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FEDERAL PREEMPTION IN AN AGE OF GLOBALIZATION

Ryan Patton†

I. Introduction

A. Federal Preemption in an Age of Globalization

States and other sub-national units do not operate in a foreign relations vacuum. As corporations expand beyond the borders of their home countries, contact between states regulating what was once within their sole discretion has taken on international importance. Sub-national economies have economic significance on the world stage, and this significance is felt by corporations and governments that are affected by differing controls enacted by states. For instance, in 2001 California’s economy ranked as the fifth largest in the world, behind the United States, Japan, Germany, and the United Kingdom; New York, the next largest state economy, was about 60% the size of California’s. Because of such a large stake in international trade, many state and local governments engage in limited foreign relations, such as attempts to attract foreign investment or deal with regional issues that extend over national boundaries. This brings into question exactly how far U.S. states can go when dealing with foreign entities while still operating under their traditional competencies outlined in the Constitution. The federal government has jurisdiction in much out-of-state regulation thanks to the Foreign and Interstate Commerce Clauses. In addition, the

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4 “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes,” US CONST. art. 1, § 8. This statement gives the federal government the responsibility of maintaining uniform commerce between a state and other states and foreign nations. It has been enlarged in many cases (see generally Wickard v. Filburn, 317 U.S. 111 (1942)) to permit expansive regulation for interstate effects of intrastate commerce, but regulation of those effects is limited (see United States v. Lopez, 514 US 549 (1995)).
Constitution spells out prohibitions against states engaging in specific foreign affairs while reserving specific powers to the federal government. However, while the Constitution grants specific powers to the federal government as well as to the states, the framework does not cover every possibility. Because of the effects globalization has brought, what was once largely the realm of the states (the regulation of intrastate commerce) has, by the advance of technology and business sophistication, encroached upon traditional federal government powers (foreign affairs and the interstate/foreign commerce clauses). This conflict has led to a series of Supreme Court decisions addressing the question of when federal preemption of state law is applicable. The question contains pitfalls for federalism concerns when state laws, which are facially constitutional, conflict with federal interests in foreign affairs (such as multinational trade agreements and maintaining diplomatic relations). This conflict cuts to the core of the recent resurgence of federalism and states rights.

5 "No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility,"

"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."

US CONST. art. I, § 10. Thus the states are prohibited from entering into agreements with foreign nations and regulating foreign commerce; it is important to note the emphasis placed on military aspects of foreign relations.

6 "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations," "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." US CONST. art. I, § 8.

"He [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; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls." US CONST., Art II, § 2. Thus the power to make war, treaties, and maintain diplomatic relations (through ambassadors, etc.) are reserved for the federal government.

7 United States v. Curtis-Wright Export Corp., 299 U.S. 304, 318 (1936) ("...if they [the federal foreign affairs powers enumerated in the Constitution] had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality").

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of states to effectively govern within their own borders, one must ask if that applies to actions which have implications beyond their borders. Does globalization now prevent the states from acting where they otherwise could? Furthermore, may the federal government commandeer large intra-state economies for the coercive diplomatic power those economies have in foreign affairs?

B. Federal Preemption

The federalism conflict between competing state and federal interests was at one time was easy to discern, but now has been complicated by the effects of increased globalization. This conflict is met by the two main doctrines of federal preemption of state laws: affirmative preemption and dormant preemption. It is through preemption that the Courts attempt to reconcile the Constitutional Framers' intent to have the U.S. speak as one in foreign relations and the enumerated power retained by the states. While the federal government is granted significant control from the Foreign Commerce Clause and the specific enumerations on war and treaty powers, it was not abundantly clear if these powers were meant as a trump to the power and sovereignty ceded to the states. Preemption doctrine is the Court's attempt to reconcile the growing contradiction within Constitutional law as sub-national economies become more active and effective in international trade.

Affirmative preemption is applied when the federal branch (Congress or the Executive) that passed the conflicting action has actively sought to exclude the states from an area of law under the Supremacy Clause.

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9 Affirmative preemption is also known as explicit preemption.
10 ALEXANDER HAMILTON, THE FEDERALIST No. 80, 403 (Buccaneer Books, 1992) (1788) ("The peace of the whole ought not to be left at the disposal of a part"); JAMES MADISON, THE FEDERALIST No. 44 (stressing "the advantage of uniformity in all points which relate to foreign powers").
11 JAMES MADISON, THE FEDERALIST No. 45, 233, 236 (Buccaneer Books, 1992) (1788) ("T[he States will retain under the proposed Constitution a very extensive portion of active sovereignty." "The powers delegated by the proposed Constitution to the Federal Government, are few and defined."); see also Michael D. Ramsey, The Myth of Extraconstitutional Foreign Affairs Power, 42 WM AND MARY L. REV. 379. The powers granted or left to the states must be balanced with the granting of specific powers to the federal government.
12 The term sub-national economy refers both to the normal manufacturing and consumption within a state as well as the procurement and investment by the state as a market participant.
13 "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."
Thus, if Congress or the President has made an affirmative attempt to occupy a field exclusively, it will supercede any state law that attempts to occupy the same field and is not complimentary. Affirmative preemption "would be found in two cases: first, 'where it is impossible for a private party to comply with both state and federal law'; [and] second, '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.'"\(^{14}\) Most preemption cases follow this logic: when a state statute clearly conflicts with a federal action, Courts apply the Supremacy clause to preempt the state action in favor of "one voice" where the federal government has chosen to exercise that voice. In determining whether state action conflicts, the Court must be able to clearly point out the conflict, weigh the Constitutional merit of each side, and if both pass Constitutional muster, then apply the Supremacy clause to preempt the state action.

The doctrine of dormant preemption is far more reaching than simply excluding the states from areas the federal government has chosen to exclude them. The doctrine calls for a strong presumption in favor of preemption whenever the states venture into foreign affairs, absent any showing of conflict with a federal action.\(^{15}\) This requires more than a simple reading of the Constitution, relying on structural intuition,\(^ {16}\) a "jaundiced" view of state competency in foreign affairs,\(^ {17}\) and a desire to keep states from discriminating against non-residents in favor of their citizens.\(^ {18}\) In most recent cases the Court has shied away from such a broad federal power, with one notable exception\(^ {19}\) - Zschernig v. Miller.\(^ {20}\) In Zschernig, the Court struck down an Oregon probate law which barred inheritance when the recipient was in a country likely to confiscate what was inherited; state courts used this law to attack and criticize Soviet Bloc nations.\(^ {21}\) In striking the law down, the Court stated that even a state law within its core competencies and without any conflicting federal law or policy was subject to preemption solely on the grounds that a state could not criticize a foreign nation. Zschernig,

\(^ {15}\)\text{Delahunty, supra note 14, at 50.}
\(^ {16}\)\text{Ramsey, supra note 11, at 385.}
\(^ {17}\)\text{Halberstam, supra note 3, at 1025.}
\(^ {19}\)\text{Delahunty, supra note 14, at 49.}
\(^ {20}\)\text{Zschernig v. Miller, 389 US 429 (1968).}
\(^ {21}\)\text{Id. at 435.}
however, is a case thought by some commentators to be so ignored or limited to subsequently seem "either irrelevant or dead."22 Never the less, it was this case that was brought to the forefront in the recent Supreme Court decision in American Insurance Association v. Garamendi23 that has revived the concept of dormant preemption.

This Note explores the ramifications of the recent Supreme Court decision in American Insurance Association v. Garamendi; its departure from established preemption case law, its effect on otherwise valid state regulation, and any Constitutional questions the opinion leaves open.

This Note will show how the recent ruling in Garamendi will affect the application of federal preemption of state laws that are perceived to conflict with a general executive exclusivity in foreign affairs. Section II of this paper traces the recent history of major preemption cases, to demonstrate the Court's past reliance on explicit exclusions of state action by corresponding federal action. The section will focus on the Court's decision in Zschernig and how it is a deviation from the historical context of other preemption decisions, both before the decision and its relative obscurity afterwards. Section II will also provide a general analysis of Garamendi, to highlight its departure from the most recent preemption cases which will be investigated in Section III.24 Section III discusses the implications of Garamendi;25 the nature of the departure from previous cases and what detrimental effect the decision could have on state regulation that runs afoul of a foreign government. Section III will also discuss how the decision itself was inconsistent with extending preemption so far in light of the recent revival of federalism and states rights. Section IV addresses the concerns raised above, namely that the Garamendi decision is a dramatic, and perhaps unwarranted, increase in federal preemption power with serious possible repercussions. Section IV will discuss whether Garamendi will only apply in particular towards politically motivated criticisms of foreign entities, or instead if the decision is the beginning of vast preemptions against intrastate regulations that now have foreign affairs implications by virtue of globalization. Section V sets forth the conclusion.

22 Delahunty, supra note 14, at 54.
24 Notably Crosby (and other cases that relied on affirmative preemption) and the resurgent state sovereignty federalism cases.
25 In Garamendi, the state of California enacted legislation (the HVIRA) designed to force companies that insured Holocaust victims and operated within the state to publicly disclose those policies. This was found to conflict with an agreement brokered by President Clinton with foreign nations and companies on the same issues, despite not clearly dealing with the issues raised by the HVIRA and specifically not offering protection from other legal action (merely offering support).
II. Federal Preemption

A. Globalization

Globalization is a term used to describe the “intensification of trans-border networks and flows,” brought about by technological changes and techniques in the marketplace. The communications revolution and economic integration which brought about globalization have diluted a nation-state’s control over international trade and relations.

