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Samuel E. Plutchok

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Denial Is Not An Option, Or Is It? How the Turkish Denial of the Armenian Genocide Blocked Recovery in the United States

Samuel E. Plutchok

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ABSTRACT

Many articles have been written on the Armenian Genocide, both in the context of how to obtain Turkish recognition and how to obtain monetary relief in the courts of the United States. This Article summarizes the issues with the *Movsesian III* holding with regards to lack of precedent and the Ninth Circuit's failure to follow the Supreme Court's trend of limiting preemption. This Article then analyzes related decisions from four other circuits, demonstrating a clear circuit split on judicial understanding of the 5-4 Supreme Court ruling in *Garamendi*. This Article provides a roadmap to a friendly forum for victims of the Armenian Genocide, or victims of any other similar foreign tragedy, who seek redress in the American judicial system. By focusing their efforts on litigating and passing legislation in these friendly circuits, individuals seeking justice may realize better results than the victims and plaintiffs in the *Movsesian* line of cases.

AUTHOR NOTE

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I. INTRODUCTION: TWO GENOCIDES, TWO RESULTS

Much has been written about the Holocaust-era litigation.¹ The idea that foreign governments and business entities could be held accountable for their criminal actions perpetrated overseas was itself a novel one.² Furthermore, the time elapsed from the crimes committed to the time of the litigation posed a significant problem.³ Overall, the Holocaust-era litigation has been extremely successful in both a monetary sense as well as from a public relations standpoint.⁴ The German government and German companies were forced to acknowledge and deal with the severe repercussions of their actions.⁵ They were also compelled to pay significant sums of money in restitution and remuneration.⁶ For the Armenian descendants of the World War I era Armenian Genocide victims, the Holocaust era victories posed a wonderful working model of how to finally gain

¹ See, e.g., Michael J. Bazylar, *From "Lamentation and Liturgy to Litigation": The Holocaust-Era Restitution Movement as a Model for Bringing Armenian Genocide-Era Restitution Suits in American Courts*, 95 MARQ. L. REV. 245, 245 (2011).

² *Id.* at 247-48.

³ See *id.* at 249; see also *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 6 (1st Cir. 2010) (explaining how "[o]n this record, given the passage of time, the validity of the transfer 'is not clear-cut.'"); see also Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37, 49-50 (2009) (explaining how sorting the legitimate transaction from the illegitimate sixty or seventy years later can be extremely difficult: "Much art was Aryanized, or subjected to forced sales for prices significantly below market value (if any value ever actually materialized for the seller), and some art was sold at infamous 'Jew auctions,' which are now universally recognized as illegal. But some sales before April 26, 1938, were legitimate and for fair market value or close thereto. Some people were able to voluntarily sell art on the open market, albeit not much modern art after Hitler declared it 'degenerate'. Additionally, because so many Jews were compelled to forfeit 'flight asset[s]' to pay for their passage out of the Reich, the European art market reflected depressed prices.").

⁴ See Bazylar, *supra* note 1, at 248-49; see also *Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006).

⁵ See Bazylar, *supra* note 1, at 248-49.

⁶ See Vartges Saroyan, *A Lesson from the Holocaust Restitution Movement for Armenians: Generate Momentum to Secure Restitution*, 13 CARDOZO J. CONFLICT RESOL. 285, 286 (2011).

some long overdue compensation for the crimes committed against them.⁷

There remains one important difference between these similar and often compared genocides. While Germany and the German nationals were openly apologetic for their crimes, Turkey adopted a shell of complete and utter denial.⁸ Much has been written about the audacity and perhaps sheer genius of Turkey's tactic of wholly rejecting responsibility for the genocide of over one million Armenian men, women, and children.⁹ In fact, Turkey has actively endeavored to uproot this genocide from its national consciousness by essentially rewriting history in its educational system and international image.¹⁰ Countries that openly acknowledge and dare to condemn the Armenian Genocide can expect fierce diplomatic retaliations from Turkey.¹¹

⁷ See Jeffrey W. Stempel, Sarig Armenian & David McClure, *Stoney Road Out of Eden: The Struggle to Recover Insurance for Armenian Genocide Deaths and Its Implications for the Future of State Authority, Contract Rights, and Human Rights*, 18 BUFF. HUM. RTS. L. REV. 1, 41-42 (2012) (detailing both the history of the Armenian Genocide as well as the attempted litigation); see also Stan Goldman, *Is It Nobody's Business but the Turks?': Recognizing Genocide*, 16 TOURO INT'L L. REV. 25, 25 (2013); see also H.R. Res. 596, 106th Cong. (2000) ("The Armenian Genocide was conceived and carried out by the Ottoman Empire from 1915 to 1923, resulting in the deportation of nearly 2,000,000 Armenians, of whom 1,500,000 men, women, and children were killed, 500,000 survivors were expelled from their homes, and which succeeded in the elimination of the over 2,500-year presence of Armenians in their historic homeland.").

⁸ See *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084, 1103 (C.D. Cal. 2013); see also Tim Arango, *A Century After Armenian Genocide, Turkey's Denial Only Deepens*, N.Y. TIMES, (Apr. 16, 2015) <https://www.nytimes.com/2015/04/17/world/europe/turkeys-century-of-denial-about-an-armenian-genocide.html> [<https://perma.cc/LCN7-S9TP>].

⁹ See Saroyan, *supra* note 6, at 298.

¹⁰ See generally Richard G. Hovannisian, *Denial of the Armenian Genocide in Comparison with Holocaust Denial*, in REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 201, 201-05 (1999).

¹¹ See *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1077 (9th Cir. 2012) [hereinafter *Movsesian III*] (explaining how California's "insurance" law affects foreign policy, and is thus preempted: "The passage of nearly a century since the events in question has not extinguished the potential effect of section 354.4 on foreign affairs. On the contrary, Turkey expresses great concern over the issue, which continues to be a hotly contested matter of foreign policy around the world. See, e.g., *Turkey retaliates over French 'genocide' bill*, [sic] BBC, Dec. 22, 2011 (reporting that the Turkish prime minister announced measures against France after the French National Assembly passed a bill criminalizing denial of the 'Armenian Genocide'); Peter Baker, *Obama Marks*

The Turkish denial of what is widely considered fact is not only insulting, but has also proved to be the ruination of the ill-fated *Movsesian* litigation, on which this Article focuses. While about forty of the states have officially recognized the genocide, it has been the long-standing executive policy to remain neutral about the issue.¹² On three occasions, the House and Senate attempted to pass concurrent legislation officially recognizing the Armenian Genocide, and each time their actions were thwarted by the Executive Branch.¹³ This long-standing policy of executive ambivalence stems from Turkey's critical status as an ally and its strategic location as a staging ground for American military action abroad, especially in the Middle East.¹⁴

California sought to make an end run around the U.S. executive indifference through legislation by enacting § 354.4, entitled "Armenian Genocide victims; insurance policy claims; waiver of statute of limitations."¹⁵ This law basically suspended the statute of

Genocide Without Saying the Word, N.Y. Times, Apr. 25, 2010, at A10 (noting that President Obama was careful to avoid using the word 'genocide' during a commemorative speech in an attempt to 'avoid alienating Turkey, a NATO ally, which adamantly rejects the genocide label.'"); *see also* *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1055 (9th Cir. 2009) [hereinafter *Movsesian I*] (noting how "[o]n December 4, 2008, our court received a letter from the Turkish Ambassador via facsimile. Letter from Nabi Sensoy, the Turkish Republic's Ambassador to the United States, to Molly Dwyer, Clerk of the United States Court of Appeals for the Ninth Circuit (December 4, 2008). The letter expresses Turkey's opposition to § 354.4, and urges the court to overturn the California statute."). This case came before the Ninth Circuit three times with three different results and is referred to throughout the Article as *Movsesian I*, *Movsesian II*, and *Movsesian III* for clarity.

¹² *See Movsesian III*, 670 F.3d at 1077; *see also Movsesian I*, 578 F.3d at 1055.

¹³ *See Movsesian III*, 670 F.3d at 1077; *see also Movsesian I*, 578 F.3d at 1055.

¹⁴ *See Movsesian III*, 670 F.3d at 1077; *see also Movsesian I*, 578 F.3d at 1057-58.

¹⁵ *See* CAL. CIV. PROC. CODE § 354.4 (West 2011). The statute reads: "(a) The following definitions govern the construction of this section:

(1) 'Armenian Genocide victim' means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.

(2) 'Insurer' means an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe or Asia at any time between 1875 and 1923.

(b) Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state

limitations for all claims arising from Armenian Genocide victims' insurance litigation in the State of California.¹⁶ The specifics of the court's holding are discussed at length below. Briefly stated, the Ninth Circuit found that the executive expression of displeasure in any official U.S. recognition of the genocide was grounds for federal preemption.¹⁷ Thus, § 354.4 was deemed unconstitutional.

This Article will take a respectful, yet highly critical look at the Ninth Circuit holding in *Movsesian III*.¹⁸ This Article will analyze the cases cited by the Ninth Circuit and explain why they do not truly support the wide contention of federal field preemption through mere executive expression of displeasure of a state law.¹⁹ This Article will also show how the general direction of Supreme Court jurisprudence has been shifting away from the wide federal field preemption exhibited in *American Insurance Ass'n v. Garamendi*²⁰ and limiting federal preemption in the foreign affairs arena to narrow circumstances.²¹ This Article will then show how other Circuits' decisions have reflected both a more tempered understanding of *Garamendi* as well as an understanding of how the Supreme Court's holding in *Medellin* severely limits *Garamendi*.²²

Finally, this Article will suggest a possible road forward for the Armenian litigants in two ways. The first road has California, a state that has consistently shown interest in the matter, redraft § 354.4,

and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution.

(c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2016.”

¹⁶ *See id.*

¹⁷ *See Movsesian III*, 670 F.3d at 1075-77.

¹⁸ *See generally id.*; *see infra* Part II.

¹⁹ *See infra* Section III.A.

²⁰ *See Am. Ins. v. Garamendi*, 539 U.S. 396(2003).

²¹ *See Medellin v. Texas*, 554 U.S. 759 (2008); *see also infra* Sections III.B, III.A.1; *see also infra* notes 143-49 and accompanying text.

