

¹⁸⁶ *Infra* part IV.E.

¹⁸⁷ See Garamendi, 123 S.Ct. at 2399 (Ginsburg, J., dissenting).

¹⁸⁸ *E.g.*, Gade, 505 U.S. at 96 (describing the “purpose” of Congress as “the ultimate touchstone” of preemption analysis).

¹⁸⁹ *Supra* Part II.C.

¹⁹⁰ See Garamendi, 123 S.Ct. at 2379.

¹⁹¹ *Id.* at 2388.

¹⁹² *Supra* part III.C.

¹⁹³ Garamendi, 123 S.Ct. at 2394.

¹⁹⁴ *Id.* at 2390-91. On this point, the Court relied on statements by executive branch officials that disclosure statutes like the HVIRA had the potential to hinder the settlement negotiations.

executive branch policies are preemptive. Hence our characterization of *Garamendi* as a case of “executive preemption.”¹⁹⁵

B. The Novelty of Executive Preemption

We emphasize again that the Court had no real precedent for its rule of executive preemption. The Court did not point to any prior case in which an executive branch policy, standing alone, ousted an otherwise valid state law.¹⁹⁶ All of the Court’s authorities – and all of the authorities of which we are aware – involved statutory or treaty preemption, executive agreements, or dormant preemption. Indeed, we are not aware even of any direct *lower court* authority for the proposition. Moreover, the only Supreme Court case in which this sort of claim was even argued was *Barclays*, in which the Court rejected the idea that executive branch statements of policy overrode state law.¹⁹⁷

Instead, the Court relied on what it characterized as the inevitable result of two incontestable propositions: that national foreign policy overrides conflicting state law, and that the executive had the power to establish national policy with respect to the Holocaust settlement. Both of these propositions appear correct (subject to some minor qualifications), but they add up to less than the Court seemed to believe. First, national foreign policy *reflected in treaties and statutes* overrides conflicting state law.¹⁹⁸ Second, the President’s power in foreign affairs allows the President to establish a *presidential* policy with respect to the Holocaust settlement.¹⁹⁹ There is a substantial further step required to reach the Court’s destination: does the presidential policy with respect to the Holocaust settlement have the same preemptive effect as a policy established by a treaty or statute? That is the question which the Court simply assumed, without any constitutional analysis or support in prior law.

That does not mean, necessarily, that the Court was wrong on this proposition as a general matter. We do not deny that the President has broad powers to conduct the foreign affairs of the United States. Nor do we deny that at some point, a state’s interference with the President’s ability to act would be unconstitutional (just as a congressional attempt to interfere with the exercise of an independent presidential power would be unconstitutional). However, given its novelty, the proposition needs to be examined in light of the text, history and structure of the Constitution, because it has important implications for separation of powers.

¹⁹⁵As noted, the Court itself described its decision at one point as involving “preemption by executive conduct in foreign affairs.” 123 S.Ct. at 2394.

¹⁹⁶We say “otherwise valid” because any contention that the HVIRA was ousted by a “dormant” power would convert the case back into a *Zschernig* analysis, which was not the basis of the Court’s opinion. We do not take any position, here or elsewhere in this article, on whether any such “dormant” power should be recognized by the Court.

¹⁹⁷*Supra* part III.B.3. In this sense we think the dissent missed the mark in arguing that there was no clear presidential policy because the only evidence of that policy were statements of lower-level executive branch officials. Whether or not that was true, the fact remains that no prior case had accorded precedential effect to a statement of policy, *even if* made clearly by the President.

¹⁹⁸U.S. CONST. Article VI.

¹⁹⁹*See* Prakash & Ramsey, *supra* note 9, at 262-63.

C. The Importance of Executive Preemption to Separation of Powers

In this section we argue that the question of executive preemption has enormous implications for the separation of powers in foreign affairs. Specifically, we argue that to the extent executive preemption is accepted as a constitutional power, it broadens the President's ability to conduct foreign affairs without a congressional check. Correspondingly, we argue that in the absence of executive preemption, the existence of competing state laws will force the President to pursue a cooperative foreign policy with Congress (or with the Senate). In other words, rejecting executive preemption enhances checks and balances in foreign affairs; accepting it reduces them. The question should be approached, we believe, with this implication firmly in mind.

In considering the matter, it is important to see that the executive's Holocaust settlement was by no means a universally applauded result. From the perspective of the insurance claimants, it had serious difficulties, particularly if it overrode (as the Court said it did) state efforts to compel disclosure of policy information. The essential problem, in the view of survivor groups, was that in the insurance context the Foundation settlement and ICHEIC itself were empty remedies without, at minimum, a disclosure regime with teeth. And whatever else the executive policy provided, it did not provide a disclosure regime with teeth. Without disclosure, the insurers simply denied claims on the basis of lack of documentation. It seemed that the disclosure issue – which was largely confined to the insurance claims – had been ignored in the negotiations leading up to the Foundation Agreement, in which insurance claims were a small minority of the total, and dealt with only at the eleventh hour.²⁰⁰ One could easily believe that the insurance claims had been sacrificed to the desire to effect a wider settlement on non-insurance claims.

As a result, a substantial number of insurance claimants remained committed at least to forced disclosure, if not to litigation, as a supplement to the procedures established by the executive branch.²⁰¹ To this extent, at least, the insurance claimants and their allies wanted to upset the executive settlement. The question was how they could do that. In this sense it is important to see that the principal losers in *Garamendi's* allocation of constitutional power were Congress and the Holocaust insurance claimants themselves. We assume that the President's executive power in foreign affairs is sufficient to allow unilateral negotiation of the relevant executive agreements with Germany and Austria, and generally to place the diplomatic weight of the United States behind a negotiated resolution to disclosure and liability issues.²⁰² The question, then, was how claimants and their legislative allies could block the executive's proposed settlement – or conversely, how the President could force the insurance claimants to accept the settlement without a disclosure provision. In a constitutional world without executive preemption the claimants likely would have been able to force the issue to the U.S. Congress. Claimants had sufficient power in the states in which they were concentrated – California, New York and Florida in particular – to press for laws like the

²⁰⁰ See EIZENSTAT, *supra* note 31, at 266-68.

²⁰¹ For example, a leading survivor group participated in the case as amicus curiae supporting the state. See Brief of Bet Tzedek Legal Services and Simon Wiesenthal Center as *Amicus Curie* Supporting Respondent, *American Insurance Association v. Garamendi* (No. 02-722).

²⁰² See Prakash & Ramsey, *supra* note 9, at 262-63 (discussing textual foundations of the President's power to establish foreign policy).

HVIRA (and broader ones facilitating litigation in state courts). Assuming these were otherwise constitutional, the executive branch seemed likely correct that these had the potential to upset the settlement – indeed, we are assuming, in this part of our discussion, that this is exactly what they were designed to do, at least to the extent of pressing for a more demanding disclosure regime.²⁰³

Without a power of executive preemption, the President would have had two possible remedies: he could have negotiated the Foundation Agreement and related undertakings as treaties, or he could have asked Congress to pass a law preempting the state legislation. Either move would have faced difficulties. In addition to their power at the state level, the claimants had substantial allies in Congress.²⁰⁴ That is not to say that they commanded a majority in Congress – whether they did was never determined, given the outcome in *Garamendi*. But they had sufficient support that the President would have been undertaking a legislative battle. In any event, the claimants and the President would have faced off in Congress, with the winner being the one that could command majority support. The President’s ability to compel the claimants to accept an unsatisfactory settlement would have been greatly constrained, and the ultimate decision likely would have rested with a majority of Congress.

Now note the effect of executive preemption. If the President has a unilateral power to overturn state law, the need to secure the cooperation of Congress disappears. Rather, the President has a greatly expanded power to force his version of the settlement upon the claimants, and the claimants’ ability to resist is correspondingly reduced. Once the claimants lose the ability to appeal to independent power centers at the local level, they lose access to any meaningful independent forum to oppose presidential policy. True, Congress could pass a law overturning the President’s settlement. But since the President presumably would veto it, the claimants would now need sufficient votes to override the veto, rather than merely a majority. Further, the burden of overcoming legislative inertia shifts from the President to the claimants. In short, an enormous presumption is established in favor of the President’s solution.

As a result, the President’s ability to pursue a unilateral foreign policy agenda is enhanced, and Congress’ role in deciding foreign policy priorities is diminished, by the constitutional innovation of executive preemption. Had *Garamendi* come out the other way, Congress would have been in the position of ratifying (or declining to ratify) the executive settlement. Another way to put this is to say that the states perform a vital role in enhancing checks and balances at the federal level.

²⁰³ We assume here that the Court was correct in assessing the executive policy. As discussed *infra* note 257, we think that is not as clear as the Court indicated: in fact, the executive seemed to be avoiding a firm position on whether the settlement agreements precluded supplemental remedies, a point noted in the dissent. Moreover, it is worth re-emphasizing that the executive branch policy displaced state disclosure laws even as applied to companies that were not part of the settlements.

²⁰⁴ See 2001 Hearings, *supra* note 15, at 31-34 (statement of Representative Waxman). The hearings involved H.R. 2693, a bill that amounted to a federal version of the HVIRA, which Waxman described as “address[ing] one of the most difficult problems faced by Holocaust survivors and their families when they seek restitution from insurance companies that have refused to pay claims held by victims of Nazi persecution: How to identify the insurance company that issued the policy.” *Id.* at 31. See also Brief of Rep. Henry A. Waxman and 51 Other Members of Congress as *Amici Curiae* Supporting Respondent, *American Insurance Association v. Garamendi* (No. 02-722).

Without executive preemption, the states form independent power centers that require the cooperation of the branches of the federal level to overcome them. Parties opposed to a presidential policy (such as the claimants in *Garamendi*) thus need only to get the ear of state governments – an easier proposition – in order to demand coordination on the federal level. Of course, the unified policy of the federal branches will triumph – that is the point of the supremacy clause – but it must be a *unified*, not unilateral, policy. In contrast, if the states are removed as independent power centers, there is no need for cooperation at the federal level in *Garamendi*-type cases, because the President can overcome opposition to executive policy by unilateral force alone. Under this model, all of the policymaking takes place in the executive branch, with Congress reduced to the difficult position of assembling a blocking supermajority. This, in short, in what was at stake in *Garamendi*.

D. The Constitutional Case against Executive Preemption

Having identified the importance of the issue, we now turn to the constitutional case against executive preemption, viewed from a separation of powers perspective. As set forth below, we think the Constitution's text, structure and history favors the balanced approach to foreign policy formulation much more than it favors unchecked presidential power.

First, the Constitution's text speaks directly to the allocation of the preemptive power among the branches of the federal government. The supremacy clause of Article VI states that the Constitution itself, treaties, and federal statutes have preemptive effect.²⁰⁵ This is most readily thought to protect states: state law can be displaced only by the procedures that underlie the creation of each of these sources of law.²⁰⁶ But it is also an allocation of power among the federal branches. Federal courts have the power of preemption when interpreting the Constitution; the President plus two-thirds of the Senate has the power of preemption in undertaking treaties; and the President plus a majority of Congress, or two-thirds of Congress acting alone, has the power of preemption when enacting statutes. Absent from this scheme is any suggestion that the President acting alone has the power of preemption. By setting forth specific allocations of preemptive power, the Constitution contains a strong negative implication that it does not contain additional allocations of preemptive power *sub silentio*.

As we have argued above, the allocation of preemptive power has important consequences for which branch controls the decisionmaking on issues such as the Holocaust insurance settlement. Since the states opposed at least part of the settlement, effecting a settlement contrary to the wishes of the insurance claimants required an exercise of the preemptive power, so whichever branch had the preemptive power would be the decisionmaker. As a result, the fact that the Constitution's text specifically allocates preemptive power in one direction and not the other seems to be a direct statement as to which branch should and should not be the decisionmaker in such cases. This illustrates how the supremacy clause is an element of checks and balances among the various branches of the federal government, not merely an allocation of power between the

²⁰⁵ U.S. CONST. Art. VI.

²⁰⁶ See generally Clark, *Separation of Powers as a Protection of Federalism*, *supra* note 12, at 1439. For further discussion of this point in the context of the *Garamendi* case, see *infra* part V.E.

federal government and the states. Creating an executive preemption power allocates federal power differently from the way explicitly contained in the Constitution's text, a matter that should not be done lightly.

Second, the Framers' understanding of separation of powers theory underlies the textual allocation. The preemptive power is, fundamentally, a legislative power. In *Garamendi*, it was the power to determine whether the claimants would be compelled to accept the President's settlement. Before the President exercised the preemptive power, the claimants' remedies were governed by state law; afterward, they were governed by the President's settlement. Preemption effected a shift in the law governing the claims.²⁰⁷

That preemption is a legislative power is confirmed by the nature of Article VI, which makes certain acts preemptive by deeming them the "supreme Law of the Land." As Louise Weinberg has noted, the supremacy clause functions as a conflicts-of-law provision, privileging the law of the Constitution, federal treaties and statutes over the law of the states.²⁰⁸ The supremacy clause, then, presupposes a conflict of law that requires resolution, and that preemption is the result of a conflict of law. To say that an executive branch policy is preemptive is to give it the force of supreme law.

Saying that an executive policy can have the force of supreme law is not only counter to the negative implication of Article VI, but counter to the most basic propositions of eighteenth century separation of powers theory. At its most fundamental level, separation of powers meant that executive power is separated from the legislative power. From John Locke forward, that is how the doctrine was understood in English and European political theory, and how it was applied in America. As Montesquieu wrote: "When the legislative and executive power are united in the same person, or in the same body of magistrates, there can be no liberty."²⁰⁹ That principle was confirmed in the early state constitutions: in Virginia, "The legislative, executive and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other"; in Massachusetts, "the executive shall never exercise the legislative and judicial powers."²¹⁰

As a result, the Framers' placement of the preemptive power in the hands of Congress followed directly from the basic principles of separation of powers. Preemption resulted from

²⁰⁷ The same point can be made from the perspective of the insurers: before the President exercised the preemptive power, the insurers had a legal obligation to disclose the policies (or cease doing business in California). After preemption, the insurers had the legal right to continue doing business without disclosure.

²⁰⁸ See Louise Weinberg, *The Federal-State Conflict of Laws: "Actual Conflicts,"* 70 TEX. L. REV. 1743, 1748-50 (1992).

²⁰⁹ BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 151 (1748) (Prometheus ed. 2002). See M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 91-106 (2d ed. 1998) (discussing Montesquieu's vision of separation of powers). As Vile puts it, Montesquieu thought "the executive officer ought to have a share in the legislative power by a veto over legislation, but he ought not to have the power to enter positively into the making of legislation." *Id.* at 103. On the history of separation of powers in English thought, see WILLIAM B. GWYN, *THE MEANING OF SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* (1965).

²¹⁰ VA. CONST., para 1 (1776); MASS. CONST., Art. XXX (1780).

making one law supreme over another; the creation of supreme law was a legislative power, and so preemption entailed a legislative act. Indeed, the unusual part of the supremacy clause was the preemptive status it gave treaties. Treaty-making under the British system was characterized as an executive power, and the Senate was conceived by at least some at the time as a quasi-executive body. Treaties had not been supreme law under either the British system or under the Articles; to some it seemed a violation of separation of powers principles to give lawmaking authority to anything less than the whole of the legislature.²¹¹ Although these reservations were overcome, they indicate the extent the constitutional generation identified preemption with lawmaking.

