

2015

## The Limits of Executive Authority to Preempt Contrary State Laws in Foreign Affairs after Medellín v. Texas

Shahrzad Noorbaloochi

*American University Washington College of Law*

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Noorbaloochi, Shahrzad. "The Limits of Executive Authority to Preempt Contrary State Laws in Foreign Affairs after Medellín v. Texas." *American University Law Review* 64, no.3 (2015): 687-727.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

The Limits of Executive Authority to Preempt Contrary State Laws in  
Foreign Affairs after *Medellín v. Texas*

# THE LIMITS OF EXECUTIVE AUTHORITY TO PREEMPT CONTRARY STATE LAWS IN FOREIGN AFFAIRS AFTER *MEDELLÍN V. TEXAS*

SHAHRZAD NOORBALOOCHI\*

*In 2012, the U.S. Court of Appeals for the Ninth Circuit decided *Movsesian v. Victoria Versicherung AG* after hearing the case three times. In the final hearing, the court held that an informal executive policy against the recognition of the Armenian Genocide was sufficient to preempt a California law that provided such formal recognition. Scholars have criticized this decision on grounds that it conflicts with one of the Court's latest holdings on foreign affairs preemption in *Medellín v. Texas*. The extension of *Medellín* to foreign affairs preemption cases such as *Movsesian III* is inappropriate, however, because *Medellín* involved highly unique facts in three ways. First, the executive action in *Medellín* inherently and radically conflicted with the will of Congress in that it attempted to execute a non-self-executing treaty into law by way of an executive memorandum. Second, *Medellín* posed the unique threat of empowering international courts over domestic courts, a threat that was absent in *Movsesian III*. Third, *Medellín* involved the adjudication of a criminal matter, an arena in which the states possess a quintessential and thus preemptively more resilient interest than the insurance regulation matter at issue in *Movsesian III*.*

*Because of these essential differences between *Medellín* and *Movsesian III*, the Ninth Circuit was correct in preempting the California law. Furthermore, the Ninth Circuit's decision in *Movsesian III* was not only consistent with precedent but also normatively sound. *Movsesian III*'s vision of executive*

---

\* Junior Staff Member, *American University Law Review*, Volume 64; J.D. Candidate, May 2016, *American University Washington College of Law*, B.A., 2011, *Boston University*. Thank you to the members of *AULR*, in particular Shayna Gilmore and Sydney P. Sgambato. I am also grateful to Professors Stephen Vladeck and Jennifer Daskal for their guidance and feedback. Also, thank you to my wonderful family whose encouragement and support knows no bounds. Finally, thank you to my lovely husband, Tyler Cullis, for his support, input, and love.

*authority, in which Congress's will receives due deference, is more likely to produce rational policy choices and accord with foundational democratic values.*

#### TABLE OF CONTENTS

Introduction.....	688
I. The Federal Government's Prominence over the States in Foreign Affairs and the Conflicting Conceptions of the Executive's Role.....	691
A. The Federal Government's Primacy in Foreign Affairs.....	691
B. The Amorphous Bounds of Executive Authority in Foreign Affairs.....	695
C. The Supreme Court's Decision in <i>Medellín v. Texas</i> .....	701
D. The Ninth Circuit's <i>Movsesian</i> Decisions.....	706
II. <i>Medellín's</i> Scope of Application to Foreign Affairs Preemption Cases Is More Limited than Recent Scholarship Suggests.....	709
A. While the President's Policy in <i>Medellín</i> Conflicted with the Will of Congress, the Executive Policy in <i>Movsesian III</i> Carried Congressional Acquiescence.....	710
B. While <i>Medellín</i> Involved a Shift of Power from U.S. Courts to International Courts, No Such Shift Was Present in <i>Movsesian III</i> .....	715
C. <i>Medellín</i> Involved the Adjudication of a Quintessential State Interest While <i>Movsesian III</i> Did Not.....	717
III. The <i>Youngstown</i> Power-Sharing Model Is More Likely to Yield Rational Policy Choices and Accord with Democratic Values than <i>Curtiss-Wright's</i> Unitary Executive Model.....	722
Conclusion.....	726

#### INTRODUCTION

On Wednesday, July 30, 2014, Republicans in the House of Representatives voted to proceed with a lawsuit against the President of the United States<sup>1</sup> on grounds that he “ha[d] circumvented the Congress through executive action.”<sup>2</sup> Though a congressional lawsuit

---

1. Paul Kane & Zachary A. Goldfarb, *House Clears Way for Lawsuit Against Obama*, WASH. POST (July 30, 2014), [http://www.washingtonpost.com/politics/house-clears-way-for-lawsuit-against-obama/2014/07/30/7436aca6-1809-11e4-9349-84d4a85be981\\_story.html](http://www.washingtonpost.com/politics/house-clears-way-for-lawsuit-against-obama/2014/07/30/7436aca6-1809-11e4-9349-84d4a85be981_story.html).

2. Rebecca Kaplan, *John Boehner Announces Plans to Sue Obama*, CBS NEWS (June 25, 2014, 3:00 PM), <http://www.cbsnews.com/news/john-boehner-announces-plans-to-sue-obama> (quoting John Boehner on his reasoning for the lawsuit).

against the President is unusual,<sup>3</sup> such bitter debates over the President's power are not.<sup>4</sup> In fact, this latest episode from the House of Representatives continues a heated debate that has lasted in American history since the Constitution's inception.<sup>5</sup>

This debate took on renewed national significance in the years leading to the Supreme Court's 2008 decision, *Medellín v. Texas*,<sup>6</sup> during which time the Bush Administration embarked upon a series of remarkably aggressive executive actions.<sup>7</sup> In recent years, however, most scholarship on *Medellín* has focused on the judgment's significance for the status of international obligations in United States courts.<sup>8</sup> Less examined is the import of *Medellín* on foreign affairs preemption and, specifically, the power of the President to preempt foreign affairs-related state laws. The limited scholarship

---

3. See Andrew C. McCarthy, *Boehner Is Bringing a Whistle to a Gunfight: A Congressional Lawsuit Is Precisely the Wrong Weapon to Combat Obama's Lawlessness*, NAT'L REV. ONLINE (June 28, 2014, 4:00 AM), <http://www.nationalreview.com/article/381453/boehner-bringing-whistle-gunfight-andrew-c-mccarthy> (rejecting the premise that a congressional lawsuit will be effective in limiting President Obama's executive overreach and describing alternative means for achieving such a result).

4. Jack Goldsmith, *Suing the President for Executive Overreach*, LAWFARE (June 30, 2014, 10:48 AM), <http://www.lawfareblog.com/2014/06/suing-the-president-for-executive-overreach> (agreeing with Clinton Rossiter that allegations of executive overreach have plagued all memorable presidents in American history).

5. See THE FEDERALIST NO. 70, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing for strong executive authority in conducting foreign relations by stating, "[d]ecision, activity, secrecy, and dispatch will generally characterise [sic] the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished"). But see JAMES MADISON, LETTERS OF HELVIDIUS NO. 1 (1793), reprinted in 6 THE WRITINGS OF JAMES MADISON 138 n.1, 147-50 (Gaillard Hunt ed., 1906) (disagreeing with Hamilton's views on presidential powers and stating the "conclusion becomes irresistible" that the Constitution did not vest legislative powers in the executive or executive powers in the legislature).

6. 552 U.S. 491 (2008).

7. See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 132-33, 314, 328, 330 (2007) (noting the Bush administration's aggressive stance on presidential powers post-9/11, including the administration's stance on warrantless wiretapping).

8. See Cindy Galway Buys, *The United States Supreme Court Misses the Mark: Towards Better Implementation of the United States' International Obligations*, 24 CONN. J. INT'L L. 39, 68-69 (2008) (discussing how the Supreme Court disregarded international law in *Medellín v. Texas* and outlining the negative consequences that such disregard carries for American foreign relations); Eric Posner, *Medellín and America's Ability To Comply with International Law*, SLATE (Mar. 25, 2008, 12:40 PM), [http://www.slate.com/content/slate/blogs/convictions/2008/03/25/medellin\\_and\\_america\\_s\\_ability\\_to\\_comply\\_with\\_international\\_law.html](http://www.slate.com/content/slate/blogs/convictions/2008/03/25/medellin_and_america_s_ability_to_comply_with_international_law.html) (arguing that *Medellín* signifies the United States's evasion of international law).

addressing *Medellín*'s impact on federal foreign affairs preemption suggests that the case narrows the President's authority over foreign affairs preemption.<sup>9</sup>

This Comment takes the opposite view, arguing that *Medellín* does not provide a widely applicable rule for foreign affairs preemption cases. To demonstrate *Medellín*'s limited effect on the foreign affairs preemption doctrine, this Comment will evaluate *Movsesian v. Victoria Versicherung AG* (*Movsesian I*, *Movsesian II*, and *Movsesian III*),<sup>10</sup> a series of three appeals decided by the U.S. Court of Appeals for the Ninth Circuit. In *Movsesian I*, the issue was whether a non-binding executive policy refusing to recognize as genocide the Turkish government's mass killings of Armenians in 1915–1916<sup>11</sup> preempted a California law providing such recognition.<sup>12</sup> After twice reversing its decision, the court, sitting en banc, held that the executive policy preempted the California law because the California law did not concern traditional state powers and intruded “on the field of foreign affairs entrusted exclusively to the federal government.”<sup>13</sup> This Comment argues that,

---

9. See, e.g., Cindy Galway Buys & Grant Gorman, *Movsesian v. Victoria Versicherung and the Scope of the President's Foreign Affairs Power to Preempt Words*, 32 N. ILL. U. L. REV. 205, 205–06, 225 (2012) (arguing that the Ninth Circuit's decision in *Movsesian I* granted too much power to the executive and cannot be upheld based on *Medellín*); Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 LOY. L.A. INT'L & COMP. L. REV. 19, 19, 41 (2010) (contending that *Movsesian I* was decided wrongly because the Supreme Court effectively limited the bounds of presidential power to preempt state laws in *Medellín* by limiting *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), to “its facts”); Carolyn A. Pytynia, Note, *Forgive Me, Founding Fathers for I Have Sinned: A Reconciliation of Foreign Affairs Preemption After Medellín v. Texas*, 43 VAND. J. TRANSNAT'L L. 1413, 1438 (2010) (asserting that *Medellín* “undermined all previous analyses of the issue” of federal foreign affairs preemption and limited the President's preemption powers).

10. (*Movsesian III*), 670 F.3d 1067 (9th Cir. 2012) (en banc), cert. denied, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013); (*Movsesian II*), 629 F.3d 901 (9th Cir. 2010), rev'd en banc, 670 F.3d 1067 (9th Cir. 2012), cert. denied, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013); (*Movsesian I*), 578 F.3d 1052, 1056 (9th Cir. 2009), withdrawn, 629 F.3d 901 (9th Cir. 2010), rev'd en banc, 670 F.3d 1067 (9th Cir. 2012), cert. denied, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

11. See, e.g., Donald Bloxham, *The Armenian Genocide of 1915–1916: Cumulative Radicalization and the Development of a Destruction Policy*, 181 PAST & PRESENT 141, 141–42 (2003) (chronicling the incarceration and murder of prominent Armenians on April 24, 1915, the forced emigration of women and children out of Turkey into Syria and Iraq, and the rape, kidnap, mutilation, starvation, and murder that occurred along the way, culminating in the death of one million Armenians).

12. *Movsesian I*, 578 F.3d at 1056.

13. *Movsesian III*, 670 F.3d at 1077.

contrary to what scholars have suggested, the Ninth Circuit was correct in its final decision because *Medellín* did nothing to limit the bounds of foreign affairs preemption.

Part I begins by contouring the historical distribution of the foreign-affairs powers between the states, the President, and Congress. Next, this Part outlines recent interpretations of this distribution of power in *Medellín* and the three *Movsesian* decisions. Part II argues that the Court's judgment in *Medellín* does not limit the bounds of executive authority and therefore does not conflict with *Movsesian III* for three reasons. First, the President's policy in *Movsesian III* carried congressional acquiescence while the President's policy in *Medellín* inherently conflicted with congressional intent. Second, *Movsesian III* did not involve the same shift of power from United States's courts to international courts as was present in *Medellín*. Third, the *Movsesian* decisions involved the adjudication of an insurance regulation matter, an area of law that is qualitatively more susceptible to preemption than the criminal law matter in *Medellín*. Because of these essential differences, applying the Court's decision in *Medellín* to federal foreign affairs preemption cases such as *Movsesian III* is inappropriate.

