
UNTANGLING THE COLLISION BETWEEN THE MCCARRAN-FERGUSON ACT AND THE RECOGNITION OF INTERNATIONAL ARBITRAL AWARDS: RECONCILING THE SECOND, FOURTH, AND FIFTH CIRCUITS' APPROACHES*

I. INTRODUCTION

As the globalization of economies and finance has taken hold, international arbitration clauses have become more and more common in contracts between multinational corporations.¹ However, in the realm of insurance contracts, the enforceability of international arbitration provisions implicates a very complicated conflict between treaty law, state law, and federal statutory law. One particular source of complication is the McCarran-Ferguson Act,² which gives state insurance laws preemption power over federal laws that indirectly affect state insurance regimes.³ Although the Supreme Court has generally articulated a broad interpretation of the McCarran-Ferguson Act,⁴ the scope of the McCarran-Ferguson Act's preemption power is unclear in the context of treaties—specifically, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention).⁵ The New York Convention is a treaty subscribed to by the United States in the Federal Arbitration Act (FAA) that mandates the enforceability of foreign arbitral awards made for or against interested U.S. parties.⁶

The conflict occurs where mandatory arbitration provisions are included in international insurance contracts, particularly in states where mandatory arbitration provisions are deemed unenforceable in insurance contracts. In resolving the conflict, the U.S. courts of appeals have reached varying conclusions as to the scope of the McCarran-Ferguson Act's reverse-preemption power and the effect it has on the provisions in the New York Convention and the FAA.⁷

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1. See Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227, 1228, 1238 (2009) (describing the delocalization of arbitration law and the inevitable rise of international arbitration as a result of globalization).

2. 15 U.S.C. §§ 1011–1015 (2012).

3. See *infra* Part II.A for a discussion of the history and impetus of the McCarran-Ferguson Act.

4. See *infra* Parts II.A.2.c–d for a discussion of the scope of the McCarran-Ferguson Act.

5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

6. See *infra* Part II.B for a discussion of the history and implementation of the New York Convention.

7. See *infra* Part II.D for a discussion of the circuit split in regards to the McCarran-Ferguson Act and the New York Convention.

The Second, Fifth, and Fourth Circuits are the only three circuits that have examined the conflict between the McCarran-Ferguson Act and the provisions of the New York Convention and FAA. The Second Circuit, in *Stephens v. American International Insurance Co.*,⁸ held that the McCarran-Ferguson Act's power did include the provisions of implemented treaties, and state insurance laws therefore preempted the New York Convention provisions set forth in the FAA.⁹ In contrast, the Fifth Circuit and the Fourth Circuit held that the McCarran-Ferguson Act did not give state insurance laws preemption power over the New York Convention provisions in the FAA.¹⁰

Given the trend in case law established by the Second, Fifth, and Fourth Circuits, and the common reasoning used to support this trend, this Comment seeks to clarify the complicated legal doctrines surrounding the conflict between the McCarran-Ferguson Act and the New York Convention. Furthermore, because more circuits will likely encounter this same issue, this Comment proffers an analytical framework that is both consistent with the trend in case law and the language and purpose of the McCarran-Ferguson Act.

II. OVERVIEW

The conflict between the McCarran-Ferguson Act and the New York Convention occurs when a foreign arbitral agreement concerns insurance disputes between U.S. and foreign organizations.¹¹ The resolution of this conflict has produced a circuit split¹² and has led to an examination of the complicated reverse-preemption¹³ and treaty self-execution doctrines.¹⁴ This Section outlines the history of the McCarran-Ferguson Act's reverse-preemption power and scope, the New York Convention, the doctrine of treaty self-execution, and the existing circuit split.

A. *The McCarran-Ferguson Act*

The McCarran-Ferguson Act was enacted in 1945 after *United States v. South-Eastern Underwriters Ass'n*¹⁵ amid the U.S. Supreme Court's expansion of Congress's

8. 66 F.3d 41 (2d Cir. 1995).

9. See *infra* Part II.D.1 for a discussion of the Second Circuit's holding in *American International Insurance Co.*

10. See *infra* Parts II.D.3–4 for a discussion of the Fifth and Fourth Circuits' holdings.

11. The New York Convention mandates each contracting state to recognize any arbitral agreements between foreign parties as binding and to enforce them according to the terms of the agreement. New York Convention, *supra* note 5, arts. 2–3. However, the McCarran-Ferguson Act allows states to impose their own rules regarding insurance without direct federal regulation to the contrary. 15 U.S.C. §§ 1011–1015 (2012).

12. See *infra* Part II.D for a discussion of the circuit split between the Second, Fifth, and Fourth Circuits.

13. Reverse-preemption is a power built into a clause by Congress that reverses the presumption of federal law supremacy over state laws in certain circumstances. See *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 720 (5th Cir. 2009) (describing the McCarran-Ferguson Act's language that reverses the presumption of federal law supremacy over state law).

14. Treaty self-execution refers to the legal enforceability of U.S. treaties without the existence of implementing legislation. *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008).

15. 322 U.S. 533 (1944).

powers under the Constitution's Commerce Clause.¹⁶ The Act sought to give states the authority to enact and enforce their own insurance laws by reversing federal preemption—in certain cases—in the context of state insurance laws.¹⁷

1. A Response to a Broad Commerce Clause

Until the 1940s, insurance laws were commonly seen as the responsibility of the states and therefore outside of the regulatory power of the federal government.¹⁸ In *Paul v. Virginia*,¹⁹ a key case in 1868, the Supreme Court reinforced the exclusive state power to regulate the insurance industry.²⁰

After the broadening of the Commerce Clause doctrine starting with *West Coast Hotel Co. v. Parrish*²¹ in 1937, the Supreme Court began to recognize expansive federal regulatory power over interstate commerce.²² In 1944, the Supreme Court in *United States v. South-Eastern Underwriters Ass'n* held that the insurance business constituted interstate commerce and was subject to the antitrust provisions of the Sherman Act,²³ effectively giving Congress the power to regulate insurance.²⁴

In response to *South-Eastern Underwriters Ass'n*, Congress passed the McCarran-Ferguson Act in 1945.²⁵ The McCarran-Ferguson Act was passed to advance the idea that “the continued regulation and taxation by the several States of the business of insurance is in the public interest.”²⁶ Section 1012 of the Act stated, “No Act of

16. See Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 851–52 (2004) (noting that the McCarran-Ferguson Act was passed during the expansion of the Commerce Clause after the New Deal).

17. See *id.* (explaining that Congress's intent when passing the McCarran-Ferguson Act was to protect state insurance regulations).

18. See *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499 (1993) (stating that “the States enjoyed a virtually exclusive domain over the insurance industry” (quoting *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978))).

19. 75 U.S. 168 (1868).

20. See *Paul*, 75 U.S. at 185 (holding that a Virginia statute imposing additional regulations on out-of-state insurance companies does not violate the Commerce Clause of the Constitution).

21. 300 U.S. 379 (1937).

22. See, e.g., *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942) (holding that Congress's regulatory power, as long as it is used in the achievement of legitimate ends, extends to all activities that affect interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (ruling that, even though a local activity may not be regarded as interstate commerce, it still may be regulated by Congress if it “exerts a substantial economic effect on interstate commerce”); *United States v. Darby*, 312 U.S. 100, 121 (1941) (holding that Congress has the power to exclude all goods that do not conform to the National Labor Relations Act from interstate commerce); *Fabe*, 508 U.S. at 499 (stating that the “emergence of an interconnected and interdependent national economy . . . prompted a more expansive jurisprudential image of interstate commerce”).

23. See 15 U.S.C. §§ 1–7 (2012) (prohibiting and regulating certain business activities that are found to be anticompetitive, such as trusts, cartels, and monopolies).

24. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553–62 (1944) (holding that there was no intention by legislators to exempt insurance companies from regulation under the Sherman Act and that insurance companies were just as capable of forming the anticompetitive business agreements that the Sherman Act prohibited).

25. *Fabe*, 508 U.S. at 499.

26. 15 U.S.C. § 1011.

Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.”²⁷ Thus, the legislative intent of the McCarran-Ferguson Act was understood to largely return regulatory power over insurance back to the states.²⁸

2. The McCarran-Ferguson Act’s Jurisprudence and Application

Subsequent case law established the constitutionality of the McCarran-Ferguson Act, the application of its elements, and the scope of its powers. In *Prudential Insurance Co. v. Benjamin*,²⁹ the Supreme Court affirmed the McCarran-Ferguson Act’s reverse-preemption power and declared it constitutional.³⁰ A stable framework for examining the McCarran-Ferguson Act’s preemption power was also established, as shown by the Eastern District of Kentucky’s application of the McCarran-Ferguson Act. And finally, although the Supreme Court first established a broad interpretation of the McCarran-Ferguson Act’s scope, it later ruled that the McCarran-Ferguson Act’s scope was not unlimited.

a. *Prudential Insurance Co. v. Benjamin: The Court Affirms the McCarran-Ferguson Act’s Reverse-Preemption Power*

In *Prudential*, a New Jersey–based corporation sought to use Commerce Clause doctrine to avoid paying a South Carolina tax that was aimed at interstate insurance companies.³¹ *Prudential* argued that the tax discriminated against interstate commerce in favor of local business, a practice that was struck down by the Supreme Court as unconstitutional.³² South Carolina argued that the tax was valid in the context of the McCarran-Ferguson Act, through which Congress gave states the power to continue such taxation.³³

The Supreme Court upheld the constitutionality of the South Carolina tax and, by extension, the McCarran-Ferguson Act.³⁴ The Court reasoned that Congress’s purpose in passing the McCarran-Ferguson Act was “broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.”³⁵ Therefore,

Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character . . . of the taxes exacted; and of the further fact that many . . . include features which . . . have not been applied generally to other

27. *Id.* § 1012(b).

28. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) (explaining that Congress’s broad legislative purpose was to support current and future state systems of insurance regulation and taxation).

29. 328 U.S. 408 (1946).

30. *See Prudential Ins. Co.*, 328 U.S. at 430 (stating that Congress did not intend to exceed its constitutional powers when it passed the McCarran-Ferguson Act).

31. *Id.* at 410–11.

32. *Id.*

33. *Id.* at 412.

34. *Id.* at 435–36.

35. *Id.* at 429.

interstate business.³⁶

In the Court's view, Congress "clearly put the full weight of its power behind existing and future state legislation" to protect it from the reach of the Commerce Clause except as provided within the McCarran-Ferguson Act.³⁷ After affirming the McCarran-Ferguson Act's reverse-preemption power, the Court articulated the broad scope of that power in a criminal case involving insurance.³⁸ However, before examining the scope of the Act, it is important to understand how the elements of the McCarran-Ferguson Act are applied. A decision from the Eastern District of Kentucky provides a comprehensive examination and application of the McCarran-Ferguson elements in the context of insurance law.

b. The Elements of the McCarran-Ferguson Act Demonstrated by the Eastern District of Kentucky

In *National Home Insurance Co. v. King*,³⁹ the district court examined whether the McCarran-Ferguson Act could protect a Kentucky anti-arbitration insurance statute⁴⁰ from provisions in the FAA.⁴¹ The district court concluded that the McCarran-Ferguson Act did reverse-preempt the FAA, thus saving the Kentucky statute.⁴²

The court began its analysis by laying out the three-part test for determining whether the McCarran Act's reverse-preemption power applies: "(1) whether the federal statute specifically relates to the business of insurance; (2) whether the state law at issue was enacted for the purpose of regulating the business of insurance; and (3) whether the application of the federal law invalidates, supersedes or impairs the state law."⁴³

The court quickly found the first and third elements satisfied.⁴⁴ The first prong was satisfied because the FAA is not a statute that specifically relates to the business of insurance.⁴⁵ Similarly, the court ruled that the third prong was satisfied because it was clear that the application of the FAA would invalidate the anti-arbitration provision of the Kentucky insurance law.⁴⁶ Therefore, the proper application of the FAA would effectively invalidate the relevant state law.⁴⁷

As to the second element, whether the state law was enacted for the purpose of regulating the business of insurance, the court determined that the Kentucky statute was

36. *Id.* at 430.

37. *Id.* at 430–31.

38. See *infra* Part II.A.2.c for a discussion of *Robertson v. California*, 328 U.S. 440 (1946).

39. 291 F. Supp. 2d 518 (E.D. Ky. 2003).

40. See KY. REV. STAT. ANN. § 417.050 (West 2013) (stating that all written agreements to submit to arbitration are valid and enforceable except for those in insurance contracts).

41. *Nat'l Home Ins. Co.*, 291 F. Supp. 2d at 528.

42. *Id.* at 530.

43. *Id.* at 528 (citing U.S. Dep't of Treasury v. Fabe, 508 U.S. 491, 501 (1993)).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

appropriately classified as regulating the business of insurance.⁴⁸ The court looked to how the Supreme Court and other circuit courts construed the definition of the term “business of insurance” as used in the McCarran-Ferguson Act.⁴⁹ The court relied upon the Supreme Court’s ruling in *SEC v. National Securities, Inc.*⁵⁰ in stating that the relationship between the insurer and the insured “should be the focus in determining what constitutes the ‘business of insurance.’”⁵¹ The court also cited decisions by various other circuits and jurisdictions, most notably the Eighth Circuit and Tenth Circuit, because the statutes involved in those cases were nearly identical to the Kentucky statute at issue.⁵² The court then concluded that, because the Kentucky legislature enacted a statute that was directed specifically at the relationship between the insurer and the insured with the aim of protecting policyholders from mandatory arbitration agreements, the statute specifically related to the “business of insurance.”⁵³

However, as the Supreme Court’s rulings in *Robertson v. California*⁵⁴ and *American Insurance Ass’n v. Garamendi*⁵⁵ demonstrate, the McCarran-Ferguson elements’ scope of applicability was gradually restricted from a broad interpretation to a more narrow understanding.

c. *Robertson v. California: The Supreme Court Articulates the Broad Scope of the McCarran-Ferguson Act’s Power*

On the same day the Supreme Court issued its holding in *Prudential*,⁵⁶ the Court also decided *Robertson*.⁵⁷ In *Robertson*, an insurance agent was convicted of violating California state regulations that restricted the activities of nonstate insurance agents.⁵⁸ The agent was acting without a license for a nonadmitted insurer and selling policies of insurance without being licensed in the state.⁵⁹ The agent argued that the state’s

48. *Id.* at 529–30.

49. *Id.* at 528–29.

50. 393 U.S. 453 (1969).

51. *Nat’l Home Ins. Co.*, 291 F. Supp. 2d at 528–29 (citing *Nat’l Sec., Inc.*, 393 U.S. at 460).

52. *Id.* at 529. The court relied on *Standard Security Life Insurance Co. v. West*, 267 F.3d 821, 823–24 (8th Cir. 2001), which held that the Missouri Arbitration Act reverse-preempted the FAA through the McCarran-Ferguson Act, and *Mutual Reinsurance Bureau v. Great Plains Mutual Insurance Co.*, 969 F.2d 931, 934–35 (10th Cir. 1992), which held that a Kansas anti-arbitration act reverse-preempted the FAA through the McCarran-Ferguson Act. *Id.*

53. *Nat’l Home Ins. Co.*, 291 F. Supp. 2d at 529. *But see* *Triton Lines, Inc. v. S.S. Mut. Underwriting Ass’n*, 707 F. Supp. 277, 278–79 (S.D. Tex. 1989) (holding that a disputed claim is not the business of insurance and that state regulation of a practice of an insurance company does not mean that the practice is the business of insurance); *Am. Bankers Ins. Co. of Fla. v. Crawford*, 757 So. 2d 1125, 1131–34 (Ala. 1999) (stating that a general anti-arbitration statute cannot be classified as relating specifically to the business of insurance because its impact on the insurer-insured relationship is too attenuated and has no bearing on the terms of insurance agreements).

54. 328 U.S. 440 (1946).

55. 539 U.S. 396 (2003).

56. See *supra* Part II.A.2.a for a discussion of *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

57. *Robertson*, 328 U.S. at 440.

58. *Id.* at 442–43.

59. *Id.* at 444.

regulations discriminated against out-of-state insurers and were therefore unenforceable.⁶⁰

The Court clarified the parameters and application of the Act without actually ruling on the application of the McCarran-Ferguson Act because the facts of the case occurred before its passage.⁶¹ The Court explained that the McCarran-Ferguson Act, if applicable, would have supported the same conclusion because it would merely be “declaring or confirming expressly” the state’s power to regulate insurance within its own borders.⁶² Basically, the McCarran-Ferguson Act stood for the states’ power to regulate and control the actions and activities of out-of-state insurance companies through its insurance laws.⁶³ However, in 2003, the Supreme Court drew back from the broad interpretation in *Robertson* and held that the McCarran-Ferguson Act’s intended scope did not include executive action in the context of foreign affairs.⁶⁴

d. American Insurance Ass’n v. Garamendi: The Supreme Court Limits the McCarran-Ferguson Act

Garamendi dealt with California’s Holocaust Victim Insurance Relief Act of 1999 (HVIRA) and the issue of whether it interfered with the federal government’s own foreign policy goals and reparation policies for victims of the Third Reich’s actions before the end of World War II.⁶⁵ The Supreme Court noted that HVIRA “undercuts the President’s diplomatic discretion and the choice he has made exercising it” by using an “iron fist where the President has consistently chosen kid gloves.”⁶⁶ California argued that, even if HVIRA conflicted with the President’s foreign policy, the McCarran-Ferguson Act indicated Congress’s intent to leave insurance regulation up to the state.⁶⁷

The Supreme Court rejected California’s argument that the McCarran-Ferguson Act permitted state authority to regulate insurance in this way and struck down HVIRA.⁶⁸ The Court reasoned that the McCarran-Ferguson Act’s purpose was to “limit congressional preemption under the commerce power,” was not intended to allow states to “regulate activities carried on beyond its own borders,” and could not be construed to address “executive conduct in foreign affairs.”⁶⁹ Therefore, the Court held that the McCarran-Ferguson Act did not allow states to enact laws that interfered with the executive branch’s actions with respect to foreign policy goals.⁷⁰

Although the Supreme Court provided an important interpretation of the intended scope of the McCarran-Ferguson Act, the Court did not examine the actual application

60. *Id.* at 452.

61. *Id.* at 461.

62. *Id.* at 462.

63. *Id.* at 459–61.

64. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427–28 (2003).

65. *Id.* at 409–11, 421.

66. *Id.* at 423–24, 427.

67. *Id.* at 427.

68. *Id.* at 427–29.

69. *Id.* at 428 (citing *FTC v. Travelers Health Ass’n*, 362 U.S. 293, 300–01 (1960)).

