

## *Garamendi's* Unspoken Assumptions: Assessing Executive Foreign Affairs Preemption Challenges to State Regulation of Greenhouse Gas Emissions

by Kimberly Breedon

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*Editors' Summary: In 2003, the U.S. Supreme Court issued its most recent pronouncement on the executive foreign affairs preemption doctrine in American Insurance Ass'n v. Garamendi. In this Article, Kimberly Breedon argues that lower courts are prone to overbroad applications of Garamendi because the Court assumed the presence of three elements when it developed the standard for executive foreign affairs preemption of state law: (1) formal source law; (2) nexus to a foreign entity; and (3) indication of intent by the executive to preempt the state law under challenge. She concludes that unless these three elements are present, courts need not even reach the question of whether a law is preempted under the Garamendi test.*

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### I. Introduction

In a recent decision,<sup>1</sup> the U.S. District Court for the Eastern District of California declared that an executive branch foreign policy statement has independent power to preempt state law.<sup>2</sup> The court reached this conclusion in *Central Valley Chrysler-Jeep v. Witherspoon*, a 2006 case involving California's regulation of greenhouse gas (GHG) emissions from motor vehicles.<sup>3</sup> The court's ruling, remarkable both for its breadth and the frailty of its foundations, finds the president's independent power to conduct foreign affairs an adequate basis to preempt state law when executive branch statements comprise the totality of expressed foreign policy.<sup>4</sup>

Such unilateral power, if it exists, would allow the president to regulate in an area of traditional state competence by merely expressing a foreign policy goal related to the same area.<sup>5</sup> Environmentalists should be especially concerned about judicial recognition of this authority because a num-

ber of states, concerned about the harmful effects of global warming, have enacted regulations setting mandatory emissions standards for GHGs<sup>6</sup> emitted within the state.<sup>7</sup> The president, however, has rejected binding agreements with other nations<sup>8</sup> in favor of voluntary measures<sup>9</sup> to reduce

6. GHGs are widely believed to be the primary man-made contributor to global warming. *See, e.g.*, The World Meteorological Organization Greenhouse Gas Bulletin No. 2: 1, at 2, November 2006, available at <http://www.wmo.ch/web/arep/gaw/ghg/ghg-bulletin-en-11-06.pdf>.

[Carbon dioxide (CO<sub>2</sub>)] is the single most important . . . anthropogenic gas in the atmosphere and is responsible for 62% of the total radiative forcing of Earth by long-lived greenhouse gas and over 90% of increase in radiative forcing in the past decade . . . Since the late 1700s atmospheric CO<sub>2</sub> has increased by 35.4% primarily because of emissions from combustion of fossil fuels . . .

7. *See, e.g.*, Shari L. Diener, *Ratification of Kyoto Aside: How International Law and Market Uncertainty Obviate the Current U.S. Approach to Climate Change Emissions*, 47 WM. & MARY L. REV. 2089, 2116–17 (2006) (describing state-based initiatives to combat climate change in California, Colorado, Maine, Massachusetts, New Hampshire, Oregon, Vermont, and Washington and a multistate regional partnership in the Northeast).

8. In 2001, shortly after President Bush took office, the United States announced its withdrawal from the Kyoto Protocol, an international treaty that would have required the United States to agree to binding reductions in the nation's total level of GHG emissions. *See, e.g.*, Kyoto Protocol, Countries Included in Annex B to the Kyoto Protocol and Their Emissions Targets, [http://unfccc.int/kyoto\\_protocol/background/items/3145.php](http://unfccc.int/kyoto_protocol/background/items/3145.php) (noting that the United States "has indicated its intention not to ratify the Kyoto Protocol"); Press Release, President George W. Bush, President Bush Discusses Global Climate Change (June 11, 2001), <http://www.whitehouse.gov/news/releases/2001/06/print/20010611-2.html> (referring to the Kyoto Protocol in the past tense).

9. U.S. executive statements expressing a policy preference for voluntary measures as between nations include a G8 Summit joint announcement in July 2005, declaring intent to promote voluntary use

Kimberly Breedon is a 2007 graduate of the University of Cincinnati College of Law. She would like to thank Prof. Bradford C. Mank for his help and guidance. This Article received an Honorable Mention in the Environmental Law Institute's 2007 Endangered Environmental Laws writing competition.

1. *Central Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359 (E.D. Cal. Sept. 25, 2006) [hereinafter *Chrysler*]. *Chrysler*, 2006 WL 2734359.

2. *Id.*

3. *Id.* at \*1.

4. *Id.* at \*\*14–15, 19.

5. Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 898–914 (2004).

GHGs. The executive branch has thus expressed a foreign policy preference for voluntary measures over binding agreements between nations. The president has also expressed a domestic policy preference for national voluntary measures over mandatory standards.<sup>10</sup> If the *Chrysler* court is correct and the executive does possess unilateral authority to preempt state law merely by expressing foreign policy on the same issue, then state efforts to control local emissions of GHGs under mandatory schemes must yield to executive branch policy statements preferring voluntary mechanisms.

Academic commentators have suggested that Supreme Court cases vesting unilateral preemptive power in the president present both separation of powers and federalism concerns.<sup>11</sup> To the extent that the *Chrysler* court recognizes a broader presidential power than do prior Supreme Court cases, its constitutional grounding is even more suspect. Although of dubious constitutional legitimacy, the *Chrysler* court's proposition rests upon the 2003 Supreme Court decision in *American Insurance Ass'n v. Garamendi*,<sup>12</sup> which arguably contains implicit support for the lower court's decision.<sup>13</sup> Relying in part on supplementary executive branch

of emissions-reducing technology in electricity generation and end-use applications (see THE GLENEAGLES COMMUNIQUE, CLIMATE CHANGE, CLEAN ENERGY, AND SUSTAINABLE DEVELOPMENT 2 (2005), available at [http://www.fco.gov.uk/Files/kfile/PostG8\\_Gleneagles\\_CCChapeau.pdf](http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_CCChapeau.pdf)) and the development of a non-legally binding partnership between the United States and Australia, China, India, Japan, and the Republic of Korea emphasizing voluntary reductions through the development of efficient technologies (see Charter for the Asia-Pacific Partnership on Clean Development and Climate, <http://www.state.gov/g/oes/fls/or/2006/59162.htm>).

10. Included among the executive branch's domestic policy statements relating to voluntary GHG emissions reductions are various programs created by the executive's administrative units: the Climate Leaders Program and the SmartWay Program, created by the U.S. Environmental Protection Agency (EPA) in 2002 and 2004, respectively; and the Climate VISION (Voluntary Innovative Sector Initiatives: Opportunities Now) Program, established in 2003 by the U.S. Department of Energy. See U.S. EPA, CLIMATE LEADERS FACT SHEET (2007), available at [http://www.epa.gov/climateleaders/docs/partnership\\_fact\\_sheet.pdf](http://www.epa.gov/climateleaders/docs/partnership_fact_sheet.pdf), for information about the Climate Leaders Program; see U.S. EPA, SmartWay Transport Program: Basic Information, <http://www.epa.gov/otaq/smartway/swplan.htm>, for information about the SmartWay Program; see Climate VISION, Program Mission, <http://www.climatevision.gov/mission.html>, for information about the Climate VISION Program.
11. See Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 134 (1998) (arguing that the original understanding of presidential powers under the U.S. Constitution encompassed independent authority to conclude international agreements other than treaties but that such international obligations were limited to "minor, short-term agreements," and that such agreements lack the status of law in the domestic legal system until they pass through legislative enactment); Denning & Ramsey, *supra* note 5, at 898-914 (arguing that the text and structure of the Constitution do not support executive preemption); Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 283, 311-13 (2003) (observing that the William H. Rehnquist Court has frequently found preemption of state law and that the Bush Administration has used the doctrine "to consolidate power in the national government"); *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1897 (2006) (arguing state law must "interact with or speak directly to foreign governments, foreign nationals, or their business partners" for foreign affairs preemption to lie). *But see* Joseph B. Crace Jr., *Gara-Mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203 (2004).
12. 539 U.S. 396 (2003).
13. Relying on *Garamendi*, the district court in *Chrysler* states, for example:

The Supreme Court cases do not suggest that the absence of a statute or an executive agreement is fatal to a foreign policy

statements, the Supreme Court found a California insurance disclosure law preempted by federal policy as expressed in an executive agreement between the United States and Germany. But the *Chrysler* court clearly went beyond *Garamendi*'s holding,<sup>14</sup> and it likely exceeded *Garamendi*'s intended reach. This Article argues that, as *Chrysler* demonstrates, lower courts are prone to overbroad applications of *Garamendi* because the Supreme Court in that decision operated under a number of unacknowledged assumptions when it developed the standard for executive foreign affairs preemption of state law.

Part II argues that the *Chrysler* decision is an overbroad application of executive power to preempt state law under the foreign affairs doctrine. To this end, Part II first describes the events leading up to the California law, including early efforts under the William J. Clinton Administration to combat global climate change by seeking binding agreements between nations to reduce GHG emissions. Part II then outlines the George W. Bush Administration's rejection of binding agreements between nations in favor of voluntary measures. Part II also discusses state responses to federal action perceived to be inadequate and subsequent reactions by industry groups challenging the constitutionality of state-initiated efforts to regulate GHG emissions. Part II also describes the *Chrysler* ruling on foreign affairs preemption and analyzes its reliance on *Garamendi*, positing that *Chrysler*'s application of *Garamendi* is overbroad because the district court failed to recognize that the *Garamendi* decision rested on several underlying assumptions and that these assumptions form an implicit part of the test for executive preemption. By failing to apply these assumptions to the facts in *Chrysler*, Part II contends, the court misinterpreted the reach of executive power to preempt state law. To place in context the *Chrysler*'s court's overbroad application of *Garamendi*, Part III discusses three features—formal source law, nexus, and intent—that undergird prior preemption cases and that implicitly informed the *Garamendi* decision. Part III also discusses the operation of source law, nexus, and intent in *Garamendi*. Part IV revisits the *Chrysler* case and critiques the court's interpretation and application of *Garamendi*. The analysis in Part IV demonstrates why *Garamendi*'s silent presuppositions are likely to lead lower courts to an overbroad application of executive preemption under the foreign affairs doctrine. Part V concludes that lower courts should be wary of broadly applying *Garamendi* to executive foreign affairs preemption claims. To avoid broad application, Part V argues, lower courts should acknowledge and consider the Supreme Court's assumptions in *Garamendi* by determining whether the federal foreign policy is grounded in formal source law, such as legislative delegation, a treaty, or an executive agreement; whether the state law being challenged has a nexus to a foreign entity; and whether the formal source law indicates an

preemption claim. In fact, the Court's analysis suggests that such a claim is permissible. In *Garamendi*, though the Court addressed the preemptive effect of an executive policy agreement, it recognized a general "executive authority to decide what that policy should be" as well as authority to act independently of Congress.

Central Valley Chrysler-Jeep v. Witherspoon, 2006 WL 2734359, at \*15 (E.D. Cal. Sept. 25, 2006) (quoting *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003)).

14. See discussion *infra* Part IV.

intent to preempt the state law under challenge. Unless these three features are present, courts need not even reach the question of whether the law is preempted under the *Garamendi* test, and state law should survive this particular constitutional challenge.<sup>15</sup>

## II. *Chrysler* as an Example of Overbroad Application of Executive Foreign Affairs Preemption Doctrine

Understanding how *Chrysler* represents an overbroad application of executive foreign affairs preemption requires some knowledge about its broader historical and legal context, including early U.S. involvement in international efforts to reduce GHG emissions; subsequent repudiation of binding international agreements; state responses to federal inaction; and industry reaction to state regulation of GHGs. After providing this context, this Part describes the *Chrysler* court's decision on executive foreign affairs preemption; analyzes its reliance on *Garamendi*; and argues that it applied *Garamendi* too broadly by failing to consider the underlying assumptions in *Garamendi* that implicitly form part of the test for executive foreign affairs preemption.

### A. Early U.S. Negotiation and Subsequent Repudiation of Binding International Agreements to Reduce GHG Emissions

Under the Clinton Administration, the United States actively pursued binding international agreements to combat global climate change through GHG emissions reductions. When President Bush took office, he asserted new priorities for dealing with global warming, focusing on voluntary measures rather than mandatory agreements. This policy shift establishes the background for subsequent state action.

