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Supremacy of the Supremacy Clause: A *Garamendi*-Based Framework for Assessing State Law That Intersects with U.S. Foreign Policy

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SUPREMACY OF THE SUPREMACY CLAUSE: A *GARAMENDI*-BASED FRAMEWORK FOR ASSESSING STATE LAW THAT INTERSECTS WITH U.S. FOREIGN POLICY

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State and local governments across the United States increasingly act in areas that intersect with foreign policy. Federalism concerns and U.S. foreign relations are thus in constant tension.

In American Insurance Ass'n v. Garamendi, *the U.S. Supreme Court in 2003 both expanded and detracted from where states and localities may permissibly act in areas that touch upon foreign affairs. This Note works within the confines of* Garamendi *to outline four distinct categories of state action that might intersect with foreign relations. It discusses how lower courts, namely the Ninth Circuit, the Eleventh Circuit, and the Northern District of Illinois, have categorized each type of case in recent interpretations of Supreme Court precedent. This Note does not advocate for or against the Court's analysis in* Garamendi. *Rather, it argues that lower courts should minimize inconsistencies—which have become quite common—by categorizing all state actions that touch upon foreign affairs pursuant to this distinct framework in accordance with* Garamendi.

This Note's typology acknowledges the Court's expansion of Supremacy Clause-based conflict preemption in the foreign affairs realm, and it argues that: (1) state actions that add on to existing federal policy—specifically economic sanctions on foreign regimes—are categorically impermissible because such "pile ons" conflict with federal policy, and (2) where there is legitimately no federal policy on a specific subject matter, there can be no conflict. And in the absence of a conflict, states may constitutionally act pursuant to their police powers, even if their actions intersect with foreign affairs.

This Note further argues that Garamendi*'s expansion of conflict preemption significantly diminishes the weight of the dormant foreign affairs doctrine and that foregoing a Supremacy Clause analysis in favor of* Zschernig v. Miller*'s dormant foreign affairs doctrine would only be appropriate where a state reaches beyond its police power.*

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INTRODUCTION

During and immediately after World War I, the Ottoman Empire undertook a series of campaigns to kill or expel the ethnic Armenians within its borders.[1] A century later, both the Ottoman Empire and its successor, present-day Turkey, have failed to acknowledge, express remorse for, or take responsibility for the genocide.[2]

Turkey is a valuable and strategic ally of the United States.[3] The alliance has been crucial to U.S. interests in the region given the constant turmoil in the Middle East throughout recent decades.[4] Presumably out of fear of endangering this relationship, the U.S. government has never officially recognized these events as genocide.[5] Nonetheless, approximately forty U.S. states have officially acknowledged the Armenian genocide, without apparent repercussions for the U.S.-Turkey relationship.[6]

Recently, California went beyond mere recognition of the genocide in the Ottoman Empire.[7] In 2000, the California legislature extended the statute of limitations for life insurance claims against insurance companies that issued policies to Armenians in the Ottoman Empire prior to the genocide but never paid out on those policies.[8] The extension of the limitations

1. *See* SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 1–2 (2002).

2. *See* Jeffrey W. Stempel et al., *Stoney Road out of Eden: The Struggle to Recover Insurance For Armenian Genocide Deaths and Its Implications for the Future of State Authority, Contract Rights, and Human Rights*, 18 BUFF. HUM. RTS. L. REV. 1, 40, 76–79 (2012); Adam B. Schiff, *Time to Recognize the Armenian Genocide*, WALL ST. J., Apr. 4, 2009, at A11 ("For over 90 years, Turkey has refused to recognize this dark chapter of its Ottoman past . . . ."). Indeed, acknowledging the Armenian killings as genocide is a crime under the Turkish penal code. *See* Sebnem Arsu, *Turkey Seethes at the U.S. over House Genocide Vote*, N.Y. TIMES, Oct. 12, 2007, at A12.

3. *See* Remarks by President Obama and Turkish Prime Minister Erdogan After Meeting, The White House, Office of the Press Secretary (Apr. 6, 2009), *available at* http://whitehouse.gov/the-press-office/remarks-president-and-pm-turkey-after-meeting; G. Lincoln McCurdy, *Armenian Genocide Resolution*, WALL ST. J., Mar. 22, 2010, at A20 (noting that 90 percent of all supplies going to U.S. troops in Iraq go through channels in Turkey and that Turkey manages the logistics for NATO operations in Afghanistan).

4. *See* McCurdy, *supra* note 3.

5. *See* Peter Baker, *Obama Marks Genocide Without Saying the Word*, N.Y. TIMES, Apr. 25, 2010, at A10.

6. *See* Movsesian v. Victoria Versicherung AG (*Movsesian II*), 629 F.3d 901, 907 (9th Cir. 2010) (listing some of the states that have organized events and speeches to commemorate the Armenian genocide), *overruled by* Movsesian v. Victoria Versicherung AG (*Movsesian III*), 670 F.3d 1067 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2795 (2013). Additionally, approximately twenty-one countries have officially recognized the Armenian killings as genocide. *See* ALEXANDER-MICHAEL HADJILYRA, THE ARMENIANS OF CYPRUS 32 (2009).

7. *See Movsesian III*, 670 F.3d 1067.

8. *See id.* at 1069–70.

period led to a settlement with New York Life Insurance Company.[9] It would have enabled claimants—descendants of policy beneficiaries—to collect from European insurance companies.[10] But one of these European insurance companies, Munich Re, challenged the statute at the appellate level.[11] Ultimately in 2012, the Ninth Circuit invalidated the California statute on the ground that it impermissibly interfered with the federal government's authority over foreign affairs.[12]

The Ninth Circuit's invalidation of the California legislation raises the question of the proper balance between federalism—respect for a state's autonomy as preserved by the U.S. constitutional balance—and the need for the United States to design and implement a coherent and uniform foreign policy. This topic has been heavily debated since the founding of the United States.[13] The reality is that the scope of traditional state police powers and the foreign policy of the United States do not fit neatly into two separate spheres.[14] Federalism and foreign policy are thus in constant tension, and the Supreme Court has addressed foreign affairs federalism cases in many different contexts.[15]

Many cases involving the intersection between foreign affairs and federalism have three common denominators: (1) an explicit act of the state legislature,[16] which (2) has affected or seems likely to affect the relations

9. *See* Stempel, *supra* note 2, at 54–55.

10. *See id.*

11. *See Movsesian III*, 670 F.3d at 1071; *see also* Stempel, *supra* note 2, at 55.

12. *See Movsesian III*, 670 F.3d at 1076.

13. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936) (holding that the federal government possesses an elevated level of control over foreign affairs, beyond the powers enumerated in the Constitution); Missouri v. Holland, 252 U.S. 416 (1920) (holding that international treaties preempt state law); *see also* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1621 (1997).

14. *See, e.g.*, Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206, 1207–08 (11th Cir. 2010) (per curiam) (discussing the Florida statute prohibiting the allocation of state university funds for state employee travel to countries designated as "State Sponsors of Terrorism"), *cert. denied*, 133 S. Ct. 21 (2012).

15. *See, e.g.*, United States v. Arizona, 132 S. Ct. 2492 (2012) (state law on immigration); Medellín v. Texas, 552 U.S. 491 (2008) (state imposition of capital punishment in contravention of international agreements); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (state insurance laws assisting victims of human rights abuses abroad); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (state economic sanctions on foreign sovereign); Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994) (state tax on global activities of a corporation located within state); United States v. Pink, 315 U.S. 203 (1942) (state cause of action for monetary claims against foreign nations). Often, state and local governments are compelled to act because they can respond more quickly to their citizens' demands than the federal government. *See, e.g.*, Howard N. Fenton, III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT'L L. & BUS. 563, 578 (1993) ("While the Reagan Administration in the 1980's steadfastly resisted imposing sweeping sanctions against the white-minority government in South Africa, the initiative was taken by states and cities across the country.").

16. *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 718–19 (9th Cir. 2014); *Garamendi*, 539 U.S. at 408–09; *Movsesian III*, 670 F.3d at 1077; *Winn*, 616 F.3d at 1207–08; Nat'l Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731, 741–42 (N.D. Ill. 2007).

between the United States and foreign nations and parties,[17] and (3) a U.S. court has been asked to invalidate the state law because it interferes with or contravenes the foreign policy preferences and freedom of action of national actors.[18] Throughout history, these cases have been analyzed through a variety of frameworks.[19]

The intersection between federalism and foreign affairs has been a hot topic among constitutional scholars.[20] There are two general schools of thought. One side reflects the idea that in the area of foreign affairs, the federal government holds exclusive supremacy, and so state statutes that seem likely to affect the relations that intersect with foreign affairs are treated with less deference.[21] The opposing side asserts that the federal government is subject to the same constitutional restraints in foreign affairs as in domestic affairs, and that the powers of the three branches of the national government over foreign affairs are confined to those affirmatively granted by the Constitution.[22] Much literature on the foreign affairs-federalism debate has focused on (1) supporting or disavowing foreign affairs exceptionalism,[23] (2) fitting foreign affairs into preexisting paradigms of conflict or field preemption,[24] and (3) most narrowly, simply reconciling the confusing thicket of Supreme Court precedents on the question.[25] But there has been less attention paid to the facts of specific cases, in which the tension between federalism and foreign affairs has exhibited itself, and the possibility of formulating a solution based on a

17. *See Garamendi*, 539 U.S. at 420–21; *Movsesian III*, 670 F.3d at 1077; *Winn*, 616 F.3d at 1207–08; *Giannoulias*, 523 F. Supp. 2d at 741–42.

18. *See Garamendi*, 539 U.S. at 413; *Movsesian III*, 670 F.3d at 1070–71; *Winn*, 616 F.3d at 1207; *Giannoulias*, 523 F. Supp. 2d at 737.

19. *See generally Crosby*, 530 U.S. 363; Zschernig v. Miller, 389 U.S. 429 (1968); *see also* Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *Movsesian III*, 670 F.3d at 1075–76.

20. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150, 162–65 (2d ed. 1996); Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002).

21. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 441 (1997).

22. *See generally* Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259 (2001); *see also* Goldsmith, *supra* note 13, at 1676–77.

23. *See, e.g.*, Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723 (2013); Michael D. Ramsey, *Review Essay: Textbook Revisionism*, 43 VA. J. INT'L L. 1111, 1116–19 (2003) (reviewing CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS (2002)).

24. *See, e.g.*, Goldsmith, *supra* note 20; Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re)Justifying, Refining and Distinguishing the dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 307–08 (2011); Joseph B. Crace, Jr., Note, Gara-*Mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 225 (2004).

25. *See, e.g.*, Abebe & Huq, *supra* note 23. Additionally, scholars have explored the balance of power on foreign affairs within the federal government itself. *See generally* Risa E. Kaufman, *"By Some Other Means": Considering the Executive's Role in Fostering Subnational Human Rights Compliance*, 33 CARDOZO L. REV. 1971 (2012).

typology of the different sorts of cases. This Note seeks to mitigate lower courts' confusion[26] in this area.

The intersection between foreign affairs and federalism arises in a variety of situations as the world becomes more globalized.[27] This Note leaves it to others to debate foreign affairs exceptionalism, reconcile foreign affairs federalism with general preemption doctrines, and balance the powers within the federal government. Instead, this Note provides a snapshot of the current state of the ever-changing balance between federalism and foreign affairs in four distinct fact patterns[28] in light of the Supreme Court's relatively recent decisions in *American Insurance Ass'n v. Garamendi*[29] and *Medellín v. Texas*[30] and recent manifestations in lower courts. Recently, lower courts have struggled with the intersection between federalism and foreign affairs in two distinct situations: (1) where the state legislature has supplemented existing federal economic sanctions on a country by enacting its own sanctions against foreign sovereigns,[31] and (2) where the state legislature acts pursuant to its police power to regulate insurance claims for victims of human rights abuses abroad, for which there is no existing federal policy on point.[32]

Part I of this Note outlines the development of perspectives on the intersection of foreign affairs and federalism from the founding of the Constitution to present day. It discusses the key Supreme Court decisions that have provided the framework for invalidating state laws that intersect with foreign affairs: *Zschernig v. Miller*,[33] *Crosby v. National Foreign Trade Council*,[34] and *Garamendi*. Part I culminates in a discussion of

26. *See, e.g.*, Nat'l Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731 (N.D. Ill. 2007).

27. *See* CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURT 190 (2012) (noting "a structural change . . . that has begun to transform the global order of unitary nation-states into a system that empowers subfederal units such as the American states"); Sandra L. Lynch, *The United States, the States, and Foreign Relations*, 33 SUFFOLK U. L. REV. 217, 219 (2000); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1247–48 (1999). For instance, two New York State lawmakers recently threatened to strip aid and bonding privileges to public and private universities that participate in organizations such as the American Studies Association that have imposed academic boycotts on Israel. *See* Ken Lovett, *2 NYS Lawmakers Want to Yank State Funding from Colleges Supporting Israeli Boycott*, N.Y. DAILY NEWS (Dec. 27, 2013, 11:47 AM), http://www.nydailynews.com/blogs/dailypolitics/1.1697658.

28. Namely, these are where a state: (1) attempts to add on to an existing federal economic sanctions regime by imposing its own sanctions on a foreign country; (2) legislates pursuant to its police power in an area that intersects with foreign affairs but does not conflict with any federal law; (3) legislates beyond its police power to significantly impact foreign affairs; or (4) legislates beyond its police power but does not create impermissible effects on foreign affairs. *See infra* Part II.

29. 539 U.S. 396 (2003).

30. 552 U.S. 491 (2008).

31. *See, e.g.*, Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010) (per curiam), *cert. denied*, 133 S. Ct. 21 (2012); *Giannoulias*, 523 F. Supp. 2d 731.

