Forgive Me, Founding Fathers for I Have Sinned: A Reconciliation of Foreign Affairs Preemption After *Medellin v. Texas*

ABSTRACT

The Supremacy Clause of the U.S. Constitution grants the federal government the authority to make the law of the land and, in turn, preempt state law that is incompatible with the federal government's legislative and treaty making efforts. In addition, other provisions of the Constitution authorize the federal government to participate in matters of foreign affairs, and the Supreme Court has found this authority to be exclusive to the federal government in a number of cases. However, the Constitution is silent on the issue of when federal preemption of state law is appropriate when states seek to legislate in matters of foreign affairs. In American Insurance Ass'n v. Garamendi, the Supreme Court found that California's Holocaust Victim Insurance Relief Act of 1999 violated the foreign affairs power of the national government. The Court's reasoning rested on the premise that the executive power includes the power to conduct foreign affairs on behalf of the nation. Ultimately, the Court employed a two-prong test that justified preemption: whether an express federal policy was in place at the time the state law was enacted and whether the conflict between the two laws was sufficient to permit preemption of the state law. In 2008, in Medellin v. Texas, the Court did not allow for preemption despite the factual similarities to the Garamendi case. These two cases demonstrate the complications surrounding federal preemption of state law in matters of foreign affairs, specifically in areas in which the federal government has yet to act. This Note seeks to rectify foreign affairs preemption cases and argues for a policy-based approach grounded in a factor analysis.

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I. INTRODUCTION

The federal government has historically derived its exclusive authority to conduct foreign affairs from an amalgamation of provisions in the U.S. Constitution. Under the Articles of Confederation, the federal government lacked power to invalidate state laws that improperly conflicted with treaties or foreign initiatives, resulting in the federal government's inability to articulate a coherent foreign policy.[1] Consequently, the Founding Fathers sought to combat this decentralization through specific provisions of the Constitution that granted the federal government the supreme authority to make the laws of the land.[2] Article I, Section Eight outlines the power of Congress to conduct foreign affairs,[3] while Article II authorizes the Executive Branch to participate in matters of international import.[4] Together, these two

1. Brandon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 843 (2004).

2. *See* 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 . . . .").

3. U.S. CONST. art. I, § 8.

4. *See* U.S. CONST. art. II, § 2 (enumerating the President's treaty power and power to receive ambassadors).

provisions provide the federal government with the power to conduct international relations and interact with foreign governments.[5]

Further, the Constitution exclusively allocates these powers to the federal government and prohibits states from exercising similar authority by barring them from entering into agreements and treaties with international actors.[6] As a result, the states' power to engage in activities in the international forum is limited to the power reserved to them by the Tenth Amendment.[7] Any additional action by state governments that incidentally affects foreign affairs is subject to congressional authorization[8] and potentially judicial scrutiny. Utilizing this constitutional basis for authority, courts have routinely upheld the exclusive right of the federal government to conduct foreign affairs to the detriment of state efforts to do so. Courts have also applied the foreign affairs doctrine in a manner that has allowed for preemption of state laws that appear to unconstitutionally interfere with the federal government's exclusive power.

Beyond this seemingly constitutional authority to conduct foreign affairs, the Supreme Court has consistently upheld this power as exclusive to the federal government. In *United States v. Belmont,* the Court articulated that the "complete power over international affairs is in the national government . . . and cannot be subject to any curtailment or interference on the part of the several states."[9] This notion, coupled with the preemption authority granted to the federal government through the Supremacy Clause, has provided the Judiciary, as well as the other branches of government, with a justification for preempting state law that addresses international affairs.

A number of cases have also furthered the principle that the President may conduct international relations without prior or even subsequent congressional approval. In *United States v. Curtiss-Wright Export Corp.*, the Court preserved the right of the President to act independent of congressional authorization.[10] The Court highlighted the "unwisdom of requiring Congress in this field of

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5. The Constitution also authorizes the federal government to act on the international stage by permitting the government to enter treaties, U.S. CONST. art. II, § 2, cl. 2, to create and financially support armies, U.S. CONST. art. I, § 8, cl. 12, and define violations against the law of nations, U.S. CONST. art. I, § 8, cl. 10.

6. U.S. CONST. art. I, § 10.

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

8. *See* U.S. CONST. art. I, § 10 (forbidding the states from taking actions related to foreign affairs without the "Consent of Congress").

9. United States v. Belmont, 304 U.S. 324, 331 (1937) (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936)).

10. *See Curtiss-Wright Export Corp.*, 299 U.S. at 319 ("[T]he President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.").

governmental power to lay down narrowly definite standards by which the President is to be governed," given the inherent delicacy with which matters of foreign affairs must be handled.[11] In order to preserve the sovereignty of the national government and its ability to participate in the international environment, the Court felt it was unnecessary to hinder the President in his interactions with foreign nations.[12]

Later, in *Dames & Moore v. Regan*, the Court permitted unilateral attempts by the President to resolve international claims without consulting Congress because of the "history of congressional acquiescence in conduct of the sort engaged in by the President."[13] In that case, the President sought to enforce executive orders that implemented an executive agreement calling for the release of American hostages in Iran.[14] The petitioner filed suit in an attempt to prevent implementation of the executive agreement on the grounds that the President was acting outside of the scope of authority granted to him by statute and the Constitution.[15] Even though no prior statutes directly addressing executive agreements existed, the Court upheld the agreement as a valid exercise of executive authority and seemed to expand the power of the President through a reliance on implicit congressional authorization through inaction.[16]

Additionally, the Court granted preemptive authority to the executive agreement, but limited its decision by arguing that Congress had consented to the type of executive agreement that was at issue.[17] Citing *Youngstown Sheet & Tube Co. v. Sawyer*, the Court justified its finding on the basis that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II."[18] The holdings in *Youngstown*, *Curtiss-Wright*, and *Dames & Moore* have historically justified the President's independent authority to conduct foreign affairs. It was not until later that these cases served as the basis for authorizing preemption of state law under the guise of upholding the Executive's exclusive power to act on the international stage.

Following the lead of the Supreme Court, lower courts have upheld the federal preemption of state law in matters of foreign

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11. *Id.* at 321–22.

12. *See id.* at 318–22 (explaining that the President can better conduct foreign affairs when unencumbered by congressional oversight on every decision).

13. Dames & Moore v. Regan, 453 U.S. 654, 678–79 (1981).

14. *Id.* at 660.

15. *Id.* at 666–67.

16. *Id.* at 686.

17. Denning & Ramsey, *supra* note 1, at 920.

18. *Dames & Moore*, 453 U.S. at 686 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952)).

affairs. However, the requisite conditions necessitating federal preemption are unclear and somewhat inconsistent. Early cases addressing the issue looked to whether the state law conflicted with the federal law,[19] while others overlooked the conflict requirement in favor of maintaining Congress's exclusive right to legislate in matters of foreign import.[20] As a result, no cohesive, generally applicable standard for cases of foreign affairs preemption emerged and the analysis became increasingly muddled.

In *American Insurance Ass'n v. Garamendi*, the Supreme Court attempted to articulate a standard for foreign affairs preemption cases that would more aptly guide lower courts in their adjudications of this issue. In that case, the Court found that California legislation directly conflicted with the President's ability to conduct foreign affairs, thereby upholding the conflict preemption doctrine.[21] At the same time, the Court appeared to grant the President's policy statement the preemptive authority previously reserved only for documents that carried the force of law.[22] However, in 2008, this standard was reevaluated and modified in *Medellin v. Texas*. Similar to a policy statement, the Court found that memoranda issued by the President did not constitute enforceable, domestic law that triggers preemption analysis even though a clear conflict between the efforts of the state and the actions of the federal government exists.[23] As a result, the analysis of federal preemption of state law in matters of foreign affairs again became confusing and seemingly irreconcilable after *Medellin*.

Since that decision, courts have struggled to discern a concrete standard for foreign affairs preemption cases and the integral factors to be considered in such analyses. In response, district courts have

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19. *See* United States v. Pink, 315 U.S. 203, 233 (1942) ("No state can rewrite our foreign policy to conform to its own domestic policies."); United States v. Belmont, 301 U.S. 324, 330–33 (1937) (finding that conduct in matters of foreign affairs was exclusively reserved to the federal government and any state law that conflicted with federal law warranted preemption).

20. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 310 (1994) ("[The Commerce Clause] has long been understood . . . to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted . . . .'" (quoting Southern Pacific Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761, 769 (1945))).

21. Am. Ins. Ass'n. v. Garamendi, 539 U.S. 396, 421 (2003).

22. *See* Denning & Ramsey, *supra* note 1, at 829.

