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J. Matthew Saunders

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An Iron Fist or Kid Gloves: *American Insurance Association v. Garamendi* and the Fate of the Federal Monopoly on Foreign Policy

*J. Matthew Saunders**

I. INTRODUCTION

Prior to and during the Second World War, the Nazi government of Germany engaged in the wide scale theft of insurance policies held by Jews throughout Europe. In *American Insurance Ass'n v. Garamendi*, the United States Supreme Court struck down California's Holocaust Victim Insurance Relief Act (HVIRA), a statute aimed at helping Holocaust victims and their heirs settle claims against insurance companies by forcing the insurance companies to disclose information about policies sold in Europe between 1920 and 1945.¹ In a five-four decision, the Court ruled that the HVIRA conflicted with the federal policy of settling the claims through diplomatic channels.² Justice Souter, writing for the majority, stated:

California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy. . . .³

Almost immediately, representatives of the Jewish community called the decision "tragic"⁴ and "a crushing blow to the victims of

* J.D. Candidate, Chapman University School of Law, 2005; M.M.C., The University of South Carolina School of Journalism and Mass Communications, 1999; B.A., Vanderbilt University, 1997. The author would like to thank Lara Saunders for her unwavering support and unending patience.

¹ *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2379 (2003).

² *Id.* at 2390.

³ *Id.* at 2393.

⁴ Charles Lane, *Court Rejects Law Aiding Survivors of Holocaust; Calif. Act Undercut Presidential Role, Ruling Says*, WASH. POST, June 24, 2003, at A11.

the Holocaust.”⁵

Furthermore, the Court’s decision in *Garamendi* reaches beyond the rights of Holocaust survivors. It has muddied the waters in an increasingly murky area of constitutional law—the nature of the federal monopoly on foreign policy. California’s legislature felt compelled to act because, as stated in the HVIRA, “[a]t least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims.”⁶ The California legislature enacted HVIRA in a legitimate aim to eliminate “the further victimization of these policyholders and their families.”⁷ The Supreme Court’s striking down of the HVIRA throws a glaring spotlight on the problem of determining where state authority ends in an increasingly interconnected global society. So far, the Supreme Court has provided little guidance to the states or the courts below as to what states can and cannot do in the global arena.⁸

That the federal government holds a monopoly on foreign policy was once a given, but in its application this idea has come under fire. As one commentator has remarked, “[m]ost everyone was comfortable supposing that the national government monopolized foreign relations until the Supreme Court actually began applying that notion.”⁹ *Garamendi* follows more than half a century of confusing and contradictory Supreme Court cases concerning this federal monopoly on foreign policy.¹⁰ It represents a retreat from the ideas put forward in these cases, but it resolves none of the issues involved. In fact, in *Garamendi*, the Court fell into many of the same traps as it had in its previous jurisprudence, including having to infer what exactly the federal foreign policy was and to decide whether Congress or the President had ultimate authority over that foreign policy. Furthermore, on the ultimate question of whether there is any room at all for state action in the foreign policy realm, the Court remained silent. Thus, *Garamendi* gives little assistance to those who hoped it would clarify the role of the states on the global

⁵ Henry Weinstein, *Holocaust Insurance Law Negated*, L.A. TIMES, June 24, 2003, at B1.

⁶ CAL. INS. CODE § 13801(d) (Deering Supp. 2003).

⁷ *Id.* § 13801(e).

⁸ Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 925 (2003).

⁹ Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT’L L. 337, 339 (2001) [hereinafter Swaine, *Foreign Relations Federalism*].

¹⁰ Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L. J. 1127, 1135 [hereinafter Swaine, *Negotiating Federalism*].

stage.

Part II of this Note explores the three prevailing theories in support of the federal monopoly on foreign policy: the dormant federal foreign affairs power, the dormant Foreign Commerce Clause, and direct preemption.¹¹ Part III discusses *Garamendi* and the opinions of both the majority and the dissent. Part IV explores the problems with the Supreme Court's ruling. Part V posits a solution to the unresolved issues faced in *Garamendi*, which involves recognizing a constitutional basis for the federal monopoly on foreign policy but limiting its application. Part VI concludes this Note with observations on the legal basis for the federal government's authority to conduct foreign policy and the future of state activity in the international arena.

II. THREE THEORIES ON THE SOURCE OF THE FEDERAL MONOPOLY ON FOREIGN POLICY

A. The Dormant Federal Foreign Affairs Power

Under the theory of the dormant federal foreign affairs power, one of the three prevailing theories on the source of the federal monopoly on foreign policy, any state law that has a direct impact on the federal government's ability to conduct foreign policy is invalid.¹² The dormant federal foreign affairs power has its roots in several Supreme Court cases from the early to mid-twentieth century. In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court upheld a joint resolution of Congress giving power to the President to outlaw the sale of arms to combatants embroiled in a conflict in Bolivia and Paraguay.¹³ Justice Sutherland, writing for the majority, said, "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."¹⁴ He went on to explain that in his view, "the states severally never possessed international powers," and that this power originated

¹¹ The term "preemption" is often used, and not incorrectly, to describe all three doctrines. The dormant foreign affairs power and the dormant Foreign Commerce Clause are forms of field preemption; the federal government having intended to occupy the entire field of foreign affairs under these doctrines. The direct preemption theory envisions instances of conflict preemption, both explicit and implied. This note attempts to avoid confusion by using "preemption" to refer only to such conflict preemption.

¹² Swaine, *Negotiating Federalism*, *supra* note 10, at 1144.

¹³ 299 U.S. 304, 329 (1936).

¹⁴ *Id.* at 315-16.

in the states acting as a union.¹⁵ Therefore, “[a]s a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.”¹⁶ In other words, there was no room for state action.

A few years later, in *Hines v. Davidowitz*, the Supreme Court struck down a Pennsylvania law that provided for the registration of immigrants within the state.¹⁷ In doing so the Court said, “[t]he Federal Government, representing as it does the collective interests of the [then] forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”¹⁸ Furthermore, the Court stated, “for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”¹⁹

The federal foreign affairs power doctrine crystallized, however, during the height of the Cold War. In *Banco Nacional de Cuba v. Sabbatino*, the Court, in ruling that the Cuban government had standing to sue in United States courts, integrated international law into federal common law.²⁰ The Court reasoned that the “concern for uniformity in this country’s dealings with foreign nations” that is manifested in various clauses of the Constitution indicated “a desire to give matters of international significance to the jurisdiction of federal institutions.”²¹ Therefore, it would be inappropriate for a federal court to apply state common law to an issue implicating international law.

Sabbatino paved the way for *Zschernig v. Miller* four years later, in which perhaps the most direct embodiment of the dormant foreign affairs power appears.²² In *Zschernig*, the Supreme Court struck down an Oregon law prohibiting a citizen of a foreign country from claiming an inheritance from a resident of Oregon unless certain conditions were met.²³ These conditions were meant to ensure the existence of reciprocity in inheritance rights between the United States and other nations and required foreign nationals to prove that this reciprocity existed.²⁴

¹⁵ *Id.* at 316.

