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FOREIGN AFFAIRS FEDERALISM AND THE LIMITS OF EXECUTIVE POWER

*Zachary D. Clopton**

On February 23 of this year, the Ninth Circuit Court of Appeals invalidated a California statute permitting victims of the Armenian genocide to file insurance claims, finding that the state’s use of the label “Genocide” intruded on the federal government’s conduct of foreign affairs.¹ This decision, *Movsesian v. Versicherung AG*, addresses foreign affairs federalism—the division of authority between the states and the federal government. Just one month later, the Supreme Court weighed in on another foreign affairs issue: the separation of foreign relations powers within the federal government. In *Zivotofsky v. Clinton*, the Supreme Court ordered the lower courts to help referee a conflict between the executive and legislative branches of the federal government concerning how Jerusalem-born American citizens list their country of birth on their passports.² The former case presented an issue of federalism and the latter an issue of separation of powers; yet both cases sought to delineate foreign affairs authority in the United States.

This Essay addresses the relationship between the states and the federal executive in foreign affairs—a federalism question—in light of coming separation-of-powers decisions. Part I briefly outlines foreign affairs federalism: how far into foreign affairs may states reach without stepping into the federal government’s exclusive terrain? Part II looks at a particular permutation of this federalism debate, examining the conflict between the states and the national executive. *Movsesian*, the Armenian genocide case, highlights this state–executive clash. The panel and en banc opinions in *Movsesian* offered two different approaches to this federalism question, both of which present textual and practical difficulties. Having laid out the problems with these approaches, Part III looks for answers in an unlikely place: decisions about the separation of powers within the federal government. In *Zivotofsky*, the Supreme Court called for increased judicial participation in contests between Congress and the President in foreign affairs. This command will produce a body of law defining the sphere of *exclusive* executive authority vis-à-vis Congress. Synthesizing these decisions, Part IV argues that, for structural and pragmatic reasons, courts should bar states as well as Congress from this exclusive executive sphere. The Supreme Court has

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1. *Movsesian v. Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) (*en banc*), vacating 629 F.3d 901 (9th Cir. 2010). *See infra* Part II.

2. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). *See infra* Part III.

called upon the courts to articulate the boundaries of executive and legislative authority within the federal government, but in so doing, the courts indirectly will provide guidance about the division between the federal government and the states.³

I. FOREIGN AFFAIRS FEDERALISM

It is undisputed that states do not exercise unlimited powers in foreign affairs. The Constitution expressly proscribes some state conduct.⁴ In addition, courts elevate national interests over state-level foreign policy through two broad doctrinal categories: preemption and the so-called dormant doctrines.

Preemption is a creature of the Supremacy Clause. The Supremacy Clause declares that the Constitution, the laws of the United States, and treaties are the supreme law of the land—i.e., they trump state law.⁵ Straightforwardly, Congress may pass laws that contain expressly preemptive language.⁶ Courts also may find a state law impliedly preempted where federal and state law conflict (“conflict preemption”), where the state law creates an obstacle to the federal purpose (“obstacle preemption”), or where Congress has occupied the entire field (“field preemption”).⁷ While these

3. With no disrespect meant to those authors and articles not listed, readers curious to learn more about foreign affairs federalism are encouraged to consult Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re)Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201 (2011); Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495 (2011); Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 LOY. L.A. INT'L & COMP. L. REV. 19 (2010); Michael Aaron Granne, *Two-Dimensional Federalism and Foreign Affairs Preemption*, 44 VAL. U. L. REV. 863 (2010); Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1 (2009); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175 (2000) [hereinafter Goldsmith, *Statutory Foreign Affairs Preemption*]; 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) [hereinafter “Ramsey, *Power of States*”]; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Richard Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821 (1989).

4. U.S. CONST. art. I, § 10.

5. U.S. CONST. art. VI, cl. 2.

6. See, e.g., 29 U.S.C. § 1144 (2006), discussed in *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983). On the flip side, Congress occasionally has passed laws expressly permitting state action in foreign policy. See, e.g., Sudan Accountability and Divestment Act, Pub. L. No. 110–174, 121 Stat. 2516 (2007).