Part III argues that the Ninth Circuit's vision of separation of powers espoused in *Movsesian III* was not only consistent with precedent but also normatively correct. The vision of power-sharing upheld in *Movsesian III* allows for cooperation and even conflict between the President, Congress, and the judiciary. The presence of such cooperation and conflict is more apt to produce rational policy choices and accord with fundamental democratic values than a unitary model in which the President acts alone and against little pushback.

## I. THE FEDERAL GOVERNMENT'S PROMINENCE OVER THE STATES IN FOREIGN AFFAIRS AND THE CONFLICTING CONCEPTIONS OF THE EXECUTIVE'S ROLE

### A. *The Federal Government's Primacy in Foreign Affairs*

It is an elementary truth in American constitutional law that the power to conduct foreign affairs rests solely with the federal government.<sup>14</sup> Justice Sutherland, a Justice otherwise known for his

---

14. *United States v. Pink*, 315 U.S. 203, 233 (1942); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575–76 (1840) (“It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation . . .”); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228 (1824) (Johnson, J., concurring) (“The

sensitivity to states' rights,<sup>15</sup> epitomized this basic assumption in *United States v. Belmont*<sup>16</sup> when he stated, "in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist."<sup>17</sup> Accordingly, when a federal law expresses the legislature's intent to exclusively govern a matter related to foreign affairs, courts will always give primacy to the federal government over the states.<sup>18</sup> However, when federal law on specific foreign relation matters is unclear or non-existent, it remains unsettled whether state law governing such matters is constitutional.<sup>19</sup> In this gray area, foreign affairs preemption jurisprudence has fluctuated between permissive and restrictive visions of the federal government's power to preempt state law.

At the permissive end sits the doctrine of dormant foreign affairs preemption.<sup>20</sup> Under dormant preemption, courts preempt state laws that act upon foreign affairs, even in the absence of explicitly conflicting federal law, on grounds that the Constitution delegates foreign affairs matters solely to the federal government.<sup>21</sup> If the courts determine that a state law negatively influences U.S. foreign relations with another nation, they can preempt that law even in the absence of an explicit federal law on the matter.<sup>22</sup>

---

States are unknown to foreign nations . . ."); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149 (2d ed. 1996) (explaining that even those Supreme Court Justices most sympathetic to states' rights recognized that states have a very limited role in foreign affairs).

15. See HENKIN, *supra* note 14, at 149 (noting that Justice Sutherland was a "Justice[] known for [his] sensitivity to the claims of the states in the federal system").

16. 301 U.S. 324 (1937).

17. *Id.* at 331.

18. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 416–17 (2003) (acknowledging that preemption of conflicting state law by express federal laws such as executive agreements and treaties is "straightforward" while preemption of state laws containing no express preemption provision requires further analysis to determine whether the state laws conflict with the federal policies); see also *infra* note 33 and accompanying text.

19. See *cf. Garamendi*, 539 U.S. at 416–17 (noting that when there is no preemption clause in the federal law, the courts must infer whether the federal law preempts the state law by assessing the extent of its impact on foreign relations).

20. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 203–04 [hereinafter Goldsmith, *Statutory Foreign Affairs Preemption*] (outlining the different formulations of foreign affairs preemption doctrine).

21. *Id.* at 203.

22. *Id.*; see *Zschernig v. Miller*, 389 U.S. 429, 432–36 (1968) (holding that an Oregon reciprocity statute unconstitutionally intruded on the national power over foreign affairs, even though the Oregon statute did not conflict with any specific,

On the restrictive end, courts have limited the federal power to preempt state laws to varying formulations of statutory preemption, whereby a state law is preempted only if it in some way conflicts with an express federal statute.<sup>23</sup> Variations of such statutory foreign affairs preemption doctrines include express foreign affairs preemption, conflict foreign affairs preemption, obstacle foreign affairs preemption, and field foreign affairs preemption.<sup>24</sup>

Express foreign affairs preemption occurs when a federal law specifically declares its intent to preclude state regulation on its face.<sup>25</sup> For example, the Export Administration Act of 1979 includes such a preemption clause, stating that the Act preempts any state's law, rule, or regulation pertaining to the "boycotts fostered or imposed by foreign countries against other countries."<sup>26</sup> Congress's preemption power "flow[s] directly" from the Supremacy Clause of Article VI and evokes no controversial federalism questions.<sup>27</sup> Conflict preemption, on the other hand, requires no such express mention of a statute's preemptory intent. Under conflict preemption, a federal law preempts a state law if the state law renders compliance with the federal statute impossible.<sup>28</sup> For example, a state statute may result in a consequence conflicting with the requirements of a federal law.<sup>29</sup> Obstacle preemption occurs when a state law stands as an obstacle to accomplishing the objects and purposes of a

---

enacted federal law because adjudicating the state law forced state probate courts to assess and criticize other governments and posed the threat of offending other nations).

23. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1179 (3d ed. 2000) (describing the bounds of federal preemption when there is an "[a]ctual [c]onflict [b]etween [f]ederal and [s]tate [l]aw").

24. See Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 20, at 205–07 (outlining the various doctrines of statutory foreign affairs preemption).

25. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387–88 (2000) (recognizing and operating under the assumption of the legitimacy of express conflict preemption but holding that such express preemption is not required).

26. Export Administration Act of 1979, Pub. L. 96-72, § 8(c), 93 Stat. 503, 524. The Act was passed in response to boycotts against Israel by Arab countries.

27. See TRIBE, *supra* note 23, at 1172 (explaining that though cases involving express preemption may raise "complex questions of statutory construction," they do not invoke controversial issues on the appropriate distribution of power).

28. See *id.* at 1179–80 (describing circumstances under which "'actual conflict' is most clearly manifest," including when federal and state law are "directly and facially contradictory" and when "compliance with both is a literal impossibility").

29. See *Free v. Bland*, 369 U.S. 663, 670 (1962) (holding that a federal Treasury regulation requiring that savings bond held in co-ownership pass to the surviving co-owner upon the others' death preempted a Texas community property law that would have resulted in the passing of the bonds to the deceased's son).

federal statute.<sup>30</sup> Such preemption requires that courts identify the federal statute's aims and determine that the state law sufficiently obstructs achieving those aims.<sup>31</sup> Finally, field preemption occurs when the federal government creates a regulatory scheme of such pervasiveness or possesses an interest so strong in regulating a matter that it leaves no room for state action.<sup>32</sup>

Assessments of the normative values associated with either end of the spectrum have evoked strong responses. At one end, scholars have cautioned that a broad reading of the power to preempt state laws grants too much power to the judicial branch.<sup>33</sup> Over-reliance on the judiciary, they posit, "dissuade[s] the more competent political branches from performing [their] constitutional role[s]" of foreign affairs lawmaking.<sup>34</sup> As a result, such scholars, including Harvard Law professor Jack Goldsmith, have argued for a minimalist approach to judicial enforcement.<sup>35</sup> Goldsmith accordingly contends that courts should rarely go beyond utilizing express, conflict, or obstacle preemption and eschew preemption in cases where federal law is unclear or absent.<sup>36</sup>

At the other end, a narrow conception of foreign affairs preemption threatens to undermine the federal government's ability to speak with one voice in conducting foreign affairs and can harm the United States's foreign relations with other countries.<sup>37</sup> State involvement in foreign relations can undermine the national interest because state level actors do not bear the consequences of foreign policy matters and therefore do not account for these consequences

---

30. *TRIBE*, *supra* note 23, at 1181.

31. *See Hines v. Davidowitz*, 312 U.S. 52, 73–74 (1941) (holding that a Pennsylvania statute requiring aliens to register with the state and carry identification cards posed an obstacle to achieving the objects and purposes of the federal Alien Registration Act, which aimed to gather information from aliens while at the same time respecting their civil liberties and leaving them free from the "possibility of inquisitorial practices and police surveillance that might . . . affect our international relations"); *see also* Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 20, at 205–06.

32. Goldsmith, *Statutory Foreign Affairs Preemption*, *supra* note 20, at 206.

33. *Id.* at 202–03, 205, 207.

34. *Id.* at 211.

35. *Id.* at 177.

36. *Id.*

37. *See, e.g.,* Martin S. Flaherty, *Are We to Be a Nation? Federal Powers vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1280 (1999).

in their decision making.<sup>38</sup> As such, proponents of this position prefer that courts intervene to stop state intervention in foreign affairs.<sup>39</sup>

The above framework establishes an outline of the historical and constitutional distribution of powers in foreign affairs between the state and federal governments. This framework demonstrates that when federal law is absent or unclear on a foreign affairs matter, the courts have granted states varying degrees of power to implement their own laws. Otherwise, however, courts have recognized and continuously affirmed that the power to establish foreign relations policies lies solely with the federal government.<sup>40</sup>

*B. The Amorphous Bounds of Executive Authority in Foreign Affairs*

The question still remains, however, as to how this largely federal power over foreign affairs is distributed within the federal government between the President and Congress.<sup>41</sup> The Constitution grants only a few of the authorities commonly exercised by the executive today.<sup>42</sup> These limited constitutionally granted powers include the power to make treaties with the advice and consent of the Senate, appoint and receive ambassadors, and little else.<sup>43</sup> However, by 1936, in *United States v. Curtiss-Wright Export Corp.*,<sup>44</sup> the Supreme Court had come to establish that “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>45</sup> *Curtiss-Wright* is one of two formative decisions in

---

38. Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1250 (1999).

39. *Id.* at 1255–58.

40. See HENKIN, *supra* note 14, at 149–50 (expressing the unquestioned principle that states are excluded from foreign affairs); TRIBE, *supra* note 23, at 656 (“The declaration of Article I, § 10, that ‘[n]o State shall enter into any Treaty, Alliance, or Confederation,’ or, without congressional consent ‘lay any imposts or duties on imports or exports’ or ‘enter into any Agreement of Compact with . . . a foreign Power’ are just a few manifestations of a general constitutional principle that, whatever the division of foreign policy responsibility *within* the national government, *all* such responsibility is ultimately reposed at the national level rather than dispersed among the states and the localities.”).

41. See HENKIN, *supra* note 14, at 35 (surveying the progression of the President’s enumerated and implied powers and the surrounding historical debate).

42. *Id.* at 31 (stating that a stranger looking at the U.S. Constitution would not be able to discern that it is the source of today’s commonly accepted boundaries of presidential authority in international relations).

43. See *id.* at 31, 38 (“On the face of it, this is all the Constitution empowers the President to do in regard to other nations.”).

44. 299 U.S. 304 (1936).

45. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 ANNALS OF CONG. 613 (1800) (statement of Rep. Marshall)).

the Court's jurisprudence on the bounds of executive authority in foreign affairs.<sup>46</sup> The other, demonstrating a dramatic shift in tone, is the Court's seminal 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>47</sup> This section undertakes an analysis of these two cases and the normative vision that each embodies in the balance of foreign affairs' powers between Congress and the President.

In American jurisprudence, *Curtiss-Wright* stands as the oft-cited poster child for broad executive authority in international relations.<sup>48</sup> In *Curtiss-Wright*, the Court upheld the constitutionality of a Joint Resolution passed by Congress empowering the President to declare illegal the provision of arms to any nation involved in the Chaco conflict if such a provision would prolong the conflict.<sup>49</sup> The Curtiss-Wright Export Corporation was charged with providing arms to Bolivia, a country involved in the Chaco conflict and on which the President had initially declared an arms embargo.<sup>50</sup> Indicted for conspiring to sell weapons of war under the Joint Resolution, Curtiss-Wright argued that the Joint Resolution was an unconstitutional abdication of congressional power to the President.<sup>51</sup>

Justice Sutherland, writing for the majority, emphatically disagreed, concluding that not only was the congressional delegation proper but also that the President could have acted without authorization from Congress in the first place.<sup>52</sup> Though the Court could have decided the case on narrower grounds, it took the opportunity to recognize broad executive authority in foreign affairs.<sup>53</sup> Finding the President to be the most suitable candidate for maneuvering foreign relations with other nations, the Court argued

---

46. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 72 (1990) (juxtaposing the Court's vision of executive authority in *Youngstown* from its vision in *Curtiss-Wright*).