²² *See infra* Part IV.

leaving out the “offensive” term of “Armenian Genocide.” In forcing the court to rehear this case, the Armenian litigants may be able to force the issue to the Supreme Court while the current trend of case law suggests a better outcome. The second road seeks to have other states such as New York or Pennsylvania, each the home of a significant number of Armenian Genocide descendants, draft legislation similar to California’s § 354.4. New York is in the Second Circuit and Pennsylvania the Third Circuit, and both have expressed a more leveled approach to foreign affairs preemption, which may very well translate into a more favorable legal outcome on the same set of facts.

II. THE WINDING TAPESTRY THAT MAKES UP THE *MOVSESIAN* LITIGATION

The procedural history of this case is unique in that there are three separate rulings by the circuit court, which this Article will reference as *Movsesian I*,²³ *Movsesian II*,²⁴ and *Movsesian III*.²⁵ The same three-justices decided *Movsesian I* and *II*; however, on a petition for rehearing that resulted in *Movsesian II*, Justice Nelson changed her vote.²⁶ Defendants were then granted their petition for an *en banc* rehearing and the court reversed *Movsesian II*. While the holdings in *Movsesian I* and *Movsesian III* have the same outcome, that § 354.4’s waiving of the statute of limitations for Armenian Genocide victims was preempted by federal policy and therefore unconstitutional, there are significant variances in their rationales. These differences have a profound outcome in both the soundness of the *Movsesian III* holding as well as on the future of potential Armenian Genocide-related litigation.

²³ See generally *Movsesian v. Victoria Versicherung AG*, (Movsesian I) 578 F.3d 1052, 1052 (9th Cir. 2009).

²⁴ See generally *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 901 (9th Cir. 2010) [hereinafter *Movsesian II*].

²⁵ See generally *Movsesian v. Victoria Versicherung AG*, (Movsesian III) 670 F.3d 1067, 1067 (9th Cir. 2012).

²⁶ See *Movsesian II*, 629 F.3d at 903 (“Judge Pregerson and Judge Nelson vote to grant the petition for rehearing and Judge Thompson votes to deny the petition for rehearing. The petition for rehearing is GRANTED. The opinion and dissent filed on August 20, 2009, are hereby withdrawn. The opinion and dissent attached to this order are hereby filed.”).

This Section will outline and explain the three *Movsesian* decisions, closely looking at all three and tracking the differences between *Movsesian I* and *Movsesian III*. This Section will then take a critical look specifically at the *Movsesian III* holding.

A. Origins of *Movsesian*

Movsesian I arose out of a lawsuit by descendants of victims of the Armenian Genocide against Munich Re, the sixth largest insurance company and the largest reinsurance company in the world.²⁷ The Munich Re litigation was not the first attempt by Armenian litigants - it was preceded by a similar complaint against New York Life.²⁸ In *New York Life*, the litigants proceeded to engage in procedural skirmishes on the issues of forum selection and statute of limitations. This jousting eventually resulted in California passing § 354.4, which expressly extended the statute of limitations for Armenian litigants against insurance companies.²⁹ Concurrently, the plaintiffs introduced a public relations aspect taking on a high-profiled attorney, which garnered significant media coverage.³⁰

The District Court's decision in *Marootian v. New York Life Ins. Co.*³¹ eventually was the impetus for New York Life to settle.³² The Court held that § 354.4 was not unconstitutional and that the forum selection clauses were unfair and therefore not enforceable.³³ On January 28, 2004, the two sides settled for \$20 million.³⁴ Perhaps bolstered by the success against New York Life, the plaintiffs in *Movsesian I* attempted to go after the larger Munich Re. Munich Re, however, did not yield to the social pressure and, while fully admitting to the fact that they did have insurance policies for Armenian

²⁷ See Stempel, Armenian & McClure, *supra* note 7, at 55 (detailing with great specificity the history of the *Movsesian* litigation).

²⁸ See Complaint, *Marootian v. New York Life Ins. No. 99-12073-CAS-Me*, Docket # 4, (C.D. Cal. filed Jan. 18, 2000).

²⁹ Stempel, Armenian & McClure, *supra* note 7, at 56.

³⁰ *Id.* at 52.

³¹ See *Marootian v. N.Y. Life Ins.*, Case No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274, at *53-54 (C.D. Cal. Nov. 28, 2001).

³² See Stempel, Armenian & McClure, *supra* note 7, at 64-65.

³³ See *Marootian*, 2001 U.S. Dist. LEXIS 22274, at 53-54.

³⁴ Stempel, Armenian & McClure, *supra* note 7, at 54.

Genocide victims, steadfastly claimed that the policies were time-barred and § 354.4 was preempted under the foreign affairs doctrine.³⁵

B. *Movsesian I*

Munich Re refiled a motion to dismiss under Rule 12(b)(6), which was partially denied. The pertinent part of the District Court holding was that § 354.4 was not preempted by the foreign affairs doctrine.³⁶ Munich Re then refiled an interlocutory appeal that resulted in *Movsesian I*. The three-judge panel for the Ninth Circuit decided on only one issue, concluding that, “[section] 354.4 impermissibly infringes on the Federal Government’s foreign affairs power and is preempted.”³⁷ This subsection will now analyze how the court reached this decision.

Even before beginning its analysis, the court pointed out how the legislative findings accompanying § 354.4 condemned as the “Armenian Genocide” the violence suffered by the Armenians during the years of 1915-1923 by the Turks.³⁸ The court then launched into a three-part analysis to find the statute preempted, first finding that there is an express federal policy against the legislative recognition of an Armenian Genocide.³⁹ Second, the court found that § 354.4 clearly conflicted with this express federal policy.⁴⁰ Third, the court examined the state’s interest in the litigation and decided that, on balance, the state’s interest was superficial compared to the government’s.⁴¹

The express federal policy enunciated by the court was embodied in an amalgam of statements and letters from three different Presidents. The court noted how on three different occasions the House of Representatives attempted to pass resolutions recognizing the

³⁵ See *Movsesian v. Victoria Versicherung AG*, (Movsesian I) 578 F.3d 1052, 1055 (9th Cir. 2009).

³⁶ See *id.* at 1055.

³⁷ See *id.*

³⁸ See *id.* at 1054 (“In the legislative findings accompanying the statute, the Legislature provides formal recognition to an ‘Armenian Genocide’: The Legislature recognizes that during the period from 1915 to 1923, many persons of Armenian ancestry residing in the historic Armenian homeland then situated in the Ottoman Empire were victims of massacre, torture, starvation, death marches, and exile. This period is known as the Armenian Genocide.”) (citations omitted).

³⁹ See *infra* notes 44-49 and accompanying text.

⁴⁰ See *infra* notes 56-58 and accompanying text.

⁴¹ See *infra* notes 59-61 and accompanying text.

Armenian Genocide and thrice the then-Executive expressed extreme displeasure at the idea.⁴² House Resolution 596 was proposed in 2000, which “called upon the President to ensure that the foreign policy of the United States reflects appropriate understanding and sensitivity concerning issues related to human rights, ethnic cleansing, and genocide documented in the United States record relating to the Armenian Genocide, and for other purposes.”⁴³ President Bill Clinton subsequently wrote a letter to the Speaker of the House expressing concern about the possible ramifications to Turkish-American Middle East military cooperation.⁴⁴ Moreover, Clinton urged the Speaker to not bring the Resolution to the floor at that time.⁴⁵ The second attempt, House Resolution 193, was met with similar resistance from President Bush in 2003, who wrote that such a resolution would only hamper the peace process between Armenia and Turkey.⁴⁶

Finally, House Resolution 106 was proposed in 2007 and the Bush Administration renewed its opposition to such a measure.⁴⁷ The Administration expressed displeasure through letters from both the Secretary of State and the Secretary of Defense.⁴⁸ President Bush also released a statement explaining that, while “[w]e all deeply regret the tragic suffering of the Armenian people that began in 1915 [. . . t]his resolution is not the right response to these historic mass killings, and its passage would do great harm to our relations with a key ally in NATO and in the global war on terror.”⁴⁹

⁴² *Movsesian v. Victoria Versicherung AG*, (Movsesian I) 578 F.3d 1052, 1057-60 (9th Cir. 2009).

⁴³ *See id.* at 1057.

⁴⁴ *See id.* (discussing a letter from President Clinton, which explains, “[I] am deeply concerned that consideration of H. Res. 596 at this time could have far-reaching negative consequences for the United States. We have significant interests in this troubled region of the world: containing the threat posed by Saddam Hussein; working for peace and stability in the Middle East and Central Asia; stabilizing the Balkans; and developing new sources of energy. Consideration of the resolution at this sensitive time will not only negatively affect those interests, but could undermine efforts to encourage improved relations between Armenia and Turkey—the very goal the Resolution’s sponsors seek to advance.”).

⁴⁵ *Id.* at 1057.

⁴⁶ *Id.* at 1059.

⁴⁷ *Id.* at 1058-59.

⁴⁸ *Id.* at 1057-58.

⁴⁹ *Id.* at 1059.

The court relied heavily upon *American Insurance Ass'n v. Garamendi*⁵⁰ to prove its contention that executive preemption can

⁵⁰ See *Am. Ins. v. Garamendi*, 539 U.S. 396, 396-97 (2003). *Garamendi* is a Supreme Court holding coming out of the Ninth Circuit that applies a broad application of express federal preemption. While the exact framework used is discussed below and was applied differently in *Movsesian I* and *Movsesian III*, the basic facts are as follows: “The Nazi Government of Germany confiscated the value or proceeds of many Jewish life insurance policies issued before and during the Second World War. After the war, even a policy that had escaped confiscation was likely to be dishonored, whether because insurers denied its existence or claimed it had lapsed from unpaid premiums, or because the German Government would not provide heirs with documentation of the policyholder’s death. These confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy after the war. Ultimately, the western Allies placed the obligation to provide restitution to victims of Nazi persecution on the new West German Government, which enacted restitution laws and signed agreements with other countries for the compensation of their nationals. Despite a payout of more than 100 billion deutsch marks as of 2000, however, these measures left out many claimants and certain types of claims. After German reunification, class actions for restitution poured into United States courts against companies doing business in Germany during the Nazi era. Protests by defendant companies and their governments prompted the United States Government to take action to try to resolve the matter. Negotiations at the national level produced the German Foundation Agreement, in which Germany agreed to establish a foundation funded with 10 billion deutsch marks contributed equally by the German Government and German companies to compensate the companies’ victims during the Nazi era. The President agreed that whenever a German company was sued on a Holocaust-era claim in an American court, the Government would (1) submit a statement that it would be in this country’s foreign policy interests for the foundation to be the exclusive forum and remedy for such claims, and (2) try to get state and local governments to respect the foundation as the exclusive mechanism. As for insurance claims in particular, both countries agreed that the German Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization whose mission is to negotiate with European insurers to provide information about and settlement of unpaid insurance policies, and which has set up procedures to that end. The German agreement has served as a model for similar agreements with Austria and France.

