Movsesian v. Victoria Versicherung and the Scope of the President's Foreign Affairs Power to Preempt Words

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I. Introduction

The federal government’s power to preempt state law in the area of foreign affairs is virtually unparalleled. However, the U.S. Supreme Court has appeared reluctant to declare that states have no room to act in ways that affect foreign affairs. What room is left for states to act is therefore unclear. The Ninth Circuit’s recent decisions in Movsesian v. Victoria Versicherung reflect this uncertainty. In Movsesian I, a three-judge panel of the Ninth Circuit issued a decision that would have expanded the federal government’s power to preempt state law in unprecedented and potentially dangerous ways. The same three-judge panel then reconsidered that decision in 2010 and reversed itself by one vote. This article uses the Movsesian decisions to illustrate the confusion in this area of the law and calls on the Supreme Court to provide greater clarity.

In Movsesian I, the Ninth Circuit declared that a few informal nonbinding statements of executive policy made to Congress regarding the executive’s objection to the use of certain words could have preemptive effect on any state law which incorporated the proscribed words. More specifically, these executive statements discouraged the use of the word “genocide” in connection with the Armenian mass killings of 1915. Based on this supposed executive policy, a 2-1 majority of the court declared that a California statute that extended the statute of limitations for

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2 578 F.3d 1052 (9th Cir. 2009), withdrawn, Movsesian v. Victoria Versicherung AG, 629 F.3d 901 (9th Cir. 2010).

3 Movsesian, 578 F.3d at 1059, 1063.

4 Id.
certain insurance claims by victims of the “Armenian Genocide” was preempted because it used
the phrase “Armenian Genocide.” The effect of this ruling would have created a precedent
pursuant to which any law using a proscribed word could be voided based solely on informal
statements of executive policy.

Perhaps recognizing in hindsight the potential implications of this new precedent, the
Ninth Circuit granted a petition for rehearing. On rehearing, one judge switched his vote, now
convinced that there was no clear federal policy that preempted the California statute. In neither
decision, however, did the three-judge panel extensively consider the implications of preempts
states from using certain words when legislating.

Prior to Movsesian I, informal executive policy alone had never been found sufficient to
preempt state law. Instead, the federal government is usually found to have preempted state law
through its power over foreign affairs when the federal government exercises its formal
law-making power through the enactment of a statute, the signing of an executive order, the
making of a treaty, or a combination of such actions. These formal legislative acts are important
because they provide the court with specific language to interpret and apply to the facts of a case
before the court, in determining whether state action is preempted.

5Id. at 1063.

6Id. at 1059.

7Id. See also e.g., Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000) (federal
statute authorizing sanctions on Burma coupled with executive order); Missouri v. Holland, 252
U.S. 416 (1920) (treaty on migratory birds).

The Ninth Circuit’s ruling in Movsesian I, however, took the law one step further. In that decision, the court held that a formal legislative act was not necessary to preempt state laws.\textsuperscript{9} Instead, the court determined that the president’s powers over foreign affairs are so extensive that letters from the President to Congress alone, expressing his objection to the use of the word “Armenian Genocide,” were enough to create an executive policy that preempts state law.\textsuperscript{10}

The Ninth Circuit’s decision in Movsesian I went too far. It expanded the executive branch’s power beyond any previous decision and would have created a precedent that is unworkable. In the absence of a formal legislative act to provide guidance, the court’s holding effectively requires the judiciary to decide for the executive branch when a foreign policy exists and the substance and scope of that policy. While the Ninth Circuit corrected this problem upon rehearing, there still exists much uncertainty as to what actions by the federal government are sufficient to preempt state law and what room, if any, is left for states to act, and especially to express opinions on U.S. foreign policy issues.

Section II of this article discusses the historical background of the federal government’s power to preempt state action in the area of foreign affairs, including an analysis of the specific actions taken by the political branches of the federal government to exercise this power. Section III describes Movsesian by summarizing the facts, procedural history, and explaining how the Ninth Circuit reached each of its decisions. Section IV analyzes the implications of Movsesian. First, it examines whether it is possible to preempt state law through executive policy statements alone. Second, it analyzes the extent of the president’s power to recognize or proscribe words.

\textsuperscript{9} Movsesian I. 578 F.3d at 1060.

\textsuperscript{10} Id.
Third, it considers whether the executive branch has a firm policy with respect to the use of the words “Armenian Genocide.” Fourth and finally, it discusses the potential consequences of a decision giving the federal government power to preempt words. The article ultimately concludes that word preemption should not exist.

II. The Preemption and Foreign Affairs Doctrines

The federal government’s preemptive power over foreign affairs has several different aspects. Subsection A below begins by setting forth the general parameters of the preemption doctrine. Subsection B summarizes the express and implied constitutional powers of the federal government over foreign affairs. Subsection C highlights the traditional deference the judiciary gives to the executive branch in the area of foreign affairs. Subsection D examines the power of international executive agreements to preempt state law. Finally, Subsection E reviews the preemptive power of executive policy, as opposed to formal legislative actions.

A. Preemption Doctrine

“A fundamental principle of the Constitution is that Congress has the power to preempt state law.” Preemption may be express or implied. Express preemption occurs when Congress’ command is explicitly stated in the statute’s language or is implicit in the statute’s structure and purpose. Implied preemption takes two forms - field preemption and conflict preemption. Courts will find field preemption to exist when the federal government has so

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11 Crosby, 530 U.S. at 372.


13 Id.

14 See id.
thoroughly regulated the entire field that there is no room left for states to act.\(^{15}\) Courts will find conflict preemption to exist when both the federal and state governments have regulated in a particular area and it is impossible for a private party to comply with both federal and state law.\(^{16}\) But even in the absence of a direct conflict, implied conflict preemption exists where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”\(^{17}\)

Field preemption was found to exist in *Hines v. Davidowitz*, where the federal government exercised its power to preempt state law by way of its formal law-making powers.\(^{18}\) In that case, the state of Pennsylvania created a law regulating the registration of aliens.\(^{19}\) The federal government already had in place a comprehensive integrated scheme for the registration of aliens.\(^{20}\) The Supreme Court held that when the federal government exercises its power over foreign affairs, including the making of rules relating to immigration and naturalization, its legislative acts are supreme over state laws pursuant to the Supremacy Clause in Article VI of the Constitution.\(^{21}\) Thus, the state no longer had any right to legislate in this field of law, even if its

\(^{15}\)See *id.*; see also *Crosby*, 530 U.S. at 372.

\(^{16}\)See *Gade*, 505 U.S. at 98; *Crosby*, 530 U.S. at 372.

\(^{17}\)Crosby*, 530 U.S. at 373.

\(^{18}\)Hines v. Davidowitz, 312 U.S. 52, 68 (1941).

\(^{19}\)Id. at 56.

\(^{20}\)Id. at 70.

\(^{21}\)See *id.* at 62-63.
legislation could be interpreted to act in harmony with the federal government’s. The Court suggested that great international harm “may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.” Therefore, the whole nation stands to suffer from missteps by the state and even harmonious legislation should be preempted if the federal government has comprehensively legislated in the area. Accordingly, the Supreme Court held that the Pennsylvania Alien Registration Act was preempted by the federal Alien Registration Act of 1940.

