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California, Climate, and Dormant Foreign Affairs Preemption (Again)

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ABSTRACT

After President Donald J. Trump announced the United States's intention to withdraw from the Paris Climate Agreement, political leaders from cities and states across the United States announced their intention to keep to the goals of the agreement. California led the vanguard of this movement, entering into agreements to control global temperature increases with other subnational governments from around the world. In the context of the sudden change to U.S. foreign policy on climate change, though, California's agreements became subject to possible dormant foreign affairs preemption.

This Comment analyzes dormant foreign affairs preemption issues with California's climate agreements both under the precedents set by the U.S. Supreme Court and under those set by the Ninth Circuit. Part I lays out the background of the Paris Climate Agreement, California's climate agreements, and the development of the Dormant Foreign Affairs Preemption Doctrine. Part II analyzes the foreign affairs preemption issues raised by California's climate agreements. Part III discusses the doctrinal ambiguities illuminated by the analysis in Part II, and proposes modest changes to the doctrine that would resolve some of those ambiguities.

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INTRODUCTION

On June 1, 2017, President Donald Trump announced his intention to withdraw from the Paris Climate Agreement (Agreement or Paris Agreement).¹ Shortly thereafter, sixteen states, Puerto Rico, and more than four hundred mayors expressed their intention to keep to the goals of the Agreement, with or without support from the White House.² California responded by signing its own nonbinding agreements with foreign states to establish shared climate change mitigation goals and propose mechanisms for achieving those shared goals.³

These new agreements were simply the latest developments in years of California's efforts to pursue international climate change mitigation strategies in the face of federal inaction. President Barack Obama's administration had explicitly approved these efforts; however, after the Trump administration reversed course on climate policy, California's efforts seemingly began to conflict with U.S. foreign policy on climate change, creating a possible dormant foreign affairs preemption problem.

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1. Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015, Addendum, Part Two: Action Taken by the Conference of the Parties at its Twenty-First Session, at 21, U.N. Doc. FCCC/CP/2015/10/Add.1 [hereinafter Paris Agreement].
 2. *Governors*, U.S. CLIMATE ALL., <https://www.usclimatealliance.org/alliance-principles/> [<https://perma.cc/PLA9-M8SB>] (explaining how the governors of California, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Puerto Rico, Rhode Island, Vermont, Virginia, and Washington have agreed to join the U.S. Climate Alliance, committing to keep to the goals of the Paris Climate Agreement); *Paris Climate Agreement*, CLIMATE MAYORS [hereinafter *Paris Climate Agreement*, CLIMATE MAYORS], <http://climatemayors.org/actions/paris-climate-agreement> [<https://perma.cc/B2B8-BRTM>] (detailing how four hundred and six mayors, including the mayors of Grand Rapids, Michigan, Kenosha, Wisconsin, and Houston, Texas, have joined Climate Mayors, who promise to uphold "commitments to the goals enshrined in the Paris Agreement"); see also 2017 Haw. Sess. Laws 101-06 (S.B. 559) (directing Hawaii to develop strategies to reduce greenhouse gas emissions to meet Hawaii's share of the Paris Agreement's goals, renaming and explaining the duties of the state's Climate Change Commission, and appropriating about \$100,000 for the implementation of the act).
 3. See Jessica Meyers, *China is Now Looking to California—Not Trump—to Help Lead the Fight Against Climate Change*, L.A. TIMES (June 6, 2017, 4:15 PM), <http://www.latimes.com/world/asia/la-fg-china-global-climate-20170606-story.html> [<https://perma.cc/4NC2-6YKZ>] (reporting on California Governor Jerry Brown's meeting with Chinese President Xi Jinping on climate change mitigation proposals).

When President George W. Bush's administration decided not to join the Kyoto Protocol⁴ in 2001, California responded by passing new legislation to regulate greenhouse gas emissions from cars. That sequence of events raised similar dormant foreign affairs preemption questions and will form the foundation of my argument that California's actions in 2017 are both more and less susceptible to preemption than were California's actions in 2002. The federal action taken in 2017 (withdrawal from the Paris Agreement) is stronger than the Bush administration's action in 2001, which could increase its potential preemptive power; however, the policy and goals of the federal action in 2017 are less clear than were the policy and goals of the federal action in 2001, which could diminish that action's preemptive power. And while California's actions in 2017 (making agreements with foreign subnational governments) look more like what we might think of as foreign affairs, California's 2017 actions, unlike its 2002 actions, impose no legal burdens or liabilities on anyone.

Part I of this Comment establishes the background of federal and state action and the dormant foreign affairs preemption doctrine. I discuss both the U.S. decision to join the Paris Agreement and the decision to leave. Next I review the doctrine of dormant foreign affairs preemption, as developed in both the U.S. Supreme Court and the lower federal courts. Part II explains the arguments for and against preemption of California's climate agreements under the *Zschernig*⁵ and *Garamendi*⁶ preemption frameworks, using the Kyoto Protocol as a point of departure for that analysis and concluding that, despite raising novel dormant preemption issues, the nonbinding nature of California's international agreements likely leaves nothing to preempt. Part III discusses weaknesses in dormant foreign affairs preemption doctrine as illuminated by my analysis of its application to California's climate diplomacy and considers various proposals for limiting the dormant foreign affairs preemption doctrine. Part III also proposes a modest limitation on the doctrine, an effects test that would read *Zschernig* and *Garamendi* to preclude only state actions that criticize foreign governments' conduct of their own affairs and impose legal liability on some third party.

4. Kyoto Protocol to the United National Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22.

5. *Zschernig v. Miller*, 389 U.S. 429 (1968).

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

I. BACKGROUND

A. The Paris Agreement

On December 12, 2015, parties to the United Nations Framework Convention on Climate Change (UNFCCC) agreed on the terms of the Paris Agreement.⁷ The Agreement establishes the shared goal of preventing the global average temperature from increasing more than 2.0 degrees Celsius above pre-industrial levels or if possible of holding temperature increases to 1.5 degrees Celsius. The Agreement allows signatories significant flexibility to decide how to achieve that goal.⁸ Under the Agreement, each signatory agrees to set its own successive, increasingly ambitious contribution to the overall goal every five years, termed nationally determined contributions (NDCs).⁹ The parties agree to set ambitious NDCs for themselves and commit to implementing those contributions at the domestic level, with peer and public pressure serving as the only enforcement mechanisms.¹⁰ To encourage accountability the Agreement introduces protocols for transparency in reporting,¹¹ and to encourage broad participation the Agreement calls on developed nations to support developing nations in their efforts to reduce emissions.¹² As of September 2018, 180 of the 197 parties to the UNFCCC have ratified the Paris Agreement,¹³ and every country in the world except the United States has agreed to join.¹⁴

The Agreement built on the UNFCCC, which was adopted by the United Nations, signed by President George H.W. Bush, and unanimously ratified as an Article II treaty by the U.S. Senate in 1992.¹⁵ The Paris Agreement was itself a successor to a previous agreement under the UNFCCC, the Kyoto Protocol (Protocol), adopted by the Conference of the Parties in 1997.¹⁶ The Protocol

7. Paris Agreement, *supra* note 1, at 21.

8. *Id.* art. 2.

9. *Id.* art. 4.

10. Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 311 (2016).

11. *Id.*

12. *Id.* at 310.

13. *Paris Agreement—Status of Ratification*, UNITED NATIONS CLIMATE CHANGE, http://unfccc.int/paris_agreement/items/9444.php [<https://perma.cc/5EVB-PTWE>].

14. Lisa Friedman, *Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html>.

15. See *Massachusetts v. EPA*, 549 U.S. 497, 509 (2007).

16. Kyoto Protocol to the United National Framework Convention on Climate Change, *supra* note 4.

imposed mandatory emissions limits on signatories, with stricter emissions goals for developed than for developing countries.¹⁷ This disparity in emissions goals was based on recognition that developed countries had been responsible for most of the greenhouse gases emitted in the preceding century.¹⁸ The Protocol nevertheless drew criticism from developed nations, including the United States which refused to join. The Paris Agreement was for this reason a striking success: Its widespread adoption was the result of decades of negotiations and emerged through a process one scholar compares to trench warfare.¹⁹ On the final day of the negotiation, the Agreement nearly crumbled when the United States discovered that a crucial “should” had been changed to “shall” in the final draft of the text, a change that would have rendered the agreement politically unacceptable to the United States.²⁰ But a last-minute fix saved the day,²¹ and the United States approved the final Agreement on December 12, 2015,²² and signed the Agreement on April 22, 2016.²³

On March 6, 2016, before the Paris Agreement was formally ratified, the United States submitted its first NDC, setting a target of reducing greenhouse gas emissions by 26–28 percent below 2005 levels by the year 2025 and committing to make best efforts to reach the 28 percent stretch goal.²⁴ The 2016 NDC submission promised to reduce greenhouse gas emissions by adopting new fuel economy standards for vehicles, regulating building emissions, reducing hydrofluorocarbon emissions, regulating methane emissions, and cutting carbon emissions from power plants.²⁵ Domestically, the Environmental Protection Agency (EPA) issued the Clean Power Plan (CPP)²⁶ as the central mechanism for achieving the last of these

17. *Id.*

18. *KP Introduction*, UNITED NATIONS CLIMATE CHANGE, <https://unfccc.int/process/the-kyoto-protocol> [<https://perma.cc/8CZV-QKEA>].

19. Bodansky, *supra* note 10, at 293.

20. *Id.* at 294.

21. *Id.* (noting that “shall” was changed back to “should” in the final draft).

22. Paris Agreement, *supra* note 1.

23. *Status of Treaties, Depositary*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXVII-7-d&chapter=27&clang=_en [<https://perma.cc/G9BH-GA6B>] (last updated Sep. 4, 2018) (providing a table of signatories).

24. U.S.A. FIRST NDC SUBMISSION (2016), <http://www4.unfccc.int/ndcregistry/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf> [<https://perma.cc/8P7W-SRA9>].

25. *Id.*

26. Clean Power Plan, 80 Fed. Reg. 64,661, 64,663 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

goals.²⁷ Promulgated pursuant to the Clean Air Act's section 111(d)²⁸ and effective December 22, 2015,²⁹ the CPP set emissions guidelines for states to follow in regulating power plants. The CPP would have reduced carbon emissions from the power sector by approximately 32 percent below 2005 levels by 2030.³⁰

On June 1, 2017, however, President Trump announced his intention to withdraw from the Paris Agreement.³¹ In August, the U.S. Department of State communicated to the United Nations its intent to withdraw from the Agreement when it is eligible to do so.³² A few months later, the EPA proposed to repeal the CPP.³³ EPA is currently conducting notice and comment procedures on the repeal proposal.³⁴ The decision was met with support from within the President's party but with widespread criticism in the press and around the world.³⁵ The President's withdrawal announcement and subsequent policy statements by the President, EPA Administrator Scott Pruitt,

27. *Id.*; see also Robinson Meyer, *Trump's EPA Repeals a Landmark Obama Climate Rule*, ATLANTIC (Oct. 9, 2017), <https://www.theatlantic.com/science/archive/2017/10/the-trump-administration-repeals-obamas-central-climate-rule/542403> [<https://perma.cc/G2YD-8AW4>].

