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# THE CONSTITUTIONALITY OF THE HEAR ACT: EMPOWERING AMERICAN COURTS TO RETURN HOLOCAUST-ERA ARTWORK AND HONOR HISTORY

*Jennifer Anglim Kreder*[*]
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## I. INTRODUCTION

> *As the Senators pointed out, art lost in the Holocaust is not just important for its aesthetic and cultural value. Restitution is so much more, much more than that, than reclaiming a material good, and this is what I learned by playing Maria Altmann. Restoring physical parts of lost heritage to Holocaust victims and their families is a moral imperative…. Art restitution is about preserving the fundamental human condition. It gives Jewish people and other victims of the Nazi terror the opportunity to reclaim their history, their culture, their memories, and most importantly, their families…. Art is a reflection of memories and is shared across familial and cultural lines. When the Jewish people were dispossessed of their art, they lost their heritage. Memories were taken along with the art. And to have no memories is like having no family. And that is why art restitution is so imperative.*

Testimony from Dame Helen Mirren to the Senate Judiciary Committee on June 7, 2016.[1]

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[1] *The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763, The Holocaust Expropriated Art Recovery Act Before the S. Comm. on the Judiciary, Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (testimony by Dame Helen Mirren).

In the 2015 film *Woman in Gold*, Dame Helen Mirren portrayed Maria Altmann, a Holocaust survivor who engaged in extensive efforts to recover a stolen portrait of her aunt by the artist Gustav Klimt, *Adele Bloch-Bauer I* (commonly known as *Woman in Gold*), from the Austrian government.[2] The painting was stolen by the Nazis after Ferdinand Bloch-Bauer, Adele's widower, fled Austria following the German *Anschluss*. The United States Supreme Court accepted the Austrian government's 2004 petition for certiorari on the issue of whether a foreign government could be sued in the United States under the Foreign Sovereign Immunities Act.[3] The Supreme Court determined that the provisions of the FSIA were indeed retroactive to 1945 and applied to Ms. Altmann's case.[4] The Court's ruling lead to arbitration between Ms. Altmann and Austria, which resulted in an order for the return of the painting to Ms. Altmann.[5]

Maria Altmann's initial struggle is the story of many Holocaust survivors who have faced museums and private collectors intent on keeping art they should have at least suspected was stolen by the Nazis. But, unlike many survivors and their descendants, Ms. Altmann, aided by a great attorney, had the ability to locate the stolen painting and to pursue legal action against the government of Austria for its return. Unfortunately, Ms. Altmann's victory in the United States Supreme Court and the arbitration with Austria that followed is the outlier in the adjudications of Holocaust expropriated art. For most Holocaust survivors and their descendants, their stories are those of defeat with no opportunity to have their day in court, mostly due to application of procedural rules severely restricting their ability to file suit or have their cases heard on the merits.

[2] *Woman in Gold* (2015) https://www.imdb.com/title/tt2404425/

[3] *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

[4] *Id.*

[5] Ms. Altmann offered the Republic of Austria the opportunity to purchase the painting so it could stay in Austria, but Austria declined her offer replying that it could not afford the painting. *See Art of the Heist: The Lady in Gold* (2008) https://www.youtube.com/watch?v=Ifi3FMtF8uQ.

Relying on extensive research of Ms. Altmann[6] studied in preparation for the movie, Dame Mirren appeared before Congress to support the Holocaust Expropriated Art Recovery Act ("HEAR Act") on June 7, 2016, while the legislation was under consideration by the Senate Committee on the Judiciary, its Subcommittee on the Constitution, and its Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts.[7] Dame Mirren testified before the committees regarding the difficulties faced by Holocaust survivors and their descendants in their efforts to retrieve their stolen property.[8] Despite the passage of nearly three quarters of a century, Holocaust survivors and their descendants are still attempting to piece together their cultural and familial history that was systematically plundered and destroyed by the Nazis, and others, during World War II and the decades thereafter.[9] As Dame Mirren noted, restitution of stolen art and other cultural property to the victims of the Third Reich is not just about correcting a theft of something financially valuable.[10] Restitution is about the restoration of culture to Jewish and other communities, their families, and, most importantly, honoring their memories, all of which the Third Reich attempted to obliterate.[11]

[6]Maria Altmann died on February 7, 2011, at the age of 95. http://www.legacy.com/ns/maria-altmann-obituary/148464498.

[7] Senate committee report to S. 2763 at pg. 6

[8] *See* https://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act_reuniting-victims-with-their-lost-heritage

[9] *Id.*

[10] *Id*. Ms. Altmann explained that her dispute with Austria was not about the money, but rather justice. She said, "They are getting away with a lie, saying 'It's ours, not yours.'" *See* https://www.chicagotribune.com/entertainment/music/howard-reich/ct-woman-gold-reflections-20150404-column.html. *See also U.S. v. Portrait of Wally*, 663 F.Supp. 2d 232 (S.D.N.Y. 2009) (Austrian government required Holocaust victims to make "donations" of art to Austria's national collection before issuing export permits for the restitution of Nazi-looted art.).

[11] *Id*.

Approximately six months after hearing testimony from Dame Mirren and the experts involved in the field of Holocaust expropriated art, Congress enacted with unanimous bipartisan support the HEAR Act to address problems faced by Holocaust survivors and their heirs in recovering artwork looted during the Holocaust-era. This article addresses recent literature maintaining that the HEAR Act is unconstitutional because its statute of limitations provision purportedly interferes with principles of federalism. Part One provides an overview of the relevant history from the Nazis' rise to power through the end of World War II that serves as the backdrop for the provisions set forth in the HEAR Act and key cases demonstrating the problems the HEAR Act addresses. Part Two discusses the HEAR Act itself. Part Three reviews the constitutional authority granted to Congress and the Executive Branch in the areas of federal preemption and foreign policy. Part Four demonstrates the constitutionality of the HEAR Act. Part Five briefly concludes that the HEAR Act is constitutional and does not interfere with principles of federalism.

## II. THE HISTORICAL AND LEGAL LANDSCAPE PRECEDING THE HEAR ACT

### *A. The Nazis Rise to Power and World War II- 1933 to 1945*

The Nazis rose to power in a climate rife with severe economic depression and anti-Semitism as Europe tried to stabilize following World War I. The Nazis blamed European Jews for Germany's failures and misfortunes during World I and thereafter.[12] Once Hitler was appointed Chancellor in 1933, the Nazis and their extreme nationalistic government were unstoppable.[13] Their goal of

[12] Marsha L. Rozenblit, *Review of Steven E. Aschheim, Brothers and Sisters: The East European Jew in German and German-Jewish Consciousness*, 6 Modern Judaism 311 (1986).

[13] *See* Wilfred F. Knapp, *Adolf Hitler: Dictator 1933-39*, Encyclopedia Britannica, https://www.britannica/biography/Adolf-Hitler/Dictator-1933-39 [https://perma.cc/XUY2-CR6Y] (stating that Hitler quickly became a dictator once in power).