The U.S. Supreme Court found conflict preemption to exist in *Crosby v. National Foreign Trade Council*, where the state of Massachusetts enacted a law restricting the authority of its agencies to purchase goods or services from companies doing business with Burma. Three months after enactment of the Massachusetts law, Congress passed legislation imposing sanctions against Burma and restricting business dealings with Burma. The federal statute also gave the President discretion with respect to the continuation or lifting of sanctions against Burma. Although the federal statute did not contain an express provision for preemption, the Court determined that Congress wanted the President to have “flexible and effective” power in this

22 *Id.*

23 *Id.* at 64.

24 *Id.* at 64-65.

25 More recently, the U.S. Federal District Court for the District of Arizona held that much of Arizona’s controversial immigration law, S.B. 1070, is preempted by the federal Immigration and Nationality Act. *See United States v. Arizona*, CV 10-1413-PHX-SRB (July 28, 2010).

26 *Crosby*, 530 U.S. at 367. Burma is also known as Myanmar.

27 *Id.* at 369.
area.\textsuperscript{28} The state law undermined this purpose through its regulation.\textsuperscript{29} Specifically, Massachusetts’ Burma law stood as an obstacle to the achievement of Congress’ objectives because: (1) Congress intended for the President to have discretion and flexibility to respond to changing international events and the state law gave the President less bargaining room; (2) the Massachusetts law was broader than the federal statute and conflicted with Congress’ policy decision to take a middle road; and (3) the Massachusetts’ law prevented the President from speaking with one voice on behalf of the United States in foreign affairs.\textsuperscript{30} Accordingly, the Court held that Congress had occupied the entire field of sanctioning Burma, and any regulation by the state was preempted.\textsuperscript{31}

\textbf{B. Federal Foreign Affairs Power}

The preemption doctrine is often at issue in foreign affairs cases. Yet nowhere in the U.S. Constitution is the federal government given express or exclusive power over foreign affairs. Instead, the U.S. Supreme Court has implied such power by accumulating other express powers such as the foreign commerce power, the power to declare war and to raise armed forces, the President’s power as Commander in Chief of the armed forces, the power to appoint ambassadors, and the President’s power to make treaties, coupled with the Senate’s power to give its advice and

\begin{footnotes}
\item[28] \textit{Id.} at 375.
\item[29] \textit{Id.} at 377.
\item[30] \textit{Id.} at 378, 381-382.
\item[31] \textit{Id.} at 372.
\end{footnotes}
consent. The Supreme Court has also found the power over foreign affairs may be implied as an incident of sovereignty.

The founding fathers decided to place the power over foreign affairs in the federal government because of difficulties creating and enforcing uniform national policies over foreign affairs under the Articles of Confederation. Problems arising from competition among states with respect to foreign trade, disagreements over boundaries and navigation rights, and states’ refusal to abide by international agreements such as the Jay Treaty provided the impetus for giving greater power over foreign affairs to the federal government under the new U.S. Constitution.

And pursuant to the Supremacy Clause, when the federal government exercises its power over foreign affairs, its actions may preempt inconsistent state law.

C. General Executive Power over Foreign Affairs

Sometimes, the federal government exercises its foreign affairs power by having the legislative and executive branches act in concerts, as when the Senate gives its advice and consent to a treaty. However, other times, the President acts alone. In Youngstown Sheet & Tube Co. v. Sawyer, Justice Jackson wrote a concurring opinion in which he developed an oft-quoted test to


34 Trimble, supra note 32 at 22-24.

35 See id.

36 U.S. Const. art. VI, cl. 2; see also Crosby, 530 U.S. at 372.
decide how much deference courts should give an exercise of presidential power.37 In that case, President Truman sought the power to take control of steel mills to prevent their closure due to labor strikes in order to protect the Korean War effort.38 Justice Jackson’s concurrence determined that there were three levels of presidential power, and the Supreme Court’s deference depends on the source of presidential power.39 First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”40 Second, “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”41 Third, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”42 In Youngstown, Justice Jackson classified the president’s power under the third category, because there was evidence congress had considered and decided not to

37 Youngstown, 343 U.S. 579, 635-38 (1952). Multiple judges wrote opinions in Youngstown; Justice Jackson’s concurring opinion is the one most frequently cited.

38 Id. at 590-91.

39 Id. at 635-38.

40 Id. at 635-37.

41 Id. at 637.

42 Id.
give the president the power to seize property in the past.\textsuperscript{43} The lesson of \textit{Youngstown} is that the president may act alone in the area of foreign affairs, and his actions may be upheld even in the face of objections by states or private parties, but his power to take action is much stronger if he has the consent of Congress.

\textbf{D. The Preemptive Power of Executive Agreements}

In some cases, the president has exercised his power over foreign affairs by the making of an international executive agreement with a foreign country. Executive agreements are a constitutional exercise of federal power and may preempt state law akin to a duly ratified treaty.\textsuperscript{44} For example, in \textit{United States v. Belmont}, the United States had formally established diplomatic relations with the Soviet Union.\textsuperscript{45} As part of the United States’ agreement to recognize the new Soviet government, the president also had negotiated an agreement between the U.S. and the Soviet government to settle their respective property claims.\textsuperscript{46} At the time it was unclear whether executive agreements could compel a state to release assets, because executive agreements are not approved by Congress and were not a stated power in the constitution.\textsuperscript{47} The State of New York objected to the federal government’s directive to release funds held in New York banks to the Soviet government because nationalization of private property without appropriate compensation was contrary to New York State policy. The Supreme Court stated that “complete power over

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\begin{itemize}
\item \textsuperscript{43} \textit{Youngstown}, 343 U.S. at 630, 640.
\item \textsuperscript{44} \textit{United States v. Belmont}, 301 U.S. 324, 331 (1937).
\item \textsuperscript{45} \textit{Id.} at 330.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 327.
\end{itemize}
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international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.\footnote{48} State laws cannot act as an obstacle to federal foreign affairs powers.\footnote{49} The Court concluded the President does not always require the advice and consent of the Senate when he negotiates with foreign countries.\footnote{50} Unilateral executive agreements with foreign countries have the same preemptive force as treaties.\footnote{51} The President’s actions constituted an exercise of federal power over foreign relations and “state lines disappear” when a federal branch correctly exercises its power over this area.\footnote{52} Therefore, the executive agreement did have the power to preempt New York policy and require the release of assets to the Soviet government.\footnote{53}

The U.S. Supreme Court reaffirmed the preemptive power and constitutionality of the international executive agreement in the case \textit{U.S. v. Pink}.\footnote{54} Similar to \textit{Belmont}, here the state did not want to give Russian property to the federal government for distribution to the Soviet government, which had nationalized all of its insurance companies.\footnote{55} Just as in \textit{Belmont}, the President, through executive agreements, had formally recognized Soviet Russia and had made

\begin{footnotesize}
\begin{enumerate}
\item Id. at 331.
\item Id. at 332.
\item Id. at 330.
\item Id. at 331.
\item Id.
\item Id. at 332.
\item \textit{United States v. Pink}, 315 U.S. 203 (1942).
\item Id. at 211, 218-19.
\end{enumerate}
\end{footnotesize}
agreements to redistribute Russian property to the Soviet government.\textsuperscript{56} New York gave its own creditors a right of priority to the property in defiance of the executive agreement.\textsuperscript{57} The Court decided this action “amounted to official disapproval or non-recognition of the nationalization program of the Soviet government.”\textsuperscript{58} New York’s action was not allowed because the president had power over foreign affairs and exclusive power to recognize other governments.\textsuperscript{59} “Power over external affairs is not shared by the States; it is vested in the national government exclusively.”\textsuperscript{60} New York’s actions and policy were irrelevant and preempted, because the president had created constitutionally condoned executive agreements with Soviet Russia which conflicted with New York’s actions.\textsuperscript{61}