28. 42 U.S.C. § 7411 (2012).

29. Clean Power Plan, *supra* note 26, at 64,662.

30. *Id.* at 64,665.

31. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

32. Media Note from Office of the Spokesperson, U.S. Dep't of State (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm> [<https://perma.cc/E2NP-F5B3>]. This communication had no legal effect because the United States cannot formally withdraw from the Paris Agreement until November 4, 2019, three years after the Agreement came into force for the United States. See, e.g., Susan Biniaz, *The U.S. Communication Regarding Intent to Withdraw From the Paris Agreement: What Does it Mean?*, COLUM. L. SCH.: CLIMATE L. BLOG (Aug. 6, 2017), <http://blogs.law.columbia.edu/climatechange/2017/08/06/the-u-s-communication-regarding-intent-to-withdraw-from-the-paris-agreement-what-does-it-mean> [<https://perma.cc/7K52-9NB7>].

33. 82 Fed. Reg. 48,035 (proposed Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60).

34. 83 Fed. Reg. 4,620 (proposed Feb. 1, 2018) (to be codified at 40 C.F.R. pt. 60).

35. See, e.g., N.Y. Daily News, (@NYDailyNews), TWITTER (June 1, 2017, 3:07 PM), <https://twitter.com/NYDailyNews/status/870401414903734273> [<https://perma.cc/SMD9-V5TR>] (showing the next day's front page and announcing the headline: "TRUMP TO WORLD: DROP DEAD"); Editorial Board, *Our Disgraceful Exit From the Paris Accord*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/opinion/trump-paris-climate-change-agreement.html>; Stewart M. Patrick, *Trump's Catastrophic Climate Decision Imperils the Planet—and Hastens American Decline*, COUNCIL ON FOREIGN REL. (June 1, 2017), <https://www.cfr.org/blog/trumps-catastrophic-climate-decision-imperils-planet-and-hastens-american-decline> [<https://perma.cc/4EQZ-ZBNL>]; Akshat Ruthi, "Eventually We'll All Be Coastal Elites": *The World's Best Reactions to Trump Quitting the Paris Agreement*, QUARTZ (June 2, 2017), <https://qz.com/997353/the-worlds-best-reactions-to-trump-quitting-the-paris-agreement> [<https://perma.cc/8QF4-4ZBZ>].

and the State Department also created confusion regarding whether the United States did, in fact, intend to permanently withdraw and about the reasoning behind the decision to leave. Several statements described the Paris Agreement as “unfair,”³⁶ and both the President and the State Department suggested that the United States would be open to renegotiating the Agreement on terms more favorable to it, without specifying what those terms might be.³⁷

B. California’s Climate Agreements

Following the federal government’s announcement that it intended to withdraw from the Paris Agreement, states, cities, and localities responded by issuing statements that they would nevertheless contribute to the goals of the Agreement. After President Trump announced that he would exit the Agreement to serve the interests of “Pittsburgh, not Paris,” Pittsburgh Mayor Bill Peduto announced that his city would nevertheless follow the guidelines of the Paris Agreement.³⁸ Former New York City Mayor Michael Bloomberg established a coalition of states and cities around the United States to work to reach the goals of the Paris Agreement.³⁹ A coalition of states led by California, New York, and Washington launched the U.S. Climate Alliance, which now has twenty-one members (including Puerto Rico) and is committed to keeping to the goals of the Paris Agreement.⁴⁰ A coalition of more than four hundred mayors

36. See News Release, EPA Press Office, Pruitt on Morning Joe: President Trump is Putting America’s Interest First (June 6, 2017), <https://www.epa.gov/newsreleases/pruitt-morning-joe-president-trump-putting-americas-interest-first> [<https://perma.cc/G45J-NQPV>] (arguing that the Paris Agreement “put . . . our country at a disadvantage economically . . . [d]espite the fact, that we had taken several significant steps” to reduce emissions reductions between 2000 and 2014, and that the emissions reduction goals set by President Barack Obama’s administration were unachievable); Donald J. Trump, U.S. President, Statement by President Trump on the Paris Climate Accord (June 1, 2017), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/> [<https://perma.cc/C8LC-HZEW>] (stating the United States will withdraw, “[b]ut we will start to negotiate, and we will see if we can make a deal that’s fair”).

37. Donald J. Trump, *supra* note 36 (stating the United States will “begin negotiations to reenter either the Paris Accord or a really entirely new transaction”); Media Note from Office of the Spokesperson, *supra* note 32 (“[The President] is open to re-engaging in the Paris Agreement . . . [on] terms that are more favorable to [the United States] . . .”).

38. Shear, *supra* note 31.

39. The “We Are Still In” declaration has been signed by ten states, nine American Indian tribes, scores of cities, and hundreds of businesses and universities. WE ARE STILL IN, <https://www.wearestillin.com/signatories> [<https://perma.cc/DU4A-C89Z>] (last visited Aug. 7, 2018).

40. About Us, U.S. CLIMATE ALL., <http://www.usclimatealliance.org/about-us/> [<https://perma.cc/EP7Y-MFL6>] (last visited Aug. 7, 2018).

has likewise pledged to the goals of the Paris Agreement.⁴¹ Hawaii went furthest, enacting legislation to promote the goals of the Paris Agreement.⁴²

Two days after President Trump announced that the United States would withdraw from the Paris Agreement, California Governor Jerry Brown left for a trip to China to discuss climate change mitigation strategies. Governor Brown met with Chinese President Xi Jinping in Beijing's Great Hall of the People to discuss global warming and signed agreements with Chinese cities, provinces, and state-owned corporations to continue to pursue the goals of the Paris Agreement.⁴³ One such agreement was with China Huadian Green Energy Company, the renewable energy arm of one of China's largest state-owned energy companies.⁴⁴

These agreements were neither the first nor the last of their kind: Over the last fifteen years, California has signed memoranda of understanding with a number of countries, including China, Peru, Norway, France, Malaysia, and Israel.⁴⁵ They include the large subnational agreement "Under 2 MOU," which

41. *Paris Climate Agreement*, CLIMATE MAYORS, *supra* note 2. A significant percentage of these mayors represent cities in states that have not joined the Climate Alliance. BLOOMBERG PHILANTHROPIES, AMERICA'S PLEDGE, AMERICA'S PLEDGE PHASE 1 REPORT: STATES, CITIES, AND BUSINESSES IN THE UNITED STATES ARE STEPPING UP ON CLIMATE ACTION 30 (2017), <https://www.bbhub.io/dotorg/sites/28/2017/11/AmericasPledgePhaseOneReportWeb.pdf> [<https://perma.cc/TDD2-8HWV>] (noting that, at the time of writing, "almost half" of the 383 cities that had joined U.S. Climate Mayors were in the thirty-six states that had not yet joined the Climate Alliance).

42. On June 6, 2017, Hawaii passed S.B. 559, which explicitly rejected the withdrawal from the Paris Agreement. 2017 Haw. Sess. Laws 101 (S.B. 559); Jonah Engel Bromwich, *Defying Trump, Hawaii Becomes First State to Pass Law Committing to Paris Climate Accord*, N.Y. TIMES (June 7, 2017), <https://www.nytimes.com/2017/06/07/climate/hawaii-climate-paris-trump.html>. The stated goal of S.B. 559 is to "document the State's commitment to combat climate change . . . aligned with the principles and contributing to the goals set by the Paris Agreement." It explains that the state intends to meet "Hawaii's share of obligations" under the Agreement, "regardless of federal action." 2017 Haw. Sess. Laws 103 (S.B. 559). The bill also directs the state to develop strategies to reduce greenhouse gas emissions to meet Hawaii's share of the Paris Agreement's goals, renames and explains the duties of the state's Climate Change Commission, and appropriates about \$100,000 for the implementation of the act. *Id.* 103–06.

43. See Meyers, *supra* note 3.

44. See *infra* note 47 (citing agreement between China Huadian Green Energy Company and the California Energy Commission). See Press Release, Chevron Corp., Chevron and China Huadian Sign Heads of Agreement for Long Term LNG Supply (Dec. 21, 2015), <https://www.chevron.com/stories/chevron-and-china-huadian-sign-heads-of-agreement-for-long-term-lng-supply> [<https://perma.cc/GC8S-Y4SE>] (stating that China Huadian Group is one of the largest power generation companies and leads gas-fired power generation in China).

45. A full list of California's "climate partnerships" is available at *Collaboration on Climate Change*, CAL. CLIMATE CHANGE, http://www.climatechange.ca.gov/climate_action_team/partnerships.html [<https://perma.cc/XM6U-A9A5>].

brings together 205 subnational and national jurisdictions from around the world to commit to goals similar to the Paris Agreement's in essentially the same terms.⁴⁶ All of California's subnational climate change memoranda, including the Under 2 MOU and the agreements with China, share two common traits: (1) They establish shared goals and propose mechanisms for achieving those shared goals,⁴⁷ and (2) they are explicitly and carefully nonbinding.⁴⁸ Those agreements are all subject to possible dormant preemption problems, but because of the special political salience of climate agreements between the United States and China, this Comment will focus on the agreements California signed in the days after the United States announced its withdrawal from the Paris Agreement.⁴⁹

46. The Under 2 MOU calls for holding the global temperature increase below 2.0 degrees Celsius beyond pre-industrial temperatures and invites signatories to set and implement their own contributions to that goal. GLOBAL CLIMATE LEADERSHIP MEMORANDUM OF UNDERSTANDING (MOU) 1 (2015) [hereinafter Under 2 MOU], https://www.gov.ca.gov/wp-content/uploads/2017/09/Under_2_MOU.pdf [<https://perma.cc/7CDJ-2PF5>].

