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THE BASES AND RANGE OF FEDERAL COMMON LAW IN PRIVATE INTERNATIONAL MATTERS

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I. INTRODUCTION

The allocation of power between the states and the nation gives rise to a basic and pervasive problem in our federal system of government. Nowhere is it more important, nor less susceptible to a precise solution, than in those areas in which the affairs of this nation touch those of other nations in the world community. In delineating the boundaries of state and federal power in cases of this kind, the courts create what has been called "the federal common law of foreign relations."[1] For clarity, two divisions of this body of law must be distinguished. One category consists of cases dealing with the supremacy of federal law in situations where the national government has exercised law-making power to establish a rule of decision. In these cases, the supremacy of federal law is clear, although, in some instances, the specific content of the rule may be obscure. The Court's method in such cases is excellently described by Justice Jackson in his concurring opinion in *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*,[2] a purely domestic case involving the applicability of the doctrine of holder in due course to a fraudulently executed note held by a bank insured by the respondent.

> Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit or the liability of the maker thereof. There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common-law sources.[3]

Later in the opinion, the Court identified those "materials."

> Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply

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1. Moore, *Federalism and Foreign Relations,* DUKE L.J. 248, 251 (1965). *See generally* Friendly, *In Praise of Erie—and of the New Federal Common Law,* 19 RECORD OF N.Y.C.B.A. 64 (1964).

2. 315 U.S. 447 (1942).

3. 315 U.S. at 468.

> the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.[4]

In private international cases, a rule of decision may be found in an international agreement promulgated either under the treaty power[5] or by the executive acting alone.[6] It may be found either in executive action, recognized by the courts as the implementation of an appropriate executive function, as in the sovereign immunity cases,[7] or in a federal common law rule such as the act of state doctrine.[8] It may, of course, be found in national legislation passed pursuant to broad congressional power in this field.[9] In each of these instances it is firmly established that the national rule is supreme. It was in this context that the Supreme Court wrote decisively in a 1937 landmark decision:[10] "Governmental power over external affairs is not distributed, but is vested exclusively in the national government."[11] Today, the primary issue before the courts dealing with cases of this type is not *whether* national power exists but rather which branch of the national government should exercise power with respect to a subject matter already identified by the existing national rule.

It is the second division of the federal common law of foreign relations with which this article is primarily concerned. This category consists of those situations in which there has been no exercise of national authority to give content to a positive rule of decision that is binding upon the states under the supremacy clause. The principal issue here is to what extent does the very structure of the federal system limit the exercise of state authority in situations containing an international element but otherwise arising under state law. Despite the admitted supremacy of the national government in foreign affairs, there has been as yet no effective statement of a general analytical approach to separate state from federal power in situations of this kind.

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4. 315 U.S. at 472.

5. Missouri v. Holland, 252 U.S. 416 (1920); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

6. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

7. Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

8. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

9. Professor Louis I. Henkin suggests that Congress has the power to do practically anything in the foreign affairs area which is presently accomplished by international treaty. He suggests, however, that congressional power in this field has not expanded as rapidly as the treaty power. *See* Henkin, *The Treaty-Makers and the Law-Makers: The Law of the Land and Foreign Relations,* 107 U. PA. L. REV. 903, 922 (1959).

10. United States v. Belmont, 301 U.S. 324 (1937).

11. 301 U.S. at 330.

Generally, cases within this second category are decided under state law. Principles identical to those applied in purely domestic cases are employed as a matter of course, usually without reference to any special difficulties raised by the presence of a foreign element. The courts, in the ordinary torts, contracts or domestic relations case properly look to their own law, including conflicts rules, to determine the parties' rights, even though international elements may be present.[12] Normally, the authority of state law in these cases is correctly assumed.[13] In many instances, however, states make de facto foreign policy decisions in situations where the subject matter otherwise falls within the ambit of traditional state authority. For example, states may refuse to recognize foreign judgments on grounds that the courts of the nation from which the judgment stems do not treat American judgments with reciprocity.[14] State courts may decide whether to enforce foreign tax claims under the traditional conflicts rule that one state will not enforce the revenue laws of another.[15] State law determines the standing of an unrecognized government to sue in state courts.[16] States have restricted sales of foreign-made products either directly, as under California's "Buy American" legislation,[17] or indirectly by means of licensing and notice requirements, as did South Carolina concerning Japanese textiles[18] and Ohio in the case of Communist-made goods.[19] The Supreme Court has recognized broad state power to impose reciprocity and "benefit and

12. *See, e.g.*, Louis-Dreyfus v. Paterson Steamships, Ltd., 43 F.2d 824 (2d Cir. 1930); Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

13. *See* Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 42-43 (1968).

14. *See* Hilton v. Guyot, 159 U.S. 113 (1895); 38 CORNELL L.Q. 423 (1953); *cf.* Cowans v. Ticonderoga Pulp & Paper Co., 219 App. Div. 120, 219 N.Y.S. 284 (Sup. Ct. 1927), *aff'd per curiam*, 246 N.Y. 603, 159 N.E. 669 (1927); Comment, 12 VILL. L. REV. 618 (1967).

15. *See* Cohen, *Nonenforcement of Foreign Tax Laws and the Act of State Doctrine: A Conflict in Judicial Foreign Policy*, 11 HARV. INT'L L.J. 1 (1970).

16. *See* Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 COLUM. L. REV. 275 (1962).

17. CAL. GOV'T CODE §§ 4300-05 (West 1966).

18. *See Japanese Textiles and South Carolina Law*, 34 DEP'T STATE BULL. 728 (1956).

19. COLUMBUS, OHIO, CITY CODE §§ 536.01-.99 (1963). These municipal ordinances have been held both constitutional and unconstitutional. City of Columbus v. McGuire, 25 Ohio Op. 2d 331, 195 N.E.2d 916 (Columbus Mun. Ct. 1963) (unconstitutional); City of Columbus v. Miqdadi, 25 Ohio Op. 2d 337, 195 N.E.2d 923 (Columbus Mun. Ct. 1963) (unconstitutional); City of Columbus v. Salt Bros. Hardware, Crim. No. 17865, Columbus Mun. Ct., Jan. 10,

use" requirements in cases involving the passage of decedent's estates to foreigners.[20] In some of these situations, the validity of the state's activities has been challenged successfully on constitutional grounds but the decisions, taken as a whole, represent a piecemeal approach to the broader question of the scope of state power.

During the past decade, there has been increasing attention on the part of legal scholars to the need for a clear statement outlining the divisions of state and federal power in this difficult area.[21] In two important cases, the Supreme Court indicated renewed judicial interest in the problem.[22] To date, however, the federal courts have not succeeded in establishing a uniform and workable guide by which the validity of state action may be judged in the absence of definitive federal policy. This deficiency has posed difficulties for state legislatures in arriving at law-making decisions and for the courts in testing the validity of the legislatures' acts. There has been no effective articulation of a legal test to determine in what circumstances the exercise of state law-making power is foreclosed by the nature of the federal system itself, in the absence of a preemptive rule of decision promulgated at the national level. The remainder of this article reexamines the current tests applied to determine the scope of permissible state activity in cases of this kind, with particular emphasis upon the guides provided by the opinions in *Zschernig v. Miller*[23] and *Banco Nacional de Cuba v. Sabbatino*,[24] and suggests a functional approach designed to establish an effective guide to state action which gives proper emphasis to the requirements inherent in the structure of the federal system.

II. THE ZSCHERNIG CASE

In *Zschernig v. Miller*, an Oregon statute denied to foreign heirs of a resident decedent the right to inherit property unless the heirs could prove:

1964 (unpublished) (constitutional), *cited in* Usher, *California's Buy-American Policy: Conflict with GATT and the Constitution*, 17 STAN. L. REV. 119, 122 n.19. *See generally* Bilder, *East-West Trade Boycotts: A Study in Private, Labor Union, State, and Local Interference with Foreign Policy*, 118 U. PA. L. REV. 841 (1970).

20. *See* pp. 141-48 *infra*.

21. *See* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Moore, *supra* note 1.

22. Zschernig v. Miller, 389 U.S. 429 (1968); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

23. 389 U.S. 429 (1968).

24. 376 U.S. 398 (1964).

(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."[25]

The Oregon courts found that the heirs in this case, residents of East Germany, had not established these three prerequisites and, consequently, that the property would escheat to the state of Oregon. The statute was challenged in the Oregon Supreme Court on two grounds: that its application in this case conflicted with two treaties concluded between the United States and Germany;[26] and that, in any event, the statute was an unconstitutional interference with the foreign relations power reserved to the national government. The Supreme Court of Oregon rejected the challenge to the statute's constitutionality and ruled that the 1923 treaty required the passage of the real but not the personal property to the heirs.[27] The court cited as authority *Clark v. Allen*,[28] a 1947 Supreme Court case involving the same treaty and raising the same constitutional issues.

In the *Clark* case, Justice William O. Douglas had ruled that a California statute requiring reciprocity of inheritance rights did not represent an "undue interference" with the federal foreign relations powers and that the 1923 German-American treaty did not prevent the application of the statute to personalty. When the *Zschernig* case was appealed to the Supreme Court of the United States, three possibilities were available. The Court could reaffirm *Clark v. Allen in toto* and thus affirm the Oregon holding; it could reverse *Clark v. Allen*'s interpretation of the 1923 German treaty[29] and thus find the Oregon statute in conflict with supreme federal law; or it could retain the interpretation of the 1923 treaty but strike down the statute as an unconstitutional invasion of the federal foreign relations power. The Supreme Court rejected the first two possibilities, despite *amicus* urging by the Department of Justice to reconsider the treaty,[30] and opted for the third.

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25. 389 U.S. at 430-31.
26. Treaty with Germany on Friendship, Commerce and Consular Rights, Dec. 8, 1923, 44 Stat. 2132 (1927), T.S. No. 725; Treaty with the Federal Republic of Germany on Friendship, Commerce and Navigation, Oct. 29, 1954, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593.
27. Zschernig v. Miller, 243 Ore. 567, 412 P.2d 781 (1966). The court did not deal with the 1954 treaty with the Federal Republic of Germany.
28. 331 U.S. 503 (1947).
29. 331 U.S. at 508-14. The parties did not raise the question of the applicability of the 1954 treaty on appeal in *Zschernig*.
30. 331 U.S. at 505.