47. 343 U.S. 579 (1952).

48. KOH, *supra* note 46, at 72.

49. *Curtiss-Wright*, 299 U.S. at 312, 322.

50. *Id.* at 311.

51. *Id.* at 315.

52. *Id.* at 319–20 (“It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.”).

53. TRIBE, *supra* note 23, at 634–35.

it was unwise to “requir[e] Congress . . . to lay down narrowly definite standards” to govern the President.<sup>54</sup>

In its 1952 *Youngstown* decision, however, the Supreme Court limited this previous recognition of broad presidential authority. In *Youngstown*, the Supreme Court held that the President’s unilateral take-over of a steel mill via an executive order was unconstitutional.<sup>55</sup> President Truman had ordered the takeover after the mill’s workers had threatened to go on strike as a result of a labor dispute with the mill owners.<sup>56</sup> Fearing that a strike by the steel mill workers would undermine weapons production and the war efforts underway in Korea, Truman ordered the takeover of the mill to grant the workers’ requests and prevent the strike.<sup>57</sup> In justifying this act, President Truman argued that the potential strike posed extreme risks to the country’s national security. As such, the power to order the takeover of the mill to prevent such risks was within his “inherent [executive] power” as President and commander-in-chief.<sup>58</sup>

This time, to the surprise of constitutional scholars and policy-makers, the Court disagreed.<sup>59</sup> The Court reasoned that the seizure of personal property was neither within the President’s powers as the nation’s commander-in-chief nor within the President’s authority to ensure that the laws were faithfully executed.<sup>60</sup> Justice Hugo Black’s opinion for the majority chose a formalistic reading of the Constitution, wherein only Congress possessed the constitutional authority to make laws.<sup>61</sup> Accordingly, the Court found that the President’s unilateral act was a transgression of this congressional authority.<sup>62</sup>

---

54. *Curtiss-Wright*, 299 U.S. at 321–22.

55. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 588–89 (1952).

56. *Id.* at 583.

57. *Id.*

58. *Id.* at 583–84.

59. *Id.* at 589; KOH, *supra* note 46, at 106 (explaining that by the time *Youngstown* reached the Court, most expected the Court to side with the President as all nine of the sitting justices had been appointed by Truman or Roosevelt, the Court “had swept aside past decisions that had limited the power of government, whether federal or state, to regulate economic and social affairs,” and Justice Jackson had himself authored a pro-executive decision just four years earlier (quoting WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 64 (1987))); *see also* *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109–10, 113–14 (1948) (recognizing that the Court should give deference to decisions involving presidential discretion and finding certain executive actions unreviewable by the Supreme Court).

60. *Youngstown*, 343 U.S. at 585–87.

61. KOH, *supra* note 46, at 106–07.

62. *Youngstown*, 343 U.S. at 585–87.

In a paradigmatic concurring opinion, Justice Jackson agreed with the Court but went further to establish the now-classic tripartite framework of executive authority.<sup>63</sup> In the first zone of Justice Jackson's tripartite framework, the President acts with the express consent of Congress and, therefore, receives wide latitude to exercise that authority.<sup>64</sup> In this zone, an executive act is unconstitutional only if the federal government as a whole lacks the authority to govern the matter under the Constitution.<sup>65</sup> In such cases, the Court would afford the President's act the "widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."<sup>66</sup>

In the second zone, which Justice Jackson named the "zone of twilight," the President acts without a grant or denial of authority from Congress.<sup>67</sup> In this circumstance, the legitimacy of the President's act depends on whether both the President and Congress have the authority to act in that area and whether Congress and the President share similar policy objectives.<sup>68</sup> Because there exists an area in which the authority of Congress and the President coincide, congressional inaction would "enable, if not invite," action by the President.<sup>69</sup> Accordingly, if the President is acting in an area that is entrusted to the executive branch, his acts may deserve deference by the courts.<sup>70</sup>

In the third zone, Justice Jackson explained, the President's act directly conflicts with the implied or express will of Congress.<sup>71</sup> Such presidential actions are at their "lowest ebb" of authority and subject to strict judicial scrutiny.<sup>72</sup> In most cases falling within this category,

---

63. *Id.* at 635–37 (Jackson, J., concurring); *see also* *Medellín v. Texas*, 552 U.S. 491, 524, 527–28, 532 (2008) (describing Justice Jackson's structure to determine the constitutionality of the President's implied powers as the "accepted framework" for the Court to decide the constitutionality of domestic application of international commitments); *Dames & Moore v. Regan*, 453 U.S. 654, 661, 669, 686 (1981) (finding that Justice Jackson's tripartite framework outlined in *Youngstown* gathers "together as much combination of analysis and common sense as there is in this area [of executive power]" and was "analytically useful" when the Court evaluated and ultimately upheld the President's seizure of assets linked to Iran during the hostage crisis).

64. *See Youngstown*, 343 U.S. at 635, 638 (Jackson, J., concurring).

65. *Id.* at 635–37.

66. *Id.*

67. *Id.* at 637.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 637–38.

72. *Id.*

the President must refrain from acting, modify his position, or pursue congressional support for his action.<sup>73</sup> Accordingly, Justice Jackson's concurrence carved out a specific place for both Congress and the judiciary in determining foreign affairs' policies.<sup>74</sup>

In his concurrence, Justice Jackson departed from the holding of *Curtiss-Wright* in two ways. First, he rejected the *Curtiss-Wright* majority's "[l]oose and irresponsible use of adjectives" specifically the use of "[i]nherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers."<sup>75</sup> Further, though recognizing a specific need for confidentiality and speed in foreign affairs, Justice Jackson minimized *Curtiss-Wright's* stark delineation between foreign and domestic matters.<sup>76</sup> In so doing, he rejected Justice Sutherland's insinuation that the judiciary should defer to the President's judgment whenever he evokes his commander-in-chief, executive, or "inherent emergency" powers from *Curtiss-Wright*.<sup>77</sup>

The decisions in *Curtiss-Wright* and *Youngstown* represent the two prominent currents in the normative debate over the proper distribution of power to the President in foreign affairs.<sup>78</sup> Justifications for the *Curtiss-Wright* model give prominence to the structural advantages enjoyed by the executive branch for the conduct of foreign affairs.<sup>79</sup> Such arguments generally claim that because of the executive's unitary structure, it is more suited to conduct foreign relations.<sup>80</sup> The executive is most able to identify threats adequately, communicate such threats clearly, respond

---

73. KOH, *supra* note 46, at 109.

74. *Id.* at 109–10.

75. *Youngstown*, 343 U.S. at 646–47 (Jackson, J., concurring) (asserting that the terms lack "fixed or ascertainable meanings" and are frequently used interchangeably); KOH, *supra* note 46, at 109–10.

76. KOH, *supra* note 46, at 110.

77. *Id.*

78. *See id.* at 72–73 (describing how *Curtiss-Wright* comprises one dominant conception of executive power while *Youngstown* comprises the other).

79. *See* John C. Yoo, *Foreign Affairs Federalism and the Separation of Powers*, 46 VILL. L. REV. 1341, 1345–46 (2001) (arguing from Thomas Schelling's theory of international relations that because the world is largely governed by anarchy, a successful foreign relations strategy requires a unitary "rational national actor" who is able to efficiently respond to international developments); *see also* Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 180, 199–205 (2006) (arguing that there are strong functionalist bases for judicial deference to executive interpretations of laws affecting foreign affairs, especially during war time).

80. Yoo, *supra* note 79, at 1345–46.

swiftly, preserve secrecy when necessary, and assess the costs and benefits of different courses of action.<sup>81</sup> For this reason, the President requires a highly centralized base of authority from which to successfully conduct foreign affairs.<sup>82</sup> Accordingly, proponents of the *Curtiss-Wright* model argue against involving more parties such as the judiciary and Congress in the President's foreign affairs' decision making process.<sup>83</sup>

In contrast, proponents of the *Youngstown* model, such as Stanford University Professor Alexander L. George, considered by many to be the greatest international relations scholar of his generation,<sup>84</sup> point to the dangers of foreign policy dominance by a single person.<sup>85</sup> Such scholars argue that allowing the President's decisions to go unchecked may enable uninformed or bad policy making.<sup>86</sup> Arguments for this model rely on historical mishaps such as Watergate, the Vietnam War, the Iran-Contra Affair, and the War on Terror to show that periods of expansive and unchecked presidential power have by and large resulted in policies that have negatively impacted the entire nation.<sup>87</sup> As such, they instead argue for an institutional structure in which Congress is revitalized to participate

---

81. *See id.* (arguing that the rational national actor must be able to act thus, and that in the modern world, only the President can do so).

82. *Id.*; *see also* Ku & Yoo, *supra* note 79, at 199–202 (contending that the judiciary is too diffuse to reach “speedy and unified interpretations” of ambiguous laws and that the executive branch possesses structural advantages for accomplishing this end).

83. *See* Yoo, *supra* note 79, at 1345 (discussing the unitary rational actor approach to foreign policy and noting that both realists and institutionalists assume such a decision making approach in nation-states).

84. Barbara Palmer, *Alexander George, “Giant” in International Relations, Dead at 86*, STAN. REP. (Aug. 23, 2006), <http://news.stanford.edu/news/2006/august23/obitgeorge-082306.html>.

85. *See generally* Alexander L. George, *The Case for Multiple Advocacy in Making Foreign Policy*, 66 AM. POL. SCI. REV. 751, 752 (1972) (highlighting the benefits that critical examination can have on decisions when the process is opened up to individuals with ideological disagreements through multiple advocacy).

86. *See* KOH, *supra* note 46, at 105, 112–13 (explaining that when the President goes to Congress and the public with a policy initiative, others can also “evaluate the wisdom and legality of the action”).

87. *See* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 67–85, 165 (2010) (pointing out that Watergate, the Iran-Contra Affair, and the War on Terror mark outbreaks of illegality from the executive branch and demonstrate the dangers of a “runaway presiden[cy],” which will only accelerate in the years to come if no action is taken); *id.* at 56–59 (outlining the institutional failures that paved the way for executive overreach that culminated in the Iran-Contra Affair).

in foreign policy decisions and in which the courts take an active role in adjudicating matters of overreach by any single branch.<sup>88</sup>

C. *The Supreme Court's Decision in Medellín v. Texas*

The Supreme Court, and the nation at large, found themselves in the midst of exactly such controversy when *Medellín v. Texas* reached the Supreme Court in 2008. *Medellín* involved a memorandum issued by President George W. Bush attempting to supersede a Texas court judgment sentencing Jose Medellín to death.<sup>89</sup> On June 24, 1993, Medellín and several of his fellow gang members captured 14-year-old Jennifer Ertman and 16-year-old Elizabeth Peña as the girls walked along railroad tracks to get home.<sup>90</sup> The girls suffered for more than an hour as six members of the gang took turns raping each girl.<sup>91</sup> Then, the men strangled Jennifer with a belt, stomping on her throat to make sure she had died.<sup>92</sup> Another one of the men strangled Elizabeth to death with one of his shoestrings.<sup>93</sup> That man was Jose Medellin, a Mexican national living in Texas.

Approximately one year after confessing to the crime, a Texas trial court jury found Medellín guilty of capital murder and in a separate

---

88. KOH, *supra* note 46, at 166–84 (suggesting various specific measures to restore balance between the three branches, including subjecting foreign policy initiatives to adversarial review from Congress and other departments in the executive branch, creating a core consultative group to monitor the output of the executive's national security apparatus, enhancing Congress's access to classified and unclassified information, utilizing statutory criminal penalties and even impeachment for instances of executive overreach and legislating the framework established by Justice Jackson in *Youngstown*).

89. *Medellín v. Texas*, 552 U.S. 491, 523 (2008); Consular and Judicial Assistance and Related Issues, 2005 DIGEST § 2(A)(1)(a).

