

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–722

AMERICAN INSURANCE ASSOCIATION, ET AL.,
PETITIONERS *v.* JOHN GARAMENDI, INSUR-
ANCE COMMISSIONER, STATE OF
CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 23, 2003]

JUSTICE GINSBURG, with whom JUSTICE STEVENS,
JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

Responding to Holocaust victims' and their descendants' long-frustrated efforts to collect unpaid insurance proceeds, California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code Ann. §13800 *et seq.* (West Cum. Supp. 2003), requires insurance companies operating in the State to disclose certain information about insurance policies they or their affiliates wrote in Europe between 1920 and 1945. In recent years, the Executive Branch of the Federal Government has become more visible in this area, undertaking foreign policy initiatives aimed at resolving Holocaust-era insurance claims. Although the federal approach differs from California's, no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA. Absent a clear statement aimed at disclosure requirements by the "one voice" to which courts properly defer in matters of foreign affairs, I would leave intact California's enactment.

I

As the Court observes, *ante*, at 1, the Nazi regimenter-

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tion of inhumanity we characterize as the Holocaust, marked most horrifically by genocide and enslavement, also entailed widespread destruction, confiscation, and theft of property belonging to Jews. For insurance policies issued in Germany and other countries under Nazi control, historical evidence bears out, the combined forces of the German Government and the insurance industry engaged in larcenous takings of gigantic proportions. For example, insurance policies covered many of the Jewish homes and businesses destroyed in the state-sponsored pogrom known as Kristallnacht. By order of the Nazi regime, claims arising out of the officially enabled destruction were made payable not to the insured parties, but to the State. M. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* 114 (2003). In what one historian called a “charade concocted by insurers and ministerial officials,” insurers satisfied property loss claims by paying the State only a fraction of their full value. G. Feldman, *Allianz and the German Insurance Business, 1933–1945*, p. 227 (2001); see Bazyler, *supra*, at 114; App. 27–28 (declaration of Rabbi Abraham Cooper, Assoc. Dean, Simon Wiesenthal Center) (“There is documentary evidence that the insurance companies paid only one-half of the Jewish insurance proceeds to the Reich and kept the other half for themselves.”).

The Court depicts Allied diplomacy after World War II as aimed in part at settling confiscated and unpaid insurance claims. *Ante*, at 3. But the multilateral negotiations that produced the Potsdam, Yalta, and like accords failed to achieve any global resolution of such claims. European insurers, encountering no official compulsion, were themselves scarcely inclined to settle claims; turning claimants away, they relied on the absence of formal documentation and other technical infirmities that legions of Holocaust survivors were in no position to remedy. See, e.g., Hearings on H. R. 2693 before the Subcommittee on Govern-

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ment Efficiency, Financial Management and Intergovernmental Relations of the House Committee on Government Reform, 107th Cong., 2d Sess., 14–15 (2002) (statement of Rep. Waxman) (“Some survivors were rejected because they could not produce death certificates for loved ones who perished in Nazi concentration camps. Other insurance companies took advantage of the fact that claimants had no policy documents to prove their policy existed.”). For over five decades, untold Holocaust-era insurance claims went unpaid. *Id.*, at 38 (statement of Leslie Tick, California Dept. of Insurance).

In the late 1990s, litigation in American courts provided a spur to action. See Bazyler, *supra*, at xi; Feldman, *supra*, at vii; Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts, 80 Wash. U. L. Q. 795, 796 (2002). Holocaust survivors and their descendants initiated class-action suits against German and other European firms seeking compensation for, *inter alia*, the confiscation of Jewish bank assets, the use of Jewish slave labor, and the failure to pay Jewish insurance claims. See generally Bazyler, *supra*, at 1–171.

In the insurance industry, the litigation propelled a number of European companies to agree on a framework for resolving unpaid claims outside the courts. This concord prompted the 1998 creation of the International Commission on Holocaust Era Insurance Claims (ICHEIC). A voluntary claims settlement organization, ICHEIC comprises several European insurers, Jewish and Holocaust survivor organizations, the State of Israel, and this country’s National Association of Insurance Commissioners. See S. Eizenstat, *Imperfect Justice* 266 (2003); Bazyler, *supra*, at 132.

