

## Foreign Affairs Federalism: The Legality of California's Link With the European Union Emissions Trading Scheme

by Hannah Chang

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*Editors' Summary: Last year, Tony Blair and Arnold Schwarzenegger signaled their commitment to join the United Kingdom and California in efforts to combat climate change. In this Article, Hannah Chang examines whether California can legitimately join its carbon market to the European Union's emissions trading scheme. She sets forth the foreign affairs federalism considerations that California must address and points to elements of its transnational action that ought to persuade a court to uphold its state legislation in the face of a foreign affairs preemption challenge. She ultimately concludes that California's legislation might well be foreign affairs-preempted, but that this result ought not be inevitable given the unique aspects of California's actions that call for a rethinking of foreign affairs federalism.*

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### I. Introduction

In July 2006, British Prime Minister Tony Blair and California Gov. Arnold Schwarzenegger signed an agreement committing California and the United Kingdom as partners in addressing climate change. In addition to collaborating on clean energy technology research and enhancing linkages between their scientific communities, California and the United Kingdom will explore the potential for joining their greenhouse gas (GHG) emissions trading markets.<sup>1</sup> Governor Schwarzenegger followed this historic agreement with an October 2006 executive order calling for the development of a "comprehensive market-based compliance program . . . that permits trading with the European Union."<sup>2</sup> Although a trans-Atlantic emissions trading system is still years away,<sup>3</sup> California and the European Union (EU) are al-

ready taking steps now to harmonize their emissions trading programs to facilitate linkage in the future.<sup>4</sup>

One of the central legal questions raised by these developments is whether California can legitimately join its carbon market to the EU's emissions trading scheme (EU-ETS) under our constitutional understanding of federalism. More generally, the question is: to what extent do U.S. states have the authority to interact with other nations in implementing legislation in an area, such as climate change policy, where the federal government has not enacted legislation? This Article will address these questions with a focus on California's enactment of reciprocal legislation as the means to implement the transnational linkage, and on the implications of foreign affairs preemption for such state legislation.

The field of foreign affairs federalism and preemption has been described as a murky "undersea world" because of its sparse and vague jurisprudence.<sup>5</sup> The U.S. Supreme Court has given little direction in the field, and scholarly debate on the interpretation of the jurisprudence is heated. The result of a challenge to California legislation implementing a transnational carbon market linkage is therefore difficult to predict. After all, as one commentator notes, the lack of Supreme Court guidance in foreign affairs preemption is reflected in "the profusion of confusing lower court opinions on the subject in which the courts appear to have applied a range of doctrinal tests roughly equal to the range of factual situations before them."<sup>6</sup>

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1. Press Release, Office of the Governor, Gov. Schwarzenegger, British Prime Minister Tony Blair Sign Historic Agreement to Collaborate on Climate Change, Clean Energy (July 31, 2006), available at <http://gov.ca.gov/index.php/print-version/press-release/2770>.
2. Cal. Exec. Order No. S-20-06 (Oct. 18, 2006), available at <http://gov.ca.gov/index.php?executive-order/4484/>.
3. Christa Case & Rantay R. Islam, *Can Arnold Terminate Emissions?*, SPIEGEL ONLINE INT'L, Aug. 9, 2006, available at <http://www.spiegel.de/international/0,1518,430631,00.html> (quoting the EU's emission trading scheme (EU-ETS) manager at the International Emissions Trading Association: "[T]his seems to be much more part of the post-2012 scenario when Kyoto expires . . . [n]egotiations (between the EU and California) would take years and years, but could start now.").

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4. *EU and California in Talks*, KANSAS CITY STAR, Jan. 27, 2007, at C6.

5. Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT'L L. 337 (2001).

6. Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign*

This Article does not attempt to delineate the precise scope of the doctrine or to propose a viable doctrinal test for foreign affairs preemption, as other scholarship has attempted.<sup>7</sup> Instead, it examines potential California legislation under the foreign affairs preemption doctrines that might be raised as challenges, and in doing so, sets forth the foreign affairs federalism considerations that must be considered in assessing the validity of the legislation. It then uses this examination as a springboard for a broader look at the role of states in areas where the federal government has not acted but where state action might affect the nation's foreign affairs.

After a background in Part II describing the alternatives open to California in enacting a transnational carbon market linkage, Part III assesses the California legislation under the various foreign affairs preemption doctrines. The unhelpful conclusion is that the jurisprudence provides so much room for interpretation that a fair reading of precedent could lead to either result—foreign affairs preemption of California's legislation, or not. Part IV's discussion of prescriptive implications, however, points to two unique elements of California's action that map broadly onto the two central concerns of foreign affairs jurisprudence and should affect the assessment of California's legislation. Part V then takes a broader, normative look at foreign affairs federalism through the lens of California's action. Ultimately, this Article concludes that California's legislation might well be invalidated under foreign affairs preemption, but that this result ought not be inevitable given elements of California's first-impression legislation that could drive a reframing of foreign affairs federalism in a globalized era.

## II. Background

The United States is a formal signatory to the United Nations Framework Convention on Climate Change (UNFCCC), an international agreement signed by 189 countries that entered into force in March 1994. The UNFCCC commits signatories to limit "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."<sup>8</sup> The United States then signed, but did not ratify, the Kyoto Protocol to the UNFCCC, which entered into force in February 2005, and implements the UNFCCC by establishing specific GHG emissions reduction targets for developed countries.<sup>9</sup>

Because the U.S. Senate never ratified it, the Kyoto Protocol is not binding on the United States, and the federal government has instead opted for a voluntary approach to

GHG reduction by, for instance, encouraging technological solutions and the formation of public-private partnerships.<sup>10</sup> Individual states have stepped into the vacuum of national climate change policy, ranging from the establishment of individual state emissions reduction targets to the formation of the Regional Greenhouse Gas Initiative (RGGI), a coalition of northeastern states committed to the development of a regional cap-and-trade program.<sup>11</sup> California is in the process of developing a GHG emission allowance market, which it hopes to eventually link to the RGGI<sup>12</sup> as well as the EU-ETS, an emissions trading scheme within the European Community that opened on January 1, 2005.<sup>13</sup>

Under an emissions trading scheme, or cap-and-trade program as they are sometimes called, emitters of GHGs, principally power plants, are assigned a cap, or limit, on the amount of their emissions, which is set at some level below their current emissions. These emitters are given credits, or allowances—essentially the right to emit a specific amount of GHGs—that add up to the market-wide cap. Emitters are then free to trade allowances among themselves so that a company that pollutes beyond its cap is required to buy emissions allowances from another company, and a company that reduces its emissions below its cap can profit from selling its excess allowances. The overall result is to reduce pollution to the established cap while simultaneously allowing industry the flexibility to maneuver economically in abating pollution.<sup>14</sup>

Linking separate trading schemes permits emissions allowances to flow between the schemes so that one country's allowances can be used by a participant in the other country's scheme for compliance purposes.<sup>15</sup> California can choose one of four avenues in establishing a link with the EU-ETS: (1) private contract; (2) political arrangement; (3) a binding international treaty or compact; or (4) mutual recognition of allowances by way of reciprocal domestic legislation.<sup>16</sup> This Article will focus on the last of these options because it seems the most likely avenue to be implemented.

First, contractual arrangements are an unlikely approach because the very nature of contracts will limit trading to individual transactions between individual parties. While this offers flexibility, companies participating in the trading scheme will likely prefer a transparent and predictable

*Affairs*, 53 SYRACUSE L. REV. 923, 926 (2003); *see also id.* at 967-72 (discussing lower courts' response to the Supreme Court's foreign affairs jurisprudence).

7. *See, e.g.*, Chiang, *supra* note 6; Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989); *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877 (2006) [hereinafter *Foreign Affairs Preemption*].

8. United Nations Framework Convention on Climate Change, U.N. Conference on Environment and Development, 5th Sess., pt. 2, U.N. Doc. A/AC.237/18 (1992), *reprinted in* 31 I.L.M. 849 (1992) (entered into force Mar. 21, 1994).

9. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add. 1, *reprinted in* 37 I.L.M. 22 (1998).

10. *See Foreign Affairs Preemption, supra* note 7, at 1888.

11. For overviews of some of the local, state, and regional initiatives in climate change policy, *see* Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54 (2005); Robert B. McKinstry Jr., *Laboratories for Local Solutions for Global Problems*, 12 PENN. ST. ENVTL. L. REV. 15 (2004).

12. Press Release, Office of the Governor, California, New York Agree to Explore Linking Greenhouse Gas Emission Credit Trading Markets (Oct. 16, 2006), *available at* <http://gov.ca.gov/index.php?/press-release/4449/>.

13. For an overview of the EU-ETS, *see* Cinnamon Carlane, *Climate Change Policies an Ocean Apart: EU and U.S. Climate Change Policies Compared*, 14 PENN. ST. ENVTL. L. REV. 435, 463-65 (2006).

14. For a more in-depth treatment of emissions trading schemes, *see* generally EMISSIONS TRADING: ENVIRONMENTAL POLICY'S NEW APPROACH (Richard F. Kosobud et al. eds., 2000).

15. *See* Michael A. Mehling, *Bridging the Transatlantic Divide: Legal Aspects of a Link Between Regional Carbon Markets in Europe and the United States*, 7 SUSTAINABLE DEV. L. & POL'Y 46, 46 (2007).

