

# GENOCIDE AND INSURANCE: A REVIEW OF *MOVSESIAN V. VICTORIA VERSICHERUNG AG*

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## I. INTRODUCTION

In Franz Kafka's parable, *Before the Law*, an imposing gatekeeper keeps out a man who "prays for admittance" to the "Law."<sup>1</sup> The man asks whether he would be let in "later" and the gatekeeper responds, "It is possible . . . but not at the moment."<sup>2</sup> The man waits.<sup>3</sup> Days turn into years.<sup>4</sup> The man sells all of his property to bribe the gatekeeper who accepts the money but refuses to let the man pass, explaining, "I am only taking [this] to keep you from thinking you have omitted anything."<sup>5</sup> The man grows old and is dying.<sup>6</sup> For his last words, he asks the gatekeeper: "Everyone strives to reach the Law . . . so how does it happen that for all these many years no one but myself has ever begged for admittance?"<sup>7</sup> The gatekeeper responds, "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."<sup>8</sup>

The gate to the law is shut for Armenian Americans who seek official

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<sup>1</sup> FRANZ KAFKA, *Before the Law*, in THE COMPLETE STORIES 3, 3–4 (Nahum N. Glatzer ed., Willa & Edwin Muir trans., 1971).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

United States recognition of the Armenian genocide.<sup>9</sup> The last remaining survivors are near death<sup>10</sup> and the U.S. government tells them, year after year, that the genocide, which occurred more than ninety years ago, will be officially recognized—just not now.<sup>11</sup> When genocide victimizes a community, its survivors often flee and are robbed of family and property.<sup>12</sup> Many survivors of the Armenian genocide fled to the United States.<sup>13</sup> However, since these refugees, upon arrival, focused on rebuilding their lives, many did not have the resources to comply with California's statute of limitations to bring suit against those who profited from their losses, specifically companies that insured lives and property.<sup>14</sup>

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<sup>9</sup> See *infra* Part II.A.

<sup>10</sup> E.g., Elaine Woo, *Martin Marootian Dies at 95; Lead Plaintiff in Suit over Armenian Genocide Victims' Insurance Policies*, L.A. TIMES (Mar. 12, 2011), <http://articles.latimes.com/2011/mar/12/local/la-me-martin-marootian-20110312> ("Martin Marootian, a retired pharmacist who stood up for Armenian genocide victims as the lead plaintiff in a lawsuit that resulted in a \$20-million settlement from New York Life Insurance Co. for failing to honor claims on policies sold to thousands of Armenians slain during the last years of the Ottoman Empire, has died. He was 95.").

<sup>11</sup> See, e.g., ConflictedYouth, *Fox News: Congressman Condemns Turkish Massacres*, YOUTUBE (Feb. 17, 2010), <http://www.youtube.com/watch?v=s0qxglUvxAA&feature=related> (Congressman Adam Schiff, author of resolutions on the Armenian genocide, answering Fox News commentator Paul Gigot's question about why Congress should bring up the Armenian genocide now, during sensitive times in the Middle East) ("You have to put this in perspective. We have been trying to recognize the genocide really for years, even for decades. We introduced this resolution before the Iraq war and the Administration said now is not a good time. We introduced the resolution before the war in Afghanistan and the administration said it was not a good time. Before 9/11, they said it wasn't a good time. . . . I think we have to expect that Turkey is going to act in their national interest. They are an important ally to us and we are an important ally to them. The fact that the European Union wants to make genocide recognition a condition of Turkey getting into the E.U. hasn't stopped Turkey from wanting to be in the E.U. . . . I also think . . . that there has never been the case where we have served our national interest well by denying the truth, particularly when it involves genocide. . . . Elie Wiesel said 'Speaking truth to power, gives power to the truth.' . . . It is also true with Turkey. I think we have to speak that compelling historic truth.").

<sup>12</sup> E.g., Jamie A. Ostroff, *Countries Strive to Return Holocaust-Era Property*, PBS NEWSHOUR (Jun. 29, 2010, 9:30 AM), [http://www.pbs.org/newshour/updates/law/janune10/holocaust\\_06-29.html](http://www.pbs.org/newshour/updates/law/janune10/holocaust_06-29.html) ("An estimated 6 million European Jews were killed during the Holocaust, and billions of dollars' worth of artwork, gold and property stolen by their Nazi captors. Sixty-five years later, countries are still working to make amends.").

<sup>13</sup> See, e.g., Letter from W.H. Anderson, State Dep't (Nov.1922), *available at* [http://upload.wikimedia.org/wikipedia/commons/6/66/US\\_State\\_Department\\_document\\_on\\_Armenian\\_Refugees\\_in\\_1921.jpg](http://upload.wikimedia.org/wikipedia/commons/6/66/US_State_Department_document_on_Armenian_Refugees_in_1921.jpg) (last visited Nov. 14, 2011) (reporting that in 1921, of the 817,873 Armenian refugees from Turkey, 125,000 fled to the United States and Canada).

<sup>14</sup> "The Legislature further recognizes that thousands of Armenian Genocide survivors and the heirs of Armenian Genocide victims are residents or citizens of the State of California." S.B. 1915 § 1(b), 1163d Leg., Reg. Sess. (Cal. 2000) (codified at CAL. CIV. PROC. CODE § 354.4 (Deering 2011)).

Therefore, in 2000, California passed Senate Bill 1915, codified as Section 354.4 of the California Code of Civil Procedure, noting that “[victims of the Armenian genocide] have, too often, been deprived of their entitlement to benefits under insurance policies issued in Europe and Asia by insurance companies.”<sup>15</sup> Section 354.4 extended the statute of limitations until December 31, 2010, for Armenian genocide victims or their heirs to file claims against insurance providers who owe them money “in any court of competent jurisdiction in [California.]”<sup>16</sup> Accordingly, in December 2003, Vazken Movsesian (“Movsesian”) filed a class action suit against German insurers Victoria Versicherung AG, Ergo Versicherungsgruppe AG, and Munchener Ruckversicherungs-Gesellschaft Aktiengesells AG (hereinafter and together “Munich Re”), claiming that Munich Re failed to honor his ancestor’s life insurance policy.<sup>17</sup>

However, Munich Re does not want to compensate policyholders for ninety years of unpaid policies. Therefore, instead of challenging Movsesian and his class on their contract claim, Munich Re argues that because the President and Congress refuse to refer to the murder of one and one-half million Armenians as genocide, section 354.4 is invalid.<sup>18</sup> This challenge argues for preemption under the foreign affairs doctrine, which provides that states cannot interfere with or conduct foreign policy.<sup>19</sup>

The district court decided that Movsesian could sue Munich Re under section 354.4 and that the law is not preempted by the foreign affairs doctrine.<sup>20</sup> Then in 2008, the Ninth Circuit granted Munich Re’s interlocutory appeal to determine whether section 354.4 is unconstitutional because it contravenes the federal government’s exclusive power to conduct foreign affairs.<sup>21</sup> Initially, the Ninth Circuit ruled in favor of Munich Re (“*Movsesian I*”),<sup>22</sup> but then in December 2010, the same three-judge panel overturned its own decision in favor of Movsesian (“*Movsesian II*”).<sup>23</sup> Later, in

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<sup>15</sup> *Id.*

<sup>16</sup> CAL. CIV. PROC. CODE § 354.4 (Deering 2011). Pursuant to this statute, Armenian Americans won settlements against insurers including \$37.5 million from New York Life Insurance Co. and AXA, S.A. Bill Kisliuk & Joe Piasecki, *Ruling Supports Armenian Genocide Suits*, LA CANADA VALLEY SUN (Dec. 15, 2010, 6:15 PM), <http://www.lacanadaonline.com/news/tn-vsl-armenian-20101215,0,7772108.story>.

<sup>17</sup> *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 904 (9th Cir. 2010).

<sup>18</sup> *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1053 (9th Cir. 2009).

<sup>19</sup> *See infra* Part III.

<sup>20</sup> *Movsesian*, 629 F.3d at 903.

<sup>21</sup> *Movsesian*, 578 F.3d at 1052, 1054–55.

<sup>22</sup> *Id.* at 1053.

<sup>23</sup> *Movsesian*, 629 F.3d at 901, 903.

February 2012, by en banc appeal, the Ninth Circuit unanimously held that the foreign affairs doctrine preempts section 354.4 ("*Movsesian III*").<sup>24</sup> Movsesian's attorneys now say that they will likely petition the U.S. Supreme Court to finally settle whether the foreign affairs doctrine invalidates section 354.4.<sup>25</sup>

This Note argues that the foreign affairs doctrine analysis is irrelevant because California's choice to characterize the massacre of one and one-half million Armenians from 1915 to 1923 as genocide is not subject to judicial review or preemption by federal law. The right to discuss history is a fundamental attribute of free society, even when exercised by a state. Part II provides background information on the Armenian genocide and U.S. efforts to acknowledge it. Part III.A. examines the foreign affairs doctrine and concludes that to preempt section 354.4, Munich Re must show that U.S. foreign policy conflicts with state law. Then, Part III.B. reviews *Movsesian II*, which held that since there is no clear U.S. foreign policy on the Armenian genocide, Munich Re may not then point to that non-existent policy to find conflict and invalidate state law. Further, Part III.C. argues that the foreign affairs doctrine analysis is irrelevant because to invalidate state law under this doctrine, Munich Re must argue that the substance of the law, the extension of the statute of limitations, conflicts with U.S. foreign policy. Instead, Munich Re argues that California may not describe the massacres as genocide, which is ancillary to the substance of the law. Then, Part IV explains that, under the First Amendment, the right to discuss history is fundamental, and outlines California's rich history of Armenian genocide recognition. Our democracy cannot function if states are censored from representing constituents. Therefore, this part argues that if the Ninth Circuit or the Supreme Court sides with Munich Re, it will send the message that if the people of any state wish to refer to the Armenian genocide, even in passing, they will be silenced. Such an outcome is adverse to our democracy and the freedom of expression. Finally, Part V concludes this Note.

## II. BACKGROUND: ARMENIAN GENOCIDE

From 1915 to 1923, the Ottoman Empire, pursuant to government policy,<sup>26</sup> murdered one and one-half million of its Armenian population.<sup>27</sup>

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<sup>24</sup> *Movsesian v. Victoria Versicherung AG*, 2012 U.S. App. LEXIS 3589.

<sup>25</sup> Telephone interview with attorneys on both sides of the case (Sept. 2010).

<sup>26</sup> On May 29, 1915, Ottoman authorities approved the Temporary Law of Deportation, which authorized the deportation of any person "on suspicion of espionage, treason, [or] military necessity." PETER BALAKIAN, *THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND*

The Ottoman government implemented this genocide by way of massacres and death marches through the desert in which soldiers, villagers, bandits, and death squads raped, stole from, and murdered the defenseless.<sup>28</sup> Many who survived this gauntlet starved.<sup>29</sup> On July 16, 1915, U.S. Ambassador to Constantinople Henry Morgenthau wrote to the U.S. Secretary of State: "Deportation of . . . peaceful Armenians is increasing and from harrowing reports of eye witnesses it appears that a campaign of race extermination is in progress under a pretext of reprisal against rebellion."<sup>30</sup> Moreover, Ambassador Morgenthau wrote that Ottoman officials publicly admitted that they intended to exterminate the Armenian people: "When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race; they understood this well, and, in their conversations with me, they made no particular attempt to conceal the fact."<sup>31</sup> The following report is from one of more than 145 articles published in *The New York Times* in 1915.<sup>32</sup>

On Tuesday, about 3:30 A. M., the ox carts appeared at the doors . . . [and Armenians] . . . were dragged from their beds without even sufficient clothing. . . . In many cases the husbands and brothers of these same women were away in the army, fighting for the Turkish Government.

