

FOREIGN AFFAIRS PREEMPTION AND STATE REGULATION OF GREENHOUSE GAS EMISSIONS

In 2001, the United States withdrew from the Kyoto Protocol. Since then, the Administration has not advocated for any international agreement or domestic legislation that would impose mandatory limits on the emission of greenhouse gases (GHGs). Frustrated by federal inaction, several states have responded with their own measures to address climate change. Some of these measures, such as heightened GHG reporting requirements and subsidies for alternative energy, impose minor costs on private parties and are therefore unlikely to generate much legal or political controversy. However, a newer set of measures that impose mandatory emissions limits is likely to produce conflict. Such measures include: the California Air Resources Board's (CARB) regulation limiting GHG emissions from new motor vehicles;¹ regulations in three states and one county limiting GHG emissions from power plants;² a suit brought by eight state attorneys general and the City of New York claiming that GHG emissions by electric generation facilities create a public nuisance and seeking injunctive relief in the form of reduced emissions;³ and the Regional Greenhouse Gas Initiative (RGGI), a plan by seven northeastern states to establish a regional cap and trade program for GHG emissions from electric generation facilities.⁴

One important objection to these state efforts is that they are preempted by the federal foreign affairs power as exercised, for example, in the withdrawal from the Kyoto Protocol. This Note considers the merits of this objection and concludes that mandatory state limits on GHGs are not preempted by the federal foreign affairs power. Part I describes the Supreme Court's foreign affairs preemption jurisprudence, paying particular attention to the 2003 case *American Insurance*

¹ The California legislature required CARB to promulgate tailpipe emissions limits for GHGs. CAL. HEALTH & SAFETY CODE § 43018.5 (West Supp. 2005).

² See 310 MASS. CODE REGS. 7.29(5)(a)(5) (2004); N.H. REV. STAT. ANN. § 125-O:3 (2005); OR. REV. STAT. § 469.503 (2003); SUFFOLK COUNTY, N.Y., LAWS ch. 235, § 235-3, available at http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=61503&infobase=suffolk.nfo&softpage=Browse_Frame_Pg42.

³ The states' and city's nuisance claim was dismissed at trial as a nonjusticiable political question. *Connecticut v. Am. Elec. Power Co.*, Nos. 04 Civ. 5669 (LAP), 04 Civ. 5670 (LAP), 2005 WL 2347900, at *7 (S.D.N.Y. Sept. 22, 2005).

⁴ See Regional Greenhouse Gas Initiative, <http://www.rggi.org> (last visited Mar. 12, 2006). The governors of California, Washington, and Oregon have agreed to explore a similar proposal. See Press Release, Cal. Env'tl. Prot. Agency, West Coast States Strengthen Joint Climate Protection Strategy (Nov. 18, 2004), available at http://www.calepa.ca.gov/PressRoom/Releases/2004/WC_Climate.pdf.

Ass'n v. Garamendi.⁵ Part II examines the case for conflict preemption — referred to as the bargaining chip theory — and concludes that the record does not show a clear enough conflict to warrant preemption. The goals of federal climate change policy are difficult to discern, and the likely effects of state GHG regulations on the achievement of those goals will be hard for courts to predict given the limitations of their institutional competence. Part III examines the case for dormant preemption, concluding that it is inappropriate to apply that doctrine to state GHG regulations. Without a controlling law indicating that state GHG regulations constitute a “matter of foreign policy” or some form of direct interaction between the states and foreigners, applying dormant foreign affairs preemption to state GHG regulations would dangerously expand a doctrine that already lacks clear limits.

I. FOREIGN AFFAIRS PREEMPTION AFTER *GARAMENDI*

None of the federal statutes, treaties, or executive agreements that relate to climate change expressly preempt state law.⁶ Nevertheless, courts could strike down state climate change laws if they deemed preemptive intent to be implied in federal law. Implied preemption comes in two forms: field preemption and conflict preemption.⁷ Under field preemption, a state statute is void if either the federal regulatory scheme is “so pervasive” that “Congress left no room for the States to supplement it,”⁸ or the federal interest in the subject area it regulates is “so dominant” that federal law “will be assumed to preclude enforcement of state laws on the same subject.”⁹ Under conflict preemption, a state statute is void if it makes compliance with both state and federal law impossible.¹⁰

In addition to these forms of implied preemption, the Supreme Court has twice held that federal courts may invalidate state laws even

⁵ 539 U.S. 396 (2003).

⁶ See David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional To Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53, 79 (2003). Also, neither the parties challenging California’s GHG vehicle rules nor the parties defending against the nuisance claim have argued for express preemption. See First Amended Complaint for Declaratory and Injunctive Relief at 17–19, 32, 43–44, *Cent. Valley Chrysler-Jeep v. Witherspoon*, No. CVF046663RECLJO, 2005 WL 3470653 (E.D. Cal. Dec. 19, 2005); Memorandum of Law in Support of Defendants’ Motions To Dismiss at 39–46, *Am. Elec. Power Co.*, 2005 WL 2347900 (No. 04 Civ. 5669 (LAP)).

⁷ CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 326 n.1 (2d ed. 2006). A third category, obstacle preemption, voids a state law if it stands as an obstacle to the purposes of a federal statute. See *id.* In practice, this category blurs with conflict preemption, and as such this Note treats conflict preemption as including obstacle preemption.

⁸ *Id.* (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)) (internal quotation marks omitted).

⁹ *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

¹⁰ See *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

in the absence of an enacted controlling federal law under what has been called the “dormant foreign affairs power.” The Court first used this power in the 1968 case *Zschernig v. Miller*.¹¹ *Zschernig* concerned an Oregon probate statute that forbade inheritance by nonresident aliens without a showing that the alien’s home country would neither confiscate the inheritance nor deny American citizens a reciprocal right.¹² The Court struck down the statute because it invited state judges, at the height of Cold War nuclear anxiety, to criticize foreign governments in a way that might embarrass the United States, thus intruding into the “field of foreign affairs which the Constitution entrusts to the President and the Congress.”¹³

Thirty-five years later in *Garamendi*, the Court struck down a California statute that required insurers doing business in California to disclose information about their dealings in Europe during the Holocaust.¹⁴ The Court did so because the President had earlier signed executive agreements with the German government that imposed less stringent requirements on the insurers.¹⁵ Although other executive agreements had previously been held to possess a narrow preemptive effect,¹⁶ that alone does not explain the result in *Garamendi* because not only did the executive agreements in this case not expressly preempt state claims, they appeared to tolerate them. In the agreements, the United States promised to file statements recommending that courts dismiss Holocaust-era claims to accord with U.S. foreign policy. These statements, however, were acknowledged to be merely precatory.¹⁷ Further, although the agreements only covered German and Austrian companies, the Court preempted the California law even as it applied to insurers from other European countries.¹⁸ The Court in *Garamendi* based its decision on the conflict it perceived between California’s disclosure requirement and the President’s policy of encouraging European governments and companies to donate to settlement funds rather than to engage in litigation or coercive regulation.¹⁹ As evidence of the federal government’s foreign policy, the Court pointed to the executive agreements themselves, to statements made by ad-

¹¹ 389 U.S. 429 (1968).

