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

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AMERICAN INSURANCE ASSOCIATION V. GARAMENDI
AND EXECUTIVE PREEMPTION IN FOREIGN AFFAIRS

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INTRODUCTION

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

A central tenet of separation of powers is that the executive is not a lawmaker. A central tenet of federalism is that directives of the federal government displace otherwise constitutional state law through the Supremacy Clause of Article VI. One would hardly

3. See Garamendi, 539 U.S. at 420-21 (suggesting that state insurance laws are interfering with executive agreements with Germany and Austria that the President signed).
5. Mark Sherman, Court Strikes Calif. Law on Nazi-Era Claims, PHILA. INQUIRER, June 24, 2003, at A10 ("Siding with the Bush administration and insurers, the court ruled 5-4 that the law amounted to unconstitutional meddling in foreign affairs by a state."); see also Jessie Mangaliman, Court Voids State Law Aiding Nazi Victims, SAN JOSE MERCURY NEWS, June 24, 2003, at 14 (writing that the "court, in effect said California ... exceeded its authority by seeking to address a foreign-policy issue meant for the federal government"); Henry Weinstein, Holocaust Insurance Law Negated, L.A. TIMES, June 24, 2003, at B1 (writing that the Bush administration's argument that the state law interfered with the ability to conduct foreign affairs was "critical" to the Court's decision). But see Charles Lane, Court Rejects Law Aiding Survivors of Holocaust, WASH. POST, June 24, 2003, at A11 (discussing implications for executive power).
suppose, therefore, that the President could unilaterally overturn a state law the President, or the President’s subordinates, thought simply to be bad policy, without the support of any legislative action and outside the scope of Supremacy Clause. If the President thinks, for example, that as a policy matter a state’s criminal punishments are too harsh or its business regulations too onerous, the President cannot change them by proclamation. This is true even if the state is interfering with presidential policy initiatives—to foster a more humane criminal justice system or a more open market, for example. Displacement of state law is a matter for the lawmakers—generally Congress; in the case of treaties, the President and the Senate; and in some other cases, the courts. The President, acting alone, may exhort the states, but not command them.

Although the foregoing principles may be uncontroversial in domestic matters, perhaps things stand differently in foreign affairs. Courts and commentators, including one of the present authors, have identified independent presidential powers in foreign affairs that go beyond anything the President can claim in the domestic sphere.6 Perhaps these independent powers include the independent ability to displace state law, without regard to the ordinary contours of separation of powers and federalism. But even if one might suppose this to be a viable abstract principle, it would have seemed contrary to two Supreme Court cases, Barclays Bank PLC v. Franchise Tax Board7 and Breard v. Greene.8 In each case, the Court rejected the proposition that the President might displace state laws with foreign affairs implications simply because the President thought the state law was bad policy.9

The Court’s conclusions in Garamendi thus come as something of a surprise, for, as we will argue, the essence of the decision is that the President, at least in some circumstances, does have this preemptive power in foreign affairs. Much of the Court’s opinion

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observed rather than explained this result, and sought to make its
decision flow routinely from prior foreign affairs cases. The final
outcome, however, was that a state law fell, not because the law
was in itself unconstitutional, but because the executive branch
disagreed with it as a policy matter. As the Court itself said, the
case was one of "preemption by executive conduct."10

It is, of course, uncontroversial that ordinarily state laws and
policies must give way to the foreign affairs objectives of the
national government. Establishing that proposition was one of the
Constitution's principal advances over the Articles of Confederation.
The critical question, though, is how these overriding federal goals
are developed and identified. The Constitution's Article VI places
the power of preemption in the legislative branch by making laws
and treaties, but not executive decrees, the supreme law of the
land.11 In unusual cases, state laws might be displaced by the
judiciary,12 or by the President pursuant to executive agreements
with foreign nations.13 Giving mere executive policy preemptive
effect, as the Court did in Garamendi, bypasses these constitutional
processes and concentrates power in the executive branch.

That is particularly problematic in foreign affairs, where the
President's substantial authority over the military and the organs
of diplomacy already gives rise to broad independent power. The
President's lack of lawmaking authority balances these other
great executive powers, because without lawmaking authority,
the President needs the support of other branches to fully effectu-
ate foreign policy. This highlights an often overlooked way that
federalism reinforces checks and balances at the national level. A
robust foreign affairs federalism promotes a cooperative approach


11. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States
which shall be made in Pursuance thereof; and all Treaties made, or which shall be made,
under the Authority of the United States, shall be the supreme Law of the Land."); see

12. See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 447-49 (1979) (displacing
state law under dormant foreign Commerce Clause doctrine); Zschernig v. Miller, 389 U.S.
429, 440-41 (1968) (displacing state law under dormant foreign affairs doctrine).

to foreign affairs, because the President will need the support of Congress to oust disruptive state laws; as a result, more foreign affairs decision making will be done by Congress (or the Senate). In contrast, allowing the President unilaterally to oust states from foreign affairs, as the Court did in *Garamendi*, means that more foreign affairs disputes may be decided only by the President, through a concentration of executive and lawmaking power that is contrary to the first principles of separation of powers.

As a result, one need not be a committed defender of state authority\(^4\) to have grave reservations about the decision's implications for separation of powers, federalism, and constitutional theory. Specifically, we argue that the *Garamendi* decision has at least three separate and substantial ill-effects on our constitutional structure.

First, the *Garamendi* decision gives the President the power to decide which state laws affecting foreign affairs survive and which do not. This executive preemption concentrates foreign affairs power in the President in a way not countenanced by the Constitution's text nor contemplated by its Framers, who emphasized the importance of separating executive power from legislative power. Previously, if the executive branch wished to pursue a foreign policy with which a state law interfered, the President usually had to seek the support of Congress (or the Senate via a treaty) to override the competing state law through Article VI of the Constitution. This procedure assured that state laws would not stand as obstacles to federal foreign policy, as they had under the Articles of Confederation.\(^5\) It also assured that federal foreign policy would be developed cooperatively, as the policy of the whole of the federal government,

\[\text{\ldots}\]

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and not merely as the policy of the executive branch. Under the post-*Garamendi* system, the President has no incentive to pursue a cooperative approach to foreign policy, and Congress must assemble a veto-proof majority to intervene.

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

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

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

This Article is presented as follows. Part I discusses the Holocaust-era insurance claims that formed the background of the case. Part II outlines the constitutional relationships between the state and federal governments in foreign affairs as they stood before the *Garamendi* decision. Part III describes the Supreme Court’s decision, and points out its discontinuity with prior decisions. In particular, Part III argues that *Garamendi* is not a true exercise in doctrinal evolution, because it owes essentially nothing to prior cases or practice, except as rhetorical cover. Part IV then turns to the troubling structural implications of *Garamendi*, which we regard as occurring primarily in the field of separation of powers. As outlined above, we conclude that the Court ended up far from the text, structure, and history of the Constitution. Part V addresses the decision’s implications for federalism, particularly the dangers of concentrating preemptive power over traditional state functions in the federal executive branch.

In sum, we argue that the Court’s lack of attention to constitutional text, history, and structure, and its casual use of prior decisions without proper attention to their specific facts or limitations allowed the Court to reach an intuitively comfortable result that is wrong both as a matter of federalism and, perhaps more importantly, as a matter of separation of powers. Centrally, the Court’s failure to begin with constitutional first principles caused it to overlook the critical relationship between federalism and separation of powers in foreign affairs.

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A. California and the Claims

Millions of people throughout Europe lost lives and property during Nazi rule in the 1930s and 1940s. Many of these victims carried life, casualty, and other insurance policies issued by Europe's major insurance companies. One might suppose the losses inflicted by the Nazis would have obligated the insurance companies to pay the beneficiaries of these policies. By the end of the twentieth century, however, relatively few such payments had been made.19

The leading problem was lack of documentary evidence. Many Holocaust survivors, and heirs of Holocaust victims, thought they were insured, but had little proof of it. Having been fortunate to escape Europe with their lives, they could hardly be expected to have salvaged documentation that would carry the day in court. Many leading European insurance companies refused to pay most Holocaust claims, on the grounds that their own records were destroyed in the turmoil surrounding World War II, and that the survivors could not demonstrate whether, and with whom, they had been insured.

Claimants came to suspect, though, that the insurers might not be fully forthcoming in providing documents that could require the companies to pay substantial claims. In a case that received much publicity, Alan Stern, a California businessman, believed that his grandfather, Moshe Stern, had purchased insurance from Assicurazioni Generali, an Italian insurer. The grandfather, along with a number of other family members, died at Auschwitz. The Stern heirs made efforts to recover from Generali, but the company denied the claim due to a lack of documentation, reporting that they had no record of any policy issued to Moshe Stern.20 Then, according

to press accounts, "in the winter of 1996-1997, the family, through an act of almost pure luck, obtained a copy of the policy that had been found at a Generali warehouse in Trieste—just a few months after the company had issued a press release denying the family's claim." Generali denied wrongdoing, but also continued to deny the Sterns' claim.

Stern and others brought the problem to the attention of the California Department of Insurance. In 1998, as a partial response, the Department—together with insurance regulators from other states, several European insurance companies, European regulators and nongovernmental organizations, and the government of Israel—founded an organization called the International Commission for Holocaust Era Insurance Claims (ICHEIC). The idea of ICHEIC was to invite insurance companies to pursue a cooperative approach to resolving the claims. Claims resolution nevertheless continued to founder on the issue of documentation. ICHEIC was a voluntary organization without means to compel disclosure, and without access to the insurers' records, claimants found that ICHEIC did little to improve their position.

In the meantime, the California legislature, at the behest of State Assemblyman Wally Knox, passed a series of measures in 1998 to facilitate recovery on the Holocaust-era insurance claims. First, it authorized "any Holocaust victim, or heir or beneficiary of

21. Id.
22. Id. (reporting Alan Stern's testimony to the California Department of Insurance); see Exhibit 2 to Commissioner's Opposition Brief, Gerling Global Reinsurance Corp. of Am. v. Quackenbush, No. CIV.S-00-0875WBSJFM, 2000 WL 777978 (E.D. Cal. June 9, 2000).
23. The Sterns' situation was by no means unique. As of the late 1990s, thousands of Holocaust survivors and beneficiaries of Holocaust victims lived in California, many of whom believed that they had potential insurance claims. See 2002 Hearing, supra note 19, app. D, at 23-24.
25. See 2002 Hearing, supra note 19, app. D, at 25-27 (reciting problems with disclosure and claims settlement at ICHEIC); Henry Weinstein, Insurers Reject Most Claims in Holocaust Cases, L.A. TIMES, May 9, 2000, at A3 (reporting that the ICHEIC insurers had rejected three-fourths of the early cases submitted to them, often for lack of documentation, even though the initial cases were specifically selected by the claimants as being those with the best documentation).
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a Holocaust victim” residing in California and having “a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer” covered by the statute to “bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides” until December 31, 2010. This, in effect, provided a cause of action and eliminated the statute of limitations for the claims.27 Further, responding to the evidentiary problems, the legislature required all insurance companies doing business in California that sold insurance in Europe during the Holocaust era, or had an affiliate that did so, to provide a list of their insureds during that period together with relevant policy information.28 The disclosure provision, known as the Holocaust Victim Insurance Relief Act (HVIRA), became the focus of the Garamendi litigation.

The HVIRA established a “central registry containing records and information relating to insurance policies ... of Holocaust victims, living and deceased.”29 The law required insurers doing business in California that sold insurance policies “directly or though a related company, to persons in Europe ... in effect between 1920 and 1945” to report to the state insurance commissioner the number of any such policies; “[t]he holder, beneficiary, and current status of those policies”; “[t]he city of origin, domicile, or address for each policyholder listed in the policies,” and whether the proceeds of such policies had been paid to beneficiaries or otherwise distributed.30 It

27. CAL. CIV. PROC. CODE § 354.5(b)-(c) (West 2004). The provision also allowed suit against any “related company,” basically an affiliate of a Holocaust-era insurer, responding to the jurisdictional difficulty that many of the companies that actually issued the policies did not do business directly in California. Id. § 354.5(a)(3).

28. Holocaust Victim Insurance Relief Act, CAL. INS. CODE §§ 13800-13807 (West 2004); see also CAL. CODE REGS. tit. 10, §§ 2278-2278.5 (2002) (implementing regulations). The disclosure provisions that became the HVIRA were originally enacted in 1998 along with the other insurance-related statutes, but then-Governor Pete Wilson vetoed that part of the 1998 enactments. After Gray Davis replaced Wilson as governor, the legislature re-passed the disclosure provisions as the HVIRA in 1999.

29. CAL. INS. CODE § 13803.

30. Id. § 13804(a)(1)-(3). A “related company” was defined in the Act as “any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.” Id. § 13802(b). Many European insurers operated in California through affiliates that purported to be largely independent of the European operations, so in many cases California sought to regulate not the company that actually had Holocaust claims against it, but a distant corporate relative.
also directed the Commissioner of Insurance to revoke the business license of any insurer that failed to comply.31

According to its preamble, the HVIRA sought to “ensure that closure” on the question of unpaid insurance proceeds was “swiftly brought to pass” for California’s Holocaust survivors.32 It spoke of insurers’ “responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state” to ensure “rapid resolution” of these issues for victims and their families.33 The legislature deemed the Act “necessary to protect the claims and interests of California residents” in light of the “active negotiations” underway through ICHEIC to “resolve all outstanding insurance claims issues,” and it sought to “encourage the development of a resolution to these issues through the international process or through direct action by the State of California.”34

B. The United States and the Claims

While these developments proceeded in California (and in other states),35 the U.S. government began to take an interest in Holocaust insurance claims.36 The U.S. Congress held hearings on the matter in 1998, roughly contemporaneously with the formation of ICHEIC and the enactment of the HVIRA. At first it

31. Id. §§ 13804 (b)(1)-(4), 13806. Knowingly making false statements to the commissioner was a misdemeanor, punishable by a civil penalty not exceeding $5,000. Id. § 13805.
32. Id. § 13801(d).
33. Id. § 13801(e).
34. Id. § 13801(f).
seemed that the initiative would remain at the state level. That was consistent with U.S. practice, where—despite insurance's multistate and multinational character—regulation had been conducted principally by the states. Congress had a long standing policy of endorsing state insurance regulatory activities, as reflected in the McCarran-Ferguson Act, which broadly authorized states to regulate the industry despite its interstate character.\footnote{McCarran-Ferguson Act, 15 U.S.C. § 1012 (2000). As we discuss below, infra Part I.B.2, Congress initially passed the McCarran Act in 1945 to shield state insurance regulation from constitutional attack under the dormant Commerce Clause doctrine. See Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-31 (1946) (describing purposes of the McCarran Act).} As the Chair of the House Banking and Financial Services Committee observed to the Insurance Commissioners of California and Washington State, when they testified before the committee on efforts at the state level:

[L]et me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one relates to the Federal nature of America, particularly in the insurance arena, [where] the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation ... gives the States a significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices.\footnote{Hearing Before the House Comm. on Banking & Fin. Servs., 105th Cong. 83 (1998) (statement of Rep. James Leach, Chair, House Comm. on Banking & Fin. Servs.). The Chair, in noting the states' role in insurance regulation, was no doubt thinking principally of the McCarran Act. See supra note 37.}

The Washington state commissioner had testified previously that states were trying to get the matter worked out cooperatively (referring in particular to ICHEIC), but that "[i]f our requests for cooperation are not satisfied, then the states may begin to exercise [regulatory] powers."\footnote{Id. at 235 (statement of Deborah Senn, Washington State Insurance Commissioner).} The California commissioner added that he was "prepared to revoke [the] certificate of authority, which allows a company to sell insurance in California" for companies that did not provide appropriate disclosure.\footnote{Id. at 75 (testimony of Charles Quackenbush, California State Insurance Commission.}
therefore, of the developing initiatives at the state level to compel disclosure of policy information. Several months later Congress passed the U.S. Holocaust Assets Commission Act of 1998, which established a commission "to examine issues pertaining to the disposition of Holocaust-era assets in the United States."41 The section of the Act relating to insurance policies stated among other things that:

In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of Insurance Commissioners [the association of state regulators] with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims ....42

Congress thus seemed willing to let the states continue to work towards a solution to the disclosure problem.

The insurance claims were soon overtaken by other events. Insurance was only a small piece of the larger puzzle of claims based on Nazi atrocities. The broader question of compensation for victims of the Third Reich and its accomplices arose immediately after the end of World War II, and by century’s end it still had not been resolved. The Cold War caused the Western allies to defer the question of post-war reparations because of worries that “continued reparations would cripple the new Federal Republic of Germany economically,” so responsibility for compensating victims of the Nazis shifted to West Germany, which compensated its citizens and signed a number of international agreements settling claims by other countries’ nationals against the German government.43 Once

42. Id. 112 Stat. at 613, §3(a)(4)(A).
43. Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 403-04 (2003); see generally STUART E.
the reunification of Germany occurred and a final settlement with the German government was effected, German courts held that a previous moratorium on claims by foreign nationals against private parties had been lifted. This ruling unleashed a torrent of litigation against insurance companies, banks, manufacturers, and others by Holocaust survivors seeking compensation for financial losses inflicted by the Nazi regime.

On the diplomatic front, the U.S. executive branch sought to negotiate a settlement with the German government regarding Holocaust-era claims, hoping to head off massive litigation that would, in all likelihood, never be concluded in time to benefit most of the survivors. In October 1998, German Chancellor Schroeder invited the United States to facilitate negotiation of a “foundation” to compensate slave labor victims. As class-action suits mounted, German companies and the German government were willing to provide financial contribution in return for, as they put it, “legal peace.” Though originally a response to slave labor litigation, the proposed foundation ultimately expanded to include insurance and other financial and property claims.

These efforts resulted in an agreement between the United States and Germany, signed in July, 2000. The agreement established a fund, to be administered by a German foundation called “Remembrance, Responsibility and the Future,” to which the German government and German corporations would contribute a total of approximately 10 billion marks to compensate victims of Nazi crimes, most prominently those who had been victims of slave labor.

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44. See Garamendi, 539 U.S. at 404-05.
46. See Garamendi, 539 U.S. at 405.
47. See EIZENSTAT, supra note 43, at 214.
48. Id. at 212-15.
49. See id. at 205-78.
50. Agreement Concerning the Foundation “Remembrance, Responsibility and the
In return for the contributions, the German companies pressed their interest in, as the preamble put it, an “all-embracing and enduring legal peace in this matter” which was “fundamental to the establishment of the Foundation.” The preamble further recognized “that German business, having contributed substantially to the Foundation, should not be asked or expected to contribute again, in court or elsewhere, for the use of forced laborers or for any wrongs asserted against German companies arising from the National Socialist era” and that “it is in the interest of both parties to have a resolution of these issues that is non-adversarial and non-confrontational, outside of litigation.”

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

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

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52. Id., pmb. para. 8-9, 39 I.L.M. at 1298-99.
53. Id., art. 1(1), 39 I.L.M. at 1299.
54. Id., art. 2(1), 39 I.L.M. at 1300. Annex B of the Foundation Agreement set forth the language of the “Statement of Interest” referred to in section 2(1), which the United States agreed to file in any case where “a claim has been asserted against German companies.” Id. That “statement” provided, in its chief operative section, that “the United States believes that all asserted claims should be pursued ... through the Foundation instead of the court[s],” but went on to say that

[i]the United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point
Finally, Article 2 required that "[t]he United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments."\(^{55}\)

In the effort leading up to the Foundation Agreement, the insurance claims were not the central focus. The settlement allocated only about 300 million of its 10 billion mark budget for insurance claims.\(^{56}\) The Foundation itself, moreover, had no mechanism for resolving the factual and documentary aspects of Holocaust insurance claims, which experience in California and elsewhere had shown to be critical. The Foundation Agreement said only that

> [t]he Federal Republic of Germany agrees that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission of Holocaust Era Insurance Claims ("ICHEIC") and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures ....\(^{57}\)

The Agreement further stated that "[t]he Foundation legislation will provide that all eligibility decisions will be based on relaxed standards of proof."\(^{58}\)

During the negotiation of the Foundation Agreement, executive branch officers contacted California's Governor and Insurance...
Commissioner, urging them to rethink their efforts against Holocaust-related firms, and asserting that state involvement risked “derail[ing]” the entire settlement enterprise. The California Department of Insurance pressed ahead under the HVIRA, directing the insurers to provide policy information by April 10, 2000, or face suspension of their business licenses.

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

II. FOREIGN AFFAIRS FEDERALISM BEFORE GARAMENDI

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

59. See Eizenstat to California Insurance Commissioner Charles Quackenbush (Nov. 30, 1999) ("The HVIRA has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period."); Eizenstat to Gray Davis, California Governor (Nov. 30, 1999) ("[C]learly, for this deal to work ... German industry and the German government need to be assured that they will get 'legal peace' not just from class-action lawsuits, but from the kind of legislation represented by the [HVIRA].... [A]ctions by California pursuant to this law have already potentially damaged and could derail [the settlement negotiations]"), reprinted in Appellee’s Petition for Rehearing at app. D, at 1, Gerling Global Reinsurance Corp. v. Low, 339 F.3d 1078 (9th Cir. 2003) (No. 01-17023).

60. 2002 Hearing, supra note 19, at 28. Some insurers complied with the statute. See id. at 35-42 (statement of David S. Waldman regarding activities of MONY Life Insurance Company).

61. See Gerling Global Reinsurance Corp. of Am. v. Quackenbush, Nos. Civ S-00-0506WBSJFM, 2000 WL 777978, at *3 (E.D. Cal. June 9, 2000); see also 2002 Hearing, supra note 19, at 28 (listing the plaintiffs who initiated federal lawsuits against California’s Insurance Commissioner).

non-Article VI executive branch preemption, chiefly by executive agreement.

A. Article VI Preemption

A basic tenet of U.S. constitutional law is that federal laws and treaties displace state laws with which they conflict. Article VI of the Constitution provides in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ...." The natural effect of making federal law supreme is that it overrides inconsistent state law. Indeed, preemption—and particularly foreign affairs preemption—was a central purpose of the clause, as explained in the founding era. Prior to the Constitution, under the Articles of Confederation the national government lacked power to displace state laws that interfered with its treaties and foreign policy objectives, with the result that the nation could not develop a coherent national foreign policy. Article VI's "Supremacy Clause" conveyed that power, in material part to protect the federal government's foreign affairs prerogatives.

The inclusion of treaties, as well as statutes, in the Supremacy Clause shows the extent to which the Constitution's framers focused upon state interferences in foreign affairs under the Articles. Perhaps the single greatest foreign affairs challenge under the Articles was that states refused to implement and abide by treaties negotiated by the national government. In particular, key states like Virginia and Pennsylvania refused to implement controversial provisions of the peace treaty with Britain that ended the Revolutionary War, even though that settlement as a whole greatly favored the United States. State intransigence provoked

63. U.S. CONST. art. VI.

64. On the origins of the Supremacy Clause, see Jack N. Rakove, Original Meanings 171-77 (1996); Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 232-60 (2000). Madison had wanted the Constitution to give Congress a "negative" over state legislation that it believed contrary to "the articles of Union or any treaties subsisting under the authority of the Union." His proposal encountered opposition on various grounds; the Supremacy Clause was the resulting compromise. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 27-29 (Max Farrand ed., 1937) [hereinafter FARRAND, RECORDS]. Among other things, the change limited Congress's "veto" to matters within Congress's enumerated powers.
Britain to drag its feet in its own implementation of crucial clauses of the treaty. Further, states failed to follow provisions of commercial treaties negotiated by Congress, and once it became clear to potential treaty partners that Congress had no effective enforcement mechanism, further treaty making became impossible.65

Of course, the Constitution could have simply given Congress the power to pass laws implementing treaties and overriding inconsistent state law through the preemptive effect of statutes. This would have been closest to the British system, in which treaties themselves did not override existing laws, but instead required parliamentary implementation. The Constitution's drafters wanted immediate implementation, though, and presumably saw no reason to allow the House to block or delay the preemptive effect of treaties already approved by the Senate. In any event, no one objected to adding treaties to the Supremacy Clause, which made sense, as the representation of the states in the Senate presumably alleviated federalism concerns.66

Article VI, then, set the basic relationship between the federal government and the states: states are obliged not to erect legal regimes in conflict with federal legislative enactments—treaties and statutes. Modern doctrine goes a bit beyond what might seem absolutely required by the Supremacy Clause's plain language, applying preemption not only in cases of direct conflict, but also when courts feel a state law "stands as an obstacle" to the desired result of a federal act, even if technically the two could exist in

65. See MARKS, supra note 15, at 52-95; Ramsey, Myth, supra note 15, at 422-24 & nn. 161-73. As Hamilton described the problem:
The treaties of the United States under the [Articles of Confederation] are liable to the infractions of the thirteen different legislatures .... The faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.
66. See FARRAND, RECORDS, supra note 64, at 22, 28-29 (recording no opposition to the supremacy of treaties, and reflecting unanimous approval of the Supremacy Clause).
67. Preemption seems absolutely required by Article VI when a statute explicitly directs it, or when state and federal law irreconcilably conflict such that it is impossible to obey both of them. Whether Congress must draft laws in such a way as to create conflict expressly, or whether courts may find conflict by implication, does not seem directly addressed by the text. See Nelson, supra note 64, at 265-90 (arguing against a constitutional basis for obstacle preemption).
parallel.\footnote{69} In unusual cases, federal legislation may be so comprehensive as to occupy the entire "field" of regulation, and thus, in the modern view, exclude state laws that may not seem to be obstacles in any tangible sense.\footnote{70}

These principles are familiar in domestic constitutional law, and apply without serious dispute to foreign affairs. In its most recent foreign affairs preemption case, \textit{Crosby v. National Foreign Trade Council}, the Supreme Court concluded unanimously that a federal statute prescribing limited economic sanctions against Burma (now Myanmar) displaced a similar, though more restrictive, regulation by Massachusetts.\footnote{71} That was so even though both laws sought the same ultimate object (lessening repression in Burma) and one could comply with both the state law and the federal law at the same time.\footnote{72} It was sufficient for preemption, the Supreme Court pointed out, that Congress intended a material, but limited and flexible sanctions regime, whereas the state's restriction was both further-reaching and fixed.\footnote{73}

\textbf{Davidowitz, 312 U.S. 52, 67 (1941).}

\footnote{69} In treaty preemption cases, the Court has, for the most part, not suggested that different rules apply. \textit{See, e.g., El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng}, 525 U.S. 155, 174-76 (1999); \textit{Guaranty Trust Co. v. United States}, 304 U.S. 126, 143 (1938); \textit{Ware v. Hylton}, 3 U.S. 199, 235-36 (1796). We assume here that preemption based on statutes and preemption based on treaties operate similarly. A threshold question is whether the treaty is "self-executing"; that is, whether the treaty intends its provisions to have direct domestic effect. The Court has held that, notwithstanding the unqualified language of Article VI, some treaties require domestic implementation and hence are not preemptive of their own effect. \textit{See} Foster v. Neilson, 27 U.S. 253, 314 (1829); Carlos Manuel Vázquez, \textit{The Four Doctrines of Self-Executing Treaties}, 89 AM. J. INT'L L. 695, 701-03 (1995). In speaking of treaty preemption, we refer only to the effect of self-executing treaties.