The panic in the city was terrible . . . . Many of the convicts in the prison had been released . . . . It was feared that the women and children were taken some distance from the city and left to the mercy of these

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AMERICA'S RESPONSE 187 (2003) (citation omitted). In addition, in September 1915, the Ottoman parliament passed the Temporary Law of Expropriation and Confiscation, which authorized Ottoman officials to confiscate all property belonging to Armenians. *Id.* at 187. "[W]hen . . . the director of the Deutsche Bank, described the new law to the German Foreign Office, he remarked [that the law could be summarized:] '1. All goods of the Armenians are confiscated. 2. The government will cash in the credits of the deportees and will repay (or will not repay) their debts.'" *Id.* (citation omitted).

<sup>27</sup> E.g., John Kifner, *Armenian Genocide of 1915: An Overview*, N.Y. TIMES (Dec. 21, 2010), [http://www.nytimes.com/ref/timestopics\\_armeniangenocide.html](http://www.nytimes.com/ref/timestopics_armeniangenocide.html).

<sup>28</sup> See, e.g., Vincent Yardum, Letter to the Editor, *The Death of Armenia: Her Land Has Been Devastated and the Few Survivors Driven Out*, N.Y. TIMES (Sept. 15, 1915), <http://query.nytimes.com/gst/abstract.html?res=9E0DE2DF1239E333A25754C1A96F9C946496D6CF&sc p=1&sq=armenia&st=p>.

<sup>29</sup> E.g., *Found, Armenians Starving in Camps*, N.Y. TIMES (Jan. 1, 1917), <http://query.nytimes.com/mem/archive-free/pdf?res=F00E14F93F5C1B728DDDA80894D9405 B878DF1D3> (reporting on Armenians starving in Turkish concentration camps).

<sup>30</sup> Telegram from Henry Morgenthau Sr., U.S. Ambassador to Constantinople, Dep't of State, to U.S. Sec'y of State (Jul. 16, 1915), available at <http://upload.wikimedia.org/wikipedia/en/d/d9/AmbassadorMorgenthautelegram.jpg> (last visited on Feb. 11, 2012).

<sup>31</sup> HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 309 (1919).

<sup>32</sup> Kifner, *supra* note 27.

men. . . . [T]here are . . . cases of the kidnapping of attractive young girls by the Turkish officials. . . . The women believed that they were going to worse than death, and many carried poison in their pockets . . . .

. . . .

. . . [An] Armenian, together with his two sons . . . were placed one behind the other and shot through . . . a child was killed by beating its brains out on a rock.

. . . .

Daily the police are searching the houses of the Armenians for weapons, and are not finding any, . . . [T]hey are torturing [men] with red hot irons to make them reveal the supposedly concealed weapons.

. . . .

The worst and most unimaginable horrors were reserved for us at the banks of the Euphrates . . . . The mutilated bodies of women, girls, and little children made everybody shudder. The bandsmen were doing all sorts of awful deeds to the women and girls . . . whose cries went up to heaven . . . [and] the bandsmen and gendarmes threw into the river all the remaining children under 15 years old. Those that could swim were shot down as they struggled in the water.

. . . .

Turkish Ministers and other officials have repeatedly avowed the intention to smash the Christian nationalities and thus forever put an end to the Armenian question.<sup>33</sup>

In December 1948, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide defined genocide as an “intent[ional] [act] to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>34</sup> Accordingly, the consensus of reputable historians, including the International Association of Genocide Scholars,<sup>35</sup> more than twenty countries,<sup>36</sup> and roughly forty U.S. states, officially recognize these

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<sup>33</sup> *Tell of Horrors Done in Armenia*, N.Y. Times, Oct. 4, 1915, at 3, available at <http://query.nytimes.com/gst/abstract.html?res=940CE6D61138E633A25757C0A9669D946496D6CF&scp=3&sq=armenia&st=p>.

<sup>34</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>35</sup> Letter from the International Association of Genocide Scholars, to Recep Tayyip Erdogan, Prime Minister of Turkey. (Jun. 13, 2005), available at [http://en.wikisource.org/wiki/A\\_Letter\\_from\\_The\\_International\\_Association\\_of\\_Genocide\\_Scholars](http://en.wikisource.org/wiki/A_Letter_from_The_International_Association_of_Genocide_Scholars) (last visited on Feb. 24, 2011).

<sup>36</sup> *Q&A Armenian Genocide Dispute*, BBC News, <http://news.bbc.co.uk/2/hi/6045182.stm> (last updated Mar. 5, 2010).

massacres as genocide.<sup>37</sup> However, even in the face of the overwhelming evidence available today, Turkey continues to deny this genocide and bully other countries, such as the United States, to do the same.<sup>38</sup>

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<sup>37</sup> *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 907 (9th Cir. 2010) (“We also note that . . . some forty states recognize the Armenian Genocide . . . .”); Letter from the International Association of Genocide Scholars, *supra* note 35.

<sup>38</sup> Christopher Hitchens, *Shut Up About Armenians or We'll Hurt Them Again: Turkish Prime Minister Erdogan's Latest Sinister Threat*, SLATE.COM (Apr. 5, 2010, 10:43 AM), [http://www.slate.com/articles/news\\_and\\_politics/fighting\\_words/2010/04/shut\\_up\\_about\\_armenians\\_or\\_well\\_hurt\\_them\\_again.html](http://www.slate.com/articles/news_and_politics/fighting_words/2010/04/shut_up_about_armenians_or_well_hurt_them_again.html); Robert Tait & Ewen MacAskill, *Turkey Threatens 'Serious Consequences' After US Vote on Armenian Genocide*, GUARDIAN.CO.UK (Mar. 5, 2010), <http://www.guardian.co.uk/world/2010/mar/05/turkey-us-vote-armenian-genocide>.

In response to Turkish threats to breach multi-billion dollar contracts, the defense industry lobbies Congress to block Armenian genocide resolutions. Andrea Shalal-Esa, *Update 2-US CEOs Warn Against Armenia 'Genocide' Bill*, REUTERS (Mar. 2, 2010, 6:11 PM), <http://www.reuters.com/article/2010/03/02/usa-turkey-armenia-idUSN0218155120100302>; *Profiting from Genocide Denial: Defense Industry CEO's Urge Congress to Oppose Armenian Genocide Legislation*, ASBAREZ.COM (Mar. 3, 2010), <http://asbarez.com/77979/profitting-from-genocide-denial-defens-e-industry-ceos-urge-congress-to-oppose-armenian-genocide-legislation>. Accordingly, Congressional opposition to Armenian genocide recognition is often tied to Turkish coffers. According to the Department of Justice, from 2000 to 2009, Turkey spent more than \$28,405,529 on private lobbying firms in comparison to Armenia's \$331,666. DOJ, REP. OF THE ATT'Y GEN. TO THE CONGRESS OF THE U.S. ON THE ADMIN. OF THE FOREIGN AGENTS REGISTRATION ACT OF 1938 [hereinafter REP. OF ATT'Y GEN.], AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2000, at 289–92 (2001); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2000, at 275–76 (2001); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2001, at 275–76 (2001); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2001, at 268–69 (2002); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2002, at 276–77 (2002); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2002, at 267–68 (2003); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2003, at 252–54 (2003); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2004, at 222–24 (2006); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2004, at 227–29 (2006); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2005, at 225–27 (2006); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2005, at 240–42 (2006); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2006, at 238–40 (2007); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2006, at 229–31 (2007); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2007, at 222–24 (2008); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2007, at 215–18 (2008); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2008, at 211–12 (2009); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2008, at 210–12 (2009); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2009, at 226–28 (2010); DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2009, at 220–22 (2010), <http://www.fara.gov/links/annualrpts.html> (providing data that, when calculated and aggregated, supports the amounts in the following table).

Year	Total Money Turkey Paid to Lobbyists in the United States	Total Money Armenia Paid to Lobbyists in the United States.	Armenian Genocide Legislation in Congress (number of co-sponsors)
2000	\$2,358,700	\$0	H. Res. 625 (1)
2001	\$2,582,489.9	\$0	
2002	\$3,447,518.9	\$0	S. Res. 307 (30)
2003**	\$1,094,107.1	\$0	H. Res. 193 (110); S. Res. 164 (40)
2004	\$2,830,145.5	\$0	
2005	\$2,222,500	\$0	H. Con. Res. 195 (88); H. Res. 316 (159); S. Res. 320 (34)
2006	\$3,552,125	\$111,666.66	
2007	\$3,499,373.2	\$220,000	H. Res. 102 (67); S. Res. 65 (9); H. Res. 106 (212) and approved by the House Committee on Foreign Affairs by 27-21; S. Res. 106 (33)
2008	\$3,430,299.2	\$0	
2009	\$3,388,271.2	\$0	
Total	<b>\$28,405,529.00</b>	<b>\$331,666.66</b>	

\*\* Only includes six months ending June 30, 2003.

Inevitably, some current and former members of Congress financially benefit from denying the genocide. The two that have arguably benefitted the most have been Robert Livingston and Dick Gephardt. *E.g.* Marilyn W. Thompson, *Ex-Congressmen Lobby Hard on Turkey's Behalf*, N.Y. TIMES, Oct. 17, 2007, <http://www.nytimes.com/2007/10/17/world/americas/17ihtlobby.4.793219.1.html>.

For example, in 2007, former Republican Chairman of the House Appropriations Committee, Bob Livingston of the Livingston Group, LLC., spoke of his more than seven-year relationship with Turkey and argued "The Turkish position is that [the Armenian genocide] is not at all true. . . . Turkey is just an indispensable ally . . . [and Congress] ought not to . . . kick it in the shins with issues that are unnecessary. . . . Nobody really knows in this day and age, unless you're a historian, what happened in those days . . . ." Robert Livingston, *Former American Congressman Talks About Armenian "Genocide"*, YOUTUBE (May 16, 2008), <http://www.youtube.com/watch?v=ToF9lNzJrY&feature=related> (beginning at 1:03). In that year alone, the Livingston Group, LLC., reported more than \$974, 273 from Turkey. DOJ, REP. OF ATT'Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2007 at 222–24 (2008) and DOJ, REP. OF ATT'Y GEN., FOR THE SIX MONTHS ENDING DEC. 31, 2007 at 215–18 (2008), available at <http://www.fara.gov/links/annualrpts.html>. That same year, current Louisiana Governor Jindal, then a U.S. Representative, withdrew his support for recognition of the Armenian genocide in suspicious proximity to a phone call from Bob Livingston and a \$10,000 campaign contribution to Jindal's gubernatorial campaign. See *Ex-Congressmen Lobby Hard on Turkey's Behalf*, supra.

Throughout his career in Congress, Dick Gephardt championed recognition of the Armenian genocide, but now, in the private sector, it is said he is on the "Turkish payroll." Press Release, Armenian National Committee of America, Gephardt Reverses Prior Support for Genocide Recognition to Serve As Foreign Agent for Turkey (May 11, 2007), [http://www.anca.org/press\\_releases/press\\_releases.php?prid=1174](http://www.anca.org/press_releases/press_releases.php?prid=1174), receiving more than \$2,538,150 in contracts as partner at DLA Piper and through the Gephardt Group Government Affairs, LLC, in 2008 and



## A. U.S. RECORD ON THE ARMENIAN GENOCIDE

United States policy on the Armenian genocide is inconsistent. In 1975, Congress recognized the Armenian genocide when the “House [of Representatives] observed a day of remembrance for ‘all victims of genocide, especially those of Armenian ancestry[.]’”<sup>39</sup> Later, on April 22, 1981, President Ronald Reagan proclaimed, “Like the genocide of the Armenians before it, and the genocide of the Cambodians which followed it—and like too many other such persecutions of too many other peoples—the lessons of the Holocaust must never be forgotten.”<sup>40</sup> Again, in 1984, the

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2009 combined. DOJ, REP. OF ATT’Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2008, at 211–12 (2009) and DOJ, REP. OF ATT’Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2008, at 210–12 (2009) and DOJ, REP. OF ATT’Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING JUN. 30, 2009, at 226–28 (2010) and DOJ, REP. OF ATT’Y GEN., AS AMENDED, FOR THE SIX MONTHS ENDING DEC. 31, 2009, at 220–22 (2010), available at <http://www.fara.gov/annualrpts.html>. Accordingly, in 2010, co-sponsors of House Resolution 106 circulated a dear colleague letter that read,

Former Majority Leader Dick Gephardt (D-MO) is now employed by the Turkish government to dissuade Members of Congress from supporting H.Res.106, the Armenian Genocide Resolution. But in 2000, as a Member of Congress, [he supported Armenian genocide resolutions and] he wrote to Speaker Hastert urging immediate floor consideration of the Armenian Genocide Resolution, claiming “this issue requires little if any additional deliberation by the House.”

