A New Foreign-Relations Restraint on American States: Zschernig v. Miller

In a judgment of January 15, 1968[1]), the Supreme Court of the United States held unconstitutional the application of a statute of the State of Oregon that required, as a condition of a non-resident alien's right to inherit property in Oregon, proof of certain reciprocal rights for Americans in the country of the alien claiming the Oregon estate. Beyond the fact that the particular claimants were residents of East Germany, the decision is of interest in showing both the Supreme Court's recent sensitivity to national limits on even the most traditional private law jurisdiction of the states when questions of foreign relations are involved, and also the unresolved difficulties in determining the nature and future scope of these limits on state laws.

The Oregon statute made inheritance by a non-resident alien, both testamentary and intestate, of personal as well as real property, dependent on three conditions: (1) reciprocal rights of Americans to inherit property in the foreign claimant's country on equal terms with its citizens; (2) the right of Americans to receive funds so inherited by payment in the United States; and (3) proof that the foreign beneficiary of the Oregon estate would receive its proceeds without confiscation by his government[2]).

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[1]) *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

[2]) "(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such an alien is an inhabitant or citizen;

(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

In 1962, the estate of a resident of Oregon who died intestate was claimed by next of kin who lived in East Germany, in opposition to the State of Oregon, which claimed the property by escheat for lack of legally qualified heirs. Unable to satisfy the terms of the statute at least with respect to its second requirement[3]), counsel for decedent's German relatives relied on two treaties made by the United States with Germany in 1923 and with the Federal Republic of Germany in 1954[4]) and also challenged the constitutionality of the Oregon reciprocity statute as an invasion of the exclusive responsibility of the federal government for foreign relations. In 1966, the Supreme Court of Oregon decided that the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic, being limited to "the territories ... under the sovereignty or authority of each Party", could not be invoked on behalf of residents of East Germany (the expression used by the American courts for the Soviet occupied zone or DDR), but that with respect to East Germany the predecessor Treaty of 1923 had survived both the war and the 1954 Treaty with the Federal Republic[5]). The Oregon court then allowed the German claimants the real but not the personal property of the estate under Article IV of the 1923 Treaty, following the construction earlier given this article by the United States Supreme Court in *Clark* v. *Allen*[6]); the court dismissed the constitutional challenge to the statute as also having been settled by *Clark* v. *Allen.*

From this constitutional decision the claimants appealed to the United States Supreme Court. There they renewed the argument that Oregon had invaded the federal foreign-affairs power. The Department of Justice, on behalf of the United States government, filed a brief *amicus curiae* which

(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property". Or. Rev. Stat. sec. 111.070 (1967).

[3]) Under the text of the statute, see *supra* note 2, reciprocity is to be tested for the country of which the alien is "an inhabitant or citizen", raising a problem of interpretation if a claimant lives outside the country of his citizenship. However, the Oregon courts took no cognizance of any difference between German citizenship, claimed for the heirs under *Grundgesetz* Art. 116 (1) and a supporting certificate of the foreign ministry of the Federal Republic, and residence in East Germany, treating the question throughout as one of reciprocal rights of Americans in East Germany. The United States Supreme Court is not free to reinterpret a state statute.

[4]) Treaty of Friendship, Commerce and Consular Rights, 1923, 44 Stat. 2132, T.S. No. 725 (1925); Treaty of Friendship, Commerce and Navigation, 1954, 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (1956).

[5]) *Zschernig* v. *Miller*, 243 Or. 567, 412 P. 2d 781 (1966), noted in 45 Or. L. Rev. 221 (1966).

[6]) 331 U.S. 503 (1947).

disclaimed any "undue interference" by Oregon with the United States' conduct of foreign relations but invited the Court to reconsider its adverse construction of the personal-property provisions of the 1923 Treaty, a request which the claimants themselves did not include in their appeal.

The United States Supreme Court reversed the Oregon judgment. The complexity of the Court's choice among different possibilities shows in the fact that the eight participating justices divided in support of four distinct positions.