32. *See, e.g.*, *Movsesian III*, 670 F.3d 1067 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2795 (2013).

33. 389 U.S. 429 (1968).

34. 530 U.S. 363 (2000).

Garamendi—the Supreme Court's most recent pro-national government attempt to articulate a general framework—and a discussion of *Medellín*—the Court's most recent statement on the unitary foreign policy-or-federalism deference issue, which was decisively resolved in favor of the states. Part II explores lower court decisions and categorizes the decisions into groups. Part III articulates a framework for dealing with state laws with potentially serious implications for the relations between the United States and foreign parties based on the typology introduced in Part II. This framework turns significantly on whether there is some affirmative federal government legislation or policy on point and on whether the state law in question is plausibly grounded in a traditional police power.

I. AN ONGOING TENSION BETWEEN FEDERALISM AND U.S. FOREIGN POLICY

This part outlines the evolution of the foreign affairs "preemption" doctrines from the founding of the United States to the Supreme Court's decision in *Garamendi*. It then discusses the impact of *Garamendi* on the preexisting foreign affairs preemption doctrines and the Court's recent decision in *Medellín*.

First, Part I.A. explains the balance between federalism and federal foreign affairs and how that balance has shifted in recent decades as the Court has dealt with foreign affairs preemption. Next, Part I.B discusses the Supreme Court's opinion in *Garamendi*, which invalidated a state law facilitating Holocaust-era insurance claims, because it conflicted with federal executive policy. Parts I.B also outlines the impact of *Garamendi* on the two distinct doctrines developed by *Crosby* and *Zschernig*. Lastly, Part I.C discusses *Medellín*, the Court's most recent case dealing with foreign affairs and federalism.

A. Foreign Affairs and Federalism Before American Insurance Ass'n v. Garamendi

Part I.A.1 discusses the constitutional provisions that address the balance between federalism concerns and the federal foreign affairs power. It examines the circumstances in which federal law might preempt state laws that interfere with the federal power over foreign affairs. Next, Part I.A.2 examines the Supreme Court's expansion of foreign affairs preemption in *Zschernig*, where a state law was held invalid because it encroached too far on the federal government's power over foreign affairs despite the absence of any conflict between the state and federal laws. Part I.A.3 examines the criticism of and retreat from *Zschernig* in the years following. Part I.A.4 discusses the Court's opinion in *Crosby*, which invalidated a state statute for attempting to impose economic sanctions on Burma, because it was an obstacle to compliance with the coexisting federal statutory sanctions regime.

1. The Constitutional Balancing of Federalism with Foreign Affairs

The Framers of the Constitution were indeed concerned with federalism and ensuring that the states retained significant powers,[35] but they recognized that the federal government should control the foreign affairs of the nation.[36] In Federalist 42, James Madison wrote, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[37] Likewise, in Federalist 80, Alexander Hamilton wrote, "the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."[38] As recognized by the Founders, state involvement in foreign affairs could have negative consequences.[39]

The Constitution reflects the idea that "the nation must speak with one voice, not fifty"[40] in global affairs.[41] Accordingly, the Constitution grants the federal government plenary, but not explicitly exclusive, power over foreign affairs.[42] Article I, Section 10 explicitly prohibits the states from performing certain foreign affairs functions, including entering into a "treaty, alliance, or confederation."[43] Article I, Section 8 and Article II affirmatively grant the legislative and executive branches power to "conduct foreign relations through the enactment of federal statutes, treaties, and executive agreements."[44] The Supremacy Clause in Article VI states that these federal enactments are supreme over state law.[45] Under Article III, the federal judiciary has power over cases concerning federal statutes, treaties, executive agreements, and controversies involving

35. THE FEDERALIST NO. 45 (James Madison) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").

36. THE FEDERALIST NO. 42 (James Madison).

37. *Id.*

38. THE FEDERALIST NO. 80 (Alexander Hamilton).

39. *See* Zschernig v. Miller, 389 U.S. 429, 440 (1968) ("[State] regulations must give way if they impair the effective exercise of the Nation's foreign policy."); *see also* Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 648 (2007) ("A misstep in foreign affairs by a state or local government can have adverse and potentially devastating effects on the entire country. If a state or local government adopts a position that differs from official federal foreign policy, it fractures the country's voice and negotiating power abroad.").

40. Goldsmith, *supra* note 13, at 1621.

41. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. 5 (1987) (noting that a state "of the United States is not a 'state' under international law . . . since by its constitutional status it does not have capacity to conduct foreign relations.").

42. *See* Goldsmith, *supra* note 13, at 1619 (citing U.S. CONST. art. I, § 8; art. II).

43. U.S. CONST. art. I, § 10.

44. Goldsmith, *supra* note 13, at 1619; *see also* U.S. CONST. art. I, § 8; art. II.

45. U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

foreigners.[46] Further, the Take Care Clause in Article II authorizes the President to enforce federal enactments.[47]

But federal sovereignty over foreign affairs must be balanced with the Tenth Amendment, which states that "[t]he 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."[48] Thus, state laws could presumably intersect with foreign affairs if outside of those powers expressly allocated to the federal government.

State actions that intersect with foreign affairs have been analyzed under various preemption doctrines.[49] Generally, if a state action interferes with federal power over foreign affairs, the state action is preempted by federal law, and is thus unconstitutional.[50]

Federal preemption of state law may be either express or implied.[51] Express preemption occurs where a federal law contains an explicit preemption clause, or Congress's intention to preempt state law is implicit in the statutory structure.[52] There are three types of implied preemption[53]: (1) conflict preemption, where it is impossible to comply with both federal and state law,[54] (2) obstacle preemption, where a state statute "stands as an obstacle to the accomplishment" of the "purposes and objectives" of a federal law,[55] and (3) field preemption, where a federal regulatory scheme is "so pervasive" that "Congress left no room for the States to supplement it,"[56] or there is such a dominant "federal interest" in the field that state law is preempted.[57]

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46. U.S. CONST. art. III, § 2, cl. 1.

47. U.S. CONST. art. II, § 3.

48. U.S. CONST. amend. X.

49. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419–20 (2003) (applying conflict preemption and discussing field preemption); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) (applying conflict, or obstacle, preemption); Zschernig v. Miller, 389 U.S. 429, 432 (1968) (applying dormant foreign affairs preemption).

50. *See, e.g.*, *Garamendi*, 539 U.S. at 401.

51. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 433–34 (4th ed. 2011).

52. *See* Cindy Galway Buys & Grant Gorman, Movsesian v. Victoria Versicherung *and the Scope of the President's Foreign Affairs Power to Preempt Words*, 32 N. ILL. U. L. REV. 205, 208 (2012). For example, the Employee Retirement Income Security Act provides that it "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the Act. Employee Retirement Income Security Act, 29 U.S.C. § 1144(a) (2012). Additionally, the federal copyright statute preempts any "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of [federal] copyright [law]." 17 U.S.C. § 301(a) (2012).

53. *See* BRADLEY & GOLDSMITH, *supra* note 51, at 433–34; Goldsmith, *supra* note 20, at 202–08. However, these categories are not "rigidly distinct," and both obstacle preemption and field preemption can be considered species of conflict preemption. English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990).

54. *See* BRADLEY & GOLDSMITH, *supra* note 51, at 434. In such cases, "there is evidence of clear conflict" between federal and state policies, so federal law preempts state law. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418, 421 (2003).

55. *See* BRADLEY & GOLDSMITH, *supra* note 51, at 434 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

56. *English*, 496 U.S. at 79.

57. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The Constitution does not explicitly grant exclusive power over foreign affairs to the federal government.[58] But given all of the constitutional provisions on federal foreign affairs power,[59] the Supreme Court has at times read a federal preemptive power over foreign affairs into the Constitution.[60] Federal law indisputably preempts state law where there is an explicit conflict between a treaty or executive agreement and the state law.[61] In the late 1930s, the Court held that the executive branch had the authority to unilaterally make foreign policy agreements that would preempt state law.[62] The Court then asserted that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively."[63]

2. The Cold War: Expansion of Preemption and Federal Exclusivity in Foreign Affairs

In the wake of World War II, the Supreme Court first recognized that a dormant foreign affairs doctrine might act to invalidate state laws that intrude into the federal domain of foreign affairs, even in the absence of an explicit conflict with federal law.[64]

In *Clark v. Allen*,[65] the Supreme Court confronted a California statute that restricted the rights of nonresident aliens to inherit property in California.[66] The state statute provided that a nonresident alien could inherit property in the state only if the individual's respective country offered U.S. citizens the same reciprocal right of inheritance.[67] The Supreme Court upheld the statute with respect to personal property,[68]

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58. *See* U.S. CONST. amend. X; HENKIN, *supra* note 20, at 156; *supra* note 48 and accompanying text.

59. *See supra* notes 43–47 and accompanying text.

60. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315–16 (1936) (noting that the federal government possesses the authority to make foreign policy, even though it is not explicitly mentioned in the Constitution and that the Tenth Amendment did not reserve to the states power over foreign affairs).

61. U.S. CONST. art. VI, cl. 2; *see* United States v. Pink, 315 U.S. 203, 230–31 (1942); Hines v. Davidowitz, 312 U.S. 52, 62–63 (1941); United States v. Belmont, 301 U.S. 324, 331 (1937).

62. *Belmont*, 301 U.S. at 330 ("[T]he Executive had authority to speak as the sole organ of [the federal] government.").

63. *Pink*, 315 U.S. at 233; *see also Hines*, 312 U.S. at 61, 63 ("The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

64. *See* Clark v. Allen, 331 U.S. 503, 516–17 (1947). This doctrine is commonly analyzed under the rubric of field preemption, which pins it to the Supremacy Clause of the Constitution. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 398 (2003). Others refer to it as the federal common law of foreign relations, referring to judge-made law. *See generally* Goldsmith, *supra* note 13. Often, it is referred to plainly as the dormant foreign affairs doctrine with no underpinnings in the Supremacy Clause. *See* Schaefer, *supra* note 24, at 299.

65. 331 U.S. 503 (1947).

66. *See id.* at 506.

67. *See id.* at 506 n.1.

68. *See id.* at 517. However, the statute was preempted with respect to real property by the Treaty of Friendship, Commerce and Consular Rights. *See id.* at 517–18.

noting that even though this aspect of the statute might have an "incidental or indirect effect in foreign countries," it did not cross a "forbidden line."[69] Although it upheld the statute, the *Clark* Court acknowledged the existence of a limitation on state action based on the extent of its effects abroad.[70]

Only in 1968 did the Supreme Court first find a state law preempted by federal law in the absence of any conflict with federal law on the basis of a federal dormant foreign affairs power.[71] In *Zschernig v. Miller*, the Supreme Court was presented with a nearly identical statute to the one at issue in *Clark*.[72] The Oregon courts had applied an Oregon escheat statute to deny a property inheritance to a resident of East Germany.[73] The Oregon statute prohibited inheritance of in-state property by foreigners unless they could show that their home country would not confiscate the property and offered American citizens reciprocal rights of inheritance.[74] This required a local probate court to inquire into the details of foreign law.[75] Although there was no explicit conflict with federal law, the Supreme Court overruled the Oregon statute because encouraging local courts to base decisions on inquiries into international law intruded into foreign affairs,[76] a "domain of exclusively federal competence."[77]

In its decision, the *Zschernig* Court relied on the "incidental or indirect effect" language from *Clark* to strike down the statute.[78] The Court acknowledged that the Oregon statute had "more than 'some incidental or indirect effect in foreign countries'" and was consequently impermissibly unconstitutional, a violation of the allegedly exclusive power of the federal government over the foreign affairs of the nation.[79] Although the "more than some incidental or indirect effect" language was used once, the Court employed other phrases throughout the opinion to justify its decision, spurring subsequent confusion over the proper test to apply to invalidate a statute based on *Zschernig*'s new and expansive dormant foreign affairs doctrine.[80] The Court noted that the statute created a "great potential" for "disruption" of U.S. foreign relations, or "embarrassment" for the nation as a whole.[81] Further, the statute "affect[ed] international relations in a

69. *Id.* at 517.
70. *See* Schaefer, *supra* note 24, at 236.
71. *See generally* Zschernig v. Miller, 389 U.S. 429 (1968).
72. *Id.*; *see supra* notes 65–70 and accompanying text.
73. *See Zschernig*, 389 U.S. at 430.
74. *See id.* at 430–31.
75. *See id.* at 435, 440.
76. *See id.* at 441.
77. *Id.* at 442 (Stewart, J., concurring).
78. *See id.* at 458 (Harlan, J., concurring). But *Zschernig* was distinguishable from *Clark* because the Oregon statute in *Zschernig* involved an as-applied challenge, whereas *Clark* involved a facial challenge. *See id.* at 433 (majority opinion). The problem with the Oregon statute in *Zschernig* was that probate courts were inquiring into foreign government policies and activities, which unconstitutionally invaded the federal foreign affairs power. *See id.* at 433–34. Such actions had not yet occurred in *Clark*, although they were probable effects of the statute there as well. *See id.* at 432–34.
79. *Id.* at 434.
80. *See infra* notes 95–109 and accompanying text.
81. *Zschernig*, 389 U.S. at 434–35.

persistent and subtle way," had a "direct impact upon foreign relations," and might have "adversely affect[ed] the power of the central government to deal with [foreign relations] problems."[82] The Court also noted that the Oregon statute might "impair the effective exercise of the Nation's foreign policy" or lead to serious "international controversies."[83] Regardless of the exact standard it put forth, *Zschernig* stood for the proposition that a state statute that does not conflict with any federal law may still be struck down for reaching too far into the field of foreign affairs.[84]

In his concurring opinion, Justice John Marshall Harlan II expressed skepticism over the possibility of preempting state laws in traditional state areas that had only a modest impact on foreign relations.[85] He argued that the majority's broad reading of the federal power over foreign affairs was unsupported and unsustainable.[86] He noted that the majority's main problem with the Oregon statute was that it encouraged state court judges to evaluate the policies of foreign governments.[87] He suggested that there were no actual foreign affairs effects and that this concern was speculative, as state court evaluation of foreign law has never "had any foreign relations consequence whatsoever."[88] Thus, Justice Harlan might have overruled the state statute only if there was an indication of *actual effects* abroad. Accordingly, he noted that the state law did not interfere with U.S. conduct abroad, as even the Solicitor General of the United States had filed an amicus brief denying that the state policy conflicted with federal foreign policy.[89]

What was the reach of the dormant foreign affairs doctrine after *Zschernig*?[90] Since *Zschernig*, the Supreme Court has not overturned a state law because of the dormant foreign affairs power in the absence of an explicit conflict between federal and state law.[91] Accordingly, scholars

82. *Id.* at 440–41.