Press Release, Armenian National Committee of America, *supra*.

In addition, Turkish groups are allegedly currently involved in ethics violations involving members of Congress. *Rep. Jean Schmidt Under Investigation*, HUFFINGTON POST (Feb. 14, 2011, 6:20 PM), [http://www.huffingtonpost.com/2011/02/14/huffpost-hill-rep-jean-sc\\_n\\_823195.html](http://www.huffingtonpost.com/2011/02/14/huffpost-hill-rep-jean-sc_n_823195.html). For example, on February 15, 2011, *Roll Call* reported that U.S. Representative Jean Schmidt, Republican from Ohio, was being investigated by the Office of Congressional Ethics for “improperly receiv[ing] free legal services from the [Turkish Coalition of America] and its legal defense fund in violation of House rules.” Jennifer Yachnin, *Ethics Board Eyes Schmidt*, ROLL CALL, Feb. 15, 2011. Although not yet confirmed, the controversy may arise from multiple disputes including her ongoing 6.8 million dollar defamation suit against political challenger and Armenian American lawyer David Krikorian for his campaign literature. In Krikorian’s defense before the Ohio Election Board, attorney Mark Geragos, a fellow Armenian American attorney, argued,

He said that she took \$30,000. Did she? Oh, she took over \$34,000, so that certainly wasn’t a problem. He said that she took it in blood money from Turkish government sponsored political action committees. . . . They said they are not Turkish sponsored in spite of the fact that the [attorneys now sitting with Schmidt across the table] exhibit A. is Mr. Fein sitting here, exhibit B. is Mr. Saltzman sitting here, [who are lobbyists for Turkey], exhibit C is the fact that [the Turkish American Legal Defense Fund] TALDF is at the exact same address, in the exact same building where the TOC is, the [American Turkish Association] ATA, is funded completely by Turkey.

Peter Musurlian, *Mark Geragos: Closing Argument @ Ohio Elections Commission, in the Schmidt vs Krikorian Case*, YOUTUBE (Dec. 30, 2009), <http://www.youtube.com/watch?v=vUygz-0caYU> (beginning at 2:45).

<sup>39</sup> *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 906 (9th Cir. 2010).

<sup>40</sup> *Id.* at 907 (quoting President Reagan).

“House [of Representatives] observed a day of remembrance for ‘all victims of genocide, especially those of Armenian ancestry.’”<sup>41</sup> However, to protect U.S. security interests in the region, every President since then, pressed by Turkey, avoided characterizing the massacres as genocide and opposed congressional resolutions that would do the same.<sup>42</sup> Since there are no treaties or binding legislation on the Armenian genocide, courts deduce federal policy on the issue from yearly White House statements near Armenian Genocide Remembrance Day, which is April 24,<sup>43</sup> and from Executive Branch opposition to congressional resolutions that use the word genocide.<sup>44</sup>

In an official statement on Armenian Genocide Remembrance Day in 1998, President Clinton dodged the genocide question by avoiding the word, and instead referred to the killings as “massacres.”<sup>45</sup> “[W]e join with Armenian-Americans throughout the nation in commemorating one of the saddest chapters in the history of this century, the deportations and massacres of a million and a half Armenians in the Ottoman Empire in the years 1915–1923.”<sup>46</sup> A stronger example is when President Clinton opposed House Resolution 596 in the 106th Congress, which “[c]all[ed] upon the President to ensure that the foreign policy of the United States reflects appropriate understanding [of] . . . the Armenian Genocide . . . .”<sup>47</sup> The President wrote to Speaker of the House Hastert: “[I] am deeply concerned that consideration of H. Res. 596 at this time could have far-reaching negative consequences for the United States. We have significant interests in this troubled region of the world . . . .”<sup>48</sup> In the end, the Speaker never scheduled House Resolution 596 for a full vote.<sup>49</sup> “In sum, President Clinton

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<sup>41</sup> *Id.* at 906.

<sup>42</sup> See *infra* notes 45–83 and accompanying text.

<sup>43</sup> See, e.g., Christopher Hitchens, *Telling the Truth about the Armenian Genocide*, SLATE MAG. (Apr. 6, 2009, 11:10 AM), <http://www.slate.com/id/2215445/> (“April is the month in which the Armenian Diaspora commemorates the bloody initiation, in 1915, of the Ottoman Empire’s campaign to erase its Armenian population. The marking of the occasion takes two forms: Armenian Remembrance Day, on April 24, and the annual attempt to persuade Congress to name that day as one that abandons weasel wording and officially calls the episode by its right name, which is the word I used above.”).

<sup>44</sup> *Movsesian*, 629 F.3d at 906–12 (finding no express foreign policy by examining presidential statements including opposition to Armenian genocide resolutions before the Congress).

<sup>45</sup> *Id.* at 906–07; Message on the Observance of Armenian Remembrance Day, 1998, 34 WEEKLY COMP. PRES. DOC. 711 (April 24, 1998), available at [http://www.anca.org/genocide\\_resource/clinton.php](http://www.anca.org/genocide_resource/clinton.php).

<sup>46</sup> *Id.*

<sup>47</sup> *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1057 (9th Cir. 2009).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1058.

urged the Speaker ‘in the strongest terms not to bring this [Armenian genocide] Resolution to the floor at this time.’”<sup>50</sup>

Given that President Clinton refused to use the word genocide, then-presidential candidate George W. Bush courted Armenian American votes with the following campaign statement: “The Armenians were subjected to a genocidal campaign . . . . If elected President, I would ensure that our nation properly recognizes the tragic suffering of the Armenian people.”<sup>51</sup> However, once we elected President Bush, he opposed House Resolution 193 because it included the words “Armenian Genocide.”<sup>52</sup> “I am writing to express the Administration’s opposition to the wording of H. Res. 193 . . . . [W]e oppose . . . [its] reference to the ‘Armenian Genocide.’ Were this wording adopted it could complicate our efforts to . . . bring about Turkish-Armenian reconciliation.”<sup>53</sup> Although the House calendared Resolution 193, the full House of Representatives never voted on it.<sup>54</sup> Then in 2007, the Bush administration opposed House Resolution 106, which would have acknowledged the genocide<sup>55</sup>:

I urge members to oppose the Armenian genocide resolution now being considered by the House Foreign Affairs Committee. We all deeply regret the tragic suffering of the Armenian people . . . . This resolution is not the right response to these historic mass killings, and its passage would do great harm to our relations with a key ally in NATO [Turkey] and in the global war on terror.<sup>56</sup>

Although House Resolution 106 passed the Foreign Affairs Committee and reached 212 co-sponsors,<sup>57</sup> the full House never voted on it.<sup>58</sup>

In 2008, presidential candidate U.S. Senator Barack Obama gave Armenian Americans hope that he would both recognize the genocide and incorporate it into his presidential foreign policy.<sup>59</sup> He wrote,

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<sup>50</sup> *Id.* at 1057.

<sup>51</sup> Letter from George W. Bush, former President, U.S., to Edgar Hagopian and Vasken Setrakian (Feb. 19, 2000), in Press Release, George W. Bush Recognizes Armenian Genocide, ARMENIAN NAT’L COMM. OF AM. (Feb. 20, 2000), [http://www.anca.org/press\\_releases/press\\_releases.php?prid=3](http://www.anca.org/press_releases/press_releases.php?prid=3).

<sup>52</sup> *Movsesian*, 578 F.3d at 1058.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1059.

<sup>56</sup> *Id.*

<sup>57</sup> H. Res. 106, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:H.RES.106>.

<sup>58</sup> *See id.*

<sup>59</sup> *See infra* notes 60–64 and accompanying text.

As a U.S. Senator, I have stood with the Armenian American community in calling for Turkey's acknowledgement of the Armenian Genocide. . . . I criticized the Secretary of State for the firing of U.S. Ambassador to Armenia, John Evans,<sup>60</sup> after he properly used the term "genocide" to describe Turkey's slaughter of thousands of Armenians starting in 1915. I shared with Secretary Rice . . . that the Armenian Genocide is not an allegation, a personal opinion, or a point of view, but rather a widely documented fact supported by an overwhelming body of historical evidence. The facts are undeniable. An official policy that calls on diplomats to distort the historical facts is an untenable policy. As a senator, I strongly support passage of the Armenian Genocide Resolution (H.Res.106 and S.Res.106), and as President I will recognize the Armenian Genocide.<sup>61</sup>

Moreover, Mr. Obama's then senior foreign policy advisor Samantha Power, whose book, *A Problem from Hell: America and the Age of Genocide*, outlines Turkey's campaign to deny genocide,<sup>62</sup> courted Armenian American voters online.<sup>63</sup> She said,

[Barack Obama] is a true friend of the Armenian people and an acknowledgment of the history and I think somebody . . . [whose] leadership is rooted in truth telling . . . I think you will join me in acknowledging that we don't have time to wait. . . . So I hope you in the Armenian community will take my word for it. . . . He is a person who can actually be trusted.<sup>64</sup>

However, soon after taking office President Obama participated in a joint press conference with Turkish President Gul, who during the event publicly denied the genocide and accused Armenians of provoking their killers.<sup>65</sup> When a reporter asked President Obama about his promise to

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<sup>60</sup> U.S. Ambassador to Armenia John Evans was removed for referring to the Armenian genocide. *John Evans*, [http://armenianpedia.org/index.php?title=John\\_Evans](http://armenianpedia.org/index.php?title=John_Evans) (last visited Feb. 26, 2011).

<sup>61</sup> Campaign Statement, Barack Obama, former U.S. Senator, Barack Obama on the Importance of US-Armenia Relations (Jan. 19, 2008), in *U.S. Presidential Statements: Obama Barack H. (2009-present)*, ARMENIAN NAT'L COMM. OF AM., [http://www.anca.org/genocide\\_resource/obama.php](http://www.anca.org/genocide_resource/obama.php). See also Hyebiz, *Sen. Barack Obama Discusses Armenian Genocide* ..., YOUTUBE (Jun. 30, 2008), <http://www.youtube.com/watch?v=JwR83GZjwdo&feature=related> ("For those of you who aren't aware, there was a genocide that did take place against the Armenian people. It is one of the situations where we have seen a constant denial on the part of the Turkish government . . .").

<sup>62</sup> See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 1-16 (2002).

<sup>63</sup> Samantha Power, *Samantha Power on Obama and Armenian American Issues*, YOUTUBE (Feb. 1, 2008), <http://www.youtube.com/watch?v=8yNt7XsV-Dg>.

<sup>64</sup> *Id.* (beginning at 2:33).