The opinion of the Court was written by Justice William O. Douglas. Twenty years earlier, Justice Douglas had written *Clark* v. *Allen*, which had dismissed in a few sentences the argument that a similar reciprocity statute in the California Probate Code was an unconstitutional state venture into foreign policy[7]). Subsequently the justice had expressed second thoughts[8]). Now these were shared by a majority of the Court.

Clark v. Allen (the Court now explains) held only that the California reciprocity statute, then recently enacted, "did not on its face intrude on the federal domain", apparently involving state courts in "no more than a routine reading of foreign laws" common to many law suits within state jurisdiction. Experience had shown otherwise. The task of finding whether foreign states allowed their nationals the benefits of an American inheritance, and reciprocal rights to American heirs, had led the courts of Oregon and other states with similar reciprocity laws into passing judgment on the institutions and policies of foreign governments, specifically Communist governments, in a manner that could not avoid touching sensitive international relations to the potential if not actual embarrassment of American diplomacy. In determining what legal rights of inheritance might exist under totalitarian regimes, the state courts had felt impelled by the primacy of government policy over paper law under such regimes to deny that the required rights had been proved. Many quotations show state judges declining to find reciprocity of inheritance rights in the U.S.S.R., Bulgaria, Czechoslovakia, Yugoslavia, and Poland because of disbelief in the testimony given by officials of these countries as to their laws, because of suspicion of the po-

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[7]) "The argument is that by this method California seeks to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. Such an offer of reciprocal arrangements is said to be a matter for settlement by the Federal Government on a nation-wide basis . . .

Rights of succession to property are determined by local law . . . What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line". *Id.* at 517.

[8]) *Ionannou* v. *New York*, 371 U.S. 30 (1962) (dissent.). Justice Douglas's majority opinion in *Zschernig* v. *Miller* incorporates key parts of this dissent verbatim.

litical manipulation of currency transfer licenses, and because of a cold-war attitude unwilling to send the proceeds of American estates behind the iron curtain. Thus, writes Justice Douglas, "the statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own", a criticism which, along with the withholding of the inheritances themselves, adversely affects United States foreign relations generally as well as in the specific field of mutual inheritance rights. As so applied, the Oregon law, illustrating the danger "if each State, speaking through its probate courts, is permitted to establish its own foreign policy", is found unconstitutional.

This opinion was signed by six justices, two of whom, however, added a further statement. In another concurring opinion, Justice Harlan reached the same result on other grounds. Invoking the duty to reach only unavoidable constitutional issues, he alone accepted the government's request to reinterpret Article IV of the 1929 Treaty that was declined by the majority and on that basis voted to grant the personal property to the East German claimants. Insofar as the Court would not reinterpret the treaty, however, Justice Harlan disagreed with its constitutional holding. So did the eighth justice, Justice White, who therefore dissented.

In reviewing this complex of issues and judicial positions, it may be best to dispose of the treaty questions before turning to the Court's new constitutional holding.

The 1954 Treaty

This treaty between the United States and the Federal Republic of Germany would unquestionably protect the German heirs against the adverse state law, if it covered them[9]). Oregon denied coverage under the territorial clause of the treaty, Article XXVI, which provides:

> "The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each Party . . .".

In support, the state's attorney general cited a letter from the Department of State which, after quoting this provision, concluded: "Consequently, the

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[9]) "Nationals and companies of either Party shall be accorded national treatment, within the territories of the other Party, with respect to acquiring property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should they because of their alienage be ineligible to continue to own such property, they shall be allowed a period of at least five years in which to dispose of it". Treaty of Friendship, Commerce and Navigation, *supra* note 4, Article IX, paragraph 3. Under Article VI, section 2, of the United States Constitution, treaties are part of "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".

1954 treaty does not apply with respect to the territory commonly referred to as East Germany". Counsel for the heirs countered with a certificate of the Federal Republic's foreign ministry, stating the position of that government that the rights granted by Article IX

> "are due and accorded to all German citizens. A citizenship of the Federal Republic of Germany as distinct from a citizenship of the Soviet occupied zone which might possibly give rise to a different application of Article IX, Paragraph 3 of the said treaty does not exist".