Aryanization of the Germanic culture would ultimately manifest in the "Final Solution," Nazi code for the worldwide destruction of the Jewish people and their culture.[14] This plan included pillaging the Jews and confiscating all their wealth and assets with the goal of either destroying it entirely or profiting from it. To execute this plan, the Nazis operated as a criminal network under the guise of the law.[15] They "legally" confiscated Jewish assets pursuant to their laws.[16] Due to the economic depression in Germany, the Nazis needed Jewish wealth to fund their occupation of Europe and the Final Solution.[17] The Nazis also engaged in the deliberate and systematic destruction of the Jewish people and their culture to further their goals of European Aryanization.[18]

In 1935, the Nazis began passing the Nuremberg Laws to target Jews and other minorities whom they deemed unfit for Aryan culture.[19] One of the Nuremberg Laws passed in 1938 required Jews who possessed more than 5000 Reichsmarks of property to periodically declare and inventory their assets with the Nazi Property Control Office, and they were prohibited from selling their property without permission from the government.[20] Any Jews who wanted to emigrate from Germany had to pay an enormous exit tax, colloquially known as the "flight tax," to the German government that effectively stripped these Jews of most of their wealth.[21] To make their thefts appear as legal and ordinary government action,

14 *See* https://www.nytimes.com/2010/12/27/world/europe/27iht-berlin27.html.
15 *Id.*
16 *Id.*
17 It is estimated that approximately one-third of the money for the Nazi war effort came from stolen Jewish property. *Id.*
18 *Id.*
19 *See* https://www.archives.gov/publications/prologue/2010/winter/nuremberg.html
20 Gotz Aly, Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State 42 (Jefferson Chase trans., Metro Books 2005); Harold James, The Deutsche Bank and the Nazi Economic War Against the Jews 51 (2001).
21 *See* https://www.jta.org/1937/05/18/archive/nazis-exacted-70000000-flight-tax-in-4-years.

the Nazi government obsessively documented these transactions.[22] The property stolen from the Jews included art by some of the world's most esteemed artists, Old Masters like Rembrandt and disdained Post-Impressionists such as van Gogh, Matisse, and more modern (then) lesser-known artists such as Gustav Klimt and his student Egon Schiele.[23]

The Nazis were obsessed with expelling modern art, coined "degenerate art" by Hitler, from the continent.[24] In his youth, Hitler was a failed artist who believed he had great artistic talent.[25] But, he was rejected by those in the popular *avant-garde* art community of the time (many of whom were leftist-leaning)[26] because of his preference for painting bland, unoriginal watercolors. Hitler found modern art and its rejection of formal, traditional artistic styles in favor of abstract expressionist styles offensive. He believed art should be symmetrical, realistic, and natural, and described modern art as "a great and fatal illness" because it did not fit into the mold of what he thought great art should be.[27] Many of the successful artists of the time were also Jewish and/or Communist. Thus, Hitler

[22] William L. Shirer, 20th Century Journey: The Nightmare Years, 1930-1940, 30 (1984).

[23] As illustrated by the cases discussed *infra*, the artwork at issue in these claims is fine art created by highly sought after artists, e.g. Vincent van Gogh, Gustav Klimt, Henri Matisse, Pablo Picasso, et al. Some of these artists were well-known preceding the war (e.g. Rembrandt and other "Old Masters"), but some have only recently gained fame in the decades following the war (e.g. Egon Schiele).

[24] Jonathan Petropoulos, Art as Politics in the Third Reich 54-55 (1996).

[25] Adolf Hitler, *Mein Kampf*, Vol. I Ch. I, http://www.hitler.org/writings/Mein_Kampf/mkv1ch01.html (describing Hitler's youthful interest in painting and architecture, and his belief that he was destined to be a great artist)[http://perma.cc/MDE8-XXHB].

[26] Ralph Croizier, *The Avant-Garde and the Democracy Movement: Reflections on Late Communism in the USSR and China*, 51 Europe-Asia Studies 3, 483, 485 (1999).

[27] Godfrey Baker, *The unfinished art business of World War Two*, BBC News (Nov. 4, 2013), http://www.bbc.com/news/world-europe-24812078 (citing Hitler's opening speech to the *Haus der Kunst* "degenerate art" exhibition) [http://perma.cc/XUS6-PRJG].

resented them, and the art world's praises of their work that he deemed to be "degenerate" art.

Masters of propaganda, the Nazis understood the power of both classical and degenerate art as visual tools to further the Nazi agenda in the eyes of the public.[28] Per Nazi decree, all modern art was declared to be anti-German and required to be turned over to the state.[29] Yet, Nazi leaders, such as Joseph Goebbels, were allowed to maintain their private collections of modern art.[30] Realizing that many of the leftist-leaning modern artists were using artistic expression as a form of political opposition to the Nazis, these works were confiscated and exhibited to the public in the *die Haustellum Entartete Kunst*, the Exhibition of Degenerate Art, held in late 1937.[31] The Nazis concurrently held an exhibition of Nazi-approved art to serve as a counter-balance to the exhibition of degenerate art.[32] The purpose of the six-month exhibition was to

[28] Marc Balcells, *Plundering Boys: A Cultural Criminology Assessment of the Power of Cultural Heritage as a Cause for Plunder in Armed Conflicts Along History*, in Cultural Heritage in the Crosshairs: Protecting Cultural Property During Conflict 329, 347 (Joris Kila & James Zeidler eds., 2013) (describing the use of visual displays and military processions as propaganda to convince the German masses of total Nazi cultural dominance); Point 23 of The Program of the N.S.D.A.P. stated: "We demand legal prosecution of artistic and literary forms which exert a destructive influence on our national life, and the closure of organizations opposing the above made demands." Document No. 1708-PS. Central Publishing House of the N.S.D.A.P., http://sourcebooks.fordham.edu/mod/25points.asp [http://perma.cc/W5NX-7WK2].

[29] Fernando Baez, A Universal History of the Destruction of Books: From Ancient Sumer to Modern-Day Iraq 211 (2008). The Reich Culture Chamber (Reichskulturkammer) was established in September of 1993 under the supervision of Joseph Goebbels to "stimulate the Aryanization of German culture and to prohibit, for example, surrealism, cubism, and Dadaism." *Id.*

[30] Peter Adam, Art of the Third Reich 56 (1992); *accord* Jonathan Petropoulos, The Faustian Bargain: The Art World in Nazi Germany 1-2 (2000).

[31] Lynn Nicholas, *Rape of Europa: The Fate of Europe's Treasures in The Third Reich and Second World War* 18 (1995).

[32] Artworks from both of the Nazi exhibits ("degenerate" and Nazi-approved) were on exhibition side-by-side at the Neue Galerie Museum for German and

persuade the German people that modern art was "degenerate art unfit for the sophisticated German master race, which placed value on classical styles of order and symmetry."[33]

In 1940, Hitler created the *Einsatzstab Reichsleither Rosenberg* ("ERR") for the sole purpose of confiscating and destroying art in Germany's occupied territories.[34] The Nazis plundered Germany and its occupied territories of art.[35] Pillaging of cultural property, although forbidden by laws dating back to Roman times, was seen by the victor as a symbol of a successful conquest.[36] Not only was stolen art a symbol of the Nazis' subjugation of the Jews and Slavs, much of it was valuable and easily transported, much like the jewelry and currency the Nazis also stole from the Jews after 1933.[37]

The ultimate goal of the Nazis was the Aryanization of Germany's culture, and all art was subject to "Germanic culture laws" that mandated the transfer of all property to German citizens from those individuals deemed by the Nazis not to be true German citizens, for reasons such as race, ethnicity, religion, or mental capacity.[38] Coerced sales of artworks were used by the Nazis to

Austrian Art in New York. *Degenerate Art: The Attack on Modern Art in Nazi Germany, 1937* (Mar. 13—Sept. 1, 2014), http://www.neuegalerie.org/content/degenerate-art-attack-modern-art-nazi-germany-1937 [http://perma.cc/SQ2Q-URBA]. This was the most the most recent exhibition of "degenerate art" in the United States since the exhibition of *"Degenerate Art": Fate of the Avant-Garde in Nazi Germany* in 1991 at the Los Angeles County Museum of Art.