<sup>65</sup> See Press Release, the White House Office of Press Sec'y, Joint Press Availability with

recognize the Armenian genocide, the President abandoned his campaign promise and replied, "What I want to do is not focus on *my views* right now but focus on the views of the Turkish and the Armenian people. If they can move forward and deal with a difficult and tragic history, then I think the entire world should encourage them."<sup>66</sup> Later, on April 24, 2010, Armenian Genocide Remembrance Day, which the White House calls "Armenian Remembrance Day," President Obama explained that his refusal<sup>67</sup> to use the word genocide does not mean that he broke his campaign promise: "Today is a day to reflect upon and draw lessons from these terrible events. I have consistently stated *my own view* of what occurred in 1915, and *my view of that history has not changed*."<sup>68</sup> With this circular rhetoric, the President brings Franz Kafka's parable to life. On the one hand, prior to being President, Senator Obama argued that the President should use the word genocide.<sup>69</sup> He scolded Secretary Rice when she ex-

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President Obama and President Gul of Turkey (Apr. 6, 2009), <http://www.whitehouse.gov/the-press-office/joint-press-availability-with-president-obama-and-president-gul-turkey> (Gul speaking) ("[S]ome citizens of the empire then were provoked by some other countries and there were many internal clashes and many people lost their lives. And we share the sorrow of all those who lost their lives, but we have to remember that the Muslim population also suffered greatly at the same time. And at the time from the Balkans, from the Caucasus, there were millions of Muslim Turks who were displaced, who were having to come to travel to Turkey, and there were many losses as they traveled. So the losses there took place during the chaotic times of the situation then.").

<sup>66</sup> *Id.* (emphasis added).

Turkish bullying also drives significant Jewish American opposition to Armenian genocide legislation. See, e.g., Jeff Jacoby, *Denying the Armenian Genocide*, N.Y. TIMES, Aug. 23, 2007, <http://www.nytimes.com/2007/08/23/opinion/23iht-edjacob.1.7227486.html> ("Particularly deplorable has been the longtime reluctance of some leading Jewish organizations, including the Anti-Defamation League, the American Jewish Committee, and the American Israel Public Affairs Committee, to call the first genocide of the 20th century by its proper name.").

For example, in 2007, the Anti-Defamation League ("ADL"), which "founded in 1913, is the world's leading organization fighting anti-Semitism through programs and services that counteract hatred, prejudice and bigotry," opposed Congressional recognition of the Armenian genocide because it "believe[d] that a Congressional resolution on such matters is a counterproductive diversion and will not foster reconciliation between Turks and Armenians and may put at risk the Turkish Jewish community and the important multilateral relationship between Turkey, Israel and the United States." Press Release, Anti-Defamation League, ADL Statement on the Armenian Genocide (Aug. 21, 2007), [http://www.adl.org/PresRele/Mise\\_00/5114\\_00.html](http://www.adl.org/PresRele/Mise_00/5114_00.html).

<sup>67</sup> E.g., Bridget Johnson, *Obama Avoids Use of 'Genocide' Again in Marking Armenian Commemoration*, THE HILL'S BLOG BRIEFING ROOM (Apr. 24, 2010, 10:19 AM), <http://thehill.com/blogs/blog-briefing-room/news/94121-obama-avoids-use-of-genocide-again-in-armenian-commemoration>.

<sup>68</sup> Press Release, The White House Office of the Press Secretary, Statement of President Barack Obama on Armenian Remembrance Day (Apr. 24, 2010) (emphasis added), <http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-armenian-remembrance-day>.

<sup>69</sup> Campaign Statement, *supra* note 61.

plained that although she personally thinks that it was genocide, this is different from her view as Secretary of State.<sup>70</sup> Senator Obama said, "The Armenian Genocide is not an allegation, a personal opinion, or a point of view, but rather a widely documented fact supported by an overwhelming body of historical evidence."<sup>71</sup> Accordingly, Senator Obama "strongly support[ed] the Armenian Genocide Resolution" because in his words: "[a]n official policy that calls on diplomats to distort the historical facts is an untenable policy[.]"<sup>72</sup> and assured voters that if elected, he would refer to the Armenian genocide as a *genocide*.<sup>73</sup> Instead, once elected, President Obama refused to use the word, stating that his "view . . . has not changed."<sup>74</sup>

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<sup>70</sup> In 2007, Congressman Adam Schiff questioned Secretary Rice on U.S. opposition to Armenian genocide resolutions, asking, "Madam Secretary, you come out of academia, is there any historic debate outside of Turkey? Is there any reputable historian that you are aware of that takes issue with the fact that the murder of a million and a half Armenians constituted genocide?" Adam Schiff, *Rep Schiff Questions Secretary Rice on the Armenian Genocide*, YOUTUBE (Oct. 4, 2007), <http://www.youtube.com/watch?v=04Yqq1t42o> (beginning at 2:37) (last visited Feb. 26, 2011). Secretary Rice responded, "Congressman I come out of academia, but I am Secretary of State now and I think that the best way to have this proceed, is for the United States not to be in the position of making this judgment but rather for the Turks and the Armenians to come to their own terms about this. . . ." *Id.* (beginning at 2:52). Congressman Schiff replied,

Madam Secretary, we have no reluctance to recognize genocide in Darfur, we have no reluctance to talk about the Cambodian genocide, or the Rwandan genocide, or the Holocaust. *Why is it only this genocide?* Is it because Turkey is a strong ally? Is that an ethical or moral reason to ignore the murder of a million and a half people? . . . Why is it only this genocide that we should let the Turks acknowledge or not acknowledge? . . . Hrant Dink, who was murdered outside of his office, is not a testimony to Turkish progress. The fact that Turkey brought a Nobel winning author up on charges insulting Turkishness because he talked about the murder of the Armenians doesn't show great efforts of reconciliation. . . . Why is it only this genocide we are incapable of recognizing? . . . You recognize more than anyone as a diplomat the power of words . . . and I am sure you supported the recognition of genocide in Darfur—not calling it tragedy, not calling it atrocity, not calling it anything else, but the power and significance of calling it a genocide. Why is that less important in the case of the Armenian genocide?

*Id.* (beginning at 3:18). Secretary Rice answered,

Congressman, the power here is in helping these people to move forward. . . . I do believe that people are better left trying to deal with this themselves if they are going to be able to move forward. We have to ask ourselves, what is the purpose here? And I think the purpose is to acknowledge of course the historic tragedy, but the purpose is also to allow Turks and Armenians to be able to move forward. And yes, Turkey is a good ally and that is important.

*Id.* (beginning at 5:14).

<sup>71</sup> Campaign Statement, *supra* note 61.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Press Release, *supra* note 68. See also Christopher Hitchens, *Telling the Truth About the Armenian Genocide*, SLATE MAG. (Apr. 6, 2009, 11:10 AM), <http://www.slate.com/id/2215445/> ("Then-Sen. Obama wrote a letter of complaint to then-Secretary of State Condoleezza Rice,

Thus the gate to the law opens only for the purpose of shutting. In the final days of the 111th Congress, politicians rumored that Speaker Pelosi was going to call for a vote on House Resolution 252, which “call[ed] upon the President to ensure that . . . foreign policy . . . reflects . . . the United States record relating to the Armenian Genocide[.]”<sup>75</sup> Democratic Speaker Nancy Pelosi, a longtime supporter of Armenian genocide recognition,<sup>76</sup> was about to hand over the gavel.<sup>77</sup> The lame duck session was surprisingly bipartisan by passing a tax bill<sup>78</sup> and repealing “Don’t Ask Don’t Tell.”<sup>79</sup> The Armenian Genocide Resolution narrowly passed the House Foreign Affairs Committee with bipartisan support.<sup>80</sup> However, Speaker Pelosi recessed the House without voting on the Resolution.<sup>81</sup> Ac-

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deploring the State Department’s cowardice and roundly stating that the occurrence of the Armenian genocide in 1915 ‘is not an allegation, a personal opinion, or a point of view, but rather a widely documented fact supported by an overwhelming body of historical evidence.’ On the campaign trail last year, he amplified this position, saying that ‘America deserves a leader who speaks truthfully about the Armenian genocide and responds forcefully to all genocides. I intend to be that president.’”).

<sup>75</sup> Bridget Johnson, *Controversial Genocide Resolution May Hit Floor of House in Final Days*, THE HILL’S BLOG BRIEFING ROOM (Dec. 19, 2010, 5:01 PM), <http://thehill.com/blogs/blog-briefing-room/news/134431-controversial-armenian-genocide-resolution-may-hit-floor-this-week>.

<sup>76</sup> See e.g., ArmenianNetwork, *Nancy Pelosi About Genocide*, YOUTUBE (April 25, 2008), [http://www.youtube.com/watch?v=OUciqJqU-dQ&feature=grec\\_index](http://www.youtube.com/watch?v=OUciqJqU-dQ&feature=grec_index) (beginning at 1:20) (“This [Armenian genocide] resolution is . . . consistent with what our government has always said about what happened at that time. Our diplomats . . . said it was a planned elimination of a race, the Armenians. . . . When I came to Congress twenty years ago it wasn’t the right time because of the Soviet Union. Then that fell and then it wasn’t the right time because of the Gulf War I and then it wasn’t the right time because . . . of Iraq, now its not the right time because of Gulf War II. And again, the survivors of the Armenian genocide are not going to be with us. . . . [I]t is a House Resolution, it is non-binding. It is a statement made by twenty-three other countries, we would be the twenty-fourth country to make this statement. Genocide still exists and we saw it in Rwanda, we see it now in Darfur.”).

<sup>77</sup> E.g., Chris Cillizza, *Republicans Win House Majority; Democrats Retain Senate Majority*, WASH. POST (Nov. 3, 2010, 2:01 AM), <http://voices.washingtonpost.com/thefix/governors/polls-begin-to-close-in-2010-e.html>.

<sup>78</sup> E.g., Janet Hook & John McKinnon, *Congress Passes Tax Deal—Divided Legislature Adopts Sweeping Measure to Avert Increases, Add New Breaks*, WALL ST. J., Dec. 17, 2010, at A1, <http://online.wsj.com/article/SB10001424052748703395204576023772342189318.html>.

<sup>79</sup> See Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/politics/19cong.html>.

<sup>80</sup> Bill Summary & Status, 111th Congress, H. Res. 252 Cosponsors, Library of Congress, <http://thomas.gov/home/LegislativeData.php> (Select Congress 111, search word/phrase “111-622,” then follow the “Cosponsors” hyperlink).

<sup>81</sup> See Bridget Johnson, *Blue Dog ‘Disappointed’ Controversial Genocide Resolution Didn’t Come to Floor*, THE HILL’S BLOG BRIEFING ROOM (Dec. 23, 2010, 2:44 PM), <http://thehill.com/news-by-subject/foreign-policy/135001-blue-dog-disappointed-that-controversial-genocide-resolution-didnt-come-to-house-floor>.

cording to Turkish Foreign Minister Ahmet Davutoğlu, Secretary of State Clinton assured him that “she would exert all possible effort [to prevent a vote.]”<sup>82</sup> State Department spokesperson P.J. Crowley, verified this claim: “[W]e strongly oppose [H. Res. 252] . . . [and w]e continue to believe that the best way for Turkey and Armenia to address their shared past is through their efforts to normalize relations.”<sup>83</sup>

### III. FOREIGN AFFAIRS DOCTRINE, *MOVSESIAN I, II, III*, AND SEMANTICS

The foreign affairs doctrine prohibits states from conducting foreign policy.<sup>84</sup> In cases when a disputed state law regulates a traditional state responsibility, such as contracts, a party attempting to invalidate the law must show that it conflicts with U.S. foreign policy.<sup>85</sup> Therefore, to find conflict, there must be a U.S. foreign policy on the subject.<sup>86</sup> In addition, the challenging party must show that the conflict stems from the substance of the state law.<sup>87</sup>

Insurance regulation is a traditional state responsibility.<sup>88</sup> As shown in Part II of this Note, there is no defined U.S. foreign policy on the Armenian genocide.<sup>89</sup> Therefore, to win here, Munich Re must show that section 354.4 conflicts with U.S. foreign policy.<sup>90</sup> Since there is no U.S. foreign policy to conflict with, Munich Re cannot argue that the foreign affairs doctrine preempts this section.<sup>91</sup>

Even if there was a defined U.S. policy on the Armenian genocide, to

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<sup>82</sup> Bridget Johnson, *Controversial Genocide Resolution May Hit Floor of House in Final Days*, THE HILL'S BLOG BRIEFING ROOM (Dec. 19, 2010, 5:01 PM), <http://thehill.com/blogs/blog-briefing-room/news/134431-controversial-armenian-genocide-resolution-may-hit-floor-this-week>.

