Movsesian v. Victoria Versicherung and the Scope of the President's Foreign Affairs Power to Preempt Words

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I. INTRODUCTION

The federal government's power to preempt state law in the area of foreign affairs is virtually unparalleled. However, the U.S. Supreme Court has appeared reluctant to declare that states have no room to act in ways

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that affect foreign affairs. What room is left for states to act is therefore unclear. The Ninth Circuit's recent decisions in *Movsesian v.Victoria Versicherung AG*[1] ("*Movsesian I*") reflect this uncertainty. In *Movsesian I,* a three-judge panel of the Ninth Circuit issued a decision that would have expanded the federal government's power to preempt state law in unprecedented and potentially dangerous ways.[2] The same three-judge panel then reconsidered that decision in 2010 and reversed itself by one vote.[3] As of this writing, the Ninth Circuit has taken up the issue en banc.[4] This article uses the *Movsesian* decisions to illustrate the confusion in this area of the law and calls on the Supreme Court to provide greater clarity.

In *Movsesian I*, the Ninth Circuit declared that a few informal nonbinding statements of executive policy made to Congress regarding the executive's objection to the use of certain words could have preemptive effect on any state law which incorporated the proscribed words.[5] More specifically, these executive statements discouraged the use of the word "genocide" in connection with the mass killings of Armenians in 1915.[6] Based on this supposed executive policy, a two-to-one majority of the court declared that a California statute that extended the statute of limitations for certain insurance claims by heirs of victims of the "Armenian Genocide" was preempted because it used the phrase "Armenian Genocide."[7] The effect of this ruling would be to create a precedent pursuant to which any state law using a proscribed word could be voided based solely on informal statements of federal executive policy.

Perhaps recognizing in hindsight the potential implications of this new precedent, the Ninth Circuit granted a petition for rehearing.[8] On rehearing, one judge switched his vote, convinced that there was no clear federal policy that preempted the California statute.[9] In neither decision, however, did the three-judge panel extensively consider the implications of preempting states from using certain words when legislating.

Prior to *Movsesian I*, informal executive policy alone had never been found sufficient to preempt state law.[10] Instead, the federal government is

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1. Movsesian v.Victoria Versicherung AG (*Movsesian I*), 578 F.3d 1052 (9th Cir. 2009), *withdrawn*, Movsesian v.Victoria Versicherung AG (*Movsesian II*), 629 F.3d 901 (9th Cir. 2010).
2. *Movsesian I,* 578 F.3d at 1063.
3. *Movsesian II*, 629 F.3d at 909.
4. Order Granting Rehearing En Banc, Movsesian v. Victoria Versicherung AG, No. 07-56722 (9th Cir. Nov. 7, 2011).
5. *See Movsesian I,* 578 F.3d at 1059, 1063.
6. *Id.*
7. *See id.* at 1063.
8. *Movsesian II*, 629 F.3d at 905.
9. *Id*. at 909.
10. *See Movsesian I*, 578 F.3d at 1059.

usually found to have preempted state law through its power over foreign affairs when the federal government exercises its formal law-making power through the enactment of a statute, the signing of an executive order, the making of a treaty, or a combination of such actions.[11] These formal legislative acts are important because they provide the court with specific language to interpret and apply to the facts of a case before the court in determining whether state action is preempted.[12]

The Ninth Circuit's ruling in *Movsesian I*, however, took the law one step further. In that decision, the court held that a formal legislative act was not necessary to preempt state laws.[13] Instead, the court determined that the President's powers over foreign affairs are so extensive that letters from the President to Congress alone, expressing his objection to the use of the word "Armenian Genocide," were enough to create an executive policy that preempts state law.[14]

The Ninth Circuit's decision in *Movsesian I* went too far. It expanded the executive branch's power beyond any previous decision and would have created a precedent that is unworkable. In the absence of a formal legislative act to provide guidance, the court's holding effectively requires the judiciary to decide for the executive branch when a foreign policy exists and the substance and scope of that policy. While the Ninth Circuit corrected this problem upon rehearing, there still exists much uncertainty as to what actions by the federal government are sufficient to preempt state law and what room, if any, is left for states to act, and especially to express opinions on U.S. foreign policy issues.

Part II of this article discusses the historical background of the federal government's power to preempt state action in the area of foreign affairs, including an analysis of the specific actions taken by the political branches of the federal government to exercise this power. Part III describes *Movsesian* by summarizing the facts, procedural history, and explaining how the Ninth Circuit reached each of its decisions. Part IV analyzes the implications of *Movsesian*. First, it examines whether it is possible to preempt state law through executive policy statements alone. Second, it analyzes the extent of the President's power to recognize or proscribe words. Third, it considers whether the executive branch has a firm policy with respect to the use of the words "Armenian Genocide." Fourth and finally, it discusses the potential consequences of a decision giving the federal government power

11. *Id.*; *see also, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (noting a federal statute authorizing sanctions on Burma coupled with an executive order); Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (noting a treaty on migratory birds).

12. *See, e.g.*, Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396, 421 (2003).

13. *Movsesian I*, 578 F.3d at 1060.

14. *Id.*

to preempt words. The article ultimately concludes that word preemption should not exist.

II. THE PREEMPTION AND FOREIGN AFFAIRS DOCTRINES

The federal government's preemptive power over foreign affairs has several different aspects. Subsection A below begins by setting forth the general parameters of the preemption doctrine. Subsections B and C summarize the express and implied constitutional powers of the federal government over foreign affairs and the traditional deference the judiciary gives to the executive branch in the area of foreign affairs. Subsection D examines the power of international executive agreements to preempt state law, while Subsection E considers the preemptive power of executive policy, as opposed to formal legislative actions. Subsection F concludes this background discussion by raising the possibility that, even if the foreign affairs power is great enough to preempt most state laws, the context in which this case arises may lead to a different result.

A. PREEMPTION DOCTRINE

"A fundamental principle of the Constitution is that Congress has the power to preempt state law."[15] Preemption may be express or implied.[16] Express preemption occurs when Congress's command is explicitly stated in the statute's language or is implicit in the statute's structure and purpose.[17] Implied preemption takes two forms: field preemption and conflict preemption.[18] Courts will find field preemption to exist when the federal government has so thoroughly regulated the entire field that there is no room left for states to act.[19] Courts will find conflict preemption to exist when both the federal and state governments have regulated in a particular area and it is impossible for a private party to comply with both federal and state law.[20] But even in the absence of a direct conflict, implied conflict preemption exists where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[21]

Field preemption was found to exist in *Hines v. Davidowitz*, where the federal government exercised its power to preempt state law by way of its

15. *Crosby*, 530 U.S. at 372.
16. Gade v. Nat'l Solid Waste Mgmt. Ass'n., 505 U.S. 88, 98 (1992).
17. *Id.*
18. *Id.*
19. *See id.*; *see also Crosby*, 530 U.S. at 372.
20. *See Gade*, 505 U.S. at 98; *Crosby*, 530 U.S. at 372.
21. *Crosby*, 530 U.S. at 373 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

formal law-making powers.[22] In that case, the State of Pennsylvania created a law regulating the registration of aliens.[23] The federal government already had in place a comprehensive integrated scheme for the registration of aliens.[24] The Supreme Court held that when the federal government exercises its power over foreign affairs, including the making of rules relating to immigration and naturalization, its legislative acts are supreme over state laws pursuant to the Supremacy Clause in Article VI of the Constitution.[25] Thus, the state no longer had any right to legislate in this field of law, even if its legislation could be interpreted to act in harmony with the federal government's.[26] The Court suggested that great international harm "may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[27] Therefore, the whole nation stands to suffer from missteps by the state and even harmonious legislation should be preempted if the federal government has comprehensively legislated in the area.[28] Accordingly, the Supreme Court held that the Pennsylvania Alien Registration Act was preempted by the Federal Alien Registration Act of 1940.[29]