As the Court observes, *ante*, at 7, ICHEIC has formulated procedures for the filing, investigation, valuation, and resolution of Holocaust-era insurance claims. At least until very recently, however, ICHEIC’s progress has been

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slow and insecure. See *In re Assicurazioni Generali S. P. A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 358 (SDNY 2002) (quoting a 2001 press account describing ICHEIC as having “repeatedly been at the point of collapse since its inception in 1998”). Initially, ICHEIC’s insurance company members represented little more than one-third of the Holocaust-era insurance market. See App. 32 (declaration of Leslie Tick, California Dept. of Insurance) (“The five insurance company members of the ICHEIC represent approximately 35.5% of the pre-World War II European insurance market.”); Eizenstat, *supra*, at 268 (despite repeated assurances that *all* German insurance companies would join ICHEIC, “[t]hey never have to this day”). Petitioners note that participation in ICHEIC has expanded in the past year, see Reply Brief 8–9, but it remains unclear whether ICHEIC does now or will ever encompass all relevant insurers.

Moreover, ICHEIC has thus far settled only a tiny proportion of the claims it has received. See Eizenstat, *supra*, at 267 (“ICHEIC’s administrative failings led to few claims paid and large costs.”). Evidence submitted in a series of class actions filed against Italian insurer Generali indicated that by November 2001, ICHEIC had resolved only 797 of 77,000 claims. See *In re Assicurazioni Generali*, 228 F. Supp. 2d, at 357. The latest reports show only modest increases. See Treaster, Holocaust List Is Unsealed by Insurers, N. Y. Times, Apr. 29, 2003, section A, p. 26, col. 6 (“In more than four years of operation [ICHEIC] has offered \$38.2 million—or just short of the \$40 million it had spent on expenses as of 18 months ago—to 3,006 claimants.”).

Finally, although ICHEIC has directed its members to publish lists of unpaid Holocaust-era policies, that non-binding directive had not yielded significant compliance at the time this case reached the Court. See Brief for Respondent 10; Bazyler, *supra*, at 132 (“Using the ICHEIC

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process, the European insurers have been able to . . . avoid revealing the names of possible claim holders.”). Shortly after oral argument, ICHEIC-participating German insurers made more substantial disclosures. See N. Y. Times, *supra*, at 26 (list of 363,232 names published in April 2003). But other insurers have been less forthcoming. For a prime example, Generali—which may have sold more life insurance and annuity policies in Eastern Europe during the Holocaust than any other company, see Bazyler, *supra*, at 113—reportedly maintains a 340,000-name list of persons to whom it sold insurance between 1918 and 1945, but has refused to disclose the bulk of the information on the list. See App. 37–38 (declaration of Leslie Tick, California Dept. of Insurance); Brief for Respondent 5.

II
A

California’s disclosure law, the HVIRA, was enacted a year after ICHEIC’s formation. Observing that at least 5,600 documented Holocaust survivors reside in California, Cal. Ins. Code Ann. §13801(d) (West Cum. Supp. 2003), the HVIRA declares that “[i]nsurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims [is] disclosed to the state,” §13801(e). The Act accordingly requires insurance companies doing business in California to disclose information concerning insurance policies they or their affiliates sold in Europe between 1920 and 1945, §13804(a), and directs California’s Insurance Commissioner to store the information in a publicly accessible “Holocaust Era Insurance Registry,” §13803. The Commissioner is further directed to suspend the license of any insurer that fails to comply with the HVIRA’s reporting requirements. §13806.

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These measures, the HVIRA declares, are “necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary.” §13801(f). Information published in the HVIRA’s registry could, for example, reveal to a Holocaust survivor residing in California the existence of a viable claim, which she could then present to ICHEIC for resolution.¹

The Court refers, *ante*, at 9, 27, to a number of other California statutory provisions enabling the litigation of Holocaust-era insurance claims in California courts. Those provisions, it bears emphasis, are not at issue here. The HVIRA imposes no duty to pay any claim, nor does it authorize litigation on any claim. It mandates only information *disclosure*, and our assessment of the HVIRA is properly confined to that requirement alone.

B

The Federal Government, after prolonged inaction, has responded to the Holocaust-era insurance issue by diplomatic means. Executive agreements with Germany, Austria, and France, the Court observes, are the principal expressions of the federal approach. *Ante*, at 14. Signed

¹In addition, California may deem an insurer’s or its affiliate’s continuing failure to resolve Holocaust-era claims relevant marketplace information for California consumers. See Brief for Respondent 42–44; Brief for National Association of Insurance Commissioners as *Amicus Curiae* 11–13. The Court discounts the HVIRA’s pursuit of this objective, stressing that the HVIRA covers only certain policies issued in Europe more than 50 years ago. *Ante*, at 27. But States have broad authority to regulate the insurance industry, *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653–655, (1981), and a State does not exceed that authority by assigning special significance to an insurer’s treatment of claims arising out of an era in which government and industry collaborated to rob countless Holocaust victims of their property.

