CONSTITUTIONAL LAW — FEDERAL PREEMPTION OF STATE LAW — NINTH CIRCUIT STRIKES DOWN CALIFORNIA LAW EXTENDING STATUTE OF LIMITATIONS FOR THE RECOVERY OF HOLOCAUST-ERA ARTWORK. — *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 07-56691, 2010 WL 114959 (9th Cir. Jan 14, 2010).

The Supremacy Clause of the United States Constitution establishes that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[1] The field preemption doctrine, which has its "root[s]" in the Supremacy Clause,[2] "recognizes limited, but exclusive, areas of federal domain even in the absence of an explicit preemption provision from Congress."[3] Recently, in *Von Saher v. Norton Simon Museum of Art at Pasadena*,[4] the Ninth Circuit held a California law that extended the statute of limitations for the recovery of Nazi-looted artwork unconstitutional because it infringed upon the federal government's foreign affairs power.[5] In doing so, the court inappropriately applied the field preemption doctrine. The Ninth Circuit should not have struck down the statute.

In 1931, Jacques Goudstikker purchased a diptych painted by sixteenth-century artist Lucas Cranach the Elder entitled *Adam and Eve* ("the Cranachs").[6] In May 1940, the Goudstikker family fled the Netherlands when the Nazis invaded the country, and Reichsmarschall Hermann Göring seized the Cranachs.[7] The works were recovered by the Allies following the war and returned to the Netherlands.[8] In 1966, the Dutch government transferred ownership of the paintings to George Stroganoff-Scherbatoff, who sold the Cranachs to the Norton Simon Art Foundation in 1971.[9] Since 1979, the paintings have been on continuous display at the Norton Simon Museum.[10] Marei von Saher, widow to Jacques Goudstikker's only child, claimed to have been unaware that the Cranachs were at the museum until November

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[1] U.S. CONST. art. VI, cl. 2.

[2] Daniel E. Troy & Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2007–2008 CATO SUP. CT. REV. 257, 258.

[3] *Id.* at 260.

[4] No. 07-56691, 2010 WL 114959 (9th Cir. Jan 14, 2010).

[5] *Id.* at *1.

[6] *Id.* at *3.

[7] *Id.*

[8] *Id.*

[9] Suzanne Muchnic, *Norton Simon To Keep Pair of Paintings*, L.A. TIMES, Oct. 19, 2007, http://articles.latimes.com/2007/oct/19/entertainment/et-simon19. Stroganoff-Scherbatoff claimed that the Bolsheviks had confiscated the works from his family during the Russian Revolution. *Id.*

[10] Von Saher v. Norton Simon Museum of Art at Pasadena, No. CV 07-2866-JFW (JTLx), 2007 WL 4302726, at *1 (C.D. Cal. Oct. 18, 2007).

2000.[11] Von Saher came forward to reclaim the Cranachs in 2001.[12] On May 1, 2007, she brought an action in federal district court against the museum under California Code of Civil Procedure section 354.3,[13] which provides that an owner's claim against "any museum or gallery" for the recovery of "Holocaust-era artwork" cannot "be dismissed for failure to comply with the applicable statute of limitation" so long as the action is commenced "on or before December 31, 2010."[14]

The museum filed a Rule 12(b)(6) motion in response to the complaint.[15] The district court granted the motion, dismissing the claim with prejudice.[16] The court found section 354.3's extension of the statute of limitations for Holocaust-era artwork claims to be a "facially unconstitutional" violation of the foreign affairs doctrine.[17] Specifically, the district court cited *Deutsch v. Turner Corp.*,[18] in which the Ninth Circuit held that a "sister" statute of section 354.3 that created a private cause of action and extended the statute of limitations for slave labor claims arising out of World War II interfered with the federal government's exclusive power to "make and resolve war"[19] because it allowed California to "create its own resolution to a major issue arising out of the war."[20] The district judge found that section 354.3 similarly "intrude[d]" on the national government's ability to "resolv[e] war claims."[21] Without section 354.3's extension of the statute of limitations, the district court consequently found that von Saher's claim was time-barred under California Code of Civil Procedure section 338.[22]

The Ninth Circuit affirmed in part and reversed in part.[23] Writing for a divided panel, Judge Thompson[24] agreed with the district court that section 354.3 "infringe[d] on the national government's exclusive

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[11] *Id.* at *3 n.2; Muchnic, *supra* note 9.