70. *Id.* at 428–29.

and scope of the McCarran-Ferguson Act's reverse-preemption power or its effect on foreign insurers.⁷¹ Furthermore, the effect of the broad "Act of Congress" language in the McCarran-Ferguson Act remained uncertain in the context of treaties that may require both executive and legislative action.⁷² Therefore, the McCarran-Ferguson Act's effect on the New York Convention's provisions in the FAA remained undetermined, and the application of the McCarran-Ferguson's scope in the international context remained confused.⁷³ To complicate matters more, the history, passage, and implementation of the New York Convention was also unique, as the multilateral treaty was not initially signed onto or implemented by the United States until ten years after it was ratified by the United Nations.

B. The New York Convention

After World War I, the International Chamber of Commerce in Paris was established to promote the enforcement of international arbitral clauses.⁷⁴ This initiative led to the Geneva Protocol on Arbitration Clauses of 1923,⁷⁵ which validated arbitration clauses and required a court of a contracting state to send parties to arbitration if so previously agreed.⁷⁶ Although the provisions in the Geneva Protocol were considered improvements over the previously vague arbitration regime, they were still considered inadequate.⁷⁷ The Geneva provisions' scope of applicability was limited; the party seeking enforcement bore a heavy burden of proof; and the laws of the country where the arbitration took place usually governed the arbitral procedure.⁷⁸

In response to these criticisms, the International Chamber of Commerce began forming a new international convention after World War II.⁷⁹ The United Nations Economic and Social Council (ECOSOC) presented its Draft Convention for Foreign Arbitral Awards and convened the Conference on International Commercial Arbitration (New York Conference) at the headquarters of the United Nations in New York from May 20 to June 10, 1958.⁸⁰ The New York Conference led to the adoption of the New York Convention.⁸¹

Article II of the New York Convention spells out the responsibilities and agreements of the member states:

71. See Angela D. Krupar, Note, *The McCarran-Ferguson Act's Intersection with Foreign Insurance Companies*, 58 CLEV. ST. L. REV. 883, 898 & n.140 (2010) (stating that the "executive agreements in *Garamendi* were not considered an 'act of Congress' and therefore did not warrant application of the McCarran-Ferguson Act").

72. See *supra* note 27 and accompanying text for the relevant language of the McCarran-Ferguson Act.

73. See Denning & Ramsey, *supra* note 16, at 886 (criticizing the discussion of the McCarran-Ferguson Act in *Garamendi* as "scanty analysis" and arguing that the Court only further confused the interpretation of the McCarran-Ferguson Act).

74. ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 6 (1981).

75. Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157.

76. VAN DEN BERG, *supra* note 74, at 6.

77. *Id.* at 7.

78. *Id.*

79. *Id.*

80. *Id.* at 7-8.

81. *Id.*

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration
2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.⁸²

The resulting New York Convention expanded the field of application to an award made in any state and no longer required the application of jurisdiction of different contracting states.⁸³ The burden of proof to show why enforcement must be refused was shifted to the party against whom enforcement was being sought.⁸⁴ However, the New York Convention did not provide for an overall regulation of international commercial arbitration or a uniform law on arbitration.⁸⁵ Instead, the Convention was limited to two aspects of international commercial arbitration: “enforcement of those arbitration agreements which come within its purview (Art. II(3)) and the enforcement of foreign arbitral awards (Arts. I and III–VI).”⁸⁶

In 1968—ten years after the New York Conference adopted the New York Convention—President Lyndon B. Johnson sent the Convention to the United States Senate.⁸⁷ The Senate ratified the Convention almost in its entirety by enacting Chapter II of the FAA.⁸⁸ The ratification and signing of the New York Convention brought about an inevitable collision between the McCarran-Ferguson Act and the New York Convention.⁸⁹ Because many states enacted anti-arbitration laws in the insurance context, the reverse-preemption power of the McCarran-Ferguson Act would

82. New York Convention, *supra* note 5, art. 2.

83. VAN DEN BERG, *supra* note 74, at 8.

84. *Id.* at 9.

85. *Id.* at 9–10.

86. *Id.* at 10.

87. Aaron L. Wells, *When “Yes” Means “No”: McCarran-Ferguson, the New York Convention, and the Limits of Congressional Assent*, 12 PEPP. DISP. RESOL. L.J. 267, 286 (2012).

88. *Id.* at 288. The only difference between the language of the treaty and the provisions in the FAA was the replacing of the word “shall” with “may.” See 9 U.S.C. § 206 (2012) (providing that “[a] court having jurisdiction under this chapter *may* direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States” (emphasis added)). However, this change was seen as inconsequential because the House Report stated that the Act’s permissive language did not diminish the treaty mandate and that courts have typically gone straight to the directive in section 206 of the Convention Act to find the mandatory language. See Wells, *supra* note 87, at 288–89 (stating that the language of the House Report establishes that “permissive language does not diminish the directive to the courts to enforce arbitration agreements” (citing H.R. REP. NO. 91–1181, at 3 (1970))).

89. See Mary Pennisi, *Enforcing International Insurers’ Expectations: Can States Unilaterally Quash Commercial Arbitration Agreements Under the McCarran-Ferguson Act?*, 16 FORDHAM J. CORP. & FIN. L. 601, 602–03 (2011) (stating that, while the New York Convention mandates that U.S. courts enforce arbitration agreements among international parties, many states have enacted insurance laws that deem insurance arbitration agreements unenforceable).

presumably render the New York Convention provisions in the FAA ineffective.⁹⁰

C. *Self-Execution Doctrine*

Because the McCarran-Ferguson Act displaces a federal act if it operates to indirectly preempt a state insurance statute, the only way the provisions of the New York Convention could have any force in the insurance context is if the federal law comes from something other than an Act of Congress.⁹¹ The treaty itself could provide that viable source of federal law, as it is a product of executive action rather than legislative action.⁹² However, for a treaty to have such independent force, it must be considered a self-executing treaty—a treaty that is judicially enforceable on its own.⁹³ Therefore, even though the New York Convention Act (as enacted and inserted as provisions in the FAA) implements the New York Convention itself, a self-executing convention may have independent force as federal law so as to preempt state law beyond the scope of the McCarran-Ferguson Act.

The distinction between self-executing and non-self-executing treaties is an unclear and controversial issue.⁹⁴ Generally, a self-executing treaty is a treaty that can be enforced without congressional legislation.⁹⁵ A non-self-executing treaty, by contrast, requires subsequent congressional implementation before being enforceable in the courts.⁹⁶ The self-executing treaty doctrine thereby seeks to distinguish between treaties that require congressional legislation to be judicially enforceable and those that require an act of the legislature to “remove or modify the courts’ enforcement power (and duty).”⁹⁷ At face value, the distinction seems to simply be a “judicially invented notion that is patently inconsistent with express language in the Constitution affirming that ‘all Treaties . . . shall be the supreme Law of the Land.’”⁹⁸ Nevertheless, the doctrine of self-executing treaties has been recognized and developed through case law, beginning with *Foster v. Neilson*⁹⁹ in 1829 and continuing to *Medellin v. Texas*¹⁰⁰ in 2008.

90. Kansas, Kentucky, and Nebraska are examples of states with statutes that prohibit arbitration agreements in insurance contracts. KAN. STAT. ANN. § 5-401(c) (West 2014); KY. REV. STAT. ANN. § 417.050(2) (West 2014); NEB. REV. STAT. ANN. § 25-2602.01(f)(4) (West 2013).

91. See *supra* Part II.A.2 for a discussion of the scope of the McCarran-Ferguson Act’s reverse-preemption language.

92. U.S. CONST. art. II, § 2, cl. 2.

93. See *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (explaining that a treaty is considered “self-executing” when it “operates of itself without the aid of any legislative provision” (quoting *Foster v. Neilson*, 27 U.S. 253, 314 (1829))).

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

95. *Id.*

96. *Id.*

97. *Id.* at 696.

98. Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988) (emphasis omitted) (quoting U.S. CONST. art. VI, cl. 2).

99. 27 U.S. 253 (1829).

100. 552 U.S. 491 (2008).

1. *Foster v. Neilson* and *United States v. Percheman*: The Supreme Court First Articulates the Difference Between a Self-Executing Treaty and a Non-Self-Executing Treaty

Foster v. Neilson and *United States v. Percheman*¹⁰¹ both involved an 1819 treaty between the United States and Spain that turned Spanish land over to the United States.¹⁰² In each case, landowners who had been granted land by the Spanish government before the treaty was written sought to have their title recognized by the United States.¹⁰³ Although both cases interpreted the same treaty provision with different results, in both instances the Court focused on the treaty's words in determining whether the treaty was self-executing or non-self-executing.¹⁰⁴

In *Foster*, the Court interpreted the eighth article of the English version of the treaty.¹⁰⁵ This version provided that all Spanish grants of land made by the Spanish king prior to January 24, 1818, “shall be ratified and confirmed to the persons in possession” thereof.¹⁰⁶ The grantees—to whom the Spanish government had granted the land before the 1819 treat—claimed that this provision confirmed their title to the property.¹⁰⁷ But the Court held otherwise, finding that the language of this provision required Congress to enact legislation recognizing the grantees' title.¹⁰⁸ Because Congress never enacted any such legislation, the Court could not confirm the landowners' title.¹⁰⁹

Chief Justice Marshall began the Court's opinion by distinguishing the way the U.S. Constitution views treaties from the way treaties are recognized in the rest of the western world. He wrote that, in general, “[a] treaty is in its nature a contract between two nations, not a legislative act[,]” and therefore, “[i]t does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by the sovereign power of the respective parties to the instrument.”¹¹⁰ However, in the United States, “a different principle is established.”¹¹¹ According to Chief Justice Marshall, because the Constitution declares a treaty to be the law of the land, a treaty must be regarded as equivalent to an act of the legislature “whenever it operates of itself without the aid of any legislative provision.”¹¹² However, if the terms involve either of the parties' promise to perform a particular act (i.e., implementing legislation), the treaty addresses

101. 32 U.S. 51 (1833).