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in July 2000, the German Foundation Agreement establishes a voluntary foundation, funded by public and private sources, to address Holocaust-era claims. Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” 39 Int’l Legal Materials 1298 (2000).² “[I]t would be in the interests of both parties,” the agreement declares, “for the Foundation to be the exclusive remedy and forum for addressing . . . all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.” *Id.*, at 1299. In the case of insurance, the agreement endorses ICHEIC as the appropriate forum for claims resolution. *Ibid.*

The German Foundation Agreement commits the Federal Government to certain conduct. It provides, for example, that when a German company is sued in a United States court on a Holocaust-era claim, the Federal Government will file with the court a statement that “the President of the United States has concluded that it would be in the foreign policy interests of the United States for the [German] Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II.” *Id.*, at 1303. The agreement also provides that “[t]he United States will recommend dismissal on any valid legal ground (which, under the U. S. system of jurisprudence, will be for the U. S. courts to determine).” *Ibid.* The agreement makes clear, however, that “[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal.” *Id.*, at 1304.

²The executive agreements with Austria and France are comparable. See *ante*, at 8, and n. 3.

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III

A

The President’s primacy in foreign affairs, I agree with the Court, empowers him to conclude executive agreements with other countries. *Ante*, at 15–16. Our cases do not catalog the subject matter meet for executive agreement,³ but we have repeatedly acknowledged the President’s authority to make such agreements to settle international claims. *Ante*, at 16–17. And in settling such claims, we have recognized, an executive agreement may preempt otherwise permissible state laws or litigation. *Ante*, at 17–18. The executive agreements to which we have accorded preemptive effect, however, warrant closer inspection than the Court today endeavors.

In *United States v. Belmont*, 301 U. S. 324 (1937), the Court addressed the Litvinov Assignment, an executive agreement incidental to the United States’ recognition of the Soviet Union. Under the terms of the agreement, the Soviet Union assigned to the United States all its claims against American nationals, including claims against New York banks holding accounts of Russian nationals that the Soviet Government had earlier nationalized. The Federal Government sued to recover the accounts thus assigned to it. Applying New York law, the lower courts refused to enforce the assignment; those courts held that the account-nationalization upon which the assignment rested contravened public policy. *Id.*, at 325–327. This Court reversed, concluding that “no state policy can prevail against the international compact here involved.” *Id.*, at 327. The

³“One is compelled to conclude that there are agreements which the President can make on his sole authority and others which he can make only with the consent of the Senate (or of both houses), but neither Justice Sutherland [in *United States v. Belmont*, 301 U. S. 324 (1937)] nor any one else has told us which are which.” L. Henkin, *Foreign Affairs and the United States Constitution* 222 (2d ed. 1996).

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Litvinov Assignment clearly assigned to the United States the claims in issue; the enforceability of that assignment, the Court stressed, “is not and cannot be subject to any curtailment or interference on the part of the several states.” *Id.*, at 331.

United States v. Pink, 315 U. S. 203 (1942), again addressed state-imposed obstacles to the Litvinov Assignment. Reiterating its holding in *Belmont*, the Court confirmed that no State may “deny enforcement of a claim under the Litvinov Assignment because of an overriding policy of the State.” 315 U. S., at 222. Pointing both to the assignment itself and to a later exchange of diplomatic correspondence clarifying its scope, see *id.*, at 224–225, and n. 7, the Court saw no “serious doubt that claims of the kind here in question were included” in the “broad and inclusive” assignment, *id.*, at 224.

Four decades later, in *Dames & Moore v. Regan*, 453 U. S. 654 (1981), the Court gave effect to an executive agreement arising out of the Iran hostage crisis. One of the agreement’s announced “purpose[s]” was “to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration.” *Id.*, at 665 (quoting the agreement). The agreement called for the formation of an Iran-United States Claims Tribunal to arbitrate claims not settled within six months. *Ibid.* In addition, under the agreement the United States undertook

“to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.” *Ibid.* (internal

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quotation marks omitted).

