The War of Art, Not the Art of War: Von Saher v. Norton Simon Museum of Art at Pasadena and the Continuing Fight to Retrieve Nazi-Looted Art in California

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THE WAR OF ART, NOT THE ART OF WAR:  
*VON SAHER V. NORTON SIMON*  
*MUSEUM OF ART AT PASADENA*  
AND THE CONTINUING FIGHT TO RETRIEVE NAZI-LOOTED ART IN CALIFORNIA

Tsolik Kazandjian*

*During World War II, the Nazi regime stole and confiscated almost all of the property of Holocaust victims fleeing their home countries to avoid persecution. In 2009, the Ninth Circuit held in Von Saher v. Norton Simon Museum of Art at Pasadena that a California statute allowing heirs of Nazi-looted art to sue museums and galleries in the state was unconstitutional because it interfered with the federal government’s foreign affairs powers. This Comment argues that the Ninth Circuit used the incorrect preemption test in Von Saher and that the statute at issue neither interferes with nor has more than an incidental effect on the federal government’s foreign affairs powers. Rather, the statute regulates an area of traditional state responsibility, which means that it is constitutional.*

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I. INTRODUCTION

During World War II, the Nazi regime stole and confiscated most, if not all, of the property of Holocaust victims fleeing their respective home countries to avoid persecution.¹ One such wave of theft began when Nazi troops invaded the Netherlands on May 10, 1940.² Jacques Goudstikker, a prominent Dutch art dealer, fled from his home with his family on a ship traveling to South America, leaving behind his gallery containing about 1,200 works of art, including Rembrandts and Cranachs.³ The Nazis proceeded to loot Goudstikker’s gallery, and thus a particular pair of paintings started its journey traveling around the world and eventually ended up in a museum in California.⁴ When Goudstikker’s heir, Marei von Saher, found out where her family’s long-lost paintings were, she decided to do something.⁵

Von Saher sued the Norton Simon Museum of Art at Pasadena (the “Museum”) under section 354.3 of the California Code of Civil Procedure.⁶ Section 354.3 allows any owner of or heir to Holocaust-era artwork to bring suit against “any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance”;⁷ it also extends the statute of limitations for the claims until December 31, 2010.⁸ Though von Saher properly brought suit under section 354.3 by suing a museum displaying her Holocaust-era artwork before December 31, 2010, both the lower court and the U.S. Court of Appeals for the Ninth

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² Von Saher, 578 F.3d at 1021.
⁴ See infra Part II.
⁶ Id.
⁷ Cal. CIV. PROC. CODE § 354.3(a)(1) (West 2006).
⁸ Id. § 354.3(c). The California legislature enacted the statute because California has a “moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to commence an action in court” for the stolen artwork currently located in museums and galleries. Assem. B. 1758, 2002 Leg., Reg. Sess. (Cal. 2002). The legislature noted that the current three-year statute of limitations was an insufficient amount of time to investigate and commence an action “[d]ue to the unique circumstances surrounding the theft of Holocaust-era artwork.” Id.
Circuit held that section 354.3 was unconstitutional because it infringed on the federal government’s foreign affairs power.⁹ Specifically, the Ninth Circuit held that by enacting section 354.3, California created a “friendly forum for litigating Holocaust restitution claims”¹⁰ open to anyone inside or out of the state who wanted to sue any gallery or museum located anywhere in the world.¹¹ The court held that by doing so, California acted outside of its “traditional state responsibility”¹² and encroached upon the government’s power to make and resolve war.¹³

This Comment argues that the Ninth Circuit erred in holding that the federal government’s foreign affairs power preempts section 354.3. Part II introduces the facts and procedural posture of the Von Saher case. Part III discusses the majority’s reasoning and Judge Harry Pregerson’s dissent. Part IV discusses why the Garamendi field-preemption analysis should not apply,¹⁴ why the original Zschernig test would have been more proper,¹⁵ and why section 354.3 has a merely incidental effect on foreign affairs.¹⁶ Finally, this Comment concludes that the Ninth Circuit’s decision should be reversed if the case is appealed to the U.S. Supreme Court.