¹² *Id.* at 430–31.

¹³ *Id.* at 432.

¹⁴ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401, 408–10 (2003).

¹⁵ *See id.* at 405–06, 425.

¹⁶ *See United States v. Pink*, 315 U.S. 203, 223, 230–31 (1942); *United States v. Belmont*, 301 U.S. 324, 327, 331 (1937); *see also* Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 919–21 (2004).

¹⁷ *Garamendi*, 539 U.S. at 435–36 (Ginsburg, J., dissenting).

¹⁸ *See id.* at 401 (majority opinion); Denning & Ramsey, *supra* note 16, at 900.

¹⁹ *Garamendi*, 539 U.S. at 421–23.

ministration officials before Congress, and to letters by a State Department official to the Governor of California.²⁰

Although *Garamendi* and *Zschernig* are both sometimes labeled “dormant foreign affairs preemption” cases, they are different. *Zschernig* held that constitutional structure excludes states from pursuing certain kinds of policies, regardless of whether the state policies conflict with those chosen by the federal government.²¹ Indeed, in *Zschernig*, the federal government filed a brief stating that it had no objection to the Oregon statute.²² *Garamendi*, in contrast, did not rest on federal exclusivity in foreign affairs, but on an assessment that the California law conflicted with the Executive’s foreign policy. The Court applied conflict preemption rather than dormant preemption.

Although *Garamendi* did not apply dormant preemption, it preserved the notion, in dicta, that dormant preemption is good law. Justice Souter sketched a two-part inquiry, explaining that foreign affairs preemption cases could be analyzed under the test for either field or conflict preemption, depending on whether the state was acting in an area of “traditional state responsibility.”²³ Under the former, when states act outside their traditional responsibilities, state laws will be preempted without the need to show conflict.²⁴ Although Justice Souter called this “field preemption,” it would apply whether or not the federal government had acted and so more closely resembles the dormant preemption of *Zschernig*.²⁵ In the second part of the inquiry, when states act *within* their traditional responsibilities, preemption requires “a conflict, of a clarity or substantiality that would vary with the . . . importance of the state concern asserted.”²⁶ Because the Court found a “clear conflict” between federal policy and state law, it did not reach dormant preemption, but it nonetheless left the doctrine on the table for future use.²⁷

The remainder of this Note analyzes state GHG regulations under the doctrinal framework described by Justice Souter, proceeding, as he did, from narrower inquiries to broader ones. Part II asks whether a clear conflict can be established between state GHG regulations and federal climate change policy. This inquiry breaks into two smaller questions: Has the federal government clearly committed itself to the

²⁰ *Id.* at 411, 422.

²¹ See *Zschernig v. Miller*, 389 U.S. 429, 434–35 (1968).

²² *Id.* at 434.

²³ *Garamendi*, 539 U.S. at 419 n.11.

²⁴ *Id.*

²⁵ *Id.* (describing a scheme in which the statute would be preempted “whether the National Government had acted and, if it had, without reference to the degree of any conflict”); see also Denning & Ramsey, *supra* note 16, at 926–27.

²⁶ *Garamendi*, 539 U.S. at 419 n.11.

²⁷ *Id.* at 419–20.

pursuit of a binding multilateral agreement on climate change? And if so, can courts say with confidence that state GHG regulations interfere with that policy? Part II continues by addressing the strength of the state interest in regulating GHG emissions, which is relevant because the strength of the state interest determines the clarity and substantiality of the conflict required for preemption under *Garamendi*. Finally, Part III addresses whether state GHG regulations may be subject to dormant preemption, asking whether they fall within an area of traditional state responsibility and whether they may be considered intrusions into foreign policy under *Garamendi* or *Zschernig*.

Before going further, it is worth noting that the extent to which the Roberts Court will push *Garamendi* is in doubt.²⁸ In particular, it is unclear whether the “traditional state responsibility” test for dormant preemption will be applied, rather than merely described in dicta. *Garamendi* has generated substantial scholarly criticism that bears on the question whether the Court ought to continue down its current path.²⁹ The primary purpose of this Note is not to join that criticism but to apply the case to the murky terrain of climate change policy. In doing so, however, this Note adds one more data point supporting those who criticize *Garamendi*’s demand that judges predict the foreign relations effects of state laws, gauge the “strength of the state interest,” and define “traditional state responsibilities.” Applied to state GHG regulations, the indeterminacy of these tests is on full display.

II. CONFLICT PREEMPTION: DO STATE GHG REGULATIONS INTERFERE WITH U.S. CLIMATE CHANGE POLICY?

A. *The Bargaining Chip Theory*

As states have begun to regulate GHG emissions, industry groups have argued that such regulations interfere with the federal government’s foreign policy on climate change. This argument, referred to here as the bargaining chip theory, has been presented, but not ruled upon, in the challenge to the CARB rules and in the multistate nuisance claim.³⁰ It has also been argued by industry advocates outside

²⁸ The decision was 5–4, and two members of the majority are no longer on the Court. The dissenters seemed to disagree not only with the assertion that there was a clear conflict between state and federal policy in the case at hand, but also with the fundamental notion that executive conduct can have preemptive effect. *See id.* at 439 (Ginsburg, J., dissenting) (“Despite the absence of express preemption, the Court holds that the [California statute] interferes with foreign policy objectives implicit in the executive agreements. I would not venture down that path.” (citation omitted)).

²⁹ *See, e.g.,* Denning & Ramsey, *supra* note 16.

³⁰ In *Connecticut v. American Electric Power Co.*, Nos. 04 Civ. 5669 (LAP), 04 Civ. 5670 (LAP), 2005 WL 2347900, at *7 (S.D.N.Y. Sept. 22, 2005), eight states and New York City sued

the litigation context³¹ and discussed, but not extensively evaluated, in the legal literature.³² The argument goes as follows:

Climate change is an inherently global problem demanding a global solution. Thus, the executive branch has fashioned a foreign policy that is committed to seeking multilateral measures to address the problem. This multilateral approach was formalized when the United States joined the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 and continues to the present.³³ However, while the federal government has committed to a policy of multilateral engagement, it has also consistently opposed any agreement that would exempt developing nations from sharing the sacrifice. To impose limits on developed countries but not developing ones would push GHG-intensive industries — and the jobs they provide — out of developed nations to developing ones. As a result, the U.S. economy would suffer and the emissions reductions the United States sacrificed for would be largely canceled out by the rising emissions of unregulated developing nations. Thus, when Kyoto negotiations produced an agreement exempting developing nations from mandatory emissions limits — in-

the five largest U.S. emitters of carbon dioxide for creating a public nuisance. The defendants argued that the plaintiffs' state law claims were preempted by the foreign affairs power. Memorandum of Law in Support of Defendants' Motions To Dismiss, *supra* note 6, at 39–46; *see also* Amicus Curiae Unions for Jobs and the Environment's Memorandum in Support of Defendants' Motion To Dismiss at 9–16, *Am. Elec. Power Co.*, 2005 WL 2347900 (No. 04 Civ. 5670 (LAP)), available at <http://ujae.org/Motion%20to%20Dismiss%20small%20file%20size.pdf>. The district court did not rule on foreign affairs preemption, but it did consider the international dimension of the climate change issue in its decision that the nuisance claim implicated a nonjusticiable political question. *See Am. Elec. Power Co.*, 2005 WL 2347900, at *7 (dismissing plaintiffs' claims because “resolution of the issues presented here requires identification and balancing of economic, environmental, foreign policy, and national security interests”).