16. *Id.* at 47.

framework rather than individually negotiated contracts with trading partners.<sup>17</sup>

This same desire for predictability will probably obviate the second avenue as well: a purely political arrangement. Although a political arrangement, such as a memorandum of understanding between California and the EU, avoids the lengthy process involved in making a treaty or passing domestic legislation, it would not be legally binding and would therefore be disfavored by market participants who will prefer the stability of a legally binding framework.<sup>18</sup>

As for the third option, it seems clear that California cannot enter into a formal treaty with the EU to implement a linkage<sup>19</sup> because the U.S. Constitution flatly prohibits any state from entering into a “treaty, alliance, or confederation.”<sup>20</sup> Although treaties are forbidden to the states, the Compact Clause, which bans states from entering into “any Agreement or Compact . . . with a foreign Power” without congressional approval,<sup>21</sup> could potentially serve as an avenue for linkage. Most obviously, California could obtain congressional approval for its linkage scheme.<sup>22</sup> Failing this, California could enter into an agreement with the EU even without congressional approval if the agreement is found not to “increase [the] political power in the States which may encroach upon or interfere with the just supremacy of the United States.”<sup>23</sup> In other words, congressional consent is required for a state-foreign government agreement only if the agreement “tends to give a State elements of international sovereignty, interferes with full and free exercise of federal authority, or deals locally with a matter on which there is or might be national policy.”<sup>24</sup> It is unclear whether California’s proposed link with the EU satisfies this test. Regardless, the broader question of whether California’s actions will be invalidated for encroaching on federal power is subsumed within this Article’s discussion of the final option available to California: enacting domestic legislation.

The most feasible option for California and the EU is to implement reciprocal domestic legislation recognizing transnational allowances between their two trading schemes. In implementing such legislation, California could avoid the limitations of the Treaty Clause and the uncertainties associated with the scope of the Compact Clause’s congressional approval requirement while still instituting transparent, legally binding rules. The remainder of this Article therefore discusses the viability of such state legislation.

### III. Foreign Affairs Preemption of State Activities in the International Realm

The following section explores the various ways in which California’s attempt to link with the EU-ETS via domestic legislation might be prohibited under foreign affairs preemption doctrines. It begins with the narrowest grounds for foreign affairs preemption—explicit statutory preemption—and continues on to discuss the broader federal preemptive powers that might be invoked to invalidate California’s actions. Despite the categorization of the different types of preemption evidenced in the subheadings, the preemption doctrines are in fact quite indistinct and blur into one another<sup>25</sup>; many of the key cases in this area actually straddle two or more areas of preemption.<sup>26</sup> Generally speaking, however, as we advance along the spectrum from the narrowest express statutory preemption grounds to the more amorphous and potentially extraordinarily broad grounds of dormant foreign affairs preemption, controversial questions concerning federalism and the separation of powers increasingly arise.<sup>27</sup>

It is a well-established principle, derived from the Constitution, that the federal government has primacy over the nation’s foreign relations.<sup>28</sup> The Constitution explicitly grants the U.S. Congress and the president power to conduct foreign relations with little interference by the states. Article I, §8 authorizes Congress to regulate commerce with foreign nations, regulate the value of foreign coin, and declare war, among other things.<sup>29</sup> Article II confers to the president the power to make treaties with the advice and consent of the Senate, and to appoint ambassadors, among other things.<sup>30</sup> These treaties, under Article VI’s Supremacy Clause, trump state law.<sup>31</sup> Moreover, Article I, §10, as mentioned earlier, bars states from performing certain foreign affairs

17. *Id.* at 48.

18. *Id.*

19. *Id.* at 50.

20. U.S. CONST. art. I, §10. Most recently, the Supreme Court indicated that “[t]he sovereign prerogatives to . . . negotiate emissions treaties with developing countries [is] now lodged in the Federal Government.” *Massachusetts v. EPA*, 127 S. Ct. 1438, 1441-42, 37 ELR 20075 (2007).

21. U.S. CONST. art. I, §10.

22. Rep. Joe Barton (R-Tex.), Ranking Member of the House Energy and Commerce Committee, has said, however, that his committee would look at any state-foreign country emissions trading “with a lot of skepticism.” Robert Meltz, *Global Warming: The Litigation Heats Up*, CRS RL32764, Congressional Research Service, at 23 n.71 (Apr. 3, 2006), available at <http://www.ncseonline.org/NLE/CRSreports/06Apr/RL32764.pdf>.

23. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

24. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 233 (1972).

25. Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 206 (2000) (noting that “[t]hese preemption doctrines are, to put it mildly, not rigidly distinct”) [hereinafter Goldsmith, *Statutory Foreign Affairs Preemption*].

26. *American Insurance Ass’n v. Garamendi*, 539 U.S. 396 (2003), for instance, involves both statutory conflict preemption and field/dormant preemption. See Joseph B. Crace Jr., *Garamending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203, 213 (2004).

27. Statutory preemption applies across the board to state actions whereas the dormant preemption discussed in Part III.B. refers to the preemption of the foreign affairs actions taken by states. This Article will focus only on the potential preemption of California’s actions as a matter of foreign affairs.

28. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 25 (2d ed. 1996) (noting that “[i]n foreign affairs . . . the federal government has undisputed monopoly”) [hereinafter HENKIN, *UNITED STATES CONSTITUTION*]; Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L L. 821, 823-24 (1989) (citing *United States v. Pink*, 315 U.S. 203 (1942); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *United States v. Belmont*, 301 U.S. 324 (1937); and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), for the “well settled” proposition that the federal government is the sole representative of the United States in its interaction with foreign nations); Peter J. Spiro, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 842 n.169 (1986) (citing cases and commentary showing the primacy of the federal government in foreign affairs) [hereinafter Spiro].

29. U.S. CONST. art. I, §8.

30. *Id.* art. II.

31. *Id.* art. VI, §2.



functions, such as entering treaties and compacts with other nations.<sup>32</sup>

At the same time, however, state and local activities are widely acknowledged to be constitutionally permissible in certain transnational contexts.<sup>33</sup> For instance, as indicated earlier, not all state-foreign government agreements fall under the scope of the Compact Clause. Except as preempted by the political branches, states may make agreements with foreign governments without congressional consent as long as agreements do not “impinge upon the authority or the foreign relations of the United States.”<sup>34</sup> So, while a state “cannot exchange ambassadors and engage generally in relations with a foreign government,” it *can* send commercial representatives to other countries.<sup>35</sup> The sending of education or goodwill exchanges, the establishment of trade and investment offices in foreign countries, and the expression of views about U.S. foreign policy,<sup>36</sup> are all accepted as permissible state activity in foreign affairs.<sup>37</sup>

The question explored here is where California’s actions fall on the spectrum between, on the one end, an impermissible encroachment on the federal primacy in foreign affairs and, on the other end, a permissible activity akin to establishing a trade office in another country. The following discussion will set forth what guidelines there are in foreign affairs preemption doctrine and analyze California’s action in the context of these guidelines. It concludes unhelpfully that the current state of foreign affairs law is so amorphous as to make a clear answer indefinable, but the vagueness of the doctrine means that some form of preemption can almost certainly be found.

### A. Statutory Preemption Under the Supremacy Clause

#### 1. Express Statutory Preemption

Express statutory preemption occurs when a federal statute explicitly addresses the preemption question on its face, such as through the use of a preemption clause.<sup>38</sup> For instance, if Congress passed legislation specifically preempting state engagement with foreign nations in emissions trading, this would undoubtedly make California legislation unconstitutional under the Supremacy Clause. At present, however, there is no such federal law, so there is no express preemption.<sup>39</sup>

32. *Id.* art. I, §10.

33. See Bilder, *supra* note 28, at 826.

34. Restatement (Third) of Foreign Relations Law §201 cmt. 9. See also HENKIN, *supra* note 24, at 230-31 (1972) (listing instances in which Congress has consented to state-foreign nation agreements, such as the agreement between New York state and Canada to establish a port authority to operate a bridge across the Niagara River).

35. Restatement (Third) of Foreign Relations Law §201 cmt. 9.

36. Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1639-40, 1654 (2006) (describing how states and localities enacted resolutions calling for the United States to ratify the Convention Against the Elimination of All Forms of Discrimination Against Women and explaining how such “hortatory commentary has long been customary and protected by the First Amendment”) [hereinafter Resnik, *Law’s Migration*].

37. Bilder, *supra* note 28, at 826.

38. See Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 25, at 205.

39. Mehling, *supra* note 15 (noting that “to date, the federal government has not adopted legislation precluding state law in the area of GHG emissions trading”).

#### 2. Implied Statutory Preemption: Conflict and Field Preemption

Implied preemption is based on federal law that does not explicitly convey preemptive intent. There are two types of implied preemption: conflict and field.<sup>40</sup> Conflict, or obstacle, preemption occurs where compliance with both federal and state law is a physical impossibility,<sup>41</sup> or where the state statute stands as an obstacle to the accomplishment of the purposes and objectives of a federal statute.<sup>42</sup> Whether the state law is sufficiently an obstacle to find preemption is “a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”<sup>43</sup> Moreover, the Supreme Court has noted in dicta that “it would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.”<sup>44</sup> So where a state acts within its traditional responsibilities, but in a way that affects foreign relations, “it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.”<sup>45</sup> In short, application of the conflict preemption doctrine will turn on a court’s perception of Congress’ objectives in a particular federal statute, the state law’s objectives, and whether the state is acting within its traditional responsibilities.

Field preemption applies when the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,”<sup>46</sup> or when the federal interest in controlling a certain subject is so strong as to presume that federal law precludes any state action on the same matter.<sup>47</sup> Field preemption, because it is grounded in a broad regulatory scheme or a federal interest not tied to text, effectively straddles statutory and dormant foreign affairs preemption<sup>48</sup>—in fact, the argument that the entire field of foreign affairs is occupied by the federal government conflates field preemption with dormant foreign affairs preemption.<sup>49</sup>

40. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 326 (2d ed. 2006); Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000). Obstacle preemption is technically a third category of implied preemption, but because it is indistinguishable in practice from conflict preemption, many treat obstacle and conflict preemption as a single form of implied preemption. See, e.g., *Foreign Affairs Preemption*, *supra* note 7, at 1878 n.7.

41. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963).

42. Hines v. Davidowitz, 312 U.S. 52 (1941).

43. Crosby, 530 U.S. at 373.

44. American Ins. Ass’n v. Garamendi, 539 U.S. 396, 420 (2003).

45. *Id.* at 420 n.11.

46. Gade v. National Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98, 22 ELR 21073 (1992); see also English v. General Elec. Co., 496 U.S. 72, 79 (1990).

