Reemergence of the Zschernig Doctrines and the Foreign Affairs Power as a Limit on a State's Power to Act: *In re World War II Era Japanese Forced Labor*

I. INTRODUCTION

In 1999, the California legislature enacted California Code of Civil Procedure section 354.6.[1] The statute provided a cause of action for all individuals forced to labor, without compensation, during the Second World War by the "'Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the [same regimes],'" by extending the applicable statute of limitations until 2010.[2] The statute did not limit the cause of action exclusively to California residents, but granted a cause of action to foreign victims of forced labor during the Second World War as well.[3] The underlying purpose of the statute, as stated in the legislative history, was to establish an avenue for victims of World War II to receive reparations for their losses arising from corporations that engaged in slave labor during the war.[4]

Suit was originally brought by a U.S. soldier of World War II who was captured by Japanese forces, held as prisoner of war, and forced to

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1. *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001).

2. *Id.* (quoting CAL. CIV. PROC. CODE § 354.6(a), (c) (alteration in original)). CAL. CIV. PRO. CODE § 354.6(b) (Deering's 2002) states:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

3. CAL. CIV. PROC. CODE § 354.6(a).

4. *In re World War II Era Japanese*, 164 F. Supp. 2d at 1173.

work as a laborer in a Japanese steel factory.[5] In addition to the American soldiers in the suit, several Chinese and Korean nonresident aliens, also victims of forced labor by Japanese corporations during the war, joined in the action under section 354.6(a).[6] The Korean and Chinese plaintiffs sought compensation and restitution from the defendant corporations for the time they were forced to labor, as well as damages for violations of international law under the Alien Tort Claim Act (ATCA).[7] The defendant Japanese corporations challenged the constitutionality of the statute on the basis that it impermissibly infringed on the President's power to conduct foreign relations.[8] Both the United States Department of State and Foreign Ministry of Japan submitted amici curiae briefs contending that section 354.6 would impede their ongoing general settlement negotiations for World War II victims of Japanese forced labor camps, though no treaty or compact existed when the suits were brought.[9] Addressing the Korean and Chinese claims, the court *held* that (1) the plaintiffs' home countries were not signatories to the Treaty of Peace with Japan and, therefore, their section 354.6 claims were not preempted by a U.S. treaty; (2) that section 354.6, as applied to the defendant corporations, was unconstitutional because it infringed upon the federal government's exclusive power over foreign affairs; and (3) that the plaintiffs had established sufficient evidence to recover under the ATCA, but the statute of limitations had run and could not be equitably tolled. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 1160 (N.D. Cal. 2001).

II. BACKGROUND

In the noted case, the district court declared the California statute unconstitutional because it impermissibly infringed upon the foreign affairs power of the federal government.[10] Broadly speaking, the federal government has exclusive power over foreign affairs and, usually, any state action that infringes on foreign affairs is unconstitutional.[11] This

5. *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000). The district court in this preliminary proceeding dismissed all the claims brought by U.S. soldiers, finding that their claims under the California statute directly infringed upon the provisions of the Treaty of Peace with Japan, and thus the statute, as applied to U.S. citizens, was preempted by the treaty. *Id.* The court deferred ruling on the claims of the Korean and Chinese plaintiffs until the instant case. *Id.*

6. *See In re World War II Era Japanese*, 164 F. Supp. 2d at 1164.

7. *See id.* at 1178.

8. *Id.* at 1164.

9. *Id.* at 1175-76.

10. *See id.* at 1178.

11. *See* United States v. Pink, 315 U.S. 203, 233 (1942).

exclusive power of the federal government is derived from several different sources, including the Constitution, history, and Supreme Court interpretations of the Constitution. The Constitution itself does not affirmatively grant the federal government exclusive power in foreign affairs, but many of its provisions support vesting the national government with sole competence in this area.[12] The Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States,"[13] "to regulate Commerce with foreign Nations,"[14] "to establish an uniform Rule of Naturalization,"[15] "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"[16] and "to declare War, grant Letters of Marque and Reprisal."[17] The Constitution also explicitly grants the President significant power in the field of international relations, including the powers to act as Commander in Chief,[18] to make treaties and appoint ambassadors,[19] and to receive ambassadors and other public ministers.[20] Thus, the Constitution itself affords the two political branches of the federal government significant, but not absolute, powers in the foreign arena.

Unlike the vast foreign affairs powers the federal government derives from the Constitution, state governments are severely restricted by the Constitution in the foreign arena. The Constitution forbids the several States from "enter[ing] into any Treaty, Alliance, or Confederation,"[21] or laying imposts or duties on imports or exports, without the consent of Congress,[22] or "enter[ing] into any Agreement or Compact with another State, or with a foreign Power, or engage[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[23] While the Constitution grants and forbids certain powers to the states and federal government, the structure of these

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12. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 49 (1st Cir. 1999), *aff'd on other grounds sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).
13. U.S. CONST. art. I, § 8, cl. 1.
14. *Id.* art. I, § 8, cl. 3.
15. *Id.* art. I, § 8, cl. 4.
16. *Id.* art. I, § 8, cl. 10.
17. *Id.* art. I, § 8, cl. 11.
18. *Id.* art. II, § 2, cl. 1.
19. *Id.* art. II, § 2, cl. 2.
20. *Id.* art. II, § 3.
21. *Id.* art. I, § 10, cl. 1.
22. *Id.* art. I, § 10, cl. 2.
23. *Id.* art. I, § 10, cl. 3.

constitutional provisions evidences the intent of the Framers to vest the foreign affairs power solely in the federal government.[24]