> 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. . . . Giving mere executive *policy* preemptive effect, as the Court did in *Garamendi*, bypasses these constitutional processes and concentrates power in the executive branch.

Id.

23. Medellin v. Texas, 552 U.S. 491, 522–32 (2008).

regularly distinguished these various precedents to accommodate their desired outcomes, and a uniform standard remains absent. This disjunction in lower court application of Supreme Court precedent has all but mandated an appropriate standard that is consistent with prior rulings, the rules of federalism, and constitutional requirements.

This Note discusses the emergence and evolution of the foreign affairs preemption doctrine from its creation through case law to its current unknown status after *Medellin*. Part II provides an outline of the changes the preemption doctrine has undergone through varying treatment by the Supreme Court that has caused the current dilemma. Finally, this Note discerns the current rule in such cases by arguing for a policy analysis of the *Garamendi* and *Medellin* decisions, resulting in a more straightforward analysis that mitigates the uncertainty surrounding this issue and provides more direct and uniform guidance.

II. THE GENESIS OF THE PREEMPTION DOCTRINE

Federal preemption of state law in matters of foreign affairs is a non-constitutional doctrine.[24] The foreign affairs preemption doctrine was not explicitly enumerated in the Constitution by the Founding Fathers. Nevertheless, the convention has been developed through comingling the requirements of the Supremacy Clause and the exclusive power of the federal government to act on the international stage.[25] To further complicate matters, the Judiciary has had difficulty distinguishing the roles to be played by the different

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24. *See* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 36–37 (2007) (pointing out that the Constitution never explicitly mentions foreign affairs preemption).

25. Jack Goldsmith discusses the opposing view by stating:

> The Framers chose a combined approach. And they chose to be specific about which powers were exclusive and which were concurrent. Article I, Section 10 reflects a decided preference for federal over state regulation with respect to some of the traditional "high"-agenda foreign relations issues concerning war, peace, and diplomacy. But it does not suggest that the Constitution biases federal over state power in the many other regulatory contexts traditionally regulated by states that might cause (and throughout our history have caused) foreign relations controversy—contexts that include tort and contract law, criminal law, family law, procurement law, procedural law, education, and much more.

Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2006 SUP. CT. REV. 175, 189 (2001) (citing Jack L. Goldsmith, *Federal Courts, Federalism, and Foreign Affairs*, 83 VA. L. REV. 1617, 1655–59 (1997)), http://www.law.uchicago.edu/files/files/116.JG.pdf.

branches of the federal government.[26] As a result, one explanation for the inconsistent application of the foreign affairs doctrine is the lack of a guiding constitutional principle to which judges can conform. Nevertheless, through a multitude of cases, the foreign affairs preemption doctrine has taken on a more definite shape and proven its continued relevance in an increasingly globalized world.

When federal preemption is viewed as a constitutional matter, "[f]ederal 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."[27] Generally, an enumeration of powers implies that the Framers intended for that list to be exhaustive, and there is nothing in the Constitution to suggest that the preemption authority of the three branches should be extended beyond this list.[28] Preemptive authority, in its most basic form, is a legislative power that permits the creation of law that is superior to the law promulgated by local governments.[29] Because preemption permits a shift in lawmaking authority from state governments to federal governments, the validity of the federal government's ability to act in this manner is paramount.[30] Permitting the Executive to preempt state laws absent any action by Congress is problematic because it allows the President to legislate.[31] At the same time, the federal government must be able to actively and effectively participate in international relations. These often diametrically opposed objectives are illuminated in the cases that have arisen under the federal preemption doctrine, as showcased by the Court's willingness to broaden the preemptive authority of the federal government when it deems it appropriate.[32]

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26. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 25, at 189.

27. Denning & Ramsey, *supra* note 1, at 907.

28. *See id.* ("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*.").

29. *Id.* at 907–08.

30. *See id.* at 827–28 ("One would hardly 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.").

31. *See id.* (noting that the Constitution does not explicitly give the Executive Branch alone the power of preemption).

32. *See, e.g.*, United States v. Pink, 315 U.S. 203 (1942) (giving executive agreements preemptive authority); United States v. Belmont, 301 U.S. 324 (1937) (same).

Federal preemption of state law in the area of foreign affairs has typically taken one of two forms.[33] The more obvious preemption cases involve the federal government promulgating a law or entering into an international treaty that results in a conflict with a law enacted by state governments.[34] The second type of preemption, referred to as the dormant foreign affairs power, has historically generated a much greater amount of adjudicatory inconsistency. This type of preemption occurs when the federal government relies exclusively on its authority to conduct foreign affairs as a means of overriding state legislation, whether or not the federal government has opted to exercise the type of authority addressed by the state law.[35] In other words, in cases in which the federal government possesses the exclusive authority to act, but has yet to do so, the dormant foreign affairs power allows for preemption of state law that seeks to beat the federal government to the legislative punch.

A. *Conflict Preemption*

When a state law conflicts with a federal law designed to regulate foreign affairs, the state law is often preempted. Conflict preemption occurs when "it is impossible for a private party to comply with both state and federal law . . . and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[36] When such cases arise, courts generally justify preemption by invoking the authority granted to the federal government by the Constitution.[37] In the early case of *United States v. Belmont*, the Supreme Court permitted federal preemption on the grounds that "[g]overnmental power over external affairs is not distributed, but is vested exclusively in the national government."[38] That case found that an executive agreement took precedence over state legislation and appeared to grant similar binding authority to executive agreements that foreign affairs

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

34. *Id.*

35. *Id.*

36. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

37. *See* Pozo, *supra* note 33, at 597 ("If Congress enacts a law that conflicts with a state law, the state law may be preempted based on a combination of the Supremacy Clause and the specific constitutional power that granted Congress the authority to enact the law in the first place.").

38. United States v. Belmont, 301 U.S. 324, 330 (1937).

preemption doctrine had previously given only to international treaties.[39]

Shortly thereafter, in *United States v. Pink*, the Supreme Court held that one of the powers of the President was to participate in foreign relations independent of congressional authorization in order to establish the public policy objectives of the United States.[40] Moreover, the Court extended preemptive authority to executive agreements independent of an act of Congress effectuating those executive agreements. Much later, in *Crosby v. National Foreign Trade Council*, the Supreme Court struck down a Massachusetts law that sought to impose sanctions on Burma in direct conflict with a federal law that "vested explicit authority with the President to develop a comprehensive policy toward Burma."[41] In that case, both the federal and state laws were aimed at accomplishing the same objectives, but the federal law preempted the state legislation because it "undermined the President's authority to conduct effective diplomacy, bargain and leverage with other nations, and speak for the nation with one voice."[42] The decision in *Crosby* suggested that conflict between foreign and state law could exist outside of substantive conflict and that mitigating the effectiveness of federal authority was sufficient to justify preemption. From these cases, the Supreme Court proposed that the easiest preemption cases were those in which the content of executive agreements conflicted with state legislation addressing a similar topic, but material conflict was not a prerequisite for preemption.[43] At the same time, the Court intimated that actions of the federal government did not have to carry the force of law in order to preempt state action.

However, the Court failed to provide adequate explanation of the various forms in which a sufficient conflict can manifest itself in preemption cases. In *American Insurance Ass'n v. Garamendi*, the Court found a conflict between a state law and statements made by the Executive Branch.[44] Similarly, in *Breard v. Greene*, absent a direct statement of foreign policy, the Court found a conflict by analyzing the traditional policy interests of the executive agreement.[45] From these two cases, it appears that discerning a

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39. Pozo, *supra* note 33, at 598–99.

40. United States v. Pink, 315 U.S. 203, 229 (1942).

41. Todd Steigman, *Lowering the Bar: Invalidation of State Laws Affecting Foreign Affairs Under the Dormant Foreign Affairs Power After* American Insurance Association v. Garamendi, 19 CONN. J. INT'L L. 465, 479 (2004).

42. *Id.*

43. *See id.* (explaining that, before *Garamendi,* the Court found preemption in cases where a state law conflicted with federal policy that carried the force of law).

44. *See* Denning & Ramsey, *supra* note 1, at 931 (arguing that the *Garamendi* court found preemption based only on statements made by the Executive Branch).

45. *Id.* at 934–35.

conflict in matters of foreign affairs is not a substantial hurdle in the federal government's efforts to preempt state law.