¹⁶ *Id.* at 318.

¹⁷ 312 U.S. 52, 73-74 (1941).

¹⁸ *Id.* at 63.

¹⁹ *Id.* (quoting *The Chinese Exclusion Cases*, 130 U.S. 581, 606 (1889)).

²⁰ 376 U.S. 398, 426-27 (1964).

²¹ *Id.* at 427 n.25.

²² 389 U.S. 429, 441 (1968); Swaine, *Negotiating Federalism*, *supra* note 10, at 1143.

²³ 389 U.S. at 441.

²⁴ *Id.* at 430-31.

Furthermore, the law required foreign nationals to demonstrate that they could take property from an Oregon estate “without confiscation.”²⁵

Although the law as written applied to all nations, the Court found that in implementing it, probate judges regularly disfavored citizens of Communist countries.²⁶ They went beyond simply determining whether reciprocity existed and sought “to ascertain whether ‘rights’ protected by foreign law are the same ‘rights’ that citizens of Oregon enjoy.”²⁷ If a right in question implicated a Communist-controlled state agency, then judges ruled that the right was not the same and that there was no reciprocity.²⁸ Most troubling for the Supreme Court was the reference in the Oregon law to “confiscation,” which “led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements,” and into speculation as to whether inherited goods were actually delivered to the rightful heirs.²⁹

This level of involvement was too much for the Court even though no treaty or federal law addressed the issue. Justice Douglas, writing for the majority, stated that “even in absence of a treaty, a State’s policy may disturb foreign relations.”³⁰ The Oregon law had “a direct impact upon foreign relations” and negatively affected the federal government’s ability to conduct foreign policy.³¹ By contrast, the Supreme Court upheld a similar reciprocity agreement in California, which relied on the statement of foreign ambassadors to prove reciprocity, because it only had “some incidental or indirect effect in foreign countries.”³²

A major criticism of the decision in *Zschernig* is that the Court lacked direct support for its statements, relying on dicta from *Curtiss-Wright* and *Hines*.³³ Because of this and because of the focus on Communist countries, the tendency has been to relegate *Zschernig* to the status of Cold War relic.³⁴ Today, few adhere fully to the reasoning of *Curtiss-Wright*, and, without express language in the Constitution, a treaty, or federal statute, the Court has been reluctant to confer power to the federal

²⁵ *Id.*

²⁶ *Id.* at 440.

²⁷ *Id.*

²⁸ *Zschernig*, 389 U.S. at 440.

²⁹ *Id.* at 435.

³⁰ *Id.* at 441.

³¹ *Id.*

³² *Id.* at 433 (quoting *Clark v. Allen*, 311 U.S. 503, 517 (1947)).

³³ Swaine, *Negotiating Federalism*, *supra* note 10, at 1142-43.

³⁴ *Id.* at 1145.

government at the expense of the states.³⁵ However, in light of the heightened tensions of the time, the *Zschernig* decision made sense. The Oregon law struck down in *Zschernig* did have the potential to spark an international incident, and the Court's expression of the dormant foreign affairs power—that a state law “with a direct impact upon foreign relations” was unconstitutional—reflected this reality.³⁶

Despite the lack of direct support in the Constitution for a federal monopoly on foreign policy, proponents of the dormant foreign affairs power can point to numerous constitutional provisions for substantiation.³⁷ Article I, Section 8 gives Congress power “[t]o regulate commerce with foreign nations. . . ; [t]o define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations;” and “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”³⁸ Article II, Section 2 makes the President “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States;” and gives him the power to make treaties and appoint ambassadors, and to receive ambassadors.³⁹ Furthermore, the Supremacy Clause, located at Article VI, Section 4, states, “[t]his Constitution, and the Laws of the United States . . . and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land. . . .”⁴⁰ Finally, Article I, Section 10 bars the states from entering into any “treaty, alliance, or confederation.”⁴¹ Still, critics point out that while these provisions give the federal government broad power over foreign policy, it is far from clear that they impart *exclusive* power.⁴²

The only other arguments available to advocates of the dormant foreign affairs power are historical and pragmatic ones.⁴³ During the Articles of Confederation period, the independent actions of several states led to disastrous results, including the disruption of much-needed trade with Great Britain.⁴⁴ The writings of Alexander Hamilton and James Madison in *The Federalist Papers* are often cited to support the proposition that the federal government needs unfettered control

³⁵ *Id.* at 1142, 1150.

³⁶ Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1241-42 (1999).

³⁷ Chiang, *supra* note 8, at 933.

³⁸ U.S. CONST. art I, § 8.

³⁹ U.S. CONST. art II, §§ 2-3.

⁴⁰ U.S. CONST. art VI, § 4.

⁴¹ U.S. CONST. art I, § 10.

⁴² Swaine, *Negotiating Federalism*, *supra* note 10, at 1135.

⁴³ *Id.*

⁴⁴ Chiang, *supra* note 8, at 938.

over the foreign affairs of the nation.⁴⁵ Hamilton wrote, “The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to [other nations],” and that these regulations needed to be restrained by a “national control” or else they “would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.”⁴⁶ In addition, Madison wrote, “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”⁴⁷ Many have argued that this danger has not diminished over time. To permit the states to conduct their own foreign policies would be to invite chaos, since the actions of one state could disrupt foreign relations for the whole nation.⁴⁸

Critics, however, argue that increased globalization has given the states much greater direct access to the world at large and that foreign entities understand that a single state does not always speak for the whole nation.⁴⁹ They point out that individual states have always involved themselves in international matters to some extent. They “establish offices overseas, launch trade and investment missions, sign bilateral and multilateral agreements, and participate in international summits.”⁵⁰ Denying the individual states any voice in foreign policy therefore runs contrary to the realities of a global marketplace.

Since the *Zschernig* decision the Supreme Court has not applied the direct impact doctrine, leaving its value as precedent in some doubt.⁵¹ However, the Court also has never overruled *Zschernig*, and many lower courts have embraced the “direct impact” test it propounds.⁵² For example, in *Deutsch v. Turner Corp.*, the Ninth Circuit applied the *Zschernig* “direct impact” test to a California law aimed at corporations who employed slave labor in Europe and Asia prior to and during World War II.⁵³ The law was enacted at the same time as the HVIRA and allowed victims of slave labor to sue for compensation for the

⁴⁵ *Id.* at 936-37.

⁴⁶ THE FEDERALIST No. 22, at 144-45 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

⁴⁷ THE FEDERALIST No. 42, at 264 (James Madison) (Clinton Rossiter, ed., 1961).

⁴⁸ Chiang, *supra* note 8, at 957.

⁴⁹ *Id.* at 956.