\textbf{E. Executive Policy Preemption}

This review of previous decisions demonstrates that the foreign affairs power of the federal government allows preemption of state law through congressional legislation, treaties, and international executive agreements where the President acts within his authority. However, recently the Executive branch has attempted to preempt state law with simple statements of policy not accompanied by any statutes or international agreements. Cases involving this issue have not

\textsuperscript{56} \textit{Id.} at 211.
\textsuperscript{57} \textit{Id.} at 228.
\textsuperscript{58} \textit{Id.} at 232.
\textsuperscript{59} \textit{Id.} at 229. The president’s exclusive power to recognize foreign governments is derived from his express power to appoint foreign ambassadors. U.S. Const. art. II, § 2, cl. 2.
\textsuperscript{60} \textit{Id} at 233.
\textsuperscript{61} \textit{Id.} at 233-34.
been clear and it is a topic of debate if and when such executive branch statements should have the power to preempt state law.

Based on the cases discussed above, one might have the impression that the power of the federal government to preempt state law in the area of foreign affairs is virtually unlimited. However, executive branch policies do not always preempt state law. In Barclays Bank PLC v. Franchise Tax Bd. of Cal, the California legislature created a law that allowed the state to tax global corporations within its boundaries. Under the law, the state would tax the percentage of the corporation’s business performed in California as compared to its business done worldwide. The defendant corporations challenged the law as preventing the U.S. government from speaking in “one voice” when dealing with foreign entities. The Court found the state statute was valid because Congress had not acted to preempt the law. The U.S. Constitution expressly gives Congress the power to regulate both interstate and international commerce. By contrast, the president has no express power over commerce. Thus, Congress has more power in the area of commerce and did not need to take overt steps to allow actions by the states. Congress had

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62 Barclays, 512 U.S. at 330.
63 Id. at 302
64 Id.
65 Id. at 302-03.
66 Id. at 330.
67 U.S. Const. art. I, § 8, cl 3.
68 Id.
plenty of opportunity to stop the state from taking actions like this and it had not acted.\textsuperscript{69} Therefore, the Supreme Court determined Congress had implicitly approved of the state’s actions.\textsuperscript{70} In addition, the Court found the Executive Branch’s actions through briefs, letters, and press releases discouraging this sort of tax were mere suggestions.\textsuperscript{71} They were “precatory,” expressing executive federal policy, but lacked the force of law and could not render unconstitutional California’s otherwise valid, congressionally condoned tax.\textsuperscript{72}

After Barclays it appeared evident that executive statements not expressed through binding legislative acts, such as executive orders or international agreements, lacked the force of law and could not preempt state law. However, American Insurance Associates v. Garamendi significantly expanded the scope of executive power to an unknown degree.\textsuperscript{73} In this case, the Supreme Court determined that executive statements of policy may be enough to preempt a state law when accompanied by international executive agreements.\textsuperscript{74} Here Congress created a law which forced insurance companies doing business in California to make public certain information on their activities between 1920 and 1945.\textsuperscript{75} Holocaust victims have had a great deal of trouble recovering

\textsuperscript{69}Id.

\textsuperscript{70}Id. at 327-28.

\textsuperscript{71}Id. at 330.

\textsuperscript{72}Id.

\textsuperscript{73}Garamendi, 539 U.S. at 396. See Brannon P. Denning and Michael D. Ramsey, American Insurance Ass’n v. Garamendi and Executive Preemption in Foreign Affairs, 46 William & Mary L. Rev. 825, 950 (Dec. 2004).

\textsuperscript{74}Id. at 429.

\textsuperscript{75}Id. at 397.
on claims from that period, partly because there is not enough information available and insurance companies refuse to release what information they have.\textsuperscript{76} Thus, the California law was created to help the victims find redress.\textsuperscript{77} However, the United States government had recently taken an interest in this matter. It negotiated an agreement between Germany and several other countries’ insurance companies to create a Holocaust victims fund.\textsuperscript{78} The United States determined this fund was the best way to give the victims reparation within their lifetimes.\textsuperscript{79} Pursuant to that agreement, the executive branch committed to submit letters to any court, which had a Holocaust insurance case in its docket, if Germany would create this fund.\textsuperscript{80} The letters would say the United States discourages any suits regarding Holocaust victims’ insurance claims.\textsuperscript{81} A group of insurance companies came together and sued the Insurance Commissioner of California to have the California statute declared invalid based on these federal actions and policies.\textsuperscript{82}

In a five-to-four decision, the Supreme Court found the state law was preempted.\textsuperscript{83} In this situation, there was no direct conflict between the state law and the previous executive agreements because the state law only required disclosure of information.\textsuperscript{84} However, the state law interfered

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.} at 426.

\textsuperscript{78} \textit{Id.} at 405.

\textsuperscript{79} \textit{Id.} at 423.

\textsuperscript{80} \textit{Id.} at 424-25.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 397

\textsuperscript{83} \textit{Id.} at 429-30.

\textsuperscript{84} \textit{Id.} at 417.
with the policy of the executive branch to have all related matters resolved through the fund created by the executive agreements.\textsuperscript{85} Thus, the Court found that executive policy, as expressed in international executive agreements, is sufficient to preempt state law.\textsuperscript{86}

Most recently, the Supreme Court upheld a state law despite a presidential memorandum expressing a contrary policy view regarding U.S. treaty obligations.\textsuperscript{87} In \textit{Medellin v. Texas}, the state sentenced a foreigner to the death penalty without providing the foreign defendant with access to his consulate as required by the Vienna Convention on Consular Relations.\textsuperscript{88} When the International Court of Justice (ICJ) issued a judgment recommending review and reconsideration of the defendant’s case,\textsuperscript{89} then U.S. President Bush issued a memorandum calling upon states to comply.\textsuperscript{90} Texas refused because the foreign defendant had failed to raise the issue of consular access in a timely manner under state law.\textsuperscript{91} Compliance with these recommendations would have forced the state to delay execution and allowed the condemned another opportunity in court.\textsuperscript{92}

\textsuperscript{85} \textit{Id.} at 425.

\textsuperscript{86} \textit{Id.} at 421, 427.


\textsuperscript{89} See \textit{Case Concerning Avena and Other Mexican Nationals} (Mex. v. U.S.), 2004 I.C.J. 12, 71 (Mar. 31).


\textsuperscript{91} \textit{Medellin}, 128 S.Ct. at 1356.