\footnote{70} \textit{See Gade}, 505 U.S. at 98 (finding preemption when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quoting \textit{Hines}, 312 U.S. at 67)). The conventional account refers to "conflict preemption," "obstacle preemption," and "field preemption." \textit{See} BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.06 (1999 & Supp. 2004); \textbf{1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1176-77 (3d ed. 2000).}


\footnote{72} \textit{See Crosby}, 530 U.S. at 379.

\footnote{73} \textit{Id. at 373-82}. The court first noted the long-standing rule preempting state laws that pose an obstacle to federal statutory objectives even in the absence of a direct conflict, and identified three ways the state law posed such an obstacle: (1) "Congress clearly intended the federal Act to provide the President with flexible ... authority over economic sanctions against Burma," while the state law did not permit any relaxation of sanctions in response...
Indeed, there was not much judicial dispute on the matter. Twelve of the thirteen judges who heard the Crosby case thought the federal law preempted the state sanctions. At the Supreme Court, Justice Scalia concurred separately to chide his colleagues for writing such a long opinion delving into the federal statute's legislative history because, Scalia said, the statute's preemptive effect was perfectly obvious on its face.

To the extent one might look for judicial debate in the area, the most one could find would be a mild one: whether there should be a presumption for or against preemption in foreign affairs matters. In domestic preemption cases, the Court purports to apply a presumption that state laws are valid unless the federal law's preemptive effect is clear. In Hines v. Davidowitz, an early foreign affairs case, the Court suggested that this presumption might be

to good behavior; (2) "Congress manifestly intended to limit economic pressure against the Burmese Government to a specific range" while the state law penalized activities that Congress had decided to exempt from sanction; and (3) Congress had directed the President to speak for the nation in developing "a comprehensive, multilateral strategy" toward Burma, while the state law prevented the President from exercising full control over the range of economic sanctions to which Burma was exposed. Id.

74. Id. at 388 (affirming the appellate court's decision in validating Massachusetts law on preemption grounds without any dissents); Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999) (affirming unanimously the decision of the district court invalidating Massachusetts law). The district court found no preemption but invalidated the law under the doctrine of Zschernig v. Miller. See id. at 48-49.

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

76. E.g., Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963) ("[F]ederal regulation... should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.").
reversed in foreign affairs because of the federal government’s naturally predominant role. In *Crosby*, the Court declined to consider whether a presumption might exist, since it found the preemption clear in any event.

In sum, one could find no serious dispute on core principles: that Article VI is the principal way the federal government displaces state laws it thinks interfere with its foreign policy objectives, and that federal legislative acts that intend to preempt state laws through Article VI will almost always be successful (even if that intent can be found only by implication). It was also plain that Article VI preemption could not be claimed in *Garamendi*: no statute or treaty even arguably conflicted with California’s HVIRA. Thus *Garamendi* lacked the critical factor that made its Supreme Court predecessor, *Crosby*, an easy case.

**B. Constitutional Exclusions**

Even absent Article VI preemption, the Constitution itself might exclude states from foreign affairs activities, without the need for preemptive federal action. Lacking a treaty or statute, this is where the HVIRA’s challengers turned. The Constitution and the Court’s prior cases offered three possibilities. First, the Constitution’s plain language might exclude states from foreign affairs. Second, states might be excluded by the negative implication of clauses granting particular foreign affairs powers to the national government. Third, and more controversially, there might be a structural exclusion of states from foreign affairs matters, not arising from any particular constitutional clause. The question of whether these methods might

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77. *312 U.S. 52*, 66-68 (1941) The Court emphasized the importance of the national government’s role in foreign affairs:

> In [determining preemption], it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits.

*Id.*

78. *Crosby*, 530 U.S. at 374 n.8; *see also* United States *v.* Locke, 529 U.S. 89, 108-09 (2000) (declining to apply any presumption in an area of “national and international maritime commerce”).
supplement Article VI preemption became the central issue in the HVIRA litigation—at least at its outset.

1. Specific Exclusions

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

80. Specifically, with respect to foreign affairs, Article I, Section 10 provides:
   No state shall enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal.... No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports.... No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.
   Id. Corresponding provisions, except respecting imports and exports, existed in Articles VI and IX of the Articles of Confederation. See ARTICLES OF CONFEDERATION AND PERPETUAL UNION, reprinted in JAMES BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 172-74, 176 (1845).
81. See Jack L. Goldsmith, Federal Courts, Foreign Affairs and Federalism, 83 Va. L. Rev. 1617, 1642 (1997) (arguing that the "natural inference ... is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty").
EXECUTIVE PREEMPTION IN FOREIGN AFFAIRS

2. The Dormant Commerce Clause Doctrine and Exclusions by Implication

A broad spectrum of opinion—supported by substantial judicial authority—holds that clauses granting a specific power to the federal government can, by implication, deny that power to the states, even if the federal government has not acted and even if the Constitution does not exclude the states in so many words. The most familiar manifestation of this principle is the so-called “negative” or “dormant” Commerce Clause doctrine, which, according to the Court, excludes states from enacting certain regulations affecting interstate commerce even absent federal action, based upon a negative implication from the grant to Congress of the authority to regulate interstate commerce in Article I, Section 8. Some Justices and academic commentators have attacked the dormant Commerce Clause doctrine at its very foundations, but the sheer volume of cases the Court has devoted to it seems to leave it firmly entrenched.

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

82. BITTKER, supra note 70, §§ 6.01-6.06; 1 TRIBE, supra note 70, § 6-2; Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091 (1986).


85. See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (facial
Presumably, then, Congress' Section 8 power to regulate "commerce with foreign Nations" implies a similar "dormant" exclusion of the states from regulating matters of international commerce. Indeed, the Court indicated in *Japan Line, Ltd. v. County of Los Angeles* that this "dormant" exclusion of states from foreign commerce was broader than the corresponding exclusion of states from domestic interstate commerce, due to special federal foreign affairs concerns. Specifically, the Court held, in addition to being subject to traditional dormant Commerce Clause categories, state regulations of foreign commerce would be displaced if they interfered with the federal government's ability to "speak with one voice" in foreign affairs.

At first blush that would seem to pose serious trouble for the HVIRA, which, at least according to the executive branch, interfered with the federal government's ability to speak with one voice on the settlement of Holocaust-era claims. And indeed, *Japan Line* figured prominently in the insurers' opening arguments. But two substantial factors cautioned against too much *Japan Line*-based optimism. First, the Court had retreated from its *Japan Line* holding in a series of cases culminating in *Barclays Bank v. Franchise Tax Board* in 1994. In *Barclays*, the Court upheld California's system of taxing the world wide operations of foreign corporations doing business in California, rejecting a *Japan Line* challenge. The Court pointed out that the state tax was neither discriminatory nor an undue burden on foreign commerce; whatever further restrictions *Japan Line* had intended did not apply because Congress appeared to endorse (or at least not to discriminate); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (discrimination in effect); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (undue burden).

86. The constitutional clauses are parallel: "The Congress shall have Power ... [t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.


88. *Id.* at 448-49; see BITTKER, supra note 70, § 8.14.

89. In addition to the "one-voice" argument, the insurers also argued that the HVIRA violated the dormant Commerce Clause because it regulated extraterritorially. Cf. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986); *Fed. Trade Comm'n v. Travelers' Health Ass'n*, 362 U.S. 293 (1960).


91. *Id.*
oppose) the California tax.\textsuperscript{92} Congress, said the Court, is the "voice of the nation" in foreign commerce, and so long as its "voice" is not compromised, the Court need not police state foreign commerce regulations.\textsuperscript{93} Although not repudiating \textit{Japan Line} outright, \textit{Barclays} seemed almost to require \textit{active} preemption by Congress (in effect, Article VI preemption) to displace a state law.\textsuperscript{94}

Even more problematic for the insurers' dormant Commerce Clause arguments, though, was the McCarran Act, the federal law authorizing states to regulate interstate insurance transactions.\textsuperscript{95} A leading theory of the dormant Commerce Clause doctrine (and presumably of the dormant foreign Commerce Clause doctrine) is that Congress is assumed not to endorse certain categories of state commercial regulation. Congressional silence, then, is construed to reflect congressional intent that these laws be displaced. Hanging the matter on congressional intent, however, implies that Congress affirmatively can manifest a contrary intent to allow state commercial regulations that would otherwise be excluded by the dormant Commerce Clause doctrine—as the Court in fact has held.\textsuperscript{96}

This was the point of the McCarran Act. In the post-New Deal period of Commerce Clause expansion, the Court held for the first time that insurance was a matter of interstate commerce.\textsuperscript{97} Although the case concerned Congress's powers over insurance, one corollary of the decision might have been that \textit{state} insurance regulation would be exposed to dormant Commerce Clause attack even in the absence of congressional regulation. To protect state

\textsuperscript{92} Id. at 314.
\textsuperscript{93} Id. at 330-31.
\textsuperscript{94} Id.; see also \textit{Wardair Can. Inc. v. Fla. Dept. of Revenue}, 477 U.S. 1 (1986); \textit{Container Corp. of Am. v. Franchise Tax Bd.}, 463 U.S. 159 (1983).
\textsuperscript{95} 15 U.S.C. § 1012 (2004); see discussion \textit{supra} Part I.B.
\textsuperscript{96} See, \textit{e.g.}, \textit{Prudential Ins. Co. v. Benjamin}, 328 U.S. 408 (1946); see also \textit{Bittker, supra} note 70, §§ 9.03-9.04; \textit{William Cohen, Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma}, 35 \textit{Stan. L. Rev.} 387 (1983); \textit{Brannon P. Denning, Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine}, 88 \textit{Minn. L. Rev.} 384, 397-99 (2003). This power of congressional "redelegation" goes back to the Wilson and Webb-Kenyon Acts of the late nineteenth and early twentieth century, in which Congress used its positive commerce power to disable the dormant Commerce Clause doctrine with respect to interstate shipments of alcohol. Previously, the dormant Commerce Clause doctrine had prevented states from enforcing their liquor laws. See \textit{Clark Distilling Co. v. W. Md. Ry. Co.}, 242 U.S. 311 (1917); \textit{In re Rahrer}, 140 U.S. 545 (1891); \textit{Bittker, supra} note 70, § 9.02.
\textsuperscript{97} \textit{United States v. South-Eastern Underwriters Ass'n}, 322 U.S. 533, 544-46 (1944).
insurance regulations, in 1945 Congress passed the McCarran Act, which explicitly reversed the dormant Commerce Clause assumption. As the Act stated, silence by Congress should not be construed as disapproval of state regulation—a clear reference to the dormant Commerce Clause.99

The McCarran Act cast a substantial pall upon the insurers’ dormant Commerce Clause claim, and thus more generally on the idea that the HVIRA might be displaced by the negative implication of a specific clause in the Constitution.100 As a result, while the dormant Commerce Clause doctrine remained a material issue in the case, quite a bit more attention focused on the idea of a structural exclusion of states from foreign affairs matters in general—an issue taken up in the next subsection.

3. Zschernig v. Miller and Structural Exclusions

Far more controversial than the dormant Commerce Clause doctrine is the proposition that there is a “dormant” exclusion of state foreign affairs activity not tied to any particular clause, but arising, apparently, from a constitutional structure that envisions material foreign affairs decisions being made at the federal level. As one of us has argued, “[T]he various provisions related to foreign affairs can be read to contain a structural or ‘penumbral’ restriction on state actions affecting foreign affairs, even in the absence of a congressional enactment.”101 That seemed, at any rate, to be the basis for the Supreme Court’s decision in Zschernig v. Miller—a case that appeared to be at the center of the Garamendi arguments.

99. The Court discussed and upheld this aspect of the McCarran Act in Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985), and in Benjamin, 328 U.S. at 434.
100. Although other negative implications presumably exist, the dormant Commerce Clause is the only one that has received much judicial development, and the only one with immediate application to the HVIRA. For the suggestion, not endorsed by judicial authority, of a broad negative implication from the Treatymaking Clause, see Edward Swaine, Negotiating Federalism: State Bargaining and the Dormant Treaty Power, 49 DUKE L.J. 1127 (2000).
101. Denning & McCall, supra note 14, at 337. But see Ramsey, supra note 14, at 429-32 (rejecting, at least as a matter of original understanding, the existence of a structural limit on state foreign affairs activities).
Cases before Zschernig had hinted at the idea of such an exclusion by describing foreign affairs as exclusively a federal concern, but did not explore the matter because a decision could rest on more conventional propositions such as Article VI preemption or the dormant Commerce Clause doctrine. For example, in Hines v. Davidowitz, the Court had observed that

> [t]he Federal Government, representing as it does the collective interests of [all] states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignies .... Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.\(^{103}\)

But this language was embedded within a paragraph that emphasized the Article VI supremacy of statutes and treaties, and the case's actual holding was that the state law in question conflicted with the federal Alien Registration Act.\(^{104}\) Hines, like the Court's subsequent decision in Crosby, did not consider what would happen when a state statute affected foreign affairs but did not conflict with a statute or treaty.\(^{105}\)

Zschernig faced that issue directly, invalidating an Oregon statute despite the lack of a preemptive federal act and the lack of any applicable constitutional clause.\(^{106}\) The case challenged a state probate law allowing foreign citizens to inherit property only if their governments gave reciprocal rights to Americans. Twenty years before Zschernig, in Clark v. Allen,\(^{107}\) the Court upheld a similar state statute, rejecting arguments that (i) the statute conflicted with a treaty and (ii) the statute was "an extension of state power into the field of foreign affairs, which is exclusively reserved by the

103. 312 U.S. 52, 63 (1941).
104. Id. at 62-64.
Constitution to the Federal Government.” In rejecting the second claim, Clark seemed to hold that when a state legislated on “local” matters, only “an overriding federal policy, as where a treaty makes different or conflicting arrangements,” would operate to restrain the states. Because there was “no treaty governing the rights of succession to personal property,” and the state had neither impermissibly negotiated with a foreign nation nor made a compact in violation of Article I, Section 10, it had not “cross[ed] the forbidden line,” though its law “will have some incidental or indirect effect in foreign countries.”

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

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

Such “state involvement in foreign affairs,” Douglas continued, was not approved by Clark v. Allen. Unlike the “incidental or indirect” effects found in Clark, “the type of probate law that Oregon enforces affects international relations in a persistent and subtle way.” Oregon’s law, while “not as gross an intrusion in the federal

108. Id. at 516-17.
109. Id. at 517.
110. Id.
111. Zschernig, 389 U.S. at 432.
112. Id. at 433-34.
113. Id. at 436.
114. Id. at 440.
domain" as a conflict with a statute or treaty, had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems"—and so was unconstitutional.\textsuperscript{115} 

\textit{Zschernig} thus announced a rule of constitutional exclusion limiting states' involvement in foreign affairs, much as the dormant Commerce Clause doctrine limits states' regulation of interstate commerce even in the absence of congressional legislation. The key proposition for which it appears to stand—and which makes it controversial—is that in the absence of a treaty provision, a law, or even an executive branch policy,\textsuperscript{116} a state law may still be struck down if it has "more than 'some incidental or indirect effect in foreign countries' or carries "great potential for disruption or embarrassment to" the Government's conduct of foreign affairs.\textsuperscript{117} The Court's basis for its rule was difficult to discern from Justice Douglas's opinion. Although the Court purported to rely on \textit{Hines v. Davidowitz}, \textit{Hines} involved Article VI statutory preemption and not the "dormant" exclusion of \textit{Zschernig}.\textsuperscript{118} "This was," Louis Henkin commented, "new constitutional doctrine."\textsuperscript{119} It was not well received by commentators. Henkin continued:

The Court did not build sturdy underpinnings for its constitutional doctrine or face substantial arguments against it.... What

\textsuperscript{115} \textit{Id.} at 441. Justices Stewart and Brennan would have gone further, to overrule \textit{Clark} and rest the outcome on "the basic allocation of the power between the States and the Nation," which, according to Justice Stewart, excluded states from matters concerning the conduct of foreign relations. \textit{Id.} at 443 (Stewart, J., concurring). Justice Harlan disagreed with the majority's analysis, preferring to provide the "full relief sought by the appellants" by "overruling the construction of the 1923 treaty, rather than the constitutional holding, in \textit{Clark v. Allen}." \textit{Id.} at 445 (Harlan, J., concurring). Only Justice White dissented, writing that he was not persuaded "that the Court's construction of the 1923 treaty in \textit{Clark v. Allen} ... and of similar treaty language in earlier cases should be overruled at this late date." \textit{Id.} at 462 (White, J., dissenting).

\textsuperscript{116} The executive branch told the Court that nothing in the Oregon probate laws interfered with its conduct of foreign policy. \textit{Id.} at 434. The Court replied that the "Government's acquiescence in the ruling of \textit{Clark v. Allen} certainly does not justify extending the principle of that case ... for [the application of Oregon's law] has more than 'some incidental or indirect effect in foreign countries,' and has great potential for disruption or embarrassment." \textit{Id.} at 434-35.

\textsuperscript{117} \textit{See id.}

\textsuperscript{118} \textit{Hines v. Davidowitz}, 312 U.S. 52, 62 (1941).

\textsuperscript{119} \textit{Louis Henkin, Foreign Affairs and the U.S. Constitution} 163 (2d ed. 1996).
the Constitution says about foreign affairs ... provides little basis for the Court's doctrine.... Nor is the Zschernig doctrine the natural inference from the expressed grants to the federal branches or from "the Constitution as a whole" .... Nor is there support for Zschernig in the history of the Constitution in practice.\footnote{120}

Professor Harold Maier wrote that Douglas's opinion was "murky" and that only Justice Stewart's structural analysis adequately explained the result in the case.\footnote{121} Recent scholars have expressed even sharper criticisms.\footnote{122}

While academic commentary as a whole expressed doubt about the opinion's reasoning (or lack thereof), commentators divided over the correct response. In the decades following Zschernig, that opinion's cryptic rationale produced at least three divergent views. Some academic commentators flatly rejected it as lacking any basis in the Constitution's text and history.\footnote{123} These commentators were comforted by the fact that Zschernig lay dormant in the courts, not clearly forming the basis of any federal appellate decision for some thirty years after it was rendered;\footnote{124} no doubt they harbored hopes that Garamendi would strike Zschernig off the books altogether.\footnote{125}

120. Id. at 436 n.64.
121. Harold G. Maier, Preemption of State Law: A Recommended Analysis, 83 AM. J. INT'L L. 832, 836-37 (1989). In particular, Maier notes that:
Justice Stewart, in classic common law decision-making tradition, applied the general organizational principles of U.S. federalism to the facts before him to arrive at his conclusion. Reiterating that the sole foreign affairs voice of the nation lies in the national Government, he concluded that the [state law was] outside the realm of state competence [because the state had trespassed on an area reserved for the federal government].

122. See, e.g., Goldsmith, supra note 81, at 1661 ("[C]ontrary to conventional wisdom, the federal common law of foreign relations announced by ... Zschernig marked a sharp departure from prior law."); Ramsey, supra note 14, at 357 & n.61 (terming Zschernig "revolutionary" and noting that its "constitutional basis ... remains unexplained").

123. See, e.g., Goldsmith, supra note 81, at 1661-62; Ramsey, supra note 14, at 429-32.

124. That desuetude led still other commentators to suggest it might lack continuing force. See HENKIN, supra note 119, at 165 (noting courts' lack of reliance on Zschernig and suggesting that Zschernig might be "a relic of the Cold War"); Peter J. Spiro, Foreign Relations Federalism, 70 U. COLO. L. REV. 1223, 1242, 1264-66 (1999). The first federal appellate decision to rely on Zschernig outside of Zschernig's particular facts was the lower court opinion in Crosby, sub nom. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38 (1st Cir. 1999). The Supreme Court had never relied on Zschernig prior to Garamendi.

125. See Jack L. Goldsmith, The New Formalism in United States Foreign Relations Law,
Others thought, as suggested above, that *Zschernig* might be defended on the basis of constitutional structure and intent, even though the Court itself had not made much of a case.\(^{126}\) For those accepting at least some version of *Zschernig*, the question was whether to emphasize its broad language or its specific facts. The Court had said, among other things, that state laws with more than an incidental effect on foreign affairs were unconstitutional, without explaining what that meant. Taking that observation as the case's core holding, however, suggested a fairly broad application, depending on how one viewed "more than incidental." Professor Maier, for example, proposed in an influential article that courts undertake a balancing of federal and state interests and exclude states from areas in which federal foreign affairs interests clearly predominated.\(^{127}\)

*Zschernig*, though, was an unusual case on its facts, and to some this suggested that it could be reserved to specific and fairly narrow categories of state acts. The principal problem in *Zschernig* had been that courts applying the state law made intrusive and inflammatory investigations into the good faith of foreign governments. The Court's focus on these facts in its opinion—and its insistence that it was not overruling its prior precedent of *Clark v. Allen*—indicated that the Court might not have intended as wide-ranging an exclusion as Maier proposed. Professor Carlos Vázquez, for example, suggested effectively confining *Zschernig* to its facts—state laws that displayed overt hostility toward foreign governments would be invalid.\(^{128}\)

As one might expect, the battle lines in *Garamendi* initially formed largely on these grounds. According to the insurers, the

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\(^{127}\) Maier, supra note 119, at 838-39.

\(^{128}\) Vázquez, supra note 75, at 1321. One merit of this proposal was that it would be relatively easy to apply. Maier's balancing test, in contrast, invited courts to make policy judgments in an area where judicial expertise was conventionally suspect.
dormant Commerce Clause doctrine invalidated the HVIRA under \textit{Japan Line}, but in any event the HVIRA fell under a broad reading of \textit{Zschernig} that excluded state laws with more than "incidental" effects on foreign affairs.\textsuperscript{129} According to California, Congress's McCarran Act answered the dormant Commerce Clause argument by authorizing the interstate regulation of insurance at the state level, and \textit{Zschernig} should be read narrowly (much in the manner advocated by Professor Vázquez) to exclude only insults to foreign governments.\textsuperscript{130} As the Supreme Court took up the case, these debates appeared to be the focus of its attention.

\textbf{C. Preemption by Executive Acts}

Executive agreements remained one substantial category of limits on state foreign affairs activities beyond pure Article VI preemption, explicit constitutional prohibitions, and the "dormant" exclusions.\textsuperscript{131} Despite three Supreme Court cases directly on point, executive agreements remained perhaps the least understood of the categories. There was at least one executive agreement directly implicated in \textit{Garamendi}—though it did not fit easily into either side's view of the case.