Globalization is the result of three major developments in recent years. The most obvious factor and effect of globalization is the integration of global markets into one large marketplace. This global marketplace is distinguished by the mobility of capital and the growing number of substitute locations for manufacturing and service industries. This dependence by local business on global resources, capital, and markets has made even the smallest sub-national unit responsive to prevailing norms. This responsiveness is a two-way street though, as other markets are likewise responsive, giving sub-national units the ability to effect how those norms are received elsewhere.

Another major development that contributed to the rise of globalization is the improved communications that have resulted from technological advances. These technologies are forging a new, knowledge-based economy with profound effects on economic and social life. The social effects are particularly profound; for instance, due to widespread internet connections local laws on decency (such as pornography laws in the Middle East) are no longer as effective as they once were. This loss of regulatory power is symbolic of the undercutting of traditional centralized control which national governments had enjoyed prior to globalization.

29 Spiro, supra note 27, at 671-72. See also Lester C. Thurow, Globalization: The Product of a Knowledge-Based Economy, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 19, 20 (2000) (“developing countries must provide relatively well-educated workforces, good infrastructure (electricity, telecommunications, and transportation), political stability, and a willingness to play by market rules”).
30 Spiro, supra note 27, at 693, 717.
31 Thurow, supra note 29, at 20.
32 Id. at 22-23.
Finally, globalization is marked by an increasing trend to submit disputes and relations to mediated processes. Before the era of globalization, stylized diplomacy along limited channels (along with the accompanying threat of retaliation against the whole for the actions of a component) was the norm. Diplomacy was centralized, as it was costly and difficult to deal with sub-national units; retaliation was broad when the traditional "state responsibility" doctrines applied and viewed a national government as a unitary body rather than as the sum of its components. Globalization, however, is marked by "the solution of vital problems [moving] beyond the reach of individual states and [the calling] for institutionalized commitment and cooperation on global and regional levels." This tendency towards the institutionalization of mediation between nations, postulates Professor Spiro, rather than by force or threats of force has led to the stability of states and the relations between them.

Globalization, though initially evident only by governments joining together to remove barriers (such as GATT and trade restrictions), has taken a life of its own, and is now a "tsunami wave created by a seismic shift in technology." Globalization is more than a blurring of the lines between what was traditionally within the domestic sphere and the international sphere; it is a restructuring of what those lines now mean. The combination of economic interdependency, the ease of sharing new economic and social trends through new and improved communication technologies, and an unprecedented wave of peaceful solution rather than conflict has changed the roles of national and sub-national units.

33 Spiro, supra note 27, at 662.
34 Id. at 667-68.
35 Id. 668, 680. This trend to view the whole rather than the parts explains the early reliance on "one voice" language preferred by early preemption doctrine, as explained below (see Japan Line v. County of Los Angeles, 441 US 434., 449 (1979), noting the framer's intent that "[The] Federal Government must speak with one voice when regulating commercial relations with foreign governments," citing Michelin Tire Corp. v. Wages, 423 US 276, at 285-6 (1976) (internal quotation marks omitted)).
37 Spiro, supra note 27, at 662.
38 Thurow, supra note 29, at 30.
39 Spiro, supra note 27, at 728.
B. Preemption and Zschernig

1. Pre-Zschernig: The Limitation of Preemption

a. Chy Lung, and Facially Discriminatory State Statutes

Before the Court’s decision in Zschernig, federal preemption of state laws which had foreign relations implications almost always rested upon existing federal actions. These cases usually contained concern voiced by the Court that by presenting the world with inconsistent (and sometimes virulent) policies, the union would suffer as a whole from retaliation based on those state actions. While such concerns may not be as relevant today as foreign countries have a better understanding of federalism and the division of authority and regulation, at that time there was still concern that the whole country might be punished for the actions of a few states. The early preemption cases were concerned that the states, free from diplomatic constraints, could engage in unfair or even insulting activity while leaving the federal government to clean up the mess. This concern still exists today, as some scholars wonder if the externalities created by state action can truly be avoided, even with the sophistication of foreign nations.

One of the most important cases illustrating this concern was Chy Lung v. Freeman. In 1875 the Supreme Court struck down a California statute regulating immigration. This statute differed from other states’ immigration policies in that it singled out special classes of immigrants for punitive
payments, presumably to ensure they would not be an immediate drain upon public funds.\textsuperscript{46} In the case at hand, a Chinese woman was singled out from about twenty fellow passengers, and deemed to be of a character which was "lewd and debauched," thus being held in custody pending the securement of a $500 bond.\textsuperscript{47} The Court found that the effect of this statute was to allow the Commissioner of Immigration to subjectively extort from the captains of commercial vessels transporting passengers a prohibitively large sum for those passengers deemed by the commissioner to be detrimental, in effect preventing immigration not desired by the state.\textsuperscript{48} While relying on an interpretation of the Foreign Commerce Clause to find that immigration policy was a federal matter, the Court seemed more concerned over how a foreign nation would view the actions of a "silly, [...] obstinate, or a wicked commissioner" and the effect of those actions that "may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend."\textsuperscript{49}

The Court therefore set out a very misleading standard to assure that states should avoid offending foreign powers, while still relying on direct preemption as a basis.\textsuperscript{50} Instead of simply prohibiting the state from discriminatory immigration policy contrary to the federal standard, the Court included concerns about how foreign nations might receive state activity as a proxy for the country as a whole.\textsuperscript{51} \textit{Chy Lung} distinguished the California statutes from those of its sister states in that it did not uniformly require bonds for immigrants, but only those based on the whim of the California commissioners.\textsuperscript{52} This type of open discrimination against those not adequately represented in the political process of the states has since been consistently struck down, particularly in state statutes involving immigration and treatment of aliens that do not closely mirror federal policy and go be-

\begin{footnotes}
\item[46] Id. at 277 (The statute required the state Commissioner of Immigration to inspect all foreign passengers, and gave the ability to require bonds for those found to be "is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm [who] is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease [...] a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman").
\item[47] Id. at 276.
\item[48] Id. at 278.
\item[49] Id. at 279.
\item[50] Id. at 280 ("The passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to \textit{regulate commerce with foreign nations}: the responsibility for the character of those regulations, and for the manner of their execution, belongs solely to the national government." (emphasis added)).
\item[51] Id. at 279.
\item[52] Id. at 276.
\end{footnotes}
yond paying for processing fees. For instance, in *Hines v. Davidowitz*, the Court in 1941 found that a Pennsylvania law requiring registration of resident aliens imposed additional requirements on the disclosure of information from immigrants beyond what Congress had enacted. By doing so, Pennsylvania conflicted with the "complete scheme" of the statutes enacted by Congress, even if not exactly contrary to Congressional aims. If the state action had been fully compatible with established federal immigration policy, preemption would not have been likely.

Thus, the early Court decisions were concerned that state discrimination against foreign subjects not only was preempted by Federal statutes and enumerated powers. In effect, the early Court seems to have placed themselves as hypothetical rulers of a sovereign nation, a nation that viewed the states not as sovereigns within their own borders but as proxies for their respective national government. This placed the court into the position where it decided what would be considered offensive to a sovereign in that position. Therefore, unlike in *Hines, Chy Lung* did not simply decide if the state action was preempted by existing federal powers or policies. Instead, the Court created a precedent for a subjective viewpoint in weighing the substance of state actions rather than on a purely affirmative preemption basis.

### b. The Litvinov Assignment Cases: Preemption when in Conflict with an Executive Agreement

On November 16, 1933, the United States government formally recognized the Union of Soviet Socialist Republics ("Soviet Union"). Part the agreement for recognition was the assignment of both claims against the Soviet Union stemming from the Soviet nationalization policies in 1918-1919 and assets frozen in retaliation of those policies to the United States for ultimate resolution. This arrangement came to be known as the Litvinov Assignments. Many of these claims were governed by state banking law and offered the ability to call into question the validity of the Soviet Union's seizures of private property. Legal action soon followed, and those cases

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55 *Id.* at 59-61.
56 Halberstam, supra note 3, at 1026.
57 De Canas v. Bica, 424 U.S. 351, 352 (1976) (for preemption of a compatible statute, specific intent to exclude must be contained within the statutory language; "either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas*, 355)
illustrate federal exclusivity when the federal government chose to act in a field specifically enumerated to it by the Constitution.

The two main cases concerning the Litvinov Assignments are United States v. Belmont and United States v. Pink, where the Court considered the United States taking title to the assigned assets and being obstructed by state laws prohibiting the initial Soviet seizure. The main question facing the Court in these two cases was the effect of the United States acceptance of the Litvinov Assignments and an apparent validation of the seizures by the Soviet Government. Those seizures were at odds with state banking law. In effect, because state laws did not recognize the initial seizures as valid, a subsequent assignment of those assets was seen as equally invalid. Thus, the Court was faced with the question of whether a federal treaty with explicit terms could override established (and normally dispositive) state regulations. The Pink and Belmont Courts found in favor of federal pre-emption, relying on the enumerated powers of the federal government to conduct foreign relations and the detrimental effect the state law would have upon the establishment of diplomatic relations to which the Litvinov Assignments were attached.