The U.S. Supreme Court found conflict preemption to exist in *Crosby v. National Foreign Trade Council*, where the State of Massachusetts enacted a law restricting the authority of its agencies to purchase goods or services from companies doing business with Burma.[30] Three months after enactment of the Massachusetts law, Congress passed legislation imposing sanctions against Burma and restricting business dealings with Burma.[31] The federal statute also gave the President discretion with respect to the continuation or lifting of sanctions against Burma.[32] Although the federal statute did not contain an express provision for preemption, the Court determined that Congress wanted the President to have "flexible and effective" power in this area.[33] The state law undermined this purpose through its regulation.[34] Specifically, Massachusetts's Burma law stood as an obstacle

22. *Hines*, 312 U.S. at 68.
23. *Id.* at 59.
24. *Id.* at 70.
25. U.S. CONST. art. VI, cl. 2; *see Hines*, 312 U.S. at 62-63.
26. *See Hines*, 312 U.S. at 62-63.
27. *Id*. at 64.
28. *See id*. at 64-65.
29. *Id.* at 73-74. More recently, the Ninth Circuit held that much of Arizona's controversial immigration law, S.B. 1070, is preempted by the federal Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified under Title 8 of the U.S.C.). *See* United States v. Arizona, 641 F.3d 339, 366 (9th Cir. 2011).
30. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 367 (2000). Burma is also known as Myanmar.
31. *Id.* at 368.
32. *Id.* at 369.
33. *Id.* at 375.
34. *Id.* at 377.

to the achievement of Congress's objectives because: (1) Congress intended for the President to have discretion and flexibility to respond to changing international events, and the state law gave the President less bargaining room; (2) the Massachusetts law was broader than the federal statute and conflicted with Congress's policy decision to take a middle road; and (3) the Massachusetts law prevented the President from speaking with one voice on behalf of the United States in foreign affairs.[35] Accordingly, the Court held that the Massachusetts law conflicted with congressional sanctions on Burma, and the regulation by the state was preempted.[36]

B. FEDERAL FOREIGN AFFAIRS POWER

The preemption doctrine is often at issue in foreign affairs cases. Yet nowhere in the U.S. Constitution is the federal government given express or exclusive power over foreign affairs.[37] Instead, the U.S. Supreme Court has implied such power by accumulating other express powers such as the foreign commerce power, the power to declare war and to raise armed forces, the President's power as Commander-in-Chief of the armed forces, the power to appoint ambassadors, and the President's power to make treaties, coupled with the Senate's power to give its advice and consent.[38] The Supreme Court has also found the power over foreign affairs may be implied as an incident of sovereignty.[39]

The Founding Fathers decided to place the power over foreign affairs in the federal government because of difficulties creating and enforcing uniform national policies over foreign affairs under the Articles of Confederation.[40] Problems arising from competition among states with respect to foreign trade, disagreements over boundaries and navigation rights, and states' refusal to abide by international agreements such as the Jay Treaty provided the impetus for giving greater power over foreign affairs to the federal government under the new U.S. Constitution.[41] And pursuant to the Supremacy Clause, when the federal government exercises its power over foreign affairs, its actions may preempt inconsistent state law.[42]

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35. *See Crosby*, 530 U.S. at 378-85.
36. *Id.* at 388.
37. Deutsch v. Turner Corp., 324 F.3d 692, 708-09 (9th Cir. 2003).
38. U.S. CONST. art. I, § 8, cl. 3, 11-12 & art. II, § 2, cl. 2. *See also* PHILLIP R. TRIMBLE, INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW 10-11 (2002).
39. *See* United States v. Curtiss-Wright, 299 U.S. 304, 316 (1936).
40. TRIMBLE, *supra* note 38, at 22-24.
41. *See id.* at 22-24.
42. U.S. CONST. art. VI, cl. 2; *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).

C. GENERAL EXECUTIVE POWER OVER FOREIGN AFFAIRS

Sometimes, the federal government exercises its foreign affairs power by having the legislative and executive branches act in concert, as when the Senate gives its advice and consent to a treaty signed by the President. Other times, however, the President acts alone. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson wrote a concurring opinion in which he developed an oft-quoted test to decide how much deference courts should give an exercise of presidential power.[43] In that case, President Truman sought the power to take control of steel mills to prevent their closure due to labor strikes in order to protect the Korean War effort.[44] Justice Jackson's concurrence determined that there were three levels of presidential power, and the Supreme Court's deference depends on the source of presidential power.[45] First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[46] Second,

> [w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.[47]

Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[48] In *Youngstown*, Justice Jackson classified the President's power under the third category because there was evidence Congress had considered and decided not to give the President the power to seize property in the past.[49] The lesson of *Youngstown* is that the President may act alone in the area of foreign affairs, and his ac-

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43. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952). Multiple judges wrote opinions in *Youngstown*; Justice Jackson's concurring opinion is the one most frequently cited.

44. *Id.* at 590-91.

45. *Id.* at 635-38.

46. *Id.* at 635-37.

47. *Id.* at 637.

48. *Youngstown*, 343 U.S. at 637.

49. *Id.* at 630, 640.

tions may be upheld even in the face of objections by states or private parties, but his power to take action is much stronger if he has the consent of Congress.

D. THE PREEMPTIVE POWER OF EXECUTIVE AGREEMENTS

In some cases, the President has exercised his power over foreign affairs by the making of an international executive agreement with a foreign country. Executive agreements are a constitutional exercise of federal power and may preempt state law akin to a duly ratified treaty.[50] For example, in *United States v. Belmont*, the United States had formally established diplomatic relations with the Soviet Union.[51] As part of the United States' agreement to recognize the new Soviet government, the President also had negotiated an agreement between the United States and the Soviet government to settle their respective property claims.[52] At the time it was unclear whether executive agreements could compel a state to release assets because executive agreements are not approved by the Senate and are not a stated power in the U.S. Constitution.[53] The State of New York objected to the federal government's directive to release funds held in New York banks to the Soviet government because nationalization of private property without appropriate compensation was contrary to New York State policy.[54] The Supreme Court stated 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."[55] State laws cannot act as an obstacle to federal foreign affairs powers.[56] The Court concluded that the President does not always require the advice and consent of the Senate when he negotiates with foreign countries and that unilateral executive agreements with foreign countries have the same preemptive force as treaties.[57] The President's actions constituted an exercise of federal power over foreign relations and "state lines disappear" when a federal branch correctly exercises its power over this area.[58] Therefore, the executive agreement did have the power to preempt New York policy and required the release of assets to the Soviet government.[59]

The Supreme Court reaffirmed the preemptive power and constitution-

50. United States v. Belmont, 301 U.S. 324, 331 (1937).
51. *Id.* at 330.
52. *Id.*
53. *Id.* at 327.
54. *Id.*
55. *Belmont*, 301 U.S. at 331.
56. *Id.* at 332.
57. *Id.* at 330-31.
58. *Id.* at 331.
59. *Id.* at 332.

ality of the international executive agreement in the case *United States v. Pink*.[60] Similar to *Belmont*, here the state did not want to give Russian property to the federal government for distribution to the Soviet government, which had nationalized all of its insurance companies.[61] Just as in *Belmont*, the President, through executive agreements, had formally recognized Soviet Russia and had made agreements to redistribute Russian property to the Soviet government.[62] New York gave its own creditors a right of priority to the property in defiance of the executive agreement.[63] The Court decided this action "amount[ed] to official disapproval or non-recognition of the nationalization program of the Soviet Government."[64] New York's action was not allowed because the President had power over foreign affairs and exclusive power to recognize other governments.[65] The Court in this case made one of its most sweeping statements regarding the federal government's power over foreign affairs, stating: "Power over external affairs is not shared by the States; it is vested in the national government exclusively."[66] New York's actions and policy were irrelevant and preempted because the President had created constitutionally condoned executive agreements with Soviet Russia which conflicted with New York's actions.[67]

E. EXECUTIVE POLICY PREEMPTION

This review of previous decisions demonstrates that the foreign affairs power of the federal government allows preemption of state law through congressional legislation, treaties, and international executive agreements where the President acts within his authority. However, recently the executive branch has attempted to preempt state law with simple statements of policy not accompanied by any statutes or international agreements. Cases involving this issue have not been clear and it is a topic of debate if and when such executive branch statements should have the power to preempt state law.