Additionally, vesting the federal government with the foreign affairs power is supported by history, international law, and the intent of the Framers. Historically, the several States never had competence to exercise their powers in international affairs.[25] During the colonial period, external powers were vested with the Crown, with no power vested in the colonies.[26] When the Colonies separated from Britain, the external sovereignty passed from the Crown, not to the colonies severally, but to the colonies in their collective and corporate capacity.[27] Moreover, the Articles of Confederation declared that the Union "was the sole possessor of external sovereignty."[28] Thus, before the Constitution was ratified, there was no indication that that the States were able to act in the international arena. International law also dictated that the federal government maintain broad power in international relations, to the exclusion of the several States. In regard to the operations of the nation, it is necessary that the federal government have the sole power to make treaties and enter into international understandings and compacts.[29] "As 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."[30] The interests of nationality, separate from the Constitution, dictate that a State speak with one voice and not from its subordinate units.[31] Finally, the Framers intended that the political branches of the federal government would have sole power over foreign affairs.[32] At the Constitutional Convention, it was "irrefutably" recognized that the states were several in their people, but one political body in respect to foreign affairs.[33] Moreover, James Madison, in Federalist 42, wrote that the

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24. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 49 (1st Cir. 1999), *aff'd on other grounds sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

25. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936).

26. *Id.*

27. *Id.* at 316-17 (finding that "[t]he treaty of peace, made on September 23, 1783, was concluded between his Brittanic Majesty and the 'United States of America,'" not each individual colony/state).

28. *Id.* at 317.

29. *See id.* at 318.

30. *Id.*

31. *See id.* at 316-17.

32. *See id.* at 317.

33. *Id.* (citing Rufus King's statement to the Congress: "The states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political

power to act in the foreign affairs arena was an "obvious and essential branch of the federal administration" and "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."[34] Therefore, there is significant historical justification for granting sole competence in the foreign arena to the national government.

In addition to the historical justifications for the foreign affairs power, Supreme Court decisions have also continually recognized that the several States do not generally have the power to directly act in international relations. In *Chae Chan Ping v. United States*, the Court found that the several States exist for local interests, "but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[35] It is the federal government, which represents the collective interests of the several states, that is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.[36] The Court, in *Hines v. Davidowitz*, unambiguously interpreted that it was unconstitutional for the several states to engage in foreign affairs: "Our system of government is such that the interest of the cities, counties, and states, 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."[37] In *United States v. Curtiss-Wright Export Corp.*, the Court emphasized the complete power of the federal government: "'As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations.'"[38]

While the Supreme Court's decisions seem to support absolute power for the federal government in the area of foreign affairs, the states are not completely prohibited from affecting international relations.[39] A

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beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign.").

34. THE FEDERALIST NO. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987).

35. 130 U.S. 581, 606 (1889).

36. *See* Hines v. Davidowitz, 312 U.S. 52, 63 (1941).

37. *Id.*

38. 299 U.S. 304, 318-19 (1936) (quoting Burnet v. Brooks, 288 U.S. 378, 396 (1933)). The President alone has the power, in the external realm, to speak or listen as a representative of the nation. *See id.* at 319. The President must be accorded, in the international field, a degree of discretion and freedom from statutory restrictions which would not be admissible if purely internal affairs alone were involved. *See id.*

39. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 50 (1st Cir. 1999), *aff'd on other grounds sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). States may make compacts or agreements with a foreign power with the consent of Congress, but such agreements are limited in scope and subject matter. *Id.* States may also make some agreements with foreign

certain degree of state involvement in foreign affairs is inevitable. When governing their own internal affairs, states will often impinge on American foreign relations.[40] Such infringements arise when states regulate and tax commerce with foreign nations.[41] Also, "[s]tate courts apply state law and policy in deciding whether domestic law or foreign law should apply to a transnational transaction; whether to give effect to a foreign act of state that imposed a tax or penalty."[42] Under the standards set forth in *Curtiss-Wright* and *Hines*, these actions, no matter how incidental and inconsequential they effect foreign affairs, would seem to unconstitutionally infringe upon the paramount foreign affairs power of the United States.[43] "Yet, many state laws are entirely valid even though they 'involv[e] matters of significant concern to foreign relations.'"[44] As a consequence, determining the boundary of whether a state action violates the foreign affairs power of the federal government is often difficult.

In determining the boundary between permissible and impermissible state legislation, two Supreme Court decisions are important. In *Clark v. Allen*, the Court considered a California statute under which a nonresident alien could only inherit personal property if the government in the alien's home country extended to American citizens the "reciprocal" rights to inherit personal property on the same terms as the citizens of that alien's country.[45] German legatees, in an effort to receive their testamentary gift from a California citizen, facially attacked the statute as unconstitutional, arguing that these requirements of reciprocal rights of inheritance was a matter to be settled by the federal government on a nation-wide basis.[46] The Court declared this argument to be "far-fetched."[47] The Court found that the rights of succession and property are determined by local law and that no federal treaty existed governing such rights to preempt these state rights.[48] In addition, the Court found that California had not entered "the forbidden domain of

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governments with the consent of Congress, so long as they do not impinge upon the authority or the foreign relations of the United States. *Id.*

40. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 238 (1972).

41. *See id.*

42. *Id.*

43. *See* Bd. of Tr. of the Employees' Ret. Sys. v. Mayor of Balt., 562 A.2d 720, 744 (Md. 1989).

44. *Id.* (quoting RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 2, cmt. d (1965) (alteration in original)).

45. 331 U.S. 503, 506 (1947).

46. *See id.* at 516-17.

47. *See id.* at 517.

