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Conflict of Laws -- Constitutionality of State Statutes Governing Ability of Nonresident Aliens to Receive Property Under American Wills: Zschernig v. Miller

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I. INTRODUCTION

American federalism involves a division of powers between a single national government on one hand, and the constituent states on the other. This division is governed by the rule that the former is a government of "enumerated powers" while the latter are governments of "residual powers." Each of these governments is to operate directly and exclusively within its own assigned sphere. A problem with our complex society is that it is not always easy to determine whether a given situation properly belongs within the national or state sphere. This is commonly referred to as a vertical conflict of laws problem.

An excellent illustration of the vertical conflict of laws problem involves the ability of nonresident aliens to receive property under American wills. Traditionally, under the American federal system, the acquisition and transmission of property located within a state has been controlled by state law. Yet article I, section 10 of the United States Constitution imposes strict limitations on a state's power to deal with matters having a bearing on international relations, such matters being within the ambit of the national government. The supremacy of the national government in the general field of foreign affairs has been given continuous recognition by the United States Supreme Court.[1] The issue, then, is whether a state statute governing the capacity of a non-resident alien to inherit property under an American will is unconstitutional as an intrusion by the state into the area of foreign affairs.

The United States Supreme Court recently faced this issue in *Zschernig v. Miller*, 389 U.S. 429 (1968). In *Zschernig* an American citizen died in Oregon, leaving real and personal property to relatives in the German Democratic Republic (Communist East Germany). An Oregon statute conditioned the right of a nonresident alien to

1. *E.g.*, Hines v. Davidowitz, 312 U.S. 52 (1940); Fong Yue Ting v. United States, 149 U.S. 698 (1893); People v. Compagnie Générale Transatlantique, 107 U.S. 59 (1882); Chy Lung v. Freeman, 92 U.S. 275 (1875); Henderson v. Mayor of New York, 92 U.S. 259 (1875).

inherit property in Oregon upon the existence of a reciprocal right of American citizens to inherit in the alien's country upon the same terms as citizens of that country; upon the right of American citizens to receive payment within the United States from the estates of decedents dying in that country; and upon proof that the alien heirs of the American decedent would receive the benefit, use, and control of their inheritance without confiscation.[2] The Oregon Supreme Court affirmed the holding of the trial court that evidence did not establish that American citizens were accorded reciprocal rights to take property from or to receive the proceeds of East German estates.[3] However, it also found that a 1923 treaty between the United States and Germany was still in effect with respect to East Germany, and consequently held that the East German heirs must be allowed to take the real, but not the personal property despite the Oregon statute.[4] The United States Supreme Court, *held,* reversed. The history and operation of the Oregon statute make it clear that it is an intrusion by the state into the field of foreign affairs which the Constitution entrusts to the President and the Congress.[5] The *Zschernig* case is particularly significant in that it effectively overturns prior authority as enunciated by the Supreme Court in the much debated *Clark v. Allen.*[6]

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2. ORE. REV. STAT. § 111.070 (1965). The specific provisions of this section are as follows:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case: (a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen; (b) Upon the right of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and (c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

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

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

3. Zschernig v. Miller, 243 Ore. 567, 412 P.2d 781; 243 Ore. 591, 415 P.2d 15 (1966). The United States Supreme Court noted probable jurisdiction in 386 U.S. 1030 (1967).

4. *Id.*

5. Zschernig v. Miller, 389 U.S. 429 (1968).

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

II. STATE LEGISLATION RELATIVE TO THE RIGHT OF NONRESIDENT ALIENS TO INHERIT PROPERTY

A. *In General*

There are two kinds of statutes governing the rights of nonresident aliens to take property under American wills. Some state statutes, while allowing aliens the same inheritance rights as citizens, forbid actual distribution to a nonresident alien unless there is reasonable assurance that he will be permitted the benefits thereof. These statutes are termed "benefit or use" statutes. Other state statutes have made the inheritance rights of nonresident aliens dependent upon a reciprocal right of American citizens to inherit in the foreign country of which the nonresident alien is a citizen. These statutes are termed "reciprocity" statutes.

B. *"Benefit or Use" Statutes*

Several states,[7] mostly in the East, have enacted statutes which state that when it appears that an heir would not be able to enjoy the benefit, use or control of property devised to him, the probate court may direct that such property be paid into the court. The court holds the property in trust until such time as the beneficiary would be able to enjoy its benefit or use. At that time the property is released to him.