In *Central Valley Chrysler-Jeep v. Witherspoon*, No. CVF046663RECLJO, 2005 WL 3470653 (E.D. Cal. Dec. 19, 2005), the plaintiff car dealers argued that California's regulation of GHGs from vehicles should be struck down because, *inter alia*, it was preempted by the foreign affairs power. *See* Complaint for Declaratory and Injunctive Relief at 5, 32–33, *Cent. Valley Chrysler-Jeep*, 2005 WL 3470653 (No. CVF046663RECLJO); First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 17–19, 32, 43–44. As of this writing, the court has only ruled on the issue of venue and has not addressed the preemption arguments. *See Cent. Valley Chrysler-Jeep*, 2005 WL 3470653.

³¹ *See* Norman W. Fichthorn & Allison D. Wood, *Constitutional Principles Prohibit States From Regulating CO₂ Emissions*, LEGAL BACKGROUNDER (Wash. Legal Found., Wash., D.C.), Sept. 23, 2005, at 1, available at <http://www.wlf.org/upload/092305LBFichthorn.pdf>; Edison Elec. Inst., Preliminary Comments on Regional Greenhouse Gas Initiative Implementation Issues 6 n.6 (Sept. 20, 2005), available at http://www.rggi.org/docs/eei_comments_9_20_05.pdf.

³² *See* Ann E. Carlson, *Federalism, Preemption, and Greenhouse Gas Emissions*, 37 U.C. DAVIS L. REV. 281, 298 n.90 (2003); Hodas, *supra* note 6, at 67–68, 75–78; Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 319–28 (2005).

³³ President Bush reaffirmed the U.S. commitment to the UNFCCC process at the 2005 G8 meeting in Gleneagles, Scotland. *See* Climate Change, Energy and Sustainable Development, The Gleneagles Communiqué 2, July 8, 2005, available at http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_CCChapeau.pdf.

cluding large emitters and emerging powers such as China and India — the United States did not join. Voting 95–0, the Senate emphatically forbade the Executive from joining any agreement that would impose mandatory emissions limits on developed countries but would not also schedule emissions limits for developing countries.³⁴

Thus, the argument continues, the diplomatic challenge the United States now faces is to fashion a multilateral agreement that includes mandatory reductions by developing nations and that developing nations are willing to join. State GHG regulations undermine that policy because they unilaterally reduce U.S. GHG emissions. Unilateral reductions weaken the President’s leverage to extract concessions from developing countries that may simply free-ride on U.S. reductions.³⁵ U.S. emissions reductions are like bargaining chips that only the President should be allowed to spend.

Judicial protection of the President’s bargaining chips, the argument continues, can be found in two recent foreign affairs preemption cases. In *Garamendi*, the Court noted that if the law demanding disclosure of Holocaust-era activities “is enforceable the President has less to offer and less economic and diplomatic leverage as a consequence.”³⁶ Earlier, in *Crosby v. National Foreign Trade Council*,³⁷ the Court struck down a Massachusetts law forbidding state agencies from contracting with companies that do business in Burma because it posed an obstacle to the objectives of a congressional statute that directed the President to develop a comprehensive Burma strategy and empowered him to use sanctions as a tool. The *Crosby* Court noted that in an earlier case it had “used the metaphor of the bargaining chip to describe the President’s control of funds valuable to a hostile country” and concluded that “here, the state Act reduces the value of the chips created by the federal statute.”³⁸

³⁴ S. Res. 98, 105th Cong. (1997).

³⁵ The Environmental Protection Agency (EPA) warned that developing nations may free-ride on unilateral U.S. reductions in its decision declining to regulate GHG emissions from motor vehicles. See Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003) (“Unilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies. . . . Any potential benefit of EPA regulation could be lost to the extent other nations decided to let their emissions significantly increase in view of U.S. emission reductions.”).

³⁶ Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 424 (2003) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 377 (2000)) (internal quotation mark omitted).

³⁷ 530 U.S. 363 (2000).

³⁸ *Id.* at 377.

B. Background: The Elements of U.S. Climate Change Policy

In *Garamendi*, the Court found a “clear conflict” between state law and federal policy.³⁹ To establish a similarly clear conflict, proponents of the bargaining chip theory must begin with an unambiguous account of what federal climate change policy is. In particular, they must establish that the federal government does indeed seek a binding multilateral solution to the problem of climate change. If the federal government had no intention of ultimately forming such an agreement, it would be hard to imagine how state GHG regulations would interfere with federal policy. Participation in conferences and nonbinding vision statements does not require the use of bargaining chips. Moreover, absent an intention to address climate change through a binding multilateral agreement, federal climate change policy ought not be considered a “foreign” policy for the purposes of foreign affairs preemption. That is, if foreign agreements do not constrain U.S. GHG emissions regulations, there is no reason not to consider them a domestic environmental policy like any other pollution control regime. So proponents of the bargaining chip theory must show that the federal government intends to reach such a deal, but that it will not do so until it can persuade developing countries to join in — a purpose frustrated by state GHG regulations. Can a federal purpose to enter a binding multilateral agreement be clearly ascertained in the acts of Congress, the Executive, or some combination of the two?

1. *Major Congressional Actions Relating to Climate Change.* — In 1987, Congress passed the Global Climate Protection Act⁴⁰ (GCPA), the first legislation to mention climate change as an issue bearing on U.S. foreign policy. The GCPA listed the four goals of U.S. policy as, one, to “increase worldwide understanding of the greenhouse effect,” two, to “foster cooperation among nations to develop more extensive and coordinated scientific research,” three, to “identify technologies and activities to limit mankind’s adverse effect on the global climate,” and four, to “work toward multilateral agreements.”⁴¹ The GCPA distinguished the responsibilities of the President — to develop a national policy on climate change — from those of the Secretary of State — “to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy.”⁴²

Although the GCPA shows that Congress was interested, as early as 1987, in approaching climate change through international mecha-

³⁹ The Court found that the federal government’s consistent policy of avoiding coercive measures was “expressed unmistakably” in the executive agreements. *Garamendi*, 539 U.S. at 421.