48. *See id.*

negotiating with a foreign country . . . or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution."[49] The Court upheld the statute and, in the process, allowed states to engage in limited activities regarding foreign affairs: "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."[50]

Twenty-one years later, the Supreme Court further clarified what types of state actions crossed the "forbidden line" into the Federal Government's foreign affairs power in *Zschernig v. Miller*.[51] In that case, the court struck down a statute similar to the inheritance statute in *Clark*.[52] The statute in *Zschernig* barred a nonresident alien from taking property from a testamentary gift or succession unless the alien showed three things: the "existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;" "the right of United States citizens to receive payment here of funds from estates in the foreign country;" and "the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.'"[53] If these requirements were not met, and there were no other heirs, the property would escheat to the state.[54] The court declared the "reciprocal right" statute unconstitutional because it was "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[55] The Court distinguished the Oregon law from the statute in *Clark*, reasoning that the prior decision was "concerned with the words of a statute on its face, not the manner of its application" as was the case with the Oregon statute.[56]

The Court explained that the problem with the Oregon statute was in its application and that it was "'inextricably enmeshed in international affairs and matters of foreign policy:'"[57]

> State courts, of course, must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote

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49. *Id.* (citations omitted).
50. *Id.*
51. 389 U.S. 429 (1968).
52. *See id.*
53. *Id.* at 430-31 (citing ORE. REV. STAT. § 111.070 (1957)).
54. *Id.* at 430.
55. *Id.* at 432 (citing Hines v. Davidowitz, 312 U.S. 52, 63 (1941)).
56. *Zschernig*, 389 U.S. at 433.
57. *Id.* at 434 (quoting *In re* Bevilacqua's Estate, 161 P.2d 589, 593 (Cal. App. 1st Dist. 1945)).

> possibility that any holding may disturb a foreign nation—whether the matter involves commercial cases, tort cases, or some other type of controversy. At the time *Clark v. Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have *launched inquiries into the type of governments that obtain in particular foreign nations*—whether aliens under their law have enforceable rights, whether the so-called "rights" are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives foreign nations is credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.[58]

The Court found that the application of the Oregon statute had "led into minute inquiries concerning the actual administration of foreign law" and "into the credibility of foreign diplomatic statements."[59] Such inquiries, coupled with courts of other states applying similar statutes, allowed for extensive critical commentary concerning the nature and conduct of foreign governments.[60] The Court stated that the statute, as construed, "seem[ed] to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[61] Because of the great potential for disruption and embarrassment of the nation, the Oregon law had "more than 'some incidental or indirect effect in foreign countries.'"[62] The Court found that the Oregon statute, as enforced, "affect[ed] international relations in a persistent and subtle way," with the state courts having continuing power to voice critical opinions toward totalitarian regimes.[63] In this regard, the Oregon law illustrated "the dangers which are involved if each State, speaking through its own probate courts, is permitted to establish its own foreign policy."[64] In reaching this conclusion, the Court, mindful of its opinion in *Clark*, recognized that several states have traditionally had power to regulate the descent and distribution of estates, but found that this tradition power to regulate these areas "must give way if they impair the effective exercise of the Nation's foreign policy."[65]

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58. *Id.* at 433-34 (emphasis added).
59. *Id.* at 435.
60. *See id.* at 437-40 nn.8-9.
61. *Id.* at 440.
62. *Id.* at 434-35.
63. *Id.* at 440.
64. *Id.* at 441.
65. *Id.* at 440.

The *Zschernig* decision sets forth some boundaries to how states may regulate international relations through their own regulations. When a state regulation only incidentally touches upon foreign affairs, the state action is not unconstitutional.[66] When a state regulation more directly impacts foreign relations, then it will be unconstitutional. As the Court sets forth in the *Zschernig* decision, allowing state political branches or courts to directly and continually criticize current foreign regimes about their types of government through these state statutes will make these regulations unconstitutional.[67] The *Zschernig* decision was important because the Court declared the statute unconstitutional even though no U.S. treaty or congressional enactment existed concerning the issues in *Zschernig*.[68] Moreover, the executive branch did not contend this statute impeded on their ability to engage in foreign affairs.[69] "[T]here was no relevant exercise of federal power and no basis for deriving any prohibition by 'interpretation' of the silence of Congress and the President. The Court tells us that the Constitution itself excludes such state intrusions even when the federal branches have not acted."[70] The Court, in effect, created a dormant foreign affairs doctrine concerning such state regulations.[71]

The Court's decision in *Zschernig* "circumscribes, but apparently does not eliminate, a state's ability under certain circumstances to take actions involving substantive judgments about foreign nations."[72] "The precise boundaries of the Supreme Court's holding in *Zschernig* are unclear."[73] At least one commentator has recognized the ambiguous nature of the foreign affairs doctrine created in *Zschernig*:

> *Zschernig v. Miller*, then, imposes additional limitations on the States but what they are and how far they reach remains to be determined.

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66. *See id.* at 432-33; *see also* Clark v. Allen, 331 U.S. 503, 517 (1947).

67. *See Zschernig*, 389 U.S. at 441. The *Zschernig* court found that the underlying purpose of the statute was not to govern inheritances, but was Oregon's attempt to influence and change, subtly, the Communist regimes in Europe and thaw the cold war. *Id.* at 437. The Oregon statute was "'not an inheritance statute, but a statute of confiscation and retaliation.'" *Id.* at 434 (quoting *In re* Bevilacqua's Estate, 161 P.2d 589, 593 (Cal. App. 1st Dist. 1945)).

68. *See id.* "Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations." *Id.* at 441 (citations omitted); *see also* HENKIN, *supra* note 40, at 239.

69. *Zschernig*, 389 U.S. at 434.

70. HENKIN, *supra* note 40, at 239.

71. *See id.* (stating that the *Zschernig* decision represents a "new constitutional doctrine").