The most important characteristic of the "benefit or use" statute is that it does not deprive the alien of his inheritance rights. Legally, the alien beneficiary does inherit the property,[8] but payment or possession is withheld until it is shown that he would be able to have the beneficial enjoyment of the property under his own domestic law. Logically, this requires some detailed analysis of the inheritance laws of the country of which the nonresident alien is a citizen.

7. New York's Surrogate's Court Act § 2218 (1967), is the prototype of the "benefit or use" statutes and has been the focal point of most of the litigation surrounding such statutes. *See also* FLA. STAT. ANN. § 731.28 (1964); MD. ANN. CODE art. 93 § 161 (1957); MASS. GEN. LAWS ch. 206, §27A (Supp. 1966), MICH. STAT. ANN. § 27.3178 (306a) (1962); N.J. STAT. ANN. § 25-10 (1953); R.I. GEN. LAWS § 33-13-13 (1956). Alabama has adopted the "benefit or use" test through judicial decree and has impounded funds and real estate on the theory that the court must effectuate the true intent of the testator. Pilcher v. Dezso, 262 Ala. 249, 78 So. 2d 306 (1955). Maine also has judicially enacted the "benefit or use" test. Berman v. Frendel, 154 Me. 337, 148 A.2d 93 (1959). However, Illinois courts have refused to adopt the test without statutory authority. Estate of Miller, 35 Ill. App. 2d 349, 182 N.E.2d 913 (1962). *See also* Chaitkin, *The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents*, 25 So. CAL. L. REV. 297 (1952).

8. *See, e.g.*, N.Y. REAL PROP. LAW § 10, which enables all aliens to take, hold, transmit and dispose of real property in the same manner as citizens. In this respect it conforms the real property law to that of personal property.

The "benefit or use" statute was a response to Nazi confiscatory policies prior to and during World War II. Many immigrants to the United States left their American property to friends and relatives in the "Old Country." When the Nazis came to power in Germany they began to confiscate much of the property belonging to certain segments of the population which they controlled.[9] The probate courts felt that in effect it would thwart the intent of the testator to turn the property over to the Nazis, so they utilized the "benefit or use" statute and paid the property into the court.

In addition to seeking to effectuate the testator's intent, some courts manifested a disposition not to aid a potential enemy. It was felt that sending property or funds to Axis countries would be equivalent to giving them bullets to be shot at American soldiers.[10]

A third motivating factor for the "benefit or use" test may have been retaliation against Nazi restrictions on the right of Americans to enjoy the beneficial use of their inheritances from German nationals.[11] In the late 1930's and early 1940's the German government sometimes refused to allow American beneficiaries resident in the United States to take under Germans wills, and at other times placed obstructive currency exchange restrictions on American inheritance of German property.

Since World War II most of the cases arising under "benefit or use" statutes have involved proposed payments to persons domiciled behind the "iron curtain." As in the Nazi period, the courts rationalized their decisions in terms of testamentary intent,[12] and in terms of a desire not to aid a "cold war" enemy.[13]

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9. *E.g.*, the German government levied a mass fine of $400,000,000 upon German Jews by reason of the act of a single individual of their race in a foreign land. It was felt that this was a joint and several obligation imposed on all members of the German Jewish community. Property in the hands of all German Jews was subject to confiscation to pay the fine. It was for this reason that the New York Surrogate's Court refused to distribute property to a German Jewish beneficiary of an American will in *In re* Weidberg's Estate, 172 Misc. 524, 15 N.Y.S.2d 252 (Sup. Ct. 1939).

10. *See* Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 Nw. U.L. REV. 221, 234 (1957).

11. *Id.* at 226.

12. *See In re* Well's Estate, 204 Misc. 975, 126 N.Y.S.2d 441 (Sur. Ct. 1953); *In re* Url's Estate, 7 N.J. Super. 455, 71 A.2d 665, *appeal dismissed*, 5 N.J. 507, 76 A.2d 249 (1950).

13. "This court would consider sending money out of this country and into Hungary tantamount to putting funds within the grasp of the Communists." *In re* Getream, 200 Misc. 543, 544, 107 N.Y.S.2d 225, 226 (Sur. Ct. 1951). "If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia . . . ." Unreported case cited in N.Y. Times, May 14, 1954, 25 at col. 7, at 25, *cited in*, Heyman, *supra* note 10, at 234. "Now, as then, it is recognized as elementary that to permit goods and dollars to flow into the countries controlled by the aggressor as against our national interest. Now, as then, various diplomatic considerations, including especially our anxiety not to give an enemy provocation for