In Belmont, the Court was quite clear when it stated “no state policy can prevail against the international compact here involved,” that no state could sit in judgment of the acts of a foreign sovereign. This is what is known as the exclusivity principle. In certain areas, such as foreign affairs, there will be a strong presumption in favor of preemption of state action. The Belmont Court went on to add that external powers of the national government could be exercised without regard to a state law or policy that it

61 Belmont, 301 US at 330; Pink, 315 US at 234.
62 Belmont, 301 US at 327 (confiscation of bank accounts belonging to companies nationalized by the Soviet Union would be “contrary to the controlling public policy of the State of New York”); Pink, 315 US at 222 (disallowing the power of New York to deny “the validity of a claim under the Litvinov Assignment because of an overriding policy of the State which denies the validity in New York of the Russian decrees on which the assignments rest.”).
63 “[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; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls…” US CONST. art. II, § 2. Clearly, the power to negotiate and enforce treaties is within the power of the federal government. See also the Supremacy Clause, “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…” US CONST. Art. IV. Thus, when there is a clear conflict between a federal act and a state act, the state act must give way and be preempted by the federal act.
64 Belmont, 301 US at 327; Pink, 315 US at 230.
65 Id. (emphasis added).
66 Spiro, supra note 1, at 1224.
might come into conflict. Thus a state policy which predated, and would normally be applied, could be preempted by later federal action.

A few years later, the Court returned to the Litvinov Assignments to rule more broadly on the question of federal preemption and the limits the federal government could go with its treaty power in preempts otherwise-legitimate state regulation. While maintaining the position that "state law must yield when it is inconsistent with" a foreign treaty, the Court seemed to back away from the apparent complete exclusivity that Belmont granted; "[i]t is, of course, true that even treaties with foreign nations will be carefully construed so as to not derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." The overarching concern for the Pink Court was to avoid fostering "a lingering atmosphere of hostility [... ] created by state action." However, the Court qualified this concern to apply when the state action is in direct contravention to a federal action that is a key component to an international compact. Some commentators have cited Pink as reaffirming the exclusivity noted in the discussion of Belmont, and with good reason. Anything short of a treaty that is openly aimed at encroaching on state power can be argued as clearly necessary to effectuate the national policy.

Despite the strong language indicating that the Court did not look favorably at state activity with foreign implications, the case law before Zschernig had still relied on an underlying conflict between state law and a federal policy that obviously intended singularly to occupy the same area of law. In Chy Lung and Hines, the federal government had long regulated immigration policy, and was permitted to do so under the Foreign Commerce Clause. Similarly in Belmont and Pink, the federal government's use of its enumerated treaty and diplomatic powers could not suffer state impairment and hope to be effective when it was explicitly trying to be defini-

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67 Belmont, 301 US at 331.
68 This important distinction will be discussed further in Section III C in a discussion as to whether the federal government can do something though foreign relations that it otherwise could not if the policy was wholly domestic, as brought up in the Pink dissent.
69 Belmont, 301 US at 332-333 ("In so holding, we deal only with the case as now presented and with the parties now before us."). The Court returned to this question in Pink, 315 US 203.
71 Id. 230 (citing Guaranty Trust Co. v. United States, 304 US 126 at 143 (1938)).
72 Id. 232-3 (friendship between nations, the goal of the agreement to which the Litvinov assignments were an integral part, is "not likely to flourish where, contrary to national policy, a lingering atmosphere of hostility is created by state action.").
73 Id. 223 (the "recognition of the Soviet Government, the establishment of diplomatic relations with it, and the Litvinov assignments were 'all parts of one transaction, resulting in an international compact between the two governments,'" citing Belmont, 301 US at 330).
74 Chiang, supra note 53, at 944 ("[Pink] contained language advocating not just federal supremacy but federal exclusivity.").
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tive on the subject at hand. However, the aversion to state actions and their possible consequences expressed by the Court in the early opinions along side explicit preemption would alone become the basis for preemption when the Court made its controversial ruling in Zschernig v. Miller.

2. Zschernig: The Departure from Explicit Preemption

The Zschernig decision was the first time where the Court relied solely on a dormant preemptive power to exclude a state from action with foreign relations implications. It was unlike the previous preemption cases cited above in that the federal government had not moved to preempt. Zschernig was an extension of previous Court rulings, but lacked the heavy reliance on an act by the federal government by which to base preemption that had marked the earlier cases. Some scholars believe this was a response to the volatile nature of Cold War politics, a compromise born from when the consequences were profound. However, with the recent reliance by the Court in Garamendi on the Zschernig standard, that expedient fix to a unique problem seems to have instead become a general rule.

Zschernig arose in the context of an Oregon statute which barred probate courts from releasing inheritances in two instances: (1) from in-state estates to foreign recipients where the inheritance was at risk for confiscation by the foreign government, and (2) from a nation where a United States citizen could not reciprocally inherit. In doing so, the findings of the state probate courts invariably compared the rights of a citizen of Oregon and the United States in general against those of other countries, specifically those of the Communist Bloc. These opinions from the state courts were often

75 Delahunty, supra note 14, at 6. There was a relevant treaty which the Court had visited a similar California statute in Clark v. Allen, 331 US 503 (1947); however, the treaty was found only to allow the prohibition of inheriting of personal property, and the inheritance of real property must be allowed. Clark, 331 US at 516. Indeed, the Clark Court dismissed invalidating the California statute on the grounds of the Foreign Commerce Clause so far as it dealt with the bequeathment of property by US nationals to those abroad (Clark, 331 US 516-7). But the Zschernig Court specifically refused to revisit its decision in Clark, and instead invalidated the Oregon statute on the grounds it was “an intrusion by the State into the field of foreign affairs.” Zschernig, 389 US at 432.

76 Chiang, supra note 53, at 950; see also Halberstam, supra note 3, at 1067 (“by refraining from reaffirming Zschernig, the Court remained open to the idea that Massachusetts may have been justified in originally enacting the state Burma sanctions”). Thus, absent the conditions of the Cold War, namely the extreme concern fostered by the gravity of Cold War politics, then it is not entirely surprising that diplomatic difficulties caused by state action no longer warrant the position of Zschernig, as noted in the Court’s lack of applying the Zschernig standard in Crosby.

77 Spiro, supra note 1, at 1242.

78 Zschernig 389 US at 431(citing Ore. Rev. Stat. § 111.070 (1957)).

79 Id. at 440.
vitriolic and representative of Cold War animosity. Despite the filing of an *amicus curiae* brief by the Department of Justice stating that the government did not find the Oregon statute as “unduly [interfering] with the United States’ conduct of foreign relations,” the Court passed down a broad prohibition against the application of state law which has foreign affairs implications. “[E]ven in the absence of a treaty, a State’s policy *may* disturb foreign relations,” and the policy “*may* well adversely affect the power of the central government to deal with [foreign relations related] problems.” The Court determined that this was enough for preemption, regardless of whether the law is within the traditional powers of the state and not a gross intrusion into foreign relations.

Thus, the *Zschernig* Court went beyond affirmative preemption, even when the option to invoke it was available, as was suggested in the Harlan concurrence. Instead, the Court established a standard which invalidated state action when there was “more than some incidental or indirect effect” in foreign countries. Such a broad standard has dire consequences for preemption, especially in the modern age. Given that a hypothetical state is enacting a regulation within its traditional bounds, the *Zschernig* standard results in the imposition of exclusivity and nearly automatic preemption against states should their laws in any way impact or have the potential to impact foreign relations. Under *Zschernig*, the states may not “invade” the President’s sole negotiating power, even if it has not been exercised. This extreme view of federal preemption was not followed until recently in *Garamendi*; soon after the *Zschernig* opinion was delivered it was interpreted narrowly to extend no further than to prohibit judicial admonishment of foreign affairs. As demonstrated in the next subsection, subsequent cases after *Zschernig* concerning federal preemption of states in foreign

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80 *Id.* at 435 n.6 (where courts found “Russia had no separation of powers, too much control in the hands of the Communist party, no independent judiciary, confused legislation, unpublished statutes, and un repealed obsolete statutes[]; also [noting] Stalin’s crimes, the Beria trial, the doctrine of crime by analogy, Soviet xenophobia; concluding] that a leading Soviet jurist’s construction of [the Soviet Civil Code] seemed modeled after Humpty Dumpty, who said, ‘When I use a word..., it means just what I choose it to mean- neither more nor less.”).

81 *Id.* at 434.

82 *Id.* at 441 (emphasis added).

83 *Id.*

84 *Id.* at 462 (Harlan, J., concurring) (“I therefore concur in the judgment of the Court upon the sole ground that the application of the Oregon statute in this case conflicts with the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.”).

85 *Id.* 434-35.

