

California's Holocaust Victim Insurance Relief Act and American Preemption Doctrine

By Libby Adler*

A. Introduction

On the same day that the United States Supreme Court handed down its much anticipated decisions on affirmative action in higher education, holding that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution permits a degree of race-consciousness in public university admissions,¹ it also issued a far less heralded decision with implications for the ability of the states to address historical injustice. In *American Insurance Association v. Garamendi* (*Garamendi*),² five members of the Court, led by Justice Souter, found that California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA)³ "interferes with the National Government's conduct of foreign relations"⁴ and is therefore preempted.

B. Background on HVIRA

HVIRA requires insurance companies doing business in California that sold policies in Europe between 1920 and 1945 to file certain information with the state's Commissioner of Insurance.⁵ The required disclosures include the names of holders and beneficiaries of such policies and their cities of origin, as well as information about the disposition of the policies.⁶ A company's failure to comply with the

* Associate Professor of Law, Northeastern University. My thanks go to Wendy Parmet and Jane Scarborough for their feedback on earlier drafts.

¹ See, generally, *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003) and *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003).

² 123 S.Ct. 2374 (2003).

³ Cal. Ins. Code Ann. §§ 13800 -13807 (West Cum. Supp. 2003).

⁴ *Garamendi*, *supra* note 2, at 2379.

⁵ Cal. Ins. Code Ann. § 13804 (West Cum. Supp. 2003).

⁶ Cal. Ins. Code Ann. § 13804 (West Cum. Supp. 2003).

disclosure requirements of HVIRA prompts the Commissioner to suspend the company's right to conduct business in California.⁷

In enacting HVIRA, the California legislature found that "insurance company records [may be] the only proof of insurance policies" sold to victims of the Holocaust.⁸ Noting that "[a]t least 5,600" Holocaust survivors currently reside in California,⁹ the statute declares its purpose to be "to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary."¹⁰

HVIRA was one of a cluster of statutes adopted by California in a gust of legislative creativity in the late 1990s.¹¹ It came as part of a comprehensive effort to enable California residents to gain redress for a host of appalling abuses by insurance companies during and after the Holocaust. European insurers, such as the Italian company *Generali* the German company *Allianz*, denied the existence of life insurance policies sold to Jews during the Nazi era, or otherwise refused to pay beneficiaries, citing the failure to produce a death certificate for decedents who had perished in mass killings.¹² Property insurance, too, was subject to abuse: following the destruction of Jewish-owned stores, homes and synagogues during *Kristallnacht*, insurance proceeds were paid to the Reich rather than to the insured, benefiting both the Reich and the companies, which paid less than the policies were worth.¹³

⁷ Cal. Ins. Code Ann. § 13806 (West Cum. Supp. 2003).

⁸ Cal. Ins. Code Ann. § 13801 (c) (West Cum. Supp. 2003).

⁹ Cal. Ins. Code Ann. § 13801 (d) (West Cum. Supp. 2003).

¹⁰ Cal. Ins. Code Ann. § 13801 (f) (West Cum. Supp. 2003).

¹¹ California also granted its courts jurisdiction to hear claims against German corporations by former slave laborers of the Reich, extending the statute of limitations to 2010. Cal. Code Civ. Proc. § 354.6 (West 2000). See, also, Russell A. Miller, *Much Ado, But Nothing: California's New World War II Slave Labor Law: Statute of Limitations and Its Place in the Increasingly Futile Effort to Obtain Compensation from American Courts*, 23 WHITTIER L. REV. 121 (2001), and Diane Richard Fooks, *Righting Past Wrongs or Interfering in International Relations? World War II-Era Slave Labor Victims Receive State Legal Standing After Fifty Years*, 31 MCGEORGE L. REV. 221 (2000).

¹² Michael J. Bazzyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 93-101 (2000).

¹³ *Id.* at 95-96.