⁵⁰ Swaine, *Negotiating Federalism*, *supra* note 10, at 1130.

⁵¹ *Id.* at 1145.

⁵² Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1632 (1997).

⁵³ 324 F.3d 692, 709 (9th Cir. 2003).

work they were forced to do.⁵⁴ The court invalidated the California law because, in its estimation, the federal government had exclusive power in foreign policy, especially concerning the ability to wage war and to negotiate an end to war.⁵⁵ The court stated that “the Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government.”⁵⁶ Because so many lower courts have adopted the “direct impact” rule, it would seem appropriate for the Supreme Court to flesh out the doctrine, but so far the Court has refused to do so.

B. The Dormant Foreign Commerce Clause

The dormant Foreign Commerce Clause doctrine derives its legitimacy from the Interstate Commerce Clause in Article II, Section 8 of the Constitution, which gives Congress the power to regulate commerce both among the states and with foreign nations, and from the Import-Export Clause in Article II, Section 10, which prohibits states from laying duties on imports or exports without congressional consent.⁵⁷ The rationale of the doctrine is identical to that of the dormant Commerce Clause doctrine.⁵⁸ A state action is invalid if it intrudes into the field of foreign commerce, even if Congress has not yet chosen to regulate a particular matter in that area.

Japan Line Ltd. v. County of Los Angeles, a case in which the Supreme Court overturned a tax imposed by California on foreign-owned cargo containers in California ports, set out the test for whether a state law violates the dormant Foreign Commerce Clause.⁵⁹ According to *Japan Line*, if the state law in question prevents the federal government from “speak[ing] with one voice,” it is unconstitutional.⁶⁰

The Supreme Court further developed the “one voice” standard in *Barclays Bank PLC v. Franchise Tax Board*.⁶¹ In *Barclays Bank*, several multinational corporations filed suit alleging that the worldwide combined reporting method employed by the State of California to calculate corporate

⁵⁴ CAL. CIV. PROC. CODE § 354.6 (Deering Supp. 2003).

⁵⁵ *Deutsch*, 324 F.3d at 711.

⁵⁶ *Id.* at 709.

⁵⁷ Swaine, *Negotiating Federalism*, *supra* note 10, at 1146-48.

⁵⁸ *Id.* at 1146.

⁵⁹ 441 U.S. 434, 453-54 (1979).

⁶⁰ *Id.* at 449.

⁶¹ 512 U.S. 298 (1994).

franchise taxes unfairly taxed foreign-based multinational corporations twice.⁶² The corporations claimed that the worldwide combined reporting method violated the Commerce Clause and the Due Process Clause.⁶³ Justice Ginsburg, writing for the majority, dismissed most of the corporations' claims because the world wide combined reporting method was "proper and fair."⁶⁴ Furthermore, the worldwide combined reporting method did not "inevitably" lead to double taxation, and other methods of calculating corporate taxes were just as susceptible to the dangers of double taxation.⁶⁵

The Supreme Court's inquiry did not end there, however. In light of *Japan Line*, the Court investigated whether California's method impaired the federal government's "capacity to speak with one voice when regulating commercial relations with foreign governments."⁶⁶ The Court held that Congress, while aware of foreign opposition to the worldwide combined reporting method, had chosen not to forbid the states to employ it.⁶⁷ Numerous bills that would have prohibited use of the worldwide combined reporting method were defeated.⁶⁸ In addition, the Senate, in ratifying a treaty with the United Kingdom, deleted a provision of the treaty that would have precluded use of the method.⁶⁹ The Court also defended the California practice against opposition by the Executive Branch, discounting executive statements on the grounds that the Constitution conferred the power to regulate foreign commerce to the Legislative Branch.⁷⁰ As the Court stated, "[W]e leave it to Congress—whose voice, in this area, is the Nation's—to evaluate whether the national interest is best served by tax uniformity, or state autonomy."⁷¹ Thus when Congress and the President differ, Congress prevails in matters of foreign commerce.⁷²

Some hailed *Barclays Bank* as a victory for state power to determine foreign policy, at least on a limited basis. However, the decision still gave the ultimate power over foreign policy to a branch of the federal government, in this case Congress, which happened to have compatible views with California.⁷³ In this

⁶² *Id.* at 302.

⁶³ *Id.*

⁶⁴ *Id.* at 316.

⁶⁵ *Id.* at 319.

⁶⁶ *Barclays Bank*, 512 U.S. at 311 (internal quotation marks omitted).

⁶⁷ *Id.* at 324.

⁶⁸ *Id.* at 325-26.

⁶⁹ *Id.* at 326-27.

⁷⁰ *Id.* at 329.

⁷¹ *Barclays Bank*, 512 U.S. at 331.

⁷² *Id.* at 329-30.

⁷³ Chiang, *supra* note 8, at 954.

way, the “one voice” test becomes virtually identical to the “direct impact” test under the dormant foreign affairs power theory, and is thus susceptible to the same criticisms.⁷⁴ Very little textual justification exists for granting Congress such power in situations where positive law enactments are absent.⁷⁵ Furthermore, because *Japan Line*, *Barclays Bank*, and the other cases using the “one voice” analysis all have to do with tax issues, the applicability of this test may very well be limited to foreign tax disputes.⁷⁶ At any rate, it is clear that the development of the dormant Foreign Commerce Clause adds yet another layer of complexity to the question of the federal monopoly on foreign policy: namely, whether the monopoly belongs to Congress, the President, or both.⁷⁷

C. Direct Preemption

At the core of the direct preemption theory lies the Supremacy Clause, which states that the Constitution, federal laws, and treaties are “the supreme Law of the Land. . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁷⁸ Thus, “[s]tate and local measures touching on foreign affairs clearly cannot be maintained in the teeth of enacted federal law—including, at a minimum, federal statutes, treaties, and congressionally authorized regulations.”⁷⁹ There is nothing controversial about this idea, which is fundamental to the functioning of the federal government. A state law which conflicts with a federal law, either expressly or by implication, is unconstitutional, regardless of its subject matter. The issue then is determining when a conflict occurs.

In *United States v. Pink*, the Supreme Court overturned several New York laws directed against the Soviet Union.⁸⁰ The laws, passed after the 1917 Revolution in Russia and the nationalization of the Russian insurance industry, denied the claims of the Soviet Union to assets of Russian insurance companies established in the state of New York prior to the Bolshevik takeover.⁸¹ However, in 1933 the United States officially recognized the Soviet Union, and the Soviet government assigned its claims to the United States for collection.⁸² The

⁷⁴ Swaine, *Negotiating Federalism*, *supra* note 10, at 1148.

⁷⁵ *Id.* at 1156.

⁷⁶ Goldsmith, *supra* note 52, at 1637.

⁷⁷ Swaine, *Negotiating Federalism*, *supra* note 10, at 1156-57.

⁷⁸ U.S. CONST. art VI, § 4.