Meanwhile, California began its own enquiry into the issue, prompting state legislation designed to force payment by defaulting insurers. Among other laws, California’s Holocaust Victim Insurance Relief Act of 1999 (HVIRA) requires any insurer doing business in the State to disclose information about all policies sold in Europe between 1920 and 1945 by the company or any one “related” to it upon penalty of loss of its state business license. After HVIRA was enacted, the State issued administrative subpoenas against several subsidiaries of European insurance companies participating in the ICHEIC. Immediately, the Federal Government informed California officials that HVIRA would damage

occur even without a federal law or treaty expressly dealing with the issue.⁵¹ The court noted how “[t]he *Garamendi* Court relied on similar communications between the [Bush] Administration and state legislative and executive officials, in addition to several executive agreements, in finding that HVIRA [Holocaust Victim Insurance Relief Act] was preempted.”⁵² The court then infused a little bit of the famous *Youngstown*⁵³ framework and explained that Congress’s acquiescence to the Executive’s request to not legislatively recognize the Armenian Genocide gave the Executive even more power.⁵⁴ However, the main takeaway of the first prong of analysis was that there existed an “express federal policy prohibiting legislative recognition of an ‘Armenian Genocide,’ as embodied in the previously mentioned statements and letters of the President and other high-ranking executive branch officials.”⁵⁵

The second prong of the Ninth Circuit’s framework found that the California law was in “clear conflict” with the express federal policy.⁵⁶ The court looked at the legislative findings, which condemned the Turks for the massacre, torture, and exile of the Armenian nationals during the Armenian Genocide.⁵⁷ The court specifically fixated on the label “Armenian Genocide,” as this term remains highly offensive to

the ICHEIC, the only effective means to process quickly and completely unpaid Holocaust era insurance claims, and that HVIRA would possibly derail the German Foundation Agreement. Nevertheless, the state insurance commissioner announced that he would enforce HVIRA to its fullest. Petitioner insurance entities then filed this suit challenging HVIRA’s constitutionality. The District Court issued a preliminary injunction against enforcing HVIRA and later granted petitioners summary judgment. The Ninth Circuit reversed, holding, *inter alia*, that HVIRA did not violate the federal foreign affairs power.” The Supreme Court overturned the Ninth Circuit and held that California’s HVIRA was unconstitutionally preempted by the express federal policy on the matter. *Id.*

⁵¹ *Movsesian I*, 578 F.3d at 1059-60.

⁵² *See id.* at 1059.

⁵³ *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579(1952).

⁵⁴ *See Movsesian I*, 578 F.3d at 1059.

⁵⁵ *See id.* (discussing *Medellin* and limiting its holding to states having a wider right to pass criminal statutes and thus less likely to be preempted by federal criminal law).

⁵⁶ *Id.* at 1060.

⁵⁷ *Id.*

Turkey and caused the statute to be in clear conflict with federal policy against recognition.⁵⁸

Finally, in its third prong of analysis, the Ninth Circuit weighed the state's interest against the federal interest.⁵⁹ The court explained that laws governing the statute of limitations are, generally speaking, "within the state's traditional area of competence."⁶⁰ However, the court ultimately found California's interest to be "superficial" because the true goal of § 354.4 "[wa]s to provide a forum for the victims of the 'Armenian Genocide' and their heirs to seek justice."⁶¹ The Ninth Circuit concluded that "California Code of Civil Procedure § 354.4 is preempted because it directly conflicts with the executive branch's foreign policy refusing to provide official recognition to the 'Armenian Genocide.' Far from concerning an area of traditional state interest, § 354.4 impinges upon the National Government's ability to conduct foreign affairs."⁶²

C. *Movsesian II*

Just over a year after *Movsesian I* was decided, a petition to rehear was granted and the Ninth Circuit made a stunning reversal, finding that § 354.4 was constitutional.⁶³ The *Movsesian II* panel framed a very narrow issue, "whether § 354.4 conflicts with a clear, express federal executive policy," and held that it did not.⁶⁴ In its holding, the

⁵⁸ *Id.* at 1060-61 (explaining how "Movsesian ridicules the idea that two words could have such a 'talismanic' effect. The symbolic effect of the words, however, is precisely the problem. The federal government has made a conscious decision not to apply the politically charged label of 'genocide' to the deaths of these Armenians during World War I. Whether or not California agrees with this decision, it may not contradict it."). The court found that "[t]he Bush Administration warned that American recognition of an 'Armenian Genocide' could endanger America's alliance with Turkey." *Id.* at 1061. While *Movsesian I* seems to grapple with the idea that the mere words "Armenian Genocide" would invalidate a statute, the court found some solace in a letter from Condoleezza Rice.

⁵⁹ *Id.* at 1062-63.

⁶⁰ *Id.* at 1062.

⁶¹ *Id.*

⁶² *Id.* at 1063.

⁶³ *Movsesian v. Victoria Versicherung AG*, (Movsesian II) 629 F.3d 901, 909 (9th Cir. 2010).

⁶⁴ *See id.* at 903.

court found that there was no express federal policy restricting legislative recognition of the Armenian Genocide.⁶⁵

The *Movsesian II* Court, unlike *Movsesian I*'s three-part analysis, did not have a clear framework, but did make two distinct points relating to federal preemption. The first point asserted that there was no conflict preemption because any expression by the executive against legislative recognition of the Armenian Genocide was counterbalanced by many statements in support of such recognition.⁶⁶ The second point further asserted that there was no field preemption because California was regulating statute of limitations on insurance claims and not explicitly legislating foreign affairs.⁶⁷

As for conflict preemption, the court held that *Garamendi* was limited to executive agreements and not applicable to this case where there was no clear expression of an executive policy.⁶⁸ In *Garamendi* “the [Supreme] Court found that several executive agreements, coupled with statements from executive branch officials, constituted an express federal policy.”⁶⁹ By contrast, in *Movsesian I*, no such executive agreement existed. The executive expression of policy was merely deduced through informal letters, memoranda, and press releases.⁷⁰ This court held that these did not constitute enough of an executive expression to create a foreign policy with preemptive implications.⁷¹

Furthermore, the court examined how, for all the informal executive criticism against legislative recognition as evidenced by the executive impeding the passage of House Resolutions 193, 596, and 106, there were also numerous statements in support of recognition of the Armenian Genocide.⁷² For example, “[i]n 1984, the House similarly recognized ‘victims of genocide, especially the one and one-

⁶⁵ See *id.* at 905. (holding that “neither the Claims Agreement nor the War Claims Act, which resolved World War I-related claims between the United States and Germany, has any application to life insurance policies issued to citizens of the Ottoman Empire between 1915 and 1923.”). However, this Article is focused on the foreign affairs preemption part of the holding.

⁶⁶ See *infra* text accompanying notes 68-75.

⁶⁷ See also *infra* text accompanying notes 68-75.

⁶⁸ See *Movsesian II*, 629 F.3d at 906.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 906-07.

half million people of Armenian ancestry.”⁷³ Additionally, the Executive Branch has repeatedly used terms virtually indistinguishable from “Armenian Genocide.” For example, more recently, “President Obama publicly remembered the 1.5 million Armenians who were [] massacred or marched to their death in the final days of the Ottoman Empire. The *Meds Yeghern* must live on in our memories, just as it lives on in the hearts of the Armenian people.”⁷⁴ These executive expressions counterbalance, and potentially outweigh, the various informal executive statements against recognition of the Armenian Genocide.⁷⁵

As for field preemption, the Ninth Circuit in *Movsesian II* applied a generous *Garamendi* standard, finding that “field preemption would only apply 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.’”⁷⁶ It held that California was well within the traditional realm of state interests and that § 354.4 was a proper state regulation of insurance companies.⁷⁷ The court was unbothered by the fact that Armenian Genocide victims were receiving preferential legislation, holding that any foreign affairs implications were “at most . . . incidental . . . particularly considering that thirty-nine other states already officially recognize the Armenian Genocide.”⁷⁸ The Ninth Circuit concluded that the “California Code of Civil Procedure § 354.4 is not preempted by federal law. There is no clearly established, express federal policy forbidding state references to the Armenian Genocide. California’s effort to regulate the insurance industry is well within the realm of its traditional interests.”⁷⁹

⁷³ *Id.* (quoting H.J. Res. 247, 98th Congress (1984)).

⁷⁴ *See id.* at 907 (internal punctuation and citations omitted).

⁷⁵ *See id.* (“Considering the number of expressions of federal executive and legislative support for recognition of the Armenian Genocide, and federal inaction in the face of explicit state support for such recognition, we cannot conclude that a clear, express federal policy forbids the state of California from using the term ‘Armenian Genocide.’”).

⁷⁶ *Id.* (internal citations omitted).

⁷⁷ *Id.* at 907-08.

⁷⁸ *Id.* at 908.

⁷⁹ *Id.* at 909.