In *Clark*, the Court apparently had applied three tests to determine the question of state interference with the foreign affairs power. The tests were whether the state legislation evidenced an "improper purpose" to influence foreign affairs; whether there was "actual interference" with a specific federal foreign policy; and whether there was some general "adverse effect" upon international relations. The opinion did not identify these tests separately and the Court may have been unaware that it was dealing with three separate issues. First, the petitioners argued that the purpose of the California statute was to influence the conduct of foreign nations because the reciprocity requirement on its face evidenced a motive "to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California."[31] Such a purpose was outside the scope of state competence. Justice Douglas, writing for the majority, rejected this argument, as "farfetched."[32] Second, the opinion considered whether there was actual interference with existing federal policy. Apparently limiting itself to a consideration of whether the statute interfered with foreign policy as evidenced by positive federal law, the Court found no such interference. As part of this discussion, the majority raised the third possible test: whether the state was injuring international relations because its statutory policy had some effect in foreign countries. If there was an effect of this kind, Justice Douglas wrote, it was only "incidental or indirect."[33] Taken as a whole, *Clark* rejected any test aimed at identifying an improper purpose underlying state action. The opinion appears to have adopted an "interference with national policy" test, although its fair implications are that, if state action could be shown to have more than an incidental and indirect effect upon United States international relations generally, this might render the state action unconstitutional even though no conflict with a specific national policy could be shown. Thus, after *Clark* it was unclear whether only a direct conflict between state and federal law would preempt state action or whether additional grounds for a finding of unconstitutionality would be available.

Five years before *Zschernig*, the Court had rejected an opportunity to reexamine *Clark v. Allen*. In *Ioannou v. New York*,[34]

31. 331 U.S. at 516.

32. 331 U.S. at 517. Justice Douglas cited Blythe v. Hinckley, 180 U.S. 333 (1901), in which the Court had found that a provision in a state constitution permitting aliens to inherit property did not violate the federal constitutional prohibitions against states entering into agreements with foreign nations.

33. 331 U.S. at 517.

34. 371 U.S. 30 (1962).

the Court scrutinized a New York statute which required a prospective foreign distributee under a will to demonstrate that she would in fact have the benefit and use of any personal property passed. The case differed from *Clark* in that the statute did not contain a reciprocity requirement and the prospective distributee, residing in Czechoslovakia, had attempted to assign her interest in the estate to a niece then living in England. Under the New York act, the funds were to be placed in escrow. They did not escheat to the state. Justice Douglas dissented from the Court's dismissal of the appeal "for want of a substantial federal question." In his dissent, Justice Douglas in effect endorsed all three tests implicitly presented in *Clark*. He argued that a substantial federal question did exist because there was a real issue concerning whether the application of the New York statute "impaired the effective exercise of the Nation's foreign policy . . . under existing federal policy and practice"[35] and whether there was a "persistent and subtle" effect on international relations generally which made the act unconstitutional. It is somewhat surprising in light of the vehemence of his expression in *Clark* that Justice Douglas also accepted the "improper purpose" test and suggested that the statute might be void on its face. He wrote, "If New York's purpose is to preclude unfriendly foreign governments from obtaining funds that will assist their efforts hostile to this Nation's interests . . . . it seemingly is an attempt to regulate foreign affairs."[36]

Given both the emphasis upon federal authority in *Banco Nacional de Cuba v. Sabbatino*[37] and Justice Douglas's strong dissent in *Ioannou*, the stage appeared to be set in *Zschernig* for an effective and clarifying reexamination of the scope of state law-making power in private international cases. Unfortunately, the Court not only failed to deal clearly with the problems presented, but its opinion created even greater uncertainty concerning the guidelines to be used by courts and state legislatures in identifying the parameters of federal preemptive authority.

Justice Douglas wrote the majority opinion in *Zschernig*. He used essentially the same reasoning suggested in his dissent in *Ioannou* to hold that the Oregon statute was unconstitutional "as applied."[38] Consequently, *Zschernig* implicitly adopts all three of the tests for unwarranted interference found in *Clark* but does nothing to clarify either the extent to which each is applicable or the weight which each

35. 371 U.S. at 32.

36. 371 U.S. at 34.

37. This aspect of *Sabbatino* is discussed in Part V of this article, pp. 159-62 *infra*.

38. The central portion of the *Zschernig* opinion is a quotation from Justice Douglas' *Ioannou* dissent. *Compare* 389 U.S. at 440-41 *with* 371 U.S. at 32.

is to be given in later cases.[39] The rule as stated by Justice Douglas appears to be that a state may make law in those subject-matter areas which it has traditionally regulated unless:

(1) the state's law has an adverse affect upon international relations;
(2) the state's law interferes with the national government in carrying out an existing foreign policy;
(3) the purpose of the state law is one to be carried out only by the national government.

No one of these three tests was isolated by the Court as a basis for its decision. At one point, Justice Douglas seems to lump the first two tests together, suggesting a "direct impact" upon foreign relations in general and a possible adverse affect upon the power of the national government to deal with those relations.[40] In addition, he suggests that the purpose behind the Oregon law is to effectuate the state's own view of foreign policy and is therefore improper.

If the tests are read conjunctively, the holding can be reduced to the rule that where a state enacts a statute regulating the descent of

39. "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. As we stated in *Hines v. Davidowitz* . . . 'Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.' Certainly, a state could not deny admission to a traveler from East Germany nor bar its citizens from going there. If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the Federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems. The Oregon law does, indeed, illustrate the dangers which are involved if each state, speaking through its probate courts, is permitted to establish its own foreign policy." 389 U.S. at 440-41 (citations omitted).

This quotation illustrates the rather hazy analysis prevalent throughout the majority opinion. In the first sentence, Justice Douglas stresses the statute's "persistent and subtle" effect upon international relations in general. In the third sentence, he stresses the invalidity of regulations which "impair the effective exercise of the Nation's foreign policy," illustrated in the next sentence by a reference to conflict between an existing treaty and state law. He then refers to state policy which may "disturb foreign relations" but chooses to illustrate such a policy with a specific instance involving prohibition of alien travel by a state, a situation clearly involving direct interference with a national decision.

40. 389 U.S. at 441.

estates to aliens, that statute is unconstitutional when it contains both a benefit and use provision and a reciprocity requirement; has a history of interpretation by the state courts which adversely affects foreign relations; may interfere with the conduct of foreign policy by the national government; and has a purpose more appropriately carried out under federal aegis. That this holding is almost useless as an effective tool for developing the law in future cases is illustrated by the confusion which has arisen in efforts to interpret the *Zschernig* holding.

III. Zschernig Aftermath

Almost immediately, the state of Oregon sought a clarification of whether the Court had held that the Oregon statute was unconstitutional per se or merely unconstitutional "as applied" and, if the latter, what were the limits of constitutional application.[41] The Court denied a rehearing.[42] This not only left the Court's position unclear with respect to the Oregon act, but also cast into doubt the status of all other similar state statutes.

Most state courts and some commentators have interpreted *Zschernig* narrowly as a prohibition aimed solely at preventing criticism of foreign governments or political institutions by state judges or legislators. None of the cases after *Zschernig* have examined the purpose of the state law as demonstrated by the legislative history or the provisions of the statute. The Supreme Court itself appears to be content to permit *Zschernig* to rest on its narrowest grounds.[43]

Following the *Zschernig* decision, numerous cases have applied the Supreme Court majority's somewhat foggy rationale on the issue of improper state action. For purposes of the following discussion,

41. Petition for Clarification and Rehearing at 2, Zschernig v. Miller, 390 U.S. 974 (1967). After the decision, the frustration in Oregon legal circles was apparent. *See* Snouffer, *Nonresident Alien Inheritance Statutes and Foreign Policy—A Conflict?*, 47 Ore. L. Rev. 390 (1968).

42. Zschernig v. Miller, 390 U.S. 974 (1967).

43. Following the *Zschernig* decision, a petition for rehearsing was filed in Ioannou v. New York, 371 U.S. 30 (1962), on the grounds that, under the *Zschernig* rule, New York's benefit and use statute which provided for court custody of the funds, rather than escheat to the state, was unconstitutional. The majority of the Court denied the petition on a representation by the New York Attorney General that a new application could be filed in Surrogate's Court in light of the changed circumstances represented by the *Zschernig* opinion. Ioannou v. New York, 391 U.S. 604 (1968). Justice Douglas dissented from the denial of rehearing on the grounds that the *Zschernig* rationale applied equally to New York's custodial statute and to Oregon's escheat provision. Therefore, in his view, *Ioannou* could be disposed of without reconsideration by the New York courts.

these cases are divided into two categories: first, those which deal with the distribution of estates to aliens and, second, those which interpret the broader language of the *Zschernig* opinion to test state action in other subject matter areas. The first group is subdivided into those cases concerning state statutes which require only reciprocity on the part of the foreign government toward American citizens as a condition of inheritance of American domestic estates by the foreign country's nationals, and those cases concerning statutes which require only that the distributee be proven to have the benefit and use of the property to be passed as a condition of inheritance. In the cases dealing with alien estates, the courts appear to have felt constrained in their interpretations by the similarity of the factual situations before them to that in *Zschernig* and, therefore, have emphasized the presence or absence of judicial improprieties as the ultimate test for constitutionality. In the few cases outside the area of alien estates which have interpreted *Zschernig*, the courts appear much more willing to give effect to the spirit of the *Zschernig* opinion without feeling constrained by the Supreme Court's limiting language concerning the effect of its decision on alien inheritance statutes in general.