⁷⁹ Swaine, *Negotiating Federalism*, *supra* note 10, at 1141.

⁸⁰ 315 U.S. 203, 234 (1942).

⁸¹ *Id.* at 210-11.

⁸² *Id.* at 211.

United States brought suit to acquire the New York assets.⁸³ The Supreme Court ruled that the agreement between the United States and the Soviet Union was valid and, relying on the Supremacy Clause, recognized the President's power to negotiate agreements with foreign governments.⁸⁴ The Court stated that "international compacts and agreements" have the same binding force on the courts as treaties, and, therefore, state actions in conflict with such agreements are invalid.⁸⁵

More recently, the Supreme Court applied the idea of direct preemption in *Crosby v. National Foreign Trade Council*.⁸⁶ In 1996 the Commonwealth of Massachusetts adopted a law entitled "An Act Regulating State Contracts with Companies Doing Business with or in Burma (Myanmar)" ("Massachusetts Act").⁸⁷ The law prohibited state entities from doing business with organizations that also did business with the government of Myanmar and was enacted in response to the atrocious human rights violations of the military junta in power.⁸⁸

Three months after the Massachusetts law went into effect, Congress passed the Foreign Operations, Export Financing, and Related Programs Appropriations Act ("Federal Act").⁸⁹ Among other provisions, the Federal Act authorized the President to apply sanctions directly on the government of Myanmar.⁹⁰ It also gave him the power to inhibit "new investment" by American entities in Myanmar and to explore diplomatic avenues "to bring democracy to and improve human rights practices and the quality of life in [Myanmar]."⁹¹ The motivations for the Federal Act were similar to those of the Massachusetts Act.⁹²

The National Foreign Trade Council, representing several business organizations adversely affected by the Massachusetts Act, filed suit in 1998.⁹³ The District Court granted a permanent injunction against the Massachusetts Act, stating that it "unconstitutionally impinged on the federal government's exclusive authority to regulate foreign affairs."⁹⁴ The First Circuit affirmed on the grounds that the Massachusetts Act

⁸³ *Id.* at 213.

⁸⁴ *Id.* at 230.

⁸⁵ *Pink*, 315 U.S. at 230.

⁸⁶ 530 U.S. 363, 366 (2000).

⁸⁷ *Id.* at 366-67 (citing MASS. GEN. LAWS ch. 7 §§ 22G-22M (2002)).

⁸⁸ *Crosby*, 530 U.S. at 367; Chiang, *supra* note 8, at 928.

⁸⁹ Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1996).

⁹⁰ *Crosby*, 530 U.S. at 369.

⁹¹ *Id.*

⁹² See *id.* at 370; *supra* text accompanying note 88.

⁹³ *Crosby*, 530 U.S. at 370-71.

⁹⁴ *Id.* at 371 (alteration in original).

violated the dormant foreign affairs power, the dormant Foreign Commerce Clause, and was preempted by the Federal Act.⁹⁵

The Supreme Court, however, affirmed the First Circuit's decision solely on the preemption ground.⁹⁶ Justice Souter, writing for the unanimous Court, stated that the Massachusetts Act was "an obstacle to the accomplishment of Congress's full objectives under the [F]ederal Act" and that "the state law undermines the intended purpose and 'natural effect' of at least three provisions of the [F]ederal Act . . ."⁹⁷ In explaining the Court's reasoning, he noted the difference between the two Acts. In many ways, the Massachusetts Act was much harsher than the Federal Act, and the Court feared that it would hamper the President's ability to implement the provisions of the Federal Act, especially its diplomatic components.⁹⁸

Direct preemption is the least controversial of the three because it has clear constitutional support. However, in limiting the *Crosby* holding to direct preemption, the court deliberately closed off any discussion of the dormant federal foreign affairs power or the dormant Foreign Commerce Clause and disappointed those who had hoped for some clarification of the meaning and continued relevance of *Zschernig* and *Barclays Bank*.⁹⁹ This disappointment reflects the major shortcoming of the direct preemption approach, a shortcoming that in many ways spurred the *Zschernig* decision in the first place. There is not always a federal law or treaty in direct conflict with a state action, but in some way, it is clear that a state action intrudes into the ability of the federal government to conduct foreign policy freely. In such a situation, the direct preemption approach will not work to alleviate the problem, and the only options open to the courts are doctrines on which the Supreme Court has not commented.¹⁰⁰

III. AMERICAN INSURANCE ASSOCIATION V. GARAMENDI – A STATEMENT OF THE CASE

A. Factual Background

Insurance policies and annuities were widely popular investments among Jews in Europe prior to the Second World

⁹⁵ *Id.*

⁹⁶ *Id.* at 372.

⁹⁷ *Id.* at 373.

⁹⁸ *Crosby*, 530 U.S. at 376-77.

⁹⁹ *Id.* at 374 n.8; Swaine, *Foreign Relations Federalism*, *supra* note 9, at 338.

¹⁰⁰ Swaine, *Foreign Relations Federalism*, *supra* note 9, at 338.

War.¹⁰¹ These policies were held by individuals from every walk of life and covered everything “from life, property, and business assets to vehicles, art, and future dowries for holders’ daughters.”¹⁰² With the rise of the Nazi government in Germany and the attendant persecution of the Jews, these insurance policies and annuities became targets for confiscation.¹⁰³ At first, this confiscation was indirect. Jews were forced to cash out their policies in order to pay the heavy taxes levied solely upon them or to pay the steep emigration fees if they wanted to leave Germany.¹⁰⁴ However, following the night of November 9, 1938—also known as *Kristallnacht*—on which Jewish-owned businesses throughout Germany were systematically looted and destroyed, the Nazi government convinced insurance companies to pay claims for damage arising out of the vandalism into the Reich treasury at a fraction of the value of the claims.¹⁰⁵ It was not long before the German government began taking the policies of Jews outright, and many insurance companies have been accused of colluding with the Third Reich in this large-scale theft.¹⁰⁶

After the end of World War II, insurance companies offered a litany of excuses for their refusal to honor pre-war policies. They pointed to “the destruction of company records during the war.”¹⁰⁷ They cited claimants’ inability to produce death certificates for relatives who had died in concentration camps or the fact that policyholders had stopped paying premiums when they were deported to those camps.¹⁰⁸ In some of the most blatant cases, they informed claimants that they could not pay on the policies because the proceeds had already been paid—to Nazi officials.¹⁰⁹ Insurance companies further argued that they were relieved from paying on policies held in countries that became Communist after the war because the insurance industries in those countries had been nationalized.¹¹⁰

¹⁰¹ Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT’L L. 11, 19 (2002) [hereinafter Bazylar, *Holocaust Restitution Movement*].

¹⁰² Adrienne Scholz, *Restitution of Holocaust Era Insurance Assets: Success or Failure?*, 9 NEW ENG. J. INT’L & COMP. L. 297, 299 (2003).