72. Bd. of Trs. of the Employees' Ret. Sys. v. Mayor of Balt., 562 A.2d 720, 746 (Md. 1989).

73. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 51-52 (1st Cir. 1999), *aff'd on other grounds sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

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> It may be, then, that *Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve "sitting in judgment" on them. Even if so limited, the new doctrine might cast doubts on the right of the States to continue to invoke their own "public policy" in transnational situations. Or is the Court suggesting different lines—between state acts that impinge on foreign relations only "indirectly or incidentally" and those that do so directly or purposefully? Between those that "intrude" on the conduct of foreign relation and those that merely "affect" them?[74]

The Supreme Court has not taken the opportunity to clarify the ambiguities with the foreign affairs doctrine since *Zschernig*.[75] Therefore, lower courts have been left to work out these ambiguities in the foreign affairs doctrine themselves. The lower court decisions in this area generally fall into two categories: challenges to the application of laws targeting specific foreign states and their governmental policies and challenges to state commercial regulations, such as state "buy-American" laws.[76]

In *Springfield Rare Coin Galleries, Inc. v. Johnson*, the Illinois legislature enacted a tax exemption for coins and currency issued by the United States or any foreign country except South Africa.[77] The Illinois Supreme Court mentioned that typically such taxes upon products imported into the state had some effect on foreign nations, but these incidental evenhanded burdens do not rise to the level of unconstitutionality; something more than an indirect effect was necessary.[78] The exclusion from the exemption in this case was not "motivated by a legitimate, permissible State purpose" and was therefore unconstitutional.[79] The court found that the sole motivation for the exclusion was to disapprove of a nation's policies, which "create[d] a risk of conflict between nations, and possible retaliatory measures."[80] The court also observed that the enactment was targeted at a single foreign nation.[81] Finally, the court noted that "the practical effect of the exclusion [was] to impose, or at least encourage, an economic boycott of the South African

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74. HENKIN, *supra* note 40, at 239-41.
75. *See* Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739, 752 (9th Cir. 2001).
76. *Natsios*, 181 F.3d at 55.
77. 503 N.E.2d 300, 302 (Ill. 1986).
78. *Id.* at 306.
79. *Id.* at 305.
80. *Id.* at 307 (finding that the statute was created to show the disapproval of Illinois with the *Apartheid* policies of South Africa).
81. *See id.*

Krugerrand" and "that regulations which amount to embargoes or boycotts are outside the realm of permissible State activity."[82]

Similarly in *New York Times Co. v. City of New York Commission on Human Rights*, the court found that New York could not apply local antidiscrimination laws to prohibit the New York Times from carrying an advertisement for employment opportunities in South Africa.[83] The commission "was without jurisdiction to make and enforce its own foreign policy" in imposing its own economic boycott aimed at South Africa.[84] Such redress of grievances for the wrongs of Apartheid must be obtained through the sovereign power of the national government.[85] The state courts may "not launch inquiries into the righteousness of foreign law, thereby effecting 'international relations in a persistent and subtle way.'"[86]

More recently, the United States Court of Appeals for the First Circuit further clarified the boundaries of the foreign affairs doctrine when it struck down a Massachusetts statute that restricted the ability of the State and its agents to purchase goods or services from individuals or companies engaging in business with Burma.[87] The court found that this was a clear case where Massachusetts was attempting to extend its public policy onto a foreign regime and transnational situations.[88] The court invalidated the statute, which, as applied to the plaintiff nonprofit organization which represented companies affected by the statute, was a direct intrusion into foreign relations.[89] The court rejected the defendant's argument that in order to determine an "incidental or indirect effect on foreign countries," the court must weigh the degree of impact on foreign

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82. *Id.*

83. 361 N.E.2d 963, 966 (N.Y. 1977).

84. *Id.* at 968.

85. *Id.*

86. *Id.* (quoting Zschernig v. Miller, 389 U.S. 429, 440 (1968)); *see also* Tayyari v. N.M. State Univ., 495 F. Supp. 1365, 1380 (D.N.M. 1980) (finding state university's decision to bar the admission of Iranian students from the university unless American hostages were released impermissibly affected international relations and that the policy could affect the President's powers under constitution to negotiate release, regulating aliens and national emergencies, and to impose sanctions against foreign countries deemed necessary for foreign policy interests).

87. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 45 (1st Cir. 1999), *aff'd on other grounds sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

88. *See id.* at 46-47. The statute was enacted, as the legislative history indicates, to show the state's rejection of the brutal military regime in Burma and its poor human rights record and to reject that regime's portrayal of itself as the legitimate government of that country. *See id.* at 46. In this case, after the statute was enacted, Congress imposed sanctions against Burma, which the Court held preempted the Massachusetts statute. *See id.* at 76.

89. *Id.* at 55.

affairs against the particular state interest at issue.[90] Instead, the court interpreted *Zschernig* to stand "for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed."[91] No strong state interest could outweigh a normally "impermissible intrusion into the federal government's foreign affairs power."[92] The court then found that the statute established ongoing scrutiny of businesses dealing with Burma.[93] Also, the court declared that the effect of the state law could not be considered in isolation; rather, courts must consider the combined effects of similar laws in other jurisdictions and the impact it would likely have on international relations.[94]