While application of the "benefit or use" statute is discretionary with the court,[14] inheritance generally will be withheld where there is either certainty of confiscation or where there might be confiscation.[15] The burden of proof as to whether a beneficiary would have the beneficial use and enjoyment of his property has been placed on the beneficiary or his representative.[16] This proof of foreign law is generally very difficult, because it is most often treated as a matter of fact.[17] And in certain circumstances this already onerous burden may be increased by a local court's bias against certain forms of government, the lack of information regarding foreign law, and the high cost of presenting proof as to the nature of foreign law.[18]

The courts have seized upon and used several criteria to determine whether to distribute a decedent's estate to a non-resident beneficiary. Generally, whether an alien would have the "benefit or use" of the property would depend upon the political and economic conditions within the country where the beneficiary resides. More specifically, there have been at least eight different tests used. Courts have looked to: (1) the status of private ownership in the country of the alien beneficiary;[19] (2) the diluting effect of excessive inheritance

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retaliatory measures and not to exacerbate the international crisis, have prevented us from applying such measures as large-scale embargoes or the freezing of funds." Chaitken, *supra* note 7, *at* 297.

14. Saniuk's Estate v. Lefkowitz, 21 App. Div. 2d 922, 251 N.Y.S.2d 204 (1964); Mintz v. Prudential Ins. Co., 38 Misc. 2d 394, 238 N.Y.S.2d 483 (Sup. Ct. 1963).

15. Payment into the court may be required " 'Where other special circumstances make it appear desirable that such payment . . . be withheld.' The nature of such special circumstances envisaged in the enactment is clarified in the note which states that it is applicable 'in cases where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country *might* be circumvented in whole or in part . . . .' The question is, therefore, whether it is 'contingently possible' that the sums due these distributees would be subject to confiscation in whole or in part . . . ." *In re* Weidberg's Estate, 172 Misc. 524, 528; 15 N.Y.S. 2d 252, 256-57 (Sup. Ct. 1939).

16. Practice Commentary to N.Y. SUR. CT. PROC. § 2218, at 254. *See also In re* Kina's Estate, 49 Misc. 2d 598, 268 N.Y.S.2d 131 (Sur. Ct. 1966).

17. 9 WIGMORE, EVIDENCE § 2573 (1940). For a general discussion of some possible relaxation of this rule, see MAGUIRE, WEINSTEIN, CHADBOURN & MANSFIELD, EVIDENCE: CASES & MATERIALS 75 (5th ed. 1965).

18. Professor Berman has stated that such a burden amounts to an irrebuttable presumption, particularly when a court infers absence of benefit or use from judicial notice of a Communist country's violation of international law, the general abhorrence of private property in Communist theory, and the unlimited power of the Communist Party. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 257, 263 (1962). Berman further points out, however, that "there is not a single known instance of confiscation by the Soviet government, or diversion by its officials, of funds in an estate sent to a Soviet citizen from a foreign country." *Id.* at 263.

19. "From such information as is available to us concerning the status of the individual in these so-called 'Iron Curtain' states, there would appear to be little doubt that these unfortunate people have been enslaved by a vicious government which deprives them of many of the rights enjoyed by the free peoples of the world, including the fundamental right of private ownership of property." Sobko Estate, 88 Pa. D.&C.

taxes in the foreign country;[20] (3) the diluting effect of the foreign exchange rate on inheritance;[21] (4) the danger of confiscation for war purposes;[22] (5) the danger of seizure motivated by religious or racial persecutions;[23] (6) the policy of the national government as perceived through Treasury Circular 655;[24] (7) stare decisis;[25] (8) and judicial notice.[26] An additional factor might be a conscious or unconscious following of the ebb and flow of the "cold war."[27]

C. *The "Reciprocity" Statutes*

Several states,[28] mostly in the West, have enacted statutes which

76, 77 (Orphan's Ct. 1954). *See also In re* Landau's Estate, 172 Misc. 651, 16 N.Y.S.2d 3 (Sur. Ct. 1939). In *In re* Bold's Estate, 173 Misc. 545, 18 N.Y.S.2d 291, 295 (Sur. Ct. 1940), it was stated: "It is conceded that there is no right to inherit land, since it is a primary principle of their [Soviet] from of government that real property is owned by the state."

20. *In re* Bold's Estate, 173 Misc. 545, 18 N.Y.S.2d 291, 293 (Sur. Ct. 1940).

21. *Id.* at 296. *See also* Petition of Mazurowski, 331 Mass. 33, 116 N.E.2d 854 (1954), where a legacy was impounded because the Polish legatee would receive only 20% of the value of the legacy because of the rate of exchange in transmission.

22. "It further appears . . . that . . . all the assets of the German people are in a state of semi-confiscation or impressment for war purposes, and this whether the real owners of the assets are willing or not." Stede's Estate, 38 Pa. D.&C. 209, 211 (1939).