Within the realm of conflict preemption, courts have upheld federal attempts to preempt state law in instances in which a state law is "'occupying' the same field Congress has enacted a statute within," otherwise known as field preemption.[46] When an area of regulation is traditionally reserved for the federal government, the Court will strike down state laws that address that area "from conflicting, interfering, curtailing, complementing, or enforcing additional or auxiliary regulations upon the federal scheme."[47] *Hines v. Davidowitz*, a 1941 case addressing the constitutionality of state efforts to regulate aliens, reinforced the use of field preemption by preempting legislation that was "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."[48] When a conflict between state and federal law or concurrent regulation exists in a field generally reserved to the federal government, preemption of state law is easily authorized. Interestingly enough, while *Hines* was a case of statutory preemption, its reasoning and holding have been subsequently cited in matters in which the federal government has yet to exercise lawmaking authority.[49]

B. *Dormant Foreign Affairs Preemption*

The dormant foreign affairs power, as the name suggests, is not grounded in constitutional authority or congressional action, but rather arises out of "a constitutional structure that envisions material foreign affairs decisions being made at the federal level."[50] That constitutional structure, proponents argue, reflects an "overall design [that] was to endow the political branches with almost all foreign affairs powers."[51] Moreover, the Federalist Papers made reference to issues of foreign relations. One reason that the Constitutional Convention was even called was to legitimize the newly created American nation with respect to other countries.[52] Essentially, courts have historically deduced the foreign affairs power from a variety of

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46. Pozo, *supra* note 33, at 599.
47. *Id.* at 599–600 (relying on Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941), which held that the registration of aliens was a power given strictly to the federal government).
48. *Hines*, 312 U.S. at 68.
49. Denning & Ramsey, *supra* note 1, at 894.
50. *Id.* at 852.
51. Pozo, *supra* note 33, at 594.
52. *Id.*

enumerated powers that permit the federal government to unilaterally participate in international matters.[53]

The dormant foreign affairs power was most notably addressed in the 1968 case *Zschernig v. Miller*.[54] In that case, the Supreme Court addressed the issue of inheritance rights of nonresident foreign nationals.[55] The state of Oregon passed a law that prevented foreign nationals from inheriting property from any estate within Oregon absent proof that their country of origin would not confiscate that inheritance.[56] In addition, the statute called for foreign countries to provide similar rights to Americans living abroad.[57] The Court ultimately held that while matters of succession were generally within the scope of the states' authority, the manner by which Oregon sought to conduct those affairs "affect[ed] international relations in a persistent and subtle way"[58] and states could not establish regulations that "impair the effective exercise of the Nation's foreign policy"[59] and "adversely affect the power of the central government to deal with those problems."[60]

Zschernig has become the quintessential example of the dormant foreign affairs power because no treaty, international agreement, or executive order existed that addressed the issue Oregon sought to rectify, nor did the federal government act in accordance with a constitutional grant of power.[61] Rather, the Supreme Court grounded its reasoning solely in the perceived, exclusive right of the federal government to conduct foreign affairs, analogizing this power to Congress's power under the dormant commerce clause.[62] The holding in *Zschernig* evidenced a "new constitutional doctrine"[63] that suggested a state law would be overturned if its effect on foreign affairs was "more than some incidental or indirect effect" or that in some way possessed "great potential for disruption or embarrassment" to the government's ability to enact its foreign policy.[64]

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53. *See id.* at 594–95 ("[T]he dormant foreign affairs power derives from the notion that the Constitution resulted from a historical need to grant broad and exclusive powers to the federal government for the effective conduct of the nation's foreign affairs.").

54. *See* Zschernig v. Miller, 389 U.S. 429 (1968) (using the dormant foreign affairs doctrine to find an Oregon law invalid).

55. *Id.* at 430–31.

56. *Id.*

57. *Id.*

58. *Id.* at 440–41.

59. *Id.*

60. *Id.*

61. Denning & Ramsey, *supra* note 1, at 852–53.

62. *Id.* at 852–55.

63. LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 163 (2d ed. 1996).

64. *Zschernig*, 389 U.S. at 434–35.

Analysts have routinely criticized the *Zschernig* decision, and the Supreme Court, despite multiple opportunities to overrule the holding, has never explicitly chosen to do so. The principal concern with the decision is its potential watershed effect. It permits a system in which "any state law, when applied in a case involving a foreign element, is potentially subject to judicial preemption."[65] Because the decision received an inordinate amount of criticism, "the Supreme Court did not invalidate a state law under the dormant foreign affairs power for another thirty-five years."[66] However, in 1994, the case of *Barclays Bank PLC v. Franchise Tax Board of California* provided the Court an opportunity to readdress the dormant foreign affairs power. At that time, California established a system of taxation for multinational corporations.[67] The federal government had a separate method of determining the appropriate tax, and Barclays contested application of the California methodology as an unconstitutional system of multiple taxation.[68] Ultimately, the Court distinguished California's system of taxation as a regulation of commerce in general from regulation of foreign affairs. The Court determined that a state's efforts to regulate commerce rather than foreign affairs could only be preempted by express congressional action rather than "actions, statements, and amicus filings" of the Executive Branch.[69] Because Congress had contemplated enacting federal legislation addressing the issue, the Court found that Congress's decision to refrain from legislating constituted acquiescence to state efforts to regulate.[70] Therefore, Congress's inaction in an area in which they had authority to act, as well as evidence of prior legislative approval of schemes similar to the one implemented in California,[71] implicitly authorized the states to exercise independent legislative authority. This decision suggests that the Executive Branch is not authorized to preempt state actions that involve powers reserved to the Legislative Branch, i.e., commerce.[72] On the other hand, many viewed the decision in *Barclays Bank* as evidence that *Zschernig* had lost its precedential value and that the dormant foreign affairs doctrine was dead for

65. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 25, at 210.
66. Steigman, *supra* note 41, at 469.
67. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 301–03 (1994).
68. *Id.* at 302–06.
69. *Id.* at 321–33.
70. *Id.* at 324–27.
71. Denning & Ramsey, *supra* note 1, at 880–81.
72. *See* Pozo, *supra* note 33, at 596 ("[B]ecause the issue presented was one of commerce, a power of Congress rather than international relations, only a conflicting federal policy expressed by Congress, rather than the Executive branch [sic], could invalidate the law.").

good.[73] However, when *Garamendi* presented itself to the Court just short of a decade later, critics discovered that the *Zschernig* decision was still very much alive.

C. *The State of Foreign Affairs Preemption Before* Garamendi

Combining the precedents in both conflict and dormant foreign affairs preemption, the Court created for itself a convoluted roadmap that led to inconsistent destinations when confronted with seemingly similar fact patterns. The holding in *Belmont* suggested that a direct conflict between state and federal law had to exist in order to justify preemption,[74] but the holding in *Hines* permitted preemption simply if Congress previously occupied the field that the legislation sought to regulate.[75] Similarly, *Crosby* found that any state law that prevented the federal government from effectively legislating in international affairs was subject to preemption.[76] Under *Pink* and *Belmont*, it appeared that executive agreements were able to preempt state law,[77] whereas *Barclays Bank* seemed to completely undermine this proposition. At the same time, *Barclays Bank* insinuated a desire to overrule the doctrine of dormant foreign affairs preemption established in *Zschernig*,[78] yet the Court continued to apply it in subsequent cases. When *Garamendi* arrived on the Supreme Court's docket, the current status and application of the foreign affairs preemption doctrine was in question, and critics of the doctrine called for a reconciliation of conflicting precedent.

III. *GARAMENDI* AND *MEDELLIN* MUDDLE THE ANALYSIS

In light of the Supreme Court's holdings in previous cases involving foreign affairs preemption, critics of the *Zschernig* decision hoped the *Garamendi* case would finally reconcile the seemingly irreconcilable approaches the Court had taken. *Garamendi* presented the issue of the preemptive power of executive agreements in cases in which state laws impede the effectiveness of those executive agreements.[79] In *Garamendi* no direct conflict between the state law and the executive agreement existed, and Congress did not effectuate

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73. *See id.* ("Some scholars believed *Barclays Bank PLC v. Franchise Tax Board of California*, curtailed or even ended the precedential value of *Zschernig*.").

74. United States v. Belmont, 301 U.S. 324, 330–33 (1937).

75. Hines v. Davidowitz, 312 U.S. 52, 68–75 (1941).

76. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–74 (2000).

77. United States v. Pink, 315 U.S. 203, 229–32 (1942); *Belmont*, 301 U.S. at 330.

78. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328–30 (1994) (undermining the dormant foreign affairs power recognized in *Zschernig*).

79. *Belmont*, 301 U.S. at 330–32.

the agreement through legislation.[80] Yet, the Court applied the foreign affairs preemption doctrine and prohibited the state's authority to regulate.