47. CHINA HUADIAN GREEN ENERGY CO., LTD. OF CHINA & CAL. ENERGY RES. CONSERVATION & DEV. COMM'N, MEMORANDUM OF UNDERSTANDING ON COOPERATION ON ENERGY STORAGE 3-4 (June 9, 2017) [hereinafter HUADIAN MOU], http://climatechange.ca.gov/climate_action_team/intergovernmental/MOU_Huadian_Energy_Storage.pdf [<https://perma.cc/87NW-5NWN>]; MEMORANDUM OF UNDERSTANDING OF CLEAN TECHNOLOGY INNOVATION PARTNERSHIP BETWEEN HAIDIAN DISTRICT OF BEIJING OF THE PEOPLE'S REPUBLIC OF CHINA AND THE CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION 3-4 (June 7, 2017) [hereinafter HAIDIAN MOU], http://climatechange.ca.gov/climate_action_team/intergovernmental/MOU_Haidian_District_CCCTP_6-7-2017.pdf [<https://perma.cc/2RXU-HV2R>]; MEMORANDUM OF UNDERSTANDING TO ENHANCE THE COOPERATION ON GREEN BUILDING AND LOW-CARBON URBAN DEVELOPMENT BETWEEN THE CENTER OF SCIENCE AND TECHNOLOGY & INDUSTRIALIZATION DEVELOPMENT OF MINISTRY OF HOUSING AND URBAN-RURAL DEVELOPMENT OF THE P.R. CHINA AND THE CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA OF THE UNITED STATES OF AMERICA (Oct. 31, 2017) [hereinafter MINISTRY OF HOUSING MOU], http://climatechange.ca.gov/climate_action_team/intergovernmental/MOU-Center_for_Science_and_Technology_and_Industrialization_Development_MoHURD_Green_Building.pdf [<https://perma.cc/N4M7-4KM7>].

48. HAIDIAN MOU, *supra* note 47, at 10, 12 ("This MOU serves only as a record of the Participants' intentions and does not constitute or create any legally binding or enforceable rights or obligations, expressed or implied . . . This MOU is neither a contract nor a treaty."); HUADIAN MOU, *supra* note 47, at 10, 12 (same).

49. This Comment goes to print on the heels of California's Global Climate Action Summit, see *About the Summit*, GLOBAL CLIMATE ACTION SUMMIT, <https://www.globalclimateactions summit.org/about-the-summit/> [<https://perma.cc/6KSG-S9KS>], which was attended by governors, mayors, large companies, and foreign climate negotiators. Brad Plumer, *California Had Its Own Climate Summit. Now What?*, N.Y. TIMES (Sept. 15, 2018), <https://www.nytimes.com/2018/09/15/climate/california-climate-summit.html>.

C. Dormant Foreign Affairs Preemption

The Supremacy Clause dictates that federal law is the supreme law of the United States.⁵⁰ For this reason, state law will be preempted if it comes into conflict with federal law. Preemption may be express or implied in the domestic context, but express preemption is rare in the context of foreign affairs.⁵¹ Implied preemption may take two forms: conflict preemption and field preemption.⁵² Conflict preemption arises when state law conflicts with or obstructs the operation of a particular federal law or policy.⁵³ Field preemption arises when state law conflicts with or obstructs the operation of federal policy; however, whereas conflict preemption is triggered by a particular federal rule or policy, field preemption is triggered when the federal government's network of rules and policies has "occupied the field" in a particular subject area, leaving no room for a state to maneuver.⁵⁴

Dormant foreign affairs preemption is best seen as a species of field preemption.⁵⁵ But unlike ordinary field preemption, dormant foreign affairs preemption does not even require the federal government to have occupied the field. The doctrine rests on the idea that the federal government has exclusive power in the field of foreign affairs⁵⁶ and so holds that state action that interferes with foreign affairs can be preempted even in the absence of a controlling treaty or law.

The Supreme Court has considered dormant foreign affairs preemption only twice, more than three decades apart: first in *Zschernig v. Miller*,⁵⁷ then in *American Insurance Ass'n v. Garamendi*.⁵⁸ The lower courts have used the doctrine more frequently, and the Ninth Circuit in particular has used the

50. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").

51. MICHAEL J. GLENNON & ROBERT D. SLOANE, FOREIGN AFFAIRS FEDERALISM 292 (2016).

52. *Id.*

53. *Id.*

54. *Id.* at 293.

55. In fact, it is often called field preemption. See, e.g., *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071–72 (9th Cir. 2012) (describing this variety of preemption as "field preemption or 'dormant foreign affairs preemption'") (citation omitted). It has also been called simply "foreign policy preemption." See, e.g., *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 392 (D. Vt. 2007).

56. *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs . . . is vested in the national government exclusively."). Many have argued, however, that federal exclusivity in foreign affairs is both impractical and constitutionally unsound. See, e.g., GLENNON & SLOANE, *supra* note 51, at 33.

57. 389 U.S. 429 (1968).

58. 539 U.S. 396 (2003).

doctrine often enough to have developed a two-step test to determine whether a state law is preempted by federal policy. The Ninth Circuit's cases present a helpful picture of how the doctrine has been applied.

As scholars have often pointed out, preemption doctrine is messy,⁵⁹ and dormant preemption doctrine, even more so. As described in *Zschernig*, the doctrine calls for the preemption of state policy whenever it intrudes into the field of foreign affairs, regardless of whether the state policy actually conflicts with federal policy on the issue in question.⁶⁰ In *Garamendi*, though, Justice Souter described the doctrine in different terms: If a state is operating within its area of traditional competence, dormant preemption arises only when a state policy conflicts with federal policy.⁶¹ The following Subpart explores the reasoning behind each of these results.

1. Dormant Foreign Affairs Preemption in the Supreme Court

In *Zschernig v. Miller*, the Court overturned an Oregon Supreme Court decision allowing the state to prevent an East German citizen from inheriting personal property.⁶² The decision was based on an Oregon statute prohibiting foreigners from inheriting unless their country of origin provided for reciprocal rights of inheritance.⁶³ The Court reversed because the statute as applied required Oregon courts to pass judgment on how foreign states conducted their internal affairs: that is, to intrude beyond state bounds into foreign affairs, a field constitutionally reserved to the federal government.⁶⁴ The Court reasoned that even though regulation of inheritance is traditionally a state concern,⁶⁵ and even though the Justice Department stated in its brief that the statute did not unduly interfere with America's conduct of foreign relations,⁶⁶ the statute "launch[ed] the State upon a prohibited voyage into a domain of exclusively federal competence."⁶⁷ Here, the Court shot down a state law not for its conflict

59. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 178 ("The Supreme Court's preemption jurisprudence is famous for its incoherence.").

60. The federal government as amicus curiae argued that the Oregon statute invalidated in *Zschernig* did not interfere with America's conduct of foreign affairs. See *Zschernig*, 389 U.S. at 434.

61. *Garamendi*, 539 U.S. at 419 n.11 ("Where, however, a State has acted within what Justice Harlan called its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict." (citation omitted)).

62. *Zschernig*, 389 U.S. at 429.

63. *Id.* at 430–31.

64. *Id.* at 440–41.

65. *Id.* at 440.

66. *Id.* at 434.

67. *Id.* at 442 (Stewart, J., concurring).

with federal policy (indeed, there was no such conflict) but merely for flying in federal airspace.

In *American Insurance Ass'n v. Garamendi*,⁶⁸ the Court used conflict preemption to invalidate a California statute, but preserved and added to the dormant preemption doctrine in a footnote. In *Garamendi*, the Court found a provision of California's Holocaust Victim Insurance Relief Act (HVIRA) preempted for interfering with the federal government's conduct of foreign relations as expressed through an executive agreement.⁶⁹ In 2000, the United States and Germany established an international forum for settling Holocaust-era insurance theft claims, a forum that both the United States and Germany hoped would be the exclusive forum for such claims.⁷⁰ While negotiations were underway, California, in its own effort to help Holocaust survivors pursue insurance claims, established new disclosure requirements for California insurers whose affiliates may have sold insurance policies in Europe during the Nazi era.⁷¹ The Court found a "clear conflict" between the state statute and federal policy,⁷² invalidating the HVIRA for "us[ing] an iron fist where the President has consistently chosen kid gloves."⁷³ In footnote eleven, however, the Court explained that finding a conflict with federal policy would not be necessary if a state action went beyond the traditional scope of state responsibility to intrude into foreign affairs, even in the absence of any federal action on the issue.⁷⁴ If the state were acting within the scope of its traditional responsibility, though, the Court clarified that "it might make good sense" to balance the strength of the state interest against the degree of conflict with federal policy in determining whether the state behavior should be preempted.⁷⁵

The Supreme Court has not since used dormant foreign affairs preemption to invalidate a state action. Some scholars have argued that the Court's subsequent decision in *Medellin v. Texas*⁷⁶ indicates a limitation on the

68. 539 U.S. 396.

69. *Id.* at 420–21.

70. *Id.* at 406–08.

71. *Id.* at 408–11.

72. *Id.* at 425.

73. *Id.* at 427.

74. *Id.* at 419 n.11.

75. *Id.*

76. 552 U.S. 491, 506 (2008) (distinguishing between "treaties that automatically have effect as domestic law" and those that require domestic implementing legislation to become operational to find that the United States's ratification of the Vienna Convention and attendant "optional protocol" for implementing it do not make International Court of Justice decisions binding on U.S. courts without implementing legislation).

expansive foreign affairs preemption doctrine of *Garamendi*. Ganesh Sitaraman and Ingrid Wuerth argue that *Medellin* was “a major step in normalizing foreign relations law” because it relied on “basic” federalism principles to find that the federal government’s foreign affairs power did not take precedence over state police power, despite the President’s strong claim to power under an Article II treaty.⁷⁷ Likewise, Mark Weisburd points to *Medellin*’s language on *Garamendi* (describing *Garamendi* as a case involving settlement of international claims) as limiting: “[I]t seems impossible to see the broad standard enunciated in *Garamendi* as surviving *Medellin*”⁷⁸ Nevertheless, the lower federal courts have seriously considered a number of dormant foreign affairs preemption claims in the years since *Medellin*. Those cases, and in particular recent Ninth Circuit cases grappling with the doctrine, are discussed below.

2. Dormant Foreign Affairs Preemption in the Lower Federal Courts

Lower federal courts have embraced the language of *Garamendi* footnote eleven and balanced the strength of a state’s interest against a state action’s intrusion into foreign affairs to find dormant foreign affairs preemption.

The Ninth Circuit, in particular, has addressed a number of dormant preemption cases since *Garamendi*⁷⁹ and has developed a two-part test to determine whether a state’s behavior should be preempted. In *Movsesian v. Victoria Versicherung AG*,⁸⁰ the Ninth Circuit, writing en banc, invalidated a

77. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1930 (2015) (citation omitted). Ganesh Sitaraman and Ingrid Wuerth note that lower courts continue to rely on the dormant preemption doctrine even after *Medellin*. *Id.* at 1927 n.166.