Third, this is the lesson of the *Steel Seizure* case, the Court's leading modern decision on the separation of executive and legislative power. As is well known, in that case President Truman on his own initiative ordered the seizure of steel mills in the United States on the verge of a lockout, to ensure that the supply of steel for the Korean War was not interrupted. The Court invalidated this move as executive lawmaking: Justice Black said for the Court that the executive was altering the legal rights of the mill owners, and that was a legislative act to which the executive had no constitutional warrant.²¹² As he wrote: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."²¹³ This account of the *Steel Seizure* case is quite familiar, and confirms in the broad sense the constitutional separation of executive and lawmaking authority.²¹⁴

It is less commonly recognized, however, that the *Steel Seizure* case posed a question of executive preemption. The mill owners' claim to a property right, which the President attempted to divest, was a right under *state* law. The reason the President's action was lawmaking was that it would change the state-law right. In other words, in the first instance the case was a question of federalism: did the President's policy (to keep the mills operating) trump the state property law (allowing the mill owners to close the mills if they wished)?²¹⁵ But Justice Black rightly saw the case

²¹¹ On the status of treaties as executive acts in Founding-era discourse, see Prakash & Ramsey, *supra* note 9, at 289-94. On Founding-era objections to treaties' status as law of the land without the approval of Congress, see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999). See also THE FEDERALIST, *supra* note 52, No. 75, at 425 (Hamilton) (responding to claims that the President would improperly exercise legislative power by treaty).

²¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-90 (1952).

²¹³ *Id.* at 587. The Court continued: "The President's order does not direct that a congressional policy be executed in a manner prescribed by the President – it directs that a presidential policy be executed in a manner prescribed by the President." *Id.* at 588.

²¹⁴ See Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 HASTINGS CONST. L.Q. 373 (2002). See also *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring) (stating that the "Executive . . . has no legislative power" and the order at issue constituted an "exercise of authority without law."); *id.* at 630 (Douglas, J., concurring) (calling Truman's order "an exercise of legislative power" and hence unconstitutional).

²¹⁵ See Clark, *Separation of Powers*, *supra* note 12, at 1393, 1396-1400 (discussing the federalism aspects of *Youngstown*). Professor Clark makes the point that the separation of powers aspects of *Youngstown* protected the states by making preemption more difficult – a point we discuss in Part V *infra*. Our point here takes an opposite though complementary perspective – Congress' role in foreign affairs is protected by preserving the states as independent power centers. As a result, federalism reinforces separation of powers, as separation of powers

principally as one of separation of powers: that is, *which branch* of the federal government had the power to preempt the state property law. According to Black, that power was a legislative power, squarely in the hands of the Congress. Presidential policy did not trump state law, because to say otherwise would be to make the President a lawmaker.²¹⁶

In this sense the *Steel Seizure* case is closely analogous to *Garamendi*. As in *Garamendi*, President Truman sought to implement executive policy, but to make it effective he needed to displace state law. If the Court had permitted executive preemption, that would have allowed Truman to set policy unilaterally, with the mill owners' only recourse to seek a veto-proof vote in Congress. Thus the decision whether to seize the mills largely would have been taken out of the hands of Congress and placed in the hands of the President. When the Court declined to find executive preemption, the existence of the competing state policy required Truman to have the support of a majority of Congress to override the state. But Truman could not get a majority (he had asked for the power earlier, without success),²¹⁷ and so Congress had the last word. The preservation of the state as an independent power source that could stand up to presidential policy protected the checks and balances at the federal level. Without the competing state policy, there would have been no meaningful check upon Truman's decision to subordinate the mill owners' rights to the national imperative of ensuring a steady supply of steel. Allowing the state to frustrate executive policy served the important function of making sure that Truman's policy had the approval of the lawmakers, and was not a unilateral formulation.

Of course, one might not doubt that the foregoing propositions hold in domestic matters, but argue that foreign affairs is different. We conceive that this is exactly what the Court was saying in *Garamendi*. Presumably the Court did not believe that executive branch policy in domestic matters would override state law – a proposition that would have run counter to the *Steel Seizure* case and basic separation of powers theory. The Court relied heavily on the President's unique powers in foreign affairs as the basis of the preemption.²¹⁸ The Court must have been saying that the executive foreign affairs power makes the President a lawmaker in foreign affairs, despite the fact that the President cannot be a lawmaker in other areas.²¹⁹

The question, then, is whether anything supports the idea of a foreign affairs exception to the broader rule against executive lawmaking. Nothing in the Constitution's text indicates such an exception, perhaps leaving aside military matters and questions of recognition, where the President has a textually explicit role. The *Garamendi* Court invoked, without elaboration, the President's supposed broad power in foreign affairs, which does not have an obvious

reinforces federalism.

²¹⁶ *Youngstown*, 343 U.S. at 587-88.

²¹⁷ *Id.* at 586.

²¹⁸ *Garamendi*, 123 S.Ct. at 2380.

²¹⁹ There is at least some suggestion of this foreign-affairs-is-different attitude in the concurring opinions in the *Steel Seizure* case. Justices Jackson and Frankfurter in particular offered some reservations about Black's simple, bright-line conclusions. This likely had to do with the fact that the *Steel Seizure* case had foreign affairs implications. See *Youngstown*, 343 U.S. at 598 (Frankfurter, J., concurring); *id.* at 265-72 (Jackson, J., concurring).

basis in text. It seems most easily located in the President’s “executive Power” of Article II, Section 1 – but that formulation invokes the traditional understanding of executive power, which did not include foreign affairs lawmaking.²²⁰ As one of us has demonstrated elsewhere, the historical understanding of executive power in the eighteenth century did not include lawmaking power in foreign affairs (save in narrow areas not applicable here). In particular, the eighteenth century British monarch did not have a domestic rulemaking power in support of foreign affairs objectives – even foreign affairs objectives specified in treaties.²²¹ It is hard to imagine that the Framers constituted their President with greater powers than the British monarch, especially on the question of displacing state law.

But if the “foreign affairs exception” to separation of powers cannot be located in constitutional text, it is equally difficult to ground in longstanding practice. The Court appealed to custom and usage in identifying the President’s “independent authority to act” in foreign affairs.²²² While we do not dispute the a tradition of independent presidential acts in some aspects of foreign affairs, there is no longstanding practice of the President acting independently to displace state laws, even ones that touch upon foreign affairs. As we have discussed, the preemption by executive policy found in *Garamendi* was essentially unprecedented.

Moreover, at least one part of the Constitution’s text, and of traditional constitutional discourse, stands squarely against the idea of executive lawmaking in foreign affairs: the inclusion of treaties in the supremacy clause. One can hardly imagine a better example of executive policy in foreign affairs than a policy reflected in a treaty. Surely the executive policy on which the Court relied in *Garamendi* would have been at least as strong had it been incorporated into a treaty, signed by the U.S. President and the European nations whose companies were involved, and stating that any disclosures should be voluntary rather than mandated. According to the conventional understanding of Article VI, for such a treaty to have preemptive effect, it would require approval of two-thirds of the Senate. Executive preemption, in contrast, would seem to allow unapproved treaties to be preemptive at the option of the President.²²³ That proposition is inconsistent with the way the supremacy clause was understood at the time of the Framing and the way it is understood today. Our system has always understood that treaties are preemptive *because of* the supremacy clause.²²⁴

²²⁰ Prakash & Ramsey, *supra* note 9, at 265-72; 340-46. Another shortcoming of the *Garamendi* opinion is that it asserted a presidential power in foreign affairs without identifying its source. While we do not deny presidential power in foreign affairs, we think it important to say where it comes from. To the extent one believes that it comes from the traditional understanding of executive power, as reflected in Article II, Section 1, there is little basis for saying that it includes lawmaking power in foreign affairs. Declining to clarify the source of the President’s power allowed the Court to finesse this difficulty.

²²¹ *See id.* at 252-56.

²²² *Garamendi*, 123 S. Ct. at 2386.

²²³ Presidents have sometimes unilaterally declared that they will comply with unratified treaties, or parts of unratified treaties. This has not been thought to displace contrary state laws, but only to establish a rule for the executive branch.

²²⁴ *See* Ramsey, *Executive Agreements*, *supra* note 107, at 219-31 (discussing early understandings of the supremacy clause as it related to treaties). *See also* *Ware v. Hylton*, 3 U.S. 199, 277 (1796) (opinion of Iredell, J.) (noting that treaties did not override state law under the Articles, but that “The extreme inconveniences felt from such a system dictated the remedy which the Constitution has now provided, that ‘all treaties made or which shall be

Indeed, as discussed, that was the reason the Framers added treaties to the supremacy clause: because otherwise they would have depended upon Congress to implement treaties and thus risk repeating the errors of the Articles, in which states routinely violated treaty obligations.²²⁵ Yet if executive foreign policy is preemptive (as the Court claimed in *Garamendi*) and treaties reflect executive foreign policy (as they surely do), then the supremacy clause is unnecessary to make them supreme over state law (something that plainly escaped the Framers' notice).

The suggestion that treaties are preemptive without regard to the supremacy clause seems implausible, not merely because it has never been seriously advanced, but also because the preemptive effect of treaties was itself a substantial innovation over previous models. Neither the British system nor the Articles of Confederation gave domestic legislative effect to treaties; in each case treaties were executive initiatives that required legislative implementation to become domestic law (in one instance by parliament, in the other by state legislatures).²²⁶ The treaty clause of Article VI was an exception to the broader principle of separation of powers that the legislative branch must make the laws, justified by the imperative (felt strongly as a result of experience under the Articles) of complying with treaty obligations. Moreover, as Hamilton noted, the participation of the Senate softened the objection that treaties were executive lawmaking: at least a part of the legislative body would have a hand in them.²²⁷ But treaties are a special case because they are addressed by a specific constitutional clause, because they respond to a particular problem felt keenly under the Articles, and because they do not represent unilateral presidential power. None of these points applies to executive policy preemption. Thus the basic principle of separation of powers should remain the rule: the legislature makes the laws, and that power includes the power to decide when to displace state laws.

In sum, if one thinks of the question only as one of federalism, one might suppose that the constitutional structure implies the President's supremacy over the states in foreign affairs. But viewed as a question of separation of powers at the national level, nothing in the Constitution's structure implies the superiority of the President over Congress, particularly in matters of lawmaking.

E. *Garamendi*, Executive Agreements, and the Treaty Power

Garamendi contains a second and related threat to the Constitution's system of checks and balances at the national level: its treatment of executive agreements threatens the balance between the President and the Senate in undertaking international obligations. As discussed, much of the Court's discussion centered upon the U.S. agreement with Germany (and a later one with Austria) relating to Holocaust claims. Most of this was essentially dicta, for as we have pointed out the preemptive effect of the executive agreements could not have been the determinative factor in

made under the authority of the United States, shall be the supreme Law of the Land. . . . Under this Constitution, therefore, so far as a treaty constitutionally is binding, it is also by the vigor of its own authority to be executed in fact. It would not otherwise be the supreme law.") (quoting Article VI); accord JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 685-86 (1833).

²²⁵ See *supra* Part II.A..

²²⁶ See Ramsey, *Executive Agreements*, *supra* note 107, at 225-229.

²²⁷ THE FEDERALIST, *supra* note 52, No. 75 (Hamilton), at 425.

the case.²²⁸ Indeed, the Court conceded as much, stating that *if* the executive agreements themselves purported to override state law, the case would have been an easy one requiring much less discussion. And the dissent seemed to agree, at least for purposes of argument, for it emphasized that the executive agreements were (in its view) not preemptive. The combination of the two opinions leaves the impression that preemption by the executive agreements, if supported by the agreements' language, would have been unremarkable.²²⁹

That is a fundamentally mistaken impression, for it discards the Court's previously cautious approach to executive agreements. It is true, of course, that executive agreements have long been a mainstay of presidential diplomacy,²³⁰ and that the Court three times prior to *Garamendi* rejected a direct constitutional attack on an executive agreement. But that statement, without more, oversimplifies the Court's prior approach, and overlooks the cautious manner the Court had previously sought to integrate executive agreements into the constitutional scheme.

1. The Case for (Some) Executive Agreements

To begin, the constitutional case for some executive agreement power is quite strong.²³¹ The treaty-making clause, of course, provides that the President may make treaties with the advice and consent of the Senate²³² – and by obvious negative implication indicates that the President may *not* make treaties *without* the advice and consent of the Senate. But that is not a constitutional argument against all forms of executive agreement unless one thinks that “treaties” are the only type of international agreement recognized by the Constitution.²³³ It seems clear that this is not so. First, the Constitution's text itself – in Article I, Section 10 – recognizes two categories: states, it says, may not enter into treaties, but may enter into “agreements” with foreign powers upon the consent of Congress.²³⁴ Second, the international treatise writers of the eighteenth century, with whom the Framers were familiar, also recognized (at least) two classes of international undertakings: “treaties” and “other agreements.”²³⁵ This confirms that the phrasing of Article I, Section 10 is not a mistake or an idiosyncrasy, but rather reflects a common eighteenth century understanding of international agreements. Presumably the national government can enter into both kinds of international undertakings, and “agreements” not encompassed within the treaty-making clause would seem to fall

²²⁸ *Supra* Part II.C.

²²⁹ *Garamendi*, 123 S.Ct. at 2387 (“If the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward”); *id.* at 2398 (Ginsburg, dissenting).

²³⁰ See Paul, *supra* note 107 (recounting twentieth century history of executive agreements).

²³¹ See Ramsey, *Executive Agreements*, *supra* note 107, at 160-183 (expanding these arguments).

²³² U.S. CONST. Art. II, Sec. 2.

²³³ See Berger, *supra* note 104, at 55; Adler, *supra* note 104, at 27-32.

²³⁴ U.S. CONST. Art. I, Sec. 10 (“No State shall enter into any Treaty, Alliance, or Confederation; . . . No State shall, without the consent of the Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power”).

²³⁵ See EMMERICH DE VATEL, *THE LAW OF NATIONS*, bk. II, sec. 152 (Joseph Chitty, ed., 1863) (originally published 1758) (distinguishing between “treaties” on one hand and “accords, conventions [and] compacts” on the other). See also Ramsey, *Executive Agreements*, *supra* note 107, at 166-171 (discussing other sources).

within the President's executive power in foreign affairs.²³⁶ Third, constitutional practice, dating to fairly near the time of the Framing, included Presidents making agreements on their own authority without the consent of the Senate, and without constitutional objection.²³⁷

Moreover, for those who count tradition and precedent alongside text and original understanding, the case is equally strong. As noted, the practice of executive agreements began in the late eighteenth century and continued, with increasing strength, through the nineteenth and twentieth centuries.²³⁸ It was rarely questioned in court, and when it was, it was invariably upheld.²³⁹ Nor was it substantially questioned by the other branches: the closest either Congress or the Senate came to a serious objection was the Case Act in the 1970s, which required the executive to disclose to Congress executive agreements made on behalf of the United States.²⁴⁰

So there should be no substantial objection to the Court unreflectively assuming that *some* executive agreements are within the constitutional power of the President. The problem is that the Court unreflectively assumed that this particular executive agreement was. Although most commentators accept some executive agreements as constitutional, for several reasons there must be limits upon them.²⁴¹

There are two obvious difficulties with an unlimited presidential power of executive agreements. First, the Constitution seems to require a limit upon the scope of executive agreements, as a necessary consequence of the treaty clause. If everything that can be done by treaty can also be done by executive agreement, the treaty-making clause is superfluous and the constitutional check of the Senate, which the Framers valued highly, is of no effect.²⁴² Second, there must be some limit to the preemptive effect of executive agreements. Treaties, of course, are preemptive by the plain language of Article VI. But Article VI does not mention executive agreements by name, and the entire constitutional argument for executive agreements in the first instance depends upon them *not*

²³⁶ Prakash & Ramsey, *supra* note 9, at 264; Ramsey, *Executive Agreements*, *supra* note 107, at 160-183.

²³⁷ See Ramsey, *Executive Agreements*, *supra* note 107, at 173-183. The *Garamendi* Court erroneously stated that the first sole executive agreement, the 1799 settlement with the Netherlands concerning the ship *Wilmington Packet*, occurred during the Washington administration. John Adams was President in 1799 and his administration concluded the *Wilmington Packet* agreement.

²³⁸ See WALLACE McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* (1941).