¹⁰³ Bazylar, *Holocaust Restitution Movement*, *supra* note 101, at 19.

¹⁰⁴ Michael J. Bazylar & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT’L L. 683, 703 (2003) [hereinafter Bazylar & Fitzgerald, *Trading With the Enemy*].

¹⁰⁵ Bazylar, *Holocaust Restitution Movement*, *supra* note 101, at 19-20.

¹⁰⁶ Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 95-96 (2000) [hereinafter Bazylar, *Nuremberg in America*].

¹⁰⁷ Scholz, *supra* note 102, at 301.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Bazylar, *Nuremberg in America*, *supra* note 106, at 97.

This preoccupation with the realities of the Cold War seemed to push the issue of reparations out of the spotlight, at least for a time. With the exception of a few scattered, mostly unsuccessful lawsuits in Europe on behalf of Holocaust victims and survivors immediately following the end of the war, there was little activity in this area until the 1990s and the fall of the Berlin Wall.¹¹¹

In 1997, various Holocaust survivors and their heirs brought federal and state suits in New York and California against over a dozen insurance companies for their failure to pay claims.¹¹² Many of the insurance companies prominent in Europe before World War II are still prominent today and are, in fact, major players in the United States insurance industry, among them Assicurazioni Generali of Italy and Allianz of Germany.¹¹³ As a result of this litigation and pressure from individual state insurance commissioners, Generali and Allianz, along with three other insurance companies, several foreign governments, and a collection of international Jewish organizations formed the International Commission on Holocaust Era Insurance Claims (ICHEIC) in order to process the claims of Holocaust victims and their heirs.¹¹⁴

In 1998, Congress also passed the Holocaust Assets Commission Act, requiring state insurance commissioners to investigate and create a record of insurance policies and other assets from the Holocaust era.¹¹⁵ Furthermore, an agreement finalized in 2000 between the German and American governments allows for the creation of a fund to compensate Holocaust victims and their heirs and provides a general promise to comply with the procedures established by the ICHEIC.¹¹⁶ The United States has negotiated similar agreements with Austria and France with respect to stolen assets of Holocaust victims.¹¹⁷

These agreements, however, are not without their critics. Insurance companies within the ICHEIC have a significant amount of control over the processing of claims, resulting in longer delays and smaller ultimate payouts than those yielded by litigation.¹¹⁸ Additionally, early conflicts between the terms of the U.S.-German agreement and the procedures established by the ICHEIC have significantly hampered the ability of claimants

¹¹¹ See Scholz, *supra* note 102, at 302-03.

¹¹² Bazylar, *Nuremberg in America*, *supra* note 106, at 101-02. As of January 2000, these claims were all either pending trial or had settled. *Id.* at 102.

¹¹³ Bazylar, *Holocaust Restitution Movement*, *supra* note 101, at 20.

¹¹⁴ *Id.* at 21.

¹¹⁵ Scholz, *supra* note 102, at 309.

¹¹⁶ Bazylar & Fitzgerald, *Trading With the Enemy*, *supra* note 104, at 708-09.

¹¹⁷ *Id.* at 698-700; Scholz, *supra* note 102, at 322.

¹¹⁸ Bazylar, *Holocaust Restitution Movement*, *supra* note 101, at 22.

to receive compensation.¹¹⁹ Furthermore, the unwillingness of the German and Austrian governments to make any reparations as long as lawsuits are pending in American courts has also complicated matters.¹²⁰

Partly in response to Congress's enactment of the Holocaust Act, California passed the HVIRA in 1999.¹²¹ According to the declaration of the legislature, "[s]urvivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass."¹²² The declaration goes on to say that "[i]nsurance companies . . . have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state" and that the HVIRA "is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary."¹²³

The HVIRA required "[a]ny insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry, educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945" to disclose information pertaining to these aforementioned policies, including whether or not the proceeds had been paid to the designated beneficiaries.¹²⁴ Furthermore, failure on the part of an insurance company to comply with the provisions of the HVIRA would result in the suspension of that company's authority to conduct insurance business in California.¹²⁵

It was not long before the HVIRA was challenged in the courts. In 2000, several insurance entities brought suit arguing the unconstitutionality of the statute by claiming that it violated the federal foreign affairs power and the Foreign Commerce Clause of the U.S. Constitution.¹²⁶ On these grounds, a federal district court granted a preliminary injunction against

¹¹⁹ Scholz, *supra* note 102, at 321.

¹²⁰ Bazzyler & Fitzgerald, *Trading With the Enemy*, *supra* note 104, at 700.

¹²¹ CAL. INS. CODE § 13800 (Deering Supp. 2003).

¹²² *Id.* § 13801(d).

¹²³ *Id.* § 13801(e), (f).

¹²⁴ *Id.* § 13804.

¹²⁵ *Id.* § 13806.

¹²⁶ *Gerling Global Reins. Corp. of Am. v. Quackenbush*, No. CIV. S-00-0506, No. CIV. S-00-0613, No. CIV. S-00-0779, No. CIV. S-00-0875, 2000 U.S. Dist. LEXIS 8815, at *12-13 (E.D. Cal. June 9, 2000).

enforcement of the HVIRA.¹²⁷ On appeal, the Ninth Circuit rejected these claims but remanded the case to the district court for consideration of the plaintiffs' due process claims.¹²⁸ The district court granted summary judgment for the plaintiffs on the grounds that the HVIRA violated the insurance companies' due process rights.¹²⁹ However, on appeal, the Ninth Circuit again reversed the district court and upheld the constitutionality of the HVIRA, ruling that it did not violate the foreign affairs power or the Commerce Clause.¹³⁰

Ultimately, though, the Supreme Court struck down the HVIRA in *Garamendi* under the theory that it was preempted by the express foreign policy of the federal government as embodied in the executive agreements with Germany, France, and Austria and by U.S. involvement in the ICHEIC.¹³¹

B. The Majority Holding and its Reasoning

In deciding that the HVIRA was unconstitutional, the majority focused on the significance of the executive agreements between the United States and Germany, Austria, and France.¹³² The petitioners, the American Insurance Association and various other insurance entities, as well as the United States government and several foreign governments as *amici curae*, argued that the HVIRA conflicted with the foreign policy expressed in these agreements.¹³³ The majority, favoring this argument, said "[t]here is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy . . ." ¹³⁴ They cited the "concern for uniformity" that the framers of the Constitution expressed, as evidenced by the writings of Alexander Hamilton and James Madison in the Federalist Papers.¹³⁵

The majority went on to say that, generally, there is no question that "there is executive authority to decide what that policy should be."¹³⁶ While admitting that the support for their conclusion "does not enjoy any textual detail," they cited the Constitution's vesting of power in the Executive Branch and

¹²⁷ *Id.* at *48.

¹²⁸ Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d 739, 754 (9th Cir. 2001).

¹²⁹ Gerling Global Reins. Corp. of Am. v. Low, 186 F. Supp. 2d 1099, 1113 (E.D. Cal. 2001).