78. A. Mark Weisburd, *Medellin, the President’s Foreign Affairs Power and Domestic Law*, 26 PENN. ST. INT’L L. REV. 595, 626–27 (2010).

79. See, e.g., *Von Saher v. Norton Simon Museum of Art (Von Saher I)*, 592 F.3d 954, 965–66 (9th Cir. 2010) (finding that foreign affairs “field preemption” precludes a California statute of limitations for art recovery claims because its real purpose is to provide a forum for relief for Holocaust victims, relief involving the “power to make and resolve war . . . reserved exclusively to the federal government”); *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 (9th Cir. 2012) (en banc); *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613, 618 (9th Cir. 2013) (overturning the trial court’s decision that a California statute of limitations for art recovery suits was subject to dormant preemption because it was enacted to avoid conflict with *Von Saher I*); *Von Saher v. Norton Simon Museum of Art (Von Saher II)*, 754 F.3d 712, 724 (9th Cir. 2014) (finding foreign affairs “conflict preemption” did not preclude the *Von Saher I* plaintiffs’ claims under the more generally applicable statute of limitations analyzed in *Cassirer*); *Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016).

80. 670 F.3d 1067 (9th Cir. 2012) (en banc).

California law citing dormant foreign affairs preemption. Section 354.4 of California's Code of Civil Procedure gave California courts jurisdiction over claims for the value of insurance policies not paid due to the Armenian Genocide.⁸¹ The court found that although the statute was formally confined to an area of traditional state interest and did not present a conflict with federal policy, its "real purpose" was to provide a forum for litigating injuries stemming from the Armenian Genocide, and therefore found section 354.4 preempted for intruding into foreign affairs.⁸² As the court noted, the federal government had carefully avoided taking a position on the Armenian Genocide to avoid offending Turkey, an ally.⁸³

Since the California law presented no clear conflict with federal policy, the Ninth Circuit undertook a two-step process inspired by *Garamendi* footnote eleven. First, the *Movsesian* court determined that the California law did not concern an area of traditional state responsibility.⁸⁴ The "traditional state responsibility" inquiry requires the court to "determine the 'real purpose of the state law,'" not merely the stated purpose.⁸⁵ Here, the court relied on the statute's text (which identified a specific class of insurance policies and beneficiaries) and history (specifically the legislative findings) to uncover its true purpose: to provide a forum for relief for victims of the Armenian Genocide.⁸⁶

Next, the court established that the California law intruded on the federal government's foreign affairs power.⁸⁷ The statute, the court found, had "more than some incidental or indirect effect' on foreign affairs,"⁸⁸ setting a foreign policy for the state and requiring the state to conduct a "highly politicized inquiry" into the affairs of the Ottoman Empire and its successor, Turkey, to determine whether a plaintiff was a victim of the Armenian Genocide.⁸⁹ The

81. *Id.* at 1069–70.

82. *Id.* at 1075–77.

83. *Id.* at 1077. For a thorough discussion of the Executive Branch's longstanding resistance to recognizing the Armenian Genocide, see Shahrzad Noorbaloochi, Comment, *The Limits of Executive Authority to Preempt Contrary State Laws in Foreign Affairs After Medellín v. Texas*, 64 AM. U. L. REV. 687, 712–15 (2015).

84. *Movsesian*, 670 F.3d at 1075.

85. *Id.* (quoting *Von Saher v. Norton Simon Museum of Art (Von Saher I)*, 592 F.3d 954, 964 (9th Cir. 2010)).

86. *Id.* at 1075–76. The legislative findings specified that the Legislature's "specific intent" was "to ensure that Armenian Genocide victims and their heirs be permitted to have an expeditious, inexpensive, and fair forum in which to resolve their claims." *Id.* (citation omitted).

87. *Id.* at 1076.

88. *Id.* (quoting *Zschernig v. Miller*, 389 U.S. 429, 434 (1967)).

89. *Id.* at 1076–77.

court concluded that, because section 354.4's "real purpose" was to "send a political message," thereby intruding into foreign affairs, the California Armenian Genocide statute was preempted.⁹⁰ On a petition for certiorari, the Supreme Court requested briefing on the case from the U.S. Solicitor General.⁹¹ The Solicitor General filed a brief urging that the California law intruded on America's foreign affairs power,⁹² and the Supreme Court ultimately denied certiorari.⁹³ Two years ago in *Gingery v. City of Glendale*,⁹⁴ the Ninth Circuit limited this test by declining to preempt the City of Glendale's erection of a statue to the Korean "comfort women" of the Second World War despite protests from the Japanese government.⁹⁵ The court found that Glendale's monument was merely an expression of the city's views on an international event, consistent with local governments' traditional interests,⁹⁶ and moreover, that the city's actions did not intrude on the foreign affairs power because there was no actual foreign affairs impact and because the statue did not impact any entity's "legal rights and responsibilities."⁹⁷ *Gingery's* emphasis on the particular kind of foreign affairs impact that would lead to preemption (imposition of legal liability, not mere expression) is an important limitation on the Ninth Circuit's jurisprudence.

Although no other circuit has explicitly embraced *Movsesian's* two-part test, courts in other circuits have considered similar factors to resolve dormant preemption cases, looking at whether the regulated interest was a traditional state interest and the degree of conflict with federal policy. For example, in *Museum of Fine Arts, Boston v. Seger-Thomschitz*,⁹⁸ the First Circuit reasoned that because Massachusetts has a "substantial interest" in enacting statutes of limitations, the plaintiff must show a "clear conflict" between the state statute of limitations and any federal policy against strict timeliness requirements in pursuing Holocaust-era art recovery claims.⁹⁹ Similarly, in *Faculty Senate of Florida International University v. Winn*,¹⁰⁰ the Eleventh Circuit found no conflict between a state policy restricting academic travel to countries that

90. *Id.*

91. *Arzoumanian v. Munchener*, 568 U.S. 809 (2012).

92. Brief for the United States as Amicus Curiae at 5, *Arzoumanian*, 568 U.S. 809 (No. 12-9), 2013 WL 1945158, at *5.

93. *Arzoumanian v. Munchener*, 569 U.S. 1029.

94. 831 F.3d 1222 (9th Cir. 2016).

95. *Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016).

96. *Id.* at 1230.

97. *Id.* at 1230–31.

98. 623 F.3d 1 (1st Cir. 2010).

99. *Id.* at 13–14 (finding no such conflict).

100. 616 F.3d 1206 (11th Cir. 2010).

sponsor terrorism and any express federal policy.¹⁰¹ Finding no explicit conflict, the court determined that the state's strong traditional interest in "managing its own spending and the scope of its academic programs" overcame any "indistinct desire" by the federal government to encourage academic travel in general, concluding that Florida's policy was not preempted.¹⁰²

The dormant foreign affairs preemption doctrine has developed based on one fifty-year-old case and a footnote in another, more recent case. In those two cases, the Supreme Court suggested that the states should steer clear of federal airspace. It is no surprise that since then the lower courts and academics have worked to define the scope of that limitation in an increasingly globalized world. The Ninth Circuit's two-part test stresses balance between states' authority to exercise their traditional responsibilities and the need for the federal government to "speak . . . with one voice"¹⁰³ in the field of foreign affairs. This approach, like every alternative approach proposed, requires the courts to identify both what the bounds of "traditional state responsibility" are and just what the federal government is trying to say. As the following Part makes clear, both lines can be fuzzy.

II. PREEMPTION ANALYSIS OF CALIFORNIA'S CLIMATE AGREEMENTS

A. Precedent: the Kyoto Protocol

All of this has happened before. In 2001, President George W. Bush announced¹⁰⁴ that the United States would not implement the greenhouse gas emissions reductions called for by the UNFCCC's Kyoto Protocol,¹⁰⁵ the predecessor to the Paris Agreement.¹⁰⁶ Cities and states responded by announcing their own efforts to address climate change.¹⁰⁷ California, for

101. *Id.* at 1211.

102. *Id.*

103. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

104. See ASSOCIATED PRESS, *U.S. Won't Follow Climate Treaty Provisions, Whitman Says*, N.Y. TIMES (Mar. 28, 2001), <https://www.nytimes.com/2001/03/28/us/us-won-t-follow-climate-treaty-provisions-whitman-says.html>.

105. Kyoto Protocol to the United National Framework Convention on Climate Change, *supra* note 4.

106. Paris Agreement, *supra* note 1.

107. See, e.g., Eli Sanders, *Rebuffing Bush, 132 Mayors Embrace Kyoto Rules*, N.Y. TIMES (May 14, 2005), http://www.nytimes.com/2005/05/14/us/rebuffing-bush-132-mayors-embrace-kyoto-rules.html?_r=0 (describing American mayors' "bipartisan coalition" to implement the demands of the Kyoto Protocol); Deborah Schoch & Janet Wilson, *Governor, Blair Reach Environmental Accord*, L.A. TIMES (Aug. 1, 2006), <http://articles.latimes.com/2006/aug/01/local/me-blair1> [<https://perma.cc/YA88-SEW7>] (describing California Governor Arnold

example, implemented AB 1493, which called for California's air pollution agency to develop regulations to limit motor vehicle emissions.¹⁰⁸ At that time, various scholars addressed the possibility of a dormant foreign affairs preemption challenge to California's emissions regulations.

The primary argument in favor of dormant preemption in the early- to mid-2000s relied on the "bargaining chip theory."¹⁰⁹ One important reason¹¹⁰ for the United States's refusal to ratify the Kyoto Protocol was the Protocol's "differentiation" between the emissions goals of developed countries and developing countries (one of three "perennial issues"¹¹¹ in climate change negotiations). Under the Kyoto Protocol, developing countries (including major greenhouse gas emitters like China) were exempt from mandatory emissions limits.¹¹² The "bargaining chip theory" of preemption went as follows: California's reduction in greenhouse gas emissions would reduce the overall emissions of the United States, which would in turn reduce America's leverage in its negotiations to develop a new international emissions agreement that would require all parties to contribute to the reduction in emissions.¹¹³

In the first decision to consider this argument, the Eastern District of California relied on the bargaining chip theory to find that plaintiffs had stated a

Schwarzenegger's agreement with British Prime Minister Tony Blair to study "the economic benefits and costs" of cap-and-trade programs).

108. Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 292 (2003).
109. See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 320–21 (2005); Note, *Foreign Affairs Preemption and State Greenhouse Gas Regulations*, 119 HARV. L. REV. 1877, 1881–83 (2006); Jeremy Lawrence, Comment, *Where Federalism and Globalization Intersect: The Western Climate Initiative as a Model for Cross-Border Collaboration Among States and Provinces*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10796, 10809–10 (2008).
110. David E. Sanger, *Bush Will Continue to Oppose Kyoto Pact on Global Warming*, N.Y. TIMES (June 12, 2001), <http://www.nytimes.com/2001/06/12/world/bush-will-continue-to-oppose-kyoto-pact-on-global-warming.html> (describing a Rose Garden address in which President Bush "reiterated his longstanding pledge that he would not agree to any *accord* that exempts the developing world") (emphasis added).
111. Bodansky, *supra* note 10, at 294; see also *id.* at 298–300 (describing how the Paris Agreement resolved to the satisfaction of the parties the problem of "differentiated responsibilities and respective capabilities" between developed and developing countries that had plagued earlier agreements).
112. See *id.* at 298–99.
113. The EPA advanced a similar argument in its notice of denial in response to a petition to regulate greenhouse gas emissions, a notice of denial that was ultimately reversed by the Supreme Court in *Massachusetts v. EPA*. 549 U.S. 497, 513–14 (citing 68 Fed. Reg. 52930, 52931). The EPA argued that "unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President's ability to persuade key developing countries to reduce greenhouse gas emissions." *Id.*

claim for dormant foreign affairs preemption of AB 1493.¹¹⁴ The theory was the subject of criticism from scholars, who argued that since the United States had not demonstrated any real commitment to negotiating a binding emissions treaty, the basis for preemption was weak.¹¹⁵ The Eastern District reversed course in 2007 and (along with a district court in Vermont) dismissed dormant preemption challenges to state greenhouse gas regulations. In *Central Valley Chrysler-Jeep, Inc. v. Goldstene*,¹¹⁶ the Eastern District of California granted summary judgment for California, finding that California's AB 1493 was not subject to dormant foreign affairs preemption. Rejecting a challenge to AB 1493 because the plaintiffs could not prove a federal policy of unilateral regulation¹¹⁷—and because AB 1493 would not present a conflict even if there were such a policy¹¹⁸—the court dismissed the bargaining chip theory as embracing too wide a spectrum of state activities, including activities traditionally included in state police powers.¹¹⁹ In a related case,¹²⁰ the District of Vermont rejected a challenge to a similar Vermont regulation under *Zschernig*¹²¹ because federal policy actually encouraged states to regulate emissions, finding that Vermont's regulation “exemplif[ied] a cooperative federal state approach” to climate change.¹²² Treating *Garamendi*¹²³ as a separate type of preemption, the *Green Mountain Chrysler* court moreover found that the United States's praise of state regulation of greenhouse gas emissions made clear that state regulations did not conflict with federal policy.¹²⁴

114. *Central Valley Chrysler-Jeep v. Witherspoon*, 456 F. Supp. 2d 1160, 1183 (E.D. Cal. 2006), *rev'd*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) (reversed after the Supreme Court determined that the EPA permitted regulation of greenhouse gases in *Massachusetts v. EPA*).

115. See Carlson, *supra* note 108, at 298 n.90; Note, *Foreign Affairs Preemption*, *supra* note 109, at 1889–91; Merrill, *supra* note 109, at 327–28.

116. 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

117. The court reads *Zschernig* and *Garamendi* to require plaintiffs to show first what federal policy is, as expressed through “some agreement, treaty, or program that is the product of negotiations between the administrative branch and foreign government.” *Id.* at 1184. This reading of dormant preemption doctrine conflicts with the language of both *Zschernig* and *Garamendi*, which expressly do not require an “agreement, treaty, or program.” *Id.* Unless “program” is read very broadly, this reading also conflicts with the outcome of subsequent cases in the Ninth Circuit, including *Movsesian*.

118. The court reasoned that AB 1493 was “aimed internally” and that it did not have international effect. *Id.* at 1188.

119. *Id.* at 1187–88.

120. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

121. *Zschernig v. Miller*, 389 U.S. 429 (1968).

122. *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F. Supp. 2d at 395.

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

124. *Green Mountain Chrysler Plymouth Dodge Jeep*, 508 F. Supp. 2d at 396–97.

Although the bargaining chip theory for preemption of state greenhouse gas regulations has been largely dismissed, it provides a useful point of comparison for the dormant preemption issues raised by California's more recent climate diplomacy. California's response to withdrawal from the Paris Agreement is different and raises new issues. The differences between 2001 and 2017 can frame the preemption analysis as applied to the current situation.

First, the United States has taken stronger action than it took in 2001. The United States did not leave the Kyoto Protocol, because it never joined. Although President Clinton signed the protocol, shortly thereafter the Senate voted ninety-five to zero to prohibit the United States from joining an agreement under the UNFCCC that did not impose emissions standards on developing nations.¹²⁵ The Senate resolution was passed specifically in response to the Kyoto Protocol. As a result, the United States never implemented the protocol, and President Bush's final decision not to implement the protocol in 2001 did not represent a sharp change in direction. By contrast, the United States both ratified the Paris Agreement and began to implement it by passing the Clean Power Plan. For this reason, leaving the Paris Agreement would be a clearer and stronger action than not joining the Kyoto Protocol, with the potential for a greater preemptive effect.

Second, the United States has not articulated clear reasons for leaving the Paris Agreement. The United States declined to join the Kyoto Protocol because the Protocol imposed strong emissions reduction obligations on developed countries but imposed no such obligations on developing countries. The United States has not so clearly articulated its reasons for withdrawing from the Paris Agreement.¹²⁶ Because the reasons are less clear, any possible preemptive effect is more complicated.

Finally, the actions taken by California in 2017 are in some ways more and in some ways less aggressive than the actions California took in 2002. In 2002, California passed a set of novel emissions regulations intended to sharply limit emissions and contribute to slowing global warming. Those regulations fit within a framework of federal emissions regulations but went beyond the federal policy, imposing new burdens on parties operating in California. By contrast, California's more recent actions look more like foreign affairs: This

125. S. Res. 98, 105th Cong. (1997); *see also* *Roll Call Vote 105th Congress—1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=105&session=1&vote=00205 [<https://perma.cc/CQ6B-2WVN>].

126. *See* Media Note from Office of the Spokesperson, *supra* note 32 (stating that the United States would leave the Paris Agreement, yet announcing its intent to continue reducing emissions and to participate in international climate change talks related to the Paris Agreement).

time, California has reached beyond its borders to form alliances with national and subnational governments and entities. Unlike California's actions in 2002, however, California's behavior now imposes no burden on California, any foreign nation, or any entity operating in California. For this reason, there is less to preempt. The remainder of this section will examine the implications of these differences under the dormant preemption frameworks laid out in *Zschernig* and *Garamendi*.

B. Can Withdrawal Be Preemptive?

There are two options for understanding the Trump administration's decision to leave the Paris Agreement. On one hand, the decision might mean that the federal government is clearing the field with regard to forging voluntary international climate agreements. On the other hand, the decision might mean that the federal government, by leaving the field, is occupying the field: that the federal government has determined that the correct course of action for the United States is to avoid voluntary international climate agreements. Understanding the Trump administration's reasons for leaving the Paris Agreement will be crucial to determining which of these two meanings to ascribe to withdrawal.

Determining the mechanics of how leaving an agreement might preempt state action appears to be a new question.¹²⁷ There are, however, useful analogies in domestic preemption principles and in administrative law principles. As *Zschernig* and *Garamendi* have made clear, state actions in the foreign policy space can be preempted by federal inaction. The same is true in the domestic preemption space. In *Sprietsma v. Mercury Marine*,¹²⁸ the Court explained that the respondent's argument that a state common law claim was implicitly preempted by the Coast Guard's decision not to regulate was a "viable pre-emption theor[y],"¹²⁹ because "a federal decision to forgo regulation

127. As discussed above, *see supra* notes 108–109 and accompanying text, scholars and students have considered the possible preemptive effects of not joining the Kyoto Protocol on state regulation of greenhouse gases. Though few have yet had the opportunity to address the effects of withdrawing from the Paris Agreement, David Sloss considers whether the withdrawal, among other Trump administration actions on climate change, might have a preemptive effect on California's cap-and-trade linkage with various Canadian provinces. Sloss, however, reads the administration's decision to mean that the administration has decided the costs of regulating emissions outweigh the benefits and declines to entertain any potential dormant foreign affairs preemption arguments. David Sloss, *California's Climate Diplomacy and Dormant Preemption*, 56 WASHBURN L.J. 507, 518, 509 (2017).

128. 537 U.S. 51 (2002).

129. *Id.* at 64.

in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much preemptive force as a decision *to regulate*.¹³⁰ Although such preemption by inaction “rarely occurs”¹³¹ and has been the subject of criticism,¹³² field preemption by inaction is a fair reading of the Court’s decisions in both *Garamendi* and *Crosby v. National Foreign Trade Council*.¹³³ In both cases, the Court found state actions preempted by their intrusion into a space that the federal government (either Congress, in *Crosby*, or the President, in *Garamendi*) had decided to keep free.¹³⁴ In *Movsesian*, the Ninth Circuit found that the federal government’s decision not to act to recognize the Armenian Genocide preempted an otherwise permissible California law.

If federal inaction can preempt a statute, can’t federal action? If we take the answer to be “yes,” then the question posed by the Trump administration’s withdrawal from the Paris Agreement is whether that withdrawal constitutes an “action”¹³⁵ with preemptive effect. Administrative law offers a useful analogy. When an agency decides to rescind a regulation, the rescission is treated as a stronger action than a decision not to promulgate or enact a regulation at all and receives the same degree of judicial scrutiny as implementation of a new regulation.¹³⁶ The implication is clear: Rescinding a rule is an affirmative action

130. *Id.* at 66 (citation omitted).

131. Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Preemption by Inaction*, 26 VA. ENVTL. L.J. 5, 33 (2008) (“The [Supreme] Court’s decisions indicate, however, that [implied] occupation [of the field] by inaction rarely occurs . . .”).

132. *See id.* at 31–32, 52 (articulating the varieties of preemption by inaction and arguing that courts should never find field preemption by inaction in order to incentivize Congress to make clear statements when it intends to preempt state regulation of a given field).

133. 530 U.S. 363 (2000).

134. In *Garamendi*, the Court objected to California’s reach into the space (contentious litigation) that the President had intentionally left free. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003). In *Crosby*, the Court objected to (among other conflicts) Massachusetts acting “beyond the reach” of federal legislation by sanctioning all companies doing business in Burma, whereas the federal sanctions targeted only “new investment” in Burma. *Crosby*, 530 U.S. at 379. As the D.C. Circuit characterized the decisions in the domestic preemption case *Saleh v. Titan Corp.*, in both cases “preemption arose not because the state law conflicted with the express provisions of federal law, but because, under the circumstances, the very imposition of *any state law* created a conflict with federal foreign policy interests.” 580 F.3d 1, 13 (D.C. Cir. 2009).