⁴⁰ Pub. L. No. 100-204, 101 Stat. 1407 (1987).

⁴¹ *Id.* § 1103(a).

⁴² *Id.* § 1103(b)–(c).

nisms, it does not confirm that the federal government is committed to forming a binding multilateral agreement. The vague suggestion to “work toward multilateral agreements” neither commands that any agreement be reached nor specifies that it contain mandatory emissions limits that would preempt state regulations.

Five years later, the Senate consented to the UNFCCC.⁴³ The UNFCCC charter is a largely aspirational and procedural document, containing sweeping language about the “global nature of climate change,” and calling for “the widest possible cooperation . . . in an effective and appropriate international response.”⁴⁴ It also establishes procedures for a regular meeting, called the Conference of the Parties (COP), in which participating nations might consider new, possibly binding obligations.⁴⁵ However, the UNFCCC itself does not contain binding emissions limits. Indeed, the Senators who debated the UNFCCC understood President George H.W. Bush to have pushed to keep binding limits out of the agreement — a result some Senators praised⁴⁶ and others criticized.⁴⁷

In June 1997, anticipating the Kyoto meeting that December, the Senate passed the Byrd-Hagel Resolution 95–0, declaring its opposition to any climate change agreement that would not impose binding emissions reductions on developing countries or that would cause serious harm to the U.S. economy.⁴⁸ On its face, the Resolution shows a concern that negotiators in Kyoto would reach a deal that exempted developing nations entirely, as had been suggested at the 1995 COP meeting in Berlin.⁴⁹ But nothing in the Byrd-Hagel Resolution or its

⁴³ 138 CONG. REC. 33,527 (1992).

⁴⁴ United Nations Framework Convention on Climate Change para. 5, *opened for signature* May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 164, 166.

⁴⁵ *Id.* art. 7.

⁴⁶ *See, e.g.*, 138 CONG. REC. 33,526 (1992) (Sen. Simpson: “I am pleased the United States stood up to certain interest groups and foreign governments and did not go along with pressure to turn political rhetoric into legally binding commitments.”); *id.* at 33,522 (Sen. Lott: “[T]he convention does not obligate the United States or any other country to achieve any particular target or timetable for limitation of greenhouse gas emissions. . . . [T]hat is the correct and responsible approach and is the result which President Bush and his administration wisely negotiated and achieved.”); *id.* at 33,521 (Sen. McConnell: “The President’s firm stand against targets and timetables for greenhouse gases was not a fashionable position at [the conference]. However, it was the only position supported by the facts.”).

⁴⁷ *See, e.g., id.* at 33,525 (Sen. Gore: “Germany, Japan, the United Kingdom — all of our G-7 partners — urged our President to join in a treaty with substance to its emissions limitations commitments. But we stonewalled the world and in the end, our intransigence meant that the final agreement is completely devoid of any legally binding commitments to action.”); *id.* at 33,524 (Sen. Mitchell: “The Bush administration prevented a meaningful convention from being signed . . .”).

⁴⁸ S. Res. 98, 105th Cong. (1997).

⁴⁹ *See* Framework Convention on Climate Change, Conference of the Parties, Berlin, F.R.G., Mar. 28–Apr. 7, 1995, *Report of the Conference of the Parties on Its First Session*, Addendum, Decision 1/CP.1, U.N. Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995).

legislative history suggests that two-thirds of the Senate was willing to ratify the anticipated agreement in Kyoto *but for* the developing countries exception.⁵⁰ First, the text of the Resolution shows a concern for the cost of any agreement, regardless of whether developing nations were included. The Resolution declares that the Senate would not consent to *any* agreement that exempts developing nations *or* that “would result in serious harm to the economy of the United States.”⁵¹ Further, it demands that any agreement be “accompanied by an analysis of the detailed financial costs and other impacts on the economy of the United States.”⁵² Second, the legislative history shows that many Senators were not persuaded by the science of climate change.⁵³ As Senator Frank Murkowski speculated, “the resolution does not say anything about endorsing the science of global warming. If it had, it would not have passed the Senate at all . . . much less than by a vote of 95–0.”⁵⁴ Senator Murkowski may have been right or wrong. The point is merely that it is unknown. Because the concerns over cost and scientific uncertainty were so prevalent in the Senate, it is impossible to say whether a treaty that required binding commitments by developing nations would have been approved. Thus, the Byrd-Hagel Resolution does not support the contention of the bargaining chip theory that the Senate has demonstrated its intent to pursue a binding multilateral agreement on climate change but for the developing countries exception.

In the years following, Congress continued to signal its displeasure with the Kyoto Protocol, passing statutes that barred the Environ-

⁵⁰ As Senator Kerry noted, “in this strange hybrid of Senators who have signed on as cosponsors to this resolution, there are some who do not want any treaty. There are some who do not think it is a problem. There are some who do not accept the science. There are some for whom the effort is one to really have nothing happen.” 143 CONG. REC. 15,788 (1997).

⁵¹ S. Res. 98 § (1)(B).

⁵² *Id.* § (2).

⁵³ See 143 CONG. REC. 15,813 (1997) (Sen. Sessions, referring to a “serious disagreement among scientists”); *id.* at 15,806 (Sen. Craig: “[T]his country cannot commit itself to this kind of binding agreement unless the science is clearer . . .”); *id.* at 15,805 (Sen. Murkowski: “[T]he science is uncertain, and the scientific debate is not over.”); *id.* at 15,803 (Sen. Enzi, referring to a “scientific consensus that is generously referred to as unsettled”); *id.* (Sen. Inhofe: “[T]he science is not there.”); *id.* at 15,798 (Sen. Shelby: “Many in the scientific community believe that we are still years away from computer models that can confidently link global warming to human activity.”); *id.* at 15,797 (Sen. Thomas, referring to “[u]ncertain global warming science”); *id.* at 15,796 (Sen. Kyl: “[T]he administration is basing its climate-change policy on questionable science.”); *id.* at 15,793 (Sen. Lott: “[T]here is no consensus among scientists about the validity of [global warming].”); *id.* at 15,791 (Sen. Roberts: “[T]he science is not clear on global warming and no nation should risk their economic well being because of environmental extremism that ignores the call for sound science.”); *id.* at 15,784 (Sen. Hagel: “[T]he scientific community has not even come close to definitively concluding that we have a problem.”); *id.* at 10,783 (Sen. Abraham: “Scientists are sharply divided as to whether the Earth is warming because of human activity.”).