23. *In re* Weidberg's Estate, 172 Misc. 524, 15 N.Y.S.2d 252 (1939).

24. 31 C.F.R. 211.3(a) (1959), issued under authority of the act, approved October 9, 1940, 54 Stat. 1086-87, 31 U.S.C. §§ 123, 127. Treasury Circular No. 655 restricts the delivery of checks drawn against funds of the United States and does not address itself to inheritance matters. Yet, the regulation has been used to deny distribution to alien beneficiaries in certain designated countries. Petition of Mazurowski, 331 Mass. 33, 116 N.E.2d 854 (1954), *In re* Best's Estate, 200 Misc. 332, 107 N.Y.S.2d 224 (Sur. Ct. 1951). *See also* Heyman, *supra* note 10. While some courts have relied on the list of countries in U.S. Treasury Circular No. 655, it has been held that a removal of a country from this list may be in furtherance of the political and diplomatic objectives of the United States, and not a finding that payees will actually reeeive the funds at full value. In such instances, the court may require proof that the rate of currency exchange is not confiscatory when compared to the market place rate of exchange. *In re* Draganoff's Estate, 43 Misc. 2d 233, 252 N.Y.S.2d 104 (1964).

25. The court in *In re* Braier's Estate, 30 N.Y. 148, 111 N.E.2d 424 (1953), used other cases to support its view that a Hungarian beneficiary would not have "benefit or use" of his inheritance. *Contra, In re* Kina's Estate, 49 Miso. 2d 598, 268 N.Y.S.2d 131 (1966).

26. Sobko Estate, 88 Pa. D.&C. 76 (Orphan's Ct. 1954).

27. "It is a commendable and salutary piece of legislation because it provides for the safeguarding of these funds even with accruing interest, in the steel-bound vaults of the Commonwealth of Pennsylvania until such time as the Iron Curtain lifts or sufficiently cracks to allow honest money to pass through and be honestly delivered to the persons entitled to them. Otherwise, wages and other monetary rewards faithfully earned under a free enterprise democratic system could be used by Communist forces which are committed to the very destruction of that free enterprising world of democracy." Belemicich's Estate, 411 Pa. 506, 508, 192 A.2d 740, 741 (1963), *rev'd sub nom.* Consul General of Yugoslavia v. Pennsylvania, 375 U.S. 395 (1964), an authority of Kolovrat v. Oregon, 366 U.S. 187 (1961).

28. *See, e.g.*, CAL. PROB. CODE § 259; IOWA CODE ANN. § 567.8 (Supp. 1966);

make the right of nonresident aliens to take property by succession, on the same terms as residents of the United States, dependent upon the reciprocal right of Americans to take property upon the same terms and conditions as residents of the respective countries of which such aliens are residents.[29]

Unlike the "benefit or use" statute, the "reciprocity" statute gives absolutely no inheritance rights to nonresident aliens who fail to meet the statutory tests. The estate immediately escheats unless there are other beneficiaries who would be able to take under state law.[30] While the "benefit or use" statute requires an analysis of the rights of the alien beneficiary in the country of which he is a citizen, the "reciprocity" statute requires an analysis of the rights of an American citizen under the law of the foreign country to inherit on the same basis as residents of such country. Clearly, the "reciprocity" statute does not require that the foreign country have the same law or judicial system; it only requires that there be no discrimination against American citizens. However, although the two types of statutes require different kinds of analysis, courts sometimes have confused the tests.[31]

"Reciprocity" statutes were first passed in 1941, in the same year and under the same impulses as the first of the "benefit or use" statutes. Unlike the drafters of the "benefit or use" statutes, the drafters of the "reciprocity" statutes were not greatly concerned with the protection of the beneficiary's rights. Rather, they had two other basic purposes in mind. First, the "reciprocity" statutes were designed to encourage foreign countries to grant certain inheritance rights to American citizens.[32] Second, they were designed to prevent

MONT. REV. CODES ANN. § 91-520 (1964); NEV. REV. STAT. §§ 134.230–250 (1957); N.C. GEN. STAT. § 64-3 to 5 (1965).

29. At one time Oregon had a variation of the "reciprocity"-type statute, involving personal property only, which compared the rights of Americans to inherit in foreign countries with the rights of residents of foreign countries to inherit in the United States. This meant that foreign states had to have the same inhertanee laws with respect to nonresident aliens as did Oregon. This law was repealed in 1951. At that time Oregon adopted a hybrid of the "reciprocity" and "benefit or use" statutes. Oregon law now provides that the Americans must be able to take "upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen." ORE. REV. STAT. § 111.070(1)(a) (1967). Also, it provides that the right is dependent upon proof that the nonresident alien would enjoy the benefit or use of the estate "without confiscation." ORE. REV. STAT. § 111.070(1)(a) (1967). The present Oregon statute covers both real and personal property.

