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PAINTING PREEMPTION WITH THE WRONG BRUSH: THE MISAPPLICATION OF THE PREEMPTION DOCTRINES IN VON SAHER v. NORTON SIMON MUSEUM OF ART

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I. Introduction

Adolf Hitler and the Nazis, infamous for massive genocide during World War II, are less known for deliberately and systematically confiscating thousands of works of art on an unprecedented scale.¹ Hitler aspired to create a “pure Germanic” race and, as part of that dream, planned to accrue an art collection consisting of “pure Germanic” art.²


² See Falconer, supra note 1, at 394 (citing LYNN H. NICHOLAS, WORD WAR II AND THE DISPLACEMENT OF ART AND CULTURAL PROPERTY, IN THE SPOILS OF WAR 39 (Elizabeth Simpson ed., 1997)) (explaining amassing pure Germanic art collection was part of Hitler’s dreams for creating pure Germanic race); see also Benjamin E. Pollock, Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims, 43 HOUS. L. REV. 193, 196 – 97 (2006) (recognizing Hitler’s plan to eradicate entire population extended to confiscating all of their property as well as cultural heritage). Conversely, in conformity with ridding his empire of anyone who he
Hitler hired art specialists to acquire this “desirable” art. These specialists bought art and seized paintings that previously belonging to Jewish art collectors in Nazi-occupied countries such as the Netherlands. While efforts were made to return wrongfully acquired artwork to the rightful owners, much of the art looted by the Nazis remains in museums and private collections, both within the United States and abroad. When the Allied Forces entered Germany in the winter of 1944 – 1945, the troops discovered large troves of Nazi-looted art hidden in castles, banks, salt mines, and caves. Consequently, the Allies were left with the enormous task of restituting the artworks to the rightful owners. The United States government initially addressed the problem of returning this artwork through the executive branch’s policy of external restitution.

3 See Falconer, supra note 1, at 395 (citing NICHOLAS, supra note 2, at 39 – 44) (noting art collection would be housed in Hitler’s hometown of Linz, Austria and would transform town into cultural capital); see also Kaye, supra note 1, at 244 (explaining Hitler’s plan to use looted art to fill museum he planned on building in hometown of Linz, Austria).

4 See Falconer, supra note 1, at 395 (citing HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART 21-23 (1997)) (noting experts forcefully bought paintings but had works from Jewish art collectors “at their disposal”). The Nazis seized approximately one-fifth of all Western art then in existence; all of the seized art amounted to a total value of about $2.5 billion at the time of looting, or a present value of $20.5 billion. See Kaye, supra note 1, at 244 (noting value of looted art exceed total value of all artwork in United State in 1945).

5 See Kaye, supra note 1, at 244 (commenting many stolen pieces ended in museums and private collections in United States); see also Pollock, supra note 2, at 194 (citing Henson, supra note 1, at 1103) (recognizing countries have made various attempts to restitute stolen art, however thousands of pieces remain in public and private collections).

6 See Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1023 (9th Cir. 2009) (noting American troops found art stashed in castles, banks, and caves when they entered Germany).

7 See Pollock, supra note 2, at 197 (explaining the Allies’ system of collection points for collecting art and returning it to original owners).

8 See Von Saher, 578 F.3d at 1023 (noting London Declaration and United States policy statement approved by President Truman, “Art Objects in U.S. Zones” were two main
Notwithstanding the federal government’s attempts to regulate and return artwork to the rightful owners, many families and heirs have turned to the judiciary to help them recover their Holocaust-era property. These plaintiffs confront many obstacles, such as statutes of limitations and federal preemption. In an effort to help overcome the legal barriers, California enacted California Code of Civil Procedure Section 354.3. Section 354.3 creates a forum in the California state courts in which


9 See Von Saher, 578 F.3d at 1019 (commenting people have looked to courts to help get back their artwork in spite of government’s legislative efforts to address restitution); see, e.g., Republic of Austria v. Altmann, 541 U.S. 677, 680 (2004) (regarding suit by niece of Holocaust victim for recovery of paintings from Austria). The plaintiffs in these lawsuits to recover Holocaust-era artwork have faces an uphill battle. See Pollock, supra note 2, at 194 (commenting American legal system often guides courts to dismiss or bar suit, thereby preventing plaintiffs from succeeding in their claims).

10 See Pollock, supra note 2, at 213 – 25 (discussing various defenses that create obstacles to those trying to recover looted artworks).

11 Section § 354.3 of the California Code of Civil Procedure, entitled “Action to recover Holocaust-era artwork” provides:

(a) The following definitions govern the construction of this section:
(1) “Entity” means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.
(2) “Holocaust-era artwork” means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.

(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution. Section 361 does not apply to this section.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

CAL. CIVIL PROCEDURE CODE § 354.3 (Deering 2009).
plaintiffs can bring claims as rightful owners to Holocaust-era artwork.12 Section 354.3 also imposes a statute of limitations for these claims such that the actions must be brought by December 31, 2010.13

In Von Saher v. Norton Simon Museum of Art at Pasadena,14 the Ninth Circuit Court of Appeals struck down California Code of Civil Procedure Section 354.3 as unconstitutional because the statute was preempted by the federal government’s foreign affairs powers.15 The Ninth Circuit’s finding was erroneous because Section 354.3 does not implicate foreign affairs and instead concerns a traditional state responsibility.16 Part II of this note examines two preemption doctrines and summarizes the law surrounding state statutes addressing Holocaust-related claims.17 Part III describes the facts and procedural history of Von Saher and outlines the Ninth Circuit’s reasoning.18 Part IV critically analyzes the Ninth Circuit’s reasoning in light of applicable law and argues that the court incorrectly interpreted and applied the law.19 Finally,

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12 See Von Saher, 578 F.3d at 1020 (explaining California enacted § 354.3 as response to challenges that plaintiffs face in trying to recover Holocaust-era artwork).

13 See id. (providing cause of action for claims to reclaim “any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive”).

14 578 F.3d 1016 (9th Cir. 2009)

15 See id. at 1019 (holding § 354.3 infringes on federal government’s exclusive power to conduct foreign affairs). The court also analyzed the claim under California Code of Civil Procedure § 338 and held that the district court’s dismissal without leave to amend was erroneous because Saher could possibly amend her complaint to bring her action within the proper statute of limitations for § 338. Id. (reversing district court’s dismissal of complaint without leave to amend). However, I do not address this issue because it is beyond the scope of this paper. The 9th Circuit’s discussion of California Code of Civil Procedure section 338 and its decision that the claim was not barred by the statute of limitations was also correct, yet unnecessary, because the case should have been decided conversely under section 354.3.

16 For a further discussion of why the Ninth Circuit wrongly decided Von Saher, see infra notes 141 – 177 and accompanying text.

17 For a further discussion of federal and state cases addressing Holocaust-era claims, see infra notes 21 – 80 and accompanying text.

18 For a further discussion of the facts and procedural history of Von Saher, see infra notes 81 – 96 and accompanying text. For a further discussion of the Ninth Circuit’s reasoning in Von Saher, see infra notes 97 – 140 and accompanying text.

19 For a further discussion and critique of the Ninth Circuit’s holding and reasoning, see infra notes 141 – 177 and accompanying text.
part V analyzes the negative impact the holding will likely have on other owners and heirs seeking to recover Holocaust-era artwork.20

II. Preparing the Palette: The Development of Law Surrounding Holocaust-Related Claims

A. The Supremacy Clause Serves as a Foundation to the Introduction of Preemption

The Supremacy Clause is a fundamental part of the Constitution that gives Congress the power to preempt state law when state law interferes with federal objectives.21 The treaty power in the Supremacy Clause is vested exclusively in the federal government due to the need for uniformity in dealing with foreign affairs.22 States cannot be allowed power to make or decide foreign policy.23 If states had the power to make foreign policy, the uniformity that is vital to the system of government would be destroyed.24 Therefore, if a state enacts a law dealing with

20 For a further discussion of the likely impact of this case, see infra notes 178 – 193 and accompanying text.

21 The Supremacy clause of the Constitution provides:

“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. See Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372 – 73 (2000) (“[State law is preempted when] it is impossible for a private party to comply with both state and federal law and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”).

22 See Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (noting federal government has “full and exclusive responsibility” for foreign affairs and government represents “collective interests” of states).

23 See United States v. Pink, 315 U.S. 203, 232 (1942) (“If state laws and policies did not yield before the exercise of the external powers of the United States, then [the United States’] foreign policy might be thwarted.”); see also United States v. Belmont, 301 U.S. 324, 331 (1937) (commenting when dealing with foreign relations and foreign policy, “state lines disappear”).

24 See Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 413 (2003) (“[A]n exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National
foreign affairs, the judicial system will invalidate the state’s law in order to standardize the United States’ policies on foreign affairs.  

When World War II ended, the United States federal government established external policies and initiatives regarding the restitution of art stolen by Nazi forces. The policies focused on restituting art found by Allied Forces after invading Germany. Despite these policies, much of

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25 See, e.g., id. at 416 – 17 (holding California’s Holocaust Victim Insurance Relief Act was unconstitutional because it interfered with federal government’s foreign relations and executive agreements, such as this one, preempt state laws); Crosby, 530 U.S. at 373 (holding Massachusetts’ Burma Law, restricting agencies abilities to interact with companies doing business with Burma, was invalid because there was exact congressional act on this point).

26 See Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1019 (9th Cir. 2009) (discussing Allied Forces’ task of returning stolen artwork to countries of origin); see also Falconer, supra note 1, at 397 – 99 (detailing United States’ approach to restitution immediately following World War II).

27 See, e.g., Forced Transfers of Property in Enemy-Controlled Territory, Jan. 5, 1943, 3 Bevans 754. (giving Allied Forces the right to invalidate wartime transfers of property); REPORT OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, (June 30, 1946) (providing procedures governing looted artwork found with United States zone of occupation and hereinafter “Art Objects in U.S. Zones”). Forced Transfers of Property in Enemy-Controlled Territory (hereinafter the “London Declaration”) provided:

The Union of South Africa, the United States of America, Australia, Belgium, Canada, China, the Czechoslovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Yugoslavia, and the French National Committee:

Hereby issue a formal warnings to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and people who have been so wantonly assaulted and despoiled.

Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including judicial persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

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the looted artwork was never returned to their rightful owners. More recently, the federal government passed acts that addressed the restitution of Holocaust-era artwork to the rightful owners and their heirs; however, these policies are no longer in effect. Therefore, state governments like California, created statutes to help Holocaust survivors and their heirs succeed in restitution for looted property in response to the lack of federal policy.

The governments making this declaration and the French National Committee solemnly record their solidarity in this matter.