D. *Movsesian III*

On a rehearing *en banc*, the Ninth Circuit once again reversed and held § 354.4 unconstitutional as preempted by federal law.⁸⁰ While the holdings in *Movsesian I* and *Movsesian III* both struck down § 354.4, the reasoning behind *Movsesian III* involves a much broader application of field preemption.⁸¹ It is perhaps the widest application of such preemption and is virtually without precedent. The court's holding relies principally on two major field preemption cases, *Zschernig v. Miller*⁸² and *American Insurance Ass'n v. Garamendi*.⁸³

In *American Insurance*, the Supreme Court first briefly explained how foreign affairs preemption encompasses two related, but distinct, doctrines: conflict preemption and field preemption.⁸⁴ *Movsesian III* emphasized that the Supreme Court in *American Insurance* clarified that even in the absence of any express federal policy, a state law may still be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state

⁸⁰ See *Movsesian v. Victoria Versicherung AG*, (Movsesian III) 670 F.3d 1067, 1069–70 (9th Cir. 2012) (“We hold that section 354.4 is preempted and, accordingly, reverse the district court’s contrary ruling.”).

⁸¹ See *infra* Section II.E.

⁸² See *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁸³ See *Am. Ins. v. Garamendi*, 539 U.S. 396 (2003).

⁸⁴ See *id.* at 419 n.11 (explaining the difference between conflict and field preemption: “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. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941). Where, however, a State has acted within what Justice Harlan called its ‘traditional competence,’ 389 U.S., at 459, 88 S.Ct. 664, but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question. Cf. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947) (congressional occupation of the field is not to be presumed ‘in a field which the States have traditionally occupied’); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507–508, 108 S.Ct. 2510, 101 L.Ed.2d 442 (1988) (‘In an area of uniquely federal interest,’ [t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption’).”).

responsibility.⁸⁵ The *Movsesian III* Court then created a new two-pronged framework regarding field preemption analysis: (1) does the statute concern a traditional area of state responsibility; and (2) if it does not, then does the statute intrude on the Federal Government's foreign affairs power.⁸⁶ While loosely based on the Supreme Court holding in *Garamendi*, this is a totally new and expansive approach to field preemption.⁸⁷

In *Zschernig*, the Supreme Court struck down an Ohio state probate law that provided for escheatment unless the nonresident alien could demonstrate that the foreign country from which the alien came granted various reciprocal rights to United States citizens.⁸⁸ The Court recognized that even without any express federal treaty, statute, agreement, or executive order, this statute still infringed upon the Executive's foreign affairs power.⁸⁹ The statute effectively created a state foreign affairs policy and was therefore impermissible.⁹⁰

In *Zschernig*, the Supreme Court noted how in applying this probate law, the state courts were launching inquiries into foreign states and their systems of governance.⁹¹ It emphasized this thought further, stating "[a]s one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata."⁹² These matters, of course, are properly within the realm of the Federal Government and so the state statute, while not expressly preempted by federal law, was nevertheless preempted under field preemption.⁹³

⁸⁵ See *Movsesian III*, 670 F.3d at 1072.

⁸⁶ *Id.* at 1074.

⁸⁷ See *id.* at 1074 (setting forth the two-prong analysis "as *Garamendi* suggests").

⁸⁸ See *Zschernig v. Miller*, 389 U.S. 429, 430–31 (1968). The Oregon statute in question "provides for escheat in cases where a nonresident alien claims real or personal property unless three requirements are satisfied:

(1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.'" *Id.*

⁸⁹ See *id.* at 432.

⁹⁰ See *id.*

⁹¹ See *infra* notes 92-93 and accompanying text.

⁹² See *Zschernig*, 389 U.S. at 437.

⁹³ See *id.* at 441 (explaining how the "Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet . . . it has a direct impact upon

Garamendi further clarified this concept of field preemption. The Supreme Court in *Garamendi* held unconstitutional a California state statute, the Holocaust Victim Insurance Relief Act (“HVIRA”), which required any insurance company doing business in California to disclose information regarding its policies sold in Europe between 1920 and 1945.⁹⁴ HVIRA was expressly preempted by multiple executive agreements, which the Court, relying on *Zschernig*, held to have preemptive power, especially in instances of clear conflict.⁹⁵

The *Movsesian III* Court focused, admittedly, on the dicta and a footnote of the *Garamendi* holding.⁹⁶ In footnote eleven of *Garamendi*, the Supreme Court noted that conflict and field preemption may in fact be complementary if a “state were to take a position on a matter of foreign policy with no serious claim to addressing a traditional state responsibility.”⁹⁷ The *Movsesian III* Court further noted how “[t]he *Garamendi* Court in dicta rejected the ‘traditional state interests’ advanced by California in support of HVIRA, finding instead that the real purpose of the state law was the ‘concern for the several thousand Holocaust survivors said to be living in the state.’”⁹⁸ The court made this determination even though the state posited that the statute attempted to regulate property, a traditional state interest.⁹⁹

Building on *Garamendi* and *Zschernig*, the court in *Movsesian III* enunciated a new framework of field preemption. Specifically, it explained that field preemption, while rare, is appropriate when the state is without a real claim addressing a traditional state interest, and it intrudes on a clear matter of foreign policy.¹⁰⁰ As for the first prong, the court held that, while regulating insurance is a traditional state interest, § 354.4 is clearly trying to provide a friendly forum for

foreign relations and may well adversely affect the power of the central government to deal with those problems.”).

⁹⁴ See *Am. Ins. v. Garamendi*, 539 U.S. 396 (2003).

⁹⁵ *Id.* at 397.

⁹⁶ See *infra* note 97.

⁹⁷ See *Garamendi*, 539 U.S. at 420 n.11.

⁹⁸ See *Movsesian v. Victoria Versicherung AG*, (*Movsesian III*) 670 F.3d 1067, 1074 (9th Cir. 2012) (internal citations omitted).

⁹⁹ *Id.*

¹⁰⁰ See *id.* (applying this new framework for field preemption as “*Garamendi* suggests”). However, this Article explains why *Garamendi* is poor support for this new test.

monetary relief for Armenian Genocide victims.¹⁰¹ As for the second prong, the court relied on *Zschernig* to support its contention that since § 354.4 “expresses a distinct political point of view on a specific matter of foreign policy,” it is preempted.¹⁰² Moreover, the distinct political point of view in *Movsesian III* was that California imposed the politically charged term “genocide” into its legislation.¹⁰³ The court further explained that in applying § 354.4 “[c]ourts . . . may . . . have to decide whether the policyholder ‘escaped to avoid persecution,’ (citations omitted) which in turn would require a highly-politicized inquiry into the conduct of a foreign nation.”¹⁰⁴ The court also noted how Turkey remains very committed to preventing the Armenian Genocide from being formally acknowledged as such, and so this remains a hotly contested foreign affairs issue.¹⁰⁵ Therefore, § 354.4 unconstitutionally infringed on the executive’s powers to conduct foreign affairs unimpeded by the states.¹⁰⁶

E. *Movsesian I vs. Movsesian III*

The *Movsesian I* holding seems to be a simple application of conflict preemption, including peripherally weighing the federal and state interests at the conclusion of the decision. In this regard, *Movsesian I* mirrors the *Garamendi* holding almost step for step. In a nutshell, such a holding looks for (1) express federal policy, which may include an incredible amount of even informal executive communication, and (2) a state statute that is clearly conflicting. While this is technically enough grounds for finding preemption, (3) the court will then balance the federal interest as compared to how generally applicable the state law is and how much it relates to a traditional state interest.¹⁰⁷

Finding the expression of clear federal policy was the major issue for the court in *Movsesian I*. While *Garamendi* relied upon multiple executive agreements to resolve American citizens’ claims against a

¹⁰¹ See *id.* at 1076 (“Thus, it is clear that the real purpose of section 354.4 is to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events.”).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* notes 9-11 and accompanying text.

¹⁰⁶ See *Movsesian III*, 670 F.3d at 1077.

¹⁰⁷ See *supra* Section II.B.

foreign country, *Movsesian I* relied on three informal letters from the President and members of the President's Cabinet to create federal law.¹⁰⁸ The dissent in *Movsesian I* as well as the majority in *Movsesian II* simply showed that such informal communications have never been given preemptive effect.¹⁰⁹ Additionally, there were numerous informal communications pushing for a legislative recognition of the Armenian Genocide that easily counterbalanced any federal expressions to the contrary.¹¹⁰

In endeavoring to fix the obvious hole in *Movsesian I*, the *Movsesian III* Court decided that there was no need to find an express federal policy against legislative recognition of the Armenian Genocide and instead substantially widened the boundaries of the seldom-used doctrine of field preemption.¹¹¹ Instead of relying on the principal holding of *Garamendi*, which is rooted in conflict preemption, the court in *Movsesian III* grasped at the dicta and footnotes relating to *Garamendi*'s understanding of *Zschernig*, an older field preemption case.¹¹²

The *Movsesian III* Court used *Garamendi* to show that § 354.4 was not legislating a traditional state interest.¹¹³ The *Movsesian III* Court also used *Zschernig* to show that § 354.4 intruded on the Federal Government's foreign affairs powers.¹¹⁴ As this Article will explore in the following section, these cases simply do not support the contentions for which the *Movsesian III* Court used them. There are very clear distinctions and, furthermore, this broad understanding of field preemption has been severely called into question by the Supreme Court's holding in *Medellin*.¹¹⁵

¹⁰⁸ *See id.*

¹⁰⁹ *See Movsesian v. Victoria Versicherung AG*, (Movsesian II) 629 F.3d 901, 906 (9th Cir. 2010) (“Munich Re argues that these communications are sufficient to constitute an express federal policy. They are not. The three cited executive branch communications arguing against recognition of the Armenian Genocide are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition.”).

¹¹⁰ *Id.*

¹¹¹ *See Movsesian III*, 670 F.3d at 1075 (explaining how “[f]ield preemption is a rarely invoked doctrine”).

¹¹² *See supra* notes 96-99 and accompanying text

¹¹³ *See supra* note 101.

¹¹⁴ *See supra* notes 102-106 and accompanying text.

¹¹⁵ *See infra* Section III.B.

III. *MOVSESIAN III* ISSUES: AN UTTER LACK OF PRECEDENT

There are two principal issues with the *Movsesian III* holding, both of which have been expressed and explored in numerous scholarly articles. Therefore, this Article will only briefly expound on them. The first problem is that after taking an even superficial look at *Garamendi* and *Zschernig*, it is clear that they are very clearly distinguishable from the facts in *Movsesian*.¹¹⁶ Even the few selected facts that were included in the *Movsesian III* opinion have glaring and critical differences from those cases. Secondly, the basic holding in *Movsesian III* relies on *Zschernig*, which is further explained by *Garamendi*. However, more recent Supreme Court cases have greatly reduced such wide application of field preemption. Many scholars believe that *Medellin*¹¹⁷ limits foreign affairs field preemption strictly to “executive agreements to settle civil claims between American citizens and foreign governments.”¹¹⁸ This Section will briefly explain these two issues.