Based on the cases discussed above, one might have the impression that the power of the federal government to preempt state law in the area of foreign affairs is virtually unlimited. However, executive branch policies

60. United States v. Pink, 315 U.S. 203 (1942).
61. *Id.* at 211, 218-19.
62. *Id.* at 211.
63. *Id.* at 228.
64. *Id.* at 232.
65. *Pink*, 315 U.S. at 229. The President's exclusive power to recognize foreign governments is derived from his express power to appoint foreign ambassadors. U.S. CONST. art. II, § 2, cl. 2.
66. *Pink*, 315 U.S. at 233.
67. *Id.* at 233-34.

implicating foreign affairs do not always preempt state law.[68] In *Barclays Bank PLC v. Franchise Tax Board of California*, the California legislature created a law that allowed the state to tax global corporations within its boundaries.[69] Under the law, the state would tax the percentage of the corporation's business performed in California as compared to its business done worldwide.[70] The defendant corporations challenged the law as preventing the U.S. government from speaking in "one voice" when dealing with foreign entities.[71] The Court found the state statute was valid because Congress had not acted to preempt the law.[72] The Constitution expressly gives Congress the power to regulate both interstate and international commerce.[73] By contrast, the President has no express power over commerce. Thus, Congress has more power in the area of commerce and did not need to take overt steps to allow actions by the states.[74] Congress had plenty of opportunity to stop the state from taking actions like this, and it had not acted.[75] Therefore, the Supreme Court determined Congress had implicitly approved of the state's actions.[76] In addition, the Court found the executive branch's actions through briefs, letters, and press releases discouraging this sort of tax were mere suggestions.[77] They were "precatory," expressing executive federal policy, but lacked the force of law and could not render unconstitutional California's otherwise valid, congressionally condoned tax.[78]

After *Barclays*, it appeared evident that executive statements not expressed through binding legislative acts, such as executive orders or international agreements, lacked the force of law and could not preempt state law. However, *American Insurance Associates v. Garamendi* further expanded the scope of executive power to an unknown degree.[79] In this case, the Supreme Court determined that executive statements of policy may be enough to preempt a state law when accompanied by international executive agreements.[80] Here California adopted a law which forced insurance

68. Barclays Bank P.L.C. v. Franchise Tax Bd. of Cal., 512 U.S. 298, 330 (1994).
69. *Id.* at 302.
70. *Id.*
71. *Id.* at 302-03.
72. *Id.* at 330.
73. U.S. CONST. art. I, § 8, cl. 3.
74. *Barclays*, 512 U.S. at 330.
75. *Id.*
76. *Id.* at 327-28.
77. *Id.* at 330.
78. *Id.*
79. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003). *See* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 950 (Dec. 2004).
80. *Garamendi*, 539 U.S. at 429.

companies doing business in California to make public certain information regarding their activities between 1920 and 1945.[81] Holocaust victims have had a great deal of trouble recovering on claims from that period, partly because there is not enough information available and insurance companies refuse to release what information they have.[82] Thus, the California law was created to help the victims find redress.[83] However, the United States government had recently taken an interest in this matter.[84] It negotiated an agreement between Germany and several other countries' insurance companies to create a Holocaust victims fund.[85] The United States determined this fund was the best way to give the victims reparation within their lifetimes.[86] Pursuant to that agreement, the executive branch committed to submit letters to any court that had a Holocaust insurance case on its docket, if Germany would create this fund.[87] The letters would say the United States discourages any suits regarding Holocaust victims' insurance claims.[88] A group of insurance companies came together and sued the Insurance Commissioner of California to have the California statute declared invalid based on these federal actions and policies.[89]

In a five-to-four decision, the Supreme Court found the state law was preempted.[90] In this situation, there was no direct conflict between the state law and the previous executive agreements because the state law only required disclosure of information.[91] However, the state law interfered with the policy of the executive branch to have all related matters resolved through the fund created by the executive agreements.[92] Thus, the Court found that executive policy, as expressed in international executive agreements, is sufficient to preempt state law.[93]

Most recently, the Supreme Court upheld a state judgment despite a presidential memorandum expressing a contrary policy view regarding U.S. treaty obligations.[94] In *Medellin v. Texas*, the state sentenced a foreigner to the death penalty without providing the foreign defendant with access to his

81. *Id.* at 397.
82. *Id.*
83. *Id.* at 426.
84. *Id.* at 405.
85. *Garamendi*, 539 U.S. at 405.
86. *Id.* at 423.
87. *Id.* at 424-25.
88. *Id.*
89. *Id.* at 397.
90. *Garamendi*, 539 U.S. at 429-30.
91. *Id.* at 417.
92. *Id.* at 425.
93. *Id.* at 421, 427.
94. Medellin v. Texas, 552 U.S. 491, 532 (2008).

consulate as required by the Vienna Convention on Consular Relations.[95] When the International Court of Justice (ICJ) issued a judgment recommending review and reconsideration of the defendant's case,[96] former President Bush issued a memorandum calling upon states to comply.[97] Texas refused because the foreign defendant had failed to raise the issue of consular access in a timely manner under state law.[98] Compliance with these recommendations would have forced the state to delay execution and allowed the condemned another opportunity in court.[99]

On appeal, the Court determined the ICJ judgment was not binding on the state and the President had no power to act unilaterally in this area.[100] The Court rejected the President's argument that his memorandum was a valid exercise of his foreign affairs authority to settle claims involving foreign nations.[101] The Court distinguished previous "claims-settlement cases involv[ing] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals" on the grounds that those cases were supported by a particularly longstanding practice of congressional acquiescence.[102] By contrast, the *Medellin* case involved an "unprecedented action" by the President in issuing a directive to state courts "that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws."[103]

Although the President has a "gloss" on his powers over foreign affairs through Article II of the Constitution,[104] the Supreme Court found that the President's action in *Medellin* actually fell at the low end of the *Youngstown* spectrum because the President was attempting to unilaterally implement treaties that were not self-executing, contrary to the implicit

95. *Id.* at 498; Vienna Convention on Consular Relations art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262 (ratified by the United States on Nov. 12, 1969).

96. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 71 (Mar. 31).

97. Memorandum from President George W. Bush to the U.S. Attorney General On Compliance with the Decision of the International Court of Justice in Avena, Office of the U.N. High Commissioner for Refugees (Feb. 28, 2005), *available at* http://www.unhcr.org/refworld/publisher,USPRES,,,429c2fd94,0.html (last visited Jan. 21, 2012).

98. *Medellin*, 552 U.S. at 504.

99. *Id.* at 502.

100. *Id.* at 505, 531.

101. *Id.* at 529.

102. *Id.* at 535.

103. *Medellin*, 552 U.S. at 531.

104. *Id.* at 529-33; U.S. CONST. art. II.

understanding of the ratifying Senate.[105] Thus, the President did not have the authority to preempt state law by way of a presidential memorandum.[106]

This survey of past case law demonstrates that the Supreme Court routinely finds that international executive agreements and federal statutes pertaining to foreign affairs preempt state law. It even has determined that executive policy, when combined with a related international executive agreement, will have preemptive power over state laws pertaining to foreign affairs.[107] It has not, however, allowed the President to preempt state law by way of a memorandum coupled with an international judgment. Moreover, it has yet to determine if executive policy alone has the power to preempt state law. The *Zscherning v. Miller*[108] case came the closest, but even in that case, the federal government could point to federal statutes and a treaty that established the federal policy.[109] *Miller* involved an Oregon statute that prohibited foreigners from inheriting property in the state unless the foreign country provided reciprocal rights to U.S. citizens.[110] The U.S. Supreme Court held that the Oregon statute impermissibly intruded into the field of foreign affairs entrusted to the federal government because Oregon's purpose was to express displeasure with policies of the Soviet and other communist regimes.[111] *Movsesian* takes this analysis one step further and asks whether, in the absence of any federal legislation or international agreements, the President can unilaterally preempt the ability of states to legislate using certain words through informal policy statements.

F. PREEMPTIVE POWER OF STATE INSURANCE LAWS OVER ACTS OF CONGRESS

Movsesian involves a California insurance law. Therefore, it is also relevant to consider the federal government's power to preempt state insurance laws.