86 Spiro, *supra* note 1, at 1242.


affairs would retreat from the broad Zschernig standard; until its revival in Garamendi, Zschernig was considered "effectively dead." 89

3. Post-Zschernig: The Return to Explicit Preemption

In the decades after Zschernig, the Court would revisit the question of federal preemption. While still echoing the concern voiced by previous Courts about the involvement of states in foreign affairs, the Court returned to reliance on specific preemption by an act of the federal government. After Zschernig and before Garamendi, this section will show that the invalidation of state actions was based the Supremacy Clause rather than solely on a presumption against state regulations having effects abroad.

In Japan Line v. County of Los Angeles, 90 the Court was faced with a tax imposed by California on shipping containers passing through the state, including those involved in international commerce. 91 This tax had the possibility of inflicting multiple taxation on foreign shippers, creating "an asymmetry in international maritime taxation operating to Japan's disadvantage." 92 While the Court was concerned "whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments," 93 Japan Line's holding still rested on that voice being manifested by the federal government in an actual agreement, in this case the Customs Convention on Containers. 94 Thus, while using strong language reminiscent of Zschernig, the language was based on explicit preemption where the federal government had engaged in a treaty in the same area covered by the state tax.

Preemption was rejected by the Court in Barclays v. California, 95 where another California tax was at question. In Barclays, California had decided on an income tax for corporations, or their affiliates or subsidiaries, doing business within the state which calculated their income on a "worldwide combined reporting basis." 96 Again, there was concern that the California tax would unfairly expose multinational corporations to multiple taxation. 97 The Court found that while both the Executive Branch and for-

89 Delahunty, supra note 14, at 54.
90 Japan Line, 441 US 434.
91 Id. at 435.
92 Id. at 453.
93 Id. at 451.
94 Id. at 452-53 (citing Customs Convention on Containers, Art. I (b) 20 U.S.T. 301, 304)
96 Id. at 302 ("California's scheme first looked to the worldwide income of the multinational enterprise, and the attributed a portion of that income (equal to the average of the proportion worldwide payroll, property, and sales located in California) to the California operations. The State imposed its tax on the income thus attributed...")
97 In this case on assets not located in the state being taxed by other, foreign sovereigns.
eign governments were opposed to the California tax calculation, it was not persuaded, especially when Congress had acted in the matter and not specifically prohibited the state action. A treaty prohibiting the federal government from using this taxation had been signed, but since tax treaties were generally considered non-binding on the states and other sub-national units, without express Congressional prohibition the states were unaffected. The Court was unmoved by Executive insistence that it could not speak with one voice alongside the state action, especially when Congress had focused on the issue and refused to prohibit the states from exercising powers specifically assigned to them by the Constitution.

Recently, the Court returned to preemption in Crosby v. National Foreign Trade Council. Here, Massachusetts passed a law sanctioning the military government of Burma by refusing to do business with companies that had dealings with that government. Three months later, the US Congress would pass a similar law, giving the President the authority to develop a comprehensive strategy for when and how to sanction Burma for its continued human rights abuses. The Court was again concerned with the effects of state action in the foreign sphere, specifically if uncoordinated responses would put the US on the political defensive. It took special note that the Massachusetts Burma law had embroiled the national government in WTO disputes. In the end, however, it still came down to statutory preemption: "the state Act stands as an obstacle in addressing the congressional obligation to devise a comprehensive, multilateral strategy"

98 Barclays, 512 US at 328, 320 (indeed, California would eventually respond to the pressure by foreign governments and reverse its tax policy). See also Delahunty, supra note 14, at 41.
99 Id. 320-24 (citing Wardair Canada Inc. v. Florida, 477 US 1 (1986)).
100 Id.
101 "The Executive statements ["proscribing States' use of worldwide combined reporting"], however, cannot perform the service for which Colgate would enlist them. The Constitution expressly grants Congress, not the President, the power to "regulate Commerce with foreign Nations" citing U.S. CONST. art. I, § 8 (emphasis in original).
"Congress has focused its attention on this issue, but has refrained from exercising its authority to prohibit [...] 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."
Id. at 328-29
102 Crosby, 530 US 363.
103 Id. at 367.
104 Id. 368-69.
105 Id. at 382 n.16.
106 Id. at 382. These disputes also highlight the international economic clout that the states individually possess. Spiro, supra note 1, at 1249-50.
granted to the discretion of the Executive Branch. In light of then-recent federalism cases invoking an increase in state sovereignty, Crosby was cautious in extending that sovereignty into foreign relations, drawing a distinction between what is ultimately a legitimate policy choice for states and what is not. Indeed the Court bypassed applying Zschernig and dormant federal preemption where First Circuit court opinions on the case had done. The Court thus drew a distinction from Barclays, that the protests by the executive branch did have weight when they were backed with specific Congressional delegation to spearhead national policy on an issue. Crosby therefore followed well-entrenched rules of conflict preemption, in that it was still based on explicit preemption. Where Congress has chosen to exclude the states through its use of the Foreign Commerce Clause, preemption was a natural result under the Supremacy Clause.

After Zschernig, the Court backed away from its stance against state regulation that had foreign affairs implications. It returned back to affirmative preemption, basing holdings on whether or not the federal government had adequately claimed the field for its own, rather than applying the Zschernig standard of almost automatically rejecting the states as soon as they treded into foreign relations. For nearly forty years the Court refused to return to Zschernig, until the recent decision in American Insurance Association v. Garamendi.

C. Garamendi and a Return to a Zschernig Standard

In 2003, the Supreme Court again returned to federal preemption when California enacted the Holocaust Victim Insurance Relief Act of 1999 (HVIRA). This legislation was California’s attempt to force insurers to publicly divulge information concerning Holocaust-era insurance policies or risk losing their license to conduct insurance business within the state. This legislation was in response to public outcry against the failure of the voluntary federal program, known as the International Commission on Holocaust Era Insurance Claims (ICHEIC), to settle existing Holocaust insurance claims. During the National Socialist era of Germany (1933-1945) the Nazi government seized the assets of Jews, including insurance policies. Some of these policies were prematurely cashed in to pay exor-

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107 Crosby, 530 US at 385 (emphasis added).
108 Tushnet, supra note 8, at 40-41.
109 Chiang, supra note 53, at 928.
110 Delahunty, supra note 14, at 2.
111 Cal Ins. Code §§13800-13806.
112 Id.
113 Garamendi, 123 S. Ct. at 2396 (Ginsburg, J. dissenting, joined by Stevens, Scalia, and Thomas).
114 Id. at 2379-80.
bitant "flight taxes" charged by the Nazi administration for Jews wishing to emigrate.\textsuperscript{115} After the pogrom in November 1938 known as Kristallnacht, the Reich government began to seize claims on insurance policies arising from the damage caused by their policies, often splitting or settling for a pittance with the insurers.\textsuperscript{116} During the Holocaust itself, many policies lapsed as Jews and other persecuted classes were unable to keep up premiums or furnish proof of death for those killed, and thus the beneficiaries were denied payments from those policies.\textsuperscript{117} Initial postwar settlement proceedings were curtailed as the Cold War required a strong West Germany as a buffer to the expansion of Soviet influence into Europe.\textsuperscript{118} Later settlements were insufficient to cover all claims, leading to a series of class-action lawsuits in American courts.\textsuperscript{119} In response to these lawsuits, the German and other governments of countries where Holocaust-era insurers were based engaged themselves and encouraged their insurance companies to enter into the ICHEIC and related funds.\textsuperscript{120}

The main question in \textit{Garamendi} was whether preemption should apply in a case where the state was acting in legitimate fashion concerning one of its traditional powers, the regulation of insurers operating in-state,\textsuperscript{121} yet was at odds with a general policy enforced by the Executive.\textsuperscript{122} The question arises because while the ICHEIC deals with voluntary disclosures by insurers and specifically denies immunity to the insurance companies from state action,\textsuperscript{123} it does occupy the field. The HVIRA deals solely with mandatory disclosures, which could have a variety of impacts beyond aiding Holocaust victims.\textsuperscript{124}

\begin{thebibliography}{124}
\bibitem{115} \textit{id.}.
\bibitem{116} \textit{id.}.
\bibitem{117} \textit{id.} at 2380.
\bibitem{118} \textit{id.} at 2381.
\bibitem{119} \textit{id.}.
\bibitem{120} \textit{id.} at 2382.
\bibitem{122} \textit{Garamendi}, 123 S. Ct. at 2385-86.
\bibitem{123} \textit{id.} at 2382 (the federal government agreed that whenever a claim was filed in an American court against a Holocaust insurer to submit a statement that "it would be in the foreign policy interests of the United States" that claims resolution stay with the ICHEIC/German Foundation). \textit{See also id.} at 2388 ("if the agreements here had expressly preempted laws like the HVIRA, the issue would be straightforward.").
\bibitem{124} \textit{id.} at 2384 (coverage of all policies, not just those issued to Holocaust victims; "necessary to protect the claims and interests of California residents."); \textit{see also} Henry Weinstein, \textit{Garamendi Wants Chairman of Holocaust Panel to Resign}, \textit{L.A. TIMES}, Sept. 26, 2003, California Metro, Part 2, Page 3 (the statute provided information to all consumers that could be useful in evaluating insurance companies).
The majority in *Garamendi* relied heavily on the *Zschernig* decision, that preemption of the HVIRA rested "on asserted interference with the foreign policy those agreements embody."¹²⁵ The Court applied *Zschernig* solely on the inference that "state laws 'must give way if they impair the effective exercise of the Nation's foreign policy,'"²⁵ not on the accepted *Shane* limitation of prohibiting state courts from using valid state laws for an excuse to criticize foreign governments.¹²⁷ The Court cites the language noted above in the discussion of *Pink* over concern that the states will stymie the executive's attempts to remove "sources of friction" following resolution of a dispute,¹²⁸ yet gloss over the underlying statutory preemption that accompanied such language in that and other opinions described earlier.