A. *Zschernig* and *Garamendi* Are Easily Distinguishable

The three authors of “Stoney Road Out of Eden: The Struggle to Recover Insurance for Armenian Genocide Deaths and Its Implications for the Future of State Authority, Contract Rights, and Human Rights,” strongly criticize the *Movsesian III* holding.¹¹⁹ While they discuss how the cited cases in *Movsesian III* are distinguishable from it, the principal focus of their criticism is in the Ninth Circuit’s extreme widening of federal preemption.¹²⁰ This Section will show that from a pure stare decisis viewpoint, the *Movsesian III* decision is devoid of true support.¹²¹

¹¹⁶ See generally Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 LOY. L.A. INT’L & COMP. L. REV. 19 (2010) (distinguishing the facts of *Zschernig* and *Garamendi* from those of *Movsesian* and further explaining how “*Movsesian*’s result is . . . inconsistent with the U.S. Supreme Court’s decision in *Medellin*.”) *Id.* at 20.

¹¹⁷ See *Medellin v. Texas*, 552 U.S. 491 (2008); see also *infra* note 143 (explaining the basic facts and holding in *Medellin*).

¹¹⁸ See *Medellin*, 552 U.S. at 491.

¹¹⁹ See generally Stempel, Armenian & McClure, *supra* note 7.

¹²⁰ See *id.*

¹²¹ See *infra* Section III.A. This Article focuses primarily on Supreme Court precedent, thus, the two Ninth Circuit cases on which the *Movsesian III* Court relies will not be examined here.

1. *Garamendi*

As noted above, the *Movsesian III* Court used *Garamendi* to support the first prong of the field preemption analysis, which is that § 354.4 “does not concern an area of traditional state responsibility.”¹²² The court relied on the legislative history of § 354.4 to conclude that, although technically a regulation on insurance, the principal aim of the statute was to provide potential monetary relief and a friendly forum for Armenian Genocide victims.¹²³

However, *Garamendi* is simply not a field preemption case at all. Rather, it established the widening application of conflict preemption.¹²⁴ *Garamendi* stands for the contention that executive expression on foreign affairs carrying the gravity of preemption can develop even through informal communications.¹²⁵ Moreover, *Garamendi* is a case where executive agreements created a preemptible executive foreign policy.¹²⁶ While the *Garamendi* majority in dicta and a footnote used language that could be instructive for a field preemption analysis, *Garamendi* is not binding precedent for the *Movsesian III* holding, which is clearly rooted in field preemption.¹²⁷

Interestingly, the *Movsesian III* Court holding is slightly confusing as to how much importance it gave to *Garamendi* as support. The court itself noted that the support from *Garamendi* was not binding.¹²⁸ However, once the court reached the application of the holding there were no limiting words on the *Garamendi* ruling as a non-binding precedent. The court simply wrote:

*This is precisely the same purpose underlying HVIRA,
the statute held unconstitutional in Garamendi,*

¹²² See *Movsesian v. Victoria Versicherung AG*, (Movsesian III) 670 F.3d 1067, 1076 (9th Cir. 2012); see also *supra* notes 97-99 and accompanying text.

¹²³ See *supra* note 101 and accompanying text.

¹²⁴ See Stempel, Armenian & McClure, *supra* note 7, at 60.

¹²⁵ *Id.*

¹²⁶ *Id.* This is precisely how the *Movsesian I* Court used *Garamendi*, albeit, in an overly broad fashion.

¹²⁷ See *id.* at 71 n.296 (explaining that *Garamendi* is a “conflict” preemption case and *Movsesian* is a “field” preemption case and thus, *Garamendi* is far from binding authority mandating the *Movsesian* holding.).

¹²⁸ See *Movsesian v. Victoria Versicherung AG*, (Movsesian III) 670 F.3d 1067, 1074 (9th Cir. 2012) (focusing on *Van Saher*, another Ninth Circuit case, and how the proposed field preemption test supposedly extrapolated from *Garamendi* should be used).

*and section 354.3, the state law held preempted in Von Saher. As Garamendi and Von Saher make clear, that goal, however laudable it may be, “is not an area of ‘traditional state responsibility,’ and the statute is therefore subject to a field preemption analysis.” Von Saher, 592 F.3d at 965; see also Garamendi (noting the weakness of the state’s interest in vindicating the insurance claims of Holocaust survivors). In sum, section 354.4 does not concern an area of traditional state responsibility.*¹²⁹

Ultimately, it seems that the court was appropriately relying more on *Van Saher*¹³⁰ for its field preemption implications than on *Garamendi*.¹³¹ However, the entire buildup to this analysis seemed to give much more weight to *Garamendi*, but then suddenly the court utilized as precedent the holdings of the Ninth Circuit, rather than those of the Supreme Court. The lack of clear Supreme Court precedent undoubtedly weakens the *Movsesian III* holding.

2. *Zschernig*

The *Movsesian III* Court uses *Zschernig* to support the second prong of its field preemption analysis, which is that “§ 354.4 intrudes on the Federal Government’s foreign affairs power.”¹³² As explained above, the court made two points: (1) § 354.4 expresses a distinct political view by using the words “Armenian Genocide”; and (2) because courts applying § 354.4 must decide if the plaintiff “escaped to avoid persecution,” thus requiring courts to make a highly-politicized inquiry into the conduct of a foreign nation.¹³³

Zschernig is distinguishable and therefore clearly not binding precedent for either of the court’s two contentions in *Movsesian III*.¹³⁴ In *Zschernig*, the Supreme Court analyzed many different cases

¹²⁹ *Id.* at 1076.

¹³⁰ *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010).

¹³¹ See discussion *supra* Section III.A.1.

¹³² See *Movsesian III*, 670 F.3d at 1076; see also *supra* note 102 and accompanying text.

¹³³ See *supra* notes 102-106 and accompanying text.

¹³⁴ See generally *Zschernig v. Miller*, 389 U.S. 429 (1968).

involving the application of the Oregon reciprocal intestacy statute.¹³⁵ The Court noted that:

*In short, it would seem that Oregon judges in construing § 111.070 seek to ascertain whether “rights” protected by foreign law are the same “rights” that citizens of Oregon enjoy. If, as in the Rogers case, the alleged foreign “right” may be vindicated only through Communist-controlled state agencies, then there is no “right” of the type § 111.070 requires. The same seems to be true if enforcement may require approval of a Fascist dictator, as in Krachler. The statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.*¹³⁶

After this robust inspection into how the Oregon courts were construing the statute to make judgments about foreign countries, the Court held the statute preempted due to its potential frustration of United States federal foreign policy.¹³⁷

Section 354.4 clearly does not require such an intrusive inquiry, nor are there any California cases that the Supreme Court can point to showing that § 354.4 would force such an inquiry. All that a California court must determine is whether the potential plaintiff fled her country to avoid persecution.¹³⁸ This determination is far from a highly-politicized inquiry into the functions of an existing government and making judgments as to its democratic value. As it relates to the Turkish government, both current and past, the analysis involves absolutely no such judgment at all.¹³⁹ The application of the statute would be purely a factual determination relating to the plaintiff and her personal motives for fleeing.

¹³⁵ See *id.* at 430-31. (“[The statute] provide[d] for escheat in cases where a nonresident alien claims real or personal property unless three requirements are satisfied: (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates ‘without confiscation.’”).

¹³⁶ *Id.* at 440.

¹³⁷ *Id.* at 441.

¹³⁸ See CAL. CIV. PROC. CODE § 354.4 (West 2011)

¹³⁹ See Stempel, Armenian & McClure, *supra* note 7, at 71 n.296.

The issue in *Zschernig* was not the expression of a distinct political viewpoint as the *Movsesian III* Court would like to intimate.¹⁴⁰ The issue lay in how the Oregon courts were applying the statute and the value-laden judgments those courts were making on then-existing foreign governments, on the court record.¹⁴¹ The court in *Movsesian III* focused on the dicta in *Zschernig* without applying its actual holding.

B. *Medellin* as a Limiter

The second issue with *Movsesian III* is that the Supreme Court's holding in *Medellin* seems to severely cut back on the applicability of field preemption.¹⁴² Interestingly, *Movsesian I* briefly distinguished *Medellin*¹⁴³ as applicable only in the realm of criminal law.¹⁴⁴ However, *Movsesian III* completely failed to even mention *Medellin*, let alone distinguish it.¹⁴⁵ This issue is noted and discussed in an

¹⁴⁰ See *id.* A valid argument can also be made that § 354.4 is not expressing a distinct political point by using the words “Armenian Genocide” as because the facts speak for themselves and the executive has made multiple statements regarding the Genocide just not in those words.

¹⁴¹ See *Zschernig*, 389 U.S. at 433-34.

¹⁴² See A. Mark Weisburd, *Medellin, the President's Foreign Affairs Power and Domestic Law*, 28 PENN. ST. INT'L L. REV. 595, 625-27 (2010).

¹⁴³ See generally *Medellin v. Texas*, 552 U.S. 491 (2008). Briefly stated, the facts of *Medellin* are as follows. The United States entered a treaty in which any international citizen arrested in the US be given the chance to contact that person's embassy or consulate. José Medellín, a Mexican national arrested, convicted and sentenced to death for a horrific double murder in Houston. After conviction and sentencing, Medellín objected that Texas had failed to inform him of his rights under the treaty. The Texas court denied relief on grounds that it was too late. After the United States rejected Mexico's diplomatic overtures, Mexico filed suit against the United States in the ICJ. The ICJ ruled that the case be reexamined. Then President George W. Bush issued a memorandum directing that state courts comply with the ICJ ruling of the treaty: Texas refused. The case proceeded to the Supreme Court on two issues; (1) statute of limitations; and (2) did the ICJ decision or the President's Memorandum supersede Texas state law. See *id.*

¹⁴⁴ See *Movsesian v. Victoria Versicherung AG*, (Movsesian I) 578 F.3d 1052, 1059 (9th Cir. 2009) (“In prior cases where the presidential policy at issue implicated criminal law (an area traditionally left to the states to regulate), or foreign commerce (an area delegated by the Constitution to Congress), the Court has refused to accord the policy preemptive effect.”).