⁵⁴ *Id.* at 17,308 (ellipsis in original).

mental Protection Agency (EPA) from implementing the Protocol administratively during each of the three remaining years of the Clinton Administration.⁵⁵ When President Bush announced U.S. withdrawal from Kyoto negotiations, the congressional preoccupation with the Protocol ceased. But since then, the climate change debate in Congress appears to have shifted, producing a series of votes that reveal no clear policy. In recent years, the notion of a unilateral, domestic cap and trade system for GHG emissions has become politically viable. In 2003, Senators McCain and Lieberman proposed such a system.⁵⁶ The McCain-Lieberman bill was defeated 55–43 in 2003⁵⁷ and 60–38 as a proposed amendment to the energy bill in 2005.⁵⁸ However, shortly after rejecting McCain-Lieberman in 2005, the Senate passed, 53–44,⁵⁹ a “sense of the Senate” resolution introduced by Senator Bingaman that affirmed the validity of climate change science and urged the Congress to enact a

national program of mandatory, market-based limits and incentives on emissions of greenhouse gases that slow, stop, and reverse the growth of such emissions at a rate and in a manner that —

(1) will not significantly harm the United States economy; and (2) will encourage comparable action by other nations that are major trading partners and key contributors to global emissions.⁶⁰

To read the Bingaman Resolution with the goal of discerning a clear and realistic Senate policy on climate change is to invite frustration. The Resolution proposed a domestic, unilateral program of mandatory emissions reductions — a bold statement that flatly contravened the concern expressed in the Byrd-Hagel Resolution over free-riding by developing nations. At the same time, the Resolution contained two conditions — that the program not “significantly harm” the U.S. economy and that it “encourage comparable action by other nations” — both so hopeful and so opaque that it is difficult to know whether to take the Resolution seriously as a statement of policy. One must conclude that the Senate wanted to play both sides of climate change politics.⁶¹ To the extent that preempting democratically enacted state laws

⁵⁵ Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998).

⁵⁶ Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003).

⁵⁷ 149 CONG. REC. S13,598 (daily ed. Oct. 30, 2003).

⁵⁸ 151 CONG. REC. S7029 (daily ed. June 22, 2005).

⁵⁹ The 53–44 vote defeated a motion to table the amendment. *Id.* at S7037.

⁶⁰ *Id.* at S7033.

⁶¹ *See id.* at S7034–35 (Sen. Inhofe: “Everybody here knows if you establish a position on a bill that is very meaningful, such as the bill that was defeated — the McCain-Lieberman bill — you can turn around and vote for a sense of the Senate and play both sides. Essentially, I think that is what happened here.”).

requires a clear policy from a politically accountable Congress, that standard has not been met.

2. *Major Executive Actions Relating to Climate Change.* — In 2001, President George W. Bush announced the U.S. withdrawal from Kyoto Protocol negotiations. President Bush offered three reasons for the decision. First, he stressed the limits of scientific knowledge about climate change, concluding with a proposal to increase funding for climate science.⁶² Second, he repeated the complaint raised in the Byrd-Hagel Resolution about the nonparticipation of developing nations such as China and India.⁶³ Third, the President touched on the economic cost of the Protocol, warning of “layoffs of workers and price increases for consumers.”⁶⁴

Since the Administration withdrew from Kyoto, its climate change policy has focused almost entirely on encouraging voluntary reductions by industry. For example, in 2002 the EPA created the Climate Leaders program and now claims that its partnerships with seventy-eight major companies will lead to voluntary reductions of eight million metric tons of carbon equivalents per year.⁶⁵ In 2003, the Department of Energy created Climate VISION (Voluntary Innovative Sector Initiatives: Opportunities Now), a program that forms partnerships with energy-intensive industries, seeking voluntary emissions reductions and the development of cleaner technologies.⁶⁶ Similarly, in 2004 the Administration created the SmartWay Transport Partnership, a voluntary partnership with the freight industry that aims to reduce between thirty-three and sixty-six million metric tons of carbon dioxide by 2012.⁶⁷

At the same time, the Administration has rejected calls for mandatory emissions limits, whether imposed domestically or internationally. On the domestic front, in 2003 the EPA denied a petition asking it to regulate GHG emissions from vehicles on the grounds that it lacked statutory authority to do so and that it was undesirable as a matter of policy.⁶⁸ The EPA’s policy justification placed its greatest emphasis on

⁶² Press Release, President George W. Bush, President Bush Discusses Global Climate Change (June 11, 2001), <http://www.whitehouse.gov/news/releases/2001/06/print/20010611-2.html>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See U.S. ENVTL. PROT. AGENCY, CLIMATE LEADERS PARTNERSHIP FACT SHEET, available at http://www.epa.gov/climateleaders/docs/partnership_fact_sheet.pdf (last visited Mar. 12, 2006).

⁶⁶ See Climate VISION, Program Mission, <http://www.climatevision.gov/mission.html> (last visited Mar. 12, 2006).

⁶⁷ See U.S. Env’tl. Prot. Agency, SmartWay Transport Program: Basic Information, <http://www.epa.gov/otaq/smartway/swplan.htm> (last visited Mar. 12, 2006).

⁶⁸ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929–31 (Sept. 8, 2003).

scientific uncertainty,⁶⁹ although it also mentioned the possibility that developing nations might free-ride on U.S. emissions reductions.⁷⁰ The statement concluded by linking the Administration's preference for voluntary programs to scientific uncertainty, describing such programs as an "effective and appropriate means of addressing global climate change while scientific uncertainties are addressed."⁷¹

The Administration has expressed its preference against mandatory emissions cuts in the international realm as well. In July 2005, the United States joined a statement at the G8 Summit in Gleneagles, Scotland, in which the major developed nations expressed their intention to take voluntary measures to reduce GHG emissions by employing superior technology in electricity generation and end-use applications.⁷² According to press reports, the United States pushed to remove language proposing binding commitments and to soften language about the certainty of climate science and the severity of predicted changes in climate.⁷³ Later that month, the United States joined the Vision Statement for the Asia-Pacific Partnership on Clean Development and Climate. Like the G8 statement, the Asia-Pacific agreement did not include mandatory limits but urged voluntary reductions and the development of more efficient technologies.⁷⁴ In December 2005, the Administration participated in the COP meeting in Montreal. Despite pressure from other Western nations, the Administration again refused to discuss mandatory emissions limits and instead advocated voluntary reductions by the member countries.⁷⁵

C. Is the United States Committed to Pursuing a Binding Multilateral Agreement?

The 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. That both Congress and the Executive have renounced just such an agreement presents

⁶⁹ *Id.* at 52,930–31 (“Until more is understood about the causes, extent and significance of climate change and the potential options for addressing it, EPA believes it is inappropriate to regulate GHG emissions from motor vehicles.”).

⁷⁰ *Id.* at 52,931.

⁷¹ *Id.*

⁷² See Gleneagles Plan of Action, The Gleneagles Communiqué, *supra* note 33.

⁷³ See Juliet Eilperin, *U.S. Pressure Weakens G-8 Climate Plan*, WASH. POST, June 17, 2005, at A1.