Forced Transfers of Property in Enemy-Controlled Territory, Jan. 5, 1943, 3 Bevans 754.

28 Von Saher, 578 F.3d at 1019 (citing Michael Bazyler, Holocaust Justice: The Battle for Restitution in America’s Courts 204 (NYU Press 2003)) (commenting on failure of restitution efforts to restore artwork to rightful owners); see also Pollock, supra note 2, at 205 (noting United States’ policies failed to provide solution to problem of restitution of artwork).

29 See Falconer, supra note 1, at 400 (describing Holocaust Victims Redress Act and U.S. Holocaust Assets Commission Act of 1998); see also Pollock, supra note 2, at 205 (discussing Holocaust Victims Redress Act and U.S. Holocaust Assets Commission Act of 1998 as promising attempts to address restitution of assets). One such policy, the Holocaust Victims Redress Act, required governments to make a good faith effort in returning property looted during the Holocaust to the rightful owners. The Holocaust Victims Redress Act provides:

[All governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Holocaust Victims Redress Act, Pub. L. No. 105-158, § 202, 112 Stat. 15, 18 (1998). This act also set aside funds for archival research and translation services to assist in this restitution. See id. at § 103, 112 Stat. at 17 (“There are authorized to be appropriated to the President $ 5,000,000 for archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust and such other activities that would further Holocaust remembrance and education.”). A second policy was the U.S. Holocaust Assets Commission Act of 1998, which provided for the establishment of the Presidential Advisory Commission on Holocaust Assets in the United States. See 22 U.S.C.S. § 1621 (LexisNexis 2008) (assigning commission duty of examining the United States’ role in the collection and disposition of Holocaust-era assets). This act also required the commission to compile a report for the President that advised the President on policies concerning the restitution of these assets. See id. (noting report was to be submitted to President no later than December 31, 2000 and commission was to dissolve ninety days after filing of last report); see also Pollock, supra note 2, at 206 (noting final report was submitted in 2000 and made six general recommendations).

30 See, e.g., Cal. Civil Procedure Code § 354.3 (Deering 2009) (creating cause of action for recovery of Holocaust-era artwork); Cal. Civil Procedure Code § 354.5
B. The “Conflict” Preemption and “Field” Preemption Doctrines

When considering whether the federal government’s foreign affairs doctrine preempts a state statute, courts have looked to either conflict preemption or field preemption theories.\(^{31}\) Conflict preemption is appropriate when a state law conflicts with a federal law or policy.\(^{32}\) On the other hand, field preemption analysis is appropriate when the state law is either incompatible with or infringes on an area heavily occupied by the federal government.\(^{33}\) When deciding if a state law is preempted, courts first consider whether conflict preemption applies.\(^{34}\) When there is no federal treaty, statute, or policy that specifically regulates an area that a

\(^{31}\) See Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 419 (2003) (explaining choice between conflict and field preemption theories is necessary with respect to executive foreign relations power); see also Zschernig v. Miller, 389 U.S. 429, 440 – 41 (1968) (inferring conflict or field preemption analysis must be used). The Zschernig Court explained that if a state law conflicts with a federal policy treaty, the treaty takes priority over the state law; however, a state’s policy may still conflict with foreign relations even if there is no treaty on the subject. See Zschernig, 389 U.S. at 441 (assuming first type of conflict is conflict preemption while the second type of conflict is field preemption).

\(^{32}\) See English v. General Elec. Co., 496 U.S. 72, 79 (1990) (noting preemption occurs when party cannot comply with both federal and state requirements); see also Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 372 (2000) (noting state law is preempted when it conflicts with federal statute); Zschernig, 389 U.S. at 441 (noting when state law conflicts with federal treaty, state law “must bow to the superior federal policy”); Hines v. Davidowitz, 312 U.S. 52, 62 – 63 (1941) (explaining federal treaty or statute is “supreme law of the land” and “[n]o state can add to or take from the force and effect of such treaty or statute”).

\(^{33}\) See Zschernig , 389 U.S. at 441 (explaining state law gives way to federal policy if it “disturb[s] foreign relations” or “adversely affect[s] the power of the [federal] government”). Field preemption is also appropriate when a state law intrudes into a field that Congress intended to occupy or regulate. See Crosby, 530 U.S. at 372 (commenting state statute must yield to Congress when Congress intended for federal law to occupy field which statute attempts to regulate).

\(^{34}\) See Garamendi, 539 U.S. at 419 – 20 (noting field preemption analysis is unnecessary where court determines state statute conflicts with federal law).
Where conflict preemption is inappropriate, the courts look to field preemption to determine if a state statute is preempted by congressional regulations in a field that the state statute also addresses. Courts frequently use the field preemption analysis to negate state statutes in cases involving distinctively federal issues. Because the federal government enjoys an exclusive power to regulate foreign affairs, state statutes attempting to dictate foreign affairs are often preempted under a field preemption analysis.

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35 See English, 496 U.S. at 79 (noting state law is preempted when it attempts to regulate field occupied exclusively by federal government); see also Crosby, 530 U.S. at 372 (explaining state law must yield to the Congressional act when “Congress intends federal law to ‘occupy the field’” (quoting California v. ARC America Corp., 490 U.S. 93, 100 (1989))); Zschernig, 389 U.S. at 441 (noting state’s policy can interfere with foreign relations even without federal statute or treaty); Hines, 312 U.S. at 63 (explaining foreign relations must be free from interferences, including interferences from states).

36 See Zschernig, 389 U.S. at 441 (commenting that state law must give way to federal policy if it conflicts but, even if there is no conflicting federal policy, state law can be preempted by federal foreign relations); see also Hines, 312 U.S. at 63 (asserting even if there is no conflicting federal law, state law is preempted if it intrudes into field of foreign relations, governed solely by federal government).

37 See English, 496 U.S. at 79 (noting field preemption occurs when federal regulations dominate field of interest so there is no room for state laws regarding same subject). The Court more clearly explained the field preemption analysis:

[S]tate law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”

Id. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

38 See, e.g., Garamendi, 539 U.S. at 420 n.11 (noting field preemption is appropriate doctrine to use when addressing foreign policy because, as stated in the Constitution, federal government is responsible for regulating foreign policy); Hines, 312 U.S. at 66 (holding state statute regarding immigration is preempted by federal immigration policies because this field is “intimately blended and intertwined with responsibilities of the national government” so state law must give way to federal program); Deutsch v. Turner Corp., 324 F.3d 692, 712 (9th Cir. 2003) (“Matters related to war are for the federal government alone to address.”).
Recently, courts have applied preemption to invalidate several California statutes that addressed Holocaust-era claims.39 These California statutes that addressed wrongfully seized insurance policies or slave labor performed during World War II were passed to help facilitate Holocaust-era claims.40 The statutes were deemed preempted by federal foreign policy.41

In American Insurance Association v. Garamendi,42 the Supreme Court discussed field preemption analysis when considering the validity of a California statute regulating the restitution of Holocaust-era insurance policies.43 The Nazi Government had illegally seized the value of Jewish insurance policies and, in other cases, forced Jews to cash in their life insurance policies prematurely so that the Nazi government could seize the funds.44 The statute at issue in Garamendi was the Holocaust Victim

39 See, e.g., Garamendi, 539 U.S. at 416 – 17 (holding California statute on restitution of Holocaust-era insurance claims unconstitutional as it interfered with Executive Branch’s policy on resolving similar claims); Deutsch, 324 F.3d at 703 & 708 (holding California statute unconstitutional as it exceeds state’s power to engage in foreign affairs).

40 See, e.g., Garamendi, 539 U.S. at 401 (invalidating California statute regarding restitution values of insurance policies looted during World War II); Deutsch, 324 F.3d at 703 & 708 (holding California Code of Civil Procedure § 354.6, creating cause of action for claims for slave labor suffered during World War II, invalid because it interfered with federal government’s exclusive powers to regulate foreign affairs); Steinberg v. Int’l Comm’n on Holocaust Era Ins. Claims, 34 Cal. Rptr. 3d 944, 945 (Ct. App. 2005) (holding California Code of Civil Procedure § 354.5, providing outlet for claims arising out of Holocaust-era insurance policies, was preempted by federal government’s power to regulate foreign policy).

41 For further discussion of California statutes that attempted to provide causes of actions for Holocaust-era claims, see supra note 40.


43 See id. at 419 – 20 (noting importance of field preemption analysis). The Supreme Court ultimately held that the statute was preempted under conflict preemption and therefore an analysis of the statute under a field preemption test was unnecessary. See id. (recognizing field preemption analysis is useful but unnecessary here because HVIRA conflicts with “express foreign policy of the National Government”).

44 See id. at 402 – 403 (explaining Jews did not received benefits from insurance policies during Nazi regime). The Nazis stole the value of insurance policies belonging to Jews and consequently, the value or proceeds of these policies were paid to the Nazis or never paid at all. See id. (explaining Nazis forced Jews to cash in insurance policies prematurely and seized proceeds or proceeds ended up in Nazi hands when Jews deported to concentration camps after policies were cashed so money was turned over to Nazis).
Insurance Relief Act (‘‘HVIRA’’).

In enacting HVIRA, California tried to provide a forum for California resident Holocaust victims seeking to bring claims for wrongfully seized insurance policies against insurers who issued policies during the war.

After World War II, the federal government agreed that the United States and Germany would settle claims for unpaid Holocaust-era insurance policies under the International Commission on Holocaust Era Insurance Claims (‘‘ICHEIC’’) organization. The ICHEIC, chaired by United States Secretary of State, was formed to help negotiate and settle claims brought against insurers who issued policies to Jews during the war. After HVIRA was enacted, the federal government warned California that the state’s efforts could derail the federal government’s initiative under ICHEIC. California responded that it would continue to enforce HVIRA despite the federal government’s clear support of the ICHEIC. Several American and European insurance companies filed for injunctive relief challenging the constitutionality of HVIRA in response to California’s continued support of its own initiative instead of the federal policy.

45 See id. at 409 (explaining HVIRA required insurers doing business in California to disclose information about policies sold in Europe between 1920 to 1945 by company or any company related to it).

46 See id. (noting HVIRA allowed California residents ‘‘to sue in state court on insurance claims based on acts perpetrated in the Holocaust’’). Suits authorized under HVIRA are against insurers doing business in California whose companies issued insurance policies to persons in Europe and which were in effect from 1920 – 1945. See id. (requiring any such insurer to disclose details about policies sold by any insurer and any related companies).

47 See id. at 406 (explaining International Commission of Holocaust Era Insurance Claims (‘‘ICHEIC’’) and federal government’s support of this policy). The ICHEIC’s job was to negotiate with European insurers, provide information regarding unpaid insurance policies issued to Holocaust victims, and assist in settling claims against these insurers. See id. at 407 (implying preference of settling claims rather than allowing claims to be litigated).