[33] Nicholas, *supra* note 30.

[34] Marc Balcells, *Plundering Boys: A Cultural Criminology Assessment of the Power of Cultural Heritage as a Cause for Plunder in Armed Conflicts Along History*, in Cultural Heritage in the Crosshairs: Protecting Cultural Property During Conflict 329, 338 (Joris Kila & James Zeidler eds., 2013).

[35] *See e.g.* Nichols, *supra* note 30; *accord* Balcells, *supra* note 33.

[36] Balcells, *supra* note 33 at 340.

[37] Michael Bazyler, Holocaust Justice: The Battle for Restitution 202 (2003).

[38] Richard Grunberger, The 12 Year Reich: A Social History of Nazi Germany 1933-1945 424-25 (1971).

further their Aryanization of Germanic culture.[39] The Nazis auctioned much of the confiscated degenerate art in Switzerland and elsewhere to purge Germany of art it deemed offensive, while simultaneously making a profit to fund the Third Reich's operations.[40]

Once the Allies became aware of the Nazi pillage and plunder of Europe's cultural treasures, they issued the London Declaration, which memorialized their intent that anyone profiting from the spoils of this plunder, including neutral countries like Switzerland, would not go unpunished.[41] The United States also created the Monuments, Fine Arts, and Archives agency, also known as the Monuments Men, who were tasked with protecting and reclaiming monuments and stolen works during the Allied advance.[42] The Art Looting Investigation Unit also was tasked with recovering Nazi-looted art under the watch of the Office of Strategic Services. Despite their successful efforts in recovering thousands of artworks looted by the Nazis, many artworks remain missing.[43]

Still, some Allied soldiers stole art, and some of it made it back to the United States. The American government engaged in efforts to locate and return any stolen property found in the United States. The Russian government, however, refused to return the

[39] Balcells, *supra* note 33 at 338. Germans utilized legal mechanisms of the Nazi-state to coerce sales from Jewish art dealers and others classified as having subservient legal rights.

[40] Baker, *supra* note 26 (citing Hitler's opening speech to the *Haus der Kunst* "degenerate art" exhibition); Nicholas, *supra* note 30, at 4.

[41] Multilateral Declaration on Forced Transfers of Property in Enemy Controlled Territory ("London Declaration"), 3 Bevans 754 (1943), 1943 U.S.T. LEXIS 188.

[42] Cheryl White & Thomas Livoti, *Cultural Heritage Preservation: A Tool for Coin,* in Cultural Heritage in the Crosshairs: Protecting Cultural Property During Conflict 195, 202 (Joris Kila & James Zeidler eds., 2013).

[43] Stuart Eizenstat, *The Unfinished Business of the Unfinished Business of World War II,* in Holocaust Restitution: Perspectives on the Litigation and Its Legacy 297, 307 (Michael J. Bazyler & Roger P. Alford eds., 2007).

train loads of art stolen by its soldiers, claiming that the art was compensation for the loss of human and cultural life in Eastern Europe as a result of Nazi war efforts.

After the war, the Western European nations created special claims commissions so victims could attempt to reclaim their lost property. But these commissions generally did not function well for a multitude of reasons. First, most victims did not have evidence documenting property ownership because they were forced to flee in haste under life-threatening circumstances. Second, the Nazi archives of stolen property were in disarray, destroyed, or still classified. Third, the Nazis were not the only ones who stole before, during, and immediately following the war. Fourth, the claim periods were too short. And, most importantly, many who worked in these commissions were just as anti-Semitic and biased against the victims of the Holocaust as were their Nazi predecessors.

In his testimony to the Senate Judiciary Committee, Ronald Lauder explained that in the decades following the war, the trade in stolen art did not wane but rather was continued by museums, private collectors, and governments who were buying and selling art that they knew was stolen during the war.[44] Mr. Lauder described this trade as the art world's "dirty secret."[45] In her book, *Rape of Europa*, Lynn Nicholas described how American museums utilized middlemen in the art acquisition process.[46]

Unlike other chattel, valuable fine art has been tracked by provenance records for centuries. The provenance of an artwork details the owners and sales. Those who trade and work in the art world spend a great deal of money and time researching the

[44] *The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 The Holocaust Expropriated Art Recovery Act Before the S. Comm. on the Judiciary, Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016) (statement by Ronald S. Lauder).
[45] *Id.*
[46] Nicholas, *supra* note 30.

provenance of a financially valuable work of art to determine both its history and whether the current owner is the legitimate owner. Therefore, museums, galleries, and private collectors—even before the rise of the internet—should have been able to determine when they were in the possession of an expensive work that was stolen and sold during the period of Nazi power (1933-1945).

### *B. The Legal Landscape Prior to the HEAR Act*

Due to the lack of information regarding the location of stolen art, biases against victims in the judicial system, differences in American and European legal systems, and legal technicalities, many survivors and their heirs have either chosen not to bring suit to recover their stolen property or have been unsuccessful in their efforts to seek restitution.

In most American jurisdictions, a purchaser or donee cannot acquire title from a thief.[47] Typically in these cases, a court will award title to the true owner if she sues.[48] But if the claim is barred by statute of limitations, laches, or any other legal or equitable defense, the present possessor may succeed in keeping the property without having legal title.[49] This prevents the rightful owner from pursuing recovery of the artwork through traditional remedies such as replevin or compensatory damages for conversion. The vast majority rule throughout state and federal courts in the United States is that a thief and any subsequent purchaser, including those who are innocent and acting in good faith, do not have title.[50]

[47] *See Bakalar v. Vavra*, 619 F.3d 136, 140-141 (2d Cir. 2010) (citing *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. N.Y. Cnty. 1966)).
[48] *Id.* at 141.
[49] *Id.*
[50] *E.g., O'Keeffe v. Snyder,* 83 N.J. 478, 513-515 (N.J. 1980) (Handler, J. dissenting). ("It is the general rule that 'a bona fide purchaser of personal property taken tortiously or wrongfully, as by trespass or theft, does not acquire a title good against the true owner.'... [I]f the wrongdoer has no title, he or she cannot convey title; the purchaser acquires only that title reposing in the transferor….It follows from this well-established principle that, generally, as

New Jersey seems to be an anomaly.[51] In New Jersey, title to stolen art work may transfer to the thief after expiration of the statute of limitations bars the claim. New Jersey also has rejected the common law rule that the statute of limitation begins anew with each subsequent transfer after the theft of personal property and instead has applied the majority rule for real property requiring tacking of the statute of limitations to transfers of personal property.[52] This is a serious disadvantage to the rightful owner who may not realize the work is stolen or may not know of its current location and possessor while the clock continues to run. Art, like most chattel, is easily concealable and can pass through many hands undetected, especially when traded on the black market.[53] These types of transfers have created a major problem for Holocaust

between the true owner who has lost personal property through theft and a subsequent good faith purchaser for value, the former is entitled to the goods over the latter. Title remains in the true owner rather than flowing to the bona fide purchaser when 'the wrongdoer sells the chattel to [such] innocent purchaser . . . because the wrongdoer had [no title] to give.'") (internal citations omitted).