47. See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

48. Crace Jr., *supra* note 26, at 209.

49. So, for instance, the Supreme Court has noted in dicta that “[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government [has] acted [or not],” as there is a well-established principle that “the Constitution entrusts foreign policy exclusively to the National Government.” *Garamendi*, 539 U.S. at 420 n.11.

*Crosby v. National Foreign Trade Council*<sup>50</sup> and *American Insurance Ass'n v. Garamendi*<sup>51</sup> are the two Supreme Court cases finding implied foreign affairs preemption.<sup>52</sup> The *Crosby* Court, self-consciously avoiding the controversial depths of dormant preemption,<sup>53</sup> explicitly based its decision on the narrow ground of statutory conflict preemption. In *Crosby*, the Court found preempted under the Supremacy Clause a Massachusetts law forbidding state agencies from contracting with companies doing business in Burma. The state law, according to the Court, conflicted with the provisions of a federal statute. Both the federal law and the Massachusetts law were adopted to address Burma's human rights violation, but whereas the federal law delegated discretion to the president to control economic sanctions against Burma, limited the type of sanctions allowed against Burma, and directed the president to proceed diplomatically in developing a comprehensive, multilateral strategy toward Burma,<sup>54</sup> the Massachusetts act was adopted with the express purpose of showing disapproval for Burma's human rights violation and implemented more expansive and stringent sanctions than the federal statute.<sup>55</sup> Examining the federal statute "as a whole," the Court found that the state law was in fact "an obstacle to the accomplishment of Congress's full objectives under the federal Act."<sup>56</sup>

In *Garamendi*, a California statute requiring insurers doing business in California to disclose outstanding Holocaust-era claims was found preempted as an impermissible encroachment on federal foreign policy. The statute, enacted to vindicate the insurance claims of California resident-Holocaust survivors, imposed more stringent requirements on insurers than the voluntary settlements being negotiated by the president in his executive agreements with Austria, France, and Germany. The question posed was whether preemption should apply in a case where the state was legitimately acting within its traditional powers (the regulation of insurers operating in-state) but was at odds with a general executive branch policy.<sup>57</sup> The Court answered in the affirmative.

*Garamendi* is notable, and extremely controversial,<sup>58</sup> because it found that the president's foreign policy, as evidenced in executive agreements and statements by high-

level executive branch officials, sufficient—standing alone and without the force of law and any action by Congress—to preempt an otherwise constitutional state law.<sup>59</sup> So even though Congress had not acted on the matter at all, the Court found evidence of a foreign policy<sup>60</sup> that produced a clear enough conflict to preempt the California law without any consideration of California's interest.<sup>61</sup> In short, under *Garamendi*, preemption can occur through mere "executive conduct"<sup>62</sup> and does not require federal legislation or even a formal executive order.<sup>63</sup>

*Garamendi*'s holding lodges independent foreign affairs power in the executive, separate from Congress' war and foreign commerce powers, that derives not from any textual basis in the Constitution, but from a "historical gloss on the executive power vested in Article II" recognizing the president's "vast share of responsibility for the conduct of our foreign relations."<sup>64</sup> The holding is thus a hybrid of conflict and field preemption blurring into dormant preemption<sup>65</sup> because while the Court verifies the existence of an independent executive foreign affairs power, it also declares that "[t]he question relevant to preemption in this case is conflict."<sup>66</sup>

The notion of a conflict between state law and federal foreign policy, whether grounded in a congressional statute as in *Crosby* or in executive branch conduct as in *Garamendi*, underscores a central thematic concern: the obstruction of the president's negotiating and bargaining power vis-à-vis foreign nations.<sup>67</sup> The *Crosby* Court, using the metaphor of bargaining chips, notes that the Massachusetts law "reduces the value of the chips created by the federal statute" and, if enforced, would cause the president to have "less to offer and less economic and diplomatic leverage."<sup>68</sup> It emphasizes that "the [p]resident's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception," and when states enact laws "willy-nilly," they compromise the president's "capacity to present a coherent position on behalf of the national economy," thereby weakening his position in dealing with other nations.<sup>69</sup> In assessing the conflict between California's insurance law and presidential foreign policy, the *Garamendi* Court cites *Crosby* verbatim to claim

50. 530 U.S. 363 (2000).

51. 539 U.S. 396 (2003).

52. Commentators have pointed out, however, that the *Garamendi* Court may have been invoking dormant preemption under the guise of its statutory counterpart, given the attenuated connection between the preempting federal policy and the state law at issue. Crace Jr., *supra* note 26, at 213.

53. *Crosby*, 530 U.S. at 374 ("Because our conclusion that the state Act conflicts with a federal law is sufficient to affirm the judgment below, we decline to speak to field preemption as a separate issue . . . or to pass on the First Circuit's rulings addressing the foreign affairs power or the dormant Foreign Commerce Clause.")

54. *Id.* at 373-74.

55. *Id.* at 366-67; Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 25, at 178-79.

56. *Crosby*, 530 U.S. at 373.

57. Ryan Patton, *Federal Preemption in an Age of Globalization*, 37 CASE W. RES. J. INT'L L. 111, 128 (2005).

58. See, e.g., Crace Jr., *supra* note 26; Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY. L. REV. 825 (2004); Todd Steigman, *Lowering the Bar: Invalidation of State Laws Affecting Foreign Affairs Under the Dormant Foreign Affairs Power After American Insurance Association v. Garamendi*, 19 CONN. J. INT'L L. 465 (2004).

59. *Id.* at 480.

60. *Garamendi*, 539 U.S. at 421-23.

61. *Id.* at 425 ("The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest . . .").

62. *Id.* at 428.

63. See Denning & Ramsey, *supra* note 58, at 829 (pointing out that the state law was struck down not because the law was in itself unconstitutional, but because the executive branch disagreed with it as a policy matter).

64. *Garamendi*, 539 U.S. at 414 (quotations omitted).

65. Compare Crace Jr., *supra* note 26, at 221 ("Given the emphasis that the Court placed on the statute's interference with the President's foreign policy goals, the Court's approach is best characterized as an application of obstacle preemption."), with Patton, *supra* note 57 (arguing that *Garamendi* revives dormant foreign affairs preemption).

66. *Garamendi*, 539 U.S. at 427.

67. See *Foreign Affairs Preemption*, *supra* note 7, at 1883 (discussing the Court's protection of the president's "bargaining chips" as seen in *Garamendi* and *Crosby*).

68. *Crosby*, 530 U.S. at 377.

69. *Id.* at 381-82.

that the president's authority to settle Nazi-era insurance claims "requires flexibility in wielding 'the coercive power of the national economy as a tool of diplomacy'" and that the California law denies such flexibility by excluding California's insurance market from the president's negotiations, thereby lessening the president's "economic and diplomatic leverage."<sup>70</sup>

In applying the implied preemption doctrines to California legislation implementing a transnational carbon market linkage, the first step is to examine the conflict at issue, as grounded in the bargaining chip notions propounded in *Crosby* and *Garamendi*. First, with regard to federal statutes, *Crosby*'s reminder that courts "examin[e] the federal statute as a whole"<sup>71</sup> means that even a federal law that does not explicitly mention the issue at hand (that is, the transnational linkage of carbon markets) may be relevant in finding conflict preemption. The 1987 Global Climate Protection Act (GCPA), currently the only federal statute that addresses climate change, includes "work[ing] towards multilateral agreements" among the four U.S. policy goals it delineates, and grants the executive branch the responsibility to develop a national climate change policy and to "coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy."<sup>72</sup> A court could therefore point to the GCPA as grounds for conflict preemption insofar as California's actions undermine the executive's delegated responsibility to engage in diplomacy to formulate climate change policy. By attempting to mitigate GHG emissions through transnational actions, California arguably diminishes the president's "economic and diplomatic leverage" in negotiating multilateral climate change agreements.<sup>73</sup>

Even if a court does not read the GCPA to preempt California's actions, it might find the California legislation preempted by executive branch policy under *Garamendi*. On the one hand, executive policy to date, in withdrawing from Kyoto negotiations and encouraging merely voluntary emissions reductions, does not appear to implicitly preempt states from linking to foreign carbon markets in other countries.<sup>74</sup> In fact, in response to international criticism of its failure to act on climate change, the federal government has pointed to state and local initiatives as evidence that there is a "broad effort going on in the United States on many levels to address global climate change."<sup>75</sup> On the other hand, the United States has agreed to a nonbinding dialogue with the international community aimed at setting mandatory limits on GHG emissions after the Kyoto Protocol expires in

2012.<sup>76</sup> This could be construed by a court as a general executive policy to enter into *future* multilateral agreements, the negotiations of which might be undermined by California's unilateral actions under the bargaining chip theory.

Under the implied preemption analysis, a court must also look at the state's interest in enacting the legislation in question. The central question here is how strong California's interest is, judged by standards of traditional state practice, in linking its carbon market with the EU-ETS. As others have pointed out, the answer to this question depends on how one frames the legislation in the context of a state's traditional responsibilities.<sup>77</sup> If California characterizes its legislation as air pollution, electric power, or business transaction regulation—all traditional state powers, then it could claim a strong interest in harmonizing its carbon market with international markets, especially given that its state economy alone is among the largest in the world. On the other hand, a court might simply characterize California's efforts to link with the EU-ETS as legislation in foreign affairs, an area that is not within the state's traditional responsibilities<sup>78</sup> and therefore cannot be the basis of any state interest.

Whether or not California's legislation is implicitly preempted will therefore depend on how a particular court assesses a conflict, based on either federal statute or executive policy, and how it weighs this conflict against California's interest. The existence of multiple moving parts identified only vaguely in the sparse jurisprudence—including the existence of a federal statute, the characterization of executive branch policy, whether California is acting within its traditional powers, and the strength of California's interest within this context—preclude any definitive conclusion as to whether the California legislation will be statutorily preempted. Under a critical assessment of California's actions, however, it is certainly possible for a court to find grounds for implied preemption under the existing jurisprudence.