83. *Id.*

84. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 418 (2003).

85. *See Zschernig*, 389 U.S. at 443–62 (Harlan, J., concurring).

86. *See id.* Justice Harlan ultimately concurred in the judgment because he found that the Oregon statute conflicted with U.S. treaty obligations with Germany. *See id.* at 443.

87. *See id.* at 461 ("Essentially, the Court's basis for decision appears to be that alien inheritance laws afford state court judges an opportunity to criticize in dictum the policies of foreign governments, and that these dicta may adversely affect our foreign relations.").

88. *Id.* at 460.

89. *See id.* (citing Brief for the United States as Amicus Curiae, Zschernig v. Miller, 389 U.S. 429 (1968) (No. 21), 1967 WL 113577, at *6 n.5).

90. *See* HENKIN, *supra* note 20, at 164 ("*Zschernig v. Miller* . . . imposed additional limitations on the states, but what they are and how far they reach still remain to be determined. . . . [I]t will be largely for the courts, and may take many years and many cases, to develop the distinctions and draw the lines that will define the *Zschernig* limitations on the states."); *see also* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1059 (1967) (noting the complexity of this question, deeming scholarship on the scope of *Zschernig* as "very sketchy treatment of a complex subject").

91. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting) (noting that the U.S. Supreme Court has never relied on *Zschernig* for a decision); *see also* Robinson, *supra* note 39, at 658 ("The continued ambiguity surrounding

have questioned whether this power exists anymore, referring to the doctrine as a "relic of the Cold War."[92] But the Court has not explicitly indicated that *Zschernig* should be overturned and has acknowledged its continued survival in subsequent decisions.[93]

3. Retreating from *Zschernig v. Miller*

Fearing that the federal government had usurped too much power, commentators expressed disapproval of the federal government's new monopoly over foreign affairs.[94] Critics of the doctrine believed that foreign affairs preemption should be narrowly defined and should only be used where the federal government has expressly articulated a policy.[95] Professor Louis Henkin noted that the idea that "the new United States government was to have major powers outside the Constitution is not intimated in the Constitution itself, in the records of the Convention, in the Federalist Papers, or in contemporary debates."[96] Likewise, Professor Jack L. Goldsmith criticized the theory that the federal government holds exclusive authority in the field of foreign affairs, outside of the powers enumerated in the Constitution.[97] He noted that this was contrary to the intent of the Founders, not written explicitly in the Constitution, and unsupported by any case law prior to 1936.[98] Most of the *Zschernig* critics dispute the concept of "foreign affairs exceptionalism,"[99] the concept and practice of resolving foreign affairs issues under a different framework from domestic issues.[100]

In *Barclays Bank PLC v. Franchise Tax Board of California*,[101] California had imposed a state tax on multinational corporations.[102] The plaintiffs asserted that such a tax regime impaired federal uniformity and prevented the United States from "speaking with one voice in international trade," in violation of the dormant Foreign Commerce Cause.[103] The Court rejected the plaintiffs' arguments, holding that the judiciary lacked power to decide how to balance foreign relations effects with state autonomy.[104] Instead, the Court indicated that this was an issue for the federal legislature and that Congress was the only entity suited to determine whether a state

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the sweeping doctrine *Zschernig* suggests has created much uncertainty about the scope of judicial preemption of localities' actions that affect foreign relations.").

92. *See, e.g.*, HENKIN, *supra* note 20, at 165 n.**.

93. *See, e.g.*, *Garamendi*, 539 U.S. at 439.

94. *See infra* notes 95–100.

95. *See* Crace, *supra* note 24, at 208 (citing Ramsey, *supra* note 23, at 1116–19).

96. HENKIN, *supra* note 20, at 19–20.

97. *See* Goldsmith, *supra* note 13, at 1659–60.

98. *See id.*

99. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1104–07 (1999) (discussing "foreign affairs exceptionalism").

100. *See* Vázquez, *supra* note 22, at 1259–60.

101. 512 U.S. 298 (1994).

102. *See id.* at 301–03.

103. *Id.* at 320 (quoting Japan Line Ltd. v. Cnty. of L.A., 441 U.S. 434, 448 (1979)) (citation omitted).

104. *See id.* at 328.

action impermissibly interferes with foreign affairs.[105] Further, the Court noted that congressional silence on the issue created a presumption that the state action was permissible.[106]

Although *Barclays Bank* was based on the dormant Foreign Commerce Clause,[107] some scholars believed that the Supreme Court's decision in *Barclays Bank* eliminated *Zschernig*'s dormant foreign affairs doctrine.[108] Accordingly, Professor Edward Swaine noted that "to those skeptical of federal judicial power, *Barclays Bank* was not unlike a powerful general-purpose pesticide: whatever the foreign relations doctrines were, it killed them."[109]

4. *Crosby v. National Foreign Trade Council*: The Supreme Court Keeps *Zschernig v. Miller* on Life Support

In 2000, the Court held that a state statute was preempted because of a conflict between state and federal law and declined to reassess or apply *Zschernig*, although *Zschernig* was arguably applicable on the facts of the case.[110] In *Crosby v. National Foreign Trade Council*, the National Foreign Trade Council challenged a Massachusetts state statute that prohibited state entities from buying products from companies that did business with Burma.[111] The underlying purpose of the law, entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma," was to sanction the Burmese government for human rights abuses.[112] However, federal legislation was passed three months after the

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105. *See id.* at 331 ("[W]e leave it to Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.").

106. *See id.* at 323–24 ("[Congress] need not convey its intent with . . . unmistakable clarity . . . .").

107. *See id.* at 311. The dormant Foreign Commerce Clause limits states' power to impact foreign commerce. *See Japan Line Ltd.*, 441 U.S. at 448 ("In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." (quoting Bd. of Trs. of Univ. of Ill. v. United States, 289 U.S. 48, 59 (1933)); *see also* Jennifer M. Lee, Comment, *A Match Made in Heaven or a Pair of Star-Crossed Lovers? Assessing Dormant-Foreign-Commerce-Clause Limitations on the Wisconsin-China Relationship*, 2009 WIS. L. REV. 733, 737. Many statutes challenged on foreign affairs preemption grounds are alternatively challenged on dormant Foreign Commerce Clause grounds. *See, e.g.*, Nat'l Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731, 737 (N.D. Ill. 2007).

108. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 865–66 (1997); Goldsmith, *supra* note 13, at 1699–1703; Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 163–65 (1994); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 24–25 (1995).

109. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1193 (2000).

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

111. *See id.* at 366.

112. *See* Brief for Petitioner at 21, Natsios v. Nat'l Foreign Trade Council, 181 F.3d 38 (1st Cir. 1999) (No. 99-474), 2000 WL 35850, at *5, *aff'd sub nom.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). Although this purpose was clear, the Court did not rely

Massachusetts statute was enacted, imposing similar sanctions on the Burmese regime.[113]

Before reaching the Supreme Court, the First Circuit struck down the Massachusetts Burma Law for violating the dormant foreign affairs power.[114] Applying *Zschernig*, the First Circuit held that the law had "more than an incidental or indirect effect on foreign relations," and was thus invalid.[115] In so holding, the court noted that the purpose of the law was to alter Burma's human rights policies.[116] Further, it relied on a slippery slope argument and concluded that the law would have a significant effect on foreign affairs in the aggregate if similar laws were passed in other states.[117] Lastly, the court took into account the views of other countries and noted the potential for embarrassment for the United States if it were to put forth multiple inconsistent foreign policies.[118] In invalidating the statute, the First Circuit determined that *Barclays Bank* only pertained to the Foreign Commerce Clause and not analogously to the dormant foreign affairs power of *Zschernig*.[119]

Many believed that the Supreme Court had granted certiorari to clarify the *Zschernig* confusion.[120] However, the Supreme Court declined to address the dormant foreign affairs issue, ruling instead that the state statute was invalid on conflict preemption grounds and leaving the First Circuit decision to stand as dicta.[121]

In *Crosby*, the Supreme Court held that the Massachusetts law was preempted by the existing federal legislation, even though the federal sanctions law did not explicitly prohibit states from making their own similar laws to penalize Burma economically.[122] Despite no explicit conflict, the Court relied on "obstacle preemption"[123] and found the state statute inconsistent with the federal policy in three ways: (1) the Massachusetts law could detract from Congress's intent by limiting the President's potential diplomatic and economic leverage,[124] (2) the state law undermined the "congressional calibration of force" by using a different means to achieve the same ends and by reaching more broadly than the

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on the state legislature's motivation for its decision. Rather, it held that the state statute was an obstacle to complying with the federal sanctions regime. *See Crosby*, 530 U.S. at 373.

113. *See Crosby*, 530 U.S. at 368.

114. *See Natsios*, 181 F.3d at 53.

115. *See id.* at 52–53.

116. *See id.* at 53.

117. *See id.* at 53–54.

118. *See id.* at 54.

119. *See id.* at 59.

120. *See* Vázquez, *supra* note 22, at 1259.

121. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000). Indeed, the *Crosby* Court's only mention of *Zschernig* was a reference to the First Circuit's prior opinion, which found that the state act interfered with the federal government's foreign affairs power. *See id.* at 371; *supra* notes 114–21 and accompanying text.

122. *See Crosby*, 530 U.S. at 380.

123. Obstacle preemption is a species of conflict preemption, as it operates in the same way. *See* BRADLEY & GOLDSMITH, *supra* note 51, at 434.

124. *See Crosby*, 530 U.S. at 374–77.

federal act,[125] and (3) it interfered with the President's authority under the federal sanctions act to represent the United States on the Burma issue.[126] The Court found that the Massachusetts statute was an obstacle to Congress's objectives under the federal sanctions regime.[127] Finding that it undermined "the intended purpose and 'natural effect'" of the federal sanctions, the Court invalidated the statute.[128]

After *Crosby*, the status of *Zschernig* was as murky as ever. Despite the First Circuit's showing that *Zschernig* could have applied, the *Crosby* Court demonstrated its reluctance to rely on or approvingly cite *Zschernig*, indicating its potential demise.[129] But on the other hand, the Court did not expressly disavow the doctrine, and so it remained for the lower courts to struggle with until the Supreme Court addressed it again in *Garamendi*.[130]

B. American Insurance Ass'n v. Garamendi

This part discusses the Supreme Court's opinion in *American Insurance Ass'n v. Garamendi*, which invalidated a state law facilitating Holocaust-era insurance claims because it conflicted with federal executive policy. Part I.B.1 outlines the facts of the *Garamendi*. Parts I.B.2 and I.B.3 analyze the impact of *Garamendi* on the two distinct doctrines developed by *Crosby* and *Zschernig*.

1. California's Holocaust Victim Relief Efforts

Three years after the *Crosby* decision, the Supreme Court in *Garamendi* altered the framework of foreign affairs federalism jurisprudence. In *Garamendi*, the Supreme Court was confronted with a California state statute, the California Holocaust Victim Insurance Relief Act (HVIRA), that allowed residents to sue in California state courts on insurance claims based on acts perpetrated during the Holocaust.[131] The purpose of the statute was to facilitate the filing of civil actions for failure to pay insurance claims to victims of the Holocaust.[132] During the Holocaust, the Nazis had seized considerable property belonging to Jews, including the value of insurance policies.[133] Many of the proceeds from these insurance policies were never paid.[134] HVIRA required any insurer to disclose information about policies sold in Europe between 1920 and 1945.[135] Insurers were required to disclose details regarding "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies" that were

125. *Id.* at 380.
126. *See id.* at 382–84.
127. *See id.* at 373.
128. *See id.*
129. *See* Schaefer, *supra* note 24, at 292.
130. *See, e.g.*, Deutsch v. Turner Corp., 324 F.3d 692, 710 (9th Cir. 2003).
131. *Id.* at 401.
132. *See id.* at 426.
133. *See id.* at 402.
134. *See id.* at 402–03.
135. *See id.* at 401.

issued to anyone in Europe during that time period.[136] A company had to disclose information about itself and any "related company," including parents, subsidiaries, reinsurers, successors in interest, managing general agents, or affiliates.[137] This requirement considered whether the entities were currently related, not whether they were related at the time of the issuance of the policy.[138]

At the time of the enactment of HVIRA, the federal government was simultaneously involved in obtaining restitution for victims of the Holocaust.[139] In 2000, the United States and Germany established the German Foundation Agreement, which is an executive agreement between U.S. President William Clinton and German Chancellor Gerhard Schröder that covered many insurance claims caused by German companies, such as German banks and insurance companies, during the Nazi era.[140] In exchange for Germany's willingness to create a voluntary compensation fund, President Clinton agreed to allow Germany some security in litigation in the United States.[141] Whenever a German company was sued for a Holocaust insurance claim in a U.S. court, the U.S. federal government agreed to submit a statement attesting that it would be in the United States' interests for the German Foundation to be the exclusive forum and provide an exclusive remedy for the claim.[142] Further, the federal government agreed that it would try to persuade state and local governments to respect the Foundation as the exclusive means of resolving Holocaust-era insurance claims.[143]