48 See id. (implying United States supported ICHEIC and thus had policy that claims against insurers should be processed according to ICHEIC policies).

49 See id. at 411 (detailing federal government’s warnings to California regarding HVIRA).

50 See id. at 411 (explaining California commissioner announced his intention to enforce HVIRA by requiring affected insurers to make disclosures, leave California voluntarily, or lose licenses).

51 See id. at 412 (discussing procedural history of suit).
The Court found that even though the federal policy was comparatively more relaxed than HVIRA, the state statute stood in the way of the federal government’s ability to enforce its constitutionally mandated objectives and policies.\textsuperscript{52} The Court noted conflict and field preemption analyses could be seen as complimentary and emphasized the necessity of addressing field preemption only after determining the outcome under the conflict preemption theory.\textsuperscript{53} The Court further suggested that a field preemption analysis is most suitable for questions regarding the executive branch’s exclusive power to regulate foreign relations.\textsuperscript{54} Although the Court discussed field preemption, it ultimately

\textsuperscript{52} See id. at 427 (explaining it is not for Court to choose stricter state policy just because it may be more effective, Court needs to enforce federal policy when state policy conflicts with federal objectives). The Supreme Court explains that the state statute must give way to foreign policy, despite the court’s own beliefs on which policy may be more powerful or effective:

> The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government’s policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is “more sufficient to demonstrate that the state Act stands in the way of [the President’s] diplomatic objectives.”

\textsuperscript{53} See id. at 420 n.11 (noting two tests even though this situation falls within conflict preemption analysis); see also English v. General Elec. Co., 496 U.S. 72, 79 (1990) (discussing conflict and field preemption theories).

\textsuperscript{54} The Court identified when a field preemption analysis is useful:

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government.

\textit{Garamendi}, 539 U.S. at 420 n.11 (citing Hines v. Davidowitz, 312 U.S. 52, 63 (1941)).
found that the conflict preemption theory should apply to invalidate HVIRA.\textsuperscript{55}

Further, an express statement of foreign policy is not required, but instead a statute can be preempted by the policy implied in the executive agreements.\textsuperscript{56} In \textit{Steinberg v. International Commission on Holocaust Era Insurance Claims},\textsuperscript{57} the California Court of Appeals voided Section 354.5 of the California Code of Civil Procedure, which provided a statutory basis for California residents to bring claims arising out of Holocaust-era insurance policies.\textsuperscript{58} The court adopted the Garamendi reasoning and

\textsuperscript{55} See id. at 419 – 20 (deciding to apply field or conflict preemption analysis is valid question, but this does not require much analysis because conflict here was so clear that it was necessary to find state statute was preempted).

\textsuperscript{56} See \textit{Steinberg v. Int’l Comm’n on Holocaust Era Ins. Claims}, 34 Cal. Rptr. 3d 944, 951 (Ct. App. 2005) (allowing preemption of state law because federal government prefers policy of settling claims through ICHEIC).

\textsuperscript{57} 34 Cal. Rptr. 3d 944 (Ct. App. 2005).

\textsuperscript{58} See id. at 945 (providing § 354.5 was preempted by United States foreign policy to favor settlements under ICHEIC’s guidelines). California Code of Civil Procedure § 354.5 provides:

(a) The following definitions govern the construction of this section:
(1) “Holocaust victim” means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.
(2) “Related company” means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.
(3) “Insurer” means an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe at any time before 1945, directly or through a related company, whether the sale of the insurance occurred before or after the insurer and the related company became related.

(b) Notwithstanding any other provision of law, any Holocaust victim, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer described in paragraph (3) of subdivision (a), may bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides, which court shall be vested with jurisdiction over that action until its completion or resolution.

(c) Any action brought by a Holocaust victim or the heir or beneficiary of a Holocaust victim, whether a resident or nonresident of this state, seeking proceeds of the insurance policies issued or in effect before 1945 shall not be dismissed for failure to comply with the applicable
noted that a state statute can be preempted even though the federal interest is not explicitly stated in federal agreements and statements.\textsuperscript{59} The court found executive agreements reflected support for using the federal policy, ICHEIC, to hear these claims.\textsuperscript{60} Therefore, because Section 354.5 provided for private actions from Holocaust-era insurance policies, it was preempted by the federal policy in favor of resolving such claims through ICHEIC’s policies.\textsuperscript{61}

The Ninth Circuit also considered preemption in light of the federal government’s exclusive power to regulate foreign affairs in Deutsch v. Turner Corporation.\textsuperscript{62} Plaintiffs sued German and Japanese corporations under California Code of Civil Procedure Section 354.6, which created a cause of action for injuries related to forced slave labor during World War II.\textsuperscript{63} The court concluded the foreign affairs doctrine statute of limitation, provided the action is commenced on or before December 31, 2010.

\textsc{Cal. Civil Procedure Code} § 354.5 (West 1999). For a further discussion of the federal government’s support of ICHEIC, see supra note 47.

\textsuperscript{59} See Steinberg, 34 Cal. Rptr. 3d at 951 (“To have preemptive effect, the specific interest need not be expressly set forth in an official agreement. An interest \textit{reflected} in official agreements and statement by Executives Branch officials is sufficient.”).

\textsuperscript{60} See id. at 952 (noting plaintiffs unsuccessfully attempted to distinguish their case from Garamendi). The plaintiffs’ argued that the reasoning from Garamendi should not apply because the executive agreements do not extend to the Italian insurer that they are suing, however the court rejected this argument by holding that it is necessary to look at the policy reflected in the executive agreements and not the agreements themselves. See id. (explaining policies behind executive agreements extend to Italian insurer even though agreements do not).

\textsuperscript{61} See id. at 951 (acknowledging § 345.5 is preempted by same policy as HVIRA from Garamendi).

\textsuperscript{62} See generally Deutsch v. Turner Corp., 324 F.3d 692, 708 – 12 (9th Cir. 2003) (discussing preemption can occur when state statute impedes on government’s power to conduct foreign affairs).

\textsuperscript{63} California Code of Civil Procedure § 354.6 provides:

(a) As used in this section:
(1) “Second World War slave labor victim” means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.
(2) “Second World War forced labor victim” means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its
preempted the statute and rendered it unconstitutional. According to the Ninth Circuit, California’s statute was preempted because it attempted to regulate foreign affairs, a power exclusively vested in the federal government and not ever allocated to states. This statute was considered to regulate foreign affairs because it sought to redress wrongs committed during World War II and therefore “intruded on the federal government’s exclusive power to make and resolve war, including the procedure for resolving war claims.”

allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) “Compensation” means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation.

(b) 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. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

**Cal. Civil Procedure Code § 354.6 (West 1999).** This case consisted of consolidated claims brought against German and Japanese corporations, seeking damages for injuries and lost wages the plaintiffs suffered in performing slave labor for these corporations. *See Deutsch,* 324 F.3d at 703 (explaining defendants are corporations or their successors or affiliates).

See *Deutsch,* 324 F.3d at 708 (holding that § 354.6 exceeded California’s power to engage in foreign affairs).

See *id.* at 708 – 09 (stating states are never free to establish their own policies regarding foreign affairs).

See *id.* at 712 (explaining California attempted to create its own resolutions to issues arising out of World War II through § 354.6 and in doing so intruded on federal government’s power to resolve wartime issues).
C. Holocaust Plaintiffs Can Win Their Claims for Property Restitution

Courts have found many state statutes regulating Holocaust-era claims preempted by federal law. Plaintiffs have encountered many obstacles in suits for the recovery of property looted during the Holocaust. Nevertheless, some plaintiffs have been successful in suits regarding restitution of property stolen during the Holocaust.

The plaintiff Holocaust survivors in Alperin v. Vatican Bank won their suit for stolen property and slave labor performed under the Nazi regime during World War II. The plaintiffs sued the Vatican Bank, alleging it profited from the stolen property and genocidal acts of the Croatian Ustasha regime, which was supported throughout World War II by Nazi forces. While these claims touched on foreign relations and political issues, the Ninth Circuit did not bar the court from hearing these claims. The Ninth Circuit based its analysis on Supreme Court

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68 See Pollock, supra note 2, at 194 (commenting Holocaust plaintiffs encounter various legal boundaries, resulting in dismissal of claims).

69 See, e.g., Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) (allowing recovery by niece of Holocaust victim of six paintings held in Austrian gallery); Alperin v. Vatican Bank, 410 F.3d 532, 539 (9th Cir. 2005) (holding that claims by Holocaust victims for lost and looted property are not barred by political question doctrine).

70 410 F.3d 532 (9th Cir. 2005).

71 See id. at 538 (finding in favor of plaintiffs).

72 See id. (explaining Croatian Ustasha regime was supported by Nazi forces and looted assets and profits from slave labor allegedly passed through Vatican Bank); see also Reuben Hart, Property, War Objectives, and Slave Labor Claims: The Ninth Circuit's Political Question Analysis in Alperin v. Vatican Bank, 36 GOLDEN GATE U. L. REV. 19, 29 (2006) (discussing Vatican Bank profited from Ustasha regime while ignoring atrocities performed by Ustasha). Plaintiffs brought suit and claimed conversion, unjust enrichment, restitution, the right to an accounting, human rights violations, and violations of international law arising out of defendants’ involvement with the Ustasha regime during and after World War II. See Alperin, 410 F.3d at 538 (explaining plaintiffs claims for defendants’ alleged conduct).

73 See Alperin, 410 F.3d at 537 (commenting tempting to think that plaintiffs’ claims, which touch on foreign relations, are barred by political question doctrine because this doctrine often bars similar claims).
precedent and explained that a claim could still survive even though it concerned some foreign affairs issues.  

Furthermore, the Ninth Circuit concluded that the courts could hear the plaintiffs’ claims for lost and looted property. The court explained that hearing claims regarding wrongfully held assets is a topic that courts typically decide. Although the claims for lost and looted

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74 See id. (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” (quoting Baker v. Carr, 368 U.S. 186, 211 (1962))).