[12] Muchnic, *supra* note 9.

[13] *Von Saher*, 2007 WL 4302726, at *1.

[14] CAL. CIV. PROC. CODE § 354.3 (West 2006).

[15] *Von Saher*, 2010 WL 114959, at *4.

[16] *Von Saher*, 2007 WL 4302726, at *3.

[17] *Id.*

[18] 324 F.3d 692 (9th Cir. 2003).

[19] *Von Saher*, 2007 WL 4302726, at *2 (quoting *Deutsch*, 324 F.3d at 714).

[20] *Id.* (quoting *Deutsch*, 324 F.3d at 712).

[21] *Id.* at *3 (quoting *Deutsch*, 324 F.3d at 712).

[22] *Id.* The district court found that von Saher had not inherited her interest in the Cranachs until after the three-year period of California's ordinary statute of limitations for actions to recover stolen property had expired. *Id.*; *see* CAL. CIV. PROC. CODE § 338 (West 2006).

[23] The Ninth Circuit filed its original opinion on August 19, 2009. *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016 (9th Cir. 2009). On January 14, 2010, the court granted the museum's petition for panel rehearing, denied von Saher's petition for rehearing and for rehearing en banc, and amended its original opinion to grant von Saher leave to amend her complaint. *Von Saher*, 2010 WL 114959, at *1.

[24] Judge Thompson was joined by Judge Nelson. Judge Pregerson dissented in part.

foreign affairs powers" and was preempted.[25] The majority noted that the Supreme Court has applied preemption analysis in the foreign affairs context in two ways.[26] First, the doctrine has been applied to bar those state laws that directly "conflict[] with a federal action such as a treaty, federal statute, or express executive branch policy."[27] The museum argued that section 354.3 was in actual conflict with the executive branch's post–World War II "policy of external restitution" — the practice of returning looted artwork to countries rather than individuals.[28] The majority held, however, that "[s]ection 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect"[29] because the external restitution policy ended in 1948.[30]

Second, the Supreme Court has held that even where a statute was not preempted by a direct conflict, field preemption could still occur if the state law purported to regulate a "traditional state responsibility"[31] but actually "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government."[32] While noting that California "certainly has a legitimate interest in regulating the museums and galleries operating within its borders,"[33] the majority examined the statute's legislative history and found that, prior to enactment, the restriction limiting the scope of section 354.3 to suits against "museums and galleries in California" was stricken[34] and replaced with "any museum or gallery."[35] The majority concluded that the real purpose of section 354.3 was to "create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state."[36] Judge Thompson concluded that this purpose was not an area of traditional state responsibility.[37] The majority then examined whether section 354.3 "intrude[d]" on a power "reserved exclusively to the federal government by the Constitution."[38] Like the trial court, the majority looked to *Deutsch* and found that section 354.3 suffered from the same fatal

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[25] *Von Saher*, 2010 WL 114959, at *1.
[26] *Id.* at *5.
[27] *Id.* (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 421–22 (2003)).
[28] *Id.* at *6.
[29] *Id.* at *7.
[30] *Id.*
[31] *Id.* at *8 (quoting *Garamendi*, 539 U.S. at 419 n.11).
[32] *Id.* at *8.
[33] *Id.* at *9.
[34] *Id.* (citing A. 1758, 2001–2002 Leg., Reg. Sess. (Cal. 2002) (amended), *available at* http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_1751-1800/ab_1758_bill_20020415_amended_asm.pdf).
[35] *Id.* (quoting CAL. CIV. PROC. CODE § 354.3(a)(1) (West 2006)) (internal quotation mark omitted).
[36] *Id.*
[37] *Id.* at *10 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003)).
[38] *Id.*

flaw as the statute in that case by attempting to "rectify[] wartime wrongs committed by our enemies."[39]