Thus, the *Garamendi* majority has revived the one part of *Zschernig* long thought irrelevant, that instead of specific preemption there is now a presumption of exclusivity against any state statute that has foreign affairs implications which may deny the President the use of the "'coercive powers of the national economy' as a tool of diplomacy."¹²⁹ *Garamendi* has brought dormant foreign affairs preemption from relative obscurity to modern case law.¹³⁰

### III. Does Garamendi Extend Preemption Too Far?

**A. Contrasting Crosby and Garamendi:**

The *Garamendi* Case demonstrates a significant departure from its immediate predecessor, *Crosby*. In *Crosby*, Justice Scalia's concurrence decried the inclusion for consideration the intent manifested by a State Department officer and statements from the sponsors of the bill, insisting that

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¹²⁵ *Id.* at 2388.
¹²⁶ *Id.* at 2389.
¹²⁷ *Shane*, 323 F. Supp. at 1332 ("It is thus apparent that every court which has considered *Zschernig*, has interpreted it to mean that judicial criticism of foreign governments is constitutionally impermissible, and the decision extends no further than that, at the present time"). Indeed, any possible litigation under the HVIRA would be hard pressed to criticize a sitting government, given that the foreign government (for the purposes of *Garamendi*, corporations working with a belligerent nation are afforded the same status as the nation itself, since finding a dividing line would be understandably difficult. *Garamendi*, 123 S. Ct. at 2387) in question was thoroughly crushed nearly sixty years ago during WWII, questioning even if a *Shane* standard would applicable should a state regulatory body use the opportunity to disparage the Nazi and Nazi-allied regimes.
¹²⁸ *Garamendi*, 123 S. Ct. at 2390.
¹²⁹ *Id.* 2391, citing *Crosby*, 530 US at 377.
¹³⁰ *Garb v. Republic of Poland*, 72 Fed. Appx. 850 (2d Cir. 2003), 855 n.1 (cautioning district courts of the new standard for weighing State Department participation and the now stark separation of powers in foreign relations).
preemption was obvious on the language of the state and federal actions.\footnote{Crosby, 530 US at 388-9 (Scalia, J., concurring).} As shown in the case synopses above, such statements of intent or opinion added little to the determination of whether a state action was preempted, and were not even mentioned in the conclusion of Crosby.\footnote{"Because the state Act’s provisions conflict with Congress’s specific delegation to the President of flexible discretion, with limitation on sanction to a limited scope of actions and actors, and with direction to develop a comprehensive, multilateral strategy under the Federal Act, it is preempted, and its application is unconstitutional, under the Supremacy Clause." \textit{Id.} at 388.} However, citing Pink, the Garamendi majority, in determining that "sources of friction" acting as an "impediment to resumption of friendly relations" existed,\footnote{\textit{Id.}, 2390-91 (citing Hearing before the Committee on House Banking and Financial Services 106th Cong., 2d Sess., 173 (2000) (Deputy Secretary of Treasury Eizenstat’s statement), n.13 ("but there is no suggestion that these high-level executive officials were not faithfully representing the President’s chosen policy").} relied heavily on statements from the executive branch despite the fact that despite no explicit protection was granted from state law by the ICHEIC; “[the U.S. Government] believe[s the ICHEIC] should be considered the exclusive remedy” for resolving Holocaust insurance claims.\footnote{As mentioned in Section B-1-\(a\); there is a concern that states will not be wholly accountable for the consequences of their actions outside their borders. Conversely, the federal government may find convenient to sacrifice the concerns of a relatively small state constituency in favor of its own problems.} Thus, the Garamendi court fulfilled the Pink decision’s "source of friction" test not on a clear conflict with a specific act, but with statements concerning how the executive branch viewed an agreement beyond the specifics included in the text itself.

This restyling of affirmative preemption is practically identical to dormant preemption. If the states are prohibited not by specific language or encompassing acts like in Crosby but merely by statements of belief by segments of the federal government, then they may find themselves at the mercy of diplomats who have their own agenda. In effect, an opposite of the "externalities" problem\footnote{As seen in the lack of a guarantee in the ICHEIC for protection against state action, something that may have raised earlier political resistance.} will take effect when concern for diplomatic tranquility may impede legitimate state concerns and actions. The Garamendi decision is problematic because it may allow the federal government to enact a treaty or agreement that is on its face non-invasive to state’s interests.\footnote{Tushnet, \textit{supra} 8, at 31.} However, through later communications from the executive branch, the same treaty can now become effectively exclusive, all the while diffusing the political responsibility for taking such an extreme action had the action been initially exclusive.\footnote{Id., 2390-91 (citing Hearing before the Committee on House Banking and Financial Services 106th Cong., 2d Sess., 173 (2000) (Deputy Secretary of Treasury Eizenstat’s statement), n.13 (“but there is no suggestion that these high-level executive officials were not faithfully representing the President’s chosen policy").}
The change in deference to post-act exclusivity based on statements from government officials (rather than exclusivity based solely on the agreements’ wording) is already apparent. After the Crosby decision, a series of 2nd Circuit cases cited to Crosby on the issue of preemption. For instance, in Bristol-Myers Squibb Company v. Rhone-Poulenc Rorer, S.A., the district court cited the Supreme Court’s reliance in Crosby on explicit preemption rather than statements by members of Congress.138 The court warned “against relying too heavily on the stated views of a small number of the members of Congress,” citing Justice Scalia’s Crosby concurrence on what was reliable indication of the meaning of an act of Congress.139 In another case citing Crosby, Mukaddam v. Permanent Mission of Saudi Arabia, the district court articulated preemption as requiring that “a state statute must legislate in an area reserved to or occupied by federal law.”140 The reliance on Crosby for affirmative preemption is clearly evident as the district court distinguished the HRL from other preempted state legislation since it did not conflict with a specific federal act.141

Compare such Crosby interpretations with a recent ruling from the 2nd Circuit Court of Appeals, Garb v. Republic of Poland.142 In an unpublished opinion the court “direct[ed] the District Courts to invite the participation of the Department of State in developing a record to support their determinations,” leaving the determination of the status of Poland’s regime at the time to the State Department.143 The court then went on to cite Garamendi in a footnote warning the District Courts that the factual inquiry into those determinations needed to respect separation-of-powers concerns, “inasmuch as the conduct of foreign relations is delegated to the political branches.”144 Instead of relying on their own determinations of the foreign sovereign immunity, 2nd District Courts must now rely heavily on the Department of State determination.

138 Bristol-Myers Squibb Company v. Rhone-Poulenc Rorer, S.A., 2001 US Dist. Lexis 19361, at 10 (2001). The case involved use of patented intermediaries in drug development, and is relevant to this discussion in its decision on how to determine Congressional intent of a phrase contained within a relevant statute. The court in this case followed Scalia’s Crosby concurrence in not giving much weight to the statements of a few members of Congress.

139 Id. (citing Crosby, 530 US at 390-1 (Scalia, J., concurring)).


141 Id. at 473.

142 Garb v. Republic of Poland, 72 Fed. Appx. 850, a case involving post-WWII Polish policies of encouraging Jewish emigration through dispossessing properties.

143 Id. at 855.

144 Id. at 855 n1.
While not conclusive, there is a significant break concerning the treatment of statements made by the political branches from the Crosby decision to Garamendi. The power of the federal government to effect change without specific action can be seen seeping into the judicial process. Instead of a Scalia-type Crosby position that would rely mostly on the court’s own findings into the status of the relevant material available, now an emphasis is placed on accepting what the political branches say. This is especially telling when the State Department is known for being hostile to state action such as the HVIRA. The warning in Garb, for district courts to remember that foreign relations is delegated to the political branches, is a reminder for them of the prime value placed on statements coming from the political branches under Garamendi.

B. Scope of Garamendi: Chilling Effect on Only Facially Discriminatory Laws?

1. Possible Effect on Nondiscriminatory Acts

What is the potential impact of the Garamendi decision? While on its face the HVIRA seemed to be discriminating against certain countries rather than a neutral law aimed at insurance regulation, the Court took relatively little notice of that possibility, relying more on its far more exhaustive analysis of federal preemption on principle, rather than in fact, to preempt the HVIRA. This brings up a chilling possibility that the lax preemption standard in Garamendi could apply to any regulation foreign corporations found bothersome and convinced their governments to complain about through diplomatic channels. The chance for conflict with increasing globalization only raises this possibility to greater likelihood, as sub-national units find their political autonomy eroding as the lines between state and international spheres becomes more blurred. As subdivisions of nations try to become more pro-active in defending their sovereignty (as is sug-

145  *Id.* at 854. In Garb, the court mentions that there is a well-established history on the US policy of sovereign immunity, though the State Department usually made “suggestions” in previous cases.