⁷⁴ See Vision Statement of Australia, China, India, Japan, the Republic of Korea, and the U.S. for a New Asia-Pacific Partnership on Clean Development and Climate (July 28, 2005), <http://www.state.gov/g/oes/rls/fs/50335.htm> (proposing a “non-binding compact”); see also Charter for the Asia-Pacific Partnership on Clean Development and Climate, Jan. 11, 2006, available at <http://www.state.gov/g/oes/rls/or/2006/59162.htm> (describing itself as “non-legally binding”).

⁷⁵ See Juliet Eilperin, *U.S. Won't Join in Binding Climate Talks*, WASH. POST, Dec. 11, 2005, at A1.

strong evidence for this claim. Even so, proponents of the bargaining chip theory may rebut this evidence by showing that the federal government nonetheless intends to enter such a deal, only not one that exempts developing nations. The proponents of this theory may satisfy their burden by reference to traditionally preemptive congressional materials such as treaties and statutes, or, under *Garamendi*, by reference to executive conduct. But regardless of whether one examines congressional or executive action, the results prompt three reasons to doubt that either branch has clearly shown an intention to enter a binding multilateral agreement.

First, an important theme running through the major policy statements has been scientific uncertainty. In Congress, this concern permeated the 1987 GCPA and the 1997 Byrd-Hagel Resolution debates. The 2005 Bingaman Amendment suggested that a majority of Senators now believe the basic theory of anthropogenic climate change. But in the Administration, concern over scientific uncertainty persists to the present, as shown by President Bush's explanation for withdrawing from the Kyoto Protocol, the EPA's decision not to regulate vehicle GHG emissions, and U.S. efforts to soften the characterizations of climate science in the 2005 G8 statement. In the EPA's case, the concern over scientific uncertainty appeared to be decisive.

Second, the record shows persistent concern over cost. Of course, a balancing of costs and benefits may inhere in any type of regulatory decisionmaking. But the repeated warnings about cost, phrased in open-ended language, raise doubts about whether the United States intends to assent to mandatory emissions limits at all. In the Byrd-Hagel Resolution, Congress forbade the administration from entering any deal that would "result in serious harm to" the U.S. economy.⁷⁶ Similarly, the Bingaman Amendment, although crediting the science of climate change, declined to advocate any system of emissions reductions that would "significantly harm" the U.S. economy.⁷⁷ The concern over costs also runs through numerous statements by the Administration and, arguably, underlies its preference for voluntary programs.

A third strand of evidence to cast doubt on the commitment of the United States to a binding multilateral agreement is the passage of time. It has been thirteen years since the signing of the UNFCCC and five since the U.S. withdrawal from Kyoto. Over the last five years, the Administration has not taken active steps to pursue a multilateral deal, nor has Congress demanded it. If the holdup truly derives from the unwillingness of developing nations to participate, then one would expect the Administration to actively engage in diplomacy with them.

⁷⁶ S. Res. 98, 105th Cong. § (1)(B) (1997).

⁷⁷ 151 CONG. REC. S7033 (daily ed. June 22, 2005).

No such efforts have occurred. The recent negotiations for the Asia-Pacific Partnership on Clean Development and Climate included the two most important developing nations, China and India, and there is no evidence to suggest that the United States exerted any diplomatic influence to persuade them to adopt binding cuts. At some point, the absence of action must stand for the absence of intention.

D. Can Courts Predict the International Effects of State GHG Regulations?

To establish a clear conflict between state and federal policy, courts must be able not only to discern the federal policy, but also to foresee that the state policy stands in its way. Thus, even were a court to disbelieve the conclusion of the previous section — that the federal government has not clearly demonstrated a policy of pursuing a binding multilateral agreement on climate change — it should nonetheless deny conflict preemption if it cannot determine that the state GHG regulation would obstruct federal goals.

Determining the likely effects of state GHG regulations on the international stage is not an inquiry susceptible to logic alone. Rather, it also requires empirical data about the preferences of developing nations and predictions about the likely economic and technological effects of the state regulations. Under one theory, state GHG regulations will make developing nations less willing to agree to emissions cuts. Developing nations will view U.S. reductions as an opportunity to free-ride: U.S. reductions mitigate future climate change, thereby reducing the need for developing nations to take matters into their own hands. Moreover, as GHG-intensive industries flee the United States for unregulated developing nations, opposition to regulation in developing nations will become entrenched. More jobs will hang in the balance, making emissions cuts that much less politically feasible.

Under other theories, state GHG reductions may make developing nations more willing to agree to emissions cuts. First, it may be that what is holding up developing nations is in part a perception that the United States is not serious about addressing climate change. After all, the lion's share of anthropogenic GHGs in the atmosphere has been produced by developed nations like the United States. Developing nations may think that as long as the United States does nothing, they can avoid cuts without sacrificing the moral high ground. But large-scale subnational regulation of GHG emissions in the United States may signal to these countries that the tide is shifting and that they must plan for escalating world pressure to make cuts. Second, state GHG regulations may spark the development of more GHG-efficient technologies, which will make it cheaper for developing na-

tions to reduce emissions. This notion is especially plausible in the context of automobile emissions. The CARB regulations will affect such a large number of automobiles⁷⁸ that they could speed the development of new, more efficient technologies and thus lower the marginal cost of reducing emissions for developing nations. Third, some state programs, including the CARB rules and RGGI, are likely to reveal price information about GHG emissions reductions. To the extent that developing nations perceive political and economic risk from the unknown costs of limiting emissions, revealing information of this kind may ease their reluctance to agree to emissions cuts.⁷⁹

The relative accuracy of these predictions depends on the answers to a set of empirical questions relating to the preferences of developing nations, the role of reputation in international affairs, and the likely economic, technological, and symbolic impacts of state GHG regulations. Answering these sorts of questions is an exercise that falls well outside the institutional competence of the courts.⁸⁰ Of course, courts would not have to make such difficult predictions if the federal government had ever made a clear statement of its own about the likely international effects of state GHG regulations, as the State Department officials did in *Garamendi*.⁸¹ But no such clear statement on the effects of state GHG regulation can be found. In Congress, the Byrd-Hagel Resolution showed the Senate's unwillingness to make emissions cuts without at least some cuts by developing nations. The Resolution said nothing, however, about the affirmative goals of U.S. climate change policy or how state actions would affect them. Further, even if the Byrd-Hagel Resolution stood for unequivocal opposition to unilateral cuts in 1997, that opposition would now be called into doubt by the Bingaman Amendment, which both recommended unilateral cuts and contemplated a scenario in which making unilateral cuts would encourage other countries to do likewise.

The executive branch also has not made a clear statement on the relationship between state GHG regulations and the willingness of developing nations to reduce their own emissions. The closest it has come is in the EPA's denial of the petition to regulate vehicle GHG emissions, which, after describing the scientific uncertainty surround-

⁷⁸ Ten states now plan to follow the CARB rules. Danny Hakim, *Battle Lines Set as New York Acts To Cut Emissions*, N.Y. TIMES, Nov. 26, 2005, at A1.