51 *See O'Keeffe v. Snyder,* 83 N.J. 478, 500-501 (N.J. 1980).

52 *Id.* at 502-504; 510-511. (Handler, J. dissenting). ("[The majority] rejects the doctrine that the acquisition of a stolen chattel, or a refusal to return it upon demand, itself constitutes a tortious conversion as against the true owner….The New York rule of subsequent conversions, rejected by the majority, is not a "statute of limitations," but rather is a *substantive* principle of the law of torts….It is clearly the predominant view that subsequent transfers of a stolen chattel constitute separate acts of conversion.")(Internal citations omitted.) *Cf. Bakalar v. Vavra,* 619 F.3d 136, 140 (2d Cir. 2010) ("[I]n New York, a thief cannot pass good title….This means that… 'absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods.'")(internal citations omitted).

53 *See O'Keeffe v. Snyder,* 83 N.J. 478, 496 (N.J. 1980) ("Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor. The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed.")

survivors and their heirs in their attempts to recover Nazi-looted art. Nazi-looted art may have passed through many different hands without a trace (or with altered or fabricated provenance records) or be stored in a private collection for many decades before the true owner learns of its whereabouts.[54] Even if a stolen work of art is held by a museum, it is not necessarily on view for the public and may be kept in storage. Compounding this problem, provenance records may have been destroyed or altered to reflect a purchase history more favorable to one of the possessors post-theft.[55]

Under the civil law system followed throughout Europe, a good faith purchaser may have title to stolen property after the passage of a certain period of time, or even immediately as may have been the law in Switzerland for some time.[56] If the rightful owner succeeds in her claim to the property, then she must reimburse the good faith purchaser for the price he paid for the property.[57] Additionally, the loser pays all attorney's fees and court costs under this system, and the filing fee to bring such suits is based on a

[54] *See generally Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010) (Heir did not know where the paintings were until she was contacted by a Dutch journalist); *Zuckerman v. The Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019)(Painting held in private collection from 1941 until 1952 when it was donated to museum. Museum's errors in published provenance went undetected until 2011 after claim made by heir.); *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008)(Painting held in private family collection for over sixty-eight years until consigned for sale and heir was notified by Art Loss Register.).

[55] *See Zuckerman v. The Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019)(error in published provenance went undetected until 2011); *U.S. v. Portrait of Wally*, 663 F.Supp. 2d 232 (S.D.N.Y. 2009)(altered provenance by owner); *Reif v. Nagy*, 175 A.D.3d 107 (Sup. Ct. N.Y. App. 2019)(provenance altered by former gallery owner); *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010)(provenance altered by former gallery owner).

[56] *See Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010). The doctrine of prescription also may apply in *Louisiana*. *See Dunbar v. Seger- Thomschitz*, 615 F.3d 574 (5th Cir. Aug. 20, 2010) (granting summary judgment to collector on prescription grounds without reaching merits).

[57] *Id.*

percentage of the value of the property. Thus, it is very difficult to bring suits for recovery of stolen art under this system ,because the financial burdens are immediate and may eventually the value of the recovered art. If the claimant is successful, she has paid the filing fee, which could be substantial if the art has a high market value. She also must pay the good faith purchaser the price he paid for the work, which could be a significant number if the purchase was recent. If the claimant loses, then she will be in a worse financial position than she was prior to filing suit.

One of the earliest Nazi-looted art restitution cases in the United States involved a Chagall painting that was left behind when its Jewish owners, the Menzels, fled Belgium in 1940 after the Nazis invaded.[58] Mrs. Menzel recognized the painting after seeing it in an art book in 1962 and demanded the owner return the painting.[59] When he refused, Mrs. Menzel filed a replevin action in New York state court and a jury returned a verdict in her favor.[60] However, the jury also returned a verdict in favor of the defendant, Mr. List, who had impleaded the Perls, the couple who sold him the painting. The Perls were to reimburse Mr. List for the present value of the painting and the costs he incurred in defending the lawsuit.[61] The case moved through the appellate courts in New York, and the state's highest court held that the Perls owed Mr. List the full present value of the painting plus the interest that had incurred since the judgment in favor of Mrs. Menzel was entered.[62]

In 2004, Maria Altmann's case against the Republic of Austria brought national attention to the problem Holocaust victims and their heirs faced when suing a sovereign nation for restitution of stolen art in the United States. Ferdinand Bloch-Bauer, Maria's uncle, fled Austria following the *Anschluss*, leaving behind most of

58 *Menzel v. List*, 24 N.Y.2d 91, 93 (Ct. App. N.Y. 1966).
59 *Id.*
60 *Id.* at 94
61 *Id.*
62 *Id.*

his possessions, including his art collection.[63] The painting of his wife by Gustav Klimt, *Adele Bloch-Bauer I*, along with others in his collection, was stolen by the Nazis under the pretext that Ferdinand owed a large tax debt due to tax evasion.[64] The painting ended up in the possession of the *Osterreichishe Galerie Belvedere* in Vienna.[65]

Despite knowing that it was in possession of stolen goods, the Austrian government refused to return the painting to Ms. Altmann upon her request and attempted to claim title to the painting based on the terms of Adele Bloch-Bauer's will.[66] Due to the painting's substantial value, Ms. Altman would have been required to pay a $350,000 filing fee, one third of its value, to bring her suit in Austria to recover the painting that was rightfully hers pursuant to her uncle's will.[67] Therefore, she chose to file her case in United States District Court in California where she only had to pay a $175 filing fee.[68] The Republic of Austria claimed it had sovereign immunity.[69] However, Ms. Altmann argued that the provisions of the FSIA, enacted in 1976, were retroactive to 1945 and applied to this case.[70] The United States Supreme Court ruled in her favor, finding that the FSIA's provision that allowed a sovereign nation to be sued in the United States if it was acting in a commercial capacity was indeed retroactive and applied to the events that took place in 1945.[71]

63 *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004).
64 *Id.*
65 *Id.*
66 *Id.* As to the alleged bequest in Adele's will, Maria Altmann said that her aunt would never have given Austria the paintings had she known what transpired during the *Anschluss* and thereafter. *See* https://www.chicagotribune.com/entertainment/music/howard-reich/ct-woman-gold-reflections-20150404-column.html
67 *Altmann*, 541 U.S. at 684-685.
68 *Id.*
69 *See Altmann*, 541 U.S. 677 (2004).
70 *Id.*
71 *Id.*

The case of *Toledo Museum of Art v. Ullin* illustrates a court blaming a victim for not doing enough to discover art allegedly sold under duress. In 2006, the Toledo Museum of Art filed suit against the heirs of Martha Nathan, a Holocaust survivor and prior owner of Paul Gauguin's *Street Scene in Tahiti*.[72] The painting was sold in a forced sale in Switzerland in 1938 along with other works owned by Ms. Nathan to gain safe passage to the United States for Ms. Nathan and her family members who were being held hostage.[73] The museum sought to quiet title to the painting, and the heirs counterclaimed for conversion and restitution.[74] The United States District Court for the Northern District of Ohio ruled in favor of the museum.[75] The court concluded that the "the heirs knew [Nathan] was persecuted by the Nazis and sustained wartime losses," and therefore should have made "further inquiries" because the Nazis' thefts were public knowledge and Ms. Nathan herself had made prior claims as a victim of the Nazis' theft.[76] As a result, the court held that the statute of limitations had expired, thus barring the heirs' claims for conversion and restitution.[77]

When Ms. Nathan's heirs sought return of Vincent Van Gogh's *The Diggers* from the Detroit Institute of Art in 2007, the museum filed an action in federal court seeking declaratory judgment.[78] This painting was also sold as part of the 1938 forced sale in Switzerland.[79] The United States District Court for the Eastern District of Michigan found that the conversion took place at the time of sale in 1938, and the Michigan statute of limitations to recover on a conversion claim expired three years later in 1941.[80]

[72] *See Toledo Museum of Art v. Ullin*, 477 F.Supp. 2d 802 (N.D. Ohio 2006).
[73] *Id.* at 803.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 807-808.
[77] *Id.*
[78] *See Detroit Museum of Art v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007).
[79] *Id.*
[80] *Id.* at *3.