75 See id. at 548 (concluding these property claims are not committed to political branch under political question doctrine, therefore Ninth Circuit can hear such claims because they are not barred by political question doctrine). The Ninth Circuit evaluated whether it was free to exercise jurisdiction over claims for the restitution of property looted during the Holocaust by evaluating whether the claims were committed to another political branch under the political question doctrine. See id. at 552 (holding this case does not concern political question). The political question doctrine was first announced in Marbury v. Madison over 200 years ago when the Supreme Court held “questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.” Id. at 544 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)). The political question doctrine is relevant here because this doctrine is often in the backdrop of cases concerning foreign relations. See id. at 538 (explaining procedural posture forces 9th to address political question doctrine). Baker v. Carr set forth the standard to evaluate the political question doctrine. See Baker v. Carr, 369 U.S. 186, 217 (1962) (setting forth six factors to consider in determining whether a case is “justiciable”). Baker v. Carr sets forth the following six factors to consider when addressing the political question doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The Supreme Court provides that “unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.” Id. To evaluate whether the Ninth Circuit could hear the Holocaust restitution claims in Alperin, the court looked to the Baker factors and concluded that the property claims do not implicate the political question doctrine and the case is justiciable because no one factor is inextricable from the property claims. See generally Alperin, 410 F.3d at 549 – 559 (discussing property claims under each of the six Baker tests and concluding that claims are not inextricably tied to case and therefore case is justiciable).

76 See Alperin, 410 F.3d at 551 (“Deciding this sort of controversy is exactly what courts do.”).
property stem from World War II atrocities and relate to a foreign
government, the claims can still be heard by the federal courts. 77 The
Ninth Circuit follows Supreme Court precedent in deciding that courts can
hear claims regarding the restitution of Holocaust-era assets. 78
“Reparations for stealing, even during wartime, is not a claim that finds
textual commitment in the Constitution.” 79 Since claims for restitution of
stolen property are not specifically allocated to a political branch, the
court system can exercise jurisdiction over claims regarding stolen
property. 80

II. Painting the Picture in Von Saher

A. Sketching out the Facts and Procedural History

Marei von Saher’s (“Saher”) suit originated in 1931 when her
ancestor, Jacques Goudstikker (“Goudstikker”), a prominent art dealer in
the Netherlands, bought a diptych by sixteenth-century artist Lucas
Cranach the Elder at an art auction in Berlin. 81 Saher sought the return of

77 See id. at 551 – 52 (recognizing political overtones in case but explaining courts are
not barred from hearing claims).

78 See id. at 551 (citing Republic of Austria v. Altmann, 541 U.S. 677, 698 (2004))
(noting Supreme Court allowed case regarding art looted by the Nazis to proceed).

79 Id.

80 See id. at 552 (deciding claims related to stolen property, even if it is during wartime,
is not already committed to another political branch, therefore is within judiciary’s power
to hear such claims).

81 See Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1020 –
21 (9th Cir. 2009) (explaining Goudstikker specialized in Old Master paintings and his
collection contained more than 1,200 artworks, including pieces by Rembrandt, Steen,
Ruisdaels, and van Gogh). Goudstikker meticulously inventoried all of the works in his
collection in a small black book; the Cranach paintings are listed in this book and
explained that the paintings were purchased at the Lepke Auction House. See id. at 1021
(noting that paintings were previously owned by the Church of the Holy Trinity in Kiev).
Goudstikker bought at an auction in Berlin when they were put up for auction by the
financially unstable Soviet regime. See Mike Boehm, Appeals court overturns Holocaust
looted-art law, but Norton Simon suit continues, LOS ANGELES TIMES, August 19, 2009,
by “Josef Stalin’s financially hard-pressed soviet regime”). A “diptych” is defined as:
“(1): a 2-leaved hinged tablet folding together to protect writing on its waxed surfaces;
(2): a picture or series of pictures (as an altarpiece) painted or carved on two hinged
tables; (3): a work made up of two matching parts.” MERRIAM-WEBSTER’S COLLEGIATE
two paintings, entitled “Adam and Eve,” painted by the sixteenth-century artist Lucas Cranach the Elder, which were taken from the collection of a prominent Jewish Dutch art dealer.\textsuperscript{82}

Goudstikker and his family fled the Netherlands when the Nazis invaded in 1940 and left behind all of their assets, including the extensive art collection.\textsuperscript{83} The Nazis looted Goudstikker’s gallery after the family had already escaped, and Herman Goring, Reichsmarschall of the Third Reich, seized hundreds of pieces from the collection, including the Cranach diptych.\textsuperscript{84} When the Allied Forces liberated Germany in 1945, the troops discovered artwork looted by Goering and sent it to a Munich collection point and the on to the Netherlands.\textsuperscript{85} Pursuant to the London

\begin{footnotes}
\textsuperscript{82} See Von Saher, 578 F.3d at 1021 – 22 (explaining two paintings were taken by Herman Goring, Nazi officer, when Nazis invaded Netherlands after Goudstikker fled when Nazis invaded). These paintings were probably seized for Hitler’s pure Germanic art collection because the artist, Lucas Cranach the Elder, was a German artist who painted in the first half of the 16\textsuperscript{th} century in a traditional German style. See NORBERT SCHNEIDER, THE ART OF PORTRAIT 176 (Iain Galbraith, trans., Taschen 2002) (1992) (stating Cranach was born in Upper Franconia). The German artists painted these in 1530 and they were valued at $24 million in 2006. See Boehm, supra note 81 (noting museum had paintings appraised in 2006). The Cranachs are the high of Sixteenth Century German painting, especially considering Cranach pieces are very rare and this diptych is especially valuable considering the condition, quality, and scale. See Suzanne Muchnic, What is their true genesis? Questions about long-ago events have the Norton Simon fighting in court to keep its prized works, LOS ANGELES TIMES, August 22, 2009, at D1.

\textsuperscript{83} See Von Saher, 578 F.3d at 1021 (noting when Goudstikker fled he brought notebook listing all artworks he left behind); see also Kaye, supra note 1, at 249 (explaining Goudstikker kept book of every piece in his collection). In a tragic turn of events, Jacques and his family (wife, Desi, and son, Eduard (Edo)) secured passage on a boat to South American but Jacques died on his way to freedom when he fell through an open hatch on the boat. See id. at 246 (explaining Jacques went on deck to get fresh air during night and fell through an open hatch, broke his neck during the fall, and died).

\textsuperscript{84} See Von Saher, 578 F.3d at 1021 (noting Goring sent the artwork he seized to his country estate near Berlin and the collection remained there until Allied Forces discovered it in 1945); see also Kaye, supra note 1, at 247 (explaining shortly after Nazi invasion of Netherlands, Goring, second in command of Third Reich, seized works from Goudstikker collection). Goring seized approximately 800 works from the Goudstikker collection and brought these works with him to Germany to display these works in several of his residences. See id. (noting most works were displayed in his country estate, Karinhall, near Berlin). Hitler wanted to compile an art collection that was “worthy of the Third Reich” and considered German and Germanic art, including Dutch and Flemish art, to be the “pinnacle of artistic accomplishment.” See Henson, supra note 1, at 1107-8 (commenting that this art collection was part of Hitler’s “grand plan” to make his Reich empire a cultural center of the European continent); see also Falconer, supra note 1, at 383 – 84 (explaining Hitler’s plan for looting art throughout Europe during World War II fell in with Hitler’s plan to create a purely Germanic empire).

\textsuperscript{85} See Kaye, supra note 1, at 247 (explaining the Allied Forces followed protocol set up by the London Declaration in sending the art to collection points). Upon the return of this artwork to the Netherlands, the Dutch Government held the art in trust for the lawful
Declaration, the troops returned the Goudstikker collection to the Netherlands around 1946, but the collection, including the Cranach diptych, was not immediately returned to the Goudstikkers.\textsuperscript{86}

Both Jacques’ wife, Desi Goudstikker, and their son, Eduard (Edo), died in 1996 before the collection was restored to the family.\textsuperscript{87} Following their deaths, Marie von Saher, Jacques Goudstikker’s heir, took over the Goudstikkers’ pursuit for their collection.\textsuperscript{88} In February 6, 2006, the Dutch government restituted 200 works of art from the Goudstikker collection to Saher.\textsuperscript{89} Although Saher was successful in the restitution of part of the collection from the Dutch government, more than 1,000 pieces were not discovered by the Allies and are consequently spread throughout the world.\textsuperscript{90}

Saher, a Connecticut resident, brought a claim against the Norton Simon Museum, located in California, in 2007, seeking the return of the Cranach paintings.\textsuperscript{91} Saher filed this suit under Section 354.3 of the California Code of Civil Procedure.\textsuperscript{92} The United States District Court for owners. \textit{See id.} (noting troops followed policies stated in the London Declaration in sending looted art to collection points, which were then responsible for returning art to original countries).

\textsuperscript{86} \textit{See Von Saher}, 578 F.3d at 1021 (stating that artwork recovered from Goring’s estate was sent to the Munich Central Collection Point and there the Goudstikker collection was identified and then returned to the Netherlands). Desi Goudstikker, Jacques’ wife, returned to the Netherlands in 1946 to recover the stolen property, but she was met with hostility and was unable to recover the stolen art. \textit{See Kaye, supra} note 1, at 248 (noting Dutch Government kept this collection in its National Collection without ever obtaining legal right to the art).

\textsuperscript{87} \textit{See Kaye, supra} note 1, at 248 (noting collection was not restored to family until 2006).

\textsuperscript{88} \textit{See id.} at 248 – 49 (commenting Saher learned about the family’s collection from Dutch journalist writing a book on family’s history); \textit{see also} Boehm, \textit{supra} note 81 (noting Saher first learned that Cranachs were in Norton Simon Museum in late 2000).

\textsuperscript{89} \textit{See Kaye, supra} note 1, at 249 (noting real tragedy that Jacques, Desi, nor son Edo, were present to witness the restitution of the collection).

\textsuperscript{90} \textit{See id.} (commenting that Goudstikker family undertook massive research to identify and locate more than 1,000 missing works). The family has had many successes in their quest for the restitution of works from the collection. \textit{See id.} at 250 – 52 (chronicling some works which have been returned to the family by museums and galleries worldwide).

\textsuperscript{91} \textit{See Von Saher}, 578 F.3d at 1020 (noting Saher is the only surviving heir of Jacques Goudstikker); \textit{see also} Boehm, \textit{supra} note 81 (recording Saher is a Connecticut resident).

\textsuperscript{92} \textit{See Von Saher}, 578 F.3d at 1019 (explaining § 354.3 extends the statute of limitations for recovery of Holocaust-era artwork until 2010).
the Central District of California granted the Museum’s pretrial motion for failure to state a claim and dismissed Saher’s claim. The district court held that Section 354.3 was unconstitutional because it violated the foreign affairs doctrine. Since the extended statute of limitations under Section 354.3 did not apply, the district court further held that the complaint was time-barred because Saher had not filed the complaint with California’s general three-year statute of limitations for causes of actions seeking restoration of property rights. Saher appealed both holdings.