30. *See, e.g.*, CAL. PROB. LAW § 259.2 (1956); ORE. REV. STAT. § 111.070 (2) (1967).

31. *See, e.g.*, Estate of Nersisian, 155 Cal. App. 2d 561, 318 P.2d 168 (1957), where the court applied the "benefit or use" test, although California's statute is of the "reciprocity" type. *See also* Bader & Grzybowski, *Soviet Inheritance Cases in American Courts and the Soviet Property Regime*, 1966 DUKE L.J. 98, 101 (1966).

32. *See, e.g.*, Clostermann v. Schmidt, 215 Ore. 55, 332 P.2d 1036, 1042 (1958).

the proceeds of American decedents' estates from falling into the hands of unfriendly nations.[33] Like the "benefit or use" statute, the "reciprocity" statute currently is employed in cases involving beneficiaries who reside behind the "iron curtain."

As with the "benefit or use" statutes, the effect of the burden of proof provisions of the "reciprocity" statutes is nearly always disastrous to the nonresident alien beneficiary in several respects: (1) it results in high costs to the beneficiary since he has the burden of proving foreign law; (2) prejudice and lack of information as to the nature of the foreign system may lead to unjust results, even after experts are called in to testify; and (3) proof of foreign law is especially difficult when the nation involved has not attracted the attention of English speaking scholars.

The courts have seized upon and used several criteria to determine whether to distribute a decedent's estate to a nonresident alien beneficiary.[34] Contrary to the requirements of the statutory burden of proof provisions, courts sometimes have judicially noticed the state of inheritance law in foreign countries as it pertains to Americans.[35] They have used expert testimony and learned treatises to discover foreign law.[36] Stare decisis has also been used.[37] Finally, it is obvious that, as in the "benefit or use" states, there is a conscious or unconscious following of the ebb and flow of the "cold war."

See also 2 CAL. LAW REVISION COMM'N REPORTS: RECOMMENDATIONS & STUDIES B-18, 19 (1959).

33. *Id.* For a discussion of the success of Oregon's statutes in attaining these objectives, see Note, *International Law—Inheritance by Nonresident Aliens in Oregon: The Oregon Statute, the Effect of Treaties, and the Federal Law*, 45 ORE. L. REV. 221, 223 (1966) (hereinafter cited *Oregon note*). For a discussion of California's statutes in this regard, see 2 CAL. LAW REVISION COMM'N, *supra* note 32, at B-5, B-20 to B-28.

34. Berman has suggested that, as a practical matter, courts in "reciprocity" states seem more concerned with whether the heir will actually receive and be able to use the property than with whether there is reciprocal treatment of Americans. Berman, *supra* note 18, at 268.

35. *In re* Estate of Chichernea, 57 Cal. Rptr. 135, 424 P.2d 687 (1967).

36. *In re* Estate of Larkin, 52 Cal. Rptr. 441, 416 P.2d 473 (1966).

37. *In re* Krachler's Estate, 199 Ore. 488, 263 P.2d 769, 776 (1953). For two reasons stare decisis is an unreliable method of determining the state of foreign law. The first reason results from the fact that the code sections disqualifying nonresident aliens from inheriting estates consisting of property of deceased residents, where the laws of such countries do not accord reciprocal rights of inheritance to Americans, is not procedural, but part of the substantive law of succession. The statute itself provides that the burden of proof shall be on the nonresident alien to establish the fact of reciprocal rights. It is generally felt that questions of foreign law are to be treated as questions of fact, and a finding as to what the foreign law is, therefore, will be sustained on appeal if there is any evidence to support it. *In re* Karban's Estate, 118 Cal. App. 2d 240, 257 P.2d 649 (1953). The result follows that unless a treaty supersedes a "reciprocity" statute, there is no binding precedent on questions whether a given country extends reciprocity rights, and there may be two judgments, both unassailable on appeal, which make opposite conclusions with respect to the identical