In *Garamendi*, the petitioners and the U.S. government argued that the federal executive relationship with Germany should preempt HVIRA.[144] Relying heavily on *Zschernig*, the petitioners contended that California's law interfered with the foreign policy of the executive branch as reflected in its executive agreements with Germany.[145]

2. Extension of Conflict Preemption Under *Crosby v. National Foreign Trade Council*

Garamendi involved executive agreements and accompanying executive branch policy.[146] There was no pertinent congressional action involved.[147] For the first time, the Supreme Court found a state law preempted by a series of executive agreements, combined with letters and statements of executive branch officials, which together constituted the federal

136. *See id.* at 409 (quoting CAL. CIV. PROC. CODE § 3545 (West 2003)).
137. *See id.*
138. *See id.* at 409–10.
139. *See id.* at 405.
140. *See id.* at 405–06.
141. *See id.*
142. *See id.* at 406.
143. *See id.*
144. *See id.* at 413.
145. *See id.* at 413, 421, 427.
146. *See id.* at 421, 427, 429.
147. *See id.* at 429 ("Congress has not acted on the matter addressed here.").

government's mechanisms for securing restitution for claims arising from the Holocaust.[148]

The state law required only disclosure of information, so there was no direct conflict with the executive agreements, but the Court noted that the state law interfered with the executive policy to have all matters resolved through the German Foundation Agreement.[149] The Court noted that "[t]he basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves"[150] and that "if the [California] law is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence."[151] Thus, the evidence of a conflict with federal law was "more than sufficient to demonstrate that [HVIRA] stands in the way of [the President's] diplomatic objectives."[152]

The *Garamendi* decision was unique: the Court expanded on *Crosby*'s statutory preemption decision by holding that a foreign policy interest of the executive branch alone could preempt an otherwise valid state statute.[153] The Court noted that "the President possesses considerable independent constitutional authority to act on behalf of the United States on international issues," and a "conflict with the exercise of that authority" can preempt a state law.[154]

3. *Zschernig v. Miller* Further Narrowed

The *Garamendi* Court not only expanded the reach of conflict preemption[155] but also discussed the *Zschernig* decision in detail and significantly cut back on where a state law can be invalidated in the absence of explicit conflict.[156] In relying on conflict preemption but discussing the dormant foreign affairs doctrine in dicta, the Court demonstrated reluctance to invoke *Zschernig* but acknowledged its continuing survival.[157]

In dicta, the *Garamendi* Court suggested a balancing test to cut back on when courts should rely on the dormant foreign affairs doctrine.[158] Through this new balancing test, the court should look first at whether the

148. *See id.* at 421 ("The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two."); *see also* Robinson, *supra* note 39, at 659 ("Until *Garamendi* the Court had only held that executive agreements preempted state law where conflict between them was explicit.").

149. *See Garamendi*, 539 U.S. at 421–22.

150. *Id.* at 427.

151. *Id.* at 424 (alteration in original) (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377 (2000)).

152. *Id.* at 427 (alteration in original) (quoting *Crosby*, 530 U.S. at 386).

153. *See* Elizabeth Trachy, Comment, *State & Local Economic Sanctions: The Constitutionality of New York's Divestment Actions and the Sudan Accountability & Divestment Act of 2007*, 74 ALB. L. REV. 1019, 1049 (2011).

154. *Garamendi*, 539 U.S. at 424 n.14.

155. *See supra* Part I.B.2.

156. *See Garamendi*, 539 U.S. at 417–20.

157. *See* Schaefer, *supra* note 24, at 288–89.

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

state is legislating in an area within its traditional capacity.[159] Only in the narrow situation where the state law affects international affairs *and* the state legislature acts beyond its traditional responsibilities should the court apply the dormant foreign affairs doctrine from *Zschernig*, asking whether the state statute had "more than some incidental or indirect effect" on foreign affairs.[160] The court should also then balance the competing interests of the state and federal governments.[161] If, however, the state action is within its "traditional competence," the court should require an explicit conflict with federal law to invalidate the state action.[162] Thus, *Zschernig*'s dormant foreign affairs doctrine is no longer sufficient to invalidate a state statute where the state is acting pursuant to its legitimate police powers.[163] Pursuant to *Garamendi*, a state law may now permissibly have significant foreign affairs effects unless there is a conflict between the federal and state laws that invokes *Crosby*-style conflict (or obstacle) preemption.[164]

C. Medellín v. Texas

The Court most recently confronted the intersection between federalism and foreign affairs in the context of criminal law and executive power in 2008.[165] In *Medellín v. Texas*, the Court limited the wide reach of *Garamendi*'s conflict preemption decision,[166] holding that not every assertion of foreign affairs authority by the President will preempt state law.[167] The defendant in *Medellín*, a Mexican citizen, was sentenced to death in Texas following his capital murder conviction.[168] He filed for state habeas relief, claiming that Texas violated his rights under the Vienna Convention on Consular Relations because the Mexican consulate was never informed of his arrest, as required under the Convention.[169] He was

159. *See id.* For example, the regulation of insurance is a traditional state responsibility. *See* McCarran-Ferguson Act, 15 U.S.C. § 1012(a)–(b) (2012); *see also* Stempel, *supra* note 2, at 74 ("The state-based nature of insurance law is further enshrined in the federal statutory law of the McCarran-Ferguson Act."). *But see* FTC v. Travelers Health Ass'n, 362 U.S. 293, 300 (1960) (noting that the McCarran-Ferguson Act was not intended to permit a state to "regulate activities carried on beyond its own borders").

160. *See supra* note 78 and accompanying text (discussing *Zschernig*); *cf. Garamendi*, 539 U.S. at 419 n.11.

161. *Cf. Garamendi*, 539 U.S. at 419 n.11.

162. *Cf. id.* (quoting Zschernig v. Miller, 389 U.S. 429, 459 (1968)).

163. *See* Crace, *supra* note 24, at 223 ("*Garamendi* . . . seems to indicate that, in the absence of conflicting federal action, dormant foreign affairs preemption is [only] possible if the state's action affects foreign affairs *without addressing a 'traditional state responsibility.'*").

164. *See Garamendi*, 539 U.S. at 419; *see also* Crace, *supra* note 24, at 223 ("[I]t is conceivable that, under the majority's analysis, a state regulation that affects foreign affairs but also regulates a 'traditional state responsibility' could survive a *Garamendi* analysis.").

165. *See generally* Medellín v. Texas, 552 U.S. 491 (2008).

166. *See supra* Part I.B.2.

167. *Cf. Medellín*, 552 U.S. at 530.

168. *See id.* at 501.

169. *See id.* at 501–02.

never informed of his right to notify the consulate.[170] Mexico successfully litigated on behalf of Medellín against the United States in the International Court of Justice (ICJ),[171] and Medellín appealed to the Texas Court of Appeals.[172] The ICJ had held that Medellín was entitled to "review and reconsideration" of his conviction, despite any contrary domestic rules.[173] President George W. Bush then issued a memorandum ordering the Texas Court of Appeals to comply with the ICJ decision.[174] The Texas Court of Appeals ignored the memorandum and dismissed the case.[175] The issues before the Supreme Court was whether state courts are bound by ICJ decisions and if so, whether the President had the authority to order the states to comply.[176]

The *Medellín* Court held that the Vienna Convention was not self-executing and thus not binding on the lower courts without congressional action.[177] Therefore, President Bush's memorandum did not preempt the Texas Court of Appeals's decision to dismiss Medellín's writ of habeas corpus.[178] The Court acknowledged that it had recognized in *Garamendi* that the exercise of the President's "narrow and strictly limited authority to settle international claims disputes pursuant to an executive agreement" may give rise to preemption of inconsistent state action but held that this authority was only applicable in a "narrow set of circumstances."[179] Thus, the presidential memorandum at issue in *Medellín* did not carry the same binding authority as the executive agreement at issue in *Garamendi*.[180]

The Court in *Medellín* looked to whether the federal action had the force of law, rather than choosing whether the state law should be invalidated on the basis of conflict preemption or dormant foreign affairs preemption according to the guidelines outlined in *Garamendi*.[181] Thus, commentators have opined that *Medellín* is an indication of the Court's willingness to disavow *Garamendi*'s analysis of foreign affairs preemption.[182]

170. *See id.* at 501.

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

172. *See generally* Medellín v. Dretke, 544 U.S. 660 (2005) (per curiam); *Ex parte* Medellín, 223 S.W.3d 315 (Tex. Crim. App. 2006).

173. *Case Concerning Avena and Other Mexican Nationals*, 2004 I.C.J. at 73.

174. *See Medellín*, 552 U.S. at 503.

175. *See id.* at 504.

176. *See id.* at 498.

177. *See id.* at 530.

178. *See id.* at 525–27.

179. *See id.* at 531–32.

180. *See* Carolyn A. Pytynia, *Forgive Me, Founding Fathers for I Have Sinned: A Reconciliation of Foreign Affairs Preemption After* Medellin v. Texas, 43 VAND. J. TRANSNAT'L L. 1413, 1433 (2010).

181. *See Medellín*, 552 U.S. at 524.

182. *See, e.g.*, Pytynia, *supra* note 180, at 1429 ("[T]he Supreme Court seemed to completely undermine its rationale in *Garamendi*.").

II. A TYPOLOGY: FOUR TYPES OF STATE ACTION THAT INTERSECT WITH U.S. FOREIGN POLICY

Although the foreign affairs preemption doctrines remain messy,[183] on a broad level, *Garamendi* has expanded conflict preemption and significantly pulled back from the relevance of *Zschernig*'s dormant doctrine.[184] Now, there are four distinct types of cases that raise concerns regarding the tension between federalism and foreign relations. Each type requires a different doctrinal analysis and outcome. This part discusses these four fact patterns separately in light of recent decisions that involve: (1) state sanctions on foreign sovereigns and (2) state efforts to facilitate insurance claims for events that occurred abroad.

Part II.A first analyzes the set of cases where there is an existing federal policy on point, whether executive or statutory, and where conflict preemption is the appropriate framework for analysis. This conflict (or obstacle) preemption is in line with the facts and holdings in both *Crosby* and *Garamendi*.[185] It analyzes state attempts to impose sanctions on foreign governments when the federal government has already imposed sanctions. It first addresses the traditional approach prior to *Garamendi*, and then discusses two recent decisions, one in the Eleventh Circuit and the other in the Northern District of Illinois. These courts confronted state attempts to impose sanctions on foreign governments that went beyond existing federal policy without express authorization from the federal government.[186]

Part II.B analyzes a second set of cases where the federal government is entirely silent on the issue at hand, and the state law attempts to fill in a gap in foreign policy. Pursuant to dicta from *Garamendi*, this type of case requires the same analysis as above while mandating the opposite result.[187] Part II.B discusses the Ninth Circuit's recent holding in *Movsesian v. Victoria Versicherung AG*.[188] There, the court invoked *Zschernig* to hold a California state statute preempted in the absence of any federal policy on point, because the California legislature was motivated by a foreign policy purpose.[189]

Part II.C discusses the third and fourth hypothetical types of foreign affairs federalism cases: where the state law intersects with foreign affairs and does not directly conflict with federal law, but the state acts *beyond* its traditional police power and either has (1) permissible, incidental, or indirect effects abroad (the third category) or (2) impermissible effects abroad (the fourth category).

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183. *See* Crace, *supra* note 24, at 223–24 ("[*Garamendi*] does not come close to setting a clear standard articulating when a state action sufficiently affects foreign affairs to necessitate preemption.").

184. *See supra* Part I.B.

185. *See supra* Part I.B.

186. These courts held that the state statutes were not preempted by federal law despite the existing federal policy. *See infra* Part III.A.

187. *See Garamendi*, 539 U.S. at 419 n.11; *supra* Part I.B.3.

188. 670 F.3d 1067 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2795 (2013).

189. *See infra* Part II.B.

A. State Sanctions Against Foreign Countries: Piling On to Federal Sanctions

The federal government often uses economic sanctions as a tool to increase its leverage on the global stage by isolating a foreign country.[190] Any state attempt to add on to an existing federal sanctions regime impermissibly conflicts with U.S. foreign policy.

1. Historically: State-Level Action Against South Africa

During the 1980s, decades prior to the Court's decisions in *Crosby* and *Garamendi*, states and localities first began experimenting with their own sanctions in response to popular opinion about the South African apartheid regime.[191] States and localities across the United States began enacting different forms of sanctions to impact South Africa, which predated any federal scheme by several years (because of executive branch hesitation).[192] During that time, approximately half of the states enacted some type of divestment statute or indirect law directed to hurt the South African apartheid regime.[193] Many of these state actions were challenged for intruding upon the federal government's power over foreign affairs pursuant to *Zschernig*.[194] For example, in *Springfield Rare Coin Galleries v. Johnson*,[195] an Illinois state law exempted all coins from taxation except those from South Africa.[196] The Supreme Court of Illinois held that this was an impermissible interference with federal power over foreign affairs, even though tax policy is generally a state power, because the state legislature was motivated by its disapproval of the South African apartheid regime.[197] Then, in 1986, the federal government passed the Comprehensive Anti-Apartheid Act to prohibit U.S. investment in South Africa.[198] In *Board of Trustees v. Mayor of Baltimore City*,[199] the Maryland Court of Appeals held that city ordinances mandating divestment of city pension funds from companies doing business with South Africa could be constitutional under *Zschernig*, depending on the extent of effects

190. *See* Trachy, *supra* note 153, at 1019. Economic sanctions have been defined as "the deliberate, government-motivated withdrawal, or threat of withdrawal, 'of customary trade or financial relations.'" *See id.* (quoting GARY CLYDE HUFBAUER, JEFFREY J. SCHOTT, KIMBERLY ANN ELLIOT & BARBARA OEGG, PETERSON INST. FOR INT'L ECON., IN BRIEF: ECONOMIC SANCTIONS RECONSIDERED (3d ed. 2007), *available at* http://www.iie.com/publications/briefs/sanctions4075.pdf).