7. See, e.g., *Arizona v. United States*, No. 11-182, 2012 WL 2368661 (U.S. June 25, 2012); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). For a helpful chart of these and other federalism doctrines relevant to foreign affairs, see Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 3, at 202.

preemption modes vary in manifold ways, each relies on particular enactments at the federal level to trump the state laws.

States also may be excluded from foreign affairs lawmaking through the dormant foreign commerce clause and dormant foreign affairs doctrine. These “dormant” doctrines infer from the Constitution’s allocation of authority to the federal government that states are prohibited from burdening the federal government’s responsibility in certain areas. The dormant foreign commerce clause, derived from Congress’s Article I authority to “regulate Commerce with foreign Nations,” means that states cannot take steps that impermissibly burden or discriminate against foreign commerce.⁸ The dormant foreign affairs doctrine, like the constitutional foreign affairs power itself, is more elusive—although the Constitution does not expressly allocate foreign affairs powers to the federal government, some judicial decisions locate an exclusive national power in the constellation of foreign affairs clauses combined with a historical gloss. Most famously, in *Zschernig v. Miller*, the Supreme Court invalidated an Oregon probate law as an impermissible “intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”⁹ *Zschernig* remains the strongest articulation of the dormant foreign affairs doctrine by the Supreme Court.

These federalism threads—preemption and the dormant doctrines—have led to numerous debates, two broad classes of which are relevant here. First, which federal actions preempt state law?¹⁰ A literal reading of the Supremacy Clause suggests that only the Constitution, federal law, or a treaty has the power to preempt. But what about international law, which is “part of our law”?¹¹ What about sole executive agreements¹² or regulations?¹³ The dormant foreign affairs doctrine produces the second class of debates. Notwithstanding a positive citation to *Zschernig* in the Supreme Court’s 2003 *Garamendi* decision, there is doubt about *Zschernig*’s continuing validity. And, to the degree that a dormant foreign affairs doctrine exists, there is ongoing debate about the breadth and effect of that doctrine.¹⁴ To use a cliché, in

8. See *Japan Line, Ltd. v. Cnty. of L.A.*, 441 U.S. 434 (1979); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

9. 389 U.S. 429 (1968). In *American Insurance Association v. Garamendi*, the Supreme Court blurred the line between field preemption and the dormant foreign affairs doctrine, 539 U.S. 396, 419 n.11 (2003), and the Ninth Circuit repeated this pattern in the en banc *Movsesian* opinion. But these doctrines are conceptually different: field preemption requires federal action (one that occupies the field), while the dormant foreign affairs doctrine requires no such federal step. See, e.g., *Kurns v. R.R. Friction Prods. Corp.*, 121 S. Ct. 1261 (2012) (discussing field preemption arising out of the Locomotive Inspection Act).

10. For a helpful summary of the scholarly debates, see Vázquez, *supra* note 3.

11. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

12. See *Dames & Moore v. Regan*, 453 U.S. 654 (1981); see also *Garamendi*, 539 U.S. 396; *United States v. Belmont*, 301 U.S. 324 (1937).

13. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985).

14. For a recent entrant into the *Zschernig* debate, see Schaefer, *supra* note 3.

this globalized era, how can courts define what is or is not “foreign affairs”?¹⁵

Although the debates about preemption and the dormant doctrine involve different textual provisions, they often run together. To ensure that the federal government is the “one voice” in foreign affairs,¹⁶ critics of state-level foreign policy are likely to apply a capacious view of preemption and to support a more muscular dormant foreign affairs doctrine. These one-voice advocates worry that a single state’s action could provoke retaliation against the whole country,¹⁷ and they invoke the supposedly superior experience and expertise of the federal government in foreign affairs.¹⁸ State backers, meanwhile, argue that state participation results in better and more democratic foreign policy¹⁹ and that concerns about retaliation are overblown, as foreign governments can target individual states.²⁰ Again, these arguments play out in both preemption and the dormant doctrines.

II. MOVSESIAN: EXECUTIVE PREEMPTION?

The previous Part posed two foreign policy federalism questions: in short, what preempts and whither *Zschernig*? These questions represent federal–state clashes, but the federal government is not a monolith. Of interest to this Essay is the class of cases in which federal executive authority comes into contact with the states. Both preemption and the dormant foreign affairs doctrine may be relevant to these cases.²¹

The Ninth Circuit’s Armenian genocide case highlights these issues.²² In 2000, California adopted a statute permitting courts to entertain insurance claims brought by “Armenian Genocide victim[s]” and extending the statute

15. Or, as the Court has said in another context, it cannot be the case that “every case or controversy which touches foreign relations lies beyond judicial cognizance.” *Baker v. Carr*, 369 U.S. 186, 211 (1962).