The most striking illustration of a narrow and literal interpretation of *Zschernig* is found in the strange case of *Gorun v. Fall.*[44] John P. Giurgiu died in 1966. His will established a trust, the proceeds of which were to be paid to named relatives living in Romania. A Montana statute[45] required a showing by the prospective beneficiaries that the foreign country recognized the right of United States citizens to inherit property left to them by residents of that country and that there were no restrictions on the movement of that property to the United States. The statute further provided that where a reciprocal right of inheritance did exist but the flow of funds or property was restricted, the state of Montana should take custody of the funds and hold them under the same restrictions on transfer which were applied by the foreign country. Attorneys for the beneficiaries sought an injunction against the enforcement of the Montana statute before a three-judge federal district court on the grounds that the statute was unconstitutional, citing *Zschernig v. Miller*. The district court granted defendants' motion to dismiss on the grounds that reciprocity statutes were not unconstitutional per se and that this statute required the state courts to do no more than read the law of the foreign nation to determine if reciprocity existed. The majority in *Zschernig* had explicitly distinguished reciprocity provisions which required "mere

44. 393 U.S. 398 (1968).
45. MONT. REV. CODES ANN. § 91-520 (1947).

matching of laws" from the Oregon rules which it held unconstitutional. Earlier state cases decided under the Montana statute, in which the courts had sought to determine de facto reciprocity, were disregarded on the grounds that Montana had changed its procedure to treat questions of foreign law as questions of law, not as questions of fact as has been done before 1966.[46] Relying heavily on Justice Stewart's opinion in *Zschernig*, plaintiffs appealed to the Supreme Court, arguing that the statute could not be applied "without involving the Montana courts in the kind of foreign relations activities proscribed by the *Zschernig* decision."[47] The Supreme Court affirmed the dismissal below per curiam with a concurring opinion by Justice Douglas, joined by Justices Black, Harlan and Fortas.[48]

The concurring opinion pointed out that *federal policy* permits the free flow of funds to Romania and that "a state probate judge is not authorized to make or apply a probate rule contrary to that federal policy."[49] From this the concurring Justices derived a "clear-cut federal policy in favor of the claim of appellants."[50]

The lack of clarity in *Zschernig* and, consequently, in the meaning of the per curiam decision in *Gorun* was illustrated immediately when the *Gorun* case was considered by the Montana probate court. At the later hearing, that court ruled that the decisions in the federal courts precluded any further investigation into the existence of actual reciprocity between the United States and Romania, as required by the Montana statute.[51] In so doing, the Montana court accepted the rather naive conception of legal operations found in the opinion of the majority in *Zschernig* and repeated by the three-judge court in *Gorun*: namely, that reciprocity could be determined merely by laying Montana law alongside the written evidence of foreign law to determine whether they matched without any investigation into their actual operations. On appeal, the Montana Supreme Court reversed the probate court,[52] ruling that the federal courts had not determined the issue of reciprocity for purposes of Montana law and that the case should be remanded for a determination of whether reciprocity existed within the meaning of the Montana statute, with the burden of proof on the foreign heirs. An appeal from this decision to the United

46. Gorun v. Fall, 287 F. Supp. 725 (D. Mont. 1968).
47. Appellant's Jurisdictional Statement at 5, Gorun v. Fall, 393 U.S. 398 (1968).
48. Gorun v. Fall, 393 U.S. 398 (1968).
49. 393 U.S. at 398-99.
50. 393 U.S. at 399.
51. *In re* Estate of Giurgiu, No. 9246, Lewis & Clark County Dist. Ct., Aug. 1, 1969, at 4 (unpublished).
52. *In re* Estate of Giurgiu, 155 Mont. 18, 466 P.2d 83 (1970).

States Supreme Court was dismissed "for want of a substantial federal question."[53]

A somewhat broader application of *Zschernig* is found in *In re Kraemer*.[54] In that case, both the trial court and the California Court of Appeals ruled that the same reciprocity statute[55] approved by the Supreme Court in *Clark v. Allen* was now unconstitutional as a result of *Zschernig*, despite the fact that *Clark* had not been overruled. The appellate court based its decision on the fact that in the time intervening between the *Clark* and *Zschernig* decisions, the California statute, which contained reciprocity provisions similar to those in the Oregon statute in *Zschernig*, had been "infected" with the same vices. This was said to be demonstrated by several earlier California cases which had indicated that California required more than a mere matching of laws to determine whether reciprocity existed. The court did not attempt to purge the statute of its unconstitutional interpretations but, rather, left it open to the California legislature to reenact the law with a continuing requirement of reciprocity. The court implied that such a reciprocity requirement would be valid if it were made clear that the statute required only equality of formal legal provisions, not an examination of practice to determine how the foreign law was in fact administered. The impropriety of the reciprocity requirement, as such, was not considered by the appellate court, nor did it interpret the *Zschernig* case to establish a general "improper purpose" test. The court was satisfied that the California statute, taken together with its judicial gloss, had entered into the forbidden field of foreign affairs and was consequently unconstitutional.

Judicial applications of *Zschernig* to pure benefit and use statutes stress the impropriety of examining foreign governmental operations to determine whether the distributee will have the actual use of the funds passed. In *Mora v. Battin*,[56] a three-judge federal district court in Ohio ruled that *Zschernig* made the Ohio "iron curtain" statute unconstitutional on its face. The statute required the probate judge to place an estate otherwise passing to foreign distributees in trust if it appeared that the distributees would not have the benefit or use of the property "because of circumstances prevailing at the place of residence of such . . . distributees."[57] Plaintiffs were residents and citizens of Czechoslovakia whose next of kin had died intestate in

53. Gorun v. Montana, 399 U.S. 901 (1970).
54. 276 Cal. App. 2d 715, 81 Cal. Rptr. 287 (2d Dist. Ct. App. 1969).
55. CAL. PROB. CODE § 259 (West 1942).
56. 303 F. Supp. 660 (N.D. Ohio 1969).
57. OHIO REV. CODE ANN. § 2113.81 (Baldwin 1964).

Ohio. The three-judge court ruled that the statute, as written, required an examination into the operations of a foreign government and into the economic, political and social conditions prevailing in the foreign country. Thus, it violated the *Zschernig* rule. The district court went on to suggest that the Ohio probate court could examine the statutory law of Czechoslovakia to determine the question of benefit and use but could go no further.

In *In re Estate of Leikind*,[58] the New York Surrogates' Court ordered funds which would otherwise pass to relatives of the intestate who were residents and citizens of the Soviet Union to be held by the court pending proof that the foreign legatees would have the benefit and use of the funds as required by New York law. A relative of the foreign legatee living in the United States had obtained a default judgment on a debt owed to him by the foreign distributee and sought to execute upon the funds then held in custody by the New York Director of Finance. The New York Court of Appeals ruled that the benefit and use requirement was not unconstitutional under *Zschernig* because there was no showing that the statute's operation interfered with the foreign relations of the United States. This was true as long as the New York courts did no more than "routinely read" foreign statutes to determine the rights of the prospective heirs in their home country.[59] The court did not examine the various purposes of the statute. The United States Supreme Court dismissed an appeal from the New York decision on the grounds that there was no final judgment below.[60] Apparently this was done because it was unclear whether the New York courts would treat satisfaction of a judgment-debt to a creditor as a bona fide "use" of the impounded funds within the meaning of the statute.[61]

In 1968, as a direct attempt to respond to the *Zschernig* decision, the New York legislature amended section 2218 of the New York Surrogate's Court Procedure Act,[62] the same section considered in *In re Estate of Leikind.* The first amended paragraph included a provision that whenever the prospective alien distributee was domiciled or resident within a country to which United States government checks could not be sent, the proceeds were to be paid into court and held for the distributee. Whether or not a country fell within that category was determined by examination of a so-called Treasury List,[63]

58. 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968).
59. 22 N.Y.2d at 351, 239 N.E.2d at 553, 292 N.Y.S.2d at 685.
60. Laikind v. Attorney General, 397 U.S. 148 (1970).
61. *See* 22 N.Y.2d at 355-56, 239 N.E.2d at 555, 292 N.Y.S.2d at 688-89 (Fuld, J., dissenting).
62. N.Y. SURR. CT. PROC. § 2218 (McKinney 1968).
63. 31 C.F.R. §211.2 (1971).

regularly issued and revised by the Treasury Department. The second paragraph of the amended statute provided for payment of such funds into court when other special circumstances indicated that the distributee would be deprived of their use. The third paragraph placed the burden of proving beneficial use upon the prospective distributee.

The latter two paragraphs in the amended statute were tested in *Goldstein v. Cox.*[64] In that case Romanian residents, who were beneficiaries of an estate in New York, sought to enjoin the application of the statute by the New York surrogates on constitutional grounds. The three-judge federal court denied summary judgment on grounds that there was no showing of any state activity that would amount to an interference with United States foreign relations under the New York statute. The court ruled that under *Zschernig*, evidence of improper application of the statute was necessary.[65] On appeal, the United States Supreme Court dismissed the *Goldstein* case on grounds that the Court had no jurisdiction because the refusal by the three-judge court to grant the injunction was not an "order denying . . . an . . . injunction" within the meaning of 28 U.S.C. § 1253.[66]

The constitutionality of the New York statute's first paragraph was challenged specifically and upheld in *Bjarsch v. Difalco.*[67] The New York Surrogate's Court had impounded funds that were to be distributed to remaindermen who were residents of the German Democratic Republic under the terms of a trust established in the will of a New York resident. East Germany was one of two countries remaining on the Federal Treasury List.[68] The remaindermen applied for the convening of a three-judge district court to hear the constitutional issues raised.[69] That panel found that the statute was not unconstitutional on its face and, since the plaintiffs had not yet sought release of the funds from the surrogate's court, it could not be held unconstitutional as applied. The court, after a review of *Zschernig* and the decisions which had preceeded and followed it, found that benefit and use provisions were permitted as long as no evidence of judicial impropriety of the kind alluded to in *Zschernig*, nor any examination of the actual administration of foreign laws, was present. Unlike the California court in *In re Kraemer*,[70] the court did

64. 299 F. Supp. 1389 (S.D.N.Y. 1968).
65. 299 F. Supp. at 1393.
66. Goldstein v. Cox, 396 U.S. 471, 479 (1969).
67. 314 F. Supp. 127 (S.D.N.Y. 1970).
68. 31 C.F.R. § 211.2 (1971).
69. Bjarsch v. Difalco, 300 F. Supp. 960 (S.D.N.Y. 1969).
70. 276 Cal. App. 2d 715, 81 Cal. Rptr. 287 (2d Dist. Ct. App. 1969). Discussed p. 144 *supra.*

not find that the statute was infected with the vices of prior judicial activity since it was clear that New York was making every effort to comply with the *Zschernig* rule. It ruled that neither the due process nor the equal protection clause of the fourteenth amendment would be violated so long as New York used the Treasury List only as an evidentiary presumption which could be rebutted by the production of evidence by the remaindermen that they would, in fact, have the use and control of their legacies. The court did not allude to a possible logical inconsistency inherent in the two constitutional rules, one of which precludes any judicial inquiry into the manner in which the foreign laws in question are actually administered in order to avoid interference with the foreign affairs power, while the other requires the court to hear evidence of actual administration of laws in order to avoid a violation of the fourteenth amendment.