\textsuperscript{92} \textit{Id.} at 1355.
On appeal, the U.S. Supreme Court determined the ICJ judgment was not binding on the state and the President had no power to act unilaterally in this area. The Court rejected the president’s argument that his memorandum was a valid exercise of his foreign affairs authority to settle claims involving foreign nations. The Court distinguished previous “claims-settlement cases involv[ing] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals” on the grounds that those cases were supported by a particularly longstanding practice of congressional acquiescence. By contrast, the Medellin case involved an “unprecedented action” by the President in issuing a directive to state courts “that reaches deep into the heart of the State’s police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws.”

Although the president has a “gloss” on his powers over foreign affairs through Article II of the Constitution, the Supreme Court found that the president’s action in Medellin actually fell at the low end of the Youngstown spectrum because the president was attempting to unilaterally implement treaties that were not self-executing, contrary to the implicit understanding of the

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93 Id. at 1357, 1372.
94 Id. at 1371.
95 Id. at 1374.
96 Id. at 1372.
97 Id. at 1371-72.
ratifying Senate. Thus, the President did not have the authority to preempt state law by way of a Presidential Memorandum.

This survey of past case law demonstrates that the U.S. Supreme Court routinely finds that international executive agreements and federal statutes pertaining to foreign affairs preempt state law. It even has determined that executive policy, when combined with a related international executive agreement, will have preemptive power over state laws pertaining to foreign affairs. It has not, however, allowed the president to preempt state law by way of a memorandum coupled with an international judgment. Moreover, it has yet to determine if executive policy alone has the power to preempt state law. The Zscherning v. Miller case came the closest, but even in that case, the federal government could point to federal statutes and a treaty that established the federal policy. Miller involved an Oregon statute that prohibited foreigners from inheriting property in the state unless the foreign country provided reciprocal rights to U.S. citizens. the U.S. Supreme Court held that the Oregon statute impermissibly intruded into the field of foreign affairs entrusted to the federal government. Movsesian takes this analysis one step further and asks whether, in the absence of any federal legislation or international agreements, the president can unilaterally preempt the ability of states to legislate using certain words through informal statements.

\[98\] Id. at 1368-69.

\[99\] Id.

\[100\] 389 U.S.429 (1968).

\[101\] For example, part of the plaintiffs’ claim in Miller was based on a 1923 Treaty of Friendship, Commerce and Consular Rights with Germany. Miller, 389 U.S. at 665.

\[102\] Id.

Despite its broad power to preempt state law, sometimes the federal government chooses not to exercise that power, and instead leaves the field largely to be regulated by the states. One example of this phenomenon is in the area of insurance. Congress enacted the McCarran-Ferguson Act to preserve the state statutes that regulate the business of insurance from preemption and to leave the regulation of the business of insurance to the states. Thus, the McCarran-Ferguson Act reverse preempts all Acts of Congress which affect state laws regulating insurance, unless the federal statute is directed specifically at insurance. The McCarran-Ferguson Act does not itself regulate insurance. However, by granting the states the right to regulate insurance companies without being preempted by federal laws that only incidentally affect insurance, it preserves significant power for the states in this area.

The McCarran-Ferguson Act came about as a response to the United States v. South-Eastern Underwriters Ass'n case in 1944. In South-Eastern Underwriters Ass'n, the government indicted a large group of insurance companies for breaching the Sherman Anti-Trust Act for monopolizing trade and fixing rates of insurance among the states. The insurance companies claimed that the regulation of insurance was not commerce as defined by Article I, § 8.
of the U.S. Constitution and, therefore, the power to regulate it should remain with the states.\textsuperscript{108}

Before this time Congress had never attempted to regulate the business of insurance and the states had grown accustomed to regulating it themselves.\textsuperscript{109} The U.S. Supreme Court held that insurance was a part of commerce and the Anti-Trust Act applied to the insurance companies.\textsuperscript{110}

In response to this case, Congress enacted the McCarran-Ferguson Act, stating:

\textit{Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.}\textsuperscript{111}

This Act restored the states’ traditional broad right to regulate and tax insurance.\textsuperscript{112} It also allowed states to regulate licensing standards and it exempted insurance from the anti-trust acts that apply to businesses in general.\textsuperscript{113}

Currently there is a split of authority with respect to the application of the McCarran-Ferguson Act when a treaty, as opposed to an Act of Congress, is involved. In \textit{Stephens v. American Int’l Ins. Co.},\textsuperscript{114} the Court of Appeals for the Second Circuit found that a Kentucky statute regulating insurance contracts was not preempted by the Federal Arbitration Act (FAA), which incorporates the New York Convention on the Recognition and Enforcement of

\textsuperscript{108} \textit{Id.} at 536.
\textsuperscript{109} \textit{Id.} at 560-561.
\textsuperscript{110} \textit{Id.} at 561-562.
\textsuperscript{111} 15 U.S.C. § 1011.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} 66 F.3d 41 (2nd Cir. 1995).
Foreign Arbitral Awards (the New York Convention) because the FAA only incidentally affects insurance and, thus, is subject to the reverse presumption rule of the McCarran-Ferguson Act.\textsuperscript{115} The Court further held that the incorporation of the New York Convention into the FAA was irrelevant because the New York Convention is a non-self-executing treaty that relies on an Act of Congress for its implementation.\textsuperscript{116}

However, in \textit{Safety National Casualty Corp. v. Certain Underwriters},\textsuperscript{117} the Fifth Circuit Court of Appeals came to the opposite conclusion in an almost identical conflict between a Louisiana insurance statute and the New York Convention, as implemented by the FAA. The Fifth Circuit found that treaties, whether self-executing or not, were not intended to be covered by the McCarran-Ferguson Act and are not “reverse preemted” by it.\textsuperscript{118} The Court stated that treaties are created by the executive branch and are ratified by the Senate.\textsuperscript{119} Thus, they are not “Acts of Congress,” which are preempted by the McCarran Ferguson Act, even if they must be implemented by Congress to take effect.\textsuperscript{120} The U.S. Supreme Court has not yet acted to resolve this circuit split, so it is still unclear today what effect treaties may have on state insurance laws. While there is no treaty involved in the \textit{Movsesian} case, this discussion is relevant to show that the federal government has been reluctant to preempt state insurance laws such as the one at issue in

\begin{footnotesize}
\textsuperscript{115} Id. at 44-45.
\textsuperscript{116} Id. at 45.
\textsuperscript{117} 587 F.3d 714 (5th Cir. 2009).
\textsuperscript{118} Id. at 737.
\textsuperscript{119} Id. at 724.
\textsuperscript{120} Id. at 722-723.
\end{footnotesize}
Movsesian. It should therefore take much stronger and more formal action by the federal government than is present in Movsesian to find state law preempted.