Stating its task to be that of giving effect to the intent of the parties as expressed in the text of the treaty, the Oregon supreme court concluded that territorial sovereignty rather than nationality was meant to determine coverage, and that the interpretation of the State Department was "the only reasonable interpretation of the language of Article XXVI" [10]).

Certainly that conclusion is not the only logically defensible one. The coverage article might well refer only to the territories where the treaty was to be carried out; that is to say, within the territories under the authority of the United States and the Federal Republic respectively. In this instance it was to apply to an estate within the United States. It is not likely that the article meant to exclude from the inheritance benefits of the treaty a holder of either an American or a West German passport who might be domiciled (for example) in Canada, though under Article XXVI the treaty obviously does not "extend" there [11]). A careful reading of the State Department letter cited by Oregon shows that it is in fact consistent with this interpretation, denying application of the treaty only with respect to the territory of East Germany and avoiding any reference to its residents; thus the Department diplomatically evaded the very point for which the Oregon court cited it.

Nevertheless, the decision may correctly correspond to the real expectations of the parties today, whatever these may have been in 1954. Since the heirs did not carry this point to the Supreme Court in their appeal, possibly to the relief of the two governments, the question may be considered to remain open in courts outside Oregon.

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[10]) American law does not bind courts, in applying treaties as domestic law in the United States, to accept the interpretation given a treaty by the executive branch. See American Law Institute, Restatement, Foreign Relations Law of the United States (1965) § 150.

[11]) The Oregon court's statement that because of the territorial coverage article "neither German citizenship nor nationality has real bearing" contradicts the opening word of Article IX, paragraph 3, *supra* note 9, which extends mutual inheritance rights to "nationals ... of either Party", not their "inhabitants".

The 1923 Treaty

The relevant article of this treaty was abrogated as between the United States and the Federal Republic by the 1954 Treaty[12]). With respect to East Germany it was again held, as already in *Clark* v. *Allen,* to have survived the war and subsequent political changes by the criteria of *Techt* v. *Hughes*[13]), under which American courts will not consider a treaty terminated in the absence of such a policy by the political organs or other compelling events inconsistent with the application of the treaty. This holding might perhaps invite interesting speculations concerning the status of the treaty as to other territories within Germany's 1923 borders in the light of American recognition policy; as to its survival for the territory of the DDR, however, the judges have been unanimous.

That the 1923 Treaty, if it survived for East Germans, entitled them to inherit real property in Oregon was also clear. In dispute was the meaning of the relevant provision, Article IV, for personal property[14]). The text establishes a right of "nationals of either High Contracting Party" to dispose of personal property "within the territory of the other", along with a corresponding right of their beneficiaries to receive it, whereas the right guaranteed an heir of real property is to inherit from "any person". Thus the Supreme Court had since 1860 held the personal-property provision (in preceding treaties) inapplicable to the American estates of American decedents[15]). In

[12]) Treaty of Friendship, Commerce and Navigation, 1954, *supra* note 4, Article XXVIII.

[13]) 229 N.Y. 222, 128 N.E. 185 (1920).

[14]) "Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or nonresident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges, other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases".

[15]) *Frederickson* v. *Louisiana,* 23 How. 445 (1860), followed in *Petersen* v. *Iowa,* 245 U.S. 170; *Duus* v. *Brown,* 245 U.S. 176; *Skarderud* v. *Tax Commission,* 245 U.S. 633

1946 the Department of Justice (as custodian of the German claim in *Clark* v. *Allen)* had thoroughly briefed the evolution of this provision from a treaty with Prussia of 1785 and even earlier treaties with France, the Netherlands, and Sweden, dating from the very origins of the United States even before the Constitution, in order to persuade the Supreme Court that the earlier textual reading had missed the purposes of the clause. It was this contention, unsuccessful at the time, which the government now renewed *amicus curiae* in *Zschernig* v. *Miller.*