191. *See* Fenton, *supra* note 15, at 564–65; *see also* Peter J. Spiro, *State and Local Anti-South Africa Action As an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 825 (1986).

192. *See* Fenton, *supra* note 15, at 564–65.

193. *See* Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 822 (1989); *see also* Schaefer, *supra* note 24, at 203.

194. *See infra* notes 195–202.

195. 503 N.E.2d 300 (Ill. 1986).

196. *See id.* at 302.

197. *See id.* at 307.

198. *See* Bd. of Trs. v. Mayor of Balt., 562 A.2d 720, 741 (Md. 1989).

199. 562 A.2d 720, 741 (Md. 1989).

abroad.[200] There, the court found that the city ordinance did not conflict with the Comprehensive Anti-Apartheid Act;[201] nor did it have a sufficient effect on U.S. foreign relations to invalidate the local action under *Zschernig*.[202]

2. Applying *Crosby* and *Garamendi*

After the state and local sanctions following the South African apartheid came a similar wave of state and local sanctions against Burma in the mid-1990s.[203] In *Crosby*, the Supreme Court held that a state law targeting Burma was unconstitutional because the existence of a federal sanctions regime created a conflict between state and local policy.[204] Pursuant to *Crosby* and *Garamendi*, a state law should be preempted when it conflicts with federal foreign policy or acts as an obstacle to compliance with federal foreign policy.[205] Accordingly, where there is no gap in federal policy on the subject, states are left with no space to legislate in the area.[206] When states legislate in contravention to this, courts find these state laws preempted due to a conflict or obstacle.[207] The Eleventh Circuit and the Northern District of Illinois were both recently presented with challenges to state laws attempting to impose sanctions on foreign countries included on the federal government's list of State Sponsors of Terrorism (SSTs).[208] These state laws were challenged on the basis of an alleged conflict with federal law and the federal foreign affairs power.[209] Both courts declined to hold that the state laws were preempted by federal law, despite the existence of the SST list and supplemental federal sanctions.[210]

3. Eleventh Circuit Upholds Florida Restriction on Travel to State Sponsors of Terrorism

In 2010, the Eleventh Circuit examined the constitutionality of a Florida statute that prohibited the use of state money that had been allocated to state universities for travel by state employees to countries that the State Department has designated as SSTs.[211] The limitation applied to both state funds and funds contributed by third-party grantors that are administered by

200. *See id.* at 746.
201. *See id.* at 743.
202. *See id.* at 746 ("[T]he effect of the Ordinances on South Africa is minimal and indirect.").
203. *See* Trachy, *supra* note 153, at 1030–31.
204. *See supra* Part I.A.4.
205. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 386 (2000); *supra* Part I.B.
206. *See supra* Part I.B.2.
207. *See supra* Part I.B.2.
208. *See* Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206 (11th Cir. 2010) (per curiam), *cert. denied*, 133 S. Ct 21 (2012); Nat'l Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731 (N.D. Ill. 2007).
209. *See Winn*, 616 F.3d at 1207; *Giannoulias*, 523 F. Supp. 2d 731.
210. *See Winn*, 616 F.3d at 1212; *Giannoulias*, 523 F. Supp. 2d 731.
211. *See Winn*, 616 F.3d at 1207–08 (citing FLA. STAT. §§ 112.061(3)(e), 1011.90(6) (2010)).

the state.[212] Various professors and researchers at Florida state universities, along with Florida International University, challenged the statute on multiple grounds.[213] The district court granted the plaintiffs' summary judgment with respect to the nonstate funds, but denied summary judgment with respect to state funds.[214] On appeal to the Eleventh Circuit, the plaintiffs contended that the statute impermissibly conflicted with federal law.[215] Alternatively, they argued that the Florida statute intruded upon the federal government's foreign affairs authority in violation of *Zschernig*'s dormant foreign affairs doctrine.[216]

Pursuant to Section 6(j) of the Export Administration Act of 1979,[217] the State Department maintains a list of foreign states that have "repeatedly provided support for acts of international terrorism."[218] Since 2008, and as of this writing, there are four countries designated as SSTs on the State Department's list: Cuba, Iran, Sudan, and Syria.[219] SSTs are subject to strict sanctions in four categories.[220] These include: restrictions on U.S. foreign assistance, a prohibition on defense exports and sales, control over exports of dual-use items, and miscellaneous other restrictions.[221] All U.S. citizens and entities are prohibited from knowingly engaging in financial transactions with any governments of the countries listed as SSTs.[222]

The Eleventh Circuit recognized that the Florida state statute at issue dealt with Florida state spending on education.[223] It recognized state funding and education as distinct, "core issues of traditional and legitimate state concern."[224] The court held that the Florida statute "neither conflicts with the federal sanctions laws [under *Crosby*], nor more than incidentally invades the realm of federal control of foreign affairs [under *Zschernig*]."[225] The court held that there was no conflict between state and federal law,

212. *See id.* at 1207–08.
213. *See id.* at 1207.
214. *See id.* at 1208.
215. *See id.* at 1207.
216. *See id.* at 1207, 1211.
217. *See* Export Administration Act, 50 U.S.C. app. § 2405(j) (2006).
218. *Accord* Prohibited Financial Transactions, 31 C.F.R. § 596.201 (2009); *see* U.S. DEP'T. OF STATE, STATE SPONSORS OF TERRORISM, http://www.state.gov/j/ct/list/c14151.htm (last visited Sept. 21, 2014). This list is "designated pursuant to three laws: section 6(j) of the Export Administration Act, section 40 of the Arms Export Control Act, and section 620A of the Foreign Assistance Act." *See* U.S. DEP'T OF STATE, *supra*.
219. *See* U.S. DEP'T OF STATE, *supra* note 218.
220. *See id.*
221. *See id.* For a detailed description of the sanctions associated with the SST list, see MARK P. SULLIVAN, CONG. RESEARCH SERV., RL32251, CUBA AND THE STATE SPONSORS OF TERRORISM LIST 1–2 (2005).
222. *See* 31 C.F.R. § 596.201 (2009) (listing countries designated as supporting international terrorism).
223. *See* Faculty Senate of Fla. Int'l Univ. v. Winn, 616 F.3d 1206, 1207–08 (11th Cir. 2010) (per curiam), *cert. denied*, 133 S. Ct. 21 (2012).
224. *Id.* at 1208.
225. *Id.* at 1211 ("Florida in this Act does not entangle itself with foreign laws or foreign officials.").

because of its finding that the Florida statute created only a "brush with federal law and the foreign affairs of the United States."[226]

The court acknowledged that the federal government has "a lot of laws dealing with how foreign countries—including those that sponsor terrorism—are to be treated."[227] It nevertheless dismissed such laws as irrelevant, noting that they "touch on many subjects, mostly trade and financial matters," and mainly "enable the Executive Branch to tighten or loosen sanctions in a discretionary way."[228] They held that these federal sanctions do not mandate states to pay for foreign travel for state university employees, nor do they prohibit states from differentiating among foreign nations when it comes to academic travel.[229]

Despite acknowledging the lack of a gap in federal sanctions on SSTs, the Eleventh Circuit found no conflict and thus upheld the Florida law.[230] It noted several reasons for this decision.[231] First, the court cited the absence of any federal statute requiring states to pay for foreign travel for any state university employees.[232] Next, it recognized the absence of any federal law prohibiting states from differentiating among foreign nations in this regard.[233] It noted that Florida had not targeted any specific country but rather all countries listed by the State Department as SSTs.[234] It cited the absence of a "clear and express [federal] foreign policy" regarding academic travel that would give rise to a similar conflict as the series of executive agreements and supplemental correspondence in *Garamendi*.[235] It distinguished the Florida law from the Burma sanctions statute in *Crosby* because the Florida law: (1) only placed restrictions on taxpayer dollars and not on individuals or companies that were actually trying to travel or trade,[236] (2) did not single out one specific country for an economic war,[237] and (3) was narrow, where the law in *Crosby* was broad.[238]

Professor Mike Dorf criticized the Eleventh Circuit's decision as "not especially persuasive."[239] He noted that "[t]he federal list—state sponsors of terrorism—does not by itself have the consequences that Florida attaches

226. *Id.* at 1208.
227. *Id.*
228. *Id.* at 1208–09.
229. *See id.* at 1208.
230. *See id.* at 1212. *But see* Odebrecht Constr. v. Fla. Dep't. of Transp., 715 F.3d 1268, 1290 (11th Cir. 2013) (holding that there is a substantial likelihood of success for a claim that Florida's Cuba Amendment, which prevented any company doing business in Cuba from bidding on public contracts in Florida, would be preempted by the "extensive federal Cuban sanctions regime," because it reached beyond federal law and undermined presidential discretion to dictate U.S. economic policy toward Cuba).
231. *See Winn*, 616 F.3d at 1208–10.
232. *See id.* at 1208.
233. *See id.*
234. *See id.* at 1210.
235. *See id.* at 1211 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)).
236. *See id.* at 1210.
237. *See id.*
238. *See id.*
239. Mike Dorf, *Can Florida Have a Foreign Policy?*, DORF ON LAW, (Sept. 8, 2010, 1:09 AM), http://www.dorfonlaw.org/2010/09/can-florida-have-foreign-policy.html.

to it, and it is those additional consequences that raise the preemption question."[240] He suggested that the Florida law is indistinguishable from the Burma sanctions law at issue in *Crosby* because both were limitations on the state's own expenditures and that the distinctions relied on by the Eleventh Circuit were immaterial.[241]

4. Northern District of Illinois: Illinois Sanctions on Sudan Survive Under *Crosby*

In the early 2000s, Sudan was facing a serious internal human rights crisis in its large province of Darfur, on the border of Libya, Chad, and the Central African Republic.[242] In 2003, two rebel organizations, the Sudan Liberation Army and the Justice and Equality Movement, attacked Sudanese government interests.[243] In response, the Sudanese government armed local Arab militias called Jinjaweid, who undertook a campaign of ethnic cleansing and forced displacement of the civilian population of Darfur.[244] The Jinjaweid received substantial support from the Sudanese government.[245] In exchange, they destroyed Sudanese villages and murdered and committed sexual crimes against civilians.[246] Two million civilians were displaced, and 200,000 people were killed.[247] The U.S. federal government deemed this to be genocide.[248] Sudan has been on the federal list of SSTs since 1993.[249]

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240. *Id.*

241. *Id.*

242. *See* ELTIGANI SEISI M. ATEEM, UNITED NATIONS ECON. COMM'N FOR AFR., THE ROOT CAUSES OF CONFLICTS IN SUDAN AND THE MAKING OF THE DARFUR TRAGEDY 6 (2007), *available at* http://www.operationspaix.net/DATA/DOCUMENT/5425~v~The_root_causes_of_conflicts_in_Sudan_and_the_makink_of_the_Darfur_tragedy.pdf.

243. *See id.* at 6.

244. *See id.* at 7.

245. *See Sudan: Government and Militias Conspire in Darfur Killings*, HUMAN RIGHTS WATCH (Apr. 23, 2004), http://www.hrw.org/news/2004/04/22/sudan-government-and-militias-conspire-darfur-killings.

246. *See* BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, 2004: SUDAN (2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm.

247. *See* Trachy, *supra* note 153, at 1020.

248. *See* Comprehensive Peace in Sudan Act of 2004, Pub. L. No. 108-497 § 3(15), 118 Stat. 4012, 4014 (2004) (codified as amended at 50 U.S.C. § 1701 (2006)) (Former Secretary of State Colin Powell stated, "[w]hen we reviewed the evidence compiled by our team, along with other information available to the State Department, we concluded that genocide has been committed in Darfur and that the Government of Sudan and the [Jinjaweid] bear responsibility—and genocide may still be occurring"); *see also Transcript: Bush's Address to U.N. General Assembly*, N.Y. TIMES, Sept. 21, 2004, *available at* http://www.nytimes.com/2004/09/21/international/21WEB-PTEX.html (quoting President George W. Bush as saying, "[a]t this hour, the world is witnessing terrible suffering and horrible crimes in the Darfur region of Sudan, crimes my government has concluded are genocide").