Unfortunately for Ms. Nathan's heirs, the court believed the museum's assertion that the 1938 sale in Switzerland was voluntary because it occurred after Ms. Nathan fled Germany for Paris but prior to the Nazi occupation of France.[81]

The 2008 case of *Vineberg v. Bissonnette* offered a ray of hope to survivors and their heirs when a federal district court in Rhode Island held that laches was an insufficient defense to a claim of stolen art.[82] Dr. Max Stern, a Jewish gallery owner in Dusseldorf, Germany, was forced by the Nazis to liquidate his gallery's inventory, including a painting by Franz Xaver Winterhaler titled *Girl from the Sabiner Mountains*.[83] The gallery's inventory and Dr. Stern's personal collection were consigned in 1937 to Lempertz Auction House, a Nazi-approved dealer, pursuant to a Reich Chamber order, and the art was auctioned within a few months of consignment for far less than market value.[84] Dr. Stern fled Germany shortly thereafter and the Nazi government froze his assets, including the proceeds of the forced sale by Lempertz Auction House.[85] After the war, Dr. Stern made numerous attempts, including advertisements and trips to Europe, to recover the stolen art.[86] Unbeknownst to Dr. Stern, Dr. Karl Wilharm purchased the painting in 1937 from the Lempertz Auction House, and kept it in his private collection until his step-daughter, Baroness Maria-Louise

[81] *Id. See also* Jennifer A. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, Chapman Law Review at 16 (2017) ("It is not widely known, however, that the Nazis often forced fleeing Jews to convey their property located in Switzerland back to the Reich, often in exchange for the promise of safe passage of other family members that were being held hostage. As a result, *The Diggers* is still on display as if Ms. Nathan had the ability to deal freely in commercial transactions while fleeing from a genocidal regime.") (footnote omitted).
[82] *See Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008).
[83] *See Vineberg v. Bissonnette*, 529 F.Supp.2d 300 (D.R.I. 2007).
[84] *Id.*
[85] *Id.*
[86] *Id.*

Bissonnette took possession of it in 1959.[87] Dr. Stern died in 1987 and left the painting to his estate.[88] Bissonnette brought the painting to Rhode Island in 1991, and in 2003, she consigned it with Estates Unlimited where it was scheduled to be auctioned in 2005.

In 2004, the Stern Estate retained the Art Loss Register to assist in recovering Dr. Stern's stolen art and listed the Winterhaler painting with the Germany's Lost Art Internet Database.[89] The Art Loss Register informed the Stern Estate of the auction, and the Estate filed a claim with New York's Holocaust Claims Processing Office.[90] The Holocaust Claims Processing Office demanded that Bissonnette return the painting to the Stern Estate.[91] When she refused to return it and negotiations failed, Bissonnette shipped the painting back to Germany and filed an action in Germany's courts to determine ownership.[92] The Stern Estate filed suit in United States District Court in Rhode Island seeking replevin, or, in the alternative, damages.[93]

The District Court granted the Stern Estate's motion for summary judgment and ordered replevin of the painting to the Estate, rejecting Bissonnette's laches defense due to Dr. Stern's efforts to locate the painting and Bissonnette's lack of evidence that she was prejudiced by the delay.[94] Finding Dr. Stern's efforts to locate the painting were reasonable, the Court noted that "[u]nder these circumstances, to require that Dr. Stern list *every* item lost in any attempt he made to locate the lost artwork would be unreasonable. The 'standard is not whether [Dr. Stern] did everything that might have been done with the benefit of hindsight, but whether [his] efforts were reasonable given the facts of the

87 *Id.* at 303.
88 *Id.*
89 *Id.* at 304.
90 *Id.*
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*

case.'"[95] The United States Court of Appeals for the First Circuit affirmed the District Court's ruling finding that Bissonnette did not meet the burden of proof of evidence-based prejudice required to support her laches defense.[96] The First Circuit concluded: "A de facto confiscation of a work of art that arose out of a notorious exercise of man's inhumanity to man now ends with the righting of that wrong through the mundane application of common law principles. The mills of justice grind slowly, but they grind exceedingly fine."[97]

The Austrian government's extortion of Holocaust victims seeking restitution of Holocaust-expropriated art came to light in 2009 in *U.S. v. Portrait of Wally*.[98] *Portrait of Wally*, a gouache by Egon Schiele, was subpoenaed in 1998 by the U.S. Attorney for the Southern District of New York while it was on loan from the Leopold Museum in Austria for exhibition at the Museum of Modern Art in New York.[99] In 1999, the U.S. government seized the painting pursuant to a warrant and filed a civil forfeiture action on the grounds that the painting was stolen property knowingly shipped into the country by the Leopold Museum in violation of the National Stolen Property Act.[100] The painting's rightful owner was Lea Bondi Jaray.[101] Bondi was a Jewish gallery owner who fled Austria with her husband for England following the Anschluss.[102] Just prior to their escape, Friedrich Welz, a Nazi to whom Bondi was forced to sell her art gallery pursuant to Aryanization laws prohibiting Jews from owning businesses, demanded that Bondi give him *Wally*.[103] Bondi initially refused, but ultimately relented

[95] *Id.* at 309 (citing *Erisoty v. Rizik*, No. Civ. A. 93-6215, 1995 WL 91406 at *14 (E.D.Pa. Feb. 23, 1995) (footnote omitted)).
[96] *Vineberg v. Bissonnette*, 548 F.3d 50, 53 (1st Cir. 2008).
[97] *Id.* at 58-59.
[98] *See U.S. v. Portrait of Wally*, 663 F.Supp. 2d 232 (S.D.N.Y. 2009).
[99] *Id.* at 237-238.
[100] *Id.* at 246.
[101] *Id.* at 238.
[102] *Id.*
[103] *Id.*

after her husband warned her that Welz may inhibit their escape.[104] After the war, Bondi was able to recover her gallery from Welz because it had been seized by U.S. troops, but *Wally* was returned to the Austrian National Gallery ("The Belvedere") by mistake.[105] Bondi was unsuccessful in her attempts to convince The Belvedere to return the painting to her.[106] When Dr. Rudolph Leopold, an Austrian collector, approached Bondi in 1953 to inquire about other Schiele works, she told him about *Wally* and he agreed to help her get the painting back.[107] However, Leopold traded The Belvedere one of his Schiele works in exchange for *Wally*, and kept *Wally* in his private collection.[108] After Bondi learned of Leopold's scheme, she attempted to convince him through her lawyers to return the painting, but was unsuccessful.[109] Dr. Leopold donated *Wally* along with the rest of his collection to the Leopold Museum in 1994.[110]