II. THE FACTS

Marei von Saher is the only living relative of Jacques Goudstikker,¹⁷ an art dealer who lived in the Netherlands. In 1931, at an auction in Berlin, Goudstikker bought a diptych comprised of two

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9. Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1019 (9th Cir. 2009); Von Saher, 2007 WL 4302726, at *3. The Supreme Court has identified the power to deal with foreign affairs as almost exclusively federal. See Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 413–14 (2003) (stating that the foreign affairs power was originally given to the federal government so that the country’s dealings with foreign nations would be uniform).

10. Von Saher, 578 F.3d at 1026.

11. Id.

12. The regulation of property is a traditional state responsibility. Id. at 1025. For examples of other traditional state responsibilities, see Garamendi, 539 U.S. at 425–26 (regulating insurance business and “blue sky” laws); Zschernig v. Miller, 389 U.S. 429, 440 (1968) (regulating the descent and distribution of estates); and Deutsch v. Turner, 324 F.3d 692, 707 (2003) (establishing state procedural rules where such regulation does not impair effective exercise of the nation’s foreign policy).

13. Von Saher, 578 F.3d at 1027.

14. See infra Part IV.A.

15. See infra Part IV.B.1.


17. Brief of Appellant at 2, Von Saher, 578 F.3d 1016 (No. 07-56691).
paintings—"Adam" and "Eve" (collectively "the Cranachs")—painted by Lucas Cranach the Elder in the sixteenth century.18 When Goudstikker fled the Netherlands after the Nazi invasion, he left behind his assets, including the Cranachs.19 After the Nazis looted Goudstikker's collection, they hid the artwork in the German countryside20 until the Allied forces discovered the pieces and returned them to the Netherlands.21 Once identified, the Cranachs were delivered to another claimant, Georges Stroganoff-Scherbatoff ("Stroganoff").22 Stroganoff sold the paintings through an art dealer to the Museum in 1971.23

In 2007, von Saher filed suit against the Museum under section 354.3, seeking the return of the Cranachs that were allegedly stolen from the Goudstikkers during World War II by the Nazis.24 The Museum then brought a motion to dismiss for failure to state a claim upon which relief may be granted.25 The lower court granted the Museum's motion and held that the statute was unconstitutional because it violated the foreign affairs doctrine26 as interpreted by the Ninth Circuit in Deutsch v. Turner Corp.27 The district court reasoned that the California statute "intrude[d] on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims" by seeking to "redress wrongs committed in the course of the Second World War."28 The court then dismissed von Saher's complaint with prejudice because it

18. Von Saher, 578 F.3d at 1020.
19. Id. at 1021.
20. The Cranachs, along with many other works, were hidden at Carinhall, the country estate of Herman Göring, Reischsmarschall of the Third Reich. Id.
21. Id.
22. Id. Though Stroganoff claimed that the Cranachs belonged to his family, the paintings actually came from the Church of the Holy Trinity in Kiev. Brief of Appellant at 7, Von Saher, 578 F.3d 1016 (No. 07-56691).
23. Id.
24. Id.
25. Id.
28. Von Saher, 2007 WL 4302726, at *3 (citing Deutsch, 324 F.3d at 712).
had not been filed within California’s three-year statute of limitations period.\textsuperscript{29} Von Saher appealed.

\section*{III. The Ninth Circuit’s Reasoning}

In \textit{Von Saher v. Norton Simon Museum of Art at Pasadena},\textsuperscript{30} the majority held that section 354.3 was barred by field preemption\textsuperscript{31} because it intruded on the federal government’s exclusive foreign affairs power.\textsuperscript{32} The Ninth Circuit reasoned that the statute went outside the scope of California’s “traditional state responsibility” and was therefore subject to field-preemption analysis.\textsuperscript{33} The court applied the \textit{American Insurance Ass’n v. Garamendi}\textsuperscript{34} test to see whether the statute infringed on any express or implied government powers.\textsuperscript{35} \textit{Garamendi} states that field preemption is the appropriate doctrine to consider if a state took a position on a matter of foreign policy “with no serious claim to be addressing a traditional state responsibility.”\textsuperscript{36}

\subsection*{A. Section 354.3 Goes Beyond the Scope of Traditional State Responsibility}