While lower courts generally tend to find state statutes aimed at criticizing policies in specific foreign countries unconstitutional, they are split on whether state statutes effecting commerce, such as buy-American statutes, are unconstitutional under the foreign affairs doctrine.[95] At least one court has invalidated such a statute that required all government agencies to purchase products from American producers. In *Bethlehem Steel Corp. v. Board of Commissioners*, a California court read the Supreme Court's decisions in *Curtiss-Wright* and *Zschernig* strictly and found that the statute effectively placed an embargo on foreign products, which "amount[ed] to a usurpation by [the] state of the power of the federal government to conduct foreign trade policy."[96] Foreign trade policy is proper for the national government to determine and state regulations in such areas only impede national policies and negotiations the United States is engaged in with foreign countries.[97] Thus, the statute had more than "some incidental or indirect effect" and had great potential to disrupt and to embarrass the nation.[98] The nation as a whole would have to bear the consequences of California's policy and this was impermissible.[99]

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90. *Id.* at 52. The balancing test the Court rejected was a suggested by Professor Louis Henkin as a potential solution to the ambiguous boundaries of the foreign affairs doctrine left by the Supreme Court after the *Zschernig* decision. Professor Henkin suggested that courts could balance the State's interest in a regulation against the impact of it on American foreign relations. *See* HENKIN, *supra* note 40, at 241.

91. *See Natsios*, 181 F.3d at 52 (citing Zschernig v. Miller, 389 U.S. 429, 440-41 (1968)).

92. *Id.* at 53.

93. *See id.*

94. *See id.* The court notes that there are 39,000 governments at levels other than the federal government; twenty of which participated in the *Natsios* case. *See id.* at 54.

95. *See id.* at 56.

96. 80 Cal. Rptr. 800, 803 (Cal. Ct. App. 1969).

97. *See id.*

98. *See id.* at 805 (citing Zschernig v. Miller, 389 U.S. 429, 434-35 (1968)).

99. *Id.*

In contrast, other courts have upheld such statutes on grounds that these state buy-American policies do not require state governments to evaluate the policies of foreign nations and because the statutes treated all foreign nations in the same fashion and did not single out particular nations in imposing its regulations.[100] In *Trojan Technologies, Inc. v. Pennsylvania*,[101] the United States Court of Appeals for the Third Circuit upheld a buy-American statute because the law "provides no opportunity for state administrative officials or judges to comment on, let alone key their decisions to, the nature of foreign regimes. On *its face* the statute applies to steel from any foreign source, without respect to whether the source country might be considered friend or foe."[102] The Court looked at the legislative history, among other factors, to determine if the statute had been selectively applied according to the foreign policy attitudes of Pennsylvania, which there was no evidence of such intent.[103]

The United States Court of Appeals for the Ninth Circuit, where the noted case was decided, most recently dealt with the foreign affairs doctrine in *Gerling Global Reinsurance Corp. v. Low*, where the court upheld a California statute that "require[d] insurers that do business in California and that sold insurance policies, in effect between 1920 and 1945 (Holocaust-era policies), to persons in Europe to file certain information about those policies with the [California] Commissioner [of Insurance]."[104] The court found that the underlying purpose of the Holocaust Victim Relief Victim Act (HVIRA) was to enable "victims of the Holocaust to know whether they have insurance claims, and [to] protect[] Californians from insurers that have not paid valid claims," typically state concerns.[105] The court found no direct conflict with the foreign affairs power of the United States, on its face.[106] The Act regulated "insurance companies that do business in California and are, or are related to, companies that issued Holocaust-era insurance policies. No plaintiff [insurance company] is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses."[107] Nor did the statute, unlike the statute in *National*

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100. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 56 (1st Cir. 1999), *aff'd on other grounds sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

101. Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990).

102. *Id.* at 913 (emphasis added).

103. *See id.*

104. Gerling Global Reinsurance Corp. v. Low, 240 F.3d 739, 742 (9th Cir. 2001).

105. *Id.* at 750 (alteration in original). The Court recognized that regulating insurance companies is traditionally a power given to the states by Congress. *See* Fed. Trade Comm'n v. Travelers Health Ass'n, 362 U.S. 293 (1960).

106. *See Gerling Global*, 240 F.3d at 753.

107. *Id.*

Foreign Trade Council v. Natsios, refer to any particular country and, according to the court, there was no evidence that HVIRA would be applied in a way that would implicate concerns mentioned in *Zschernig*.[108]

III. NOTED CASE

In the noted case, the United States District Court for the Northern District of California evaluated the constitutionality of California statute section 354.6, which created a cause of action for any World War II slave labor victim or heir of someone forced into labor during the war.[109]

Before determining the constitutionality of the statute, the court first analyzed whether any treaty signed by the United States or any congressional enactment preempted the statute, in order to avoid unnecessary constitutional questions.[110] The inquiry in this case was not "whether the [Treaty of Peace with Japan] preempts section 354.6 generally, but whether the treaty preempts California's effort to supply a cause of action for non-Allied plaintiffs such as those of Korean and Chinese descent."[111] Ultimately, the court found that the Treaty of Peace with Japan did not preclude the Chinese and Korean plaintiffs' claims.[112] In making this determination, the court referred to the Supremacy Clause of the Constitution[113] and the treaty power Article II[114] gives to the President, which, when read together, allow for valid treaties to override any conflicting state law.[115] The court recognized that there was little guidance in determining the preemptive effect of treaties on state laws from the Supreme Court, but that treaties could not be interpreted mechanically because "'the nation-state, not subdivisions within one nation, is the focus of the [treaty] and the perspective of our partners.'"[116] The court would have to assess the language of the treaty and "'give the

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108. *Id.*

109. *See In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1164 (N.D. Cal. 2001).

110. *See id.* at 1166. The court stated that the Supreme Court instructs federal courts faced with both statutory and constitutional questions to decide the statutory questions first in an attempt to avoid unnecessary constitutional inquiries. *See id.*

111. *Id.*

112. *See id.* at 1168.

113. U.S. CONST. art. VI, cl. 2.

114. *Id.* art. II, § 2, cl. 2.