Judge Thompson then distinguished *Alperin v. Vatican Bank*,[40] in which the Ninth Circuit had held that the judiciary could adjudicate Holocaust-era property claims.[41] The court concluded that von Saher's reliance on the case was "misplaced" because the property restitution issues underlying *Alperin* were not political questions "constitutionally committed to the political branches," whereas questions of wartime restitution are part of the war powers "exclusively reserved" to the federal government.[42] The majority went on to examine the "documented history of federal action addressing the subject of Nazi-looted art"[43] to conclude that there was "no role for individual states to play in the restitution of Nazi-looted assets during and immediately following the war."[44] The court concluded that even though no international commission to settle Nazi-looted art disputes yet exists, "[o]nly the federal government possesses the power" to create such a remedy "with the international community."[45] For these reasons, the majority struck down section 354.3 as an unconstitutional intrusion by California "into a field occupied exclusively by the federal government."[46]

Although von Saher's section 354.3 claim was disallowed, the Ninth Circuit reversed the district court's dismissal of von Saher's claim under section 338, remanding the case for further proceedings.[47] Section 338 creates a three-year statute of limitations for general actions to recover stolen property.[48] The court observed that von Saher might be able to "state a cause of action" within that period depending on how she alleged the notice element.[49]

Judge Pregerson dissented in part. Citing the Supreme Court's decision in *American Insurance Ass'n v. Garamendi*,[50] the dissent noted that when a state acts within its "traditional competence," conflict preemption rather than field preemption is the proper doctrine.[51] Judge Pregerson went on to argue that because "[i]t is undisputed that

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[39] *Id.* at *11 (quoting Deutsch v. Turner Corp., 324 F.3d 692, 708 (9th Cir. 2003)).

[40] 410 F.3d 532 (9th Cir. 2005).

[41] *Von Saher*, 2010 WL 114959, at *11 (citing *Alperin*, 410 F.3d at 551).

[42] *Id.*

[43] *Id.* at *12

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at *1.

[48] CAL. CIV. PROC. CODE § 338 (West 2006).

[49] *Von Saher*, 2010 WL 114959, at *13.

[50] 539 U.S. 396 (2003).

[51] *Von Saher*, 2010 WL 114959, at *15 (Pregerson, J., dissenting in part) (quoting *Garamendi*, 539 U.S. at 419 n.11) (internal quotation marks omitted).

property is traditionally regulated by the State,"[52] the majority erroneously relied on *Deutsch* and should have upheld the statute under conflict preemption analysis as it did not clash with federal policy.[53] The dissent further distinguished *Deutsch* by noting that the statute at issue in that case, unlike section 354.3, expressly targeted enemies of the United States for wartime actions and provided for war reparations.[54] The dissent also disagreed with the majority's characterization of section 354.3 as having "created a world-wide forum for the resolution of Holocaust restitution claims"[55] and argued that a "reasonable reading of 'any museum or gallery' would limit Section 354.3 to entities subject to the jurisdiction of the State of California."[56] Judge Pregerson highlighted the strange result that followed from the majority's holding: "Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war."[57]

The Ninth Circuit was correct in allowing the suit to continue, but it should not have struck down section 354.3. Correctly interpreted, the statute should have survived field preemption analysis for four reasons: (1) the federal government had not fully occupied the field; (2) section 354.3 concerned an area of traditional state competence; (3) the statute did not intrude on the national government's war or foreign affairs powers; and (4) the field preemption doctrine is itself suspect.

Field preemption generally comes into play only when the federal government has "wholly occupie[d] a particular field."[58] This complete occupation was not present in *Von Saher*. In addition to abandoning its official policy on Nazi-looted art more than sixty years ago, the federal government had not created any remedy "with the international community" to resolve this problem,[59] despite the fact that it had done so for other Holocaust-related claims.[60]

Furthermore, section 354.3 concerned a "quintessential state function": the creation of a statute of limitations for plaintiffs to seek the return of stolen property.[61] The court disregarded this traditional state

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[52] *Id.*

[53] *Id.* at *15–16.