### B. Dormant Foreign Affairs Preemption

Even if not statutorily preempted, California's action might be invalidated under dormant foreign affairs preemption. The following section discusses the two doctrines of dormant foreign affairs preemption that could be invoked to invalidate California's legislation: the dormant foreign affairs power and the dormant foreign Commerce Clause. In their most extreme forms, these dormant preemption doctrines reinforce federal exclusivity in foreign affairs and bar states from taking *any* actions having an effect on U.S. foreign relations.<sup>79</sup> Dormant preemption relies entirely on judicial au-

70. *Garamendi*, 539 U.S. at 424 (citing *Crosby*, 530 U.S. at 377 (quotations omitted)).

71. *Crosby*, 530 U.S. at 373.

72. Pub. L. No. 100-204, 101 Stat. 1407, §1103(a)-(c).

73. The GCPA aside, conflict preemption is increasingly likely as Congress currently contemplates various climate change legislation. See NATURAL RESOURCES DEFENSE COUNCIL, FACT SHEET: SOLVING GLOBAL WARMING: YOUR GUIDE TO LEGISLATION (2007), available at [http://www.nrdc.org/legislation/factsheets/leg\\_07032601A.pdf](http://www.nrdc.org/legislation/factsheets/leg_07032601A.pdf).

74. See *Foreign Affairs Preemption*, *supra* note 7, at 1889 (noting that "[t]he record of congressional and executive actions does not clearly establish that the federal government is committed to pursuing a binding multilateral agreement on climate change").

75. Andrew Revkin & Jennifer Lee, *White House Attacked for Letting States Lead on Climate Policy*, N.Y. TIMES, Dec. 11, 2003, at A32.

76. Alison Hardie, *EU States That Berated Bush on Kyoto Fail to Hit Emissions Targets*, THE SCOTSMAN, Dec. 27, 2005.

77. See *Foreign Affairs Preemption*, *supra* note 7, at 1894-95.

78. *Garamendi*, 539 U.S. at 420 n.11:

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

79. See, e.g., Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1226 (1999) (citing the dormant foreign affairs power and the dormant foreign commerce clause as doctrinal components of the federal exclusivity in foreign affairs) [hereinafter Spiro, *Foreign Relations Federalism*]; Spiro, *supra* note 28, at 832.



thority to invalidate state actions and is broader in scope than statutory preemption because it can invalidate state action even when the federal political branches have taken no action at all on the issue.<sup>80</sup> The emphasis in dormant preemption is on invalidation rather than preemption per se—whereas state action might otherwise have been legitimate but for federal preemption, under dormant foreign affairs preemption, the state action is arguably invalid because the state never had authority to take action in foreign affairs in the first place.<sup>81</sup>

Dormant preemption calls forth a fierce debate about whether states have or ought to have the authority to engage in foreign affairs.<sup>82</sup> Both camps in the debate agree that Congress has the power to preempt state regulations affecting foreign affairs if it chooses to do so. The key source of controversy is whether, in the absence of congressional action, the default presumption ought to be judicially enforced preemption (as the orthodox view argues) or no preemption at all (as the revisionist view argues).<sup>83</sup>

Orthodox pro-preemption scholars argue that foreign affairs is the exclusive domain of the federal government and offer several different reasons for supporting the “foreign affairs differential” or foreign affairs exceptionalism—the claim that federalism concerns underlying domestic law do not apply to foreign affairs law.<sup>84</sup> First, orthodox scholars interpret the Constitution to reveal an overriding intent to entrust all matters of foreign affairs to the federal government; under this interpretation, dormant preemption is seen as a means of protecting plenary foreign relations power from state encroachment. Moreover, this camp argues pragmatically that a broad federal preemption power is necessary to maintain a strong, yet flexible, foreign policy in the face of increasingly complex issues of globalization and national security.<sup>85</sup> Focusing on the potentially detrimental effects of discriminatory state foreign affairs activities, pro-preemptionists point to the need for the nation to speak with “one voice,” so that one state’s actions do not have adverse consequences for the nation as a whole.<sup>86</sup> This argument relates to the claim that state and local involvement in foreign policy is anti-democratic because states do not represent the entire nation’s interest.<sup>87</sup> Finally, the orthodox camp makes the structural argument that it is not enough to rely solely on the political branches to preempt illegitimate state action in foreign affairs—rather, the federal judiciary

ought to play a role in policing the boundaries between federal and state powers.<sup>88</sup>

Revisionists challenge the pro-preemptionist foreign affairs differential by making historical, practical, and structural arguments that states ought to have some authority to engage in conduct affecting foreign affairs.<sup>89</sup> First, they attack the very “orthodoxy” of the federal exclusivity in foreign affairs, which they point out is not explicitly stated in the Constitution<sup>90</sup> and was only developed in 20th-century jurisprudence.<sup>91</sup> Revisionists therefore view the foreign affairs differential as premised on a “construction of international society”<sup>92</sup> that has changed since the Founding and should therefore be narrowly construed to preempt state actions only when the federal government has taken express action. Practically, revisionists argue that globalization and the end of the cold war mean that: (1) state activity in foreign affairs is increasingly inevitable as the line between issues of national and state concerns blur<sup>93</sup>; and (2) retaliation by other countries for the actions of a single state is no longer a concern as foreign countries, recognizing the increasing role of subnational units in the international sphere, can directly retaliate against individual states.<sup>94</sup> Moreover, on the anti-democratic argument, revisionists contend that state involvement in foreign relations actually strengthens democracy by allowing ordinary citizens to be heard.<sup>95</sup> Finally, from a structural perspective, anti-preemptionists argue that courts are institutionally incompetent to police the boundaries of foreign affairs.<sup>96</sup> For all these reasons, revisionists advocate abandoning the foreign affairs differen-

80. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 25, at 203.

81. See Steigman, *supra* note 58, at 476 (noting too that “invalidating a state law under the foreign affairs power is a constitutional decision, while ruling that a statute is preempted under the Supremacy Clause only requires a statutory analysis”).

82. For a review of the opposing sides in this debate, see Chiang, *supra* note 6, at 932; James J. Pascoe, *Time for a New Approach? Federalism and Foreign Affairs After Crosby v. National Foreign Trade Council*, 35 VAND. J. TRANSNAT’L L. 291, 303-08 (2002); Swaine, *supra* note 5.

83. See Chiang, *supra* note 6.

84. See, e.g., *id.*; Brannon P. Denning & 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 (1999); Howard N. Fenton III, *The Fallacy of Federalism in Foreign Affairs: State and Local Foreign Policy Trade Restrictions*, 13 NW. J. INT’L L. & BUS. 563 (1993).

85. See Crace Jr., *supra* note 26, at 230.

86. See Chiang, *supra* note 6, at 956.

87. Bilder, *supra* note 28, at 827.

88. See Spiro, *Foreign Relations Federalism*, *supra* note 79, at 1270 (noting how “[t]he rule of federal exclusivity over foreign relations has cast the judiciary as an active defender of federal powers over foreign relations”).

89. See, e.g., Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 25; Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999) [hereinafter Goldsmith, *The New Formalism*]; Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Spiro, *Foreign Relations Federalism*, *supra* note 79; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997) [hereinafter Goldsmith, *Federal Courts*].

90. See, e.g., Ramsey, *supra* note 89.

91. See, e.g., Swaine, *supra* note 5, at 337 (“If we have learned anything from the groundbreaking scholarship of the last five years, it’s that the most fiercely held shibboleths—including the orthodox view that the federal government holds a monopoly in external relations . . . have little binding precedent for or against them.”); see also Goldsmith, *The New Formalism*, *supra* note 89; G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109 (1999).

92. Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002) [hereinafter Spiro, *Globalization*]; see also Peter J. Spiro, *Contextual Determinism and Foreign Relations Federalism*, 2 CHI. J. INT’L L. 363 (2001); Spiro, *Foreign Relations Federalism*, *supra* note 79, at 1260.

93. See, e.g., Curtis A. Bradley, *A New American Foreign Affairs Law*, 70 U. COLO. L. REV. 1089 (1999); White, *supra* note 91; Goldsmith, *Federal Courts*, *supra* note 89, at 1670-77.

94. See Pascoe, *supra* note 82; Goldsmith, *The New Formalism*, *supra* note 89, at 1412; Spiro, *Foreign Relations Federalism*, *supra* note 79, at 1275.

95. See, e.g., Robert J. Delahunty, *Federalism Beyond the Water’s Edge: State Procurement Sanctions and Foreign Affairs*, 37 STAN. J. INT’L L. 1, 8 (2001); Bilder, *supra* note 28, at 828-29.

96. See, e.g., John C. Yoo, *Foreign Affairs Federalism and the Separation of Powers*, 46 VILL. L. REV. 1341 (2001); Goldsmith, *The New Formalism*, *supra* note 89, at 1414-19; Goldsmith, *Federal Courts*, *supra* note 89, at 1690-98.

tial and applying traditional notions of federalism in foreign affairs law.