115. *See In re* World War II Era Japanese, 164 F. Supp. 2d at 1166.

116. *Id.* at 1167 (quoting El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155, 175 (1999) (alteration in original)).

specific words of the treaty a meaning consistent with the shared expectations of the contracting parties.'"[117]

The court reviewed the Treaty of Peace with Japan and article 14(b) of the treaty for an expression of the treaty's intent toward claims for nonsignatory nationals.[118] "[T]his provision bar[red] the claims of signatory nations and their nationals arising out of Japan's actions in the Second World War," and the intent of the treaty was to terminate all claims against Japan by signatory nations.[119] The court found, however, that "[a]rticle 14(b) ha[d] no effect on the claims of nationals from non-signatory nations."[120] The court also found that other relevant provisions of the treaty suggested that the treaty did not address claims of nonsignatory nationals.[121] Two of the provisions in the treaty addressing claims against Japan by Korea and China indicated that the treaty contemplated that those war claims be resolved through separate and distinct agreements between China, Korea, and Japan.[122] The court noted, in its analysis, that "[t]he fact that the signatory nations encouraged such agreements does not show intent to occupy the field of non-signatory nations' claims through the treaty."[123] The Treaty had no bearing on the claims of the Chinese and Korean plaintiffs and thus did not preempt their causes of action under section 354.6.[124]

The court next declared section 354.6 unconstitutional because it "infringe[d] on the exclusive foreign affairs power of the United States."[125] Then, the court gave a historical account of the doctrine and reasserted validity of the *Zschernig* doctrine.[126] To the court,

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117. *Id.* (quoting *El Al Israel Airlines*, 525 U.S. at 167 (quoting Air France v. Saks, 470 U.S. 392, 399 (1985))).

118. *See id.*

119. *Id.*

120. *Id.*

121. *See id.*

122. *Id.* Specifically, article 4(a) addressed Japan's post-war relationship with Korea:

> The disposition of property of Japan and of its nationals . . . and their claims, including debts, against [Korea], and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3173.

Similarly, with respect to China, article 26 provides: "Japan will be prepared to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty. . . ." *Id.* at 3190.

123. *In re World War II Era Japanese*, 164 F. Supp. 2d at 1168.

124. *See id.*

125. *Id.*

126. *See id.* at 1170-73. The court in this discussion dispels the plaintiffs' argument that the foreign affairs doctrine is no longer valid because it has been infrequently used. *See id.* at

> *Zschernig* thus stands for the proposition that states may legislate with respect to traditional state concerns, such as inheritance and property rights, even if the legislation has international implications, but such conduct [will be] unconstitutional when it has more than an "incidental or indirect effect in foreign countries." . . . "[T]here is a threshold level of involvement in and impact on foreign affairs which the states may not exceed." . . . [I]f a state law were to "involve[] the state in the actual conduct of foreign affairs[, the statute] is unconstitutional."[127]

The court justified the *Zschernig* decision as follows:

> This doctrine makes sense because the nation as a whole is affected when state-driven foreign policy has an impact on other countries. Indeed, for that very reason states have inadequate incentive to consider the effects of their actions on foreign relations. *Zschernig* thus enables the courts to ensure that the states have not overstepped the line at the risk of endangering the nation as a whole.[128]

The court, turning to the analysis of section 354.6, reiterated that "California may legislate with respect to local concerns that touch upon foreign affairs, but only if its actions have only 'some incidental or indirect effect in foreign countries.'"[129] The court concluded that section 354.6 clearly crossed the "forbidden line."[130]

The district court first observed that the terms of section 354.6 and its legislative history demonstrated the intent of the California legislature to influence foreign affairs directly.[131] The language of the statute purported "to enable individuals from any country forced to labor during World War II by Japan or Japanese companies" to bring claims against those companies.[132] The court cited comments by the governor of California and the author of the bill indicating that the entire purpose of

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1171. The court rejects this argument by citing *National Foreign Trade Council v. Natsios*, in which the doctrine was employed and then states that "*Zschernig* has not been overruled, and thus the constitutional principles it enunciates remain the law." *Id.* at 1171. "As the Ninth Circuit has noted on numerous occasions, 'speculation' about the continuing vitality of Supreme Court precedent 'does not permit us to ignore [such] controlling . . . authority.'" *Id.* (quoting United States v. Pacheco-Zepeda, 234 F.3d 411, 414 (9th Cir. 2001)). The court stated that the infrequency of the application of *Zschernig* over the years reflects "that the federal government has affirmatively enacted legislation or international agreements in most areas of foreign relations that expressly preempt conflicting state and local legislation under the Constitution's Supremacy clause, thereby obviating the need for analysis under *Zschernig*." *Id.* at 1172-73.

127. *Id.* (citations omitted) (alteration in original).

128. *Id.* at 1171 (citations omitted).

129. *Id.* at 1173 (quoting Zschernig v. Miller, 389 U.S. 429, 433 (1968) (quoting Clark v. Allen, 331 U.S. 503, 517 (1947))).