Insurance is a field Congress has largely left to be regulated by the states, despite Congress's broad power to preempt state law.[112] Congress enacted the McCarran-Ferguson Act to preserve the state statutes that regu-

105. *Medellin*, 552 U.S. at 524-27.

106. *Id.*

107. *Garamendi*, 539 U.S. at 425-27.

108. Zscherning v. Miller, 389 U.S. 429 (1968).

109. For example, part of the plaintiffs' claim in *Miller* was based on Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, 44 Stat. 2135 (1923). *Miller*, 389 U.S. at 431.

110. *Id.*

111. *Id.* at 437-38.

112. *See, e.g.*, Cooley v. Bd. of Wardens of the Port of Phila., 53 U.S. (12 How.) 299 (1851) (allowing states, by federal law, to continue to regulate pilots in inland waters and ports).

late the business of insurance from preemption and to leave the regulation of the business of insurance to the states.[113] Thus, the McCarran-Ferguson Act reverse preempts all Acts of Congress which affect state laws regulating insurance, unless the federal statute is directed specifically at insurance.[114] The McCarran-Ferguson Act does not itself regulate insurance. However, by granting the states the right to regulate insurance companies without being preempted by federal laws that only incidentally affect insurance, it preserves significant power for the states in this area.

The McCarran-Ferguson Act came about as a response to the *United States v. South-Eastern Underwriters Ass'n.* case in 1944.[115] In *South-Eastern Underwriters Ass'n.*, the government indicted a large group of insurance companies for breaching the Sherman Antitrust Act for monopolizing trade and fixing rates of insurance among the states.[116] The insurance companies claimed that the regulation of insurance was not commerce as defined by Article I, § 8 of the U.S. Constitution and, therefore, the power to regulate it should remain with the states.[117] Before this time Congress had never attempted to regulate the business of insurance and the states had grown accustomed to regulating it themselves.[118] The U.S. Supreme Court held that insurance was a part of commerce and the Antitrust Act applied to the insurance companies.[119]

In response to this case, Congress enacted the McCarran-Ferguson Act, stating:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.[120]

This Act restored the states' traditional broad right to regulate and tax insurance.[121] It also allowed states to regulate licensing standards and it ex-

113. *See generally* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41, 43 (2d Cir. 1995).
114. *See* McCarran-Ferguson Act, 15 U.S.C. § 1011 (2009 & Supp. 2011).
115. *See* Ronen Perry, *Insurance Regulation: Lessons from a Small Economy*, 63 SMU L. REV. 189, 189 (2010).
116. *See* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 534-535 (1944).
117. *Id.* at 536.
118. *Id.* at 560-61.
119. *Id.* at 561-62.
120. 15 U.S.C. § 1011 (2009 & Supp. 2011).
121. *Id.*

empted insurance from the antitrust acts that apply to businesses in general.[122]

Currently there is a split of authority with respect to the application of the McCarran-Ferguson Act when a treaty, as opposed to an Act of Congress, is involved. In *Stephens v. American International Insurance Co*.,[123] the Court of Appeals for the Second Circuit found that a Kentucky statute regulating insurance contracts was not preempted by the Federal Arbitration Act (FAA),[124] which incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The court reasoned that because the FAA only incidentally affects insurance, it is subject to the reverse preemption rule of the McCarran-Ferguson Act.[125] The court further held that the incorporation of the New York Convention into the FAA was irrelevant because the New York Convention is a non-self-executing treaty that relies on an Act of Congress for its implementation.[126]

However, in *Safety National Casualty Corp. v. Certain Underwriters*,[127] the Fifth Circuit Court of Appeals came to the opposite conclusion in an almost identical conflict between a Louisiana insurance statute and the New York Convention, as implemented by the FAA. The Fifth Circuit found that treaties, whether self-executing or not, were not intended to be covered by the McCarran-Ferguson Act and are not "reverse preempted" by it.[128] The court stated that treaties are created by the executive branch and are ratified by the Senate.[129] Thus, they are not "Acts of Congress," which are preempted by the McCarran-Ferguson Act, even if they must be implemented by Congress to take effect.[130] The U.S. Supreme Court has not yet acted to resolve this circuit split, so it is still unclear today what effect treaties may have on state insurance laws. While there is no treaty involved in the *Movsesian* case, this discussion is relevant to show that the federal government has been reluctant to preempt state insurance laws, such as the one at issue in *Movsesian*. It should therefore take much stronger and more formal action by the federal government than is present in *Movsesian* to find state insurance law preempted.

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122. *Id.*
123. Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995).
124. 9 U.S.C. § 1 et seq. (2009).
125. *See Stephens*, 66 F.3d. at 44-45.
126. *Id.* at 45.
127. Safety Nat'l Cas. Corp. v. Certain Underwriters, 587 F.3d 714 (5th Cir. 2009).
128. *Id.* at 737.
129. *Id.* at 724.
130. *See id.* at 722-723.

III. THE UNDERLYING CASE: *MOVSESIAN V. VICTORIA VERSICHERUNG*

The *Movsesian* case arose out the actions of the California legislature in 2000 that extended the statute of limitations on various types of insurance policies for victims of the "Armenian Genocide."[131] The California statute also gave California state courts jurisdiction over some of the claims arising from the "Armenian Genocide."[132] Heirs of the beneficiaries of these insurance policies filed a class action suit seeking damages from three insurance companies for breach of contract regarding the "Armenian Genocide."[133]

In response, the insurance companies challenged the constitutionality of the statute and claimed it was preempted by the executive branch's policy to prohibit governmental recognition of the term "Armenian Genocide."[134] The defendant companies derived this policy from statements by the executive branch to Congress,[135] pointing out that on three separate occasions the Congress attempted to create resolutions either recognizing the "Armenian Genocide" or mentioning the phrase "Armenian Genocide."[136]

In response to each of these bills the executive branch wrote a letter.[137] In the first letter, former President Clinton expressed his concern that legislation recognizing the "Armenian Genocide" could "negatively affect" the U.S. interests in the Balkans and the Middle East, and hurt Armenian and Turkish relations.[138] He urged "in the strongest terms not to bring this Resolution to the floor at this time."[139] The second letter, this time by the Bush Administration, expressed the executive branch's concern that use of the

131. CAL. CIV. PROC. CODE § 354.4 (2010).

132. Movsesian v.Victoria Versicherung AG (*Movsesian I*), 578 F.3d 1052, 1054 (9th Cir. 2009). The "Armenian Genocide" refers to a series of atrocities committed against the Armenian people by the Ottoman Empire during World War I. According to the Armenian National Institute website, approximately 1.5 million Armenians died between 1915 and 1923 as a result of this persecution. *See* ARMENIAN NAT'L INST., http://www.armenian-genocide.org/index.html. (last visited Jan. 29, 2012); Turkey, however, maintains that the Armenians died as a result of inter-ethnic conflict in which many Turks died as well and as a result of the larger armed conflict of World War I. *See Q&A, Armenian Genocide Dispute*, BBC NEWS (Mar. 5, 2010, 9:50 AM), http://news.bbc.co.uk/2/hi/europe/6045182.stm. Turkey thus denies the government had genocidal intent as that term is defined in international law. *See* Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, art. 2 (9 Dec. 1948). This article does not take a position on whether the Armenian deaths amounted to genocide.

133. *Movsesian I*, 578 F.3d at 1055.

134. *Id.* at 1055, 1057.

135. *See id.*

136. *See id.* at 1059. *See e.g.*, H.R. Res. 596, 106th Cong. (2000); H.R. Res. 193, 108th Cong. (2003); H.R. Res. 106, 110th Cong. (2007).

137. *Movsesian I*, 578 F.3d at 1057-59.

138. *Id.* at 1057.