III. The Underlying Case: Movsesian v. Victoria Versicherung

The Movsesian case arose out the actions of the California legislature in 2000 to extend the statute of limitations on various types of insurance policies for victims of the “Armenian Genocide.” The California statute also gave California state courts jurisdiction over some of the claims arising from that genocide.121 Beneficiaries of these insurance policies filed a class action suit seeking damages from three insurance companies for breach of contract regarding the Armenian Genocide.122

In response, the insurance companies challenged the constitutionality of the statute and claimed it was preempted by the executive branch’s policy to prohibit governmental recognition of the term “Armenian Genocide.”123 The defendant companies derived this policy from statements by the executive branch to Congress,124 pointing out that on three separate occasions the U.S. Congress attempted to create resolutions either recognizing the Armenian Genocide or mentioning the word “Armenian Genocide.”125

121 Movsesian I. 578 F.3d at 1054. (The “Armenian Genocide” refers a series of atrocities committed against the Armenian people by the Ottoman Empire during World War I. According to the Armenian National Institute website, approximately 1.5 million Armenians died between 1915 and 1923 as a result of this persecution. See http://www.armenian-genocide.org/index.htm).

122 Id. at 1055.

123 Id. at 1055, 1057.

124 Id.

In response to each of these bills the executive branch wrote a letter.\textsuperscript{126} In the first letter, former President Clinton expressed his concern that legislation recognizing the Armenian Genocide could “negatively affect” the U.S. interests in the Balkans and the Middle East and hurt Armenian and Turkey relations.\textsuperscript{127} He urged “in the strongest terms not to bring this resolution to the floor at this time.”\textsuperscript{128} The second letter, this time by the Bush Administration, expressed the executive branch’s concern that use of the phrase “Armenian Genocide” could “hamper ongoing attempts to bring about Turkish-Armenian reconciliation.”\textsuperscript{129} The third letter expressed the United States’ concern that using the word Armenian Genocide could affect relations with Turkey.\textsuperscript{130} Previously, Turkey had cut off contact with the French military when they officially recognized the “Armenian Genocide.”\textsuperscript{131} The president stated that any action by Congress could harm the United States’ interests in the war in the Middle East and “do great harm to … [U.S.] relations with a key ally in NATO and the war on terror.”\textsuperscript{132}

The U.S. District Court for the Central District of California granted the insurers’ motion to dismiss the claims for unjust enrichment and constructive trust but denied their motion to dismiss the claims for breach of contract and breach of the covenant of fair dealing.\textsuperscript{133} The insurance companies appealed.\textsuperscript{134}

\textsuperscript{126} Movsesian I. 578 F.3d at 1057-59.

\textsuperscript{127} Id. at 1057.

\textsuperscript{128} Id.

\textsuperscript{129} Id. at 1058.

\textsuperscript{130} Id. at 1058-59.

\textsuperscript{131} Id. at 1058.

\textsuperscript{132} Id. at 1059.

\textsuperscript{133} Id. at 1055.

\textsuperscript{134} Id.
The primary issue on appeal was whether letters by the president discouraging Congress from creating resolutions or laws mentioning the phrase “Armenian Genocide” were sufficient to demonstrate an executive policy from which the states could not derogate. In other words, how clear must an executive policy be to preempt the states from taking action?

In Movsesian I, a three-judge panel of the Ninth Circuit Court of Appeals voted 2-1 that simple non-binding executive statements discouraging the use of the word “genocide” with regards to the Armenian mass killings were sufficient to create an explicit executive policy which alone could preempt state law. The Court decided that an international executive agreement was not a necessary condition for a court to find an executive policy from which the states may not derogate. Thus, the Ninth Circuit reversed and remanded the district court’s ruling.

In Movsesian II, the same three-judge panel reversed itself, with one judge switching his vote. In that decision, the court stated: “we cannot conclude that a clear, express federal policy forbids the state of California from using the term ‘Armenian Genocide’”. Although it acknowledged previous executive branch statements opposing recognition of “Armenian Genocide,” it also cited several legislative and executive branch statements that used the term favorably. The court further observed that there are forty states that have laws or resolutions recognizing “Armenian Genocide” and the federal government has never expressed any

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135 Id. at 1059.
136 Id.
137 Movsesian, 578 F.3d at 1063.
138 Id. at 1063.
139 Id.
140 Movsesian II, 629 F.3d at 907.
141 Id. at 906-07.
opposition to those laws. Finally, the court noted that “California’s attempt to regulate insurance clearly falls within the realm of traditional state interests” and “has, at most, an incidental effect on foreign affairs.”

The Ninth’s Circuit’s decision in Movsesian I was quite extraordinary. In prior cases such as Belmont, Pink, and even Garamendi, the U.S. Supreme Court used international executive agreements to decide whether a law would interfere with an executive foreign relations policy. However, in Movsesian I, the Ninth Circuit went one step further. The court decided mere statements by past presidents discouraging the adoption of laws that use the term “Armenian Genocide” are enough to create an executive policy that is enforceable by the courts when confronted with any inconsistent state laws.

The president clearly has the authority to act with respect to foreign affairs. And more than one president publicly expressed concern regarding the potential ramifications of any official U.S. recognition of an “Armenian genocide.” In response to these expressions of concern, Congress largely deferred to the President’s wishes by not enacting statutes using the proscribed term. The Ninth Circuit in Movsesian I construed congressional inaction as acquiescence in

142 Id. at 907.
143 Id. at 907-08.
144 Movsesian I, 578 F.3d at 1059.
145 Id.
146 Id. at 1060. See also Pink, 315 U.S. at 203; Belmont, 301 U.S. at 324.
147 Id.
148 Id. Recently, the Foreign Affairs Committee of the U.S. House of Representatives voted in favor of a nonbinding resolution condemning the Armenian Genocide. Brian Knowlton, “House Panel Says Armenian Deaths Were Genocide” N.Y. TIMES (March 4, 2010). As of this writing, the committee resolution has not reached the House floor. The day prior to passage, U.S. Secretary of State, Hilary Rodham Clinton, had told Representative Berman, the committee chair, that passage of the resolution would be harmful to Turkish-Armenian reconciliation efforts.
the president’s policy under the *Youngstown* analysis, thus adding to the president’s authority.\(^{149}\) Therefore, the Court decided the President had exercised valid authority and the states could not derogate from it.\(^ {150}\) Doing so would interfere with the President’s ability to speak with “one voice” for the country.\(^ {151}\)

In addition, the court concluded California’s interests were not strong enough to overturn this valid expression of executive authority.\(^ {152}\) It said California’s true purpose in creating this law was to give a forum to Armenian Genocide victims. As in *Miller*, California was merely “expressing its dissatisfaction with the federal government’s chosen foreign policy path” and this was “not a permissible state interest.”\(^ {153}\)

On the other hand, in *Movsesian II*, the majority was persuaded that California was acting in an area of traditional state interests, *i.e.*, the regulation of insurance, and there was no express federal policy prohibiting California from using the term Armenian Genocide.\(^ {154}\) Therefore, it is unclear whether there is any conflict between state and federal interests. As a result, the Court upheld California’s law.

**IV. The Ninth’s Circuit’s Decision in *Movsesian I* Represents Bad Law and Policy**

*Movsesian* involves an area of law which is still under construction -- the intersection between foreign affairs and preemption. The Supreme Court has yet to give states all the answers and lower courts are left struggling to reconcile previous precedent. In this case, the Ninth Circuit

\(^{149}\) *Id.*

\(^{150}\) *Id.* at 1063.

\(^{151}\) *Id.* at 1061.

\(^{152}\) *Id.* at 1062-63.