102. *Percheman*, 32 U.S. at 63; *Foster*, 27 U.S. at 273–74.

103. *Percheman*, 32 U.S. at 82–83; *Foster*, 27 U.S. at 299–300.

104. Compare *Percheman*, 32 U.S. at 88–89 (examining the language and Spanish translation of the 1819 treaty and concluding that “[a]lthough the words ‘shall be ratified and confirmed,’ are properly the words of contract, stipulating for some future legislative act; they are not necessarily so”), with *Foster*, 27 U.S. at 314 (examining only the English version of the 1819 treaty and concluding that the words formed a contract, requiring that “the legislature must execute the contract before it can become a rule for the Court”).

105. *Foster*, 27 U.S. at 314.

106. *Id.* at 310, 314 (emphasis added).

107. *Id.* at 254–55.

108. *Id.* at 316–17.

109. *Id.* at 317.

110. *Id.* at 314.

111. *Id.*

112. *Id.*

itself to the political branches, as opposed to the judicial department, and therefore, the legislature must act upon the treaty before it can become an enforceable law for the courts.¹¹³ Thus, the question of whether a treaty was self-executing—being enforceable in itself—focused on the words of the treaty and was ultimately a matter of treaty construction.¹¹⁴ Chief Justice Marshall then looked to the language of the 1819 treaty itself and concluded that the “shall be” language merely indicated a future promise that the legislature would act upon it—thus requiring a legislative act to validate the landowners’ pre-treaty grants.¹¹⁵ Thus, Justice Marshall concluded that because legislation was needed to recognize the enforceability of the grants, and no legislative action had been taken during the time the petitioners received the grants, the petitioners’ claims to title were dismissed.¹¹⁶

However, four years after the *Foster* decision, Chief Justice Marshall revisited the 1819 treaty and came out with an opposite result in *United States v. Percheman*. In *Percheman*, Chief Justice Marshall examined the Spanish language version of the treaty’s eighth article.¹¹⁷ This version provided that all Spanish grants of land made by the Spanish king prior to January 24, 1818, “shall remain ratified and confirmed to the persons in possession of them.”¹¹⁸ Based on this language, the Supreme Court reversed its decision in *Foster* and held that the treaty did not “stipulat[e] for some future legislative act” but was independently enforceable by the courts without prior legislative action.¹¹⁹

Chief Justice Marshall’s reasoning in both *Foster* and *Percheman* focused on the construction of the treaty itself to determine whether a particular treaty could be enforceable without legislative action. The Supreme Court viewed a treaty as a contract between sovereigns, and an intention to make the treaty provisions non-self-executing would be found in the words of the treaty itself.¹²⁰ Thus, if the two parties to the treaty agreed that the rights and obligations contained within the treaty provisions should be non-self-executing, then the words in the provisions would express the parties’ intent that the treaty be enforceable only in the event of future domestic legislation.¹²¹ The *Percheman* decision, in reversing *Foster*, seemed to refine the Court’s reasoning by requiring very explicit language in showing intent that treaty obligations should be enforceable by the court regardless of domestic legislation.¹²² However, the problem

113. *Id.*

114. Vázquez, *supra* note 94, at 701.

115. *Foster*, 27 U.S. at 314–15.

116. *Id.* at 317.

117. *United States v. Percheman*, 32 U.S. 51, 88 (1833).

118. *Id.* (emphasis added).

119. *Id.* at 89.

120. See Vázquez, *supra* note 94, at 701 (stating that the Court’s holdings in *Foster* and *Percheman* established a rule wherein the parties to the treaty, through the language of rights and liabilities, must decide whether to make a provision of the treaty possess the capability to “operate of itself” or merely “stipulate for some future legislative act” (quoting *Percheman*, 32 U.S. at 88–89)).

121. See *id.* at 702 (stating that, under the *Foster* reasoning, while treaties themselves do not automatically require legislative implementation, “they may require legislative implementation through affirmative agreement of the parties”).

122. See *id.* at 704 (stating that *Percheman* “should be interpreted to require a clear statement—a

with the Supreme Court's reasoning in *Foster* and *Percheman* was that it did not require any evidence indicating that the requisite level of specific intent was reached.¹²³ Instead, the Court inferred intent based on the words of the treaty itself, the use of future tense, and language that the Court "construed as contemplating the 'perform[ance] of a particular act.'"¹²⁴

Until 2008, the doctrine of self-execution was a source of debate among legal academics. Some scholars argued that the *Foster* and *Percheman* decisions, as well as the Constitution's Supremacy Clause, required the presumption that treaties were self-executing.¹²⁵ Others argued that a presumption of self-execution would give treaties undue power to affect a wide range of laws.¹²⁶

2. *Medellín v. Texas*: The Supreme Court Articulates a Narrow Self-Execution Rule

In 2008, the Supreme Court decided *Medellín v. Texas*¹²⁷ and articulated a presumption of non-self-execution, as well as a narrow, text-based analysis to overcome that presumption.¹²⁸ *Medellín* involved the conviction of Jose Medellín, a Mexican national and gang member who participated in the rape and murder of two girls in Houston, Texas.¹²⁹ He was subsequently convicted of capital murder and sentenced to death.¹³⁰ When Medellín was arrested, however, he was not informed of his Vienna Convention right to notify the Mexican consulate of his detention as a

stipulation—of the parties' intent to alter the principle that . . . implementing legislation is not required to make the treaty cognizable by the courts of the United States").

123. *Id.* at 703.

124. *Id.* at 703–04 (alteration in original) (quoting *Foster*, 27 U.S. at 314).

125. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 reporters' note 5 (1987) (stating that "[s]elf-executing treaties were contemplated by the Constitution and have been common" and "[a] proposal to amend the Constitution to render all treaties non-self-executing was not adopted"); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2173 (1999) (arguing that, because the "concept of a non-self-executing treaty is in tension with the Supremacy Clause[,]," the Constitution should give a treaty the presumption of being self-executing).

126. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1241 (2008) (arguing that "nearly everything that is done through the Treaty Clause can and should be done through congressional-executive agreements approved by both houses of Congress"); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2240 (1999) (stating that non-self-execution "better promotes democratic government in the lawmaking process by requiring the consent of . . . the House of Representatives, before the nation can implement treaty obligations at home").

127. 552 U.S. 491 (2008).

128. See *Medellín*, 552 U.S. at 530 (concluding that the President's constitutional inability to unilaterally "create domestic law" requires that the "non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts"); Jeremy Lawrence, *Treaty Violations, Section 1983, and International Law Theory*, 16 SW. J. INT'L L. 1, 7–8 (2010) (describing *Medellín*'s narrow, text-based clarification of the self-execution doctrine). *But see* Ingrid Wuerth, *Medellín: The New, New Formalism?*, 13 LEWIS & CLARK L. REV. 1, 2–5 (2009) (arguing that the Supreme Court in *Medellín* advanced a "series of factors" focusing on intent of treaty makers rather than strict, formalist rules).

129. *Medellín*, 552 U.S. at 500–01.

130. *Id.* at 501.

foreign national.¹³¹ He “first raised his Vienna Convention claim in his first application for state postconviction relief.”¹³² Medellín’s claim was denied because he did not raise it at trial or on direct review.¹³³ As Medellín continued to appeal to the Fifth Circuit, the International Court of Justice (ICJ) issued its decision in *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*¹³⁴ and determined that the United States must “provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals.”¹³⁵ Furthermore, before the Supreme Court heard the case, President George W. Bush issued a memorandum to the U.S. Attorney General, asking the courts to respect and implement the ICJ decision:

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in [*Avena*], by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.¹³⁶

Medellín contended that the ICJ’s judgment in *Avena* “constitute[d] a ‘binding’ obligation on the state and federal courts.”¹³⁷ Medellín argued that the treaties requiring compliance with the ICJ’s judgment in *Avena* bound the courts by virtue of the Supremacy Clause.¹³⁸

The Supreme Court, in an opinion by Chief Justice Roberts, recognized the distinction between self-executing and non-self-executing treaties and applied a textual, intent-based interpretation to the United States–signed Optional Protocol,¹³⁹ which stipulates the recognition of ICJ decisions.¹⁴⁰ However, the Court acknowledged that the Optional Protocol merely provides that “[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice” and may be brought before the ICJ.¹⁴¹ The Court clarified that the Optional Protocol says nothing about the effect of an ICJ decision and does not commit the signatories to an ICJ judgment.¹⁴² Furthermore, the Court declared that the obligation for member nations to comply with ICJ judgments derives from the

131. *Id.*

132. *Id.*

133. *Id.*

134. 2004 I.C.J. 12 (Mar. 31).

135. *Avena*, 2004 I.C.J. at 72.

136. Memorandum from George W. Bush, President of the United States, to the Attorney Gen. of the United States (Feb. 28, 2005).

137. *Medellin*, 552 U.S. at 504.

138. *Id.*

139. The Vienna Convention on Consular Relations’ Optional Protocol was an agreement by member countries to give the ICJ “compulsory jurisdiction” in disputes relating to the interpretation of application of that convention. Optional Protocol Concerning the Compulsory Settlement of Disputes art. 1, Apr. 24, 1963, 21 U.S.T. 325 [hereinafter *Optional Protocol*].

140. *Medellin*, 552 U.S. at 506–09.

141. *Id.* at 507 (alteration in original) (quoting *Optional Protocol*, *supra* note 139, art. 1).

142. *Id.* at 507–08.