In order to resolve whether the foreign affairs doctrine preempted section 354.3, the court first asked whether the statute addressed a traditional state responsibility.\textsuperscript{37} Though the court stated that property is a traditional area of state regulation, it reasoned that

\begin{itemize}
  \item 29. \textit{Id.} The Ninth Circuit, while affirming that section 354.3 is unconstitutional, reversed the lower court’s ruling that Von Saher’s claim be dismissed with prejudice because it was not apparent from her complaint whether it had been properly filed within California’s regular three-year statute of limitations as set forth in \textit{Cal. CIV. PROC. CODE} \textsection{} 338 (West 2006). \textit{Von Saher}, 578 F.3d at 1031. The fact that Von Saher may still be able to bring suit under section 338 is not relevant to this Comment.
  \item 30. 578 F.3d 1016 (9th Cir. 2009).
  \item 31. \textit{Id.} at 1029. The notion of field preemption arises from the Supremacy Clause, which provides that “the Laws of the United States” and “all Treaties . . . , shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” U.S. CONST. art. VI, \textsection{} 1 cl. 2. Even if there is no conficting federal law or policy, a state law may nonetheless be preempted if it deals with an exclusive federal power. In other words, that particular field is essentially off limits. \textit{See, e.g.}, \textit{Zschernig}, 389 U.S. at 432.
  \item 32. \textit{Von Saher}, 578 F.3d at 1019.
  \item 33. \textit{Id.} at 1027.
  \item 34. 539 U.S. 396 (2003).
  \item 35. \textit{Von Saher}, 578 F.3d at 1025–26.
  \item 36. \textit{Garamendi}, 539 U.S. at 420 n.11.
  \item 37. \textit{Von Saher}, 578 F.3d at 1025.
\end{itemize}
the statute could not be “fairly categorized as a garden variety property regulation” because it does not apply to “all claims of stolen art, or even all claims of art looted in war. [Instead, t]he statute addresses only the claims of Holocaust victims and their heirs.”

The court analogized section 354.3 to other state statutes that had been struck down. The statute at issue in Garamendi, for example, required insurance companies to disclose information about Holocaust-era policies. The Supreme Court struck down that statute because it interfered with the executive branch’s ability to conduct foreign affairs. The Court stated in dicta that the real purpose of that statute was to provide relief to Holocaust victims, which was not a legitimate state responsibility.

The Ninth Circuit reasoned that section 354.3, like the statute in Garamendi, overstepped the boundaries of state regulatory powers because its real purpose was to “provide relief to Holocaust victims and their heirs.” The court also stated that although California’s interest in regulating the galleries and museums in California was a legitimate one, section 354.3’s language would allow suits to be brought against any gallery or museum, regardless of its location. Section 354.3 therefore created “a friendly forum for litigating Holocaust restitution claims” and expressed California’s “dissatisfaction with the federal government’s resolution (or lack thereof) of restitution claims arising out of World War II.” Because the creation of a “world-wide forum” is not an area of traditional state responsibility, the Ninth Circuit went on to explore whether the statute was subject to field preemption.

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38. Id.
40. See Garamendi, 539 U.S. at 420–21.
41. See id.
42. Id. at 426.
43. Von Saher, 578 F.3d at 1026–27.
44. Id.
45. Id.
46. Id. at 1027.
47. Id.
B. Section 354.3 Intrudes on the Federal Government's Power to Make and Resolve War

The court considered whether section 354.3 infringed on a power reserved to the federal government. The district court held that section 354.3 intruded on the federal government's exclusive power to make and resolve war. The Ninth Circuit discussed the war power and pointed to Deutsch v. Turner Corp., which provides that "matters related to war are for the federal government alone to address" and that any state statute that infringed on the war power will be preempted.

The Ninth Circuit held that section 354.3—like section 354.6 in Deutsch—established a remedy "for wartime injuries" that created a new cause of action for a new class of plaintiffs. In Deutsch, the Ninth Circuit found section 354.6, which extended the statute of limitations of suits involving World War II slave labor compensation, unconstitutional because it infringed on the federal government's power to make and resolve war. Similarly, the Von Saher court reasoned that since section 354.3 dealt with injuries that were inflicted during World War II, claims brought under the section would require California courts to review restitution acts made by foreign courts. The recovery of Holocaust-era artwork affects not only the international art market but also foreign affairs, an area reserved for the federal government. Therefore, section 354.3 is unconstitutional and preempted.

