

## Sec. 2—Powers, Duties of the President    Cl. 2—Treaties and Appointment of Officers

sivity. “No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.”<sup>481</sup>

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation’s foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller*<sup>482</sup> the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien’s country, and that the alien heir would be allowed to receive payments from the Oregon estate “without confiscation.”<sup>483</sup> Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any “undu[e] interfer[ence] with the United States’ conduct of foreign relations,” the Court saw a “persistent and subtle” effect on international relations stemming from the “notorious” practice of state probate courts in denying payments to persons from Communist countries.<sup>484</sup> Regulation of descent and distribution of estates is an area traditionally regulated by states, but such “state regulations must give way if they impair the effective exercise of the Nation’s foreign policy.” If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints “must be provided by the Federal Government.”<sup>485</sup>

*Zschernig* lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign govern-

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<sup>481</sup> *United States v. Pink*, 315 U.S. 203, 233–34 (1942). Chief Justice Stone and Justice Roberts dissented.

<sup>482</sup> 389 U.S. 429 (1968).

<sup>483</sup> In *Clark v. Allen*, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

<sup>484</sup> 389 U.S. at 440.

<sup>485</sup> 389 U.S. at 440, 441.