¹³⁰ Gerling Global Reins. Corp. of Am. v. Low, 296 F.3d 832, 849 (9th Cir. 2002).

¹³¹ American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2390 (2003).

¹³² *Id.* at 2386.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

several cases, including *Curtiss-Wright*, which generally support the premise that there is executive authority to decide foreign policy.¹³⁷

More specifically, the majority considered the power of the President to enter into executive agreements such as the ones with Germany, Austria, and France.¹³⁸ Citing *Pink*, they noted that, starting with George Washington, Presidents have negotiated executive agreements with foreign governments without Senate approval or congressional challenge, and that the practice has always been upheld by the courts.¹³⁹ They also dismissed the notion that executive agreements concerning World War II-era insurance claims were less valid because they took aim at foreign corporations rather than foreign governments themselves.¹⁴⁰ Justice Souter stated that “untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments.”¹⁴¹

The majority thus concluded that “valid executive agreements are fit to preempt state law, just as treaties are . . .”¹⁴² However, because the executive agreements did not contain explicit preemption clauses, in order to determine the act’s constitutionality they were forced to examine whether the executive agreements truly preempted the HVIRA.¹⁴³

Continuing their inquiry, the majority turned to *Zschernig*. They noted the Court’s claim in that case that “our system of government is such that . . . no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.”¹⁴⁴ This language echoes the broad statements of national power in *Curtiss-Wright* and *Hines*.¹⁴⁵ They also touched, however, on Justice Harlan’s concurring opinion in *Zschernig* and his disagreement over the idea of a complete federal monopoly on foreign affairs, that for him a “conflicting federal policy” was necessary.¹⁴⁶

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 2387.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 2388.

¹⁴⁴ *Id.* (alterations in original).

¹⁴⁵ See *supra* text accompanying notes 14, 18.

¹⁴⁶ *Garamendi*, 123 S. Ct. at 2389.

“It is a fair question,” Justice Souter wrote, “whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories . . . evident in the *Zschernig* opinions,” but having brought up the question, Justice Souter declined to answer.¹⁴⁷ He reasoned that, under either view, legislation “in conflict with express foreign policy of the National Government” would be preempted.¹⁴⁸ The majority then concluded that the HVIRA conflicted sufficiently with federal policy as to be unconstitutional because it was clear from the executive agreements with Germany and Austria that federal policy mandated working within the procedures of the ICHEIC.¹⁴⁹ Citing *Crosby*, the majority noted that while the goals and motivations of the state and federal governments might have been similar, their approaches were not, and the HVIRA had the potential for frustrating the implementation of the federal policy by undermining the ICHEIC and annoying European nations.¹⁵⁰ Regardless of which was the better approach, California could not be allowed to frustrate the President’s diplomacy.¹⁵¹

Finally, the majority dismissed California’s argument, which paralleled those in *Barclays Bank*: that Congress, in passing the Holocaust Commission Act, condoned statutes such as the HVIRA; and that Congress, with its power to regulate foreign commerce, should control despite executive agreements to the contrary.¹⁵² In so doing, the majority insisted that the President took the “lead role” in foreign policy,¹⁵³ and that the majority’s reading of the Holocaust Commission Act did not authorize anything in the HVIRA.¹⁵⁴ In addition, the Court pointed out that Congress had not acted in disapproval of the President’s actions.¹⁵⁵

C. The Dissent

Justice Ginsburg, writing for the dissent, began by stating: “The President’s primacy in foreign affairs . . . empowers him to conclude executive agreements with other countries.”¹⁵⁶ She also agreed that such executive agreements have the power to

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 2390.

¹⁵⁰ *Id.* at 2392.

¹⁵¹ *See id.* at 2393.

¹⁵² *Id.* at 2394.

¹⁵³ *Id.* at 2391 n.12.

¹⁵⁴ *Id.* at 2394.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2398 (Ginsburg, J., dissenting).

preclude state law.¹⁵⁷ However, in such instances, she insisted that the agreements be narrowly construed. Applying this reasoning, Justice Ginsburg concluded that the executive agreements with Germany, Austria, and France did not preclude the HVIRA,¹⁵⁸ that the United States' involvement in the ICHEIC concerned the actual settlement of claims, and that the HVIRA merely concerned disclosure—an issue which the executive agreements did not address.¹⁵⁹

Justice Ginsburg also took issue with the majority's reliance on *Zschernig*, saying, "We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here."¹⁶⁰ She reasoned that *Zschernig* applies only to "state policy critical of foreign governments."¹⁶¹ She also disagreed with the application of *Pink* and *Crosby*. In *Crosby* a federal statute was implicated, not merely an executive agreement, and while an executive agreement was at issue in *Pink*, it spoke directly against the activity of the state of New York.¹⁶² In addition, she dismissed the statements of executive officials against the HVIRA, noting that similar statements of opinion were not controlling in *Barclays Bank*.¹⁶³ Justice Ginsburg felt that by giving weight to such statements and by inferring preclusion from the stated goals of the executive agreements, the Court was overstepping its bounds.¹⁶⁴ She concluded by saying, "judges should not be the expositors of the Nation's foreign policy, which is the role they play by acting when the President himself has not taken a clear stand."¹⁶⁵

IV. STRETCHING DIRECT PREEMPTION TO ITS BREAKING POINT – PROBLEMS WITH THE REASONING OF *GARAMENDI*

It is evident from both the majority and the dissenting opinions in *Garamendi* that the Supreme Court favors the direct preemption theory of federal supremacy in the realm of foreign affairs. The majority, while seeming to pay homage to the dormant federal foreign affairs power theory in *Zschernig*, ultimately did not apply it, and the dissent was openly hostile to the idea.¹⁶⁶ Likewise, the majority dismissed the dormant

¹⁵⁷ *Id.* (Ginsburg, J., dissenting).

¹⁵⁸ *Id.* at 2399 (Ginsburg, J., dissenting).

¹⁵⁹ *Id.* (Ginsburg, J., dissenting).

¹⁶⁰ *Id.* at 2400 (Ginsburg, J., dissenting).

¹⁶¹ *Id.* (Ginsburg, J., dissenting).

¹⁶² *Id.* (Ginsburg, J., dissenting).

¹⁶³ *Id.* at 2401 (Ginsburg, J., dissenting).

¹⁶⁴ *Id.* (Ginsburg, J., dissenting).

¹⁶⁵ *Id.* (Ginsburg, J., dissenting).

¹⁶⁶ *Garamendi*, 123 S. Ct. at 2389, 2400 (Ginsburg, J., dissenting).