B. Adding the Color: The Ninth Circuit Reasons Section 354.3 Should be Preempted

The Ninth Circuit affirmed the district court’s holding that Section 354.3 is preempted by the federal government’s exclusive power to conduct foreign affairs. The Ninth Circuit determined that the statute

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93 See id. at 1021 (noting the district court dismissed Saher’s claim with prejudice).

94 See id. (noting district court held statute violated the foreign affairs doctrine because the statute “intruded on the federal government’s exclusive power to make and resolve war, including the procedure for resolving war claims). The district court also said that § 354.3 violates the foreign affairs doctrine as interpreted in Deutsch v. Turner Corp. See Deutsch v. Turner Corp., 324 F.3d 692, 703 (9th Cir. 2003) (invalidating § 354.6 of the California Code of Civil Procedure, which creates a cause of action for claims involving World War II slave labor, as unconstitutional).

95 See Von Saher, 578 F.3d at 1021 (noting the district court’s holding the complaint was time-barred under the statute of limitations in California Code of Civil Procedure § 338). Section § 338 of the California Code of Civil Procedure provides a three year statute of limitations for many claims:

Within three years:
(a) An action upon liability created by statute, other than a penalty or forfeiture . . .
(c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significant is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.”

CAL. CIVIL PROCEDURE CODE § 338 (Deering 2009).

96 See Von Saher, 578 F.3d at 1019 (noting Saher appealed her suit from the district court’s holding against her).

97 See id. (affirming the district court’s holding that § 354.3 is preempted). California has enacted several statutes to facilitate lawsuits for Holocaust-era claims; these statutes extend the statute of limitations for such claims but have been found unconstitutional under the foreign affairs doctrine. See Deutsch v. Turner Corp., 324 F.3d 692, 703 (9th
was not preempted by conflict preemption, but the court further found the statute interfered with the federal government’s power to conduct foreign affairs pursuant to a field preemption analysis. The court rested its holding on the grounds that a state statute is invalid if it interferes or is incompatible with the federal government’s exclusive power to conduct foreign affairs.

1. The “Conflict” Preemption Doctrine

The Ninth Circuit first determined that the statute did not conflict with the executive branch’s policy of external restitution, leading to the conclusion that the statute was not unconstitutional under the conflict preemption analysis. The court rejected the Museum’s contention that the California statute conflicted with Executive Branch policies regarding restitution of artwork. There is no current policy and the past policy pertaining to these pieces is no longer in effect.

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98 For a further discussion of conflict preemption in the court’s analysis, see supra notes 100 – 102 and accompanying text.

99 See Von Saher, 578 F.3d at 1022 (noting state law is struck down if incompatible with federal government’s power to conduct foreign affairs); see also Zschernig v. Miller, 389 U.S. 429, 432 (1968) (striking down Oregon law because intrudes into federal foreign affairs); Hines v. Davidowitz, 312 U.S. 52, 63, 63 (1941) (rejecting Pennsylvania immigration law because immigration occupied by federal government’s regulations); Deutsch, 324 F.3d at 712 (rejecting California state statute because it infringed on federal government’s exclusive power to resolve war).

100 See Von Saher, 578 F.3d at 1025 (recognizing California statute does not conflict with Executive Branch’s policy for external restitution because applicable policy is no longer in effect). When the American troops entered Germany, the troops found thousands of art work which had been looted by the Nazis and consequently the United States developed a policy of external restitution to determine how the American troops should handle this art work and how the United States would help return this looted art work. See id. at 1023 (commenting London Declaration and President Truman’s policy statement, “Art Object in U.S. Zones” as basis for executive branch’s external restitution policy).

101 See id. at 1025 (rejecting Museum’s claim that § 354.3 conflicts with executive branch policies because policies raised by Museum are no longer effective).
2. The “Field” Preemption Doctrine

The Ninth Circuit Court then addressed the argument that the California statute can be preempted because it infringed on the federal government’s exclusive power to conduct foreign affairs.\(^\text{103}\) To ascertain whether the statute was preempted, the court engaged in a field preemption analysis.\(^\text{104}\) The court explained it was crucial to determine if Section 354.3 “addressed a traditional state responsibility, or [whether] it infringed on a foreign affairs power reserved by the Constitution exclusively to the national government[.].”\(^\text{105}\) If the state statute both concerned a traditional state responsibility and did not intrude on a power reserved exclusively to the federal government, the statute would not be preempted; whereas, the statute would be preempted if the opposite were true.\(^\text{106}\)

a. Section 354.3 Did Not Concern a Traditional State Responsibility

Applying the field preemption framework, the court first concluded that Section 354.3 did not concern a traditional state

\(^{102}\) See id. (commenting that California’s statute would have been preempted if it had been enacted immediately following World War II).

\(^{103}\) See id. (explaining a state statute is preempted by field preemption analysis if conflicts with general field of foreign affairs doctrine even if it is not preempted under conflict preemption analysis).

\(^{104}\) See id. (noting state law is preempted if it “infringes upon the federal government’s exclusive power to conduct foreign affairs, even though the law does not conflict with a federal law or policy”); see also Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 420 n.11 (2003) (noting if there is not applicable federal statute or policy, field preemption analysis should be used to determine if state law is preempted by federal government’s power to conduct foreign affairs); Zscherig, 389 U.S. at 441 (“[E]ven in absence of a treaty, a State’s policy may disturb foreign relations); Hines, 312 U.S. at 63 & 66 (inferring state law must give way to federal government’s exclusive power to conduct foreign affairs when federal regulations in the field are “so intimately blended and intertwined with responsibilities of national government”).

\(^{105}\) See Von Saher, 578 F.3d at 1025 (explaining central question in field preemption analysis here is: “in enacting § 354.3 has California address a traditional state responsibility, or has it infringed on a foreign affairs power reserved by the Constitutional exclusively to the national government?”).

\(^{106}\) See id. (quoting Garamendi 539 U.S. at 420 n.11) (implying that if state statute concerns traditional state responsibility and does not intrude on federal government’s powers, it will not be preempted, whereas if state statute does not concern traditional state responsibility and does intrude on federal government’s power, state law will be preempted).
responsibility. Saher relied on Alperin v. Vatican Bank and argued that the Section 354.3 of the California Civil Code of Procedure “concern[ed] a quintessential state function” because it involved the regulation of stolen property, an area of law traditionally regulated by states. The court rejected this argument, reasoning Section 354.3 was not a “garden variety property regulation.” Rather, Section 354.3 was more like an attempt at regulating United States’ foreign policy.

Notwithstanding Saher’s argument, the Ninth Circuit Court of Appeals invalidated the statute because it infringed on the federal government’s foreign affairs powers. The majority reasoned that through this provision, California was trying to open its courts as a forum for Holocaust claims against any museum or gallery. The law’s passage was an expression of the California legislature’s frustration with the lack of comprehensive federal policy for regulating the return of Nazi-looted artwork. While California has an interest in regulating museums and galleries within the state to prevent them from displaying Nazi-looted

107 See id. at 1027 (noting that resolution of Holocaust restitution claims is not an area of “traditional state responsibility”).

108 See id. at 1025 (recognizing Von Saher’s contention that a statute of limitations governing actions for return of stolen property is a traditional state function); see also Alperin v. Vatican Bank, 410 F.3d 532, 551 (9th Cir. 2005) (noting courts’ are supposed to hear property claims).

109 See Von Saher, 578 F.3d at 1025 (determining § 354.3 cannot be categorized as governing traditional property issues because it is so specific). The court reasons that section 354.3 is not a traditional stolen property regulation because it addresses the specific field of claims brought by Holocaust victims and their heirs, a field which touches on foreign relations. See id. (inferring that § 354.3 could possibly survive if it regulated a broader area of property such as all claims regarding stolen art or even all claims of art looted in war).

110 See id. at 1028 (noting that § 354.3 concerns restitution for injuries caused by the Nazis during World War II).

111 See id. at 1026 (noting courts have consistently struck down state statutes if it affects foreign affairs even if it claims to regulate an area of traditionally controlled by states); see, e.g., Garamendi, 539 U.S. at 425 (rejecting purported state interest in regulating insurance policies because statute covers Holocaust-era claims which is covered by foreign policy); Deutsch v. Turner Corp., 324 F.3d 692, 707 (9th Cir. 2003) (rejecting purported state interest in procedural rules).

112 See Von Saher, 578 F.3d at 1026 (“[California intended] to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state.”).

113 See id. at 1027 (“California has expressed its dissatisfaction with the federal government’s resolution (or lack thereof) of restitution claims arising out of World War II.”).
artwork, the majority read Section 354.3 as an attempt by California to create an even broader forum for claims brought against any museum or gallery, within or outside of the state.\(^{114}\) Thus, the majority thought the statute was overbroad and could not reasonably be said to regulate a traditional state responsibility because it purported to create a cause of action for extraterritorial property.\(^{115}\) Therefore Section 354.3 did not regulate an area of “traditional state responsibility” and the statute needed to be further analyzed under a field preemption analysis.\(^{116}\)

b. Section 354.3 Did Intrude on a Power Expressly or Impliedly Reserved to the Federal Government

Using the field preemption analysis, the court determined that Section 354.3 “intrude[d] on a power expressly or impliedly reserved to the federal government by the Constitution.”\(^{117}\) The Ninth Circuit explained that the federal government has the exclusive power to address war-related matters and state statutes cannot seek to address or resolve these issues.\(^{118}\) According to the Ninth Circuit’s interpretation of Section 354.3, the statute “establish[ed] a remedy for wartime injuries” by allowing Holocaust survivors and heirs a forum to bring claims regarding wrongs committed by enemies of the United States during World War II.\(^{119}\)

\(^{114}\) See id. at 1026 (analyzing § 354.3 before and after it was amended to suggest that California purposely changed the wording of the statute to open its courts to claims against any museum or gallery). The previous version only addressed California residents and its art trade within state. See id. (noting previous version specifically limited statute to “museums and galleries in California”).

\(^{115}\) See id. (implying that § 354.3 could not regulate traditional state interest because statute opened California court system to anyone in the world who wanted to sue museum or gallery within or outside of California).

\(^{116}\) See id. at 1027 (inferring field preemption analysis is used to invalidate state statute when statute does not regulate an area of “traditional state responsibility”). “By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of ‘traditional state responsibility.’” Id.

\(^{117}\) See id. (explaining § 354.3 intrudes on power reserved to federal government by Constitution because statute intrudes on government’s power to make an resolve war, federal government’s exclusive power).

\(^{118}\) See id. (“Matters related to war are for the federal government alone to address.” (quoting Deutsch v. Turner Corp., 324 F.3d 692, 712 (9th Cir. 2003))).