249. *See* Lucien J. Dhooge, *Darfur, State Divestment Initiatives, and the Commerce Clause*, 32 N.C. J. INT'L L. & COM. REG. 391, 406 n.77 (2007). Sudan was originally added to this list because it offered sanctuary to any Muslim individual, including numerous terrorist leaders such as Osama bin Laden. *See id.*

In 1997, President Clinton issued Executive Order 13067 to freeze Sudanese government property located in the United States and to prohibit some, but not all, financial transactions with Sudan.[250] Executive Order 13067 enumerated seven specific types of transactions that were prohibited between the United States and Sudan.[251] In 2002, Congress passed and President George W. Bush signed the Sudan Peace Act, which sought to facilitate a comprehensive solution to the crisis in Sudan and condemn violations of human rights.[252] In 2004, the federal government enacted the Comprehensive Peace in Sudan Act, which extended the Sudan Peace Act to include the crisis in Darfur.[253] The Comprehensive Peace Act instructed the President to pursue remedies at the United Nations and also to impose unilateral sanctions on Sudan by prohibiting travel to Sudan and freezing Sudanese governmental assets.[254] In 2006, Congress passed the Darfur Peace and Accountability Act, which amended the Comprehensive Peace in Sudan Act by further restricting travel and freezing Sudanese assets of individuals involved with the ongoing crisis in Darfur.[255]

The state of Illinois has a tradition of activism in international human rights. In the 1980s, Illinois took action against the South African apartheid regime.[256] Again in 2005, Illinois enacted a divestment law targeting Sudan.[257] The Governor of Illinois signed the Act to End Atrocities and Terrorism in the Sudan.[258] This Act amended two state laws: the Deposit of State Moneys Act and the Illinois Pension Code.[259] The amendment to the Deposit of State Moneys Act prohibited state investment in financial institutions whose customers were connected with Sudan and prohibited companies from doing business with or in Sudan.[260] The amendment to the Illinois Pension Code required divestment of state retirement systems and pension funds from companies that maintained defined contacts with Sudan.[261] The purpose of the Illinois Act as a whole was unambiguously to help stop the violence in Sudan.[262] Illinois Governor Rod Blagojevich was

250. *See* Nat'l Foreign Trade Council v. Giannoulias, 523 F. Supp. 2d 731, 735 (N.D. Ill. 2007).

251. *See id.*

252. *See id.* at 736.

253. § 3(15), 118 Stat. at 4014; *see Giannoulias*, 523 F. Supp. 2d at 736.

254. § 3(15), 118 Stat. at 4014; *see Giannoulias*, 523 F. Supp. 2d at 736.

255. Darfur Peace and Accountability Act, Pub. L. No. 109-344, 120 Stat. 1869 (2006); *see Giannoulias*, 523 F. Supp. 2d at 736.

256. *See, e.g.*, Springfield Rare Coin Galleries v. Johnson, 503 N.E.2d 300, 302 (Ill. 1986).

257. *See Giannoulias*, 523 F. Supp. 2d at 733. Numerous other states took action with regard to the human rights crisis in Sudan, including Arizona, California, Louisiana, New Jersey, and Oregon. *See* Lucien J. Dhooge, *Condemning Khartoum: The Illinois Divestment Act and Foreign Relations*, 43 AM. BUS. L.J. 245, 274–75 (2006).

258. Act to End Atrocities and Terrorism in the Sudan, 15 ILL. COMP. STAT. 520 / 22.5–.6 (2005) and 40 ILL. COMP. STAT. 5 / 1–110.5 (2005); *see Giannoulias*, 523 F. Supp. 2d at 733–35.

259. *See Giannoulias*, 523 F. Supp. 2d at 733.

260. *See id.* at 733–34.

261. *See id.* at 733–34, 738.

262. *See id.* at 734 ("The purpose of the Act is clear from its title and its text: it is intended to help stop the atrocities in Sudan.").

quoted upon signing the Act, "[t]his bill sends a clear message to the Sudanese government—the people of Illinois will not condone human rights abuses and genocide, we will take our money elsewhere."[263]

The Illinois Act prohibited all transactions with Sudan, not merely the seven types of transactions prohibited by Executive Order 13067.[264] It also imposed sanctions on foreign subsidiaries of U.S. entities operating legally in Sudan and imposed sanctions on foreign countries.[265] The federal sanctions regime extended to neither of these entities.[266]

In 2007, the Northern District of Illinois examined the Illinois Sudan Act in *National Foreign Trade Council v. Giannoulias*.[267] It was the first lower federal court to address a state sanctions law since *Crosby* and *Garamendi*.[268] The National Foreign Trade Council, some members of which had business connections with Sudan, together with Illinois municipal pension funds and beneficiaries of public pension funds, sought to enjoin enforcement of the Illinois Sudan Act.[269] The plaintiffs contended that the Act was preempted by federal law on Sudan, or alternatively, that it interfered with the federal government's foreign affairs power.[270]

The court held that the amendment to the Deposit of State Moneys Act was unconstitutional under *Crosby*, because it "stands as an obstacle to the accomplishment of the national government's objectives vis-à-vis Sudan."[271] The court then noted that the amendment to the Illinois Pension Code did not similarly violate the doctrine from *Crosby*, because federal law was silent on the issue of divestment of holdings connected with Sudan.[272]

After analyzing the Act under *Crosby*, the court then asked whether it was an unconstitutional intrusion into foreign affairs under the *Zschernig* framework and came to the same conclusion[273]: the amendment to the Deposit of State Moneys Act was an unconstitutional intrusion into the federal government's power over foreign affairs,[274] but the amendment to the Illinois Pension Code was not.[275] The court reached this conclusion with regard to the Illinois Pension Code because the potential effects abroad of the "inability to offer debt or equities to Illinois public pension funds"

263. *See id.* at 735 (citing Press Release, Office of the Governor, Governor Ends State Investment in Sudan (June 25, 2005), *available at* http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=4097).

264. *See id.* at 733–34, 744; *supra* notes 250–53 and accompanying text.

265. *See Giannoulias*, 523 F. Supp. 2d at 744–45.

266. *See id.*

267. 523 F. Supp. 2d 731, 735 (N.D. Ill. 2007).

268. *See* MICHAEL JOHN GARCIA & TODD GARVEY, CONG. RESEARCH SERV., RL33948, STATE AND LOCAL ECONOMIC SANCTIONS: CONSTITUTIONAL ISSUES 9 (2013).

269. *See Giannoulias*, 523 F. Supp. 2d at 737.

270. *See id.* The plaintiffs contended, alternatively, that the Act violated the Foreign Commerce Clause or that it was preempted by the National Bank Act. *See id.*

271. *See id.* at 741.

272. *See id.*

273. *See id.* at 742–46.

274. *See id.* at 745.

275. *See id.* at 745–46.

were speculative and insignificant.[276] The court stated that the amendment to the Illinois Pension Code would have only a "hypothetical impact" on foreign policy.[277]

Relying on *Zschernig*, and attempting to articulate a general rule for foreign affairs preemption, the court implied that it would only find foreign affairs preemption where there was clear evidence of a tangible effect of the law on federal policy, noting that "*Zschernig* and *Garamendi* are both concerned with the practical effect a state law might have on the national government's ability to conduct foreign policy on behalf of the United States."[278] The court recognized that the overarching purpose of the statute was to enact economic sanctions on Sudan and invalidated the amendment to the Deposit of State Moneys Act for its impermissible effects abroad.[279] But the amendment to the Illinois Pension Code did not violate *Zschernig*'s dormant foreign affairs doctrine, because its effects abroad were too small.[280]

In response to this decision, Professor Martha F. Davis opined that "[c]ourts are ill-equipped to adopt the *Giannoulias* court's approach to determining which of these subnational initiatives have tangible foreign affairs effects that usurp the executive function."[281] Further, she argued that the *Giannoulias* decision is in obvious tension with the strong judicial trend in favor of reserving more leeway for the states and localities to legislate in areas that impact foreign relations.[282]

B. State Action Within Police Power

According to the *Garamendi* Court, where there is no federal policy on point, states are permitted to legislate in areas of traditional state regulation even if the state legislation intersects with foreign affairs.[283] As long as the state is acting within its traditional capacity, such state action is only invalid

276. *See id.*

277. *See id.* at 745.

278. *Id.* at 744; *see also* Martha F. Davis, *Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era*, 77 FORDHAM L. REV. 411, 431–32 (2008); Trachy, *supra* note 153, at 1047.

279. *See Giannoulias*, 523 F. Supp. 2d at 745.

280. *See id.* at 746. The court ultimately held that the amendment to the Illinois Pension Code was unconstitutional in violation of the dormant Foreign Commerce Clause. *See id.* at 750. Since *Giannoulias*, the federal government passed the Sudan Accountability and Divestment Act of 2007 (SADA). Sudan Accountability and Divestment Act of 2007, Pub. L. No. 110-174, 121 Stat. 2516 (codified at 50 U.S.C. § 1701 (2006)). SADA expressly authorizes state and local government divestment actions against companies that do business with Sudan. *Id.* § 3(b). Importantly, SADA proclaims that states acting under this authority are "not preempted by any Federal law or regulation." *Id.* § 3(g). SADA specifically outlines four mandatory requirements for any state sanction on Sudan, which allows divestment to take place in a consistent and predictable manner across the country. *Id.* § 3(e).

281. Davis, *supra* note 278, at 435.

282. *Id.* at 424 (citing Medellín v. Texas, 552 U.S. 491 (2008)).

283. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003); Crace, *supra* note 24, at 223.

if it conflicts with federal policy as in *Crosby*.[284] Thus, where there is no federal policy on point but the state acts pursuant to its police power, it is inappropriate to invoke *Zschernig*'s dormant foreign affairs doctrine.[285]

1. Litigating Ottoman-Era Life Insurance Claims in California

Between 1915 and 1920, the Ottoman Empire systematically organized the killing of approximately 1.5 million of its Armenian population.[286] Another million were deported through "death marches" to the Syrian Desert.[287]

Before this, American and European life insurance companies had begun expanding into foreign markets.[288] Many educated and urbanized Armenians and Greeks sensed instability in the Ottoman Empire and sought financial security from insurance policies.[289] The insurance companies overlooked the political instability in favor of a rapidly growing demand for life insurance policies.[290]

In 1999, a class action lawsuit was filed against New York Life Insurance Company ("New York Life") on behalf of Armenians who claimed benefits from life insurance policies that existed during the Ottoman Empire's reign from 1875 to 1923.[291] New York Life then moved to dismiss, questioning the validity of the forum selection clauses at issue, jurisdiction, and the statute of limitations for the insurance contract claims.[292] In response, the plaintiffs in this litigation teamed up with the California state senate to draft the Armenian Genocide Victims Insurance Act.[293] This Act extended the statute of limitations for victims of the Armenian Genocide to file insurance claims until 2010 and granted California courts jurisdiction to adjudicate these claims.[294] New York Life never challenged the validity of the Act itself and that case settled for $20 million in 2004.[295] This resulted in a distribution of $4,583.33 on average to the heirs of each of 2,400 policyholders.[296]

284. *E.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000); *see Garamendi*, 539 U.S. at 419 n.11; *supra* Part I.A.4, I.B.2.

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

286. *See* Stempel, *supra* note 2, at 3–4.

287. *See id.*

288. *See id.* at 19–20. New York Life Insurance Company was one of the main players in the issuance of life insurance policies to Armenians in the Ottoman Empire before World War I. *See id.*

289. *See id.* at 11, 20 ("Savings in foreign banks and the purchase of life insurance were natural responses to the perils faced by Armenians in Turkey.").

290. *See id.* at 20.

291. *See* Marootian v. N.Y. Life Ins. Co., No. 99 Civ. 12073 (CAS), 2001 U.S. Dist. LEXIS 22274, at *3–6 (C.D. Cal. Nov. 28, 2001).

292. *See id.* at *6, *40; *see also* Stempel, *supra* note 2, at 47–48.

293. *See* Stempel, *supra* note 2, at 48.

294. *See Movsesian III*, 670 F.3d 1067, 1070 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2795 (2013).

295. *See* Stempel, *supra* note 2, at 54.

296. *See id.*

2. The Ninth Circuit Invalidates California Law on Armenian Genocide Life Insurance Claims

In 2003, Vazken Movsesian filed a class action lawsuit against the German insurer Münchener Rückversicherungs-Gesellschaft Aktiengesellschaft ("Munich Re").[297] Munich Re is the sixth largest insurance company in the world, the largest reinsurance company in the world, and the successor in interest to Victoria Versicherung AG and Ergo Versicherungsgruppe AG, two insurers that sold life insurance policies to Armenians in the Ottoman Empire prior to 1915.[298] In *Movsesian*, the family members and descendants of the holders of these policies joined the litigation.[299] Munich Re defended the action, disputing the extended statute of limitations for breach of contract and contending that it was unconstitutional in violation of the federal government's foreign affairs power.[300] The trial court held in favor of the plaintiffs but the Ninth Circuit first reversed in favor of Munich Re.[301] Then the same Ninth Circuit panel reversed its own decision, with one of the judges changing her vote in favor of the plaintiffs.[302] Munich Re then petitioned for rehearing en banc.[303]

The first *Movsesian* decision held the California statute invalid on conflict preemption grounds.[304] In its initial opinion (now overruled), the Ninth Circuit opined that the California legislature's use of the words "Armenian Genocide" conflicted with executive foreign policy regarding Turkey and the Armenian Genocide.[305] The U.S. federal government has never formally recognized the occurrence of the Armenian Genocide.[306] The federal policy on the topic is effectively one of nonrecognition.[307] But to rule on conflict preemption grounds, the court had to point to some express federal policy that would invalidate the state statute.[308] Accordingly, it recognized letters from the Bush Administration to the House of Representatives discouraging the House from passing resolutions

297. *See* Movsesian v. Victoria Versicherung AG (*Movsesian I*), 578 F.3d 1052 (9th Cir. 2009), *overruled by Movsesian III*, 670 F.3d 1067.

298. *See* Stempel, *supra* note 2, at 55.

299. *See Movsesian III*, 670 F.3d at 1070. New York Life Insurance Company had already entered into a settlement. *See supra* notes 295–96 and accompanying text.

300. *See Movsesian I*, 578 F.3d at 1055.

301. *See id.* at 1062–63.

302. *See Movsesian II*, 629 F.3d 901 (9th Cir. 2010), *overruled by Movsesian III*, 670 F.3d 1067 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2795 (2013).

303. *See* Petition for Panel Rehearing and Rehearing En Banc, *Movsesian III*, 670 F.3d 1067, (No. 07-56722).