C. Judge Pregerson's Dissent

Judge Pregerson did not agree with the majority's holding that California overreached its traditional state responsibility and that field preemption applied. Instead, he argued that California had...
every right to regulate property located in its jurisdiction.\textsuperscript{58} Pregerson thought that the majority read the statute too broadly when it held that section 354.3 created a “world-wide forum” where anyone could bring a suit against any museum anywhere.\textsuperscript{59} Instead, Pregerson stated that a more reasonable reading of section 354.3 would interpret it as limiting claims “to entities subject to the jurisdiction . . . of California.”\textsuperscript{60} Moreover, since the section allowed California to act within its traditional competence, the \textit{Garamendi} test should not have applied at all.\textsuperscript{61}

Furthermore, Judge Pregerson stated that the majority’s reliance on \textit{Deutsch} was misplaced.\textsuperscript{62} Section 354.6 allowed “recovery for slave labor performed ‘between 1929 and 1945, [under] the Nazi regime [or] its allies and sympathizers’”\textsuperscript{63} and was declared unconstitutional because it was enacted “‘with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies’ protection.’”\textsuperscript{64} Section 354.3 neither targeted enemies of the United States for wartime actions nor provided for war reparations.\textsuperscript{65} Instead, the statute would have allowed Marie von Saher to recover property stolen from her and in the possession of a museum in California’s jurisdiction;\textsuperscript{66} such a right, Pregerson argued, would not intrude on the federal government’s war powers.\textsuperscript{67}

IV. ANALYSIS

\textit{A. The Garamendi Field-Preemption Test Should Not Apply}

The Ninth Circuit relied on \textit{Garamendi}'s field-preemption analysis in finding that the federal government’s foreign affairs powers preempted section 354.3—specifically, the power to make

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1032.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 1031.
\item \textit{Id.} at 1032.
\item \textit{Id.} (quoting \textit{Deutsch v. Turner Corp.}, 324 F.3d 692, 706 (9th Cir. 2003)).
\item \textit{Id.} (quoting \textit{Deutsch}, 324 F.3d at 708) (emphasis omitted).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
and resolve war. In Garamendi, the Supreme Court described the application of the field preemption doctrine as follows:

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.

The Supreme Court went on to say that if a state acted within its competence, then there would have to be a conflicting federal statute that trumped the state’s legitimate responsibility in legislating the target issue.

The Ninth Circuit was mistaken in applying Garamendi’s field-preemption analysis to section 354.3. First, California acted within its competence by trying to regulate an area of traditional state responsibility—property. The Ninth Circuit stated that section 354.3 was similar to other statutes that courts had struck down because they “purport[ed] to regulate an area of traditional state competence” but in reality affected foreign affairs. However, section 354.3 differs from other state statutes that courts have struck down because of their improper effect on foreign affairs. Those cases dealt with statutes that specifically and obviously targeted foreign countries or foreign nationals, even though the statutes loosely dealt with areas of traditional state responsibility. The Von Saher court compared three such statutes to section 354.3.

First, the court pointed to the statute at issue in Garamendi—the Holocaust Victim Insurance Relief Act (HVIRA)—which required “insurers doing business in California to disclose information regarding insurance policies sold, by them or related companies, in Europe between 1920 and 1945.” HVIRA was preempted (through

68. Id. at 1025 (majority opinion).
70. Id.
71. Von Saher, 578 F.3d at 1026.
72. Id.
conflict preemption, as opposed to field preemption) because it interfered with the president’s ability to handle foreign affairs. 74

Second, the Ninth Circuit referenced the statute in *Crosby v. National Foreign Trade Council*. 75 That statute, the Massachusetts Burma Law, restricted the authority of Massachusetts and its agencies to purchase goods or services from companies that did business with Burma (The Union of Myanmar). 76 The Supreme Court declared the statute preempted because it obstructed Congress’s ability to deal with the foreign country. 77