⁷⁹ For example, the auto industry forecasts that the CARB rules will increase costs by \$3000 per vehicle, three times higher than CARB estimates. See Danny Hakim, *Steering California's Fight on Emissions*, N.Y. TIMES, Dec. 9, 2004, at C1. Implementing the rules offers the chance to falsify or confirm that prediction. Either result will reduce political and economic risk for developing countries implementing similar reductions.

⁸⁰ See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1414-18 (1999).

⁸¹ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 411, 422 (2003).

ing climate change, contained a few sentences on the subject: “Unilateral EPA regulation of motor vehicle GHG emissions could also weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies.”⁸² The brief, speculative character of this statement and the fact that it came from the EPA and not an agency responsible for foreign policy makes it a less-than-authoritative statement of the executive branch’s understanding.

Moreover, the EPA’s speculation that unilateral GHG reductions could weaken efforts to persuade developing countries to cut emissions is hard to square with its own strategy of voluntary emissions reductions. The Administration claims that its voluntary initiatives will generate large reductions. But if the bargaining chip theory is correct, unilateral emissions reductions will compromise the U.S. bargaining position regardless of whether they are mandatory or voluntary. From the free-rider’s perspective, it should not matter whether U.S. power plants reduce their emissions to comply with state law, to win points with the EPA, or out of the goodness of their hearts. Unilateral reductions are unilateral reductions. If the political branches of the federal government are unconcerned about the foreign effects of voluntary emissions reductions, then why should the courts worry about the foreign effects of state-imposed reductions?

E. How Strong Is the State Interest in Regulating GHG Emissions?

In *Garamendi*, Justice Souter explained 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 state law preempted.”⁸³ On a simple level, the state interest in regulating emissions is strong. If states believe that the accumulation of GHGs in the atmosphere creates a risk of harmful consequences — which is not a completely unreasonable belief — then they certainly have an interest in regulating GHGs. Regulated industries then have two counterarguments at their disposal. First, they may argue that states have only a weak or symbolic interest because the global scale of the problem dictates that individual state regulations have negligible effects on atmospheric GHG concentrations. States may respond to this argument first by appealing to the surprisingly large scale of their projected regulatory impact. For example, the CARB regulations and the RGGI program involve the participation of ten and seven states respectively and thus may have nontrivial global impacts. But even if state regulations have only small impacts in

⁸² Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003).

⁸³ *Garamendi*, 539 U.S. at 420.

terms of global emissions, states may claim an interest in demonstrating the economic or technological feasibility of the regulatory approaches they have chosen. If, for example, the RGGI program succeeds, it could serve as a model for a national cap and trade program. Or, the CARB regulations may reveal lower compliance costs than are currently projected by industry, creating a political opportunity for national regulations. In sum, if constitutional law recognizes an interest in preserving states as laboratories of experimentation,⁸⁴ then surely the states themselves have an interest in fulfilling that experimental function when doing so may further the cause of favorable national policy.

Second, regulated industries may argue that the state interest in regulating GHGs is undifferentiated from the national interest and thus is weak as a state interest per se. The *Garamendi* Court made this point, observing that the national government had the “very same objective” in vindicating the claims of Holocaust survivors as the state government and noting that “only a small fraction” of U.S. Holocaust survivors live in California.⁸⁵ States may respond first by arguing that, under plausible scientific models, climate change will cause certain regions of the country to suffer disproportionately. For example, rising sea levels may harm coastal states, while rising concentrations of carbon dioxide may help agricultural states. In addition to geographic differentiation, people in different states may possess different preferences relating to the tradeoff between regulatory costs and environmental risks. A state’s interest may differ from the federal interest insofar as it reflects a substantially higher willingness to pay for mitigating the risk of climate change.

III. DORMANT PREEMPTION: TRADITIONAL STATE RESPONSIBILITIES AND THE MEANING OF FOREIGN POLICY

A. *Is GHG Regulation a Traditional State Responsibility?*

If a reviewing court finds insufficient conflict between federal policy and state law to warrant conflict preemption, regulated industries nonetheless may argue that state GHG regulations are preempted on a theory of dormant preemption. In *Garamendi*, Justice Souter explained that state law may be preempted even in the absence of federal government action:

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 Gov-

⁸⁴ See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸⁵ *Garamendi*, 539 U.S. at 426.

ernment 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.⁸⁶

The task of building a stable federalism doctrine around “traditional” state functions is likely to prove as difficult in the foreign affairs preemption context as it has in the domestic preemption context.⁸⁷ And admittedly, the ambiguities of the doctrine make firm predictions about the outcome of a dormant preemption challenge to state GHG regulations impossible. Ambiguity arises because state policies that affect foreign relations frequently may also be framed in terms of traditional state responsibilities.⁸⁸ The California statute in *Garamendi* involved insurance regulation, a traditional state responsibility; the Massachusetts law in *Crosby* involved state procurement; and so on. Adding to the confusion is the Court’s failure to state how *Zschernig* would fit in this scheme. That case involved a classic example of a traditional state responsibility — rules of inheritance — and presented no conflict between state and federal law, yet the Court nonetheless struck down the state statute. The *Garamendi* Court did not say, however, that *Zschernig* ought to be overruled;⁸⁹ to the contrary, it relied heavily on the case.⁹⁰ It is not clear whether the *Garamendi* Court believed rules of inheritance were not a traditional state responsibility or whether it just did not consider how *Zschernig* would be resolved today. The former suggests the Court has disavowed any shred of formalist reasoning in its test for traditional state responsibilities; the latter leaves the lower courts on their own to define traditional state responsibilities.

Unsurprisingly, state GHG regulations may also be framed in ways that make them seem either traditional or nontraditional, depending on how one views their purposes and at what level of abstraction one characterizes them. States have regulated air pollution since before the Clean Air Act (CAA), and now, under the cooperative federalist structure of the CAA, they enjoy substantial latitude to devise their own policies and to exceed minimum federal standards.⁹¹ California’s practice of regulating vehicle emissions predates the CAA⁹² and has been

⁸⁶ *Id.* at 419 n.11.

⁸⁷ See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 146–50 (2001) (describing problems the Court encountered in its era of “dual federalism”).

⁸⁸ See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 195–201; Young, *supra* note 87, at 178.

⁸⁹ See Denning & Ramsey, *supra* note 16, at 928–30.

⁹⁰ See *Garamendi*, 539 U.S. at 417–20.

⁹¹ 42 U.S.C. § 7416 (2000).