#### 1. United Nations Framework Convention on Climate Change

On June 12, 1992, the United States signed the United Nations Framework Convention on Climate Change (UNFCCC), which the U.S. Senate ratified on October 15, 1992.<sup>16</sup> The treaty entered into force on March 21, 1994.<sup>17</sup> The UNFCCC's ultimate objective, as stated in Article 2, is to stabilize atmospheric concentrations of GHGs "at a level that would prevent dangerous anthropogenic interference with the climate system."<sup>18</sup> By becoming a Party to the

UNFCCC, the United States officially "not[ed] that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, [and] that per capita emissions in developing countries are still relatively low."<sup>19</sup> Additionally, the United States

acknowledge[ed] the need for developed countries to take immediate action in a flexible manner on the basis of clear priorities, as a first step towards comprehensive response strategies at the global, national and . . . regional levels that take into account all greenhouse gases, with due consideration of their relative contributions to the enhancements of the greenhouse effect.<sup>20</sup>

Pursuant to Article 4 of the UNFCCC, the United States committed to, inter alia, "[p]romot[ing] and cooperat[ing] in the development and diffusion . . . of . . . practices and processes that control, reduce, or prevent anthropogenic emissions of greenhouse gases . . . in all relevant sectors, including the energy, transport, industry, agriculture, forestry, and waste management sectors."<sup>21</sup> The UNFCCC also obligates the United States to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases . . ."<sup>22</sup> The text and structure of Article 4 demonstrate that the developed countries recognized their duty to take a leadership role in the world community by providing a model for developing countries and by sharing resources and technologies with them to encourage them to reduce GHG emissions.<sup>23</sup>

The UNFCCC imposed no binding emissions reductions. As its name implies, its purpose was to provide an internationally agreed-upon framework to form the basis for a later series of binding agreements that would implement the UNFCCC and set specific reductions targets.<sup>24</sup> The subse-

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trient cycles; air quality; the productivity and structure of natural ecosystems; the productivity of agricultural, grazing, and timber lands; and the geographic distribution, behavior, abundance, and survival of plant and animal species, including vectors and hosts of human disease. . . .

Intergovernmental Panel on Climate Change, *Climate Change 2001: Working Group II: Impacts, Adaptation, and Vulnerability*, available at [http://www.grida.no/climate/ipcc\\_tar/wg2/022.htm#12](http://www.grida.no/climate/ipcc_tar/wg2/022.htm#12).

19. UNFCCC, ¶ 3.

20. *Id.* ¶ 18.

21. *Id.* art. 4(1)(c).

22. *Id.* art. 4(2)(a).

23. *Id.*

These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases . . . would contribute to such modification.

*Id.*

24. The UNFCCC took as its model the Vienna Convention for the Protection of the Ozone Layer, which created a framework for establishing subsequent protocols, procedures for amendment, and mechanisms for dispute resolution related to the Parties' agreed upon commitment in the Convention to take appropriate measures "to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the Ozone Layer." Vienna Convention for the Protection of the Ozone Layer art. 2, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

15. Of course, other challenges may render a particular law constitutionally invalid, but the scope of this Article is restricted to foreign affairs preemption by the executive branch.

16. United Nations Framework Convention on Climate Change List of Signatories and Ratification of the Convention Parties, [http://unfccc.int/files/essential\\_background/convention/status\\_of\\_ratification/application/pdf/unfccc\\_conv\\_rat.pdf](http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc_conv_rat.pdf).

17. *Id.*

18. United Nations Framework Convention on Climate Change art. 2, June 12, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 164 [hereinafter UNFCCC].

Future changes in climate are expected to include additional warming, changes in precipitation patterns and amounts, sea-level rise, and changes in the frequency and intensity of some extreme events. . . . Numerous Earth systems that sustain human societies are sensitive to climate and will be impacted by changes in climate. . . . Impacts can be expected in ocean circulation; sea level; the water cycle; carbon and nu-

quent implementation instrument of the UNFCCC was finalized in 1997 as the Kyoto Protocol.<sup>25</sup>

## 2. The Kyoto Protocol

In 1997, the Kyoto Protocol was adopted as the implementation agreement of the UNFCCC.<sup>26</sup> Building on the UNFCCC's stated objective and guiding principles, the Protocol requires certain Parties, including the United States, subject to ratification, to meet mandatory targets of limited or reduced GHG emissions.<sup>27</sup> The Protocol imposes a binding worldwide minimum target of a 5% reduction in GHG emissions from 1990 levels to be achieved between 2008 and 2012.<sup>28</sup> Developed countries bear the burden for reductions, with the U.S. emissions reduction target established at 7% lower than 1990 levels.<sup>29</sup> However, Parties to the UNFCCC that have not ratified the Protocol (or otherwise acceded to it) are not bound by the Protocol's commitments.<sup>30</sup>

## 3. U.S. Response to Kyoto Protocol

Despite participating in the Protocol negotiations and submitting to its provisions as a signatory under President Clinton, the United States is not a Party. The Senate had indicated that it would not ratify the treaty, so President Clinton elected not to submit it for a vote in the face of certain defeat.<sup>31</sup> The United States is therefore not bound by the terms of the Protocol. Even though the Protocol was never presented for ratification, the Senate nonetheless passed a resolution expressing opposition to any international agreement that would either

(A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the Protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or (B) . . . result in serious harm to the economy of the United States.<sup>32</sup>

The Protocol faced similar opposition from the U.S. House of Representatives and the incoming Bush Administration. For example, subsequent congressional bills prohibited the U.S. Environmental Protection Agency (EPA) from enforcing the Protocol.<sup>33</sup> And in 2001, the Bush Administration sounded the final death knell, declaring the Protocol ineffective for mitigating climate change and announcing U.S. rejection of it.<sup>34</sup> Subsequently, the Bush Administration issued numerous policy statements calling for voluntary reductions in GHG emissions.<sup>35</sup>

In recent years, the U.S. Congress has indicated less hostility toward the concepts embodied in the Protocol. Expressing concern about global warming, Congress has sought to enact legislation establishing mandatory emissions standards but has been unable to muster the necessary votes.<sup>36</sup> The Senate, at least, has passed a resolution "calling for binding limits 'on emissions of greenhouse gases that slow, stop, and reverse the growth of such emissions' and that 'will encourage comparable action by other nations.'"<sup>37</sup>

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GHG emissions limits in the United States to GHG emissions limits on foreign countries, it sought to craft the contours of binding agreements with other nations. Second, by opposing any international GHG emissions agreement that would damage the U.S. economy, it sought to ensure a connection between binding international agreements and the economic health of the United States. This resolution is an appropriate measure insofar as it pertains to the Senate's role to provide "advice and consent" to treaties that the executive has negotiated. To the extent that it seeks to preempt state action or to regulate domestic or foreign commerce, it is irrelevant, as the Senate has no independent power to do either.

25. Kyoto Protocol to the United Nations Framework on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998), available at [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) [hereinafter the Protocol].

26. *Id.*

27. *Id.*, Annex B, at 42. The Parties that are required to reduce their GHG emissions are listed in Annex B of the Kyoto Protocol and are therefore frequently referred to as "Annex B countries."

28. *Id.* art. 3.1, at 33.

29. *Id.*, Annex B, at 42.

30. *Id.* at 22. To date, 165 countries have ratified the Protocol. Initially a signatory to the Protocol, the United States has since repudiated it, <http://maindb.unfccc.int/public/country.pl?group=kyoto>. Failure to ratify the Protocol does not terminate U.S. obligations under the UNFCCC, however. A Party may withdraw from the UNFCCC "[a]t any time after three years from the date on which the [UNFCCC] has entered into force for a Party" by "giving written notification to the [Secretary-General of the United Nations]." United Nations Framework Convention on Climate Change art. 25, June 12, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. To date, the United States has not withdrawn from the UNFCCC.

31. The Protocol, *Countries Included in Annex B to the Kyoto Protocol and Their Emissions Targets*, [http://unfccc.int/kyoto\\_protocol/background/items/3145.php](http://unfccc.int/kyoto_protocol/background/items/3145.php) (noting that the United States "has indicated its intention not to ratify the Kyoto Protocol").

32. S. Res. 98, 105th Cong. (1997). This resolution is commonly called "The Byrd-Hagel Resolution," after the senators who sponsored it. The focus of the Byrd-Hagel Resolution is twofold. First, by linking

33. *Central Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359, at \*13 (E.D. Cal. Sept. 25, 2006) (listing enacted legislation in 1998, 1999, and 2000). See, e.g., Veterans Affairs and HUD Appropriations Act (Knollenberg Amendment), Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998). Notably, both the Byrd-Hagel Resolution, which the Senate passed by unanimous vote, and the appropriations bills forbidding expenditure of funds for Kyoto enforcement, condemned binding international agreements that imposed emissions reductions standards at a national level. But none of these instruments speaks, even indirectly, to unilaterally imposed federal standards or to state imposed standards having no—or only an incidental—nexus to foreign entities.

34. Bush's reasons for refusing to support the Protocol included uncertain science and unfair economic disadvantage to the United States because developing countries are exempt. Press Release, President George W. Bush, President Bush Discusses Global Climate Change (June 11, 2001), <http://www.whitehouse.gov/news/releases/2001/06/print/20010611-2.html> (referring to the Kyoto Protocol in the past tense). Interestingly, President Bush's objections to the Protocol disregard both the text and the structure of the UNFCCC, which is designed not to give developing parties a "pass" but to equip them with the necessary practices and technologies to reduce their GHG emissions. UNFCCC, June 12, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 164.

35. See *supra* note 10.

36. Diener, *supra* note 7, at 2118–19 (describing failed congressional efforts to enact legislation imposing federal limits on GHG emissions).

37. The Bingaman-Domenici resolution calls for national mandatory GHG emissions limits that "'slow, stop, and reverse the growth of such emissions'" and that "'will encourage comparable action by other nations.'" *Chrysler*, 2006 WL 2734359, at \*14 (quoting 151 CONG. REC. S7033 (daily ed. June 22, 2005)). The language of this resolution clearly demonstrates, in the Senate's view at least, that mandatory limits at the national level do not foreclose voluntary measures as between nations. By logical extension, then, mandatory limits at the state level similarly would not foreclose international voluntary measures. Further, the Bingaman-Domenici resolution is more in keeping with U.S. international obligations under the UNFCCC, as it recognizes the leading role developed nations must take in the global effort to combat anthropogenic climate change.

At present, therefore, the federal government is relying solely on voluntary measures to reduce GHG emissions.<sup>38</sup>

### B. State Reactions

In the absence of federal action, states have initiated a number of measures to decrease GHG emissions within their borders. In 2006, for instance, California passed the Global Warming Solutions Act (GWSA).<sup>39</sup> The GWSA will directly regulate GHG emissions from most industries in California by capping the state's GHG output at 1990 levels by 2020.<sup>40</sup>

States have also joined forces, entering into partnerships with other states. The Regional Greenhouse Gas Initiative (RGGI) is one example.<sup>41</sup> The RGGI is an agreement between seven northeastern states<sup>42</sup> to reduce power plant emissions by capping carbon dioxide power plant emissions at current levels in 2009, then reducing emissions by 2015, with a 10% target reduction established by 2019.<sup>43</sup>

### C. Constitutional Challenges to State Regulation of GHG Emissions

Hailed by environmentalists, state initiatives face a number of constitutional challenges from industry groups,<sup>44</sup> who have invoked, among other constitutional claims, the dormant Commerce Clause, the political question doctrine, and the preemption doctrine. Challenges under the preemption doctrine pose special difficulties because a single state law may be preempted by any one of multiple federal laws, or by federal foreign policy.<sup>45</sup> Preemption by federal foreign policy or foreign affairs in turn poses its own set of problems. The Supreme Court's jurisprudence in this area is unclear, particularly regarding the extent to which the executive branch, acting under its independent power to conduct for-

ign affairs, may preempt otherwise constitutionally valid state law.

The Court's most recent pronouncement on foreign affairs preemption came in *Garamendi*. But that decision may have done more to confuse the issue than to clarify it. The most troubling aspect of *Garamendi* is that it appears to sanction broader executive preemptive power than it probably actually does. This tension between what the Court seems to have done and what it likely has actually done results from the presence of several assumptions in *Garamendi*'s rationale that the Court failed to acknowledge. Lower courts that overlook these presuppositions are likely to be misled into applying *Garamendi* too broadly, as the *Chrysler* decision illustrates.