130. *See id.*

131. *See id.*

132. *Id.*

the statute was to affect negotiations between the United States and Germany on a settlement of World War II claims.[133] The court also found the statute itself "purport[ed] to create a cause of action for compensation from companies [for war crimes] related to 'the Nazi regime, its allies or sympathizers,'" and by implication, the same message extended to Japan and its companies.[134] The statute, in effect, allowed victims to obtain war-related reparations, which are generally brought under international law by national governments.[135] The statute, therefore, "engage[d] California in the uniquely federal foreign policy function of addressing claims for reparations that arise in the aftermath of war."[136]

Second, the court observed that the California statute targeted a particular set of countries and that because it "single[d] out such a narrow set of countries—most notably, Germany and Japan—it suggests that California intended the statute to send an explicit foreign relations message, rather than simply to address some local concern."[137] The court contrasted this case to the statute in *Trojan Technologies*, which did not single out a particular country or set of countries.[138] By not focusing on a set of countries, this indicated that the statute in *Trojan Technologies* was "focused on a local concern . . . as opposed to engaging in international relations directly with a particular country."[139] The court found that the California statute was more similar to the invalidated statute in *Zschernig*, in that the "Oregon statute at issue was generally applied only against residents of a narrow set of countries," mainly authoritarian regimes.[140] Section 354.6 focused on an even narrower set of countries, Nazi Germany and its allies, which evidenced "an intrusion by the state on the field of foreign affairs."[141]

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133. *Id.* Senator Tom Hayden, the author of the bill, stated:

> [Section 354.6] sends a very powerful message from California to the U.S. government and the German government, who are in the midst of rather closed negotiations about a settlement. . . . If the international negotiators want to avoid very expensive litigation by survivors as well as very bad public relations for companies like Volkswagen and Ford, they ought to settle. . . . Otherwise, this law allows us to go ahead and take them to court.

Id. at 1173-74 (alteration in original) (quoting Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, L.A. TIMES, July 29, 1999, at A3).

134. *Id.* at 1174.

135. *See id.* (citing Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 273-74 (D.N.J. 1999)).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1174-75.

Third, the court found that section 354.6 did not "regulate an area that Congress had expressly delegated to the states."[142] As it mentioned earlier in the decision, "establishing a mechanism for forced labor victims to obtain war reparations," these types of activities had always been addressed at the federal level.[143] The court distinguished this activity from the regulation of foreign insurance companies in the *Gerling* decision, which Congress deems a "local matter."[144]

The court also found that section 354.6 affected international relations because it opened the door for continuing judicial criticism about the conduct of the Japanese government and its companies during World War II.[145] This directly implicated the primary dangers cautioned against in the *Zschernig* decision: "Specifically, such litigation cannot be carried to fruition without making 'unavoidable judicial criticism' of the efforts of Japan and its war industry."[146] The court acknowledged that the criticism focused on the past, but because such criticism "emanate[d] from the official forum of American courts, Japan's current regime could not avoid being negatively implicated by association."[147] The statute, thus, had the potential to have a continuing impact on foreign relations between Japan and the United States.[148] The court also mentioned the formal complaint lodged by the Japanese government against the statute and that litigation under the statute would impede settlement negotiations between Japan, China, and North and South Korea.[149] "California's efforts to provide an alternative forum for these claims interferes with Japan's diplomatic efforts and its credibility in this regard."[150] This, in turn, could endanger diplomatic relations between the United States and Japan as well.[151] This was also evidenced by the formal complaint submitted by the State Department, as the representative of the executive branch, one of the two political branches with the exclusive authority to handle the country's foreign affairs.[152]

After weighing these factors, the court rejected several of the Chinese and Korean plaintiffs' arguments. First, the plaintiffs argued that *Zschernig*, which the Supreme Court framed as an applied analysis,

142. *Id.* at 1175.
143. *Id.*
144. *See id.*
145. *See id.*
146. *Id.* (citing Zschernig v. Miller, 389 U.S. 429, 440 (1968)).
147. *Id.*
148. *See id.*
149. *See id.*
150. *Id.*
151. *See id.*
152. *See id.* at 1176.

could not control in this case because the defendants challenged the validity of the statute on its face, similar to the challenge in *Clark*.[153] The district court rejected this notion, finding that the "defendants, in fact, challenge section 354.6 as it applies to them."[154] The court relied on Supreme Court precedent and found that "the proper method of adjudicating the constitutionality of a statute is for the affected parties to challenge the statute at issue as applied to them" and the posture of the defendants' particular challenge clearly indicated that they challenged it as the statute would be applied against them.[155]

The court also rejected the plaintiffs' contention that because the defendants are businesses, as opposed to foreign governments, section 354.6 does not implicate *Zschernig*'s foreign affairs doctrine.[156] The court found that this contention did not hold weight with the plaintiffs' complaints, which indicated that "the conduct of the Japanese companies during the war was condoned and controlled by the Japanese government."[157] Since there was such a connection between the Japanese government and the nation's companies, the Japanese government would be clearly implicated by the claims asserted under section 354.6, as opposed to just private companies.[158] The court then stated that even if these claims could be characterized as claims between private parties, *Zschernig* would still apply and there would still be more than "some incidental or indirect effect" on Japan without further elaboration.[159]

Finally, the court rejected the plaintiffs' suggestion that "since Congress has not addressed the subject matter [in section 354.6], forced labor compensation claims against Japanese companies," there is no federal policy with which section 354.6 may conflict.[160] The court rejected this argument as directly contrary to *Zschernig*.[161] It is the intrusion itself that is prohibited by *Zschernig*, regardless of whether a conflicting federal policy or law exists.[162] Ultimately, the court held that "applying section 354.6 to defendants will 'affect[] international relations in a persistent and subtle way,' have a 'great potential for disruption or

153. *See id.*
154. *Id.*
155. *Id.* (citing United States v. Raines, 362 U.S. 17, 20-21 (1960)).
156. *See id.* at 1177.
157. *Id.*
158. *See id.*
159. *See id.*
160. *Id.*
161. *See id.*
162. *See id.*

embarrassment' in the United States and trigger 'more than some incidental or indirect effect' in Japan."[163]