304. *See Movsesian I*, 578 F.3d at 1060–61 ("[T]here is an express federal policy prohibiting legislative recognition of an 'Armenian Genocide,' as embodied in . . . statements and letters of the President . . . .").

305. *See id.* ("The conflict is clear on the face of the statute: by using the phrase 'Armenian Genocide,' California has defied the President's foreign policy preferences.").

306. *See, e.g.*, Baker, *supra* note 5.

307. *See id.* (noting that President Barack Obama avoided the phrase "Armenian Genocide" to "avoid alienating Turkey, a NATO ally, which adamantly rejects the genocide label").

308. *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 425 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000).

condemning the Genocide.[309] Specifically, the Bush Administration, in 2007, referenced similar legislation that had been passed in France, which led to the Turkish military cutting ties with the French military and the termination of pending defense contracts between the two nations.[310] Further, in 2000, President Clinton had sent a letter to the House of Representatives discouraging the passage of a similar resolution, citing the importance of a strong relationship between Turkey and the United States in light of conflict in the Middle East.[311] Lastly, the court referenced a State Department letter from 2003, which stated: "[W]e oppose HR 193's reference to the 'Armenian Genocide.' Were this wording adopted it could complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation."[312] Citing these letters from the executive branch as evidence of conflict, the first *Movsesian* decision expanded upon *Garamendi* by allowing conflict preemption to be based on much less than what was allowed in *Garamendi*.[313]

In the second *Movsesian* decision, Judge Dorothy W. Nelson switched sides, and the same panel reversed itself and held that the California statute was permissible.[314] There, the court noted that an express federal policy would be necessary to invalidate the state law on conflict preemption grounds.[315] It also noted that almost forty states had enacted statutes officially recognizing the Armenian Genocide.[316] The federal government had never challenged those statutes.[317] If those statutes were permitted to stand, the court noted, then this one should be no different.[318]

In its third and final *Movsesian* decision, the Ninth Circuit, sitting en banc, invalidated the California statute as an unconstitutional intrusion into the federal government's power over foreign affairs.[319] The court did not address whether there was a conflict between federal policy and the state law, and it did not rule on conflict preemption grounds like it did in the first *Movsesian* decision.[320] Rather, the court found that it was unnecessary to ask whether the California statute conflicted with federal law before moving to an analysis under *Zschernig*.[321] The court then noted that the statute would have "'more than some incidental or indirect effect' on foreign

309. *See Movsesian I*, 578 F.3d at 1059–61.
310. *See id.* at 1058.
311. *See id.* at 1057.
312. *See id.* at 1058.
313. *Compare Garamendi*, 539 U.S. at 415 (finding preemption based on a combination of executive agreements and supplemental expressions of executive policy), *with Movsesian I*, 578 F.3d at 1060–61 (lacking any similar official statements of federal policy).
314. *See Movsesian II*, 629 F.3d 901 (9th Cir. 2010), *overruled by Movsesian III*, 670 F.3d 1067 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2795 (2013).
315. *See id.* at 903.
316. *See id.* at 907.
317. *See id.*
318. *See id.*
319. *See Movsesian III*, 670 F.3d at 1070.
320. *See id.* at 1072.
321. *See id.*

affairs," thus relying on *Zschernig*'s dormant foreign affairs doctrine.[322] The Ninth Circuit relied on language from its own case, *Von Saher v. Norton Simon Museum of Art*,[323] to find that the "real purpose" of Section 354.4—to offer a remedy that the plaintiffs could not redeem elsewhere for those harmed by human rights abuses during the Armenian genocide—unconstitutionally infringed on the federal government's foreign affairs power.[324] The court found that the state was not addressing a traditional state responsibility[325] despite dealing with areas usually under state control: statutes of limitations[326] and insurance contracts.[327] According to the en banc Ninth Circuit, the underlying motivation of the legislation disqualified it from claiming to address an area traditionally under state control.[328] Under *Garamendi*, where a state is not addressing a traditional state responsibility, a conflict between state and federal law is not required for invalidation of a state statute on the basis of foreign affairs preemption.[329] Thus, *Garamendi* would allow for preemption of the California statute under *Zschernig*'s dormant foreign affairs doctrine, solely because it touched on international affairs.[330]

The *Movsesian* en banc opinion provides an example of a state statute that did not conflict with any express federal enactments.[331] Yet the Ninth Circuit found that the California statute nevertheless infringed on the federal government's power over foreign affairs, resurrecting *Zschernig* and stretching *Garamendi* by engaging in a motive inquiry and presuming that a foreign affairs-minded legislature is incompatible with traditional state legislation.[332] The court effectively found that permitting American plaintiffs to sue German insurers in California impermissibly infringed on the federal government's power over foreign affairs with Turkey, because the insurance claims' basis in the Armenian Genocide might impact U.S. relations with Turkey.[333]

In response to the final *Movsesian* decision, Professor Jeffrey W. Stempel argued that the California statute at issue in *Movsesian* was clearly distinguishable from the Holocaust statute of limitations cases like

322. *See id.* at 1076.
323. 592 F.3d 954 (9th Cir. 2009).
324. *See Movsesian III*, 670 F.3d at 1076–77 ("[I]t is clear that the real purpose of section 354.4 is to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events.").
325. *See id.* at 1074–75.
326. *See* Guar. Trust Co. v. York, 326 U.S. 99 (1945) (instructing federal courts to honor the statute of limitations of the state in which they sit).
327. *See* McCarran-Ferguson Act, 15 U.S.C. § 1012 (2012); *see also* Stempel, *supra* note 2, at 62 (arguing that "states have traditionally enjoyed wide authority to regulate insurance and that state regulation designed to enforce insurance contract commitments serves a substantial state interest").
328. *See Movsesian III*, 670 F.3d at 1076.
329. *See id.* at 1074.
330. *See id.*
331. *See generally id.*
332. *See id.* at 1077.
333. *See generally id.*

Garamendi.[334] He noted that those cases "presented dramatically more federal-state tension than the extended statute of limitations in *Movsesian*,"[335] stressing the fact that the federal government has never taken a position on the Armenian Genocide.[336]

Professor Stan Goldman pointed out that the Ninth Circuit declined to mention the United States' ratification of the United Nations Genocide Convention and the federal legislation that was enacted afterwards to implement it.[337] The United States became a signatory to the treaty in the late 1980s.[338] In implementing the Convention as law, many U.S. Congressmen were quoted as accepting the Armenian Genocide as a primary reason for its enactment.[339] Professor Goldman argued that the United States has implicitly recognized the Armenian Genocide in its adoption of the Convention, because "[y]ou cannot eliminate from the definition of a term the very thing the word was created to describe."[340]

Professor Julian Ku expressed disapproval with the Ninth Circuit's use of *Zschernig*. He noted:

> I am very skeptical of field preemption in this way, and I am not a fan of the way the Ninth Circuit questioned the motives of the California legislature. It is not their motives that matter, but whether it is a traditional state power. And since this would give a cause of action in California courts against insurance companies already subject to California jurisdiction, I don't think this is a very clear case of field preemption. Nor should the fact that there is a foreign relations impact, by itself, turn this into a field preemption case.[341]

C. Two Hypothetical Possibilities: State Action Beyond Police Power

In the words of Professor Matt Schaefer, "*Zschernig* is alive, but not preferred."[342] Under *Garamendi*, the only remaining application of *Zschernig* is where the state acts outside of its traditional role to impact

334. *See* Stempel, *supra* note 2, at 106.
335. *See id.*
336. *See id.* at 107–08.
337. *See* Stan Goldman, *Is it Nobody's Business but the Turks'?: Recognizing Genocide*, 16 TOURO INT'L L. REV.25, 25–27 (2013). The United Nations Genocide Convention was largely the result of drafting and lobbying by Raphael Lemkin, the man who created the word "genocide" to link together the events of the Holocaust and the Turkish massacre of the Armenians. *See* POWER, *supra* note 1, at 17–78 (detailing Lemkin's dedication to criminalizing genocide internationally); *see also* Yuval Shany, *The Road to the Genocide Convention and Beyond*, *in* THE UN GENOCIDE CONVENTION: A COMMENTARY 3, 7 (Paola Gaeta ed., 2009) (discussing the use of Lemkin's term "genocide"); Goldman, *supra*, at 29–30.
338. *See generally* LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 1–2 (1991).
339. *See* Goldman, *supra* note 337, at 33–35.
340. *Id.* at 36.
341. Julian Ku, *Will the Supreme Court Revisit Dormant Foreign Affairs Preemption in California's Armenian Genocide Law?*, OPINIO JURIS (May 16, 2013, 1:11 PM), http://opiniojuris.org/2013/05/16/will-the-supreme-court-revisit-dormant-foreign-affairs-preemption-in-californias-armenian-genocide-law/.
342. Schaefer, *supra* note 24, at 307.

foreign policy on a subject that the federal government has not already addressed.[343] If *Zschernig* is the appropriate framework for analysis, the state action will be invalidated if it has more than an incidental or indirect effect on foreign affairs and upheld if it has only incidental or indirect effects.[344]

These two scenarios are largely hypothetical, as there are two mandatory prerequisites now to properly invoke *Zschernig* as a framework for analysis: (1) no federal enactment on point and (2) a state acting outside of its traditional role.[345] Where these two prerequisites are not met, conflict preemption is the appropriate framework for analysis,[346] and the state statute will either fail because it conflicts with federal policy or survive because it does not conflict.[347]

III. PROHIBITING "PILE ONS," PERMITTING POLICE POWER: A SUPREMACY CLAUSE ANALYSIS IS ALMOST ALWAYS APPLICABLE UNDER *GARAMENDI*

When faced with a state statute that intersects with foreign affairs, pursuant to *Garamendi*, the court should ask a series of specific questions to determine where the case fits in the four-part framework outlined in Part II.[348] Because of the murkiness of Supreme Court precedent on the issue, lower courts should strive to follow the Court's most recent "clarification" of the tension between federalism and foreign relations—*Garamendi*.[349] In interpreting *Garamendi*'s expansion of conflict preemption and narrowing of the dormant foreign affairs doctrine, courts should follow consistent guidelines depending on the type of case that they are presented with pursuant to the typology outlined in this Note.

A court presented with a state law that intersects with foreign affairs should first ask if there is a conflict with any existing federal law. A conflict exists if there is any federal policy that touches on the same subject, or addresses the same foreign country in the same way, or is explicitly intended to be comprehensive.[350] If there is a conflict, the state action fits into the category discussed above in Part II.A and should be preempted pursuant to *Crosby*.[351] If there is no existing federal law on point, there is

343. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003).
344. *See supra* Parts I.A.2–4, II.B.
345. *See supra* Parts I.A.2–4, II.B.
346. *See supra* Part II.A.
347. *See supra* Part II.A; *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).
348. *See supra* Part II.
349. For a theoretical alternative to the framework put forth in *Garamendi*, see Marc P. Epstein, Note, *Comity Concerns Are No Joke: Recognition of Foreign Judgments Under Dormant Foreign Affairs Preemption*, 82 FORDHAM L. REV. 2317, 2355–56 (2014) (arguing that the *Garamendi* balancing test is too "difficult and ambiguous," and advocating instead for an objective standard, wherein federal law would preempt state law where "another sovereign would reasonably expect the federal government to have exclusive jurisdiction over a type or body of law").
350. *See supra* Part I.B.2.
351. *See supra* Parts I.B.2, II.A.

no conflict,[352] and the court should then ask whether the state has acted pursuant to its traditional police power.[353] If the state has acted pursuant to its traditional police power, then the state action fits into the category discussed above in Part II.B and should be upheld, pursuant to *Garamendi* dicta.[354] If the state has acted outside its traditional responsibilities and beyond its police power, the court has one more question to ask. Only if the state has acted beyond its traditional police power should the court then resort to *Zschernig* and ask whether the state statute has more than an incidental or indirect effect on foreign affairs.[355] If it does, then the state action should be preempted pursuant to *Zschernig*.[356] If it does not have such impermissible effects, then the court should uphold the state action pursuant to *Zschernig*.[357]

This part's four sections each correspond to distinct types of state action discussed in this Note. Additionally, the lower court cases are classified by type. Part III.A argues that, pursuant to *Crosby* and *Garamendi*, and contrary to the holdings in both *Faculty Senate of Florida International University v. Winn*[358] and *Giannoulias*, states cannot enact sanctions on foreign governments when the federal government has already implemented sanctions. Next, Part III.B argues that *Garamendi* allows states to legislate pursuant to their traditional state police powers in areas that intersect with foreign policy when the federal government has not acted. Where there is a gap in federal foreign policy, states should be permitted to fill in the gap. Although the federal government should undoubtedly be the voice of the nation,[359] it is infeasible to allow gaps to go unfilled. Part III.C argues that the dormant foreign affairs doctrine from *Zschernig* only applies in an extremely limited and largely hypothetical set of cases where the states are acting beyond their traditional police power and that courts have misinterpreted *Garamendi* in continuing to apply *Zschernig* broadly.