<sup>83</sup> *Id.*

<sup>84</sup> See e.g., Harold G. Maier, *Special Issue: The United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l L. 832, 832 (1989) (“The Constitution allocated various specific powers in foreign affairs to the national Government, but neither the Articles of Confederation nor the Constitution provided for a general foreign affairs power. Nonetheless, there was never any real question that the United States would act as a single nation in the world community.”).

<sup>85</sup> See *infra* Part III.A.

<sup>86</sup> See *infra* Part III.B.

<sup>87</sup> See *infra* Part III.C.

<sup>88</sup> See *infra* Part III.A.4.

<sup>89</sup> See *infra* Part II.A.

<sup>90</sup> See *infra* Part III.A.4.

<sup>91</sup> See *infra* Part III.B.



apply the foreign affairs doctrine in the first place, a party seeking to invalidate a state law must show that the substance of the law interferes with U.S. foreign policy.<sup>92</sup> This means that Munich Re must show that when California extended its statute of limitations to bring claims against insurance companies operating within this state, it interfered with U.S. foreign policy. Instead, Munich Re argues that when California used the words “Genocide victims” to describe whom the law applies to, and not what the law achieves, it interfered with U.S. foreign policy.<sup>93</sup> Therefore, in this case, the foreign affairs doctrine is inapplicable from the start, because semantics is not substance: whether California prefers the word genocide over massacre is irrelevant to what the law achieved.

#### A. THE FOREIGN AFFAIRS DOCTRINE

The foreign affairs doctrine stems from the Constitution, which allocates specific foreign policy duties to the Executive and Legislative branches and prohibits states from conducting other specific foreign policy duties.<sup>94</sup> “[T]he Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved for the federal government.”<sup>95</sup> Therefore, the federal government, alone, chooses which issues to include or exclude from U.S. foreign policy.<sup>96</sup>

To determine whether a state law is invalid under the foreign affairs doctrine, courts apply two tests: the conflict test and the field test.<sup>97</sup> Decid-

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<sup>92</sup> See *infra* Part III.C.

<sup>93</sup> *Id.*

<sup>94</sup> Compare U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”), and U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors . . .”), and U.S. CONST. art. II, § 3 (“[The President] shall receive Ambassadors and other public Ministers . . .”), and U.S. CONST. art. I, § 8, cl. 3 (“[The Constitution grants Congress the power to] regulate Commerce with foreign Nations . . .”), and U.S. CONST. art. I, § 8, cl. 11 (“[Congress has power to] declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures of Land and Water . . .”), and U.S. CONST. art. I, § 8, cl. 12 (“[Congress has power to] raise and support Armies . . .”), and U.S. CONST. art. I, § 8 cl. 13 (“[Congress has power to] provide and maintain a Navy . . .”), with U.S. CONST. art. I, § 10 cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal . . .”), and U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . keep Troops, or Ships of war in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War, unless actually invaded . . .”).

<sup>95</sup> *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 (9th Cir. 2003).

<sup>96</sup> See *id.*

<sup>97</sup> See *infra* Part III.A.

ing which to apply depends on whether the state is attempting to regulate an area of traditional state responsibility and whether this regulation has more than an incidental effect on U.S. foreign policy.<sup>98</sup>

### 1. Conflict Test

Under the conflict test, a state law may be invalidated when the law conflicts with an express foreign policy that carries preemptive weight.<sup>99</sup> Although the President may direct U.S. foreign policy, “not every executive action or pronouncement constitutes a proper invocation of that potentially preemptive policy-making power.”<sup>100</sup> The *Youngstown* formula measures presidential powers as fluctuations that depend “upon their disjunction or conjunction with those of Congress.”<sup>101</sup> In *Youngstown*, the President enacted an executive order that seized domestic steel mills to avoid shutdowns caused by labor disputes.<sup>102</sup> He argued that because the military was fighting the Korean War<sup>103</sup> and the steel mills produced equipment necessary to conduct war, the order was valid under his power as Commander-in-Chief.<sup>104</sup> However, since Congress refused to ratify the executive order, the President’s seizure was an exercise of his Category 3 presidential power, which meant that his power was “at its lowest ebb.”<sup>105</sup> Therefore, the executive order was invalid because Congress, with express constitutional authority to declare war and fund the military, subtracted its power from the President:

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.<sup>106</sup>

Thus, Presidential power depends on whether Congress authorizes

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<sup>98</sup> See *infra* Part III.A.3.

<sup>99</sup> *Infra* notes 111–127 and accompanying text.

<sup>100</sup> *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 908 (9th Cir. 2010) (citing *Medellin v. Texas*, 552 U.S. 491, 531–32).

<sup>101</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring).

<sup>102</sup> *Id.* at 582–84.

<sup>103</sup> *Id.* at 590–91.

<sup>104</sup> *Id.* at 587.

<sup>105</sup> *Id.* at 585–86.

<sup>106</sup> *Id.* at 642.

the policy ("Category 1"),<sup>107</sup> whether Congress is silent on the issue and the President must rely on independent authority ("Category 2"),<sup>108</sup> or whether the President's policy is in spite of Congress ("Category 3").<sup>109</sup> Accordingly, Presidential power is highest at Category 1 and lowest at Category 3 because total power equals executive power plus or minus congressional power.<sup>110</sup>

Therefore, generally, treaties and international compacts can invalidate state law.<sup>111</sup> For example, in *U.S. v. Belmont*, a New York bank argued that state policy gave it the right to absorb the bank accounts of a dissolved Russian corporation.<sup>112</sup> However, since an international compact between the U.S. and the Soviet governments assigned all disputed Russian funds to the U.S. government, the New York law was invalid.<sup>113</sup>

[A]ll international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . [and] [w]ithin the field of its powers, . . . State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision.<sup>114</sup>

Therefore, since the purpose of the agreement between the U.S. and

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<sup>107</sup> *Id.* at 635 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

<sup>108</sup> *See id.* at 637 ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.").

<sup>109</sup> *Id.* at 637-38 ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

<sup>110</sup> *Id.* at 635-36.

<sup>111</sup> *E.g.* *U.S. v. Belmont*, 301 U.S. 324, 331 (1937) ("[A]ll international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.").

<sup>112</sup> *Id.* at 327.

<sup>113</sup> *Id.* at 331-32.

<sup>114</sup> *Id.*

the Soviet government was to "bring about a final settlement of the claims and counter claims between the [parties]," New York state policy was invalid.<sup>115</sup>

In *Dames & Moore*, the President, with congressional acquiescence, brokered a deal with Iran to free U.S. embassy personnel being held hostage.<sup>116</sup> In exchange for the American hostages, the United States agreed to "terminate all litigation . . . between the Government of each party and the nationals of the other"<sup>117</sup> which the national government implemented by several executive orders<sup>118</sup> backed by congressional acquiescence.<sup>119</sup> Therefore, because the President acted within his own authority to broker international compacts, and Congress acquiesced, the President's executive order was not an unconstitutional intrusion into the rights of individuals.<sup>120</sup>

Even broader, federal laws can invalidate state law if there is indirect conflict.<sup>121</sup> At issue in *Crosby v. National Foreign Trade Council* was whether a Massachusetts Burma divestment law should be preempted by congressional Burma divestment legislation.<sup>122</sup> Since Congress banned almost all aid to Burma, but authorized the President to determine when Burma "has made measurable and substantial progress,"<sup>123</sup> the Massachusetts law was invalid because otherwise "the President has less to offer and less economic and diplomatic leverage as a consequence."<sup>124</sup> Said differently, the Court preempted the Massachusetts Burma divestment law because it conflicted with Congress's "specific delegation to the President of

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<sup>115</sup> *Id.* at 326. Likewise, in *U.S. v. Pink*, in consideration for recognizing the U.S.S.R., the Litvinov Assignment allocated assets formerly belonging to a nationalized Russian company to the U.S. Although domestic creditors wanted to apply New York laws, the Litvinov Assignment trumped state law because "[i]t was the judgment of the political department that full recognition of the Soviet Government required the settlement of . . . the claims of our nationals. We would usurp the executive function if we held that decision was not final . . . ." *U.S. v. Pink*, 315 U.S. 203, 230 (1942).

<sup>116</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 662, 664–65 (1981).

<sup>117</sup> *Id.* at 664–65.

<sup>118</sup> *Id.* at 665.

<sup>119</sup> *Id.* at 686 ("Past practice does not, by itself, create power, but 'long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . ." (quoting *U.S. v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915))).

<sup>120</sup> *Id.*

<sup>121</sup> See, e.g., *infra* notes 122–27 and accompanying text.

<sup>122</sup> *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000).

<sup>123</sup> *Id.* at 368 (quoting Burma Divestment Law)

<sup>124</sup> *Id.* at 377.

flexible discretion,” in the realm of foreign affairs.<sup>125</sup> “[S]tate law is naturally preempted to the extent of any conflict with a federal statute.”<sup>126</sup> Therefore, the state law was invalid not because the federal government disagreed with the state’s intentions, but because it weakened the power Congress delegated to the President.<sup>127</sup>

## 2. Field Test

Absent conflict, the nature of state action, alone, may trigger preemption under the foreign affairs doctrine regardless of whether the federal government occupies the field.<sup>128</sup> A clear example would be if California entered into a treaty with a foreign nation.<sup>129</sup> However, there are instances where a traditional state action may violate the field preemption test.<sup>130</sup> For example, in *Zschernig v. Miller*, at issue was the “disposition of the estate of a resident of Oregon who died there intestate.”<sup>131</sup> The deceased’s sole heirs were residents of East Germany.<sup>132</sup> The Land Board tried to enforce an Oregon probate statute that allowed it to take the “net proceeds of the estate . . . in cases where a nonresident alien claims real or personal property,” unless three requirements were satisfied.<sup>133</sup> The three requirements amounted to whether a U.S. resident would be granted similar rights in the alien’s country if the roles were reversed.<sup>134</sup> However, since the statute required the court to comment on the “administration of foreign law, the credibility of foreign diplomatic statements, and the policies of foreign governments,” it was a wrongful “intrusion by the State into the field of foreign affairs.”<sup>135</sup> Therefore, although states traditionally regulate the “distribution of estates[,]”<sup>136</sup> the state statute was unconstitutional because it affected international relations in a “persistent and subtle way[.]”<sup>137</sup>

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<sup>125</sup> *Id.* at 388.

<sup>126</sup> *Id.* at 372.

<sup>127</sup> *See id.* at 388.

<sup>128</sup> *See infra* notes 131–37 and accompanying text.

<sup>129</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>130</sup> *E.g.*, *Zschernig v. Miller*, 389 U.S. 429 (1968).

<sup>131</sup> *Id.* at 430.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *See id.*

<sup>135</sup> *Id.* at 432.

<sup>136</sup> *Id.* at 440.