Third, the Ninth Circuit cited *Zschernig v. Miller*, 78 the only case the court used in which the Supreme Court actually applied field preemption instead of conflict preemption. 79 In *Zschernig*, the Supreme Court invalidated an Oregon probate statute that, as applied, barred heirs in certain foreign countries from inheriting Oregon property (another typical area of state regulation). 80 Though the law was drafted to apply to all nations, 81 the Supreme Court found that judges were implementing the statute in a way that “regularly disfavored citizens of Communist countries.” 82

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74. *Id.*
75. 530 U.S. 363 (2000).
76. *Id.* at 367.
77. *Id.* at 373. Congress enacted the Foreign Operations, Export Financing and Related Programs Appropriations Act three months after the Massachusetts law went into effect. *Id.* at 368. Among other things, the Act allowed the president to impose sanctions on the government of Myanmar directly. J. Matthew Saunders, *An Iron Fist or Kid Gloves: American Insurance Association v. Garamendi and the Fate of the Federal Monopoly on Foreign Policy*, 7 CHAP. L. REV. 279, 289 (2004).
79. The other cases the Ninth Circuit relied on deal with conflict preemption. See Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 425 (2003) (“The express federal policy and the clear conflict raised by the state statute are alone enough to require state law to yield.”); Crosby, 530 U.S. at 373 (“[W]e see the state Burma law as an obstacle to the accomplishment of Congress’s full objectives under the federal Act.”). Although the Ninth Circuit did not specifically state that it applied conflict preemption in *Deutsch*, it made it clear that *Deutsch* involved an actual conflict in a later case. Alperin v. Vatican Bank, 410 F.3d 532, 561 (9th Cir. 2005) (“[W]e emphasized in *Deutsch* that ‘the United States resolved the war against Germany by becoming a party to a number of treaties and international agreements.’” (citations omitted)).
81. The law states in part that “[t]he right of an alien not residing within the United States or its territories to take . . . property . . . by succession or testamentary disposition” depends upon certain factors concerning reciprocal rights. *Zschernig*, 389 U.S. at 430 n.1.
82. Saunders, *supra* note 77, at 283.
All of the cases that the Ninth Circuit cited in order to show that section 354.3 was masquerading as a statute concerned with traditional state responsibility are completely different from Von Saher. Unlike the statutes in Garamendi, Deutsch, and Zschernig, which targeted foreign countries or nationals under the pretext of exercising traditional state power, section 354.3 focused on museums and galleries specifically. 83 The statute defined entities that could be sued as “any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance”84 that has in its possession artwork “taken as a result of Nazi persecution during the period of 1929 to 1945 . . . .”85 The Ninth Circuit’s determination that the language of the act opened California courts to the world by not specifically identifying California museums and galleries is based on reasoning that is far too broad.86 A more practical reading of the statute would show that the statute applies to museums located solely within California’s borders.87

Furthermore, no person has tried to sue a gallery in a jurisdiction outside of California under section 354.3. In fact, the defendant museum in Von Saher is located in Pasadena, California.88 There is no evidence that the statute would lead to opening a “world-wide forum” and encroach on foreign affairs by inviting a flood of looted artwork claims, as the Ninth Circuit majority suggests.89

The Garamendi field-preemption test should only apply if California acts outside of its traditional state responsibility.90 Section 354.3 deals with the recovery of stolen property—a traditional state area of regulation.91 California is not attempting to use section 354.3 to meddle in foreign affairs; therefore the Garamendi field-preemption analysis is inapplicable.92 As Judge Pregerson suggests, since field preemption does not apply, the only other logical choice is

84. CAL. CIV. PROC. CODE § 354.3(a)(1) (West 2006).
85. Id. § 354.3(a)(2).
86. Von Saher, 578 F.3d at 1032 (Pregerson, J., dissenting).
87. Id.
88. Id. at 1019 (majority opinion).
89. See id. at 1032 (Pregerson, J., dissenting).
90. See supra Part III.C.
91. Von Saher, 578 F.3d at 1032 (Pregerson, J. dissenting).
92. Id.
to apply conflict preemption,93 which prescribes preemption only where the statute directly conflicts with federal policy.94

