

Constitutional Law—Foreign Affairs Power Preempts California Law: National Government to Resolve Holocaust-Era Insurance Claims—*American Insurance Association v. Garamendi*, 539 U.S. 396 (2003)

To ensure uniformity in dealing with foreign nations, the United States Constitution allocates responsibility for foreign affairs to the National Government.¹ Although states may enact legislation that touches on foreign relations, at some point state power must yield to the policy of the National Government.² In *American Insurance Ass'n v. Garamendi*,³ the United States Supreme Court considered whether a California statute, the Holocaust Victims Insurance Recovery Act (HVIRA), unconstitutionally interfered with the National Government's foreign policy by requiring local insurers to disclose policy information held by their foreign affiliates.⁴ The Court held that the Executive Branch had its own policy for dealing with the settlement of Holocaust-era claims, that the California law conflicted with it, and that HVIRA was therefore preempted.⁵

Between 1920 and 1945, amidst the Nazi regime's horrific reign, the German Government and insurance companies stole, in gigantic proportions, insurance policies issued in Germany and other countries under Nazi control.⁶ In the aftermath of World War II, reconstruction led by the Allies failed to resolve the resulting multitude of claims for unpaid and illegally confiscated policies.⁷ Thousands of Holocaust survivors and their descendants in the

1. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (citing constitutional provisions reflecting this concern); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381-82, 382 n.16 (2000) (quoting Alexander Hamilton's Federalist No. 80). Hamilton wrote, "[T]he peace of the WHOLE ought not to be left at the disposal of a PART." THE FEDERALIST NO. 80, at 535-36 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In defining the logical extent of federal courts' jurisdiction, Hamilton highlighted the necessity of federal judicature in cases involving foreign affairs because he foresaw that the entire country would be answerable to foreign powers for the conduct of its individual members. THE FEDERALIST NO. 80, *supra*, at 535-36.

2. *United States v. Pink*, 315 U.S. 203, 232 (1942) (explaining state laws might thwart foreign policy if they did not yield before federal powers); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (stating state power restricted to "narrowest of limits" in field of international relations). The *Hines* Court explained that dealing with international relations "demand[s] broad national authority." 312 U.S. at 68.

3. 539 U.S. 396 (2003).

4. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003) (introducing case and describing central issues); see also CAL. INS. CODE § 13800-807 (West Cum. Supp. 2003) (setting forth provisions of HVIRA).

5. 539 U.S. at 421 (explaining state law must give way to federal executive authority when clear conflict exists).

6. *Id.* at 402-05 (illustrating how Nazi regime and insurance industry colluded to deprive Jewish policyholders of their proceeds); see also *id.* at 430-31 (Ginsburg, J., dissenting) (providing further examples of larcenous takings under Third Reich).

7. *Id.* at 403-05 (discussing effects of Yalta and Potsdam Conferences, as well as Paris and London Agreements). Following World War II, Allied diplomacy was unsuccessful at settling these confiscated or

United States were helpless to seek restitution until September 12, 1990, when Germany signed a reunification agreement and the German courts interpreted it as lifting the moratorium on Holocaust claims by foreign nationals.⁸ Class-action lawsuits against companies doing business in Germany during the Nazi-era poured into United States courts, generating much protest by defendant companies and their countries.⁹

This litigation led the United States Government to take action towards resolving “the last great compensation related negotiation arising out of World War II.”¹⁰ Ensuing negotiations produced the German Foundation Agreement in which Germany agreed to establish a foundation funded with ten billion deutsch marks to be used to compensate Holocaust survivors and their descendants.¹¹ With regard to insurance claims, both countries agreed that the German Foundation would work with another newly formed organization, the International Commission on Holocaust Era Insurance Claims (ICHEIC), to provide information and facilitate claims settlement.¹² While these

otherwise unpaid insurance claims. *Id.* Ultimately, concern that continued reparations would cripple the new Federal Republic of Germany led to the London Debt Agreement, which Germany signed with its international creditors to reduce its debt burden. *Id.* German courts construed the terms of the London Debt Agreement as postponing resolution of foreign claims against both the German Government and German industry until the creation of an ultimate postwar treaty. *Id.* In her dissent, Justice Ginsburg quotes Congressman Henry Waxman, who heart-wrenchingly described the failure of multilateral negotiations to produce any real resolution of claims. *Id.* at 431 (Ginsburg, J., dissenting).