Companies that engaged in these behaviors were not made to answer for their transgressions until the late 1990s, and California was among the most determined jurisdictions to take them on. The statutory initiatives that state took in 1999 were designed to provide an effective avenue to relief for California residents when they had none. HVIRA, together with related provisions, one creating a special team within the California Division of Insurance to search through insurance company archives¹⁴ and another extending the statute of limitations in California state courts for insurance-related claims arising out of the Holocaust until 2010,¹⁵ enables California residents who may have been wrongfully denied insurance proceeds to identify policies and seek overdue payment. The disclosure provision of HVIRA, however, was the sole provision at issue in *Garamendi*.¹⁶ Insurers argued that this well-intended effort intruded upon the President's authority over foreign affairs.¹⁷

C. What Preempts HVIRA?

In July of 2000, U.S. President Bill Clinton entered into an executive agreement with German Chancellor Gerhard Schroder under which the German government and a consortium of German companies would create and fund a ten billion DM foundation to compensate the victims of Nazi forced labor and theft ("the Foundation").¹⁸ In return, the United States agreed to submit a "Statement of Interest" in all future lawsuits filed in American courts stating that it is in the interest of the United States that the Foundation be understood to constitute the exclusive forum for claims arising out of the Nazi era.¹⁹ Furthermore, the U.S. government agreed to use its "best efforts" to persuade the states to give the Foundation the same priority.²⁰

Separately, in 1998, American, European, Israeli and Jewish groups (including insurance companies, insurance regulators and Holocaust survivors) privately organ-

¹⁴ Cal. Ins. Code Ann. § 12967 (West Cum. Supp. 2003).

¹⁵ Cal. Code Civ. Proc. § 354.5 (c) (West Cum. Supp. 2003).

¹⁶ *Garamendi*, *supra* note 2, at 2397 (Ginsburg, J. dissenting).

¹⁷ *Id.* at 2385.

¹⁸ *Garamendi*, *supra* note 2, at 2381; Agreement Between the Government of the United States and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future" (July 17, 2000) [hereinafter "Executive Agreement"], at http://www.state.gov/www/regions/eur/holocaust/000717_agreement.html.

¹⁹ See, Executive Agreement, Art. 2(1). It is worth noting, however, that the United States did not *promise* that its Statement of Interest would bind American courts. It understood its own authority to be limited by the American tripartite system. See STUART EIZENSTAT, IMPERFECT JUSTICE 272-273 (2003).

²⁰ See, Executive Agreement, Art. 2(2).

ized the International Commission on Holocaust Era Insurance Claims (ICHEIC).²¹ The ICHEIC was designed specifically to settle claims related to the various insurance abuses discussed above. Like the Foundation, the ICHEIC was intended to divert would-be plaintiffs from the courtroom to a private body that would use allegedly expeditious procedures²² and relaxed standards of proof to resolve claims.²³ Then, in the same Executive Agreement that provided for the Foundation two years later, the U.S. and Germany also agreed to resolve claims against German insurers using procedures drawn up by the Foundation in cooperation with the ICHEIC, and in 2002, the Foundation provided the ICHEIC with 200 million DM to settle insurance claims.²⁴

Not surprisingly, the majority and dissent in *Garamendi* agreed on the overarching principle “that at some point, an exercise of state power that touches on foreign relations must yield to the national government’s policy, given the ‘concern for uniformity in [American] dealings with foreign nations.’”²⁵ The “national government’s policy” often means Presidential policy, though textual support for executive autonomy in this arena is scant.²⁶ It is nonetheless a “longstanding practice”²⁷ for the President to enter into executive agreements without Congressional approval, sometimes even “to settle claims of American nationals against foreign governments.”²⁸ Furthermore, as the Court observes, such executive agreements “are fit to preempt state law, just as treaties are.”²⁹

²¹ *Garamendi*, *supra* note 2, at 2382.