⁹² For a timeline, see Cal. Air Res. Bd., Background Material: California’s Air Quality History Key Events, <http://www.arb.ca.gov/html/brochure/history.htm> (last visited Mar. 12, 2006).

grandfathered into it.⁹³ Similarly, states have historically exercised significant, though not exclusive, regulatory authority over electricity generation.⁹⁴ So, when characterized as a species of air pollution or electric power regulation, state GHG regulations fall within traditional state responsibilities. In response, industry may argue that these cooperative federalism relationships reflect a tradition in which states may address unique local problems, not one in which states address problems that are unavoidably global in scope. Both sets of arguments are viable. Sadly, it is hard to imagine judges deciding whether state GHG regulation falls within a traditional area of state responsibility without reference to their own views on climate change policy and their level of sympathy with the state's approach. This problem recalls the Court's conclusion after years of wrestling with the state immunity doctrine that "[a]ny rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."⁹⁵

B. *Is GHG Regulation a "Matter of Foreign Policy"?*

If a reviewing court were to find that, in implementing GHG regulations, a state had acted outside its traditional area of responsibility, the state would still have a defense: to claim that state GHG regulations are not foreign policy at all, absent a controlling enacted law or clear executive statement to the contrary. Dormant foreign affairs preemption must have some gatekeeping test, some way of sorting out which state policies relate to foreign affairs and which do not. Under *Zschernig*, dormant preemption requires a showing that the state law would have more than an "incidental or indirect effect" on foreign relations.⁹⁶ Justice Souter's description of dormant foreign affairs preemption in *Garamendi* made no reference to this requirement, leading some scholars to conclude that he intended to omit it.⁹⁷ Yet even if Justice Souter did intend to remove this test, he retained a gatekeeping

⁹³ See 42 U.S.C. § 7543(a)–(b).

⁹⁴ See Jeffery S. Dennis, *Federalism, Electric Industry Restructuring, and the Dormant Commerce Clause*, 43 NAT. RESOURCES J. 615, 624–30 (2003).

⁹⁵ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

⁹⁶ *Zschernig v. Miller*, 389 U.S. 429, 433 (1968) (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)). In *Clark*, the Court upheld a California escheat law against a similar foreign affairs preemption challenge because it had only "some incidental or indirect effect in foreign countries." 331 U.S. at 517. In *Zschernig*, the Court distinguished *Clark* on the basis that the Oregon law, as applied, had a "direct impact upon foreign relations." 389 U.S. at 433, 441.

⁹⁷ See Denning & Ramsey, *supra* note 16, at 929–30. Note that even if Justice Souter's omission of *Zschernig*'s "more than incidental effects" test was intentional, it was only dicta, and thus a future Court could plausibly reintroduce the *Zschernig* gatekeeping test.

test of sorts, by limiting dormant preemption to instances in which states “take a position on a matter of foreign policy.”⁹⁸

But what are the limits of “foreign policy”? Or, if the *Zschernig* test is revived, what does it mean for a state law to have a direct as opposed to indirect effect on foreign affairs? This boundary may be as hard to define as the one surrounding “traditional state responsibilities,” especially as international law seeps into the realm of what was formerly only domestic, and as connections between the local and the global deepen.⁹⁹ In light of these changes, the best method for deciding what should constitute “foreign policy” for the purposes of foreign affairs preemption is to return to the principal justification for federal supremacy in foreign relations. From the Founding through *Garamendi*, federal supremacy has been motivated by the desire to preserve uniformity in dealings with foreign nations, often described as the national interest in speaking with “one voice.”¹⁰⁰ Taking account of that interest, as well as the interests in federalism and in creating a workable, bright-line rule, courts should limit foreign affairs preemption to the extent that states interact with or speak directly to foreign governments, foreign nationals, or their business partners as such.¹⁰¹ If there is no such interaction, then the interest in uniformity in foreign dealings is no longer implicated. Or, at least, it is no more implicated than when a foreigner opens a newspaper and reads that there exists difference of opinion in the United States.

This principle does not appear in the case law explicitly. However, it runs through the cases by negative implication because the Court has never struck down a state law on foreign affairs preemption grounds absent some sort of interaction along these lines. State GHG

⁹⁸ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003).

⁹⁹ See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1670–80 (1997).

¹⁰⁰ See *Garamendi*, 539 U.S. at 413–14 (collecting authorities).

¹⁰¹ Professor Thomas Merrill made a similar point when he argued that earlier foreign affairs preemption cases could be distinguished from the multistate nuisance claim because the states did not intend to influence behavior outside the territorial sovereignty of the United States. See Merrill, *supra* note 32, at 327–28. But, as a limiting principle for foreign affairs preemption, the intent to exert extraterritorial influence is not ideal. First, such intent is not always required for preemption: states that impose unique restrictions on foreigners inside their borders may be subject to foreign affairs preemption even without the intent to exert extraterritorial influence. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 62–69 (1941). Second, as integration between local and global affairs deepens, it becomes harder to know whether a state intends to influence behavior outside U.S. borders. For example, when a state regulates multinational corporations within its jurisdiction, courts will have trouble determining how far the state intends to exert its influence. In *Garamendi*, for instance, California demanded disclosure and compensation from Holocaust-era insurers, but only from those that did business in California. 539 U.S. at 409–10. Of course, complying with the California disclosure requirement could well have had ramifications for the affected insurers outside the United States. Conclusively establishing the California legislature’s desire for extraterritorial influence may have been impossible.

regulations are a good illustration of the principle because they typically involve interaction only with in-state industries and make no distinction between foreign and domestic companies. While it is possible that these regulations will yield benefits that extend beyond U.S. borders, it is far from obvious, absent guidance from the political branches, that they will intrude on the foreign relations of the United States. Thus, without a controlling federal law or a clear conflict with executive foreign policy of the kind found in *Garamendi*, and in the absence of any direct interaction with foreign governments, foreign nationals, or their business partners, courts should presume that state GHG regulations are not a “matter of foreign policy.”

CONCLUSION

Garamendi is a remarkable opinion along two dimensions. First, it handed expansive power to the executive branch by enabling executive conduct to wield preemptive force. In this respect, *Garamendi* itself may have been an easy case in that there was no significant doubt that the State Department officials spoke for the President, or that they were articulating a foreign policy that was both sincere and truly a matter of *foreign* policy. A harder case would arise if such statements were made in a more obscure venue or if they touched on subject matter that was less obviously categorized as foreign affairs. Without limits, *Garamendi* could allow the Executive to trench on the legislative power.¹⁰² Second, *Garamendi* empowered the federal courts by preserving, albeit in dicta, the notion of an exclusive sphere of federal responsibility in foreign affairs. Whatever might be said for this architecture, the construction is frail. As the application to state GHG regulations demonstrates, courts that would use “traditional state responsibility” as the trigger for dormant foreign affairs preemption may have little to rely on aside from their own tastes in public policy. Facing these poorly constrained new powers, courts should consider a threshold test for foreign affairs preemption under which no state law would be preempted unless it involves state interaction with foreign governments, foreign nationals, or their trading partners as such. Such a test would have the virtues of a bright-line rule, would preserve the interest in uniform dealings with foreign nations, and would protect state experimentation at a time when the boundaries of foreign affairs are expanding unpredictably.

¹⁰² See Denning & Ramsey, *supra* note 16, at 829–30.