### 1. The Dormant Federal Foreign Affairs Power

Developed through judicial interpretation, most notably in *Zschernig v. Miller*,<sup>97</sup> the dormant foreign affairs power derives its existence from the structure of the Constitution rather than from constitutional text<sup>98</sup> and allows courts to invalidate state actions infringing on foreign affairs in the absence of any affirmative or conflicting federal action. In *Zschernig*, the Supreme Court invalidated an Oregon statute that forbade inheritance by nonresident aliens unless the alien could show that his home country would not deny U.S. citizens a reciprocal right of inheritance. Enacted at the height of the cold war, the law was intended to make it difficult for residents of Communist-bloc countries to inherit land in Oregon.<sup>99</sup> Reasoning that the statute invited state judges to criticize “nations established on a more authoritarian basis than our own” and consequently held “great potential for disruption or embarrassment” to the nation, the Court found that the Oregon statute constituted “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”<sup>100</sup> The Court therefore invalidated the statute because it had a “direct impact upon foreign relations and may well adversely affect the power of the central government to deal with [foreign affairs] problems”<sup>101</sup>—despite the fact that descent of estates is traditionally regulated by states<sup>102</sup> and that the U.S. Department of Justice submitted a brief on behalf of Oregon pointing out that the statute actually did not interfere with U.S. foreign relations.<sup>103</sup>

*Zschernig* thus stands as the only Supreme Court decision that invalidates a state law “on the grounds of interference with the federal foreign affairs power, absent any showing of conflict with an act of Congress, an Article II treaty, or an executive agreement.”<sup>104</sup> Under the dormant foreign affairs power, then, states are barred from pursuing activities that have a direct (and not merely incidental or indirect) effect on foreign policy, even where such actions do not conflict with any federal government policies at all.<sup>105</sup>

Whereas implied preemption is grounded in statutory analysis, at least to some extent, and turns on an assessment of several elements, including the federal policy, the extent of a conflict with the state statute, the state’s interest, and whether the state is acting within its traditional powers, the dormant foreign affairs test articulated in *Zschernig* boils down to an examination solely of the effects of the state statute. The key question is: How should courts decide where to draw the line between state activities that have only “incidental and indirect” effects in foreign countries and are therefore permissible and those that directly interfere with foreign relations and are therefore unconstitutional under *Zschernig*? This question of effects is grounded in a desire to ensure that the actions of an individual state not adversely affect the federal government in its implementation of foreign policy—whether or not the federal government has actually taken any steps to exercise that power.

The Court has been reticent in clarifying the contours of the doctrine,<sup>106</sup> so its scope remains exceedingly vague.<sup>107</sup> Some lower courts have suggested that *Zschernig* be narrowly construed to proscribe only state activities that involve detailed inquiry into the operation of a foreign government and “sit in judgment” on foreign governments.<sup>108</sup> Others, however, have read *Zschernig*’s application broadly.<sup>109</sup> Scholarly interpretation is equally wide-ranging. Revisionists argue for a narrow interpretation of the dormant foreign affairs power<sup>110</sup> and point out that the Court’s failure to reaffirm the federal exclusivity approach since *Zschernig*, despite having opportunities to do so, signify its demise.<sup>111</sup> The orthodox camp, on the other hand, defends *Zschernig*’s continuing relevance.<sup>112</sup>

Given the widespread confusion over *Zschernig*’s application and the amorphousness of the jurisprudence, California’s legislation could be either upheld or invalidated under

97. 389 U.S. 429 (1968).

98. See, e.g., David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 67-68 (2003) (describing how the foreign affairs power resides in the president’s executive powers and in certain powers granted to Congress); Barry Friedman, *Federalism’s Future in the Global Village*, 47 VAND. L. REV. 1441, 1466-71 (1994) (discussing how the exclusivity principle’s basis in the Constitution is uncertain).

99. Crace Jr., *supra* note 26, at 211. The Court made a note of this, pointing out that “it seems that foreign policy attitudes, the freezing or thawing of the ‘cold war,’ and the like are the real desiderata.” *Zschernig*, 389 U.S. at 437-38.

100. *Id.* at 440, 435, 432.

101. *Id.* at 441.

102. *Id.* at 440.

103. *Id.* at 434.

104. Delahunty, *supra* note 95, at 50.

105. *Zschernig*, 389 U.S. at 434, 441 (distinguishing *Clark v. Allen*, 331 U.S. 503 (1947), an earlier Supreme Court case which had upheld a similar California law against a foreign affairs preemption challenge, because the law at issue there only had “some incidental or indirect effect in foreign countries,” whereas the law at issue in *Zschernig* had “a direct impact on foreign relations”).

106. In *Crosby*, for instance, the Court avoided addressing dormant federal common-law preemption by striking down the state statute on statutory preemption grounds.

107. See Crace Jr., *supra* note 26, at 211 (noting that the vast majority of preemption decisions are decided on the basis of statutory preemption and that there is consequently a “marked lack of available case law illustrating dormant preemption”); Chiang, *supra* note 6, at 925 (noting that “lower courts will have to continue to explore with little guidance” the area in which “federal common law, foreign affairs, and the structures underlying the Constitution intersect”); Delahunty, *supra* note 95, at 52 (noting that “[c]ommentators have long been baffled by its interpretative difficulties, and the lower courts trying to follow *Zschernig* have been split for years”). For an analysis of the confusion in this area, see HENKIN, *supra* note 24, at 476-77; *The Supreme Court, 2002 Term—Leading Cases in Constitutional Law*, 117 HARV. L. REV. 226 (2003); Maier, *supra* note 7.

108. See, e.g., *Cruz v. United States*, 387 F. Supp. 2d 1057 (N.D. Cal. 2005); *Board of Trustees v. Mayor of Baltimore*, 317 Md. 72 (Md. 1989).

109. See, e.g., *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1376 (D.N.M. 1980); *New York Times Co. v. City of New York Comm’n on Human Rights*, 41 N.Y.2d 345, 352 (N.Y. 1977).

110. See, e.g., HENKIN, *supra* note 24, at 240; *The Supreme Court, 2002 Term*, *supra* note 107; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 865 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 5-8 (1995); Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 481 (1987).

111. See, e.g., Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2400 (2006); Delahunty, *supra* note 95, at 54.

112. See, e.g., Denning & McCall, *supra* note 84; Fenton III, *supra* note 84.



the dormant foreign affairs power depending on a particular court's interpretation of its effects. On the one hand, the California law arguably only has indirect effects on foreign relations and is therefore permissible. As legislation undertaken to address air pollution and to regulate in-state businesses—the argument might go—California's recognition of emissions allowances generated under the EU-ETS only has incidental effects on U.S. foreign policy and does not impair the federal government's ability to negotiate and participate in post-Kyoto climate change policy. In fact, insofar as the president can use congressional preemption of California's legislation as a bargaining chip in post-Kyoto climate change negotiations, California's linkage to the EU-ETS as a forerunner of federal policy might actually *enhance* executive diplomatic and economic leverage in multilateral negotiations.

On the other hand, it might be persuasively argued that California legislation has direct, and not merely incidental, effects on foreign relations because it effectively signs California onto the Kyoto Protocol in contradiction of current official U.S. position. In doing so, California is impermissibly engaging in foreign affairs and usurping the role of the federal executive, which alone has the authority to engage in multilateral climate change policy, even if it has yet to actually exercise that power. Moreover, California's actions could adversely affect the interests of the nation by interfering with the executive's ability to present a unified national front and to wield the full economic clout of the nation in negotiating post-Kyoto climate change policy.

## 2. The Dormant Foreign Commerce Clause

A final foreign affairs preemption doctrine that might be raised to challenge California's actions is the dormant foreign Commerce Clause. Whereas the dormant foreign affairs power defers primarily to the primacy of the executive in foreign affairs,<sup>113</sup> the dormant foreign Commerce Clause defers to Congress' power to regulate foreign commerce. The dormant foreign Commerce Clause, a subset of the dormant Commerce Clause, is grounded in Article I, § 8 of the Constitution, which gives Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>114</sup>

The dormant foreign Commerce Clause was first seen in the 1927 *Brown v. Maryland*<sup>115</sup> decision, in which the Supreme Court struck down a state import-licensing requirement on the ground that such state-level regulation of foreign commerce would weaken the nation in its interaction with other nations. Half a century later, the Court's emphasis on federal primacy in foreign affairs in its foreign commerce cases reached a high point in *Japan Line, Ltd. v. County of Los Angeles*,<sup>116</sup> in which the Court applied the dormant foreign Commerce Clause to strike down a state tax on foreign-owned cargo containers despite the absence of any affirmative or conflicting federal law. The Court emphasized

that “[f]oreign commerce is preeminently a matter of national concern.”<sup>117</sup>

In this context, the Court formulated the dormant foreign Commerce Clause test, which it concluded required a “more extensive constitutional inquiry” than the interstate dormant Commerce Clause.<sup>118</sup> Beyond the typical interstate dormant Commerce Clause inquiry,<sup>119</sup> a court must also inquire: (1) “whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation;” and (2) “whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments.”<sup>120</sup> The formulation of this foreign Commerce Clause test in nontaxation cases has been clarified by *Japan Line*'s progeny: a state measure may not: (1) discriminate against foreign commerce; (2) present a risk of cumulative burdens being placed on foreign commerce; or (3) hinder the federal government's efforts to speak with “one voice” on matters of foreign trade by either violating a clear federal directive or by implicating foreign policy issues best left to the federal government.<sup>121</sup>

The “one voice” requirement is the centerpiece of the foreign dormant Commerce Clause test. Like the dormant foreign affairs power's concern with “effects,” the one voice concern raises the specter of foreign retaliation against the nation on account of the actions of a single state.<sup>122</sup> The primary policy assumption that animates both dormant doctrines, then, is that one state ought not detrimentally affect the interests of the entire nation.<sup>123</sup>

In *Barclays Bank v. Franchise Tax Board*,<sup>124</sup> the Court appeared to substantially cut back on the *Japan Line* one voice test when it upheld a California worldwide corporate franchise tax scheme, noting that federal courts are “not vested with power to decide how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.”<sup>125</sup> The Court upheld the state statute because it could “discern no ‘specific indications of congressional intent’ to bar the state action.”<sup>126</sup> *Barclays Bank* therefore appears to disavow dor-

117. *Id.* at 448.

118. *Id.* at 446.

119. The domestic dormant Commerce Clause inquiry is stated as follows:

Where the Statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

120. *Japan Line*, 441 U.S. at 450 (quotation omitted).

121. Denning & McCall, *supra* note 84, at 347.

122. See *Japan Line*, 441 U.S. at 450, 453 (“The risk of retaliation by Japan . . . is acute, and such retaliation of necessity would be felt by the Nation as a whole.”); see also Spiro, *supra* note 28, at 832 n.121, 835 n.130.

123. *Id.* at 845; see also Goldsmith, *Federal Courts*, *supra* note 89, at 1634 (pointing out that the foreign Commerce Clause's one voice test is essentially identical to the effects test in dormant foreign relations preemption).