III. CONSTITUTIONALITY OF STATE CONTROL OF DISPOSITION OF PROPERTY TO NONRESIDENT ALIENS

A. *The State of the Law Before Zschernig*

In the leading case *Clark v. Allen*,[38] the constitutionality of the California "reciprocity" statute was challenged on the ground that it was "an extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the federal government."[39] The attack proceeded on the basis that "by this method California sought to promote the rights of American citizens to inherit abroad by offering reciprocal rights of inheritance in California."[40] Given this purpose it was argued that such reciprocal arrangements are properly the subject for national determination. The Supreme Court rejected this argument as "farfetched," and held that a general reciprocity statute did not on its face intrude on the national domain.[41] In sustaining the constitutionality of the California statute, Mr. Justice Douglas, speaking for the Court, stated that succession rights are determined by local law, and while those rights may be affected by an overriding national policy, there was no evidence of an overriding national policy in *Clark v. Allen*.[42] Moreover, the Court maintained that the statute did not violate the prohibition against a state's negotiating with a foreign country.[43] By way of conclusion, the Court stated that: "What California has done will have some incidental or indirect effect in foreign countries. But this is true of many state laws which none would claim cross the forbidden line."[44]

Clark v. Allen did not, however, lay the issue to rest. There has been continuing discussion relating to the possibility that the decision may have suffered from erroneous reasoning.[45] It has been suggested that the Court generally underestimated the effect of the

country and the identical time period. *See* Chaitkin, *supra* note 7, at 311, for a summary of reported California decisions which illustrate this point. The second reason that stare decisis is an unreliable method of determining the state of foreign law is that the law of a foreign country, like that of the United States, is constantly changing. Consequently, a decision which finds the state of the law at one time may not be accurate at another time.

38. 331 U.S. 503 (1947).

39. *Id.* at 516.

40. *Id.* at 516-17.

41. *Id.*

42. *Id.* at 517.

43. *Id.*

44. *Id.* For a critical analysis of the holding in Clark v. Allen, see Boyd, *The Invalidity of State Statutes Governing The Share of Nonresident Aliens in Decedents' Estates*, 51 GEO. L.J. 470 (1963).

45. *See, e.g.*, Boyd, *supra* note 44; *Oregon note, supra* note 34.

state statutes on foreign relations, and that the Court failed to examine in sufficient detail prior Supreme Court decisions which concerned themselves with the vertical conflict of laws problem as it pertains to the ability of states to interfere with foreign relations. These points deserve some further consideration.

There can be little question that state statutes governing alien inheritance rights affect foreign relations. Several commentators have expressed the view that such internal regulation may affect international relations far more than is readily apparent.[46] Although there is little direct evidence either in support of, or in contradiction to, this proposition, there is a great deal of evidence in other areas of the law to support the general proposition that local regulation of property rights of aliens does affect foreign relations.[47]

There are also strong indications that the Court in *Clark v. Allen* failed to examine prior authority. It is settled law that the Constitution imposes severe limitations on the power of the states to affect foreign relations of the United States.[48] Complete power over international affairs belongs with the national government and is not or cannot be subject to any curtailment or interference on the part of the several states.[49] Since the nation as a whole would be answerable if a state created difficulties with a foreign country, a state's law cannot be given effect if it has regulated an area of foreign relations that should be regulated by the national government.[50] The Court in *Clark v. Allen* did not dispute this authority. Rather, it seemed to establish the rule that unless a state actually negotiated with a foreign country or contravened a clearly established foreign policy, as enunciated in a treaty or executive agreement, there was not sufficient interference with international relations to require that the statute be struck down as unconstitutional.[51] This view seems to have been a retreat from the position expressed by the Supreme Court only six years earlier in *Hines v. Davidowitz*,[52] where the Court stated: "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from

46. *See, e.g.*, Ioannou v. New York, 371 U.S. 30, 32 (1962), (Douglas, J., dissenting), Berman, *supra* note 18; Boyd, *supra* note 44.

47. See F. DUNN, THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW, ch. 2 (1932), for an in depth study of how domestic legal decisions which involve nonresident aliens affect international relations.

48. U.S. Const. art. I, § 10.

49. United States v. Belmont, 301 U.S. 324, 331 (1937).

50. United States v. Pink, 315 U.S. 203, 232 (1942).

51. Clark v. Allen, 331 U.S. 503, 517 (1947).

52. 312 U.S. 52 (1941). The Supreme Court concluded that the power to restrict, limit, regulate, and register aliens as a distinct group is not an equal and continuously existing concurrent power of state and nation, but that whatever power a state may have is subordinate to supreme national law. *Id.* at 68.

real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[53] In *Hines*, the Court further pointed out that there are "conditions which make the treatment of aliens, in whatever state they may be located, a matter of national moment."[54]

The question of the constitutionality of New York's "benefit or use" statute was placed before the United States Supreme Court in *Ioannou v. New York*.[55] There the Court, in a per curiam decision, dismissed the appeal for want of a substantial federal question. Mr. Justice Douglas, with Mr. Justice Black concurring, dissented on the grounds that the case did raise the substantial federal question of whether the New York statute was invalid because it conflicted with national power over foreign affairs.[56] Mr. Justice Douglas stated that "if New York has, in effect, regulated an area of our international relations that should be regulated only by the Federal Government, or if New York's statute conflicts with existing federal policy, then that statute cannot be given effect."[57] He further stated without elaboration that this federal question was not foreclosed by the Court's decision in *Clark v. Allen*.