### D. Chrysler

At issue in *Chrysler* is California's effort to establish minimum standards for GHG emissions by motor vehicles. Pursuant to California Health and Safety Code §43018.5, the California Air Resources Board (CARB) promulgated regulations in 2004, adding GHG emissions standards to California's existing motor vehicle standards.<sup>46</sup> Section 43018.5(a) requires CARB "to develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles."<sup>47</sup>

Automobile dealers sought declaratory judgment and injunctive relief in the Eastern District of California under multiple bases of preemption, including a claim for foreign affairs preemption.<sup>48</sup> Defendants moved for judgment on the pleadings.<sup>49</sup> In a September 25, 2006, decision, the court granted defendants' motion for judgment on the pleadings relating to dormant commerce clause preemption<sup>50</sup> and Sherman Act preemption<sup>51</sup> but denied the motion on foreign affairs preemption,<sup>52</sup> Energy Policy and Conservation Act preemption,<sup>53</sup> and Clean Air Act (CAA) preemption.<sup>54</sup>

In its analysis of the foreign affairs preemption claim, the *Chrysler* court correctly relied on the Supreme Court's most recent pronouncement of its executive foreign affairs preemption jurisprudence in *Garamendi*.<sup>55</sup> But the district

38. Federal reliance on voluntary programs may preempt state action, as may legislative schemes such as the Energy Policy and Conservation Act (EPCA) or the Clean Air Act (CAA), but those challenges fall beyond the scope of this Article.

39. Cal. A.B. 32, available at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_32&sess=PREV&house=B&author=nunez](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_32&sess=PREV&house=B&author=nunez). Signed into law by Gov. Arnold Schwarzenegger on September 27, 2006, the GWSA became effective on January 1, 2007. *Id.*

40. *Id.* This goal represents a cut of approximately 25% from current emissions levels. *Id.*

41. The RGGI describes itself as "a cooperative effort by Northeastern and Mid-Atlantic states to reduce carbon dioxide emissions—a greenhouse gas that causes global warming." <http://www.rggi.org>. In an effort to "address this important environmental issue, the RGGI participating states will be developing a regional strategy for controlling emissions." *Id.*

42. Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York, and Vermont have entered into the RGGI. Multistate RGGI Agreement, <http://www.rggi.org/agreement.htm>. Maryland joined on April 20, 2007. Participating States, <http://www.rggi.org/states.htm>.

43. RGGI, MEMORANDUM OF UNDERSTANDING IN BRIEF (2005), [http://www.rggi.org/docs/mou\\_brief\\_12\\_20\\_05.pdf](http://www.rggi.org/docs/mou_brief_12_20_05.pdf).

44. *E.g.*, *Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (political question); *Central Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359 (E.D. Cal. Sept. 25, 2006) (preemption, dormant Commerce Clause).

45. For example, the plaintiffs in *Chrysler* alone have stated three separate preemption claims, including the one for foreign affairs preemption. *Chrysler*, 2006 WL 2734359, at \*3 (plaintiffs claim federal preemption of state law by the EPCA, the CAA, and the federal foreign policy and foreign affairs powers).

46. *Id.* at \*1.

47. *Id.* The CARB regulations encompass carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons and establish the standard for compliance as "fleet average," defining two sets of averages for compliance, one for passenger cars and light-duty trucks under 3,750 pounds, and one for light-duty trucks over 3,750 pounds and medium-duty passenger vehicles. The regulations apply to vehicles manufactured for model year 2009 and later. Manufacturers may accrue offset credits on the emissions standards by meeting the standards for model year 2009 or exceeding standards in later years; they may then use these credits to make up compliance shortfalls in later years, to transfer between categories, or to sell to other manufacturers. Noncompliance subjects a manufacturer to civil penalties, which the manufacturer can avoid by accruing sufficient offsets within five years of the year it is found to be in noncompliance. *Id.* at \*\*1, 2.

48. *Id.* at \*3.

49. *Id.*

50. *Id.* at \*21.

51. *Id.* at \*23.

52. *Id.* at \*19.

53. *Id.* at \*11.

54. *Id.* at \*12.

55. *Id.* at \*\*12-19.

court unjustifiably extended *Garamendi* to encompass executive policy pronouncements as sufficient to state a valid claim for preemption.<sup>56</sup>

### III. *Garamendi*'s Jurisprudence

Analysis of *Chrysler*'s overbreadth requires a brief exposition of the history of executive foreign affairs preemption. The overview presented here first summarizes the silent assumptions underlying the *Garamendi* decision. It then discusses the Court's prior cases that led to those assumptions, concluding with an analysis of the role the presuppositions played in *Garamendi*.

#### A. Silent Assumptions

The district court's overbroad application in *Chrysler* resulted from a failure to recognize three underlying assumptions that the *Garamendi* Court made—but failed to state—about executive foreign affairs preemption: (1) the existence of a formal source of law for the preemptive action; (2) a nexus between the state law and a foreign entity; and (3) executive intent, as evidenced in the formal source law, to preempt state regulation in a particular area. That the Supreme Court assumed these features is a fair conclusion because they were present in prior Supreme Court cases construing foreign policy preemption and because they were present in the *Garamendi* facts. *Garamendi*'s text suggests that the Court assumed the presence of these features in both the precedents on which it relied and in the case before it, which indeed it did. But because the Court failed to make them explicit components of the test for preemption, lower courts are unlikely to require them in executive foreign affairs preemption cases.

#### B. Prior Cases

Relevant to a preemption analysis under the executive foreign affairs power are a number of cases decided prior to *Garamendi*, only some of which *Garamendi* itself discussed. Taken together, these cases indicate the importance of three factors. First, underlying each case was the existence of either federal legislation delegating authority to the president or a formal agreement between the U.S. government and a foreign government.<sup>57</sup> Second, the challenged state law in each case intersected in some way with a foreign entity.<sup>58</sup> Finally, the source law embodied a direct or indirect indication that the government intended to displace state law. Notably, these features underlie cases both where the Court found preemption and where it did not.

#### 1. Cases Finding Preemption

The triad of cases *United States v. Belmont*,<sup>59</sup> *United States*

*v. Pink*,<sup>60</sup> and *Dames & Moore v. Regan*<sup>61</sup> serves as the starting point for modern foreign affairs preemption jurisprudence.<sup>62</sup> These cases recognize the constitutionality of the president's authority "to create international obligations binding upon the United States as a matter of international law."<sup>63</sup> They also laid the foundation for later, expansive interpretations of that authority to supplant state laws operating in traditional areas of state competence.

The first case in the triad was *Belmont*. The matter at issue in *Belmont* was whether an executive agreement between the United States and a foreign country preempted state law governing the territorial operation of nationalization laws.<sup>64</sup> *Belmont* involved a dispute between the United States and the custodian of certain property in New York to which the U.S. government claimed title as a result of the executive agreement concluded between President Franklin D. Roosevelt and the newly recognized Soviet Union.<sup>65</sup> Under that agreement, the U.S. government waived its claims for property nationalized within the Soviet Union; in exchange, the Soviet government, among other things, assigned its interests in purportedly nationalized-property claims located in the United States.<sup>66</sup> The two countries also agreed that "the Soviet government was to be duly notified of all amounts realized by the United States from such release and assignment," which was part "of the larger plan to bring about a settlement of the rival claims of the high contracting parties."<sup>67</sup> New York policy posed an impediment to this "larger plan" because it did not allow foreign nationalization decrees to reach property within the state, and therefore title remained with the original owner. For the United States to prevail on its preemption claim, the Court had to first find that an executive agreement constituted a constitutionally legitimate exercise of presidential power, and then to find that the agreement carried the force of a treaty in domestic law.<sup>68</sup> The Court held that under the president's independent constitutional power, the executive acted as the "sole organ" of the United States to conduct foreign affairs, and therefore the agreement was valid not only as between foreign sovereigns, but also as to domestic law preemption.<sup>69</sup>

Even at this early juncture, the executive's preemption power rested on the existence of formal source law,<sup>70</sup> a

60. 315 U.S. 203 (1942).

61. 453 U.S. 654 (1981).

62. Although courts routinely rely on the *Belmont-Pink-Dames & Moore* line of cases when analyzing president's authority to undertake international agreements, Professor Ramsey argues that these cases fail to "make clear that the President asserted two distinct powers: (1) the authority to enter into international agreements; and (2) the authority to give agreements legislative effect to alter rights and obligations established under domestic law." Ramsey, *supra* note 11, at 143. Nonetheless, the Court made both findings, and once it did, the power of the executive to preempt state law became firmly rooted in the Supreme Court's foreign affairs preemption jurisprudence.

63. Ramsey, *supra* note 11, at 145.

64. *Belmont*, 301 U.S. at 326–27.

65. *Id.* at 330.

66. *Id.* at 326.

67. *Id.*

68. Ramsey, *supra* note 11, at 147.

69. *Belmont*, 301 U.S. at 330–32.

70. Before the Court reached the question whether the executive agreement in *Belmont* preempted state law, it first determined that the executive agreement was a constitutionally valid, binding international agreement. *Id.* at 330–31.

56. *Id.* at \*19. See discussion *infra* at Part IV.

57. Whether the formal agreement assumes the form of a treaty or an executive agreement is immaterial to this discussion, but some commentators have argued that some executive agreements lack constitutional authority to preempt state law. See, e.g., Ramsey, *supra* note 11.

58. The foreign entity may be a government, a corporation, or a private citizen. See *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, *supra* note 11, at 1898.

59. 301 U.S. 324 (1937).

nexus between a state law and a foreign entity, and executive intent to preempt state law, all of which supported the Court's finding of preemption in *Belmont*. First, the Court found that the president had entered into a binding international agreement.<sup>71</sup> Although the formal agreement did not take the form of a treaty, the Court found that the executive agreement passed constitutional muster as a valid instrument of executive authority under his foreign affairs power.<sup>72</sup> Additionally, the New York law had a clear nexus to a foreign entity, the Soviet government. By asserting that the nationalization laws of other countries violated state policy and therefore did not operate within New York's territorial jurisdiction, the state action demonstrably intersected with a foreign government's own laws.<sup>73</sup> Finally, although the majority did not discuss whether the executive agreement intended to displace state law, Justice Harlan F. Stone's concurring opinion pointedly discussed intent, noting:

We may, for present purposes, assume that the United States, by treaty with a foreign government with respect to a subject in which the foreign government has some interest or concern, could alter the policy which a state might otherwise adopt. It is unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty within this rule, for neither the allegations of the bill of complaint, nor the diplomatic exchanges, suggest that the United States has either recognized or declared that any state policy is to be overridden.

So far as now relevant, the document signed by the Soviet government, as preparatory to a more general settlement of claims and counterclaims between the two governments, assigns and releases to the United States all amounts "due or that may be found to be due it" from American nationals, and provides that the Soviet government is "to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment." The relevant portion of the document signed by the President is expressed in the following paragraph:

"I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of the amounts admitted to be due or that may be found to be due."

There is nothing in [these agreements] to suggest that the United States was to acquire or exert any greater rights than its transferor, or that the President, by mere executive action, purported or intended to alter the laws and policy of any state in which the debtor of an assigned claim might reside, or that the United States, as assignee, is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity with those laws.<sup>74</sup>

71. *Id.*

72. *Id.*

73. As the Court noted: "The continuing and definite interest of the Soviet government in the collection of assigned claims is evident; and the case, therefore, presents a question of public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government." *Id.* at 327 (emphasis added).

74. *Belmont*, 301 U.S. at 336-37 (Stone, J., concurring).

In short, Justice Stone concurred in the judgment but rejected the majority's finding of intent and therefore its finding of preemption.<sup>75</sup>

The Court sought to avoid broad application of *Belmont*, noting that its holding "deal[t] with only the case as . . . presented and with the parties now before [the Court]."<sup>76</sup> Thus, in its initial modern iteration, the executive foreign affairs preemption power was narrowly limited.

The Supreme Court had occasion to revisit executive foreign affairs power to preempt state law five years later in *Pink*. The operative facts in *Pink* were for all practical purposes identical to those in *Belmont*, the primary distinction being that in *Pink*, the property at issue was tangible property in the possession of its owners, whereas in *Belmont* it had been money in the possession of a custodian.<sup>77</sup> The Court found these differences immaterial and held New York law denying territorial effect to Soviet nationalization decrees to be preempted by executive agreement.<sup>78</sup> As in *Belmont*, the features of formal source law, nexus, and intent played a role in the *Pink* Court's analysis. The formal agreement<sup>79</sup> and nexus<sup>80</sup> considerations formed essential elements of the Court's finding of preemption, but unlike the *Belmont* majority, the *Pink* majority also discussed the executive's intent to displace contrary state law, albeit in terms of the president's intent to eliminate "impediments to friendly relations" between the Soviet Union and the United States.<sup>81</sup> Thus, the executive agreement intended preemption of any state law that impeded good relations with the Soviet regime.