\(^{119}\) See id. (explaining § 354.3 addresses wartime issues by referencing “Nazi regime, “Nazi persecution,” and “the many atrocities” the Nazis committed). Section 354.3 is very similar to California Code of Civil Procedure Section 354.6, which was found unconstitutional in Deutsch v. Turner Corporation because the statute impeded on the
Saher argued that Section 354.3 did not intrude on a power reserved to the federal government because it did not target former wartime enemies. Saher argued that the statute only provided a cause of action for suits against museums and galleries, not against wartime enemies at large. Saher attempted to distinguish Section 354.3 from the statute at issue in Deutsch v. Turner Corporation by arguing that Section 354.3 did not target former wartime enemies. The court rejected this argument. The majority reasoned the statute was similar to that in Deutsch because both dealt with matters related to war by addressing art theft committed by a wartime enemy during war. The majority acknowledged the statute authorized suits against museums and galleries; however, the purpose was to rectify wrongs committed during war by wartime enemies. Therefore, the court held that the statute sufficiently infringed on an area of exclusive federal power.

federal government’s power to make and resolve war by creating a new class of plaintiffs and a new cause of actions to rectify wrongs committed by enemies during World War II. See id. at 1027 – 28 (noting § 354.3 was modeled after § 354.6 and is also unconstitutional because contains similar fatalities to § 354.6).

See id. (noting Saher’s argument that this statute does not target wartime enemies because it only regulates artwork).

See id. at 1028 (noting Saher’s attempt to distinguish § 354.3 from § 354.6 in Deutsch by arguing statute at issue here targets museums and galleries, which are not former wartime enemies).

See id. (noting Saher’s attempt to distinguish statute at issue in Deutsch as one that explicitly aimed to address wrongs committed during war).

See id. (rejecting because § 354.3 targeted crimes committed by Nazis during war).

See id. (discussing Saher’s argument that § 354.3 does not target wartime enemies because it addressed suits against museums and galleries).

See id. (comparing legislative intent to that in Deutsch). In Deutsch v. Turner Corporation, the Ninth Circuit stated that the statute at issue there was enacted “with the aim of rectifying wartime wrongs committed by out enemies or by parties operating under our enemies protection.” See Deutsch v. Turner Corp., 324 F.3d 692, 708 (9th Cir. 2003) (noting California legislature created special class of tort actions in enacting this statute). The Ninth Circuit compared the legislative intent in Deutsch to that in Von Saher. See Von Saher, 578 F.3d at 1028 (imputing same legislative intent on § 354.3 as that found in Deutsch).

See Von Saher, 578 F.3d at 1028 (rejecting Saher’s attempt to distinguish § 354.3 from § 354.6 in Deutsch by explaining both statutes aim to rectify “wartime wrongs committed by [United States’] enemies”). The Ninth Circuit explained that since section 354.3 concerns restitution for injuries suffered during the Nazi regime and therefore, a claim brought under this statute would require courts to review foreign governments restitution decisions. See id. (explaining § 354.3 claims statute are intertwined with Nazi

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Saher also argued that her claim for the restitution of stolen property could be differentiated from claims regarding wartime injury. Saher likened her claim for restitution of stolen property to the claim in Alperin v. Vatican Bank by relying on the fact that “reparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution.” The court rejected this argument because it concluded that claims for recovery of stolen property, even during wartime, are matters that can be resolved by the judicial branch, as opposed to matters assigned to a political branch. Although it is assigned to the judicial branch, it was not necessarily an issue for state courts to decide. Even though Saher adequately proved the judiciary has power to hear property claims, the majority reasoned that the state court system does not have power to provide remedies for Holocaust-related claims.

The Ninth Circuit Court held that Section 354.3 ultimately failed because California lacks power to regulate or modify the resolution of war in any way. The court explained not only does California lack power to wartime wrongs, therefore, even if claims are brought against a museum or gallery, claims still touch on foreign affairs).

127 See id. (noting Saher argued claims for restitution of “garden variety property” are different from claims for “reparation arising from wartime injury”).

128 See id. (quoting Alperin v. Vatican Bank, 410 F.3d 532, 551 (9th Cir. 2005)) (distinguishing Saher’s claim from reasoning in Alperin in explaining this quote considers whether claim is political question and therefore committed to another branch of government).

129 See id. (commenting that Saher’s reliance on Alperin is misplaced). Alperin v. Vatican Bank hinges on the political question doctrine, which determines whether an issue can be decided by the judiciary; the Ninth Circuit does not address this issue in Von Saher. See id. (explaining why Saher cannot rely on Alperin and its discussion of the political question doctrine); see also Alperin v. Vatican Bank, 410 F.3d 532, 544 (9th Cir. 2005) (discussing applicability of political question doctrine).

130 See Von Saher, 578 F.3d at 1028 (citing Alperin, 410 F.3d at 551) (reasoning claims for property stolen during World War II are not political questions committed to political branches but can be heard by the judiciary).

131 See id. (asserting that judiciary’s power to hear Holocaust-era property claims does not equate to state courts’ power to remedy such claims). The issue still hinged on whether the state statute regulates foreign affairs and infringes on the federal government’s power to make and resolve war, not whether the judiciary has the power the hear wartime property claims. See id. (holding that § 354.3 does infringe on the federal government’s exclusive power to wage and resolve war).

132 See id. at 1030 (noting California may not modify federal government’s resolution of World War II); see also Deutsch v. Turner Corp., 324 F.3d 692, 714 (9th Cir. 2003) (providing that states are prohibited from “modifying the federal government’s resolution of war-related disputes,” even without authorization to federal government to act).
add to the federal government’s resolution of war, but California cannot intrude into this field that is exclusively occupied by the federal government—even where the federal government has not expressed or implied a policy regarding this particular issue.133

3. The Dissenting Opinion

In his dissent, Judge Pregerson disagreed with the majority’s use of the field preemption analysis.134 He felt that California acted within its traditional state responsibility to regulate property rights and, as such, field preemption did not apply.135 The dissent further argued that the majority wrongly relied on Deutsch v. Turner Corporation, because the majority overlooked significant differences between the statute in Deutsch and Section 354.3.136 Although the majority discussed the similarities between the unconstitutional statute in Deutsch and Section 354.3, the dissent argued that the later should not fail because, unlike the Deutsch statute, Section 354.3 did not intrude on the federal government’s exclusive foreign affairs power.137

133 See Von Saher, 578 F.3d at 1029 (explaining there is no room for state legislation on matters regarding recovery of Holocaust-era art because history of federal regulation is so “comprehensive and pervasive”); see also English v. General Elec. Co., 496 U.S. 72, 79 (1990) (discussing field preemption). The federal government has addressed problems facing Holocaust survivors and heirs and the restitution of Holocaust-era artwork that was looted by the Nazis. See Von Saher, 578 F.3d at 1029 (noting recent administrations and congress continue to address Holocaust-era problems). There is no comprehensive plan that deals with the restitution of Holocaust-era artwork, yet this does not create room for California regulations because the federal government has exclusively occupied this field. See id. (noting federal government has initiated discussions to create a comprehensive plan to handle restitution of Holocaust-era art).

134 See id. at 1032 (Pregerson, J., dissenting) (concluding that field preemption does not apply when a state acts within its traditional competence).

135 See id. at 1031 (Pregerson, J., dissenting) (noting it is undisputed that states typically regulate property issues). Judge Pregerson disagreed with the majority’s opinion that that the statute exceeded traditional property regulations; although the statute refers to “any museum or gallery,” the majority read the statute too broadly in deciding that the statute exceeds state power. See id. at 1032 (Pregerson, J., dissenting) (explaining majority thought California acted beyond its authority by creating worldwide forum for Holocaust restitution claims by allowing suits against “any museums or gallery”).

136 See id. (Pregerson, J., dissenting) (differentiating § 354.3 from statute in Deutsch in § 354.3 does not target former wartime enemies, provide for war reparations, and governs a traditional state responsibility); see also Deutsch v. Turner Corp., 324 F.3d 692, 712 (9th Cir. 2003) (holding § 354.6 unconstitutional because it attempts to redress wrongs committed during World War II).

137 See Von Saher, 578 F.3d at 1032 (Pregerson, J., dissenting) (arguing that § 354.3 does not deal with foreign affairs because it does not concern war reparations or wartime
Judge Pregerson agreed with the majority that conflict preemption would not apply, but diverged from the majority opinion when concluding that field preemption should not apply either.\footnote{138} Instead, Judge Pregerson would have ruled that Section 354.3 did not offend the Constitution because the statute neither conflicted with federal policy nor infringed on an area of power exclusively vested in the Executive Branch.\footnote{139} Section 354.3 was within California’s traditional competence and therefore field preemption should not apply.\footnote{140}

IV. The Final Critique: The Ninth Circuit Misapplied the Paint by Invalidating § 354.3

The Ninth Circuit evaluated whether California Code of Civil Procedure Section 354.3 was preempted by federal policy or the foreign affairs doctrine.\footnote{141} The court correctly found that the statute could not be preempted under the theory of conflict preemption because there is no current federal statute or executive branch policy that deals with Holocaust-era artwork.\footnote{142} Nevertheless, the court incorrectly found the statute unconstitutional under a field preemption analysis.\footnote{143}

A. The “Conflict” Preemption Doctrine

\footnote{138}See id. (Pregerson, J., dissenting) (concluding that conflict preemption would not apply because there is no conflicting federal policy and field preemption would not apply because California acting within its traditional competence).

\footnote{139}See id. (Pregerson, J., dissenting) (concurring with majority in that § 354.3 does not conflict with federal policy but concluding that field preemption should not apply either).

\footnote{140}See id. (Pregerson, J., dissenting) (concluding that field preemption should not apply because § 354.3 is within California’s traditional state competence).

\footnote{141}See id. at 1022 (discussing state law can be preempted by executive branch policy or by foreign policy because federal government has exclusive power to deal with foreign affairs).

\footnote{142}For a further discussion of the court’s correct reasoning with regard to conflict preemption, see supra notes 100 – 102 and accompanying text.

\footnote{143}For a further discussion of the court’s incorrect reasoning with regard to field preemption, see supra notes 103 – 133 and accompanying text.
The Supreme Court has recognized that state law must give way to federal action when it expressly conflicts with a federal treaty, statute, or executive branch policy.144 The Ninth Circuit applied the Supreme Court’s reasoning in its discussion about whether Section 354.3 was preempted under the traditional conflict preemption theory.145 The Ninth Circuit Court looked to the two leading executive branch policies of external restitution promulgated by the United States but concluded that neither policy is relevant today and therefore no longer serve to preempt the California statute.146 Thus, the Ninth Circuit Court correctly found Section 354.3 was not preempted by a conflicting federal policy on external restitution because no such policy was in force.147

B. The “Field” Preemption Doctrine

Although no federal policy conflicted with the California statute, the Ninth Circuit Court then discussed whether the statute was preempted under the field preemption analysis.148 The court was correct in discussing field preemption because a statute can be preempted in the absence of a conflict; however, the court misapplied the field preemption analysis and incorrectly concluded that the statute was preempted.149


145 See Von Saher, 578 F.3d at 1023 (discussing that conflict preemption analysis is appropriate when state law is an obstacle to a federal objective).