[54] *Id.* at *15 (citing Deutsch v. Turner Corp., 324 F.3d 692, 708, 711 (9th Cir. 2003)).

[55] *Id.* (quoting *id.* at *10 (majority opinion)) (internal quotation mark omitted).

[56] *Id.*

[57] *Id.*

[58] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000).

[59] *Von Saher*, 2010 WL 114959, at *12.

[60] For example, the United States had entered into the German Foundation Agreement to resolve Holocaust-related insurance claims. *See* Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims, 34 Cal. Rptr. 3d 944, 948–49 (Ct. App. 2005).

[61] *Von Saher*, 2010 WL 114959, at *8.

responsibility when it concluded from the legislative history that California's real purpose in enacting section 354.3 was to open the state as a "forum to all Holocaust victims and their heirs."[62] This turn to legislative history was inappropriate, however, because the canon of constitutional avoidance[63] provides that when a statute is "susceptible" to two reasonable constructions, courts must adopt the one that avoids "grave and doubtful constitutional questions."[64] Though the merit of canons generally[65] — and of the avoidance canon specifically[66] — can be debated, the Supreme Court "shows no signs of abandoning" the canon's use.[67] As Justice Brandeis noted in his concurrence in *Ashwander v. Tennessee Valley Authority*,[68] the avoidance canon promotes separation of powers because it forces judges to "shrink" from striking down legislative enactments where possible.[69] In *Von Saher*, the dissent rightly noted that a plain reading of "any museum or gallery" would have limited section 354.3 to entities otherwise subject to California's jurisdiction.[70] This narrower interpretation would not have been found unconstitutional since the majority and the dissent agreed that property is something "traditionally regulated by the state."[71] The

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[62] *Id.* at *10. For general arguments on why the use of legislative history should be curtailed, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 29–37 (Amy Gutmann ed., 1997).

[63] The canon "most frequently applied" in favor of states in the preemption context is typically not the canon of constitutional avoidance, but the canon against preemption, which creates "a presumption against interpreting federal statutes to preempt state law." EINER ELHAUGE, STATUTORY DEFAULT RULES 229 (2008). The canon against preemption does not apply here, however, because there is no federal statute that preempted section 354.3 (that is, there is no conflict preemption). *Von Saher*, 2010 WL 114959, at *8.

[64] Harris v. United States, 536 U.S. 545, 555 (2002) (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

[65] The turn to canons has been controversial for decades. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

[66] *Compare* Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405 (2002) (arguing that the avoidance canon is "wholly illegitimate"), *with* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 463 (2005) (arguing that the avoidance canon can be a "useful tool").

[67] Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 412 (2007).

[68] 297 U.S. 288 (1936).

[69] *Id.* at 345 (Brandeis, J., concurring) (quoting 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 332 (8th ed. 1927)).

[70] 2010 WL 114959, at *15 (Pregerson, J., dissenting in part) (internal quotation marks omitted). Another canon that cuts against the majority's reading of section 354.3 as applying outside of the United States is the "longstanding principle . . . of the presumption against [statutory] extraterritoriality." EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[71] *Von Saher*, 2010 WL 114959, at *8; *see id.* at *15 (Pregerson, J., dissenting in part).

Ninth Circuit should have respected the principle of separation of powers, utilized the avoidance canon, and read the statute in this way, deferring to the "wisdom" and "integrity" of the California State Legislature.[72]

The majority also attempted to distinguish section 354.3 from "garden variety property regulation[s]" by noting that the "statute addresses only the claims of Holocaust victims and their heirs."[73] The court, citing *Garamendi* and *Crosby v. National Foreign Trade Council*,[74] argued that state laws that "purport to regulate an area of traditional state competence" but that actually "affect foreign affairs" have been consistently struck down.[75] The statutes in both cases can be distinguished from section 354.3, however, because they directly clashed with expressed federal policy.[76] Since the majority admitted that section 354.3 did not directly conflict with federal law,[77] and section 354.3 *actually* regulated property, an area of traditional state competence, field preemption should not have been found.