²² The ICHEIC has faced charges of having “so far produced little.” *Insurance and the Holocaust: Line to Nowhere*, THE ECONOMIST Aug 2-8, 2003 at 61-62.

²³ See, *Garamendi*, *supra* note 2, at 2382.

²⁴ See, *id.*

²⁵ See, *id.* at 2386. Accord *id.* at 2395, (Ginsburg, J. dissenting): “Absent a clear statement aimed at disclosure requirements by the ‘one voice’ to which courts properly defer in matters of foreign affairs, I would leave intact California’s enactment.” The necessity for a single voice is unanimously accepted, but Justice Ginsburg would not have found that the voice had spoken.

²⁶ See, *id.* at 2386.

²⁷ *Id.* at 2387.

²⁸ *Id.*

²⁹ See, *id.*

American preemption doctrine provides that a federal law may preempt a state law expressly or impliedly.³⁰ In the case of implied preemption, the Supreme Court has

recognized at least two types[:] field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.³¹

In *Garamendi*, Justice Souter and the majority found a conflict, though the dissenters saw none.

The Rehnquist Court divided along unusual lines, considering that the issue is one of federalism. Justice Souter's opinion for the Court was joined by the Chief Justice, as well as Justices Kennedy, O'Connor, and Breyer. Justice Ginsburg authored the sole dissent, joined by Justices Stevens, Scalia and Thomas. As any observer of the Court's recent decisions concerning various facets of the American federalist arrangement are acutely aware, it would be difficult for even the most devoted formalist to ignore the transparently ideological split over so-called "states rights."³² One ought to be surprised, therefore, to find Justices Ginsburg and Scalia, or Justice Breyer and the Chief Justice, allied. What might account for this sudden change in the Court's line-up?

Quite possibly, the matter involved nothing of political import, turning instead on a purely technical question on which reasonable minds, of whatever ideological proclivities, could easily disagree. Preemption cases sometimes require disengaged judgments about the extent to which a "field" has been "occupied" or a "conflict" exists. Five members, of various political predispositions, agreed that the California law conflicted with the Executive Agreement, while four equally dissimilar members believed that conflict preemption would only have been warranted in the case of explicit mention of insurance policy disclosure in the Executive Agreement.

The quirkiness of nine individual reactions to a technical question may do some of the work of explaining the strangeness of the Court's division, but I do not believe

³⁰ See, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.2.1 (2d ed. 2002).

³¹ *Id.* (citing *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 98 (1992)).

³² See, e.g., Richard H. Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

that it completes the job. *Garamendi* brings together an astonishing mix of current and politically charged issues, of which federalism is only one. Also implicated in *Garamendi* are the President's authority over foreign affairs, an issue of renewed interest in any time of war; and redressing past injustice, omnipresent in affirmative action jurisprudence as well as in recent discussions of reparations for American slavery, South African Apartheid, the sexual exploitation of Asian-Pacific "comfort women" by the Japanese army during World War II, as well as the Holocaust. If only one of these three issues, federalism, executive wartime autonomy, or addressing historical injustice, were implicated in *Garamendi*, perhaps the split would have fallen along more predictable lines. It is, however, the fact that all three issues appeared in a single, seemingly narrow legal question, that shook things up. Both Justice Souter's opinion for the majority and Justice Ginsburg's dissent strain to maintain their focus on the narrow issue of preemption, but neither manages to avoid entirely betraying its author's peripheral apprehensions.

Just what conflict did the majority see that so thoroughly eluded the dissenters? Surely Justice Ginsburg was correct to observe that the Executive Agreement makes no mention of disclosure of insurance policy information, the sole object of regulation under HVIRA.³³ Further, as Justice Souter concedes, the United States took the position, while negotiating the Executive Agreement, that it could guarantee the behavior of neither the states nor the federal courts, but could only *urge* that the German Foundation be regarded as the exclusive forum for pertinent claims, in effect disclaiming preemptive authority.³⁴ With what exactly, then, does HVIRA conflict?