In line with these firm commitments, the Court held that the agreement and the executive order implementing it validly “suspended” litigation in United States courts against Iranian interests. See *id.*, at 686–688.

Notably, the Court in *Dames & Moore* was emphatic about the “narrowness” of its decision. *Id.*, at 688. “We do not decide,” the Court cautioned, “that the President possesses plenary power to settle claims, even as against foreign governmental entities.” *Ibid.* Before sustaining the President’s action, the Court determined: (1) Congress “had implicitly approved” the practice of claim settlement by executive agreement, *id.*, at 680; (2) the alternative forum created under the executive agreement was “capable of providing meaningful relief,” *id.*, at 687; (3) Congress had not in any way disapproved or resisted the President’s action, *id.*, at 687–688; and (4) the settlement of claims was “a necessary incident to the resolution of a major foreign policy dispute between our country and another,” *id.*, at 688.

Together, *Belmont*, *Pink*, and *Dames & Moore* confirm that executive agreements directed at claims settlement may sometimes preempt state law. The Court states that if the executive “agreements here had expressly preempted laws like HVIRA, the issue would be straightforward.” *Ante*, at 17. One can safely demur to that statement, for, as the Court acknowledges, no executive agreement before us expressly preempts the HVIRA. *Ante*, at 18. Indeed, no agreement so much as mentions the HVIRA’s sole concern: public disclosure.

B

Despite the absence of express preemption, the Court holds that the HVIRA interferes with foreign policy objectives implicit in the executive agreements. See *ante*, at 18. I would not venture down that path.

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The Court’s analysis draws substantially on *Zschernig v. Miller*, 389 U. S. 429 (1968). In that case, the Oregon courts had applied an Oregon escheat statute to deny an inheritance to a resident of a Communist bloc country. The Oregon courts so ruled because the claimant failed to satisfy them that his country’s laws would allow U. S. nationals to inherit estates, nor had the claimant shown he would actually receive payments from the Oregon estate with no confiscation by his home government. *Id.*, at 432. Applying Oregon’s statutory conditions, the Court concluded, required Oregon courts to “launc[h] inquiries into the type of governments that obtain in particular foreign nations,” *id.*, at 434, rendering “unavoidable judicial criticism of nations established on a more authoritarian basis than our own,” *id.*, at 440. Such criticism had a “direct impact upon foreign relations,” the Court said, *id.*, at 441, and threatened to “impair the effective exercise of the Nation’s foreign policy,” *id.*, at 440. The Court therefore held the statute unconstitutional as applied in that case. *Id.*, at 433–434. But see *id.*, at 432 (“We do not accept the invitation to re-examine our ruling in *Clark v. Allen* [331 U. S. 503 (1947)],” which held a substantively similar California statute facially constitutional.).

We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here. The notion of “dormant foreign affairs preemption” with which *Zschernig* is associated resonates most audibly when a state action “reflect[s] a state policy critical of foreign governments and involve[s] ‘sitting in judgment’ on them.” L. Henkin, Foreign Affairs and the United States Constitution 164 (2d ed. 1996); see Constitutionality of South African Divestment Statutes Enacted by State and Local Governments, 10 Op. Off. Legal Counsel 49, 50 (1986) (“[W]e believe that [*Zschernig*] represents the Court’s reaction to a particular regulatory statute, the operation of which intruded extraordinarily deeply into foreign af-

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fairs.”). The HVIRA entails no such state action or policy. It takes no position on any contemporary foreign government and requires no assessment of any existing foreign regime. It is directed solely at private insurers doing business in California, and it requires them solely to disclose information in their or their affiliates’ possession or control. I would not extend *Zschernig* into this dissimilar domain.⁴

Neither would I stretch *Belmont*, *Pink*, or *Dames & Moore* to support implied preemption by executive agreement. In each of those cases, the Court gave effect to the express terms of an executive agreement. In *Dames & Moore*, for example, the Court addressed an agreement explicitly extinguishing certain suits in domestic courts. 453 U. S., at 665; see *supra*, at 9–10. Here, however, none of the executive agreements extinguish any underlying claim for relief. See Neuborne, 80 Wash. U. L. Q., at 824, n. 101. The United States has agreed to file precatory statements advising courts that dismissing Holocaust-era claims accords with American foreign policy, but the German Foundation Agreement confirms that such statements have no legally binding effect. See 39 Int’l Legal Materials, at 1304; *supra*, at 7. It remains uncertain, therefore, whether even *litigation* on Holocaust-era insurance claims must be abated in deference to the German Foundation Agreement or the parallel agreements with Austria and France. Indeed, ambiguity on this point

⁴The Court also places considerable weight on *Crosby v. National Foreign Trade Council*, 530 U. S. 363 (2000). As the Court acknowledges, however, *ante*, at 25, *Crosby* was a statutory preemption case. The state law there at issue posed “an obstacle to the accomplishment of Congress’s full objectives under the [relevant] federal Act.” 530 U. S., at 373. That statutory decision provides little support for preempting a state law by inferring preclusive foreign policy objectives from precatory language in executive agreements.