Moreover, section 354.3 did not affect foreign affairs. *Zschernig v. Miller*[78] and *Hines v. Davidowitz*,[79] the cases the majority cited as instances where the Supreme Court found a state law to be field preempted because the law infringed upon the federal government's "exclusive power to conduct foreign affairs,"[80] can be distinguished from *Von Saher*. Section 354.3, unlike the statutes in those cases, does not antagonize other nations by withholding inheritances from their nationals,[81] nor does it deal with immigration, which, unlike property, is a part of the "general field of foreign affairs" where the federal government's supremacy is unquestioned.[82]

Section 354.3 also lacks impact outside of the United States, unlike the California statutes the majority cited in *Steinberg v. International Commission on Holocaust Era Insurance Claims*[83] and *Deutsch*, which similarly extended the statute of limitations for Holocaust claims and were found unconstitutional. Section 354.3 does not undermine an

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[72] *Ashwander*, 297 U.S. at 355 (Brandeis, J., concurring) (quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (opinion of Washington, J.)).

[73] *Von Saher*, 2010 WL 114959, at *8.

[74] 530 U.S. 363 (2000).

[75] *Von Saher*, 2010 WL 114959, at *8.

[76] The Court explicitly stated in both *Garamendi* and *Crosby* that the statutes were conflict preempted rather than field preempted. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 425 (2003); *Crosby*, 530 U.S. at 374 n.8.

[77] *Von Saher*, 2010 WL 114959, at *8.

[78] 389 U.S. 429 (1968).

[79] 312 U.S. 52 (1941).

[80] *Von Saher*, 2010 WL 114959 at *8.

[81] *Zschernig*, 389 U.S. at 432, 440.

[82] *Hines*, 312 U.S. at 62.

[83] 34 Cal. Rptr. 3d 944 (Ct. App. 2005).

official foreign policy of the United States,[84] nor does it intrude on the federal government's ability to resolve war by creating a private right of action against former wartime enemies.[85]

The Ninth Circuit chose to link section 354.3 to America's war effort, but the statute could have just as easily been framed as a response to illicit art trafficking. Analyzed in this light, it seems strange that the Ninth Circuit made dispositive the fact that more than sixty years ago the United States was involved in World War II, ignoring that the one official policy the federal government held with regard to Holocaust-appropriated art ended in 1948.[86] The majority argued that the "fatal similarity"[87] between section 354.3 and the statute in *Deutsch* was that they both had the same forbidden intent of "rectifying wartime wrongs."[88] But in fact one could characterize section 354.3 as having the perfectly permissible intent of ensuring that museums in California were not claiming title to misappropriated property.

As the majority acknowledged, field preemption occurs "seldomly" in the context of foreign affairs.[89] One reason for field preemption's rarity, as Justice Thomas has observed, is the fact that the doctrine is "itself suspect," and the Supreme Court has "frequently rejected" its use "in the absence of statutory language expressly requiring it."[90] Preemption should occur "only when the rules provided by state and federal law contradict each other, so that a court cannot simultaneously follow both."[91] In other words, courts should apply only conflict rather than field preemption. As Justice Brandeis argued, judges should only "encroach on the domain"[92] of the legislature when a law's "violation of the [C]onstitution is proved beyond all reasonable doubt."[93] Congress or the executive branch, "rather than the unelected federal judiciary," should make "the crucial decision" to preempt state law.[94] Because field preemption is a suspect doctrine, and because it was far from clear that the doctrine should apply to section 354.3, the court should have upheld the statute.

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[84] *See id.* at 951.

[85] *See* Deutsch v. Turner Corp., 324 F.3d 692, 716 (9th Cir. 2003).

[86] *See Von Saher*, 2010 WL 114959, at *7.

[87] *Id.* at *11.

[88] *Id.* (quoting *Deutsch*, 324 F.3d at 708).

[89] *Id.* at *8.

[90] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting).

[91] Nelson, *supra* note 58, at 303.

[92] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 355 (1936) (Brandeis, J., concurring) (quoting Sinking-Fund Cases, 99 U.S. 700, 718 (1878)).

[93] *Id.* (quoting Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827) (opinion of Washington, J.)).

[94] Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1428 (2001).