The modern President commonly concludes some agreements with foreign nations independently—that is, without the approval of Congress or the Senate. Some academic commentators take strong issue with that practice as inconsistent with the Treatymaking Clause of Article II.\textsuperscript{132} Treaties require approval of two-thirds of the Senate; therefore, if all agreements with foreign nations are treaties, it would seem that the President lacks unilateral power to agree to anything on the nation's behalf.\textsuperscript{133}

\begin{itemize}
  \item \textsuperscript{129} Gerling Global Reinsurance Co. v. Quackenbush, 2000 WL 777978, at *9-*10 (E.D. Cal. June 9, 2000).
  \item \textsuperscript{130} Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 752-53 (9th Cir. 2001).
  \item \textsuperscript{131} We use the term "executive agreements" to mean international agreements concluded on the sole authority of the President, as opposed to "congressional-executive agreements," which are approved by Congress but not by a supermajority of the Senate.
  \item \textsuperscript{132} \textit{See} U.S. CONST. art. 2, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.").
  \item \textsuperscript{133} David Gray Adler, \textit{Court, Constitution and Foreign Affairs}, in \textit{THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY} 19, 20-22, 27-32 (David Gray Adler & Larry N.
Perhaps, as others have argued, Congress also has the power to approve international agreements, but that would not support the common practice of Presidents making them alone. Nonetheless, in all three cases in which the Court considered the matter—United States v. Belmont, United States v. Pink, and Dames & Moore v. Regan—it had little difficulty in approving the executive agreements in question, and various academic and historical arguments have been made in support of the Court’s decision.

It is a somewhat larger step to conclude that executive agreements are not only constitutional but preemptive. After all, they are not mentioned in Article VI, the usual source of preemption. The Court’s three cases, nonetheless, gave preemptive effect to the agreements they approved without elaborate discussion.

Of course, at least one executive agreement was relevant to the Garamendi case. If the state law posed an obstacle to the implementation of an executive agreement, the Court’s precedents suggested that this could be a basis for preemption—and the insurers did make this claim, albeit somewhat indirectly. But several obstacles prevented an easy resolution on this ground. First, the scope and extent of executive agreement preemption remained

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135. 301 U.S. 324 (1937).


140. An executive agreement approved by Congress would presumably be preemptive in the same way as a statute, but the issue here is an agreement based solely upon the President’s power.

141. See supra notes 50-55 and accompanying text (discussing agreements with Germany and Austria).
hazy despite the Court's precedents. As noted, executive agreements stand outside the traditional methods of preemption by statute or treaty. Perhaps in recognition of this, the Court's prior cases—and commentators' evaluations of them—had been fairly cautious. The Pink and Belmont cases involved an area of unique presidential competence—recognition of a foreign government. Both concerned an executive agreement that Franklin Roosevelt concluded with the Soviet Union, as part of Roosevelt's recognition of the Soviet government in 1934. The Court made some mention of that context, and it was surely plausible to argue (as a number of commentators did) that their relationship to recognition gave the executive agreements particular constitutional force despite the fact that they rested on presidential power alone.\footnote{142. United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937); see HENKIN, supra note 119, at 219-30; Wuerth, supra note 139, at 12-13.}

One could almost think of this as a negative implication of the President's power to receive ambassadors: states could not do anything that would interfere with the President's ability to establish diplomatic relations with another government.

The Court's third and most important executive agreement case, Dames & Moore v. Regan, seemed to confirm the need to read Pink and Belmont narrowly. The Dames & Moore litigation challenged executive orders made pursuant to President Carter's executive agreement ending the Iran hostage crisis in 1980. In upholding the President's action, the Court proceeded extremely cautiously, emphasizing the emergency nature of the international situation and the implicit consent it found Congress had given to Carter's settlement.\footnote{143. Dames & Moore v. Regan, 453 U.S. 654, 677-80 (1981).} The Court carefully avoided a blanket holding that executive agreements were either constitutional or preemptive, cautioning that it was deciding only the facts of the immediate case.\footnote{144. Id. at 680, 688.} Dames & Moore seemed to signal that not all executive agreements were preemptive, though without identifying their constitutional limit; otherwise it would have been a much easier case than the Court appeared to believe.

A second problem with relying too heavily on executive agreements in Garamendi was that the principal agreement, the German Foundation Agreement, seemed to disclaim preemptive effect. It did...
not contain any language specifically overriding inconsistent state laws, especially not disclosure laws. Instead, it contained puzzlingly tepid language. The United States agreed that in any case in which a claim was asserted against a German company, the United States would submit a brief saying that it was in the “policy interests of the United States for the Foundation [Agreement] to be the exclusive remedy.”145 The Agreement also said that these “policy interests” do not “in themselves provide an independent legal basis for dismissal” even with respect to actual claims.146 With respect to state regulatory actions, the U.S. agreed only to use “best efforts, in a manner it considers appropriate.”147 None of this seemed to invalidate state laws, even with respect to claims. That was, moreover, how the United States read the agreement in its amicus brief to the court of appeals. The U.S. brief in the court of appeals made the statement contemplated by the agreement, but went on to say that “[Appellee] is mistaken ... if ... [it] means to suggest that the Agreement by its terms preempts the California statute.”148

A third factual difficulty stood in the way of deciding the case on the basis of the executive agreements: they did not apply to all the plaintiffs. The German Foundation Agreement affected only German companies. There was also an agreement with Austria and an informal arrangement with Switzerland, in each case covering those governments’ nationals. The HVIRA applied to all insurance companies doing business in California (and their affiliates), and some of these companies were based in countries other than Germany, Austria, and Switzerland. Generali, for example, was an

146. Id. Annex B, 39 I.L.M. at 1304.
147. Id. art. 2(1). 39 I.L.M. at 1300; see also supra Part I.B.
148. Brief for the United States as Amicus Curiae in Support of Affirmance, Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739 (9th Cir. 2001), reprinted in Respondents’ Brief in Opposition app. H, at 48, Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (No. 02-722); see also id. at 44, 47-48 (noting that the “agreements do not, of their own force, extinguish any claims that Holocaust victims or their families might assert in court against foreign insurance companies” but that they “make clear, however, that United States policy disfavors the imposition of further obligations on companies subject to the agreements, whether through regulation or litigation, beyond the obligations contemplated by the agreements themselves”); id. at 48 (“Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court.”). This comports with chief negotiator Eizenstat’s statement that “we would not take a formal legal position barring U.S. citizens from their own courts.” EIZENSTAT, supra note 43, at 269.
Italian company, and no agreement existed (or was even in the works) with Italy or Italian companies. So at best the executive agreements seemed to support a decision invalidating the HVIRA as applied to some of the insurers, but not others.

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

One possibility is that executive agreements on matters of plenary presidential power, such as recognition, are enough like treaties to draw their preemptive effect from Article VI, even though they are not mentioned in the Article's text. That claim finds support in at least one of the Court's executive agreement cases, United States v. Belmont, where the Court directly analogized the executive agreement to treaties made preemptive by Article VI. A second possibility is that executive agreements depend to some extent upon the approval, or at least acquiescence, of Congress, and that they draw their preemptive effect from the fact that, like statutes but less formally, they reflect the will of Congress. Dames & Moore supports this view, for the Court in that case emphasized Congress's acquiescence as a key component of its

149. See U.S. CONST. art. VI.
150. See Belmont v. United States, 301 U.S. 324, 330 (1937) (holding that "the Executive had authority to speak as the sole organ of [the federal] government" in settling claims with the Soviet Union and that "[t]he assignment and agreements in connection therewith did not, as in the case of treaties ... require the advice and consent of the Senate"); id. at 331 (stating that "the external powers of the United States are to be exercised without regard to state laws or policies"); id. (noting that the Supremacy Clause operates "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); see also United States v. Pink, 315 U.S. 203, 230-31 (1942) ("[S]tate law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement.").
Neither possibility worried the state in Garamendi, as recognition was not involved and if anything Congress seemed to endorse the state’s actions.

A third possibility is that executive agreements draw their preemptive power from the President’s independent power in foreign affairs. This was obviously the most troubling to the state in Garamendi, as it might suggest that other executive acts, such as mere policy formulation, might be preemptive as well. The Court, however, had never explained executive agreements on this ground, and among other things it seemed inconsistent with the Court’s cautious approach in Dames & Moore. Little judicial or academic authority hinted that presidential policies could have preemptive effect. Several lower court opinions, and perhaps one Supreme Court opinion, suggested that some state law causes of action that interfered with presidential policies might be barred, although the courts attributed their decisions to “federal common law” rather than anything explicitly constitutional. Beyond this, the idea


152. As the Court stated in Pink:

The powers of the President in the conduct of foreign relations include[] the power, without consent of the Senate, to determine the public policy of the United States with respect to Russian nationalization decrees.... That authority ... includes the power to determine the policy which is to govern the question of recognition.... Power to remove such obstacles to full recognition as settlement of claims of our nationals ... certainly is a modest implied power of the President who is the “sole organ of the federal government in the field of international relations.”

315 U.S. at 229; see also United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319-21 (1936) (describing the President’s power in foreign affairs as including, among other things, executive agreements); Prakash & Ramsey, supra note 6, at 252-65 (arguing for a textual basis for the President’s independent power in foreign affairs but denying that the power is preemptive).

153. E.g., Torres v. S. Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997). Some academic commentators suggested that these decisions really amounted to using executive policy to override state law, and found this to be constitutionally inappropriate; Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 109 F.3d 850, 855-56 (2d Cir. 1997). See Goldsmith, supra note 81, at 1695-98; Michael D. Ramsey, Escaping International Comity, 83 IOWA L. REV. 893, 937-51 (1998). The possible Supreme Court case is Boyle v. United Technologies Corp., 487 U.S. 500 (1988), where the Court invalidated a state tort claim against a defense contractor who followed a design submitted by the military. For varying views of Boyle, see Bradford Clark, Federal Common Law: A Structural Reinterpretation, 144
that a presidential policy could, in itself, displace a state law seemed barely to have been contemplated. It was not even mentioned in the leading foreign affairs law casebook, published only months before the Court’s decision. The Court, moreover, seemed firmly opposed, at least in commercial cases. In Barclays, the President had pointed to executive branch opposition to California’s tax law as a reason for invalidating it; the Court took this as a claim that executive policies could preempt state law, and rejected it in strong terms.

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

As a result, the parties’ arguments focused on the dormant Commerce Clause doctrine and upon Zschernig, not upon preemptive effects of executive action. To be sure, the insurers emphasized the President’s actions, especially the German settlement, and the degree to which the state law (supposedly) interfered with them. Their principal thrust, though, was to argue that the matter

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U. PA. L. REV. 1245, 1368-75 (1996); Ramsey, supra note 14, at 395-96; Vázquez, supra note 75, at 1302-04.

154. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN AFFAIRS LAW: CASES AND MATERIALS 275-335 (2003) (discussing state power in foreign affairs under four heads: statutory preemption, treaty preemption, “dormant” preemption—meaning Zschernig and related matters—and the federal common law of foreign affairs). Prior to Garamendi, the only academic article of which we are aware that explicitly discussed the idea of executive preemption was by one of the current authors. See Ramsey, supra note 14, at 390-429 (considering and rejecting, as a matter of original understanding, the idea that the President’s executive power in foreign affairs has a negative implication preempting inconsistent state laws).

implicated foreign affairs, as shown by the President’s involvement with foreign governments over the issue, and thus that Zschernig and Japan Line invalidated the HVIRA.

D. The HVIRA in the Lower Courts

The decisions in the lower courts followed the sketch of the law set forth above. Although the facts were novel, the courts’ approaches were not. At the outset, the insurers had their way on both of the closely contested issues. The district court took the broad view of Zschernig, highlighting its “no more than incidental effect on foreign affairs” language. Reciting the foreign policy objectives of the President, and the executive branch statements as to the HVIRA’s perverse effect upon negotiations, the district court thought it evident that the state law had more than an incidental effect on foreign affairs. The court made clear that it was relying on a constitutional exclusion of the states from foreign affairs, as suggested by Hines and related cases and confirmed by Zschernig.

On the dormant Commerce Clause doctrine, the district court took the Japan Line approach, ignoring Barclays altogether and emphasizing the imperative to “speak with one voice” in foreign affairs. The court accordingly entered a preliminary injunction against enforcement of the HVIRA in June 2000.

The court of appeals did not differ fundamentally in its vision of foreign affairs law, but in reversing, simply adopted the opposite view of the critical cases. With respect to Zschernig, the court followed California’s suggestion to confine Zschernig to its facts. The court emphasized that the HVIRA was not a regulation of, and certainly not an insult to, Germany or any other European govern-

156. Gerling Global Reinsurance Corp. of Am. v. Quackenbush, No. CIV.S-00-0506WBSJFM, 2000 WL 777978, at *9 (E.D. Cal. June 9, 2000) (“Zschernig requires that the statute have ‘more than some incidental or indirect effect in foreign countries.’” (emphasis omitted) (quoting Zschernig v. Miller, 389 U.S. 429, 434 (1968))).
157. Id. at *6-*9.
158. Id. at *5-*6.
159. Id. at *12 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979)).
160. The court threw out the insurers’ challenge to California’s other Holocaust-related statutes as unripe (since no one had actually filed suit under them yet). Id. at *1 n.2.
ment, but rather a regulation of private European companies. ¹⁶¹ Noting that it was "rarely invoked by the courts" and that "the Supreme Court has not applied it in more than 30 years," the court declined to take the insurers' broad view of Zschernig. ¹⁶² "HVIRA regulates insurance companies that do business in California .... No plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses." ¹⁶³ Further, according to the court, the HVIRA did not target a particular country, nor did it raise the sensitive "diplomatic concerns mentioned in Zschernig," specifically the risk of state actions giving offense to a particular foreign regime. ¹⁶⁴

On the dormant Commerce Clause doctrine, the appeals court thought the McCarran Act shielded the state law: "Congress has expressly delegated to the states the power to regulate insurance, free from the constraints of the dormant Commerce Clause.... HVIRA is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." ¹⁶⁵ As a result, "[t]he McCarran Act applies and the dormant Commerce Clause does not." ¹⁶⁶ In any event, while conceding that the HVIRA did "touch[]on" foreign commerce "indirect[ly]," the court emphasized the extent to which Barclays had undercut Japan Line. ¹⁶⁷ The court observed that under Barclays, Congress is the "voice" of the nation in foreign commerce, and found that "Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA" by passing the Holocaust Commission Act.¹⁶⁸ The court acknowledged that the HVIRA might be in some tension with the Foundation Agreement and executive policy more generally, although it downplayed the extent of direct conflict. It pointed out, however, that there was no preemptive act under Article VI, that the executive agreement itself did not claim

¹⁶¹ Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 753 (9th Cir. 2001).
¹⁶² Id. at 752.
¹⁶³ Id. at 753.
¹⁶⁴ Id.; see Vázquez, supra note 75, at 1324 (arguing that courts should "interpret[] Zschernig to bar state laws that single out a state or group of states for unfavorable treatment").
¹⁶⁵ Gerling, 240 F.3d at 746.
¹⁶⁶ Id.
¹⁶⁷ Id.
¹⁶⁸ Id. at 747; see also the discussion of the Holocaust Act supra Part I.B.
preemptive effect, and that neither *Zschernig* nor *Japan Line* (the principal methods of constitutional exclusion it recognized) required reversal. 169

Thus, as the case headed for the Supreme Court, it appeared to pose two central questions about the scope of two key lines of cases. 170 First, how broadly should one read *Zschernig* (assuming *Zschernig* did not meet the fate its harshest academic detractors wished upon it)? Second, did *Barclays* leave intact anything of the enhanced dormant Commerce Clause doctrine envisioned by *Japan Line*, and if so, did the McCarran Act nonetheless protect the state law? 171 Looming above both questions was the broader matter of

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169. The court was unimpressed by the "letters in which executive branch officials argue[d] that HVIRA does conflict with the federal government's policy concerning Holocaust-era claims," writing that the Supreme Court had in the past—particularly in *Barclays*—rejected arguments that such executive branch declarations should be determinative. *Gerling*, 240 F.3d at 751.

170. For the sake of simplicity, this Article's summary of the lower court proceedings is abbreviated. In its initial opinion, the court of appeals disagreed with the district court's reasoning, but left the preliminary injunction in place to allow the district court to consider the insurers' further argument that the HVIRA violated the Due Process Clause by taking "away the licenses of California insurers for failure to perform tasks that are literally impossible." *Id.* at 753-54. On remand, the district court granted summary judgment for the insurers on the ground that the HVIRA violated the requirements of procedural due process. *Gerling Global Reinsurance Corp. of Am. v. Low*, 186 F. Supp. 2d 1099, 1113 (E.D. Cal. 2001). The Ninth Circuit again reversed. *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002). The court of appeals found that the district court had "conflated[s] the analytically distinct concepts of procedural and substantive due process" because "[r]egulated parties generally have a right to meaningful hearing only with respect to those defenses actually allowed under a given statute. Thus, if a particular defense is deemed irrelevant under the statute, a party has no procedural due process right to a hearing ...." *Id.* at 845. The question was whether the state's denial of defenses violated substantive due process—a question properly analyzed under the rational basis test. *Id.* The court then found that the state law had a rational basis. *Id.* at 845-47. As a result, the insurers had no constitutional right to "raise defenses premised on their lack of control over the required information or the illegality under foreign law of their disclosure of the information," and the HVIRA was not "unconstitutional on its face because it makes no provision for a hearing prior to revocation of an insurance company's license." *Id.* at 845-49. The court of appeals also reaffirmed its conclusions on the *Zschernig* and *Japan Line* issues. *Id.* at 849.

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

171. Petitioners' "Questions Presented" were "Whether the HVIRA, which the United States government has called an 'actual interference' with U.S. foreign policy, and which affected foreign governments have protested as inconsistent with international agreements,
whether Zschernig and Barclays could be reconciled, or if one would have to give way—Zschernig with its direction that states stay out of foreign affairs controversies and Barclays with its approval of a state law that infuriated most of the nation’s major trading partners. These were important questions, to be sure, but not new ones. They had been debated in academic commentary on more or less these exact terms, and as discussed these were the questions that divided the district court from the court of appeals, and the insurers from the state.

As we discuss in the next section, the outcome in the Supreme Court was, in contrast, quite novel. The Court did not answer either of the questions seemingly posed to it, but instead found a new basis for preempting the state law outside both Zschernig and the dormant Commerce Clause doctrine. It was that shift, we argue, that converted Garamendi from an important case to, potentially, a landmark one.

III. THE SUPREME COURT DECISION: REINVENTING FOREIGN AFFAIRS FEDERALISM

In Garamendi, the Supreme Court reversed the court of appeals on foreign affairs grounds. As it did three years earlier in Crosby, the Court invoked preemption analysis to avoid larger questions about Zschernig’s dormant foreign affairs power and the dormant foreign Commerce Clause doctrine. But instead of repeating

violates the foreign affairs doctrine of Zschernig v. Miller, 389 U.S. 429 (1968); “Whether the HVIRA, which regulates on an extraterritorial basis in an area where the United States must speak with one voice, violates the Foreign Commerce Clause and exceeds the scope of legitimate state regulation under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015; and “Whether the HVIRA, which regulates insurance transactions that occurred overseas between foreign parties more than half a century ago, exceeds California’s legislative jurisdiction under the Due Process Clause.” See Brief for the Petitioners at 1, Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (No. 02-722), available at 2003 WL 834719. The Respondents’ formulation was essentially the same. Brief for the Respondents at 1, Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (No. 02-722), available at 2003 WL 554499.

172. See Goldsmith, supra note 81, at 1704-05 (finding the two cases irreconcilable); Spiro, supra note 124, at 1266 (suggesting that the reasoning of Barclays "could be deployed to reverse the rule[] of Zschernig").

173. Compare Garamendi, 539 U.S. at 413 n.7: Our grant of certiorari ... encompassed three of the questions addressed by the Ninth Circuit: whether HVIRA intrudes on the federal foreign affairs power, violates the self-executing element of the Foreign Commerce Clause, or exceeds
Crosby's unanimity, the Court managed only a 5-4 majority, and it would be a mistake to conclude that, like Crosby, Garamendi was a narrow decision. Unlike Crosby, Garamendi did not involve the routine application of preemption analysis, despite the Court's contrary suggestions. Rather, the language of preemption used in Garamendi masks profound implications for separation of powers and federalism.

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

Our criticisms of the Court's handling of the federalism and separation of powers issues in Garamendi have a common element. In both areas, the Court presented its conclusions as following ineluctably from its own precedents. As we demonstrate, however, Garamendi furnishes an excellent example of "doctrine creep," whereby entirely new principles of law are justified on the basis of prior cases, while ignoring important facts or limiting language that were important—perhaps decisive—in the previous cases. Garamendi, we argue, calls into question the desirability of privileging so-called "common law constitutional interpretation"—in which precedent, as opposed to text, history, or structure, does the heavy lifting of constitutional decisionmaking—as a mode of

the State's 'legislative jurisdiction.' ... Because we hold that HVIRA is preempted under the foreign affairs doctrine, we have no reason to address the other questions.

Id. (citation omitted) with Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 ("Because our conclusion that the state Act conflicts with federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue ... or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause.") (citation omitted). On the narrowness of the Crosby decision, see supra notes 72-78 and accompanying text; Goldsmith, supra note 75, at 177-78, 215-21; Denning & McCall, supra note 71, at 750-57.
constitutional interpretation. As Garamendi suggests, common law constitutional interpretation can easily devolve into an expedient way to legitimize intuitive reactions to difficult cases while avoiding important questions raised by text, history, and structure.

A. Overview of the Garamendi Opinion

Justice Souter's analysis for the majority began with several premises claimed to be "beyond dispute." First, "an exercise of state power that touches on foreign relations must yield to the National Government's policy" at some point, given the interest in uniformity that necessitated the grant of that power to the federal government in the first place. Second, "there is executive authority to decide what the policy should be" stemming from the President's independent foreign affairs power, as grounded in history, custom, and usage. The President, moreover, could express that policy through executive agreements with foreign nations, which, unlike treaties, do not require Senate ratification. The Court thus presented a simple syllogism: national foreign policy preempts inconsistent state acts; the President has the power

174. See Strauss, supra note 18, at 904-05.
175. Garamendi, 539 U.S. at 413-14. Our description of the Court's decision here draws on Denning, supra note 36, at 950-56.
176. Garmendi, 539 U.S. at 413.
177. Id. at 414.
178. Id. ("While Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers, in foreign affairs the President has a degree of independent authority to act."); id. at 415 ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic.") (citations omitted). The Court dismissed the objection that the settlement involved claims against purely private parties rather than governments; "Historically, wartime claims against even nominally private entities have become issues in international diplomacy," and "[a]cceptance of this historical practice is supported by a good pragmatic reason for depending on executive agreements to settle claims against foreign corporations associated with wartime experience," viz., "untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments." Id. at 416. For a challenge to this conclusion, see Wuerth, supra note 139, at 14-41.
to determine national foreign policy; and, therefore, the President's foreign policy preempts inconsistent state laws.

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

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

179. Garamendi, 539 U.S. at 421.
180. Id.
181. Id. at 422-23.
182. Id. at 423.
183. Id. at 425.
184. Id. at 427.
encourage both voluntary disclosure and contributions to the foundations established through the executive agreements described above.\textsuperscript{185}

Even if the conflict was not as sharp as the evidence suggested, "it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA."\textsuperscript{186} The Court pointed out that only a fraction of the nation's 100,000 living Holocaust survivors resided in California. "As against the responsibility of the United States of America," it noted, "the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy."\textsuperscript{187}

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

Finally, the Court rejected arguments that Congress had implicitly authorized the HVIRA, either through the McCarran Act or the Holocaust Commission Act. In the Court's estimation, "Congress has not acted on the matter addressed here," and significantly, "Congress has done nothing to express disapproval of the President's policy," though federal HVIRA-like statutes had been proposed.\textsuperscript{188} Absent congressional disapproval, the Court concluded, the President was free to act in the area of foreign policy, and conflicting state laws had to yield.\textsuperscript{189}

\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 425.
\textsuperscript{187} \textit{Id.} at 426-27.
\textsuperscript{188} \textit{Id.} at 429.
\textsuperscript{189} \textit{Id.} The McCarran Act's purpose, the Court wrote, "was to limit congressional preemption under the commerce power, whether dormant or exercised," and "a federal
Justice Ginsburg, joined by Justices Stevens, Scalia and Thomas, dissented. Absent a clear expression of intent to displace state authority, the dissenters would have upheld the HVIRA. Although conceding the majority's premises—the President may conclude executive agreements with foreign countries that settle claims, and those agreements may displace otherwise valid state laws or state litigation—the dissenters pointed out that "no executive agreement before us expressly preempts the HVIRA. Indeed no agreement so much as mentions the HVIRA's sole concern: public disclosure." Even "[i]f it is uncertain whether insurance litigation may continue given the executive agreements on which the Court relies," Justice Ginsburg wrote, "it should be abundantly clear that those agreements leave disclosure laws like the HVIRA untouched."