The third case in the triad, *Dames & Moore*, presents substantial differences from *Belmont* and *Pink*, both in its underlying facts and in the features concerning source law and nexus. First, the source law included a combination of legislative delegation, independent executive orders, and a series of executive agreements. Second, the challenged state law was a contract claim—a law of general applicability—for which a court had granted default judgment and attached the assets of the defaulting party, which happened to be a foreign government. As a result of these differences, the case does not fit neatly into an analysis of independent executive power to preempt state law. Nevertheless, *Dames & Moore* further illuminates the Court's assumptions contributing to the *Garamendi* decision.

75. Justice Stone concurred on the basis that New York policy was consistent with federal policy and that therefore under New York law, the United States should prevail. *Id.* at 334-36 (Stone, J., concurring).

76. *Id.* at 332-33.

77. Ramsey, *supra* note 11, at 154-55.

78. *United States v. Pink*, 315 U.S. 203, 234 (1942).

79. The same Executive Agreement—the so-called Litvinov Assignment—that was at issue in *Belmont* served as the source law in *Pink*, as well. *Id.* at 211.

80. New York's law, "no matter what gloss be given it, amounts to official disapproval or non-recognition of the nationalization program of the Soviet Government." *Id.* at 232.

81. "Enforcement of such state policies would . . . tend to restore some of the precise impediments to friendly relations which the President intended to remove on inauguration of the policy of recognition of the Soviet Government." *Id.* at 231. The *Pink* dissent required intent and found it missing: "Even when courts deal with the language of diplomacy, some foundation must be laid for inferring an obligation where previously there was none, and some expression must be found in the conduct of foreign relations which fairly indicates an intention to assume it." *Id.* at 250 (Stone, J., dissenting).

The preemption issues in *Dames & Moore* had their roots in the 1979 Iranian revolution, in which nationalist militants seized the U.S. Embassy in Tehran and took American diplomatic personnel hostage.<sup>82</sup> The new Iranian regime repudiated the prior government's contractual obligations with U.S. companies, including contracts between Dames & Moore and the Iranian Atomic Energy Organization (IAEO).<sup>83</sup> President Jimmy E. Carter responded to the Embassy seizure by exercising his legislative grant of authority under the International Emergency Economic Powers Act (IEEPA) to issue an executive order freezing Iranian assets in the United States and directing the U.S. Department of the Treasury to promulgate regulations implementing the executive order.<sup>84</sup> Dames & Moore responded to the IAEO's contract repudiation by suing under a state breach of contract claim. The federal trial court issued orders of attachment against Iranian assets in the jurisdiction and ultimately granted summary judgment in favor of Dames & Moore.<sup>85</sup>

The district court stayed its execution of judgment, however, because while the *Dames & Moore* litigation was pending, Iran and the United States had negotiated a series of agreements in which Iran pledged to free the American hostages in exchange for the U.S. release of frozen Iranian assets.<sup>86</sup> Among other arrangements, the United States agreed to transfer \$1 billion of the unfrozen Iranian assets to an international arbitration tribunal, which would serve as the sole mechanism for the settlement of outstanding claims against Iran.<sup>87</sup> The United States further agreed to terminate all legal proceedings by U.S. persons against Iran in U.S. courts.<sup>88</sup> To implement the agreements with Iran, President Ronald W. Reagan<sup>89</sup> issued a series of executive orders which had the effect of dissolving Dames & Moore's attachment and terminating its rights under state law.<sup>90</sup> Dames & Moore challenged the various executive orders, claiming, inter alia, that the president had acted beyond the scope of his constitutional powers.<sup>91</sup>

The Supreme Court upheld the president's state law preemption as constitutionally authorized.<sup>92</sup> For purposes of this discussion, the relevant features of the Court's analysis include the existence of congressional legislation authorizing the president to nullify the attachments and order the transfer of Iranian assets to the international arbitration tribunal; the nexus of the state law to a foreign entity; and the intent of the executive to preempt state law.

Respecting the existence of federal legislation, the Court found that the IEEPA clearly authorized the president to freeze Iranian assets in the United States.<sup>93</sup> Whether the

IEEPA—together with the "Hostage Act"<sup>94</sup>—authorized the president to suspend claims pending in U.S. courts was a closer question, but the Court ultimately concluded that congressional acquiescence to the executive agreements was sufficient to find congressional approval of the president's actions.<sup>95</sup>

The nexus question was somewhat more attenuated, as the state law in question was a claim for breach of contract. Thus, unlike the New York policy at issue in *Belmont and Pink*, the law itself was one of general applicability, not directed in any way at a foreign government, corporation, or person. The contract, however, was between a private U.S. party and the Atomic Energy Organization of Iran, an agency of the Iranian government.<sup>96</sup> Because one party to the contract was a foreign government, the state law in this instance possessed the requisite nexus.

Similarly, the agreement embodied the requisite intent by the executive to displace state law. The Court noted as much, observing that one of the executive agreements specifically stated that among its purposes was the termination of "all litigation as between the Government of each party and the nationals of the other, and . . . the settlement and termination of all such claims through binding arbitration."<sup>97</sup> Further, the executive agreement obligated the United States "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."<sup>98</sup> The language of this agreement evinces the president's unmistakable intent to preempt all legal claims in U.S. courts by U.S. persons against the Iranian government, including those arising from state law.

Thus, although the underlying facts of *Dames & Moore* differed vastly from those in *Belmont and Pink*, the Court's analysis in all three cases relied (at least in part) on the existence of formal source law, a nexus between the state law and a foreign entity, and an intent to preempt state law, as evidenced in the source law. These elements—or rather their absence—continued to play a significant role in later preemption cases where the Court found no preemption.

82. *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981).

83. *Id.* at 664.

84. *Id.* at 662.

85. *Id.* at 663–64, 666.

86. *Id.* at 666.

87. *Id.* at 665.

88. *Id.*

89. Although President Carter issued the initial executive orders when the hostages were seized, Ronald Reagan, who was elected president in 1980, issued the executive orders terminating the *Dames & Moore* litigation as part of the arrangements to secure the hostages' release.

90. *Id.* at 666.

91. *Id.* at 667.

92. *Id.* at 674.

93. "[T]he IEEPA constitutes specific congressional action to nullify the attachments and order the transfer of Iranian assets." *Id.* at 674.

94. 22 U.S.C. §1732 (2006).

95. *Dames & Moore*, 453 U.S. at 686. Importantly, the Court took great pains to emphasize the narrowness of its holdings:

We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

*Id.* at 688.

96. *Id.* at 663–64.

97. *Id.* at 664–65 (quoting the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran).

98. *Id.* at 665 (quoting the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran).



## 2. Cases Finding No Preemption

A second triad of cases, less invoked but equally important, consists of *Container Corp. of America v. Franchise Tax Board*,<sup>99</sup> *Wardair Canada, Inc. v. Florida Department of Revenue*,<sup>100</sup> and *Barclay's Bank v. Franchise Tax Board of California*.<sup>101</sup> One explanation for the lesser degree of reliance on these cases in executive foreign affairs preemption analyses under independent executive powers may be that they all concern taxation of foreign entities. The more likely reason is that duly enacted treaties—not executive agreements—formed the primary basis of the foreign affairs preemption challenge. These cases remain instructive, however, for two reasons. First, the Court found that none of them preempted state law, despite the stronger source of potential preemptive instruments, namely treaties. More importantly, the Court found no governmental intent in the international agreements (or in subsequent legislation) to preempt state action.

The first case in this second triad is *Container Corp.*, which involved California's taxation on worldwide income as applied to a corporation with its domicile and headquarters in the United States and with subsidiaries overseas.<sup>102</sup> In this case, as well as in *Wardair* and *Barclay's*, the Court's inquiry partly focused on congressional preemption through its foreign commerce powers rather than executive preemption through the president's independent foreign affairs authority because the source of preemption was in the form of treaties, the ratification of which requires Senate consent. The Court examined subsequent congressional action to determine whether legislation enacted after the treaty altered the state's relationship to foreign entities in a way that the treaties did not.<sup>103</sup> The three essential features for preemption nevertheless run through the Court's analysis. And in the later formulation of its preemption test in *Garamendi*, the Court would rely heavily on an earlier concurring opinion<sup>104</sup> that depended on the validity of a treaty to find preemption, thus making these cases material to an analysis of executive foreign affairs preemption.

As an initial matter, the potential sources of a federal policy preempting state law in *Container Corp.* were a number of international treaties in which the federal government agreed to adopt a particular form of analysis to assess taxes on the domestic income of multinational corporations.<sup>105</sup> Thus, the formal source law existed. Second, the requisite nexus was present because state law sought to tax the foreign subsidiaries of a domestic corporation.<sup>106</sup> Finally, intent played an expressly fundamental role in the Court's decision. The Court upheld California's tax scheme because federal policy as articulated in international agreements and domestic legislation lacked "specific indica-

tions of congressional intent" to preempt the California tax law at issue.<sup>107</sup>

[T]here is no claim here that the federal tax statutes themselves provide the necessary pre-emptive force. . . . [A]lthough the United States is a party to a great number of tax treaties that require the Federal Government to adopt some form of "arm's-length" analysis in taxing the domestic income of multinational enterprises . . . [none of] the tax treaties into which the United States has entered cover[s] the taxing activities of subnational governmental units such as States. . . . Thus, whether we apply the "explicit directive" standard articulated in *Mobil*, or some more relaxed standard which takes into account our residual concern about the foreign policy implications of California's tax, we cannot conclude that the California tax at issue here is preempted by federal law or fatally inconsistent with federal policy."<sup>108</sup>

Additionally, as the Court noted, "Congress has long debated, but has not enacted, legislation designed to regulate state taxation of income,"<sup>109</sup> adding further support to the conclusion that the federal government did not intend to displace state law.

The second case in the triad of cases finding no preemption is *Wardair*, which involved a different state tax scheme, one of general applicability on the sale of aviation fuel within the state of Florida.<sup>110</sup> The Court found no preemption, rejecting arguments that the state sales tax on "instrumentalities of international air traffic" threatened the government's federal policy to remove impediments to foreign air travel and its ability to speak with "one voice" on taxation as such an impediment.<sup>111</sup> As in *Container Corp.*, a formal agreement that could potentially preempt state law existed in the form of a treaty.<sup>112</sup> The nexus between the state law and foreign entities was present but incidental, as the tax applied to the purchase of aviation fuel, regardless of the nationality of the purchaser. Intent to preempt—or lack thereof—proved as essential in *Wardair* as it had in *Container Corp.* Most of the *Wardair* treaties prohibited the federal government from imposing national taxes on aviation fuel by foreign carriers, but none prohibited the States or their subdivisions from taxing the sale of fuel to foreign airlines.<sup>113</sup> Because the international agreements were silent as to prohibitions against state taxation, the Court found that, "[b]y negative implication arising out of [these international accords,] the United States has at least acquiesced in state taxation of fuel used by foreign carriers in international travel" and upheld Florida's tax.<sup>114</sup>

107. *Id.* at 196.

108. *Id.* at 196–97.

109. *Id.* at 197. The state law upheld in *Container Corp.* possesses a striking similarity to California's GHG emissions regulations. In *Container Corp.*, the federal government had concluded treaties that were silent as to state law. The relevant treaty relating to GHG emissions is the UNFCCC, which is similarly silent as to state law. (The Kyoto Protocol likewise makes no mention of state law.) And, as in *Container Corp.*, Congress has subsequently debated but has not enacted legislation on mandatory standards for GHG emissions. See Diener, *supra* note 7, at 2118–19.

110. *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 4 (1986).

111. *Id.* at 13.

112. *Id.* at 4.

113. *Id.* at 12.

114. *Id.*

99. 463 U.S. 159 (1983).

100. 477 U.S. 1 (1986).

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

102. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 163 (1983).

103. Importantly, the Court has long required intent in cases of congressional preemption of state law. *E.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

104. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–20 (2003).

105. *Container Corp.*, 463 U.S. at 196.

106. *Id.* at 162–63.