Garamendi addressed the constitutionality of a California state law, entitled the California Holocaust Victim Insurance Relief Act of 1999 (HVIRA).[81] The Act required insurance companies that conducted business within California to disclose certain information about policies sold in Europe during the time period between 1920 and 1945 for purposes of prosecuting those companies that had acquired the insurance policies of Holocaust victims through larcenous means.[82] However, the federal government, through an executive agreement by President Clinton, enacted the German Foundation Agreement, which established a fund to reimburse Holocaust victims for insurance policies that were usurped during the Nazi occupation in Germany.[83] At the same time, the agreement permitted the Foundation to serve as the sole entity responsible for the restitution claims made against German companies that were involved during the National Socialist Era and World War II.[84] Because the purpose of HVIRA was to "'ensure the rapid resolution' of unpaid insurance claims, 'eliminating the further victimization of these policyholders and their families,'"[85] the federal government feared that the California legislation would inappropriately interfere with the effective operation of the German Foundation Agreement and sought judicial intervention as a means of approving federal preemption.[86]

In its holding, the Court invalidated HVIRA because it was an unconstitutional exercise of state authority that interfered with the federal government's ability to establish foreign policy.[87] The Court argued that California's interest in passing the statute was insufficient to permit independent state action.[88] Essentially, the Court applied a balancing test, weighing the importance of the state's interest in legislating against the severity of the conflict between the state and federal actions.[89] The Court did not provide much clarity as

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80. Pozo, *supra* note 33, at 603.

81. *Garamendi*, 539 U.S. at 401; Holocaust Victim Insurance Relief Act (HVIRA), CAL. INS. CODE §§ 13800–13807 (Deering 1999).

82. *Garamendi*, 539 U.S. at 408–11.

83. Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.–Ger., July 17, 2000, 39 I.L.M. 1298, 1299; *Garamendi*, 539 U.S. at 405.

84. *Id.* at 406.

85. *Id.* at 410 (quoting CAL. INS. CODE § 13801(e) (Deering 1999)).

86. *Garamendi*, 539 U.S. at 411.

87. *Id.* at 415–30.

88. Steigman, *supra* note 41, at 474.

89. Joseph B. Crace, Jr., Note, *Gara-Mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 217 (2004).

to the implementation of the test, but they did provide an example of when federal preemption would likely be appropriate:

> 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.[90]

The Court explained that if a state tried to effectuate a statute that was within its authority, but happened to affect foreign affairs, the existence of a conflict could tip the balance in favor of preemption that would fluctuate depending on the state interest at issue.[91]

Citing the need for uniformity in the area of foreign affairs, the Court stated that California's purported consumer protection interest was neither compelling nor persuasive. Given a weak state interest, the extent of conflict needed for preemption is smaller.[92] At the same time, the Court refused to overturn *Zschernig* and distinguished *Garamendi* as an obvious case of conflict preemption.[93] Seeming to most closely analogize the case to *Crosby*, the Court reasoned that the conflict existed between "the one-sided nature of the state approach . . . [and] the balanced, cooperative federal approach."[94] On the issue of the lack of congressional approval of the executive agreement, the Court found that Congress's inaction amounted to acquiescence and deference to the Executive's authority to conduct foreign affairs[95] rather than submission to the state's right to legislate.[96]

In her dissent, Justice Ginsberg chastised the dormant foreign affairs doctrine and argued that preemption in the absence of a federal policy was contrary to precedent and that effectuating preemption is only appropriate when the federal government has provided a "clear statement."[97] Relying on the unbinding nature of executive agreements, Ginsburg argued, "the displacement of state law . . . requires a considerably more formal and binding federal instrument."[98] Absent explicit executive or congressional intent

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90. Denning & Ramsey, *supra* note 1, at 926 (quoting *Garamendi*, 539 U.S. at 420 n.11).

91. *Id.*

92. *See* Crace, *supra* note 89, at 219 (explaining that, because California had a weak interest in *Garamendi*, any ambiguity as to whether a conflict existed would be "resolved in favor of the federal government").

93. *Id.* at 218.

94. Denning & Ramsey, *supra* note 1, at 872.

95. *Id.*

96. *Id.*

97. Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 430, 436–43 (2003) (Ginsburg, J., dissenting).

98. *Id.* at 441.

authorized through statutory or constitutional grants of power, preempting state laws is not proper simply based on "inference and implication."[99]

Garamendi provided the foundation for the understanding that "even vaguely defined federal action may be sufficient to preempt state legislation."[100] At the same time, the Court did not clarify the basis for the decision in *Zschernig*, nor its application and continuing status as binding law.[101] The Court's unwillingness to expressly overrule *Zschernig* suggested that the Supreme Court implicitly endorsed dormant foreign affairs preemption.[102] In addition, it appeared that preemption is seemingly permitted in instances in which a state attempts to regulate foreign affairs without justifying it as a "'traditional state responsibility.'"[103] Thus, presumably under the most literal reading of *Garamendi*, the Court would condone state action that served a strong traditional state interest regardless of its effect on foreign affairs.[104]

From the host of judicial decisions leading up to *Medellin v. Texas*, a series of rules can be derived. The holdings in *Pink* and *Belmont* granted preemptive and force of law power to executive agreements in matters in which conflict exists.[105] *Hines* distinguished this idea by permitting field preemption in the absence of direct conflict, arguing for the exclusive authority of the federal government to regulate registration of aliens.[106] *Zschernig* continues to serve as the paragon of the dormant foreign affairs power of the federal government, which permitted federal preemption, in the absence of federal action, on the grounds that the state's efforts unduly interfered with federal objectives.[107] Shortly thereafter, *Barclays Bank* distinguished this precedent, all but overturned it, and explained that federal preemption in foreign affairs required congressional action, but that congressional inaction could qualify as acquiescence to federal preemption.[108] Then, *Garamendi* bypassed the *Zschernig* analysis by fabricating a conflict and relying on the

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99. Denning & Ramsey, *supra* note 1, at 874 (quoting *Garamendi*, 539 U.S. at 442–43 (Ginsburg, J., dissenting)).

100. Crace, *supra* note 89, at 205.

101. Denning & Ramsey, *supra* note 1, at 877–79.

102. *See id.* ("The principal effect of the Court's discussion was to make *Zschernig* a precedent for executive policy preemption . . . .").

103. Crace, *supra* note 89, at 223 (quoting *Garamendi*, 539 U.S. at 419 n.11).

104. *Id.* ("Consequently, it is conceivable that, under the majority's analysis, a state regulation that affects foreign affairs but also regulates a 'traditional state responsibility' could survive a *Garamendi* analysis.").

105. United States v. Pink, 315 U.S. 203, 229–32 (1942); United States v. Belmont, 301 U.S. 324, 330–32 (1937).

106. Hines v. Davidowitz, 312 U.S. 52, 73–74 (1941).

107. Zschernig v. Miller, 389 U.S. 429, 440–41 (1968).

108. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 328–30 (1994).

force of law authority that had been granted to executive agreements in cases like *Pink* and *Belmont*.[109]

The *Garamendi* decision did more to complicate the analysis of foreign affairs preemption than it did to simplify it. The Court failed to clarify the scope of the dormant foreign affairs preemption doctrine, and it relied on a fact-specific balancing test rather than articulating a clear standard for foreign affairs preemption cases. Four short years later, in *Medellin v. Texas*,[110] the Supreme Court seemed to completely undermine its rationale in *Garamendi*. Rather than analyzing whether the invalidation of state law on the basis of conflict preemption or dormant foreign affairs preemption was appropriate, the Court looked to whether the federal action held the force of law.[111] Moreover, the Court refused to grant a presidential memorandum the authoritativeness previously granted to executive agreements absent explicit congressional approval.[112]

Joseph Medellin was a Mexican national convicted of rape and murder and was ultimately sentenced to death.[113] However, pursuant to the Vienna Convention on Consular Relations, to which the United States is a party, Medellin was entitled to notify the Mexican consulate of his arrest.[114] But, he was never informed of his right to do so.[115] Because he was not afforded this procedural requirement, his attorneys sought to appeal his death sentence through various adjudicative and diplomatic efforts.[116] Two such efforts involved successful litigation brought by Mexico against the United States in the International Court of Justice (ICJ),[117] as well as Medellin's personal appeal to the Texas Court of Appeals.[118] The ICJ's holding found that Medellin was entitled to "'review and reconsideration' of his conviction, notwithstanding domestic procedural rules to the contrary."[119] Consequently, President Bush,

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109. *See* Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 415–30 (2003) (holding that California law was preempted by executive agreements because it interfered with the federal government's conduct of foreign affairs).