The dissent gave little weight to executive branch statements that the HVIRA interfered with the policy of the national government, "lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch." Though those officials no doubt accurately represented the President's policy, "no authoritative text accords such officials the power to invalidate state law simply by conveying the Executive's views on matters of federal policy. The displacement of state law ... requires a considerably more formal and binding federal instrument." Justice Ginsburg and her fellow dissenters would have "reserve[d] foreign affairs preemption for circum-

\[\text{statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.} \]
\[\text{Id. at 428. As to the Holocaust Act, "[t]he Commission's focus," the Court found, "was limited to assets in the possession of the Government"; references in the act encouraging the state commissioners to assist by collecting information on foreign and domestic insurers doing business in the United States were limited "to the degree the information is available." Id. at 429. This proviso, the Court concluded, "can hardly be read to condone state sanctions interfering with federal efforts to resolve such claims." Id. On the McCarran Act and the Holocaust Act, see infra Part III.C.}
\[\text{190. } \text{Garamendi, 539 U.S. at 430. (Ginsburg, J., dissenting) ("Absent a clear statement aimed at disclosure requirements by the 'one voice' to which courts properly defer in matters of foreign affairs, I would leave intact California's enactment.").}
\[\text{191. Id. at 438 (citation omitted).}
\[\text{192. Id. at 441.}
\[\text{193. Id. at 442.}
\[\text{194. Id.}
stances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand," and she counseled the judiciary to resist establishing national foreign policy predicated "on no legislative or even executive text, but only on [the] inference and implication" that state law is preempted "when the President himself has not taken a clear stand." 195

B. Garamendi and Its Precedents

1. Crosby: The Irrelevant Precedent

The Court's first sleight-of-hand was its invocation of the prior statutory decision, Crosby. "The situation created by the California legislation," Justice Souter wrote, "calls to mind the impact of the Massachusetts Burma law on the effective exercise of the President's power, as recounted in the statutory preemption case, Crosby v. National Foreign Trade Council." 196 As in Crosby, "HVIRA's economic compulsion to make public disclosure, of far more information about far more policies ... undercuts the President's diplomatic discretion and the choice he has made exercising it." 197 The opinion then discussed how the threat of litigation and sanctions posed obstacles to the federal government's attempt to encourage voluntary participation with the German Foundation and the ICHEIC. Though the Garamendi Court admitted that Crosby could be distinguished because

the President in this case is acting without express constitutional authority ... we were careful to note [in Crosby] that the President possesses considerable independent constitutional authority to act on behalf of the United States on international

195. Id. at 442-43; see id. at 423 & n.13 (relying on executive statements). With respect to Zschernig, the dissenters indicated that they would take the view expressed by the court of appeals (and Professor Vázquez): "Zschernig ... resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involves 'sitting in judgment' on them' .... [The HVIRA] takes no position on any contemporary foreign government and requires no assessment of any existing foreign regime." Id. at 439-40 (quoting HENKIN, supra note 119, at 164); see also Vázquez, supra note 75, at 1262, 1321.
196. Garamendi, 539 U.S. at 423.
197. Id. at 423-24.
issues ... and conflict with the exercise of that authority is a comparably good reason to find preemption of state law.\textsuperscript{198}

As one of us commented at the time, “the ultimate outcome of Crosby seems to have hinged not on any inherent powers of the presidency or on any presumed expertise uniquely possessed by the executive branch, but rather on the powers delegated to the president by Congress through statute.”\textsuperscript{199} Indeed Crosby’s entire decision was premised on the notion that the President, acting pursuant to statutory authorization, was exercising maximum power under the Constitution. As for Crosby’s supposed discussion of the President’s “considerable independent ... authority,”\textsuperscript{200} the Court merely cited a page of the Crosby opinion listing the President’s foreign affairs powers enumerated in Article II and noted the “capacity of the President to speak for the Nation with one voice in dealing with other governments.”\textsuperscript{201} Of course no one doubts these powers, but to the extent the citation suggested that Crosby discussed the President’s ability to displace state law without statutory authority (a matter not the least at stake in Crosby), it is entirely misleading.

The Court’s invocation of Crosby, then, was pure misdirection. In Crosby, everyone assumed (correctly) that presidential authority, based upon a congressional enactment, would override conflicting state law. The whole question was whether the state law posed a conflict.\textsuperscript{202} Everyone assumed conflict would result in preemption because Article VI of the Constitution declares that rule. In Garamendi, the question was whether presidential authority, not based upon a congressional enactment, would override conflicting state law. As the Court itself said later in the opinion, the case was a matter of “preemption by executive conduct in foreign affairs.”\textsuperscript{203} Article VI, the entire basis of Crosby, says nothing on this question, so Crosby was essentially irrelevant. Invoking it only obscured the

\begin{footnotesize}
\begin{itemize}
    \item[198.] Id. at 424 n.14 (citations omitted).
    \item[199.] Denning & McCall, supra note 71, at 757 (citation omitted); see also Goldsmith, supra note 75, at 218-20.
    \item[200.] Garamendi, 539 U.S. at 424 n.14.
    \item[201.] Id. at 424 (quoting Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 381 (2000)).
    \item[202.] See supra notes 71-75 and accompanying text.
    \item[203.] Garamendi, 539 U.S. at 428.
\end{itemize}
\end{footnotesize}
question posed in *Garamendi*: whether an executive branch policy could override a state law when Article VI did not apply.

2. *Zschernig: The Misstated Precedent*

The Court's second disingenuous move involved *Zschernig v. Miller*. Its opinion reads as if *Garamendi* follows *a fortiori* from *Zschernig*. Comparison of the opinions, however, shows that *Garamendi* not only does not follow from *Zschernig* but in fact brushes it aside, creating an entirely new way of looking at the matter.

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

*Garamendi* began with the assertion that "valid executive agreements are fit to preempt state law, just as treaties are." *Citing Pink* and *Belmont*, in which the Court held that an executive agreement with the Soviet Union establishing diplomatic relations preempted state policies regarding the legality of Soviet expropriation of private property, the Court continued: "[i]f the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward." *As described below, we think this statement in*

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204. HENKIN, supra note 119, at 165 (calling Zschernig "a unique statement and a sole application of constitutional doctrine"); Goldsmith, supra note 81, at 1705 (suggesting that Barclays implicitly overruled Zschernig); Spiro, supra note 124, at 1242, 1264-66 (suggesting that doctrine and the end of the Cold War have operated to sap Zschernig's vitality). But see Ramsey, supra note 14, at 358-65 (warning that announcements of Zschernig's demise were premature); Vázquez, supra note 75, at 1266-78 (arguing on the basis of Crosby that Zschernig retained doctrinal force).

205. *Garamendi*, 539 U.S. at 416 (citation omitted).


itsel seriously oversimplified existing law. The majority then conceded that, unlike the agreement in Pink and Belmont, "the agreements include no preemption clause" and that petitioners' preemption claim must "rest on asserted interference with the foreign policy those agreements embody." Thus, the Court seemed to concede that the executive agreements in themselves did not resolve the matter.

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

There are several problems with this approach. First, Douglas's Zschernig opinion was not rooted in field preemption. Field preemption is a type of implied preemption in which either "a federal regulatory scheme [is] 'so pervasive' as to imply that 'Congress left no room for the States to supplement it,'" or the federal interest in the field is "'so dominant' that federal law 'will be assumed to preclude enforcement of state laws on the same subject.'" It arises, like other kinds of preemption, from the intent of Congress. Because there was no claim in Zschernig that the state law conflicted with any congressional enactment or even with

208. Infra Part IV.E.
210. Id. at 419-20 (citation omitted).
211. Goldsmith, supra note 75, at 206 (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990) and Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947)); see also Britker, supra note 70, at § 5.06[E] ("State statutes can also be preempted ... because the federal rules are so pervasive that they 'occupy' the field, leaving no room for additional or supplemental state regulations.") (footnote omitted).
executive policy, it is wrong to discuss Justice Douglas's analysis using statutory preemption terms. Zschernig made clear that Oregon's statute involved state officials "in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government ...." Despite the bootstrapping citations to Hines v. Davidowitz, Douglas's opinion barred Oregon's statute as a matter of constitutional exclusion, not statutory preemption.\footnote{212. Zschernig v. Miller, 389 U.S. 429, 436 (1968) (emphasis added); see also id. at 432 ("[T]he history and operation of this Oregon statute makes clear that [it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.").}

Second, the Court misstated Justice Harlan's position. According to the Court, Harlan would have displaced state law if there was a "likelihood that state legislation will produce something more than [an] incidental effect in conflict with express foreign policy of the National Government ...."\footnote{213. Garamendi, 539 U.S. at 420.} That description implied that Harlan endorsed preemption where any federal policy existed, regardless of the branch from which it emanated. But this is not what Harlan said. It is true that Harlan stated, without elaboration: "in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations."\footnote{214. Zschernig, 389 U.S. at 458-59 (Harlan, J., concurring) (citation omitted).} But he concurred on the ground that a treaty preempted the Oregon law; all of the cases he cited as examples of "federal policy" preempting state law involved statutes or treaties, and he made no reference to preemption by executive policy.\footnote{215. Id. at 458-59 & n.25 (Harlan, J., concurring).} It seems clear that by "federal policy" Harlan meant policy expressed in either a treaty or congressional statute, which would, by operation of the Supremacy Clause, preempt contrary state law. It is unlikely that he would have endorsed the result in Garamendi—that state laws not in conflict with any law, treaty, or executive agreement were nevertheless preempted on the strength of executive branch statements that the state law interfered with its conduct of foreign affairs. In any event, Harlan
plainly did not mean to decide the matter; it was not presented by Zschernig nor established by any prior case.

Again, the rhetorical force of Garamendi's discussion depends upon a misleading invocation of statutory preemption. Justice Souter's "synthesis" of the two Zschernig opinions did nothing to advance his central claim that executive action alone can have preemptive effect, because neither Harlan nor Douglas made that claim. Approaching the case in this way, however, allowed the Court to avoid answering the two critical questions about Zschernig: (i) did it remain good law, despite its lack of clear constitutional foundation and lack of judicial citation, and (ii) if so, what was its scope—the relatively broad formulation of "all but incidental effects" adopted by the district court or the narrower "insults and hostility" version preferred by the court of appeals? Put another way, Souter made it appear that if there had been a contrary executive policy in Zschernig, that would have solved Justice Harlan's objections; that simply is not correct.

The principal effect of the Court's discussion was to make Zschernig a precedent for executive policy preemption, which it assuredly was not. The executive branch in Zschernig had expressly disclaimed any desire to see Oregon's statute displaced. Douglas, for the majority, was talking about a "dormant" constitutional exclusion, and Harlan, in concurrence, was talking about Article VI preemption. As with its discussion of Crosby, the Court's use of Zschernig was camouflage rather than reasoning—it obscures rather than clarifies the issue the Court confronted.

216. Even if the Court had characterized Justice Douglas's opinion correctly, it is incoherent for the Court to talk of "synthesizing" Douglas and Harlan's opinions because they embody two distinct (and irreconcilable) types of preemption. Field preemption operates regardless of the presence of an actual, or even a potential, conflict between federal and state statutory schemes. Conflict preemption, on the other hand, permits complementary state regulation, as long as it does not render compliance with both impossible, or pose an "obstacle" to the stated goals of congressional legislation. The degree to which a state statute does or does not conflict with or obstruct the federal legislation is simply irrelevant under field preemption analysis, because the very action of Congress is said to "occupy the field" and leave no room for states to act. See supra notes 151-53 and accompanying text.

217. See Zschernig, 389 U.S. at 434-35.
3. Barclays and Breard: The Missing Precedents

_Crosby_ and _Zschernig_ essentially exhaust the Court's precedents. The only other cases the Court cited even marginally in its favor were _Curtiss-Wright_ (on presidential power in foreign affairs) and the _Pink-Belmont-Dames & Moore_ line of authority on executive agreements. The Court itself acknowledged, however, that the executive agreement cases did not settle the matter, and whatever scope _Curtiss-Wright_ gave to executive power in foreign affairs, it said nothing about displacement of state law by unilateral presidential policy. On the other hand, at least two cases pointed in the other direction, because they upheld state interferences with executive branch foreign policy, and yet they received no serious attention from the Court.

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

With no congressional approval for the executive agreements, and with no intent to preempt expressed in the agreements themselves, the facts in _Garamendi_ seem much closer to those of _Barclays Bank PLC v. Franchise Tax Board_ than to cases like _Crosby_. If the Court believed the executive policy in _Garamendi_ was preemptive, one would think it would need a fairly strong explanation for why the executive policy in _Barclays_ was not preemptive.

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218. _Garamendi_, 539 U.S. at 415-17.
Barclays addressed whether California’s method for computing taxes for multinational corporations violated the Japan Line principle that state taxation of foreign commerce cannot inhibit the ability of the federal government to “speak with one voice” in the regulation of international trade. The Barclays Court found evidence of congressional intent to permit state tax structures like California’s, and so it found that California’s requirement did not violate the “one voice” requirement. Arguments that the method of taxation was “unconstitutional because it [was] likely to provoke retaliatory action by foreign governments,” the Court wrote, were “directed to the wrong forum.” The Court specifically refused to give force to executive branch representations that California’s tax laws interfered with the foreign policy interests of the country. Noting that Congress, not the President, possessed the power to regulate foreign commerce, the Court remarked: “[t]hat the Executive Branch proposed legislation to outlaw a state taxation practice, but encountered an unreceptive Congress, is not evidence that the practice interfered with the Nation’s ability to speak with one voice, but is rather evidence that the preeminent speaker decided to yield the floor to others.” The Court concluded that the communications from the executive branch “express[ing] federal policy but lack[ing] the force of law cannot render unconstitutional California’s otherwise valid, congressionally condoned, use of worldwide combined reporting.”

Barclays seemed directly relevant to Garamendi, which appeared similarly to turn on the effect of executive branch communications “express[ing] federal policy but lack[ing] the force of law.” The Garamendi majority declined to apply Barclays, explaining in a brief footnote that Barclays involved the regulation of foreign commerce, which is vested in Congress, not the President. “[I]n the

222. Barclays, 512 U.S. at 302-03 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449 (1979)).
223. Id. at 316-17, 326-27.
224. Id. The “one voice” formulation arose from the Court’s prior decision in Japan Line, as explained supra notes 87-88 and accompanying text.
226. Id. at 330.
227. Id.
field of foreign policy,” the Court said without further discussion, “the President has the 'lead role.'”

This distinction seems unsatisfactory. Even if one accepts the President’s “lead role” in foreign policy, Justice Souter did not explain why the HVIRA was not a regulation of foreign commerce. After all, California’s disclosure requirements applied to entities doing business in the state, and made compliance a condition of continued licensing. In other words, the HVIRA set conditions under which private companies did business in California. It is hard to see it as anything other than a commercial regulation.

To be sure, the HVIRA was a commercial regulation that implicated foreign affairs, so perhaps the Court meant that Barclays could be distinguished on that ground. California’s taxation methods in Barclays, however, also affected foreign policy, as the executive branch in that case pointed out. This confirms the obvious: regulations of “commerce” also affect “foreign policy.” These are not inherently separate categories. Garamendi provided no intelligible principle to distinguish between them, and it seems plain that they overlap. The Court’s distinction does not really distinguish Barclays from Garamendi. Each case involved a state


229. Indeed, the Court in South-Eastern Underwriters had previously held that regulation of insurance was a matter of interstate commerce, see United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 552-53 (1944), and one of the central issues in the Garamendi litigation from its inception was that the HVIRA violated the dormant Commerce Clause doctrine. See discussion supra Part II. In three years of litigation, no one had argued that the HVIRA was not a regulation of commerce.


231. As with Justice Souter’s focus on traditional and nontraditional state regulations, his distinction between commerce and foreign policy is surprising coming from a Justice who excoriated the Lopez and Morrison majorities for “categorical formalism” in making an inquiry into the commercial or noncommercial nature of activity—a central feature of its inquiries into the scope of congressional power over interstate commerce. See United States v. Morrison, 529 U.S. 598, 652 (2000) (Souter, J., dissenting); United States v. Lopez, 514 U.S. 549, 608-09 (1995) (Souter, J., dissenting).
commercial regulation that interfered with an executive branch foreign policy.232

Barclays seems even more relevant when one considers the existence of two federal statutes suggesting that Congress consented to the passage of statutes like the HVIRA. Barclays construed the failure of Congress explicitly to disapprove of California's tax as an implicit endorsement of the state's tax structure.233 Whatever the merits of construing the failure of congressional proposals as an endorsement of the opposite position, the Court's conclusion is in keeping with its employment of "clear statement rules" designed to protect federalism by requiring Congress to be explicit when altering the allocation of responsibilities between the federal government and the states.234 In Garamendi, as in Barclays, neither Congress nor the President had formally disapproved of the HVIRA, except through executive policy statements of the sort Barclays found insufficient to preempt state law. Rather than applying a similar clear statement rule, however, Justice Souter discussed the lack of congressional disapproval of the President's actions in signing the executive agreements (which were not preemptive on their own terms and did not affect all of the parties). Despite the fact that "[l]egislation along the lines of HVIRA has been introduced in Congress," he noted that "none of the bills has come close to making it into law."235 Because the President had "independent authority" in foreign affairs, he wrote, Congress's silence should not be equated with disapproval.236 Though it went unremarked, the Court seemed to suggest that clear statement rules do not apply when the executive branch is reallocating responsibilities between federal and state

232. Of course, the commercial/noncommercial distinction might serve to distinguish Zschenig from Barclays, since Zschenig was not a commercial case. Cf. Goldsmith, supra note 81, at 1698-1705 (discussing tensions between Zschenig and Barclays). Looking at the case in this way, though, suggests that Garamendi was more like Barclays than like Zschenig.


234. See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) ("[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotation marks omitted) (citations omitted).


236. Id.
governments. In any event, none of this distinguishes Barclays, which also implicated the President's authority in foreign affairs and yet employed the opposite presumption.\textsuperscript{237}

In addition to Barclays, the Court's discussion showed tension with at least its language, if not its result, in a case the Garamendi decision did not mention: Breard v. Greene.\textsuperscript{238} Breard, a Paraguayan citizen, had been sentenced to death in the Virginia state courts. At his arrest, and throughout the prosecution, he was never informed of his right to contact the Paraguayan embassy for assistance—a right guaranteed by the Vienna Convention on Consular Relations, to which the United States is a party. Breard claimed this violation entitled him to a retrial, a claim that seemed weak under U.S. law, both because it had been procedurally defaulted and because Breard had a difficult time showing prejudice from the failure. In a parallel proceeding, however, Paraguay raised the matter before the International Court of Justice (ICJ), which requested—or, depending on one's view, ordered—the United States to stay Breard’s execution pending its hearing of the matter.\textsuperscript{239} The U.S. executive branch then requested, on the basis of the ICJ order, that Virginia stay the execution. Virginia refused, however, and the Supreme Court held that it lacked legal grounds to intervene. As the Court put it:

\begin{quote}
Last night the [U.S.] Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.\textsuperscript{240}
\end{quote}

\textsuperscript{237} The only distinction that seems relevant to what the Court was saying is that in Barclays, legislation to override the states had been introduced in Congress but had failed to pass; in Garamendi no such legislation had even been introduced. We cannot imagine how the second situation places the executive in a better position in terms of congressional assent than the first, at least so long as Congress was aware of the state activities. Alternatively, one might focus on the lack of executive agreements in Barclays, and their presence in Garamendi. If that were the distinction, however, presumably the President could have reversed the outcome in Barclays by creating executive agreements overriding California's system of taxation, which European nations would have been happy to do. Surely this cannot be what the Court intended in Barclays.

\textsuperscript{239} Id. at 374.
\textsuperscript{240} Id. at 378.
Most of Breard's arguments, and the subsequent academic discussion, focused on the claim that the Vienna Convention and the treaty establishing the ICJ constituted supreme law binding Virginia under Article VI of the Constitution. At the time, that seemed a correct analysis because otherwise it was difficult to locate another source of law superior to Virginia's. To the extent Congress had spoken on the matter, in general terms it had endorsed the idea that state procedural bars should be honored. The executive's position on the matter was somewhat equivocal, and in any event—consistent with what we have argued above—no one seemed to think that executive branch policy standing alone could displace state law. As the United States put it, in its brief to the Court: "The measures at the United States' disposal under our Constitution may in some cases include only persuasion ... [T]hat is the case here." To be sure, Breard might be distinguishable from Garamendi on various grounds, though not the commercial/non-commercial basis. One would have thought, nonetheless, that at least some explanation of Breard should have been forthcoming, as Breard plainly depended on the proposition that executive branch foreign affairs objectives do not bind states in all cases.


242. The Solicitor General further wrote that "our federal system imposes limits on the federal government's ability to interfere with the criminal justice system of the states" and acknowledged "Virginia's right to go forward," while requesting that it not do so. See Curtis A. Bradley & Jack L. Goldsmith, The Abiding Relevance of Federalism to U.S. Foreign Relations, 92 AM. J. INT'L L. 675, 675-76 (1998) (discussing and endorsing the executive's position). But see Frederic L. Kirgis, Zschernig v. Miller and the Breard Matter, 92 AM. J. INT'L L. 704, 707 (1998) (arguing on the basis of Zschernig that the Virginia Governor's action was unconstitutional because it "not only denigrated the role of the International Court of Justice ... but also ignored or subordinated foreign policy concerns expressly pointed out to him by the Secretary of State."); Carlos Manuel Vázquez, Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures, 92 AM. J. INT'L L. 683, 685 (1998) (arguing that because compliance with the ICJ order was a treaty-based obligation of the United States, the President could require the state to comply with it).

243. See Breard, 523 U.S. at 378.
C. Congressional Authorization in Garamendi

The Court's endorsement of extravagant preemptive effect of the executive's policy in Garamendi contrasts markedly with its parsimonious reading of relevant congressional statutes. Two congressional statutes, the McCarran Act and the Holocaust Commission Act, indicated congressional acquiescence in the HVIRA's disclosure requirement. Employing scanty analysis, the Court found neither statute material to its resolution.244

1. The McCarran Act

The McCarran Act "redelegates" to states the ability to regulate the business of insurance, and was intended to disable the dormant Commerce Clause doctrine as to those state regulations. The Act begins with a declaration that "the continued regulation and taxation by the several States of the business of insurance is in the public interest" and instructs that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States."245 The operative part of the statute directs, without qualification, that the business of insurance "shall be subject to the laws of the several States which relate to the regulation or taxation of such business."246

The Court simply sidestepped the Act. Assuming that the "HVIRA would qualify as regulating the 'business of insurance' given its tangential relation to present-day insuring in the State," the Court wrote, "a federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to

245. 15 U.S.C. § 1011 (2000). See Garamendi, 539 U.S. at 428 ("[T]he point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised."); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946); Bittker, supra note 70, § 9.04.
246. 15 U.S.C. § 1012(a) (2000). The Act also disables implied statutory preemption, requiring Congress clearly to state an intention to regulate insurance and that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." Id. at § 1012(b).
address preemption by executive conduct in foreign affairs."\textsuperscript{247} There are several problems with this conclusion. First, despite the Court's insinuation, the HVIRA was obviously a regulation of the "business of insurance" because it regulated the relationship between insurers and policy holders (including policy holders residing in California and insurers doing business in California). As to such regulations, McCarran's language is categorical: they "shall be subject to the laws of the several States."\textsuperscript{248}

Second, the Court provided no explanation for its assertion that the Act "cannot sensibly be construed to address" preemption by the executive branch.\textsuperscript{249} This comment confirms what we have suggested—that \textit{Garamendi} is about executive policy preemption. The Act naturally did not address executive preemption; prior to \textit{Garamendi}, it likely never occurred to Congress that there was such a thing as executive preemption, at least as Justice Souter's opinion formulated it. The text of the McCarran Act, however, is comprehensive; it says that congressional silence should never be construed to invalidate a state insurance law.\textsuperscript{250} Yet the Court argued that there had been no congressional disapproval of the executive's action,\textsuperscript{251} and that lack of disapproval (i.e., Congress's silence) supported displacing the state law—in other words, doing exactly what the Act says not to do.