United Nations Charter itself rather than the Optional Protocol.¹⁴³

The Court pointed to Article 94 of the Charter, which provides that “[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.”¹⁴⁴ The Court then interpreted this language as merely “call[ing] upon governments to take certain action,” rather than requiring that nations “must” or “shall” comply with the ICJ judgments.¹⁴⁵ The Supreme Court held that—because Article 94 allows the ability of the “political branches to determine whether and how to comply with an ICJ judgment,” and the purpose of the ICJ was to mediate disputes between nations rather than individuals—the United Nations Charter itself makes ICJ rulings non-self-executing and unenforceable.¹⁴⁶ However, Justices Breyer, Souter, and Ginsberg remained unconvinced by Chief Justice Roberts’s reasoning and argued that the Optional Protocol should be considered self-executing.¹⁴⁷

3. The Dissent in *Medellín*

The dissent, penned by Justice Breyer, criticized the majority’s method of “interpreting the labyrinth of treaty provisions as creating a legal obligation that binds the United States internationally, but which, for Supremacy Clause purposes, is not automatically enforceable as domestic law.”¹⁴⁸ The dissent pointed out that the majority placed too much weight upon treaty language where, in reality, “[t]he words undertak[e] to comply, for example, do not tell us whether an ICJ judgment rendered pursuant to the parties’ consent . . . does, or does not, automatically become part of our domestic law.”¹⁴⁹ Instead, the dissent argued, the Court must look “to our own domestic law,” especially “to the many treaty-related cases interpreting the Supremacy Clause.”¹⁵⁰

The dissent concluded that it would find the relevant treaty provision self-executing as applied to the ICJ judgment in *Avena*.¹⁵¹ The dissent argued that the Optional Protocol invoked the Supremacy Clause and cited case law where the Court found “self-executing multilateral treaty language that [was] far less direct or forceful (on the relevant point) than the language set forth in the present treaties.”¹⁵² The dissent concluded by affirmatively answering Chief Justice Marshall’s question in *Foster* on whether a treaty provision addressed the judicial branch of government rather than the political branches.¹⁵³

143. *Id.* at 508.

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

145. *Id.* (quoting *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988)).

146. *Id.* at 511.

147. *Id.* at 540–41 (Breyer, J., dissenting).

148. *Id.* at 540.

149. *Id.* at 541 (second alteration in original) (internal quotation marks omitted).

150. *Id.*

151. *Id.* at 551.

152. *Id.* at 552 (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 247, 252 (1984); *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 160, 161 n.9 (1940)).

153. *Id.* at 567.

D. *The Collision Between the McCarran-Ferguson Act and the New York Convention: Reverse-Preemption and Treaty Self-Execution*

The Second Circuit became the first to encounter the conflict between state insurance laws and insurance arbitration provisions protected by the New York Convention Act—as enacted and inserted as provisions in the FAA.¹⁵⁴ The Second Circuit concluded that the McCarran-Ferguson Act’s reverse-preemption power applies to the New York Convention Act.¹⁵⁵ However, the Fifth Circuit concluded the opposite, holding that the McCarran-Ferguson Act was never intended to reverse-preempt a federal treaty and therefore simply did not apply.¹⁵⁶ The Fourth Circuit used a similar method of reading into the intended purpose of the McCarran-Ferguson Act and concluded that the New York Convention Act provisions in the FAA were outside of the scope of the McCarran-Ferguson Act’s reverse-preemption authority.¹⁵⁷

1. The Second Circuit Rules that the New York Convention Is a Non-Self-Executing Treaty and Is Reverse-Preempted by the McCarran-Ferguson Act

In *Stephens v. American International Insurance Co.*,¹⁵⁸ a reinsurance company chartered in Kentucky was found to be insolvent by the Franklin Circuit Court of Kentucky.¹⁵⁹ The subsequent liquidator sued various companies (the cedents) for premiums they owed to the insolvent reinsurance company.¹⁶⁰ The cedents refused to pay the premiums because they claimed, due to industry practice and prior dealings with the insolvent company, to be entitled to set off the premiums the liquidator asserted they owed against the losses owed to them by the insolvent company.¹⁶¹ The liquidator responded that setoffs are prohibited under the Kentucky Insurers Rehabilitation and Liquidation Law (Kentucky Liquidation Act), which prohibited the offset of premiums owing to an insolvent insurer.¹⁶² Every reinsurance contract contained broad arbitration clauses, and the cedents therefore promptly moved to compel arbitration under the FAA.¹⁶³ One of the cedents was a British corporation that moved to compel arbitration abroad under the New York Convention provisions contained in the FAA.¹⁶⁴ The liquidator opposed the cedents’ efforts to compel arbitration, citing the Kentucky Liquidation Act provision prohibiting forced arbitration

154. See *Stephens v. Am. Int’l Ins. Co.*, 66 F.3d 41, 42 (2d Cir. 1995) (deciding whether the FAA preempts the anti-arbitration provision in the Kentucky Insurers Rehabilitation and Liquidation Law under the McCarran-Ferguson Act).

155. *Id.* at 45–46.

156. *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 587 F.3d 714, 725 (5th Cir. 2009).

157. *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 388–91 (4th Cir. 2012).

158. 66 F.3d 41 (2d Cir. 1995).

159. *Am. Int’l Ins. Co.*, 66 F.3d at 42. “Reinsurance is the practice whereby primary insurers who have assumed risk from their policy holders in exchange for premiums, cede portions of that risk to reinsurers, in exchange for premiums, pursuant to reinsurance agreements.” *Id.*

160. *Id.*

161. *Id.* at 42–43.

162. *Id.* at 43 (citing Ky. Rev. Stat. Ann. § 304.33–330(2)(d) (Baldwin 1994)).

163. *Id.*

164. *Id.*

of a liquidator.¹⁶⁵ The cedents then claimed that the FAA preempts this section of the Kentucky Liquidation Act, to which the liquidator responded by invoking the reverse-preemption power of the McCarran-Ferguson Act.¹⁶⁶

Two of the international cedents in the bankruptcy litigation argued that the Convention still required arbitration of their claims even if the FAA did not preempt the Kentucky Liquidation Act.¹⁶⁷ They claimed that the Supremacy Clause of the Constitution required the preemption of the New York Convention over the Kentucky Liquidation Act.¹⁶⁸ The Second Circuit ultimately found that this argument failed based on the court's conclusion that the Convention was not self-executing because it relied on an "Act of Congress" for its implementation.¹⁶⁹

The court, in examining the question of whether the New York Convention preempted the Kentucky Liquidation Act, concluded that the Kentucky statutes reverse-preempt the Convention through the McCarran-Ferguson Act.¹⁷⁰ The court reasoned that the Convention was not self-executing and therefore required an Act of Congress to be enforceable.¹⁷¹ Therefore, since the Convention had no enforceable power, the relevant document at issue was the Convention Act legislation contained in the FAA.¹⁷² The court concluded that the Convention Act was an Act of Congress for the purposes of the McCarran-Ferguson Act.¹⁷³ Therefore, since the Act explicitly stated that "[n]o Act of Congress shall be construed to . . . supersede any law . . . regulating the business of insurance," and because the Kentucky Liquidation Act was a law "regulating the business of insurance," the Kentucky law was given reverse-preemption power through the McCarran-Ferguson Act over the Convention Act.¹⁷⁴ Therefore, the court concluded, "[t]he [New York] Convention itself is simply inapplicable in this instance."¹⁷⁵

2. The Second Circuit Later Holds That the McCarran-Ferguson Act Does Not Apply to the Foreign Sovereign Immunities Act

Later that year, the Second Circuit ruled differently in *Stephens v. National Distillers and Chemical Corp.*¹⁷⁶ In *National Distillers*, the liquidator of an insolvent reinsurance company demanded that the parties in the suit post security to cover any potential judgment.¹⁷⁷ The international companies named in the suit claimed that the

165. *Id.* (citing Ky. Rev. Stat. Ann. § 304.33-010(6)).

166. *Id.*

167. *Id.* at 45.

168. *Id.*

169. *Id.*

170. *Id.* at 45-46.

171. *Id.* at 45.

172. *See id.* (concluding that "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation" (citing 9 U.S.C. §§ 201-08 (1994))).

173. *Id.*

174. *Id.* (alteration and omissions in original) (citing 15 U.S.C. § 1012(b) (1994)).

175. *Id.*

176. 69 F.3d 1226 (2d Cir. 1995).

177. *Nat'l Distillers*, 69 F.3d at 1228.