146 See London Declaration, supra note 27 (giving Allied Forces the right to invalidate wartime transfers of property); see also Art Objects in US Zones, supra note 27 (setting procedures for United States policy for operating procedures governing artwork found within United States zone of occupation). More recently, Congress addressed the problem of restitution of Holocaust-era artwork, however these acts have since lapsed and there is no current federal act or policy regarding this issue. See 22 U.S.C.S. § 1621 (LexisNexis 2008) (creating commission to examine government’s role in collection of Holocaust-era assets); see also Holocaust Victims Redress Act, Pub. L. No. 105-158, § 202, 112 Stat. 15, 18 (1998) (calling for governments to make good faith efforts to aid in restitution of Nazi-confiscated assets).

147 See Von Saher, 578 F.3d at 1025 (holding § 354.3 did not conflict with any federal policy on restitution of Holocaust-era artwork).

148 See id. (commenting that state statute can be preempted under field preemption if there is not conflicting federal law or policy).

149 See id. at 1027 (applying field preemption analysis to find that § 354.3 was unconstitutional). The Supreme Court held that even in the absence of a direct conflict with federal law or policy, a state law is unconstitutional when it intrudes into an area
majority decided that under a field preemption analysis, the main question is whether the state law concerned a traditional state responsibility or whether the statute intruded on a power reserved to the federal government by the constitution.\textsuperscript{150}

1. Section 354.3 \textit{Did} Concern a Traditional State Responsibility

The court incorrectly found that the statute does not concern a traditional state responsibility.\textsuperscript{151} The field preemption analysis may be used to preempt a state law dealing with foreign policy when the law does not concern a traditional state responsibility.\textsuperscript{152} As accurately expressed by Judge Pregerson in the dissent, Section 354.3 concerns a traditional state responsibility—the regulation of stolen property.\textsuperscript{153}

Section 354.3 regulates artwork in “any museum or gallery.”\textsuperscript{154} Although the majority insisted this opened the door of California courts as a worldwide forum for Holocaust restitution claims leading the court to hold the statute did not address a traditional state responsibility, this phrasing likely restricted the reach of Section 354.3 to entities subject to personal jurisdiction in California and did not expose virtually any museum or gallery to suits.\textsuperscript{155} California has taken the initiative to expose

\textsuperscript{150} See \textit{Am. Ins. Assoc. v. Garamendi}, 539 U.S. 396, 420 n.11 (2003) (noting state statute would be overturned if state law addresses foreign policy with no claim to address traditional state responsibility); \textit{see also Hines}, 312 U.S. at 63 (commenting state law must not interfere with federal power in field affecting foreign relations).

\textsuperscript{151} For a further discussion of the fact that Section 354.3 does concern traditional state responsibility, see \textit{supra} notes 107 – 166 and accompanying text.

\textsuperscript{152} \textit{See Deutsch v. Turner Corp.}, 324 F.3d 692, 703, 708 (9th Cir. 2003) (commenting states can never enact their own foreign affairs policies, instead foreign affairs can only be regulated by federal government).

\textsuperscript{153} \textit{See Von Saher}, 578 F.3d at 1031 (Pregerson, J., dissenting) (commenting that it is undisputed that property traditionally regulated by state).

\textsuperscript{154} \textit{CAL. CIVIL PROCEDURE CODE § 354.3} (Deering 2009).

\textsuperscript{155} \textit{See id.} (declaring any owner or heir of an owner of Holocaust-era artwork can bring a claim for that art against “any museum or gallery”); \textit{see also id.} at 1032 (Pregerson, J.,
entities that wrongly benefitted the Holocaust, but this does not automatically suggest that by passing Section 354.3, California opened its courts to suits against all museums and galleries as the majority suggests. 156

Furthermore, Section 354.3 is different from other California statutes governing Holocaust-era claims that were invalidated because they did not concern a traditional state responsibility. 157 Other such statutes, although facially similar to Section 354.3, in fact dealt with recovery of assets from wartime enemies or entities directly involved in World War II. 158 Instead, Section 354.3 regulates an area of traditional state responsibility—recovery of stolen artwork from museums and galleries within the jurisdictional reach of California state courts. 159

Section 354.3 can be differentiated from California’s Holocaust Victim Insurance Relief Act ("HVIRA"), which the Supreme Court found unconstitutional because it interfered with the executive policy controlling

dissenting) (“A reasonable reading of ‘any museum or gallery’ would limit Section 354.3 to entities subject to the jurisdiction of the State of California.”).

156 See Von Saher, 578 F.3d at 1027 (citing Memorandum from California Governor’s Office of Planning & Research, Enrolled Bill Report on Assem. Bill No. 1758 (2001-2002) Reg. Sess. (Aug. 1 2002)) (“California has been a leader in exposing those entities who benefitted financially from the plunder or exploited the unusual circumstances of the Holocaust, who have been less than forthcoming in their business dealings.”). The Ninth Circuit suggests that California wanted to create a forum for Holocaust restitution claims that is open to anyone in the world; however, this is an unreasonable and too attenuated an inference because it simply assumes California’s intent was to open its doors to anyone in the world, not just those subject jurisdiction of California. See id. (implying that because California has been a leader in exposing wrongs committed during the Holocaust, the intent was to apply section 354.3 to anyone).

157 Compare CAL. CIVIL PROCEDURE CODE § 354.3 (Deering 2009) (creating cause of action for Holocaust survivors and heirs to sue museum or gallery for Holocaust-era artwork), with CAL. CIVIL PROCEDURE CODE § 354.5 (West 1999) (providing means for Holocaust victims and heirs to recover proceeds of looted insurance policies from insurance provider that sold policies in Europe before 1945), and CAL. CIVIL PROCEDURE CODE § 354.6 (West 1999) (creating means for World War II slave laborers to sue for recovery of compensation).

158 See Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 426 – 27 (2003) (invalidating California statute concerning Holocaust-era insurance policies because of existing federal law regulating same field); see also Deutsch v. Turner Corp., 324 F.3d 692, 712 (9th Cir. 2003) (rejecting California statute concerning restitution for forced labor during World War II because it intruded on federal government’s regulations); Steinberg v. Int’l Comm’n on Holocaust Era Ins. Claims, 34 Cal. Rptr. 3d 944, 951 (Ct. App. 2005) (holding California statute, which regulated Holocaust-era insurance policies, preempted by federal regulations).

159 See § 354.3 (allowing suits against “any museum or gallery” to recover Holocaust-era artwork).
the precise issue the statue addressed.\textsuperscript{160} Even though California may have had an interest in providing a forum for claims regarding the restitution of proceeds of insurance policies issued before and during World War II, this interest could not save HVIRA from preemption.\textsuperscript{161} California overstepped its authority by providing a stricter statute; using an “iron fist,” when the federal government instead consistently chose “kid gloves.”\textsuperscript{162} Section 354.3 does not suffer from the same fatality.\textsuperscript{163} California is not creating a worldwide forum for the resolution of Holocaust restitution claims but instead is simply regulating property. The dissent wrote that a reasonable reading of this statute would limit the statute to entities subject to California court’s jurisdiction rather than creating a worldwide forum for restitution claims.\textsuperscript{164} Furthermore, the court should not be concerned that Section 354.3 would hamper the uniformity that is necessary in foreign affairs because this case deals with only California and uniformity within its own borders, not national uniformity.\textsuperscript{165}

2. Section 354.3 Did Not Intrude on a Power Expressly or Impliedly Reserved to the Federal Government

\textsuperscript{160} See Garamendi, 539 U.S. at 427 (invalidating HVIRA because it stood as obstacle to Presidential diplomatic objectives). The Supreme Court did not approve of California’s attempt to more firmly provide a cause of action for stolen Holocaust-era insurance policies when there was already an initiative promoted by the President regarding this same topic. See id. (asserting state law should still be preempted even though Executive’s policy was more lenient than state statute).

\textsuperscript{161} See id. at 426 (noting that California’s concern for its residents who are Holocaust victims and heirs does not save HVRIA from preemption).

\textsuperscript{162} See id. at 427 (“California seeks to use an iron fist where the President has consistently chosen kid gloves.”).

\textsuperscript{163} For a further discussion of Section 354.3 not suffering from the same fatality as the statute in Garamendi, see supra notes 164 – 166 and accompanying text.

\textsuperscript{164} See Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1032 (9th Cir. 2009) (Pregerson, J., dissenting) (asserting that § 354.3 regulates property, which is traditional state responsibility).

\textsuperscript{165} See id. (Pregerson, J., dissenting) (“A reasonable reading of ‘any museum or gallery’ would limit Section 354.3 to entities subject to the jurisdiction of the State of California.”).

\textsuperscript{166} See United States v. Pink, 315 U.S. 203, 232 (1942) (commenting uniformity between federal and state laws with regard to foreign policy is necessary so that United States’ foreign policy is not undermined); see also United States v. Belmont, 301 U.S. 324, 331 (1937) (noting states do not have input as to foreign policy as to maintain uniformity).
While a state statute cannot survive if it intrudes on a power expressly or impliedly reserved to the federal government by the Constitution, Section 354.3 does not violate that principle. A statute does not implicate foreign affairs merely by addressing artwork stolen during a specific time period. The problem of Nazi looted artwork has only recently come to light and California simply created a longer statute of limitations to allow plaintiffs the opportunity to recover their stolen property.

Even in applying the same reasoning from Deutsch v. Turner Corporation to Section 354.3, the statute should not be invalidated. Although Section 354.3 may be facially similar to Section 354.6 analyzed in Deutsch, the two statutes addressed different issues and so, Section 354.3 should not be preempted after a cursory review of the seeming similarities between the two statutes. By enacting Section 354.6, the statute at issue in Deutsch, California targeted wartime enemies of the United States and provided a remedy for wartime injuries; a forbidden action because the federal government alone should address wartime matters. In finding Section 354.6 unconstitutional for impeding on the

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167 See, e.g., Zschemig v. Miller, 389 U.S. 429, 441 (1968) (noting state law cannot exist if impairs federal government’s exclusive power to regulate foreign affairs); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (explaining states cannot modify rules or regulations entrusted to federal government by the Constitution or control foreign affairs, as both powers are reserved exclusively to federal government).