Finally, the unhelpful divide between "foreign affairs" and "foreign commerce" that furnished the basis for the Court's clumsy attempt to distinguish \textit{Barclays} reappeared here, though in an even less coherent form. The Act plainly applies to state regulation of foreign insurance companies, and no one has seriously suggested otherwise. As \textit{Garamendi} illustrates, such "commercial" regulations often have important foreign policy overtones. Trying to demarcate a line of separation between the two areas is bound to fail; the Court's own inability to explain even roughly, where the line is, illustrates the difficulty and provides no useful yardstick for lower

\textsuperscript{247} \textit{Garamendi}, 539 U.S. at 428.
\textsuperscript{248} 15 U.S.C. § 1012(a) (emphasis added). At the 1998 hearings, members of Congress seemed to think it obvious that McCarran applied to state regulations like HVIRA. \textit{See supra} notes 37-38.
\textsuperscript{249} \textit{Garamendi}, 539 U.S. at 428.
\textsuperscript{250} 15 U.S.C. § 1012(b).
\textsuperscript{251} \textit{Garamendi}, 539 U.S. at 429.
courts or state policy makers to gauge the constitutionality of future state legislation. It seems unlikely that Congress intended such a division in the Act, particularly in light of its comprehensive language.\textsuperscript{252}

2. \textit{The Holocaust Commission Act}

The Holocaust Commission Act created a federal commission to study and report on the disposition of Holocaust-era assets controlled or possessed by the federal government.\textsuperscript{253} Section 3 of the Act instructed the commission to "take note of" the efforts of the National Association of Insurance Commissioners—the association of state regulators—"with regard to Holocaust-era insurance issues."\textsuperscript{254} The Act, moreover, instructed the commission specifically to encourage the state commissioners to provide reports "on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims," and further specified that the commission's report should include—"to the degree the information is available"—the number of policies issued by companies, the value of each policy when issued, the total number and amount of claims paid, and the present-day value of assets of each insurance company held in the United States.\textsuperscript{255} California claimed that this statute showed congressional awareness of the actions of the state insurance commissioners in trying to secure information on Holocaust-era policies and, far from disapproving of these efforts, encouraged them to aid the work of the federal Holocaust commission.\textsuperscript{256}

\textsuperscript{252} The insurers pressed the distinct argument that the McCarran Act did not authorize states to regulate extraterritorially. This depended on the proposition that the HVIRA regulated extraterritorially, which was rejected by the court of appeals. Gerling Global Reinsurance Corp. of Am. v. Low, 286 F.3d 832, 843-44 (9th Cir. 2002). In any event, this did not seem to be the distinction the Court had in mind.


\textsuperscript{254} Id.

\textsuperscript{255} Id. § 3(a)(4)(B), 112 Stat. at 613.

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

That seems a hasty conclusion. When Congress passed the Act, it obviously knew of state plans to compel disclosure. This is evident from the face of the statute, and from the fact that the state commissioners had testified about those plans just prior to enactment of the law. The Act instructed the commission, then, to undertake its work against the backdrop of on-going state-level research into the disposition of Holocaust-era assets, including insurance policies. That the commission focused on assets owned or possessed by the federal government does not cut against the argument that state efforts to compile information (and because of Souter’s reference to “sanctions,” it is important to emphasize again that disclosure is all the HVIRA mandated) were tacitly approved. It is true that Congress, in 1998, did not know much about the executive’s impending effort to settle claims, or the executive’s subsequent concerns about interference by the states. It seems clear from the Act, however, that Congress had no objection to the state actions in 1998, and it did not subsequently do anything to show a different view.

Justice Souter added that Congress had not acted to disapprove of the President’s actions in entering into the executive agreements or formulating the executive policy with which the HVIRA supposedly conflicted. “Legislation along the lines of HVIRA has been introduced in Congress ... but none of the bills has come close to making it into law,” he wrote, and because of the President’s

257. Id. at 429.

258. U.S. Holocaust Assets Commission Act of 1998 § 3(a)(3), Pub. L. 105-186, 112 Stat. 611, 611 (1998). This seems particularly clear taken in conjunction with the legislative history, recounted supra Part I.B., which shows that Congress was aware of the activities of the state insurance commissioners, especially in California.
“independent authority” in foreign affairs, Congress’s silence should not be equated with disapproval.\textsuperscript{259}

Souter’s observation here is a non sequitur. Although the lack of congressional disapproval may be relevant to an inquiry into the President’s authority to enter into executive agreements or formulate policy in the first place, it sheds little light on the intended preemptive effects of those agreements and policies. Given that the executive agreement itself never indicated that it was to have preemptive effects, and explicitly disclaimed such effects,\textsuperscript{260} and that the HVIRA’s disclosure requirement does not address the subject of those agreements—resolution of claims—why would Congress have thought it had to express disapproval of anything? Further, since members of Congress presumably saw the HVIRA as a regulation of insurance companies, they would have thought Congress had spoken, in the McCarran Act, and could not have foreseen the distinction the Court invented between “real” insurance regulations and those whose foreign affairs implications pushed them outside the scope of the Act.

In any event, none of the Court’s statutory discussion advances its central claim that executive policy alone can displace state law. The Court did not claim to find congressional approval, just lack of disapproval. This assumes, however, that presidential policies displace state law unless Congress affirmatively disapproves—a proposition hardly established by any of the Court’s authorities.

\textbf{D. Garamendi and Constitutional Interpretation: An Aside}

There is a final troubling aspect to the \textit{Garamendi} decision. Despite the recent appearance of a number of detailed and sophisticated scholarly treatments of foreign affairs questions, the Court seemed sublimely indifferent to those studies and their conclusions. In contrast to many of its other recent decisions involving federalism and the scope of governmental powers,\textsuperscript{261} the Court

\textsuperscript{259} \textit{Garamendi}, 539 U.S. at 429.
\textsuperscript{260} See supra notes 41-42 and accompanying text.
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ignored the usual interpretive trinity of text, history, and structure in resolving the issues before it. Other than a glancing reference to custom, and three citations to The Federalist, the Court purported to build the case for Garamendi on its past decisions. Though scholars such as David Strauss have made claims that “common law constitutional interpretation” is, both descriptively and normatively, a superior methodology for deciding constitutional cases, Garamendi is a good illustration of its dangers.

A full-blown critique of common law constitutional interpretation would take us far afield, but we think that Garamendi, while only one case, is a troubling example of the misuse of precedent by the Court. As such, we argue it flags potential problems with common

462 U.S. 919 (1983). Even Lopez, in which the Court synthesized over 100 years of doctrine, invoked “first principles” of constitutional structure—enumerated powers and federalism, in particular—to inform that synthesis. Lopez, 514 U.S. at 552. In addition, the dormant Commerce Clause doctrine, which Henry Monaghan characterized as being “constitutional common law,” has been defended throughout its history as a principle consistent with the intentions and expectations of the framers and ratifiers of the Constitution. E.g., Camps Newfound/Owatonna v. Harrison, 520 U.S. 564, 571-72 (1997); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 534-35 (1949).

262. See, e.g., Printz, 521 U.S. at 905 (lacking an explicit textual provision on point, the answer to constitutional question depends upon “historical understanding and practice, in the structure of the Constitution, and in the [Court’s] jurisprudence”); id. at 939 (Stevens, J., dissenting) (invoking text, history, and structure in dissent); Lopez, 514 U.S. at 585 (Thomas, J., concurring) (supplementing the Court’s doctrinal discussion with “a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law”); see also U.S. Term Limits, 514 U.S. at 806 (relying on text, history, structure, and precedent to strike down state term limits of federal officials).

263. See Garamendi, 539 U.S. at 414.

264. Strauss, supra note 18, at 879 (“The common law approach ... provides a far better account of our practices” than either textualism or originalism and “best explains ... American constitutional law today.”); id. at 885 (“[O]ur written constitution has, by now, become part of an evolutionary common law system, and the common law—rather than any model based on the interpretation of codified law—provides the best way to understand the practices of American constitutional law.”) (citation omitted); id. at 887 (“Constitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory [based on text or the intent of the Framers].”); id. at 888 (“The common law approach captures the central features of our practices as a descriptive matter.”); id. (“[T]he common law provides the best model for both understanding and justifying how we interpret the Constitution. The common law approach ... justifies our current practices, in reflective equilibrium, to anyone who considers our current practices to be generally acceptable ....”); id. at 904 (“In practice constitutional law is, mostly, common law. What matters to most constitutional debates, in and out of court, is the doctrine the courts have created, not the text.”) (citation omitted); see also David A. Strauss, Common Law, Common Ground, and Jefferson’s Principle, 112 Yale L.J. 1717, 1726 (2003) [hereinafter Strauss, Common Law, Common Ground]:
law constitutional interpretation, a methodology for which strong claims are being made. Specifically, common law constitutional interpretation does not easily restrain judicial decision making, and may be worse on that score than interpretive methods using text, history, and structure, at least as aids to doctrinal modes of interpretation. In particular, the lack of rigor attending common law constitutional interpretation results in the use of cases as mere rhetorical cover for decisions reached on other grounds.

In brief, Strauss has argued that common law constitutional interpretation permits current generations to escape the "dead hand" of the past by updating and translating textual provisions. The common law method can promote the development of the law by encouraging analogical reasoning from precedent that enables the law to evolve, providing a counterweight to troublesome textual provisions or anachronistic traditions that might otherwise cause a constitutional regime to degrade. Strauss acknowledged a potential objection to common law constitutional interpretation: that it does not sufficiently restrain judges. He responded that

While arguments based on a careful parsing of the text of the Constitution sometimes play a large role in resolving relatively unimportant issues, the text plays essentially no operative role in deciding the most controversial constitutional questions ... which are resolved on the basis of principles derived primarily from the cases.

Id. But see id. at 1719 (noting that although "[m]uch of American constitutional law consists of precedents that have evolved in a common-law-like way, with a life and logic of their own," it "would be a mistake to say that American constitutional law consists entirely of precedents and is independent of the text and the Framers"—both "continue to play a significant role"); id. at 1720 (noting that precedent can provide a common ground for discussion of issues among those with widely varying belief systems, especially if rooted in a text commonly regarded as authoritative). For other treatments, see, for example, Richard H. Fallon, Jr., Implementing the Constitution, 34 Colum. L. Rev. 1 (1934); K. N. Lewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1 (1934); Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975).


266. Strauss, supra note 18, at 925. The other objection was that "a theory of common law constitutional interpretation overlooks the crucial difference that common law judges can be overruled by the legislature but judges interpreting a constitution ordinarily cannot." Id. We do not discuss this objection here, but Strauss argued that "the principles developed through the common law method"—examples of which he listed—"are not likely to stay out of line for long with views that are widely and durably held in the society," and the Court's decisions "now rest on a broad democratic consensus," despite being controversial at the time initial decisions were handed down. Id. at 929-30. As a result, he argued, the common law method actually suffers from less of a democracy-gap than does textualism or intentionalism, since
when a judge works within the constraints of existing precedent, the judge "is significantly limited in what she can do," whereas "a judge who acknowledges only the text of the Constitution as a limit can ... go to town" because of textual indeterminacy. Although conceding that "precedents can be treated disingenuously," he pointed out that "no system is immune from abuse" and offered that fear of criticism can remove the temptation of judges to overreach when applying precedent.

We see two related objections to Strauss's theory highlighted by the Garamendi case. First, there is no positive account in Strauss's work of what, precisely, "common law constitutional interpretation" requires of those employing it. By defining common law constitutional interpretation largely by what it does not rely on—the Constitution's text or the intention of its framers—Strauss lacks a positive account of what it should be, other than to say that future principles are derived, in some part, from past cases. His primary article on the subject repeatedly referred to the "common law tradition" without fully defining it, other than to say that its components are "traditionalism" and "innovation," as well as "conventionalism." A more recent article contained a few more hints—a common law system has "elaborate doctrinal structure"—but again devoted more space to justifying it in either descriptive or normative terms. For Strauss's theory to have any purchase, as a normative matter, he would seem to need some account of the qualities of common law constitutional interpretation, lest its open outputs be seen merely as result-oriented decisions masked by rhetorical adherence to past decisions.

the latter methods subject present generations to the past's dreaded dead hand. Id. at 928.

267. Id. at 926.

268. Id. at 927.

269. Id. passim.

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

271. Strauss, Common Law, Common Ground, supra note 264, at 1729; see, e.g., id. (describing the common law approach as "central to many of the most important areas of constitutional law"); id. at 1730 (arguing that "[t]he practice of following precedent can be justified in fully functional terms" and is "unavoidable").

272. As stated by Philip Bobbitt:

Doctrinal ideology requires that decisions be based on premises of general applicability, otherwise they would be ad hoc or 'legislative.' At the same time
Elaborating a theory of common law decision making would take us far afield indeed, but its idealized form—a "doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation"—seems absent in Garamendi and in many of the cases employed to justify Garamendi's result.

This lack of guidelines for its use deprives us of a yardstick to measure whether common law constitutional interpretation is being done well or poorly. The lack of such criteria would seem to limit the possibility of criticism—the very thing that Strauss argues will stay judges' hands. It increases the chance that cases will be cited merely as rhetorical cover, as we argue they were in Garamendi, rather than as steps in a carefully reasoned argument linking points of law articulated in prior cases with the result in the present case. The foreign affairs cases on which Garamendi purported to rely simply do not involve close readings of prior cases and applications of the existing rules and doctrines to new facts. In turn, the Court's citations to those prior cases seems more rhetorical than principled. Consider the following examples:

(i) Though Hines v. Davidowitz expressly denied any intention to address the constitutionality of state laws in the absence of congressional action, Justice Douglas's Zschernig opinion cited it for precisely that proposition: that even absent congressional action, federal supremacy in foreign affairs could constitutionally preempt state law. Garamendi then recharacterized Zschernig as laying down rules of preemption relevant to the question whether the President's policy regarding Holocaust litigation preempted the HVIRA, even though in Zschernig there was no conflicting executive branch policy.

The doctrinal method requires that adjudication be neutral, thereby claiming the allegiance of litigants through a tacit arrangement of reciprocity. In short, doctrinal argument is the ideology of the common law tradition of deciding appeals.


273. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2 (1949).

274. See Strauss, supra note 18, at 927.


276. Zschernig v. Miller, 389 U.S. 429, 432 (1968); see supra Part III.B.

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Garamendi also cited and relied on the parallel with Crosby, even though Crosby, like Hines, was a statutory preemption case.\(^{278}\)

(ii) Garamendi failed to distinguish Barclays persuasively, suggesting that the Court's decision not to apply relevant precedent is as questionable as its choice of the cases it found to be controlling. As discussed, Barclays was the only case prior to Garamendi where the Court had considered a claim of preemptive effect of an executive policy standing alone—and had rejected it. The Court similarly had nothing to say about Breard, in which the Court had thought it obvious that mere executive policy was not preemptive.\(^{279}\)

(iii) In Dames & Moore v. Regan, the Court stressed the limited reach of its decision, and disclaimed an intent to establish the broad proposition that the President can settle its citizens' claims by executive agreement.\(^{280}\) Garamendi did not quote, or even acknowledge, that limiting language, while citing Dames & Moore as one of a number of cases allegedly standing for the proposition that "our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."\(^{281}\)

(iv) Garamendi cited Belmont and Pink as establishing the preemptive effects of executive agreements. The Court passed over the fact that the executive agreement in those cases expressed preemptive intent, while the Foundation Agreement—which in any event was addressed solely to the issue of litigation of Holocaust-era claims—expressly disclaimed any such preemptive effects.\(^{282}\)

(v) In Youngstown and Dames & Moore, the Court focused upon finding express or even implied statutory authority for presidential actions with domestic effects. The Garamendi Court made no effort to find congressional

\(^{278}\) Id. at 424-25.  
\(^{279}\) See supra Part III.B.  
\(^{281}\) Garamendi, 539 U.S. at 415. For more on this point, see infra Part IV.  
\(^{282}\) See supra Part I.B.
approval of presidential actions, yet cited both cases as authorizing the President's actions. 283

While Strauss's work conceded that precedents can be treated disingenuously, he apparently thought that would be the unusual case, without explaining why. If one takes another of his arguments seriously—that common law constitutional interpretation produces more "democratic" results—it suggests a built-in incentive continuously to expand precedent to authorize more action, to "[g]radual[ly] innovat[e] in the hope of improvement" through "sharp, critical challenges" to the past while piously claiming only to apply principles developed in the past. 284

Garamendi is powerful evidence that the Court's prior foreign affairs decisions do not constrain it, or indeed even meaningfully inform its subsequent decisions. In this respect the Garamendi Court followed the pattern of previous foreign affairs decisions, which also owed little to their predecessors. If the Court has engaged in common law constitutional interpretation, it has done so largely to provide rhetorical cover. The common law method, as practiced by the Court in Garamendi, is not a constraint, nor does it provide doctrinal stability.

Again, we acknowledge that we are basing this critique on a single case. We believe, though, that even a single case like Garamendi can signal problems with a particular interpretive methodology. The common law method should be used with caution in constitutional law. The benefits of the method—it can provide points of departure for analogical reasoning, it can cabin disagreement about first principles, and it can provide stability and predictability without stagnation—should not render us insensitive to its problems. First, precedent can be manipulated so past cases become authority for future action despite compelling differences in facts or despite express disclaimers contained in earlier cases. Second, this manipulation can occur at a low level of visibility.

283. See Garamendi, 539 U.S. at 414 (citing Youngstown for the proposition that the President has large responsibility for conduct of external affairs and that the President has some independent authority to act in the absence of congressional action); id. at 415-16 (citing Dames & Moore for the proposition that the President can make executive agreements, including agreements to settle claims, without congressional authority). We elaborate this critique infra Part IV.

284. Strauss, supra note 18, at 935.
Third, the relatively narrow focus on particular cases can obscure future implications. Fourth, the court-centered focus on doctrine can diminish the status of the Constitution as the supreme law of the land, elevating courts above the document from which they draw their power. Finally, defending the common law method by reference to popular acceptance of the principles it has produced begs the question whether popular opinion would have coalesced the same way around contrary decisions.

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

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

IV. **GARAMENDI AND SEPARATION OF POWERS**

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

A. *Garamendi* as a Case of Executive Preemption

In saying that the state law must give way to the "National Government's policy"\(^{285}\) in foreign affairs, the Court really meant that the state law must give way to the foreign policy of the executive branch. No congressional act authorized the executive policy, even implicitly. Nor did the executive branch negotiate the Foundation Agreement as a treaty and present it to the Senate for its advice and consent. Had either course been followed, no one would have doubted the federal policy's superiority over the state law. The doubt arose only because the President asserted an independent power to oust the state law, based solely upon a policy formulated within the executive branch. In this sense, the case was not about whether the state law should be preempted, but rather about which branch of the federal government could do the preempting.\(^{286}\)

In the lower courts, the central foreign affairs question was the scope of the Court's *Zschernig* decision, involving the so-called

\(^{285}\) *Garamendi*, 539 U.S. at 413.

\(^{286}\) Although the Court declared that "an exercise of state power that touches on foreign relations must yield to the National Government's policy," *id.*, its actual holding was that an exercise of state power that touches on foreign relations must yield to the executive branch's policy, which is a fundamentally distinct proposition.
"dormant" foreign affairs power. The theory of *Zschernig* was that certain foreign affairs-related activities are simply off-limits to states, regardless of what the federal government might be doing. The question—the lower courts thought—was the breadth of that category. The district court thought that it included matters that touched upon foreign affairs in general; the court of appeals read it more specifically to involve principally state activities that insulted or showed hostility toward foreign governments.\textsuperscript{287}

The Supreme Court, in effect, disclaimed any need to identify an area of "dormant" federal foreign affairs power because, it said, the federal government had acted and thus made the case one of "active" preemption.\textsuperscript{288} For this reason, the Court said that it did not decide whether the HVIRA would be valid in isolation,\textsuperscript{289} and we assume for purposes of discussion that it would have been. As a result, the case—as the Supreme Court saw it—depended upon identifying a preemptive federal action.

At first glance one might suppose that this preemptive federal action arose from the executive agreements discussed above. Indeed, prior cases had said that some executive agreements were preemptive,\textsuperscript{290} a matter we discuss at greater length below.\textsuperscript{291} As the Court seemed to appreciate, however, there were several problems with relying on the executive agreements alone. As the dissent pointed out, the agreements themselves seemed to disclaim preemptive effect.\textsuperscript{292} Assuming that the law of preemptive executive agreements parallels the law of preemptive statutes, the central question should have been the intent of the agreements.\textsuperscript{293} If the agreements reflected a nonpreemptive intent, that was a serious difficulty. In fact, the problems were even more intractable. The agreements with Germany and Austria, on which the Court relied, covered claims against German and Austrian insurance companies. Those companies did not make up all of the insurance companies affected by the California statute, or all of the companies party to

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\textsuperscript{287} Supra Parts II.B, II.D.
\textsuperscript{288} Garamendi, 539 U.S. at 420-21.
\textsuperscript{289} Id. at 427.
\textsuperscript{290} See supra Part II.C.
\textsuperscript{291} See infra Part IV.E.
\textsuperscript{292} See Garamendi, 539 U.S. at 435 (Ginsburg, J., dissenting).
\textsuperscript{293} E.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (describing the "purpose of Congress" as "the ultimate touchstone" of preemption analysis).
the suit. Yet the Court purported to invalidate the HVIRA across the board, not merely as applied to insurers covered by an executive agreement. \textsuperscript{294} The Court, therefore, must have been relying on a source of preemption beyond the executive agreements, as the Court itself conceded. \textsuperscript{295}

Nor did the Court seem to be relying on an action or acquiescence of Congress. To the extent Congress had done anything in the field, it seemed to have endorsed state activity. \textsuperscript{296} The Holocaust Act had directed the President to collect information and give a report to Congress, but did not appear to authorize executive settlement. Although the Court acknowledged the Holocaust Act, it did so mainly in the context of arguing that Congress had \textit{not} authorized the HVIRA. \textsuperscript{297} Congress had not taken steps even implicitly authorizing preemption of state law, and the Court did not claim otherwise.

If the preemption did not come from Congress, and did not come from the executive agreements (or, obviously, a treaty), then the only possible source is the President's power in foreign affairs. The Court's language seems to support this conclusion. According to the Court, the executive agreements reflected a wider executive policy that Holocaust-era insurance claims should be settled through

\textsuperscript{294} See \textit{Garamendi}, 539 U.S. at 401.

\textsuperscript{295} \textit{Id.} at 417. The first district court decision arising after \textit{Garamendi} confirms this view. The court dismissed claims by Holocaust-era policyholders against Generali, one of the plaintiffs in the \textit{Garamendi} litigation, on the basis of the Supreme Court's decision. The claimants argued, among other things, that Generali was not covered by the executive agreements on which the Supreme Court relied on \textit{Garamendi}. The district court found instead that the "laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC." \textit{In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation}, No. MDL 1374 M21-89, at 3 (S.D.N.Y. Oct. 14, 2004). As the court explained:

Plaintiffs argue that the executive agreements at issue in \textit{Garamendi} do not address claims against Generali, and stress that the United States and Italy have not entered into a comparable agreement governing such claims.... However, the \textit{Garamendi} ruling strongly implies that an executive policy need not be formally embodied in an executive agreement in order for the policy to have juridical effect.... Although the agreements were said to be 'exemplars' of the Executive's position on this issue, evidence of that position was not limited to the agreements. Thus, it was to the Executive's position, and not simply to the agreements, that the Court deferred.

\textit{Id.} at 20-21.

\textsuperscript{296} See supra Part III.C.

\textsuperscript{297} See supra Part III.C.
cooperative means—specifically ICHEIC—rather than through litigation. Relatedly, according to the Court, the executive’s policy was to seek disclosure through cooperative means, not through coercive measures like the HVIRA. These were policies produced wholly within the executive branch. If they were preemptive, and apparently they were, that means executive branch policies are preemptive; hence, our characterization of Garamendi as a case of “executive preemption.”

B. The Novelty of Executive Preemption

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

298. Garamendi, 539 U.S. at 422-23.
299. Id. at 424. On this point, the Court relied on statements by executive branch officials that disclosure statutes like the HVIRA had the potential to hinder the settlement negotiations. Id. at 424-25.
300. As noted, the Court itself described its decision at one point as involving “preemption by executive conduct in foreign affairs.” Id. at 428; see also In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation, at 7 (“The Court [in Garamendi] ruled that HVIRA was preempted by an Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC.”).
301. We say “otherwise valid” because any contention that the HVIRA was ousted by a “dormant” power would convert the case back into a Zschernig analysis, which was not the basis of the Court’s opinion. We do not take any position, here or elsewhere in this article, on whether any such “dormant” power should be recognized by the Court.
302. See supra Part III.B.3. In this sense, we think the dissent understated in arguing that there was no clear presidential policy because the only evidence of that policy were statements of lower-level executive branch officials. Whether that was true, the fact remains that no prior case had accorded precedential effect to a statement of policy, even if made clearly by the President. See also Breard v. Greene, 523 U.S. 371, 378 (1998), discussed supra Part III, in which the Court assumed that a statement of executive policy would not bind a state, even in a foreign affairs matter.
Instead, the Court relied on what it characterized as the inevitable result of two incontestible propositions: that national foreign policy overrides conflicting state law, and that the executive had the power to establish national policy with respect to the Holocaust settlement. Both of these propositions appear correct, subject to some minor qualifications, but they add up to less than the Court seemed to believe. First, national foreign policy reflected in treaties and statutes overrides conflicting state law.\textsuperscript{303} Second, the President's power in foreign affairs allows the President to establish a presidential policy with respect to the Holocaust settlement.\textsuperscript{304}

There is a substantial further step required to reach the Court's destination: does the presidential policy with respect to the Holocaust settlement have the same preemptive effect as a policy established by a treaty or statute? That is the question which the Court simply assumed, without any constitutional analysis or support in prior law.