During the pendency of the case, it was discovered that the Austrian government utilized a scheme requiring claimants seeking the return of expropriated artworks in Austria's possession to make "donations" to the Austrian government in exchange for export permits for the artworks to be returned.[111] After a protracted legal battle and an unfavorable ruling for the museum setting the case for trial, the Leopold Museum settled the case with Bondi's heirs in 2010 for $19 million in exchange for the painting.[112] The U.S. Attorney's Office issued a press release about the settlement, noting

104 *Id.*
105 *Id.* at 240.
106 *Id.* at 242. The Belevedere was the same Austrian museum that refused to return the stolen Klimt paintings in its collection to Ms. Altmann, thus forcing her to take legal action. *See Republic of Austria v. Altmann*, *supra* note
107 *Id.* at 243.
108 *Id.* at 243-244.
109 *Id.*
110 *Id.* at 245.
111 *See* Kreder, *supra* note 80, at 11.
112 See United States Attorney Southern District of New York Press Release, dated July 20, 2010. https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf

that "the civil forfeiture action brought public attention to the struggle of victims of Nazi crimes to recover art and other property stolen by the Nazis."[113] As part of the settlement, the museum agreed that a plaque detailing its true provenance would always be displayed next to the painting.[114]

While *Wally* was pending in New York, the United States Court of Appeals for the Ninth Circuit decided the case of *Von Saher v. Norton Simon Museum of Art* in 2009.[115] Marei von Saher, heir of Dutch art dealer Jacques Goudstikker, filed suit against the Norton Simon Museum Art for return of two paintings by Lucas Cranach the Elder.[116] Goudstikker fled the Netherlands with his family after the Nazi invasion, leaving behind his art collection which included the Cranach paintings and works by other well-known artists such as Rembrandt and van Gogh.[117] The Nazis confiscated the works, and Hermann Goering kept most of the collection, including the Cranach paintings, at his country estate until they were discovered by Allied Forces.[118] The Goudstikker collection was returned to the Netherlands by the Allied Forces, but the Dutch government returned the Cranach paintings to another claimant instead of Goudstikker and this claimant sold them to the Norton Simon Museum.[119] After von Saher filed her complaint, the museum filed a motion to dismiss that was granted by the United States District Court on the grounds that the California statute extending the statute of limitations was unconstitutional and von Saher's complaint had not been filed within the three year statute of

113 *Id.* at 3. *See also Republic of Austria v. Altmann*, *supra* note
114 *See* https://itsartlaw.org/2010/07/30/19-million-settlement-frees-portrait-of-wally-after-13-year-of-legal-disputes/
115 *Von Saher v. Norton Simon Museum*, 578 F.3d 1016 (9th Cir. 2009), amended and superseded on denial of reh'g en banc by No. 07-56691, 592 F.3d 954 (9th Cir. 2010) ("Von Saher I").
116 *Id.*
117 *Id.*
118 *Id.*
119 *Id.*

limitations required under the prior statute.[120] Von Saher appealed and the Ninth Circuit affirmed the lower court's ruling that the statute was unconstitutional due to the Federal Government's field preemption in foreign affairs.[121] The Supreme Court of the United States denied von Saher's petition for certiorari.[122]

As federal courts were ruling against survivors in this terrible history of cases, the United States maintained that its foreign policy with regard to Holocaust expropriated art was consistent with the Washington Principles. The State Department entered into the Terezin Declaration in 2009, which renewed and reaffirmed the principles agreed upon at the Washington Conference in 1998.[123] Despite this renewed commitment by the federal government to ensure that these claims were adjudicated on the merits and not decided on purely procedural defenses, unlawful owners continued to prevail in federal court.[124]

Prior to the HEAR Act, the only Congressional legislation to address restitution issues were the U.S. Holocaust Assets

120 *Id.*
121 *Id.*
122 *Von Saher v. Norton Simon Museum of Art*, 564 U.S. 1037 (2011).
123 *See The Holocaust Era Assets Conference Terezin Declaration* 4, Holocaust Era Assets Conference (June 30, 2009), http://www.holocausteraassets.eu/program/conference-proceedings/declarations/.
124 *See Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010) (Laches defense successful in claim for Egon Schiele drawing even though current owner could not prove title. Issue of diligence in proving claims.) and *Museum of Fine Arts of Boston v. Seiger-Thomschitz* (2010) ("innocent transfer," no bad faith, laches or unclean hands). *See also* Kreder, *supra* note 80, at 18 ("When a museum as esteemed as the Museum of Fine Arts, Boston, asserts the statute of limitations, it renders the Washington Principles and Terezin Declaration all but meaningless. Other American museums have asserted the statute of limitations against claimants in court and/or sued survivors to shut down their inquiries on technical defenses like laches….They shut down any judicial inquiry into the merits of the survivors' heirs [*sic*] claims. They undermine the credibility of the United States as a leader seeking justice for Holocaust victims and their heirs.") (footnote omitted).

Commission Act of 1988 and the Holocaust Victims Redress Act.[125] This legislation was largely ineffective and is discussed *infra*.

## II. THE HEAR ACT

### *A. Legislative History*

Initially drafted in early 2016 as bipartisan-sponsored legislation, the Holocaust Expropriated Art Recovery Act was signed into law by President Barack Obama on December 16, 2016.[126] The Ninth Circuit's ruling in *Von Saher* was the impetus for the Act.[127] In consideration of the bill, Congress looked at the history and effectiveness of prior efforts by the United States to ensure fair adjudication of Nazi-looted art claims, including the Washington Conference Principles, the Terezin Declaration, the standards adopted by the Alliance of American Museums, the Holocaust Victims Redress Act, and the U.S. Holocaust Assets Commission Act of 1998.[128]

[125] *See U.S. Holocaust Assets Commission Act of 1998*, Pub. L. No. 105-186 (1998)("To establish a commission to examine issues pertaining to disposition of Holocaust-era assets in the United States before, during, and after World War II, and to make recommendations to the President on further action, and for other purposes.") and *Holocaust Victims Redress Act*, Pub. L. No. 105-158 (1998)("To provide redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust, and for other purposes.").

[126] After President Obama signed HEAR into law, Ronald S. Lauder, chairman of the Commission for Art Recovery and the World Jewish Restitution Organization, stated: "The HEAR Act will end an enduring injustice for Holocaust victims and their families. For too long, governments, museums, auction houses and unscrupulous collectors allowed this egregious theft of culture and heritage to continue, imposing legal barriers like arbitrary statutes of limitations to deny families prized possessions stolen from them by the Nazis." https://web.archive.org/web/20180104140428/http://www.newsweek.com/obama-hear-act-law-holocaust-534793

[127] S. Rep. No. 114-394, at 5 (2016).