90. *Medellín*, 552 U.S. at 501; *see also* Respondent Cockrell's Answer and Motion for Summary Judgment with Brief in Support at 3–5, *Medellín v. Cockrell*, No. Civ.A. H-01-4018, 2003 WL 25321243 (S.D. Tex. Nov. 15, 2002) (providing the gruesome details of the gang's acts).

91. *Medellín*, 552 U.S. at 501; *see also* Respondent Cockrell's Answer and Motion, *supra* note 90, at 2–5.

92. Joint Appendix at 17, *Medellín v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 189680 (providing the custodial statement of Medellín); Respondent Cockrell's Answer and Motion, *supra* note 90, at 5 (reporting that Medellín stepped on one of the girl's throats “because she would not die”); Allan Turner, *First Execution Nears in Victims' Right Case*, CHRON (May 14, 2006), <http://www.chron.com/news/houston-texas/article/First-execution-nears-in-victims-right-case-1881082.php> (describing that the gang members stomped on the girls' necks “for good measure”).

93. *Medellín*, 552 U.S. at 501; *see also* Respondent Cockrell's Answer and Motion, *supra* note 90, at 5.

hearing sentenced him to death.<sup>94</sup> Counsel for Medellín raised a post-conviction challenge to this sentence on the grounds that local law enforcement officers had failed to inform him of his right to contact the Mexican consulate, as granted under Article 36 of the Vienna Convention—to which the United States was a signatory. Both the Texas trial court and the Court of Criminal Appeals rejected this challenge, finding that Medellín had failed to show that “non-notification of the Mexican authorities impacted . . . the validity of his conviction or punishment.”<sup>95</sup> Medellín then filed a habeas petition in the district court, which the court denied on procedural grounds.<sup>96</sup> In response, Medellín filed a petition of appealability before the Fifth Circuit.<sup>97</sup>

While Medellín’s case stalled there, the International Court of Justice (ICJ) pronounced judgment on *Avena and Other Mexican Nationals*.<sup>98</sup> In that case, the ICJ held that law enforcement officers in the United States had indeed violated the Article 36 rights of Medellín and fifty other Mexican nationals by failing to inform them of their right to contact the Mexican consulate when they were detained.<sup>99</sup> The ICJ ordered that the United States review and reconsider Medellín’s case “by means of its own choosing.”<sup>100</sup>

Despite this ICJ ruling, the Fifth Circuit rejected Medellín’s petition.<sup>101</sup> The Fifth Circuit argued that the Vienna Convention provided no individually enforceable rights, and as such, the decision of the ICJ had no precedential authority in the United States.<sup>102</sup> Medellín then appealed the Fifth Circuit’s decision to the Supreme Court.<sup>103</sup> Prior to oral argument before the Court, President George W. Bush, fearing for the United States’s relations with Mexico, issued an unusual Memorandum for the U.S. Attorney General. The memorandum stated that pursuant to his authority as President, the United States would discharge its international obligations under the

---

94. *Medellín*, 552 U.S. at 501; see also Respondent Cockrell’s Answer and Motion, *supra* note 90, at 4–5 (noting how additional facts were introduced during the punishment phase of the trial).

95. *Medellín*, 552 U.S. at 501–02.

96. Brief for Respondent at 4, *Medellín*, 552 U.S. 491 (No. 06-984), 2007 WL 2428387.

97. *Medellín v. Dretke*, 371 F.3d 270, 274 (5th Cir. 2004).

98. (*Mex. v. U.S.*), 2004 I.C.J. 12, 72 (Mar. 31).

99. *Id.* at 71.

100. *Id.* at 73.

101. *Medellín*, 371 F.3d at 279.

102. *Id.* at 280.

103. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006), *aff’d*, 552 U.S. 491 (2008).

*Avena* judgment and implement the ICJ's decision.<sup>104</sup> Based on President Bush's new memorandum, Medellín's lawyers filed a new post-conviction challenge in Texas courts under Texas laws.<sup>105</sup> As a result of this new challenge, the Supreme Court dismissed the appeal from the Fifth Circuit, reasoning that the case would reach the Supreme Court after the state court had made a decision on the new challenge.<sup>106</sup> The Texas Court, acting on the new challenge, held that the President did not have the constitutional authority to enforce the ICJ's decision via a memorandum.<sup>107</sup> Accordingly, the decision reached the Supreme Court as predicted.

Once at the Supreme Court, the Justices agreed with the Texas Supreme Court, holding that the President did not have the authority to unilaterally enforce the judgment of an international court via a memorandum. Writing for the majority, Justice Roberts reasoned that while submission to the ICJ's jurisdiction was obligatory because of the United States's treaty obligations under the Optional Protocol to the Vienna Convention on Consular Relations (VCCR), enforcing the ICJ's judgment was not. The Optional Protocol said nothing of ICJ decisions' enforcement mechanisms.<sup>108</sup> Article 94(1) of the United Nations Charter was the only potential source for such an obligation.<sup>109</sup> The text of Article 94(1) stated, "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party."<sup>110</sup> The Court reasoned, and in fact the Bush memorandum agreed, that the most plausible reading of this language was that the United States had a "*commitment . . . to take future action through their political branches to comply with an ICJ decision.*"<sup>111</sup> Because of this requirement for future action, the Court concluded that Article 94 of the treaty was non-self-executing.<sup>112</sup>

---

104. *Medellín*, 552 U.S. at 503; Consular and Judicial Assistance and Related Issues, *supra* note 89, § 2(A)(1)(a).

105. See *Ex parte Medellín*, 206 S.W.3d 584, 585–86 (Tex. Crim. App. 2005) (providing the procedural history).

106. *Medellín v. Dretke*, 544 U.S. 660, 666–67 (2005); *Ex parte Medellín*, 206 S.W. at 585–86.

107. *Ex parte Medellín*, 223 S.W.3d at 348.

108. *Medellín*, 552 U.S. at 507–09; Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

109. *Medellín*, 552 U.S. at 500.

110. *Id.* (alterations in original) (quoting U.N. Charter art. 94, para. 1).

111. *Id.* at 508 (citation omitted).

112. *Id.*

Then, evoking precedent, the Court reasoned that the “responsibility for transforming an international obligation . . . into a domestic law falls to Congress.”<sup>113</sup> As the Court in *Whitney v. Robertson*<sup>114</sup> and *Foster v. Neilson*<sup>115</sup> had established, non-self-executing treaties could “only be enforced pursuant to legislation.”<sup>116</sup> The President’s attempt to execute this non-self-executing treaty without such legislation conflicted with the “implicit understanding of the ratifying Senate” and fell within *Youngstown*’s third category.<sup>117</sup>

Further, the Court found that neither its holding in *Sanchez-Llamas v. Oregon*<sup>118</sup> nor the text of Article 94(2) required that U.S. courts follow ICJ decisions.<sup>119</sup> In *Sanchez-Llamas*, the Court held that a state court did not have to exclude evidence obtained in violation of Article 36 of the VCCR.<sup>120</sup> Allowing ICJ interpretations to supersede state procedural rules, the Court stated, “swe[pt] too broadly” and could not be reconciled with the power of domestic courts to adjudicate cases in the United States.<sup>121</sup>

Furthermore, the Court distinguished *Medellín*’s factual circumstances from a 2003 foreign affairs preemption case called *American Insurance Ass’n v. Garamendi*.<sup>122</sup> In *Garamendi*, the Court held that the federal government’s existing scheme of adjudicating insurance claims arising during the Holocaust preempted California’s Holocaust Victim Insurance Relief Act (HVIRA).<sup>123</sup> The HVIRA required California insurance companies who had sold insurance policies in Europe during the Holocaust to disclose requested information regarding such policies to the California Insurance Commissioner or risk losing their licenses.<sup>124</sup> Insurance companies and the American Insurance Association brought action against John

---

113. *Id.* at 525–26.

114. 124 U.S. 190 (1888).

115. 27 U.S. (2 Pet.) 253 (1829).

116. *Medellín*, 552 U.S. at 526 (quoting *Whitney*, 124 U.S. at 194); see *Foster*, 27 U.S. at 315 (“Until such act shall be passed, the Court is not at liberty to disregard the existing laws on the subject.”).

117. *Medellín*, 552 U.S. at 527.

118. 548 U.S. 331 (2006).

119. *Medellín*, 552 U.S. at 509–10, 518.

120. *Sanchez-Llamas*, 548 U.S. at 349–50, 356; see also Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (stating that States can implement the rights provided in Article 36 “in conformity” with their own laws).

121. *Sanchez-Llamas*, 548 U.S. at 357–58.

122. 539 U.S. 396 (2003).

123. *Id.* at 401.

124. *Id.* at 401, 411–12.

Garamendi, the Insurance Commissioner of California, to enjoin him from enforcing the legislation on grounds that it conflicted with federal law.<sup>125</sup> The Court found that the California statute interfered with the national government's conduct of foreign relations.<sup>126</sup> The federal government had already established an exclusive scheme in agreement with Germany for adjudicating such Holocaust-era claims.<sup>127</sup> Even though this scheme did not expressly exclude state action, the Court held, the President's policies were sufficiently clear and the California statute sufficiently impeding to this policy to warrant preempting California's statute.<sup>128</sup>

In squaring its judgment in *Medellín* with *Garamendi*, the Supreme Court distinguished *Garamendi* as a "claims-settlement case[] involv[ing] a narrow set of circumstances" that involved only "the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals."<sup>129</sup> Because cases of this character had enjoyed a long history of congressional knowledge and inaction, they carried a presumption of congressional acquiescence.<sup>130</sup> In contrast, preemption of a criminal judgment by way of a unilateral executive memorandum enjoyed no such history of congressional acquiescence; therefore, the Court held *Garamendi* bore no impact on *Medellín*'s outcome.<sup>131</sup>

The *Medellín* Court then went on to assess whether the executive's traditional powers to conduct foreign affairs justified the President's action.<sup>132</sup> The Court found that they did not because in addition to conflicting with the implicit understanding and will of Congress, it was a radical usurpation of state authority, as historically recognized and established in cases such as *Engle v. Isaac*.<sup>133</sup> The memorandum, if enforced, would "reach[] deep into the heart of the [s]tate's police powers and compel[] state courts to reopen final criminal judgments and set aside neutrally applicable state laws."<sup>134</sup> As such, the Court

---

125. *Id.* at 412.

126. *Id.* at 420–25.

127. *Id.* at 421–25.

128. *Id.* at 420–25.

129. *Medellín v. Texas*, 552 U.S. 491, 531 (2008).

130. *Id.*

131. *Id.* at 532.

132. *Id.* at 530.

133. 456 U.S. 107 (1982); *Medellín*, 552 U.S. at 532 (citing *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)).

134. *Medellín*, 552 U.S. at 532.

concluded, the President's memorandum was unconstitutional and carried no preemptive weight.<sup>135</sup>

#### D. *The Ninth Circuit's Movsesian Decisions*

One year after the *Medellín* judgment, the Ninth Circuit heard *Movsesian v. Victoria Versicherung AG*.<sup>136</sup> In a series of three appeals, the court assessed whether a California insurance regulation recognizing the Armenian Genocide conflicted with an informal executive policy against such recognition.<sup>137</sup> In each of the first two appeals, the Ninth Circuit utilized *Medellín* to reach a different conclusion. The first *Movsesian* judgment (*Movsesian I*), decided by a three-judge panel, alluded to *Medellín* to find that the President had the power to preempt the California law.<sup>138</sup> The second utilized the same to find that no such power existed.<sup>139</sup>

At issue in all three *Movsesian* cases was Senate Bill 1915, which amended the California Code of Civil Procedure to give California courts jurisdiction over certain claims brought by "Armenian Genocide victim[s]."<sup>140</sup> The bill defined and formally recognized the Armenian Genocide, stating, "[t]he legislature recognizes that during the period from 1915 to 1923, many persons of Armenian ancestry residing in the historic Armenian homeland then situated in the Ottoman Empire were victims of massacre, torture, starvation, death marches, and exile. This period is known as the Armenian

---

135. *Id.*

136. *Movsesian v. Victoria Versicherung AG (Movsesian I)*, 578 F.3d 1052 (9th Cir. 2009), *withdrawn*, 629 F.3d 901 (9th Cir. 2010), *rev'd en banc*, 670 F.3d 1067 (9th Cir. 2012), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungsgesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

137. *See Movsesian v. Victoria Versicherung AG (Movsesian III)*, 670 F.3d 1067, 1071 (9th Cir. 2012) (en banc), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungsgesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

138. *Movsesian I*, 578 F.3d at 1059–60 (citing *Medellín*, 552 U.S. at 524, to demonstrate that "[t]he Constitution squarely, if not solely, vests . . . powers" over policies concerning national security, a war in progress, and diplomatic relations with a foreign nation "with the Executive Branch" and therefore permits the preemption of the California policy).