The historical argument is set forth in the concurring opinion of Justice Harlan, who alone voted to accept it even at this late date in preference to reaching a difficult constitutional issue. Apart from its review of reciprocal inheritance clauses, this discussion of the background of the 1923 Treaty is interesting for the glimpse it gives of treaty practice. To overcome the rule of *stare decisis* as settling the long-standing interpretation of the treaty text, the government argued that in negotiating and in applying analogous clauses in other treaties, the United States had ignored the Supreme Court's 1860 decision. When the drafters of the 1923 Treaty with Germany, therefore, again used the same phrasing, they might have acted in reliance on their prior diplomatic practice and, indeed, in ignorance of the interpretation given it by the Supreme Court in 1860 and 1917. – As displayed in the brief and in Justice Harlan's summary, this treaty process, remote from the intent scrutiny given critical issues of immediate foreign policy, apparently tended like old common-law conveyancing to repeat venerable texts no matter how faulty, perhaps fearing evident ambiguities less than the prospect of negotiating and ratifying with one partner today a text different from those used before or with other nations and further complicated by possible most-favored-nation clauses. Although from 1860 until 1946 the formula here involved had been proved unsatisfactory, it was retained in most American treaty provisions on the subject; twenty years later the State and Justice departments were still asking the Supreme Court to reinterpret the formula, without any indication that the government might have sought to cure the ancient flaw by renegotiating its older treaties (though not with respect to the peculiar situation of East Germany involved here) in terms of its more modern usage illustrated in the 1954 Treaty with the Federal Republic.

(1917). The history of the text interpreted in these cases, and its importance for the majority of United States treaties with respect to the disposition of personal property, was reviewed after *Clark* v. *Allen* in Meekison, Treaty Provisions for the Inheritance of Personal Property, 44 A.J.I.L. 313 (1950).

The Constitutional Issue

It is perhaps not surprising that the Supreme Court, except for Justice Harlan, declined to give the treaty a new construction upon the government's argument that it had been drafted in ignorance or disregard of the Court's earlier interpretation, though this made decision of the German heir's constitutional attack on the Oregon statute inescapable. Decisions that a state has exceeded constitutional bounds are neither uncommon nor to be compared in gravity with the rare holding that the Congress has done so, particularly when the Court's judgment purports only to hold the state to established principle. But what *Zschernig* v. *Miller* presents as an application of familiar doctrine appears on closer examination to break new ground in a well-mapped old field of constitutional law.

That the doctrinal premises sound familiar is understandable. The supremacy of national power to conduct foreign relations is beyond doubt. It appears throughout the annals of the Constitution as one of the main objects of the men who drafted it, obtained its adoption, and first put it into practice. Judicial rhetoric has often reiterated this national supremacy, as has the scholarly literature. Concretely, however, these doctrinal sources in fact referred to the supremacy of the national conduct of policy when the nation had conducted a policy. To strike down a state law otherwise within the most traditional field of state power as an invasion of an unexercised federal foreign-relations power meant exploring the implications of federalism well beyond the constitutional text or precedents.

The constitutional text (article II, section 2) places within the President's executive power the conduct of diplomacy (stated as the power to appoint and receive ambassadors), including the negotiation of treaties, with the Senate's consent, which like the Constitution and other federal laws override contrary state constitutions and laws as the supreme law of the land (article VI). Congress is given power "to regulate Commerce with foreign Nations . . ." and an arsenal of financial and war powers adequate to support a conduct of foreign policy that had proved beyond effective management by a committee of the Congress under the Articles of Confederation. Article I, section 10 absolutely forbids the separate states to enter into treaties or alliances and to tax imports or exports, while requiring the consent of Congress for any state military force and "any Agreement or Compact with another State, or with a foreign Power". Though counsel dutifully cited Article I as a textual source of his attack on Oregon's statute, none of the four opinions in *Zschernig* v. *Miller* cites any constitutional provision at all. Clearly the development of a national monopoly over foreign affairs has left

the simplicity of the text far behind. Yet the judicial precedents that have marked out this development, though rich in rhetoric, fell equally short of compelling one or the other conclusion, once *Clark* v. *Allen* itself was to be reexamined.