²³⁹ *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

²⁴⁰ Case-Zablocki Act, 1 U.S.C. sec. 112b (1972) ("The Secretary of State shall transmit to the Congress the text of any international agreement . . . , other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force. . . ."). The Act did not, however, contain any restrictions upon the entry into executive agreements.

²⁴¹ See HENKIN, *supra* note 91, at 219-230.

²⁴² *Id.* at 222. On the Framers' strong desire for a two-thirds supermajority in the Senate as a check on treaty making, see Charles Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 *Geo. WASH. L. REV.* 271 (1934). We note that it is a separate question – and one we do not address here – whether executive agreements approved by Congress can cover the same ground as treaties. *Cf.* Ackerman & Golove, *Is NAFTA Constitutional?*, *supra* note 105.

being treaties. That is not to say that no executive agreements can be preemptive (although one of us has made that argument elsewhere),²⁴³ but it does suggest some limit on the preemptive effect of executive agreements. Otherwise, one would be in the peculiar situation of arguing that while treaties are preemptive only because of Article VI, executive agreements, which are a lesser form of agreement, are preemptive even without Article VI. Yet if some other mechanism in the Constitution makes executive agreements preemptive across the board, presumably that same mechanism would make treaties preemptive (and thus render this aspect of Article VI superfluous).

These are sufficiently serious objections that they seem to require a careful constitutional theory of executive agreements. The Court has never developed one, but rather – prior to *Garamendi* – embraced the alternative approach of proceeding extremely cautiously and narrowly in approving executive agreements.

2. The (Prior) Cautious Approach to Executive Agreements

As discussed above,²⁴⁴ the Court has considered constitutional challenges to two executive agreements. The first challenge arose in a pair of cases, *United States v. Belmont* in 1937 and *United States v. Pink* in 1942.²⁴⁵ Both cases challenged the same agreement, President Roosevelt’s agreement with the Soviet Union regarding claims settlement and other matters ancillary to the U.S. diplomatic recognition of the Soviet government. Neither case engaged the constitutional difficulties of executive agreements, and in some places the Court worded its decisions quite broadly. But the Court also emphasized the specific context of the agreement, which arose in connection with diplomatic recognition.²⁴⁶ As the Court pointed out, recognition is widely assumed to be an exclusive presidential power, and one may easily conclude that the power also includes the power to make bargains relating to recognition.

The cautious approach to executive agreements seemed doubly reaffirmed in *Dames & Moore v. Regan* in 1981. That case challenged the executive agreements ending the Iran hostage crisis, which among other things terminated private claims against the Iranian government and transferred them to an international tribunal. In upholding the agreement, the Court was even more careful to point out the narrowness of its holding. Indeed, the Court went out of its way to emphasize that it was not upholding executive agreements generally. Rather, it focused on the fact that Congress had consented to the type of executive agreement at issue in *Dames & Moore*.

²⁴³ Ramsey, *Executive Agreements*, *supra* note 107, at 218-235.

²⁴⁴ *Supra* part II.c.

²⁴⁵ 315 U.S. 203 (1942); 301 U.S. 324 (1937).

²⁴⁶ Belmont, 301 U.S. at 330 (“We take judicial notice of the fact that coincident with the [executive agreement], the President recognized the Soviet Government and normal diplomatic relations were established between the government and the government of the United States followed by an exchange of ambassadors. . . . The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. 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.”); Pink, 315 U.S. at 229-230 (“Power to remove such obstacles to full [diplomatic] recognition as settlement of claims of our nationals . . . certainly is a modest implied power of our President.”). See Wuerth, *supra* note 107, at 11-14.

Congress manifested that consent (according to the Court) in two ways, both of which the Court discussed at length. Congress had passed statutes that contemplated the exercise of unilateral presidential power to settle claims against foreign governments by executive agreement, thereby “indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case”; and the President had exercised that power without objection throughout constitutional history, thereby showing “a history of congressional acquiescence in the conduct of the sort engaged in by the President.”²⁴⁷ “[W]e do not decide,” the Court cautioned, “that the President possesses plenary power to settle claims, even against foreign government entities.”²⁴⁸

In sum, prior to *Garamendi* the Court had not established a general theory of executive agreements, but rather had identified specific instances in which they might be used, without explaining their outer boundaries. But there must be some boundaries, both because the Constitution’s text seems to require it, and because the Court’s extreme caution in approving the agreements it did approve shows that the Court thought it was dealing with an instrument available only in limited circumstances. And for what it is worth, that was also the view of the modern executive branch. The President, in ordinary practice, did not claim a universal power of executive agreement. Rather, the State Department had developed guidelines for deciding when a matter could be handled by executive agreement and when it required senatorial (or congressional) approval.²⁴⁹ Indeed, apparently the executive branch negotiators of the Holocaust settlements thought they did not (or at least might not) have the power to make preemptive settlement agreements on their own authority.²⁵⁰

3. *Garamendi* and Executive Agreements

All this was casually swept away in *Garamendi*, if one takes the Court’s statements seriously. According to the Court, there would have been no substantial issue if the only question had been whether an executive agreement plainly intended to be preemptive could displace California’s law: “Generally, then, valid executive agreements are fit to preempt state laws, just as treaties are.”²⁵¹ That, though, was not at all obvious under prior law. First, there should have been a question whether the subject matter of the agreement was properly handled by treaty rather than executive agreement. Second, there should have been the issue whether the agreement, even if

²⁴⁷453 U.S. 654, 677, 678-79 (1981). The Court further stressed that the decision rested “on the narrowest possible grounds” and did not “attempt to lay down any general guidelines.” *Id.* at 600-01

²⁴⁸ *Id.* at 688.

²⁴⁹ U.S. State Department, Foreign Affairs Manual, Considerations for Selecting among Constitutionally Authorized Procedures, 11 F.A.M. 721.3.

²⁵⁰ EIZENSTAT, *supra* note 31, at 257 (“There was no precedent in American history for such a legal negotiation by the U.S. government with private companies and for intervening in this way in present and future private lawsuits.”); Ronald Bettauer, *The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 BERKELEY J. INT’L L. 1, 6 (2002) (“there was no precedent in U.S. law for the settlement of claims of nationals against foreign private entities by executive agreement (as opposed to treaty) and thus such method could be subject to serious challenge”).

²⁵¹ *Garamendi*, 123 S.Ct. at 2388. For this proposition the Court cited, without elaboration, only *Pink* and *Belmont* (notably omitting *Dames & Moore* at this point).

constitutional, was preemptive. As *Pink*, *Belmont* and *Dames & Moore* show, these points are not automatic, but depend (or at least depended) upon an examination of the particular context.

The casual approach could be defended if *Garamendi* was essentially on all fours with one of the prior cases. But it was not. It lacked the context of recognition, emphasized in *Pink* and *Belmont*. Perhaps the case fit within another exclusive constitutional power of the President that conveyed a similar unilateral power, but it was hard to see what that would be.²⁵² Further, the evidence of congressional acquiescence, critical in *Dames & Moore*, was quite weak in *Garamendi*. Moreover, although both *Garamendi* and *Dames & Moore* involved international claims, there was a critical distinction: *Dames & Moore* involved claims against a foreign government (and its instrumentalities) whereas *Garamendi* involved claims against private parties. That was important because the indicia of congressional intent identified in *Dames & Moore* related to settlement of claims against governments – neither the practice nor the applicable statutes relied on in *Dames & Moore* extended to settlement of private claims. As the executive branch acknowledged, settlement of private claims by executive agreement was “unprecedented.”²⁵³

The central problem in the *Garamendi* litigation was that no one directly based the argument upon the executive agreements. Rather, the argument, and the Court’s decision, turned upon an odd combination of the executive agreements plus the executive policy stated more broadly. Arguments about the scope of preemptive executive agreements did not play a major role, because the parties assumed that was not the key to the case. This may have produced the Court’s unreflective dicta that if the only issue was whether the executive agreement could be preemptive, the case would have been an easy one. That only appeared to be so, because that was not the issue and thus no one contested it. As a result, the Court appeared to cast aside the restraint it had shown in previous cases, and approve a broad role for preemptive executive agreements.

If taken seriously, that pronouncement portends an substantial shift of power from the Senate to the executive. As discussed, prior to *Garamendi* the President had entered into many executive agreements, but had been circumspect about their subject matter, and the executive branch seemingly had doubts whether it could enter into a preemptive agreement in the Holocaust settlement itself. *Garamendi* appears to invite a much broader use, and certainly indicates that the executive branch was taking far too narrow a view of its own power.

Moreover, by not questioning the preemptive nature of executive agreements, the Court abandoned the most promising avenue for judicial limitation on the President’s agreement-making power. It would appear quite difficult to mount a judicial challenge to a non-self-executing (i.e., not preemptive) executive agreement.²⁵⁴ The line between non-self-executing treaties and non-preemptive executive agreements will in most cases have to be worked out between the President and the Senate, and the President would have wide latitude to decide what should and should not be

²⁵² Cf. *Deutsch v. Turner Co.*, 324 F.3d 692, 711-12 (9th Cir. 2003) (describing claims settlement in war as an aspect of war power).

²⁵³ Bettauer, *supra* note 250, at 4 (calling the Foundation Agreement “unprecedented”). For an elaboration of this point see Wuerth, *supra* note 107, at 14-40.

²⁵⁴ In particular, it is hard to see how anyone would have standing to assert such a claim.

submitted to the Senate. So long as the judiciary declines in general to make executive agreements part of the domestic legal system, particularly in the sense of declining to give them preemptive effect, that again forces a cooperative approach upon the President: the President must get the Senate (or Congress) involved in order to displace state law that interferes with the executive agreement. In short, a cautious approach to making executive agreements preemptive prevents the President from taking too much advantage of the uncertain, and judicially non-cognizable, line between the permissible subject matters of executive agreements and treaties.

Of course, it may be that the Court's pronouncement on this score should not be taken at face value. As noted, the issue was not really before the Court. Moreover, the case did involve settlement of claims, albeit a different sort than those at issue in *Dames & Moore*; perhaps it means no more than that the President can make preemptive executive agreements in the area of claims settlement. We believe that future decisions should not read *Garamendi* as a blanket approval of preemptive executive agreements in future cases, whatever the *Garamendi* decision appears to say. The structural issues are simply too important to be decided in a case in which they were not seriously argued by the parties or considered by the Court.

The larger point is that the relationship between executive agreements and state law is as much (if not more) a question of separation of powers as it is a question of federalism. The Court's casual approvals of executive agreements have never fully appreciated that perspective.²⁵⁵ In *Pink* and *Belmont*, that was less problematic because those cases involved an independent constitutional power of the President – recognition – which could mark out a narrow and defined area in which the President could safely be a lawmaker. In *Dames & Moore*, the lawmaking by executive agreement was less problematic because the Court relied on the approval of Congress. As a matter of separation of powers, this fell short of a complete answer, because the issue of executive agreements at least in part involves the Senate, as well as the Congress as a whole. But given that the matter in *Dames & Moore* was essentially one of foreign commerce (the claims were principally commercial), Congress plainly had an enumerated power over it. Whether or not the President could enter into the international settlement without the approval of the Senate, plainly Congress could terminate the claims and transfer them to arbitration in support of the settlement, and that was the extent of *Dames & Moore*'s objection. So again the Court provided a separation of powers solution, without exactly calling it that.

Garamendi, on the other hand, lost sight of any separation of powers limitations on executive agreements. To the *Garamendi* Court, it was all about federalism, and so it seemed an easy result to say that the federal interest overrode the state interest. The difficulty, here as elsewhere, was that the Court did not inquire as to the appropriate procedures for establishing a federal interest.

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²⁵⁵ See Ramsey, *Executive Agreements*, *supra* note 107, at 145-154 (elaborating this point with particular reference to *Belmont*).

Garamendi thus sows the seeds for serious inroads on separation of powers law as it stood prior to the Court's opinion. First, the Court endorsed the entirely novel concept that presidential policy, unaided by explicit or implicit congressional authorization, possesses the quality of a legislative act, at least to the extent of displacing state law. The practical result is that the President may make policy altering the rights of individuals and preempt contrary state law unilaterally, without the coordination and cooperation with Congress—or the Senate, in the case of treaties—previously required. Second, the Court seemed to abandon its prior tentative approach toward sole executive agreements, opening the way for a substitution of unilateral agreement-making for the constraints of the treaty clause. While future decisions may prove us incorrect, it seems clear that the President's foreign policymaking power has grown as a result of *Garamendi*, that its growth comes at the expense of Congress and the Senate, and that it has grown in a way not countenanced by the Constitution's text, structure and history.²⁵⁶

V. *Garamendi* and Federalism in Foreign Affairs

We now turn to the federalism aspects of the *Garamendi* decision. What one thinks of the *Garamendi* and foreign relations federalism depends to some extent upon what one thinks of *Zschernig* and its theory of a structural exclusion of states from foreign affairs. Since we disagree in some respects between ourselves on this matter, we necessarily state our conclusions cautiously. Nonetheless, we can identify at least three unsatisfactory implications of the *Garamendi* decision that should trouble even those who endorse some form of "dormant" foreign affairs exclusion. First, the Court seemed to revive the previously inoperative "dormant" foreign affairs exclusion of *Zschernig*, while doing nothing to clarify its scope and constitutional basis. It is not even clear, after *Garamendi*, whether dormant exclusion is now broader or narrower than the Court envisioned it in *Zschernig*. Second, the Court shifted much of the decisionmaking power, in terms of which state laws should be overridden, from the judiciary to the executive, in the context of a test that is extraordinarily malleable and difficult to apply. But that test seems to require that state laws, even in areas of traditional state authority, must give way to executive policies where the conflict between them is sufficiently sharp. Third, the Court's endorsement of a broad preemptive power through independent executive action disables the political safeguards—endorsed in other contexts by members of the Court's majority—that are supposed to protect state interests in the national lawmaking process.

A. *Garamendi*'s Balancing Test

We begin by describing, as best we can, the new test articulated by the majority. It apparently balances the degree of conflict with federal policy with the interests of the states.

²⁵⁶ A further problem with the decision is that it essentially allowed the President to have it both ways. By declining to enter into an explicitly preemptive executive agreement, the President managed to avoid taking a clear stance against litigation of Holocaust claims and state regulation of the Holocaust insurers, while quietly persuading the Court to resolve the insurers' concerns about "legal peace." See EIZENSTAT, *supra* note 31, at 205-278. At the very minimum, it would seem that the Court should require a fairly forthright executive policy, so that political accountability is placed squarely with the executive.

However, neither prong of the new test is adequately explained or easy to apply, as evidenced by the Court's own breezy implementation. As a result, *Garamendi* imposes new substantive limits on state involvement in foreign affairs that are thinly justified, difficult to articulate, and offer no guidance to lower courts or state policymakers.

As discussed above, the Court constructed a test that it applied to the HVIRA using a “synthesis” of Justices Douglas and Harlan’s approaches in *Zschernig*, as the Court characterized them.²⁵⁷ As the Court put it: “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 conflict” since “the Constitution entrusts foreign policy exclusively to the National Government.” But if a State tries to address matters within its legislative 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.”²⁵⁸

It is not clear what one is to make of the hedges—“if a state were,” “field preemption might be,” “it might make good sense”—with which Justice Souter salted his “synthesis” of Douglas and Harlan’s *Zschernig* opinions. But he seemed to devise an entirely new test taking into account “the strength of the state interest, judged by standards of traditional practice” in deciding “how serious a conflict must be shown” —or whether one need be shown at all—“before declaring the law preempted” by executive action.²⁵⁹

Under Souter’s formulation, the apparent threshold question is whether the state is “taking a position on a matter of foreign policy” without a “serious claim to be addressing a traditional state responsibility . . .” In such case, Souter said “field preemption” might apply—but what he really meant was that *Zschernig*’s dormant foreign affairs preemption might apply, since he also made clear that the federal government need not have acted at all (another example of misleading use of statutory preemption terms). If the state is operating outside its traditional sphere – whatever that may mean – its actions are preempted (excluded). This follows, wrote Souter, from the Constitution’s “exclusiv[e]” vesting of power over “foreign policy” in the federal government. This statement is further evidence that at least a portion of the new test proposed in *Garamendi* is constitutional, not merely statutory preemption.