\(^{153}\) *Id.*

\(^{154}\) *Movsesian II*, 629 F.3d at 907.
initially misapplied the rules that have been established through prior case law. It expanded the powers of the executive branch beyond any previous ruling and did so without seriously recognizing the consequences. Even though it corrected course in Movsesian II, it did so in a way that fails to recognize some of the broader implications of the decision and reasoning. Therefore, greater clarity in this area of law is needed.

This next section analyzes whether presidential policy alone could have the power to preempt state law. The second section discusses the extent of the executive branch’s power over the recognition of the word “Armenian Genocide” in this situation. The third section analyzes whether there is a sufficiently firm executive policy that may be enforced by courts. The fourth section examines the potential effects an executive word preemption policy could have on the United States and ultimately concludes that the effects of such a policy would be unacceptable.

A. An Executive Policy Alone Could Preempt State Law

The Ninth Circuit misapplied prior case law in Movsesian I without recognizing subtle, but important distinctions in those cases. For example, the Court relied heavily on Garamendi because similar to Movsesian, that case involved an unenacted executive branch policy which directly conflicted with state law and was found to preempt state law.\textsuperscript{155} However, the Court failed to recognize the differences between Garamendi and the present case, most especially the fact that the executive had entered into international executive agreements which arose out of that executive policy.\textsuperscript{156}

\textsuperscript{155} Garamendi, 578 F.3d at 1059.

\textsuperscript{143} Id. at 1060.
One way of reconciling these cases involving the preemption doctrine in foreign affairs has been suggested by the author Celeste Pozo.\footnote{Celeste Boeri Pozo, \textit{Foreign Affairs Power Doctrine Wanted Dead Or Alive: Reconciling One Hundred Years Of Preemption Cases}, 41 VAL. U. L. REV. 591 (2006).} Ms. Pozo proposes that the federal government’s use of its foreign affairs power is best viewed in terms of a spectrum.\footnote{\textit{Id.} at 608.} She posits that “foreign affairs power is a zero sum calculation; the more power the federal government has over foreign affairs, the less states have.”\footnote{\textit{Id.} at 609.} There is a spectrum of power where at one end the federal government has exclusive reign over foreign affairs issues, regardless of the state’s interest.\footnote{\textit{Id.} at 613.} At the other end the federal government has no power and the states hold it all.\footnote{\textit{Id.}} The more the underlying issue involves an area of traditional state competence, such as criminal law, the less power the federal government has over it. Therefore, a stronger action must be taken on the part of the federal government to preempt state law.

The most powerful acts of the federal government are the making of treaties and laws. Under the Supremacy Clause, these federal actions will trump state action in foreign affairs in almost all situations.\footnote{U.S. Const. Art. VI. As discussed in more detail below, one exception may be in the area of speech.} The next most powerful actions are international executive agreements, which are unilateral acts by the president. Because Article II of the U.S. Constitution gives the president independent power over foreign affairs, and expressly gives him the power “to make
treaties,” his actions in this regard are generally found preemptive of state action.\textsuperscript{163} Executive statements of policy are the weakest form of federal action.\textsuperscript{164} But, as \textit{Garamendi} demonstrates, if such statements are combined with international executive agreements, they can have preemptive effect.\textsuperscript{165} However, before \textit{Movsesian I}, it had never been determined that executive statements alone contained foreign affairs preemptive power. In fact, in \textit{Medellin}, the Supreme Court expressly held that a Presidential Memorandum directing states to comply with an ICJ judgment was not sufficient to preempt state criminal law inconsistent with that judgment.\textsuperscript{166}

Arguably, in only one case has the U.S. Supreme Court found state law to be preempted where the federal government took no specific action directly on point - \textit{Zshernig v. Miller}.\textsuperscript{167} However, in that case, there was a treaty relevant to at least part of the plaintiffs’ claims - the 1923 U.S.-German Treaty of Friendship, Commerce and Consular Rights.\textsuperscript{168} The presence of a relevant treaty may have influenced the court’s decision that there was, in fact, a federal policy that preempted state law. And although the underlying state law dealt with probate, a matter traditionally regulated by states, the Court did not appear to be convinced that the true purpose of the statute had anything to do with concerns about probate. Instead, Oregon was trying to send a

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\textsuperscript{163} U.S. Const. Art. II. \textit{See also Pink}, 315 U.S. at 203; \textit{Belmont}, 301 U.S. at 324.
\textsuperscript{164} \textit{See, e.g.}, \textit{Barclays}, 512 U.S. at 330.
\textsuperscript{165} \textit{Garamendi}, 578 F.3d at 1059.
\textsuperscript{166} \textit{Medellin}, 128 S.Ct. at 1371-73. The Supreme Court reached this conclusion despite the fact that the State of Texas had failed to provide consular notification as required under the Vienna Convention on Consular Relations, to which the U.S. is a party.
\textsuperscript{167} 389 U.S. at 429.
\end{flushright}
message of opposition towards communism. The *Miller* case arose during a period when there was great controversy over the issue of communism in the United States. The federal government had demonstrated its own opposition to communism in many ways through congressional resolutions, economic sanctions, and other actions. Although Oregon’s position was consistent with the general federal position on communism, the Court was concerned with the states interfering with the federal government’s ability to speak with one voice. Pozo suggests that this decision may be explained by the fact that the federal power to determine whether the United States would engage in friendly relations with a foreign country is so complete that the federal government did not need to take any specific action to preempt a state law intruding on foreign affairs.

Pozo’s theory is somewhat analogous to the *Youngstown* test in that the amount of power a branch of government wields over an issue is also viewed along a spectrum and is determined by the source(s) of that power. Under the *Youngstown* test, the executive is at his most powerful

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169 The Red Scare created a number of federal acts which opposed communists and communism at large. There was the McCarran-Walter Act which restricted communists from entering the country and allowed deportation of immigrant members of the communist party. U.S. Statutes at Large, 81st Cong., II Sess., Ch. 1024, p. 987-1031. There was also the Communist Control Act of 1954 which outlawed the Communist Party of the United States and made it illegal to be a member or to support it. U.S. Statutes at Large, Public Law 637, Chp. 886, p. 775-780. In addition, the House of Un-American Activities Committee was a part of the House of Representatives. It was used to investigate subversive activities of private individuals such as being a member of the communist party. Eleanor Roosevelt National Historic Site, *House Un-American Activities Committee*, http://www.nps.gov/archive/elro/glossary/huac.htm (last visited March 9, 2011). The McCarran Internal Securities Act required members of communist parties to register with the government and placed restrictions on those suspected to be members of those parties. The Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U.S.C. s 781 et seq. (1958 ed.).

170 *Youngstown*, 343 U.S. at 635-39.
when he is acting with approval of Congress, such as with a ratified treaty. The president has only the power inherent to the executive branch when he is acting without the consent of Congress, but he still may be successful if Congress has acquiesced or is indifferent. Finally, the executive may act solely on the basis of his enumerated powers under Article II, but is at the lowest ebb of power when acting with the disapproval of Congress. Pozo likewise suggests that, even at his lowest ebb of power, it is still possible for the executive to preempt law.