<sup>137</sup> *Id.*

### 3. Reconciling the Conflict and Field Tests: Traditional State Responsibility

In harder cases in which the disputed state law involves a traditional state responsibility,<sup>138</sup> the Supreme Court prefers the conflict test.<sup>139</sup> This reflects the Court's recognition that states have important interests that should not be lightly compromised, including the right to speak on issues of public concern.<sup>140</sup> For example, in *American Insurance Assoc. v. Garamendi*, the U.S. Supreme Court invalidated the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), which required insurers that operate in California and "that sold insurance policies, in effect between 1920 and 1945 (Holocaust-era policies), to persons in Europe to file information about those policies with the [California Insurance] Commissioner."<sup>141</sup> In discussing which test to apply, the Court curbed the authority of *Zschernig*'s field test by noting that Justice Harlan's concurrence, which gave the majority the winning vote, differed from the majority on a key point.<sup>142</sup> Justice Harlan argued that "states may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations" and only joined the majority because he thought the state law conflicted with a 1923 treaty with Germany.<sup>143</sup> Therefore, since the national government already addressed the issue of restitution for Holocaust-era property claims through multiple treaties including the German

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<sup>138</sup> See e.g., Harold G. Maier, *The United States Constitution in Its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Preemption of State Law: A Recommended Analysis*, 83 A.J.I.L. 832, 833 ("Most of the issues about federalism and foreign affairs that remain to be resolved arise when the exercise of authority clearly allocated to a state and reserved to it under the Tenth Amendment touches upon matters that also may affect the foreign affairs of the nation.").

<sup>139</sup> *Contra* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 n.11 (2003) ("If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine.").

<sup>140</sup> See, e.g., Bd. of Tr. of the Emp. Ret. Sys. of Balt. v. Mayor of Balt., 562 A.2d 720, 741 (Md. 1987) ("Furthermore, in areas traditionally regulated by state and local governments, there is a strong presumption against finding federal preemption.").

<sup>141</sup> Gerling Global Reins. Corp. v. Commissioner, 296 F.3d 832, 836 (9th Cir. 2002), *rev'd*, 539 U.S. 396 (2003).

<sup>142</sup> *Garamendi*, 539 U.S. at 418–19.

<sup>143</sup> *Id.*; see also *Zschernig v. Miller*, 389 U.S. 429, 443 (1968) ("First, by resting its decision on the constitutional ground that this Oregon inheritance statute infringes the federal foreign relations power, without pausing to consider whether the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany itself vitiates this application of the state statute, the Court has deliberately turned its back on a cardinal principle of judicial review.") (Harlan, J., concurring).

Foundation, which is the exclusive forum for such claims,<sup>144</sup> HVIRA, which puts “‘an affirmative duty’ [on California] . . . ‘to play an independent role in representing the interests of Holocaust survivors,’ including an obligation to ‘gather, review, and analyze the archives of insurers . . . to provide for research and investigation’ into unpaid insurance claims,”<sup>145</sup> is invalid because it conflicts with U.S. foreign policy.<sup>146</sup>

However, when the state law expands beyond a traditional responsibility, courts apply the field test.<sup>147</sup> In *Von Saher v. Norton Simon Museum of Art*, the Ninth Circuit determined that a California law, “which extend[ed] the statute of limitations until 2010 for actions for the recovery of Holocaust-era art[.]” violated the foreign affairs doctrine and was invalid.<sup>148</sup> The Ninth Circuit applied a two-step preemption test.<sup>149</sup> First, it determined that the California law survived the conflict test because it did not conflict with any *current* law: “In sum, had the California statute been enacted immediately following WWII, it undoubtedly would have conflicted with the Executive Branch’s policy of external restitution. The statute does not, however, conflict with any current foreign policy espoused by the Executive Branch.”<sup>150</sup> Second, it looked for a traditional state interest to determine whether to apply the field test.<sup>151</sup> The key fact that triggered the field test was that California amended the law to include art galleries located outside of the state.<sup>152</sup> If California limited the law to galleries within its borders, then it would have avoided field test analysis.<sup>153</sup>

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<sup>144</sup> *Garamendi*, 539 U.S. at 421 (“As for insurance claims in particular, the national position, expressed unmistakably in the executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the [International Commission on Holocaust Era Insurance Claims.]”).

<sup>145</sup> *Id.* at 409.

<sup>146</sup> *Id.* at 420–21 (“[T]he issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War. Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.”).

<sup>147</sup> See *infra* notes 148–55 and accompanying text.

<sup>148</sup> *Von Saher v. Norton Simon Museum*, 592 F.3d 954, 957 (9th Cir. 2010).

<sup>149</sup> *Id.* at 961–68.

<sup>150</sup> *Id.* at 963.

<sup>151</sup> *Id.* at 963–68.

<sup>152</sup> See *infra* text accompanying note 153–54.

<sup>153</sup> *Von Saher*, 592 F.3d at 965.

California certainly has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art. . . . Prior to its enactment, however, the bill was amended. The restriction limiting the scope of the statute to suits against “museums and galleries in California” was stricken.

. . .

In sum, the scope of § 354.3 belies any purported state interest in regulating stolen property or museums or galleries within the State. By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of “traditional state responsibility,” and the statute is therefore subject to a field preemption analysis.<sup>154</sup>

Therefore, since the law “intrudes on the [national government’s exclusive] power to make and resolve war[,]” it was invalid.<sup>155</sup>

#### 4. Here, The Conflict Test Is Proper Because Section 354.4 Regulates a Traditional State Responsibility

Although the Ninth Circuit Court, which changed its mind on which test to apply, erroneously settled on the field test analysis in *Movsesian III*, the conflict test is proper. Indeed Congress delegated insurance regulation to the states:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. . . . No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . .<sup>156</sup>

Therefore, since section 354.4 regulates insurers operating within California, the proper test is the conflict test.<sup>157</sup> However, the court applied the field test because it believed that California’s insurance regulation was actually a cover for its true intention: “to send a political message on an issue of foreign affairs[,]” which is not a traditional state responsibility as in *Von Saher* above.<sup>158</sup> Yet unlike *Von Saher*, in which California’s exten-

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 965–66.

<sup>156</sup> McCarran–Ferguson Act, 15 U.S.C.A. § 1012 (1948).

<sup>157</sup> *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 908 (9th Cir. 2010) (“The Supreme Court has recognized that California has ‘broad authority to regulate the insurance industry.’”).

<sup>158</sup> *Movsesian v. Victoria Versicherung AG*, 2012 U.S. App. LEXIS 3589, at \*23.



sion of its statute of limitations to reclaim stolen “Nazi-era art” was subject to field test analysis because the law applied to galleries operating outside of the state, here, section 354.4 only extended the statute of limitations for claims against insurers operating within California and therefore should not be subject to field test analysis.

Most poignantly, unlike *Zschernig* in which the Oregon probate statute failed the field test because the law required judges to analyze and comment on the laws and policies of foreign nations, here in *Movsesian*, section 354.4 is silent on the laws and affairs of foreign nations and only applies to insurance companies subject to California’s jurisdiction. The Court should not defer to Munich Re’s argument that California’s characterization of history constitutes the conduction of foreign affairs because this would call into question all laws that refer to historical events that involve foreign nations. This last point is discussed further in part IV.

#### B. NO POLICY, NO CONFLICT

If the President and Congress refuse to address an issue, Munich Re cannot then claim that this inaction, which amounts to an absence of policy, can invalidate state law.<sup>159</sup> Initially, in *Movsesian I*, the Ninth Circuit ruled incorrectly, two to one, in favor of Munich Re, finding section 354.4 invalid under the foreign affairs doctrine.<sup>160</sup> It did so by focusing on the national government’s refusal to address the Armenian genocide and not on what the law actually did. It held that section 354.4 “interfere[d] with the national government’s conduct of foreign relations,”<sup>161</sup> because it “st[ood] in the way of [the President’s] diplomatic objectives.”<sup>162</sup> The court inferred this assertion by noting Presidential opposition to U.S. House Resolutions that would “formally recognize the ‘Armenian Genocide.’”<sup>163</sup> However, it conceded that these findings were not “embodied in any executive agreement[,]” but argued that preemptive power was from “the executive branch’s authority.”<sup>164</sup> Accordingly, Congress’s “acquiescence” to the President’s wishes, by not voting on Armenian genocide resolutions, “infuses the President’s authority to act with additional sup-

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<sup>159</sup> See *infra* note 178 and accompanying text.

<sup>160</sup> *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1053 (9th Cir. 2009).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 1056 (alteration in original) (citing *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 427 (2003)).

<sup>163</sup> *Id.* at 1057–59.

<sup>164</sup> *Id.* at 1059.

port.”<sup>165</sup> Therefore, since the law referred to the “‘Armenian Genocide,’ California ha[d] defied the President’s foreign policy preferences.”<sup>166</sup> Finally, since the court believed that California’s real intent was not to regulate insurance, but to “seek justice,” California’s interest in section 354.4 was superficial, not a traditional state responsibility, and invalid.<sup>167</sup> Therefore, the court decided that the national government can avoid an issue and that avoidance may preempt state law.

However, in *Movsesian II*, by en banc appeal, the same panel overturned its own decision, two to one.<sup>168</sup> It argued that if the government wants to preempt state law, it must have a policy—refusing to deny or recognize the Armenian genocide is dodging the decision to make a policy.<sup>169</sup> Dodging policy is not defining policy.<sup>170</sup> Since insurance regulation is a traditional state responsibility, the court applied the conflict test and refused to apply the field test.<sup>171</sup> In doing so, it found that “there [was] no express federal policy forbidding states to use the term ‘Armenian Genocide.’”<sup>172</sup> The Ninth Circuit acknowledged the presidential statements cited in *Movsesian I* but countered that this was not enough to establish “an express federal policy.”<sup>173</sup> Instead, it argued that sometimes Congress favors genocide recognition as evidenced by House Joint Resolution 148 of the 94th Congress and House Joint Resolution 247 of the 98th Congress, which “similarly recognized ‘victims of genocide, especially the one and one-half million people of Armenian ancestry.’”<sup>174</sup> In addition, the court cited executive recognition by pointing to the aforementioned speech by President Reagan in which he used the phrase Armenian geno-

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1060.

<sup>167</sup> *Id.* at 1062–63.

<sup>168</sup> *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901, 903 (9th Cir. 2010).

<sup>169</sup> *Id.* at 907.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* (quoting *Am. Ins. Assoc. v. Garamendi* 539 U.S. 396, 420 n.11 (2003) (“Under the Court’s suggested approach, field preemption would only apply if a ‘State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility.’ . . . That is not the case here. California’s attempt to regulate insurance clearly falls within the realm of traditional state interests.”).

<sup>172</sup> *Id.* at 903.

<sup>173</sup> *Id.* at 906 (“Munich Re argues that these communications are sufficient to constitute an express federal policy. They are not. The three cited executive branch communications arguing against recognition of the Armenian Genocide are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition.”).

<sup>174</sup> *Id.* (quoting H.R.J. Res. 247, 98th Cong. (1984)).

cide, President Clinton's "massacres" euphemism, and Senator Obama's statement: "It is imperative that we recognize the horrific acts carried out against the Armenian people as genocide."<sup>175</sup> Most strongly, it held that there is no express federal policy to prevent states from using the term "Armenian Genocide"<sup>176</sup> because "some forty states recognize the Armenian Genocide [and] the federal government has never expressed any opposition to any such recognition."<sup>177</sup> Further, section 354.4 "ha[d], at most, an incidental effect on foreign affairs[,]""<sup>178</sup> and did not conflict with any express federal policy, including the 1922 War Claims Act.<sup>179</sup> Thus, section 354.4 did not violate the foreign affairs doctrine because there was not a federal policy on the Armenian genocide to conflict with.<sup>180</sup>

### C. PREEMPTION BY SEMANTICS

Supposing for the sake of argument that a foreign policy can be discerned, foreign affairs doctrine analysis would still be inapplicable because the term genocide is ancillary to what section 354.4 achieved. In this case, to oppose state law under the foreign affairs doctrine, Munich Re must argue that the disputed law's substantive policy contravenes U.S. foreign policy. Instead, Munich Re focuses on the word genocide, which is extraneous and severable to what the law achieved.<sup>181</sup> California never intended to and the law does not result in the conduction of foreign policy. In 2000, California state legislators noted that thousands of California residents were either victims or heirs of victims of the Armenian genocide and that "these people have, too often, been deprived of their entitlement to benefits under insurance policies issued in Europe and Asia by insurance companies . . . ."<sup>182</sup> Accordingly, California codified this sentiment

<sup>175</sup> *Id.* at 906–07.