110. 552 U.S. 491 (2008).

111. *Id.* at 524.

112. *Id.*

113. *Id.* at 500–01.

114. *Id.* at 501.

115. *Id.*

116. *Id.* at 501–04.

117. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31) (finding that the United States violated the Vienna Convention by failing to inform Medellin and the other named Mexican nationals of their Vienna Convention rights).

118. Medellin v. Dretke, 544 U.S. 660, 661 (2005) (per curiam); *Ex parte* Medellin, 223 S.W.3d 315, 322–23 (Tex. Crim. App. 2006).

119. Margaret E. McGuinness, *Three Narratives of* Medellin v. Texas, 31 SUFFOLK TRANSNAT'L L. REV. 227, 229 (2008); *see also Avena*, 2004 I.C.J. at 72 (finding that the Mexican nationals were entitled to review and reconsideration of their convictions).

through a memorandum, ordered the Texas Court of Appeals to comply with this decision.[120] The court of appeals refused and dismissed Medellin's claim.[121] Ultimately, the Supreme Court was faced with the task of determining whether state courts were bound by decisions made by the ICJ and if the President had the constitutional authority to demand compliance from the states.

Medellin argued that the ICJ's decision was binding on the states through the Supremacy, Treaty, and Take Care Clauses of the Constitution.[122] First, because the ICJ's decision was binding on the United States as a whole, in turn, the Supremacy Clause made the decision binding on the states severally.[123] Secondly, the Executive Branch's obligation to "take care that the Laws be faithfully executed" through what Medellin saw as a valid lawmaking procedure—the establishment of treaties with foreign nations—required the President to demand compliance from the states.[124] Texas, on the other hand, argued that the President's memorandum was an attempt to legislate and an unconstitutional infringement on congressional power.[125] Texas further argued that the President was invading the exclusive jurisdiction of state judiciaries and that the ICJ's decision could not be enforced in domestic courts on private parties.[126]

The Court's analysis relied heavily on the "distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."[127] In other words, certain treaties require effectuating congressional action in the absence of explicit terminology that the President intends for a treaty to be self-executing.[128] Without a provision that specifically states that the treaty is self-executing, the treaty will have no effect on the

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120. Medellin v. Texas, 552 U.S. at 503; Memorandum from President George W. Bush to Att'y Gen. Alberto R. Gonzales (Feb. 28, 2005) [hereinafter Bush Memorandum], www.brownwelsh.com/Archive/2005-03-10_Avena_compliance.pdf; McGuinness, *supra* note 119, at 229.

121. McGuinness, *supra* note 119, at 229; Medellin v. Texas, 552 U.S. at 504.

122. Reply Brief for Petitioner at 1, Medellin v. Texas, 552 U.S. 491 (2008) (No. 06–984), 2007 WL 2886606, at *1.

123. *Id.* at 3–4; *see* U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."); Medellin v. Texas, 552 U.S. at 504 (recounting Medellin's argument regarding the Supremacy and Treaty clauses of the Constitution).

124. Reply Brief for Petitioner, *supra* note 122, at 8–9; *see* U.S. CONST. art. II, § 3 ("[H]e shall take care that the laws be faithfully executed . . . ."); Medellin v. Texas, 552 U.S. at 532 (recounting Medellin's argument based upon the Take Care Clause of the Constitution).

125. Brief for Respondent at 13–16, Medellin v. Texas, 552 U.S. 491 (2008) (No. 06–984), 2007 WL 2428387, at *13–16.

126. *Id.* at 25–26.

127. Medellin v. Texas, 552 U.S. at 504.

128. *Id.* at 505.

United States unless Congress enacts legislation to supplement it as a means of applying it to the states.[129] However, even in instances where treaties constitute federal law, many courts have "presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary."[130] Thus, in *Medellin*, the Court found the Vienna Convention was not self-executing and, therefore, without congressional action, not binding on the lower courts.[131] As a result, the President's memorandum could not preempt the Texas Court of Appeals' decision to dismiss Medellin's writ of habeas corpus.[132]

Through its holding in *Medellin*, the Court circumvented the question of when treaties constitute binding domestic law and preserved for itself discretion in determining such authority on a case-by-case basis.[133] Justice Roberts distinguished between "international legal obligations and binding federal law"[134] by citing the need for congressional action to extend such legal obligations domestically.[135] Thus, future international adjudications could potentially serve as binding authority, provided that Congress explicitly authorized this "wholesale effect."[136] As a result, the Court suggested that domestic enforcement of matters of foreign affairs was a product of the symbiotic relationship between the President and Congress, whereby Congress corroborates the President's decisions by enacting enforcing legislation.[137] The President's memorandum in *Medellin* did not carry the force of law because Congress had yet to issue legislation enforcing it, and the Court did not find that congressional acquiescence to the President's action was implied.[138] The Court further distinguished this case from previous preemption cases by arguing that it was an unprecedented exercise of executive authority that infringed upon the state's inherent police power.[139]

The *Medellin* case can be most closely analogized to the case of *Breard v. Greene* because the factual circumstances of the two cases are nearly identical, yet the Court relied on different reasoning with regard to the preemption question. In 1993, Angel Francisco Breard,

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129. *Id.*
130. *Id.* at 506 n.3.
131. *Id.* at 506.
132. *Id.* at 525.
133. *Id.* at 519.
134. Mary D. Hallerman, Case Note, Medellin v. Texas*: The Treaties that Bind*, 43 U. RICH. L. REV. 797, 804 (2009).
135. *Id.*
136. Cindy Galway Buys, *The United States Supreme Court Misses the Mark: Towards Better Implementation of the United States' International Obligations*, 24 CONN. J. INT'L L. 39, 49–50 (2009) (quoting Medellin v. Texas, 552 U.S. at 520).
137. Medellin v. Texas, 552 U.S. at 520–21, 525–26.
138. *Id.* at 528.
139. *Id.* at 532.

a citizen of Paraguay, was tried, convicted of attempted rape and murder, and sentenced to death.[140] In 1994, the United States Supreme Court denied certiorari.[141] Breard argued that his conviction was invalid because his rights under the Vienna Convention had been violated.[142] Like Medellin, at the time of his arrest, Breard was not informed by arresting authorities that he was entitled to contact the Paraguayan Consulate.[143] In response, Breard filed a motion for habeas relief in federal district court.[144] However, the district court overruled his motion, stating that because he did not raise it at the state level, he forfeited his right to raise it at the federal level.[145] In response, Paraguayan officials brought suit in district court against Virginia officials, but the district court concluded it lacked subject matter jurisdiction because the Vienna Convention did not qualify as federal law under 42 U.S.C. § 1983.[146]

As an alternative, the Paraguayan officials filed suit in the ICJ seeking enforcement of the Vienna Convention.[147] The ICJ issued an order asking the United States to postpone Breard's execution pending settlement of his claims under the ICJ.[148] In Breard's writ of certiorari to the Supreme Court, he claimed that the Vienna Convention qualified under the Supremacy Clause as the supreme law of the land and thereby trumped state procedural requirements that mandated he raise his habeas corpus claim at the state level.[149] The Supreme Court responded by citing the provision of the Vienna Convention stating, "rights expressed in the Convention 'shall be exercised in conformity with the laws and regulations of the receiving State,' provided that 'said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'"[150] Consequently, Breard was required to raise his claim at the state level and, in failing to do so, sacrificed the right to raise it in subsequent proceedings.[151]

While the factual similarities between *Medellin* and *Breard* are striking, one noticeable difference accounts for the different rationales. *Breard* involved preemption of state statutory procedural requirements by the Vienna Convention treaty, a type of document

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140. Breard v. Greene, 523 U.S. 371, 372–73 (1998).
141. *Id.* at 373.
142. *Id.* at 373.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 374.
147. *Id.*
148. *Id.*
149. *Id.* at 375.
150. *Id.* (citing Vienna Convention on Consular Relations art. 36(2), Apr. 24, 1963, 21 U.S.T. 77.).
151. *Breard*, 523 U.S. at 375–76.

that the Supreme Court has routinely recognized as possessing the force of law. However, *Medellin* disallowed preemption, partially on the grounds that President Bush's memorandum requesting compliance with a ruling of the ICJ did not carry such power. The Court in *Breard* ultimately found that it lacked the authority under the Constitution to comply with the order of the ICJ.[152] In doing so, the Court bypassed analysis under the dormant foreign affairs power altogether. Had the *Breard* case arrived on the Court's docket after *Garamendi*, in which the Court found an interference with a foreign policy interest sufficient to justify preemption, the Court may have found that submitting to the authority of the ICJ was in the United States' best foreign policy interest.[153]

In *Garamendi*, the Supreme Court upheld an executive agreement's ability to preempt state law and ultimately serve as binding domestic law.[154] However, in *Medellin*, the Court found that a presidential memorandum effectuating a decision by the ICJ did not carry similar binding authority.[155] In *Garamendi*, a conflict between state law and federal action existed, while in *Medellin*, no express state law was in place with which the President's memorandum could conflict.[156] Thus, these cases beg the question, can a generally applicable rule be discerned from all of this conflicting precedent?