Under Pozo’s spectrum of power, it is arguable that if no specific action by the government was needed in Zschernig v. Miller to preempt state law, it stands to reason an executive policy could preempt state law if the foreign affairs issue was close enough to the executive’s exclusive power end of the spectrum. Likewise, using her zero sum analysis, it would be possible for the executive branch to preempt state law with informal executive policy in other cases, only if its power was close enough to the exclusive end of the spectrum. Creating an executive policy would be a demonstration of power less than Garamendi (which coupled executive policy with an international executive agreement) but more than Zchernig v. Miller (where there was no direct conflict between state and federal policy.) An executive policy set forth in letters or memoranda from the president is not the law, but it is still an action that would be theoretically sufficient to preempt a state law if the issue was almost exclusively within the president’s competence. Given it is possible to preempt state law through executive policy the question becomes whether the president has sufficient power under the facts of Movsesian.

171 Id. at 635-36.
172 Id. at 637.
173 Id. at 637-38.
B. The Executive Branch Has Some Power Over The National Policy Regarding the Recognition Of The Armenian Genocide

It is unclear the level of power the executive branch has over the recognition of specific terms, such as “Armenian genocide”, as they relate to foreign affairs. The Ninth Circuit found that the executive branch did have power over this area because the federal government has general power over foreign relations.\(^{174}\) Under Article II of the U.S. Constitution, the president is given power to make treaties, and to appoint ambassadors with the advice and consent of the senate.\(^{175}\) This article of the Constitution has been interpreted over time to encompass numerous powers over foreign affairs including the recognition or non-recognition of foreign governments, the establishment or termination of diplomatic relations, and the creation of executive agreements.\(^{176}\)

To the extent that official recognition of the “Armenian Genocide” could interfere with the status of U.S. relations with Armenia and Turkey, California’s statute at issue in Movsesian may affect these powers. In Movsesian I, the Ninth Circuit recognized as much, stating that the California statute impacts “presidential policy concerns on national security, a war in progress, and diplomatic relations with a foreign nation. . .The Constitution squarely, if not solely, vests these powers with the Executive Branch.”\(^{177}\) On the other hand, in Movsesian II, the court stated the effect would be only incidental.\(^{178}\)

\(^{174}\) Movsesian I, 578 F.3d at 1060.

\(^{175}\) U.S. Const. Art. II, § 2.

\(^{176}\) Garamendi, 539 U.S. at 414-15. See also Pink, 315 U.S. at 203; Belmont, 301 U.S. at 324.

\(^{177}\) Movsesian I, 578 F.3d. at 1060.

\(^{178}\) Movsesian II, 629 F.3d at 908.
According to Movsesian I, California’s statute affects the president’s constitutional powers because of the controversial nature of genocide recognition. Turkey does not want other countries to recognize an Armenian genocide. The position the United States takes regarding the recognition of an Armenian genocide could affect the Middle Eastern war effort and relations with Turkey. This is because Turkey may be less willing to cooperate with the United States if it officially recognizes that it was complicit or responsible for the commission of genocide.

The power to use words in legislation that relate to foreign affairs, such as the name of a foreign country, appears to be related to the president’s implied power over the recognition of governments. Individual U.S. states do not have the power to recognize other countries. This power is only in the president and has been implied through his Article II powers. Thus, it would appear that the federal government has a significant amount of power in this case and that not as much federal government action may be necessary to preempt state law.

On the other hand, the state of California was regulating insurance claims with respect to persons or companies over which it had jurisdiction. Insurance is an area traditionally regulated by states. Accordingly, the weighing of federal and state interests would likely balance out, leaving the issue in the middle of Pozo’s spectrum. If that is the case, stronger federal action than a simple statement by the executive would be needed to preempt California’s law.

179 Movsesian I, 578 F.3d at 1055.
180 Zivotofsky v. Secretary of State, 571 F.3d 1227, 1231 (D.C. Cir. 2009).
181 Id.
182 Id.
Moreover, there is no evidence that the President has been given the power to decide which words states may use when legislating. To the contrary, allowing the president to dictate whether particular words may be used is contrary to our notions of freedom of speech and state sovereignty. It is an unprecedented action, which would imply that the president has no authority over it because there is no approval by congress or the courts that might place a gloss on the President’s power and allow action in this area. Thus, the *Youngstown* analysis also points to this case falling in the middle spectrum of presidential power - where the president is relying on some of his own powers and congress has not enacted any laws contrary to the president’s stated policy (although at least one congressional committee has adopted a resolution recognizing the Armenian Genocide).
C. It Is Unclear Whether There Is an Official Policy Regarding Recognition of the Armenian Genocide

As noted by the court in Movsesian, there is evidence both for and against finding an official federal policy regarding the Armenian Genocide. In Movsesian I, the Ninth Circuit determined there was a presidential policy. However, it made this determination through only a few statements by the presidents over seven years. In response to three separate House resolutions, the executive branch has continuously discouraged the recognition of an Armenian genocide. These statements and any resulting policy would not be overt to the general public, but they may imply there was at one time an official policy, or at least a strong preference, not to connect the Armenian mass killings with genocide.

However, the executive position on this issue has not been consistent. Previous to the Bush and Clinton eras, President Ronald Reagan used the words “Armenian Genocide.” It is not generally claimed that this qualified as an official recognition by the United States of an actual genocide. But it does imply that the policies regarding this subject may have changed over time. At the very least it is evident that any policy that may exist is subtle.

Indeed, it is not clear what the current policy is under President Obama. He has always been a strong supporter of recognizing the Armenian Genocide, and as a Senator in 2008, he

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183 Movsesian, 578 F.3d at 1060.
184 Id. at 1057-59.
185 Id.
said he would recognize it once he was president.\textsuperscript{189} More recently, President Obama stated that his views on the matter have not changed.\textsuperscript{190} He has yet to openly declare an official policy recognizing the “Armenian Genocide,” but there has also been no overt statement saying the United States does not recognize it. Accordingly, it is unclear what the official policy is today given the unofficial actions by previous administrations discouraging recognition combined with the subtle unofficial hints the Obama administration has given.\textsuperscript{191} It may be possible to say the only policy the United States has is to not create an official one. The federal government does not appear to want to use the term, but it also does not want to officially admit to not using it, because either decision could have negative effects. Therefore, given that executive policies are a weak form of preemptive action, the executive must have near exclusive power over the issue if the president is to preempt the state law.

In light of the subtlety of the executive branch regarding this issue, this case presents an inappropriate atmosphere for the judiciary to rule on policy. In the past, the judiciary has been able to make decisions based on federal policies that were set forth in binding legal documents such as federal statutes, executive orders, and international agreements. Having these formal documents

\begin{itemize}
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} \textit{The White House, Statement of President Barack Obama on Armenian Remembrance Day (Apr. 24, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Armenian-Remembrance-Day/}
\item \textsuperscript{191} When the House Foreign Affairs Committee voted to condemn the Armenian Genocide in March 2010, Secretary of State Hilary Rodham Clinton contacted the Committee Chairman to express concern that the vote could be harmful to Turkish-Armenian relations. However, news reports do not indicate that official U.S. policy is or is not to recognize the Armenian Genocide.
\end{itemize}
to interpret is essential to assist the judiciary in determining whether a policy exists, the scope of that policy and whether it preempts a potentially inconsistent state policy. For example, in *Garamendi*, while the international executive agreements did not directly conflict with the state law, they implemented a broader executive policy with which the state law did conflict.\(^\text{192}\) If courts find federal policy to exist based on unenacted informal policy statements, they risk creating a federal policy, possibly before the federal government has determined for itself what its policy should be. Further, the courts could also define the parameters of that policy, potentially freezing it into place when the federal government’s policy may actually be evolving. Therefore, in some instances it may be possible to preempt state law on policy alone, but the courts should be very careful actually declaring it so for fear they would create law instead of interpret it.