<sup>176</sup> *Id.* at 907 ("Considering the number of expressions of federal executive and legislative support for recognition of the Armenian Genocide, and federal inaction in the face of explicit state support for such recognition, we cannot conclude that a clear, express federal policy forbids the state of California from using the term 'Armenian Genocide.'").

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 908 ("Furthermore, Section 354.4's regulation of the insurance industry has, at most, an incidental effect on foreign affairs, particularly considering that thirty-nine other states already officially recognize the Armenian Genocide.").

<sup>179</sup> *Id.* ("Munich Re argues that the Claims Agreement and War Claims Act apply to claims against German insurance companies by Armenian Genocide victims. We disagree. The insurance policies were the private property of insured Armenian citizens of the Ottoman Empire, not German debts owing to American citizens.").

<sup>180</sup> *Id.* at 907.

<sup>181</sup> See *infra* notes 183–92 and accompanying text.

<sup>182</sup> S.B. 1915 § 1(b), 1163d Leg., Reg. Sess. (Cal. 2000) (codified at CAL. CIV. PROC. CODE

as section 354.4, which reads:

(a) The following definitions govern the construction of this section:

(1) "Armenian Genocide victim" means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that *period*.

(2) "*Insurer*" means an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe or Asia at any time between 1875 and 1923.

(b) Notwithstanding any other provision of law, *any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution.*

(c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitation, *provided the action is filed on or before December 31, 2010.*

(d) *The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.*<sup>183</sup>

Therefore, section 354.4 only extends the state statute of limitations to bring insurance related claims against insurance companies operating in California.<sup>184</sup> The law does not create a cause of action for genocide and is only applicable to people and insurance companies operating in California.<sup>185</sup>

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§ 354.4 (Deering 2011)).

<sup>183</sup> CAL. CIV. PROC. CODE § 354.4 (Deering 2011) (emphasis added).

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

In addition, as mentioned above, the President often referred to the tragedy as a “massacre.”<sup>186</sup> If section 354.4 applied to “Armenian Massacre victims,” instead of “Armenian Genocide victim[s],”<sup>187</sup> Munich Re would have no argument under the foreign affairs doctrine. Therefore, the term genocide is purely descriptive.

Thus, the foreign affairs doctrine analysis is irrelevant because preemption focuses on what the law achieves and not semantics. For example, in *Deutsch v. Turner*, the Ninth Circuit held that a California law that created a cause of action for World War II slave laborers was “impermissible because it intrudes on the federal government’s exclusive power to make and resolve war, including the procedure for resolving war claims.”<sup>188</sup> Since the United States resolved World War II claims through treaties and international agreements, like at Yalta and Potsdam, “in which the United States, Britain, and the Soviet Union agreed to extract reparations from Germany and its nationals but did not include a private right of action against either[,]” the law conflicted with foreign policy.<sup>189</sup> In addition, since the state law included actions for prisoners of war, it conflicted with the federal War Claims Act of 1948.<sup>190</sup> The court reasoned, “The federal government, acting under its foreign affairs authority, provided its own resolution to the war; California has no power to modify that resolution.”<sup>191</sup>

Here, California’s use of the word genocide is purely descriptive rather than substantive. Section 354.4 reads in part, “‘Armenian Genocide victim’ means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.”<sup>192</sup> Unlike *Deutsch v. Turner*, in which the foreign affairs doctrine preempted a law that created a cause of action for Second World War slave laborers, which conflicted with and intruded into federal authority to resolve war, here, Munich Re objects to the label, genocide, a historical fact, and not the substance of section 354.4.

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<sup>186</sup> See *supra* note 45 and accompanying text.

<sup>187</sup> § 354.4.

<sup>188</sup> *Deutsch v. Turner Corp.*, 324 F.3d 692, 709, 712 (9th Cir. 2003).

<sup>189</sup> *Id.* at 712.

<sup>190</sup> *Id.* at 714–15.

<sup>191</sup> *Id.* at 715.

<sup>192</sup> CAL. CIV. PROC. CODE § 354.4 (Deering 2011).

#### IV. RULING IN FAVOR OF MUNICH RE WOULD CENSOR STATES FROM DISCUSSING HISTORY

George Orwell wrote, "If the Party could thrust its hand into the past and say of this or that event, it never happened—that, surely, was more terrifying than mere torture and death."<sup>193</sup> The purpose of the foreign affairs doctrine is to allow the national government to effectively deal with foreign nations and not to censor states from discussing history.<sup>194</sup> Section 354.4 only refers to the Armenian genocide in its historical context to describe to whom the law applies and does not create an independent cause of action for genocide.<sup>195</sup> Moreover, the law does not comment on the policies of Turkey. Therefore, if the Supreme Court sides with Munich Re, it will set the precedent that any state law mentioning the Armenian genocide will be invalid. In addition, this will set a dangerous precedent that, for reasons of foreign policy, the President may censor state governments from discussing history.

The values rooted in the First Amendment of the Constitution are vital to free society. It was established to protect us from unnecessary government censorship:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>196</sup>

This fundamental right, the freedom of expression, is innate in the sovereign rights of the several states because our democracy requires that state governments represent the will of the people. If we censor states, we censor the people they represent.<sup>197</sup>

Courts already recognize that when a state speaks about the Armenian genocide, it is accountable to constituents. Under the government speech doctrine, the Supreme Court held that "[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."<sup>198</sup> Accordingly, in *Griswold v. Driscoll*, the First Circuit

<sup>193</sup> GEORGE ORWELL, 1984 34 (Signet Classic ed. 1949).

<sup>194</sup> See *supra* Part III.A.

<sup>195</sup> See § 354.4.

<sup>196</sup> U.S. CONST. amend. I.

<sup>197</sup> See, e.g., *Bd. Of Regents v. Southworth*, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy.").

<sup>198</sup> *Id.*

determined that Massachusetts's choice to educate the population on the Armenian genocide is government speech that is beyond judicial review.<sup>199</sup> In 1998, the Massachusetts legislature voted to include information on the Armenian genocide in the state's education curriculum guide.<sup>200</sup> However, soon after the first draft, a Turkish coalition successfully lobbied the Commissioner of Education to include "contra-genocide" materials, which argued that the "fate of Ottoman Armenians did not reflect a policy of genocide."<sup>201</sup> In response to counter lobbying efforts from the Armenian American community with then-Massachusetts Governor Cellucci, the Commissioner removed the genocide denial material.<sup>202</sup> In 2005, the Turkish coalition sued, arguing that removing the materials from the curriculum guide violated the First Amendment right "to 'inquire, teach and learn free from viewpoint discrimination.'"<sup>203</sup> The court ruled against the Turkish coalition's position, holding that under the government speech doctrine, they are not entitled to relief in federal court.<sup>204</sup> "[P]laintiffs and those who share their viewpoint concerning the treatment of Armenians in the Ottoman Empire are capable of participating fully in the political process, which provides the opportunity to petition the government to alter its policies. . . . If plaintiffs still want those materials included in the Curriculum Guide, they will have to . . . prevail in the political arena because they are not entitled to relief in federal court."<sup>205</sup> The Turkish coalition appealed and on January 18, 2011, the Supreme Court denied certiorari.<sup>206</sup> Thus, courts recognize that generally, when a state speaks about the Armenian genocide it is accountable to constituents and not judges.

Accordingly, here, if we censor California from speaking about the Armenian genocide, we censor Californians from speaking about the Ar-

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<sup>199</sup> *Griswold v. Driscoll*, 616 F.3d 53, 54–57 (1st Cir. 2010), *cert. denied*, 131 S. Ct. 1006 (2011).

<sup>200</sup> *Id.* at 54.

<sup>201</sup> *Id.* at 55.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 55–56.

<sup>204</sup> *Griswold v. Driscoll*, 625 F. Supp. 2d 49, 65 (D. Mass. 2009).

<sup>205</sup> *Id.* at 61 (quoting *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541–42 (2001) (quoting *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (U.S. 2000))) ("When the government speaks . . . to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials could espouse some different or contrary position."); *id.* (quoting *Chiras v. Miller*, 432 F.3d 606, 612 (5th Cir. Tex. 2005) ("The government undoubtedly has the authority to control its own message when it speaks or advocates a position it believes is in the public interest.")).

<sup>206</sup> *Griswold v. Driscoll*, 131 S. Ct. 1006, 1006 (2011).

menian genocide. Given California's sizable Armenian constituency, remembering, acknowledging, and legislating on the genocide is a core value of governance.<sup>207</sup> California has been advocating for genocide recognition for the past quarter-century.<sup>208</sup> For example, in 1986, Governor Deukmejian proclaimed, "[The] formal affirmation of the Armenian Genocide by the world community would underscore our abhorrence and help deter further acts of violence . . . ."<sup>209</sup> In 1990, he continued, "[T]his systematic program of genocide and forced deportation was undertaken with the clear intent of annihilating the entire Armenian race . . . ."<sup>210</sup> Then, the California Senate in 1991 stated, "The Turkish government initiated the systematic extermination of the Armenian people, which . . . left . . . more than 60 percent, of the Armenian population . . . dead, and . . . yet the Turkish government of today not only refuses to acknowledge this genocide, but continues to ignore the human rights of the Armenian people . . . ."<sup>211</sup> The California Assembly in 1995 stated, "Recogni[zing] . . . this genocide is crucial to ensuring against the repetition of genocide and provides the American public with an understanding of America's heritage . . . ."<sup>212</sup> In 2000, Governor Gray Davis continued the tradition: "[A] million and a half Armenians were killed during the Armenian Genocide because of the abhorrent ignorance, intolerance, and inhumanity that prevailed in Turkey during the year 1915 . . . ."<sup>213</sup> Again, the Senate in 2003 stated, "This measure would designate April 24, 2003, as the 'California Day of Remembrance for the Armenian Genocide of 1915-1923.' It would memorialize the Congress of the United States to act likewise to commemorate the Armenian Genocide."<sup>214</sup> California also encourages its schools to include the genocide in its public school curriculum:

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<sup>207</sup> See *infra* notes 208–216 and accompanying text.

<sup>208</sup> *Genocide Recognition by U.S. States*, ARMENIAN NAT'L COMM. OF AM., [http://www.anca.org/genocide\\_resource/states\\_map.php](http://www.anca.org/genocide_resource/states_map.php) (last visited Feb. 27, 2011) (listing Governor's proclamations, State Assembly bills, and State Senate bills from 1986 to 2008 that acknowledge the Armenian genocide).

<sup>209</sup> George Deukmejian, Governor of Cal., Proclamation (Apr. 8, 1986), *available at* <http://www.anca.org/assets/pdf/proclamations/CA1986.pdf>.

<sup>210</sup> George Deukmejian, Governor of Cal., Proclamation (Apr. 18, 1990), *available at* <http://www.anca.org/assets/pdf/proclamations/CA1990.pdf>.

<sup>211</sup> S.R. 19, 1991 Sen., Reg. Sess. (Cal. 1991), *available at* <http://www.anca.org/assets/pdf/resolutions/1991S.pdf>.

<sup>212</sup> A.C.R. 26, 1995 Assemb., Reg. Sess. (Cal. 1995), *available at* [http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab\\_0001-0050/acr\\_26\\_bill\\_950424\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0001-0050/acr_26_bill_950424_chaptered.pdf).

<sup>213</sup> Gray Davis, Governor of Cal., Proclamation (Apr. 20, 2000), *available at* <http://www.anca.org/assets/pdf/proclamations/CA2000.pdf>.