135. Some have argued that the United States cannot leave the Paris Agreement because it did not validly join. *See, e.g.*, Eugene Kontorovich, *The U.S. Can’t Quit the Paris Climate Agreement, Because It Never Actually Joined*, WASH. POST: VOLOKH CONSPIRACY (June 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/01/the-u-s-cant-quit-the-paris-climate-agreement-because-it-never-actually-joined/?utm_term=.508bb0297960 [<https://perma.cc/J23N-JBUV>].

136. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 41–42 (1983) (rejecting the petitioner’s argument that rescission of a regulation should receive the same

just like promulgating a rule (because “the forces of change do not always point in the direction of deregulation”¹³⁷). Since both promulgating a rule (or joining an international agreement) and deciding not to regulate can have preemptive effects, surely rescinding a rule would also have a preemptive effect. It does not strain the analogy to suggest that if joining an international agreement can have preemptive effect, so can leaving one.

C. What Policy Is the Trump Administration Pursuing?

Another challenge in determining how withdrawal from the Paris Agreement might preempt state action is the difficulty in discerning what withdrawal from the Paris Agreement means. When President George W. Bush declined to join the Kyoto Protocol, he did so with the support of a Senate resolution advising against joining any international agreement that did not place substantial emissions regulations on developing nations.¹³⁸ President Bush clearly articulated his administration’s policy goals in negotiating a new agreement. By contrast, President Trump’s withdrawal from the Paris Agreement lacks a clear statement on the reason for withdrawing. This lack of clarity makes it difficult to discern what preemptive effect withdrawing might have. Unlike the decision not to join the Kyoto Protocol, there is no argument for a bargaining chip theory of preemption here because without being clear on the goals of a negotiation, it is difficult to determine what might serve as leverage in that negotiation.

Withdrawal raises the question of what the U.S. policy is: Is it the policy of the United States that the Paris Agreement was a “bad deal,” or is it the policy of the United States that any international agreement asking the United States to reduce its carbon emissions is unacceptable? The latter seems unlikely, but the lack of clarity in explaining the decision leaves room for

scrutiny that a decision not to regulate receives and finding instead that rescission “is subject to the same test” as implementation, basing its decision both on statutory language and on the acknowledgment that “revocation . . . is substantially different than a failure to act”).

137. *Id.* at 42.

138. See S. Res. 98, 105th Cong. (1997). Douglas Kysar and Bernadette Meyler nonetheless argue that the Bush administration expressed its climate change policy primarily through “casual” mechanisms like amicus briefs and public addresses, but that this “casualness” was in turn transformed into the bargaining chip theory as a way to maximize the administration’s preemptive powers. Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1637–38 (2008). The same logic holds in the case of the Trump administration, which has expressed its climate policy primarily through speeches and press releases.

argument. Such a policy, if clearly stated, would make it more difficult for California to argue that its global agreements are not preempted.

The President's, EPA Administrator Scott Pruitt's, and the State Department's statements on the Paris Agreement all point toward a long-term goal of reducing emissions and joining an international climate change agreement.¹³⁹ Yet reading a different set of signals from the Trump administration, including from the EPA and the State Department, paints a different picture of the administration's goals. The White House famously removed the "climate change" section from its website shortly after the new administration took office.¹⁴⁰ When President Trump pledged that the United States would "continue to be the cleanest and most environmentally friendly country on Earth," he emphasized clean air and clean water but did not mention greenhouse gas emissions.¹⁴¹ In fact, President Trump made no reference to climate change in his speech; nor did Administrator Pruitt. This deemphasis, while not entirely surprising from Donald Trump, who has described global warming as a Chinese plot to make U.S. manufacturing less competitive,¹⁴² is a departure from previous Republican administrations.¹⁴³ Some have argued that the Trump administration's policy goals go beyond

139. Donald J. Trump, *supra* note 36 (arguing that the Agreement would not reduce global warming enough to be worth implementing and pledging that the United States would "continue to be . . . the most environmentally friendly country on Earth"). The State Department has since committed the United States to emissions reductions and international cooperation on "clean and efficient" energy use. Media Note from Office of the Spokesperson, *supra* note 32; Judith G. Garber, Acting Assistant Sec'y, Bureau of Oceans and Int'l Dev. & Sci. Affairs, Remarks at United Nations Framework Convention on Climate Change Conference of the Parties in Bonn, Germany: U.S. National Statement at COP-23 (Nov. 16, 2017) (transcript available at <https://www.state.gov/e/oes/rls/remarks/2017/275693.htm> [<https://perma.cc/378Y-SF8A>]).

140. Coral Davenport, *With Trump in Charge, Climate Change References Purged From Website*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/trump-white-house-website.html>.

141. Donald J. Trump, *supra* note 36.

142. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 6, 2012, 11:15 AM), <https://twitter.com/realdonaldtrump/status/265895292191248385?lang=en> [<https://perma.cc/34V2-LNFW>] ("The concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive.").

143. See George W. Bush, U.S. President, President Bush Discusses Global Climate Change (June 11, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/06/20010611-2.html> [<https://perma.cc/MGQ7-T92Z>] (announcing President George W. Bush's decision to not join the Kyoto Protocol while addressing climate change throughout, starting in the first sentence).

deemphasizing climate change and represent a rejection of climate change mitigation policies altogether.¹⁴⁴

It seems far-fetched that the Trump administration would embrace a policy of actively rejecting climate change mitigation policies. It is more likely that President Trump's climate agenda is to prioritize economic growth over climate change mitigation wherever the two conflict with one another. If the Trump administration has developed a policy against climate change mitigation, however, such a policy would present a clear conflict with California's efforts to forge cross-border climate mitigation partnerships. Even if the administration's policy is simply that economic growth should always be prioritized over climate change mitigation, such a policy might preempt any action on the part of the states that imposed financial burdens on regulated parties. California's MOUs do not in themselves impose a financial burden on private parties, but any more binding action taken pursuant to those MOUs could be subject to a preemption challenge.

A different reading of President Trump's withdrawal from the Paris Agreement and the administration's subsequent rescission of the Clean Power Plan is that the new administration views climate change mitigation as a local issue, rather than an international or even a federal issue. If climate change policy is not "foreign affairs," then dormant foreign affairs preemption cannot apply. This argument comports with various actions the administration has taken since the decision to withdraw. In explaining its proposal to rescind the Clean Power Plan, the EPA emphasized the CPP's imposition "on areas of traditional state regulatory authority."¹⁴⁵ EPA Administrator Scott Pruitt has emphasized "cooperative federalism" as a bedrock principle for the operation of his EPA.¹⁴⁶ Moreover, the Trump administration has publicly expressed its support for state and local emissions reduction initiatives.¹⁴⁷

144. Nives Dolšak & Aseem Prakash, *The Trump Administration Wants to Kill the Popular Energy Star Program Because It Combats Climate Change*, WASH. POST: MONKEY CAGE (Mar. 23, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/23/the-trump-administration-wants-to-kill-the-popular-energy-star-program-because-it-combats-climate-change/?utm_term=.32fc7c8d362f [<https://perma.cc/QWN2-H4JP>].

145. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48035, 48038 (proposed Oct. 16, 2017).

146. See, e.g., Devin Henry, *Pruitt Says His EPA Will Work With the States*, HILL (Jan. 18, 2017, 10:43 AM), <http://thehill.com/policy/energy-environment/314786-pruitt-says-his-epa-will-work-with-the-states> [<https://perma.cc/F38D-M8T4>].

147. Hiroko Tabuchi & Lisa Friedman, *U.S. Cities, States and Businesses Pledge to Measure Emissions*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/climate/cities-states-businesses-emissions-climate-pact.html> ("In a statement, Kelly Love, a White House spokeswoman, said the Trump administration 'believes in cooperative federalism

If U.S. climate policy is a policy of decentralization, then California's action will pass every dormant preemption test. *Zschernig* will only preempt state action if it intrudes into the field of foreign affairs—so if climate policy is not foreign policy, then California's climate change mitigation cannot intrude into federal airspace. Under the *Garamendi* framework, a policy of federalism would militate strongly in favor of determining that climate policy is a traditional state interest and therefore that it is not subject to dormant preemption.

D. Is There Anything to Preempt?

One final difference between California's actions in 2017 and 2002 is the form of action California has taken. In 2002, California passed creative new greenhouse gas emissions regulations. Since 2002, California has been trying something new: The state has reached beyond U.S. borders to form agreements with national governments. The question is whether these actions constitute an intrusion into foreign affairs beyond the scope of traditional state responsibilities.

To the extent that these agreements can be read as international climate change agreements, they may extend beyond the scope of traditional state responsibilities. California cannot, of course, unilaterally make binding emissions reduction treaties with foreign governments.¹⁴⁸ But these agreements are carefully and explicitly nonbinding and expressly disclaim being "treaties."¹⁴⁹ Their nonbinding nature helps them avoid Compact Clause problems.¹⁵⁰ Still, the breadth of the dormant foreign affairs preemption doctrine renders these MOUs susceptible to preemption problems. It would be difficult to argue that these agreements do not intrude into "foreign affairs": They are the result, at the least, of meetings and negotiations between

and therefore are supportive of states and cities making their own choices within their respective borders on climate change policy."").

148. See U.S. CONST. art. I, § 10, cl. 3 ("No state shall, without the consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign power . . .").

149. See, e.g., HAIDIAN MOU, *supra* note 47, at 10, 12 ("This MOU serves only as a record of the Participants' intentions and does not constitute or create any legally binding or enforceable rights or obligations, expressed or implied . . . This MOU is neither a contract nor a treaty."); Under 2 MOU, *supra* note 44, at 4 ("This MOU is neither a contract nor a treaty.").

150. Eugene Kontorovich, *States' "Climate Alliance" Raises Questions About the Constitution's Interstate Compacts Clause*, WASH. POST: VOLOKH CONSPIRACY (June 2, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/02/states-climate-alliance-raises-questions-about-the-constitutions-interstate-compacts-clause/?utm_term=.0b9d4bd396f4 [https://perma.cc/BVB8-JRDN].