In the present case, it is unclear whether or not there is a federal policy with respect to the Armenian Genocide and what that policy may consist of if it exists, because the executive branch has been purposefully subtle. There are no executive agreements or direct statements by the executive branch declaring the U.S. shall not use the phrase “Armenian genocide.” The court in *Movsesian I* should not have declared that a policy exists when the executive branch itself has not done so. A contrary decision runs the risk of misinterpreting policy or even creating federal policy out of whole cloth. This is not the function of the judiciary.

D. If a Federal Policy Barring “Armenian Genocide” Exists, It Should Not Preempt States

A policy that bars the use of certain words could have exceptional effects on states. Accordingly, normal preemption rules should not be applied. In neither *Movsesian* decision did the court take into account the special nature of the ability to preempt law through the use of proscribed words. The idea of word preemption itself appears to be unprecedented.

\(^{192}\) *Garamendi*, 539 U.S. at 429.
The Ninth Circuit erroneously treated this as a normal preemption case. Indeed, states can have an “incidental effect on foreign affairs” but they are discouraged from performing acts which embarrass, or are critical of other countries.193 This Californian law could embarrass or even be considered critical of Turkey, given the connotations associated with the word genocide. It could therefore interfere with foreign relations between Turkey and the United States. Also, the court seemed concerned with Turkey’s sanctions against France when France officially declared they recognize there was an Armenian genocide.194 Therefore, the court did have some justification for preventing the state from hurting any official policy of the U.S. of non-recognition.

However, preempting state law is a direct infringement on state sovereignty under the Tenth Amendment to the Constitution195 and should only occur where there is clear federal authority preempting state law. In addition, this type of restriction on the use of certain words is not normal, and it could cause unforeseen, unacceptable and far reaching effects. It is a fundamental principle of our government that “Congress shall make no law . . . abridging the freedom of speech.”196 States “speak” by creating laws to address issues. Restricting the words they can use restricts the laws they can create. Therefore, although the U.S. government acknowledges there was an Armenian mass killing, allowing the federal government to bar states

193 Id. at 397.

194 Movsesian, 578 F.3d at 1058-59.

195 U.S. Const. Amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

196 U.S. Const. Amend. I.
from using the words “Armenian Genocide” is likely to make it more difficult for states to address issues surrounding that issue or other issues.  

Allowing federal policies to preempt state laws through unrecognized words may void many laws. Currently, approximately 40 U.S. states have laws, proclamations or resolutions that incorporate the words “Armenian Genocide.” Some of these laws have no legal effect on anyone’s rights or obligations. They simply create a time of remembrance. If California’s law is preempted based on use of the words “Armenian Genocide” alone, then numerous state remembrance days and proclamations would be invalid as well. Indeed, acts by state legislatures which incorporate the proscribed language could be declared invalid, despite their subject, their legal effect, or the lack thereof. For instance, California has a law which requires schools to instruct students on World War II Japanese internment and the Armenian Genocide. Technically, this law would be invalid under the Movsesian I court’s reasoning because it uses the term “Armenian Genocide.”

In the future, other words might be declared contrary to executive policy and therefore banned from use. The Movsesian I ruling would have invalidated any law throughout the country which uses the proscribed words. Even if the words were used incidentally, such as to honor or remember an event, or to educate students about a historical subject to be taught at school, it would

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197 On the other hand, if the California statute read, “Armenian mass killings” rather than “Armenian genocide,” perhaps the state could have still achieved its purpose without concern for “word preemption” by the federal government.

198 Armenian National Institute, *International Affirmation of the Armenian Genocide*, http://www.armenian-genocide.org/current_category.11/affirmation_list.html (Lists all states and can click on any state to find the legislation enacted).

be preempted. The problem is that it is a blanket preemption which does not differentiate between laws.

Also, given the subtle and uncertain nature of this federal policy, it may be difficult to tell if a law is in fact preempted. Here, for example, it has not been made explicit by the executive branch that it has a federal policy regarding the Armenian Genocide. In future cases the federal policy could be just as vague or even more so. Nevertheless, a ruling permitting word preemption would require state officials to attempt to interpret vague executive statements to determine what actions states may or may not take, which could have an unnecessarily chilling effect on state action. In effect, the Movsesian I ruling could allow any statement by the executive branch to void laws. This requires unreasonable vigilance on the part of citizens, state and local governments, congresspersons, and the judiciary to pay attention for any informal executive statement which may void a law.

Moreover, the federal government does not appear concerned about state recognition of Armenian Genocide because it has never taken any action to enforce its supposed policy on the states through official or unofficial action. No statement was made to the California legislature deterring them from using the language nor has the executive branch submitted a statement to the court declaring its position in the case.\(^{200}\) In fact, according to the Armenian National Institute’s web site, the vast majority of states have enacted laws or policies recognizing the Armenian Genocide and the federal government has never taken action against any of them.\(^{201}\) It may be that the states do not have the ability to change the federal government’s official policy given their

\(^{200}\) Movsesian I, 578 F.3d 1052

limited power over foreign affairs. This case is different from the case of Turkey’s sanctions against France because France as a country declared recognition of an Armenian genocide.\textsuperscript{202} It is possible the proposed resolutions by Congress which the previous administrations discouraged could have resulted in a similar action by Turkey.\textsuperscript{203} The executive only appears concerned with official federal declarations, not those by states. Any future trouble with Turkey appears to rest on official national recognition and the states cannot perform that task. Therefore, there is good reason why the federal government has not applied its policy to the states as preemting law.

Finally, given the growth of federal government regulation and increasing globalization, more and more state action is likely to touch on areas within the concurrent sphere of the federal and state governments and to be preempted if the reasoning of the Movsesian I court is endorsed by other courts. The courts should be careful to protect some areas of state sovereignty to preserve our constitutional structure. Subtle, fluctuating and informal federal policies, such as the executive’s statements regarding Armenian Genocide, should not be allowed to preempt state action, especially when the state’s action has little or no legal effect.

V. Conclusion

The Movsesian I court erroneously applied an inchoate federal policy to preempt state law. It may be possible for a court to declare that an executive policy alone can preempt state law if the executive branch has enough power over the area. However, it is not clear whether or not the President, acting alone, has sufficient power over the official recognition of words to do so. More specifically, it is not clear that there even is an official policy regarding the recognition of an

\textsuperscript{202}Movsesian, 578 F.3d at 1058-59.

\textsuperscript{203}Id.
Armenian Genocide and whether such a policy is intended to preempt state law relating to that subject. Thus, the courts should not create a policy when it is not clear what that policy is and if there is, in fact, any policy at all. Finally, the executive branch does not appear to have desired to apply word preemption to the states in this case. This lack of federal government action may be because such preemption would have such extensive negative effects on state law.