Finally, in *Barclay's*, the Court resolved an issue left undecided in *Container Corp.*, namely whether California's worldwide tax scheme as applied to foreign-based corporations with domestic subsidiaries threatened federal policy as embodied in formal international agreements or domestic federal legislation.<sup>115</sup> To distinguish *Container Corp.*, the *Barclay's* petitioner argued that California's worldwide tax scheme hindered the federal government's ability to "speak with one voice," invoking as support several actions, statements, and amicus filings by the executive branch, which, the petitioners argued, formulated a clear federal policy sufficient to preempt California's method of taxation.<sup>116</sup> The Court rejected the preemption arguments.<sup>117</sup>

As in other preemption cases, source law and intent featured prominently in the Court's analysis. (The nexus element was present in the *Barclay's* facts, but the Court focused extensively on the underlying source law and its preemptive intent.) Formal source law with potential preemptive effect existed in *Barclay's* because, as in *Container Corp.*, the United States had entered into a number of tax treaties.<sup>118</sup> But, also as in *Container Corp.*, the mere existence of formal treaties cannot displace state law unless the treaties embody an intent to do so. Relying heavily on *Container Corp.* and *Wardair*, and on subsequent legislative inaction, the Court found no specific indications that Congress intended to preempt state taxation of foreign-based enterprises, either in the international agreements or in domestic federal statutes.<sup>119</sup> Nor, for that matter, did the Court find that the executive branch actions and statements constituted sufficient preemptive force.<sup>120</sup> In fact, the Court specifically stated that executive statements are insufficient to constitute a clear national policy prohibiting states from using worldwide combined reporting for taxation purposes.<sup>121</sup> The Court stated unequivocally:

Congress may "delegate very large grants of its power over foreign commerce to the President," who "also possesses in his own right certain powers conferred by the [U.S.] Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." We need not here consider the scope of the President's power to preempt state law pursuant to authority delegated by a statute or a ratified treaty; nor do we address whether the President may displace state law pursuant to legally binding executive agreements with foreign nations made

115. *Barclay's Bank v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994).

116. *Id.* at 328.

117. *Id.* at 330–31.

118. *Id.* at 322.

119. *Id.*

120. One of the petitioners in *Barclay's* had argued for preemption on the basis of several executive branch statements articulating foreign policy: an executive decision to introduce legislation requiring states to apply a particular method of tax calculation; letters from executive branch members of to California's governor and the chairman of the Senate Finance Committee, expressing opposition to California's method of worldwide combined reporting; and "Department of Justice amicus briefs filed in this Court, arguing that the worldwide combined reporting method violates the dormant Commerce Clause . . ." *Id.* at 328, note 30 (internal citations omitted). The Court rejected arguments that these executive branch statements served as sufficient authority to preempt state law. *Id.* at 328–29.

121. *Id.* at 328–29. ("The *Executive statements* to which [Petitioner] refers, however, cannot perform the service for which [Petitioner] would enlist them. The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations . . .'" (emphasis added in part).

"in the absence of either a congressional grant or denial of authority, [where] he can only reply upon his own independent powers." The Executive Branch actions—press releases, letters, and amicus briefs—on which [petitioner] here relies are merely precatory. Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting.<sup>122</sup>

Quoting an earlier concurring opinion by Justice Antonin G. Scalia in *Itel Containers International Corp. v. Huddleston*, the Court observed that the executive branch holds a superior position to that of the judiciary to determine "which state regulatory interests should currently be subordinated to . . . national interest in foreign commerce," but that the constitutional power to make such determinations resides in Congress, not in the judiciary or the executive branch.<sup>123</sup> Thus, executive branch statements, standing alone, could not preempt state law. "Congress [had] focused its attention on [the] issue, but [had] refrained from exercising its authority," and so no congressional act itself preempted state law or delegated authority to the president to do so.<sup>124</sup>

*Container Corp.*, *Wardair*, and *Barclay's* demonstrate the importance of formal source law, nexus, and intent in an analysis of a claim for state law preemption under the executive foreign affairs power. The presence or absence of these features guided the Court's analysis of executive foreign affairs preemption in the first triad of cases, where it found preemption, and in the second triad of cases, where it found no preemption. The Court's analysis was similarly informed by these features in two cases forming the foundation for *Garamendi's* analysis.

### 3. *Garamendi's* Foundational Cases

Two remaining preemption cases figured prominently in *Garamendi*, and therefore warrant attention. They are *Zschernig v. Miller*<sup>125</sup> and *Crosby v. National Foreign Trade Council*.<sup>126</sup>

In 1968, the Court decided *Zschernig*.<sup>127</sup> At issue in *Zschernig* was an Oregon probate law prohibiting inheritance by a foreign national, unless the foreign heir could demonstrate that succession to the proceeds of the Oregon estate would not be subject to confiscation by the heir's home government and that the home government recognized reciprocal rights of inheritance for American citizens.<sup>128</sup> *Zschernig* invalidated the Oregon law as preempted by federal foreign policy.<sup>129</sup>

The majority decision in *Zschernig* presents a bit of an obstacle to the argument that formal source law is a precondition to federal preemption of state legislation: although a 1923 treaty did in fact exist between Germany and the

122. *Id.* at 329.

123. *Id.* The Court noted that Congress had introduced a number of bills that would have proscribed California's taxation method but had enacted none of them. *Id.* at 324–26.

124. *Id.* at 329.

125. 389 U.S. 429 (1968).

126. 530 U.S. 363 (2000).

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

128. *Id.* at 430–31.

129. *Id.* 441.

United States, the majority found its provisions irrelevant to the Oregon law.<sup>130</sup> Disregarding a previous case in which the Court had upheld a state's general reciprocity clause between governments in matters of inheritance,<sup>131</sup> *Zschernig* offered precious little citation to—and no analysis of—any Supreme Court precedents<sup>132</sup> or constitutional provisions to support its conclusion that federal policy preempted Oregon's law. That the latter “ha[d] a direct impact upon foreign relations” and therefore could possibly “adversely affect the power of the central government to deal with [national] problems”<sup>133</sup> served as the sole rationale for the Court's decision. Based as it is on such feeble legal footing, the *Zschernig* majority offers little to the Court's foreign affairs preemption jurisprudence.<sup>134</sup>

Notwithstanding the weaknesses of its constitutional and precedential foundations, *Zschernig* operated as the basis for a significant portion of the Court's newly formulated preemption test in *Garamendi*. One of the unfortunate effects of the Court's reliance on *Zschernig* is the misperception it creates that the Court has eliminated the formal source law requirement from the preemption test. But Justice John M. Harlan's concurrence also played a major role in *Garamendi*'s preemption test.<sup>135</sup> And although *Garamendi* relegated mention of it to a footnote,<sup>136</sup> a 1923 treaty between Germany and the United States featured prominently in Justice Harlan's decision.<sup>137</sup> In fact, Justice Harlan concurred in the *Zschernig* decision “on the sole ground that the application of the Oregon statute in this case conflicts with the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.”<sup>138</sup> Thus, at least in the concurrence that would later play such a substantial role in *Garamendi*, formal source law for federal preemption did exist in *Zschernig*.

Regardless of the presence or absence of formal source law, Oregon's probate law had an obvious nexus with foreign entities, as the law addressed issues of inheritance of “foreign citizens” and reciprocity requirements for U.S. citizens living in a “foreign country.”<sup>139</sup> For the majority, the (perceived) strength of the nexus between the state law and the citizens and governments of foreign nations proved in itself sufficient to preempt the state law under the foreign relations doctrine. Most important to the *Zschernig* majority was not the effect of the law itself but the oppor-

tunity for state judges to disparage foreign regimes in their decisions.<sup>140</sup>

In fact, the nexus element held such sway over the majority that the Court failed to recognize the need for formal source law as the basis for preemption and disregarded the role of intent.<sup>141</sup> That the executive had expressed no preemptive intent in formal source law (or elsewhere) posed no obstacle to finding preemption. Indeed, the Court explicitly disregarded a Department of Justice amicus brief that expressly rejected any claim that the application of the Oregon statute “unduly interferes with the United States' conduct of foreign relations.”<sup>142</sup> Notably, Justice Harlan's concurrence expounded at great length on the text and history of the treaty to divine preemptive intent, which according to Justice Harlan was “to grant a right of inheritance no matter what the decedent's citizenship,” irrespective of state law to the contrary.<sup>143</sup> But Justice Harlan similarly disregarded executive branch statements that stood outside the text of the formal source law.<sup>144</sup>

At first blush, *Zschernig* seems to be an outlier in the Court's foreign affairs preemption jurisprudence, and had *Garamendi* relied exclusively on *Zschernig*'s majority opinion to develop its most recent iteration of the foreign affairs preemption doctrine, reconciling its reliance on *Zschernig* would be impossible. But because much of *Garamendi*'s analysis rested on Justice Harlan's concurrence, *Zschernig*—at least insofar as the rationale underlying Justice Harlan's concurrence—supports the argument that source, nexus, and intent are necessary precursors to preemption, even if the *Garamendi* Court failed to acknowledge their importance.

Another case that featured prominently in *Garamendi* was *Crosby*.<sup>145</sup> *Crosby* concerned a Massachusetts law placing restrictions on trade with Burma by limiting the ability of state agencies to buy goods or services from entities doing business with Burma.<sup>146</sup> The Court held the state law preempted by express federal legislative delegation of discretion to the president “to exercise economic leverage against Burma . . .”<sup>147</sup> in a 1997 statute.<sup>148</sup> *Crosby*'s analysis focused on source law and intent.

130. *Id.* at 432.

131. *Clark v. Allen*, 311 U.S. 503 (1947).

132. One of the few cases the majority mentioned is *Hines v. Davidowitz*, 312 U.S. 52 (1941), which it cited for the proposition that “even in the absence of a treaty, a State's policy may disturb foreign relations.” *Zschernig*, 389 U.S. at 441. What the *Zschernig* majority failed to mention is that preemption of state law in *Hines v. Davidowitz* was based upon federal legislation. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

133. *Zschernig*, 389 U.S. at 441.

134. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 417–20 (2003). Notwithstanding the weaknesses of its constitutional and precedential foundations, *Zschernig* operated as the basis for a significant portion of the Court's newly formulated preemption test in *Garamendi*.

135. *Id.*

136. *Id.* at 418 n.10.

137. *Zschernig*, 389 U.S. at 449–57 (Harlan, J., concurring).

138. *Id.* at 462 (Harlan, J., concurring).

139. *Id.* at 430–31.

140. *Garamendi*, 539 U.S. at 417. *Zschernig* was decided at the height of the Cold War, and the heir to the Oregon estate was an East German citizen residing in East Germany, which at the time was under Communist rule. *Id.*

141. Once the majority deemed the treaty irrelevant, and in the absence of federal legislation, the Court had no legitimate basis for determining whether the federal government intended to displace state probate law relating to inheritance by foreign citizens. Of course, absent a formal source for preemption, discerning intent to preempt presents a tricky task, to say the least.

142. *Zschernig*, 389 U.S. at 434 (quoting U.S. Department of Justice amicus brief). By negative implication, the Court's dismissal of such an informal claim to intent, or in this case the lack thereof, speaks volumes about the *Zschernig* majority's view of independent executive statements serving the sole basis for determining preemption.

143. *Id.* at 455 (Harlan, J., concurring).

144. Whether Justice Harlan would have resorted to the executive branch statements as supplementary tools had he found the treaty silent or ambiguous on the issue of intent remains an open question, but given his departure from the majority's analysis, it is doubtful that he would have done so.

145. 530 U.S. 363 (2000).

146. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366–67 (2000).

147. *Id.* at 375.

148. Congress made this express delegation in the Foreign Operations, Export Financing, and Related Programs Appropriations Act of

The federal legislation on which the Court relied consisted of three substantive parts: (1) imposition of economic sanctions directly on Burma; (2) authorization of the president to impose additional sanctions subject to certain constraints; and (3) direction to the president to develop “a comprehensive, multilateral strategy to bring democracy to and to improve human rights practices and quality of life in Burma.”<sup>149</sup> Pursuant to the express delegation of power from Congress, the president issued an executive order prohibiting “U.S. persons” from making new investments in Burma.<sup>150</sup> Thus, the formal source law for preemption in *Crosby* consisted of a federal law with express delegation of power to the president to undertake certain actions to achieve Congress’ goals relating to Burma.

*Crosby* also contained a clear and direct nexus between the Massachusetts law prohibiting certain trade and the foreign government of Burma. Indeed, the purpose of Massachusetts’ law was to limit trade with Burma. *Crosby*, perhaps more than any other case before *Garamendi*, presents a state law most directly linked to—and most severely affecting—a foreign entity.

Regarding intent, the Court discussed both the express purpose of the federal law and the implied intent to supplant state law regulating in the same area. Both areas of intent constituted important elements of the *Crosby* Court’s analysis. The intended purpose of the federal legislation, the Court said, was to delegate “effective discretion to the President to control economic sanctions against Burma,” to limit those sanctions “solely to United States persons and new investment,” and to instruct the president “to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma.”<sup>151</sup> According to the Court, preemption of state law was intended because Congress assigned plenary power to the president to deal with Burma:

[I]t is just this plenitude of Executive authority that we think controls the issue of preemption here. The President has been given this authority not merely to make a political statement but to achieve a political result, and the fullness of his authority shows the importance in the congressional mind of reaching that result. It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.<sup>152</sup>

And elsewhere: “We find it unlikely that Congress intended both to enable the President to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the President’s judgment of what national security requires.”<sup>153</sup> Consistent with its jurisprudence requiring intent by Congress to preempt state law,<sup>154</sup> the Court found

Congress’ intent to grant the president plenary power to be a necessary component for the federal law to have preemptive effect against the states.