139. *Movsesian v. Victoria Versicherung AG (Movsesian II)*, 629 F.3d 901, 906 (9th Cir. 2010) (citing *Medellín*, 552 U.S. at 531–32, to establish that "informal presidential communications" have "limit[ed] preemptive effect . . . where Congress has not implicitly approved such authority" and therefore could not preempt the California policy in this case), *withdrawing* 578 F.3d 1052 (9th Cir. 2009), *rev'd en banc*, 670 F.3d 1067 (9th Cir. 2012), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungsgesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

140. CAL. CIV. PROC. CODE § 354.4(b) (West 2011).

Genocide.”<sup>141</sup> Three years later, Vazken Movsesian, an Armenian, filed a class action suit against three insurance companies, Victoria Versicherung AG (“Victoria”), Ergo Versicherungsgruppe AG (“Ergo”), and Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AGH (“Munich Re”).<sup>142</sup> Movsesian and his class argued that as beneficiaries to insurance policies issued by these companies, he and his class were entitled to damages for the companies’ breach of contract.<sup>143</sup> In response, Munich Re filed a motion to dismiss on the ground that an executive policy against recognizing the incidents occurring between 1915 and 1923 as genocide preempted Section 354.4.<sup>144</sup> As such, Movsesian and his fellow class members could not utilize the legislation to seek damages from the insurance companies.<sup>145</sup>

At trial, the district court disagreed with Munich Re and held that the federal policy did not preempt the California statute.<sup>146</sup> The court reasoned that the matters governed by the California statute, such as the statute of limitations for filing claims arising from the Armenian Genocide, fall within a state’s traditional competence over procedural laws.<sup>147</sup> Further, the court reasoned that because the policy had no more than a minute effect on foreign affairs, federal policy did not preempt the California law.<sup>148</sup>

On appeal, the Ninth Circuit disagreed with the district court, finding that the presence of a clear executive policy against the recognition of the “Armenian Genocide” preempted the California law.<sup>149</sup> The court pointed to clear statements from the executive that urged against recognizing the Armenian Genocide and expressed that such action would impact negatively the United States’s national

---

141. *Id.* § 354.4 cmt. a.

142. *Movsesian I*, 578 F.3d at 1055.

143. *Id.*

144. *Id.*

145. *Id.* at 1054–55.

146. *Id.* at 1055.

147. *Id.* at 1062.

148. Brief for the United States as Amicus Curiae at 3, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013) (No. 12-9), 2013 WL 1945158 (“[T]here is no indication that [S]ection 354.4(c) has had any effect, incidental or otherwise, upon United States foreign policy.” (second alteration in original) (quoting *Movsesian v. Victoria Versicherung AG*, No. 2:03-cv-09407, slip op. at 33 (C.D. Cal. June 7, 2007))).

149. *Movsesian I*, 578 F.3d at 1063.

security, foreign relations, and war efforts.<sup>150</sup> The court noted that Congress had on numerous occasions acquiesced to the wishes of Presidents Bush and Clinton and repeatedly stalled resolutions attempting to recognize the Armenian Genocide.<sup>151</sup> Further, the court reasoned that the preemptive powers of the federal policy originated not from the classification of that policy as an executive agreement or otherwise but “from the source of the executive branch’s authority to act.”<sup>152</sup> Because such matters of foreign policy fall within the executive’s sphere of power, the President’s policy was entitled to preemptive weight.<sup>153</sup>

However, one year later, the Ninth Circuit reversed its decision, this time finding that the federal policy against recognizing the Armenian Genocide was not clear and therefore could not preempt California’s legislation.<sup>154</sup> Starting with conflict preemption, the court held that because the President’s policy against recognizing the Armenian Genocide was neither contained in an executive agreement nor clearly expressed in informal documents, there could be no conflict preemption.<sup>155</sup> Specifically, the court pointed to statements made by President Obama as a U.S. Senator, in which he expressed support for the recognition of the “Armenian Genocide.”<sup>156</sup> The Ninth Circuit elaborated that the federal government knew about but had not challenged existing legislation in thirty-nine other states recognizing the Armenian Genocide.<sup>157</sup> Such inaction, the Court reasoned, evidenced the federal government’s ambiguity on the policy.<sup>158</sup> The court also rejected the possibility of federal field preemption because it reasoned that the

---

150. *Id.* at 1057–59 (inferring from a series of presidential responses to House Resolutions that recognizing the Armenian Genocide would complicate peace efforts in the region, possibly result in harm to American troops in the field, and do great harm to key relations with NATO allies).

151. *Id.* (referencing that House Resolutions 596, 106th Cong. (2000); 193, 108th Cong. (2003); and 106, 110th Cong. (2007) were never brought to a vote after the Executive expressed its concerns).

152. *Id.* at 1059.

153. *Id.*

154. *Movsesian v. Victoria Versicherung AG (Movsesian II)*, 629 F.3d 901 (9th Cir. 2010), *withdrawing* 578 F.3d 1052 (9th Cir. 2009), *rev’d en banc*, 670 F.3d 1067 (9th Cir. 2012), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

155. *Id.* at 905–06.

156. *Id.* at 907; *see also* 154 Cong. Rec. 7039 (2008) (statement of Sen. Barack Obama).

157. *Movsesian II*, 629 F.3d at 907.

158. *Id.*

California law concerned an area of traditional state interest.<sup>159</sup> Citing a dissenting opinion by Justice Ginsburg from *Garamendi*, the court placed the regulation of insurance in an area of state responsibility.<sup>160</sup> The court concluded that, given the presence of this interest, the ambiguous expression of the presidential policy was not strong enough to carry preemptive weight.<sup>161</sup>

Two years later, this time sitting en banc, the Ninth Circuit reversed its decision yet again.<sup>162</sup> This time, it held that the California law intruded on the federal government's exclusive power to conduct and regulate foreign affairs.<sup>163</sup> The court held that although on the surface the statute concerned rules of procedure, its "true purpose" was to "send a political message on an issue of foreign affairs by providing relief and a friendly forum to a perceived class of foreign victims."<sup>164</sup> As such, the statute more than incidentally touched upon foreign affairs because the adjudication of the provision required a "highly politicized inquiry into the conduct of a foreign nation."<sup>165</sup> Because this underlying purpose conflicted with the federal government's policy, the Ninth Circuit held the California statute unconstitutional.<sup>166</sup>

## II. *MEDELLÍN'S* SCOPE OF APPLICATION TO FOREIGN AFFAIRS PREEMPTION CASES IS MORE LIMITED THAN RECENT SCHOLARSHIP SUGGESTS

Despite what scholars have suggested, the Ninth Circuit correctly found that *Medellín* did not pose an obstacle to its holding in *Movsesian III* because of three essential differences between the two

---

159. *Id.*

160. *Id.* at 908 (citing *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 434 n.1 (2003) (Ginsburg, J., dissenting)); see also McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945). Since the passing of the McCarran-Ferguson Act, the Supreme Court has recognized the power of the states to regulate insurance. See *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-18 (1979) ("The primary concern of Congress . . . in enacting [the McCarran-Ferguson Act was to] ensure that the States would continue to have the ability to tax and regulate the business of insurance."); *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452 (1962) ("[T]he McCarran-Ferguson Act . . . provide[s] that the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause.").

161. *Movsesian II*, 629 F.3d at 907.

162. *Movsesian v. Victoria Versicherung AG (Movsesian III)*, 670 F.3d 1067, 1069-70 (9th Cir. 2012) (en banc), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

163. *Id.* at 1075.

164. *Id.* at 1075-77.

165. *Id.* at 1076.

166. See *id.*

cases. First, in *Medellín*, the President's exercise of power radically and inherently conflicted with the will of Congress, whereas the executive policy in *Movsesian III* had repeatedly received congressional acquiescence. Second, in *Medellín*, enforcing the Bush Memorandum would have resulted in a transfer of power from domestic to international courts, whereas enforcing the federal policy in *Movsesian III* resulted in no such power transfer. Finally, in *Medellín*, the President's attempted exercise of executive authority encroached on the quintessential state power over criminal matters, whereas the executive policy in *Movsesian III* did not act upon an area of such quintessential state concern.

A. *While the President's Policy in Medellín Conflicted with the Will of Congress, the Executive Policy in Movsesian III Carried Congressional Acquiescence*

In reaching the decision to disallow the President's memorandum to preempt the Texas court judgment in *Medellín v. Texas*, the Court relied upon a characterization of Article 94 of the United Nations Charter as non-self-executing.<sup>167</sup> As such, President Bush's attempt to implement the treaty into law by way of unilateral presidential action was a radical departure from the fundamental constitutional allocation of lawmaking power to Congress.<sup>168</sup> Legal scholars and courts have consistently affirmed and reaffirmed that the authority to pass legislation implementing a non-self-executing treaty rests with Congress.<sup>169</sup> The U.S. Constitution grants general law-making power to Congress in the Necessary and Proper Clause,<sup>170</sup> and since 1829,

---

167. *Medellín v. Texas*, 552 U.S. 491, 505 (2008). While it is debatable whether the treaty was in fact non-self-executing, a matter taken up by the dissent, *id.* at 542–46 (Breyer, J., dissenting), this question is immaterial to the analysis here as President Bush's memorandum operated under the assumption that the treaty was non-self-executing and proceeded to attempt to unilaterally enforce it even under this characterization.

168. *Id.* at 527 (majority opinion).

169. See David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1099–1100 (2000) (reasoning that the Constitution unequivocally leaves the power to implement non-self-executing treaties to Congress). But see Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1937–38 (2005) (arguing that the text and structure of the Treaty Clause and the Necessary and Proper Clause do not establish that the power to execute non-self-executing treaties rests with Congress).

170. See U.S. CONST. art. I, § 8, cls. 1, 18 (“Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

the Court has continuously reaffirmed that this law-making power encompasses the power to implement non-self-executing treaties.<sup>171</sup>

In *Foster v. Neilson*, the Court voiced this principle when it held that the “legislature” bore the responsibility of enacting laws to implement a non-self-executing treaty between Spain and the United States into enforceable provisions of U.S. law.<sup>172</sup> Justice Marshall writing for the majority wrote, “when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political . . . department; and the legislature must execute the contract . . . .”<sup>173</sup> Justice Marshall’s opinion made clear that when a treaty is non-self-executing, it is Congress who holds the power to execute it. Later, in *Whitney v. Robertson*, the Supreme Court further affirmed this principle, stating that “[w]hen [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject.”<sup>174</sup>

David Golove, one of the foremost scholars of treaty power and implementation in the United States, also confirms the fundamental nature of this principle, stating the power to pass legislation implementing non-self-executing treaties, like the power to pass any legislation to make federal law, “without doubt” lies with Congress.<sup>175</sup> This principle is so rudimentary to U.S. law, Golove contends, that no one has ever really questioned it.<sup>176</sup> Louis Henkin, Professor Emeritus at Columbia University prior to his passing in 2010, considered one of the most influential scholars of international law and foreign policy, also affirmed this understanding. In his seminal book, *Foreign Affairs and the United States Constitution*, Henkin begins a section called “Congressional

---

171. See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314–15 (1829).

172. See *id.*

173. *Id.* at 314.

174. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

175. Golove, *supra* note 169, at 1311 (“The constitutional text . . . makes . . . clear where authority lies for implementing non-self-executing treaties: Congress is given the authority ‘[t]o make all Laws which shall be necessary and proper for carrying into Execution’ not only its own powers, but ‘all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’ The treaty power is without doubt such a power, and there has never been any question but that Congress has the power under the Necessary and Proper Clause to implement any (constitutional) treaty made by the President and Senate . . . .” (third alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 18)).