California officials and representatives of foreign governments. As discussed above, the question of whether these agreements extend into the foreign affairs arena also turns on what U.S. foreign policy is with respect to climate change. If U.S. foreign policy is in fact a policy of avoiding international climate agreements, or of prioritizing economic growth over climate change mitigation in every circumstance, then the MOUs extend into that space. On the other hand, if U.S. foreign policy is a policy of cooperative federalism, then California is probably operating within the scope of its traditional responsibilities.¹⁵¹

California's nonbinding agreements offer another counterargument to preemption: It is not clear there is anything to preempt. The agreement between California's Energy Resources Conservation and Development Commission and China's Ministry of Housing and Urban-Rural Development is illustrative. The Memorandum of Understanding's stated goals are to "further strengthen and coordinate efforts to combat global climate change" and to "develop a mutually beneficial relationship of partnership and cooperation."¹⁵² The agreement provides for specific areas of cooperation and a mechanism the parties will use to implement their shared plans (establishing working groups to meet annually). At the same time, the agreement is careful not to require anything of either party: It specifies forms of cooperation the parties "can" use, including information exchange and coordination of seminars, and specifies that parties "may" cooperate in multilateral exchanges to advance the MOU's goals. In other words, the agreement carefully avoids committing either party to anything except the goals of the MOU: The agreements do not impose legal obligations on California or any other party, including any private party in California. The only effect they could have on foreign relations is a symbolic one, likely well within the scope of *Zschernig*'s "incidental or indirect effect" test.

Finally, even if these nonbinding agreements intrude into the federal government's foreign affairs power, it is hard to imagine a legal injury they might cause that would give rise to standing to challenge them.¹⁵³

151. Kysar and Meyler have similarly argued that any dormant preemption analysis of California's emissions regulations would likely depend on whether the courts treat emissions regulation as "an area of traditional congressionally condoned presidential foreign affairs authority." Kysar & Meyler, *supra* note 138, at 1646.

152. MINISTRY OF HOUSING MOU, *supra* note 47, at 1.

153. To satisfy Article III's standing requirement, a plaintiff must allege an "injury in fact—an invasion of a legally protected interest." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). If California's MOUs are unenforceable, it is hard to imagine how they could inflict an injury on anyone that would be concrete enough to support Article III standing.

E. Are California's Agreements Preempted?

The preceding three Subparts distinguished the Paris Agreement preemption analysis from the Kyoto Protocol preemption analysis on the basis of three factors: the action taken by the federal government, the reasons for that action, and the action taken by California. The first of those factors works in favor of preemption: It seems likely that withdrawal from an international agreement could have a preemptive effect. But the other two factors militate against preemption here. The clearest purpose the Trump administration has articulated for withdrawal is one of cooperative federalism, which would not prohibit California from pursuing climate change mitigation strategies on its own. More importantly, although California's actions in 2016 look more like foreign affairs than California's actions in 2002, a key difference militates against preemption: There is nothing to preempt. California's agreements create no legal obligations on any party (even California). The agreements are instead best read as expressions of the state's commitment to pursuing climate change mitigation policies, and federal courts have consistently resisted preempting states' expressions of foreign policy positions.¹⁵⁴ Because it is not at all clear that California's actions intrude into the foreign affairs airspace, and because California and its partners have not created any new legal obligations or mechanisms for vindicating legal obligations, a serious dormant foreign affairs preemption challenge to California's subnational agreements seems unlikely.

Actions only slightly more aggressive than these, however, could plausibly be preempted under *Movsesian*'s broad interpretation of the dormant foreign affairs power. California has established a cap-and-trade program with Quebec, Canada that has already drawn constitutional scrutiny from scholars and practitioners.¹⁵⁵ A similar program with a Chinese province could draw

154. See, e.g., *Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016) (finding that the Supremacy Clause does not preempt a state's expression of "a particular viewpoint on a matter related to foreign affairs"); *U.S. Awami League v. City of Chicago*, 110 F. Supp. 3d 887, 892–93 (N.D. Ill. 2015) (finding that a challenger to a city ordinance erecting a street sign in honor of a former ruler of Bangladesh lacked standing and that even if the challenger had standing, the ordinance would not be preempted because the ordinance had insufficient effect abroad to trigger preemption); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365, 1376 (D.N.M. 1980) (finding a state university's policy against offering admission or readmission to Iranian students in the wake of the Iranian hostage crisis preempted because in enacting the policy, the university's regents "ha[d] gone beyond personal expression of their anger and frustrations in a permissible way").

155. See Kontorovich, *supra* note 150; see generally Augusta Wilson, *Linking Across Borders: Opportunities and Obstacles for a Joint Regional Greenhouse Gas Initiative-Western Climate Initiative Market*, 43 COLUM. J. ENVTL. L. 227 (2018); David V. Wright, *Cross-*

even more public scrutiny. Even the implementation of laws or regulations developed pursuant to the MOUs without any other international effect could plausibly be preempted based on a perceived intention of meddling in foreign affairs. Hawaii's SB 559,¹⁵⁶ for example, does have the legal effect of appropriating a very small amount of money and explicitly criticizes the Trump administration's withdrawal from the Paris Agreement, so it would plausibly be subject to preemption under *Movsesian*.

Moreover, this analysis illustrates one of the pitfalls of a foreign policy as undefined as the Trump administration's: It is unclear what the federal government's climate change foreign policy is and indeed whether the federal government even considers climate change mitigation to be a foreign affairs issue. This reality undermines global cooperation on climate change mitigation but also creates confusion for states who wish to pursue climate change mitigation policies of their own. Clearer federal policy would benefit the international community as well as the states.

III. DOCTRINAL IMPLICATIONS

A. Problems With the Dormant Foreign Affairs Preemption Doctrine

That an action like California's memoranda of understanding with Chinese provinces could be susceptible to preemption illuminates the weakness of existing dormant foreign affairs preemption: It has few limitations. This is particularly true of the doctrine as it has been developed by the Ninth Circuit. The analysis above showcases several of the recognized problems with the doctrine, including the hazy line between foreign and domestic affairs, a range of separation of powers problems, and questions about federalism.

The inquiry into whether a state's actions intrude into the foreign affairs airspace raises the question of exactly what activity constitutes "foreign affairs." As the analysis above demonstrates, that distinction is not always clear. Jack Goldsmith points out that, as the lines between foreign and domestic policy blur, "just about any state law... is potentially subject to judicial preemption."¹⁵⁷ Because that line is unclear, the *Zschernig*¹⁵⁸ framework

Border Constraints on Climate Change Agreements: Legal Risks in the California-Quebec Cap-and-Trade Linkage, 46 ENVTL. L. REP. NEWS & ANALYSIS 10478 (2016) (addressing possible dormant foreign affairs and Dormant Commerce Clause preemption problems with the linkage between California's and Quebec's cap-and-trade programs).

156. 2017 Haw. Sess. Laws 101-06 (S.B. 559).

157. Goldsmith, *supra* note 59, at 210.

158. *Zschernig v. Miller*, 389 U.S. 429 (1968).

requires courts, not the political branches to whom the foreign affairs power is delegated, to locate the boundaries of the foreign affairs power and to announce when state behaviors go beyond those boundaries.¹⁵⁹

This process of inquiry implicates normative and practical separation of powers concerns. Ryan Baasch and Saikrishna Bangalore Prakash argue vehemently against foreign affairs federalism—they reason that states are incompetent meddlers in foreign affairs, apt to anger and confuse foreign nations¹⁶⁰—yet they also reject the current role courts play in policing states’ foreign policy adventures.¹⁶¹ Their concern is practical: Baasch and Prakash argue that courts, like states, are “incompetent actors in this arena,” lacking the requisite policy expertise and agility, and, moreover, they enforce preemption doctrine unevenly. According to Baasch and Prakash, “*Zschernig* is something of an embarrassment.”¹⁶² On the other hand, if states do have some role in foreign affairs, the lack of clarity about what constitutes “foreign affairs” is likely to discourage states from taking constitutional action.¹⁶³ Normatively, the reassignment of foreign policy decisions from the political branches to the courts is just as troubling as their reassignment to the states.

Separation of powers problems are also implicated in the analysis under *Garamendi*.¹⁶⁴ The *Garamendi* framework requires courts to determine not only the boundaries of the foreign affairs power but also, in some cases, what U.S. foreign policy is on the issue in question. Only then can a court decide whether state action conflicts. Sometimes the U.S. policy on a given issue will be clear: for example, when an Article II treaty governs or even (as in *Garamendi*) an executive order. But as the analysis above indicates, teasing out policy positions from public statements can be difficult, and courts have been forced to rely on sources that lack the democratic legitimacy of an Article II

159. See *id.*; see also Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L. L. 821, 825–27 (1989) (noting that since *Zschernig*, “scholars and judges have continued to puzzle” over where that boundary lies).

160. Ryan Baasch & Saikrishna Bangalore Prakash, *Congress and the Reconstruction of Foreign Affairs Federalism*, 115 MICH. L. REV. 47, 53–58 (2016).

161. *Id.* at 63.

162. *Id.* at 68; see *id.* at 95–97. Baasch and Prakash suggest a range of congressional mechanisms for controlling states’ interference in foreign relations, from delegating express preemption authority to the State Department to criminalizing state interference in foreign affairs. As they acknowledge, however, identifying when a state action intrudes into the foreign affairs arena would remain equally difficult under this regime. *Id.*

163. David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 1039 & n.434 (2014) (citing *Movsesian* as a possible example of such discouraging).

164. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

treaty.¹⁶⁵ There might be times when courts must rely on President Trump's tweets¹⁶⁶ to identify the foreign policy of the United States, an unlikely basis for determining "the basic allocation of power between the States and the Nation."¹⁶⁷ Moreover, policy positions change: Justice Stewart, in his *Zschernig* concurrence, dismissed the opinion of the United States as *amicus curiae* because the constitutionality of a state law "cannot vary from day to day with the shifting winds at the State Department."¹⁶⁸

Even a more limited inquiry based exclusively on executive agreements (as contrasted with Article II treaties) would implicate separation of powers issues. Rather than reassign responsibility for determining foreign policy to the courts, this inquiry effectively consolidates power over foreign affairs in the hands of the executive, transferring power away from the Senate by giving executive agreements (and, as applied in the Ninth Circuit, even less binding executive policy decisions) the same preemptive force as Article II treaties.¹⁶⁹

The doctrine (especially as it has been developed in the Ninth Circuit and applied in the above analysis) raises federalism problems as well. Dormant preemption asks federal courts to identify states' intentions in acting, a potentially fraught undertaking. Under the *Movsesian* framework, one trial court has even invalidated a state rule of civil procedure of general applicability

165. For example, in 2010, the Second Circuit dismissed a Holocaust insurance recovery claim against an Italian bank on the grounds that it conflicted with federal policy as expressed in two letters to the court from the State Department. *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 119 (2d Cir. 2010). In *Von Saher II*, the majority opinion rejected as a basis for its decision the Solicitor General's brief opposing a petition for certiorari in an earlier iteration of the case. The court's reasoning makes clear, though, that the brief was rejected not because an *amicus* brief cannot preempt a valid state law but because of factual inconsistencies in the brief. In dissent, Judge Wardlaw argued that the brief should be decisive in this case. *Von Saher v. Norton Simon Museum of Art (Von Saher II)*, 754 F.3d 712, 724–25, 729–30 (9th Cir. 2014) (Wardlaw, J., dissenting); see also *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-GAF (CTx), 2012 WL 12875771, at *13 (C.D. Cal. May 24, 2012), *rev'd in relevant part*, 737 F.3d 613 (9th Cir. 2013) (relying on the same brief to determine the U.S. policy on Holocaust art restitution claims).

