ments or to curtail trade with out-of-favor countries.[486] In 1999, the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[487] Similarly, in 2003, the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[488]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemption not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[489] and grants of power.[490] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court, field preemption may be appropriate if a state legislates "simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional responsibility, "but in a way

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[486] *See*, *e.g.*, Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Carlos Manuel Vazquez, *Whither Zschernig?*, 46 VILL. L. REV. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 149–69 (2d ed. 1996).

[487] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000). For the appeals court's application of *Zschernig*, see National Foreign Trade Council v. Natsios, 181 F.3d 38, 49–61 (1st Cir. 1999).

[488] American Ins. Ass'n v. Garamendi, 539 U.S. at 419 & n.11 (2003).

[489] It is contended, for example, that Article I, § 10's specific prohibitions against states engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, supra.

[490] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.