The absence of specific contradictory provisions posed no obstacle for Justice Souter, who found "evidence of a clear conflict,"³⁵ not in the text of the Executive Agreement, but in the foreign policy "embod[ied]" therein,³⁶ and to discern the embodied policy, Justice Souter referred to his own "account of negotiations" leading to the Executive Agreement.³⁷ As he explained, "Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions."³⁸ The national policy with

³³ See, *Garamendi*, *supra* note 2, at 2399 (Ginsburg, J. dissenting).

³⁴ *Id.* at 2382.

³⁵ *Id.* at 2390.

³⁶ *Id.* at 2388.

³⁷ *Id.* at 2390.

³⁸ *Id.*

which HVIRA conflicts does not regard disclosure of insurance information. *The offended national policy is the Presidential preference for diplomacy over litigation.* "As for insurance claims in particular, the national position, expressed unmistakably in the executive agreement[] signed by the President with Germany... has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures governing disclosure of policy information."³⁹ But again, the Executive Agreement does not mention disclosure. This "unmistakable expression," therefore, is *the fact of a negotiated agreement*, rather than the *content* of that agreement. "California seeks to use an iron fist where the President has consistently chosen kid gloves," concluded Justice Souter.⁴⁰ The Court inferred a conflict from the *process* undertaken by the executive branch.

But this process was not, in the eyes of Justice Ginsburg, sufficient to preempt the *substance* of HVIRA. In her dissent, Justice Ginsburg reexamines the precedent relied upon by the majority and demonstrates that in cases of "executive agreements to which [the Court has] accorded preemptive effect"⁴¹ it was on the *express terms* of the agreement that the Court relied.⁴²

The majority may well have recognized this truth, for Justice Souter strives to generate a conflict from the express terms of text, but the text cited is not that of the Executive Agreement. Instead, he recounts letters by Deputy Treasury Secretary Stuart Eizenstat designed to persuade California's Governor and Insurance Commissioner that HVIRA "threatened to damage the cooperative spirit" required for the ICHEIC to function and could even "derail" the Executive Agreement providing for the Foundation.⁴³ Former Secretary of State and ICHEIC Chairman Lawrence Eagleburger made similar arguments, all of which went unheeded by California.⁴⁴ Justice Souter excavates them to demonstrate that federal actors regarded state legislative activity with hostility.

³⁹ *Id.*

⁴⁰ *Id.* at 2393.

⁴¹ *Id.* at 2398 (Ginsburg, J. dissenting).

⁴² *See, id.* at 2399 (Ginsburg, J. dissenting). The exception is a case from 1968 striking down a bizarre Oregon statute that denied inheritance rights to claimants residing communist bloc countries. *See id.* at 2399-2400 discussing *Zschernig v. Miller*, 389 U.S. 429 (1968). As Justice Ginsburg notes in her dissent, the case has never been relied upon to justify implied preemption for foreign affairs and was unique in that the statute at issue contained a "'state policy critical of foreign governments and involve[d] 'sitting in judgment' on them.'" *Id.* at 2400, citing L. HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996).

⁴³ *Id.* at 2384-85.

⁴⁴ *See, id.*

As Justice Ginsburg points out, however, judicial reliance on “statements of that order...[places] considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch.”⁴⁵ While the central apprehensions of the majority revolve around California’s exertion of coercive power over culpable foreign corporations, Justice Ginsburg appears to be more concerned about the majority’s dangerous and unprecedented expansion of authority formerly located only in the highest echelons of the executive branch.