139. *Id.*

phrase "Armenian Genocide" could "hamper ongoing attempts to bring about Turkish-Armenian reconciliation."[140] The third letter expressed the United States' concern that using the phrase "Armenian Genocide" could affect relations with Turkey.[141] Previously, Turkey had cut off contact with the French Military when France officially recognized the "Armenian Genocide."[142] The President stated that any action by Congress to recognize "Armenian Genocide" could harm the United States' interests in the war in the Middle East and "do great harm to . . . [U.S.] relations with a key ally in NATO and the war on terror."[143]

At the trial court level in *Movsesian I*, the U.S. District Court for the Central District of California granted the insurers' motion to dismiss the claims for unjust enrichment and constructive trust, but denied their motion to dismiss the claims for breach of contract and breach of the covenant of fair dealing.[144] The insurance companies appealed.[145]

The primary issue on appeal was whether letters by the President discouraging Congress from creating resolutions or laws mentioning the phrase "Armenian Genocide" were sufficient to demonstrate an executive policy from which the states could not derogate.[146] In other words, how clear or formally expressed must an executive policy be to preempt the states from taking action?

In *Movsesian I*, a three-judge panel of the Ninth Circuit Court of Appeals voted two-to-one that simple non-binding executive statements discouraging the use of the word "genocide" with regard to the Armenian mass killings were sufficient to create an explicit executive policy, which alone could preempt state law.[147] The court decided that an international executive agreement was not a necessary condition for a court to find an executive policy from which the states may not derogate.[148] Thus, the Ninth Circuit reversed and remanded the district court's ruling.[149]

In *Movsesian II*, the same three-judge panel from *Movsesian I* reversed itself, with one judge switching his vote, stating that, upon further review, "we cannot conclude that a clear, express federal policy forbids the state of California from using the term 'Armenian Genocide.'"[150] Although the

140. *Id.* at 1058.
141. *Id.* at 1058-59.
142. *Movsesian I*, 578 F.3d at 1058.
143. *Id.* at 1059.
144. *Id.* at 1055.
145. *Id.*
146. *See id.* at 1059.
147. *Movsesian I*, 578 F.3d at 1063.
148. *See id.* at 1063.
149. *Id.*
150. Movsesian v.Victoria Versicherung AG (*Movsesian II*), 629 F.3d 901, 907 (9th Cir. 2010).

court acknowledged previous executive branch statements opposing recognition of "Armenian Genocide," it also cited several legislative and executive branch statements that used the term favorably.[151] The court further observed that there are forty states that have laws or resolutions recognizing "Armenian Genocide" and the federal government has never expressed any opposition to those laws.[152] Finally, the court noted that "California's attempt to regulate insurance clearly falls within the realm of traditional state interests" and "has, at most, an incidental effect on foreign affairs."[153]

The Ninth's Circuit's decision in *Movsesian I* was quite extraordinary. In prior cases such as *Belmont*, *Pink*, and even *Garamendi,* the Supreme Court used international executive agreements to decide whether a law would interfere with an executive foreign relations policy.[154] However, in *Movsesian I*, the Ninth Circuit went one step further.[155] The court decided mere statements by past presidents discouraging the adoption of laws that use the term "Armenian Genocide" are enough to create an executive policy that is enforceable by the courts when confronted with any inconsistent state laws.[156]

The President clearly has the authority to act with respect to foreign affairs,[157] and more than one President publicly expressed concern regarding the potential ramifications of any official U.S. recognition of an "Armenian Genocide." In response to these expressions of concern, Congress largely deferred to the President's wishes by not enacting statutes using the proscribed term.[158] The Ninth Circuit in *Movsesian I* construed congressional inaction as acquiescence in the President's policy under the *Youngstown* analysis, thus adding to the President's authority.[159] Therefore, the Court decided the President had exercised valid authority and the states

151. *Id.* at 906-07.

152. *Id.* at 907.

153. *Id.* at 907-08.

154. *Movsesian I*, 578 F.3d at 1059.

155. *Id.*

156. *Id.* at 1060. *See also* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

157. *See, e.g.*, *Pink*, 315 U.S. at 203; *Belmont*, 301 U.S. at 324.

158. *See Belmont*, 301 U.S. at 324. In 2010, the Foreign Affairs Committee of the U.S. House of Representatives voted in favor of a nonbinding resolution condemning the Armenian Genocide. Brian Knowlton, *House Panel Says Armenian Deaths Were Genocide*, N.Y. TIMES, Mar. 4, 2010, at A4, *available at* http://www.nytimes.com/2010/03/05/world/europe/05armenia.html. As of this writing, the committee resolution has not reached the House floor. The day prior to passage, U.S. Secretary of State, Hilary Rodham Clinton, had told Representative Berman, the committee chair, that passage of the resolution would be harmful to Turkish-Armenian reconciliation efforts. And, in fact, the day following passage, Turkey recalled its ambassador for consultations. *See id.*

159. *Movsesian I*, 578 F.3d at 1060.

could not derogate from it.[160] Doing so would interfere with the President's ability to speak with "one voice" for the country.[161]

In addition, the court concluded that California's interests were not strong enough to overturn this valid expression of executive authority.[162] It said California's true purpose in creating this law was to give a forum to victims of the "Armenian Genocide." As in *Miller*, California was merely "express[ing] its dissatisfaction with the federal government's chosen foreign policy path," and this was "not a permissible state interest."[163]

Upon reconsideration in *Movsesian II*, the majority was persuaded that California was acting in an area of traditional state interests (i.e., the regulation of insurance), and there was no express federal policy prohibiting California from using the term "Armenian Genocide."[164] Therefore, it is unclear whether there is any conflict between state and federal interests. As a result, the court upheld California's law in *Movsesian II*. Following that decision, in January 2011, the defendant insurance companies filed a petition for rehearing en banc,[165] which was granted in November 2011.[166] To date, the Ninth Circuit has not issued its decision on the merits. Therefore, the ultimate resolution of this case is still in doubt.

IV. THE NINTH CIRCUIT'S DECISION IN *MOVSESIAN I* REPRESENTS BAD LAW AND POLICY

Movsesian involves an area of law which is still under construction—the intersection between foreign affairs and preemption. The Supreme Court has yet to give states clear guidance, and lower courts are left struggling to reconcile varying precedent. In this case, the Ninth Circuit initially misapplied the rules that have been established through prior case law. It expanded the powers of the executive branch beyond any previous ruling and did so without seriously recognizing the consequences. Even though it corrected course in *Movsesian II,* it did so in a way that fails to recognize some of the broader implications of the decision and reasoning. Therefore, greater clarity in this area of law is needed.

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160. *Id.* at 1063.

161. *Id.* at 1061.

162. *Id.* at 1062-63.

163. *Id.*

164. Movsesian v. Victoria Versicherung AG (*Movsesian II*), 629 F.3d 901, 907-08 (9th Cir. 2010).

165. *See* Petition for Rehearing En Banc, Movsesian v.Victoria Versicherung AG No. 07-56722 (9th Cir. Jan. 3, 2011), *available at* http://www.appellate.net/briefs/Munich_Re_PFR.PDF.

166. Order Granting Rehearing En Banc, Movsesian v. Victoria Versicherung AG, No. 07-56722 (9th Cir. Nov. 7, 2011).

This next section analyzes whether presidential policy alone could have the power to preempt state law. It then discusses the extent of the executive branch's power over the recognition of the word "Armenian Genocide" in this situation and whether there is a sufficiently firm executive policy that may be enforced by courts. Finally, it examines the potential effects an executive word preemption policy could have on the United States and ultimately concludes that the effects of such a policy would be unacceptable.

A. AN EXECUTIVE POLICY ALONE COULD PREEMPT STATE LAW, BUT ONLY IF CLOSELY RELATED TO AN EXPRESS EXECUTIVE POWER

The Ninth Circuit misapplied prior case law in *Movsesian I* without recognizing subtle, but important, distinctions in those cases. For example, the court relied heavily on *Garamendi* because, similar to *Movsesian*, that case involved an unenacted executive branch policy which directly conflicted with state law and was found to preempt state law.[167] However, the court failed to recognize the differences between *Garamendi* and the present case, most especially the fact that the executive had entered into international executive agreements which arose out of that executive policy.[168]

One way of reconciling these cases involving the preemption doctrine in foreign affairs has been suggested by the author Celeste Pozo.[169] Ms. Pozo proposes that the federal government's use of its foreign affairs power is best viewed in terms of a spectrum.[170] She posits that "foreign affairs power is a zero sum calculation; the more power the federal government has over foreign affairs, the less states have."[171] There is a spectrum of power where at one end the federal government has exclusive reign over foreign affairs issues, regardless of the state's interest.[172] At the other end the federal government has no power and the states hold it all.[173] The more the underlying issue involves an area of traditional state competence, such as criminal law, the less power the federal government has over it.[174] Therefore, a stronger action must be taken on the part of the federal government to preempt state law.