8. *Id.* at 404-05 (delineating history of restitution obligation from 1945 through reunification). After the London Debt Agreement took effect in 1953, the new West German Government bore the obligation to provide restitution to victims of Nazi persecution. *Id.* at 404. Although it paid out more than 100 billion deutsch marks as of 2000, many claimants and certain types of claims were left out. *Id.* at 404-05.

9. See Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 796 n.2, 813-14 (2002) (providing chronological listing of major decisions from Holocaust-era class-action litigation between 1998 and 2002); see also 539 U.S. at 405 (explicating historical context for class-action lawsuits).

10. 539 U.S. at 405 (quoting press briefing by United States Deputy Treasury Secretary Eizenstat). From the beginning, the U.S. Government advocated mediated settlement “as an alternative to endless litigation” promising little relief to aging Holocaust survivors.” *Id.* (quoting United States Secretary of State Madeleine Albright).

11. *Id.* at 405 (describing U.S. Government’s response to class-action lawsuits); see Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” July 17, 2000, U.S.-F.R.G., art. 5, 39 I.L.M. 1298, 1303-04 [hereinafter German Foundation Agreement] (promising U.S. commitment to urge German Foundation as exclusive forum and remedy for asserted claims). Although the Agreement states that the United States’ foreign policy interests would not “in themselves provide an independent legal basis for dismissal,” the United States Government agreed to tell courts “that U.S. policy interests favor dismissal on any valid legal ground.” German Foundation Agreement, *supra*, at 1304. The Agreement further stated that the Government promised to use its “best efforts, in a manner it considers appropriate,” to get state and local governments to respect the Foundation as the exclusive mechanism. *Id.* at 1300.

12. 539 U.S. at 406 (noting connection between German Foundation, ICHEIC, and former United States Secretary of State Lawrence Eagleburger). In 1998, several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners (the organization of American state insurance commissioners) voluntarily formed the ICHEIC to provide information and facilitate claim settlement. *Id.* at 406-07. Former Secretary Eagleburger served as the chair of the ICHEIC. *Id.* The ICHEIC negotiates with European insurers to provide information regarding unpaid policies issued to Holocaust victims and settlement of claims brought under them. *Id.* at 407. The German

international efforts were underway, the California Legislature passed HVIRA, which required any insurer doing business in the state to disclose the details of all insurance policies issued to persons in Europe in effect between 1920 and 1945, as well as full disclosure about policies sold by any related company.¹³ Following HVIRA's enactment, California issued subpoenas to several subsidiaries of European insurance companies participating in the ICHEIC.¹⁴ Despite protest by United States Deputy Treasury Secretary Stuart Eizenstat, the California Insurance Commissioner announced that he would fully enforce HVIRA, requiring the affected insurers to make disclosures, leave California voluntarily, or lose their licenses.¹⁵

Several American and European insurance companies and the American Insurance Association countered by filing suit for injunctive relief against California's Insurance Commissioner, challenging HVIRA's constitutionality.¹⁶ The district court issued a preliminary injunction against enforcing the Act, holding that the plaintiffs had established a probability of success on two of their four claims, namely that HVIRA violated the federal foreign affairs power and the Commerce Clause.¹⁷ On appeal, the Ninth Circuit remanded the case

Foundation and the ICHEIC set aside large portions of money for Holocaust victim compensation. *Id.* at 408-09. As of April 29, 2003, their disclosure efforts had led to the release of the names of over 360,000 victims owning policies issued by German insurers. *Id.* After four years of operation, however, the ICHEIC had offered money to just 3,006 claimants. *Id.* at 433.

13. *Id.* at 409-10 (detailing provisions of HVIRA). The term "any related company" encompasses "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." *Id.* (quoting CAL. INS. CODE § 13804(b) (West Cum. Supp. 2003)).

14. *Id.* at 410-11 (setting forth aftermath of HVIRA's enactment).

15. *Id.* at 412 (claiming National Government's expressions of concern proved of no consequence to California).