147  It should be noted that in this case, the term discriminatory refers to if and how the offending state act is targeted specifically against (or in favor of) a particular country, corporation, or individual, rather than to denote, say, a racial bias of such an act.

148  Garamendi, 123 S. Ct. at 2393.

gested by some commentators), will they run into more *Garamendi*-type walls as the federal government finds it expedient for diplomatic concerns to oppose state sovereignty?

The extension of *Garamendi* beyond acts which are facially neutral will first have to be proven to be nondiscriminatory, but most would pass such rudimentary a roadblock if the statute poses few or incidental externalities, rather than targeting a foreign entity. But once this is passed, what is to prevent the application of the *Garamendi* standard across the board, to any state action discriminatory or otherwise that a foreign government or corporation represented by the diplomatic organs of its home nation finds bothersome? What was unpersuasive in *Crosby*, namely foreign protests to the WTO, may bring new weight if backed up by a State Department more interested in diplomacy than pleasing state and local constituencies. This presents problems especially when those constituencies are concerned about which nations (and whatever customary norms they are violating) receive benefits from procurement contracts.

Of course, the federal government's position for preemption in *Garamendi* had the ICHEIC, and not just simply letters from the Executive Branch, on which to at least nominally base the preemption of the HVIRA. This may not be the roadblock it seems, however, as institutionalization of relations resulting from globalization and broad powers granted to the federal government become more commonplace. In the backdrop of threatened WTO action, a court following a *Garamendi* precedent could be swayed more by testimony and evidence pointing to the views of the executive branch, unlike the previous precedent from *Crosby*. Furthermore, under broad grants of discretion to the President by Congress, as in the International Emergency Economic Powers Act ("IEEPA"), the Executive Branch could point to a "policy of silence" in a comprehensive strategy to

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150 *Id.* at 74-75.

151 Eskridge and Ferejohn, *supra* note 18, at 1393 (finding that courts are generally more lenient with facially neutral state statutes which happen to have some effects abroad; the fewer externalities imposed on non-participating entities, the more likely the statute will be upheld).

152 *Crosby*, 530 US at 383.

153 As mentioned in Section II-A.

154 *Bristol-Myers*, 2001 US Dist. Lexis 19361 at 10 (citing *Crosby*, 390-1 (Scalia, J., concurring)); where the testimony of a few members of Congress should not be given weight far beyond the text of the passed legislation or agreement.


156 Chiang, *supra* note 53, at 960 (describing how Congress, while agreeing with the substantive ends of a state action, would want to legislatively overrule the offending state action
say something by saying nothing; by preempting the states with silence, specifically allowing them to act could be taken as indirect criticism. In this scenario, nearly any state action with foreign affairs implications could find itself under the Garamendi gun, though perhaps to a lesser degree than facially discriminatory acts.

To illustrate how the effect of Garamendi could impair even those laws that do not seem to directly affect international affairs, consider the following hypothetical loosely based on California’s ban of methyl tertiary-butyl ether (MTBE), a fuel additive. Consider a state, within its own power, which bans a chemical with proven harmful side effects (as was the case with MTBE) in favor of another chemical that has similar properties but without the similar detrimental side effects. Before Garamendi, such a law would be valid on its face unless the federal government had taken affirmative steps to preempt the states, such as issuing its own ban (that may or may not include the specific chemical) or phasing-out regimen.

Two factors have now changed what was a rather simple and predictable scenario: globalization and the Garamendi decision. As mentioned in Section II-A, a hallmark of globalization is the increased reliance on international institutions for arbitration of disputes; such an institution would be the arbitration mechanisms under the North American Free Trade Agreement (NAFTA). Under the Anti-Expropriation clauses in the NAFTA agreement signed by the United States, a Canadian company producing MTBEs claimed that California’s ban on its methanol-based product was in fact an expropriation in favor of domestically-produced ethanol substitutes rather than a true environmental policy decision. Although the long-term effect of the litigation is not yet clear, some scholars have already supposed that such litigation will severely erode a state’s ability to have its own environmental policy. Any damages under a Methanex-type complaint through NAFTA would be paid out by the United States, though undoubtedly pressure would be applied to the offending state to drop its ban to lessen the damages (it is significant to note that the ban itself would remain

157 Id.
158 For more information on the California ban on MTBEs controversy, please visit http://www.naftaclaims.com/ (last visited Mar. 12, 2004).
159 As part of their police powers to ensure the safety and well-being of their citizens.
161 Id. art. 1110.
163 Id. 103-35.
unmolested under the Anti-Expropriation clauses under NAFTA, simply that damages must be awarded for its consequences to foreign investors).\textsuperscript{164}

Added to this already bleak picture for a state’s environmental concerns now comes the Garamendi decision. Under Garamendi, the federal government would not have to even apply pressure (and thus, perhaps, a deal is struck for California’s loss of sovereignty on account of a federal treaty being interpreted in a unfavorable way) to have the California ban dropped. Using similar language to Deputy Secretary Eisenstat’s that the Garamendi majority relied so heavily on,\textsuperscript{165} the federal government can simply state it believes that NAFTA (or any similar trade agreement) “occupies the field,” even if the initial document is ambiguous or does not specifically preclude sub-national units from acting, just as the ICHEIC did not specifically preclude state action. Preemption would then largely turn on the convenience of the federal government and how it felt entitled to use state economies in shifting diplomatic concerns. If the federal government is finding itself subject to damage awards because of state action, that convenience becomes advantageous. The “pressure” mentioned above that has environmentalists worried about the continued viability of state policies could become a sledge-hammer under Garamendi. The federal government will be able to simply preempt the state law by stating that law seems to affect what the federal government believed (but did not articulate in any formal agreement) it had reserved to itself.

2. Possible Effect on Discriminatory Acts

Even if Garamendi is interpreted to apply only to discriminatory state acts rather than regulations which just happen to run afoul of foreign affairs, what effect will this have on the positive aspects those targeted acts bring? Targeted acts would resemble foreign relations more representative of diplomacy rather than the effects a facially neutral action has upon foreign commerce that happen to occur at an intrastate level. Yet these politically motivated acts have proven to be more practical for NGOs and grass roots campaigns to garner attention for their cause on a national forum.\textsuperscript{166} States have been instrumental in condemning such foreign issues as Apartheid, the Arab League’s boycott of Israel, and the plight of dissidents,\textsuperscript{167} and even in prompting federal adoption of similar measures as in Crosby.\textsuperscript{168} While the effect of Garamendi on neutral regulations may be questionable, it will cer-

\textsuperscript{164} Id. at 106.
\textsuperscript{165} Garamendi, 123 S. Ct. at 2390-91.
\textsuperscript{166} Delahunty, supra note 14, at 9.
\textsuperscript{167} Opusunju v. Giuliani, 175 Misc. 2d 541 (1997) (renaming of a street across from the Nigerian consulate after the slain wife of a Nigerian dissident).
\textsuperscript{168} Halberstam, supra note 3, at 1067 (even in being struck down, the state statute had done its job).
tainly have a negative effect on the future attempts of grassroots campaigns, limiting their effectiveness at the state level. Instead, those organizations will be forced to compete and influence legislation at the national level, where their opponents may have far more clout.169

This brings into question whether state actions with open or direct foreign affairs implications170 are practical or even desired in the age of globalization. Certainly, the effects of globalization have put it within the power of local sub-national governments to have an effect on international affairs, yet the old concerns such as a lack of concern for externalities being felt by those beyond state borders, reliance upon unitary state responsibility, "one voice" language, belief in state incompetence when dealing with international affairs linger. Is this still a valid premise upon which to deny sub-national units the ability to make use of their new power? For instance, if the threat of externalities from the repercussions of state action, such as a foreign power punishing the whole for the act of the part, has largely diminished should the Court's trepidation about allowing states to enter the foreign affairs arena be updated?171 If the unitary state model is no longer how the world views the United States and its component parts,172 is invalidating sub-national acts on the principle of "state responsibility" still relevant in the age of globalization? If the states can be successfully engaged on the international sphere (both as actors and targets of action),173 is the protective umbrella of the federal government necessary?

Take, for instance, the anti-apartheid movement of state and local agencies divesting themselves from companies that did business in South Africa during the period. These divestment policies were never directly challenged in federal court,174 though they were at odds with President

169 Delahunty, supra note 14, at 2-3.

170 Either openly targeting a country or class of countries (such as with the HVIRA), or while being facially neutral in effect applying only to one or a few countries; see Tayyari v. New Mexico 495 F. Supp. 135 (1980), (where a policy of denying admission of students from any country that held US citizens hostage was found in effect to in fact be targeting students from Iran).

171 Spiro, supra note 27, at 690-63 (there are simply too many brakes and other options (by exploiting the dependence on global markets that now exists) to allow catastrophic consequences stemming from component action as once may have been the case).