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167. *See Movsesian I*, 578 F.3d at 1059-62; Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401 (2003).

168. *See Movsesian I*, 578 F.3d at 1059-62; *Garamendi*, 539 U.S. at 413-14.

169. *See* Celeste Boeri Pozo, *Foreign Affairs Power Doctrine Wanted Dead or Alive: Reconciling One Hundred Years of Preemption Cases*, 41 VAL. U. L. REV. 591, 608-09, 613 (2006).

170. *Id.* at 609.

171. *Id.*

172. *See id.*

173. *See id.*

174. Pozo, *supra* note 169, at 609-14.

The most powerful acts of the federal government are the making of treaties and laws whereby each of the political branches exercises its respective express constitutional powers. Under the Supremacy Clause, these federal actions will trump state action in foreign affairs in almost all situations.[175] The next most powerful actions are international executive agreements, which are unilateral acts by the President that are binding on the United States vis-à-vis one or more foreign countries.[176] Because Article II of the Constitution gives the President independent power over foreign affairs, and expressly gives him the power "to make Treaties," his actions in this regard are generally found preemptive of state action.[177] Executive statements of policy are the weakest form of federal action.[178] But, as *Garamendi* demonstrates, if such statements are combined with international executive agreements, they can have preemptive effect.[179] However, before *Movsesian I,* it had never been determined that executive statements alone contained foreign affairs preemptive power. In fact, in *Medellin*, the Supreme Court expressly held that a presidential memorandum directing states to comply with an ICJ judgment was not sufficient to preempt state criminal law inconsistent with that judgment.[180]

Arguably, in only one case has the U.S. Supreme Court found state law to be preempted where the federal government took no specific action directly on point—*Zschernig v. Miller.*[181] However, in that case, there was a treaty relevant to at least part of the plaintiffs' claims—the 1923 U.S.-German Treaty of Friendship, Commerce and Consular Rights.[182] The presence of a relevant treaty may have influenced the Court's decision that there was, in fact, a federal policy that preempted state law. And although the underlying state law dealt with probate, a matter traditionally regulated by states, the Court did not appear to be convinced that the true purpose of the statute had anything to do with concerns about probate.[183] Instead, Oregon

175. *See* U.S. CONST. art. VI. As discussed in more detail below, one exception may be in the area of speech.

176. *See* United States v. Pink, 315 U.S. 203, 229-31 (1942); United States v. Belmont, 301 U.S. 324, 330-31 (1937).

177. U.S. CONST. art. II, § 2. *See Pink*, 315 U.S. at 229; *Belmont*, 301 U.S. at 331.

178. *See, e.g.*, Barclays Bank P.L.C. v. Franchise Tax Bd. of Cal., 512 U.S. 298, 330 (1994).

179. *See supra* notes 75-88 and accompanying text.

180. Medellin v. Texas, 552 U.S. 491, 529-35 (2008). The Supreme Court reached this conclusion despite the fact that the State of Texas had failed to provide consular notification as required under the Vienna Convention on Consular Relations, to which the United States is a party.

181. Zschernig v. Miller, 389 U.S. 429, 441 (1968).

182. Treaty of Friendship, Commerce and Consular Rights with Germany, U.S.-Ger., Dec. 8, 1923, T.S. No. 725 44 Stat. 2135; *see Miller*, 389 U.S. at 431.

183. *Miller*, 389 U.S. at 440.

was trying to send a message of opposition towards communism.[184] The *Miller* case arose during a period when there was great controversy over the issue of communism in the United States. The federal government had demonstrated its own opposition to communism in many ways through congressional resolutions, economic sanctions, and other actions.[185] Although Oregon's position was consistent with the general federal position on communism, the Court was concerned with the states interfering with the federal government's ability to speak with one voice.[186] Celeste Boeri Pozo, an attorney, suggests that this decision may be explained by the fact that the federal power to determine whether the United States would engage in friendly relations with a foreign country is so complete that the federal government did not need to take any specific action to preempt a state law intruding on foreign affairs.

Pozo's theory is somewhat analogous to the *Youngstown* test in that the amount of power a branch of government wields over an issue is also viewed along a spectrum and is determined by the source(s) of that power.[187] Under the *Youngstown* test, the President is at his most powerful when he is acting with approval of Congress, such as with a ratified treaty.[188] The President has only the power inherent to the executive branch when he is acting without the consent of Congress, but he still may be successful if Congress has acquiesced or is indifferent.[189] Finally, the President may act solely on the basis of his own powers under Article II, but is at the lowest ebb of power when acting contrary to the will of Congress.[190] Even

184. *Id.* at 437-38.

185. The Red Scare created a number of federal acts which opposed communists and communism at large. There was the McCarran-Walter Act, 15 U.S.C. § 1011 (2009 & Supp. 2011), which restricted communists from entering the country and allowed deportation of immigrant members of the Communist Party. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). There was also the Communist Control Act of 1954, Pub. L. No. 83-637, 68 Stat. 775, which outlawed the Communist Party of the United States and made it illegal to be a member or to support it. In addition, the House Un-American Activities Committee was a part of the House of Representatives. It was used to investigate subversive activities of private individuals such as being a member of the Communist Party. *House Un-American Activities Committee*, ELEANOR ROOSEVELT PAPERS PROJECT, http://www.gwu.edu/~erpapers/teachinger/glossary/huac.cfm (last visited Feb. 9, 2012). The McCarran Internal Securities Act required members of communist parties to register with the government and placed restrictions on those suspected to be members of those parties. Subversive Activities Control Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

186. *Miller*, 389 U.S. at 440.

187. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-39 (1952) (Jackson, J., concurring); *see also* Pozo, *supra* note 169.

188. *Youngstown*, 343 U.S. at 635-36.

189. *Id.* at 637.

190. *Id.* at 637-38.

at his lowest ebb of power, however, it is still possible for the executive to preempt state law depending on the context.

Under Pozo's spectrum of power and zero sum analysis, it is arguable that if no specific action by the government was needed in *Zschernig v. Miller* to preempt state law, it stands to reason an executive policy could preempt state law if the foreign affairs issue was close enough to the executive's exclusive power end of the spectrum. Creating an executive policy would be a demonstration of power less than *Garamendi* (which coupled executive policy with an international executive agreement) but more than *Zschernig v. Miller* (where there was no direct conflict between state and federal policy). An executive policy set forth in letters or memoranda from the President is not the law, but it is still an action that would be theoretically sufficient to preempt a state law if the issue were exclusively or very largely within the President's competence. Assuming that it is possible to preempt state law through executive policy, the question becomes whether the President has sufficient power under the facts of *Movsesian*.

B. THE EXECUTIVE BRANCH HAS SOME POWER OVER THE NATIONAL POLICY REGARDING THE RECOGNITION OF THE "ARMENIAN GENOCIDE"

It is unclear the level of power the executive branch has over the recognition of specific terms, such as "Armenian Genocide," as they relate to foreign affairs. The Ninth Circuit found that the executive branch did have power over this area because the federal government has general power over foreign relations.[191] Under Article II of the Constitution, the President is given power to make treaties and to appoint ambassadors with the advice and consent of the Senate, and to receive ambassadors.[192] These enumerated powers have been interpreted over time to encompass numerous powers over foreign affairs including the recognition or non-recognition of foreign governments, the establishment or termination of diplomatic relations, and the creation of executive agreements.[193] To the extent that official recognition of the "Armenian Genocide" could interfere with the status of U.S. relations with Armenia and Turkey, California's statute at issue in *Movsesian* may affect these powers. In *Movsesian I*, the Ninth Circuit recognized as much, stating that the California statute impacts "presidential policy concerns [on] national security, a war in progress, and diplomatic relations with

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191. *See* Movsesian v.Victoria Versicherung AG (*Movsesian I*), 578 F.3d 1052, 1060 (9th Cir. 2009), *withdrawn*, Movsesian v.Victoria Versicherung AG (*Movsesian II*), 629 F.3d 901 (9th Cir. 2010).