16. *See, e.g.*, *United States v. Pink*, 315 U.S. 203, 242 (1942).

17. Most famously, Alexander Hamilton wrote that “the peace of the WHOLE ought not to be left at the disposal of a PART.” THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

18. For better or worse, this view lends itself to foreign policy exceptionalism. *See* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104–07 (1999).

19. *E.g.*, Bilder, *supra* note 3, at 828–29.

20. *E.g.*, Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002).

21. This Essay focuses on the conflict between presidential foreign affairs policy and the states. It does not consider the related question of regulatory or agency preemption, which also could fall under the umbrella of “executive preemption.” For an excellent set of articles on this topic, see the Northwestern University Law Review’s Symposium on Ordering State–Federal Relations through Federal Preemption Doctrine, published at 102 NW. U. L. REV. 503 (2008). *See also* Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 (2012).

22. *Movsesian v. Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) (*en banc*), vacating 629 F.3d 901 (9th Cir. 2010).

of limitations on such claims.²³ Potential claimants (including Movsesian) filed a class action against insurers. As part of their defense, the insurance companies claimed that the law was an invalid exercise of foreign affairs powers by the state.

At the panel level, the “what preempts” debate took center stage. Defendants argued that an executive foreign policy of declining to acknowledge the Armenian genocide preempted the California law. Executive policymaking is not included in the Supremacy Clause’s list of preemptive federal enactments, but all three judges on the panel accepted the possibility of executive preemption, even though the judges disagreed on whether executive preemption occurred in this particular instance. The two-judge majority blessed the law because there was no clear executive policy against recognizing the Armenian genocide, while the dissent identified a “clear Presidential foreign policy” that preempted the California law.²⁴

The problem with both the majority and dissenting opinions is that there is no such thing as executive preemption. Preemption works where the Supremacy Clause stamps out state action, and the Supremacy Clause identifies only the Constitution, federal law, and treaties as preemptive. While there may be some debate over what constitutes federal law, there is no doubt that an executive statement of policy does not fit into any of these categories.²⁵ Constitutional history and political realities reject the notion that the President can veto state laws by fiat.²⁶

The practicalities also weigh against so-called executive preemption. It is simply impractical for courts to wade through the piles of statements of executive officials from various administrations, various parties, various agencies, and various contexts. The dueling panel opinions in *Movsesian* reveal the difficulty of this task. Furthermore, in diplomacy, sometimes inaction is as important as action. Thus, to adopt the notion of executive preemption, courts must either ignore this discretion-as-diplomacy piece or they must add executive silence to the Augean stable of potential executive policy sources. And even in this view, the President always has the option of asking Congress to codify any executive policy for which a preemptive effect is desired.²⁷

The foregoing arguments address *executive* preemption, not the division of power between the federal government and the states more broadly. The textual argument here is that executive policy is not encompassed by the Supremacy Clause, but Congress can pass statutes to the same effect. On the

23. Cal. Code. Civ. Proc. § 354.4 (West 2011).

24. 629 F.3d 901 (9th Cir. 2010), *vacated*, 670 F.3d 1067 (9th Cir. 2012). For an excellent survey of executive claims of lawmaking authority, see Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006).

25. For persuasive arguments in favor of the literal reading, see, e.g., Clark, *supra* note 3; Ramsey, *Power of States*, *supra* note 3; Bellia & Clark, *supra* note 3.

26. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008).

27. See, e.g., Ramsey, *Power of States*, *supra* note 3 (discussing the negative on state laws).

practical side, while the United States Code is extensive, it is a finite, manageable set of documents for courts to examine. And Congress, unlike the executive, is not responsible for the covert and discrete actions that sometimes comprise modern diplomacy—Congress is a public body and its public acts (laws and ratified treaties) can be identified readily. At the same time, the rejection of executive preemption does not give states *carte blanche*. Congress and the President always can preempt state laws together, and opponents of state foreign policy can fall back on the dormant foreign affairs doctrine, which avoids the textual and practical problems of executive preemption.