Foreign Sovereign Immunities Act (FSIA) exempted them from having to post security.¹⁷⁸ Contrary to its earlier conclusion in *Stephens v. American International Insurance*, the Second Circuit held that the FSIA was not reverse-preempted by the McCarran-Ferguson Act because the FSIA, in governing all suits against foreign sovereigns, was a federal law that “clearly intend[ed] to displace all state laws to the contrary.”¹⁷⁹ The Second Circuit also reasoned that, even before the enactment of the McCarran-Ferguson Act and the FSIA, federal common law explicitly held that foreign sovereigns were absolutely immune from security attachment.¹⁸⁰ Therefore, since the FSIA merely reinforces an already existing common law rule that is not an Act of Congress, the McCarran-Ferguson Act simply did not apply.¹⁸¹

Therefore, although the Second Circuit ruled that the McCarran-Ferguson Act specifically reverse-preempted the New York Convention provisions in the FAA, its subsequent decision in *National Distillers* introduced the idea that the McCarran-Ferguson Act’s scope was not unlimited—there were instances where the McCarran-Ferguson Act’s reverse-preemption power could be overridden by additional policy concerns. Nearly fourteen years after the Second Circuit issued its rulings in *American International Insurance* and *National Distillers*, the Fifth Circuit decided *Safety National Casualty Corp. v. Certain Underwriters at Lloyd’s, London*.¹⁸²

3. The Fifth Circuit Declines To Decide Whether the New York Convention Is Self-Executing and Holds That It Is Outside of the Intended Scope of the McCarran-Ferguson Act

Safety National involved the Louisiana Safety Association of Timbermen–Self Insurers Fund (LSAT), a self-insurance fund that provided workers’ compensation insurance for its members.¹⁸³ Underwriters at Lloyd’s, London (Underwriters) provided LSAT with excess insurance via certain reinsurance agreements, each of which included arbitration provisions.¹⁸⁴ Safety National Casualty Corporation (Safety National) also provided excess workers’ compensation coverage and alleged that LSAT transferred its rights under the reinsurance agreements with Underwriters to Safety National.¹⁸⁵ Underwriters disputed that claim, arguing that LSAT’s obligations were strictly personal and non-assignable.¹⁸⁶

Safety National then sued Underwriters in federal court, wherein Underwriters filed a motion to compel arbitration and eventually joined LSAT to the suit.¹⁸⁷ The

178. *Id.* at 1229–30.

179. *Id.* at 1233. The Second Circuit also pointed out that it recognized a limitation on the McCarran-Ferguson Act when it ruled that the Act’s reverse-preemption power did not apply to Title VII of the Civil Rights Act of 1964. *Id.* at 1232–33 (citing *Spirit v. Teachers Ins. & Annuity Ass’n*, 691 F.2d 1054 (2d Cir. 1982), *vacated and remanded on other grounds*, 463 U.S. 1223 (1983)).

180. *Id.* at 1233.

181. *Id.* at 1234.

182. 587 F.3d 714 (5th Cir. 2009).

183. *Safety Nat’l*, 587 F.3d at 717.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

district court agreed with Safety National and held that the Louisiana state statute—through the McCarran-Ferguson Act—reverse-preempted the New York Convention Act provisions in the FAA, thereby denying Underwriters’ motion to compel arbitration.¹⁸⁸

The Fifth Circuit, on appeal, held that the state law did not reverse-preempt federal law because

(1) Congress did not intend to include a treaty within the scope of an “Act of Congress” when it used those words in the McCarran-Ferguson Act, and (2) in this case, it is when we construe a treaty—specifically, the Convention, rather than the Convention Act—to determine the parties’ respective rights and obligations, that the state law at issue is superseded.¹⁸⁹

In making its above-mentioned conclusions, the court also addressed the self-execution argument.¹⁹⁰ This issue was relevant to the resolution of the case because, on one hand, LSAT argued that the Convention was not self-executing and could only be enforceable in the courts through an Act of Congress—that is, congressional legislation.¹⁹¹ On the other hand, the Underwriters argued primarily that, even if it was not self-executing, the Convention was a treaty and not an “Act of Congress” within the meaning of the McCarran-Ferguson Act.¹⁹²

The court concluded that there was no clear answer as to whether the Convention was self-executing.¹⁹³ The Fifth Circuit mentioned that the “Supreme Court indicated in dicta in *Medellin* that at least the provisions of the Convention pertaining to the enforcement of judgments of international arbitration tribunals are not self-executing,” thereby implying that the Convention may not be entirely self-executing.¹⁹⁴ However, “such a conclusion cannot be drawn with any certainty from the brief discussion in the [*Medellin*] opinion.”¹⁹⁵

The court then held that, regardless of whether the treaty was self-executing, the Convention could not be reverse-preempted by the McCarran-Ferguson Act because Congress simply did not intend to include treaties as Acts of Congress when it drafted the McCarran-Ferguson Act.¹⁹⁶ The Fifth Circuit agreed that a non-self-executing treaty could not be enforceable without congressional implementation; however, the court ruled that the self-execution issue was not essential to its holding.¹⁹⁷ Instead, the court reasoned that the “Act of Congress” text simply did not include “a treaty implemented by an Act of Congress.”¹⁹⁸ Therefore, the Fifth Circuit held that implemented treaty provisions—whether self-executing or not—were outside of the

188. *Id.* at 717–18.

189. *Id.* at 718.

190. *Id.* at 721–25.

191. *Id.* at 721.

192. *Id.*

193. *Id.* at 721–22.

194. *Id.* at 722.

195. *Id.*

196. *Id.* at 731–32.

197. *Id.* at 731.

198. *Id.*

scope of the McCarran-Ferguson Act.¹⁹⁹

The Fifth Circuit recognized that its holding conflicted with the Second Circuit's decision in *Stephens v. American International Insurance*, but it justified its split by referring to the Second Circuit's subsequent decision in *Stephens v. National Distillers and Chemical Corp.*²⁰⁰ The Fifth Circuit reasoned that *National Distillers* supported its holding for two reasons: (1) it provided an exception for federal statutes that "clearly intend[ed] to displace all state laws to the contrary," and (2) the common law rule before the passage of the McCarran-Ferguson Act supported the notion that international law preempted state insurance law.²⁰¹

On July 9, 2012—three years after the Fifth Circuit's decision in *Safety National*—the Fourth Circuit became the latest circuit to decide on the clash between the McCarran-Ferguson Act and the New York Convention in *ESAB Group, Inc. v. Zurich Insurance PLC*.²⁰²

4. The Fourth Circuit Also Declines To Rule on Self-Execution and Holds That the Scope of the McCarran-Ferguson Act Does Not Include the New York Convention Provisions in the FAA

ESAB Group involved a dispute between an American manufacturer and a Swedish insurance company.²⁰³ ESAB Group, a South Carolina-based manufacturer of welding materials, operated as a subsidiary of the Swedish company ESAB AB from 1989 to 1994.²⁰⁴ During this time, Trygg-Hansa, a Swedish insurer, issued seven global liability policies to ESAB AB and its subsidiaries.²⁰⁵ Some of these policies contained arbitration agreements that mandated the resolution of disputes in Swedish arbitral tribunals under Swedish law.²⁰⁶ After a series of transfers, Zurich Insurance PLC (ZIP) eventually acquired Trygg-Hansa's obligations.²⁰⁷

By 2009, ESAB Group faced numerous products liability lawsuits totaling more than \$54 million in defense costs and over \$25 million due to adverse verdicts.²⁰⁸ ESAB Group then requested that its insurers defend and indemnify it in the products liability actions.²⁰⁹ After many of these insurers—including ZIP—refused, ESAB Group sued them in state court in South Carolina.²¹⁰ The insurers removed the case to federal court under the New York Convention Act's grant of removal jurisdiction.²¹¹ The ESAB Group objected to the district court's subject matter jurisdiction, arguing

199. *Id.*

200. *Id.* at 731–32.

201. *Id.* at 732 (quoting *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1233 (2d Cir. 1995)).

202. 685 F.3d 376 (4th Cir. 2012).

203. *ESAB Group*, 685 F.3d at 383.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

that the South Carolina state statute prohibitions—given the power of reverse-preemption under the McCarran-Ferguson Act over the FAA New York Convention provisions—rendered the arbitration clauses invalid.²¹² Thus, the ESAB Group argued that, because the policies did not contain valid arbitration agreements, the claims could not fall under the FAA’s New York Convention provisions and were therefore not removable.²¹³

ESAB Group’s argument focused on the text of the McCarran-Ferguson Act, which states that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.”²¹⁴ ESAB Group also argued that the Convention was not a self-executing treaty and therefore relied upon an Act of Congress, the Convention Act, for its implementation.²¹⁵ ESAB Group argued that South Carolina law, which would invalidate the arbitration clauses from the 1989 to 1993 policies, was applicable because the McCarran-Ferguson Act reverse-preempted the implementing legislation of the Convention Act.²¹⁶

The Fourth Circuit, like the Fifth Circuit, refused to resolve the self-execution question and instead ruled that the McCarran-Ferguson Act was “limited to domestic affairs” and was simply not “intended to delegate to the states the authority to abrogate international agreements that [the] country has entered into.”²¹⁷ The court reasoned that the scope of the McCarran-Ferguson Act was not unlimited, noting specifically that the Supreme Court’s decision in *Garamendi* demonstrated that “Congress did not intend for the McCarran-Ferguson Act to permit state law to vitiate international agreements entered by the United States.”²¹⁸ The Fourth Circuit also used the Second Circuit’s proposition in *National Distillers* that the McCarran-Ferguson Act did not alter rules of preemption where the federal statute “clearly intends to preempt all other state laws.”²¹⁹ Employing that same reasoning, the court found that the provisions in the Convention Act expressed that intention and were therefore outside the scope of the McCarran-Ferguson Act.²²⁰

The Fourth Circuit’s conclusion in *ESAB Group* clearly tilted the circuit split in favor of declaring the New York Convention provisions outside of the scope of the McCarran-Ferguson Act. Both the Fifth and Fourth Circuits concluded that the question of self-execution was neither relevant nor necessary to reach that same conclusion. However, the path that the Fifth and Fourth Circuit courts each respectively used to reach that conclusion differed in treatment and depth. Because other circuits will likely encounter this same issue, it is important that a stable framework is

212. *Id.*

213. *Id.* at 384.

214. *Id.* at 388; 15 U.S.C. § 1012(b) (2012).

215. *Id.* at 385.

216. *Id.* at 383–85.

217. *Id.* at 390–91.

218. *Id.* at 389.

219. *Id.* (citing *Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1233 (2d Cir. 1995)).