124. 512 U.S. 298 (1994).

125. *Id.* at 328.

126. *Id.* at 324.

113. See Delahunty, *supra* note 95, at 6 (noting that *Zschernig* is “the only Supreme Court decision attributing to the President an independent Article II power to preempt state law”).

114. U.S. CONST. art. I, § 8.

115. 25 U.S. (12 Wheat.) 419 (1827).

116. 441 U.S. 434 (1979).

mant foreign affairs preemption in favor of the more narrow grounds of statutory preemption.<sup>127</sup>

The implications of *Barclays Bank* for the dormant foreign Commerce Clause test and dormant foreign affairs preemption are unclear, however, and scholarly interpretations vary. Some see *Barclays Bank* as having “functionally eviscerated one-voice preemption”<sup>128</sup> and consequently portend the end of all dormant foreign affairs doctrines.<sup>129</sup> Others point out that the Supreme Court never explicitly rejected the dormant foreign affairs doctrines<sup>130</sup> and argue that *Barclays Bank* should not be read broadly to indicate a general hostility towards dormant preemption,<sup>131</sup> but is instead a narrow holding that reflects the fact that the California law: (1) did not single out specific foreign countries for criticism; and (2) involved state tax policy, which is considered a traditional local concern.<sup>132</sup>

Another point of contention is whether the market participant exception to the dormant Commerce Clause applies to the dormant foreign Commerce Clause. The exception applies to the domestic dormant Commerce Clause when a governmental entity contracts for goods or services in the marketplace as a “purchaser” rather than a “regulator.”<sup>133</sup> The commentary on whether the market participant exception applies to the foreign Commerce Clause is, unsurprisingly, divided.<sup>134</sup>

An analysis of California’s reciprocal legislation with the EU concludes that while the answer is far from clear, there is room in the jurisprudence to find that the dormant foreign Commerce Clause invalidates California’s actions. First, regardless of its application in the foreign commerce context, we can likely assume that the market participant exception does not apply to potential California legislation because such legislation would involve the state of California regulating the ability of industries to trade emissions permits with the EU-ETS and does not involve the state itself as a market participant. Next, bypassing the domestic dormant Commerce Clause test and assuming that California’s legislation is nondiscriminatory, it is not obvious how California’s actions would fare under the one voice test. On the one hand, it could be upheld under a narrow reading of *Barclays Bank* because it does not single out a foreign country for criticism and can be characterized as involving a traditional state practice. On the other hand, if *Barclays Bank* is distinguished and *Japan Line* is applied, California’s legislation arguably hinders the federal government’s efforts to speak with one voice by implicating foreign policy issues best left to the federal government—that is, participation in the establishment of an international emissions trading market.

127. Carol E. Head, *The Dormant Foreign Affairs Power: Constitutional Implications for State and Local Investment Restrictions Impacting Foreign Countries*, 42 B.C. L. REV. 123, 160 (2000).

128. *The Supreme Court, 2002 Term, supra* note 107, at 232-33 n.68.

129. Goldsmith, *Statutory Foreign Affairs Preemption, supra* note 25, at 212.

130. Swaine, *supra* note 5, at 337-38.

131. Chiang, *supra* note 6, at 954-55.

132. Head, *supra* note 127, at 160.

133. This exception was first recognized by the Supreme Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). For more on the market participant exception, see Denning & McCall, *supra* note 84, at 353; David E. Dreifke, *The Foreign Commerce Clause and the Market Participant Exemption*, 25 VAND. J. TRANSNAT’L L. 257 (1992).

134. See Chiang, *supra* note 6, at 930 n.33.

In short, the viability of California’s legislation under the various foreign affairs preemption doctrines, ranging from implied statutory preemption to dormant foreign affairs preemption, is unclear due to the lack of clarity in the jurisprudence. Much will simply depend on a court’s analysis of California’s purpose in enacting the legislation and the effects of such legislation—two elements that are unique in the case of California’s efforts to link with the EU-ETS and deserve special attention, as detailed in the next part.

#### IV. Prescriptive Implications for California’s Transnational Actions

Looking at the foreign affairs preemption jurisprudence as a whole, two central concerns come to the forefront: maintaining a proper balance between state and federal authority and avoiding negative effects on the nation’s relations with other countries.<sup>135</sup> The first concern is reflected in an examination of the state statute’s purpose to determine “whether [it is] designed to serve some legitimate local purpose.”<sup>136</sup> We witness this in implied preemption’s analysis of the state’s interest within the context of traditional state powers and the dormant Commerce Clause’s inquiry into a state statute’s purpose. The confusion in this line of inquiry lies in how to characterize a state’s interest where foreign affairs are implicated.

The second concern that appears consistently in the foreign affairs preemption doctrines is the effect of the state action and involves an analysis of the state action’s impact on U.S. foreign affairs or the internal affairs of a foreign state.<sup>137</sup> We see this in the bargaining chip theory that underscores implied statutory preemption as well as the effects test of the dormant foreign affairs power and the one voice test of the foreign Commerce Clause. All three inquiries revolve around the same concern that a state’s actions might harm the interests of the nation by impairing the foreign affairs power of the federal political branches and thereby invite foreign retaliation against the entire country because of the behavior of a single state.

The general confusion in the foreign affairs preemption doctrine and wide variation in lower court interpretation stem from the indeterminacy of both of these concerns.<sup>138</sup> Notwithstanding the common conclusion that both the purpose and effects tests make defining the scope of foreign affairs preemption impossible,<sup>139</sup> this section points to unique aspects of the proposed California legislation that map onto these two concerns and should therefore be considered in an assessment of California’s actions under the preemption doctrines.

First, with respect to the purpose of California’s legislation: enacting a transnational link to the EU-ETS is intended to implement state environmental protection by facilitating the reduction of GHG emissions. Even granting the notion underscoring foreign affairs preemption that states have lit-

135. See *id.* at 979; Fenton III, *supra* note 84, at 571 (noting that federal statutory preemption, the foreign Commerce Clause, and dormant foreign policy preemption all “involve the same two fundamental inquiries”: the purpose of the state law and its effect on foreign affairs).

136. *Id.*

137. *Id.*

138. See Chiang, *supra* note 6, at 983.

139. *Id.*

tle role to play in international matters, cooperative federalism and the realities of climate change policy ought to temper this understanding.

The cooperative federalism model, which allows for shared federal and state governmental responsibilities for regulating private activity,<sup>140</sup> developed in the 1960s and 1970s in large part around the spate of federal environmental legislation enacted at that time. Many of our key federal environmental statutes, including the Clean Water Act (CWA) and the Clean Air Act, create federal-state partnerships as a means of pursuing environmental policy goals.<sup>141</sup> These statutes preempt certain state activities while mandating other state actions.<sup>142</sup>

Congressional preemption is complex and includes three types (complete, partial, and contingent), with eighteen subtypes of complete preemption, including those that require state cooperation for success, and twelve subtypes of partial preemption statutes.<sup>143</sup> One subtype of partial preemption statutes, of which the CWA is an example, forges a national-state partnership by “encourag[ing] states to activate dormant regulatory powers or to exercise more fully such powers.”<sup>144</sup> Even a complete preemption statute does not necessarily deny states a role in the regulatory field as Congress “recognized [that states] could play helpful roles including enforcement of such a statute.”<sup>145</sup> One common feature of cooperative federalism and preemption legislation, for instance, is the acceptance that states can enact and enforce more stringent standards than federal standards. States therefore play significant roles in preemption implementation and because both the state and federal governments have leverage and resources prized by the other, federal intergovernmental programs reflect a relationship that is “best characterized as a bargaining, rather than a hierarchical, process.”<sup>146</sup> So, preemption statutes, while restrictive on states at a surface level, frequently also enhance and facilitate state activity—hence the term “cooperative federalism.”

These cooperative federalism features of federal environmental legislation and their concomitant acceptance of a state role in regulating the environment within its jurisdiction should temper the way we view foreign affairs federalism where states are implementing environmental regulations that have an effect on foreign affairs. Whereas foreign affairs federalism calls for the preemption of statutes that are more restrictive or stringent than federal policy, the opposite

understanding applies in the cooperative federalism context, where states are actually allowed to implement more stringent standards. The question, of course, is why our traditional acceptance of state participation in environmental protection via cooperative federalism ought to affect our understanding of foreign affairs federalism at all—why not adhere instead to a foreign affairs differential? Two points are relevant here.

First, globalization has inevitably translated into a dissolution of a sharp distinction between domestic and foreign affairs: in effect, “globalization has changed the definition of what constitutes ‘local issues.’”<sup>147</sup> As faster communication and travel facilitate greater interconnectedness between nations, global issues such as commerce and environment, are increasingly relevant at the local level, and local issues, such as commerce and environment, increasingly have impacts at the global level.<sup>148</sup> Problems that once could have been dealt with as foreign policy at the national level are increasingly being directly implemented at the state and local levels.<sup>149</sup> In the midst of this blurring of domestic and foreign affairs, and as international environmental matters come to be seen as local environmental issues and local environmental issues take on global significance, logic dictates that we at least acknowledge the prominent role that states have long played in addressing local environmental policy goals under schemes of cooperative federalism. If states have traditionally played a role in local environmental policy, and if global environmental issues are becoming local issues and vice versa, must states necessarily be ousted from local/global environmental policy simply because it now contains global dimensions?

A second point specific to climate change suggests that the answer must be no. As with other environmental problems—particularly interstate pollution—that have required a partnership between state and federal efforts, the control of GHGs cannot be other than a joint local-national project. It is widely accepted that “[s]ome form of cooperative federalism will be necessary for an effective greenhouse gas policy because the United States’ variety of greenhouse gas emitters and sinks is so numerous and varied that any purely national-level response will have minimal chances for success.”<sup>150</sup> Thus, while global warming is a quintessentially international problem, it is also very much a local concern: “emissions are local, and impacts, although driven globally by the extra energy trapped in the atmosphere, are ultimately local . . . [l]ocal action will be central to possible success of any international legal regime or policy initiative.”<sup>151</sup>

Thus, an assessment of California’s legislation, intended as it is to facilitate carbon market trade and thereby contribute to the reduction of GHGs, ought to consider the extent to which GHG emissions are a valid concern for states and the extent to which states have long played a cooperative role

140. Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 737 (2006).