The *Crosby* Court’s finding of preemption rested largely on the strength of the source law and its embodiment of intent. Express legislative delegation to the president formed a compelling source of formal law to effect preemption. Similarly, the Court’s discussion of intent conveys the importance of that feature’s presence in the source law itself.

Taken together, the Court’s preemption cases, with the exception of the *Zschernig* majority, share two common features: (1) a formal, written source, and (2) demonstrable preemptive intent embodied in the written source. And all of them share the element of a nexus between the state law and a foreign entity. These elements similarly inform *Garamendi*, albeit implicitly.

### C. Garamendi

In 2003, the Court again addressed executive foreign affairs preemption. In a decision much criticized for its analysis,<sup>155</sup> the Court created a new test to determine state law preemption by independent executive action taken under the president’s power to conduct foreign affairs. As the Court’s most recent (and broadest) pronouncement on executive foreign affairs preemption, *Garamendi* now serves as the anchor for lower court decisions on preemption claims under this doctrine. Lower court application of *Garamendi* is likely to be faulty, however, because neither the Court’s analysis nor the resulting test acknowledges the case’s source law, nexus, and intent.

#### 1. Background

During the 1930s and 1940s, among the unspeakable atrocities that Jews suffered at the hands of the Nazi regime in Germany was the theft of the value of their insurance policies.<sup>156</sup> For decades, Holocaust survivors and their heirs sought reparations for the loss of these assets.<sup>157</sup> In California, the state sought to facilitate Holocaust-related insurance litigation by enacting a law requiring “any insurer . . . doing business in the state” to disclose certain details about insurance policies that the insurer or any “related company” had sold to anyone in Europe and that had been in effect between 1920 and 1945.<sup>158</sup>

Insurance companies challenged the state law, claiming that the president’s foreign affairs policy, as expressed in executive agreements (primarily those with Austria and Germany) and in other policy statements, preempted the state statute.<sup>159</sup> These agreements sought to resolve Holocaust-era insurance claims by providing a single mechanism to

1997, which it enacted three months after Massachusetts passed the Massachusetts Burma Law. *Id.* at 368.

149. *Id.* at 369.

150. *Id.* at 370.

151. *Id.* at 373–74.

152. *Id.* at 376.

153. *Id.* at 376 n.10.

154. See case cited *supra* note 110.

155. See, e.g., Denning & Ramsey, *supra* note 5; Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court’s Vision of the Police Power in an Age of Globalization*, 42 HOUS. L. REV. 637, 706–13 (2005).

156. American Ins. Ass’n v. Garamendi, 539 U.S. 396, 401–02 (2003).

157. *Id.* at 402–04.

158. *Id.* at 409 (quoting California’s Holocaust Victim Insurance Relief Act (HVIRA) (internal quotations omitted)). Noncompliance would subject the insurer to suspension of licensure to do business in the state. *Id.* at 410. HVIRA also provided misdemeanor criminal sanctions certain false representations regarding the payment of policy proceeds. *Id.*

159. *Id.* at 412.

supplant litigation through which victims and their heirs could seek restitution. Under the agreement with Germany, which served as a model for agreements with other European countries, the German government pledged to create and partly fund a foundation to compensate persons who had been denied the proceeds of insurance policies in effect during the designated period.<sup>160</sup> As part of the agreements, the U.S. government also assumed certain obligations. The government agreed to inform U.S. courts adjudicating any Holocaust-era insurance claim against a German company that U.S. foreign policy interests supported using the German foundation as the exclusive mechanism for resolving such claims.<sup>161</sup> The United States also pledged to use its “best efforts” to have state and local governments [use] the foundation as the exclusive mechanism.”<sup>162</sup>

## 2. Majority Decision

In a 5-4 decision, *Garamendi* invalidated the California law under the foreign affairs preemption doctrine, finding that the executive agreements, together with subsequent executive policy statements, expressed a federal policy with which the state law conflicted.<sup>163</sup> To reach this conclusion, the Court relied on dicta from both the majority and concurring opinions in *Zschernig*,<sup>164</sup> and in the process established a new, two-prong, quasi-balancing test.

Under the first prong, a court must ask two questions: (1) Is the state legislating in an area of traditional competence; and (2) Is the effect on foreign relations only incidental? If the answer to either question is “no,” then federal policy preempts state law.<sup>165</sup> If the answer to both of these questions is “yes,” then state law is only preempted if it clearly conflicts with federal policy or it violates an express mandate of the Constitution, which raises the second prong of the test.<sup>166</sup>

Under the second prong, a federal policy that conflicts with a state law regulating an area of traditional competence and having only incidental effect on foreign affairs will still preempt the state law where a clear conflict exists between the federal policy and the state interests, or where the strength of the state interest is weak as against the traditional legislative subject matter.<sup>167</sup> In other words, the more firmly rooted in an area of traditional competence, the stronger the state interest is as against the federal interest.<sup>168</sup>

On the facts presented in *Garamendi*, the Court found that California sought to legislate in an area beyond the scope of traditional state competence and therefore federal policy

preempted state law on that basis alone.<sup>169</sup> Nevertheless, the Court also analyzed the case under the second prong, that is, the “conflict” prong.<sup>170</sup> The Court referred to the extensive negotiations leading to the executive agreements as evidence of the president’s consistent foreign policy

to encourage European governments and companies to volunteer settlement funds . . . in preference to litigation or coercive sanctions. . . . As for insurance claims in particular, the national position expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the [International Commission on Holocaust-Era Insurance Claims (ICHEIC)] to develop acceptable claim procedures, including procedures governing disclosure of policy information.<sup>171</sup>

California, by contrast, the Court observed, sought to impose regulatory sanctions on those companies failing to comply with the state’s disclosure requirements and to create a new legal cause of action for Holocaust victims and their heirs if the other sanctions proved ineffective. “[The 1999 Holocaust Victim Insurance Relief Act’s (HVIRA’s)] economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require, . . . undercuts the President’s diplomatic discretion . . .”<sup>172</sup> Thus, even had the Court found California to be legislating in an area of traditional state competence, federal policy would have preempted state law because of the “clear conflict” between the two.

In addition to finding preemption because (a) the state was legislating in an area of “traditional subject matter of foreign policy,” in which the federal government has expressed consistent policy (and therefore beyond traditional state competence); and (b) the state law, even if it had been regulating in an area of traditional competence, was in clear conflict with express federal policy interests, the Court proceeded, purportedly, to weigh the strength of the state interest as judged by standards of traditional practice.<sup>173</sup> The Court defined the state’s interest narrowly: “regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.”<sup>174</sup> Rejecting California’s claim that the regulatory purpose was to protect consumers by allowing them to know which insurers have failed to pay insurance claims, the Court stated that the real interest was protecting the Holocaust survivors living in California.<sup>175</sup> But rather than weigh the state’s interest against the backdrop of traditional competence, the Court’s analysis weighed the state’s interest against the federal interest: analogizing to sister-state conflict of laws, the Court noted that under general conflict-of-law standards, a court will not apply forum law

160. *Id.* at 405. The German foundation, working together with the International Commission on Holocaust Era Insurance Claims, a voluntary international organization, would negotiate with European insurers to provide information about unpaid insurance policies issued to Holocaust victims, and would seek to settle claims brought under such policies. *Id.* at 406–07.

161. *Id.* at 406.

162. *Id.*

163. *Id.* at 425.

164. For a critique of *Garamendi* on these points, see Denning & Ramsey, *supra* note 5, at 876–79.

165. *Garamendi*, 539 U.S. at 420 and n.11.

166. *Id.* at 420–21.

167. *Id.*

168. The Court raises, but does not answer, the question whether the strength of the federal policy interest itself should be weighed. *Id.* at 420 n.11.

169. “[R]esolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive’s responsibility for foreign affairs . . . . Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy . . . .” *Id.* at 420–21.

170. To provide a thorough analysis under its newly devised test, the Court should have also first answered whether the state law had only an incidental effect on foreign policy before proceeding to the conflict prong, but it did not do so.

171. *Garamendi*, 539 U.S. at 421.

172. *Id.* at 423–24.

173. *Id.* at 425–27.

174. *Id.* at 425.

175. *Id.* at 425–26.

if the forum state interests are weak as compared to the interests of another state represented in a particular controversy or transaction.<sup>176</sup> Thus, the Court observed, because California's interest is weak as against federal policy, federal policy should preempt state law.<sup>177</sup>

In sum, the Court found three distinct avenues under which the California law failed the foreign affairs preemption test. First, the law sought to regulate outside its area of traditional competence. Second, even if the law were legislating within an area of traditional competence, consistent federal policy as expressed in executive agreements and supplementary executive branch statements conflicted with state law. And third, even if the state law were regulating an area of traditional competence, and even if it were not in clear conflict with express federal policy, the state interest was weak as against traditional areas of state competence or the strength of federal interests.

### 3. *Garamendi's* Dissent

The dissent's argument rejects the majority's reliance on *Zschernig*, pointing out the long period of dormancy of that decision and stating that the Court should not "resurrect [it] here."<sup>178</sup> Without using the term "nexus," the *Garamendi* dissent clearly invokes that concept to distinguish *Zschernig* from *Garamendi*. The *Zschernig* decision, Justice Ruth Bader Ginsburg comments,

resonates most audibly when a state action "reflects a state policy critical of foreign governments and involves 'sitting in judgment' on them." . . . The HVIRA entails no such state action or policy. It takes no position on any contemporary foreign government and requires no assessment of any existing foreign regime. It is directed solely at private insurers doing business in California, and it requires them solely to disclose information in their or their affiliates' possession or control.<sup>179</sup>

Similarly, the *Garamendi* dissent implicitly invokes the concept of intent to express disagreement with the majority. As Justice Ginsburg notes, the U.S. government agreed to file precatory statements urging courts to dismiss Holocaust-era insurance claims against German companies on any valid legal ground because dismissal comports with federal foreign policy, but the content of the agreement lacks evidence of intent to preempt state law in that "such statements have no legally binding effect."<sup>180</sup> In this manner, they differ vastly from the executive agreements at issue in *Belmont*, *Pink*, and *Dames & Moore*, which "explicitly distinguish[ed] certain suits in domestic courts."<sup>181</sup>

### 4. Critique

*Garamendi* suffers from a number of infirmities that make it ill-suited for broad application. First, the decision rests on questionable constitutional foundations and weak prece-

dent.<sup>182</sup> Second, the foreign affairs-executive preemption test it establishes lacks clarity and presents application difficulties.<sup>183</sup> Third, *Garamendi* was decided under a number of assumptions that the Court fails to make an explicit part of the preemption test and that lower courts may not recognize as prerequisites to an application of the test and a finding of preemption.

Among the many reasons that lower courts should not apply *Garamendi* broadly are its lack of textual and structural support in the Constitution and its simultaneous reliance on and departure from prior law. Textually, the Constitution provides for foreign affairs preemption of state action in Article I, §10, which prohibits states from making treaties with other nations; from entering into other compacts with foreign nations without congressional consent; from granting letters of marque or reprisal; from maintaining armed forces in peacetime without congressional consent; and from conducting war unless actually invaded.<sup>184</sup>

Other constitutional exclusions of state action are reached by negative implication, that is, where the Constitution has expressly vested a particular power in the federal government, such power is denied to the states. The Court has found, for example, that constitutional grant of power to Congress, in Article I, §8, to regulate commerce with foreign nations implicitly preempts state action regulating such matters.<sup>185</sup> Similarly, the structure of the Constitution implies some federal power to preempt state law based on the need for "material foreign affairs decisions [to be] made at the federal level."<sup>186</sup> The extent to which the executive possesses this power independently, however, remains unclear, and defining its contours resides in the judiciary.

In shaping the contours of independent executive power to preempt state action, *Garamendi* relied on a number of precedents, none of which individually or jointly, supports an interpretation that executive policy statements, with nothing more, can preempt state law.<sup>187</sup> Of relevance to this

182. See Denning & Ramsey, *supra* note 5, at 890-98.

183. *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, *supra* note 11, at 1891-98.

184. U.S. CONST. art. 1, §10.

185. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). In *Japan Line*, the Court recognized a broader congressional power to preempt state action on the basis of Congress' dormant foreign commerce power than on its dormant interstate commerce power because in matters of foreign affairs, the federal government must be able to "speak with one voice." *Id.* at 448-49.

186. Denning & Ramsey, *supra* note 5, at 852. See also Brannon P. Denning & Jack H. McCall Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307, 337 (1999). But see Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 429-32 (1999).