The key to the threshold inquiry, of course, is how “areas of . . . traditional competence” are defined. The Court offered only that they are to be “judged by standards of traditional practice,”²⁶⁰ without identifying where those standards can be found. Given Justice Souter’s opposition to tests looking to traditional state concerns in ascertaining the scope of

²⁵⁷ See *supra* part III.A. As discussed, we think the Court mis-described Justice Harlan’s opinion as an endorsement of executive preemption and wrongly characterized Justice Douglas’ opinion in terms of statutory preemption language, rather than as a constitutional exclusion.

²⁵⁸ *Id.* at 2389 n.11.

²⁵⁹ *Id.* at 2389.

²⁶⁰ 123 S.Ct. at 2389.

congressional power under the commerce clause, it is passing strange to see him invoke that very concept in defining the line between state and federal power in foreign affairs.²⁶¹ But, leaving aside the odd position in which this places Justice Souter, one might suppose that commerce clause cases such as *Morrison* and *Lopez* might offer at least some guidance.

It does seem, at a minimum, that despite *Garamendi*'s use of statutory preemption language, Justice Souter's reformulation of *Zschernig* suggested that some state legislation could be invalidated whether or not any branch of the federal government had acted. The Court apparently did not invoke that rule in *Garamendi*, since it concluded that preemptive effects could be imputed to an articulated executive branch policy, but it did say that state action in foreign affairs outside traditional state areas of competence might fail even in the absence of any conflict with the executive. The discussion was heavily qualified and relegated to a footnote. And the Court further confused the matter by using the term "field preemption" to describe this process – which, as we have discussed, is a complete misnomer. Nonetheless, there is substantial evidence that the Court gave dormant foreign affairs preemption an "extended lease on life" rather than the "burial" one subsequent commentator thought it deserved.²⁶²

As a second step, if a state is regulating in accord with its traditional responsibilities, the Court will use a conflict preemption analysis (with federal policy defined by the executive branch). Here Souter said that the strength and the clarity required of the conflict will vary with the strength of the state's interest in regulating in a way that affects or touches on foreign policy matters. Again, while the Court used the language of preemption, it apparently intended a somewhat distinct approach. There is no parallel in the law of statutory preemption for what the Court proposed, which is essentially a balancing test comparing the degree of conflict with the extent of the state's interest.²⁶³ But at least as the Court stated it, it appears that even a state regulation solidly within its traditional responsibilities would be ousted by an unmistakable conflict with executive foreign policy. That, in any event, seems to be the implication of roping the analysis to statutory conflict preemption.

B. Preserving Dormant Foreign Affairs Preemption

The first problem with the Court's test is identifying its threshold. How demanding is the requirement that a state regulate only in its traditional area of interest? Apparently the HVIRA was sufficiently within that area to invoke the balancing test. Souter wrote that when federal executive authority is exercised "state law must give way where, as here, there is evidence of a clear

²⁶¹ See *United States v. Morrison*, 529 U.S. 598, 652 (2000) (Souter, J., dissenting) (criticizing "the Court's choice to invoke considerations of traditional state regulation in" cases addressing the scope of congressional power under the commerce clause); *United States v. Lopez*, 514 U.S. 549, 609-10 (1995) (Souter, J., dissenting) (same).

²⁶² *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 235 (2003).

²⁶³ The closest counterpart is probably Harold Maier's balancing test interpretation of *Zschernig*, although Maier made his proposal in the context of a dormant exclusion analysis rather than executive preemption. See Maier, *supra* note 93, at 383-39. Maier proposed balancing the state interest versus federal interest, rather than the state interest versus the degree of conflict.

conflict between the policies adopted by the two.”²⁶⁴ Instead of beginning by inquiring into the sufficiency of California’s regulatory interest, Souter jumped directly to his conclusion that the HVIRA represented a conflict with presidential policy. Souter seemed initially to accept (at least *arguendo*) that the HVIRA reflected an area of traditional state competence, though the opinion later expressed some skepticism on this point.²⁶⁵

In other cases this might be a critical and difficult call. Consider, for example, *Zschernig* itself. Since the executive branch in that case expressly disclaimed a conflicting federal policy, under the Court’s new test the only question would be whether the state was regulating in an area of traditional competence. Arguably, it was, since it was regulating inheritance – something that has always been done at the state level.²⁶⁶ Justice Harlan in *Zschernig* (upon whom the Court relied as an initial matter in creating the test) apparently thought that the regulation in *Zschernig* concerned a matter of traditional local interest, despite its novelty and impact on foreign affairs.²⁶⁷ Of course, the state was using its regulation of inheritance to insert itself to some extent into foreign affairs. Under the new test, did that mean that it had stepped outside its traditional competence in a way that was *constitutionally* excluded, or only in a way that triggered the balancing test in the event of a conflict? It depends substantially on the level of generality at which one assesses the state activity, something on which the Court provided no guidance. One would have thought that the Court would at least explain whether its new test would cause its principal precedent to come out the other way, but no explanation was made and we find ourselves unable to reach a conclusion on the matter.

Indeed the new formulation potentially broadens *Zschernig*. Gone is *Zschernig*’s inquiry into the “direct” or “incidental” effects of state laws on foreign relations. Under *Garamendi*, regardless of the level or existence of executive action, or the effect on the government’s ability to conduct foreign affairs, if a state legislates outside its area of traditional competence, its law will be struck down. In *Zschernig*, at least, states were permitted to argue that the impact of their law was only “indirect” or “incidental.” The new exclusion is potentially categorical. Given the dramatic implications of falling on the wrong side of the traditional/non-traditional state competence line, one might expect the Court to have spent some time describing how that line was to be drawn, or what factors should drive the inquiry.

Finally, while the Court endorsed *Zschernig*’s constitutional holding, and perhaps even expanded it, it did not supply the constitutional analysis that Justice Douglas’s opinion lacked, justifying such a rule in terms of text, history, or structure.²⁶⁸ The Court offered little other than tendentious rendering of prior cases in support of its conclusions.²⁶⁹ At best, the Court conflated

²⁶⁴ 123 S.Ct. at 2390.

²⁶⁵ See *infra* Part III.A.

²⁶⁶ See *Clark v. Allen*, 331 U.S. 503, 517 (1947).

²⁶⁷ See *Zschernig*, 389 U.S. at 458-59 (Harlan, J., dissenting) (referring to the Oregon statute as legislating within the state’s “area[] of traditional competence.”).

²⁶⁸ This is not to say that one could not be made. See generally Denning & McCall, *The Constitutionality of State and Local “Sanctions”*, *supra* note 8, at 327 (arguing that a form of dormant preemption derived from *Zschernig* would have invalidated the Massachusetts law in *Crosby* even absent federal action).

²⁶⁹ The common law constitutional interpretation aspect of *Garamendi* is analyzed *infra* Part IV.

statutory and constitutional preemption: citing cases like *Pink*, *Hines*, and *Crosby*, on the one hand, but reviving and applying *Zschernig*, which was decided on constitutional preemption grounds, yet recharacterizing it as a statutory preemption case. At least, it has compounded the error of *Zschernig* by endorsing the “dormant foreign affairs” doctrine as a restraint on states without any attempt to justify its proscription in terms of text, history, or structure; and without furnishing any useful guidelines for state governments or for lower courts to determine what is and is not permissible. Opinions differ over the existence and scope of any structural restriction, but however the Court decides the issue, surely it is not too much to ask that the Court not merely announce a rule of constitutional preemption, but rather articulate reasons for the rule that at least acknowledge the textual, historical, and structural arguments for and against it.

C. The Balancing Test: Problems in Application

Once past the threshold, the Court’s test encounters two serious problems, reflected in *Garamendi* itself. The first is the strength of the conflict required for preemption. Justice Souter claimed that “the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions.” California, he contended, has chosen to provide “regulatory sanctions to compel disclosure, *supplemented by a new cause of action for Holocaust survivors* if the other sanctions should fail.”²⁷⁰ Unfortunately for the Court, the “new cause of action” was not at issue in the case, which encompassed only the challenge to the disclosure provisions.²⁷¹ The Court’s mention of the cause of action suggested a lack of confidence in the clarity of the conflict between the disclosure provisions and the executive policy. But this was more misdirection: surely the Court did not mean to suggest that if California repealed the cause of action law, the HVIRA would become constitutional.

The Court’s trouble was that, with respect to the HVIRA’s disclosure provision standing alone, it had only the executive branch’s say-so as evidence of a conflict. As the dissent pointed out, the executive agreements, even read broadly, related only to ending claims litigation in U.S. court. The policy reflected in the agreements was that claims would be settled through ICHEIC, not through litigation. The HVIRA, considered in isolation, had no relationship to that policy – as the state pointed out, the HVIRA reflected no policy whatsoever as to where or how claims should be settled: it just took the understandable position that claims would be easier to settle in an atmosphere of full disclosure.²⁷² It was a further step to say that the executive policy was that disclosure should not be compelled – a step taken only in relatively informal (though pointed) executive branch communications (and, of course, in the executive branch filings in the *Garamendi* case itself). Yet even faced with only informal statements, the Court was hardly in a position to dispute with the executive over the content of executive policy: the Court had to take at face value

²⁷⁰ 123 S. Ct. at 2390-91 (emphasis added).

²⁷¹ *See id.* at 2384 n.4 (“Challenges to [the cause of action] were dismissed by the District Court for lack of standing, a ruling that was not appealed.”).

²⁷² It is worth repeating that there was no necessary connection between the HVIRA and the cause of action legislation. Insurance claimants wanted the disclosure provision, even without the cause of action, so that they could make claims through ICHEIC, the voluntary settlement organization.

the executive's claims of conflict, or else engage in an independent evaluation of the needs of U.S. foreign policy, an enterprise in which courts tend to doubt their own ability.

The second problem with the test is assessing the state's interest. The Court questioned whether the HVIRA actually represented legislation in a state's area of traditional competence, and in any event found the state's interest wanting when weighed against the federal government's responsibility for foreign policy. If the conflict was not as clear as the majority found it, the Court wrote, still "it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter" in enacting HVIRA's disclosure requirements.²⁷³

California justified the HVIRA as, among other things, a consumer protection measure alerting citizens to insurance companies that have failed to pay valid claims. It also justified the measure as informational: permitting state citizens to know which insurance companies failed to pay valid claims of Holocaust victims should they not want to do business with such firms. The Court dismissed California's stated purposes, claiming that the HVIRA's limitation of the disclosure requirements to Holocaust-era policies "raises great doubt that the purpose of the California law is an evaluation of corporate reliability in contemporary insuring in the State," without explaining why.²⁷⁴

Instead, the Court held that "there is no serious doubt that the state interest actually underlying the HVIRA is concern for the several thousand Holocaust survivors said to reside in the State." This, it turned out, was insufficient "[a]s against the responsibility of the United States of America," given that "only a small fraction of [survivors reside] in California."²⁷⁵ No attempt was made, however, to justify the conclusion that, when "judged by standards of traditional practice," California acted outside its area of "traditional competence" in requiring insurance companies to disclose information about payment of Holocaust-era policies.²⁷⁶ States have traditionally assumed

²⁷³ 123 S. Ct. at 2392.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 2393.

²⁷⁶ Further, in applying its test the Court never addressed whether the analytical framework developed for dealing with legislative preemption—express versus implied preemption, obstacle and conflict forms of implied preemption—applied, and if it does not, what should take its place, and why. When the Court discussed the "conflict preemption" aspect of its new test, it offered little explanation of the terms it was using and little guidance for prospective application. Since the Foundation Agreement disclaimed preemptive intent, the Court apparently regarded this inquiry as a species of implied preemption. But the Court did not employ the usual vocabulary used in its implied preemption cases that involve congressional legislation. Since one could comply with both the Foundation Agreement and the HVIRA, it was not as the Court suggested a case of "clear conflict." The Court had to recharacterize the disclosure requirement as a "sanction" and link it to the cause of action not at issue in the case even to suggest that California's regulatory scheme presented a real "obstacle" to the achievement of executive branch goals. The Court also never made it clear whether the HVIRA represented an area of traditional state competence, and if it did not, what criteria were used, other than to suggest that whatever California's interest, it was not sufficient to outweigh that of the federal government. As noted above, this does not sound like statutory preemption analysis at all, but rather more like the tests the Court has developed for the dormant commerce clause doctrine. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S.137, 142 (1970) (evaluating whether facially neutral commercial regulations nevertheless offend the dormant commerce clause doctrine because the burdens on interstate

responsibility for protecting insurance policyholders residing within their borders—a responsibility Congress has recognized and endorsed, as discussed above.²⁷⁷ The real problem, it seemed, was that the burden California imposed *on the insurers* was disproportionate to the state interest involved – the HVIRA required an enormous volume of disclosure to aid a relatively small number of claimants. But this comparison did not seem to be part of the Court’s test, at least not overtly.²⁷⁸

D. *Breard* and Executive Preemption of Traditional State Functions

However one might apply the balancing test in close cases, the Court’s language seemed to assume that at some level of conflict, any state law would give way to a presidential foreign policy. That, at least, seems to be the natural conclusion from the Court’s use of the terminology of statutory conflict preemption, and from its discussion of the President’s preeminence in foreign affairs.²⁷⁹ An explicitly preemptive presidential foreign policy, then, would overcome a state regulation even in an area of traditional competence. Particularly in a time of increasing globalization, this reading concentrates immense power in the executive to oversee state activities.

As an example, consider the Court’s prior decision in *Breard v. Greene*.²⁸⁰ *Breard*, a Paraguayan citizen, had been sentenced to death in Virginia state courts. At his arrest, and throughout the prosecution, he was never informed of his right to contact the Paraguayan embassy for assistance – a right guaranteed by the Vienna Convention on Consular Relations, to which the United States is a party. *Breard* claimed this violation entitled him to a retrial, a claim that seemed weak under U.S. law both because it had been procedurally defaulted and because *Breard* had a difficult time showing prejudice from the failure. But in a parallel proceeding, Paraguay raised the matter before the International Court of Justice (ICJ), which requested (or, depending on one’s view, ordered) the United States to stay *Breard*’s execution pending its hearing of the matter. The U.S. executive branch then requested, on the basis of the ICJ order, that Virginia stay the execution; Virginia refused, and the Court held that it lacked legal grounds to intervene. As the Court put it: “Last night the [U.S.] Secretary of State sent a letter to the Governor of Virginia requesting that he stay *Breard*’s execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.”²⁸¹

Most of *Breard*’s arguments (and the subsequent academic discussion) focused on the claim that the Vienna Convention and the treaty establishing the ICJ constituted supreme law binding Virginia under Article VI. At the time, that seemed a correct analysis, since otherwise it was

commerce “clearly exceed” the “putative local benefits”); *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851) (holding that states are prohibited from regulating where national problem required uniform solution).

²⁷⁷ See *supra* Part III.C.

²⁷⁸ But see *infra* Part VII.

²⁷⁹ See *Garamendi*, 123 S.Ct. at 2389 n. 11 (where state regulates within its traditional competence in a way that affects foreign affairs, preemption requires “a conflict of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.”).