141. *Id.* at 739.

142. See Paul L. Posner, *The Politics of Preemption: Prospects for the States*, 38 POL. SCI. & POL. 371, 371 (2005) (noting that the line between preemption and mandates is unclear); Joseph F. Zimmerman, *Congressional Preemption: Removal of State Regulatory Powers*, 38 POL. SCI. & POL. 375, 375-76 (2005) (describing the “major federalism revolution” that Congress initiated in 1965 with its enactment of cooperative federalism statutes and noting that many such statutes “contain[ed] mandates requiring subnational governments to initiate specified actions”) [hereinafter Zimmerman, *Congressional Preemption*].

143. Joseph F. Zimmerman, *The Nature and Political Significance of Preemption*, 38 POL. SCI. & POL. 359, 361 (2005) [hereinafter Zimmerman, *Political Significance*].

144. *Id.* at 361.

145. Zimmerman, *Congressional Preemption*, *supra* note 142, at 375.

146. Posner, *supra* note 142, at 373.

147. Resnik, *Law’s Migration*, *supra* note 36, at 1644 (quotations omitted).

148. Goldsmith, *The New Formalism*, *supra* note 89, at 1413.

149. See Resnik, *Law’s Migration*, *supra* note 36, at 1653.

150. Hodas, *supra* note 98, at 54-55 (citing John Dernbach & the Widener University Law School Seminar on Global Warming, *Moving the Climate Change Debate From Models to Proposed Legislation: Lessons From State Experience*, 30 ELR 10933 (Nov. 2000)).

151. *Id.* at 57.



with the federal government in enacting environmental policy. Under an implied preemption analysis, then, California could be seen as acting well within its traditional state responsibilities and having a strong state interest in mitigating local effects of GHGs. And under a dormant Commerce Clause analysis, California's legislation could be seen as having a legitimate local purpose.

With respect to foreign affairs preemption's second key concern regarding the effects of state actions, it is worth noting that, unlike the state statutes in all of the key foreign affairs preemption cases (*Zschernig*, *Japan Line*, *Barclays Bank*, *Crosby*, and *Garamendi*, in chronological order), California's legislation neither restricts, sanctions, criticizes, nor taxes a foreign country or its nationals or instrumentalities. Far from being restrictive of foreign governments, California's legislation in fact facilitates the trade of emissions permits with the EU and is enacted pursuant to an agreement with the EU. The obvious but critical point is that California's statute is not comparable to the state restrictions seen in *Zschernig* and *Garamendi*, nor the "morals" legislation seen in *Crosby* and the anti-apartheid divestment laws that are the focus of scholarly literature on foreign affairs preemption,<sup>152</sup> nor even the even-handed tax laws at issue in *Japan Line* and *Barclays Bank*.

Foreign affairs preemption, particularly dormant preemption, resonates most when "a state policy critic[izes] foreign governments and involve[s] 'sitting in judgment' on them"<sup>153</sup>—it is this critical nature of state action that underscores the effects test in foreign affairs preemption and drives the apprehension of foreign retaliation.<sup>154</sup> Because foreign affairs preemption to date focuses on the legitimacy of state and local *restrictions* on trade and the fear of economic retaliation by foreign countries,<sup>155</sup> it is not entirely relevant in California's context.<sup>156</sup> If the statute at issue in *Crosby*, which barred state entities from purchasing goods or services from organizations doing business with Burma, is the "paradigmatic state action at issue" in foreign affairs preemption cases,<sup>157</sup> then California legislation permitting the trade of emissions allowances with the EU-ETS is quite nearly the opposite of the paradigm.

Instead, California is constructively engaging with the EU, with the EU's consent, in a way that opens the door to trade and exchange. In fact, California's facilitation of carbon market trade is in line with the burgeoning role of states in foreign trade and investment. Most states now maintain at

least one trade office abroad and many have entered into trade-related agreements with foreign entities.<sup>158</sup> Projects directed at foreign trade and investment are considered among the central functions of state governments.<sup>159</sup> Such state trade and investment-related activities are widely accepted as unobjectionable, "from both policy and constitutional perspectives."<sup>160</sup>

Moreover, a "fruitful form of cooperation between federal and state actors has emerged" in trade and investment activities.<sup>161</sup> One commentator has noted that "at least with regard to trade policy, the federal response to state involvement in foreign affairs has increasingly been to opt for a policy of constructive engagement rather than exclusion."<sup>162</sup> The federal government benefits from state activity in these areas because it can utilize the state's resources, such as information, experience, and funding, to increase the effectiveness of federal policy development.<sup>163</sup> This is particularly relevant in the case of California's efforts to link with the EU-ETS as its experience could provide technical expertise upon which future federal policy joining to a post-Kyoto regime might rely. In this sense, California's transnational actions are providing a valuable federal service in advance of present federal action.

In short, one can draw a clear line between state action designed to promote foreign trade and interaction, on the one hand, and state action that has the effect of inhibiting it, on the other. Foreign affairs preemption doctrines are built on the back of the latter: state statutes that sanction or restrict foreign relations in a way that could potentially arouse foreign retaliation. This paradigmatic scenario is at odds with California's actions—a fact that should affect a court's examination of California legislation under the foreign affairs preemption doctrines.

Ultimately, the point is that the two central concerns that animate foreign affairs preemption—state purpose and effects—must be understood and viewed through the unique light and first-case impression of California's legislation. For one, California's purpose of limiting GHG emissions is grounded in a long tradition of state participation in the implementation and enforcement of local environmental policy and its participation is necessary to address climate change. Moreover, California's actions are not restrictive and critical, with potentially detrimental national effects, of the sort found preempted by the foreign affairs jurisprudence. Thus, while an analysis of California legislation under the foreign affairs preemption doctrines does not lead to a clear conclusion as to its validity, these aspects of the legislation ought to be considered by a court and could weigh in favor of validation.

152. See, e.g., Delahunty, *supra* note 95; Head, *supra* note 127.

153. HENKIN, UNITED STATES CONSTITUTION, *supra* note 28, at 164.

154. Most of the literature in foreign affairs federalism, both those opposing preemption of state actions and those supporting it, assume the mentality that "[l]eft unchecked, state and local interference could cripple the national government's ability to conduct foreign affairs, resulting in the sort of fractious cacophony that a federal entity can ill afford to project in its relations with other nations." Spiro, *supra* note 28, at 842, 850.

155. See Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1016 (2001) (noting that the debate focuses largely on "the existence and mitigation of adverse consequences of States' foreign affairs activities to the Nation as a whole").

156. See Bilder, *supra* note 28, at 829 (noting that "[d]ifferent kinds of state and local action and involvement—from sister city and trade promotion programs to politically motivated and discriminatory actions against [foreign governments]—obviously raise very different legal and policy issues" that need to be analyzed separately).

157. Chiang, *supra* note 6.

158. Spiro, *Foreign Relations Federalism*, *supra* note 79, at 1248.

159. Delahunty, *supra* note 95.

160. Spiro, *Foreign Relations Federalism*, *supra* note 79, at 1248; see also Resnik, *Law's Migration*, *supra* note 36, at 1652 (noting that many transnational projects are innocuous from a legal perspective).

161. See Halberstam, *supra* note 155, at 1046.

162. *Id.*

163. *Id.* "State participation in foreign affairs may help counteract resource limitation at federal level, provide expertise on foreign policy matters with significant local implications, mediate among competing interest groups and broaden political support for national initiatives, and spur the federal government into action." *Id.* at 1068.

## V. A Normative Discussion

The unique aspects of California's legislation also lead to two broader normative points. First, with reference to California's purpose in enacting the legislation and the tradition of cooperative federalism in which it acts, federalism itself ought to be seen in a neutral light—as the multi-variable phenomenon that it is, rather than as a rigid and politicized conceptualization of a power struggle between either state or federal control. This understanding of federalism, exemplified by the cooperative federalism schemes under which states have long exercised control in environmental protection, should color the way in which we think about California's actions in the international realm.

In the last decade, the Supreme Court has taken measures to revive federalism by both imposing federalism restrictions on the national government<sup>164</sup> and resurrecting state sovereignty.<sup>165</sup> This raises the question of whether a similar development might occur in the area of foreign affairs federalism.<sup>166</sup> As is characteristic of its forays into foreign affairs federalism, however, the Court has been ambiguous about the extent to which these federalism developments affect foreign relations law.<sup>167</sup> The Court's dodging of the issue means that foreign affairs preemption, including the dormant doctrines, stand as good law and prohibit certain state actions infringing on foreign affairs—of course, as described in Part III, the actual scope of these doctrines is unclear. Noting this ambiguity in the current state and future direction of foreign affairs preemption, commentators have called for preemption law to be coordinated “with the constitutional law of federalism, if the nation is to have a coherent unified law of national and state power.”<sup>168</sup>

Regardless of whether domestic federalism developments are to be integrated into foreign affairs preemption doctrines, federalism should be viewed in the complex, multi-variable reality in which it actually exists. Current legal commentary and case law depict a “categorical or essentialist” federalism that is rigidly bi-polar and thereby “misses the many ‘others,’ the variety of combinations, be they intermediate organizations, regionalism within states, networks of states, or informal as well as rule-based collaborations” that exist.<sup>169</sup> A growing body of scholarship criticizes the “power struggle image” of state-federal conflict as an “outmoded [ ] concept of the states and the national gov-

ernment as competing sovereigns, vying for the right to control the national destiny.”<sup>170</sup>