16. 539 U.S. at 412-13 (laying out procedural history). The District Court for the Eastern District of California granted a preliminary injunction, but its opinion is not reported. The defendants appealed, and the Ninth Circuit remanded to the district court. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001), *rev'd sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The district court denied the defendant's motion for summary judgment. *Gerling Global Reinsurance Corp. of Am. v. Low*, 186 F. Supp. 2d 1099, 1113 (E.D. Cal. 2001), *aff'd on other grounds sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The defendant again appealed, and the Ninth Circuit reversed the district court's ruling. *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832, 852 (9th Cir. 2002), *rev'd on other grounds sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). Petitioner insurance companies then appealed to the United States Supreme Court, where their argument prevailed. 539 U.S. 396 (2003). In the meantime, John Garamendi replaced Harry Low, the former respondent, as California's Insurance Commissioner, and the Supreme Court granted certiorari to the American Insurance Ass'n, a co-petitioner in the original case filed by *Gerling Global Reinsurance Corp. of America* and others. *Id.*

17. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 742-43 (9th Cir. 2001) (setting forth prior procedural history), *rev'd on other grounds sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The National Government's "foreign affairs power," although not mentioned expressly in the Constitution, is interpreted as inherent in the nature of federalism. See Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832, 836-37 (1989). The plaintiffs' two other arguments were that HVIRA violated both the Commerce Clause and the Equal Protection Clause. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 742 (9th Cir. 2001), *rev'd sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). They also sought review of two statutes enacted at the same time as HVIRA. *Id.* These statutes: (1) allowed California residents to bring claims for the payment of Holocaust-era insurance policies

for consideration of plaintiffs' due process claim.¹⁸ On remand, the district court granted summary judgment to the petitioners, opining that the statute violated procedural due process requirements.¹⁹ The Insurance Commissioner appealed, and the Ninth Circuit reversed, affirming its own prior ruling that the Act did not violate the foreign affairs power.²⁰ The Supreme Court disagreed and reversed, holding that because California's HVIRA varied so starkly from the President's approach to assisting Holocaust victims in collecting their unpaid insurance policies, the Act unconstitutionally conflicted with national policy.²¹

Since the 1930s, the Supreme Court has recognized that the Constitution vests power over foreign affairs exclusively in the National Government.²²

and extended the statute of limitations on such claims until December 31, 2010, and (2) required the Commissioner to suspend the certificate of authority on any insurer who had failed to pay on valid Holocaust-era policies. *Id.* at 742-43. The district court dismissed the plaintiffs' request to review these statutes for lack of standing. *Id.* at 743.

18. *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001) (holding district court erred regarding Commerce Clause and foreign affairs power), *rev'd sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). Despite these errors, the Ninth Circuit affirmed the preliminary injunction and remanded the case because it acknowledged a potential due process violation. *Id.*

19. *Gerling Global Reinsurance Corp. of Am. v. Low*, 186 F. Supp. 2d 1099, 1109 (E.D. Cal. 2001) (characterizing license to do business as insurer as property interest deserving of Fourteenth Amendment protection), *aff'd on other grounds sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The district court held that HVIRA violated due process because it mandated license suspension for non-performance of impossible tasks without allowing for a meaningful hearing. *Id.* at 1111. The court explained that there was a due process violation because, under HVIRA, a failure to produce the demanded records effectively resulted in automatic license suspension without a meaningful hearing. *Id.*

20. *Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832, 849 (9th Cir. 2002) (explaining no due process violation because requirement for proper procedural hearing implicit within statute), *rev'd on other grounds sub nom.* *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The Ninth Circuit rejected plaintiffs' argument, explaining that under California law such a hearing must be implied into the statute. *Id.* at 849. The Ninth Circuit also noted that the California Supreme Court established a presumption that hearing requirements should be inferred in a statute unless the statute expressly provides otherwise. *Id.* Lastly, the Ninth Circuit denied petitioners' foreign affairs power and Commerce Clause arguments, clarifying that "California has urged foreign insurers to help their state-licensed affiliates comply with HVIRA, but it has not sought to regulate these foreign insurers directly." *Id.*

21. *See* 539 U.S. at 427 (observing California using "iron fist where . . . President has consistently chosen kid gloves"). The Court opined that the evidence was more than sufficient to demonstrate that the Act stands in the way of the President's diplomatic objectives. *Id.* The Court also quickly dispensed with California's remaining arguments that the McCarran-Ferguson Act and the Holocaust Commission Act authorized HVIRA. *Id.* at 427-28. The Court explained that the McCarran-Ferguson Act, which specifies that the business of insurance shall be recognized as a subject of state regulation, could not sensibly be construed to address preemption by executive conduct in foreign affairs. *Id.* at 428. The Court described reliance on the Holocaust Commission Act as misplaced because the Act, which set up a presidential commission dealing with the historical record of Holocaust-era assets, limited the Commission's focus to assets in the Government's possession. *Id.*

22. *See* *United States v. Pink*, 315 U.S. 203, 233 (1942) (stating power over external affairs vested exclusively in National Government); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (observing Federal Government has full and exclusive responsibility for conduct of affairs with foreign sovereignties); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (noting external powers of United States not dependent upon state laws or policies).