220. *Id.* at 390.

established to provide guidance and consistency between the circuit courts.²²¹

III. DISCUSSION

Although the Fourth and Fifth Circuits' analysis varied in depth of reasoning and use of precedent, both circuit courts used similar arguments to conclude that the New York Convention provisions in the FAA were beyond the scope of the McCarran-Ferguson Act.²²² This Section identifies the trend and two main reasons the courts used in holding that the McCarran-Ferguson Act was inapplicable to the New York Convention. Next, this Section discusses the merits of both approaches. Finally, given the merits of these approaches, this Section sets forth a simple framework for future circuits to follow when they examine the same issue—thereby producing a holding that is consistent with both the trend in case law set by the Second, Fourth, and Fifth Circuits, as well as the relevance and language of the McCarran-Ferguson Act.

A Trend Toward a Resolution: The Two Main Approaches To Holding That the McCarran-Ferguson Act Is Not Applicable to the New York Convention

The Fourth and Fifth Circuits, in holding that the McCarran-Ferguson Act's scope did not include the New York Convention provisions in the FAA, provided two different and alternative reasons backed by a varying degree of precedent and legal reasoning.²²³ The first reason that both courts used was based on the Second Circuit's holding in *Stephens v. National Distillers and Chemical Corp.* that federal law will be applied to the insurance industry "whenever federal law clearly intends to displace all state laws to the contrary."²²⁴ The second reason that both circuits gave was based on the formulation of an international and foreign policy exception to the McCarran-Ferguson Act.²²⁵

1. The Federal Intent Approach: The Scope of the McCarran-Ferguson Act Does Not Include Federal Laws that Clearly Intend To Displace All State Laws to the Contrary

Both the Fourth and the Fifth Circuits looked to the Second Circuit's decision in *National Distillers* to hold that, because the provisions in the FAA implementing the New York Convention clearly intended to displace all state laws to the contrary, the

221. States in the Tenth, Sixth, and Eighth Circuits have similar anti-arbitration laws in the insurance context. See KAN. STAT. ANN. § 5-401(a), (c) (West 2014) (stating that arbitration agreements are enforceable unless found within insurance agreements, "except for those contracts between insurance companies, including reinsurance contracts"); KY. REV. STAT. ANN. § 417.050 (West 2014) (finding that a "written agreement to submit any existing controversy to arbitration" is not enforceable if found within an insurance contract); NEB. REV. STAT. § 25-2602.01(a), (f)(4) (West 2013) (stating that arbitration provisions in written contracts are "valid, enforceable, and irrevocable" unless found in "any agreement concerning or relating to an insurance policy").

222. See *supra* Parts II.D.3-4 for a discussion of the Fifth and Fourth Circuits' holdings.

223. See *supra* Parts II.D.3-4 for a discussion of the Fifth and Fourth Circuits' opinions.

224. *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1233 (2d Cir. 1995).

225. See *supra* Parts II.D.3-4 for a discussion of the Fifth and Fourth Circuits' opinions on the international scope of the McCarran-Ferguson Act.

New York Convention was not superseded by the McCarran-Ferguson Act.²²⁶ The Fifth Circuit in *Safety National Casualty Corp. v. Certain Underwriters at Lloyd's, London* provided a brief examination of the argument—using it mostly to justify its split from the Second Circuit's holding in *Stephens v. American International Insurance Co.*²²⁷ The Fourth Circuit in *ESAB Group, Inc. v. Zurich Insurance PLC* used the same argument but provided a more in-depth examination of its reasons.²²⁸

The Fourth Circuit argued that the Second Circuit's decision in *National Distillers*—supported by various substantive law exceptions applied to the McCarran-Ferguson Act—indicated that the New York Convention provisions were outside the scope of the McCarran-Ferguson Act.²²⁹ The examples that the Fourth Circuit used included an additional Second Circuit opinion that held provisions of Title VII of the Civil Rights Act of 1964 were outside the scope of the McCarran-Ferguson Act, as well as *National Distiller's* holding that the FSIA also lay outside the McCarran-Ferguson Act's scope.²³⁰ Because the New York Convention Act provided that the Convention “shall be enforced in United States courts,”²³¹ the Fourth Circuit held that Congress clearly intended it to “replace all contrary state laws.”²³² However, at the same time, both the Fifth and Fourth Circuits articulated a foreign policy approach to provide an alternative reason to deny the McCarran-Ferguson Act's applicability.

2. The Foreign Policy Approach: Statutes with International and Foreign Policy Implications Are Outside of the Scope of the McCarran-Ferguson Act

The second reason that the Fourth and Fifth Circuits gave to hold the McCarran-Ferguson Act did not apply to the New York Convention, and the enacted New York Convention Act provisions in the FAA, was that federal laws with important foreign policy implications were outside the scope of the McCarran-Ferguson Act.²³³

The Fifth Circuit, once again, gave a more cursory examination of the reason and used it to justify its split from the Second Circuit's ruling in *American International Insurance*.²³⁴ However, the weight that the Fifth Circuit gave the foreign policy consideration was evident in its examination of the “Act of Congress” language in the

226. See *supra* Parts II.D.3–4 for a discussion of the Fifth and Fourth Circuits' analysis of the McCarran-Ferguson Act's applicability to the New York Convention.

227. The Fifth Circuit acknowledged that its holding conflicted with *American International Insurance*, but it justified the split by bringing up *National Distillers*, in which the Second Circuit held that the McCarran-Ferguson Act did not apply to the Foreign Sovereign Immunities Act. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 731–32 (5th Cir. 2009).

228. See *supra* Part II.D.4 for a discussion of the Fourth Circuit's ruling in *ESAB Group*.

229. *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 389 (4th Cir. 2012).

230. *Id.*

231. 9 U.S.C. § 201 (2012).

232. *ESAB Group*, 685 F.3d at 390.

233. See *supra* Parts II.D.3–4 for a discussion of the Fifth and Fourth Circuits' analysis regarding the scope of the McCarran-Ferguson Act.

234. See *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 732 (5th Cir. 2009) (stating that a footnote in *National Distillers* emphasized that, as a common law rule, international law preempts all state insurance law and should supersede the McCarran-Ferguson Act).

McCarran-Ferguson Act.²³⁵ The court put significant weight on the fact that the “Act of Congress” language did not include “a treaty implemented by an Act of Congress,” regardless of whether the treaty was considered self-executing.²³⁶ The Fifth Circuit’s argument that a “treaty implemented” by Congress was beyond the scope of the McCarran-Ferguson Act’s “Act of Congress” language suggests that the foreign policy interests in a treaty are superior to the McCarran-Ferguson Act’s interest in protecting state insurance laws.²³⁷

The Fourth Circuit supported this argument through the Second Circuit’s decision in *National Distillers*, the Supreme Court’s interpretation of the McCarran-Ferguson Act in *American Insurance Ass’n v. Garamendi*, and international foreign policy rationales.²³⁸ The Fourth Circuit noted *National Distiller*’s distinction of the FSIA’s “international-law origins” as outside the scope of the McCarran-Ferguson Act.²³⁹ Furthermore, the Fourth Circuit used the Supreme Court’s decision in *Garamendi* to support the fact that the McCarran-Ferguson Act was limited to “domestic commerce legislation,” and was not intended to affect “arbitration or treaties.”²⁴⁰ Finally, the court used important international policy reasons to hold that implemented treaty provisions were beyond the scope of the McCarran-Ferguson Act.²⁴¹ The Fourth Circuit observed that the “federal government must be permitted to ‘speak with one voice when regulating commercial relations with foreign governments,’” and that “[n]othing in McCarran-Ferguson suggests that . . . Congress intended to delegate to the states the authority to abrogate international agreements that this country has entered into.”²⁴²

Although the Fifth and Fourth Circuits advanced both of these reasons for holding that the McCarran-Ferguson Act did not apply to the New York Convention, they both have serious faults as to the use of case support and interpretation of the McCarran-Ferguson Act.

B. *The Foreign Policy Approach Is Preferable to the Federal Intent Approach*

The foreign policy approach, establishing that international policy reasons should supersede the McCarran-Ferguson Act, is preferable to the federal intent approach because it satisfies important foreign policy goals and retains the overall integrity of the McCarran-Ferguson Act.

The federal intent approach, adopting the rule that the McCarran-Ferguson Act does not apply where “federal law clearly intends to displace all state laws to the contrary,”²⁴³ would provide a rule that is too broad. The McCarran-Ferguson Act’s plain language indicates a broad standard that Congress left absent any conditional

235. *Id.* at 731.

236. *Id.*

237. *See id.* (holding that treaty provisions are not reverse-preempted by state law, regardless of whether they are self-executing or not).

238. *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 388–90 (4th Cir. 2012).

239. *Id.* at 389 (quoting *Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1231 (2d Cir. 1995)).

240. *Id.* at 390 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 428 (2003)).