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

C. The Importance of Executive Preemption to Separation of Powers

In this section we argue that the question of executive preemption has enormous implications for the separation of powers in foreign affairs. Specifically, we argue that to the extent executive preemption is accepted as a constitutional power, it broadens the President's ability to conduct foreign affairs without a congressional check. Correspondingly, we argue that in the absence of executive

\textsuperscript{303} U.S. CONST. art. VI.

\textsuperscript{304} See Prakash & Ramsey, supra note 6, at 262-63.
preemption, the existence of competing state laws will force the President to pursue a cooperative foreign policy with Congress, or with the Senate. In other words, rejecting executive preemption enhances checks and balances in foreign affairs; accepting it reduces them. The question should be approached, we believe, with this implication firmly in mind.

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

As a result, many insurance claimants remained committed at least to forced disclosure, if not also to litigation, as a supplement to the procedures established by the executive branch. To this extent, at least, the insurance claimants and their allies wanted to upset the executive settlement. The question was how they could do that. In this sense it is important to see that the principal losers in

305. As many claimants had feared, ICHEIC proved to be a less than satisfactory remedy, in large part due to its inability to solve the disclosure issue. See Bad Policies — More Trouble for the Body Created to Settle Holocaust Insurance Claims, THE ECONOMIST, Oct. 18, 2003, at 76 (discussing problems with ICHEIC); see also Tom Tugend, Holocaust Claims Commission Mired in Strife, JERUSALEM POST, June 15, 2004, at 6.

306. See EIZENSTAT, supra note 43, at 266-68.

307. For example, a leading survivor group participated in the case as amicus curiae supporting the state. See Brief of Bet Tzedek Legal Services and Simon Wiesenthal Center as Amicus Curie in Support of Respondent, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (No. 02-722).
Garamendi's allocation of constitutional power were Congress and the Holocaust insurance claimants themselves. We assume that the President's executive power in foreign affairs is sufficient to allow unilateral negotiation of the relevant executive agreements with Germany and Austria, and generally to place the diplomatic weight of the United States behind a negotiated resolution to disclosure and liability issues. The question, then, was how claimants and their legislative allies could block the executive's proposed settlement—or conversely, how the President could force the insurance claimants to accept the settlement without a disclosure provision. In a constitutional world without executive preemption, the claimants likely would have been able to force the issue to the U.S. Congress. Claimants had sufficient power in the states in which they were concentrated—California, New York, and Florida in particular—to press for laws like the HVIRA (and broader ones facilitating litigation in state courts). Assuming these laws were otherwise constitutional, the executive branch seemed correct that these had the potential to upset the settlement. Indeed, we are assuming in this part of our discussion that this is what they were designed to do, at least to the extent of pressing for a more demanding disclosure regime.

Without the power of executive preemption, the President would have had two possible remedies. He could have negotiated the Foundation Agreement and related undertakings as treaties, or he could have asked Congress to pass a law preempting the state legislation. Either move would have faced difficulties. In addition to their power at the state level, the claimants had substantial congressional allies: some members of Congress had taken strong public positions in support of California's disclosure requirements, and indeed against the whole structure of the settlement crafted by the executive. That is not to say that the claimants commanded

308. See Prakash & Ramsey, supra note 6, at 262-63 (discussing textual foundations of the President's power to establish foreign policy).

309. We assume here that the Court was correct in assessing the executive policy. We think that assessment is not as clear as the Court indicated. In fact, the executive seemed to be avoiding a firm position on whether the settlement agreements precluded supplemental remedies, a point noted in the dissent. See Eizenstat, supra note 43, at 269. It is, moreover, worth re-emphasizing that the executive branch policy displaced state disclosure laws even as applied to companies that were not part of the settlements.

a majority in Congress—whether they did was never determined, given the outcome in *Garamendi*. They had enough support, however, that the President would have been undertaking a legislative battle. In any event, the claimants and the President would have faced off in Congress, with the winner being the one that could command majority support. The President’s ability to compel the claimants to accept an unsatisfactory settlement would have been constrained greatly, and the ultimate decision likely would have rested with a majority of Congress.

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

As a result, the President’s ability to pursue a unilateral foreign policy agenda is enhanced and Congress’s role in deciding foreign policy priorities is diminished by the constitutional innovation of executive preemption. Had *Garamendi* come out the other way,

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involved H.R. 2693, a bill that amounted to a federal version of the HVIRA, which Waxman described as “address[ing] one of the most difficult problems faced by Holocaust survivors and their families when they seek restitution from insurance companies that have refused to pay claims held by victims of Nazi persecution: How to identify the insurance company that issued the policy.” *Id.* at 14; see also *Brief of Amici Curiae Rep. Henry A. Waxman and 51 Other Members of Congress at 1, Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003) (No. 02-722) [hereinafter Waxman Brief]; *Letter from Rep. Waxman and 44 Other Members of Congress to Lawrence Eagleburger, Chairman of ICHEIC, Sept. 29, 2000, reprinted in Waxman Brief, supra, at app. F (objecting to inclusion of insurance claims in the Foundation settlement, and “reject[ing] the notion that insurance claims estimated to be worth billions could be satisfied by the arbitrary DM 300 million set aside in the German Foundation Fund”).
Congress would have been in the position of ratifying—or declining to ratify—the executive settlement. Another way to put this is to say that the states perform a vital role in enhancing checks and balances at the federal level. Without executive preemption, the states form independent power centers that require the cooperation of the branches at the federal level to overcome them. Parties opposed to a presidential policy, such as the claimants in Garamendi, thus need only to get the ear of some state governments—an easier proposition—in order to demand coordination on the federal level. Of course, the unified policy of the federal branches will triumph—that is the point of the Supremacy Clause—but it must be a unified, not unilateral, policy. In contrast, if the states are removed as independent power centers, there is no need for cooperation at the federal level in Garamendi-type cases, because the President can overcome opposition to executive policy by unilateral force alone. Under this model, all of the policymaking takes place in the executive branch, with Congress reduced to the difficult position of assembling a blocking supermajority. This, in short, is what was at stake in Garamendi.

D. The Constitutional Case Against Executive Preemption

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

First, the Constitution’s text speaks directly to the allocation of the preemptive power among the branches of the federal government. The Supremacy Clause of Article VI states that the Constitution itself, treaties, and federal statutes have preemptive effect. Reading the clause strictly will most evidently protect the states, as it means that state law can be displaced only by the procedures underlying the creation of each of these sources of law.\(^\text{311}\) Yet Article VI is also an allocation of power among the

\(^{311}\) See Clark, Separation of Powers, supra note 17, at 1489. For further discussion of this point in the context of the Garamendi case, see infra Part V.E.
federal branches. Federal courts have the power of preemption when interpreting the Constitution; the President (plus two-thirds of the Senate) has the power of preemption in undertaking treaties; and the President plus a majority of Congress, or two-thirds of Congress acting alone, has the power of preemption when enacting statutes. Absent from this scheme is any suggestion that the President acting alone has the power of preemption. By setting forth specific allocations of preemptive power, the Constitution contains a strong negative implication that it does not contain additional allocations of preemptive power *sub silentio.*

As we have argued above, the allocation of preemptive power has important consequences for which branch controls the decision making on issues such as the Holocaust insurance settlement. Because the states opposed at least part of the settlement, effecting a settlement contrary to the wishes of the insurance claimants required an exercise of the preemptive power; whichever branch had the preemptive power would be the decision maker. As a result, the fact that the Constitution's text specifically allocates preemptive power in one direction and not the other seems to be a direct statement as to which branch should and should not be the decision maker in such cases. This illustrates how the Supremacy Clause is an element of checks and balances among the various branches of the federal government, not merely an allocation of power between the federal government and the states. Creating an executive preemption power allocates federal power differently from the way explicitly contained in the Constitution's text—a matter that should not be done lightly.

Second, the Framers' understanding of separation of powers underlies the textual allocation. The preemptive power is, fundamentally, a legislative power. In *Garamendi,* it was the power to determine whether the claimants would be compelled to accept the President's settlement. Before the President exercised the preemptive power, the claimants' remedies were governed by state law; afterward, they were governed by the President's settlement. Preemption effected a shift in the law governing the claims. 312

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312. The same point can be made from the perspective of the insurers. Before the President exercised the preemptive power, the insurers had a legal obligation to disclose the policies or cease doing business in California. After preemption, the insurers had the legal right to continue doing business without disclosure.
Article VI confirms that preemption is a legislative power, as it makes certain acts preemptive by deeming them the "supreme Law of the Land."\textsuperscript{313} As Louise Weinberg has noted, the Supremacy Clause functions as a conflicts-of-law provision, privileging the law of the Constitution, federal treaties, and statutes over the law of the states.\textsuperscript{314} The Supremacy Clause, then, presupposes a conflict of law that requires resolution, and that preemption is the result of a conflict of law. To say that an executive branch policy is preemptive is to give it the force of supreme law.

Saying that an executive policy can have the force of supreme law is not only counter to the negative implication of Article VI but also counter to the most basic propositions of eighteenth century separation of powers theory. At its most fundamental level, separation of powers meant that executive power is separated from the legislative power. As Montesquieu wrote: "When the legislative and executive power are united in the same person, or in the same body of magistrates, there can be no liberty."\textsuperscript{315} Blackstone made a similar point, in a way that directly addresses executive lawmaking. Speaking of proclamations of the monarch, Blackstone began by saying:

These proclamations have then a binding force, when ... they are grounded upon and enforce the laws of the realm.... [They] are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary.\textsuperscript{316}

\textsuperscript{313} U.S. CONST. art. VI.
\textsuperscript{315} BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 151 (1748) (Prometheus ed. 2002); see M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 91-106 (2d ed. 1998) (discussing Montesquieu's vision of separation of powers). As Vile puts it, Montesquieu thought "[t]he executive officer ought to have a share in the legislative power by a veto over legislation, but he ought not to have the power to enter positively into the making of legislation." \textit{Id.} at 103. On the history of separation of powers in English thought, see generally WILLIAM B. GWYN, THE MEANING OF SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION (1965).

\textsuperscript{316} 1 WILLIAM BLACKSTONE, COMMENTARIES 261.
He then gave an example based on an existing law prohibiting arms to Catholics:

A proclamation for disarming papists is also binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. 317

"Indeed," Blackstone continued,

by the statute 31 Hen. VIII c.8 it was enacted, that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fundamental to the liberties of this kingdom, had it not been luckily repealed ... about five years after. 318

As a result, the Framers placed the preemptive power in the hands of Congress, an allocation that followed directly from the basic principles of separation of powers. Preemption resulted from making one law supreme over another. The creation of supreme law was a legislative power, and so preemption entailed a legislative act. Indeed, the unusual part of the Supremacy Clause was the preemptive status it gave treaties. Treaty making under the British system was an executive power, and the Senate was conceived, by at least some at the time, as a quasi-executive body. Treaties had not been supreme law under either the British system or under the Articles; to some it seemed a violation of separation of powers principles to give lawmaking authority to anything less than the whole of the legislature. 319 Although these reservations

317. Id.
318. Id. That principle was confirmed in the early state constitutions. See, e.g., VA. CONST. art. III, § 1 (1776) ("[T]he legislative and executive powers of the state should be separate and distinct from the Judiciary; and ... the members of the two first may be restrained from oppression ...."); MASS. CONST., art. XXX (1780) ("the executive shall never exercise the legislative and judicial powers"). On the influence of Montesquieu and Blackstone upon the framers, see Prakash and Ramsey, supra note 6, at 271-72.
319. On the status of treaties as executive acts in Founding-era discourse, see Prakash &
were overcome, they indicate the extent to which the constitutional generation identified preemption with lawmaking.

Third, the association of preemption with lawmaking is confirmed by Youngstown, the Court's leading modern decision on the separation of executive and legislative power.\textsuperscript{320} In that case, President Truman, on his own initiative, ordered the seizure of steel mills in the United States during a labor dispute, to ensure that the supply of steel for the Korean War was not interrupted. The Court invalidated this move as executive lawmaking. Justice Black wrote for the Court that the executive was altering the legal rights of the mill owners, and that was a legislative act to which the executive had no constitutional warrant.\textsuperscript{321} As he explained:

\begin{quote}
In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.\textsuperscript{322}
\end{quote}

This account of Youngstown is quite familiar, and confirms in the broad sense the constitutional separation of executive and lawmaking authority.\textsuperscript{323}

It is less commonly recognized, however, that Youngstown posed a question of executive preemption. The mill owners' claim to a property right, which the President attempted to divest, was a right under state law. The President's action was lawmaking because it

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Ramsey, supra note 6, at 289-94. On Founding-era objections to treaties' status as law of the land without the approval of Congress, see generally John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution and the Original Understanding, 99 COLUM. L. REV. 1955 (1999); see also THE FEDERALIST NO. 75, at 425 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (responding to claims that the President would improperly exercise legislative power by treaty).

321. Id. at 585-90.
322. Id. at 587. The Court continued: "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." Id. at 588.
323. See Christopher Bryant & Carl Tobias, Youngstown Revisited, 29 HASTINGS CONST. L.Q. 373 (2002); see also Youngstown, 343 U.S. at 655 (Jackson, J., concurring) (stating that "[T]he Executive ... has no legislative power" and the order at issue constituted "an exercise of authority without law"); id. at 630 (Douglas, J., concurring) (calling Truman's order "an exercise of legislative power" and hence unconstitutional).
\end{quote}
would have changed the state law right. Thus, in the first instance the case was a question of federalism: Did the President's policy—to keep the mills operating—trump the state property law that allowed the mill owners to close the mills if they wished? But Justice Black rightly saw the case principally as one of separation of powers, that is, which branch of the federal government had the power to preempt the state property law. According to Black, that power was a legislative power, squarely in the hands of the Congress. Presidential policy did not trump state law because to say otherwise would be to make the President a lawmaker.

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

324. See Clark, Separation of Powers, supra note 17, at 1393, 1396-1400 (discussing the federalism aspects of Youngstown). Professor Clark makes the point that the separation of powers aspects of Youngstown protected the states by making preemption more difficult—a point we discuss in Part V infra. Our point here takes an opposite, though complementary, perspective. Congress's role in foreign affairs is protected by preserving the states as independent power centers. As a result, federalism reinforces separation of powers, as separation of powers reinforces federalism.

325. Youngstown, 343 U.S. at 587-88.

326. Id. at 586.
Of course, one might agree that the foregoing propositions hold in domestic matters but argue that the area of foreign affairs is different. We conceive that this is exactly what the Court was saying in *Garamendi*. Presumably the Court did not believe that executive branch policy in domestic matters would override state law—a proposition that would have run counter to *Youngstown* and basic separation of powers theory. The Court in *Garamendi* relied heavily on the President’s unique powers in foreign affairs as the basis of the preemption.\(^\text{327}\) The Court must have been saying that the executive foreign affairs power makes the President a lawmaker in foreign affairs, despite the fact that the President cannot be a lawmaker in other areas."\(^\text{328}\) The question, then, is whether anything supports the idea of a foreign affairs exception to the broader rule against executive lawmaking.\(^\text{329}\) Nothing in the Constitution’s text indicates such an exception, perhaps leaving aside military matters and questions of recognition where the President has a textually explicit role. The *Garamendi* Court invoked, without elaboration, the President’s supposed broad power in foreign affairs, which does not have an obvious basis in text. It seems most easily located in the President’s “executive Power” of Article II, Section 1, but that formulation invokes the traditional understanding of executive power, which did not include foreign affairs lawmaking.\(^\text{330}\) As one of us has demonstrated elsewhere, the historical understanding of executive power

\(^{328}\) There is at least some suggestion of this foreign-affairs-is-different attitude in the concurring opinions in *Youngstown*. Justices Jackson and Frankfurter in particular offered some reservations about Black’s simple, bright-line conclusions. This likely had to do with the fact that *Youngstown* had foreign affairs implications. See *Youngstown*, 343 U.S. at 598 (Frankfurter, J., concurring); id. at 634-40 (Jackson, J., concurring).  
\(^{329}\) As one of us has commented, “[t]o distinguish *Garamendi* from, say, *Youngstown*, on the ground that the former more directly involves the conduct of foreign relations, which is the President’s bailiwick, merely begs the question whether the Constitution’s text or the framers intent consigns Congress to a secondary, reactive role in foreign affairs.” Denning, supra note 36, at 959.  
\(^{330}\) Prakash & Ramsey, supra note 6, at 265-72, 340-46. The failure to identify a source for presidential power in foreign affairs is another serious shortcoming of the *Garamendi* opinion. Although we do not deny presidential power in foreign affairs, we think it important to say from whence it comes. To the extent one believes that it comes from the traditional understanding of executive power, as reflected in Article II, Section 1, there is little basis for saying that it includes lawmaking power in foreign affairs. Declining to clarify the source of the President’s power allowed the Court to finesse this difficulty.
in the eighteenth century did not include lawmaking power in foreign affairs (save in narrow areas not applicable here). In particular, the eighteenth century British monarch did not have a domestic rulemaking power in support of foreign affairs objectives—even foreign affairs objectives specified in treaties.\textsuperscript{331} It is hard to imagine that the Framers constituted their President with greater powers than the British monarch.

Thus the "foreign affairs exception" to separation of powers cannot be located in constitutional text, and it is equally difficult to ground the exception in longstanding practice. The Court appealed to custom and usage in identifying the President's "independent authority to act" in foreign affairs.\textsuperscript{332} Although we do not dispute the tradition of independent presidential acts in some aspects of foreign affairs, there is no longstanding practice of the President acting independently to displace state laws, even ones that touch upon foreign affairs. As we have discussed, the preemption by executive policy found in \textit{Garamendi} was essentially unprecedented.

Moreover, at least one part of the Constitution's text, and of traditional constitutional discourse, stands squarely against the idea of executive lawmaking in foreign affairs: the inclusion of treaties in the Supremacy Clause. One can hardly imagine a better example of executive policy in foreign affairs than a policy reflected in a treaty. Surely the executive policy on which the Court relied in \textit{Garamendi} would have been at least as strong had it been incorporated into a treaty, signed by the U.S. President and the European nations whose companies were involved, and stating that any disclosures should be voluntary rather than mandated. According to the conventional understanding of Article VI, for such a treaty to have preemptive effect would require approval of two-thirds of the Senate. It is assumed that treaties awaiting Senate action, or never submitted to the Senate, do not displace state law, and there is no evidence of such treaties ever having done so.

Executive preemption, in contrast, would seem to allow unapproved treaties to be preemptive at the option of the President,

\textsuperscript{331} See \textit{id.} at 252-56.
\textsuperscript{332} \textit{Garamendi}, 539 U.S. at 414.
since they reflect a presidential foreign policy.\textsuperscript{333} That proposition is inconsistent with the way the Supremacy Clause was understood at the time of the Constitution's framing and the way it is understood today. Our system has always understood that treaties are preemptive \textit{because of} the Supremacy Clause.\textsuperscript{334} Indeed, as discussed, that was the reason the Framers added treaties to the Supremacy Clause. Otherwise, they would have depended upon Congress to implement treaties and thus risk repeating the errors of the Articles, in which states routinely violated treaty obligations.\textsuperscript{335} Yet if executive foreign policy is preemptive, as the Court claimed in \textit{Garamendi}, and if treaties reflect executive foreign policy (as they surely do), then the Supremacy Clause is unnecessary to make them supreme over state law—something that plainly escaped the notice of the Framers.

The suggestion that treaties are preemptive without regard to the Supremacy Clause seems implausible, not merely because it has never been seriously advanced, but also because the preemptive effect of treaties was itself a substantial innovation over previous models. Neither the British system nor the Articles of Confederation gave domestic legislative effect to treaties; in each case treaties were executive initiatives that required legislative implementation to become domestic law (in one instance by parliament, and in the other by state legislatures).\textsuperscript{336} The Treatymaking Clause of Article VI was an exception to the broader principle of separation of powers that the legislative branch must make the laws, justified by

\textsuperscript{333} Presidents have sometimes unilaterally declared that they will comply with unratified treaties, or parts of unratified treaties. This has not been thought to displace contrary state laws, but only to establish a rule for the executive branch.

\textsuperscript{334} See Ramsey, \textit{Executive Agreements}, supra note 139, at 219-31 (discussing early understandings of the Supremacy Clause as it related to treaties). According to Justice Iredell, treaties did not override state law under the Articles, but:

\begin{quote}
The extreme inconveniences felt from such a system dictated the remedy which the [C]onstitution has now provided, "that all treaties made or which shall be made under the authority of the United States, shall be the supreme Law of the Land..." Under this Constitution, therefore, so far as a treaty constitutionally is binding ... it is also by the vigor of its own authority to be executed in fact. It would not otherwise be the supreme law.
\end{quote}

\textit{Ware v. Hylton}, 3 U.S. 199, 277 (1796) (quoting U.S. CONST. art. VI); \textit{accord} \textsc{Joseph Story}, \textsc{Commentaries on the Constitution of the United States} 685-86 (1833).

\textsuperscript{335} See supra Part II.A.

\textsuperscript{336} See Ramsey, \textit{Executive Agreements}, supra note 139, at 225-29 (discussing the British system of treaty making); \textit{Articles of Confederation} art. IX, cl.6.
the imperative, felt strongly as a result of experience under the Articles, of complying with treaty obligations. As Hamilton noted, moreover, the participation of the Senate softened the objection that treaties were executive lawmaking, because at least a part of the legislative body would have a hand in them.\textsuperscript{337} Treaties, however, are a special case because they are addressed by a specific constitutional clause, they respond to a particular problem felt keenly under the Articles, and they do not represent unilateral presidential power. None of these points applies to executive policy preemption. Thus the basic principle of separation of powers should remain the rule. The legislature makes the laws, and that power includes the power to decide when to displace state laws.

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

\textit{E. Garamendi, Executive Agreements, and the Treaty Power}

\textit{Garamendi's} treatment of executive agreements also threatens the balance between the President and the Senate in undertaking international obligations. As discussed above, much of the Court's discussion centered upon the U.S. agreement with Germany—and a later one with Austria—relating to Holocaust claims. Most of this was essentially dicta, for (as we have pointed out) the preemptive effect of the executive agreements, standing alone, could not have been the determinative factor in the case.\textsuperscript{338} Indeed, the Court conceded as much, stating that \textit{if} the executive agreements themselves purported to override state law, the case would have been an easy one requiring much less discussion.\textsuperscript{339} The dissent seemed to agree, at least for purposes of argument, for it emphasized that the executive agreements were (in its view) not preemp-

\textsuperscript{337} \textit{The Federalist} No. 75, at 425 (Alexander Hamilton) (Kramnick ed., 1987).
\textsuperscript{338} \textit{Supra} Part II.C.
\textsuperscript{339} Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 416-17 (2003) ("If the agreements here had expressly preempted laws like HVIRA, the issue would be straightforward.").
The combination of the two opinions leaves the impression that preemption by the executive agreements, if supported by the agreements’ language, would have been unremarkable.

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

1. The Case for (Some) Executive Agreements

To begin, the constitutional case for some executive agreement power is quite strong. The Treatymaking Clause, of course, provides that the President may make treaties with the advice and consent of the Senate, and by obvious negative implication indicates that the President may not make treaties without the advice and consent of the Senate. That is not a constitutional argument against all forms of executive agreement, however, unless one thinks that “treaties” are the only type of international agreement recognized by the Constitution. It seems clear that they are not. First, the Constitution’s text itself—in Article I, Section 10—recognizes two categories. States, it says, may not enter into treaties, but may enter into “agreements” with foreign powers upon the consent of Congress. Second, the international treatise writers of the eighteenth century, with whom the Framers were familiar, also recognized at least two classes of international

340. Id. at 436-43.
341. See supra Part II.C.
342. See Ramsey, Executive Agreements, supra note 139, at 160-83 (expanding these arguments).
344. See Adler, supra note 133, at 27-32; Berger, supra note 133, at 55.
345. U.S. Const. art. I, § 10 ("No State shall enter into any Treaty, Alliance, or Confederation .... No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power....").
undertakings: “treaties” and other agreements. This confirms that the phrasing of Article I, Section 10, is not a mistake or an idiosyncracy, but rather reflects a common eighteenth century understanding of international agreements. Presumably the national government can enter into both kinds of international undertakings, and “agreements” not encompassed within the Treatymaking Clause would seem to fall within the President’s executive power in foreign affairs.