176. *Id.*

Implementation” by stating, “[w]hen a treaty requires domestic legislation . . . only the Congress can supply them.”<sup>177</sup>

In light of this broad consensus, President Bush’s attempt to implement the ICJ judgment, while acknowledging that Article 94 was non-self-executing, was a radical departure from a core pillar of the American constitutional structure. Responding to this overreach, the Court found that it was impossible for such action to acquire congressional acquiescence because it was by its very nature at odds with Congress’s will.<sup>178</sup> The *Medellín* Court, therefore, placed the President’s memorandum in *Youngstown*’s third zone of presidential authority and refused compliance with its directive.<sup>179</sup>

The characterization of the executive policy in *Medellín* as belonging in the third category of *Youngstown* distinguishes it from *Movsesian III* in an essential way. Unlike *Medellín*, the presidential policy in *Movsesian III* received congressional acquiescence numerous times. This congressional acquiescence is evidenced by Congress’s willingness to stall three separate House Resolutions as a direct response to efforts by the President.<sup>180</sup> First, in 2000, the House of Representatives agreed to stall House Resolution 596 recognizing the Armenian Genocide after President Clinton made extensive efforts to halt the resolution from going to the floor.<sup>181</sup> The resolution, which used the phrase “Armenian Genocide” twenty-two times, formally recognized the Armenian Genocide by detailing its atrocities and expressing the federal government’s support and sympathy for its victims.<sup>182</sup> In response, President Clinton personally contacted Speaker of the House Dennis Hastert and urged him not to bring the resolution to the floor.<sup>183</sup> In his letter, President Clinton expressed

---

177. HENKIN, *supra* note 14, at 204.

178. *Medellín v. Texas*, 552 U.S. 491, 527 (2008) (“When the President asserts the power to ‘enforce’ a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the implicit understanding of the ratifying Senate. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson’s third category, not the first or even the second.”).

179. *Id.*

180. See *Movsesian v. Victoria Versicherung AG (Movsesian I)*, 578 F.3d 1052, 1057 (9th Cir. 2009), *withdrawn*, 629 F.3d 901 (9th Cir. 2010), *rev’d en banc*, 670 F.3d 1067 (9th Cir. 2012), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungsgesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013). These failed resolutions were H.R. Res. 106, 110th Cong. (2007); H.R. Res. 193, 108th Cong. (2003); and H.R. Res. 596, 106th Cong. (2000).

181. H.R. Res. 596.

182. *Id.*

183. Letter to the Speaker of the House of Representatives on a Resolution on Armenian Genocide, 3 PUB. PAPERS 2225–26 (Oct. 19, 2000).

concern that bringing the resolution would have “far-reaching negative consequences” for United States’s efforts in the Middle East and for improvement in the relations between Armenia and Turkey.<sup>184</sup> As a response to these efforts, the House agreed and never brought the bill to a vote.<sup>185</sup>

In 2003, the House made another attempt to give formal recognition to the Armenian Genocide in House Resolution 193.<sup>186</sup> Again, the House never brought the resolution to a vote because of executive efforts, this time by President George W. Bush and senior officials from the State Department.<sup>187</sup> In various letters, the President and his officials expressed their opposition to the resolution, and again, the House complied.<sup>188</sup>

In 2007, the House of Representatives brought another bill, similar in content to the previous two, yet again attempting to give formal recognition to the Armenian Genocide.<sup>189</sup> The Bush Administration again expressed its disapproval of the bill, strongly urging the House not to bring it to a vote.<sup>190</sup> In a letter from Secretary of Defense Robert Gates and Secretary of State Condoleezza Rice to Speaker of House Nancy Pelosi, the Administration emphasized Turkey’s central role in the United States war in Iraq.<sup>191</sup> The letter explained that recognition of the Armenian Genocide by the French government

---

184. *Id.* Senior administration officials such as the Secretary of Defense Bill Cohen, Assistant Secretary of State Barbara Larkin, and Undersecretary of Defense Walter B. Slocombe, as well as a bipartisan group of former national security and military leaders, also all sent letters to the Chairman of the Committee on International Relations, in which they, too, cautioned against the passing of the Resolution. H.R. REP. NO. 106-933, at 14–18 (2000).

185. *Mousesian I*, 578 F.3d at 1058.

186. H.R. Res. 193, 108th Cong. (2003); *see also Mousesian I*, 578 F.3d at 1058.

187. *Mousesian I*, 578 F.3d at 1058.

188. Press Release, White House Office of the Press Sec’y, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/10/20071010.html> [hereinafter Bush Press Release].

189. H.R. Res. 106, 110th Cong. (2007).

190. Letter from Robert M. Gates, Sec’y of Def., and Condoleezza Rice, Sec’y of State, to Nancy M. Pelosi, Speaker of the House of Representatives (Mar. 7, 2007), *available at* [http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/military/library/congress/2007\\_hr/070315-gatesandrice.pdf](http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/military/library/congress/2007_hr/070315-gatesandrice.pdf) [hereinafter Pelosi Letter]; *see also* Letter from Robert M. Gates, Sec’y of Def., and Condoleezza Rice, Sec’y of State, to John A. Boehner, Minority Leader of the House of Representatives (Mar. 7, 2007), *available at* [http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/military/library/congress/2007\\_hr/070315-gatesandrice.pdf](http://www.globalsecurity.org/jhtml/jframe.html#http://www.globalsecurity.org/military/library/congress/2007_hr/070315-gatesandrice.pdf).

191. Pelosi Letter, *supra* note 190, at 2.

had resulted in Turkey's terminating military contract negotiations with France.<sup>192</sup> Similar actions by Turkey towards the United States would threaten the United States's war efforts in Iraq and put American troops at risk.<sup>193</sup> In a press release by the White House, the President further asked members of Congress to oppose the Armenian Genocide Resolution.<sup>194</sup> The statement cautioned that the passing of the Resolution would undermine United States's relations with Turkey, a nation the President identified as a "key ally in NATO [North Atlantic Treaty Organization] and in the global war on terror."<sup>195</sup> Upon the issuance of these statements, the House of Representatives took no further action and the "Armenian Genocide Resolution" went no further.<sup>196</sup>

Since 2007, the White House's opposition to formally recognizing the Armenian Genocide has remained the same. For example, the President's statements on Armenian Remembrance Day in 2009, 2010, 2011, 2012, 2013, and 2014 never used the phrase "Armenian Genocide."<sup>197</sup> Moreover, on April 6, 2009, when a reporter asked President Obama whether he would support a resolution recognizing the Armenian Genocide in a press conference, President Obama specifically stated that though his stance as a Senator had not changed, he would not express his views on the matter because the Turkish and Armenian governments had made progress on their own in resolving the matter.<sup>198</sup> That the President's policy against the

---

192. *Id.*

193. *Id.*

194. Bush Press Release, *supra* note 188.

195. *Id.*

196. *Movsesian v. Victoria Versicherung AG (Movseian I)*, 578 F.3d 1052, 1059 (9th Cir. 2009), *withdrawn*, 629 F.3d 901 (9th Cir. 2010), *rev'd en banc*, 670 F.3d 1067 (9th Cir. 2012), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungsgesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

197. Statement on Armenian Remembrance Day, 2014 DAILY COMP. PRES. DOC. 286 (Apr. 24, 2014); Statement on Armenian Remembrance Day, 2013 DAILY COMP. PRES. DOC. 270 (Apr. 24, 2013); Statement on Armenian Remembrance Day, 2012 DAILY COMP. PRES. DOC. 302 (Apr. 24, 2012); Statement on Armenian Remembrance Day, 2011 DAILY COMP. PRES. DOC. 283 (Apr. 23, 2011); Statement on Armenian Remembrance Day, 1 PUB. PAPERS 537 (Apr. 24, 2010); Statement on Armenian Remembrance Day, 1 PUB. PAPERS 553 (Apr. 24, 2009).

198. The President's News Conference with President Abdullah Gul of Turkey in Ankara, Turkey, 1 PUB. PAPERS 446, 448 (Apr. 6, 2009) ("I don't want to, as the President of the United States, preempt any possible arrangements or announcements that might be made in the near future. I just want to say that we are going to be a partner in working through these issues in such a way that the most important parties, the Turks and the Armenians, are finally coming to terms in a constructive way.").

formal recognition of the Armenian Genocide continues to this day is also evidenced by express statements in an amicus curiae brief filed by the United States in *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*,<sup>199</sup> in which the government argued against the granting of a writ of certiorari.<sup>200</sup> There, the Solicitor General stated on behalf of the Executive,

Section 354.4 does not simply intrude on foreign policy judgments made long ago by the United States. . . . Petitioners' claims implicate difficult questions of foreign policy, and the Executive Branch has consistently responded to those questions by encouraging Turkish and Armenian officials to engage in a dialogue that acknowledges their shared history. California wants to take a different approach . . . .<sup>201</sup>

In light of these statements by the President and his repeated refusals to refer to an "Armenian Genocide," it is clear the federal policy against recognizing the Armenian Genocide has remained the same.

As outlined above, the presidential action taken in *Medellín* inherently conflicted with the will of Congress, and the presidential policy in *Movsesian III* received congressional acquiescence on three separate occasions. Accordingly, *Medellín* is in the third and lowest category of presidential authority from *Youngstown*, while *Movsesian III* is in the second.<sup>202</sup> Therefore, the President's policies are subject to far more scrutiny in *Medellín* than they are in *Movsesian III*.<sup>203</sup> In light of this essential difference, applying *Medellín* to *Movsesian III* is inappropriate.

*B. While Medellín Involved a Shift of Power from U.S. Courts to International Courts, No Such Shift Was Present in Movsesian III*

*Medellín* was also a highly unique case because enforcing the President's policy therein would have resulted in a dramatic transfer of adjudicatory powers from U.S. domestic courts to international courts. Warning of this threat, the majority in *Medellín* wrote,

*Medellín's* interpretation would allow ICJ judgments to override otherwise binding state law; there is nothing in his logic that would exempt contrary federal law from the same fate. . . . And there is nothing to prevent the ICJ from ordering state courts to annul

---

199. 133 S. Ct. 2795 (2013).

200. Brief for the United States as Amicus Curiae, *supra* note 148, at 16–17.

201. *Id.*

202. *See supra* notes 167–79 and accompanying text.

203. *See supra* notes 67–74 and accompanying text.

criminal convictions and sentences, for any reason deemed sufficient by the ICJ.<sup>204</sup>

The Court went on to say that “[e]ven the dissent flinches at reading the relevant treaties to give rise to self-executing ICJ judgments in all cases.”<sup>205</sup>

The Supreme Court’s decision in *Sanchez-Llamas* further evidences judicial concern about the power of international courts.<sup>206</sup> In *Sanchez-Llamas*, the Court emphasized that Article III, Section 1 of the Constitution vests the authority to interpret and implement treaties as federal law in the Supreme Court of the United States.<sup>207</sup> The Court reiterated the limits on the ICJ’s power in *Medellín*, stating, “[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.”<sup>208</sup>

In fact, scholars, such as D.A. Jeremy Telman at Valparaiso University, have criticized *Medellín* on grounds that its reasoning was guided more by this very fear rather than any plausible reading of the Constitution or precedent.<sup>209</sup> Telman argues that the decision in *Medellín* is neither supported by the Constitution’s text nor the Supreme Court’s recent case law.<sup>210</sup> The drafters’ original intent in creating the Supremacy Clause, Telman contends, was to “empower[] the courts to enforce treaties at the behest of affected individuals without awaiting authorization from state or federal legislatures.”<sup>211</sup> As such, the Framers intended to create a presumption of self-

---

204. *Medellín v. Texas*, 552 U.S. 491, 518 (2008).

205. *Id.*

206. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–56 (2006) (postulating that because the Constitution gives the judiciary power to interpret federal laws, treaties—which are on par with federal law—also should be interpreted by the judiciary); *see also Medellín*, 552 U.S. at 518 (using *Sanchez-Llamas* to justify its reasoning that ICJ judgments are not “conclusive on [American] courts”); *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (rejecting the application of the laws of war in U.S. domestic courts in dicta).