Foreign Commerce Clause argument formulated in *Barclays Bank*, noting that, in foreign policy, the President and not Congress has the “lead role.”¹⁶⁷ The dissent did not even address the issue, despite the fact that the Ninth Circuit decision was based on the theory enumerated in *Barclays Bank*.¹⁶⁸

However, the Court’s reliance in *Garamendi* on direct preemption raises an issue: What is “express foreign policy?” Normally, this question is not so hard to answer. “No one disputes that properly enacted treaties, statutes, and executive acts have preemptive authority; as long as someone makes clear what the law is, supremacy usually takes care of itself.”¹⁶⁹ In other words, the Supremacy Clause can easily be invoked if there is a federal statute or treaty on point or an executive agreement with a clear statement of its purpose and effect. As evidenced by the deep division amongst the Justices in the *Garamendi* decision, it is, however, questionable whether the Court had before it such a clear statement of foreign policy.

When the courts look to something less authoritative than a federal statute or treaty or a precisely stated executive agreement—executive pronouncements, *amici* briefs, or even mere silence—to make a case for direct preemption, three problems occur. First, the courts risk, as Justice Ginsburg cautioned in *Garamendi*, overstepping their bounds.¹⁷⁰ As stated in the unanimous *Crosby* opinion, the details of foreign policy belong to Congress and the President.¹⁷¹ Moreover, “the Constitution does not make the judiciary the overseer of our government.”¹⁷² Simply stated, the judicial branch is not equipped to determine controversies related to foreign policy based upon anything other than explicit statements of such foreign policy from the other branches.

Second, in relying on documents such as congressional reports, debate transcripts, *amici* briefs, and failed legislation, or on silence for preemptive statements of foreign policy, the courts allow Congress and the President to exceed their constitutional powers.¹⁷³ In *Barclays Bank*, the Supreme Court ruled that Congress’ acquiescence to California’s employment of the worldwide combined reporting accounting method was enough of

¹⁶⁷ *Id.* at 2391 n.12.

¹⁶⁸ Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d 739, 749 (9th Cir. 2001).

¹⁶⁹ Swaine, *Foreign Relations Federalism*, *supra* note 9, at 343.

¹⁷⁰ *Garamendi*, 123 S. Ct. at 2401 (Ginsburg, J., dissenting).

¹⁷¹ 530 U.S. at 386.

¹⁷² *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 330 (1994) (internal quotation marks omitted).

¹⁷³ Swaine, *Negotiating Federalism*, *supra* note 10, at 1156.

a foreign policy statement to sanction California's actions.¹⁷⁴ In *Garamendi*, Congress' silence was interpreted as support for the President's actions in making executive agreements with Germany, Austria, and France and for the United States' involvement in the ICHEIC.¹⁷⁵ Given that the powers conferred to the federal government in Articles I and II of the Constitution are affirmative powers, there is little constitutional justification for this practice.

Third, in looking beyond positive executive or congressional statements to make a case for direct preemption, the Supreme Court has initiated something of a "turf war" between Congress and the President over which is the "one voice" of foreign policy. Under the dormant Foreign Commerce Clause theory espoused in *Barclays Bank*, the speaker is clearly Congress, and the Ninth Circuit's decision relied on this Supreme Court determination.¹⁷⁶ In concluding that the HVIRA did not violate the dormant foreign affairs power or the dormant Foreign Commerce Clause, the Ninth Circuit stated, "On the basis of the text, context, and history of the Holocaust Act, we conclude that Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA."¹⁷⁷ The decision in *Garamendi* flew in the face of this statement. Despite the fact that the sale of insurance clearly implicates foreign commerce, the Supreme Court (who's composition was virtually the same as in *Barclays Bank*) dismissed the dormant Foreign Commerce Clause argument and handed the reigns of foreign policy back to the President.¹⁷⁸ Such inconsistency undermines the ability of the court to provide the lower courts and the states with a workable rule.

V. VINDICATING *ZSCHERNIG* – A SOLUTION TO THE PROBLEM OF THE FEDERAL MONOPOLY ON FOREIGN POLICY AND ITS APPLICATION TO *GARAMENDI*

Given the apparent failure of the direct preemption theory in the absence of a federal law or treaty or a clear statement of policy, a workable rule is desperately needed to provide consistent direction to the lower courts. Despite the Supreme Court's seeming disdain for *Zschernig*, that case may very well provide the solution. After all, even a vague rule is better than no rule at all. By abandoning the precedent set in *Zschernig*, the

¹⁷⁴ 512 U.S. at 327-28.

¹⁷⁵ 123 S. Ct. at 2394.

¹⁷⁶ 512 U.S. at 331.

¹⁷⁷ *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739, 749 (9th Cir. 2001).

¹⁷⁸ 123 S. Ct. at 2391 n.12.

Supreme Court has left lower courts to fend for themselves, resulting in “any number of tests rules [sic] and standards.”¹⁷⁹

In addition, though there is little constitutional support for a broad foreign affairs power, it is not completely without constitutional basis.¹⁸⁰ Given the demonstrated practicality of having a unified foreign policy, it seems prudent to have a mechanism for curtailing state activity.

Moreover, while Congress or the President could preempt a state law at any time through a positive pronouncement, the damage to foreign relations is often already done. Applying a dormant foreign affairs test allows the judiciary to more efficiently curtail the damaging activity, especially in potentially inflammatory situations.¹⁸¹ One of the criticisms of *Zschernig* is that its reasoning seems to be based upon a uniquely Cold War mentality and that it is simply no longer applicable to today’s world.¹⁸² Legal scholars have argued that increasing globalization has blurred, and in some cases erased, the line between strictly local and foreign affairs, and that the end of the Cold War has made foreign retaliation for state actions less likely and judicial intervention less necessary.¹⁸³ However, the events of recent years have shown how quickly the world can change. Those who shrug off *Zschernig* as nothing more than a relic of a tense, paranoid time in our national history do so at their own peril.

Granted, the danger in applying the *Zschernig* “direct impact” test—that the courts will overstep their authority—still exists. As laid out, the outcome of a *Zschernig* analysis “turns on a court’s independent assessment of its foreign relations implications.”¹⁸⁴ However, adding two more layers to the analysis would diminish this danger greatly. First, when looking for a “direct impact,” courts should focus not on any specific foreign policy that Congress or the President has chosen but rather on the powers contained in Articles I and II of the Constitution. For instance, the Court should ask whether the state action in question would have a direct impact on the federal government’s ability to regulate foreign commerce or to wage war. Doing so removes the Court’s focus from the meaning of congressional silence or the implications of low-level executive statements and places that focus on the area of greatest judicial

¹⁷⁹ Chiang, *supra* note 8, at 967.

¹⁸⁰ See *supra* text accompanying notes 37-42.

¹⁸¹ See Spiro, *supra* note 36, at 1242.

¹⁸² See Goldsmith, *supra* note 52, at 1663.

¹⁸³ See, e.g., Spiro, *supra* note 36, at 1247.