The court in *Bjarsch* did not address the question of whether the use of the Treasury List as a criterion for state action intruded per se into the foreign affairs realm. This question was considered by the New Jersey Supreme Court in *In re Estate of Kish*.[71] In that case, a New Jersey resident willed property to residents of Hungary. Before *Zschernig v. Miller* was decided by the United States Supreme Court, the New Jersey Attorney General, representing contingent charitable devisees, challenged the right of the named beneficiaries to take on the grounds that they would not have the benefit and use of the property passed, as required by the New Jersey statute.[72] After the state lost in the trial court and the Appellate Division affirmed,[73] the New Jersey Supreme Court granted certiorari but directed that more evidence be obtained on *how* the transmission of funds to the Hungarian legatees was to be handled.[74] The New Jersey Supreme Court heard the appeal after *Zschernig* was decided. The court ruled that the *Zschernig* decision did not prevent New Jersey from examining the *physical means* by which the funds were to be transmitted in determining if such means were likely to result in actual receipt of the funds by the heirs. The court made it clear, however, that variations between the "free market" exchange rate and the official Hungarian rate could not be interpreted to amount to a deprivation of benefit and use of the legacy, even though the amount the heirs would receive was smaller under the official rate. The court ruled that examination of United States Treasury Department Circular 655, which prohibits the transmission of government checks or warrants to certain listed

71. 52 N.J. 454, 246 A.2d 1 (1968).
72. N.J. REV. STAT. § 3A:25-10 (1953).
73. Neither opinion is reported.
74. 52 N.J. at 461, 246 A.2d at 5.

countries, was an inappropriate means of determining whether the heirs would actually have the benefit or use of the funds passed, in part because the Treasury determinations could involve political considerations not relevant to remittances of private funds. Finally, the court refused to engage in any consideration of the general political and economic situation in Hungary as a means of determining the rights of the heirs to retain the legacy under Hungarian law and practice.

The cases above, together with those arising under the reciprocity statutes, indicate that, although the exorcism of the "judicial horribles" cited by the *Zschernig* majority has been effective, state courts are applying varying criteria for determining the limits of state power. More important, these later cases demonstrate that the Supreme Court has not provided an effective expression of the limitations on state action in subject-matter areas other than decendent's estates in which similar conflicts between state and federal power arise. If *Zschernig* represents only a prohibition upon judicial criticism of foreign governments, as the cases above imply, its scope is narrow indeed.

In those few opinions which have not involved the descent or distribution of estates to non-resident aliens but which have, nonetheless, cited the *Zschernig* decision as authority, the courts have taken a broader view of the *Zschernig* holding. The farthest reaching of these decisions is *Bethlehem Steel Corp. v. Board of Comm'r.*[75] In that case, a contract had been awarded to the lowest competitive bidder to supply structural steel for use by the city of Los Angeles. Bethlehem, an unsuccessful bidder, brought suit to enjoin the award of the contract and to recover damages on the ground that the successful bidder had predicated his price upon the use of steel manufactured in Japan. Bethlehem argued that the award violated the California "Buy American" Act.[76] That act requires that contracts for the construction of public works or the purchase of materials for public use be awarded only to persons who will agree to use or supply materials either which have been manufactured in the United States or which have been produced substantially from materials manufactured in the United States. Citing *Zschernig*, the California Court of Appeals rejected the suit on the grounds that the California "Buy American" Act was an unconstitutional encroachment upon the federal government's exclusive power over foreign affairs and represented an undue interference with the United States' conduct of foreign relations. In so

75. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).
76. CAL. GOV'T CODE § 4303 (West 1943).

doing, the Court applied all of the possible tests mentioned in *Zschernig* except the "judicial horribles" test, none of these being present. First, the court found that the existence of countervailing state policies was "wholly irrelevant" when weighed against the purpose of placing an embargo on foreign products. Also, the court pointed out that problems of foreign trade were national in scope and could not be subject to resolution on a state-by-state basis. The court, specifically, did not base its decision upon a conflict between the "Buy American" Act and the General Agreement on Tariffs and Trade (GATT).[77] Instead, it ruled that the act was unconstitutional without regard to GATT, except as that agreement evidenced general federal policy.[78] Emphasizing the improper purpose of the state legislation, the court concluded:

> The present legislation is an impermissible attempt by the state to structure national foreign policy to conform to its own domestic policies. It illustrates the dangers which are involved if federal policy is to be qualified by the variant notions of the several states.[79]

In *South African Airways v. New York State Division of Human Rights*,[80] *Zschernig* played a supporting, but not a controlling, role. In that case, the New York State Division of Human Rights summoned South African Airways to appear in order to answer alleged violations of Executive Law, art. 15, § 293, which made it unlawful to discriminate against persons in places of public accommodations because of race. The state charged that South African Airways refused transportation to anyone who did not have a valid visa to visit South Africa and that the South African Government regularly refused visas to black persons. South African Airways sought an injunction in the New York Supreme Court to prohibit the state from holding the hearing. The court held that the Human Rights Division had no power to hold the hearing because "such a hearing would interfere with a federal act of state and the conduct of foreign affairs by the federal

77. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3 (1948), T.I.A.S. 1700.

78. In Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1st Dist. Ct. App. 1962), a California court of appeals refused to apply the "Buy American" Act on the grounds that it had been superceded by GATT. In that case, the court treated GATT as an international agreement binding upon the states under the supremacy clause. *Accord,* Territory v. Ho, 41 Hawaii 565 (1957). *See generally* Jackson, *The General Agreement on Tariffs and Trade in the United States Domestic Law,* 66 MICH. L. REV. 250 (1967); Note, 32 OHIO ST. L.J. 568 (1971) (suggests that state "Buy American" statutes are unconstitutional under the commerce clause).

79. 276 Cal. App. 2d at 229, 80 Cal. Rptr. at 805-06.

80. 64 Misc. 2d 707, 315 N.Y.S.2d 651 (1970).

government,"[81] citing *Zschernig* and other cases. The decision turned on the fact that the hearing, of necessity, would question the policies, not of the airline, but of the South African Government in granting or withholding visas. The South African Government, itself, could not be brought to the hearing because it was immune. Thus, since the airline had the right to fly into the United States by treaty and executive permission, an investigation into its activities would interfere with United States foreign policy. The court distinguished *American Jewish Congress v. Carter*[82] on the grounds that in that case the alleged discrimination was being carried out by the oil company itself rather than by the foreign sovereign. *South African Airways* is more directly related to the sovereign immunity cases than to *Zschernig*, but the *Zschernig* rationale was used as a basis for dismissing the state's complaint in the absence of positive federal law which directly sanctioned the airline's actions. The direct permission to the South African Government to grant visas and to operate on United States soil was sufficient to prohibit state inquiry into its policies.[83]

In *Duple Motor Bodies, Ltd. v. Hollingsworth*,[84] a dissenting judge cited *Zschernig* for the proposition that the application of Hawaii's long-arm statute to gain personal jurisdiction in Hawaii over a British company which had manufactured a bus body in England was unconstitutional, not only because it amounted to a denial of due process but also because it was an unnecessary intrusion into the field of international relations.[85] The defendant had done no business in Hawaii other than to sell the bus body to Vauxhall in England with the knowledge that it would be used in Hawaii. The dissent reasoned that subjecting an alien corporation to the jurisdiction of an American court on the basis of an isolated transaction should be done only as a matter of national policy, "particularly in light of possible reprisals, political, economic, or legal."[86] Balanced against this possibility, the dissent argued, any state interest in exercising jurisdiction was outweighed by the interest of the nation. In view of the fact that there was neither evidence of an objection by the British Government nor any indication of a discriminatory attitude toward the British or the

81. 64 Misc. 2d at 710-11, 315 N.Y.S.2d at 653.

82. 19 Misc. 2d 205, 190 N.Y.S.2d 218 (1959), *modified*, 10 App. Div. 2d 833, 199 N.Y.S.2d 157 (1960), *aff'd as modified*, 9 N.Y.2d 223, 173 N.E.2d 788, 213 N.Y.S.2d 60 (1961).

83. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

84. 417 F.2d 231 (9th Cir. 1969).

85. 417 F.2d at 239 (Ely, J., dissenting).

86. 417 F.2d at 239-40 (Ely, J., dissenting).

particular British firm, nor any indication that the application of the long-arm statute by the Hawaiian courts was designed to achieve a goal otherwise properly within the aegis of the national government, this argument by the dissent based on the *Zschernig* rule appears to be the broadest application of the *Zschernig* rationale to date. It certainly goes far beyond the limited interpretation of *Zschernig* in the cases involving decedent's estates.

Thus, in the cases which have followed *Zschernig*, the federal common law rule of preemption has varied in scope from its relatively narrow application in those cases involving the transmission of estates to aliens, to quite broad applications in other cases where the constraining influence of the obfuscatory language concerning the validity of the specific statute in *Zschernig* could be disregarded.

IV. The Tests Analysed

The majority opinion in *Zschernig*, taken as a whole, does not provide an effective tool for identifying the division of state and federal power in private international cases. Furthermore, neither the interference with foreign policy test, nor the adverse effect on foreign relations test, nor the improper purpose test is adequate alone to serve as a useful guide for judicial decision.

The oldest and most often articulated test is that which prohibits the states from exercising any law-making power that interferes with an established policy being actively carried out by the national government. Application of this test involves two determinations: first, what the existing national policy is and, second, whether the state action interferes with its operations. The easiest method of determining the existence of a federal policy is to find it in existing federal law. Where a written treaty, executive agreement or piece of legislation is available, any state law that contravenes it is inoperative under the supremacy clause. Where no such written law exists, the court is left with alternative choices. It can rule either that there is no federal preemption in the absence of conflict with positive federal law or it can look to less definitive statements by the national government to determine the existence of a policy with whose operations the state law interferes. The first approach represents that taken in *Clark v. Allen*,[87] which, in effect, denies federal preemption unless there is direct conflict between state action and positive federal law. Apparently, this is the rule adopted by Justice Harlan in his concurrence in *Zschernig*.[88] This rule would stifle any attempt by the

87. 331 U.S. 503 (1947).
88. 389 U.S. at 458-59.

courts to develop by common law methods a rule of preemption based upon the policies inherent in the federal constitutional structure. Moreover, a rule establishing preemption only where there is a clear statutory basis would leave much room for state action that would impede the operation of national policies promulgated by the executive through one of the many departments which deal with foreign affairs under the executive power. Clearly, the Constitution does not contemplate state freedom to interfere with these policies any more than it contemplates state contravention of positive federal foreign affairs law.