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appears to have been the studied aim of the American negotiating team. See Eizenstat, *Imperfect Justice*, at 272–273 (describing the “double negative” that satisfied German negotiators and preserved the flexibility sought by Justice Department litigators).

If it is uncertain whether insurance *litigation* may continue given the executive agreements on which the Court relies, it should be abundantly clear that those agreements leave *disclosure* laws like the HVIRA untouched. The contrast with the Litvinov Assignment at issue in *Belmont* and *Pink* is marked. That agreement spoke directly to claim assignment in no uncertain terms; *Belmont* and *Pink* confirmed that state law could not invalidate the very assignments accomplished by the agreement. See *supra*, at 8–9. Here, the Court invalidates a state disclosure law on grounds of conflict with foreign policy “embod[ied]” in certain executive agreements, *ante*, at 18, although those agreements do not refer to state disclosure laws specifically, or even to information disclosure generally.⁵ It therefore is surely an exaggeration to assert that the “HVIRA threatens to frustrate the operation of the particular mechanism the President has chosen” to resolve Holocaust-era claims. *Ante*, at 26. If that were so, one might expect to find some reference to laws like the HVIRA in the later-in-time executive agreements. There is none.

To fill the agreements’ silences, the Court points to

⁵The Court apparently finds in the executive agreements’ “express endorsement of ICHEIC’s voluntary mechanism” a federal purpose to preempt any information disclosure mechanism not controlled by ICHEIC itself. *Ante*, at 24, n. 13. But nothing in the executive agreements suggests that the Federal Government supports the resolution of Holocaust era insurance claims only to the extent they are based upon information disclosed by ICHEIC. The executive agreements do not, for example, prohibit recourse to ICHEIC to resolve claims based upon information disclosed through laws like the HVIRA.

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statements by individual members of the Executive Branch. See *ante*, at 11–12 (letters from Deputy Secretary of the Treasury Stuart Eizenstat to California Governor Gray Davis and the Insurance Commissioner of California); *ante*, at 23 (testimony before Congress by Eizenstat, stating that a company’s participation in ICHEIC should give it “safe haven from sanctions, subpoenas, and hearings relative to the Holocaust period” (internal quotation marks omitted)). But we have never premised foreign affairs preemption on statements of that order. Cf. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U. S. 298, 329–330 (1994) (“Executive Branch actions—press releases, letters, and *amicus* briefs” that “express federal policy but lack the force of law” cannot render a state law unconstitutional under the Foreign Commerce Clause.). We should not do so here lest we place the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch. Executive officials of any rank may of course be expected “faithfully [to] represen[t] the President’s policy,” *ante*, at 24, n. 13, but no authoritative text accords such officials the power to invalidate state law simply by conveying the Executive’s views on matters of federal policy. The displacement of state law by preemption properly requires a considerably more formal and binding federal instrument.

Sustaining the HVIRA would not compromise the President’s ability to speak with one voice for the Nation. See *ante*, at 25. To the contrary, by declining to invalidate the HVIRA in this case, we would reserve foreign affairs preemption for circumstances where the President, acting under statutory or constitutional authority, has spoken clearly to the issue at hand. “[T]he Framers did not make the judiciary the overseer of our government.” *Dames & Moore*, 453 U. S., at 660 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 594 (1952) (Frankfurter, J., concurring)). And judges should not be the

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expositors of the Nation's foreign policy, which is the role they play by acting when the President himself has not taken a clear stand. As I see it, courts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication, to preempt state laws on foreign affairs grounds.

In sum, assuming, *arguendo*, that an executive agreement or similarly formal foreign policy statement targeting disclosure could override the HVIRA, there is no such declaration here. Accordingly, I would leave California's enactment in place, and affirm the judgment of the Court of Appeals.