Specifically, the Court acknowledges that the Executive Branch holds the vast share of this responsibility.²³ Because of the perceived need for one national voice in the conduct of foreign affairs, the Court interprets executive agreements and policies as preempting any state law where there is evidence of clear conflict between the two.²⁴

In *Zschemig v. Miller*,²⁵ the Court deemed unconstitutional an Oregon probate statute that prohibited non-resident aliens from collecting inheritances when the inheritances would be confiscated by the claimant's home country.²⁶ The Court explained that the statute violated the foreign affairs power because, as applied, it inappropriately provided an opportunity for Oregon judges to criticize foreign regimes and thereby express state-based, not national, foreign policy attitudes.²⁷ Such an outcome, the Court concluded, signified "an intrusion by the State into the field . . . which the Constitution entrusts to the President and the Congress."²⁸

23. See *United States v. Belmont*, 301 U.S. 324, 330 (1937) (noting Executive Branch has authority to speak as sole organ of National Government); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-20 (1936) (declaring President alone holds power to speak or listen as representative of Nation); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (acknowledging President's vast share of responsibility for conduct of U.S. foreign relations). Although there is no explicit language in the Constitution giving rise to the President's power to act in foreign affairs, Justice Frankfurter explained that the historical gloss on the executive power vested by § 1 of Article II recognizes this responsibility. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).

24. See *supra* notes 1-2 and accompanying text (explaining goals of providing uniform foreign policy and limiting state interference); see also *United States v. Pink*, 315 U.S. 203, 230 (1942) (declaring state law must yield when inconsistent with policy or impairing international agreement); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (cautioning local interference impermissible in foreign relations); *United States v. Belmont*, 301 U.S. 324, 327 (1937) (holding no state policy can prevail against international compact). But see *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329-30 (1994) (refusing to premise foreign affairs preemption on Executive Branch press releases, letters, and amicus briefs). The *Barclays* Court explained that these Executive Branch communications expressing federal policy are "merely precatory" and "lack the force of law." *Id.*

25. 389 U.S. 429 (1968).

26. *Zschemig v. Miller*, 389 U.S. 429, 441 (1968) (invalidating state law because of impermissible intrusion into federal domain of foreign relations). The Court held that although such probate regulations were traditionally left to the states, those regulations had to "give way if they impair[ed] the effective exercise of the Nation's foreign policy." *Id.* at 440.

27. *Zschemig v. Miller*, 389 U.S. 429, 437-38 (1968) (interpreting Oregon judges' decisions regarding statute as inappropriately conveying foreign policy attitudes). The *Zschemig* decision, rendered at the height of the Cold War, included quotations from judges throughout the country who were weighing in on similar statutes and spewing pugnacious rhetoric. *Id.* at 438 n.8.; cf. Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local "Sanctions" Against Foreign Countries: Affairs of State, States' Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307, 371-72 (1999) (arguing against subnational-level sanctions and admonishing states to voice foreign policy concerns to Congress).

28. *Zschemig v. Miller*, 389 U.S. 429, 432 (1968) (refusing invitation to re-examine former ruling in similar case). The Court would not extend the principle of *Clark v. Allen* to the Oregon statute. *Id.*; see also *Clark v. Allen*, 331 U.S. 503 (1947). In *Clark*, the Court held that a similar probate statute with a general reciprocity clause was facially constitutional whereas the Oregon statute, as applied, had "more than some incidental or indirect effect in foreign countries" and therefore was unconstitutional. *Zschemig*, 389 U.S. at 433-35 (emphasis added). But see *id.* at 434 (referencing Solicitor General's brief regarding statute's interference with foreign affairs). The Department of Justice's Solicitor General wrote in its amicus brief that

Granting this kind of broad deference to the Executive Branch in matters of international relations has been a hallmark of the Court's foreign affairs power jurisprudence.²⁹ Citing presidential agreement-making and a long history of congressional acquiescence thereto, the Court has approved the President's authority to make executive agreements with other countries without Senate ratification or Congress' approval.³⁰ The Court has further held, albeit with some qualifying language, that the President's power to settle claims between United States nationals and foreign governments is indisputable.³¹