Since the Supreme Court's decision in *Medellin*, two lower court decisions have addressed the issue of federal preemption of state law in matters of foreign affairs,[157] and both of these courts have found preemption to be an appropriate remedy.[158] However, neither made reference to the *Medellin* decision and, instead, relied on the *Garamendi* holding that executive agreements carry preemptive weight.[159] In *Movsesian v. Versicherung*, the Ninth Circuit determined that an amendment to the California Code of Civil Procedure that provided state courts with jurisdiction over claims arising out of insurance policies held by victims of the Armenian genocide was a violation of the foreign affairs doctrine.[160] Defendants

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152. *Id.* at 376.
153. Steigman, *supra* note 41, at 483.
154. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 421, 425 (2003).
155. Medellin v. Texas, 552 U.S. 491, 530–32 (2008).
156. *Id.* at 503–04; *Garamendi*, 539 U.S. at 408–09.
157. *See* Movsesian v. Versicherung, 578 F.3d 1052, 1053 (9th Cir. 2009) (holding that presidential policy prohibiting recognition of the Armenian genocide preempted an amendment to the California Code of Civil Procedure that gave state courts jurisdiction over claims arising out of insurance policies held by victims of the Armenian genocide); Von Saher v. Norton Simon Museum of Art, 578 F.3d 1016, 1019 (9th Cir. 2009) (holding that California statute allowing individuals to file claims against museums to recover art seized by the Nazis intrudes on federal power to make and resolve war).
158. *Movsesian*, 578 F.3d at 1063; *Von Saher*, 578 F.3d at 1029.
159. *Movsesian*, 578 F.3d at 1059–60; *Von Saher*, 578 F.3d at 1025.
160. *Movsesian*, 578 F.3d at 1053.

argued the amendment was preempted by the Claims Agreement of 1922, the War Claims Act of 1928, and "the Executive Branch's policy prohibiting legislative recognition of an 'Armenian Genocide.'"[161] In its decision, the court cited *Garamendi*, stating, "presidential foreign policy itself may carry the same preemptive force as a federal statute or treaty."[162] However, the policy in *Movsesian* was embodied in letters from the President and not in an executive agreement.[163] The court overlooked this distinction and argued that the form of the policy was irrelevant.[164] The more appropriate analysis investigated the source of the President's authority to act.[165] Citing Justice Jackson's tripartite division of executive authority in *Youngstown*,[166] the court found that issues of national security and foreign relations were quintessential executive powers and, as such, presidential actions in these areas carried preemptive weight.[167] In addition, the court found that congressional deference to this type of executive authority through failed House resolutions evidenced implicit acquiescence to this kind of exercise of power, therefore eliminating the need for explicit congressional approval.[168]

The second case, *Saher v. Norton Simon Museum of Art*, addressed the issue of whether a California statute permitting individuals to file claims against museums for the recovery of art seized by the Nazis infringed on the federal government's exclusive authority to conduct foreign affairs.[169] Defendants argued that the policy adopted by President Truman at the Potsdam Conference, which called for "'external restitution,' under which the looted art was returned to the countries of origin—not to the individual owners"[170] trumped the California statute that sought restitution of property for the original owners.[171] However, this policy proved unworkable and was discontinued in 1948, though the federal government continued to engage in efforts to recover the stolen art throughout the late 1990s.[172] Because Truman's policy was no longer in effect, the California statute did not directly conflict with any federal

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161. *Id.* at 1056.
162. *Id.* (internal quotation marks omitted).
163. *Id.*
164. *Id.* at 1059.
165. *Id.*
166. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636–38 (1952) (Jackson, J., concurring) (defining a tripartite theory of presidential power).
167. *Movsesian*, 578 F.3d at 1059–60.
168. *Id.* at 1060.
169. Von Saher v. Norton Simon Museum of Art, 578 F.3d 1016, 1019 (9th Cir. 2009).
170. *Id.*
171. *Id.* at 1023; AM. COMM'N FOR THE PROT. AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, M1944, RECORDS 1943–1946, at 148 (1946).
172. *Von Saher*, 578 F.3d at 1019–20, 1024.

directive.[173] Therefore, the court applied the ruling in *Zschernig* and asked whether the statute concerned an appropriate state function or unnecessarily permeated the realm of foreign affairs.[174] The court found that while returning property to wronged victims was a legitimate goal, the state statute evidenced displeasure with the federal government's attempts to remedy the situation and ultimately sought to create a "'distinct juristic personality" from that of the United States.[175] The court permitted federal preemption on the grounds that the statute interfered with the federal government's ability to wage and resolve war.[176] Given that the restitution efforts were inextricably linked with the crimes committed by the Nazi regime during World War II, the court found that the "history of federal action is so comprehensive and pervasive as to leave no room for state legislation."[177]

These lower court decisions suggest that despite the confusion that the *Medellin* decision infused into the foreign affairs preemption analysis, perhaps the lower courts will continue to analyze foreign affairs cases under the holding in *Garamendi*. However, these cases give policy statements and letters from the President the binding authority that the presidential memorandum in *Medellin* was denied.[178] Under this analysis, it appears that the decisions in *Movsesian* and *Saher* are inconsistent with precedent. On the other hand, perhaps the court found the precedent too confusing and incompatible to discern an appropriate guiding principle. Through adding these cases to the foreign affairs preemption analysis, the question of which documents are sufficiently important to be granted the force of law becomes exponentially more complicated.

IV. LIFE AFTER *MEDELLIN*

Up until *Medellin*, precedent seemed to suggest that federal preemption required one of three scenarios: either a federal action with the force of law and a conflict; congressional action; or congressional acquiescence to preemption by a federal action of a state's interference with matters of foreign affairs that were overly

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173. *Id.* at 1025.
174. *Id.* at 1025–29.
175. *Id.* at 1027.
176. *Id.* at 1027–28.
177. *Id.* at 1029.
178. Movsesian v. Versicherung, 578 F.3d 1052, 1057 (9th Cir. 2009) (holding that the California statute "stands in the way of the President's diplomatic objectives" because it violates the policy disallowing a legislative recognition of an Armenian genocide); *Von Saher*, 578 F.3d at 1025 (stating that if the California statute had been enacted after World War II when the federal government had a policy of external restitution, the statute would have undoubtedly been preempted).

substantial. Then, in *Medellin*, the Court did not grant a presidential memorandum binding authority despite the presence of a conflict. It refused to allow for preemption and, in doing so, did not allow for congressional inaction to qualify as acquiescence as had been previously permitted in *Barclays Bank*. As a result, after *Medellin*, it appeared that the federal preemption doctrine was a fluid concept that could be adjusted and tailored to fit differing factual circumstances. In light of the Court's varying treatment of federal preemption, the *Medellin* decision can be reconciled with previous precedent by analyzing three distinct aspects of a given executive action: whether the action had the force of law, whether a state law conflicts with that executive action, and whether or not Congress has approved of the action. A summary of the role these three factors play in all of the preceding cases is provided in Appendix 1.

A. *Executive Action Carries the Force of Law*

As Appendix 1 shows, the existence or nonexistence of an executive action that carries the force of law is not dispositive in determining whether or not federal preemption of state law is appropriate. Ironically, of the cases analyzed within this Note, the Court granted only the executive agreements in *Pink* and *Belmont* the force of law.[179] Nonetheless, the Court determined that preemption was appropriate in four other cases. At the same time, the Court engaged in a discussion regarding the binding nature of executive action in *Crosby*, *Zschernig*, and *Medellin*, although it allowed for preemption in its absence. Conversely, *Garamendi* stands for the proposition that, "the federal government's foreign policy interests are sufficient, standing alone, to preempt a valid state law."[180] From these premises, one can deduce that the Court routinely recognizes that while an executive action's binding nature is neither sufficient nor necessary to allow for federal preemption of state law, it is a factor that is often considered and more readily enables the Court to justify preemption in close cases.