<sup>214</sup> S.J.R. 1, 2003 Sen., Reg. Sess. (Cal. 2003), *available at* [http://info.sen.ca.gov/pub/03-04/bill/sen/sb\\_0001-0050/sjr\\_1\\_bill\\_20030414\\_chaptered.pdf](http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0001-0050/sjr_1_bill_20030414_chaptered.pdf).



It is the intent of the Legislature to provide accurate instructional materials to schools on all of the following topics: . . . [t]he Armenian genocide. . . . [In addition, t]he Legislature hereby finds and declares that films and video recordings giving a historically accurate depiction of . . . the Armenian genocide . . . should be made in order that pupils will recognize these events for the horror they represented. The Legislature hereby encourages teachers to use these films and video recordings as a resource in teaching pupils about these . . . important historical events that are commonly overlooked in today's school curriculum.<sup>215</sup>

In 2008, Governor Arnold Schwarzenegger added,

Every April, we take time to commemorate the lives of those forever devastated by the Armenian Genocide. . . .

California has ensured that those lost and affected by this tragedy will not be forgotten. In 2006, I signed Assembly Bill 1210 . . . to allow construction of a memorial for California's survivors . . . . Additionally, in 2005, I signed Senate Bill 424 . . . which designated in state law a specific time to observe the California Days of Remembrance of the Armenian Genocide.

. . .

. . . I, Arnold Schwarzenegger, . . . do hereby proclaim April 20-27, 2008, as "Days of Remembrance of the Armenian Genocide."<sup>216</sup>

Therefore the record shows that when California speaks on the Armenian genocide, it does so on behalf of the people. Like in *Griswold*, in which Massachusetts's choice to categorize the massacres as genocide was beyond judicial review because state speech is generally accountable to the political process, here too, in *Movsesian*, California's choice to characterize the massacres as genocide is beyond judicial review because this choice represents the political will of Californians.

For good reason, the sensitivities of other countries should not determine whether we acknowledge history; otherwise, foreign nations, especially allies, could export revisionist history. Article 301 of Turkey's constitution criminalizes "insulting Turkishness," which includes discussing the Armenian genocide.<sup>217</sup> Turkey prosecuted many for discussing the ge-

<sup>215</sup> CAL. EDUC. CODE § 52740 (Deering 2010).

<sup>216</sup> Arnold Schwarzenegger, Governor of Cal., Proclamation, "Days of Remembrance of the Armenian Genocide" (Apr. 7, 2008), available at <http://www.anca.org/assets/pdf/proclamations/CA2008.pdf>.

<sup>217</sup> E.g., *Popular Turkish Novelist on Trial for Speaking of Armenian Genocide*, N.Y. TIMES (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/international/europe/16turkey.html>.

nocide, including Turkish Nobel Prize-winning author Orhan Pamuk,<sup>218</sup> and late editor of the *Daily Agos*, Hrant Dink, who was shot and killed by a seventeen-year-old nationalist in 2007—another casualty of genocide denial.<sup>219</sup> California is just one of the forty odd states that have officially recognized the Armenian genocide and the federal government has never opposed any of these measures. Therefore, if the Supreme Court determines that California may not speak truth to history, it will call into question every state measure that refers to the Armenian genocide. It will import Article 301.<sup>220</sup>

There is even more at stake. Ruling in favor of Munich Re will set precedent that for reasons of foreign policy, the President may censor states from discussing history, bringing us one step closer to Orwell's prophetic novel. As China buys more and more U.S. debt, our economies become more and more interdependent.<sup>221</sup> Will there be a day when we censor our history books, which are approved by states, from speaking of the students killed during the Tiananmen Square massacre?<sup>222</sup> It is no secret that for years now, the Islamic Republic of Iran is likely advancing towards the goal of obtaining nuclear arms.<sup>223</sup> It is conceivable that, like Pakistan<sup>224</sup> and North Korea,<sup>225</sup> it will achieve this goal.<sup>226</sup> As of today, Iran

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<sup>218</sup> *Id.*

<sup>219</sup> Sebnem Arsu, *Turkish Police Arrest Teenage Suspect in Editor's Killing*, N.Y. TIMES (Jan. 21, 2007), [http://www.nytimes.com/2007/01/21/world/europe/21turkey.html?\\_r=2&ref=hrant\\_dink](http://www.nytimes.com/2007/01/21/world/europe/21turkey.html?_r=2&ref=hrant_dink).

<sup>220</sup> *E.g.*, *Turkey Shamelessly Attempts to Export to U.S. Congress Its Article 301*, PANARMENIAN.NET (Oct. 19, 2007, 16:10 AMT), <http://www.panarmenian.net/eng/world/news/23677/>.

<sup>221</sup> *See, e.g.*, *China Holds More U.S. Debt than Indicated*, WASH. TIMES (Mar. 2, 2010, 5:00 AM), <http://www.washingtontimes.com/news/2010/mar/02/chinas-debt-to-us-treasury-more-than-indicated/>.

<sup>222</sup> *Cf.* Jinzhi Dong, *What Happens As Google Uncensors Search in China?*, N.Y. TIMES (Mar. 25, 2010, 12:57 PM), <http://bits.blogs.nytimes.com/2010/03/25/what-does-google-achieve-by-uncensoring-chinese-search-results/> (discussing Chinese efforts to use Google to censor information on the Tiananmen Square massacre).

<sup>223</sup> *Iran's Nuclear Program*, N.Y. TIMES (Jan. 18, 2011), [http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear\\_program/index.html](http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear_program/index.html) (last updated Sept. 1, 2011).

<sup>224</sup> *E.g.*, Thom Shanker & David E. Sanger, *Pakistan Is Rapidly Adding Nuclear Arms*, U.S. SAYS, N.Y. TIMES (May 17, 2009), <http://www.nytimes.com/2009/05/18/world/asia/18nuke.html>.

<sup>225</sup> *E.g.*, Justin McCurry & Tania Branigan, *North Korea Tests Nuclear Weapon 'As Powerful As Hiroshima Bomb'*, GUARDIAN.CO.UK (May 25, 2009), <http://www.guardian.co.uk/world/2009/may/25/north-korea-hiroshima-nuclear-test>.

<sup>226</sup> *Iran's Nuclear Program*, N.Y. TIMES (Jan. 18, 2011), [http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear\\_program/index.html](http://topics.nytimes.com/top/news/international/countriesandterritories/iran/nuclear_program/index.html).

denies the Holocaust,<sup>227</sup> opposes Israeli sovereignty,<sup>228</sup> and is known to fund our enemies abroad,<sup>229</sup> including extreme religious groups that are intent on destroying free society.<sup>230</sup> What if a future day arrives in which the leaders of Iran broker a deal with our President: deny the genocide of Jews during the Second World War or face nuclear holocaust today? A lesser threat could achieve the same goal: loosen your convictions on the Holocaust or we might not secure our nuclear weapons. This proposal may sicken the reader. You may also think that this is unfathomable or that we would reject such an offer. If so, why did we accept when Turkey offered us a less threatening but just as egregious proposal: kill the Armenian genocide resolution in Congress or we will block U.S. access to Turkish air fields?<sup>231</sup> The Armenian genocide is no different. We do not want this

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<sup>227</sup> E.g. *Anger at Iranian Holocaust Denial*, BBC NEWS (Sept. 18, 2009), [http://news.bbc.co.uk/2/hi/middle\\_east/8264111.stm](http://news.bbc.co.uk/2/hi/middle_east/8264111.stm) ("Speaking in the capital, Tehran, President Mahmoud Ahmadinejad said the Holocaust was 'a lie based on an un-provable and mythical claim.' . . . In reaction, White House Press Secretary Robert Gibbs cited President Barack Obama's assertion in a speech to the Muslim world that 'denying the Holocaust is baseless, ignorant and hateful.'"). The leaders of Iran also called for a "'fact-finding commission' to determine whether Holocaust happened or not." Associated Press, *Iranian Leader Says Israel Will Be 'Wiped Out'*, MSNBC.COM (Dec. 12, 2006, 4:45 PM), [http://www.msnbc.msn.com/id/16149717/ns/world\\_news-mideast/n\\_africa/](http://www.msnbc.msn.com/id/16149717/ns/world_news-mideast/n_africa/). In response, "the White House condemned Iran for convening a conference it called 'an affront to the entire civilized world.'" *Id.* However, inconsistently, the White House brokered a now stale normalization agreement between Armenia and Turkey, which included the condition that the nations form "an international commission" to determine whether the Armenian genocide happened or not. Mark Landler, Sebnem Arsu & David Stern, *After Hitch, Turkey and Armenia Normalize Ties*, N.Y. TIMES (Oct. 10, 2009), <http://www.nytimes.com/2009/10/11/world/europe/11armenia.html>. Today, relations between Turkey and Armenia are not normalized. Does the reader think that reconciliation between Germans and Jews was possible without recognition of the Holocaust? Could Israel and Iran move forward without the recanting of Holocaust denial? Why is the Armenian genocide different?

<sup>228</sup> Associated Press, *Iranian Leader Says Israel Will Be 'Wiped Out'*, MSNBC.COM (Dec. 12, 2006, 4:45 PM), [http://www.msnbc.msn.com/id/16149717/ns/world\\_news-mideast/n\\_africa/](http://www.msnbc.msn.com/id/16149717/ns/world_news-mideast/n_africa/).

<sup>229</sup> E.g., Matthew Saltmarsh, *Task Force Warns Anew on Terrorist Funding from Iran*, N.Y. TIMES (Feb. 18, 2010), <http://www.nytimes.com/2010/02/19/business/global/19launder.html>.

<sup>230</sup> See, e.g., Viola Gienger, *Iran Gives Weapons, \$200 Million a Year to Help Lebanese Hezbollah Re-Arm*, BLOOMBERG.COM (Apr. 20, 2010), <http://www.bloomberg.com/news/2010-04-19/iran-helps-lebanese-hezbollah-rebuild-its-arsenal-pentagon-says-in-report.html>.

<sup>231</sup> E.g., Brian Knowlton, *Bush Urges Congress to Reject Armenian Genocide Resolution*, N.Y. TIMES (Oct. 10, 2007), <http://www.nytimes.com/2007/10/10/world/americas/10ihturkey.5.7842263.html> ("President George W. Bush strongly urged lawmakers Wednesday to reject a resolution that describes the deaths of hundreds of thousands of Armenians early in the last century as genocide—a highly sensitive issue at a time of rising U.S.-Turkish tension over northern Iraq. . . . Turkey has been a vital way-station for fuel and material shipments to U.S. forces in Iraq, and the administration has spared little effort to lobby against the resolution. The State Department secured signatures of the eight living former secretaries of state on a letter opposing the resolution. Secretary of State Condoleezza Rice and Defense Secretary Robert Gates spoke against it Wednesday. . . . The bulk of U.S. air cargo and about one-third of the fuel headed for

precedent.

## V. CONCLUSION

Insurance companies are now trying to make it unconstitutional for states to discuss the Armenian genocide. They are doing this not because they care about whether the murder of one and one-half million Armenians is acknowledged as genocide but because they do not want to compensate policyholders for more than ninety years of back payments. So instead of directly challenging Movsesian's contract claims, Munich Re argues that because it is U.S. policy to avoid the issue, California may not categorize the massacres as genocide.

To win under this argument, Munich Re must show that section 354.4 conflicts with U.S. foreign policy. However, since there is no consistent foreign policy on the issue, Munich Re cannot show conflict. In addition, because section 354.4's use of the word genocide is purely descriptive, the foreign affairs doctrine analysis is irrelevant because Munich Re objects not to what the law does, but to the words California uses to describe history.

Therefore if the Supreme Court grants certiori, it should not side with Munich Re because this would set the precedent that for reasons of foreign policy, the President may censor states from discussing politically sensitive crimes against humanity. Such an outcome would be to shut the gate to the law.

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Iraq passes through Turkey, Gates said, the passage rights 'would very much be put at risk if this resolution passes.'").