Precedent established beyond dispute that under Article VI Oregon's statute must yield to a contrary treaty[16]). Also, after President Franklin D. Roosevelt with recognition of the U.S.S.R. in 1933 had received from Maxim Litvinov an assignment of Russian assets in the United States, the Supreme Court held that such an executive agreement would similarly displace state law[17]). A famous theory of a national foreign-affairs power derived from American independence apart from the Constitution had been proposed by Justice Sutherland – but the case that offered him the opportunity to write his dicta into the Supreme Court Reports held only that a statute of the Congress had not exceeded the permissible limits of delegating legislative discretion to the President[18]).

Such judicial celebrations of national power would not alone suffice to invalidate a state reciprocal-inheritance law even in the absence of contrary national action. This required a constitutional doctrine that national control of foreign relations is not only dominant when exercised, but exclusive to some degree beyond that stated in Article I, section 10. Yet even *Hines* v. *Davidowitz*, the only case invoked as something resembling a precedent, while pronouncing it imperative "that federal power in the field affecting foreign relations be left entirely free from local interference", had in fact decided only that passage of an alien registration law by the Congress made invalid a state's legislation on the same subject[19]).

On the other hand, the Court did not mention the one modern decision in which it had "federalized" foreign relations law even without federal governmental action, the *Sabbatino* case[20]). For many years there had been doubt whether American courts, in deciding international legal questions not embodied in a treaty or other federal act, were applying state law or federal law[21]). In *Sabbatino*, before holding that a Cuban nationalization decree must be given effect under the "act of state" doctrine undiluted by excep-

[16]) *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961).

[17]) *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942).

[18]) *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

[19]) *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941), quoted in *Zschernig* v. *Miller*, 389 U.S. 432, 442 (1968).

[20]) *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398.

[21]) See Jessup, The Doctrine of *Erie Railroad* v. *Tompkins* Applied to International Law, 33 A.J.I.L. 740 (1939); *Bergman* v. *De Sieyes*, 170 F. 2d 360 (1948); Restatement, Foreign Relations Law of the United States (1965), notes to §§ 3, 78.

tions, the Court propounded "constitutional underpinnings" for reaching this conclusion as one of federal law. The clear implication was that the conclusion to apply the undiluted doctrine should equally have followed if the relevant state (New York) had happened to have a contrary statute, perhaps like that adopted by Congress after *Sabbatino* – *i. e.*, that the courts could invalidate a state rule of law touching foreign relations without needing the support of any law-making action by the federal government. But it was only an implication[22]).

The Supreme Court's holding in *Zschernig* v. *Miller*, then, is without precedent – new constitutional law. What is the scope of the new doctrine?

Various theoretical positions were open to the Court if foreign-policy limitations on state laws were to be pushed beyond the supremacy of formal federal acts. The first, in order of increasing stringency, might push beyond the formal diplomatic action held to make law in the Litvinov Assignment cases and strike down state laws whenever they contradict an actual national policy expressed by the President or his responsible delegates, whether in general or in particular reference to the litigated issue. Second, state laws might fall if they potentially disrupt national policy in a recognized area of foreign policy, even when none has actually been expressed by the responsible organs. Third, a state law might be held to exceed constitutional bounds, without regard to present or potential conflict with an actual national policy, when the state pursues a goal that is properly one of foreign policy or in which the state's local interest must be subordinated to dominant for-

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[22]) 376 U.S. at 425. The constitutional significance of *Sabbatino* has been expertly analyzed in Henkin, The Foreign Affairs Power of the Federal Courts: Sabbatino, 64 Colum. L. Rev. 805 (1964), and Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024 (1967). Since federal courts had developed the judicial act of state doctrine before the state-or-federal issue rose to analysis, one can view *Sabbatino* primarily as asserting a law-creating power of the federal courts which, once recognized, necessarily carries federal supremacy. This is the easier because nothing like my hypothetical state statute resembling 22 U.S.C. 2310 (e) (2) (1965) actually sharpened the issue. Still, *Sabbatino* justified this assignment of judicial law-making to the federal courts, as against the states, by referring to the act of state doctrine as involving considerations it called "intrinsically federal" and "supporting exclusion of state authority", a constitutional conception that goes beyond the question of the federal courts' obligation under *Erie Railroad* in matters of international concern. Moreover, even a functional analogy between the Oregon reciprocal-inheritance law and the refusal of the lower courts in *Sabbatino* to recognize the Cuban expropriation is not too farfetched: both rules withheld property in the jurisdiction from the foreign claimant in disapproval of the foreign nations' policies, whether seeking by this to influence those policies or only to give priority to a worthier claim. The Supreme Court held that both were matters for national, not state, policy. It is interesting that the author of the "constitutional underpinnings" in *Sabbatino*, Justice Harlan, dissented from the constitutional invalidation of Oregon's law.