A. Prohibiting State "Pile Ons" to Federal Foreign Policy

In both *Winn* and *Giannoulias*, the courts were presented with a state's attempt to impose economic sanctions on foreign governments, where the federal government had already enacted a comprehensive sanctions regime aimed at the same country or countries.[360] Both the Eleventh Circuit and the Northern District of Illinois were mistaken in upholding parts of state statutes that added on to an existing federal sanctions regime.[361] These

352. *See supra* Part I.A.4.
353. *See supra* Part I.B.
354. *See supra* Parts I.B.3, II.B. This also reflects the concerns of Justice Harlan in his concurring opinion in *Zschernig*. *See supra* notes 85–91 and accompanying text.
355. *See supra* Parts I.B.3, II.C.
356. *See supra* Part I.B.3.
357. *See supra* Part I.B.3.
358. 616 F.3d 1206, 1207–08 (11th Cir. 2010) (per curiam), *cert. denied*, 133 S. Ct. 21 (2012).
359. *See supra* Part I.A.1.
360. *See supra* Part II.A.3–4.
361. *See supra* Part II.A.3–4.

courts were incorrect in their analyses because *Crosby* and *Garamendi* instruct that, if there is no gap in federal policy, state laws dealing with the same subject matter should be preempted because they create an obstacle to compliance with federal law.[362]

Such an outcome is not only consistent with Supreme Court precedent, it is preferable from a policy standpoint. States should not be permitted to add on to any existing federal foreign policy, where the policy is thought to be exhaustive. Permitting states to add on to existing federal foreign policy creates uncertainty abroad and uncertainty across the states and localities as to the extent to which they can permissibly supplement existing federal policy. Permitting such "pile ons" might encourage retaliatory action from foreign entities, directed at the United States as a whole or at individual states. It could create a significant problem in the aggregate: many states targeting a foreign country could have a significant effect abroad even though each on its own might not. Moreover, permitting states to pile on to national foreign policy would discourage the federal government from expressly indicating when state and local action is actually permissible, as it has done in its most recent sanctions law against Sudan.[363] Indeed, the U.S. federal government should strive to minimize ambiguity in federal law by encouraging Congress to include express nonpreemption clauses in its laws. Where feasible, the federal government should articulate an explicit policy to increase predictability around the country and the world and make the legislative process more efficient.

1. *Faculty Senate of Florida International University v. Winn*

In *Winn*, the federal SST list provided a list of countries to which the state action would apply.[364] The Florida statute prohibited the use of state money—in state universities—for travel by state university employees to SSTs.[365] The Eleventh Circuit upheld the statute, finding that it neither conflicted with federal law pursuant to *Crosby*[366] nor intruded into the federal government's foreign policy domain under *Zschernig*.[367]

The Eleventh Circuit correctly applied *Garamendi* in finding *Zschernig* inapplicable, because the state was legislating in the areas of education and state funding pursuant to its police power.[368] However, the Eleventh Circuit misapplied *Garamendi* with respect to *Crosby*.[369] The Florida law should have been invalidated on obstacle—or conflict—preemption grounds pursuant to *Crosby*.[370] Federal law provides for four distinct categories of strict sanctions for countries on the SST List, and explicitly

362. *See supra* Part I.A.4, I.B.2.
363. *See supra* note 280.
364. *See supra* Part II.A.3.
365. *See supra* notes 211–14 and accompanying text.
366. *See supra* notes 225–31 and accompanying text.
367. *See supra* note 225 and accompanying text.
368. *See supra* Part I.B.3.
369. *See supra* Part I.B.2.
370. *See supra* Part I.A.4, I.B.2.

bars all U.S. citizens from financial transactions with SSTs.[371] There is thus no gap in federal sanctions on SSTs, but Florida's law adds on to the comprehensive federal regime. The Eleventh Circuit distinguishes the Massachusetts sanctions at issue in *Crosby*,[372] but the distinction between restricting taxpayer dollars and restricting actual travel is immaterial.[373] Accordingly, the Eleventh Circuit should have held that the Florida statute was preempted by the federal SST list and its accompanying sanctions.

2. *National Foreign Trade Council v. Giannoulias*

Similarly, the Northern District of Illinois in *Giannoulias* found that the pension fund divestment at issue was not an obstacle to the accomplishment of Congress's objectives on its Sudan policy and would survive a conflict preemption analysis.[374] Thus, the court relied on *Crosby* in finding that Illinois's amendment to the Pension Code would have been found constitutional if not for the Foreign Commerce Clause issue.[375] But there already existed a comprehensive system of federal statutes dealing with Sudan, so the court should have invalidated the amendment to the Pension Code pursuant to *Crosby*.[376]

In *Giannoulias*, the court looked into whether the pension funds' inability to purchase securities of companies doing business in Sudan would have been likely to affect decisions to do business in Sudan.[377] However, *Crosby* calls for an inquiry into "the federal statute as a whole and identifying its purpose and intended effects."[378] The purpose of the federal statutory regime was to impose a unified and comprehensive system of sanctions on Sudan.[379] This effect is impossible if there are state statutes that add on to the federal statutory regimes. *Crosby* does not command a reviewing court to look for gaps in an existing federal regime.[380] The existence of a comprehensive federal regime is prohibitive for the states, outside of an express delegation of authority in the federal law.[381]

The purpose of the amendment to the Illinois Pension Fund, as well as of the rest of the Illinois Sudan Act, was to hurt the Sudanese government economically.[382] The Northern District of Illinois found that this purpose was unlikely to be accomplished, given the nature of the Illinois Pension Fund.[383] But if the state act had brought about the desired effects of the Illinois legislature, it would have frustrated the purpose of the federal

371. *See supra* notes 220–22 and accompanying text.
372. *See supra* note 236 and accompanying text.
373. *See supra* notes 239–41.
374. *See supra* Part II.A.4.
375. *See supra* Part II.A.4.
376. *See supra* Part I.A.4, I.B.2.
377. *See supra* Part II.A.4.
378. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).
379. *See supra* notes 249–57 and accompanying text.
380. *See supra* Part I.A.4, I.B.2.
381. *See, e.g.*, *supra* note 280.
382. *See supra* notes 262–67 and accompanying text.
383. *See supra* note 272 and accompanying text.

sanctions regime. It is counterintuitive to uphold a statute because it will not ever have the effects intended by the legislature in enacting the statute. The amendment to the Illinois Pension Fund should have been held preempted under *Crosby* and *Garamendi* as an obstacle to the achievement of the goals of the existing federal policy on Sudan.

B. Permitting States to Fill Gaps in Foreign Policy Pursuant to Police Power

Garamendi instructs that state action that does not conflict with any federal policy may intersect with foreign affairs, so long as the state is acting pursuant to its police power.[384]

Black's Law Dictionary defines "police power" as "[a] state's Tenth Amendment right, subject to due-process and other limitations, to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments."[385]

Allowing states to act pursuant to their police power in areas where the federal government has left a distinct gap is preferable to leaving these spaces unfilled for the following reasons: First, there is a strong argument that it would be contrary to the Tenth Amendment to prohibit a state from acting where the federal government has taken no action.[386] Next, state and local governments are often more responsive to the desires of their constituencies, and so they are the most pragmatic governmental bodies to quickly and efficiently deal with issues that arise.[387] For instance, a large number of citizens in California of Armenian descent is grounds for a strong public policy in favor of allowing descendants of victims of the Armenian Genocide to collect on life insurance claims. Furthermore, allowing states to fill in gaps in foreign policy might persuade the federal government to enact a more complete foreign policy that would increase the consistency and predictability of U.S. policy abroad. Lastly, *Garamendi*'s expansion of the applicability of conflict preemption to executive policy means that gaps in federal policy will not be so readily found.[388] Gaps will thus only exist where there is a true lack of any federal foreign policy, and states should be permitted to fill in this space, however limited it is.

The Ninth Circuit miscategorized the *Movsesian* case as an issue of "field preemption" that implicated *Zschernig* rather than as a permissible exercise of California's police power. In that case, the Ninth Circuit correctly recognized that compensation for victims of the Armenian genocide does not conflict with federal policy because there is no existing federal policy with which to conflict.[389] Indeed, no federal policy is possible if the federal government has never spoken on the issue.[390] Because there is no federal

384. *See supra* note 163 and accompanying text.
385. BLACK'S LAW DICTIONARY 1345 (10th ed. 2014).
386. *See supra* note 48 and accompanying text.
387. *See supra* note 15.
388. *See supra* Part I.B.2. *But see supra* Part I.C.
389. *See supra* notes 320–24 and accompanying text.
390. *See supra* notes 306–09 and accompanying text.

statute or executive policy on Turkish compensation for genocide victims, the state statute cannot be preempted on the basis of conflict preemption because there is no discernible conflict with foreign policy.

The statute at issue in *Movsesian* should have been upheld because: (1) there was no conflict with federal law[391] and (2) the state acted pursuant to its traditional police power to regulate both insurance claims against companies subject to personal jurisdiction in California, and statutes of limitations in general.[392] The Ninth Circuit recognized that the federal government's policy on the Armenian Genocide was insufficient to be considered a concrete policy for conflict preemption,[393] which is why it stretched the bounds of *Garamendi* in its application of "field preemption" from *Zschernig* to preclude the claims from going forward. Undoubtedly, the Ninth Circuit accepted that the federal government should not be permitted to have an inactive, silent foreign policy that is available only to preempt state law. If force of law is what matters now for conflict preemption,[394] a nonexistent federal policy certainly does not carry the force of law.

Importantly, the Ninth Circuit was incorrect in its interpretation of dicta from *Garamendi* and its broad application of *Zschernig*. In *Movsesian*, the court found that there was no conflict with federal law, and analyzed the statute under *Zschernig* because it found that the California legislature's foreign policy purpose disqualified it from claiming to act pursuant to its police power.[395] Yet despite the Ninth Circuit's insistence, having a foreign policy purpose is not relevant in the inquiry whether a state is acting pursuant to its police power.[396] The court thus incorrectly analyzed the case under *Zschernig*'s dormant foreign affairs doctrine—or "field preemption"[397]—and the corresponding dicta from *Garamendi*.[398] In doing so, the Ninth Circuit avoided expanding the explicit conflict preemption holding of *Garamendi* but was still able to invalidate the statute that would have allowed for millions of Armenians to collect from the breach of their ancestors' life insurance contracts.[399]

C. Zschernig *Analysis Is Appropriate Only Where the State Acts Beyond Its Traditional Police Power*

The only situation where *Garamendi* allows for foreign affairs preemption in the absence of a conflict is when the state acts beyond its constitutionally delegated police power *and* the state action has more than an incidental or indirect effect on foreign affairs.[400] Such analysis under

391. *See supra* notes 306–09, 320–24 and accompanying text.
392. *See supra* notes 326–30 and accompanying text.
393. *See supra* notes 306–09, 320–24 and accompanying text.
394. *See supra* note 181 and accompanying text.
395. *See supra* notes 324–30 and accompanying text.
396. *See supra* note 341 and accompanying text.
397. *See supra* notes 319–32 and accompanying text.
398. *See supra* Part I.B.3.
399. *See supra* note 10 and accompanying text.
400. *See supra* Parts I.B.3, II.C.

Zschernig is appropriate only after the court has found that there is no conflict between federal and state policy, and the state is acting beyond its police power.[401] Then it requires *only an analysis of the effects of the state action*.[402]

Limiting the applicability of *Zschernig* is preferable because, given the expansion of conflict preemption in the past two decades,[403] a dormant foreign affairs doctrine is now superfluous. Previously, courts may have found the dormant foreign affairs doctrine necessary because there was uncertainty about the preemptive reach of existing federal law. Today, given the Court's expansion on conflict preemption in foreign affairs law in both *Crosby* and *Garamendi*,[404] and despite the possible limitations of *Medellín*,[405] the dormant foreign affairs doctrine is unnecessary to invalidate state laws merely for tangentially intersecting with foreign affairs. Because of continuing globalization, state and local action will increasingly intersect with foreign affairs.[406] It is thus unnecessary and unproductive to litigate over state and local action in the absence of any conflicting federal policy.

CONCLUSION

Given the tumultuous history of court decisions in the realm of foreign affairs and federalism, it is unsurprising that lower courts have struggled with Supreme Court precedent. Despite lower courts' assertions to the contrary, the dormant foreign affairs doctrine of the Cold War has not persisted. And given increasing globalization, it is infeasible to categorically prohibit state and local action from sporadically overlapping with foreign policy. Pursuant to *Garamendi*, the states can legislate in areas that intersect with foreign relations, even if their motivation is to impact foreign affairs, as long as they act pursuant to their traditional police power.

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401. *See supra* Part I.B.3.

402. *See supra* Part I.A.3, I.B.3. A key question persists: How do we determine which effects abroad are incidental or indirect, instead of permissible? On top of mistakenly applying *Zschernig* where analysis under *Crosby* was appropriate, even if a *Zschernig* analysis had been appropriate, the Ninth Circuit in *Movsesian* misapplied the *Zschernig* effects test. The court merely cited the purpose of the state law, the effects of other countries' recognitions of the Armenian genocide, and Turkey's views of the issue to determine that it was an unconstitutional state action, rather than looking at the extent of the law's effects abroad. *See supra* notes 324–32 and accompanying text. Thus, "[t]he fact that Turkey abhors the term 'Armenian Genocide' and that the President does not want to upset Turkey was enough to overturn an official act of a sovereign state legislature." Stempel, *supra* note 2, at 107; *see also Movsesian III*, 670 F.3d 1067, 1077 (9th Cir. 2012) (en banc) ("Turkey expresses great concern over the issue, which continues to be a hotly contested matter of foreign policy around the world."), *cert. denied*, 133 S. Ct. 2795 (2013). This was an incorrect determination because only the actual effects abroad of the legislation would be relevant under a *Zschernig* analysis, and it is unlikely that a statute affecting insurance companies that already operate in California would have significant effects abroad. *See supra* note 341 and accompanying text.

403. *See supra* Part I.B.2.

404. *See supra* Part I.B.2.

405. *See supra* Part I.C.

406. *See supra* note 27 and accompanying text.

However, *Garamendi* does not allow states to add on to existing federal laws unless Congress expressly delegates such authority to the states. Adhering to the *Garamendi*-consistent typology developed in this Note might persuade the federal government to build a more comprehensive foreign policy, minimize gaps and ambiguity in U.S. foreign policy, and increase judicial efficiency.