Third, constitutional practice, dating to near the time of the Constitution’s framing, included Presidents making agreements on their own authority without the consent of the Senate, and without constitutional objection.

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

346. See Emmerich de Vattel, The Law of Nations § 192 (Joseph Chitty ed., 1863) (1758) (distinguishing between “treaties” on one hand and “accords, conventions [and] compacts” on the other); see also Ramsey, Executive Agreements, supra note 139, at 166-71 (discussing other sources).

347. Prakash & Ramsey, supra note 6, at 264; Ramsey, Executive Agreements, supra note 139, at 160-83.

348. See Ramsey, Executive Agreements, supra note 139, at 173-83. The Garamendi Court erroneously stated that the first sole executive agreement, the 1799 settlement with the Netherlands concerning the ship Wilmington Packet, occurred during the Washington administration. John Adams was President in 1799 and his administration concluded the Wilmington Packet agreement. Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 415 (2003); see 5 Treaties and Other International Acts of the United States of America 1075-1105 (Hunter Miller ed., 1931-48).


351. Case-Zablocki Act, 1 U.S.C. § 112b (1972) (amended 1978) ("The Secretary of State shall transmit to the Congress the text of any international agreement ... other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force...."). The Act did not, however, contain any restrictions upon the entry into
There should be no substantial objection, therefore, to the Court unreflectively assuming that some executive agreements are within the constitutional power of the President. The problem is that the Court unreflectively assumed that this particular executive agreement was within that power. Although most commentators accept some executive agreements as constitutional, for several reasons there must be limits upon them.\footnote{352. See Henkin, supra note 119, at 219-30.}

There are two obvious difficulties with an unlimited presidential power to make executive agreements. First, the Treatymaking Clause seems to require a limit upon the scope of executive agreements. If everything that can be done by treaty can also be done by executive agreement, the Treatymaking Clause is superfluous, and the constitutional check of the Senate, which the Framers valued highly, is of no effect.\footnote{353. Id. at 222. On the Framers' strong desire for a two-thirds supermajority in the Senate as a check on treaty making, see Charles Warren, The Mississippi River and the Treaty Clause of the Constitution, 2 Geo. Wash. L. Rev. 271, 293-301 (1934). We note that it is a separate question—and one we do not address here—whether executive agreements approved by Congress can cover the same ground as treaties. Cf. Ackerman & Golove, supra note 134.} Second, there must be some limit to the preemptive effect of executive agreements. Treaties, of course, are preemptive by the plain language of Article VI. Article VI, however, does not mention executive agreements by name, and the entire constitutional argument for executive agreements in the first instance depends upon them not being treaties. That is not to say that no executive agreements should be preemptive, although one of us has made that argument elsewhere,\footnote{354. Ramsey, Executive Agreements, supra note 139, at 218-35.} but it does suggest some limit on the preemptive effect of executive agreements. Otherwise, one would be in the peculiar situation of arguing that while treaties are preemptive only because of Article VI, executive agreements, which are a lesser form of agreement, are preemptive even without Article VI. Yet if some other mechanism in the Constitution makes executive agreements preemptive across the board, presumably that same mechanism would make treaties preemptive and thus render this aspect of Article VI superfluous.

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

2. The (Prior) Cautious Approach to Executive Agreements

As discussed above, the Court has considered constitutional challenges to two executive agreements.\(^{355}\) United States v. Belmont\(^{356}\) and United States v. Pink\(^{357}\) challenged President Roosevelt's agreement with the Soviet Union regarding claims settlement and other matters ancillary to the U.S. diplomatic recognition of the Soviet government. Neither case engaged the constitutional difficulties of executive agreements, and in some places the Court worded its decisions quite broadly. But the Court also emphasized the specific context of the agreement, which arose in connection with diplomatic recognition.\(^{355}\) As the Court pointed out, recognition is widely assumed to be an exclusive presidential power,\(^{359}\) and one may easily conclude that this power also includes the power to make bargains relating to recognition. Dames & Moore v. Regan reaffirmed the Court's cautious approach to executive agreements.\(^{360}\) That case challenged the executive agreements ending the Iran hostage crisis, which among other things terminated private claims against the Iranian

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\(^{355}\) See supra Part II.C.

\(^{356}\) 301 U.S. 324 (1937).

\(^{357}\) 315 U.S. 203 (1942).

\(^{358}\) The Belmont Court stated that:

We take judicial notice of the fact that coincident with the [executive agreement], the President recognized the Soviet Government, and normal diplomatic relations were established between that government and the Government of the United States, followed by an exchange of ambassadors.... The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Belmont, 301 U.S. at 330; see Pink, 315 U.S. at 229 ("Power to remove such obstacles to full [diplomatic] recognition as settlement of claims of our nationals ... certainly is a modest implied power of the President...."); Wuerth, supra note 139, at 11-14 (suggesting that Pink and Belmont rest on the recognition power).

\(^{359}\) Pink, 315 U.S. at 229-30; Belmont, 301 U.S. at 330.

government and transferred them to an international tribunal. In upholding the agreement, the Court was careful to point out the narrowness of its holding. Indeed, the Court went out of its way to emphasize that it was not upholding executive agreements generally.\textsuperscript{361} Rather, it focused on the fact that Congress had consented to the type of executive agreement at issue in \textit{Dames & Moore}. According to the Court, Congress manifested that consent in two ways, both of which the Court discussed at length. Congress had passed statutes that contemplated the exercise of unilateral presidential power to settle claims against foreign governments by executive agreement, thereby "indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case," and the President had exercised that power without objection throughout constitutional history, thereby showing "a history of congressional acquiescence in the conduct of the sort engaged in by the President."\textsuperscript{362} "We do not decide," the Court cautioned, "that the President possesses plenary power to settle claims, even as against foreign governmental entities."\textsuperscript{363}

In sum, prior to \textit{Garamendi} the Court had not established a general theory of executive agreements, but rather had identified specific instances in which they might be used, without explaining their outer boundaries. There must be some boundaries, however, both because the Constitution's text seems to require it, and because the Court's extreme caution in approving the agreements in \textit{Dames & Moore} shows that the Court thought it was dealing with an instrument available only in limited circumstances. For what it is worth, that was also the view of the modern executive branch. The President, in ordinary practice prior to \textit{Garamendi}, did not claim a universal power of executive agreement. Rather, the State Department had developed guidelines for deciding when a matter could be handled by executive agreement and when it required senatorial or congressional approval.\textsuperscript{364} Indeed, apparently the executive branch negotiators of the Holocaust settlements

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{361} \textit{Id.} at 660-61 (stressing that the decision rested "on the narrowest possible grounds" and did not "attempt to lay down any general guidelines").
\item \textsuperscript{362} \textit{Id.} at 677-79.
\item \textsuperscript{363} \textit{Id.} at 688.
\item \textsuperscript{364} U.S. DEP'T OF STATE, 11 FOREIGN AFFAIRS MANUAL 721.3 (1985).
\end{itemize}
\end{footnotesize}
thought they did not, or at least might not, have the power to make preemptive settlement agreements on their own authority.\footnote{365}

3. Garamendi and Executive Agreements

This cautious approach was casually swept away in Garamendi, if one takes the Court’s statements seriously. According to the Court, there would have been no substantial issue if the only question had been whether an executive agreement plainly intended to be preemptive could displace California’s law: “Gener-
ally, then, valid executive agreements are fit to preempt state law, just as treaties are.”\footnote{366} That, though, was not at all obvious under prior law. First, there should have been a question of whether the subject matter of the agreement was properly handled by treaty rather than by executive agreement. Second, there should have been the issue of whether the agreement, even if constitutional, was preemptive. As Pink, Belmont, and Dames & Moore show, these points are not automatic, but depend (or at least depended) upon an examination of the particular context.

The casual approach could be defended if Garamendi was essentially on all fours with one of the prior cases, but it was not. It lacked the context of recognition, emphasized in Pink and Belmont. Perhaps the case fits within another exclusive constitutional power of the President that conveyed a similar unilateral power, but it was hard to see what that would be.\footnote{367} Further, the evidence of congressional acquiescence, crucial in Dames & Moore, was quite weak in Garamendi. Moreover, although both Garamendi and Dames & Moore involved international claims, there was a critical distinction: Dames & Moore involved claims

\footnote{365. Eizenstat, supra note 43, at 257 ("There was no precedent in American history for such a legal negotiation by the U.S. government with private companies and for intervening this way in present and future private lawsuits."); Bettauer, supra note 43, at 6 ("[T]here was no precedent in U.S. law for the settlement of claims of nationals against foreign private entities by executive agreement (as opposed to by treaty), and thus such a method could be subject to serious challenge.").}

\footnote{366. Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 416 (2003). For this proposition the Court cited, without elaboration, only Pink and Belmont (notably omitting Dames & Moore at this point). Id. at 416-17.}

\footnote{367. Cf. Deutsch v. Turner Co., 324 F.3d 692, 711-12 (9th Cir. 2003) (describing claims settlement in war as an aspect of war power).}
against a foreign government (and its instrumentalities), whereas Garamendi involved claims against private parties. That was important because the indicia of congressional intent identified in Dames & Moore related to settlement of claims against governments—neither the practice nor the applicable statutes relied on in Dames & Moore extended to settlement of private claims. As the executive branch acknowledged, settlement of private claims by executive agreement was “unprecedented.”

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

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

Moreover, by not questioning the preemptive nature of executive agreements, the Court abandoned the most promising avenue for judicial limitation on the President’s agreement-making power. It would appear quite difficult to mount a judicial challenge to a non-self-executing (i.e., not preemptive) executive agreement. The

368. Bettauer, supra note 43, at 4 (calling the Foundation Agreement “unprecedented”). For an elaboration of this point, see Wuerth, supra note 139, at 14-40.

369. In particular, it is hard to see how anyone would have standing to assert such a claim.
line between non-self-executing treaties and nonpreemptive executive agreements will in most cases have to be worked out between the President and the Senate, and the President would have wide latitude to decide what should and should not be submitted to the Senate. However, so long as the judiciary declines to make executive agreements part of the domestic legal system, particularly in the sense of declining to give them preemptive effect, that again forces a cooperative approach upon the President. The President must get the Senate, or Congress, involved in order to displace state law that interferes with an executive agreement. In short, a cautious approach to making executive agreements preemptive prevents the President from taking too much advantage of the uncertain, and judicially non-cognizable, line between the permissible subject matters of executive agreements and treaties.

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

The larger point is that the relationship between executive agreements and state law is as much, if not more, a question of separation of powers as it is a question of federalism. The Court's endorsements of executive agreements have never fully appreciated that perspective. In Pink and Belmont, that was less problematic because those cases involved an independent constitutional power of the President—recognition—which could mark out a narrow and defined area in which the President could safely be a lawmaker. In Dames & Moore, the lawmaking by executive agreement was less problematic because the Court relied on the approval of Congress. As a matter of separation of powers, this fell short of a complete

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370. See Ramsey, Executive Agreements, supra note 139, at 145-54 (elaborating this point with particular reference to Belmont).
answer because the issue of executive agreements, at least in part, involves the Senate as well as the Congress as a whole. But given that the matter in *Dames & Moore* involved foreign commerce, Congress clearly had an enumerated power over it. Whether the President could enter into the international settlement without the approval of the Senate, Congress could plainly terminate the claims and transfer them to arbitration in support of the settlement, and that was the extent of *Dames & Moore*’s objection. Again the Court provided a separation of powers solution, without exactly calling it that.

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

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

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371. A further problem with the decision is that it effectively allowed the President to have it both ways. By declining to enter into an explicitly preemptive executive agreement, the President managed to avoid taking a clear stance against litigation of Holocaust claims and state regulation of the Holocaust insurers, while quietly persuading the Court to resolve the
V. GARAMENDI AND FEDERALISM IN FOREIGN AFFAIRS

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

A. Garamendi’s Balancing Test

We begin by describing, as best we can, the new test articulated by the majority. It apparently balances the strength of the state’s interest against the degree of conflict with federal policy. Neither prong of the new test is adequately explained or easy to apply, as

insurers’ concerns about “legal peace.” See EIZENSTAT, supra note 43, at 205-78. At the very minimum, it would seem that the Court should require a fairly forthright executive policy, so that political accountability is placed squarely with the executive.
evidenced by the Court's own breezy implementation. As a result, Garamendi imposes new substantive limits on the states' involvement in foreign affairs that are thinly justified, difficult to articulate, and lacking in guidance to lower courts or state policymakers. The Court described its test as follows:

If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict [because] the Constitution entrusts foreign policy exclusively to the National Government.  

If, the Court continued, a state tries to address matters within its legislative competence, "but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."  

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

This seems to establish a two-step inquiry. The apparent threshold question is whether the state is "tak[ing] a position on a matter of foreign policy" without a "serious claim to be addressing a traditional state responsibility." In such a case, Justice Souter said "field preemption" might apply. What he meant, however, was that Zschernig's dormant foreign affairs exclusion might apply, because he also made clear that the federal government need not

373. Id.
374. Id. at 420.
375. Id. at 420 n.11.
376. See id.
have acted at all (another example of misleading use of statutory preemption terms). Put more directly, if the state is operating outside its traditional sphere—whatever that may mean—its actions are excluded by the Constitution itself, without regard to federal action. This follows, Justice Souter wrote, from the Constitution’s "exclusiv[e]" vesting of power over "foreign policy" in the federal government.\(^{377}\)

The key to the threshold inquiry, of course, is how "'areas of ... traditional competence'\(^{378}\) are defined. The Court offered only that they are to be "judged by standards of traditional practice,"\(^{379}\) without identifying where those standards can be found. Given Justice Souter's opposition to tests looking to traditional state concerns in ascertaining the scope of congressional power under the Commerce Clause, it is passing strange to see him invoke that very concept in defining the line between state and federal power in foreign affairs.\(^{380}\) Leaving aside the odd position in which this places Justice Souter, one might suppose that Commerce Clause cases such as \textit{Morrison} and \textit{Lopez} might offer at least some guidance.

It does seem, at a minimum, that despite \textit{Garamendi}'s use of statutory preemption language, Justice Souter's reformulation of \textit{Zschernig} suggested that some state legislation could be invalidated even if no branch of the federal government had acted. The Court apparently did not invoke that rule in \textit{Garamendi} because it concluded that preemptive effects could be imputed to an articulated executive branch policy. It did say, however, that state action in foreign affairs outside traditional state areas of competence might fail even in the absence of any conflict with the executive.\(^{381}\) The discussion was heavily qualified and relegated to a footnote. The Court further confused the matter by using the term "field preemption" to describe this process, which, as we have dis-

\(^{377}\) \textit{Id.}  
\(^{378}\) \textit{Id.} at 420 (quoting \textit{Zschernig v. Miller}, 389 U.S. 429, 459 (1968) (Harlan, J., concurring)).  
\(^{379}\) \textit{Id.}  
\(^{381}\) See \textit{Garamendi}, 539 U.S. at 420 n.11.
cussed is a complete misnomer. There is, nonetheless, substantial evidence that the Court gave dormant foreign affairs preemption an "extended lease on life" rather than the "burial" one subsequent commentator thought it deserved.

Assuming the state passes the threshold inquiry, as a second step the Court said it would look to conflict preemption analysis (with federal policy defined by the executive branch); the strength and clarity required of the conflict will vary with the strength of the state's interest. Again, although the Court used the language of preemption, it apparently intended a distinct approach. There is no parallel in the law of statutory preemption for what the Court proposed, which is essentially a balancing test comparing the degree of conflict with the extent of the state's interest. At least as the Court stated it, however, it appears that even a state regulation solidly within its traditional responsibilities would be ousted by an unmistakable conflict with executive foreign policy. That, in any event, seems to be the implication of roping the analysis to statutory conflict preemption.

B. Zschernig: Overruled or Broadened?

The first problem with the Court's test is identifying its threshold. How demanding is the requirement that a state regulate only in its traditional area of interest? Apparently the HVIRA was sufficiently within that area to invoke the balancing test. Justice Souter wrote that when federal executive authority is exercised, "state law must give way where, as here, there is evidence of a clear conflict between the policies adopted by the two." Instead of beginning by inquiring into the sufficiency of California's regulatory interest, he jumped directly to the conclusion that the HVIRA represented a conflict with presidential policy. Justice Souter

382. See supra Part III.B.2.
384. Garamendi, 539 U.S. at 420 n.11.
385. The closest counterpart is probably Harold Maier's balancing test interpretation of Zschernig, although Maier made his proposal in the context of a dormant exclusion analysis rather than executive preemption. Maier proposed balancing the state interest the federal interest, rather than the state interest against the degree of conflict. See Maier, supra note 121, at 832-39.
386. Garamendi, 539 U.S. at 421.
seemed initially to accept, at least arguendo, that the HVIRA reflected an area of traditional state competence—though the opinion later expressed some skepticism on this point.\textsuperscript{387}

In other cases this might be a critical and difficult call. Consider \textit{Zschernig} itself, for example. The executive branch in that case expressly disclaimed a conflicting federal policy. Under the Court's new test, the only question would be whether the state was regulating in an area of traditional competence. Arguably, it was, because it was regulating inheritance—something that has always been done at the state level.\textsuperscript{388} Justice Harlan in \textit{Zschernig}, upon whom the \textit{Garamendi} Court relied as an initial matter in creating the test, thought that the regulation in \textit{Zschernig} concerned a matter of traditional local interest, despite its novelty and impact on foreign affairs.\textsuperscript{389} Of course, the state was using its regulation of inheritance to insert itself into foreign affairs. Under the new test, did that mean that it had stepped outside its traditional competence in a way that was constitutionally excluded, or only in a way that triggered the balancing test in the event of a conflict? It depends substantially on the level of generality at which one assesses the state activity, a question on which the Court provided no guidance. One would have thought that the Court would at least explain whether its new test would cause its principal precedent to come out the other way, but it did not. We find ourselves unable to reach a conclusion on the matter.

On the other hand, the new formulation potentially broadens \textit{Zschernig}. Gone is \textit{Zschernig}’s inquiry into the “direct” or “incidental” effects of state laws on foreign relations.\textsuperscript{390} Under \textit{Garamendi}, regardless of the level or existence of executive action, or the effect on the government’s ability to conduct foreign affairs, if a state legislates outside its area of traditional competence, its law will be struck down. Under \textit{Zschernig}, at least, states could argue that the impact of their law was only “indirect” or “incidental.”\textsuperscript{391} The new

\textsuperscript{387} See supra Part III.A.
\textsuperscript{388} See Clark v. Allen, 331 U.S. 503, 517 (1947).
\textsuperscript{389} Zschernig v. Miller, 389 U.S. 429, 458-59 (1968) (Harlan, J., concurring in the result) (referring to the Oregon statute as legislating within the state's "area[ ] of ... traditional competence").
\textsuperscript{390} Id. at 432-36.
\textsuperscript{391} Id. at 432-33.
exclusion is potentially categorical. Given the dramatic implications of falling on the wrong side of the traditional/nontraditional state competence line, one might expect the Court to describe how that line was to be drawn, or what factors should drive the inquiry.

Finally, though the Court endorsed Zschernig's constitutional holding—and perhaps even expanded it—it did not supply the constitutional analysis that Justice Douglas's opinion lacked, justifying such a rule in terms of text, history, or structure.\textsuperscript{392} The Court offered little support other than a tendentious rendering of prior cases in support of its conclusions.\textsuperscript{393} It conflated statutory and constitutional preemption, citing cases like Pink, Hines, and Crosby, on the one hand, but reviving and applying Zschernig, which was decided on constitutional preemption grounds, and recharacterizing it as a statutory preemption case. It also compounded the error of Zschernig by endorsing the “dormant foreign affairs” doctrine as a restraint on states without any attempt to justify its proscription in terms of text, history, or structure, and without furnishing any useful guidelines for state governments or lower courts to determine what is and is not permissible. Opinions differ over the existence and scope of any structural restriction, but when the Court decides the issue, surely it is not too much to ask that the Court not merely announce a rule of constitutional preemption but also articulate reasons for the rule that at least acknowledge the textual, historical, and structural arguments for and against it.

\textbf{C. The Balancing Test: Problems in Application}

Once past the threshold, the Court's test encounters two serious problems, reflected in Garamendi itself. The first is the strength of the conflict required for preemption. Justice Souter claimed that “the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions.”\textsuperscript{394} California,

\footnotesize{\textsuperscript{392} This is not to say that the analysis could not be provided. See generally Denning & McCall, supra note 14, at 327 (arguing that a form of dormant preemption derived from Zschernig would invalidate the Massachusetts law in Crosby even absent federal action).

\textsuperscript{393} See discussion supra Part III.

\textsuperscript{394} Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 421 (2003).}
he contended, had chosen to provide "regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." Unfortunately for the Court, the "new cause of action" was not at issue in the case, which encompassed only the challenge to the disclosure provisions. The Court's mention of the cause of action suggests it lacked confidence in the clarity of the conflict between the disclosure provisions and the executive policy. Mentioning the cause of action, however, was more misdirection. Surely the Court did not mean to suggest that if California repealed the cause of action law, the HVIRA would become constitutional.

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

395. Id. at 423 (emphasis added).
396. See id. at 410 n.4 ("Challenges to [the cause of action] were dismissed by the District Court for lack of standing, a ruling that was not appealed.").
397. Id. at 434.
398. It is worth repeating that there was no necessary connection between the HVIRA and the cause of action legislation. Insurance claimants wanted the disclosure provision, even without the cause of action, so that they could make claims through ICHEIC, the voluntary settlement organization. Indeed, claimants viewed ICHEIC as an essentially empty remedy without disclosure mandates, but a potentially powerful one with disclosure.
evaluation of the needs of U.S. foreign policy—an enterprise in which courts tend to doubt their own ability.

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

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

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

400. Id.
402. Garamendi, 539 U.S. at 426.
403. Id.
404. Id. at 426-27.
disclose information about payment of Holocaust-era policies. The States have traditionally assumed responsibility for protecting insurance policy holders residing within their borders—a responsibility Congress has recognized and endorsed. The real problem, it seemed, was that the burden California imposed on the insurers was disproportionate to the state interest involved. The HVIRA required an enormous volume of disclosure to aid a relatively small number of claimants. This comparison, however, did not seem to be part of the Court’s test, at least not overtly.

D. Breard and Executive Preemption of Traditional State Functions

The Court’s language seemed to assume that at some level of conflict, any state law must give way to presidential foreign policy. That, at least, seems to be the natural conclusion from the Court’s use of the terminology of statutory conflict preemption, and from its

405. Id. at 420. Further, in applying its test the Court never addressed whether the analytical framework developed for dealing with legislative preemption—express versus implied preemption, obstacle and conflict forms of implied preemption—applied, and if it does not, what should take its place, and why. When the Court discussed the “conflict preemption” aspect of its new test, it offered little explanation of the terms it was using and little guidance for prospective application. Because the Foundation Agreement disclaimed preemptive intent, the Court apparently regarded this inquiry as a species of implied preemption but did not employ the usual vocabulary used in its implied preemption cases that involve congressional legislation. As one could comply with both the Foundation Agreement and the HVIRA, it was not a case of “clear conflict,” as the Court suggested. The Court had to recharacterize the disclosure requirement as a “sanction” and link it to the cause of action not at issue in the case even to suggest that California’s regulatory scheme presented a real “obstacle” to the achievement of executive branch goals. The Court also never made it clear whether the HVIRA represented an area of traditional state competence, and if it did not, what criteria were used to make that determination, other than to suggest that whatever California’s interest, it was not sufficient to outweigh that of the federal government. As noted above, this does not sound like statutory preemption analysis at all, but rather more like the tests the Court has developed for the dormant Commerce Clause doctrine. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (evaluating whether facially neutral commercial regulations nevertheless offend the dormant Commerce Clause doctrine because the burdens on interstate commerce are “clearly excessive” as to the “putative local benefits”); Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851) (holding that states are prohibited from regulating commerce where national problems require uniform solutions).

406. See supra Part III.C.

407. But see infra Conclusion.
discussion of the President’s preeminence in foreign affairs.\textsuperscript{408} An explicitly preemptive presidential foreign policy, then, would overcome a state regulation even in an area of traditional competence. Particularly in a time of increasing globalization, this reading concentrates immense power in the executive to oversee state activities.