eign-relations interests – *i. e.*, those of the foreign nation affected and thus of the United States as a nation – even when this assessment has not been expressed by the national political organs[23]). Past rhetoric about "exclusive" federal power in foreign affairs did not determine the choice among these possibilities. A classic analogy is the judicial limitation of state action in interstate commerce – similarly derived from a constitutional grant of power to Congress without explicit prohibition upon the states – which has swung between doctrines of exclusive federal and concurrent state power, settling into a judicial protection of interstate commerce even without a demonstrable national policy which in practice resembles the third of the positions mentioned above[24]).

In *Zschernig* v. *Miller* two justices, Stewart and Brennan, chose this third position also with respect to state action in foreign affairs. Demonstrated interference with national foreign policy, they said, "is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department". Oregon had "framed its inheritance laws to the prejudice of nations it disapproved and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate"[25]). They would overrule *Clark* v. *Allen*. On the other hand Justice Harlan, joined by Justice White, re-

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[23]) In the academic literature speculation was rarely pushed beyond the first possibility. Henkin, *supra* note 22, leaned toward having courts base a federalized foreign-relations rule, such as act of state, on national policy of the political branches. Miller, The Corporation as a Private Government in the World Community, 46 Va. L. Rev. 1539, 1542–49 (1960), would have national policy displace state laws even when it is expressed only in policy statements rather than laws or international agreements. But Hill, *supra* note 22, argued that even without action by the political branches, the Constitution "preempts" for federal law both the field of international law (which he extends beyond agreed rules to all matters which an international consensus deems inappropriate for unilateral action) and also a further, undefined area of domestic law involving foreign relations; however, he thought mere "exacerbation of foreign relations" not alone ground for judicial invalidation of state law, citing *Clark* v. *Allen*. Moore, Federalism and Foreign Relations, 1965 Duke L. J. 248, called for recognizing federal foreign relations power, even when unexercised, as a constitutional check on state action, particularly if in the motive or the effect of the state action foreign-policy interests exceed proper local interests. Boyd, The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates, 51 Geo. L. J. 470 (1963), had directed this same argument specifically at the state reciprocal-inheritance statutes, adding that an inappropriate state objective could also make the states' classification of eligible heirs vulnerable under the 14th Amendment. The three positions stated in the text do not, of course, exhaust the possible variations.

[24]) See, *e. g.*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964).

[25]) 389 U.S. 441–443 (Stewart, J., concurring).

sponded in dissent that state legislation prejudicing foreign interests had repeatedly been sustained "in the absence of a conflicting federal policy" [26]). The reference to conflicting policy suggests that they would go so far as the first-stated position, though no further.

Between these poles, the majority found the second, intermediate position adequate to dispose of the immediate case. As already quoted at the beginning of this article, Justice Douglas found in the practice of probate courts under state reciprocity statutes an inescapable embarrassment of American foreign relations. But the mere adoption of those statutes had not, apart from this embarrassment in practice, already crossed a constitutional line between state and federal power; *Clark* v. *Allen* need not be overruled. The states retain their traditional power to regulate the descent and distribution of estates – presumably including, if they choose, also the traditional discriminations against foreigners. "But those regulations must give way if they impair the effective exercise of the Nation's foreign policy" [27]).