166. The reliability of the President's tweets as policy statements was at issue recently in *Hawaii v. Trump*. 138 S. Ct. 2392 (2018). The plaintiffs and the dissent urged that the President's tweets indicated that hostility toward Muslims was the true purpose behind the President's Proclamation No. 9645, which restricted entry of nationals of certain countries into the United States. *Id.* at 2433 (Sotomayor, J., dissenting). But the majority pointedly avoided relying on the President's tweets, finding that the suspension had "a legitimate grounding in national security concerns, quite apart from any religious hostility," and so upheld the suspension. *Id.* at 2421 (majority opinion).

167. *Zschernig v. Miller*, 389 U.S. 429, 443 (1968) (Stewart, J., concurring).

168. *Id.* at 443.

169. Brandon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 829 (2004).

based on a perceived effort on the state's part to avoid triggering a dormant preemption analysis.¹⁷⁰ This intent-based inquiry is practically difficult to police: As the *Cassirer* trial court's decision indicates, identifying a state's purpose in enacting legislation is likely to be "difficult and controversial."¹⁷¹ Edward T. Swaine moreover notes the delicacy of inquiring whether a state or city has intentionally violated the Constitution.¹⁷²

B. Proposed Doctrinal Changes

Scholars have proposed a range of responses that speak to these problems.¹⁷³ One creative and persuasive proposal would preclude the states from "bargaining" with foreign governments.¹⁷⁴ "Bargaining" could include anything from actually concluding a treaty to states unilaterally implementing laws clearly intended to affect foreign governments' behavior.¹⁷⁵ Although this approach would expose California's climate diplomacy to possible preemption, it is appealing: As Swaine points out, this approach would resolve separation of powers issues while preserving the power of the federal government in the foreign affairs arena. Michael Glennon and Robert Sloane, however, argue that this approach comes into direct conflict with the Constitution: The Compact Clause requires states to submit international agreements to Congress but obviously contemplates that states might make such agreements.¹⁷⁶

Another tempting proposal would eliminate the distinction between foreign affairs preemption and domestic preemption and apply straightforward preemption in both contexts. Goldsmith, for example, argues for "ordinary" preemption techniques, with a preference for express and conflict preemption,

170. *Cassirer*, 2012 WL 12875771, at *2, *rev'd in relevant part*, 737 F.3d 613 (9th Cir. 2013) (finding that a generally applicable statute of limitations enacted in response to the Ninth Circuit's decision in *Von Saher I*, which found preempted a Holocaust-recovery-specific statute of limitations, was preempted for attempting an "end run" around *Von Saher*).

171. Goldsmith, *supra* note 59, at 200. Goldsmith considers both instituting a presumption against preemption (as exists in domestic preemption analysis) and a presumption in favor of preemption (as, he argues, essentially exists in foreign affairs preemption analysis now) but ultimately concludes that courts should reject the "presumptive canons" altogether. *Id.*

172. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1257–58 (2000).

173. See, e.g., Baasch & Prakash, *supra* note 160, at 93–106.

174. Swaine, *supra* note 172, at 1261. Edward T. Swaine rejects result-oriented and intent-oriented limitations on the dormant foreign affair preemption power in favor of an "act-oriented" approach. See *id.*

175. *Id.* at 1262–63.

176. GLENNON & SLOANE, *supra* note 51, at 138–40.

in all circumstances.¹⁷⁷ This solution would resolve several problems with dormant preemption doctrine: It would account for the blurring between federal and state behaviors that is the inevitable result of globalization, and it would help resolve the separation of powers problem because it would not ask courts to define the bounds of foreign affairs. Field preemption by inaction, however, is an “ordinary” preemption doctrine, if a rarely-used one.¹⁷⁸ It does not seem far-fetched to imagine that dormant foreign affairs preemption would be quickly replaced by field preemption where courts see state interference in foreign affairs as going too far. Dormant preemption therefore seems likely to persist even if it were formally eliminated.

Glennon and Sloane similarly argue that dormant foreign affairs preemption should be eliminated.¹⁷⁹ Their argument rests on the reality that nearly all behavior currently covered by dormant foreign affairs preemption is covered by (what they suggest should be a narrowed version of) Dormant Commerce Clause preemption, which has a sounder constitutional basis than dormant foreign affairs preemption. But Glennon and Sloane go further than Goldsmith, arguing for express preemption in all circumstances because the political branches are best able to address state overreach if necessary. This argument is attractive: Express preemption is the only way to allocate the foreign affairs power exclusively to the political branches. This approach would also resolve the possibility that dormant preemption would simply be replaced with a robust form of field preemption.

Glennon and Sloane’s argument for requiring express preemption in all circumstances would be the most effective approach for redressing the weaknesses I have discussed above. Elimination of the doctrine would remove uncertainty for state legislators and policymakers, transfer foreign affairs power away from the courts and back to the political branches, and take account of the reality that the line between state behavior and foreign affairs is blurry.¹⁸⁰ Still, requiring express preemption in all circumstances is an extreme shift away from current practices.

177. Goldsmith, *supra* note 59, at 212–14.

178. See Glicksman, *supra* note 131, at 52.

179. GLENNON & SLOANE, *supra* note 51, at 87–147.

180. As Glennon and Sloane point out, states actively participate in behavior that could be called foreign affairs all the time. States have established trade offices in foreign countries, established sanctions on foreign countries, and participated in UNFCCC conferences. See *id.* at 64–67, 70–71, 67–68; see also Lisa Friedman, *A Shadow Delegation Stalks the Official U.S. Team at Climate Talks*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/climate/un-climate-talks-bonn.html?_r=0 (describing American states’ delegations to the UNFCCC Conference of the Parties in Bonn, Germany, in November 2017).

A more modest limitation on the foreign affairs preemption power would also address the particular problems discussed in this Comment.¹⁸¹ This functional, effects-based test would read *Zschernig* and *Garamendi* narrowly, to preclude only state actions that (a) criticize foreign governments' conduct of their own affairs, and (b) impose legal liability on some third party.

This test would embrace the results of *Zschernig* and *Garamendi*. The Court in both cases was primarily concerned with the possibility that a state behavior would make it more difficult for the political branches to do their job with respect to foreign policy. Although it is easy to imagine circumstances in which a state action that praised a foreign government's conduct of its own affairs conflicted with federal foreign policy, it is harder to imagine how such praise would impair the federal government's exercise of its foreign affairs powers. Moreover, the *Garamendi* result seemed to rest on the particular problems created by resolution of Holocaust-era insurance claims outside the forum created by the United States and Germany. In other words, the problem the Court sought to resolve was not California's expression of disapproval of Holocaust-era insurance policy theft, but California's imposition of legal liability on German (and Italian and Japanese) companies. My two-part effects-based test would squarely address both of these problems.

This test would also embrace the results of *Crosby*,¹⁸² the Ninth Circuit cases *Movsesian*¹⁸³ and *Gingery*,¹⁸⁴ and the 2007 emissions regulations cases, *Green Mountain Chrysler*¹⁸⁵ and *Central Valley Chrysler*.¹⁸⁶ Moreover, it is consistent with the reasoning underlying *Zschernig* and *Garamendi*: The federal government has ultimate control over foreign affairs, and when state behaviors tread too heavily on the federal government's territory, those state behaviors should be preempted. This limitation would also, however, allow state and local governments to express opinions, to legislate and regulate local matters even if states' goals aligned with foreign governments' goals, and permit state and local governments to cooperate with foreign national and subnational governments within the limitations of the Compact Clause, the Dormant Foreign Commerce Clause, and existing express preemption doctrine. Although a more expansive proposal may be desirable, this modest reading of *Zschernig* and *Garamendi* would provide clear, reasonable limits on state behavior.

181. See *supra* Part III.A.

182. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000).

183. *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 (9th Cir. 2012) (en banc).

184. *Gingery v. City of Glendale*, 831 F.3d 1222, 1229 (9th Cir. 2016).

185. *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

186. *Central Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007).

CONCLUSION

California's climate diplomacy illuminates several of the weaknesses in the dormant foreign affairs preemption doctrine, especially when the underlying federal policy that might preempt California's action is as undefined as current federal policy is. More broadly, the history of California's climate policy shows how difficult it can be for courts and lawmakers to decide what counts as foreign affairs and to legislate and adjudicate accordingly. As the world grows increasingly connected, interaction between states and foreign governments will only increase. It is crucial for states to understand the limits of those relationships, particularly for the other states and cities that have committed to the goals of the Paris Agreement,¹⁸⁷ who may be discouraged from taking action by legal uncertainty.

Finally, the issues raised above represent commonly expressed objections to the dormant preemption doctrine, but our current political moment raises new problems as well. As addressed in Part II.C, the opacity of the Trump administration's climate policy combines with the breadth of the dormant preemption doctrine to create confusion for states. More broadly, what some journalists have described as an intentional "policy of chaos" in the White House¹⁸⁸ may have the effect of dissuading state policymakers from acting in the face of an unclear federal policy, particularly in an area like this one, where whether the federal government defines climate change as state or federal policy could determine not only what regulations states can implement but whether states can regulate at all. If inaction and deregulation are the climate policy goals, as they seem to be in the Trump administration, then a policy of chaos will achieve its intended goal. If, on the other hand, a more cooperative federalism is the goal, then a policy of chaos will prevent both states and the federal government from fulfilling their legislative responsibilities.

187. See *supra* Part I.B.

188. Mark Landler & Maggie Haberman, *Trump's Chaos Theory for the Oval Office Is Taking Its Toll*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/us/politics/trump-chaos-oval-office.html>; Christi Parsons, *First Immigration, Then Guns, Now Tariffs: Policy Chaos Defines Trump's White House*, L.A. TIMES (Mar. 8, 2018, 3:55 PM), <http://www.latimes.com/politics/la-na-pol-trump-erratic-style-20180308-story.html> [<https://perma.cc/8J77-Z38V>].