¹⁴⁵ See generally *Movsesian v. Victoria Versicherung AG*, (Movsesian III) 670 F.3d 1067 (9th Cir. 2012); see also Stempel, *Armenian & McClure*, *supra* note 7, at 75-76.

article by Professor Michael D. Ramsey.¹⁴⁶ While Professor Ramsey's criticism is on the *Movsesian I* decision, it is obviously applicable to the *Movsesian III* holding as well.

While much of the Supreme Court's discussion in *Medellin* relates to the International Court of Justice ("ICJ") ruling and the non-self-executing nature of treaties, the plain language of *Medellin* clearly limits the wide application of field preemption.¹⁴⁷ The United States argued, with support presumably from *Garamendi*, that Texas law must give way to the express executive foreign policy that was expressed in the President's memorandum.¹⁴⁸ The Court limited *Garamendi* to its facts and explained that "[t]he claims-settlement cases involve a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals."¹⁴⁹ This language clearly limits the applicability of *Garamendi*.

While Professor Ramsey's criticism is true regarding *Movsesian I*, one could argue that because *Movsesian III* is rooted in field preemption and not conflict preemption, *Medellin* has no applicability at all. However, this is clearly not the case. *Movsesian III*'s entire support comes from dicta in *Garamendi* (and *Zschernig*) and if the principal holding has been so limited, then what validity could such dicta carry?

The First Circuit, while expressing no opinion as to whether *Medellin* is a limiter or not, succinctly summarized the different opinions then in existence as follows:

We recognize that the Supreme Court's decision in Medellin v. Texas, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008), may have cast doubt on the continuing vitality of Garamendi. See, e.g., A. Mark Weisburd, Medellin, the President's Foreign Affairs Power and Domestic Law, 28 Penn St. Int'l L.Rev. 595, 625 (2010) ("One fairly clear consequence of Medellin is that the very broad language used in American Ins. Ass'n v. Garamendi no longer carries weight." (footnote omitted)). But see In re Assicurazioni Generali, S.P.A., 592 F.3d 113, 119 n. 2

¹⁴⁶ See Ramsey, *supra* note 116, at 19.

¹⁴⁷ See *Medellin*, 552 U.S. at 497-98, 525.

¹⁴⁸ *Id.* at 495.

¹⁴⁹ *Id.*

(2d Cir.2010) (concluding that *Medellin* is consistent with a broad understanding of *Garamendi*)¹⁵⁰; *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1059 (9th Cir. 2009) (acknowledging *Medellin*¹⁵¹ but nonetheless applying *Garamendi* broadly). We express no opinion on that issue.¹⁵²

Despite the First Circuit refraining from expressing any opinion on the matter, there is much criticism and doubt regarding the continued viability of *Garamendi*.

IV. FINDING A CIRCUIT SPLIT AND FINDING A FRIENDLY FORUM

Even if *Medellin* is not a limiter, *Garamendi* simply may not mean what the Ninth Circuit assumes it means. *Garamendi* may simply be a widened application of federal express conflict preemption and not field preemption.¹⁵³ This Section will demonstrate that there are other cases where the Supreme Court showed its willingness to limit

¹⁵⁰ Interestingly, the exact words of the Second Circuit in *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 119 n.2 (2d Cir. 2010) are as follows: (“We find nothing inconsistent with this position in the reference in *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008), to ‘cases in which [the Supreme Court] has upheld the authority of the President to settle foreign claims pursuant to an executive agreement.’ *Id.* at 1371.”).

So, while in *Generali*, where the plaintiffs sought the benefits of life insurance policies bought by Holocaust victims from an Italian company, the Court easily found *Garamendi* to be applicable, to the point that *Medellin* has supplanted or limited *Garamendi* it had no effect on the *Generali* holding simply because even per *Medellin* the executive has preemptive power with regards to settling claims against foreign governments or foreign nationals, which was the case in *Generali* since the Court found that “such law suits (suits against foreign insurance companies for the benefits of Holocaust victims’ insurance policies) are *directly* in conflict with the Government’s policy that claims should be resolved exclusively through the ICHEIC.” Therefore, the First Circuit’s barebones assertion that the Second Circuit has not found *Medellin* to be limiting *Garamendi* is not strictly true.

¹⁵¹ *Movsesian v. Victoria Versicherung AG*, (Movsesian I) 578 F.3d 1052, 1059 (9th Cir. 2009) (referring to *Movsesian I* as *Movsesian III* did not make mention of *Medellin* at all).

¹⁵² See *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 12 n.12 (1st Cir. 2010).

¹⁵³ See discussion *supra* Section III.A.1.

Garamendi.¹⁵⁴ Additionally, this Section will attempt to show that there currently seems to be a circuit court split as to how far reaching field preemption is considering *Garamendi*, irrespective of *Medellin* as a limiter. This circuit split could have a substantial impact on future litigation in the areas of field and conflict preemption, as well as act as a guide for groups seeking newly enacted state legislation that could possibly implicate a foreign policy.¹⁵⁵

In *Chamber of Commerce v. Whiting*,¹⁵⁶ the Supreme Court once again used extremely limiting language in its characterization of *Garamendi*. In *Whiting*, an Arizona state law providing “that the licenses of state employers that knowingly or intentionally employ unauthorized aliens may be, and in certain circumstances must be, suspended or revoked,” was challenged under express and implied federal preemption.¹⁵⁷ The government posited that the Arizona law was impliedly preempted by a federal statute.¹⁵⁸ The government relied heavily on the *Garamendi* holding regarding implied preemption.¹⁵⁹

The Court easily disregarded *Garamendi* as precedent for implied preemption in this instance through two short arguments. First, the Court explained how “[a]s an initial matter, the cases on which the Chamber relies in advancing this argument all involve uniquely federal areas of regulation. *See American Ins Assn. v. Garamendi* . . .

¹⁵⁴ See *infra* text accompanying notes 153-59.

¹⁵⁵ See Evan Bernick, *The Circuit Splits Are Out There—and the Court Should Resolve Them*, FEDERALIST SOC’Y (Aug. 13, 2015), <https://fedsoc.org/commentary/publications/the-circuit-splits-are-out-there-and-the-court-should-resolve-them> [http://perma.cc/W4VC-44K3] (explaining how circuit splits are generally a reason for the Supreme Court to grant certiorari).

¹⁵⁶ See generally *Chamber of Commerce v. Whiting* 563 U.S. 582 (2011).

¹⁵⁷ *Id.* at 587.

¹⁵⁸ See *id.* at 588-89. (“The Immigration Reform and Control Act (IRCA) makes it ‘unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.’ 8 U.S.C. § 1324a(a)(1)(A). Employers that violate that prohibition may be subjected to federal civil and criminal sanctions. IRCA also restricts the ability of States to combat employment of unauthorized workers; the Act expressly preempts ‘any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.’ § 1324a(h)(2).”).

¹⁵⁹ *Id.* at 604.

(presidential conduct of foreign policy).”¹⁶⁰ Second, the Court explained that “In *Garamendi*, a state law imposing sanctions on insurance companies directly ‘thwart[ed] the [Federal] Government’s policy of repose’ for insurance companies that participated in an international program negotiated by the President.”¹⁶¹ This very narrow interpretation of *Garamendi* harmonized with the Supreme Court’s general trend toward limiting the implications of the *Garamendi* holding.¹⁶²

A. Circuit Split

Garamendi represents the first time since *Zschernig* that the Supreme Court weighed in on the application of federal field preemption.¹⁶³ *Garamendi* itself recognized that *Zschernig* left unanswered questions, but opted to circumvent these issues and focus instead on express conflict preemption.¹⁶⁴ Consequently, while *Garamendi* carries definite implications for a field preemption analysis, it is not a pure field preemption case.¹⁶⁵ Furthermore, to the extent that *Garamendi* widens federal preemption, it seems likely to have been limited by *Medellin* and possibly *Whiting*.¹⁶⁶

However, the Ninth Circuit clearly understood *Garamendi* to have serious field preemption overtones and implications given that it applied a field preemption test to *Movsesian III* as “*Garamendi* suggests.”¹⁶⁷ The Fifth¹⁶⁸ and Second¹⁶⁹ Circuits seem to have adopted

¹⁶⁰ *Id.* (citation omitted).

¹⁶¹ *Id.*

¹⁶² See discussion *supra* Section III.B.

¹⁶³ See *Movsesian v. Victoria Versicherung AG*, (*Movsesian III*) 670 F.3d 1067, 1073 (9th Cir. 2012) (explaining how “[m]ore than three decades later [after the *Zschernig* decision], in *Garamendi*, the Supreme Court clarified when the application of the field preemption doctrine might be appropriate.”).

¹⁶⁴ See *Am. Ins. v. Garamendi*, 539 U.S. 396, 419–20 (2003) (“It is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, but the question requires no answer here.”).

¹⁶⁵ See *id.* (explaining that “we think petitioners and the Government have demonstrated a sufficiently clear conflict to require finding preemption here”) The clear conflict resulted from three international agreements which the United States was party to.

¹⁶⁶ See discussion *supra* Section III.B; see also *supra* text accompanying notes 153–59.

¹⁶⁷ See *Movsesian III*, 670 F.3d at 1074.

¹⁶⁸ See generally *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010).

a similar interpretation of *Garamendi*. By contrast, the First Circuit understood *Garamendi* as pertaining to express conflict preemption.¹⁷⁰ Similarly, the Third Circuit has discussed *Garamendi* in a very limited fashion.¹⁷¹

With so many of the federal appellate courts weighing in and so many of them applying their understanding of *Garamendi* in different ways, this issue of federal field preemption is ripe for a Supreme Court ruling. Even assuming this split is not clear enough to require Supreme Court review, this Article provides a roadmap for jurisdictions with a more tempered view of field preemption, thereby providing a friendlier forum for Armenian litigants and future similarly situated litigants.