IV. ANALYSIS

The circumstances of this case seem to justify the court's decision. All the factors tend to show that the California statute had more than an incidental or indirect impact on foreign affairs.[164] While the court seems to use a totality of circumstances standard in declaring section 354.6 unconstitutional, a fair reading of the *Zshcernig* doctrine seems to imply that the overriding factor that killed section 354.6 was the continuing judicial scrutiny by California courts of the former Japanese government, even though this potential criticism arose indirectly through suits against Japanese corporations.[165] This factor alone should have rendered the statute unconstitutional because it is the kind of state interference that the Supreme Court cautioned against in the *Zschernig* decision.[166] The statute allowed California courts to make "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements" in a "persistent and subtle" manner.[167] Every time a suit was brought under the statute, Japan was subject to potentially damaging criticism of their past acts in World War II.[168]

While section 354.6 was a clear example of a violation of the foreign affairs doctrine, the decision does seem to clarify the ambiguous boundaries of the doctrine. By stating that the judicial inquiry into past events of the Japanese government crossed the impermissible line into foreign affairs, the court expanded the scope of the foreign affairs doctrine slightly.[169] Commentators have noted the ambiguous nature of the doctrine and the difficulty of when to apply it.[170] At least one scholar believes that that *Zschernig* possibly may only exclude "state actions that reflect a state policy critical of a foreign government and involve 'sitting in judgment' on them."[171] However it is still unclear what level of criticism rises to this level or what "sitting in judgment" on these foreign

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163. *Id.* at 1177-78 (citing Zschernig v. Miller, 389 U.S. 429, 434-35 (1968)).
164. *See id.* at 1173-76.
165. *See id.* at 1175-76; *see also* Zschernig v. Miller, 389 U.S. 429, 433-35 (1968).
166. *See Zschernig*, 389 U.S. at 436.
167. *See id.* at 435.
168. *See In re World War II Era Japanese*, 164 F. Supp. 2d at 1175-76.
169. *See id.*
170. *See* HENKIN, *supra* note 40, at 240-41.
171. *Id.* at 240.

governments exactly means.[172] Must the state regulation "intrude" on the conduct of foreign relations or merely "affect" them?[173]

Before the noted case, the foreign affairs doctrine seemed to focus on intrusions into the foreign affairs of other nations and the United States, such as attempts to change policies or governments in other countries.[174] *Zschernig* itself dealt with a state statute that was intended to subvert Cold War Era totalitarian regimes through state inheritance powers.[175] The problem with the Oregon statute was that it was directly critical of the current regimes, their type of governments and policies, and this criticism may have embroiled the nation as a whole into foreign affairs conflicts with those nations that statute intruded upon.[176] Other decisions striking down state actions also deal with similar actions. Both state actions in *Springfield Rare Coin Galleries*[177] and *New York Times*[178] were designed to create embargos on South Africa and aimed to change the Apartheid policies in that country. Similarly, in *Natsios* the court found the Burma statute an intrusion on foreign policy because it worked to punish Burma for its poor human rights records.[179]

The California statute, on the other hand, was not directed at any current foreign government or changing current policies that California felt were particularly reprehensible.[180] The statute was intended to allow victims to recover for wrongs resulting from forced labor, which might have effected settlement negotiations of other World War II claims, but it does not rise to the level of intrusion as seen in the other decisions on the foreign affairs doctrine.[181] The statute, as applied to the defendants, focused criticism upon Japanese companies, and only by association of history was the Japanese government implicated.[182] It seems, then, the district court is expanding the definition of impermissible actions from clear intrusions by regulations like those evidenced in prior case law on the foreign affairs doctrine to state regulations that merely have a

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172. *See id.* at 241.

173. *See id.*

174. *Cf.* Bethlehem Steel Corp. v. Bd. of Comm'rs, 80 Cal. Rptr. 800, 805 (Cal. Ct. App. 1969).

175. *See* Zschernig v. Miller, 389 U.S. 429, 435, 437 (1968).

176. *See id.* at 441.

177. *See* Springfield Rare Coin Galleries v. Johnson, 503 N.E.2d 300, 307 (Ill. 1986).

178. *See* New York Times Co. v. City of New York Comm'n on Human Rights, 361 N.E.2d. 963, 968 (N.Y. 1977).

179. *See* Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 51-52 (1st Cir. 1999), *aff'd on other grounds sub nom.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

180. *See In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d, 1160, 1173 (N.D. Cal. 2001).

181. *See id.*

182. *See id.*

potential impact on international relations. The court's decision seems to be more in line with *Bethlehem Steel*, where the California Court of Appeals found that the mere possibility to effect international trade negotiations was impermissible.[183] It seems that the district court finds this goal, preventing the possible repercussions of state regulations from affecting international negotiations, as an overriding concern when making the foreign affairs analysis, rather than whether there is a direct intrusion.

V. CONCLUSION

Even after the noted decision, much ambiguity still remains in the doctrine. The court had a relatively easy statute to strike down as unconstitutional. The court did not have to address a more difficult or ambiguous state action. For instance, had the court found that the Japanese corporations were not extensions of the war-time Japanese regime, but merely private entities, the dividing line between permissible and impermissible action would have not been so clear. Or had the statute regulated an area traditionally reserved for the states to regulate but the statute still had a significant effect upon foreign relations, it is unclear how the district court would have ruled. With an ever growing global society including states and local governments increasingly transacting business on the international level, in the future more state regulations will implicate this doctrine. As a result, the need for clear boundaries in which a state may permissibly regulate and legislate becomes essential. The noted decision offers some insight into these boundaries, but not enough to guide state and municipal governments in forming their regulations that may implicate international relations.

Todd Jascott*

183. *See* Bethlehem Steel Corp. v. Bd. of Comm'rs, 80 Cal. Rptr. 800, 802, 805 (Cal. Ct. App. 1969).

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