[128] *Id.*

After reviewing these prior efforts, Congress concluded that the "United States has not fulfilled its promise to ensure that claims to art lost in the Holocaust are resolved on their merits."[129] Reciting language from the Ninth Circuit's ruling in *Von Saher I*, Congress noted that obstacles faced by these claimants include "procedural hurdles such as statute of limitations that prevent the merits of claims from being adjudicated."[130] Congress expressed concern that "State statutes of limitations can be an unfair impediment to the victims and their heirs, contrary to United States policy. Yet states have been unable to remedy this injustice because the regulation of war-related disputes is within the powers of the Federal Government."[131]

Based on its findings, Congress concluded that "a Federal limitations period, appropriately tailored to the unique circumstances of Holocaust-era claims, is therefore needed to guarantee that the United States fulfills the promises it has made to the world to facilitate just and fair solutions with regard to Nazi-confiscated and looted art and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims."[132]

The bill was referred to the Senate Committee on the Judiciary on April 7, 2016, and a hearing was conducted on June 7, 2016, by the Subcommittees on the Constitution and Oversight, Agency Action, Federal Rights, and Federal Courts.[133] During the hearing, the Committee heard testimony from various experts in the field of Holocaust expropriated art.[134] In September 2016, the

129 *Id.*
130 *Id.* (footnote omitted).
131 *Id.*
132 *Id.* at 5-6 (footnote omitted)(internal quotations omitted).
133 *Id.* at 6.
134*Id.* Dr. Agnes Peresztegi, the Executive Director for the Commission for Art Recovery Europe, testified that the "Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another. To

Senate amended the bill to include language "favoring the resolution of disputed art claims without litigation and using alternative dispute resolution mechanisms involving experts in art research."[135] Additional amendments included specific descriptions of the types of art covered under the Act, a broadened knowledge standard for the trigger of the statute of limitations, broad coverage for all groups persecuted by the Nazis, an exception for claims previously barred, and a sunset date.[136] The Senate also removed the definition of "unlawfully lost," which the House of Representatives defined as "theft, seizure, forced sale, sale under duress, or any other loss of an artwork or cultural property that would not have occurred absent persecution during the Nazi era."[137] The most significant amendment, however, was the removal of the bar on the availability of equitable defenses, including the doctrine of laches, to those defending against these claims.[138]

cite some concerns: narrowing the definition of looted art, shifting the burden of proof unnecessarily in some instances to the claimant; and generally adding or confirming other procedural obstacles. Cases related to Holocaust looted art should only be adjudicated on the merits." *Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the S. Comm. on the Constitution, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. 1 (2016)(testimony of Agnes Peresztegi). Unfortunately, the Senate amended the bill to remove the language precluding the use of laches, which is precisely what Dr. Peresztegi advised against. *See* S. Rep. No. 114-394, at 7 (2016).

135 *Id.* at 6.

136 *Id.* at 7.

137 *Id.* By including equitable defenses and laches and removing the definition of "unlawfully lost," this amendment appears to contradict the stated purpose of this Act to ensure that these claims "are resolved in a just and fair manner" in accordance with U.S. foreign policy. This is outside the scope of this article, but this issue has been addressed in other scholarly articles. *See generally* Jennifer A. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 Chap. L. Rev. 1 (2017); and Soffia H. Kuehner Gray, *The Holocaust Expropriated Art Recovery Act of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, U. Ill. L. Rev. 363 (2019).

138 *Id.* Prior to the amendments, Section 5(a) of Senate bill originally read: "Notwithstanding any other provision of Federal law, any provision of State law, or any defense at law or equity relating to the passage of time (including

### *B. The Provisions*

#### i. Congressional Findings

As a result of its investigation, Congress determined that "Federal legislation is needed because the only court that has considered the question held that the U.S. Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art."[139] Thus, the Act "expresses [Congress'] sense that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner."[140]

#### ii. Purpose

The stated purpose of the HEAR Act is twofold:

"(i) [F]irst, to ensure that laws governing claims art and cultural property confiscated by the Nazis further United Policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act and the Terezin Declaration; (ii) second, to ensure that claims are not unfairly barred by statutes of limitations and are resolved in a just and fair manner."[141] This section clearly establishes the intent of Congress to regulate in the area of Holocaust-expropriated art, due to the "unique

the doctrine of laches)…." S. 2763, 114th Cong. 2D § 5(a) (April 7, 2016).

139 HEAR

140 *Id.*

141 *Id.*

circumstances" of these claims stemming directly from the horrific events of World War II.[142]

iii. Definitions

The Act defines actual discovery as "knowledge," which, in turn, is defined as "having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof."[143] The Senate Judiciary Committee clarified that "for the purposes of the limitations period established in Section 5(a), this is intended to require more than access to the information with regard to relevant facts and circumstances. The party must have the knowledge itself or have sufficient information to constitute actual knowledge."[144] This is a significant change as many state statutes only require constructive knowledge, which can be imputed to a victim's heir.[145] Neither constructive nor imputed knowledge are included in the HEAR Act.

Art covered under the Act includes fine art, graphic art, applied art, books, music, photographs, cinematographic archives and mediums, sacred and ceremonial objects, and Judaica stolen or lost during the covered period.[146] The period for losses covered under the Act is from the rise of the Nazis in January 1, 1933 through

142 *Id.*
143 *Id.*
144 *Id.*
145 *See* Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 Colum. J.L. & Arts 157, 163 (2019) ("Many states have limitations periods that run from when the original owner knew or should have known (that is, had constructive knowledge) of the whereabouts of the stolen property. Even in those states where the statute of limitations begins upon "knowledge" of the claim, different elements may suffice to constitute knowledge.")(footnote omitted).
146 HEAR

the end of World War II in December 31, 1945.[147] The limitations period applies to any group who was persecuted by the Nazis, their allies, agents, or associates and lost art as a result of this persecution during the covered period.[148] The Senate report noted that Nazi persecution was not carried out by the Nazis alone, but also the German government, Germany's allies, and "private agents and others."[149] Congress has clearly recognized that there are many groups who were persecuted by the Nazis and their co-conspirators. It also has recognized that these co-conspirators were not members of the Nazi party, but nevertheless assisted the Nazis in furtherance of their "Final Solution."

iv. Federal Statute of Limitations

Section 5 is the key provision of the Act setting forth the applicable Federal statute of limitations for Holocaust expropriated art claims. Subsection (a) defines the statute of limitations period:

> (a) In general—
> Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—
> (1) the identity and location of the artwork or other property; and
> (2) a possessory interest of the claimant in the artwork or other property.[150]

147 HEAR
148 HEAR
149 S. Rep. No. 114-394, at 9 (2016).
150 HEAR

The statute of limitations under the Act is six years after the actual discovery by the claimant or the claimant's agents or heirs. The Senate Judiciary Committee noted that "the purpose of this section is to open courts to claimants to bring covered claims and have them resolved on the merits, consistent with the Terezin Declaration. While defenses at law are not merely procedural, the special circumstances created by the Nazi persecution necessitate an opportunity for their temporary waiver."[151] Section 5 applies to claims pending on the date of enactment and those filed from the period of the date of enactment through December 31, 2026.[152]

v. Limitations on the HEAR Act

Subsection (b) addresses issues with misidentification and clarifies that the statute of limitations only begins to run on the date actual knowledge occurs, i.e. when the claimant has sufficient facts to establish that the work is the one that was stolen during the covered period.[153]

Pursuant to subsection (c), a claim is deemed actually discovered on the date of enactment under the following circumstances:

> (1) before the date of enactment of this Act—
> (A) a claimant had knowledge of the elements set forth in subsection (a); and
> (B) the civil claim or cause of action was barred by a Federal or State statute of limitations; or
>
> (2)(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and

[151] S. Rep. No. 114-394, at 9 (2016).
[152] HEAR
[153] HEAR

> (B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.[154]