192. U.S. CONST. art. II, §§ 2, 3.

193. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414-15 (2003). *See also* United States v. Pink, 315 U.S. 203, 232-33 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

a foreign nation," and that "the Constitution squarely, if not solely, vests these powers with the Executive Branch."[194] On the other hand, in *Movsesian II* the court reversed itself, stating that the effect would be only incidental.[195]

According to *Movsesian I*, California's statute affects the President's constitutional powers because of the controversial nature of genocide recognition.[196] Turkey does not want other countries to recognize an "Armenian Genocide."[197] The position the United States takes regarding the recognition of an "Armenian Genocide" could affect the Middle Eastern war effort and relations with Turkey. This is because Turkey may be less willing to cooperate with the United States if the United States officially recognizes that the Turkish government was complicit in or responsible for the commission of genocide.

The power to use words in legislation that relates to foreign affairs, such as the name of a foreign country, appears to be connected to the President's implied power over the recognition of governments.[198] Individual U.S. states do not have the power to recognize other countries.[199] This power is only in the President and has been implied through his Article II powers.[200] Thus, it would appear that the federal government has a significant amount of power in this case and that not as much federal government action may be necessary to preempt state law.

On the other hand, the State of California was regulating insurance claims with respect to persons or companies over which it had jurisdiction. Insurance is an area traditionally regulated by states. Accordingly, the weighing of federal and state interests would likely balance out, leaving the issue in the middle of Pozo's spectrum. If that is the case, stronger federal action than a simple statement by the executive would be needed to preempt California's law.

Moreover, there is no evidence that the President has been given the power to decide which words states may use when legislating. To the contrary, allowing the President to dictate whether particular words may be used is contrary to our notions of freedom of speech and state sovereignty.[201] It is an unprecedented action, which may imply that the President has no authority over it because there is no approval by Congress. On the

194. *Movsesian I*, 578 F.3d at 1059.
195. *Movsesian II*, 629 F.3d at 908.
196. *Movsesian I*, 578 F.3d at 1061.
197. *See id.* at 1055.
198. *See* Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1231 (D.C. Cir. 2009), *cert. granted*, 131 S. Ct. 2897 (May 2, 2011).
199. *See id.*
200. *Id.*
201. *See* discussion *infra* Part IV.D.

other hand, courts might place a gloss on the President's power and allow action in this area because Congress has generally acquiesced with the President's wishes thus far. Accordingly, the *Youngstown* analysis also points to this case falling in the middle spectrum of presidential power—where the President is relying on some of his own powers and Congress has not enacted any laws contrary to the President's stated policy.

C. IT IS UNCLEAR WHETHER THERE IS AN OFFICIAL POLICY REGARDING RECOGNITION OF THE "ARMENIAN GENOCIDE"

As noted by the Ninth Circuit in *Movsesian*, there is evidence both for and against finding an official federal policy regarding the "Armenian Genocide." In *Movsesian I*, the court determined there was a presidential policy.[202] It made this determination based on only a few statements by the presidents over seven years.[203] In response to three separate House resolutions, the executive branch has continuously discouraged the recognition of an "Armenian Genocide."[204] These statements and any resulting policy would not be overt to the general public, but they may imply there was at one time an official policy, or at least a strong preference, not to connect the Armenian mass killings with genocide.

However, the executive position on this issue has not been consistent. Previous to the Bush and Clinton eras, President Ronald Reagan used the words "Armenian Genocide."[205] It is not generally claimed that this qualified as an official recognition by the United States of an actual genocide. But it does imply that the policies regarding this subject may have changed over time. At the very least, it is evident that any policy that may exist is subtle.

Indeed, it is not clear what the current policy is under President Obama.[206] He has always been a strong supporter of recognizing the "Armenian Genocide,"[207] and as a Senator in 2008, he noted that he would recognize it once he was President.[208] More recently, President Obama stated that his views on the matter have not changed.[209] He has yet to openly de-

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202. *Movsesian I*, 578 F.3d at 1060.

203. *Id.* at 1057-59.

204. *Id.*

205. *Ronald Reagan*, ARMENIAN NAT'L INST., http://www.armenian-genocide.org/Affirmation.63/current_category.4/affirmation_detail.html (last visited January 22, 2012).

206. *Barack Obama on the Importance of US-Armenia Relations*, ORGANIZING FOR AMERICA (Jan. 19, 2008) (copy on file with author).

207. *Id.*

208. *Id.*

209. Press Release, The White House, Statement of President Barack Obama on Armenian Remembrance Day (Apr. 24, 2009), *available at*

clare an official policy recognizing the "Armenian Genocide," but there has also been no overt statement saying the United States does not recognize it. Accordingly, it is unclear what the official policy is today given the unofficial actions by previous administrations discouraging recognition combined with the subtle unofficial hints the Obama administration has given.[210] It may be possible to say the only policy the United States has is not to create an official one. The federal government does not appear to want to use the term, but it also does not want to officially admit to not using it, as either decision could have negative effects. Therefore, given that executive policies are a weak form of preemptive action, the President must have near exclusive power over the issue if the President is to preempt the state law.

In light of the subtlety of the executive branch regarding this issue, this case presents an inappropriate atmosphere for the judiciary to rule on policy. In past cases, the judiciary has been able to make decisions based on federal policies that were set forth in binding legal documents, such as federal statutes, executive orders, and international agreements. Having these formal documents to interpret is essential to assist the judiciary in determining whether a policy exists, the scope of that policy and whether it preempts a potentially inconsistent state policy. For example, in *Garamendi,* while the international executive agreements did not directly conflict with the state law, they implemented a broader executive policy with which the state law did conflict.[211] If courts find federal policy to exist based on unenacted informal policy statements, they risk creating a federal policy, possibly before the federal government has determined for itself what its policy should be. Further, the courts could also define the parameters of that policy, potentially freezing it into place when the federal government's policy may actually be evolving. Therefore, in some instances it may be possible to preempt state law on policy alone, but the courts should be very careful actually declaring it so for fear they would create law instead of interpret it.

In sum, it is unclear whether there is a federal policy with respect to the "Armenian Genocide" and what that policy may consist of if it exists, because the executive branch has been purposefully subtle. There are no executive agreements or direct statements by the executive branch declaring the United States shall not use the phrase "Armenian Genocide." The court

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http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Armenian-Remembrance-Day/.

210. When the House Foreign Affairs Committee voted to condemn the "Armenian Genocide" in March 2010, Secretary of State Hilary Rodham Clinton contacted the Committee Chairman to express concern that the vote could be harmful to Turkish-Armenian relations. However, news reports do not indicate that official U.S. policy is or is not to recognize the "Armenian Genocide." Peter Baker, *Obama Marks Genocide Without Saying the Word*, N.Y. TIMES, Apr. 24, 2010, http://nytimes.com/2010/04/25/world/europe/25prexy.html.

211. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 429 (2003).

in *Movsesian I* should not have declared that a policy exists when the executive branch itself has not done so. A contrary decision runs the risk of misinterpreting policy or even creating federal policy out of whole cloth. This is not the function of the judiciary.

D. IF AN EXECUTIVE POLICY BARRING USE OF THE PHRASE "ARMENIAN GENOCIDE" EXISTS, IT SHOULD NOT PREEMPT STATES

A federal policy that bars the use of certain words is unprecedented and could have exceptional effects on states. In the words of Professor Gey: "Government speech claims always arise in the context of First Amendment disputes with private speakers."[212] *Movsesian* appears to be the first case in which the federal government and a state government have made competing claims in the context of speech. In neither *Movsesian* decision did the court take into account the special nature of the ability to preempt state law through the use of proscribed words. Instead, the Ninth Circuit erroneously treated this as a normal preemption case. Indeed, as noted in other preemption cases, state actions can have an "incidental effect on foreign affairs;" accordingly, states are discouraged from performing acts which embarrass or are critical of other countries.[213] This Californian law could embarrass or even be considered critical of Turkey, given the connotations associated with the word genocide. It could therefore interfere with foreign relations between Turkey and the United States. Also, the court seemed concerned with Turkey's sanctions against France when France recognized an "Armenian Genocide."[214] Therefore, the court did have some justification for preventing the state from hurting any official policy of the U.S. of non-recognition.