B. The Ninth Circuit Should Have Applied the Zschernig Direct/Indirect Field-Preemption Test

The Ninth Circuit should have applied the original Zschernig test in order to determine whether section 354.3 was preempted instead of relying on dicta in Garamendi.95 The Supreme Court stated in Zschernig that a state statute would be field preempted if it had “a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.”96 Even in the absence of a treaty, a state could violate the Constitution by “establish[ing] its own foreign policy.”97 For example, the Supreme Court in Zschernig stated that the Oregon probate statute at issue was preempted because it had “more than ‘some incidental or indirect effect in foreign countries’” and could lead to embarrassment or disruption among foreign nations.98

1. Section 354.3 Does Not Directly Interfere with Foreign Affairs, Including the Federal Government’s Power to Make and Resolve War

The Deutsch court, relying on Zschernig, created a rule for determining when effects on foreign affairs were more than merely incidental.99 The court suggested that any issues states dealt with that lay in the “inner core” of foreign affairs would have more than an incidental effect on those affairs.100 In Deutsch, the court stated that the statute at issue dealt with war matters, an issue reserved for the federal government exclusively.101 The statute considered in

94. Id.
97. Id.
98. Id. at 434–35 (quoting Clark v. Allen, 331 U.S. 503, 517 (1947)).
100. Id.
101. Id. at 711–12. (“Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress, seven concern preparing for war, declaring war, waging war, or settling war. Most of the Constitution’s express limitations on states’ foreign affairs powers also concern war. Even those foreign affairs powers in the Constitution that do not expressly concern
Deutsch—section 354.6 of the California Code of Civil Procedure—allowed any "Second World War slave labor victim,"\textsuperscript{102} "forced labor victim,"\textsuperscript{103} or heir to "bring an action to recover compensation for labor performed . . . from any entity or successor in interest thereof, for whom that labor was performed."\textsuperscript{104} The court concluded that section 354.6 was created as a remedy for wartime acts that California did not think the federal government had properly resolved; therefore, it infringed on the federal government's war powers.\textsuperscript{105}

The Ninth Circuit's reliance on Deutsch in the Von Saher decision is misplaced. The Von Saher court declared that section 354.3 bore a fatal similarity to section 354.6 because it was created "'with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection.'"\textsuperscript{106} However, section 354.3 does not deal with rectifying wartime wrongs. Unlike the Deutsch statute, which allowed slave labor victims or their heirs to be compensated for the unpaid labor they performed for the Nazis or their allies during World War II,\textsuperscript{107} section 354.3 does not seek to compensate plaintiffs for injuries caused by the Word War II Nazi Regime\textsuperscript{108} as the majority claims. Instead, section 354.3 allows owners of artwork to reclaim what is rightfully theirs. Although the artwork's history is traceable to its theft during World War II, section 354.3 does not permit compensation for the artwork's owner on the basis of the market value of the artwork at the time of theft as section 354.6 did in Deutsch;\textsuperscript{109} instead, recovery is limited to repossession of the artwork itself.\textsuperscript{110}
Nor does section 354.3 target former wartime enemies, a purpose so interconnected with war that it would definitely have more than an incidental effect on foreign affairs.\textsuperscript{111} In \textit{Deutsch}, section 354.6 allowed former slave labor victims to receive compensation from “any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.”\textsuperscript{112} The statute effectively continued to punish those who collaborated with a former U.S. enemy during the war.\textsuperscript{113}

Section 354.3, on the other hand, does not deal with wartime enemies. In fact, the only mention of war in section 354.3 is in the section that identifies the “Nazi persecution” era as the relevant time frame during which a piece of art must have been stolen to qualify under the statute.\textsuperscript{114} The statute does not allow Holocaust victims or their heirs to sue people or organizations that stole the art—namely, the Nazi regime, corporations that worked for the regime, or successors in interest to those corporations.\textsuperscript{115} Instead, the statute allows victims or heirs to sue galleries or museums that subsequently purchased stolen property.\textsuperscript{116} A gallery or museum in California is not a former wartime enemy of the United States.