B. *Conflict Between State Law and Executive Action*

As previously mentioned in the discussion of field preemption, a direct conflict between state law and executive action need not exist in order to allow for federal preemption of state law in matters of foreign affairs. However, permitting federal preemption of state law is easiest in matters in which the federal government has effectuated

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179. United States v. Pink, 315 U.S. 203, 233–34 (1942); United States v. Belmont, 301 U.S. 324, 331–33 (1937).

180. Steigman, *supra* note 41, at 480.

an agreement that has the force of law and conflicts with a state law. These cases are most easily justified by invoking the Supremacy Clause.[181] Of the cases represented in Appendix 1, *Medellin* is the only case in which the Court articulated their finding of a conflict and yet refrained from allowing for preemption. In *Garamendi*, the Court manufactured a conflict in order to avoid a constitutional analysis of the foreign affairs power in favor of a statutory analysis under the Supremacy Clause.[182] *Garamendi* represents the Court's most liberal application of conflict preemption and the Court's willingness to create a conflict if one is not immediately cognizable. But, the Court found no such conflict in *Medellin*. Since *Medellin* represents the Court's most recent treatment of the federal preemption of state law in matters of foreign affairs, perhaps the case should be viewed as the exception rather than the rule.

C. *Congressional Approval*

The holdings in *Belmont* and *Zschernig* relied partially on the existence of congressional action in order to allow for preemption. In order to better understand the role that Congress plays in matters of foreign affairs preemption, an analysis of the cooperative relationship between the Executive and Legislative Branches of the federal government is beneficial. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson established a framework for determining when the Executive Branch's authority supersedes that of the Legislative:

> When the President acts in absence of either a Congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, Congressional inertia, indifference, or quiescence may sometimes, at least in a practical matter, enable, if not invite, measures of independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.[183]

When Congress authorizes the presidential action, as it did in *Belmont*, federal preemption is more readily permitted. However, the

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181. *See Pink*, 315 U.S. at 230 (stating that international compacts and agreements, like the Litvinov Assignment at issue in this case, are the law of the land under the Supremacy Clause); *see also Belmont*, 301 U.S. at 331 (recognizing the supremacy of the United States' external powers, such as treaties and international agreements, with regard to state laws or policies).

182. *See* Steigman, *supra* note 41, at 476 ("Invalidating a state law under the foreign affairs power is a constitutional decision, while ruling that a statute is preempted under the Supremacy Clause only requires a statutory analysis.").

183. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

Garamendi and *Medellin* decisions fall within the area of congressional inertia, whereby the President is implicitly authorized to act.[184] At the same time, *Garamendi* allowed for preemption and *Medellin* did not.[185] Because this inconsistency makes reconciliation of these two holdings difficult, the Court vacillates in its interpretation of congressional inertia in terms of its deference to executive action.

D. *Reconciliation*

With the assistance of Appendix 1, this Note specifically seeks to reconcile the Court's differing approaches in the *Garamendi* and *Medellin* cases for purposes of discerning a guiding principle for application in future judicial encounters with this issue. The holding in *Medellin* undermined all previous analyses of the issue, and the Court did not provide reconciliation of seemingly conflicting precedent.[186] In order to ascertain a rule that governs future approaches to this issue, the holdings in *Medellin* and *Garamendi* must be viewed as harmonious rather than disjointed.

As Appendix 1 shows, in both *Garamendi* and *Medellin* the executive action did not have the force of law and a direct conflict existed between the federal action and the state action, but Congress had yet to inject itself into the situation.[187] In *Garamendi*, congressional inaction was interpreted as a relinquishing of legislative authority to the Executive Branch rather than as condoning the state's efforts to regulate.[188] Analyzing the case under this premise suggests that congressional acquiescence is irrelevant when a state action conflicts with a foreign policy interest of the Executive Branch.[189] However, in *Medellin*, congressional inaction was viewed as sufficient to imply disapproval of the Executive's attempts to preempt state actions.[190] Taken together, these two cases present nearly identical factors yielding conflicting outcomes.

One possible explanation for this differing treatment is that the chart misrepresents the Court's approach. While all three factors are routinely taken into an account, perhaps it is not a factor analysis, but rather a balancing test similar to the one adopted in

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184. Medellin v. Texas, 552 U.S. 491, 524–25 (2008); Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414–15 (2003).

185. Medellin v. Texas, 552 U.S. at 531–32; *Garamendi*, 539 U.S. at 427.

186. *See supra* text accompanying notes 115–17.

187. Medellin v. Texas, 552 U.S. at 491; *Garamendi*, 539 U.S. at 396.

188. Steigman, *supra* note 41, at 488.

189. *Id.*

190. *See generally* Medellin v. Texas, 552 U.S. at 528 (holding that Congress had not acquiesced to the President's memorandum making the ICJ judgment at issue domestic law).

Garamendi.[191] The Court in *Medellin*, although never explicitly acknowledging it, appeared to adopt the balancing approach utilized in *Garamendi*.[192] Specifically, the Court in *Garamendi* articulated this test, stating, "the state's interest in the regulation should be balanced against the impact of the regulation on foreign relations."[193] Before *Garamendi*, conflict with a foreign policy interest, without manifestation in the form of a binding federal law, had never been sufficient to justify preemption.[194] After *Garamendi*, in *Medellin*, the Court found that while a presidential memorandum did not carry the force of law, such a finding was irrelevant because the state's interest in resolving criminal cases trumped the federal government's interest in adhering to its obligations under the Vienna Convention.

Because the Supreme Court has yet to offer a legal justification for this inconsistency, an analysis based on policy can illuminate the Judiciary's motives. *Garamendi* was a case that involved rectifying past losses of innocent victims of the Holocaust.[195] In that case, the Court took a more activist position and determined that the federal government was the more effective mechanism by which these restitution obligations could be satisfied.[196] Thus, the Court allowed preemption as a means of ensuring the same due process rights for victims among different states while simultaneously maintaining diplomatic relations with foreign nations.[197] However, the Court provided no analysis of the policy objectives of their actions.[198] Rather, the Court opted to justify, although tenuously, their decision "given the 'concern for uniformity in this country's dealing with foreign nations'"[199] and the principle that in matters of "foreign affairs the President has a degree of independent authority to act."[200] Moreover, the Court emphasized that the President has the authority to enter into executive agreements without the approval of Congress.[201]

At the same time, the Supreme Court has historically granted executive agreements preemptive authority, provided a preemptive clause is included in that agreement.[202] In *Garamendi,* the

191. *See Garamendi*, 539 U.S. at 419–20.
192. Medellin v. Texas, 552 U.S. at 536–37 (Stevens, J., concurring).
193. Steigman, *supra* note 41, at 474 (citing *Garamendi*, 539 U.S. at 419–20).
194. *Garamendi*, 539 U.S. at 442 (Ginsberg, J., dissenting).
195. *Id.* at 402–03.
196. *Id.* at 406.
197. *Id.* at 413, 442–43 (Ginsburg, J., dissenting).
198. *Id.* at 439 (Ginsburg, J., dissenting) (noting that because the HVIRA takes no position on any contemporary foreign government, it "requires no assessment of any existing foreign regime").
199. *Id.* at 413 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964)).
200. *Id.* at 414.
201. *Id.* at 415.
202. *Id.* at 416–17.

preemptive clause, which permitted the application of preemption under the holding in *Zschernig* and the dormant foreign affairs power, was absent.[203] While this paradigmatic approach sufficed for the *Garamendi* decision, it received considerable criticism after the *Medellin* decision was released.[204] Thus, the decision reflects a problematic reliance on the dormant foreign affairs power disguising the Court's greater policy objectives to provide a streamlined approach to resolving issues arising out of World War II.

In contrast, *Medellin* found that permitting preemption would have essentially allowed for the federal government to interfere with the state justice system[205] that is presumably unbiased, independent, and allows for maximum rights for the accused. The President's memorandum called for conformity with the ICJ's decision, and enforcing that decision would have deprived Medellin of a separate and independent adjudication to which he was entitled under the Due Process Clause.[206] The Court relied on the sensitivity of the foreign policy objectives that state courts would have to address.[207] The Court proceeded by likening the memorandum to a treaty that requires implementing legislation, promulgated by Congress, in order to be effectuated.[208] Under the Vienna Convention, the United States was obligated to submit Medellin to the jurisdiction of the ICJ, but there was nothing in the treaty that required the holdings of those courts to be binding on domestic courts.[209] Using *Garamendi*'s own words, adjudicating claims is a "traditional state responsibility" that

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203. *Id.* at 417.

204. *See* Edward Swaine, Remarks at the American Enterprise Institute's Legal Center for Public Interest Panel Discussion on *Medellin v. Texas*: Presidential Power and International Tribunals (Sept. 27, 2007), *reprinted in* 6 GEO. J.L. & PUB. POL'Y 160, 162 (2008).