If the test for federal preemption is drawn broadly enough to encompass implicit as well as explicit national policies, the task of determining what the policies are is exceedingly difficult for the judiciary. One possibility, of course, would be to adopt the approach already employed in sovereign immunity cases and, to some degree, in act of state situations.[89] In these instances the executive communicates its desires to the court and the court automatically gives effect to them. This approach was explicitly rejected by the Court in *Zschernig*, where the State Department had expressly stated that the statute in question did not injure American foreign policy. As Mr. Justice Stewart noted in his concurring opinion, the "[r]esolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department."[90] Considerable question concerning the efficacy of executive determination of private law issues in American courts has already been raised in the sovereign immunity and act of state situations.[91] Of primary importance, particularly in cases where the question involves not judicial abstention but rather preemption of state power, is the difficulty which may confront a state legislature or court in communicating with the federal government and in receiving a definitive answer to any question which it has posed. Equally important is the fact that in many instances the national government, particularly the Department of State, might find it even more embarrassing to state, for the record, its present operative policy than to permit the state to interfere with the operation of that policy. Both of these problems are illustrated sharply by the history of executive action in sovereign immunity cases and under the Sabbatino Amendment.[92]

89. *See generally* Maier, *Sovereign Immunity and Act of State: Correlative or Conflicting Policies*, 35 U. CIN. L. REV. 556 (1966).

90. 389 U.S. at 443.

91. *See, e.g.*, Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901 (1969).

92. *See* Cheatham & Maier, *supra* note 13, at 83-94.

The difficulties in determining what federal policy is and whether the questioned state action interferes with that policy are multiplied when the courts must look to general statements and acts of the State Department. In instances where there has been no statement of federal policy directed to the particular situation, the court or legislature would be reduced to reading the newspapers in order to devine either the government's approach to the question presented or the government's attitude toward the particular country most immediately affected by the state's law. It was the very difficulty of identifying executive policy and the dangers inherent in "second-guessing" the Executive which prompted the Court in *Sabbatino*[93] to overturn those lower courts that had found a release from the act of state doctrine in general federal pronouncements concerning United States relations with Cuba.[94] In summary, it appears that a test requiring a demonstrated interference with national foreign policy as a prerequisite for federal preemption is either too narrow to be effective or, if sufficiently broad, requires factual determinations which courts and state legislatures are not equipped to make.

The second test rests upon the possible adverse affect of state action on United States foreign relations rather than upon state interference with specific activities or policies of the national government. The attitudes and responses of foreign governments to the actions of the state are the determining factor. The theory underlying this test is that, since the state has no international standing or responsibility as a political unit, any adverse response by a foreign nation to the state's action would be directed against the United States national government, which bears inherent international responsibility for injury caused to other nations.[95] To separate the responsibility for performing the decision-making function from the responsibility for answering to other nations for the results of that decision would remove from the decision-maker the necessity of tempering his actions in light of the consequences which he must suffer because of those decisions. Even assuming a careful and good faith assessment by the state government of the possible international consequences of its acts, information available to state decision-makers is so limited as to make any truly effective evaluation of these consequences impossible. If the states are permitted to take action

93. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

94. 376 U.S. at 432; *see* Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962); Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961).

95. *See, e.g.*, 6 J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 837-41 (1906) (diplomatic exchange concerning the lynching of several Italian citizens in New Orleans in 1891).

which adversely effects international relations, the national government would have no control over those state acts which are likely to bring on the foreign protests with which it alone may deal. Thus, the "adverse effect" test would prevent the separation of the decision to take action which might disturb a foreign country from the responsibility for answering for the results of that decision by precluding all state action which might tend to affect adversely United States foreign relations.

The principal objection to this test is that it is far too broad. Many kinds of state action clearly within the ambit of state power may ruffle the sensitivities of foreign nations. Illustrations may be found in the normal exercise of state police power to quarantine animals, to reject food products coming from outside a designated geographic area, or to control participation in certain professions and businesses by foreigners.[96] For example, Professor John Norton Moore, writing before the passage of the modern civil rights acts in the United States, suggested that state attitudes toward minority groups might affect adversely the relationships of the United States with countries in which those groups have an ethnic connection.[97] Indeed, almost any state action could have a "persistent and subtle" effect upon international relations. The need to determine whether that action is preempted by the Constitution in favor of the national government, however, requires a judgment concerning the *degree* of effect required to invalidate the state action. To charge the federal judiciary, not to mention a state court or legislature, with this kind of factual determination raises even greater objections than those noted above in connection with the first test. Short of direct acquiescence by the courts or the state legislatures in an executive suggestion that a given state practice creates sufficient international disharmony as to be prohibited, the "adverse effect" test would require courts, state governments, and, ultimately, the Supreme Court, to assess potential or actual international responses to given state actions in order to make a realistic determination. If the Court assesses the situation inaccurately, the national government has little or no recourse but to live with the decision, no matter how great the international difficulties, unless legislation or an international agreement could be obtained to override the state action by positive federal law.[98] The

96. *See generally* M. MASSEL, COMPETITION AND MONOPOLY 64-70 (1962).

97. Moore, *supra* note 1, at 288; *cf.* South African Airways v. New York State Division of Human Rights, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (1970) (discussed pp. 149-50 *supra;* p. 169 *infra).*

98. *See* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption,* 67 COLUM. L. REV. 1027, 1057 (1967).

degree of international disharmony created by state action is exceedingly difficult for the courts to determine. The mere absence of diplomatic protests is hardly a sufficient ground to assume no exacerbation of foreign relations. This fact is illustrated in the *Zschernig* case itself, where only one foreign government had objected to the prevailing practice of American state courts in decedent's estate cases,[99] but where there was general dissatisfaction with the practice abroad.[100] On the other hand, the presence of diplomatic protests, although persuasive on the issue of whether international ill-will is being engendered by the state practice, would not necessarily indicate that the state was acting outside its proper constitutional role. In such a situation, other policies underlying the division of state and federal power in our system might provide a sound basis for permitting the state practice even if some international difficulties were created. The problems created by judicial second-guessing on foreign policy questions were among the most important factors leading to the Court's prohibition of judicial determination of international law for purposes of setting aside the act of state doctrine in the *Sabbatino* case. The same reasoning would indicate that a test stressing exacerbation of foreign relations as a determining factor in defining proper state-national power relationships requires factual determinations which courts or state legislatures are not able to make with any precision, consistency or clarity.

The third test, which requires an examination of the purpose of the questioned state action to determine whether that purpose is one properly carried out only by the national government, comes closer than the other two suggested tests to serving as an effective means of identifying the respective roles of the nation and the state in private international cases. Nevertheless, it is not completely satisfactory. Under this "improper purpose" test, if the sole purpose of the state law is to injure a foreign government by taking action against its own people in order to encourage that government to alter its policies, that purpose would render the state law unconstitutional. Where, however, the state law is designed to accomplish multiple goals, some of which are legitimately within the state's aegis and some of which are not, the improper purpose test provides no effective guide that state legislatures or reviewing courts can use to balance these purposes in determining the law's constitutionality.

Illustrative of state laws with a single purpose, wholly improper within the constitutional context, are those requiring reciprocity on

99. *See* 389 U.S. at 437 n.7.

100. *See generally* Berman, *Soviet Heirs in American Courts,* 60 COLUM. L. REV. 257 (1962).

the part of foreign nations as a prerequisite to the recognition of legal rights within the state for citizens of those nations. These laws include not only reciprocal inheritance statutes, but also reciprocity requirements concerning foreign judgments and the enforcement of foreign revenue laws. A reciprocity requirement amounts to a policy decision by the state that it will determine rights of parties in cases under its jurisdiction without regard to individual equities because a foreign nation has treated American claimants in other cases in a way that the state disapproves. Such laws have as their *raison d'être* the improper purpose of influencing the conduct of a foreign nation by encouraging it to revise its approach toward American citizens in order to secure better treatment for its own nationals. If such a decision is reached, it clearly should be made by the national government at whose disposal are the additional diplomatic tools necessary to aid in bringing about the desired change in foreign law.[101] Therefore, state laws based on the single identifiable requirement of reciprocity in connection with the activities of foreign governments would be unconstitutional, without investigation into the manner in which they were actuallly applied.[102]

The improper purpose test does not operate effectively in those instances where the state law has multiple purposes, some properly within the ambit of state activity and others clearly within the area of foreign affairs. In such cases, arriving at an effective determination

101. Chief Justice Fuller correctly labeled the reciprocity rule one of "retorsion" and suggested that this traditional international means of self-help was to be invoked only by the executive branch and not by the judiciary. Hilton v. Guyot, 159 U.S. 113, 234 (1895) (Fuller, C.J., dissenting).

102. An initial reading of the majority's opinion in *Zschernig* indicates that the improper purpose test may have been, in fact, the one applied to strike down the Oregon statute. Although Justice Douglas articulated the majority opinion in terms of interference with the foreign policy of the national government and disruption of foreign relations, his emphasis upon prior expressions by state courts of hostility toward Communist governments, together with his indication that the reciprocity requirement was designed to procure foreign governmental action, indicated that he may have been concerned primarily with the likelihood that the state was attempting to establish its own foreign policy. *See* Linde, *A New Foreign-Relations Restraint on American States: Zschernig v. Miller,* 28 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 595, 606 (1968). This interpretation appears to be even more reasonable when it is noted that the United States Government, itself, had indicated that the Oregon law did not interfere with any policy then being carried out by the government and that there was no evidence of a general disturbance of foreign relations brought on by the state's action. 389 U.S. at 432. Nonetheless, the Court's action in Gorun v. Fall, 393 U.S. 398 (1968), indicates that this test will not be treated as controlling except in situations such as *Zschernig* where a state court or legislature has engaged in overt criticism of foreign political institutions.

involves weighing the undesirability of permitting the state to give effect to its own conceptions of foreign policy against the desirability of the state performing its other proper functions as part of the appropriate division of power between the national and state governments within the federal system.[103] Without more, the improper purpose test does not provide an adequate guide to carry out this weighing process.

Illustrative of such multipurpose state laws are the "benefit and use" statutes discussed earlier.[104] The determination by a state that the proceeds of an estate may not pass to foreign heirs who will not have the benefit and use of that property can be justified on the grounds that the state's traditional role is to give effect to the intention of the decedent.[105] If the decedent dies intestate, the state law on descent and distribution theoretically carries out the decedent's presumed intent by passing property to designated next of kin, determined by proximity of blood relationship.[106] If the decedent dies testate, the state carries out his expressed intent by giving effect to his will. The benefit and use provisions can be justified on the theory that the decedent probably would not want his estate to pass to a foreign government instead of to the individuals named either in his will or in the distribution statute.[107] By preventing the passage of inheritance in those cases in which it is not proven that the assets would reach the designated heirs, the state carries out its traditional role. This is accomplished either by passing the estate to heirs further down the line of descent, by taking the funds in escheat, or by holding the funds until such time as benefit to and use by the heirs or devisees becomes possible. Where the state takes the funds in escheat, it does so on the assumption that if a government is to have them, the decedent would prefer the government of his domicile state to that of a foreign country. Thus, on its face, a benefit and use provision carries out the traditional state function of protecting the decedent and giving effect to his intent, presumed or actual.