172 See Barclays, 512 US at 320 (California eventually respond to pressure by foreign governments and reverse its tax policy, indicating that foreign entities are sophisticated enough and channels developed enough to support direct interaction without going through a centralized intermediary (such as the federal government) or an end to the issue with a Supreme Court decision); see also Spiro, supra note 27, at 682.

173 Spiro, supra note 27, at 720-21 (postulating on the international condemnation of some states (notably Texas) that practiced capital punishment against juveniles, asking how much could Texas afford to lose to substitute states in lost markets and investment).

174 Spiro, supra note 146, 148; there was one state court decision that held a divestment law was not preempted: Board of Trustees v. Mayor and City Council of Baltimore, 317 Md. 72,
Regan's policy of "constructive engagement," a policy that encouraged reform with the South African government through increased contacts and using influence from those contacts.\footnote{Department of State Bulletin, January, 1984.} Under the \textit{Crosby} precedent,\footnote{Indeed, the state laws at issue in \textit{Crosby} were modeled after anti-apartheid measures. Bernard H. Oxman ed., \textit{International Decision: Crosby v. National Foreign Trade Council}. 120 S. Ct. 2288. \textit{Supreme Court of the United States, June 19, 2000}, 94 AM. J. INT'L L. 750, at 751 (2000).} the federal government would have to make it clear that its policy was intended to occupy the field; in \textit{Crosby}, this was determined by the Legislature giving the Executive full discretion in using the national economy for sanctions against Burma.\footnote{\textit{Crosby}, 530 US at 373-74.} As long as the policy of "constructive engagement" remained the executive preference in policy rather than a concrete action, it would be difficult to make a case for preemption under \textit{Crosby}, especially absent Congressional delegation of authority to the executive to make policy.

Under \textit{Garamendi}, however, the rules have changed and there is no longer the need for such explicit preemption. Instead of simply allowing the states to accept the consequences for their actions,\footnote{As a result of these policies, the states and municipalities dropped their investments in some very attractive companies, such as IBM, Ford, and Texaco- over half of the companies listed on the "Fortune 100" could be considered as doing business with South Africa and thus subject to divestment actions. Peter J. Spiro, \textit{State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs}, 72 VA. L. REV. 813, at 823 n.59 (1986). Thus, the financial effects of the divestment policies could not be taken lightly by those enacting them.} the federal government could instead respond to the detrimental effect the local divestment policies were having on US-South African relations.\footnote{\textit{Id. at 815.}} The federal executive could preempt future divestment strategies by using the strategy of combining the powers given under the IEEPA and "policy of silence"\footnote{Described in Section III-B-1.} or by later "beefing up" a "constructive engagement" policy after the fact with statements like those concerning the ICHEIC in \textit{Garamendi}, simply to maintain positive diplomatic relations with the government in question. While it is true that the federal government would then have to accept the consequences for not acting as strongly against nations with significant human rights violations, the history of such actions\footnote{Such as "constructive engagement" policy during apartheid and the lesser sanctions imposed by the Executive in the \textit{Crosby} situation.} tends to indicate that federal action will be watered-down. With the deference to the political branches expressed in post-\textit{Garamendi} cases, it could be very likely that actions styled after the
anti-apartheid divestment strategy could find themselves preempted before they had time make a significant impact.

C. Has the Court Overstated the Executive's Power to Preempt?

There is also a more fundamental problem with Garamendi, as to whether it overstates the power of the federal government to preempt, in effect to reserve the "coercive power" of the collective state economies in exclusivity, which could be considered a violation of the Anti-Commandeering doctrine.\(^\text{182}\) While at first glance a state would seem to not have any say in its use of economy in such a fashion since it is generally prohibited by the Constitution from developing a foreign policy of its own,\(^\text{183}\) the federal government would have to be equally bound by its specific grants of power concerning foreign affairs as well. This means that not all foreign affairs are automatically the realm of the federal government.\(^\text{184}\) A narrow view of reading the powers enumerated to and possessed by the national government in preemption doctrine would be more in line with the recent federalism cases, such as Printz\(^\text{185}\) and Lopez,\(^\text{186}\) where it appears that the current Court had intended to strengthen state sovereignty while limiting the discretion of the federal government.\(^\text{187}\) Before Garamendi, there had been no obvious generalized exclusion of the states from matters affecting foreign affairs\(^\text{188}\)

This was not the case with the narrow Garamendi majority, which instead chose to limit state power in favor of the Executive Branch. This brings up the possibility of violating the Anti-Commandeering principle. States now have fewer options available to them when concerning their economic regulation, while the federal government enjoys greater diplomatic leeway by using large state economies, such as California's large, $1.3 trillion-strong economy. No longer can sub-national units, for in-

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\(^{182}\) Tushnet, supra note 8, at 27; the federal government is not allowed to take control or "commandeer" the resources of a state, in particular to mandate state officials or organs to act or implement a policy of the federal government. Commandeering is seen as unfair since it uses state resources as a front for federal policy; states must not only pay for the enactment of the policy, but they may also be falsely attributed with the problems and voter displeasure the federal policy creates.

\(^{183}\) US CONST. art. 1, § 10; states are prohibited from entering into agreements with foreign nations and regulating foreign commerce

\(^{184}\) Id., Art. I § 8; the powers of the federal government are specified in the Constitution. See also Spiro, supra note 1, at 1228 (there is no "general power" of foreign relations conferred upon the federal government, nor denied to the states).

\(^{185}\) Printz, 521 US 898.

\(^{186}\) Lopez, 514 US 549.

\(^{187}\) Chiang, supra note 53, 934, 951; see also Cross, supra note 8, 58; see also Tushnet, supra note 8.

\(^{188}\) Ramsey, supra note 11, at 385.
stance, choose to exclude a foreign country from its procurement regimen even without the presence of an explicit federal policy that would preempt as in *Crosby* and the Massachusetts sanctions against Burma. *Garamendi*, by relying heavily on a general power to exclude and executive announcements showing support for the ICHEIC over the HVIRA\(^{189}\) rather than a specific manifestation of that power, has created a situation where the federal government is able to use the Court to exclude states from acting without taking the political consequences for directly doing so.

This diffusion of political responsibility goes to the heart of the Anti-Commandeering principle,\(^{190}\) albeit a less defined version of that principle. There are two forms of the Anti-Commandeering principle. Negative commandeering occurs where the federal government prevents a state from acting in furtherance of a federal policy,\(^{191}\) even a policy of silence.\(^{192}\) Positive commandeering is the placing duties on the states to act and spend resources on the national policy, which was prohibited in *Printz*. The effect of commandeering is to impose a policy that may not be popular with state constituencies, their will perhaps best demonstrated by such actions as the HVIRA and the Massachusetts Burma law, while making use of state resources; in the case of sanctions, the persuasive effect of their large economies.

While under a policy of explicit statutory preemption state constituencies could at least know where to lay the blame, whether on unresponsive state legislators or a conflicting national law which openly removed the power of the states to do so. In the case of an explicitly preempting federal policy, more attention to the policy can be brought while it is still being developed since interested constituencies can fully appreciate the effects the proposed federal action would have. This dialogue would be more helpful to the federal and explicitly preempting policy being more representative of all interested parties, rather than once it is already established and is already surprise-preempting state action. *Garamendi* changes this equation. With such a broad precedent for preemption, state action is rendered largely futile by conflicts not manifested during the development process of the federal policy. By making the standard by which preemption is applied low, the Court has inevitably allowed the federal government to commandeer state economies without explicitly saying so, which could provide a backdoor around the anti-commandeering principles.

\(^{189}\) Recall that such pronouncements were unpersuasive in *Barclays*, 512 US at 320-24.

\(^{190}\) Tushnet, *supra* note 8, at 27; Commandeering is seen as unfair since it uses state resources as a front for federal policy; states must not only pay for the enactment of the policy, but they may also be falsely attributed with the problems and voter displeasure the federal policy creates.

\(^{191}\) *Id.* at 28.

\(^{192}\) Chiang, *supra* note 53, at 960.
IV. Lasting Effects of Garamendi

A. Effect upon Facially Neutral State Policies

While *Garamendi* can easily be read to apply to nondiscriminatory acts, this is probably unlikely. One protection is the reluctance of the Court to directly attack a fundamental and well established tradition of federalism in states creating their own business regulations for local businesses; some pro-preemption scholars feel this was the motivation behind the *Barclays* decision refusing to preempt the California corporate tax,193 rather than a lack of statutory preemption as this note contends. Complimentary to this is that *Garamendi* itself did recognize a probable, impermissible intent for the HVIRA; yet the basis for this was simply that California represented only a fraction of Holocaust victims and descendants living in the United States.194

The implication of such a basis is profound. That test could be applicable to nearly any state action, except in the rare case where the state represented a majority of the interested parties, an unlikely scenario. Furthermore, the Court did recognize the merits that the HVIRA could have beyond punishing those nations and companies unfortunate enough to have a history of involvement in the Holocaust. Despite a rational, Constitutionally-permitted reason for the HVIRA, the Court nevertheless moved for preemption because of a vague conflict with federal policy and opinion.