In sum, the state of the law prior to *Zschernig* was that state statutes governing the capacity of nonresident aliens to inherit property under American wills were not unconstitutional so long as they were not inconsistent with a federal treaty or other strong federal policy similarly enunciated. Where the national government had not clearly enunciated such a policy, the states were free to act.

B. *The State of the Law After Zschernig*

The Supreme Court in *Zschernig* took a completely different tack than it did in *Clark v. Allen*. Instead of looking to see if there was a strong national policy involved, the Court sought to determine whether, even in the absence of an enunciated national policy,

53. *Id.* at 64.

54. *Id.* at 73.

55. 371 U.S. 30 (1962). Petitioner made an application for permission to withdraw funds deposited with the Treasurer of New York for the benefit of his assignor in the estate of the decedent. The funds had been deposited under the terms of a decree in which the petitioner's assignor was a distributee of the decedent. The decree also determined that since the petitioner's assignor resided in Czechoslovakia and since it appeared that she would not have the beneficial use and enjoyment of the property to which she was entitled, her distributive share should be deposited with the court. The Surrogate's Court dismissed the petition, and the Appellate Division affirmed without opinion. Ioannou v. New York, 13 App. Div. 2d 917, 217 N.Y.S.2d 1010 (1961), *aff'd*, 11 N.Y.2d 740, 181 N.E.2d 456 (1962).

56. Mr. Justice Douglas also felt that a substantial question of due process was also tendered since in "New York the Surrogate apparently holds no hearing but simply determines that any payments to or by people behind the 'iron curtain' are barred by the statute." Ioannou v. New York, 371 U.S. 30, 33 (1962).

57. *Id.* at 31.

Oregon had entered into an area it is prohibited from entering under the Constitution and the separation of powers principle.

The Court noted that the Oregon statute, which had both "reciprocity" and "benefit of use" provisions, had more than an indirect effect on foreign relations. The Court particularly condemned the decisions that "radiated some of the attitudes of the 'cold war.' "[58] Such considerations, it was pointed out, were "matters for the Federal Government, not for the local probate courts."[59] The Court then held that the Oregon statute operated in a field that has been preempted by the United States. It distinguished *Clark v. Allen* on the grounds that in that case the Court was only concerned with the words of the statute on its face, not the manner of its application.

The state of the law under *Zschernig* seems to be as follows. Since the majority refused to overrule *Clark v. Allen,* state statutes, as worded, have not been overturned. They only have been overturned as applied—where they have sanctioned an involvement with international relations. It seems, then, that each case must be decided on an ad hoc basis. So long as state courts, in utilizing either "reciprocity" or "benefit or use" statutes, do no more than routinely read foreign laws, their decisions will be constitutional. Where the courts go further and use the statutes to create an impact on foreign relations, their decisions will be unconstitutional.

Zschernig discussed in particular the "reciprocity" provisions of the Oregon statute. Yet, there are strong indications that "benefit or use" statutes also may have been condemned. One such indication is found in the case itself. As the Court considered the objection that the Oregon courts appeared to be applying foreign policy attitudes, such as the freezing or thawing of the "cold war" and the like, as the real desiderata, it footnoted the proposition that such attitudes were not confined to Oregon courts.[60] The Court went on to cite several examples from both "reciprocity" and "benefit or use" states where courts fell into the same unconstitutional trap. A second indication that the decision is not confined to "reciprocity" statutes is that Mr. Justice Douglas, in writing *Zschernig,* borrowed heavily the reasoning and, indeed, the very language he used in his *Ioannou* dissent, which involved the New York "benefit or use" statute.

IV. Conclusion

The problem of vertical conflict of laws is fundamentally concerned with a basic allocation of power between the national and state gov-

58. Zschernig v. Miller, 389 U.S. 429, 435 (1968).
59. *Id.* at 438.
60. *Id.* at 437 n.8.

ernments. There are three possible views that can be taken as to a particular case involving vertical conflicts. First, the subject matter may not be specifically allocable to either government. Rather, it may be concurrently a matter with some state and some national implications, such that neither government is totally precluded from acting in the area, but each is required to be careful not to encroach upon that part of the area belonging to the other. Second, the subject matter may be totally within the ambit of the national government so as to preempt any state activity. Third, the subject matter may be totally a matter reserved to the states so as to prevent the national government from acting in the area.