This prima facie purpose of the benefit and use statutes is belied by a closer examination of their history and actual operation. First,

103. *Cf.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 117, comment (b) at 370 (1965).

104. Pp. 141-48 *supra; see, e.g.,* N.Y. SURR. CT. PROC. § 2218 (McKinney 1968).

105. F. SAVIGNY, PRIVATE INTERNATIONAL LAW 227 (1869).

106. *See* Labine v. Vincent, 401 U.S. 532, 554-55 (1971) (Brennan, J., dissenting).

107. *See* Pilcher v. Dezso, 262 Ala. 249, 78 So. 2d 306 (1955); *In re* Url's Estate, 7 N.J. Super. 455, 71 A.2d 665 (Somerset County Ct. 1950); *In re* Well's Estate, 204 Misc. 975, 126 N.Y.S.2d 441 (Sur. Ct. 1953).

statutes of descent and distribution are really administrative devices to determine the final repose of property owned by a decedent, rather than devices to give effect to the decedent's intent.[108] In fact, evidence in any form other than a valid will that the decedent would not have desired his property to pass to particular distributees in line under the statute is not admissible. The benefit and use provisions, therefore, appear to be designed more to prevent property from passing to a government which the state considers hostile than to effectuate the decedent's presumed intent.[109] Second, the effect of the benefit and use statutes is to deny the validity of action taken by a foreign government toward its own residents merely because the forum state disagrees with the foreign government's economic, social and political structure. State governments do not withhold passage of property to heirs living in sister states where, for example, it is demonstrated that the property passed would be taken by the state of the heir's domicile to satisfy a judgment or debt owed to the state. Constitutional arguments aside, providing property with which the heir may satisfy a legal obligation to a sister state is surely an appropriate use of the property and a benefit conferred upon the heir. Where the decedent's domicile state presumes that the decedent would not want his property to pass to a foreign government in satisfaction of a legal obligation imposed by that government on its nationals, the domicile state has, in effect, decided that the use of such property to meet the foreign legal obligation is not a bona fide use by the heir. This disapproval of an otherwise valid foreign-created obligation can be based only upon an evalutation of the government which created it, together with an implicit finding that it has committed a "wrong" by creating the obligation within its own borders. Such a state determination directly conflicts with the act of state doctrine.[110] The decedent's domicile state has imposed upon the decedent a political judgment that will thwart his actual intent when he has left a will and his presumed intent when he has died intestate. This is true even in the absence of overt judicial or legislative criticism of the foreign government or its political structure. Political judgments of this sort

108. *See* Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850).

109. Most of these statutes were originally designed to prevent passage of property to heirs living in Nazi Germany, a goal at that time in complete consonance with United States national policies. *See* Note, 21 VAND. L. REV. 502, 504-05 (1968).

110. The classic statement of this doctrine appears in Underhill v. Hernandez, 168 U.S. 250, 252 (1897): "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

are properly made only by the national government. On the other hand, the state does have a legitimate interest in determining whether physical facilities exist to guarantee actual transmission of the inheritance to the heirs.[111] For example, in situations involving heirs residing in a country without a reliable banking system, it would appear to be appropriate for the state to hold the funds until arrangements for transmission become available. However, the lack of adequate banking facilities would not justify the state's taking the property in escheat.

The improper purpose test as articulated in *Zschernig* does not indicate in what manner the proper state purposes of protecting the decedent and of effectively administering estates should be balanced against the additional political purposes of the statute. Thus, none of the three tests suggested in the *Zschernig* opinion is an effective guide in delineating the functions of state and federal government in private international matters.

V. The Relevance of Sabbatino

The raw material from which the Court could have fashioned an effective method for dealing with problems of federal-state power relationships in the foreign affairs area was available in *Banco Nacional de Cuba v. Sabbatino*,[112] decided four years before *Zschernig*. The Supreme Court in that case dealt with two principal issues. The first was whether a state or the federal government had the constitutional power to give content to the act of state doctrine. Once national law was chosen as the authoritative source for the doctrine, the second issue was which branch of the national government was to serve as the law-maker. In deciding the first issue, the Supreme Court went outside the requirements of the case to rule that the act of state doctrine, which prevented the examination of foreign governmental acts in American courts, was national law and controlled state decisions. This was so because the doctrine arose "out of the basic relationships between branches of government in a system of separation of powers."[113] The Court noted that the doctrine itself represented "a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community [which] must be treated exclusively as an aspect of federal law."[114]

111. *See In re* Estate of Kish, 52 N.J. 454, 246 A.2d 1 (1968).

112. 376 U.S. 398 (1964). The majority opinion in *Zschernig* made no reference to the *Sabbatino* case.

113. 376 U.S. at 423.

114. 376 U.S. at 425.

Justice Harlan, writing for the majority, made it clear that no specific text of the Constitution required the act of state doctrine. Rather, it was the implications drawn from the structure and special competences of the branches of the federal government which gave rise to the doctrine and provided its "constitutional underpinnings." Consequently, the issue of judicial competence presented a problem which was "uniquely federal in nature." Justice Harlan concluded that such a basic decision concerning the competence of a branch of the government to exercise the kind of authority in question could not be subject to varying interpretations under the laws of the fifty states.[115] The doctrine was part of a mechanism for allocating functions among governmental branches within the framework of the constitutional structure. Thus, the federal-state controversy in *Sabbatino* turned solely on the question, what is the authoritative body of law—state or federal—which determines the allocation of the separated powers. The answer to this question was to be found in federal law, no less than a rule of law based upon a specific text of the Constitution.[116]

In the *Zschernig* case, the question of *whether* a rule of preemption existed was clearly a question of federal law. The question of the *scope* of such preemption raised different issues and it is on this question that the *Sabbatino* Court's treatment of the second principal issue—who should serve as the law-maker—could have provided insight into a method of analysis which would have given *Zschernig* much greater scope and clarity than it in fact achieved.

The rule promulgated by the lower federal judiciary, which the Supreme Court reviewed in *Sabbatino*, was that an act of a foreign state need not be given effect in domestic courts if that act violated international law.[117] The second major issue before the Supreme Court was one of judicial competence to make this determination under the principles of the doctrine of separation of powers. The Court ruled that judicial determination of such an issue was inappropriate. In reaching its conclusion, the Court stressed the nature of the policy decisions required to apply the rule as set forth by the lower courts. First, the Court found that to permit the promulgation of such a rule by the judiciary would interfere with the operation of national policy by putting the State Department in an embarassing position if the judicial determination were contrary to the Depart-

115. 376 U.S. at 424.

116. *But see* Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 811-19 (1964).

117. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962).

ment's stated position in the international negotiation process. Second, the Court found that the judicial implementation of the suggested rule might have adverse effects on American foreign political and economic relations generally, even though no identifiable interference with a specific foreign policy or operation would result. Last, the purposes underlying the rule—for example, to encourage the development of an international legal rule against expropriation and to protect American investors against expropriating foreign sovereigns—were best accomplished by political methods and were not suited to implementation by the judicial branch.[118] The Court, in effect, found that the judiciary was preempted by the power allocations within the constitutional framework from deciding the issues implicit in the rule enunciated in the lower courts. It did so *without* finding preemption based either upon an explicitly stated executive policy or upon positive federal law.

The emphasis in *Sabbatino* on the necessity for identifying the appropriate decision-maker among the federal governmental branches, in terms of the nature of the question to be decided, suggests that ground had been broken for a definitive statement concerning state-federal relationships in *Zschernig*. The fact that the *Sabbatino* holding on this issue rested upon an analysis of the appropriate separation of powers between the judiciary and the federal executive does not make its method of analysis any less relevant to the determination of state-federal relationships. While the doctrine of separation of powers usually is applied to distinguish responsibilities of the executive, judicial and legislative branches of the federal government, the theory underlying it is equally applicable to the question of the division of state from federal authority. When governmental powers in the United States are viewed as a unit, it is plain that there are four, rather than three, groups of authoritative law-makers and that the states represent the fourth major group. The debates at the Constitutional Convention indicate that "checks and balances" were to operate vertically as well as horizontally and that the assignment of constitutional law-making power was carried out with this functional utility in mind. Between the states and the nation, just as between the three branches of the national government, the constitutional object was to allocate to different types of decision-makers the task of establishing authoritatively those policies which control social relationships. Thus, the functional approach employed by Justice Harlan to determine that the judiciary should be excluded from examining foreign acts of state in the light of international law

118. 376 U.S. at 427-37.

appears to be equally applicable to determine whether the states are precluded from dealing with problems that the constitutional structure of the nation suggests are not appropriate for state determination.[119]

The tests used by the Supreme Court in *Sabbatino* to determine whether the judiciary should treat itself as being "preempted" were essentially the same ones which can be derived from the *Zschernig* case,[120] and which were implicit in *Clark v. Allen*.[121] The difference, however, lies in the fact that the emphasis on functional analysis found in *Sabbatino* is almost wholly absent in *Zschernig*. The discussion of both the "vertical" and "horizontal" issues in the *Sabbatino* opinion did not represent an attempt to fit the act of state doctrine within one of a number of available characterizations as a means of determining the appropriate legal result. Rather, the emphasis was upon the nature of the decision-making process protected by the doctrine and upon the necessity of determining which was the most appropriate governmental division within the federal structure to make the required decisions. Careful attention to this kind of analysis in *Zschernig* would have helped to clarify the functional interrelationships between the states and the national government in those private international matters that have implications for the nation's external relations. Only a test which emphasizes the functional dissimilarities of the states and the nation as law-makers will serve as an effective demarcation of allocated powers when private international issues must be decided.

119. Justice Harlan, himself, did not choose to apply this approach to the solution of the questions in *Zschernig*. In his concurring opinion, he strongly criticized the majority for finding a general "interference with foreign relations" without also finding a specific constitutional or federal law prohibition. He wrote: "Prior decisions have established that in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." 376 U.S. at 458-59.