B. Fifth Circuit

The Fifth Circuit seems to understand *Garamendi* as a field preemption case, as evidenced in *Dunbar v. Seger-Thomschitz*,¹⁷² where the court discussed *Garamendi* in dicta. In *Dunbar*, the current owner of a valuable painting sued for quiet title under Louisiana's prescription laws (statute of limitations).¹⁷³ The painting originally belonged to Raimund Reichel whose sole heir, Dr. Seger-Thomschitz, alleged that the painting was confiscated from Reichel by the Nazis in a forced sale.¹⁷⁴ The basic facts about the ownership and chain of title were undisputed, however, Dunbar simply claimed that true title was acquired through acquisitive prescription.¹⁷⁵ The District Court granted summary judgment to Dunbar.¹⁷⁶

On appeal, Seger-Thomschitz argued that federal common law should replace Louisiana's prescription law and, pertinent to the issue at hand, that the "Terezin Declaration"¹⁷⁷ should preempt Louisiana

¹⁶⁹ See generally *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113 (2d Cir. 2010).

¹⁷⁰ See generally *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010).

¹⁷¹ See generally *Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006).

¹⁷² See generally *Dunbar*, 615 F.3d 574.

¹⁷³ See *id.* at 575.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 576.

¹⁷⁷ See *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 13 (1st Cir. 2010) (explaining that, "The parties to the Declaration stated, in relevant part: [W]e urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just

state law.¹⁷⁸ The Court initially noted that because this argument was initially only brought up on appeal, it would not explore this issue.¹⁷⁹ The court then explained that “[e]ven if we were to consider Appellant’s preemption theory, it is untenable.”¹⁸⁰ Appellants argued that “[t]he policy represented by the Terezin Declaration should preempt Louisiana prescription periods because it expresses a preference to adjudicate claims for recovery of Nazi-confiscated artworks on their facts and merits.”¹⁸¹

Seger-Thomschitz principally relied on *Garamendi* as support that a federal policy evidenced in executive agreements and treaties can have preemptive effect against state law.¹⁸² The court easily distinguished *Garamendi*, stating that:

*California was essentially pursuing independent policy objectives in favor of Holocaust victims. The existence of its law limited the President’s ability to exercise his preeminent foreign affairs authority. In this case, Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state’s prescription periods apply generally to any challenge of ownership to movable property, and are well within the realm of traditional state responsibility.*¹⁸³

The court’s characterization of *Garamendi* is a clear indicator that the Fifth Circuit understood *Garamendi* as a field preemption case. In explaining the *Garamendi* holding, the court wrote:

and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.”).

¹⁷⁸ See *Dunbar*, 615 F.3d at 577.

¹⁷⁹ See *id.*

¹⁸⁰ *Id.* at 578.

¹⁸¹ See *id.* at 578-79 (“As additional support, Appellant cites statements by various executive branch officials expressing concern that such claims were not being adjudicated on the merits but were barred by statutes of limitations and other defenses.”).

¹⁸² *Id.* at 578.

¹⁸³ *Id.* at 579.

*Significantly, Garamendi found preemption while acknowledging the absence of either an express federal preemption clause or a direct conflict between California and federal law. Garamendi noted, however, that where a state has acted within “its traditional competence, but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or traditional importance of the state concern asserted.”*¹⁸⁴

If the court understood *Garamendi* to be an express conflict preemption case, as this Article proposes, it might have simply distinguished *Garamendi* because there is no express federal policy expressed in *Dunbar*. The Fifth Circuit clearly understands *Garamendi* as the Ninth Circuit did: as a field preemption case where the state ventured beyond its “traditional competence.”¹⁸⁵

C. Second Circuit

The Second Circuit in *In re Assicurazioni Generali, S.P.A.*,¹⁸⁶ also seemed to apply *Garamendi* as a field preemption case, however, it is not perfectly clear on this point.¹⁸⁷ *Generali* involved a direct application of *Garamendi* and as such the facts are not as critical to this analysis.. Briefly stated, plaintiffs were beneficiaries of insurance policies sold by Generali, an Italian insurance company, to Holocaust victims during the years of 1920-1942.¹⁸⁸ Many similar lawsuits, originating in different circuits, were consolidated and transferred to the Southern District of New York.¹⁸⁹ Relying on the *Garamendi* ruling, which came down from the Supreme Court in 2003, the District Court dismissed all these actions the following year.¹⁹⁰ On appeal, the Second Circuit found *Garamendi* to be controlling precedent and upheld the District Court’s dismissal.¹⁹¹ According to the court, the

¹⁸⁴ *Id.* at 578 (citations omitted).

¹⁸⁵ *Id.*

¹⁸⁶ *See generally In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113 (2d Cir. 2010).

¹⁸⁷ *See infra* text accompanying notes 192-95.

¹⁸⁸ *See Generali*, 592 F.3d at 115-18 (regarding the background and procedural history).

¹⁸⁹ *Id.* at 116.

¹⁹⁰ *Id.* at 117.

¹⁹¹ *Id.* at 120.

claims against *Generali* were precisely the kinds of claims that the United States government previously had agreed with Germany to be handled by the International Commission on Holocaust Era Insurance Claims (“ICHEIC”).¹⁹² In *Garamendi*, the California law merely mandated disclosure requirements on insurance companies regarding all policies sold in Europe between 1920 and 1945.¹⁹³ But “although not directly in conflict with government’s policy to encourage use of the ICHEIC to resolve Holocaust-era insurance claims, [the California law] nonetheless undermined the Government’s objective” and was therefore preempted.¹⁹⁴ In contrast, *Generali* was a direct lawsuit against an insurance company for benefits owed due to actions occurring during World War II.¹⁹⁵ The court explained that “such law suits are *directly* in conflict with the Government’s policy that claims should be resolved exclusively through the ICHEIC.”¹⁹⁶

The court in *Generali* characterized *Garamendi* first as a conflict preemption case, but then, in answering the plaintiffs’ attempts to

¹⁹² See *id.* at 116 (providing a brief history and overview of the facts leading up to both the *Garamendi* and *Generali* litigation: “In July 2000, the United States announced an agreement with Germany in which the German government agreed to enact legislation to establish a foundation that would be used to compensate all victims who suffered at the hands of German companies during the Nazi era. In return, the United States agreed that whenever a German company was sued on a Holocaust-era claim in an American (state or federal) court, the government of the United States would submit a statement of interest to the court explaining 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 With respect to insurance claims, the agreement specified that the German foundation would work with the ICHEIC to handle insurance claims. The ICHEIC was formed in 1998 by ‘several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners,’ to negotiate with European insurers to provide information about unpaid policies issued to Holocaust victims between 1920 and 1945, and to settle any claims that arose in the Holocaust era under these policies.”) (citations omitted).

¹⁹³ See *Am. Ins. v. Garamendi*, 539 U.S. 396, 397 (2003) (“[a]mong other laws, California’s Holocaust Victim Insurance Relief Act of 1999 (HVIRA) requires any insurer doing business in the State to disclose information about all policies sold in Europe between 1920 and 1945 by the company or any one “related” to it upon penalty of loss of its state business license.”).

¹⁹⁴ See *Generali*, 592 F.3d at 118.

¹⁹⁵ *Id.* at 113.

¹⁹⁶ *Id.* at 118.

distinguish *Generali* from *Garamendi*, seemed to consider *Garamendi* to be a field preemption case. In introducing *Garamendi*, the Court wrote that “[i]n *Garamendi*, the Supreme Court explained that state law ‘must give way’ to the foreign policy of the United States, as set by the President, where there is ‘evidence of clear conflict between the policies adopted by the two.’”¹⁹⁷ These words evidence an understanding that *Garamendi* is rooted in conflict preemption.

The court demonstrated that while *Generali* is distinguishable from *Garamendi* in that there was no executive agreement between the United States and Italy, this argument is unconvincing.¹⁹⁸ Specifically, the court stated:

*The Court in Garamendi . . . did not find that the United States policy of encouraging resolution of Holocaust-era insurance claims through the ICHEIC depended on the existence of executive agreements. Rather, the Court viewed the executive agreements as the product of the policy. The agreements, and statements of interest issued by the Government pursuant to them, illustrate or express the national position, rather than define it.*¹⁹⁹

The Second Circuit understood that express conflict preemption comes about due to the “executive policy.”²⁰⁰ In *Garamendi*, the executive policy was evidenced, in part, by an executive agreement.²⁰¹ However,

¹⁹⁷ See *id.* (“[the *Garamendi*] Court concluded that the ‘consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions,’ and, in the insurance context specifically, ‘to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures.’”).

¹⁹⁸ *Id.* at 118.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *Am. Ins. v. Garamendi*, 539 U.S. 396, 421 (2003) (explaining that there was clear conflict between the Federal position and that of California: “The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two. The foregoing account of negotiations toward the three settlement agreements is enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable

the court in *Generali* was clearly open to the idea that the federal expression of executive policy may come about in other ways and still have preemptive effect. This is the precise reasoning that was applied by in *Movsesian I*.²⁰² Thus, while the Second Circuit clearly applied *Garamendi* to *Generali* in a conflict preemption fashion, the *Generali* holding is mostly consistent with the Ninth Circuit's *Movsesian I*.

D. First Circuit

The First Circuit decision in *Museum of Fine Arts, Boston v. Seger-Thomschitz*²⁰³ has already been discussed in this Article for its contention that some scholars and courts have found *Medellin* to be a limiter of *Garamendi*.²⁰⁴ This Section will focus on the *Museum of Fine Arts* principal holding on foreign affairs preemption. The First Circuit seems to have clearly understood *Garamendi* as conflict preemption case. Consequently, the First Circuit would very likely come up with a different outcome than the *Movsesian III* Court if presented with similar facts.

Interestingly, *Museum of Fine Arts* involves nearly identical facts to the *Dunbar* case, as discussed above.²⁰⁵ In *Museum of Fine Arts*, Claudia Seger-Thomschitz, the same plaintiff as in *Dunbar*, sought to regain possession of a different valuable painting from the Museum of Fine Arts in Boston, under the same theory that her ancestor had been forced to sell the painting in dispute.²⁰⁶ Eventually, the Museum of Fine Arts sued for quiet title and the District Court granted the museum summary judgment on the grounds of statute of limitations.²⁰⁷

On appeal, there was the narrow issue of whether the plaintiff's claim was time-barred.²⁰⁸ The court held that the claims were time-barred, federal common law did not apply, and that there was no

claim procedures, including procedures governing disclosure of policy information.”).