²⁸⁰ 523 U.S. 371 (1998)

²⁸¹ *Id.* at 378. See *id.* at 373-75 (recounting the procedural history and the ICJ proceedings).

difficult to locate another source of law superior to Virginia's.²⁸² To the extent Congress had spoken on the matter, it had in general terms endorsed the idea that state procedural bars should be honored. The executive's position on the matter was somewhat equivocal, and in any event – consistent with what we have argued above – no one seemed to think that executive branch policy standing alone could displace state law.²⁸³

Breard seems to merit some reconsideration after *Garamendi*, which did not mention it. To be sure, Virginia's death penalty law, and its refusal to recognize *Breard*'s claimed right to retrial, seem sufficiently within the state's area of traditional competence to pass *Garamendi*'s threshold test. But then matters become complicated. The conflict with federal policy was difficult to assess, since the executive did not state its policy clearly, and (naturally enough) appeared to think that it lacked the power to order Virginia to do anything about the matter. But the executive plainly had a policy of respecting the ICJ's request, and Virginia plainly took the opposing position. Even in an area of traditional state competence, that might seem sufficient to point the *Garamendi* test toward the federal interest. (One might further question the strength of the state's interest in defying the ICJ). But in any event, it seems that under *Garamendi*'s test the executive *could* override the state by a sufficiently clear statement of policy, creating an irreconcilable conflict. In other words, *Garamendi* appears to give the President the power to do what most everyone, including the executive, assumed he did *not* have the power to do in *Breard*: direct a state to conform its laws and actions to executive foreign policy.²⁸⁴

The potential implications reach well beyond *Breard*. It is a commonplace that in an increasingly interconnected world even activities that appear purely local may have international effects. In the context of the death penalty, for example, international interest has focused not merely upon the treatment of defendants such as *Breard*, but also upon the treatment by the states of their own citizens. Indeed, if recent briefs are to be believed, this has become of matter of some

²⁸² See 523 U.S. at 375-76 (describing *Breard*'s arguments). For academic discussion, see *Agora: Breard*, 92 AM. J. INT'L L. 666 (1998); Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999); Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS J. INT'L & COMP. L. REV. 27 (1999); Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147 (1999).

²⁸³ The Solicitor General, on behalf of the United States, wrote that "our federal system imposes limits on the federal government's ability to interfere with the criminal justice system of the states" and acknowledged "Virginia's right to go forward," while requesting that it not do so. See Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AMER. J. INT'L L. 675, 676 (1998) (discussing and endorsing the executive's position). See also Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AMER. J. INT'L L. 683 (1998) (arguing that because compliance with the ICJ order was a treaty-based obligation of the United States, the executive could require the state to comply with it). *But see* Frederic L. Kergis, *Zschernig v. Miller and the Breard Matter*, 92 AMER. J. INT'L L. 704, 707 (1998) (arguing on the basis of *Zschernig* that Virginia's action was unconstitutional because it "not only denigrated the role of the International Court of Justice. . . but also ignored or subordinated foreign policy concerns expressly pointed out to him by the Secretary of State.").

²⁸⁴ In sum, *Garamendi* seems essentially to vindicate Professor Kergis' position with respect to *Breard*. See note 283 *supra*. Kergis' view, of course, was much in the minority at the time, and flatly contrary to both the executive branch's position and the Supreme Court's decision in *Breard*.

diplomatic inconvenience to the United States.²⁸⁵ The executive has, of course, not taken a position against state applications of the death penalty in general. But would the executive have the power to establish preemptive policies on the implementation of state death penalties, as a matter of the conduct of foreign affairs? This seems an unlikely result (particularly given the make-up of the current Court), but it is hard to see how the *Garamendi* opinion avoids it.

E. Executive Preemption and the “Political Safeguards” of Federalism

At a fundamental level, as we discuss elsewhere, there is a tension between our constitutional structure and claims by the executive branch of extensive independent lawmaking power. While the Court has recognized some executive lawmaking in past cases, it has always been careful to limit those cases to their facts. Such limiting language is gone in *Garamendi* and is replaced only with citations to those prior, circumspect cases -- not, as one might expect, to a thorough discussion of text, structure, or history demonstrating why previous Courts and prior commentators were wrong to take it as a given that the President does not have broad lawmaking powers, especially those that can displace or preempt state laws.

From a federalism perspective, however, it may not be obvious that the states are worse off under the *Garamendi* system than they would be under an expansive view of *Zschernig*. It may be that *Garamendi* in practice effectively replaces judicial preemption (under *Zschernig*) with executive preemption (as in *Garamendi*). One might conclude that, whatever doctrinal manipulations occurred, from the perspective of the states the Court’s new approach is an improvement over *Zschernig*. After all, *Zschernig*, read broadly, might allow a court to strike down all sorts of state activity that it (as a non-political branch with little expertise in foreign affairs) did not like, whereas the new approach generally envisions action by at least one political branch (the President) before state laws would be displaced. Moreover, the states can hardly complain that federal foreign policy overrides state law, as that is the essence of the federal system reflected in the Constitution; disputing that proposition is tantamount to calling for a return to the Articles. To be sure, as we have discussed in the previous section, there is a substantial separation of powers question as to *which branch* of the federal government sets preemptive federal foreign policy – but at least on its face, that is not a matter of immediate concern to the states.

The truth of these statements, though, depends on the relative scope of *Zschernig* preemption and the Court’s new executive policy preemption. The dormancy of *Zschernig* prior to the *Garamendi* case, and the lower courts’ relatively narrow reading of it both in *Garamendi* and in similar cases, suggested that as a practical matter courts were not inclined to read *Zschernig* broadly whatever its language might say. As we discuss below, the creation of executive policy preemption hands a potentially powerful weapon to a branch that is much more likely to wield it aggressively. Moreover, as previous commentators have observed, it *does* matter to the states which branch of the federal government sets preemptive federal policy, because one branch (the executive) operates

²⁸⁵ See Brief of the European Union as Amicus Curiae in Support of Petitioner, *McCarver v. North Carolina*, No. 00-8727 (June 8, 2001); Brief of Morton Abramowitz et al. as Amici Curiae in Support of Petitioner, *McCarver v. North Carolina*, No 00-8727 (June 8, 2001).

under substantially fewer constraints than the others. Finally, not only does *Garamendi* concentrate power in the executive branch to the detriment of the states, it also may constrain Congress' ability to limit executive preemption. All of these matters add up to a serious undermining of federalism protections, even if one is inclined to think that *Zschernig* itself contained some valuable insights.

1. Disabling the Structural Protections of the States

It is an article of faith among critics of substantive federalism limits on Congress that states' interests are adequately secured in Congress through "political safeguards" offered by either the formal institutions of national lawmaking in which states are represented²⁸⁶ or in informal institutions like political parties that take account of state interests.²⁸⁷ Justice Souter himself embraced this view in his *Morrison* dissent, where he emphasized "[p]olitics as the moderator of the congressional employment of the commerce power."²⁸⁸

Bradford Clark has argued that political safeguards enthusiasts should, therefore, vigorously enforce textual and structural restrictions on national lawmaking power in order to ensure that national lawmaking will displace state law only when the Constitution's forms and formalities are complied with.²⁸⁹ In his view, the Supreme Court's enforcement of separation of powers principles "preserve[s] federalism by making federal law more difficult to adopt, and by assigning lawmaking power to actors subject to the political safeguards of federalism"; federal lawmaking outside the constitutionally-recognized avenues "does not clearly fall within the terms of the Supremacy Clause, and thus provides a questionable basis for displacing federal law."²⁹⁰

²⁸⁶ See JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Jesse H. Choper, *The Scope of National Power Vis-à-vis the State: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

²⁸⁷ See Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000). On the differences between Wechsler and Choper on the one hand, and Kramer on the other, see Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 80. TEX. L. REV 327, 327-28, 333-38 (2001) [hereinafter Clark, *Safeguards*].

²⁸⁸ 529 U.S. 598, at 649 (Souter, J., dissenting). See *id.* at 647-51 (Souter, J., dissenting) (arguing that the Framers intended for state interests to be safeguarded through the political processes). Justice Breyer, too, stressed that the Court's role should be limited to the monitoring of process. *Id.* at 662-63 (Breyer, J., dissenting). Justice Souter did not join the portion of Justice Breyer's opinion arguing for a judicial role in enforcing process protections. *Id.* at 655 (Breyer, J., dissenting).

²⁸⁹ See Clark, *Safeguards*, *supra* note 287, at 333 (arguing that "[a]t a minimum, courts should enforce the political safeguards by restricting 'the supreme Law of the Land' to measures adopted in accordance with the precise lawmaking procedures prescribed by the Constitution").

²⁹⁰ Clark, *Separation of Powers*, *supra* note 12, at 1324. The supremacy clause, he noted, recognizes as the supreme law that displaces state law only the Constitution, laws adopted pursuant to the Constitution, and treaties. Only "lawmaking procedures governing the adoption of the 'Constitution,' 'Laws,' and 'Treaties' of the United States," he argues, "creat[e] 'the supreme Law of the Land.'" *Id.* at 1324, 1326. Further, "the procedures established by the Constitution make adoption of such laws more difficult by requiring the participation and assent of multiple actors subject to the political safeguards of federalism—especially the Senate." See *also id.* at 1330 ("the ultimate procedural safeguard may be the procedural gauntlet that any legislative proposal must run and the concomitant difficulty of overcoming legislative inertia") (quoting Ernest A. Young, *Constitutional Avoidance*,

While Professor Clark looked at lawmaking by all three branches of government, his comments on executive branch lawmaking and sole executive agreements are of particular relevance here. As in our earlier discussion, he saw a rejection of executive lawmaking in the *Steel Seizure* case: the Court demanded that the federal government use the Constitution's prescribed lawmaking procedures if it wished to seize the steel mills.²⁹¹ Relatedly, he expressed concern over the use of executive agreements. Since executive agreements allow Presidents to avoid the difficult supremacy procedures of Article VI, Clark questioned whether these agreements—particularly sole executive agreements that do not involve Congress—should preempt state law.²⁹² If congressional-executive agreements are a source of concern because they avoid the Senate's supermajority requirement designed to protect state interests, sole executive agreements also avoid Article I, Section 7's lawmaking requirements. While "these procedures render lawmaking more difficult than congressional inaction . . . this difficulty was meant to protect . . . state governance prerogatives."²⁹³

On our reading, *Garamendi* significantly eroded the protections Professor Clark described. First, the opinion deprives states the protections of Article VI by adding to the list of legal sources having preemptive effects. Further, encouraging independent executive branch lawmaking removes essential safeguards by ensuring that law can be made by a political institution not as subject to state pressure as Congress. By uncritically extending *Belmont*, *Pink*, and *Dames & Moore*, the Court essentially amended Article VI to make "executive agreements" and, apparently, executive policy more broadly, the supreme law of the land. Not only is this inconsistent with the omission from Article VI of the "other agreements" mentioned in Article I, Section 10, it permits displacement of state law without subjecting legislative actors to state pressure or otherwise allowing states to make their views known. In fact, given that the executive agreement in question did not claim preemptive intent, and the executive branch argued for preemption only after the litigation arose,²⁹⁴ states would not have even been on notice that they needed to resist displacement of state law at all. While the President does have a national constituency, and depends on popularity in key states to

Resistance Norms, and the Preservation of Judicial Review, 78 TEX. L. REV. 1549 (2000)).

²⁹¹ The Court, he argued, "has . . . invalidated attempts by the executive branch to engage in lawmaking outside the constitutionally prescribed process." Even Justice Jackson's opinion concurring with the Court's invalidation of President Truman's seizure of steel mills, widely regarded as a paradigm "functional" approach to separation of powers questions, "confirms that Justice Jackson agreed with the Court's essential premise that the President possesses no independent lawmaking authority." The decision, Clark argued, preserved federalism by preventing displacement of state law permitting possession of steel mills by confiscatory federal law enacted by presidential fiat. "The constitutional distinction between executive and legislative power recognized by both Jackson and the Court ensures that the federal government cannot interfere with private rights unless it employs the lawmaking procedures established by the Constitution." Clark, *Separation of Powers*, *supra* note 12, at 1393, 1400.

²⁹² *Id.* at 1439.

²⁹³ *Id.* at 1444 (footnote omitted). Clark was particularly troubled by the Court's holding in *Dames & Moore* that congressional acquiescence authorized the President's assignment of pending claims to a special tribunal, though there was no statutory authority for that power. Placing on Congress the burden of disapproving executive action, Clark wrote, "flips the burden of inertia established by federal lawmaking procedures. The absence of congressional disapproval ordinarily does not authorize the President to alter important legal rights, even if necessary to implement a sole executive agreement." *Id.* at 1450. He offered the tentative opinion that *Dames & Moore* was "limited to its facts" and "lack[ed] significant generative force." *Id.* at 1451.

²⁹⁴ See *supra* Part I.B.

stay in power, it was, as Hamilton wrote in *Federalist No. 68* an “important desideratum . . . that the executive should be independent in his continuance in office on all but the people themselves” lest he “be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence.”²⁹⁵ In other words, the presidency is an office with a national constituency, one—by design—less likely to take account of individual states’ interests.²⁹⁶ While some might argue that this is normatively desirable, there is little doubt that judicial attribution of preemptive effect to such policy statements reduce the ability of states to have their interests taken into account prior to having their policies displaced by federal law.

Assuming the political safeguards argument embraced in *Morrison* by Justice Souter was not simply a makeweight, and that there are “safeguards” in the “political safeguards” approach, it is surprising that the majority was indifferent to the ways in which its endorsement of executive preemption in *Garamendi* eroded or disabled any protections that political institutions furnish states. While one may differ with Professor Clark on the desirability of relying largely on political safeguards to protect federalism,²⁹⁷ focusing first on the process safeguards endangered by *Garamendi* should furnish common ground on which those who favor vigorous judicial review to protect state interests and those who do not can gather to criticize the decision.

2. New Limitations on Congress’ Ability to Protect the States?

Not only does *Garamendi* empower the President to displace state law unilaterally and without the participation of Congress, its treatment of congressional acts suggests that the Court applied to Congress what Professors Eskridge and Frickey have termed a “super-strong clear statement rule.”²⁹⁸ Making it more difficult for Congress to act further insulates the President from even an attentive Congress and imposes additional burdens on states seeking legislative protections for its actions.

In 1992, Eskridge and Frickey identified a “super-strong” rule against curbing executive power. In *Japan Whaling Association v. American Cetacean Society*, the Court found the Commerce Department had not violated congressional statutes when it failed to certify that Japan’s

²⁹⁵ THE FEDERALIST, *supra* note 52, No. 68, at 413 (Hamilton).

²⁹⁶ Professor Powell argues that this makes the President particularly well-suited to make foreign policy. H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999).

²⁹⁷ See Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460 (2001) (concluding that “the theory of the political safeguards of federalism remains fundamentally mistaken” and that Clark’s attempt to rehabilitate it “is rather akin to reinforcing the walls of a sand castle as the tide turns”).

²⁹⁸ Clear statement rules “require a ‘clear statement’ on the face of the statute to rebut a policy presumption that the Court has created”; a “super-strong clear statement rule” requires “a clearer, more explicit statement from Congress in the text of the statute, without reference to the legislative history, that prior clear statement rules have required.” William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4, 597 (1992). A “presumption” about different policies that the Court has made can, on the other hand, be overcome “by persuasive arguments that the statutory text, legislative history, or purpose is inconsistent with the presumption.” *Id.* at 595 n4.

whaling practices violated international agreements, contrary to the congressional enactments' plain language.²⁹⁹ According to Eskridge and Frickey, *Japan Whaling* potentially created “a super-strong clear statement rule requiring the statutory clear statement to target the specific issue unmistakably” in order to “protect[] presidential discretion in foreign affairs matters.”³⁰⁰

After *Garamendi*, what Eskridge and Frickey tentatively characterized as a only a possible transformation is arguably complete. To ensure that the McCarran Act permits California to pass a law like HVIRA, Congress will apparently have to amend it clearly specifying that it applies in cases with foreign affairs overtones and even in the face of contrary presidential policies. Similarly, the Holocaust Commission Act would require an unmistakably clear statement that Congress recognizes that states are compiling the insurance information in question and that such collection efforts (including the use of penalties to motivate recalcitrant insurance companies) should continue regardless of the future actions of the executive branch.