168 See Alperin v. Vatican Bank, 410 F.3d 532, 551 (9th Cir. 2005) (explaining courts can decide claims concerning Holocaust-era looted assets); see also Von Saher, 578 F.3d at 1032 (Pregerson, J., dissenting) (commenting § 354.3 does not regulate foreign affairs simply because it concerns property stolen during the Holocaust which is now located in California museum).

169 See Kaye, supra note 1, at 244 (discussing that information concerning artworks looted by Nazis is just coming to light).

170 The Ninth Circuit invalidated Section 354.6 in Deutsch v. Turner Corporation because the statute sought to address wrong committed during the course of World War II. See Deutsch v. Turner Corp., 324 F.3d 692, 712 (9th Cir. 2003) (rejecting § 354.6 because California sought to provide remedy for wartime acts, contrary to concept such matters are for federal government alone to address).

171 Compare CAL. CIVIL PROCEDURE CODE § 354.3 (Deering 2009) (allowing claims by Holocaust victims or their heirs for Holocaust-era artwork against any museum or gallery), with CAL. CIVIL PROCEDURE CODE § 354.6 (West 1999) (providing cause of action by Holocaust victims or heirs for compensation for slave labor during World War II).

172 See § 354.6 (allowing Second World War slave labor victim and their heirs “to bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim”); see also Deutsch, 324 F.3d at 712 (explaining § 354.6 attempts to address wrongs committed during World War II but
federal government’s exclusive power to make and resolve war, the Ninth Circuit highlighted that the statute addressed wrongs committed during and after World War II.\footnote{173}

While Section 354.3 does address recovery of property stolen during World War II, it does not directly address wartime matters.\footnote{174} Section 354.3 concerns museums and galleries and their wrongfully obtained artwork and it does not specifically concern enemies of the United States, as was the case in \textit{Deutsch}.\footnote{175} These two statutes regulate very different matters; Section 354.6 is unconstitutional for regulating wartime issues are “for the federal government alone to address”). The Ninth Circuit invalidates Section 354.6 because it attempts to remedy wrongs committed during World War II:

By its [Section 354.6] terms, only “Second World War slave labor victims” and “Second World War forced labor victims” can bring suit under the provision. The wrong-doers under the statute—the enslaving individuals or entities—include “the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers.” The governmental entities are, by definition, wartime enemies of the United States, while the “enterprises” identified in the provision, if not themselves our wartime enemies, were operating in enemy territory and presumably-no party disputes this—with the consent and for the benefit of our wartime enemy. Wrongs committed \textit{after the end of the war} are not cognizable under Section 354.6; the provision concerns only acts that took place \textit{during the years leading up to the war and during the years of the war itself}. In short, California has sought to create its own resolution to a major issue arising out of the war—a remedy for wartime acts that California's legislature believed had never been fairly resolved.

\textit{Id.} (emphasis added).

\footnote{173} See \textit{Deutsch}, 324 F.3d at 712 (noting that § 354.6 specifically targets wrongs during the war itself and not wrongs after the end of the war).

\footnote{174} See § 354.3 (allowing actions against “any museum or gallery” for “Holocaust-era artwork,” art taken due to Nazi persecution during 1929 to 1945).

\footnote{175} See § 354.6 (providing cause of action for those who performed slave labor for Nazis or their allies). Section 354.3 is not being enforced against a wartime enemy but rather a museum, which is subject to the protections and laws of the state of California. \textit{See Von Saher v. Norton Simon Museum of Art at Pasadena}, 578 F.3d 1016, 1032 (9th Cir. 2009) (Pregerson, J., dissenting) (stating § 354.3 does not target former wartime enemies or provide for wartime reparations). The federal court thereby equated California’s right to regulate a California museum’s property with its lack of power to regulate the property of a wartime enemy. \textit{See id.} at 1029 (determining California does not have power to regulate this property).
wartime matters—the regulation of slavery.\textsuperscript{176} It should not follow that the regulation of artwork by Section 354.3 is also unconstitutional.\textsuperscript{177}

V. Impact and Consequences of the Ruling

The Ninth Circuit’s decision to declare Section 354.3 unconstitutional in \textit{Von Saher} creates negative precedent for future litigation regarding Holocaust-era claims.\textsuperscript{178} By finding Section 354.3 substantially similar to other previously voided state statutes dealing with Holocaust-related claims, the Ninth Circuit creates precedent that could render it impossible for states to regulate property within their borders when the property is related to a foreign war but the defendant is a domestic citizen.\textsuperscript{179} The court relied on mere facial similarities between Section 354.3 and the prior unconstitutional statutes, and consequently the ruling could have far broader implications than the court intended.\textsuperscript{180}

Rejecting other state statutes that provided for the restitution of wrongs committed during the Second World War may have been appropriate when the statute did not concern a traditional state responsibility and infringed on the federal government’s exclusive foreign affairs power to make and resolve war.\textsuperscript{181} Preemption was not appropriate in this case.

\textsuperscript{176} See § 354.6 (regulating compensation to Second World War slave labor victim for forced or slave labor during the war); see also Deutsch, 324 F.3d at 712 (rejecting § 354.6 because it attempts to regulate wartime matter).

\textsuperscript{177} Compare Deutsch, 324 F.3d at 712 (holding § 354.6 unconstitutional because it seeks to redress wrongs made over course of World War II), with \textit{Von Saher}, 578 F.3d at 1032 (Pregerson, J., dissenting) (arguing that § 354.3 does not target wartime enemies for wartime actions nor provide for war reparations).

\textsuperscript{178} When the court declared Section 354.3 preempted by the federal government’s exclusive power to conduct foreign affairs, the court wrongfully foreclosed future suits pertaining to the Holocaust; here, no foreign affairs were implicated in this suit against a domestic museum. See \textit{Von Saher}, 578 F.3d at 1019 (stating the museum is located in California).

\textsuperscript{179} The Ninth Circuit preempted the state statute even though Saher tried to enforce it against a California museum in attempt to regain property actually in California. See id. (holding § 354.3 is preempted).

\textsuperscript{180} The majority compared Section 354.3 to other Holocaust-related statutes and concluded that since these other statutes were preempted and were facially similar to Section 354.3, this statute should also be preempted. See id. at 1026 & 1027 (likening statutes invalidated in \textit{Garamendi} and Deutsch to Section 354.3).

\textsuperscript{181} See, e.g., Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 421 (2003) (rejecting California statute regarding Holocaust-era insurance policies conflicted with federal laws); Deutsch, 324 F.3d at 712 (rejecting § 354.6 because California sought to provide remedy for wartime acts, contrary to concept such matters are for federal government alone to address).
because the statute dealt with a traditional state power—namely, the regulation of property rights. By invalidating this statute, the Ninth Circuit closed the door against future statutes that touch on Holocaust-related restitution claims.

The Ninth Circuit found the statute unconstitutional but it disregarded certain key points to reach this conclusion. The court failed to acknowledge that Section 354.3 concerned the regulation of property within the state’s borders. Instead, the court found that the federal power outweighed the state responsibility, thereby making a value judgment that federal regulation of Holocaust-era artwork is more important than Saher’s claim against a domestic museum without even reaching the merits of Saher’s property claims.

The court’s ruling has significant separation of powers implications. The court justified intruding on the state’s ability to regulate property within its borders by holding the statute overbroad because it applied to museums and galleries anywhere and, thus, did not represent a serious attempt to address the traditional state responsibility.

See Von Saher, 578 F.3d at 1032 (Pregerson, J., dissenting) (stating § 354.3 dealt with regulation of property, which is traditional state responsibility).

For a further discussion on negative implications of this holding, see supra notes 178–182 and accompanying text.

For a further discussion on the flaws in the majority’s reasoning, see supra notes 141–177 and accompanying text.

See Von Saher, 578 F.3d at 1032 (Pregerson, J., dissenting) (explaining § 354.3 dealt with regulation of property within California’s borders which is a traditional state responsibility).

The majority seems to imply that the field preemption analysis involves a balancing test between traditional state responsibility and federal policy without explicitly saying it applied such balancing between these two factors. See id. at 1025 (noting field preemption analysis’ central question is whether statutes addressed traditional state responsibility or infringed on foreign affairs power).

For a further discussion of the separation of power implications, see infra notes 188–193 and accompanying text.

See Von Saher, 578 F.3d at 1025 – 27 (discussing whether statute concerns traditional state responsibility); see also Am. Ins. Assoc. v. Garamendi, 539 U.S. 396, 420 n.11 (2003) (“If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine.”). The court found the legislative history of Section 354.3 telling because the legislature amended the statute from restricting its scope to “museums and galleries in California” to museums and galleries anywhere. See Von Saher, 578 F.3d at 1026 (comparing Assem. Amend. to Assem. Bill No. 1758 (2001-2002 Reg. Sess.) to Sen. Jud. Com., Analysis of Assem. Bill No. 1758 (2001-2002 Reg. Sess.) Jun. 25, 2002, pp. 5-6) (noting majority’s opinion that original goal of § 354.3 was to restrict
But in this case, the statute was being applied to a domestic museum within California’s borders. By voiding Section 354.3, the court created troublesome precedent and demonstrated the willingness of federal courts to intervene where state legislatures empower state courts to enforce state law over state residents. The Holocaust was the context of this case, but it surely was not the subject matter. In such circumstances, the federal district court should not have voided the whole statute but rather should have considered whether the state of California should have been constitutionally able to regulate the art in question. That answer should have been: yes, it can.

to museums and galleries within California). The court found this change indicative of an intent to redress war injuries instead of address property rights. Id. The dissent noted the California legislature was not seeking to apply the statute to museums and galleries everywhere, but rather only those museums and galleries over which a California state court may exercise personal jurisdiction. See id. at 1032 (Pregerson, J., dissenting) (noting “reasonable reading” of statute would limit § 354.3 to entities subject to California jurisdiction).

See Von Saher, 578 F.3d at 1019 (stating Museum located in California).

For a further discussion of negative precedent Ninth Circuit creates, see supra notes 178 – 183 and accompanying text.

Saher’s claim regarded Holocaust-era artwork but it is never alleged that the museum conspired with Nazis to obtain this stolen artwork; instead, this is simply a suit by a Connecticut resident for stolen property now located in California. See Von Saher, 578 F.3d at 1019 (noting Saher’s suit if for paintings purchased by Museum in 1971, well after World War II ended).

See Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 329 (2006) (explaining courts prefer to try to keep statute in tact before finding it is unconstitutional). “We prefer . . . to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact. See id.

For further discussion of idea that Section 354.3 should not have been preempted and should have been allowed to regulate art in question, see supra notes 16 and accompanying text.