One case, French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968), which appears to recognize this potential relationship between *Sabbatino* and *Zschernig*, cites both cases to support the proposition that currency regulations of a foreign state are not an appropriate subject for evaluation by state courts applying local conceptions of public policy. The case involved a regulation by the Cuban Government which prohibited foreign investors from receiving currency other than Cuban pesos on Cuban investments.

120. *See* pp. 139-41 *supra*.

121. *See* pp. 137-39 *supra*.

VI. Towards a Functional Approach

There are at least three reasons for the failure of the courts to articulate more effectively a guide for identifying the division of state and federal authority in this area; all of them apply to the *Zschernig* decision. The first is based upon a presently outmoded and, perhaps, initially erroneous concept of the states and the national government as competing sovereigns, vying for the right to control the national destiny. Under this view, any "victory" for one of the political divisions represents a "defeat" for the others. The second reason arises from the adoption by the courts and by many commentators of a descriptive rhetoric which is inherently vague and devoid of sufficient functional inferences to serve as an effective guide to decision. The third reason lies in a failure both to analyze the situations described by that rhetoric and to treat the characterizations as functional tools for describing factual results achieved in particular cases. These three reasons will be considered in succession.

The concept of the states and the federal government as competing sovereigns has its roots in the debates of the Constitutional Convention and in the struggle to ratify the document which the Convention produced. Several of the plans submitted to the Convention implicitly envisioned such competitive activity by providing means by which the national government could enforce its will against the states if any should become obstreperous. These proposed enforcement measures ranged from a national legislative veto over state action to provisions that would permit the use of federal military force when "any state shall oppose or prevent carrying into execution acts or treaties of the national government."[122] On the other hand, the advocates of state sovereignty took as an article of faith the position that the states were independent sovereigns before the adoption of the Constitution and that they remained so afterwards. Proponents of this view argued that the states had the legal rights of interposition and nullification to prevent "illegal" activities by the national power.[123] All of these suggested possibilities give emphasis

122. Debates in the Federal Convention of 1787 Which Framed The Constitution of the United States of America, Reported by James Madison 967-68 (G. Hunt & J.B. Scott eds. 1920) (from "The New Jersey Plan," presented to the Convention on June 15, 1787).

123. *See* G. Johnston, The Effect of Judicial Review on Federal-State Relations in Australia, Canada and the United States 14-15 (1969). Although it may be difficult today to take such state action seriously, early illustrations of the activities of the advocates of state sovereignty are found in the Virginia and Kentucky Resolutions, striking at the judicial jurisdiction of the Supreme Court. *See* 2 C. Warren, The Supreme Court in United States History chs. 13, 16 (1923).

to potential divergence of interest between the states and the nation and each was designed to "settle" a conflict arising from attempts to assert divergent interests by competing political divisions.[124] This emphasis is retained in the otherwise useful term, "vertical *conflicts* of law," which implicitly describes the process of selection between state and national authority as one involving a decision between competing interests. The Supreme Court, in those cases in which it has explicitly recognized exclusive federal competence in the field of foreign affairs, has used both a tone and specific phraseology that reflects the "competitor theory."[125] In these cases, the Court has written as if it were adjudicating between conflicting interests rather than as a director of coordination, seeking the most appropriate governmental performance of a necessary duty.

This assumption regarding the existence of a power struggle between the states and the national government leads to the second reason for the failure of courts to articulate an effective distinction between state and federal authority; *i.e.*, the use of a rhetoric which inaccurately describes the legal relationships between those governmental entities in private international cases and the policies which those legal relationships reflect. A description of the national government and the states as political entities operating in different spheres of interest establishes an implicit dichotomy, described in these cases by the terms "domestic" and "international." Courts and commentators ring the changes on these terms: "domestic affairs" and "foreign affairs;" "private international law" and "public international law;" "domestic concern" and "foreign relations"—but such rearticulation of the same dichotomy does nothing to clarify the functional basis of the decisions. As is true of all legal dichotomies, the extreme and easy cases fall clearly within one characterization or the other. Most of the cases which reach the appellate courts, however, require

124. *But see* THE FEDERALIST No. 46, at 321 (M. Dunne ed. 1901) (J. Madison). "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have . . . viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments, whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other."

125. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); United States v. Belmont, 301 U.S. 324 (1937); Missouri v. Holland, 252 U.S. 416 (1920).

much finer distinctions. In these cases, the rhetoric of dichotomy has had a limiting rather than a clarifying effect.

The domestic-international dichotomy, in all of its various forms of statement, describes a legal result, not a set of Platonic norms. Failure to emphasize this fact leads the courts to examine the two classifications to determine which one best describes the subject-matter at hand. In the class of cases involving a general subject-matter normally controlled by state law, the characterization of the subject-matter before the court as "domestic" appears foreordained and automatically leads to the presumption that state law ought to control. The reasoning involved can be reduced to the following erroneous syllogism:

States have no power to deal with matters of international concern.
States have dealt with *this* subject-matter.
Thus, this subject-matter must not be one of international concern.

Despite the rhetorical use of the domestic-international dichotomy, it is clear to the courts that these labels, in themselves, do not provide an effective means of evaluating the needs of the nation. Therefore, although the general subject-matter classification indicates state law, the courts seek to articulate an "unless" clause which modifies the results apparently required by the dichotomy. In each instance, the "unless" clause modifies the dichotomous characterization by reference to a functional element whose presence takes the situation out of the normal sphere of state power. The actual rule, then, tends to be stated: in a case containing a foreign element but otherwise involving traditionally domestic subject-matter, state law will apply *unless* its operation "interferes with foreign relations;"[126] *unless* there is an "overriding federal policy;"[127] or *unless* there is a need for "national uniformity" in the application of this rule.[128]

In order to satisfy any of these "unless" clauses, the court must find affirmatively in the case before it that the national interest will be injured by state action or that the legislative jurisdiction of the state does not extend to the issue raised. This search for interference with a specific federal interest as a prerequisite to federal preemption leads to unrealistic descriptions of the legal basis for court decisions. Such faulty descriptions impede rather than advance the distinction between federal and state responsibility.

126. *See, e.g.,* Zschernig v. Miller, 376 U.S. 429 (1968); *In re* Estate of Leikind, 22 N.Y.2d 346, 239 N.E.2d 550, 292 N.Y.S.2d 681 (1968).

127. *See, e.g.,* Clark v. Allen, 331 U.S. 503 (1947).

128. *See, e.g.,* Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (1969) (Ely, J., dissenting); Bethlehem Steel Corp. v. Board of Comm'r, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969); Moore, *supra* note 1, at 263.

The concept of state-federal conflict and the use of an inaccurate rhetoric to describe its resolution are interrelated bases for the judicial failure to articulate an effective approach for separating state from national authority in private international matters. The compromises necessary to create an effective federal structure during the Constitutional Convention were brought about, in part, by a recognition that the federalization of government was a means of attaining both internal and external security for the constituent states. Hamilton, for example, answering criticisms of proposals for a federal judiciary during the struggle to ratify the Convention's product, emphatically stated:

> [The] plain proposition [is] that the peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty for preventing it.[129]

This early use of the rhetoric of peace and war to support national action in areas that previously had been the province of the states has its vestigial remains in the emphasis on actual state "interference" with foreign relations as a rationale for prohibiting state action in some private international cases. But today there is little concern with a struggle for control between the state and federal governments. The United States is a *de facto*, as well as a *de jure*, nation. Emphasis upon the coordination of the institutions of government—state and federal—should now replace the emphasis on implicit or potential conflict in private international matters.

Heretofore, however, the courts and most commentators have failed to emphasize that, because of the *nature of the decision required*, the principal determination on which cases in this area should turn is whether the matter is best decided by a national rather than a state decision-maker. This type of functional analysis, without reliance upon a specific constitutional text, is not new to constitutional interpretation. In *Gibbons v. Ogden*,[130] a landmark decision under the commerce clause, Chief Justice Marshall made clear that the overriding consideration in determining state-federal relationships

129. THE FEDERALIST No. 80, at 111 (M. Dunne ed. 1901) (A. Hamilton). This emphasis is found throughout these discussions. *See, e.g.*, No. 1, at 12-13 (A. Hamilton); No. 3, at 20 (J. Jay); No. 4, at 25 (J. Jay); No. 5, at 30 (J. Jay); No. 6, at 35 (A. Hamilton); No. 8, at 49 (A. Hamilton); No. 9, at 56 (A. Hamilton); No. 11, at 71, 78 (A. Hamilton); No. 23, at 152 (A. Hamilton); No. 41, at 274 (J. Madison).

130. 22 U.S. (9 Wheat.) 1 (1824).

should be the identification of the appropriate decision-maker in terms of broad functional utility. He wrote:

> The genious and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of government.[131]

In *Zschernig*, Justice Stewart put the question much more sharply in his concurring opinion. He sought to identify "the basic allocation of powers between the states and the nation in matters touching foreign affairs."[132] A clear and effective method of identifying this allocation is available. It is somewhat surprising that the Supreme Court has not yet accepted the task of articulating these functional considerations with more precision.

Given the enormous complexities that surround questions of foreign affairs, any attempt to articulate a workable general rule to implement Justice Stewart's suggested approach must be unsatisfactory. If the Court is seeking to identify in each case whether a state or the national government is the appropriate decision-maker to control the rights of the parties, its analysis must be a functional one. Consequently, an identification of the considerations which indicate functional appropriateness would serve as the most effective guide for courts and for other law-makers in determining the proper sphere in which each division of government may operate. In each instance, the question of allocating constitutional power involves determining *degrees* of competence, not identifying absolute competence as the various dichotomies described earlier would indicate. In other words, the proper method for dealing with these cases should closely resemble the governmental interests analysis presently employed in normal "horizontal" conflict of laws decisions. Whenever the decision to be made should flow from a governmental unit or branch structured to represent the entire body politic rather than the constituency within a particular political subdivision, the state's power to decide has been constitutionally preempted. This is the thrust of the existing judicial decisions in which federal rather than state power has been found to prevail.

131. 22 U.S. (9 Wheat.) at 195. Theodore Roosevelt was characteristically more direct: "I believe in state's rights wherever state's rights mean the people's rights. On the other hand, I believe in national rights wherever national rights mean the people's rights." T. ROOSEVELT, THE NEW NATIONALISM 43 (Prentice Hall ed. 1961).

132. 389 U.S. at 443.

To determine whether a particular decision is appropriate for the national and not the state governments, at least three basic interrelated factors should be considered as guides. They are:

(1) whether the limited constituency of the state provides an appropriate political context in which to make the required policy judgment;

(2) whether the pertinent information which must be weighed to determine the wisdom of the policy decision is available to the state decision-maker; and

(3) whether any potential adverse effects of the decision will fall upon the entire nation or will be localized within the particular state.