> [S]omebody who ordinarily is in favor of strong presidential authority may balk when it comes to interfering with the rights of the states, and those who are often pro-international may have difficulties with the assertion of presidential authority. I may appear to be one of the lingering few who supports the enforcement of international obligations under these particular circumstances. But let me just identify for you the broader spectrum of opinion, which I think suggests that I'm really not at the extreme but rather somewhat more of a centrist in this regard.

Id.

205. *See* Medellin v. Texas, 552 U.S. 491, 532 (2008) (rejecting the argument that the President may, pursuant to his foreign affairs authority, "compel[] state courts to reopen final criminal judgments and set aside neutrally applicable state laws").

206. *Id.* at 503; Bush Memorandum, *supra* note 120; *see also* U.S. CONST. amend. V, § 2 ("[N]or be deprived of life, liberty, or property, without due process of law.").

207. Medellin v. Texas, 552 U.S. at 511.

208. *Id.* at 508–10.

209. *Id.* at 507–08.

should not be interfered with by the federal government.[210] Without explicitly acknowledging it, the Court actually relied on a portion of the *Garamendi* analysis in order to provide a mechanism through which they could comfortably disallow federal preemption.

Both cases utilized somewhat textual arguments, but *Garamendi* overlooked the traditional requirement that executive agreements include express clauses authorizing preemption, while *Medellin* relied fully on the text of the Vienna Convention to disallow preemption without direct congressional authorization.[211] While the Supreme Court has routinely invoked *Garamendi*'s call for uniformity in matters of foreign affairs, the Court arguably found that the need to provide a fair and independent judicial system trumped the interest in uniformity. With these precepts in mind, perhaps the decisions in *Saher* and *Movsesian* are easier to understand. Like *Garamendi*, both cases were directed at the federal government's efforts to recover property stolen from victims of genocide.[212] In *Movsesian*, the decision was made easier by legislative history that evinced preliminary efforts by Congress to legislate, which culminated in the ultimate decision to refrain from doing so.[213] As a result, congressional deference to the state's right to delegate was easily ascertainable.[214]

In *Saher*, the Court relied heavily on the "traditional state responsibility" argument, finding that California had a "legitimate interest in regulating the museums and galleries operating within its border, and preventing them from trading in and displaying Nazi-looted art."[215] However, the Court found California's interest was not strong enough to disallow preemption and utilized a field preemption analysis instead.[216] Citing the federal government's historical efforts to provide restitution to the Jewish people, the Court found no additional room for states to legislate in the area.[217] The need for negotiation rather than an adversarial approach, as well as the potential far-reaching effects that restitution orders could have on the international community, helped to justify the government's preemption of the state's efforts to legislate.[218] The three cases of

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210. *See* Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 420 n.11 (2003) ("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 . . . .").

211. Medellin v. Texas, 522 U.S. at 522–23.

212. Movsesian v. Versicherung, 578 F.3d 1052, 1053 (9th Cir. 2009); Von Saher v. Norton Simon Museum of Art, 578 F.3d 1016, 1019 (9th Cir. 2009).

213. *Movsesian*, 578 F.3d at 1057–59.

214. *Id.*

215. *Von Saher*, 578 F.3d at 1026.

216. *Id.* at 1027.

217. *Id.* at 1027–29.

218. *Id.* at 1029.

Garamendi, Movsesian, and *Saher* suggest that in matters involving the restitution obligations of Nazi looters, enforcement is best left to the federal government. If the federal government has traditionally treated the matter as a state responsibility and doing otherwise could potentially undermine the values of the American judicial system, the Court appears more reluctant to allow for federal preemption.

V. CONCLUSION

The increased implementation of the foreign affairs preemption doctrine demonstrates that, in some cases, "rather than having a presumption against preemption and in favor of concurrency, some judges have relied on a presumed special federal authority over areas related to foreign affairs . . . to find local initiatives illegal."[219] This underlying predicate has revitalized the foreign affairs preemption doctrine and permitted courts to exercise a significant amount of discretion. As a result, prior precedents involving matters of foreign affairs preemption have been reinvigorated and incorporated into the Court's newly established, seemingly dynamic approach to foreign affairs preemption jurisprudence.[220] Within the last decade, the doctrine has undergone significant changes and the conflicting results of the *Garamendi* and *Medellin* cases have required the ascertainment of a uniform principle of law.

From a results-based perspective, arguably the decisions in *Garamendi* and *Medellin* were the correct decisions.[221] In *Garamendi*, the Court recognized the cooperative spirit underlying the German Foundation Agreement and effectuated the intent of the drafters to avoid upholding state legislation that sought to undercut that spirit.[222] As a result, victims of the Nazi invasion of World War II could be compensated for their losses through a mechanism that ensured fairness and uniformity.[223] Similarly, *Medellin* upheld the independence of domestic courts from intervention by international forums for dispute resolution.[224] In the end, the independence of the American judicial system was preserved. Leaving aside the appropriateness of the decisions as a matter of ultimate consequences, the legitimacy of the decisions from a jurisprudential standpoint is difficult to determine.

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219. Resnik, *supra* note 24, at 72 (citing Lozano v. City of Hazelton, 496 F. Supp. 2d 477, 517–33 (M.D. Pa. 2007)).

220. *See* supra notes 157–78 and accompanying text.

221. Crace, *supra* note 89, at 224.

222. *Id.*

223. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 406, 422–23 (2003).

224. Medellin v. Texas, 552 U.S. 491, 529–30 (2008).

The foreign affairs preemption doctrine is one that scholars and courts have debated and adjusted for decades. Since *Zschernig*, the Supreme Court has grappled with varying approaches to questions of federal preemption of state law, both in matters in which the federal government has acted with the force of law and in situations in which they have failed to act, but argue for exclusive authority in regulating a given activity.[225] The twenty-first century decisions of *Garamendi* and *Medellin* have appeared to further complicate the situation. While the analysis of the conflict between the decisions in *Medellin* and *Garamendi* can be distilled down to three major components, reconciling these decisions requires a much more general analysis based largely on the policy preferences of the federal government and the degree of intervention with which the federal government is comfortable. *Garamendi* relied heavily on the importance of the need for uniformity in matters of foreign affairs in which the federal government is involved to the detriment of California's ability to satisfy restitution claims of local Holocaust victims.[226] *Medellin*, however, opted to preserve litigation of criminal suits as a traditional state responsibility that was immune from preemption by holdings in the ICJ under the Vienna Convention.[227] While the Court did not explicitly base its decision on these policy interests, the Court was able to distinguish the actions of Congress in both cases in order to permit broad executive authority.

The decisions of *Garamendi* and *Medellin* expanded the foreign affairs preemption doctrine to situations in which a conflict with a federal policy exists and the federal government has not yet articulated that policy. Nonetheless, this expansion may not necessarily be a negative development in the area of foreign affairs preemption. Dormant foreign affairs preemption, while somewhat subjective, "can be narrowly tailored to work without sacrificing the flexibility needed to respond to state interference with federal responsibilities."[228] While expanding preemptive authority perhaps prevents states from effectuating change in the international realm,[229] empowering the federal government with the sole authority to determine foreign policy and pursue that policy could result in an increase in the predictability of the actions of the federal government. Keeping in mind "the U.S. foreign policy on the subject, the state legislation's potentially adverse effects on that policy, the state legislation's potential adverse effect on foreign policy in general, as well as the state's own interest in legislating in the first place,"[230]

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225. Crace, *supra* note 89, at 223–24.
226. *Garamendi*, 539 U.S. at 413–14.
227. Medellin v. Texas, 552 U.S. at 520.
228. Crace, *supra* note 89, at 225.
229. *Id.* at 227.
230. *Id.* at 228–29.

courts will likely balance this multitude of factors in a manner that preserves the federal government's ability to conduct foreign affairs while simultaneously permitting state governments to participate in a system of governance that is becoming increasingly transnational.

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Appendix 1

Case	Force of Law	Conflict	Congressional Action	Preemption
No preemption problem	No	No	No	No
Belmont	Yes	Yes	Yes	Yes
Medellin	**No**	**Yes**	**No**	**No**
Barclays Bank/ Garamendi	**No**	**Yes**	**No**	**Yes**
Zschernig	No	No	Yes	Yes
Field preemption	Yes	No	Yes	Yes
Pink	Yes	Yes	No	Yes
Supremacy Clause	Yes	Yes	Yes	Yes
Movsesian	No	Yes	No	Yes
Saher	No	Yes	No	Yes