2. Any Effect Section 354.3 Has on Foreign Affairs Is Merely Incidental

Section 354.3 does not directly interfere with foreign affairs, and any effect it may have on foreign affairs is merely incidental. First, section 354.3 does not have such an effect that foreign countries are actively complaining about the state statute as they did in \textit{Garamendi} and \textit{Crosby}. In \textit{Garamendi}, two countries filed amicus briefs claiming that the HVIRA statute interfered with their dealings with the United States.\textsuperscript{117} Similarly, in \textit{Crosby}, fifteen member countries

\begin{itemize}
\item \textsuperscript{111} \textit{Deutsch}, 324 F.3d at 712.
\item \textsuperscript{112} \textit{CAL. CIV. PROC. CODE} § 354.6(b).
\item \textsuperscript{113} \textit{Deutsch}, 324 F.3d at 712.
\item \textsuperscript{114} \textit{CAL. CIV. PROC. CODE} § 354.3(a)(2).
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} Brief for the Federal Republic of Germany as Amicus Curiae in Support of Petitioners, Am. Ins. Ass’n v. Garamendi, 539 U.S. 396 (2003) (No. 02-722) (asserting that the HVIRA statute interfered with the U.S.-German executive agreement and that the statute created tension between the United States and Germany); Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners, \textit{Garamendi}, 539 U.S. 396 (Nos. 02-722, 02-733) (claiming that the HVIRA statute conflicted with “a []joint [e]ndorsement of the [i]nternational [c]ommission on
in the European Union jointly filed an amicus brief because they were concerned with the Massachusetts Burma law's effects on relations between the United States and the European Union. This brief alleged that "the Massachusetts Burma Law interfered with the normal conduct of EU-U.S. relations . . . [and that] the Massachusetts Burma Law has created a significant issue in EU-U.S. relations, including—but not limited to—raising questions about the ability of the United States to honor international commitments into which it has entered." In both Garamendi and Crosby, the state statutes' worldwide effects were so obvious that other countries were motivated to petition the Court to invalidate them. No such issue exists in Von Saher.

Though the case has been before the Federal Circuit for at least two years, no foreign country has stepped forward to express concern that upholding section 354.3 would jeopardize its relationship with the United States. The Von Saher majority stated that section 354.3 would make California courts review Dutch court decisions, yet the Dutch government has never confirmed this concern. Accordingly, any effect section 354.3 could have in the Netherlands is not significant enough to draw its government's attention.

Furthermore, section 354.3 does not risk criticizing foreign governments or their policies. The Zschernig Court struck down the Oregon probate statute despite the absence of any conflicting federal law because it was concerned that Oregon was criticizing foreign governments (namely Communist bloc countries). At that time, it made sense to strike down the statute because it had "the potential to spark an international incident." Again, no such potential exists with section 354.3. Allowing a woman to sue a local museum does not carry the risk of sparking an incident.

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Holocaust Era [i]nsurance [c]laims by the Swiss and United States Governments and that upholding HVIRA would require Swiss companies to violate Swiss law).


119. Id. at 3.

120. Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1028 (9th Cir. 2009).


122. Saunders, supra note 77, at 283.
between the United States and the Netherlands. In saying that section 354.3 has that power, the court is stretching the limits of the foreign affairs doctrine to its breaking point.

V. CONCLUSION

The Ninth Circuit reaffirmed the district court’s holding that section 354.3 is field-preempted by the foreign affairs doctrine—specifically by the federal government’s power to make and resolve war. In doing so, the court blocked potential owners from reclaiming valuable property taken from them in the chaos of World War II.

Though the federal government could eventually give those owners of Holocaust-era artwork a way to get their property back, the future is bleak. As J. Christian Kennedy said, there is “no specific role for the federal government in the art restitution process” because “museums tend to be owned and operated privately.” The federal government has not historically become involved in private property disputes, which have traditionally been an area of state responsibility. By declaring section 354.3 unconstitutional, the Ninth Circuit has left Holocaust-era art owners with no solution. The federal government will not help them, and the state cannot help.

If the federal government has no specific role in the art restitution process, then state legislatures should logically be allowed to assume that responsibility. If Marei von Saher decides to appeal to the U.S. Supreme Court—as she should—the Court should grant a hearing and reverse the Ninth Circuit’s holding invalidating section 354.3. If it did so, the statute could help art owners reclaim their lost treasures from California museums and galleries. In addition, other states may follow suit to reunite art and owner once again.

123. *Von Saher*, 578 F.3d 1016.