241. *Id.*

242. *Id.* (quoting *Michelen Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

243. *Nat’l Distillers*, 69 F.3d at 1233.

limits.²⁴⁴ A broad ruling that a federal law is intended to displace all contrary state laws goes against Congress's intention to give states the power to regulate insurance.²⁴⁵ Furthermore, subsequent courts have criticized the substantive law example that the Fourth Circuit used to support the federal intent approach.²⁴⁶ The substantive law example that the Fourth Circuit referred to was the Second Circuit's decision in *Spirt v. Teachers Insurance & Annuity Ass'n*.²⁴⁷ In *Spirt*, the Second Circuit held that Title VII contained "congressional intent to displace all contrary state laws" and was therefore outside the scope of the McCarran-Ferguson Act.²⁴⁸ *Spirt* was subsequently vacated on appeal and questioned by other circuit courts.²⁴⁹ By contrast, the foreign policy approach keeps true to the generally broad "Act of Congress" language as long as it pertains to "domestic commerce legislation."²⁵⁰ The foreign policy approach merely carves out an exception to the McCarran-Ferguson Act by taking treaties and foreign policy instruments out of the "Act of Congress" language.²⁵¹ Furthermore, scholars and commentators have advanced a myriad of policy reasons and arguments to conclude that implemented treaties are beyond the scope of the McCarran-Ferguson Act.²⁵²

The foreign policy approach, though preferable, also has its faults. The Fourth Circuit's reliance on *Garamendi* to support the argument that the McCarran-Ferguson Act pertains only to domestic commerce legislation seems an oversimplification of the Supreme Court's holding in that case.²⁵³ First, the Supreme Court in *Garamendi* was

244. See Denning & Ramsey, *supra* note 16, at 887 (stating that the scope of the McCarran-Ferguson Act is comprehensive).

245. See 15 U.S.C. § 1011 (2012) ("[T]he continued regulation and taxation by the several States of the business of insurance is in the public interest."); Claudia Lai, *The McCarran-Ferguson Act and the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards: To Reverse-Preempt or Not?*, 2011 U. CHI. LEGAL F. 349, 372 (2011) (stating the reasons why the McCarran-Ferguson Act's reverse-preemption power is desirable for the regulation of insurance).

246. See *ESAB Group*, 685 F.3d at 389 (asserting that on several occasions, "Courts of Appeals have refused to give the McCarran-Ferguson Act [a] broad scope").

247. 691 F.2d 1054 (2d Cir. 1982).

248. *Spirt*, 691 F.2d at 1065.

249. *Spirt* was vacated by the Supreme Court and questioned by the Eighth and Seventh Circuits. See *Long Island Univ. v. Spirt*, 463 U.S. 1223, 1223 (1983) (vacating and remanding *Spirt*); *Murff v. Prof'l Med. Ins. Co.*, 97 F.3d 289, 292 n.4 (8th Cir. 1996) (questioning the holding in *Spirt*); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 294–95 (7th Cir. 1992) (stating that the *Spirt* court incorrectly interpreted the "Act of Congress" language in the McCarran-Ferguson Act).

250. *ESAB Group*, 685 F.3d at 390 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003)).

251. See *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 731 (5th Cir. 2009) ("The text of the McCarran-Ferguson Act does not support the inclusion by implication of a treaty implemented by an Act of Congress." (internal quotation mark omitted)).

252. See David A. Rich, *Deference to the "Law of Nations": The Intersection Between the New York Convention, the Convention Act, the McCarran-Ferguson Act, and State Anti-Insurance Arbitration Statutes*, 33 T. JEFFERSON L. REV. 81, 129 (2010) (suggesting that the *Charming Betsy* canon, which states that an act of Congress cannot be interpreted to conflict with international law, should be invoked to allow a treaty to supersede the McCarran-Ferguson Act); Wells, *supra* note 87, at 306–07 (stating that the Foreign Commerce Clause requires the recognition of the New York Convention over state insurance laws); Leonie W. Huang, Note, *Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties*, 79 FORDHAM L. REV. 2211, 2257–58 (2011) (stating that implemented treaties like the New York Convention invoke the Supremacy Clause power to supersede the McCarran-Ferguson Act).

253. See *ESAB Group*, 685 F.3d at 390 (citing *Garamendi*, 539 U.S. at 428) (relying on *Garamendi* to

not examining the application of the McCarran-Ferguson Act to a treaty.²⁵⁴ Rather, the Court was examining the preemption of executive foreign policy actions over state law and how the purpose of the McCarran-Ferguson Act indicated Congress's intent to allow state insurance preemptive rights over certain federal actions.²⁵⁵ This also goes against the comprehensively broad "Act of Congress" language that Congress specifically included in the McCarran-Ferguson Act.²⁵⁶ Unduly narrowing that definition to involving only domestic commerce legislation, without any showing that Congress intended such a restriction, seems to be a faulty reading of the McCarran-Ferguson Act's intent and purpose.²⁵⁷

For future circuits with states that also contain anti-arbitration laws in the insurance context, it is important for a framework to be established that is consistent with the trend in case law. The approaches that the Fourth and Fifth Circuits took—using reasoning supplied by the Supreme Court and the Second Circuit—can be adopted and modified to establish a clear and coherent framework that is consistent with the trend in case law and the language and purpose of the McCarran-Ferguson Act.

C. *Establishing a Framework for Future Circuits*

Because state anti-arbitration statutes in insurance contracts are common throughout the United States, it is inevitable that more circuit courts will face the conflict between the New York Convention and the McCarran-Ferguson Act.²⁵⁸ Furthermore, the McCarran-Ferguson Act's broad "Act of Congress" language will likely conflict with subsequent treaties that may indirectly implicate state insurance laws.²⁵⁹ In order to be consistent with the trend in case law analyzing this issue, as well as staying true to the intent and spirit of the McCarran-Ferguson Act, the foreign policy approach should be modified to establish a two-step framework. This framework should be used to examine the McCarran-Ferguson Act's effect on a federal statute or treaty, regardless of whether the treaty is considered self-executing. The two-step framework should work as follows: first, the court should identify the McCarran-Ferguson Act's elements and apply them to the state statute and the treaty; then, if the elements apply, the court should examine whether the statute or treaty contains a product of executive action with important foreign policy implications. If the statute or

support the argument that the McCarran-Ferguson Act applies only to domestic commerce legislation).

254. See *supra* Part II.A.2.d for a discussion of *Garamendi*.

255. *Garamendi*, 539 U.S. at 427–28.

256. See Denning & Ramsey, *supra* note 16, at 887 (stating that the scope of the McCarran-Ferguson Act is comprehensive); Krupar, *supra* note 71, at 904 (stating that limiting the McCarran-Ferguson Act's scope to only domestic insurers would produce "unjust, far-reaching results" that would give foreign insurance companies undue power over domestic individuals); Rich, *supra* note 252, at 135 (noting the ambiguity in the McCarran-Ferguson Act's language and suggesting an amendment to narrow its scope).

257. See Krupar, *supra* note 71, at 901 ("The legislative history of the McCarran-Ferguson Act warrants that the states are to be the regulators of the insurance industry as a whole.").

258. See *supra* note 221 and accompanying text for examples of circuits with states containing anti-arbitration laws in insurance context.

259. See *supra* note 256 and accompanying text for a description of the broad language of the McCarran-Ferguson Act.

treaty does contain both a product of executive action with important foreign policy goals, then the statute or treaty should supersede the McCarran-Ferguson Act's reverse-preemption power.

Applying this framework to the New York Convention would produce a result that is consistent with the trend in case law, the legal and policy support that the Fourth and Fifth Circuits use, and the text of the McCarran-Ferguson Act. This framework is consistent with the trend in case law because it would produce the same result if applied to the New York Convention Act. Although the FAA provisions implicating the New York Convention would presumably satisfy all the elements of the McCarran-Ferguson Act,²⁶⁰ the New York Convention Act would supersede the McCarran-Ferguson Act because it was a product of executive action—as a byproduct of a treaty.²⁶¹ Also, it would satisfy the foreign policy approach by implicating important U.S. foreign policy goals.²⁶² The framework is also consistent with the legal and policy support used by the Fourth and Fifth Circuits because it is consistent with the reasoning in *National Distillers* and *Garamendi*, by requiring an executive action and international element to be present for the treaty to be determined as outside the scope of the McCarran-Ferguson Act.²⁶³ Finally, this framework would also preserve the broad “Act of Congress” language by requiring executive action, rather than unduly narrowing the scope of the McCarran-Ferguson Act to just domestic commerce legislation.²⁶⁴ Therefore, the states will be able to keep their broad powers over regulation of insurance law, with the narrow exception of federal laws that are a product of executive action and implicate important foreign policy goals.

IV. CONCLUSION

The interplay between the McCarran-Ferguson Act and the FAA's New York Convention provisions implicate a variety of extremely complex legal doctrines. Given the number of circuit courts that will likely encounter this issue in the future,²⁶⁵ a framework should be established to analyze the McCarran-Ferguson Act's effect in a simple and consistent way. By following the framework outlined in this Comment, circuit courts will be able to follow the current trend set by the Second, Fourth, and Fifth Circuits, as well as remain consistent with the language and spirit of the McCarran-Ferguson Act.

260. See *supra* Part II.A.2.b for a discussion of the application of the three elements of the McCarran-Ferguson Act: (1) both the FAA provisions and the New York Convention did not directly relate to the business of insurance, (2) state anti-arbitration law was enacted for the purpose of regulating insurance, and (3) application of the FAA and New York Convention provisions would impair the state insurance laws.

261. See *supra* notes 91–93 and accompanying text for a discussion of the Constitution's characterization of a treaty as a product of executive rather than legislative action.

262. See *supra* note 250–52 and accompanying text for a discussion of all the foreign policy reasons for placing the New York Convention beyond the scope of the McCarran-Ferguson Act.

263. See *supra* Parts II.A.2.d and II.D.2 for a discussion of *Garamendi* and *National Distillers*.

264. *ESAB Group, Inc. v. Zurich Ins. PLC*, 685 F.3d 376, 390 (4th Cir. 2012). See *supra* Parts II.A.2.c–d for a discussion of the scope of the McCarran-Ferguson Act.

265. See *supra* note 221 and accompanying text for examples of circuits with states containing anti-arbitration laws in insurance context.