187. The Court relied in part on its earlier finding of implied independent executive preemption power in *Belmont*, which determined that an executive agreement constituted a constitutionally valid exercise of executive power and that the agreement at issue preempted conflicting state law. In *Belmont*, the Court found the president's power to make an executive agreement to be an implied component of the executive's power to grant official recognition to a foreign government. A careful reading of the *Belmont* Court's statement that, "the Executive ha[s] authority to speak as the sole organ of [the federal] government" reveals the very limited context to which that statement applies, that is, the recognition of a foreign government. The full paragraph containing the "sole organ" reference states:

We take judicial notice of the fact that coincident with the assignment set forth in the complaint, the President recognized the Soviet government, and normal diplomatic relations were

176. *Id.* at 426.

177. *Id.*

178. *Id.* at 439 (Ginsburg, J., dissenting).

179. *Id.* (Ginsburg, J., dissenting) (internal quotations and citations omitted).

180. *Id.* at 440 (Ginsburg, J., dissenting).

181. *Id.* (Ginsburg, J., dissenting).

discussion, *Garamendi's* reliance on *Zschernig* and *Crosby* pose special concerns. Reliance on *Zschernig* allowed the Court to invoke the executive branch policy statements as evidence of both the existence and the strength of foreign federal policy on the matter of disclosure relating to Nazi-era insurance policies.<sup>188</sup> Reliance on *Crosby* allowed the Court to invoke the president's "diplomatic discretion" in foreign affairs and the choice of how to exercise it.<sup>189</sup> The Court's failure to acknowledge and distinguish the legal and factual circumstances of those cases has, in Professors Denning and Ramsey's words, embraced language implying "broad executive branch lawmaking power [that] far exceeds that recognized by the Court's prior, carefully-qualified decisions."<sup>190</sup> *Garamendi* ignored the majority's emphasis on the strength of nexus and the concurrence's reliance on the treaty in *Zschernig*, and downplayed the congressional delegation of plenary power to the president in *Crosby*. Thus, neither precedent in its totality supports *Garamendi's* finding of preemption.

Based largely as it was on *Zschernig*, which itself lacked solid precedential or constitutional grounding, *Garamendi* expanded the authority of the executive, acting alone, to pre-

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established between that government and the Government of the United States, followed by an exchange of ambassadors. The effect of this was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence. The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment, and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty-making clause of the Constitution (Art. II, §2), require the advice and consent of the Senate.

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

In the sentence recognizing the executive as "the sole organ" with authority to speak on behalf of the government, the word "therewith" (in the phrase "[t]he assignment and the agreements in connection therewith"), refers to the rather vague phrase "in respect of what was done here," which in turn refers to "the President[']s recogniz[ing] the Soviet government, and [the establishment of] normal diplomatic relations . . . between that government and the government of the United States." *Id.* The final two sentences of the "sole organ" paragraph should therefore be read as the Court's finding that insofar as the executive has authority to speak as the sole organ of the federal government to recognize a foreign government and to establish diplomatic relations with that government, then agreements made in connection with that diplomatic recognition do not require Senate consent. A broader interpretation of the executive's power to speak as the sole organ of the federal government does lie in *Belmont*, as *Belmont* did not address whether executive agreements negotiated in other contexts could preempt state law, or for that matter whether they constitute a constitutionally valid exercise of the president's power to conduct foreign affairs.

188. American Ins. Ass'n v. Garamendi, 539 U.S. 396, 417–20 (2003).

189. *Id.* at 424.

190. Denning & Ramsey, *supra* note 5, at 869. "*Garamendi* furnishes an excellent example of 'doctrine creep,' whereby entirely new principles of law are justified on the basis of prior cases, while ignoring important facts or limiting language that were important—perhaps decisive—in the previous cases." *Id.*

empt state law, even in areas of traditional state competence, but it did so without adequate analysis of the bases for its decision; without defining or clarifying certain elements for its application; and without making explicit the assumptions under which it was operating.

In addition to relying on questionable legal grounds, *Garamendi* is also subject to criticism because it created a test for executive foreign affairs preemption that leaves too much power in the executive branch and gives too little guidance to the courts.<sup>191</sup> The test itself lacks clarity. For example, the Court fails to define or even provide guidelines for determining what constitutes an area of traditional state competence.<sup>192</sup> In *Garamendi*, the Court applied a narrow construction—disclosure of Holocaust victim's insurance claims. Under this level of abstraction, California was found to be legislating beyond an area of traditional state competence. Had the Court defined the area more broadly as regulating insurance fraud, as California argued it should, the law would have fallen well within the scope of traditional state competence. Thus, whether a given law falls within or beyond an area of traditional competence will depend in part upon the level of abstraction a court assigns to the area in which a law operates. As one commentator notes, this decision will necessarily reflect a court's own policy choice.<sup>193</sup>

Another question the Court leaves unanswered, and one with which lower courts will undoubtedly grapple, is identifying when a state law has more than an incidental effect on foreign affairs policy. The Court neither defines "incidental effect" nor offers guidelines for ascertaining when a state law's effects on foreign policy reach beyond the incidental. Courts are also likely to struggle with how "clear" a conflict must be between state law and foreign policy for preemption to lie.

These difficulties in application are evident from the text and structure of the *Garamendi* test, but more troubling application concerns also lurk in the decision. Specifically, *Garamendi*, as have many of the Court's prior cases, assumed the presence of certain features in the facts of the case at hand and of the precedents upon which it relied. Because

191. Denning & Ramsey, *supra* note 5, at 930–33; *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, *supra* note 11, at 1895–96.

192. See generally American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

193.

Unsurprisingly, state GHG regulations may . . . be framed in ways that make them seem either traditional or nontraditional, depending on how one views their purposes and at what level of abstraction one characterizes them. States have regulated air pollution since before the Clean Air Act (CAA), and now, under the cooperative federalist structure of the CAA, they enjoy substantial latitude to devise their own policies and to exceed minimum federal standards. . . . [W]hen characterized as a species of air pollution of electric power regulation, state GHG regulations fall within traditional state responsibilities. In response, industry may argue that these cooperative federalism relationships reflect a tradition in which states may address unique local problems, not one in which states address problems that are unavoidably global in scope. . . . [I]t is hard to imagine judges deciding whether state GHG regulation falls within a traditional area of state responsibility without reference to their own views on climate change policy and their level of sympathy with the state's approach.

*Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, *supra* note 11, at 1895–96.

these assumptions remained unspoken in *Garamendi*, even in the Court's articulation of a test for executive preemption, lower courts are likely to overlook their necessity for finding preemption.

Without acknowledging (or perhaps without recognizing) that it was doing so, *Garamendi* continued applying the three features that previous decisions had also assumed, or in some cases had explicitly discussed: the existence of a formal writing, in the form of legislation, a treaty, or an executive agreement; a clear and targeted nexus between the state legislation and a foreign entity, either facially or as applied; and a demonstrable intent by the executive, embodied in the formal writing (supplemented by executive policy statements if necessary), to preempt state law.

Although the dissent in *Garamendi* made much of the majority's reliance on executive statements as the source for preempting California's law, the majority in fact relied primarily on the executive agreement, and only on the executive statements as supplementary documents to clarify the federal policy already established in the executive agreements. The Court discussed in some detail the language contained in the agreement:

First, the Government agreed that whenever a German company was sued on a Holocaust-era claim in an American court, the Government of the United States would submit a statement that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from involvement in the [Nazi] era and World War II." Though unwilling to guarantee that its foreign policy interests would "in themselves provide an independent legal basis for dismissal," that being an issue for the courts, the Government agreed to tell courts "that U.S. policy interests favor dismissal on any valid legal ground." [T]he Government [also] promised to use its "best efforts, in a manner it considers appropriate," to get the state and local governments to respect the foundation as the exclusive mechanism [for resolving claims].<sup>194</sup>

Clearly, then, the existence of the executive agreement provided the necessary anchor with which to ground a preemption finding. Had an agreement pertaining specifically to Holocaust-era insurance claims not existed, the Court would have had no basis for considering the executive policy statements at all. Thus, although the Court's final *Garamendi* formulation failed to expressly include the requirement of legislation (with delegation to the president), a treaty, or an executive agreement as a necessary (but insufficient) element for executive preemption, the test incorporates this requirement by implication in the Court's analysis and prior case law.

As in *Zschernig*, the targeted nexus of the state law to foreign entities proved a strong motivator in the Court's executive foreign affairs preemption finding. Rejecting California's argument that the state law's disclosure requirement aimed at protecting general insurance claim consumer interests, the Court pointedly remarked that the HVIRA did not function as "a generally applicable 'blue sky' law," but instead "effectively singles out only policies issued by European companies, in Europe, to European residents . . ."<sup>195</sup> Like the required existence of a formal source of binding

law, the Court assumed the need for a nexus but did not make it part of the *Garamendi* test. Nevertheless, the implication is clear: had the California law been a generally applicable "blue sky" law, then, as in *Wardair*, where a generally applicable sales tax on aviation fuel survived a preemption challenge, the Court's analysis would have proceeded differently, possibly yielding a different outcome.

Finally, the Court assumed that the formal legal source—the executive agreements with Austria and Germany—embodied the executive's intent to displace conflicting state law. After pronouncing that, "valid executive agreements are fit to preempt state law, just as treaties are," the Court observed that the executive agreements lacked express intent because "the agreements include no preemption clause," but that an implied intent embodied in the agreements may nevertheless preempt state law.<sup>196</sup> As with the formal source and nexus features, however, the Court failed to make intent an explicit part of the *Garamendi* test.

Similarly unstated, and potentially problematic in application is the degree of specificity with which the agreement must embody the intent of foreign policy in relation to state law. For the majority in *Garamendi*, for example, the broader federal policy of encouraging settlement of Holocaust-era insurance claims through the foundation instead of litigation incorporated an intent to displace state disclosure laws. By contrast, the dissent found the absence of provisions relating to disclosure important to its conclusion that the executive agreements did not reach disclosure laws:

[I]t should be abundantly clear that those agreements leave disclosure laws like the HVIRA untouched. The contrast with the Litvinov Assignment at issue in *Belmont* and *Pink* is marked. That agreement spoke directly to claim assignment in no uncertain terms; *Belmont* and *Pink* confirmed that state law could not invalidate the very assignments accomplished by the agreement. Here, the Court invalidates a state disclosure law on grounds of conflict with foreign policy "embodied" in certain executive agreements, although those agreements do not refer to state disclosure laws specifically, or even to information disclosure generally.<sup>197</sup>

Because *Garamendi* failed to include intent as an express element in its executive foreign affairs preemption test, it likewise failed to develop the specificity requirement. This gap, along with those the other assumptions create, makes broad interpretation of executive foreign affairs preemption power under the *Garamendi* test undesirable.

Under the explicit *Garamendi* test, lower courts are likely to be unaware of the elements that the Court assumed as prerequisites to application of the test. In other words, courts should apply the *Garamendi* test only where (1) a formal legal source for preemption (legislation, treaty, or executive agreement) exists; (2) a targeted nexus links state law to a foreign entity; and (3) the formal legal source embodies an executive intent to preempt. Where these prerequisites are not met, the explicit *Garamendi* test is inapplicable. But because the Court failed to identify these foundational assumptions, lower courts may believe that they are immaterial.

194. *Garamendi*, 539 U.S. at 406.

195. *Id.* at 425–26.

196. *Id.* at 416–17.

197. *Id.* at 441 (Ginsburg, J., dissenting).



#### IV. *Chrysler* Revisited

*Garamendi*'s history provides the necessary foundation to evaluate *Chrysler*'s interpretation and application of Supreme Court jurisprudence on executive foreign affairs preemption. The analysis presented in this Part will demonstrate why *Garamendi*'s implied assumptions are likely to result in overbroad applications of the executive foreign affairs preemption doctrine.

*Chrysler*'s analysis of executive foreign affairs preemption furnishes an excellent example of lower court misunderstanding and misapplication of *Garamendi*.<sup>198</sup> An intriguing—and telling—aspect of *Chrysler*'s analysis is the court's intuitive grasp of the potential role of source law, nexus, and intent but its rejection of them as necessary for a preemption claim under executive foreign affairs doctrine.