Indeed, the *Movsesian* en banc opinion eschewed executive preemption in favor of this approach. The en banc court cited approvingly to *Zschemig* and held that a state law was invalid if (1) it was not within an area of traditional state responsibility and (2) it intruded on exclusive national authority to manage foreign affairs.²⁸ The court looked to the law’s purpose to answer the former requirement—it concluded that California had a foreign affairs purpose, not a traditional state one. And the court found that the Armenian genocide law impermissibly intruded on federal foreign affairs power, although it did not offer any clear, bounded definition of that exclusive federal area. This lack of a definition is exactly the problem that scholars associate with *Zschemig*. Not only is the constitutional basis for the dormant foreign affairs doctrine thin, but there is no coherent rule for drawing the line around “foreign affairs.”²⁹ Some limitation must be placed on this doctrine, but at least in this case, no clear limit was offered.

III. ZIVOTOFSKY: EXCLUSIVE EXECUTIVE AUTHORITY?

Although the United States was quick to recognize the new government of Israel in 1948, the U.S. government also adopted a policy of declining to recognize Israel’s (or anyone’s) sovereignty over Jerusalem. As part of that policy, the passports of U.S. citizens born in Jerusalem do not provide a country of birth—they list only “Jerusalem.” In 2002, Congress passed a statute that required the Secretary of State to list “Jerusalem, Israel” on the passport of any U.S. citizen born in Jerusalem who so requested. The executive branch refused.

28. The court, following *Garamendi*, referred to this approach as both field preemption and the dormant foreign affairs doctrine, losing sight of the distinction discussed above. *See supra* note 9 and accompanying text.

29. *See, e.g.*, Roger Alford, *Ninth Circuit Embraces Foreign Affairs Field Preemption*, OPINIO JURIS (Feb. 24, 2012, 4:33 AM), <http://opiniojuris.org/2012/02/24/ninth-circuit-embraces-foreign-affairs-field-preemption> (suggesting that the *Movsesian* en banc opinion’s logic could invalidate “long-arm statutes to address libel tourism, state laws regulating drug trafficking at international borders, ad hoc state tax credits to promote targeted foreign direct investment, emergency state funds for the benefit of Japanese tsunami victims, or state pension divestment rules such as those applied to address South African apartheid”). This is true even if the opinion is read to apply a limited “purpose-review” standard. *See* Shaeffer, *supra* note 3 (advocating for this position).

Menachem Binyamin Zivotofsky was born in Jerusalem in 2002. Through his parents, Zivotofsky sued for the right to have “Jerusalem, Israel” on his passport. The executive branch argued that the Constitution gives it exclusive authority in certain areas of foreign relations—although various definitions of this executive authority exist, in the Executive’s view, any proper definition includes the diplomatic and administrative duties of passport management. Zivotofsky claimed that the 2002 statute controlled passport-naming conventions, thus arguing on behalf of Congress’s rightful authority in this area.

The district court and court of appeals decided that Zivotofsky’s claim presented a nonjusticiable political question, thereby declining to resolve the separation-of-powers dispute. The Supreme Court, however, permitted no such passivity. Eight Justices agreed that the lower courts had the capacity and the duty to weigh in on the dispute, and so the case has been returned to the lower courts to determine whether the issuance of passports is within the scope of exclusively executive authority or whether a duly enacted law can constrain the executive in this sphere.³⁰ While there is no dispute that some narrow zone of exclusive executive authority exists—for example, the presidential power to “receive Ambassadors” is absolute³¹—the lower courts addressing *Zivotofsky* and other similar cases will have the opportunity to engage substantively with separation-of-powers issues and (presumably) to develop legal rules defining legislative and executive authority in foreign affairs.

IV. ZIVOTOFSKY AND MOVSESIAN: A SYNTHESIS

Zivotofsky is not a federalism case, yet it portends important insights for federalism cases like *Movsesian*. Critics of executive preemption argue that the executive should ask Congress to preempt any supposedly interfering state law. But following *Zivotofsky*, lower courts will define areas of exclusive executive control insulated from Congress. This separation-of-powers limit on Congress has consequences for federalism as well: barring congressional action in an area of executive authority means that preemption by statute is not an option. But it would be odd to suggest that that states have free reign on topics exclusively designated for executive control.