In *American Insurance Ass'n v. Garamendi*,³² the Supreme Court highlighted the breadth and significance of presidential power in foreign policy and relied on *Zschernig* to characterize almost any state interference therewith as unconstitutional.³³ The Court asserted that a consistent presidential foreign policy for dealing with Holocaust-era insurance claims had been established, that the mandates of the California statute interfered with this policy, and that the foreign affairs power therefore necessitated preemption of the statute.³⁴ Concluding that congressional silence on the matter did not equate to disapproval, the Court held that HVIRA impermissibly impaired the President's foreign policy.³⁵

the Oregon statute did *not* unduly interfere with the Federal Government's conduct of foreign relations. *Id.*

29. See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936). *But cf.* Maier, *supra* note 19, at 838 (recommending relevant questions for courts to address when allocating authority between state and federal governments).

30. *United States v. Pink*, 315 U.S. 203, 229 (1942) (contending President's power in foreign relations includes power to determine public policy without Senate's consent); see also *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (recalling longstanding practice of settling claims by executive agreement without advice and consent of Senate). The *Dames & Moore* Court was referring to claims by American nationals against foreign countries. 453 U.S. at 679.

31. *United States v. Pink*, 315 U.S. 203, 240 (1942) (describing importance to Nation of President having unfettered negotiating power in foreign affairs); *United States v. Belmont*, 301 U.S. 324, 330 (1937) (citing indubitability of President's negotiations and their acceptance as integral part of United States federal system). *But cf.* *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (emphasizing narrowness of decision and refusing to decide President possesses plenary power to settle claims). The Court declared that it approved the constitutionality of the President's power in this specific instance because his settling claims against the Iranian government and Iranian banks was "a necessary incident to the resolution of a major foreign policy dispute between our country and another." *Id.*

32. 539 U.S. 396 (2003).

33. *Id.* at 413 (setting forth case law supporting virtually exclusive presidential authority in realm of foreign affairs); *id.* at 417 (relying on *Zschernig* because it prohibits curtailment of federal authority in foreign relations).

34. *Id.* at 420-26 (citing executive agreement, congressional testimony by various ambassadors, and correspondence from Deputy Treasury Secretary). The Court construed the combination of these occurrences as an expression of national foreign policy. *Id.*; see also *id.* at 423-25 (contrasting national policy with HVIRA and expressing necessity of preemption).

35. *Id.* at 429 (noting Congress introduced legislation like HVIRA yet never came close to passing such legislation). In summarizing the lack of constraints on presidential policy in foreign affairs, the Court quotes *Haig v. Agee*, to support the proposition that congressional silence does not constitute congressional disapproval. *Id.* at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)). *But cf. id.* at 436 n.3 (Ginsburg, J., dissenting) (criticizing lack of guidance for deciding when President needs Senate's approval to make

Although this holding seems to comport with the relevant precedent, the Court unnecessarily authorized foreign affairs preemption, thereby overstepping its bounds and undermining a constitutionally-sound state law.³⁶ In so doing, the majority misconstrued the German Foundation Agreement, the ICHEIC, and various letters and testimony as collectively representing United States' foreign policy.³⁷ The Court was wrong to give these statements preemptive effect because, first, the German Foundation Agreement's express terms state that it does *not* provide an independent legal basis for the dismissal of Holocaust-era insurance recovery lawsuits; second, the ICHEIC is merely a voluntary, private organization, not the product of an official Executive Branch action; and, third, letters and testimony of individual sub-cabinet members cannot legitimately constitute Executive Branch action.³⁸

The Court's reliance on *Zschernig* was misplaced because the diplomatic concerns central to that decision are not relevant here.³⁹ HVIRA is directed solely at private insurers doing business in California and does not entail state action reflecting a policy critical of foreign governments.⁴⁰ Although the majority opinion established that executive agreements can legitimately preempt state action, the precedent upon which it relied, by the majority's own

executive agreements).

36. 539 U.S. at 442 (Ginsburg, J., dissenting) (arguing HVIRA would not compromise President's ability to speak with one voice for Nation). Justice Ginsburg pointed out that the displacement of state law by preemption should require a more formal and binding federal instrument. *Id.*

37. *See supra* note 36 (summarizing statements and occurrences construed by majority as constituting U.S. foreign policy).