Though it was not explicit, the Court's disregard of both statutes apparently stemmed from its reluctance to countenance interference with what it concluded was the President's premier role in “foreign affairs,” which the Court did not define, but which it repeatedly contrasted with congressional responsibilities for “foreign commerce” and “domestic commerce.”³⁰¹ *Japan Whaling* at least evinced concern about congressional interference with an enumerated presidential power, the power to negotiate agreements with foreign governments.³⁰² Likewise, as we stressed elsewhere, *Dames & Moore* took pains to emphasize the limited nature of the presidential power it authorized, disclaimed any intent to pass on the question of a general presidential power to settle claims, and suggested that though not expressly authorized, the transfer of the claims out of U.S. courts was at least similar to remedies Congress had prescribed in the past and to which Congress had not objected.³⁰³ *Garamendi*, by contrast, claimed the potentially broad universe of “foreign affairs” or “foreign policy” for the President. It is also a considerable stretch to even imply that a wide-ranging independent lawmaking power with broad preemptive effect is a “traditional” presidential power, since the Court itself denied that it was as recently as 1981. Not only does this empower the President at the expense of Congress, it also harms federalism interests by making it difficult for Congress to come to the states' defense.

²⁹⁹ 478 U.S. 221, 231-41(1986).

³⁰⁰ Eskridge & Frickey, *supra* note 298, at 617

³⁰¹ See, e.g., 123 S. Ct. at 2394 (contrasting McCarran-Ferguson Act's concern with “implied preemption by domestic commerce legislation” with “preemption by executive conduct in foreign affairs”); *id.* (stating that Holocaust Commission Act “can hardly be read to condone state sanctions [*sic*] interfering with federal efforts to resolve such claims”); see also *id.* at 2391 n.12 (explaining that *Barclays* did not apply because it dealt with Congress's power over foreign commerce, as opposed to “the field of foreign policy” in which the President has “the lead role”); *id.* at 2392 n.14 (recharacterizing *Crosby* as a decision involving the President's “independent constitutional authority to act on behalf of the United States on international issues”).

³⁰² Eskridge & Frickey, *supra* note 298, at 617 (“What seemed to move the Court was the argument that the President needed flexibility not to certify so that he could negotiate a bilateral agreement with Japan on this matter.”).

³⁰³ See *supra* Part IV.E.

VI. *Garamendi* and the Perils of Common Law Constitutional Interpretation

There is a final troubling aspect to the *Garamendi* decision. Despite the recent appearance of a number of detailed and sophisticated scholarly treatments of foreign affairs questions, the Court seemed sublimely indifferent to those studies and their conclusions. In contrast to many of its other recent decisions involving federalism and the scope of governmental powers,³⁰⁴ the Court ignored the usual interpretive trinity of “text, history, and structure”³⁰⁵ in resolving the issues before it. Other than a glancing reference to custom, and three citations to *The Federalist*,³⁰⁶ the Court purported to build the case for *Garamendi* on its past decisions. This approach, so-called “common law constitutional interpretation,” is a common feature of foreign affairs law cases. In this final section, we argue that *Garamendi* is a good illustration of its dangers; specifically, that it does not easily restrain judicial decisionmaking, and may be worse on that score than interpretive methods that use text, history, and structure at least as aids to doctrinal modes of interpretation. In particular, it lends itself to use as rhetorical cover for decisions reached on other grounds.

A. The Case for Common Law Constitutional Interpretation

Though earlier scholars noted that a good deal of constitutional law is made by the Supreme Court through the evolution of case law,³⁰⁷ David Strauss recently offered a detailed defense of common law constitutional interpretation, which we summarize here, and take as a standard statement of that mode of interpretation. Strauss argued that common law interpretation is the best *descriptive* theory of contemporary constitutional interpretation as practiced by the

³⁰⁴See, e.g., *United States v. Printz*, 521 U.S. 898 (1997); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1996); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Even *Lopez*, in which the Court synthesized over 100 years of doctrine, invoked “first principles” of constitutional structure—enumerated powers and federalism in particular—to inform that synthesis. In addition, the dormant commerce clause doctrine, which Henry Monaghan characterized as being “constitutional common law,” has been defended throughout its history as a principle consistent with the intentions and expectations of the Framers and ratifiers of the Constitution. E.g., *Camps Newfound/Owatonna v. Harrison*, 520 U.S. 564, 571-72 (1997); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-35 (1949).

³⁰⁵See, e.g., *Printz*, 521 U.S. at 905 (lacking explicit textual provision on point, answer to constitutional question depends upon “historical understanding and practice, in the structure of the Constitution, and in the [Court’s] jurisprudence”); *id.* at 939 (Stevens, J., dissenting) (invoking text, history, and structure in dissent); *Lopez*, 514 U.S. at 585 (Thomas, J., concurring) (supplementing Court’s doctrinal discussion with “a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law”); see also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (relying on text, history, structure, and precedent to strike down state term limits on federal officials).

³⁰⁶See 123 S. Ct. at 2386, 2387.

³⁰⁷See, e.g., Richard H. Fallon, Jr., IMPLEMENTING THE CONSTITUTION (2001); K.N. Lewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

Supreme Court,³⁰⁸ and further that a common law approach is *normatively* superior to modes of interpretation based around the text of the Constitution or the intentions of its framers and ratifiers.³⁰⁹

First, Strauss argued, common law constitutional interpretation permits current generations to escape the “dead hand” of the past by updating and translating textual provisions. The common law method can promote the evolution of the law by encouraging analogical reasoning from precedent that enables the law to evolve, providing a counterweight to troublesome textual provisions or anachronistic traditions that might otherwise cause a constitutional regime to degrade.³¹⁰ Strauss argued that the common law method can ensure that the Constitution is meaningfully “implemented” without holding the current polity hostage to traditions and textual interpretations incommensurate with majoritarian values; and, at the same time, restrain judges who might otherwise simply project their personal values through their judicial decisions. Indeed, he suggested that common law constitutionalism is more democratic than other interpretive methodologies because “the principles developed through [it] are not likely to say out of line for long with views that are widely and durably held in the society.”³¹¹

Second, in Strauss’ account, common law constitutional interpretation constrains judicial power by forcing change to take place within parameters of prior cases. Though the common law method allows courts to implement the substantive guarantees of the document in a way that is of use to both policymakers and judges by translating and updating sometimes vague textual provisions into judicial standards, judges are not free to do as they wish. Rather, common law

³⁰⁸ Strauss, *Common Law Constitutional Interpretation*, supra note 13, at 879 (“The common law approach . . . provides a far better account of our practices” than either textualism or originalism and “best explains . . . American constitutional law today); *id.* at 885 (“[O]ur written constitution has, by now, become part of an evolutionary common law system, and the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law.”) (footnote omitted); *id.* at 887 (“Constitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory [based on text or the intent of the Framers]”.); *id.* at 888 (“The common law approach captures the central features of our practices as a descriptive matter.”); *id.* at 904 (“In practice, constitutional law is, mostly, common law. What matters to most constitutional debates, in and out of courts, is the doctrine the courts have created, not the text.”) (footnote omitted); see David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 *YALE L.J.* 1717, 1726 (2003) (“While arguments based on a careful parsing of the text of the Constitution sometimes play a large role in resolving relatively unimportant issues, the text plays essentially no role in deciding the most controversial constitutional questions . . . which are resolved on the basis of principles derived primarily from the cases.”) [hereinafter Strauss, *Common Law, Common Ground*]; but see *id.* at 1719 (noting that while “[m]uch of American constitutional law consists of precedents that have evolved in a common-law-like way, with a logic of their own” it “would be a mistake to say that American constitutional law consists entirely of precedents and is independent of the text and the Framers”; both “continue to play a significant role”).

³⁰⁹ Strauss, *Common Law Constitutional Interpretation*, supra note 13, at 888 (“[T]he common law provides the best model for both understanding and justifying how we interpret the Constitution. The common law approach . . . justifies our current practices, in reflective equilibrium, to anyone who considers our current practices to be generally acceptable”); see also Strauss, *Common Law, Common Ground*, supra note __, at 1720 (noting that precedent can provide a common ground for discussion of issues among those with widely varying belief systems, especially if rooted in a text commonly regarded as authoritative).

³¹⁰ See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 79-81 (1996).

³¹¹ Strauss, *Common Law Constitutional Interpretation*, supra note 13, at 929.

constitutional interpretation restrains judges by forcing them to take account of prior cases interpreting those provisions and to justify present decisions in terms of those decisions rendered in the past.³¹² Strauss in fact argued that the common law approach restrains judges better than either textualism or originalism, the principal competing interpretive paradigms: “The text of the Due Process and Cruel and Unusual Punishment Clauses, taken alone without reference to the precedents interpreting them, could justify a thorough overhaul of the criminal justice system.”³¹³

Strauss acknowledged two potential objections: that common law constitutional interpretation does not sufficiently restrain judges; and that “a theory of common law constitutional interpretation overlooks the crucial difference that common law judges can be overruled by the legislature but judges interpreting a constitution ordinarily cannot.”³¹⁴ On the first point, Strauss responded that when a judge works within the constraints of existing precedent (as opposed to feeling free to ignore *stare decisis* and reason from first principles) the judge “is significantly limited in what she can do” whereas “a judge who acknowledges only the text of the Constitution as a limit can . . . go to town” because of textual indeterminacy. The text functions as a limit, he writes, only “if one assumes a background of highly developed precedent.” While conceding that “precedents can be treated disingenuously,” he pointed out that “no system is immune from abuse” and offered that fear of criticism can remove the temptation of judges to overreach when applying precedent.³¹⁵

As for fears about the insufficient democratic checks on common law constitutional interpretation, Strauss argued that the “principles developed through the common law method”—examples of which he listed—“are not likely to stay out of line for long with views that are widely and durably held in the society,” and the Court’s decisions “now rest on a broad democratic consensus,” despite being controversial at the time initial decisions were handed down.³¹⁶ As a result, he argued, the common law method actually suffers from less of a democracy-gap than does textualism or intentionalism, since the latter methods subject present generations to the past’s dreaded dead hand.³¹⁷

Strauss’ claims, and the idea of constitutional common law more broadly, may appear to have particular resonance in foreign affairs. Many commentators have observed that foreign affairs adjudication frequently owes little to text, structure and history, and Strauss himself used foreign affairs doctrines to illustrate his points. Moreover, *Garamendi* may seem to continue that pattern, being (as we have argued) largely disconnected from textual, structural and historical considerations.

In the ensuing sections we assess the idea of common law constitutionalism through the prism of *Garamendi*. First, we argue that though foreign affairs law often gives the appearance

³¹² Strauss, *Common Law, Common Ground*, *supra* note 308, at 1724 (“In a common law system, precedents from earlier eras bind to a degree.”).

³¹³ Strauss, *Common Law Constitutional Interpretation*, *supra* note 13, at 926-27.

³¹⁴ *Id.* at 925.

³¹⁵ *Id.* at 926.

³¹⁶ *Id.* at 929-930.

³¹⁷ *Id.* at 928.

of having developed largely along the common law constitutional interpretation model, and that *Garamendi* continued that appearance, it is doubtful that it truly conforms to a “common law constitutional interpretation” methodology. It is not the case that *Garamendi* proceeded from reasoned elaboration of prior decisions. Whether Strauss would consider it an exemplar of his method is unclear. The lack of a suitable definition that would cover foreign affairs law cases, moreover, calls into question the sufficiency of Strauss’s responses to the two objections described above and illustrates the peril, not the promise, of adopting Strauss’s method as the primary mode of constitutional decisionmaking.

B. Is Foreign Affairs Law “Constitutional Common Law”?

One might suppose that foreign affairs law has developed in the Supreme Court largely through what Philip Bobbitt called the “doctrinal modality.” As Bobbitt noted, this modality not only involves the elaboration of *judicial* doctrine, but also the invocation of what might be termed “custom and usage” by other branches to support particular judicial decisions.³¹⁸ Two examples of “principles developed essentially by common law methods” that Strauss mentioned involve foreign affairs law: broad federal power and “expansive presidential power, particularly in foreign affairs” Such principles, he claimed, were neither “rooted in original intent” nor have “particularly strong textual roots” but rather evolved as “doctrine [developed] in response to the perceived . . . needs of society.” Though once “highly controversial,” Strauss maintained that these doctrinal principles “now rest on a broad democratic consensus.”³¹⁹

A survey of the canonical foreign affairs law cases bears out at least some of Strauss’s observations. Cases such as *Belmont*, *Pink*, *Zschernig*, and *Dames & Moore*, along with the famous concurrences in *Youngstown*, though decided by different courts over a half-century, are all common law opinions — or at least none is rooted in original intent nor anchored to particularly strong textual provisions. None of them contained lengthy forays into original intent to support confident statements of what the Framers intended vis-à-vis state participation in foreign affairs or about who plays the lead role in the formation of foreign policy. The Court barely mentioned, much less closely parsed constitutional text or structure. Justice Jackson’s opinion in *Youngstown Sheet & Tube* famously despaired of resolving disputes regarding presidential power by relying on what the text

³¹⁸ PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 39-58 (1982) (discussing the doctrinal modality). See, e.g., Brannon P. Denning & Glenn H. Reynolds, *Constitutional “Incidents”:* *Interpretation in Real Time*, 70 TENN. L. REV. 281 (2003) (suggesting that close study of the acts of non-judicial branch participants in government can furnish data for ascertaining the state of particular areas of constitutional law in which the Supreme Court has not or will not issue authoritative decisions).

³¹⁹ Strauss, *Common Law Constitutional Interpretation*, *supra* note 13, at 929-930. We are not sure what Strauss means by “expansive presidential power . . . in foreign affairs.” At least one of us would raise substantial objections to the claim that a fair portion of presidential foreign affairs power cannot be located in the text of the Constitution. See Prakash & Ramsey, *supra* note 9. By the same token, we are not sure to what extent presidential foreign affairs power – if read broadly to include matters such as independent war power – is either the product of judicial doctrine or rests upon substantial consensus.

says or what the Framers intended,³²⁰ choosing to defer to practice and what Michael Reisman has called the “operational code” by which Presidents exercise power.³²¹

To note a few additional examples, Justice Douglas’s opinion in *Zschernig* did not cite any history or constitutional text, or make a careful structural argument; it relied principally on two cases, *Clark v. Allen* and *Hines v. Davidowitz* – one of which it distinguished.³²² *Belmont*, which established the proposition that the President alone may enter into binding executive agreements with preemptive effects, also had little to say about text, structure and history, instead relying on prior decisions in *Curtiss-Wright* and *B. Altman & Co. v. United States*.³²³ In what was, before *Garamendi*, the Court’s last word on presidential power to settle claims, *Dames & Moore v. Regan*, the Court relied almost exclusively on *Curtiss-Wright* and on the analytical framework developed by Justice Jackson in his *Youngstown* opinion.³²⁴ In addition, the Court cited the “longstanding practice of settling claims by executive agreement without the advice and consent of the Senate.”³²⁵ There was only the barest nod to the intent of the Framers or the text of the Constitution, but a frank acknowledgment of the tension between “executive authority in a world that presents each day some new challenge with which [the president] must deal and the Constitution . . . which no one disputes embodies some sort of system of checks and balances.”³²⁶

Even *Curtiss-Wright*, the *ur-text* for foreign affairs nationalists and presidentialists, for all of its dubious appeals to history, derived primarily from Justice Sutherland’s distinction

³²⁰ *Youngstown*, 343 U.S. at 634-35 (Jackson, J., concurring).

A judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, 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. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Id.

³²¹ *Id.* at 635 (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”). See W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT’L L. 777 (1989) (suggesting that extra-constitutional factors have influenced the allocation of war-making powers more than the original constitutional scheme). But see Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1521 (2002) (outlining a theory of war powers based on the original meaning of the Constitution’s text and roughly corresponding to the modern allocation).

³²² 389 U.S. at 432 (citing *Hines*); *id.* at 432-33 (distinguishing *Clark v. Allen*).