207. *Sanchez-Llamas*, 548 U.S. at 353–54. The Court stated, “[i]f treaties are to be given effect as federal law under our legal system, determining their meaning . . . ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court.’” *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

208. *Medellín*, 552 U.S. at 518 (alteration in original) (quoting *Sanchez-Llamas*, 548 U.S. at 354).

209. *See* D.A. Jeremy Telman, *Medellín and Originalism*, 68 MD. L. REV. 377, 380–83 (2009) (explaining that the majority opinion’s reasoning largely ignored the “original meaning of the Supremacy Clause”).

210. *See id.* at 414 (stating that the Court reached its conclusion “[b]ased on an abbreviated discussion of [early] cases and guided by relevant scholarship”).

211. *Id.* (quoting Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 696 (1995)).

execution, wherein treaties are assumed self-executing unless they expressly state otherwise.<sup>212</sup> In finding the treaty in *Medellín* non-self-executing, the *Medellín* Court manipulated this requirement in order to evade the possibility of U.S. courts submitting to an international legal system.<sup>213</sup>

In the three *Movsesian* decisions, however, the enforcement of the presidential policy would not have involved such a shift of power from U.S. courts to international courts. The sole issue before the Ninth Circuit was whether the enforcement of the executive policy against the recognition of the Armenian Genocide preempted a state policy that gave such recognition to the Armenian Genocide. This decision bore no impact on the power of international courts to adjudicate matters that lay at the heart of state powers. As such, concerns with allowing preemption to go forward in *Medellín* were not present in *Movsesian III*.

C. *Medellín Involved the Adjudication of a Quintessential State Interest While Movsesian III Did Not.*

*Medellín's* application to *Movsesian III* is further limited because *Medellín* involved matters of criminal law while *Movsesian III* involved insurance regulation matters.<sup>214</sup> Because criminal law is an arena unequivocally reserved to the states, it is qualitatively more resilient to preemption than the insurance regulation matters at issue in *Movsesian III*.<sup>215</sup>

It is indisputable that criminal matters fall to state courts in U.S. legal jurisprudence. The Tenth Amendment entrusts states with police powers to create and adjudicate almost all criminal matters.<sup>216</sup>

---

212. *Id.*

213. *See id.* at 415 (“[T]he Supremacy Clause was necessary to prevent the federal government from being embarrassed by state regulation that substantially frustrated the government’s ability to comply with treaty obligations.”).

214. *See Medellín v. Texas*, 552 U.S. 491, 532 (2008) (stating that criminal judgments and criminal state laws are at the very heart of state police powers).

215. *See Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 425 (2003) (holding that the executive policy for handling insurance claims arising out of the Holocaust preempted California’s Holocaust Victim Insurance Relief Act (HRIVA) because it impermissibly interfered with the President’s conduct of foreign affairs); *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 118, 120 (2d Cir. 2010) (holding that the executive policy in favor of the resolution of Holocaust-era insurance claims through the International Commission on Holocaust Era Insurance Claims (ICHEIC) preempted insurance benefits claims against Italian insurers under state statute and customary international law).

216. *See U.S. CONST. amend. X* (declaring that all powers not delegated to the federal government are reserved for the states).

In *Engle v. Isaac*, the Supreme Court reaffirmed this basic principle, stating, “States possess primary authority for defining and enforcing the criminal law.”<sup>217</sup> In sum, *Medellín* appropriately characterized criminal law as at the heart of states’ powers.<sup>218</sup>

Courts have recognized that the nature of the injury sustained, the nature of the law at issue, and the institutional structure of a legal system are relevant in determining whether to allow a foreign judgment to prevail over a domestic one.<sup>219</sup> In *Hilton v. Guyot*,<sup>220</sup> the Supreme Court’s paradigmatic case on the comity of nations, the Court stated that whether a nation will allow the laws of other nations to interfere with the enforcement of its own laws in its courts “depend[s] on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions.”<sup>221</sup> Because criminal matters quintessentially belong to the states in the “policy” and legal “institutions” of American law, courts in the United States are less likely to accept the contrary judgments of international courts over the judgments of domestic courts in this arena.<sup>222</sup>

As the *Guyot* criteria suggest, the nature of the injuries sustained is also relevant in deciding to allow international judgments or laws to override domestic ones in the receiving state.<sup>223</sup> In *Medellín*, the injuries sustained were particularly gruesome. *Medellín*’s victims were only fourteen and sixteen years old.<sup>224</sup> The girls were taunted,

---

217. *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

218. *Medellín*, 552 U.S. at 532.

219. See *Hilton v. Guyot*, 159 U.S. 113, 163–67 (1895) (outlining the factors that jurists have considered in deciding to allow the judgments of an international court to have weight in the United States’s domestic courts); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS §§ 23–24, 28 (8th ed. 1883) (describing how the structure and institutional framework of governments impact their openness to the judgments of non-domestic courts under the doctrine of comity).

220. 159 U.S. 113 (1895).

221. *Id.* at 164–65 (quoting STORY, *supra* note 219, § 28).

222. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337 (2006) (rejecting the application of the Vienna Convention even though it created judicially enforceable rights and allows a state to apply regular rules of procedural default); *Breard v. Greene*, 523 U.S. 371, 373 (1998) (*per curiam*) (refusing to grant habeas petition to Paraguayan national convicted of rape and capital murder even though he had not been informed of his Vienna Convention of Consular Relations (VCCR) rights).

223. See *supra* note 219 and accompanying text.

224. *Medellín v. Texas*, 552 U.S. 491, 501 (2008); Respondent Cockrell’s Answer and Motion, *supra* note 90, at 3–5 (providing the gruesome details of the gang’s acts).

gang-raped, and then gruesomely strangled to death with their own belt and shoelace.<sup>225</sup> Though the persuasive force of these facts do not make for good precedent,<sup>226</sup> they inevitably figure into the Court's decision to disallow the enforcement of a foreign judgment over domestic laws and judgments.<sup>227</sup>

Conversely, *Mousesian III* did not involve matters that were of such quintessential state interest or the enforcement of an international judgment. *Mousesian III* involved a California law that allowed California courts to adjudicate insurance claims brought by victims of the "Armenian Genocide" and extended the statute of limitations for hearing such cases. Though the Supreme Court now recognizes that states hold most of the power over insurance regulation,<sup>228</sup> the history of the allocation of this power between the federal and state government has been one of tension.<sup>229</sup>

The Supreme Court's jurisprudence starting in *Paul v. Virginia*,<sup>230</sup> its subsequent overturning in *United States v. South-Eastern Underwriters Ass'n*,<sup>231</sup> and the final enactment of the McCarran-Ferguson Act demonstrate the historical tension between the federal

---

225. *Medellín*, 552 U.S. at 501; Respondent Cockrell's Answer and Motion, *supra* note 90, at 4–5.

226. *See* *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.")

227. *See supra* note 219 and accompanying text.

228. Congress passed legislation to require that the Supreme Court recognize state power over insurance regulations. 15 U.S.C. §§ 1011–1015 (2012) ("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.")

229. Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625, 626 (1999) (explaining the role of the states in regulating insurance policy and the power struggle between the federal and the state governments in governing insurance regulations).

230. 75 U.S. (8 Wall.) 168, 177, 180 (1868), *overruled by* *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533 (1944), *superseded by statute*, McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945), *as recognized in* *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 27–28 (1996).

231. 322 U.S. 533 (1944), *superseded by statute*, McCarran-Ferguson Act, Pub. L. No. 79-15, *as recognized in* *Barnett Bank of Marion Cnty., N.A.*, 517 U.S. 25.

and state governments.<sup>232</sup> In the early days of the Republic, the states held most of the power to regulate insurance. In *Paul v. Virginia*, the Court canonized this allocation of power by rejecting attempts by the insurance industry to shift the authority to regulate insurance to the federal government. In *Paul*, the Supreme Court held, much to the dismay of insurance companies that wished to benefit from what they believed would be less aggressive federal oversight, that insurance regulation was a state power and did not constitute interstate commerce.<sup>233</sup>

In 1944, however, the Supreme Court overturned this holding in *South-Eastern Underwriters*.<sup>234</sup> This time, the Court held that insurance regulation involved interstate commerce was subject to regulation by the federal government and was therefore governed by the Sherman Anti-Trust Act.<sup>235</sup> However, signaling the tension between the federal and the state government, Congress overruled this holding by enacting the McCarran-Ferguson Act one year later.<sup>236</sup> The Act states,

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.<sup>237</sup>

Under the McCarran-Ferguson Act, the power to regulate insurance is largely restored to the states with exceptions for federal regulation only in areas that involve the “business of insurance.”<sup>238</sup>

Furthermore, the Supreme Court has recently characterized states’ interest in insurance regulation laws as weak.<sup>239</sup> In *Garamendi*, the Court held that California did not have a traditionally strong interest in adjudicating matters regarding insurance claims and that federal law preempted a California law requiring the disclosure of Holocaust-era European insurance policies.<sup>240</sup> While some have argued that the

---

232. 15 U.S.C. § 6701; *Barnett Bank of Marion Cnty., N.A.*, 517 U.S. at 27–28; *S.-E. Underwriters Ass’n*, 322 U.S. at 578–87, 592; *Paul*, 75 U.S. at 177, 180, 183.

233. *Paul*, 75 U.S. at 183 (finding that insurance was not a transaction of commerce and, thus, could not be regulated by Congress).

234. *S.-E. Underwriters*, 322 U.S. at 552–53.

235. *Id.* at 582–88.

236. 15 U.S.C. §§ 1011–1015.

237. *Id.* § 1011.

238. *Id.* § 1012(b).

239. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 425 (2003).

240. *See id.* (“The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield. If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National

Court's treatment of *Garamendi* in *Medellín* swung the pendulum back in favor of the states by limiting *Garamendi* to its own "narrow set of circumstances,"<sup>241</sup> this contention is debatable for several reasons.

First, the text of the *Medellín* opinion suggests that the Court relied upon the characterization of *Garamendi* as a claim-settlement case only because it needed to establish that the policy therein had enjoyed a long history of congressional acquiescence. Justice Souter, writing for the majority in *Garamendi*, stated,

Making executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799 . . . . Given the fact that the practice goes back over 200 years, and has received congressional acquiescence throughout its history, the conclusion that the President's control of foreign relations includes the settlement of claims is indisputable.<sup>242</sup>

By establishing that claims-settlement cases enjoyed 200 years of congressional inaction, and that *Garamendi* was a claims-settlement case, the court was able to grant *Garamendi* a presumption of congressional acquiescence.<sup>243</sup> Under this construction, the Court could categorize the case under zone two of *Youngstown* and thus justify the President's preemption therein.<sup>244</sup>

However, the federal policy in the *Movsesian* cases possessed specific evidence of congressional acquiescence and did not depend on characterization as a claim-settlement case to fall into *Youngstown*'s second category.<sup>245</sup> Therefore, regardless of whether *Movsesian III* is characterized as a claims-settlement case, there were sufficient grounds on which to find the presence of congressional acquiescence and, accordingly, preempt the California law.<sup>246</sup> Conversely, the federal memorandum in *Medellín* was intruding on

---

Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.").

241. See Ramsey, *supra* note 9, at 35–37.

242. *Garamendi*, 539 U.S. at 415 (internal quotations marks and alterations omitted).

243. *Id.* at 415–16.

244. *Id.*

245. See *Movsesian v. Victoria Versicherung AG (Movsesian I)*, 578 F.3d 1052, 1060 (9th Cir. 2009) (stating that there is a clear executive policy against recognizing the "Armenian Genocide," that this policy has received congressional "deference," and that as such, it is "entitled to preemptive weight"), *withdrawn*, 629 F.3d 901 (9th Cir. 2010), *rev'd en banc*, 670 F.3d 1067 (9th Cir. 2012), *cert. denied*, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S. Ct. 2795 (2013).

246. See *supra* notes 63–69.

criminal law, an area that has throughout history been unequivocally entrusted to the states.

In light of this congressional acquiescence and the disparity between California's interest in adjudicating the subject matter regarding insurance claims and Texas's quintessential interest in adjudicating matters of criminal law, *Medellín's* extension to *Movsesian III* is inappropriate.