38. 539 U.S. at 435-36 (Ginsburg, J., dissenting) (excerpting sections from German Foundation Agreement). The Agreement, signed by President Clinton in 2000, expressly "does not . . . provide an independent legal basis for dismissal" of Holocaust-era insurance recovery lawsuits. German Foundation Agreement, *supra* note 11, at 1304; *see also* Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 750 (9th Cir. 2001) (describing German Foundation Agreement as not comprehensive national foreign policy), *rev'd on other grounds sub nom.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003). Additionally, the German Foundation Agreement only pertains to German companies while the Swiss-U.S. Joint Statement pertains to Swiss insurers. *Gerling*, 240 F.3d at 750. Neither agreement governs with respect to Generali, an Italian insurance company, or Winterthur, an insurance company with affiliates throughout Europe. *Id.* The ICHEIC, referenced several times in the majority opinion, is a voluntary, private organization in which the United States has merely the role and status of "observer;" it is by no means an official Executive Branch action. *Id.* at 751; *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 329-30 (1998) (refusing to premise foreign affairs preemption on Executive Branch press releases, letters, and amicus briefs). The *Barclays Bank* Court explained that these Executive Branch communications expressing federal policy are "merely precatory" and "lack the force of law." *Id.* at 330; *see also* 539 U.S. at 441-42 (Ginsburg, J., dissenting) (arguing against premising foreign affairs preemption on statements by individual sub-cabinet members of Executive Branch).

39. *See* Gerling Global Reinsurance Corp. of Am. v. Low, 240 F.3d 739, 753 (9th Cir. 2001) (exposing distinctions between *Zschernig* probate statute "as applied" and likely impact of HVIRA), *aff'd on other grounds sub nom.* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

40. 539 U.S. at 439 (Ginsburg, J., dissenting) (refusing to resurrect thirty-year-old *Zschernig* decision Court never applied in any other case). Justice Ginsburg explained that the notion of "dormant foreign affairs preemption," with which *Zschernig* is most closely associated, is most applicable when a state action involves sitting in judgment on foreign governments. *Id.*

admission, was inapplicable.⁴¹ Unlike the cases cited, in which the majority opinion was giving effect to express terms of executive agreements, in this case none of the executive agreements expressly addressed disclosure requirements such as those in HVIRA.⁴² That is, while the federal approach to dealing with Holocaust-era insurance claims did differ from California's, no executive or formal, binding, federal expression of foreign policy disapproved state public disclosure laws.⁴³ Where the President and Congress have not taken a clear position, judges step out of their proper role when they infer and imply the Nation's foreign policy in order to preempt state law.⁴⁴

The *Garamendi* Court considered whether a California law mandating disclosure of Holocaust-era policy information by local insurance companies with foreign affiliates violated the foreign affairs power. Unquestionably, the Constitution grants the President a high degree of independent authority in foreign affairs. But, by misinterpreting precedent and inappropriately relying on mere precatory statements to infer preclusive effect, the Court wrongly extended the power of the National Government. More importantly, by invalidating the California statute, the Court eliminated an effective means of redress for California's Holocaust victims and their families. The Court, as arbiter of the tenuously balanced federalism in our country, should be more cautious of overstepping its bounds when deciding what constitutes executive action and when that action constitutionally preempts state law.

Nicholas P. Martinelli

41. *See id.* at 417 (acknowledging executive agreements cited by petitioners include no preemption clause). The majority argues that the preemption claims rest on "interference with the foreign policy those agreements embody" and then relies on *Zschernig* to support this proposition. *Id.*

42. *Id.* at 440 (Ginsburg, J., dissenting) (refusing to expand *Belmont, Pink, or Dames & Moore* to support implied preemption by executive agreement).

43. *Id.* at 430 (Ginsburg, J., dissenting) (citing lack of clear statement from Executive Branch as reason for dissent). Justice Ginsburg acknowledged that the Executive Branch undertook foreign policy initiatives to resolve Holocaust-era insurance claims, but she highlighted the necessity and absence of a clear statement coming from the "one voice" to which the judiciary properly defers. *Id.*

44. 539 U.S. at 442-43 (Ginsburg, J., dissenting) (arguing judges should not expound Nation's foreign policy). Justice Ginsburg explained that courts step out of their proper role when they rely on no legislative or executive text. *Id.*