Further, this extension of preemptive authority comes in an area of a traditional state function, *i.e.*, insurance regulation. California asserted a legislative purpose of ensuring the availability of “marketplace information for California consumers,” but the majority “discount[ed]”⁴⁶ that interest because it “singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago.”⁴⁷ Justice Ginsburg observes that “States have broad authority to regulate the insurance industry [and that] a State does not exceed that authority by assigning special significance to an insurer’s treatment of claims arising out of [the Holocaust] era.”⁴⁸ The majority experiences its most acute uneasiness at precisely the idea of the state flexing its regulatory muscle in the face of guilty corporate actors for the benefit of Holocaust survivors, while the dissent steadfastly resists presuming that a remedial purpose is outside the reach of state regulators.

In addition, the Court’s radically expanded conception of conflict preemption enabled it to expand in turn its own power to assess both the scope and the particulars of foreign diplomacy under the guise of protecting executive autonomy in that area. Justice Souter begins his opinion with a description of the abuses perpetrated by European insurers and continues, seamlessly, with a discussion of post-war diplomacy resulting in the deferral of claims “arising out of the war.”⁴⁹ By recounting the tale in this fashion, Justice Souter places the insurance claims squarely under the rubric of post-war reparations, a subject properly suited to diplomatic, rather than judicial, resolution, but he does so on an entirely conclusory basis, (“[t]hese confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy,”)⁵⁰ never bothering to

⁴⁵ *Id.* at 2401 (Ginsburg, J. dissenting).

⁴⁶ *Id.* at 2397, n.1 (Ginsburg, J. dissenting).

⁴⁷ *Id.* at 2392.

⁴⁸ *Id.* at 2397, n.1 (Ginsburg, J. dissenting).

⁴⁹ *Id.* at 2379-80.

⁵⁰ *Id.* at 2380.

explain why the insurance abuses, many of which occurred after 1945, were not properly the subject of civil litigation.

Then, in the Court's continuing account, a rash of class action lawsuits erupts fifty years later, following the reunification of Germany and the end of a moratorium on war-related claims,⁵¹ only to have the United States government, in the person of Stuart Eizenstat, step in to divert the claims from a judicial forum to a diplomatic one.⁵² The majority apparently found this a sensible move: the opinion notes approvingly that the policy pursued by Eizenstat takes account of all of the pertinent interests, including respect for German privacy laws, "the national interest in maintaining amicable relationships with current European allies, survivors' interests in a 'fair and prompt' but nonadversarial resolution of their claims... and the companies' interest in securing 'legal peace.'"⁵³

The dissent, however, chronicles events a bit differently. Justice Ginsburg's version reminds readers that post-war diplomacy included no resolution of insurance claims.⁵⁴ "European insurers, encountering no official compulsion, were themselves scarcely inclined to settle claims; turning claimants away, they relied on the absence of formal documentation and other technical infirmities that legions of Holocaust survivors were in no position to remedy."⁵⁵ Justice Ginsburg credits litigation with "provid[ing] a spur to action,"⁵⁶ prompting European insurers, who had ignored these claimants for a half-century, to form the ICHEIC (which both the majority and dissent refer to, ironically, as a "voluntary" organization).⁵⁷ Indeed, the majority implicitly concurs in Justice Ginsburg's assessment when it notes the companies' interest in "legal peace," *i.e.*, an end to the lawsuits.

⁵¹ *Id.* at 2381. See, also, Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990; Bazylar, *supra* note 12, at 5-9.

⁵² See, *Garamendi*, *supra* note 2, at 2381. For more elaboration on this point, but in the context of Nazi slave and forced labor suits, see, Libby Adler and Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 41-49 (2002); also in NS-ZWANGSARBEIT: ERINNERUNG UND VERANTWORTUNG/NS-FORCED LABOR: REMEMBRANCE AND RESPONSIBILITY 333 (P. Zumbansen ed., Nomos 2002).

⁵³ *Garamendi*, *supra* note 2, at 2391.

⁵⁴ See, *id.* at 2395, (Ginsburg, J. dissenting).

⁵⁵ *Id.* (Ginsburg, J. dissenting).

⁵⁶ *Id.* (Ginsburg, J. dissenting).