As an example, consider the Court’s prior decision in \textit{Breard v. Greene}.\textsuperscript{409} As discussed above, that case held—or rather took as axiomatic—that a request by the President to the governor of a state to stay Breard’s execution to avoid interference with federal foreign affairs goals was just that: a request, lacking any force of law enforceable by the courts.\textsuperscript{410} The principal issue in \textit{Breard} was whether the state policy to pursue the execution contravened a treaty obligation, such that it would be displaced by Article VI; once the Court found that it did not, the Court thought it obvious that an executive branch request not based upon a treaty obligation was simply addressed to the discretion of the state governor.\textsuperscript{411} Yet in \textit{Garamendi}, the Court thought an executive branch request to a state governor—even though similarly not based on a treaty obligation—was enough to overturn state law.\textsuperscript{412}

\textit{Breard} seems to merit some reconsideration after \textit{Garamendi}, which did not mention it. To be sure, Virginia’s death penalty law, and its refusal to recognize Breard’s claimed right to retrial, seem sufficiently within the state’s area of traditional competence to pass \textit{Garamendi}’s threshold test. But then matters become complicated. The conflict with federal policy was difficult to assess, because the executive did not state its policy clearly, and (naturally enough) appeared to think that it lacked the power to order Virginia to stay Breard’s execution. The President plainly had a policy of respecting

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\textsuperscript{408} \textit{See Garamendi}, 539 U.S. at 420 n.11 (noting that when a state regulates within its traditional competence in a way that affects foreign affairs, preemption requires “a conflict[] of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted”).


\textsuperscript{410} \textit{Id.} at 378. \textit{See supra} Part III.B.3.

\textsuperscript{411} \textit{See Breard}, 523 U.S. at 376-78. The question was whether Virginia could execute a capital defendant despite a directive from the International Court of Justice that he not be executed. The executive branch requested that Virginia postpone the execution, but the Court held, and the executive branch agreed, that the state was not obligated to do so.

\textsuperscript{412} \textit{Garamendi}, 539 U.S. at 420-22.
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the ICJ's request, however, and Virginia plainly took the opposing position. Even in an area of traditional state competence, that might seem sufficient to weight the *Garamendi* test toward the federal interest. In any event, it seems that under *Garamendi*'s test the executive could override the state by a sufficiently clear statement of policy, creating an irreconcilable conflict. In other words, *Garamendi* appears to give the President independent power to do what most everyone, including the executive, assumed he did not have independent power to do in *Breard*: direct a state to conform its laws and actions to executive foreign policy.\(^{413}\)

The potential implications reach well beyond *Breard*. It is a common observation that in an increasingly interconnected world even activities that appear purely local may have international effects. In the context of the death penalty, for example, international interest has focused not merely upon the treatment of defendants such as Breard, but also upon the treatment by the states of their own citizens. Indeed, if recent briefs are to be believed, this issue has become a matter of some diplomatic inconvenience to the United States.\(^ {414}\) The President has, of course, not taken a position against state applications of the death penalty in general. But would the President have the power to establish preemptive policies on the implementation of state death penalties, as a matter of the conduct of foreign affairs? This seems an unlikely result, particularly given the make-up of the current Court, but it is hard to see how the *Garamendi* opinion avoids it.

We make these observations not to suggest that *Breard* should have come out the other way, but to suggest that the Court was not thinking systematically about how its balancing test fit into the rest of the law of state-federal relations. That may be understandable, because no party in the case cited *Breard*. This in turn was because, prior to the *Garamendi* decision, the idea of executive foreign affairs preemption was, as the Court said in *Breard*,

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413. In sum, *Garamendi* seems to vindicate Professor Kirgis's position with respect to *Breard*. See supra note 242. Of course Kirgis's view, that the state action could be overturned by the President even in the absence of a binding law or treaty, was a minority view and flatly contrary to both the executive branch's position and the Supreme Court's decision in *Breard*.

414. See Brief of the European Union as Amicus Curiae in Support of Petitioner, McCarver v. North Carolina, No. 00-8727 (June 8, 2001); Brief of Morton Abramowitz et al. as Amici Curiae in Support of Petitioner, McCarver v. North Carolina, No. 00-8727 (June 8, 2001).
supported by “nothing in our existing caselaw.” In any event, as a practical matter we think the Court’s balancing test is profoundly misguided, as demonstrated by the Breard case. We cannot imagine how the Court could “balance” the importance of respecting ICJ decisions against the state’s interest in domestic application of its own criminal justice system, other than by unbridled intuition.

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

As discussed above, there is a tension between our constitutional structure and claims by the executive branch of independent lawmaking power. Although the Court has recognized some executive lawmaking in past cases, it has always been careful to limit those cases to their facts. Such limiting language is gone in Garamendi and is replaced only with citations to those prior, circumspect cases. This shift is unaccompanied by any discussion of text, structure, or history demonstrating why previous Courts and prior commentators were wrong to take it as a given that the President does not have broad lawmaking powers, especially those that can displace or preempt state laws. As we have suggested, this has serious implications for the distribution of federal power in foreign affairs.

From a federalism perspective, however, it may not be obvious that the states are worse off under the Garamendi system than they would be under an expansive view of Zschernig. It may be that Garamendi in practice effectively replaces judicial preemption under Zschernig with executive preemption. One might even conclude that, whatever doctrinal manipulations occurred, from the perspective of the states the Court’s new approach is an improvement over Zschernig. After all, Zschernig, read broadly, might allow a court to strike down all sorts of state activity that, as a nonpolitical branch with little expertise in foreign affairs, it did not like. The new approach generally envisions action by at least one political

416. See Goldsmith, supra note 125, at 1414-16 (commenting on courts’ lack of ability to make such judgments). To be clear, we express no opinion on the view that Virginia’s policy was preempted by treaty obligations, or by executive implementation of treaty obligations. See Vázquez, supra note 75.
branch—the executive—before state laws would be displaced. The states, moreover, can hardly complain about federal foreign policy overriding state law, as that is the essence of the federal system reflected in the Constitution; disputing that proposition is tantamount to calling for a return to the Articles of Confederation. To be sure, there is a substantial separation of powers question as to which branch of the federal government sets preemptive federal foreign policy, but at least on its face that is not a matter of immediate concern to the states.

The truth of these statements, though, depends on the relative scope of Zschernig preemption and the Court’s new executive policy preemption. The dormancy of Zschernig prior to the Garamendi case, and the lower courts’ relatively narrow reading of it in Garamendi and in similar cases, suggested that as a practical matter courts were not inclined to apply Zschernig broadly, whatever its language might say. The creation of executive policy preemption hands a potentially powerful weapon to a branch that is much more likely to wield it aggressively. As previous commentators have observed, moreover, it does matter to the states which branch of the federal government sets preemptive federal policy, because one branch—the executive—operates under substantially fewer constraints than the others. Finally, not only does Garamendi concentrate power in the executive branch to the detriment of the states, but it also may constrain Congress’s ability to limit executive preemption. All of these matters add up to a serious undermining of federalism protections, even if one is inclined to think that Zschernig itself contained some valuable insights.

1. Disabling the Structural Protections of the States

It is an article of faith among critics of court-imposed federalism limits on Congress that states’ interests are adequately secured in Congress through “political safeguards” offered by either the formal institutions of national lawmaking in which states are represented,417 or in informal institutions like political parties that

417. See generally Jesse Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980);
take account of state interests.\textsuperscript{418} Justice Souter himself embraced this view in his \textit{Morrison} dissent, where he emphasized "[p]olitics as the moderator of the congressional employment of the commerce power."\textsuperscript{419}

Professor Bradford Clark has argued that political safeguards enthusiasts should, therefore, vigorously enforce textual and structural restrictions on national lawmaking power in order to ensure that national lawmaking will displace state law only when such lawmaking complies with the Constitution's forms and formalities.\textsuperscript{420} In his view, the Supreme Court's enforcement of separation of powers principles "preserve[s] federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism." Federal lawmaking outside the constitutionally recognized avenues "does not clearly fall within the terms of the Supremacy Clause, and thus provides a questionable basis for displacing state law."\textsuperscript{421}


\textsuperscript{419} United States v. Morrison, 529 U.S. 598, 649 (1999) (Souter, J., dissenting); see id. at 647-51 (arguing that the Framers intended for state interests to be safeguarded through the political processes). Justice Breyer, too, stressed that the Court's role should be limited to the monitoring of process. \textit{Id.} at 662-63 (Breyer, J., dissenting). Justice Souter did not join the portion of Justice Breyer's opinion arguing for a judicial role in enforcing process protections. \textit{Id.} at 655.

\textsuperscript{420} See Clark, \textit{Safeguards}, supra note 418, at 333 (arguing that "[a]t a minimum, courts should enforce the political safeguards by restricting 'the supreme Law of the Land' to measures adopted in accordance with the precise lawmaking procedures prescribed by the Constitution").

\textsuperscript{421} Clark, \textit{Separation of Powers}, supra note 17, at 1324. The Supremacy Clause, he noted, recognizes only the Constitution, laws adopted pursuant to the Constitution, and treaties as the supreme law that displaces state law. Only "lawmaking procedures governing the adoption of the 'Constitution,' 'Laws,' and 'Treaties' of the United States," he argues, "create[s] the supreme Law of the Land." \textit{Id.} at 1326. Further, "the procedures established by the Constitution make adoption of such law[s] more difficult by requiring the participation and assent of multiple actors subject to the political safeguards of federalism—especially the Senate." \textit{See also id.} at 1330 ("[T]he ultimate procedural safeguard may be the procedural
Though Professor Clark looked at lawmaking by all three branches of government, his comments on executive branch lawmaking and sole executive agreements are of particular relevance here. As we noted in our earlier discussion, he saw a rejection of executive lawmaking in *Youngstown*. The Court demanded that the federal government use the Constitution's prescribed lawmaking procedures if it wished to seize the steel mills. Relatedly, he expressed concern over the use of executive agreements. Since executive agreements allow Presidents to avoid the difficult supremacy procedures of Article VI, Clark questioned whether these agreements—particularly sole executive agreements that do not involve Congress—should preempt state law. If congressional-executive agreements are a source of concern because they avoid the Senate's supermajority requirement designed to protect state interests, sole executive agreements also avoid the lawmaking requirements in Article I, Section 7. Although “these procedures render lawmaking more difficult than congressional inaction ... this difficulty was meant to protect ... state governance prerogatives.”

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422. The Court, he argued, "has ... invalidated attempts by the executive branch to engage in lawmaking outside the constitutionally prescribed process." Clark, *Separation of Powers*, supra note 17, at 1393. Even Justice Jackson's opinion concurring with the Court's invalidation of President Truman's seizure of the steel mills, widely regarded as a paradigm "functional" approach to separation of powers questions, "confirms that Justice Jackson agreed with the Court's essential premise that the President possesses no independent lawmaking authority." *Id.* at 1400. The decision, Clark argued, preserved federalism by preventing displacement of state law permitting possession of steel mills by confiscatory federal law enacted by presidential fiat: "The constitutional distinction between executive and legislative power recognized by both Jackson and the Court ensures that the federal government cannot interfere with private rights unless it employs the lawmaking procedures established by the Constitution." *Id.*

423. *Id.* at 1439.

424. *Id.* at 1450 (citation omitted). Clark was particularly troubled by the Court's holding in *Dames & Moore* that congressional acquiescence authorized the President's assignment of pending claims to a special tribunal, though there was no statutory authority for that power. Placing on Congress the burden of disapproving executive action, Clark wrote, "flips the burden of inertia established by federal lawmaking procedures. The absence of congressional disapproval ordinarily does not authorize the President to alter important legal rights, even if necessary to implement a sole executive agreement." *Id.* He offered the tentative opinion that *Dames & Moore* was "limited to its facts" and "lack[ed] significant
On our reading, *Garamendi* significantly eroded the protections Professor Clark described. First, the opinion deprives states of the protections of Article VI by adding to the list of federal actions having preemptive effects. Further, encouraging independent executive branch lawmaking removes essential safeguards by ensuring that law can be made by a political institution not as subject to state pressure as Congress. By uncritically extending *Belmont, Pink,* and *Dames & Moore,* the Court essentially amended Article VI to make executive agreements, and executive policy more broadly, the supreme law of the land. Not only is this inconsistent with the omission from Article VI of the "other agreements" mentioned in Article I, Section 10, but it also permits displacement of state law without subjecting legislative actors to state pressure.\(^4\)\(^2\)\(^5\) Although the President does have a national constituency, and depends on popularity in key states to stay in power, as Hamilton wrote in *Federalist No. 68,* it was an "important desideratum ... that the executive should be independent for his continuance in office on all but the people themselves" lest he "be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence."\(^4\)\(^2\)\(^6\) In other words, the presidency is an office with a national constituency, one—by design—less likely to take account of individual states' interests.\(^4\)\(^2\)\(^7\) This may be normatively desirable, but there is little doubt that judicial attribution of preemptive effect to executive statements reduces the ability of states to have their interests taken into account prior to having their policies displaced.

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

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

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

In 1992, Eskridge and Frickey identified a “super-strong” rule against curbing executive power. In *Japan Whaling Ass’n v. American Cetacean Society*, the Court found the Commerce Department had not violated congressional statutes when it failed to certify that Japan’s whaling practices violated international agreements, apparently contrary to the congressional enactments’ plain language. According to Eskridge and Frickey, *Japan Whaling* potentially created “a super-strong clear statement rule

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

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

requiring the statutory clear statement to target the specific issue unmistakably" in order to "protect[] presidential discretion in foreign affairs matters."\(^{431}\)

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

Though it was not explicit, the Court's disregard of both statutes apparently stemmed from its reluctance to countenance interference with what it concluded was the President's premier role in "foreign affairs." The Court did not define this role, but repeatedly contrasted it with congressional responsibilities for "foreign commerce" and "domestic commerce."\(^{432}\) Japan Whaling at least evinced concern about congressional interference with an enumerated presidential power—the power to negotiate agreements with foreign governments.\(^{433}\) Likewise, as we stressed earlier, Dames & Moore took pains to emphasize the limited nature of the presidential power it authorized, disclaimed any intent to pass on the question of a general presidential power to settle claims, and suggested that—though not expressly authorized—the transfer of

\(^{431}\) Eskridge & Frickey, supra note 429, at 617.

\(^{432}\) See, e.g., Am. Ins. Ass'n v. Garamendi, 539 US. 396, 428 (2003) (contrasting the McCarran-Ferguson Act's concern about "implied preemption by domestic commerce legislation" with "preemption by executive conduct in foreign affairs"); \(\text{id. at 429}\) (stating that the Holocaust Commission Act "can hardly be read to condone state sanctions interfering with federal efforts to resolve such claims"); see also \(\text{id. at 422 n.12}\) (explaining that Barclays did not apply because it dealt with Congress's power over foreign commerce, as opposed to "the field of foreign policy" in which the President has "the lead role"); \(\text{id. at 424 n.14}\) (recharacterizing Crosby as a decision involving the President's "independent constitutional authority to act on behalf of the United States on international issues").

\(^{433}\) Eskridge & Frickey, supra note 429, at 617 ("What seemed to move the Court was the argument that the President needed flexibility not to certify so that he could negotiate a bilateral agreement with Japan on this matter.").
the claims out of U.S. courts was at least similar to remedies Congress had prescribed in the past and to which Congress had not objected. Garamendi, by contrast, claimed the potentially broad universe of "foreign affairs" or "foreign policy" for the President. Not only does this empower the President at the expense of Congress, but it also harms federalism interests by making it difficult for Congress to come to the states' defense.

CONCLUSION: ADJUDICATION BY INTUITION?

In sum, Garamendi cannot be defended as an example of the so-called constitutional common law method, at least in the idealized form that David Strauss and others present it. Garamendi is not an example of analogical reasoning from prior decisions, nor indeed does it have much relationship with prior decisions at all. To be sure, the lower court opinions in the case followed the outlines suggested by Strauss. They took the Court's most relevant precedents—principally Zschernig, Japan Line and Barclays—and attempted a synthesis in light of the new facts of the case and the way those cases had been applied in the past. As we have argued, however, that is not what the Supreme Court did. Instead, it essentially ignored Barclays, gave an odd and inaccurate recharacterization of the concurring opinion in Zschernig (by ignoring that case's facts and majority opinion altogether), and created a wholly new idea of executive preemption—a constitutional rule so novel that it was not even squarely argued in the lower courts. To the extent the Court's opinion relied on prior cases, its justifications seemed decidedly post-hoc.

Garamendi also cannot be defended on the basis of the Constitution's text, structure, and history. As we have explained, it creates a new executive power whereby the President can displace state laws that interfere with the President's foreign policy. Nothing in the Constitution gives the President such a power. To the contrary, Article VI of the Constitution expressly assigns the preemptive power to Congress, in the case of statues, and to the President plus two-thirds of the Senate, in the case of treaties. To be sure, the President has the "executive Power" granted by Article II,

434. See supra Part IV.E.
Section 1. Yet even if one believes (as the Court apparently did) that this conveys to the President independent power in foreign affairs, the historical understanding of "executive Power" denies that it could contain the lawmaking power of preemption. The interaction of Article II, Section 1 and Article VI assure that while the President can formulate foreign policy independently, the cooperation of Congress (or a supermajority of the Senate) is needed to conform domestic law to foreign policy objectives. This creates a check upon the President's foreign policy powers that protects both the states and, perhaps more importantly, the legislative branch of the federal government. Ignoring this structure, as we argue the Court did in *Garamendi*, harms both federalism and separation of powers.

It seems unlikely, though, that the Court was deliberately pursuing a pro-executive foreign affairs agenda, or indeed that it was proceeding with much attention to the structural implications of its decision. The Court's discussion of structural constitutional issues is so thin that one suspects the Court did not consider the broader picture with much focus. Moreover, all of the Justices in the majority had either joined or substantially agreed with the central holding of *Barclays*, which took a deliberately anti-executive line. 435 It is not that the majority ignored a prior Court's precedent; it ignored one of its own precedents. So, even though the Court did not articulate a distinction with *Barclays*, there must have been one. As the opinion does not contain limiting language, we therefore doubt that the Court actually saw itself engaged in the sweeping extension of executive power that we have attributed to its opinion. Instead, we believe that the case was driven not by a broader structural vision of the Constitution, nor by incremental reasoning from prior cases, but by intuition about the facts of this particular case.

Although any suggestions about unstated judicial intuitions are necessarily speculative, we can imagine at least two ways of looking at *Garamendi* that made it an intuitively attractive case in which to find against the state. One possibility is that the Court saw the

435. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 301 (1994) (majority opinion joined by Rehnquist, C.J., and Kennedy, Souter, & Breyer, JJ.); id. at 334 (O'Connor, J., dissenting) (agreeing with the majority that preemption should not turn upon "statements made and briefs filed by the executive branch").
case as driven by the particular context of executive agreements settling international claims. Of course, there were material technical barriers to making this the legal basis of the decision. The agreements did not purport to be preemptive, the agreements did not cover all of the plaintiffs, prior law had been cautious about the permissible scope of executive agreements in general, and the Constitution does not establish international settlement as a plenary and preemptive presidential power. Nonetheless, all three of the Court's prior cases upholding executive agreements had been settlements; no executive settlement had ever been overturned for any reason, and executive settlements had a long and essentially uncontested history. One might surely believe that, whatever the contours of executive lawmaking in general, prior law had embraced lawmaking through settlement agreements as a presidential power.

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

If one views negotiation and implementation of international settlements as strongly presidential powers (similar to, say, 436. See Dames & Moore v. Regan, 453 U.S. 654, 678-79 (1981); supra Part IV.E.
437. See supra Part I.A.
recognition), then one would likely be suspicious of state attempts to upset a settlement. In particular, one would likely be comfortable with a "field preemption" analysis, derived from the rules of preemptive statutes that would clear the states out of the way altogether, without lingering over technicalities like the fact that the agreements did not cover all of the plaintiffs or that the agreements had little to say about disclosure issues. This would also distinguish Garamendi from Barclays and Breard, which were not about settlements, or any other core executive power. It also would explain the Court's lack of interest in broader structural concerns, because a rule applying only to settlements would not raise such concerns.

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

First, the HVIRA required disclosure of all insurance policies issued in Europe between 1920 and 1945—surely a staggering number. It was not limited to policies of Holocaust victims, or to policies of persons who were believed to be or claimed to be Holocaust victims, nor was it limited to persons residing in California, or even to persons residing in the United States. True, the state had its reasons. As the state pointed out, it would be hard to compile a list limited to victims or based on current residency. Moreover, the insurers' good faith was sufficiently suspect that the

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439. As one of us observed elsewhere:

    The majority was perhaps wise not to close its eyes to the reality that HVIRA was not simply about disclosing information to assist California's insurance consumers, but rather about creating a reservoir of information that [claimants] and their lawyers would eagerly plumb to support the very sort of class action litigation that the executive agreements were intended to forestall.

Denning, supra note 36, at 960.

440. Supra note 170.

441. CAL. INS. CODE § 13804(a) (West 2004).

442. See Appellant's Opening Brief at 6 n.3, Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739 (9th Cir. 2001) (Nos. 00-16163).
state did not want to leave any discretion in deciding which names to release. At the same time, though, this meant that only a small fraction of the names released would have any relation to the Holocaust policies. An even smaller number would have any relation to the United States or to California.

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

Third, there was some material dispute whether the HVIRA's required disclosures violated German or other European privacy laws. In any event, the state took the position, confirmed by the plain language of the statute, that illegality under foreign law was not an excuse for noncompliance with the HVIRA. Yet surely there were some legitimate privacy concerns. Most of the people whose policies were covered by the HVIRA were not Holocaust victims and so did not benefit from publication. They might have good reason to prefer that, other things being equal, their insurance history not be broadcast to the whole world.

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443. *Id.*
445. *See* Brief of Gerling Appellees at 21-51, Gerling Global Reinsurance Corp. of Am. v. Low, 296 F.3d 832 (9th Cir. 2002) (making these points).
446. *See* Gerling Global Reinsurance Corp. of Am. v. Low, 186 F. Supp. 2d 1099, 1111 n.8 & 1112 n.9 (E.D. Cal. 2001).
447. *Id.* at 1113.
448. It would be the whole world, because the HVIRA contemplated putting the information on an Internet-accessible database, not merely using it for the internal regulatory activities of the insurance commissioner. *See* *Cal. Ins. Code § 13803 (West 2004). On the privacy point, see Brief of the Gerling Appellees at 35-37, Gerling Global Reinsurance Corp. of Am. v. Low, 296 F.3d 832 (9th Cir. 2002).
The combination of these ill attributes meant that in some cases a U.S. company doing business in California might be punished because a distant corporate relative in Europe, over which it had no realistic control or influence, declined to supply it with an enormous volume of information, most of it irrelevant to the state's interest—perhaps in violation of European law and likely in violation of the interests of many of its clients. It was not hard to conclude that California had gone too far in pursuit of an entirely legitimate goal. The insurers made various arguments, mostly founded on the Due Process Clause, that the state's overreaching in these and other respects rendered the HVIRA unconstitutional.

Due process jurisprudence was, however, not hospitable to the insurers' claims once one encountered the details. For example, no clear rule requires that illegality under foreign law excuse non-compliance with local regulatory requirements, and the impact upon state regulatory functions of a contrary rule as a general matter would be daunting. Further, although the HVIRA's disclosure requirements seemed out of proportion to the state's interest, the Due Process Clause's extraordinarily low standard for validating economic regulation meant that the state had to show only the most minimal connection between its law and its interest, which it surely could. Finally, though penalizing one member of a corporate family for nondisclosure by another might seem unfair in this case, in the ordinary case it is a common enough practice. As with the asserted excuse for foreign illegality, a contrary rule stated broadly would cripple state regulatory functions.

There was a further serious drawback to founding a decision on the Due Process Clause. Such a decision would be hard to limit. Most of the due process arguments had little to do with foreign affairs, and holding for the insurers on this ground would suggest a whole charter of potential rights available to all corporations against all state regulatory agencies. Moreover, these rights would potentially limit the federal government as well, assuming the Due Process Clauses of the Fifth and Fourteenth Amendments are parallel in this regard.


450. See Gerling Global Reinsurance Corp. of Am. v. Low, 296 F.3d 832, 845-49 (9th Cir. 2002).
Although the Due Process Clause seemed an unattractive ground for decision, the fact remained that the state regulation, at least in some visions of the case, bordered on the unreasonable. Of course, in the usual case—especially in the usual economic regulatory case—courts are reluctant to strike down laws simply because they seem burdensome, or because the costs seem out of proportion to the benefits. *Garamendi* was not the usual case, though, because it also had the foreign affairs dimension. As a result, the state law seemed uniquely unreasonable, because it overreached in its treatment of the insurers and it overreached by involving the state in matters of international concern.

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

We do not mean to endorse the Court’s intuition in these respects, nor to endorse this method of judicial decision making. We do think, however, that it goes further in explaining what actually happened in *Garamendi* than does either a theory of constitutional adjudication based on the trinity of text, structure, and history, or a theory of common law constitutionalism.
Nor do we mean to suggest that *Garamendi* is, after all, a narrow opinion. We are persuaded that the Court thought it was issuing a narrow opinion, and that this Court likely would not give it wide application to, say, reverse the outcome in *Breard*. The danger is that while events come and go, and circumstances giving rise to intuitive judgments dissipate, opinions and holdings remain, in Justice Jackson's "loaded weapon" metaphor, for future courts to use. The danger is not that this Court intends to revolutionize foreign affairs law, but that it has left the tools for some future court to do so.

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

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