The three views, as expressed above, were articulated in the various majority, concurring, and dissenting opinions in *Zschernig*. The majority seemed to follow the first view, reasoning that under the Supremacy Clause national law supplants state law where there is an area of conflict, and any application of state inheritance statutes which affects international relations would be ineffective. The majority held that according to the facts in *Zschernig*, the application of the Oregon statute did interfere with international relations and was therefore unconstitutional *as applied*. Mr. Justice Stewart, with whom Mr. Justice Brennan joined, concurred with the result reached by the majority, but would follow the second view expressed above by overruling *Clark v. Allen* and striking down the Oregon statute as unconstitutional *on its face*. They reasoned that the very words of the statute required courts to interpret foreign policy and foreign law. Both Mr. Justice Harlan, in his concurring opinion, and Mr. Justice White, in his dissent, reasoned in accordance with the third view that without a clearly enunciated national policy in the area, the matter of inheritance rights was totally within the competence of the states under the authority of *Clark v. Allen*. Since there was no such policy stated, these Justices felt that the Oregon statute was not an impermissible interference with foreign affairs.

The holding in *Zschernig* indicates that the Court has correctly shifted the consideration from whether there was a specifically enunciated national policy contrary to the state statutes, to whether the states in fact had the constitutional power to affect international relations even if there was no such national policy. While *Zschernig* is on safer constitutional grounds than *Clark v. Allen*, it probably did not carry its reasoning to its most reasonable conclusion. The obvious danger in the rule adopted in *Zschernig* is that of uncertainty. The constitutionality of the application of statutes governing nonresident alien inheritance rights must be determined on a case-by-case approach. As Mr. Justice Stewart pointed out in his concurring opinion,

the resolution of the constitutional issue may vary from day to day. It might also vary from court to court. More definite guidelines as to what constitutes an unconstitutional invasion of the realm of foreign relations are urgently needed. Perhaps the Court will soon provide them.

Another area of uncertainty was created in *Zschernig*, because the Court failed to overrule *Clark v. Allen*. However carefully the majority tried to distinguish the two cases, the fact remains that they are indistinguishable for practical purposes. Apparently, the "reciprocity" statutes (and by analogy the "benefit or use" statutes) are valid as written, but not as applied. Such a distinction seems more academic than real. The purposes of the "reciprocity" statutes were to encourage foreign countries to grant inheritance rights to American citizens and to deny aid to unfriendly nations.[61] These statutes are allowed to stand as written according to the rule in *Clark v. Allen*. On the other hand, the carrying out of these purposes in individual cases necessarily interferes with international relations. Therefore, if the purposes were sought to be effectuated, the statute would be unconstitutional as applied according to the rule in *Zschernig*. As Mr. Justice Harlan points out in his concurring opinion, "while a State may legitimately place inheritance by aliens on a reciprocity basis, it may not take measures to assure that reciprocity exists in practice and that the inheritance will actually be enjoyed by the person whom the testator intended to benefit."[62] It follows, then, that the real effect of *Zschernig* is to render *Clark v. Allen* impotent.

The Court probably would have reached a more reasonable result if it had adopted the position expressed by Mr. Justice Stewart in his concurring opinion. He noted that the Oregon "reciprocity" statute was specifically designed to affect foreign relations. He reasoned that any realistic attempt to apply the criteria of the statute would necessarily involve more than a passive reading of foreign law. The state courts, in applying the bare words of the statute, would be required to make an evaluation, either expressed or implied, of the administration of foreign law, the credibility of foreign diplomatic statements, the policies of governments, and other criteria. These clearly are foreign affairs matters that fall within the enumerated powers of the national government. Moreover, it has been held that the application of the statute does in fact have a direct impact on foreign affairs in an impermissible fashion. Since it is established law that the conduct of foreign relations is entrusted by the Constitution to the national

61. *See* text accompanying notes 31 & 32 *supra*. The California Law Revision Commission admitted that these are interests which the national government seeks to advance. CAL. LAW REVISION COMM'N, *supra* note 32, at B-19.

62. Zschernig v. Miller, 389 U.S. 429, 458 (1968).

government, it follows that the purpose and the wording, as well as the application, of the statute are unconstitutional. The majority in *Zschernig* should not have shrunk from so holding.

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