³²³ *Belmont*, 301 U.S. at 331; *B. Altman & Co. v. United States*, 224 U.S. 583 (1912).

³²⁴ 453 U.S. 654, 661-62 (1982).

³²⁵ *Id.* at 679 n.8 (footnote omitted).

³²⁶ *Id.* at 659-60, 662. The Court tried to leaven the tension between the two in *Dames & Moore* by stressing the limited nature of its decision—language ignored in *Garamendi*. See *id.* at 660 (emphasizing the “necessity to rest the decision on the narrowest possible ground capable of deciding the case”); *id.* at 661 (“We attempt to lay down no general ‘guidelines’ covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to the decision of the case.”).

between “internal” and “external” governmental power, which was necessary to reconcile the Court’s limitation on congressional delegation of power to the President to serve as a domestic economic caretaker, and the reality that the President needed latitude to conduct foreign policy in its name since the United States had emerged as an important actor on the world scene.³²⁷

To be sure, none of these opinions relied much upon the Constitution’s text, structure and history. We are less confident, however, that they are properly classified as constitutional common law. By defining common law constitutional interpretation largely by what it does *not* rely on – the Constitution’s text or the intention of its framers – Strauss lacked a positive account of what it should be, other than to say that future principles are derived, in some part, from past cases. His primary article on the subject repeatedly referred to the “common law tradition” without fully defining it,³²⁸ other than to say that its components are “traditionalism” and “innovation,” as well as “conventionalism.”³²⁹ A more recent article contained a few more hints – a common law system has “elaborate doctrinal structure” – but again devoted more space to justifying it in either descriptive or normative terms.³³⁰ For Strauss’s theory to have any purchase, as a normative matter, he would seem to need some account of the qualities of common law constitutional interpretation, lest its open outputs be seen merely result-oriented decisions masked by rhetorical adherence to past decisions.³³¹

Elaborating a theory of common law decisionmaking would take us far afield indeed. But its idealized form – “a doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation”³³² – seems absent in many of the cases described above. The Court’s foreign affairs cases simply do not involve close readings of prior cases and applications of the existing rules and doctrines to new facts. Rather, the Court’s citation to prior cases seems more rhetorical than principled. For example, *Zschernig* relied principally on *Hines*, and distinguished *Clark v. Allen*. But the Court cited *Hines* for the proposition that state law conflicting with federal “foreign relations” must give way.³³³ The problem, of course,

³²⁷ 299 U.S. at 316-20 (asserting that states never had powers to conduct foreign relations; that such powers passed directly from Great Britain to the new United States; that those powers were not dependent upon enumeration in the Constitution; and that the President was the preeminent actor in foreign relations). For criticism of Sutherland’s history, see CHARLES A. LOFGREN, “GOVERNMENT FROM REFLECTION AND CHOICE”: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 167-205 (1986); Ramsey, *Myth*, *supra* note 10, at 395-437. See also G. Edward White, *The Transformation of the Constitutional Regime of Foreign Affairs*, 85 VA. L. REV. 1 (1999) (describing the emergence of a new constitutional regime in foreign affairs centered around *Curtiss-Wright*).

³²⁸ Strauss, *Common Law Constitutional Interpretation*, *supra* note 13, *passim*.

³²⁹ *Id.* at 891-97, 906-13. Strauss defines “conventionalism” as “a generalization of the notion that it is more important that some things be settled than they be settled right.” *Id.* at 907.

³³⁰ Strauss, *Common Law, Common Ground*, *supra* note 308, at 1729. See, e.g., *id.* (describing the common law approach as “central to many of the most important areas of constitutional law”); *id.* at 1730 (arguing that “[t]he practice of following precedent can be justified in fully functional terms” and is “unavoidable”).

³³¹ BOBBITT, *supra* note 318, at 57 (“Doctrinal ideology requires that decisions be based on premises of general applicability, otherwise they would be *ad hoc* or ‘legislative.’ At the same time the doctrinal method requires that adjudications be neutral, thereby claiming the allegiance of litigants through a tacit arrangement of reciprocity. In short, doctrinal argument is the ideology of the common law tradition of deciding appeals.”).

³³² EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949) (1972 ed.).

³³³ *Id.* at 441.

was that in *Hines*, Congress had acted; *Hines* was a statutory preemption case, as its opinion made clear. *Clark v. Allen*, where Congress had not acted, was much more closely on point. Nevertheless, Douglas seized upon statements in *Hines* about federal primacy in foreign affairs cases, and ignored other language qualifying those statements.³³⁴

Similarly, neither of *Belmont*'s principal authorities had much to do with the question that case faced. Though the agreement in *Belmont* was not a treaty, the Court cited *Curtiss-Wright* for the proposition that “the same rule [preempting conflicting state laws] would result in the case of all international compacts and agreements” because “complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.”³³⁵ Whether or not that was true, Congress had endorsed the President's action in *Curtiss-Wright*, and the case had nothing to do with executive agreements or preemption of state law. That was also true of *Altman*, *Belmont*'s other principal citation, which involved a congressional-executive agreement.³³⁶ (As in *Garamendi*, it is interesting to see how discussions of *federal* power in *Belmont* are conflated with the preemptive effects of *presidential* power, unaided by congressional authorization, for which easily distinguished cases are cited.)³³⁷ It is hard to believe that the Court's decisions in these cases arose from guidance found in the previous opinions.

Instead, many of the cases seem less driven by doctrine than by prudence, with which doctrinal arguments are often confused.³³⁸ Prudentialists believe that circumstances can dictate ignoring “even the plainest constitutional limitations”: prudential judges have through their decisions, Bobbitt argues, converted this belief into a “legitimate, legal argument, fit[] it into opinions, and use[d] it as the purpose for doctrines”³³⁹ By invoking—or failing to invoke—precedent (even precedent of dubious relevance) as a shortcut, the Court can avoid many of the constitutional questions that we have raised here: whether there is a textual, structural, or historical basis for a rule of constitutional preemption like that established in *Zschernig*, for example; or whether making presidential executive orders with preemptive effects is consistent either with the language of Article VI or with long-held notions of separation of powers. But it seems disingenuous to think that precedent *constrained* these decisions in any way.

³³⁴ *Hines*, 350 U.S. at 497 (“the decision in this case does not affect the right of States to enforce their sedition laws at times when the Federal government has not occupied the field . . .”).

³³⁵ *Belmont*, 301 U.S. at 331.

³³⁶ *B. Altman* simply concluded that a congressionally-authorized executive agreement was a “treaty” for purposes of a statute providing for direct appeal of certain cases to the Supreme Court. *B. Altman & Co.*, 224 U.S. at 597 (“If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the circuit court of appeals act, and, where its construction is directly involved . . . there is a right of review by direct appeal to this court.”). No party in the case seemed to be contesting the constitutionality of the president's actions.

³³⁷ See Ramsey, *Executive Agreements*, *supra* note 107, at 145-154.

³³⁸ BOBBITT, *supra* note 318, at 60. Bobbitt defines a prudential argument as a “constitutional argument which is actuated by the political and economic circumstances surrounding the decision.” *Id.* at 61.

³³⁹ *Id.*

C. Foreign Affairs Law and the Pitfalls of Common Law Constitutional Interpretation

The role that prudence – as opposed to the pure analogical reasoning at the heart of a common law model – often plays in foreign affairs decisions, renders us doubtful of the safeguards that Strauss finds inherent in his theory. *Garamendi* illustrates the dangers of using a loosely-denominated common law method to resolve constitutional questions, unaided by text, history, and structure.

All of the cases discussed above are cited in *Garamendi* for their various propositions—that Presidents have inherent powers to settle claims, that settlements can be made through executive agreement, that those agreements preempt contrary state law. The Court seemed uninterested in the textual, structural or historical arguments that might shed light on the questions the case presented. *Garamendi* thus is, in some sense, the apotheosis of the common law method in foreign affairs law as described by Strauss. Yet, as an example of common law constitutional interpretation, *Garamendi* raises questions about this method, and especially about Strauss's claims that common law constitutional interpretation may restrain judges better than text- or intent-based methods. As in prior foreign affairs cases, the Court was not constrained by, or indeed even guided by, its precedents. In citing prior cases, the *Garamendi* Court elided or ignored language from those opinions limiting their scope, and failed to meaningfully discuss differences in fact situations that strongly suggested the earlier cases' inapplicability to the Court's discussion of the HVIRA; all this suggests that something else was driving the Court's decision.

Consider the following examples:

- (A) Though *Hines v. Davidowitz* expressly denied any intention to address the constitutionality of state laws in the absence of congressional action,³⁴⁰ Justice Douglas's *Zschernig* opinion cited it for precisely that proposition: that even absent congressional action, federal supremacy in foreign affairs could constitutionally preempt state law.³⁴¹ *Garamendi* then recharacterized *Zschernig* as laying down rules of preemption relevant to the question whether the President's policy regarding Holocaust litigation preempted HVIRA, even though in *Zschernig* there was no conflicting executive branch policy. *Garamendi* then cited and relied on the parallel with *Crosby*, even though *Crosby*, like *Hines*, was a statutory preemption case.
- (B) *Garamendi* failed to distinguish *Barclays* persuasively, suggesting that the Court's decision *not* to apply relevant precedent is as questionable as its choice of the cases it found to be controlling. As discussed, *Barclays* was the only case prior to *Garamendi* where the Court had considered a claim of preemptive effect of an executive policy standing alone (and had rejected it).³⁴²

³⁴⁰ 312 U.S. at 62-64.

³⁴¹ 389 U.S. at 432; *see supra* Part III.B.

³⁴² *See supra* Part I.B.

- (C) In *Dames & Moore v. Regan*, the Court stressed the limited reach of its decision, and disclaimed an intent to establish the broad proposition that the President can settle its citizens' claims by executive agreement. Garamendi did not quote, or even acknowledge, that limiting language, while citing *Dames & Moore* as one of a number of cases allegedly standing for the proposition that "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, this power having been exercised since the early years of the Republic."³⁴³
- (D) *Garamendi* cited *Belmont* and *Pink* as establishing the preemptive effects of executive agreements. The Court passed over the fact that the executive agreement in those cases expressed preemptive intent while the Foundation Agreement—which in any event was addressed solely to the issue of litigation of Holocaust-era claims—expressly *disclaimed* any such preemptive effects.³⁴⁴
- (E) In *Youngstown* and *Dames & Moore*, the Court focused upon finding express or even implied statutory authority for presidential actions with domestic effects. The *Garamendi* Court made no effort to find congressional approval of presidential actions, yet cited both cases as authorizing the President's actions.³⁴⁵

While Strauss' work conceded that precedents can be treated disingenuously, he apparently thought that would be the unusual case, without explaining why. If one takes seriously the second part of his argument—that common law constitutional interpretation produces more "democratic" results—it suggests a built-in incentive to continuously expand precedent to authorize more action, to "gradual[ly] innovat[e] in the hope of improvement" through "sharp, critical challenges" to the past while piously claiming only to apply principles developed in the past.³⁴⁶

It is not clear that fear of criticism is much of a deterrent to over-reading prior cases, at least by Supreme Court justices.³⁴⁷ Academic criticism might not be particularly effective for the simple reason that unless someone takes the trouble to read the cases cited by the Court, the factual differentiations, limiting language, and qualifications are not apparent from the simple citation offered in cases like *Garamendi*. Common law constitutional interpretation is gradual and evolutionary, sometimes—like the frog in water scalded to death through imperceptible, but cumulative increases in water temperature—perniciously so. It seems insufficient in evaluating it to respond to the elastic nature of precedent by noting that any system can be abused. That is true,

³⁴³ 123 S. Ct. at 2386-87.

³⁴⁴ See *supra* Paet III.B.

³⁴⁵ See 123 S. Ct. at 2386 (citing *Youngstown* for the proposition that President has large responsibility for conduct of external affairs and that President has some independent authority to act in the absence of congressional action); 2386-87 (citing *Dames & Moore* for the proposition that President can make executive agreements, including agreements to settle claims, without congressional authority).

³⁴⁶ Strauss, *Common Law Constitutional Interpretation*, *supra* note 13, at 935.

³⁴⁷ Lower courts that disingenuously treat controlling precedent are subject to being overruled.

but claims about what the Court's cases authorize can lack transparency and be difficult for casual readers (even those with a professional interest) to verify. This means that claims made by courts employing common law constitutional interpretation may be (at least) no easier to verify than those made by a Court regarding what the text of the Constitution say or requires, or what inferences can be made from its structure, or even claims about what the Framers and ratifiers of the Constitution intended.

Moreover, common law constitutional interpretation sits uneasily beside a written Constitution whose provisions were intended to limit power, and that furnishes an explicit method for its amendment should those provisions prove outmoded or unworkable. Interpretation and doctrinal evolution are an inevitable part of what Richard Fallon calls constitutional "implementation,"³⁴⁸ but unless one accepts a particularly strong version of judicial supremacy essentially equating the Constitution with what the Supreme Court has said about it,³⁴⁹ Article VI makes the document—not the Court's gloss on it—supreme.³⁵⁰ To the extent the Court claims legitimacy from the document, it seems difficult to embrace a methodology in which the document itself is largely absent.

Strauss's further claim, that his common law constitutional interpretation is more "democratic" than other methodologies because the principles now enshrined in the Court's "common law Constitution" have attained broad popular support, could be seen as a backstop to the common law method-as-restraint argument. Even if the common law method does not effectively restrain judges, he seems to say, it does not matter because the principles adopted through common law constitutional interpretation either reflect or soon will reflect the dominant public opinion on a particular issue. This, too, seems a weak defense against objections that it either provides no restraint or that common law development is a bad model for constitutional decisionmaking because of the lack of a legislative override, other than through constitutional amendment.

First, Strauss's argument presumes the ability accurately to measure popular approval or disapproval of particular lines of doctrine. Perhaps this is easily done when it comes to high-profile issues like abortion, free speech, or sex discrimination. Some of the other principles that have emerged through the common law method that Strauss cites -- expansion of presidential power, for example -- no doubt command considerably less public attention, making it more difficult to gauge accurately whether the public at large approves or disapproves of particular doctrinal evolutions.³⁵¹ We suggest that many of the issues discussed in this article—though of profound importance to the way the government conducts foreign affairs—would barely register even with

³⁴⁸ See FALLON, IMPLEMENTING THE CONSTITUTION, *supra* note 307.

³⁴⁹ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (declaring "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

³⁵⁰ For this reason some constitutional scholars have suggested reliance on *stare decisis* is itself unconstitutional. See, e.g., Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

³⁵¹ That is particularly true when one recognizes that the most visible manifestation of presidential power in foreign affairs, presidential war power, has not arisen principally from judicial doctrine.

constitutional law specialists, much less with the undifferentiated public on which Strauss depends to legitimate the Court's common law constitutional decisions.³⁵²

Moreover, there is a chicken-and-egg problem with Strauss's defense. Are the components of our common law Constitution now accepted without question because people actually approve of the results, or do people register approval of the results because those results have received the Court's imprimatur? In 1960, Charles Black wrote of the "legitimizing function" of judicial review, which he defined as "an affirmative function vital to the government of limited powers—the function of keeping up a satisfactorily high public feeling that the government has obeyed the law of its own Constitution, and stands read to obey it as it may be declared by a tribunal of independence."³⁵³ Black argued that the Court's exercise of judicial review to *uphold* governmental action—to say that it complied with the requirements of the Constitution—was as important as the Court's checking function, exercised when the Court struck down legislation.³⁵⁴

Might the public "approval" of Court decisions Strauss cites instead signal mere acquiescence in a decision rendered by the Court or mere acknowledgment of the Court's primacy in "saying what the law is"? It is difficult to imagine that had *Belmont* or *Zschernig* come out the other way, either would have engendered a constitutional crisis. Likewise, to say that presidential power to settle claims through executive agreements without congressional approval has attained legitimacy through democratic consensus likely means little more than it is accepted that the Court has said the president has that power.