⁵⁷ *Id.* at 2396 (Ginsburg, J. dissenting). *Accord id.* at 2382.

The majority frets over the possibility, raised in Eizenstat's letters to California officials, that litigation has "placed the [federal] Government at a disadvantage in obtaining practical results" through diplomacy,⁵⁸ but this fear is poorly-founded. It never came to pass that California's renegade refusal to acquiesce to Eizenstat's wishes "derailed" diplomatic efforts. Why would it? If litigation is what brought the recalcitrant companies to the table after fifty years, is it not more than likely that the bargaining power of the claimants' representatives would be fortified by the specter of additional litigation? Might not the willingness of the companies to engage in conciliatory efforts increase as a result of legal conditions created by state law? Rather than attempting to exclude California, Eizenstat could have brought it and other states to the table, to wield the threat of laws such as HVIRA, and thereby further the alleged goals of fairness and promptness for survivors.⁵⁹

The two mechanisms, the threat of state litigation and the executive diplomatic approach, were not necessarily in conflict. By granting Eizenstat's letters preemptive power, the Court ratified their content, that is, ratified the sub-cabinet angst over state remedial action. To decide the case as it did, the Court had to subscribe to Eizenstat's unsubstantiated view that California's actions threatened to derail diplomatic negotiations. Otherwise, what conflict would there be? The Court decided not merely to strike down a state law in deference to federal policy regardless of its wisdom, but rather that Eizenstat's position that state activity threatened rather than advanced negotiations was in fact correct.

D. Conclusion

While Justices Ginsburg and Stevens crossed lines on federalism, arguing for the more constricted reach of federal power under the preemption doctrine,⁶⁰ they were staunch in their wariness of an extension of unfettered executive branch authority over international matters beyond the President and Cabinet, as well as in their support for state leeway to address past injustice, a position also evidenced in their support for affirmative action.⁶¹ Likewise, the Chief Justice found himself support-

⁵⁸ *Id.* at 2392.

⁵⁹ Relatedly, disclosures made pursuant to HVIRA could enable a claimant to identify a policy that could form the basis for a claim with the ICHEIC. *See, id.* at 2397 (Ginsburg, J. dissenting).

⁶⁰ It should be noted that Justice Ginsburg maintained that executive power was *compromised* rather than preserved by the majority because the Court did not "reserve foreign affairs preemption for circumstances where the President... has spoken clearly to the issue at hand." *Id.* at 2401 (Ginsburg, J. dissenting).

⁶¹ *See, e.g., Gratz, supra* note 1.

ing an expansive understanding of federal power in this case,⁶² and against state autonomy even in an area of traditional state functioning,⁶³ but undoubtedly drew comfort from the familiarity of his surroundings on the matters of executive autonomy in a time of war⁶⁴ and state authority to redress past injustice.⁶⁵

Justices Scalia and Thomas rested most easily the night they signed onto the dissenting opinion in *Garamendi* not only because they were able to stick to their guns on a federalism doctrine, but also because they found a remedy for a past wrong they could live with, one that operates as the neatest of tort or contract claims does, with clearly identified plaintiffs and defendants in which one is alleged to have committed a civil wrong directly against the other.⁶⁶ The California statutory scheme suffers from none of the messiness that characterizes affirmative action, a remedial regime that allocates benefits to parties without requiring them to establish their individual deservedness and tolerates costs for those who have not been charged with any wrongdoing.⁶⁷

⁶² Notice, however, that this case could have been decided on foreign commerce clause grounds and was not; whether HVIRA violated that clause was among the three questions in the grant of certiorari. *Garamendi*, *supra* note 2, at 2385, n. 7. The extension of the foreign aspect of the commerce clause to strike down a state insurance law might not have sat well with the Chief Justice after his opinions limiting federal power in such interstate commerce cases as *U.S. v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 as beyond the scope of Congressional power under the Commerce Clause), and *U.S. v. Morrison*, 529 U.S. 598 (2000) (striking down the civil rights cause of action under the Violence Against Women Act as beyond the scope of Congressional power under the Commerce Clause and the § 5 of the Fourteenth Amendment).