²⁰² See discussion *supra* Section II.B. The *Movsesian I* Court greatly expanded which federal expressions can have preemptive effect on state laws – there, it was the mere act of the executive sending disapproving letters to Congress.

²⁰³ *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010).

²⁰⁴ *Supra* notes 150-52 and accompanying text.

²⁰⁵ Compare *Museum of Fine Arts, Boston*, 623 F.3d 1, with *Dunbar v. Seger-Thomschitz*, 615 F.3d (5th Cir. 2010).

²⁰⁶ *Museum of Fine Arts, Boston*, 623 F.3d at 2.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 6.

foreign affairs preemption.²⁰⁹ Notably, in this proceeding, Seger-Thomschitz brought up the issue of foreign affairs preemption in her opening brief and the First Circuit ruled definitively on this issue, unlike in *Dunbar*, where the ruling on the foreign affairs issue was essentially dicta.²¹⁰ Seger-Thomschitz argued that the Massachusetts statute of limitation laws as applied to the case conflicted with the Federal Government's foreign policy.²¹¹ She relied on several international declarations signed by the Executive Branch, among them the Terezin Declaration.²¹² Plaintiff argued that these declarations evidenced a federal policy "disfavoring the application of rigid limitations periods to claims for Nazi-looted art."²¹³

As in *Dunbar*, Seger-Thomschitz attempted to use *Garamendi* as support for her claim.²¹⁴ The court first characterized *Garamendi* as a case where "[t]he Supreme Court held . . . that 'state law must give way' when it is in 'clear conflict' with an 'express federal policy' in the foreign affairs context."²¹⁵ The court then easily defeated this point by distinguishing *Garamendi* on two points, including that "First, there is no comparably express federal policy bearing on the issues in this case. Second, even if there were such a policy, the Massachusetts statute of limitations would not be in clear conflict with it."²¹⁶

Both in the court's introduction and its application of *Garamendi*, the First Circuit plainly understood *Garamendi* as nothing more than a

²⁰⁹ *Id.* at 6-13.

²¹⁰ *See id.* at 11 n.11 ("The MFA contends that Seger-Thomschitz's foreign affairs preemption argument is forfeited because it was raised for the first time in her reply brief. That is not correct. Seger-Thomschitz specifically argued for foreign affairs preemption in her opening brief. She then developed that argument further in her reply brief. There was no forfeiture.").

²¹¹ *Id.* at 9-14.

²¹² *Id.* at 12.

²¹³ *Id.* at 11.

²¹⁴ *Id.* at 11-12.

²¹⁵ *See id.* The court also explains that, "The [Supreme] Court held that the 'clear conflict' between the state statute and an 'express federal policy' was sufficient to justify preemption. *Id.* It added: If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA." *Id.* at 12 (citations omitted).

²¹⁶ *Id.*

wide application of express conflict preemption.²¹⁷ In *Museum of Fine Arts*, the First Circuit did not find any express federal policy even though there were two declarations, a treaty and an executive agreement, and both evinced the idea that technicalities of the law should not govern looted property claims²¹⁸ Accordingly, if the First Circuit were to rule on the facts of *Movsesian*, it is likely that it would not find conflict preemption as there is even less evidence in *Movsesian* as to any express federal policy. Furthermore, the logic of the court in *Movsesian III* would be unavailing for the First Circuit, as it clearly understood *Garamendi* to be rooted in conflict preemption and not field preemption.²¹⁹

E. Third Circuit

Similarly, the Third Circuit in *Gross v. German Found. Indus. Initiative*²²⁰ applied *Garamendi* in a most limited manner and seriously confined the breadth of field preemption to areas of law and instances where the federal government has adopted a clear and express policy.²²¹ This is in direct conflict with the Ninth Circuit's holding in *Movsesian III*, where the California insurance law was preempted merely because the state failed to address its clear traditional state interest, and thus intruded on a matter of foreign affairs.²²² While *Gross* is preeminently a case about justiciability, there are clear implications as to how the Third Circuit understood and applied *Garamendi*.²²³ In *Gross*, the dispute centered on how much interest

²¹⁷ See *supra* notes 215-16 and accompanying text.

²¹⁸ See *Museum of Fine Arts, Boston*, 623 F.3d at 13 (“None of this language is sufficiently clear and definite to constitute evidence of an express federal policy against the applicability of state statutes of limitations to claims for the recovery of lost, stolen, or confiscated art.”).

²¹⁹ See *supra* notes 215-16 and accompanying text.

²²⁰ See *Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006).

²²¹ See *id.* at 381 (explaining that the *Garamendi* Court found preemption since “[t]hese claims to enforce insurance policies [under the California statute] were the claims the Foundation was set up to exclusively resolve.”).

²²² See *Movsesian v. Victoria Versicherung AG, (Movsesian III)* 670 F.3d 1067, 1077 (9th Cir. 2012) (“Because California Code of Civil Procedure section 354.4 does not concern an area of traditional state responsibility and intrudes on the field of foreign affairs entrusted exclusively to the federal government, we hold that section 354.4 is preempted.”).

²²³ See *Gross*, 456 F.3d at 380-81, 388.

was contemplated in the German government's newly-created fund.²²⁴ The vast majority of the holding is a detailed analysis of the *Baker v. Carr*²²⁵ factors for finding a justiciable conflict. The court in *Gross* ultimately decided that there did exist a justiciable conflict and this issue was not a political question.²²⁶ The Court reversed and remanded to the District Court of New Jersey.²²⁷

Defendants in *Gross* argued that *Garamendi* “stands for the proposition that the United States Executive has an ‘exclusive role in matters relating to the Foundation and Nazi-era claims against German nationals.’”²²⁸ The Third Circuit limited *Garamendi* to its facts where the executive branch had created a clear policy by addressing the issue in question (insurance policies) saying “[t]hese claims [of the plaintiff’s in *Garamendi*] to enforce insurance policies were the claims the Foundation was set up to exclusively resolve.”²²⁹ This is a clear reflection of an understanding that *Garamendi* is a conflict preemption case.

The Supreme Court in *Baker* expounded on *Garamendi* when deciding on the first *Baker* factor: whether there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”²³⁰ The *Gross* Court explained, citing to *Garamendi*, that “[al]though the Executive’s powers in foreign affairs ‘do not enjoy any textual detail’ within the Constitution itself, ‘in foreign affairs the President has a degree of independent authority to act.’”²³¹ However, the court then severely limited this contention to instances where the executive has exercised its foreign affairs powers.²³²

While the Third Circuit’s analysis in *Gross* of executive foreign affairs power is fixed in justiciability, the idea enunciated is applicable to foreign affairs preemption as well. The Third Circuit wrote:

²²⁴ See generally *id* at 367-75 (explaining that background facts in *Gross* are analogous to the U. S. government’s efforts in *Garamendi* to try to keep all such litigation out of American courts).

²²⁵ *Baker v. Carr*, 369 U.S. 186 (1962).

²²⁶ See *Gross*, 456 F.3d at 388.

²²⁷ See *id.* at 394.

²²⁸ *Id.* at 381 (emphasis added).

²²⁹ *Id.* at 381.

²³⁰ See *Baker*, 369 U.S. at 217.

²³¹ See *Gross*, 456 F.3d at 387 (citations omitted).

²³² See *supra* text accompanying note 221.

But it is precisely the breadth of the Executive's power in this field that counsels against our finding that the political question doctrine precludes our review. While the Executive could constitutionally act to resolve the issue of whether "interest" is owed on this "contract" or to settle this claim through diplomacy, it has not done so. If we were to find that any claim raising an issue that the Executive could potentially resolve within its constitutional "independent authority to act" in foreign affairs to be nonjusticiable, we would risk erroneously sweeping "every case or controversy which touches foreign relations . . . beyond judicial cognizance." Baker, 369 U.S. at 211, 82 S.Ct. 691. The mere existence of the Executive's power to extinguish claims made to the Judiciary for redress from foreign entities and to resolve certain issues raised in those claims, without an exercise of that power, does not render those claims nonjusticiable by virtue of being committed to a co-equal branch.²³³

If the Third Circuit in *Gross* held as the Ninth Circuit did in *Movsesian III*, then what consequence would exist if these types of disputes are justiciable? Once such claims get to court, they will be dismissed under field preemption.²³⁴ Obviously, the Third Circuit has adopted a more tempered understanding of field preemption in general.

V. CONCLUSION

While the Ninth Circuit's holding in *Movsesian III* potentially slammed the doors of American courts in the face of Armenian Genocide victims, there remain options for moving forward. The model of the Holocaust-era litigation still stands as an example of how to hold rogue countries and their corporations accountable for past misdeeds. The Turkish refusal to face the reality of its guilt and the United States executive's strategic decision to permit this denial, have created an insurmountable obstacle for Armenian litigants. However,

²³³ See *Gross*, 456 F.3d at 387.

²³⁴ If the *Movsesian III* Court preempted states from passing laws which were in the "domain" of the Executive's foreign affairs power, it might reasonably have held that the interest issue in *Gross* was not properly before the courts – as the issue is clearly in the area of foreign affairs.

the idea of relentless persistence and dogged determination can still be gleaned from the Holocaust-era litigation. In fact, as long as Armenian survivors refuse to forget, there remains the chance that at some date justice will prevail either by Turkey officially recognizing the Armenian Genocide or in a legal victory for monetary compensation to survivors and their descendants.

Even if there is never another case brought by an Armenian Genocide descendant, this Article still stands as a useful model for future analysis. There are unfortunately numerous instances where governments go rogue and refuse to acknowledge the facts of history and long-lasting impact on survivors. Regrettably, when governments neglect their duties of truth to their citizens, many private companies take advantage by profiteering. Consequently, many innocent people are victimized. The victims of some future genocide or state-sponsored seizure may seek redress in the U.S. courts and this Article helps those litigants either frame better legislation in friendlier jurisdictions or force the Supreme Court to rule on an apparent circuit split.