That leaves the dormant foreign affairs doctrine, but now with a structurally defined limit—a dormant constitutional authority steps into the breach *only* where statutory preemption is not an option (i.e., topics exclusively assigned to the executive).³² To put it another way, once the courts define the sphere of exclusive executive authority vis-à-vis Congress, they

30. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). Justice Breyer dissented, arguing that the political question doctrine applied in this case. *Id.* at 1437–41.

31. U.S. CONST. art. II, § 3.

32. I would hasten to note that this position does not endorse any particular view of executive authority—especially an exaggerated one. Rather, this argument supports the limited proposition that to the extent that there is a sphere of executive authority exclusive of Congress, that sphere should be exclusive of the states as well.

also should invoke an executive-based dormant foreign affairs doctrine within that same limited area.

This structural case for a dormant authority is supported by practical arguments as well. In *Zivotofsky*, the Secretary of State argued that the Executive's passport authority, as a part of the recognition authority, must be exclusive to avoid sending conflicting messages in the conduct of foreign affairs and diplomacy.³³ In other words, the Executive is the "one voice" in foreign affairs. Indeed, many of the arguments for excluding Congress boil down to the practical benefits of the Executive as the "sole organ" in foreign affairs however defined. These same arguments apply to federalism—in whatever sphere the courts prevent Congress from stepping on the President's message, the states should be excluded as well.³⁴

In addition, this limited dormant doctrine should be palatable to most combatants in the "executive preemption" debate. Supremacy Clause literalists win the day on preemption—executive policy statements, which do not appear in the Supremacy Clause, do not preempt state law. But critics of state-level foreign policy succeed in prohibiting some state action: in the limited area of executive exclusivity, the states join Congress on the sidelines. And, because the exclusive executive sphere will be policed by courts in the context of executive encroachment on Congress, critics of executive authority will not lose any new ground by applying the same standard to Congress and to the states.³⁵ While scholars and courts may continue to debate the preemptive effect of other federal government actions or whether there is a dormant foreign affairs power that attaches to the federal government writ large, the coming separation-of-powers jurisprudence will create a small space for agreement in foreign affairs federalism.³⁶

33. Brief of Respondent, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10–699).

34. Indeed, the Secretary of State in *Zivotofsky* relied heavily on federalism decisions to support her separation-of-powers argument. See Brief of Respondent, *Zivotofsky*, 132 S. Ct. 1421 (No. 10–699).

35. In his excellent *Texas Law Review* article, Professor Clark argues that federal lawmaking rules (e.g., bicameralism and presentment) protect the states better than federalism-directed jurisprudence (e.g., Commerce Clause cases). See Clark, *supra* note 3. Of course, one cannot rely on these federal lawmaking rules where there is no federal lawmaking—i.e., where the Executive has exclusive authority.

36. This argument is not entirely novel, but has not received significant scholarly attention either. Professor Ramsey makes a powerful case against executive preemption—one that this author joined in Part II of this Essay. See Ramsey, *Power of States*, *supra* note 3. Professor Ramsey's article touches on the notion of dormant executive power, *see id.* at 394–96, but the thrust of his critique is related to executive preemption. In his *Villanova Law Review* article, Professor Vazquez in passing refers to the notion that the Constitution may free the President from the constraints of state laws, but he does not explore this position in detail. See Vazquez, *supra* note 3, at 1294–95, 1313–14. And Professor Van Alstine devotes one paragraph to this idea in a much larger article on executive power. See Van Alstine, *supra* note 3, at 370. Notably, Professor Vazquez supports a broad view of federal foreign policy supremacy, while Professor Ramsey and Professor Van Alstine are critical of too wide a berth for federal executive power in this realm.

That brings us back to the Armenian genocide case. The en banc court eschewed the panel's focus on "executive preemption" and instead concluded the states are not permitted to engage in foreign policy that intrudes on the federal government's exclusive prerogative. A better approach would have been to focus on whether the President had the exclusive authority to recognize the Armenian genocide, or whether Congress's concurrent authority meant that statutory preemption was necessary to trump state law. And it will be separation-of-powers cases like *Zivotofsky*—not federalism cases like *Zschernig*—that will provide an answer.