However, preempting state law is a direct infringement on state sovereignty under the Tenth Amendment to the Constitution[215] and should only occur where there is clear federal authority preempting state law. In addition, this type of restriction on the use of certain words is not normal, and it could cause unforeseen, unacceptable, and far-reaching effects. It is a fundamental principle of our government that "Congress shall make no law . . . abridging the freedom of speech."[216] This First Amendment prohibition on

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212. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 IOWA L. REV. 1259, 1262 (2010).

213. *Garamendi*, 539 U.S. at 398.

214. Movsesian v.Victoria Versicherung AG (*Movsesian I*), 578 F.3d 1052, 1060 (9th Cir. 2009), *withdrawn*, Movsesian v.Victoria Versicherung AG (*Movsesian II*), 629 F.3d 901 (9th Cir. 2010).

215. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

216. U.S. CONST. amend. I.

congressional action is consistent with the limited role of federal government envisioned by the Framers and embodied in the Tenth Amendment.[217] States "speak" by creating laws to address issues.[218] Restricting the words states can use restricts the laws they can create. Therefore, although the U.S. government acknowledges there was an Armenian mass killing, allowing the federal government to bar states from using the words "Armenian Genocide" is likely to make it more difficult for states to address concerns surrounding that issue or other issues.[219]

Allowing federal policies to preempt state laws through unrecognized words may void many laws. Currently, approximately forty U.S. states have laws, proclamations or resolutions that incorporate the words "Armenian Genocide."[220] Some of these laws have no legal effect on anyone's rights or obligations. They simply create a time of remembrance. If California's law is preempted based on use of the words "Armenian Genocide" alone, then numerous state remembrance days and proclamations would be invalid as well. Indeed, acts by state legislatures which incorporate the proscribed language could be declared invalid, despite their subject, their legal effect, or the lack thereof. For instance, California has a law which requires schools to instruct students on World War II Japanese internment and the "Armenian Genocide."[221] Technically, this law would be invalid under the *Movsesian I* court's reasoning because it uses the term "Armenian Genocide."

In the future, other words might be declared contrary to executive policy and therefore banned from use. The *Movsesian I* ruling would have invalidated any law throughout the country which uses the proscribed words. Even if the words were used incidentally, such as to honor or remember an event or to educate students about a historical subject to be taught at school, it would be preempted. The problem is that the court's holding in *Movsesian I* creates a blanket preemption which does not differentiate between state laws.

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217. U.S. CONST. amend. X; *see also* Gey, *supra* note 212, at 1263.

218. There are several cases in which the Supreme Court has recognized and enforced a legitimate interest in government speech; *See* Gey, *supra* note 212, at 1267 and cases cited therein.

219. It is possible that if the California statute read, "Armenian mass killings" rather than "Armenian Genocide," the State could have still achieved its purpose without concern for "word preemption" by the federal government. But changing the words likely would also change the legal meaning.

220. *International Affirmation of the Armenian Genocide*, ARMENIAN NAT'L INST., http://www.armenian-genocide.org/current_category.11/affirmation_list.html (listing all states and can click on any state to find the legislation enacted).

221. CAL. EDUC. CODE. § 52740 (West 2009).

The federal government should not be able to monopolize the marketplace of ideas by restricting the words that may be used.[222] The main reason offered by scholars to support a right of government speech is the idea that it contributes to that marketplace.[223] Allowing the federal government to ban the use of certain words would shrink the marketplace of ideas, thereby undermining that policy rationale, as well as the role of states as laboratories for new public policies.[224]

Moreover, if the government does ban speech, it should have a clear and unambiguous message of its own.[225] Otherwise, it is not contributing to the marketplace of ideas, the underlying policy reason for recognizing a right of government speech. If the nature of the federal policy asserted is subtle and uncertain, it is difficult to tell if a law is in fact preempted. Here, for example, the executive branch has not delineated a clear and unambiguous federal policy regarding the "Armenian Genocide." In future cases the federal policy could be just as vague or even more so. Nevertheless, a ruling permitting word preemption would require state officials to attempt to interpret vague executive statements to determine what actions states may or may not take, which could have an unnecessarily chilling effect on state action. In effect, the *Movsesian I* ruling could allow any statement by the executive branch to void state laws. Such a result would require unreasonable vigilance on the part of citizens, state and local governments, congresspersons, and the judiciary to pay attention for any informal executive statement which may void a law. Similarly, if courts interpret the prohibition too broadly due to the ambiguity of the federal policy, they may unnecessarily hinder viewpoints opposed to the government, contrary to the purposes of the First Amendment.

Moreover, the federal government does not appear very concerned about state recognition of "Armenian Genocide" because it has never taken any action to enforce its supposed policy on the states through official or unofficial action. No statement was made to the California legislature deterring it from using the phrase nor has the executive branch submitted a statement to the court declaring its position in the case.[226] In fact, according to the Armenian National Institute's web site, the vast majority of states

222. *See* Gey, *supra* note 212, at 1268.

223. *See id.* at 1266 n.26; 1274 n.57.

224. New State Ice Co. v. Liebman, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

225. *See* Gey, *supra* note 212, at 1290.

226. Movsesian v.Victoria Versicherung AG (*Movsesian I*), 578 F.3d 1052 (9th Cir. 2009), *withdrawn*, Movsesian v.Victoria Versicherung AG (*Movsesian II*), 629 F.3d 901 (9th Cir. 2010).

have enacted laws or policies recognizing the "Armenian Genocide," and the federal government has never taken action against any of them.[227]

It is possible that the federal government has not taken action because it does not believe these kinds of state laws will have much impact on U.S. relations with Turkey. Individual states like California do not create foreign policy for the whole United States. Thus, this case is different from the situation where a sovereign nation such as France officially recognizes an "Armenian Genocide" and is subjected to retaliation by Turkey as a result.[228] It is possible the proposed resolutions by Congress, which the previous administrations discouraged, could have resulted in similar Turkish sanctions against the United States.[229] The executive only appears concerned with official federal declarations, not those by states. Any future trouble with Turkey appears to rest on official national recognition and the states cannot perform that task. This explanation may be the reason why the federal government has not intervened to oppose state laws recognizing "Armenian Genocide."

Finally, given the growth of federal government regulation and increasing globalization, more and more state action is likely to touch on areas within the concurrent sphere of the federal and state governments and could be preempted if the reasoning of the *Movsesian I* court is endorsed by other courts. The courts should be careful to protect some areas of state sovereignty to preserve our constitutional structure and to preserve free speech. Subtle, fluctuating, and informal federal policies, such as the executive's statements regarding "Armenian Genocide," should not be allowed to preempt state action, especially when the state's action may have little or no legal effect.

V. CONCLUSION

The *Movsesian I* court erroneously applied an inchoate executive policy to preempt state law. It may be possible for a court to declare that an executive policy alone can preempt state law if the executive branch has enough power over the area. However, it is doubtful the President, acting alone, has sufficient power over the official recognition of words to do so. More specifically in this case, it is not clear that there even is an official policy regarding the recognition of an "Armenian Genocide" and whether such a policy is intended to preempt state law relating to that subject. Thus, the courts should not create a policy when it is not clear what that policy is

227. *International Affirmation of the Armenian Genocide*, ARMENIAN NAT'L INST., http://www.armenian-genocide.org/current_category.11/affirmation_list.html.

228. *Movsesian I*, 578 F.3d at 1058-59.

229. *Id.*

or if any policy exists at all. Finally, the executive branch does not appear to have desired to apply word preemption to the states in this case. This lack of federal government action may be because such preemption would have such extensive negative effects on state law.