This, then, is the new constitutional test. Its virtue is not to be found in ease of application, since the courts under *Zschernig* v. *Miller* are to look beyond executive-branch policy in making their assessment. Its difficulties are apparent even in the matter immediately before the court, the state reciprocal-inheritance laws. As Justice Harlan pointed out, if such laws are not themselves unconstitutional, state courts must examine whether foreign governments do grant the required rights and, sometimes, decide that they do not. Would Oregon's, or another state's, reciprocity law remain constitutional if its courts did this with scrupulous courtesy and avoidance of critical comment on the foreign legal system? If they accepted evidence of written laws as conclusive without inquiring into their application or the administration of discretionary rules? Has the experience on which the majority predicates unconstitutionality shown the reciprocity laws to be irretrievably invalid, or can a state salvage its policy by amendment or careful judicial administration? Of course these immediate consequences of *Zschernig* v. *Miller* will soon be explored and settled in litigation [28]). But what of other state laws? If state courts make equally derogatory findings, perhaps accompanied by undiplomatic criticism, in other cases involving important deter-

[26]) *Id.* at 458 and note 25 (Harlan J., dissenting on the constitutional question).

[27]) For this proposition Justice Douglas cites (as already in his *Ionnaou* dissent, *supra* note 8) the Miller article cited in note 23. In the article, however, Miller argued only for displacing state law by an actual national policy clearly articulated by some responsible organ, though not grounded in a statute or international agreement.

[28]) After the *Zschernig* opinion, Oregon filed a "Petition for Clarification or Rehearing", stating that with *Clark* v. *Allen* left unoverruled, the state could not understand whether only parts of its statute, or perhaps just the procedure by which courts determined reciprocity, had been held unconstitutional.

minations of foreign law, facts, or interests, what constitutional consequences follow for the state's statutory or common law rules involved? In the *Zschernig* case itself the courts consistently treated the "country" with which reciprocity was to be examined as being "East Germany" – a matter of some delicacy for United States recognition policy. Any state's conflicts-of-law rule in such a matter inescapably touches and perhaps disturbs foreign relations; are such rules therefore constitutionally beyond state power, or only when they misjudge the direction or needs of the government's policy?

Perhaps the weight placed in *Zschernig* v. *Miller* on the boat-rocking of the state judges is more apparent than real. It was the state legislatures that chose to make the inheritance of a domestic estate depend on the policy of foreign nations with respect to other, unrelated persons and property. A state's adoption of such a policy is different from the problems inherent in ascertaining foreign law or facts essential to deciding a case in the state's jurisdiction; and it is a policy which well might by itself be found to seek objectives that fall outside any proper interest of a single state into the external concerns of Americans vis-à-vis foreign nations and their policies[29]). The Court's parade of horribles from state court opinions served to make the danger from such state ventures concrete in this instance and thus made it unnecessary for the moment to go with the concurring justices to that full doctrinal position.

As so often, it is easier for both that position and the dissenting one of Justices Harlan and White to show the flaws in the other positions than to avoid problems with their own. Independent judicial policing of all state laws affecting foreign interests would in the modern world leave few fields untouched, or at the least require much weighing of legitimate and illegitimate motives of state law. To let the states proceed in the absence of contrary national policy, on the other hand, leaves courts too dependent on the shifting interests expressed from time to time by diverse federal agencies[30]), or

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[29]) See Boyd, *supra* note 23, at 498.

[30]) See Hill, *supra* note 22, at 1050–1053. With respect to the state reciprocal-inheritance laws themselves, government policy had been to argue that these laws unconstitutionally invaded national control of foreign relations in *Clark* v. *Allen* (when the Alien Property Custodian had vested this and many other alien estates) and to deny such interference in *Zschernig* v. *Miller;* and recall the careful non-responsiveness of the State Department's communication about the 1954 Treaty in this case. Apart from the illusion inherent in taking episodic agency action or statements as evidence of a coherent Presidential policy, the deductions to be made about such policy also invite sophistry. Is the fact that the United States has widely negotiated reciprocal inheritance treaties evidence of a national policy favoring inheritance rights for aliens, or of a national policy to grant such rights only in return for equal rights for Americans which would be undercut by judicial invalidation of alien ineligibility?

burden Congressional and diplomatic dockets with the need for much new formal action. For the time being, then, the Supreme Court has set the courts at the task of mapping the new boundary of federalism neither by deduction of state objectives nor by following political guidance, but by independent examination of the pragmatic significance of a state's action for the foreign relations of the nation.

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