These three factors, taken together, include, but reorganize and consolidate, all of the pertinent considerations heretofore alluded to by the courts to determine the existence of exclusive federal power. If the weight of any one factor in a given case indicates that the state is not the appropriate decision-maker, then its power should be deemed constitutionally preempted by the national government.

The first factor suggested above includes considerations of an improper purpose underlying the state's action, the need for national uniformity, and the direct interference by a state with an operating and identifiable foreign policy of the national government. In each of these instances, the state's action is not necessarily unconstitutional because its policy decision is incorrect. Rather, it is unconstitutional because the limited constituency which provides the political context in which the policy is formulated is too narrow to be representative of the nation as a whole. In the case of state legislatures or administrations, the political forces operating upon them are solely those of their local constituencies. More important, the socio-political context of which they, in their official capacities, are a product does not bring to bear that diversity of attitudes present in the national constituency. This is just as true of the more cosmopolitan states like New York or California as it is of Mississippi or Montana. Even assuming that state court judges are not influenced by the potential political consequences of their decisions, they are representative of the judicial system of a particular state without that broader charge of national responsibility which falls on the judges of the federal courts. Thus, whenever the policy decision required is one which should flow from the national constituency, not from the limited constituency of a particular state, state law should be held to be preempted.

Under this reasoning, a state statute or common law rule would be an improper exercise of power if it required international reciprocity as a condition precedent to either the enforcement of a foreign

judgment, the passage of an estate to an alien, or the enforcement of a foreign revenue law. The decision of the state body politic to establish such a condition vis-à-vis a foreign nation would be determined only by the limited foresight available at the state level. There would be lacking the necessary focus upon both the international consequences that such action might have for the entire nation and the needs of other citizens outside the protective aegis of the state's jurisdiction.

The second factor covers those situations in which the state's action may interfere with a national foreign policy that is not readily identifiable or that cannot be publicly articulated by the national government for reasons of international or domestic politics. In addition, it is designed to include those situations in which the information concerning potential foreign political, economic or legal repercussions is not available to the state decision-maker. The situation in the *South African Airways* case[133] is illustrative. In that case it seems clear that the airline, as a government-owned entity, was engaged in implementing the racial policies of the government of South Africa and, therefore, was in violation of the New York Civil Rights Act. To permit the state of New York to inquire into this question and to find a violation by South African Airways, however, might very well have interfered with a decision by the United States to ignore the South African Government's racial policies in order to serve international commercial or political interests related to the desirability of continuing communication between the two countries. Because of the emotional impact of issues involving race, it would have been practically impossible for the United States to state this policy publicly without causing disastrous domestic and international consequences. As was true of the courts compared to the executive in the *Sabbatino* case, the information available to the state compared to that available to the national government in *South African Airways* would have been inadequate to permit an effective balancing of the values to be served by enforcing the public accommodations rule in the state of New York against the broader international ends to be secured by withholding such enforcement.

The third factor recognizes the wisdom of Hamilton's axiom: "Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number than when it is to fall singly upon one."[134] This factor includes both those situations in which the action of the state might damage or disrupt the position of the United States internationally and those instances in which the

133. South African Airways v. New York State Div. of Human Rights, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (1970) (discussed pp. 149-50 *supra*).

134. THE FEDERALIST No. 15, at 102 (M. Dunne ed. 1901) (A. Hamilton).

action of the state, if taken by the national government, would violate the principles of customary international law. The dilemma presented in *Bethlehem Steel Corp. v. Board of Comm'r*[135] is illustrative. The United States has specifically agreed under the General Agreement on Tariffs and Trade (GATT) not to discriminate against goods manufactured in other member nations in favor of domestic products, except to the extent that tariffs are imposed under the GATT schedules. The "Buy American" Act of California was designed to discriminate in precisely this manner. Yet the possible retaliatory responses by the nations affected by that legislation would fall not upon the state of California alone, but upon the people of the United States as a whole. The government of the United States, not that of the state of California, is required to respond to a GATT investigation of a violation. To permit a state to take an action of this kind without the necessity of weighing the benefits to be gained against possible direct adverse consequences places the state in a position which encourages irresponsibility.

A more pointed illustration is found in *Tupman Thurlow Co. v. Moss.*[137] A Tennessee law required the labeling of foreign meat products as such and imposed a license fee upon persons who handled them.[138] No similar provisions applied to domestic products. The United States argued as *amicus curiae* that the Tennessee law was unconstitutional because it interfered with United States foreign trade policy as set forth in the Trade Expansion Act of 1962[139] and various bilateral and multilateral treaties. The government referred to an affidavit filed by William M. Roth, Acting Special Representative for Trade Negotiations in the Kennedy Round of tariff talks, which noted:

> [T]he Tennessee and similar state legislation is totally inconsistent with and is endangering the United States' policy of expanding trade among the countries of the free world. . . . Our bargaining position and the credibility of our offers of tariff concessions are being adversely affected by the Tennessee legislation. A number of the countries participating in the negotiations have protested to the United States about this and similar state statutes, and it is feared that offers of tariff concessions which otherwise would be made will be withheld because of this legislation.[140]

135. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969) (discussed pp. 148-49 *supra*).

136. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3 (1948), T.I.A.S. 1700.

137. 252 F. Supp. 641 (M.D. Tenn. 1966).

138. Chs. 34, 367, [1965] Public Acts Tennessee 67, 1093.

139. 76 Stat. 872, 19 U.S.C. § 1801 (1962).

140. 5 INT'L LEGAL MATERIALS 483, 484 (1966) (excerpts from the Memorandum of the United States as *amicus curiae*).

The three-judge panel did not reach this question because it found the Tennessee law unconstitutional as an interference with foreign commerce. The *amicus* brief, however, effectively sets forth the reasons for finding federal preemption even if no commerce clause violation had been found.[141] The functional test urged by the United States in the *Tupman Thurlow* case would cover all situations in which state activity could be found to operate in an area where repercussions from such actions would fall, not upon the state itself, but upon the United States in its position as the international representative of its people.

This same test would deny final state authority in situations where private rights of foreign nationals turn on the content of customary international legal rules. For example, questions concerning diplomatic immunity which are not otherwise decided according to positive federal law, either in the form of a consular convention or under federal statutes,[142] appear to be governed by state interpretation of customary international legal principles. The extent to which an erroneous application of these principles contravenes federal law appears still to be unresolved.

Illustrative are situations involving diplomats not accredited to the United States who are in transit through the country, or concerning claims of immunity of servants and other non-diplomatic employees of embassies, consolates or missions.[143] In *Bergman v. De Sieyes*,[144] the defendant, a representative of France on his way to Bolivia where he was accredited, was served with process in an action for deceit as he passed through New York City. In the diversity action, Judge Learned Hand ruled that the law of New York applied to determine the question of immunity. He wrote:

> [S]ince the defendant was served while the cause was in the state court, the law of New York determines its validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves. Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here.[145]

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141. In those instances in which a specific conflict with a bilateral treaty was present, the supremacy clause would, of course, control.

142. *See, e.g.*, Foreign Relations and Intercourse Act, 22 U.S.C. § 252 (1964).

143. People v. Roy, 21 Misc. 2d 303, 200 N.Y.S.2d 612 (Ct. Spec. Sess. 1959) (prosecution of Canadian Ambassador's chauffer for speeding).

144. 170 F.2d 360 (2d Cir. 1948).

145. 170 F.2d at 361.

This kind of unfortunate application of the doctrine of *Erie v. Tompkins*[146] was predicted and correctly criticized by Professor Philip Jessup shortly after the *Erie* case was decided.

> [A]ny attempt to extend the doctrine of the *Tompkins* case to international law should be repudiated by the Supreme Court. . . . Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . . The duty to apply it is one imposed upon the United States as an international person. The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.[147]

Professor Jessup's forceful statement is equally applicable to potential conflicts between the asserted police power of the state and international legal principles. In *People v. Roy*,[148] a New York state court considered the power of the federal government to be preempted by the state police power where traffic violations by diplomats were concerned. In that case, which involved a traffic ticket issued to the chauffeur of the Indonesian Ambassador to Canada while driving his employer through New York State from United Nations Headquarters, the court said, in dicta, "Safety on the public highway, particularly a high-speed super-highway of the Thruway type, is of paramount importance to the People of the State of New York. It is impossible for *any* government to grant *any kind* of immunity from property damage, injury, or death to any person using our highways."[149] As late as 1966, the New York Assembly apparently assumed that it had authority to deal with traffic violations by diplomats when it passed a bill to permit revocation of diplomatic license plates of those who commit three parking violations within one year.[150]

The third suggested functional guide would make it clear that the question of whether diplomatic immunity existed under principles of customary international law in instances of this type would be determined by federal law. This is not to suggest that state courts would be prohibited from applying principles of customary international law in cases in which those rules were pertinent; it indicates merely that their determinations would become reviewable under

146. 304 U.S. 64 (1938).

147. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).

148. 21 Misc. 2d 303, 200 N.Y.S.2d 612 (Ct. Spec. Sess. 1959).

149. 21 Misc. 2d at 305, 200 N.Y.S.2d at 614 (emphasis added).

150. *See* Garretson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U.L. REV. 67, 74 & n.30 (1966).

federal common law and that a federal determination of the content of customary international law would be authoritative in both state and federal courts.

The identification of the three factors outlined above as guides to determining the constitutionality of state actions should not be expected to serve as a panacea for difficult constitutional questions. Each of these factors must be weighed against other values of our federal system, including the principle that most private law matters ought to be decided at the lowest possible governmental level where the influence of the people can be most directly felt. Such a functional approach would, however, focus the attention of the courts, both state and federal, as well as other organs of government, upon the true nature of the questions presented in cases of this kind. In addition, it would provide the Supreme Court with a useful analytical tool with which to mould the high policy determinations which face it when constitutional issues of state versus national power in this area are raised. The national government is charged with the duty of adjusting the relationships of this nation with other nations having widely diverse interests and philosophies in an economically and politically divided world. It should not be hindered in achieving a wise adjustment by occasional pin-pricks from state actions ostensibly justified by a mechanical characterization of a subject matter as "domestic" or "local." Just as important, application of a careful functional analysis would not deprive the states of authority in the vast majority of situations containing international elements where primarily state interests are concerned and where the authority of state decision-makers is appropriately exercised.