##### A. No Formal Source Law Requirement

In its discussion on formal source law as a prerequisite to executive foreign affairs preemption, the court acknowledged that recent Supreme Court cases have found preemption based upon the embodiment of a foreign affairs policy in an executive agreement or a federal legislative delegation to the president. After observing that no executive agreement or federal law embodies federal foreign policy on the matter of GHG emissions,<sup>199</sup> the court reviewed what it considered potential sources for preemption of state action: the Byrd-Hagel resolution in the Senate,<sup>200</sup> and official statements by executive branch personnel in the Department of State.<sup>201</sup> The court mentioned, but did not discuss, the UNFCCC,<sup>202</sup> and it rejected the Bingaman-Domenici Senate resolution (adopted after the Byrd-Hagel resolution)<sup>203</sup> and legislative evidence suggesting federal foreign policy does not "eschew unilateral greenhouse gas regulation."<sup>204</sup>

Citing only *Garamendi*, which relied on executive branch statements as a gap-filler, and *Crosby*, which recognized the president's preemptive power via legislative delegation, the *Chrysler* court announced that "[t]he Supreme Court cases do not suggest that the absence of a statute or an executive agreement is fatal to a foreign policy preemption claim."<sup>205</sup> In making this pronouncement, the court misconstrued the power of the executive branch acting alone to preempt state law. Failing to recognize that an executive agreement formed the primary source for preemption in *Garamendi*,

and misstating *Crosby*,<sup>206</sup> the court determined that executive branch statements may of their own force preempt state law.<sup>207</sup> *Chrysler*'s announcement far exceeds *Garamendi*'s use of executive statements as gap-fillers. But, as *Garamendi* did not explicitly assert the need for formal source law, *Chrysler* could find a valid preemption claim based solely on executive policy statements and a Senate resolution rejecting binding international agreements that would require mandatory emissions reductions.

##### B. No Nexus Requirement

Just as the *Chrysler* court failed to recognize *Garamendi*'s assumption that formal source law was a prerequisite to an executive foreign affairs preemption claim, it also failed to recognize the need for the state law to intersect with a foreign entity. In *Chrysler*'s, words, "[t]he [*Garamendi*] Court did not speak to whether preemption generally turned on the breadth of the state regulation."<sup>208</sup> For this reason, the *Chrysler* court concluded, the Supreme Court's foreign policy jurisprudence allows "the possibility of preemption of a generally applicable law that interferes with foreign policy."<sup>209</sup> Again, to support its proposition, the court cites only *Garamendi* and *Crosby*, both of which involved state statutes with a very strong nexus to foreign governments.<sup>210</sup>

##### C. No Executive Preemptive Intent Requirement

Finally, like its treatment of source law and nexus, *Chrysler*'s treatment of intent fails to acknowledge the unexpressed assumption in *Garamendi* that the formal source

206. According to *Chrysler*,

even though the President's discretionary powers derived from a statute, the [*Crosby*] Court did not foreclose the potential preemption of a state statute interfering with a Presidential foreign policy option on which he has not yet acted. Thus, so long as the President is empowered to act to benefit the United States foreign policy interests, whether through express or implied congressional or through his independent authority, a state statute that excessively interferes with an action "he may choose to take" in furtherance of that interest may be preempted.

*Id.* The context of *Crosby* clearly demonstrates that the president's power to preempt state law with an as-yet-to-be-exercised foreign policy option was founded purely in the legislative delegation of plenary power to the president and in no way stands for the proposition that executive branch statements acting alone are sufficient to preempt state law. By cobbling together a collection of observations by the *Crosby* Court and giving affirmative weight to the Court's silence on preemption by executive branch policy statement, *Chrysler* misstates *Crosby* and mistakenly invokes it to support its claim that no source law is required for executive preemption of state law.

207. "If the Executive Branch statements are competent evidence of what our foreign policy is, the court sees no reason to limit preemption to foreign policy as expressed in statutes or executive agreements." *Chrysler*, 2006 WL 2734359, at \*15.

208. *Chrysler*, 2006 WL 2734359, at \*18. The district court assigned a strange interpretation to *Garamendi*'s treatment of generally applicable laws. *Garamendi* stated that California's disclosure law "was quite unlike a generally applicable . . . law" in that it "effectively singles out only policies issued by European companies, in Europe, to European residents . . ." *Id.* (quoting *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425 (2003)). According to *Chrysler*, this statement "does not evince the Court's intent to exclude generally applicable laws from . . . preemption." *Id.* True, but it in no way evinces the opposite either.

209. *Id.* at \*\*18–19.

210. See *supra* discussion Parts III.B.3.b., III.C.

198. *Chrysler*'s analysis conflates the executive foreign affairs preemption doctrine and the congressional foreign policy preemption doctrine. Given the scope of this Article, the discussion herein focuses exclusively on the former doctrine.

199. The court couches the inquiry in terms of whether—not where—the federal government has expressed foreign policy on GHG emissions. By focusing on whether any executive source embodies foreign policy on the matter, the court both subordinates the importance of formal source law and fails to recognize that federal foreign policy opposing binding agreements as between nations in no way speaks to independent state action to regulate emissions within state borders.

200. *Central Valley Chrysler-Jeep v. Witherspoon*, 2006 WL 2734359, \*14 (E.D. Cal. Sept. 25, 2006).

201. *Id.* at \*\*16–17.

202. *Id.* at \*16.

203. *Id.* at \*14.

204. *Id.* at \*16.

205. *Id.* at \*15.

law must embody an intent to preempt state law. *Chrysler's* analysis of intent is misdirected, focusing on whether Congress intended, under the CAA, to allow state law to continue to regulate in an area that federal law had expressly not preempted even if that state law interfered with foreign policy.<sup>211</sup> According to *Chrysler*, the implementing regulations of the CAA did not evince congressional intent “to permit California to implement emissions regulations even if they interfere with foreign policy goals . . . . Presumably, Congress would not be required to draft [the CAA] so as to explicitly preclude emissions regulations that interfere with United States foreign policy . . . .”<sup>212</sup> The district court’s focus on congressional intent is not surprising, given the court’s failure to require formal source law for executive foreign affairs preemption, but it is also not relevant to whether the executive policy intended to preempt state law.<sup>213</sup> Congressional intent to preempt state law that conflicts with federal foreign policy is relevant only insofar as the intent is embodied in legislation (or lack thereof) relating to foreign commerce or delegating authority to the president. Further, given the court’s failure to require formal source law as a precondition to preemption, the court could not very well require that such law embody the executive branch’s intent to preempt state law.

#### D. Critique

The facts in *Chrysler* indicate that formal source law of potential preemptive force does exist. The UNFCCC, as a duly enacted treaty, would serve as the necessary source for preemption if nexus and intent are also present.<sup>214</sup> Neither nexus nor intent exists in the context of the California law and the UNFCCC, however. Nexus does not exist because the California law regulating intrastate GHG emissions is a law of general applicability and, like the gas tax on aviation fuel in *Wardair*, does not specifically reach foreign governments, corporations, or other entities. Foreign parties are only incidentally affected if their activities emit GHGs in California.<sup>215</sup> Even if the requisite nexus were present, intent to preempt state law is missing. Nothing in the UNFCCC indicates an intent to preempt state action on GHG emissions regulation. Thus, even if the executive branch policy statements were used as gap-fillers, the UNFCCC does not furnish a sufficient basis for preemption.

Aside from the UNFCCC, no other potentially preemptive source law exists. The Kyoto Protocol does not qualify because it is an implementing instrument of the UNFCCC and does not stand alone, so the U.S. repudiation of it speaks only to the rejection of an internationally binding agreement as between nations. Repudiation of the Protocol does not itself constitute law, nor does it in any way speak to state law preemption. Additionally, no pertinent executive agree-

ments are in force. The president’s GHG reduction partnerships with countries in the Asia Pacific are not—as the partnerships pointedly make clear—legally binding;<sup>216</sup> they therefore do not constitute law. Further, Congress has not legislatively delegated plenary power to the president to leverage U.S. voluntary measures to secure reductions in the international arena.

What remains for the *Chrysler* court to use as source law is policy embodied in executive branch statements. Under *Garamendi*, executive branch policy statements may clearly be used as gap-fillers to supplement formal source, but where such source law does not exist, executive branch policy statements, which lack the force of law, cannot act alone to preempt state law, even where the executive branch policy statements indicate intent to do so.

Similarly, where state law such as California’s GHG emissions law lacks the requisite nexus with a foreign entity, source law and intent cannot displace state law. The nexus element is likely to prove most problematic in today’s globalized world, as more state laws will have a foreign nexus. In *Chrysler*, however, the issue is moot because of the lack of source law embodying an intent to preempt state law. Insofar as the *Chrysler* court indicated such a nexus was unnecessary, its application of *Garamendi* is overbroad.

That the *Chrysler* court was able to find a valid claim for preemption of a generally applicable state law on the sole basis of executive branch policy statements (and a Senate resolution, which itself lacks the force of law) serves as an exemplar of how lower courts are likely to go astray when applying *Garamendi* because the Supreme Court failed to make its assumptions about source law, nexus, and intent clear.

In sum, *Chrysler's* executive foreign affairs preemption analysis overlooks the silent assumptions that informed the *Garamendi* analysis. Consequently, the court’s failure to require formal source law, nexus, and intent resulted in an overbroad application of *Garamendi* and a mistaken finding of a valid claim for preemption under the executive foreign affairs doctrine.

#### V. Conclusion

State-initiated efforts to regulate GHG emissions face a number of constitutional challenges. Among them is preemption under the executive foreign affairs doctrine. The Court’s jurisprudence in this area remains ill defined, and the most recent Court decision to reach the issue lacks clarity in its formulation of the test that lower courts should apply to determine whether state law is preempted. One of the difficulties lower courts are likely to face involves when to even apply the *Garamendi* test, as the Court made several assumptions that it neither stated nor incorporated into the test itself. Courts should therefore be wary of broadly applying *Garamendi* to executive foreign affairs preemption claims.

Unless and until the Court revisits *Garamendi*, clarifies its executive foreign affairs preemption test, and makes its underlying presuppositions an explicit part of that test, lower courts should consider preemption claims under *Garamendi* in the context of the Court’s assumptions. First, a formal legal source in the form of legislation delegating

211. *Chrysler*, 2006 WL 2734359, at \*18.

212. *Id.* at \*17.

213. To be fair, the court’s discussion of intent occurred in the context of its response to defendant’s arguments that the CAA authorized California to legislate in the area even if doing so interferes with the Bush Administration’s policy. *Id.*

214. UNFCCC art. 2, June 12, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 164.

215. The result would be different if the California law required all entities doing business in California to meet California’s emissions standards in the foreign country, but it does not.

216. *See supra* note 9.

authority to the executive, a treaty, or an executive agreement must exist as minimal prerequisites. Additional executive policy statements may supplement, but may not displace, the formal legal writing as the primary source for determining preemption.<sup>217</sup> Second, there must be a nexus between the state law and a foreign entity. Absent such a nexus, i.e., if the state law is one of general applicability, and not targeted in any way at a foreign entity, the *Garamendi* test should not be applied. As the Court has implied, but not stated, that generally applicable laws in areas of traditional state competence may fail to present an adequate link to foreign affairs, lower courts should be hesitant to apply *Garamendi* to state laws of general applicability.<sup>218</sup> Finally, the formal legal source must intend to preempt state law in the area in which the state law is legislating.<sup>219</sup> If the intent is not

expressly stated, then a reasonable guideline for determining intent is the specificity of the context indicating intent: the more specific the context indicating intent, the stronger the implication that the executive intended to preempt state law. If the legal source contains no indication that it intended preemptive effect on state law, however, then there is no need to proceed to the *Garamendi* test. In sum, because the Court's presuppositions about the existence of a formal legal source, the nexus between state law and a foreign entity, and the executive's intent to preempt state law informed the *Garamendi* decision, lower courts should similarly consider these features in executive foreign affairs preemption challenges to state law.

Once these preliminary questions are addressed, and a court determines that all three features are present in the facts under its consideration, the inquiry should proceed to the *Garamendi* test. Although requiring formal source law, a nexus, and intent before considering a preemption claim under the *Garamendi* test will not address the larger concerns about federalism and separation of powers, it will prevent overbroad application until the Court can clarify its executive foreign affairs jurisprudence.

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217. The wisdom of allowing executive agreements to serve as the anchoring legal source or for allowing executive policy statements at all is beyond the scope of this discussion.
218. This question may be too inextricably linked with the "traditional competence" and "incidental effects" parts of the *Garamendi* test, but as an initial matter, courts should not be too quick to disregard the nexus feature in the preliminary inquiry.
219. Requiring the executive to manifest this intent is not unreasonable: The U.S. Department of State Foreign Affairs Manual requires that, when deciding among procedures for international agreements, State Department officials are to give due consideration to whether

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the agreement is intended to affect state laws. 11 F.A.M. 720, 723.3(2) (2006). Thus, the executive is expected to consider and decide as a matter of course whether a particular agreement is intended to affect state laws.