¹⁸⁴ Goldsmith, *supra* note 52, at 1637.

competence—interpreting the provisions of the federal Constitution. Second, the court should only strike down a state law under the *Zschernig* test when the danger of leaving it intact is greater. Such a requirement gives deference to the legislative and executive branches while allowing for swift action when necessary.

As previously mentioned, the Ninth Circuit in *Deutsch v. Turner Corp.* applied something similar to this modified *Zschernig* test to the California law in question in that case.¹⁸⁵ In applying *Zschernig*, it backed off from the sweeping statements of federal power found in *Pink*.¹⁸⁶ Further examination reveals that the court based this exclusive power on several of the enumerated powers concerning the conduct of war found in Articles I and II of the Constitution, and not on some vague general notion of federal foreign affairs power.¹⁸⁷ The court noted that the California law, because it implicated the ability of the United States to negotiate the end of hostilities as World War II drew to a close, was provocative by its nature and would be dangerous if allowed to stand.¹⁸⁸

Using *Deutsch v. Turner Corp.* as a model for a *Zschernig* analysis of the HVIRA, the Court should first look at the specific bases for federal power which come into play. For instance, Congress has the ability to regulate foreign commerce, and “statutes that ‘mainly involve foreign commerce’ are among those least likely to be held invalid under the foreign affairs power.”¹⁸⁹ Several states also filed a joint *amicus* brief in support of the HVIRA in *Garamendi* in which they explained that insurance is clearly a matter of commerce governed by Congress and that, “Congress was aware of the state activities in question Congress has not acted to stop those state efforts. To the contrary, Congress—through the U.S. Holocaust Assets Commission Act of 1998, and congressional statements—has encouraged the States to continue their efforts.”¹⁹⁰ In addition, the states argued that HVIRA has only an incidental effect on foreign policy. They said, “[t]he HVIRA is directed to corporations, not governments. It does not turn upon the policies or structures of foreign governments. Moreover, its application is

¹⁸⁵ *Deutsch v. Turner Corp.*, 324 F.3d 692, 709-11 (9th Cir. 2003).

¹⁸⁶ *Id.* at 710.

¹⁸⁷ *Id.* at 712.

¹⁸⁸ *Id.* at 711.

¹⁸⁹ *Id.* (quoting *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739, 753 (9th Cir. 2001)).

¹⁹⁰ Brief for the States of California et al. as Amici Curiae Supporting Respondent at 15, *American Ins. Ass’n v. Garamendi*, 123 S. Ct. 2374 (2003) (No. 02-722).

not only evenhanded, but is also ministerial.”¹⁹¹ Furthermore, the Court in *Deutsch* argued that the “HVIRA does not attempt to hold defendants liable for their past wartime conduct; it therefore does not implicate the exclusive power of the federal government to make and resolve war.”¹⁹² If these assertions are true, then the HVIRA does not meet the “direct impact” test.

On the other hand, the requirements of the HVIRA may come into conflict with the President’s ability to negotiate with other nations as bestowed by the Treaty Power. The United States’ *amicus* brief filed in support of the petitioner insurance entities in *Garamendi* said, “HVIRA has generated the very tensions in international relations that the United States has sought to avoid, prompting protests from the governments of Germany and Switzerland concerning HVIRA’s application to insurance policies written in those countries.”¹⁹³ Furthermore, the brief cautioned:

State government officials, who are not part of the process through which the Nation formulates and conducts its international relations, are not well positioned to evaluate what adverse impact their actions may have for those relations. They cannot, for example, be expected to make an informed assessment of whether, or how, or when a foreign government might respond to provocative state legislation, or how detrimental the response might be to various important interests of the United States as a whole.¹⁹⁴

In addition, many of the prohibitions on the states in the Constitution can be viewed as aimed at preventing war, and in this light, any provocative state action flies in the face of these prohibitions and conflicts with the federal government’s War Powers.¹⁹⁵ The government of Germany, in its *amicus* brief filed in opposition to the HVIRA, stated that “the HVIRA offends German and U.S. sovereignty. California’s law is particularly offensive to Germany in light of the law’s clear implication that the Federal Republic is either incapable or unwilling to achieve the proper resolution of unpaid Holocaust-era insurance claims.”¹⁹⁶ Clearly the German government regards the HVIRA as a provocative state action causing tension in U.S.-German relations and implicating the federal government’s War Powers.

¹⁹¹ *Id.* at 19 (emphasis omitted).

¹⁹² *Deutsch*, 324 F.3d at 716.

¹⁹³ Brief for the United States as Amicus Curiae Supporting Petitioners at 18, *Garamendi* (No. 02-722).

¹⁹⁴ *Id.*

¹⁹⁵ *Deutsch*, 324 F.3d at 711.

¹⁹⁶ Brief for the Federal Republic of Germany as Amicus Curiae in Support of Petitioners at 19, *Garamendi* (No. 02-722).

Therefore, a strong case exists that the HVIRA has a “direct impact” on the power of the federal government to conduct foreign policy.

If the Court were to determine that the HVIRA had a “direct impact” on the federal government’s ability to conduct foreign policy based upon the statute’s implication of the Treaty Power and the War Powers, then the Court should continue the analysis by looking at the relative danger of allowing the HVIRA to stand. For example, the United States’ *amicus* brief stated, “It is not for respondents to trivialize the potential implications of [foreign governments’] protests for United States foreign policy, especially at a time of international tension when relations between this Nation and its European allies are at their most sensitive.”¹⁹⁷ Given the great desire to avoid harming the United States’ relationships with its European allies any further and the importance of those relationships, the Court could deem the danger great enough to invalidate the HVIRA without resorting to the tortured application of the direct preemption theory found in *Garamendi*.

VI. CONCLUSION

It is clear from history and from the enumerated powers found in Article I and II of the Constitution that the federal government has substantial power to conduct foreign policy. While the rationale for a complete federal monopoly on foreign policy lacks substantial support, the Supreme Court acts on equally shaky ground in rejecting *Zschernig* and stretching the idea of direct preemption to its breaking point to strike down state laws that interfere with the federal government’s ability to conduct foreign policy.

The decision in *Garamendi* illustrates the shortcomings of the direct preemption approach. In the absence of a federal law, treaty, or other official pronouncement, the Court is forced to look at other, less official sources for preemptive language, a practice which does nothing to diminish the danger of the judiciary interfering in the foreign policy prerogative of Congress or the President. In addition, by being inconsistent as to whether the Congress or the President has the final word on foreign policy determinations, the Supreme Court has left lower courts and state governments without guidance.

The *Zschernig* test is not so vague that it cannot be applied. *Deutsch v. Turner Corp.* illustrates such an analysis, and with

¹⁹⁷ Brief for the United States at 18, *Garamendi* (No. 02-722) (citations omitted).

2004]

An Iron Fist or Kid Gloves

304

additional safeguards—narrowly construing the powers of the federal government and weighing the danger of allowing the law in question to stand—the *Zschernig* test could easily have been applied to the HVIRA.