Finally, the focus on democratic consensus as a litmus test for the legitimacy of constitutional principles is in tension with written constraints meant to limit the even ability of democratically-elected representatives to act. Strauss's argument seems willing to assume that improvement and progression of the law will be the order of the day, and, at least implicitly, questions the utility or desirability of written limitations as checks on the exercise of power.

* * *

In sum, we simply deny that Strauss' model is correct as a descriptive matter, at least as applied to foreign affairs.³⁵⁵ *Garamendi* is powerful evidence that the Court's prior foreign affairs decisions do not constrain it, or indeed even meaningfully inform its subsequent decisions. In this respect the *Garamendi* Court followed the pattern of previous foreign affairs decisions, which also

³⁵² Indeed, *Garamendi* barely made the papers, and then most stories stressed only the fact that the Court had struck down the state law as an interference with the federal government's ability to conduct foreign policy. See *supra* note 3 and accompanying text. The larger implications of the Court's decision were scarcely mentioned even in passing, even by the *Garamendi* dissenters. We suspect that a similar lack of attention characterized, for example, *Belmont*, *Curtiss-Wright*, *Hines*, and *Zschernig*.

³⁵³ CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 86 (1960).

³⁵⁴ See *id.* at 56-86; see also Alexander & Schauer, *supra* note 349 (arguing that the necessity of settling controversies militates in favor of judicial supremacy in constitutional interpretation).

³⁵⁵ We do not deny that it may be descriptive in other areas, such as the dormant commerce clause doctrine. See Monaghan, *supra* note 307 (identifying the dormant commerce clause doctrine as an example of constitutional common law).

owed little to their predecessors. The common law constitutionalism that Strauss and others think they see in foreign affairs law is the Court's rhetorical cover, not its basis for decision. That being so, neither of the normative merits Strauss claims for his constitutionalism are well-founded. The common law method, as practiced by the Court, is not a constraint, nor does it provide doctrinal stability. And his appeal to democracy seems misplaced, both because the *demos* likely are not paying close attention to structural foreign affairs cases, and because, in any event, the entire point of structural constitutional provisions is to protect the framework of our institutions – particularly separation of powers and federalism – from the impulses of today's majority.

As a result, the common law method should be used with caution in constitutional law. The benefits of the method—it can provide points of departure for analogical reasoning, it can cabin disagreement about first principles, and it can provide stability and predictability without stagnation—should not render us insensitive to its problems. First, precedent can be manipulated so past cases become authority for future action despite compelling differences in facts or despite express disclaimers contained in earlier cases. Second, this manipulation can occur at a low level of visibility. Third, the relatively narrow focus on particular cases can obscure future implications. Fourth, the court-centered focus on doctrine can diminish the status of the Constitution as the supreme law of the land, elevating courts above the document from which they draw their power. Finally, defending the common law method by reference to popular acceptance of the principles it has produced begs the question whether popular opinion would have coalesced the same way around contrary decisions.

Not only have we argued that Court's cases do not add up to the result reached in *Garamendi*, we are also troubled by the lack of an attempt, even in passing, to harmonize the results in *Garamendi* with the text, structure, and history of the Constitution. Such a focus might sensitize the Court to the substantial structural implications of its decision. At least such a discussion might provide some needed support to decisions, like *Zschernig*, whose foundations have always been open to question. This is not to say that strong arguments could not be made supporting decisions reached by the Court, but that on important constitutional questions like those presented in *Zschernig*, to close one's eyes to text and structure, is (at least) as much as danger to our constitutional enterprise as would a constant resort to first principles. Especially where the important constitutional questions are unlikely to command popular attention; where the costs of judicial error have profound implications (as they do in foreign affairs cases); where the cases on which the Court sought to construct its decision have been questioned; and where material exists (as it does now) to guide the Court, it has a responsibility to bolster its bland citations of prior cases with textual, structural, and historical analysis. Constitutional common law can all too often provide a rhetorical shield to avoid such an undertaking.

VII. Conclusion: Adjudication by Intuition?

The foregoing discussion suggests that the so-called constitutional common law method, at least in the idealized form that David Strauss and others present it, simply does not

describe what is actually happening at the Supreme Court in many cases. *Garamendi* is not an example of analogical reasoning from prior decisions, nor indeed does it have much relationship with prior decisions at all. To be sure, the *lower court* opinions in the case followed the outlines suggested by Strauss: they took the Court's most relevant precedents – principally *Zschernig*, *Japan Line* and *Barclays* – and attempted a synthesis in light of the new facts of the case and the way those cases had been applied in the past. But as we have argued, that is not what the Supreme Court did. Instead, it essentially ignored *Barclays* (and, for that matter, *Japan Line*), gave an odd and inaccurate recharacterization of the concurring opinion in *Zschernig* (ignoring that case's facts and majority opinion altogether), and created a wholly new idea of executive preemption (a new constitutional rule so novel that it was not even squarely argued in the lower courts). To the extent the Court's opinion relied on prior cases, its justifications seemed decidedly *post-hoc*.

It also seems unlikely, though, that the Court was deliberately pursuing a pro-executive foreign affairs agenda, or indeed that it was proceeding with much attention to the structural implications of its decision. The Court's discussion of structural constitutional issues is so thin that one suspects the Court did not consider the broader picture with much focus. Moreover, all of the Justices in the majority had either joined or substantially agreed with the central holding of *Barclays*, which took a deliberately anti-executive line.³⁵⁶ It is not just that the majority ignored a prior Court's precedent; it ignored one of its *own* precedents. So, although the Court did not *articulate* a distinction with *Barclays*, there must have been one. Therefore (although the opinion does not contain limiting language) we doubt that the Court actually saw itself engaged in the sweeping extension of executive power which we have attributed to its opinion. Instead, we believe that the case was driven not by a broader structural vision of the Constitution (nor by incremental reasoning from prior cases) but by intuition about the facts of this particular case.

Although any suggestions about unstated judicial intuitions are necessarily speculative, we can imagine at least two ways of looking at *Garamendi* that made it an intuitively attractive case in which to find against the state. One possibility is that the Court saw the case as driven by the particular context of executive agreements settling international claims. Of course, there were material technical barriers to making this the legal basis of the case: the agreements did not purport to be preemptive, the agreements did not cover all the plaintiffs, prior law had been cautious about the permissible scope of executive agreements in general, and the Constitution does not establish international settlement as a plenary and preemptive presidential power. Nonetheless, all three of the Court's prior cases upholding executive agreements had been settlements; no executive settlement had ever been overturned for any reason, and executive settlements had a long and essentially uncontested history.³⁵⁷ One might surely believe that, whatever the contours of executive lawmaking in general, prior law had embraced lawmaking through *settlement* agreements as a presidential power.

³⁵⁶ *Barclays*, 512 U.S. at 301 (majority opinion joined by Rehnquist, C.J., and Kennedy, Souter and Breyer, JJ.); *id.* at 334 (dissenting opinion of O'Connor, J.) (agreeing with the majority that preemption should not turn upon "statements made and briefs filed by the executive branch").

³⁵⁷ See *supra* part IV.E; *Dames & Moore*, 453 U.S. at 678-79.

Further, although the *Garamendi* case challenged only the HVIRA, which did not seem in great tension with the settlement, it was difficult to ignore the fact that the HVIRA was part of set of laws that explicitly contemplated resolving Holocaust-era insurance claims by litigation in California.³⁵⁸ The Court did not ignore it, stating that California had “provid[ed] sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail.”³⁵⁹ As a legal matter, that sentence was almost wholly misconceived: the HVIRA did not provide sanctions for non-payment (only for non-disclosure); at most, the HVIRA supplemented the cause of action, not the other way around, but in fact the two were almost entirely independent, since disclosure was needed whether the remedy came through ICHEIC or through litigation; and most importantly the cause of action statute was not before the Court. But this reference showed that the Court was thinking of California’s actions more broadly, which were in substantial tension with the settlement.

If one views negotiation and implementation of international settlements as a strongly presidential powers (similar to, say, recognition), then one would likely be suspicious of state attempts to upset a settlement. In particular, one would likely be comfortable with a “field preemption” analysis, derived from the rules of preemptive effects of statutes, that would clear the states out of the way altogether, without lingering over technicalities like the fact that the agreements did not cover all of the plaintiffs or that the agreements had little to say about disclosure issues. This would also distinguish *Garamendi* from *Barclays* (and *Breard*), which were not about settlements, or anything else quintessentially executive. And it would explain the Court’s uninterest in broader structural concerns, because a rule applying only to settlements would not raise such concerns.

A second possibility requires further explanation of an aspect of the case that we have so far literally relegated to a footnote.³⁶⁰ In addition to their foreign affairs and dormant commerce clause challenges, the insurers attacked the HVIRA on due process grounds. In main, this part of the case centered upon three particularly overreaching aspects of the California law that made it seem especially unfair and burdensome upon at least some of the insurers.

First, the HVIRA required the disclosure of *all* insurance policies issued in Europe between 1920 and 1945³⁶¹ – surely a staggering number. It was not limited to policies of Holocaust victims, or of persons who were believed to be or claimed to be Holocaust victims; nor was it limited to persons residing in California, or even persons residing in the United States. True, the state had its reasons. As the state pointed out, it would be hard to compile a list limited to victims or based on current residency. Moreover, the insurers’ good faith was sufficiently suspect that the state did not want to leave any discretion in deciding which names to release.³⁶² At the same time, though, this meant that only a small fraction of the names released would have any relation to the Holocaust policies. An even smaller number would have any relation to the United States, or to California.

³⁵⁸ See *supra* part I.A.

³⁵⁹ *Garamendi*, 123 S. Ct. at 2391.

³⁶⁰ Note 124 *supra*.

³⁶¹ Cal. Ins. Code sec. 13804(a)

³⁶² See Appellant’s Opening Brief, *Gerling Global Reinsurance Co. v. Low*, 240 F.3d 739 (9th Cir. 2001), at 6, n.3.

Second, the HVIRA required disclosure from entities that were often only very distant corporate relatives of the companies that did business in California. Many of the companies regulated by the state had no relation to the Holocaust other than that at some time long after it occurred, the California-licensed company had been acquired by a company that issued Holocaust-era policies. The HVIRA thus would penalize a company for the failures of a distant corporate relative over which it likely had little control (and perhaps little relationship aside from distant common ownership). This was not true of all the insurers affected by the HVIRA, but it was true of enough of them that the point could be made quite sharply.³⁶³

Third, there was some material dispute whether the HVIRA's required disclosures violated German or other European privacy laws. But in any event, the state took the position (confirmed by the plain language of the statute) that illegality under foreign law was not an excuse for noncompliance with the HVIRA.³⁶⁴ And surely there were some legitimate privacy concerns: most of the people whose policies were covered by the HVIRA were not Holocaust victims, and so did not benefit from publication, yet they might have good reason to prefer that, other things being equal, their insurance history not be broadcast to the whole world. (And it would be the whole world, since the HVIRA contemplated putting the information on an Internet-accessible database, not merely using it for the internal regulatory activities of the insurance commissioner.)³⁶⁵

The combination of these ill-attributes meant that in some cases a U.S. company doing business in California might be punished because a distant corporate relative in Europe, over which it had no realistic control, declined to supply it with an enormous volume of information (most of it irrelevant to the state's interest), perhaps in violation of European law and likely in violation of the interests of many of its clients. It was not hard to conclude that California had gone too far in pursuit of an entirely legitimate goal.

The insurers made various arguments, mostly founded on the due process clause, that the state's overreaching in these and other respects rendered the HVIRA unconstitutional. But due process jurisprudence was not hospitable to their claims once one encountered the details. For example, no clear rule requires that illegality under foreign law excuse non-compliance with local regulatory requirements, and the impact upon state regulatory functions of a contrary rule as a general matter would be daunting.³⁶⁶ Further, although the HVIRA's disclosure requirements seemed out of proportion to the state's interest, the due process clause's extraordinarily low standard for validating economic regulation meant that the state had to show only the most minimal connection between its law and its interest (which it surely could).³⁶⁷ And finally, while penalizing one member of a corporate family for non-disclosure by another might seem unfair in this case, in

³⁶³ Cal. Ins. Code Sec. 13802(b) (defining "related company"); see Brief of Gerling Appellees, *Gerling Global Reinsurance Co. v. Low*, 296 F.3d 832 (9th Cir. 2002), at 21-51 (making these points).

³⁶⁴ See *Gerling Global Reinsurance Corp. v. Low*, 186 F.Supp. 2d 1099, 1113 (E.D. Cal. 2001).

³⁶⁵ See Cal. Ins. Code sec. 13803. On the privacy point see Brief of the Gerling Appellees, at 35-37.

³⁶⁶ See *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987); *In re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982).

³⁶⁷ *Gerling*, 296 F.3d at 845-49.

the ordinary case it is a common enough practice, and like the asserted excuse for foreign illegality, a contrary rule stated broadly would cripple state regulatory functions.

There was a further serious drawback to founding a decision on the due process clause: such a decision would be hard to limit. Most of the due process arguments had little to do with foreign affairs, and holding for the insurers on this ground would suggest a whole charter of potential rights available to all corporations against all state regulatory agencies. Moreover, these rights would potentially limit the federal government as well (assuming the due process clauses of the fifth and fourteenth amendments are parallel in this regard).

So while the due process clause seemed an unattractive ground for decision, the fact remained that the state regulation, at least in some visions of the case, bordered on the unreasonable. Of course, in the usual case – especially in the usual economic regulatory case – courts are reluctant to strike down laws simply because they seem burdensome, or because the costs seem out of proportion to the benefits. But *Garamendi* was not the usual case, because it *also* had the foreign affairs dimension. Thus the state law seemed uniquely unreasonable, because it overreached in terms of its treatment of the insurers *and* it overreached by involving the state in matters of international concern.

In sum, we suggest that what may have moved the Court was the combination of an *unreasonable* (in its view) state law combined with adverse foreign affairs affects. This would explain why the Court said that the HVIRA was not really within the traditional regulatory area of the state. In the abstract, it seems hard to say that the conditions under which a company (especially an insurance company) can do business in a state lie anywhere but at the very center of the traditional regulatory powers of the state. What was untraditional about the HVIRA was not insurance regulation in general, nor even the HVIRA's objective of protecting policyholders, but the peculiar and overreaching scope of the statute in particular. This would also explain the Court's thinking that *Barclays* and *Breard* were different from *Garamendi* – in both cases, the Court likely thought that the state's activities were more traditional and justifiable.

We do not mean to endorse the Court's intuition in these respects, nor to endorse this method of judicial decisionmaking. We do think, however, that it goes further in explaining what actually happened in *Garamendi* than does either a theory of constitutional adjudication based on the trinity of text, structure and history, or a theory of common law constitutionalism.

Nor do we mean to suggest that *Garamendi* is, after all, a narrow opinion. We are persuaded that the Court *thought* it was issuing a narrow opinion, and that *this Court* likely would not give it wide application to, say, reverse the outcome in *Breard*. The danger is that while events come and go, and circumstances giving rise to intuitive judgments dissipate, opinions and holdings remain, in Justice Jackson's "loaded weapon" metaphor,³⁶⁸ for future courts to use. So the danger is not that this Court intends to revolutionize foreign affairs law, but that it has left the tools for some future court to do so.

³⁶⁸ See *Korematsu v. United States*, 323 U.S. 214 (1944) (Jackson, J., dissenting)

If we are correct, that suggests caution in extending *Garamendi* to its logical implications. As argued in this Article, we think that is the right approach for other reasons as well. Taken to its logical implications, *Garamendi* threatens to effect a material re-allocation of foreign affairs power toward the executive branch, contrary to the plain language, structural implications and history of the Constitution. The executive is not a lawmaker, and we should not be tempted to think otherwise by what the Court appeared to say in *Garamendi*.