### III. THE *YOUNGSTOWN* POWER-SHARING MODEL IS MORE LIKELY TO YIELD RATIONAL POLICY CHOICES AND ACCORD WITH DEMOCRATIC VALUES THAN *CURTISS-WRIGHT'S* UNITARY EXECUTIVE MODEL

The above discussion demonstrates that there are good reasons to accept that *Movsesian III* is consistent with the Supreme Court's formulation of foreign affairs preemption in *Medellín*.<sup>247</sup> The question still remains, however, whether that conception of foreign affairs preemption is a normatively good one.

This Part argues that the conception of power sharing captured in both *Medellín* and *Movsesian III* as consistent with *Youngstown* is good for several reasons. First, the *Youngstown* model's vision of congressional-executive cooperation carries structural advantages that are outweighed by the secrecy and dispatch advantages offered by the unitary executive model.<sup>248</sup> Second, beyond the above consequentialist considerations, the *Youngstown* model is superior because it is more consistent with deontological commitments to a democratic model of constitutional government.<sup>249</sup> In so far as the Supreme Court's decision in *Movsesian III* is consistent with the Court's holding in *Youngstown*, the Ninth Circuit espouses a sound conception of the executive power in foreign affairs.

A multiple advocacy model of foreign affairs decision making, where various advocates from both inside and outside of the executive engage in structured debate over conflicting positions, is structurally superior to *Curtiss-Wright's* unitary, rational national actor model.<sup>250</sup> These structural advantages result from a realistic recognition of the limitations that individual cognitive abilities

---

247. See *supra* Part II.A–C.

248. George, *supra* note 85, at 752 (arguing that foreign policy decision making is more effective when people with different opinions from outside and inside the executive branch participate in discussion than when there is one unitary decision maker).

249. KOH, *supra* note 46, at 212–13 (finding unpersuasive the arguments against congressional involvement in foreign policy).

250. George, *supra* note 85, at 752.

face.<sup>251</sup> To account for these limitations, the multiple advocacy model includes various voices advocating for conflicting courses of action in foreign-policy decision making procedures.<sup>252</sup> In so doing, the multiple advocacy model ensures that the Executive makes foreign policy choices after a careful analysis of differing perspectives and on the basis of complete information.<sup>253</sup> Stanford University professor Alexander L. George states, in so far as

there is significant *disagreement* among policy makers on . . . foreign policy ideology and related cognitive beliefs, . . . a more openly competitive system . . . is more likely to secure a critical examination and weighing of [such beliefs], . . . than a highly centralized policy-making system.<sup>254</sup>

In an organizational framework affording “structured, balanced debate among policy advocates” from inside and outside the executive branch, foreign policy decisions are more likely to be rational and adequately assessed.<sup>255</sup>

Additionally, social studies of decision making systems provide evidence that certain amounts of conflict over choices in a group can have a productive influence on the group’s problem solving abilities and on the quality of its choices.<sup>256</sup> Joseph Bower, a Harvard University professor, argued that conflict is significant for motivating individuals to engage in constructive thought and analysis.<sup>257</sup> In a unitary executive model, the Executive’s decision making procedures

---

251. See Steven B. Redd & Alex Mintz, *Policy Perspectives on National Security and Foreign Policy Decision Making*, 41 POL’Y STUD. J. S11, S13 (2013) (arguing that “individuals face constraints that limit decision-makers’ computational capabilities . . . [and] memory and recall abilities”).

252. George, *supra* note 85, at 751.

253. *Id.*

254. *Id.* at 752.

255. *Id.* at 751.

256. See, e.g., NORMAN R.F. MAIER, PROBLEM SOLVING AND CREATIVITY: IN INDIVIDUALS AND GROUPS 217–18 (1970) (collating and summarizing studies assessing the effects of conflict in problem solving in group dynamics); L. Richard Hoffman, *Conditions for Creative Problem Solving*, 52 J. PSYCHOL. 429, 430–37, 440 (1961) (contending that differing opinions as to the appropriate solution from different group members is one condition for creative problem-solving); Victor H. Vroom et al., *The Consequences of Social Interaction in Group Problem Solving*, 4 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 77, 90, 94–95 (1969) (arguing that group evaluation of different solutions to a specific problem is more effective than such evaluation performed by a single person).

257. Joseph L. Bower, *The Role of Conflict in Economic Decision-Making Groups: Some Empirical Results*, 79 Q.J. ECON. 263, 272, 276–77 (1965) (comparing unanimity versus majority rule procedures).

lack these advantages.<sup>258</sup> When the President makes choices via self-servient procedures that involve the input of only a few similarly minded individuals, the environment for critical thought and adversarial assessment is diminished.<sup>259</sup> Accordingly, policy choices are more prone to mistake and bias.<sup>260</sup>

Furthermore, “[a] highly centralized decision-making system . . . can easily overburden the top-level decision-maker.”<sup>261</sup> Making this assessment in the context of President Nixon’s highly centralized National Security Council, George noted that fostering too much reliance on one cognitively limited decision maker likely weakens the entire system.<sup>262</sup> Establishing a structure in which conflicting voices from Congress receive space for expression and influence, as the *Youngstown* model does, combats against exactly such dangers.<sup>263</sup>

This is not to say that the multiple advocacy model is perfect. For example, successful multiple advocacy often requires time-intensive procedures, which may place unrealistic expectations on the government in time-sensitive situations.<sup>264</sup> Furthermore, employing the multiple advocacy model does not necessarily mean that the best foreign policy decisions will prevail.<sup>265</sup> This is because the character and advocacy skills of a position’s advocate, in addition to the substantive merits of his or her position, determine whether the decision maker adopts the position.<sup>266</sup> In other words, a particularly skilled advocate may advance an inferior foreign policy choice if the superior choice is less adequately presented. Additionally, conflict fostered in a multiple advocacy model may also go too far and disrupt decision making on certain issues.<sup>267</sup>

---

258. George, *supra* note 85, at 752.

259. *See id.* (arguing that a decision making environment wherein different ideologies openly compete is more likely to “secure a critical examination and weighing” of the different options than a unitary or centralized model).

260. *Id.* at 755.

261. *Id.*

262. *Id.*

263. *See id.* (asserting that there is significant risk of overloading the Executive without strong and competent centers cooperating from other parts of the government).

264. *Id.* at 759.

265. *See id.* at 752 (explaining that in addition to the process by which the executive makes decisions, other factors such as actors’ “[i]deological premises and cognitive beliefs about [their] opponent[s] and about the nature of the international system” impact the value of decisions).

266. *See id.* at 759 (describing how expertise, knowledge, and “analytical resources bearing on the policy issue in question” may be disparately allocated among each position’s different advocate and impact which position is adopted).

267. *Id.* at 785.

None of these criticisms, however, dismantle the multiple advocacy model. All systems of decision making entail costs.<sup>268</sup> Scholars have noted that though multiple advocacy may be imperfect, history has demonstrated that “the *absence* of effective multiple advocacy . . . can . . . have very serious costs in terms of the maladaptive policies it generates.”<sup>269</sup> Historical incidents since George wrote this article in 1972, such as the Iran-Contra Affair and the War on Terror, have further confirmed the fact that centralized decision making procedures produce detrimental policies. The major historical mishaps of the last few decades have resulted not from too extensive a congressional involvement in foreign policy decisions but rather a too secretive and unitary Executive.<sup>270</sup>

Further, beyond these consequentialist advantages, the *Youngstown* model of multiple advocacy is also superior because it represents a commitment to a vision of constitutional government that transcends the consequentialist notions of speed and secrecy. Implicit but monumental in *Youngstown* was the premise that “certain principles are so central to [the American] notion[] of constitutional government that no president should knowingly violate them, even in the pursuit of the most efficient and effective foreign-policy-making mechanism.”<sup>271</sup>

The Constitution emerged in a time of extreme trepidation towards the idea of a unitary authority at the head of government.<sup>272</sup> This historical context suggests that the Founders largely espoused a system more similar to the multiple advocacy model.<sup>273</sup> During the American Revolution, the Founders had just revolted against a ruler they perceived to be a dictator who controlled the British parliament and exploited his power.<sup>274</sup> In fact, so acute was their awareness of this tyranny that the first time they formed a government they created

---

268. *Id.*

269. *Id.*

270. *See supra* note 87 (summarizing scholarship that contends Water Gate, the Iran-Contra Affair, and the War on Terror were the result of overly centralized executive authority).

271. KOH, *supra* note 46, at 213.

272. SAVAGE, *supra* note 7, at 14–15.

273. *Id.*

274. *See id.* (describing and affirming the Founders’ fears regarding too strong an executive branch). *But see* JOHN YOO, CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH xiv, 20–51 (2009) (rejecting arguments that the Framers of 1787 designed a weak presidential office and instead arguing that the Framers’ intended “to create a Presidency with broad, rather open-ended powers in . . . foreign affairs and national security”).

no executive in it at all.<sup>275</sup> While they found the lack of an executive unsatisfactory and revised this strategy later, their awareness of the dangers posed by the consolidation of power in the executive was formative.<sup>276</sup> As such, the Founders provided specific safeguards against such consolidation through a structure of checks and balances,<sup>277</sup> which is most succinctly summarized in Justice Jackson's concurrence in *Youngstown*.

As established above, the Ninth Circuit's decision in *Movsesian III* was by and large consistent with the framework intended by the Founders and outlined in *Youngstown*. The President's policy against recognizing the Armenian Genocide had received congressional acquiescence on three separate occasions and therefore had received opportunity for congressional input.<sup>278</sup> Taken in addition to the states' historically equivocal power over insurance regulation and the absence of concerns over transfer of power from domestic to international courts, the factual circumstances in *Movsesian III* dictate towards the Ninth Circuit's final holding to preempt the California law.

#### CONCLUSION

The Ninth Circuit's decision in *Movsesian III* rightly applied foreign affairs preemption to invalidate a California law that extended the statute of limitations for victims of the Armenian Genocide. Contrary to what scholars have argued, *Medellín* did nothing to limit the previous bounds of the executive's power to preempt contrary state laws, following precedent already established in *Youngstown*. *Movsesian III*, largely following that same precedent, came to the opposite conclusion because of three essential differences in the factual circumstances of the two cases.

First, in *Movsesian III*, there was evidence of repeated congressional acquiescence to the President's policy whereas in *Medellín* no such congressional acquiescence was present. In *Medellín*, the President attempted to implement a non-self-executing treaty by way of a unilateral executive action contained in a memorandum. Because the power to execute laws, including laws implementing non-self-executing treaties, belongs quintessentially to Congress, the President's act inherently conflicted with the will of Congress. The presence of this conflict placed *Medellín* in category three of

---

275. SAVAGE, *supra* note 7, at 14–15.

276. *Id.*

277. *Id.*

278. *See supra* Part II.A.

*Youngstown*. *Movsesian III* on the other hand had received explicit congressional acquiescence on numerous occasions as evidenced by Congress's willingness to halt the passing of legislation contrary to the President's will. As such, the President's policy in *Movsesian III* belonged in the second category of *Youngstown*.

Second, *Movsesian III* and *Medellín* were critically different in that *Movsesian III* involved insurance regulation, an area of law that has passed between the states and the federal government throughout its history. In *Medellín*, the matter before the court involved criminal law, an area of law that occupies an unequivocal place in the canon of powers allocated to the states. As a result, criminal laws and judgments tend to be qualitatively more resilient to preemption by informal federal policies and foreign courts' judgments.

Finally, *Medellín* and *Movsesian III* differed in that *Movsesian III* involved no shift of power from domestic to international courts. Conversely, in *Medellín*, enforcing the President's memorandum would have transferred power over some criminal judgments to the ICJ, a consequence of which the judiciary is highly weary. Because of these unique circumstances, *Medellín's* broad application to other cases, including *Movsesian III*, is inappropriate.

In light of this analysis, the Ninth Circuit's decision in *Movsesian III* is a normatively sound commitment to *Youngstown's* balanced vision of separation of powers. This model is most apt to produce rational policy choices by subjecting foreign policy decisions to critical debate. In so doing, the *Youngstown* model safeguards against overburdening one cognitively limited executive and accounts for these inevitable cognitive limits by including additional voices. Beyond these consequentialist advantages, the *Youngstown* model is also deontologically superior because it accords more closely with foundational democratic values upon which American constitutional law was built.