Rather, it seems important to recognize that “state and federal interests are not fixed sets but are interactive and interdependent conceptions that vary over time.”<sup>171</sup> Our federal system is modeled on mutuality and “reflect[s] the interdependence of the governmental planes—national, state, and local—and the general reliance of one plane upon the others for the performance of certain functions.”<sup>172</sup> The multiplicity of preemption statutes described earlier and wide variation in forms of interaction between federal and state government (of which cooperative federalism is one) bolster these assertions and suggest that national-state relationships are more kaleidoscopic than is typically acknowledged.<sup>173</sup> Recognizing that federal-state relations are in fact multi-dimensional also translates into an acknowledgment that there is no definitively “correct” allocation of power between the states and the federal government.<sup>174</sup> To echo the words of one commentator, “it is time to depart from the history of dichotomous alternatives (of either a state or federal domain) and of essentialized images (of both state and the federal government) so as to investigate ongoing, and to imagine new, institutional arrangements that embody the interdependence of participants within the United States.”<sup>175</sup>

A second critical point to remember is that whether a court will uphold California's legislation thereby allowing it to take actions with effects on foreign affairs, or whether it will uphold the orthodox view that states have no role to play in foreign affairs, “there is nothing inherently ‘conservative’ or ‘liberal,’ or ‘regressive’ or ‘progressive’” about the lessening of the foreign affairs differential.<sup>176</sup> Foreign affairs federalism embodies one of those rare scenarios where contradictory political interests dovetail. Environmentalists protest an excessive devolution of authority to the states in the domestic realm of federalism and call for a federal voice in environmental policy, and yet join more conservative voices in calling for state involvement in the international realm—at least insofar as they might support California's transnational link to the EU-ETS. The reason for these seemingly inconstant positions lies in the many moving parts of foreign affairs federalism.

Because federalism has long been used as a justification by sovereign countries for declining to participate in trans-

164. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

165. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144, 22 ELR 21082 (1992).

166. Bradley, *supra* note 93, at 1100.

167. In *Crosby*, the Court skirted the issue, stating: “We leave for another day a consideration in this context of a presumption against preemption.” 530 U.S. at 374 n.8. In *Garamendi*, the Court similarly dodged the question of the state role in foreign affairs by noting: “It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here.” 539 U.S. at 419-20.

168. Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 13 (2000).

169. See Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465, 469, 472, 500 (1996) (pointing out that this “categorical or essentialist” federalism is formalistic and unresponsive to the reality of a “vast array of efforts—both within the United States and beyond this country's borders—to reformat arrangements crafted in earlier eras”) [hereinafter Resnik, *Afterword*].

170. Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 163 (1971).

171. Resnik, *Afterword*, *supra* note 169, at 473.

172. Zimmerman, *Political Significance*, *supra* note 143, at 361-62.

173. *Id.* at 362.

The theory of dual federalism is a simple one explaining a complete separation of national and state powers. The theory of cooperative federalism builds upon this theory by emphasizing the cooperative nature of national-state relations. Dissatisfaction with the explanatory values of these theories, commencing in the 1960s, led to a myriad of new terms. William H. Stewart identified 497 figurative descriptors. Neither the two current theories nor the descriptors adequately explain the impact of complete, partial, contingent and innovative preemption statutes on the current nature of the federal system.

Zimmerman, *Congressional Preemption*, *supra* note 142, at 377.

174. Resnik, *Afterword*, *supra* note 169, at 478.

175. *Id.*

176. Bradley, *supra* note 93, at 1106-07.

national efforts, such as human rights promotion,<sup>177</sup> many orthodox scholars who support a foreign affairs differential criticize revisionists who wish to domesticize foreign affairs for being isolationist. These orthodox scholars, who view the foreign affairs differential as a means to help federal courts infuse U.S. foreign relations common law with liberal international norms, fear that if foreign affairs is no longer exceptional and is instead domesticized, more conservative domestic doctrines may end up superseding customary international norms, including aspirational human rights norms.<sup>178</sup> This view assumes two things that are not necessarily true, however.

First, state policies might be more or less liberal than federal policy. Although it may seem politically conservative to allow greater state involvement in foreign affairs activities, some state activities—such as California’s climate change policy—are more liberal than the federal government’s stance.<sup>179</sup> “[I]nstitutional voices in a host of jurisdictions, public and private, can and do shift their tones,” therefore “neither the kind of jurisdiction nor the territorial space occupied by a polity produces rights of a particular kind.”<sup>180</sup> Understanding that the distinction between state and federal involvement in foreign affairs is not a strictly black and white dichotomy between more conservative or more liberal approaches to international norms allows us to let go of any assumptions about the role of the state in foreign affairs.<sup>181</sup>

Second, states do not only “import” international norms and therefore pose themselves as potential barriers to the infusion of international law; they also export international norms and can facilitate the internalization of international law by engaging with it. States and localities, then—“through city councils, state legislatures, national organizations of local officials, and courts—serve as both importers and exporters of law.”<sup>182</sup> Federalism, in other words, operates in both directions in the context of foreign affairs. Allowing states to play a role in the international realm therefore does not necessarily signify that international law will be obstructed by states refusing to import or incorporate international norms. Rather, states such as California might take the opportunity to proactively step into the international realm by “exporting” and engaging with international law and norms.

In short, whatever decision is made in upholding or invalidating California’s legislation, it ought to be made with an understanding that no outcome dictates a particular political result. A new foreign affairs law “may leave no political group entirely satisfied.”<sup>183</sup> Viewing foreign affairs federalism through this lens allows us to reconceptualize without any preconceived notions how and whether federalism ought to be integrated into foreign relations law. Without political predilections getting in the way, an assessment of

California’s actions can be made based on what makes sense, as grounded in our Constitution and the world we live in—a rapidly globalized one and one that sees a multitude of kaleidoscopic interactions between the states and the federal government.<sup>184</sup>

## VI. Conclusion

The current state of the foreign affairs preemption doctrine and its future direction are unclear. Whether there is even any real doctrine of dormant foreign relations preemption, or when it applies; whether the dormant foreign Commerce Clause has broader preemptive effect than the dormant Commerce Clause<sup>185</sup>; whether congressional acquiescence to a state law affecting international commerce should affect the ability of the executive to invalidate such a law under the dormant foreign affairs power<sup>186</sup>; and how to resolve the inconsistency between *Zschernig* and *Barclays Bank*<sup>187</sup> are just a few of the many unanswered questions that plague the jurisprudence.

Unsettled as the foreign affairs preemption jurisprudence may be and as little clear indication as it gives of the viability of California’s transnational climate change policy, the ultimate question is the future of federalism itself in an era of globalization. What role do states have, if any, in an increasingly globalized world? Globalization could lead to greater centralization as the national government takes the reins in guiding the country as a whole with respect to other nations.<sup>188</sup> On the other hand, federalism might be perfectly consistent with increasing globalization as internationalization, by distancing governance and accountability from citizens, prompts individuals to seek a closer attachment to local communities and thereby lead to a “bottom-up return to federal values.”<sup>189</sup>

Whatever the outcome, federalism and the state’s role in the international arena must be reconsidered. California’s action implementing a link with the EU-ETS, taken as it is against a tradition of cooperative federalism and opening as it does interaction with foreign nations, can serve as a critical driver in this rethinking of old assumptions about the exceptional character of foreign affairs.<sup>190</sup> These unique aspects of California’s action call for us not only to recog-

177. See Resnik, *Law’s Migration*, *supra* note 36, at 1564.

178. White, *supra* note 91, at 1123-24.

179. Bradley, *supra* note 93, at 1106-07.

180. Resnik, *Law’s Migration*, *supra* note 36, at 1669.

181. *Id.* at 1670 (noting that “[o]nce norm entrepreneurs let go of any assumption that any one level of power—the international, the transnational, the national, or the local—can be an ongoing source of any particular political stance, they have to understand the necessity to work at multiple sites”).

182. *Id.* at 1576.

183. Bradley, *supra* note 93, at 1106-07.

184. While foreign affairs federalism seems to be fundamentally about federalism, no discussion can be had without at least some mention of separation of powers—in fact, most foreign affairs preemption cases have been decided on separation-of-powers grounds, rather than on federalism grounds. See Hodas, *supra* note 98, at 78. Preemption directly involves the balance of powers between Congress and the executive and also indirectly implicates the role of the judiciary in policing and monitoring this balance. For greater explication of these structural implications of preemption, see Denning & Ramsey, *supra* note 58; Swaine, *supra* note 5; Spiro, *Foreign Relations Federalism*, *supra* note 79.

185. Swaine, *supra* note 5, at 340.

186. Steigman, *supra* note 58, at 486.

187. *The Supreme Court, 2002 Term*, *supra* note 107, at 232, 235.

188. See Tushnet, *supra* note 168, at 38-39.

189. Friedman, *supra* note 98, at 1479-80, 1482.

190. White, *supra* note 91, at 1123 (predicting that such assumptions are “bound to lose [their] resonance and, thus, [their] authority”). See also Spiro, *Globalization*, *supra* note 92, at 729-30 (similarly predicting that “[w]ith the advent of globalization, as defined by the democratic peace, the disaggregation of nation-states, and the intensification of global economic competition, the foundations of the foreign relations differential have been swept away”).



nize federalism in its current reality as a complex, changing, kaleidoscopic relationship, but also to remember that while the allocation of federal versus state authority is both a political and legal interpretation,<sup>191</sup> whatever path is chosen—be it the deconstruction of the foreign affairs differential or a bolstering of such exceptionalism—does

not guarantee any particular political result.<sup>192</sup> Whether California's action is ultimately upheld or struck down, then, it can serve as an important flashpoint in the reconceptualization of foreign affairs federalism in a modern, globalized era.

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191. Barry G. Rabe, *North American Federalism and Climate Change Policy: American State and Canadian Provincial Policy Development*, 14 WIDENER L.J. 121, 144 (2004).

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192. See White, *supra* note 91, at 1125 (“No one can tell what form the new foreign affairs law will take, but one can be sure that its starting assumptions will align with the . . . reactions twenty-first century Americans have to the international world they confront.”).