⁶³ See, (then Associate) Justice Rehnquist's majority opinion in *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (relying on a traditional state function analysis to hold that the federal government was limited in its competence to regulate the states as employers). The Court overruled *Nat'l League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), from which Justice Rehnquist dissented.

⁶⁴ See, WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224 (1998) (recalling the maxim "Inter arma silent leges," - in time of war, the law is silent - and noting, apparently without disturbance, that "apart from the added authority that the law itself may give the President in time of war, presidents may act in ways that push their legal authority to its outer limits, if not beyond.").

⁶⁵ See, e.g., *Grutter*, *supra* note 1, at 2365-2370 (Rehnquist, CJ. dissenting from the Court's approval of the affirmative action program employed by the University of Michigan Law School, on the grounds that the program amounted to "racial balancing.")

⁶⁶ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J. concurring, but urging that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole" in the manner of a private suit, rather than a legislative program of social engineering.)

⁶⁷ Some of the negotiated compensation arrangements arising out of the Holocaust do bear a resemblance to the more "social" and less "private" approach of affirmative action, such as the Swiss bank settlement. See, e.g., Bazylar, *supra* note 12, at 86-87, (observing that "almost all of the individuals and organizations who will be receiving a share of the \$1.25 billion paid by the Swiss banks have not been harmed, at least directly, by the Swiss banks' actions during and after World War II.")

Finally, Justices Souter and Breyer,⁶⁸ while faithful to their historical position on federal power,⁶⁹ did a disservice to California's sizeable population of Holocaust survivors, betraying their deeper fear of aggressive state action precisely for the benefit of the victims of European corporate transgressions. "But should the general standard not be displaced, and the State's interest recognized as a powerful one, by virtue of the fact that California seeks to vindicate the claims of Holocaust survivors?"⁷⁰ Justice Souter asks rhetorically? "The answer," he explains, "lies in recalling that the very same objective dignifies the interest of the National Government in devising its chosen mechanism for voluntary settlements."⁷¹

But Justice Ginsburg points out what the majority ignores, that the ICHEIC, the federal government's favored mechanism, has been slow, inefficient, and ineffective at bringing the companies into compliance.⁷² Justice Souter is apparently more interested in whether the "objective" of aiding Holocaust survivors "dignifies" the federal government than he is in whether the survivors are "dignified" by the actual delivery of insurance proceeds. Holocaust survivors gain little from the "dignity" accorded by this usage.

Conceding that the justices "heard powerful arguments that [an] iron fist would work better [than kid gloves]," Justice Souter nonetheless insists that "the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy."⁷³ The only question for the Court, Justice Souter admonishes us, is whether a conflict exists.⁷⁴ But the existence or nonexistence of a conflict is not a chaste, technical question that can be answered on a plain comparative reading of two legal texts. To answer the ultimate question in a case of asserted conflict preemption, the Court must characterize the breadth and meaning of the laws alleged to conflict. In this case, the breadth and meaning cannot be gleaned without deliberation on the forbidden question of the "wisdom of the National Government's policy" a question awash in political

⁶⁸ I have left out Justices Kennedy and O'Connor here due to their recurrent roles as "swing voters" on federalism cases.

⁶⁹ See, e.g., *Lopez*, *supra* note 61, at 603-615 (Souter, J. dissenting), and *id.* at 615-631, (Breyer, J. dissenting).

⁷⁰ *Garamendi*, *supra* note 2, at 2393.

⁷¹ *Id.*

⁷² *Id.* at 2396 (Ginsburg, J. dissenting).

⁷³ *Id.* at 2393.

⁷⁴ *Id.*

meaning, for both Europe's corporations and the victims of European corporate misdeeds.