While *Garamendi* preempted an act that could be reasonably considered facially discriminatory and could be interpreted to only apply to such cases,195 there is no substantial limit to keep its effects within those types of acts should the executive find non-discriminatory acts bothersome in diplomatic relations. As shown in the hypothetical in Section III-B-I, given the nature of some international trade agreements the federal government may find it expedient to simply preempt a state law under *Garamendi* rather than negotiate with the states to nullify the powers they enjoy under traditional federalism. This brings up significant concerns for federal action that abuses the Anti-Commandeering principle, as that principle can seemingly be circumvented after the fact by segments of the federal government. Under *Garamendi*, little more seems required than issuing opinions on how the act in question is viewed by the federal government, as long as the initial federal action occurred under its treaty-making or other powers. It is entirely plausible that the federal government would simply find it advantageous to score diplomatic points with a trading partner by recreating a trade agreement, with the costs of those points falling to the states.

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193 *Id.* at 955.

194 *Garamendi*, 123 S. Ct. at 2393.

195 As contrasted with *Barclays*, where the court found the nonpolitical act to be permissible despite intense protests from foreign sovereigns. *Barclays*, 512 US at 320, 326-67.
Garamendi cannot be dismissed entirely from endangering the status of any local regulation when foreign entities come into greater contact with sub-national units as globalization marches on. This creates an intolerable situation for those who felt states-rights was on the rise and those activists who found success at the state level for improving the lives of citizens, as with the environmental concerns outlined in Section III-B-1. It is likely that globalization will foster more trade agreements and bring more international players under the jurisdiction of state laws, creating more conflicts between those agreements and traditional state powers. Therefore, as long as the Garamendi precedent is active, it is critical that states be skeptical of any trade agreement the federal government enters into; even written statements that seem to point to the contrary, as seen in the ICHEIC, no longer shield states from preemption.

B. The Curtailment of State Targeted Actions

The effect of Garamendi on politically-targeted acts will, however, be drastic. As noted in Section III, NGOs and grassroots campaigns have found more success at the state and local level than at the national level in changing foreign policy, despite the fact that states are generally more susceptible to the flight of investment than a large national body. The problem that the broad preemption doctrine as implemented by Garamendi poses is that it quickly removes the instigating effect of state and local activity. As noted in the state sanctions against Apartheid, the federal government was forced to reexamine its policy after significant state action raised public awareness through publicity stemming from the numerous state measures. The possibility of such widespread activity is now curtailed in the wake of Garamendi, as states with similar laws begin to repeal them to conform with the Supreme Court's decision. Perhaps later in the future, when grass roots organization are attempting to raise awareness and thwart support of regimes that violate human rights, states will simply not bother if the actions are no longer likely to generate as much publicity when they will be so easily preempted.

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196 Delahunty, supra note 14, at 13. Investors will often find less difference in a neighboring state than in a neighboring country as far as education in workforce, state of infrastructure development, geographical conditions, etc. This would lead one to initially assume that states would be less willing to risk individual action.

197 Halberstam, supra note 3, at 1035.

198 Janet Elliot, Holocaust Registry Law Struck Down; Attorney General Cites California Ruling, HOUSTON CHRONICLE, Oct. 25, 2003, at Section A Pg. 31 (similar Texas state law withdrawn).
While the Court battle of the HVIRA has brought some nation-wide attention to the failings of the ICHEIC, one wonders if other causes can garner as much attention as a Supreme Court case dealing with Holocaust survivors and implementing a new, far more extensive standard for preemption, especially when they are facing case law that favors simple preemption such as Garamendi. It remains to be seen if a state seeking to impose anti-apartheid style divestment actions would be dissuaded by Garamendi. While it is certainly possible that the publicity generated by the preemption proceedings could be significant, in no way could the actions be sustained like those during the anti-apartheid period, as described in Section III-B-2, should the Executive find those actions imposing difficulty in diplomatic relations. Garamendi, with its reliance on statements from the executive branch, has opened the door for the federal executive to preempt state actions on its own.

There is also the concern that in an age of globalization, as dispute resolution moves beyond interaction between individual nations and into international bodies, that there will be a dilution of the participation of the average citizen. As Garamendi pushes such discriminatory acts to the sole discretion of the federal government, there is already a dilution of the voice expresses by state and local constituencies in favor of solutions from the national level, where NGOs and grass roots campaigns have a difficult time competing. If the trend towards more international arbitration continues, states may find themselves hoisted upon their own petard of encouraging international investment; where globalization allowed them to act since the mid-1980s, it may in the end remove that ability entirely. As state action may become more intolerable in the context of international trade regimen, and preemption doctrine expands as under the Garamendi precedent, the positive effect of state voices may be silenced where customary international law norms are falling short.

C. Constitutional Concerns

The Constitutional concerns for the Anti-Commandeering principle are unsure. There are no cases specifically prohibiting the federal government from negative commandeering. The affirmative commandeering cases

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199 2003 H.R. 1210 (bill in the House of Representatives with similar goals as the HVIRA, in response to the Garamendi decision; its success is unsure).
200 Stein, supra note 36, at 490.
201 See Section III-B-2.
202 Spiro, supra note 146, at 146.
203 Id. at 150.
204 Negative commandeering occurs where the federal government prevents a state from acting in furtherance of a federal policy.
are of limited value since they applied anti-commandeering principles to actions forced upon the state, rather than actions denied to the state. However, some scholars would find the distinction meaningless. For instance, in *Printz*, instead of Congress requiring state officials to enforce the Brady Act, it could bar the sale of handguns conditionally where state officials did not perform background checks to national standards. While certainly deserving of more study, in foreign relations the states and local sub-state governments have a demonstratably lesser standing to enact policy than for intrastate firearm regulation.

It is conceivable that the only time such Constitutional concerns would come into consideration is when Congress has not specifically used its Foreign Commerce Clause powers to bar state action. A policy relying solely on a *Garamendi*-type finding that the state economies are inherently under the domain of the executive when formulating policy, anti-commandeering trepidations may exist. In such a case where states would otherwise be able to act under the various Commerce Clause limitations, there could be anti-commandeering concerns when the states are denied the use of their own economies by dormant preemption. To respond to the likelihood of further commandeering abuses under the *Garamendi* precedent, it is likely that state and local constituencies will have to treat any federal act or policy as if it were explicitly preempting them from acting, even if there is specific language that would indicate otherwise.

V. Conclusion

With the precedent established in *Garamendi*, it is very easy for the federal government to occupy the field of a given area in foreign relations. No longer is preemption grounded on explicit exclusion of the states from acting on similar grounds. Instead, letters of support and the viewpoint of executive branch officials define the position of the federal government on an issue, rather than what any federal regulation or policy agreement may actually say, Justice Scalia’s concurring opinion in *Crosby* notwithstanding. By applying the old, “one voice” derivative language, the Court has given the federal government a free hand in what amounts to commandeering state economies for its own purposes without specifically saying it is doing so.

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205 Positive commandeering is the placing duties on the states to act and spend resources on the national policy.

206 Tushnet, *supra* note 8, at 34.

207 Quilici v. Morton Grove, 695 F.2d 261 (7th Cir. 1982), cert. denied 464 U.S. 863 (1983) (federal courts have permitted states and localities to regulate firearms, the Second Amendment seeming to make possession of firearms a federal issue notwithstanding).

208 *Garamendi*, 123 S. Ct. at 2386.

209 Such as the explicit lack of a guarantee of protection from state action in the ICHEIC. *Garamendi*, 123 S. Ct. at 2382.
This grant of power is especially meaningful for the executive branch, as they are no longer tied to the delegation of power by Congress nor by necessarily being explicit in their preemption.

*Garamendi* is indicative the benefits and pitfalls of globalization. Thirty years ago a Massachusetts Burma law or California’s HVIRA would have been improbable, even unthinkable. Because of growing realization of the world around them through improved communications, local constituencies are becoming more aware of what is going on in the world. More importantly those constituencies are becoming aware of what they can do to affect what goes on in the world as better communications highlight the interdependencies between markets. Thanks to that increased interdependency of the global market, they have learned that there are now tools at their disposal to affect change in that world. With those benefits, however, comes an increased likelihood of running afoul of a general, institutionalized international agency. Globalization has both expanded the subject matter of preemption cases, from mostly immigration to now even the most mundane local regulation, and increased the potential number of players on the international field that will take offense to the state act under review for preemption. Without globalization, a state act like the HVIRA would probably not exist; yet it is the results of globalization that knocked it down.

The precedent of *Garamendi*, however, does not take into account the balancing vulnerability that states now face thanks to globalization, as described by Professor Spiro and others. This deficiency has lead to basing preemption on “one voice” language where that voice had spoken, and had not definitively excluded state actors until later revised by statements of opinion. Unlike the clear standard for preemption set out by *Crosby* and most of its predecessors, *Garamendi* has left a troublesome uncertainty for state legislatures and grass roots organizers alike as they cope with the additional power and responsibility that globalization has bestowed upon them. The balance is now struck, as states are still open to the increased exposure of globalization while unable to capture the accompanying benefits, indeed perhaps even more limited in exercising their traditional powers than before. By not recognizing the effect that globalization has had on states, the Court has perpetuated the notion of the states as foreign-relation juveniles, while globalization has, in fact, caused them to mature rapidly into independently-operating entities within a global context.