This subsection allows "claimants to resuscitate claims that may have been barred in the past," but does not affect claims that have already been adjudicated to final judgment "from which no appeal lies on the date of enactment."[155] The statute of limitations period also applies to those claims that are known on the date of enactment, but not yet barred.[156]

The HEAR Act limitations period does not pertain to claims barred by a Federal or State statute of limitation on the day before the enactment if the claimant had the requisite knowledge required under subsection (a) on or after January 1, 1999 and "not less than 6 years have passed" since the claimant obtained the requisite knowledge and during that time, the claim was not barred by a statute of limitations.[157] In other words, a claimant who had knowledge of a claim on or after January 1, 1999 cannot bring a claim under the HEAR act limitation period if 6 or more years have passed since she obtained the requisite knowledge. But, this exception does not "[bar] the claimant from asserting claims that remain timely under applicable State law."[158] Congress included this exception because it "recognizes the importance of quieting title in property generally and the importance that claimants assert their rights in a timely fashion."[159] The Senate Judiciary Committee explained how this exception should operate:

> "The six year period in subsection 5(e) reflects that in subsection 5(a), but it is not intended to extend

154 HEAR
155 S. Rep. No. 114-394, at 10 (2016).
156 *Id.*
157 HEAR
158 S. Rep. No. 114-394, at 10 (2016).
159 *Id.*

> shorter limitations periods that came and went prior to the enactment of the HEAR Act. For instance, if the relevant conditions are met and the claim arose after 1999; the applicable limitations period was three years; and three years elapsed before the HEAR Act was enacted, the claim would fall under the 5(e) exception. The claimant must have had, however, an opportunity to bring a claim that was not time-barred during that six year period."[160]

While the language of this exception is somewhat confusing, it appears that the purpose of this subsection is to encourage claimants to bring their claims in a timely manner. The exception is similar to a *laches* defense but not exactly the same. The exception requires a demonstration by the one asserting the defense that the claimant had the "opportunity" within the requisite six year period to bring a claim that would not have been ruled time-barred. Seemingly, this "opportunity" depends upon the applicable statute of limitations as interpreted by the courts through the date the claim arose, which varies from state to state.[161] In any event, as demonstrated above, the cases were being decided against survivors

[160] *Id.* at 11.

[161] *See generally* Simon J. Frankel & Sari Sharoni, *Navigating the HEAR Act of 2016*, 42 Colum. J.L. & Arts 157 (2019) (discussing interpretative issues with HEAR Act); Jason Barnes, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, Colum. J. Transnational Law (discussing implication that HEAR Act interferes with states' traditional domain over statute of limitations in regard to property rights); Jennifer A. Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 Chap. L. Rev. 1 (2017) (arguing the HEAR Act eliminates the complex choice of law problem faced by courts as well as the laches defense); and Soffia H. Kuehner Gray, *The Holocaust Expropriated Art Recovery Art of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, U. Ill. Rev. 363 (2019) (arguing the extension of statute of limitations in the HEAR Act does not go far enough and recommending further action such as extending sunset of the HEAR Act).

at every step of the way since *Altmann* came down in the Supreme Court in 2004.

The Act concludes with an express statement that it does not create any claim or new Federal or state cause of action.[162] All claims must be filed before the sunset of the Act on January 1, 2027.[163]

vi. Construction of the HEAR Act

The language used by Congress in the operative provision of Section 5 (a) establishing the uniform statute of limitations is permissive: "a civil claim…*may be commenced* not later than 6 years….[emphasis added]"[164] Mandatory language ("shall") appears only in the text of subsections (b) through (f) in Section 5. As discussed *supra*, these later subsections set forth the limitations on the Act: possible misidentification, pre-existing claims, exceptions, applicability, and the sunset date. Thus, mandatory language would be necessary to define the limitations set forth in these sections. Presumably, Congress chose to utilize permissive language in Section 5 (a) because there is a wide variance of time periods allowed under existing state statutes of limitations[165] and the Act itself does not create any cause of action.[166] Thus, the HEAR

[162] HEAR

[163] HEAR

[164] HEAR. *See also* Frankel and Sharoni, *supra* note 159, at 174. ("courts should construe the ambiguity of 'may be commenced' to allow claims to be brought that remain timely under applicable state statutes of limitations, such as under New York's demand and refusal rule.").

[165] *See also* Frankel and Sharoni, *supra* note 159.

[166] Although it is outside the scope of this article, retroactive application is acceptable and clear, *see e.g., Altmann*. *See* Emily J. Cunningham, Justice on the Merits: An Analysis of the Holocaust Expropriated Art Recovery Act of 2016, 69 Case W. Res. L. Rev. 427, ___ (2018) ("Procedural changes might be impermissibly retroactive if they create a new cause of action based on old conduct. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, the Supreme Court found that Congress could not create a cause of action against conduct occurring before a statute's enactment where no cause of action previously

Act does not command the States to take any action in regard to their statute of limitations, but rather extends the window of opportunity to assert claims thereby opening the courts to victims and their heirs.

### *C. The Legal Landscape Since the Enactment of the HEAR Act*

Since the enactment of HEAR, the New York Supreme Court Appellate Division and the United States Courts of Appeals for the Second Circuit, the Ninth Circuit, and the D.C. Circuit have considered the HEAR Act. Two recent cases illustrate the divergent outcomes.

In June 2019, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court dismissing *Zuckerman v. The Metropolitan Museum of Art.*[167]

existed. The case addressed whether private parties could sue on behalf of the United States for pre-1986 conduct under a 1986 amendment to the False Claims Act, which previously barred the claims at issue in the case. While Congress couched the amendment's language in jurisdictional terms, the Supreme Court applied the presumption against retroactivity to bar its application to pre-1986 conduct. The Court refined its statement in *Landgraf* that jurisdictional statutes speaking to the "power of the court" to hear a case are not retroactive by distinguishing between situations that qualify as an exception to the general presumption and a separate exception altogether. Jurisdictional statutes that *"create* [] jurisdiction where none previously existed" concern parties' substantive rights and hence are subject to the presumption against retroactivity. A court might interpret HEAR to present a new cause of action. Instead of transferring jurisdiction from one court to another, HEAR restores opportunities previously barred. While technically HEAR does not create a cause of action and was not intended to do so, like *Hughes Aircraft*'s amendment, HEAR arguably creates jurisdiction that did not exist prior to its enactment. However, HEAR does not create a cause of action because the underlying offense of conversion applied at the time of the thefts; instead, HEAR restores a claimant's procedural opportunity to present its cause of action before a court. Under *Hughes Aircraft*, if HEAR creates a cause of action, HEAR is subject to the *presumption* of retroactivity, which Congress may overcome through express language.).

167 *See Zuckerman v. The Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019).

Laurel Zuckerman, the great-grandniece of Paul and Alice Leffmann and heir to their estate, sought replevin of Pablo Picasso's *The Actor*, a painting owned by the Leffmanns until they were forced to sell it to escape Nazi-occupied Europe in 1938.[168] The Leffmanns were wealthy Jewish industrialists who fled Nazi Germany in 1937 for Italy only to discover that Italy was just as dangerous.[169] After being stripped of their assets by the Nazis pursuant to the Nuremburg Laws, the Leffmanns had to pay an enormous flight tax on their flight from Germany.[170] Before fleeing to Italy, the Leffmanns sent *The Actor* to storage in Switzerland.[171] Desperate for cash to flee Italy, the Leffmanns sold *The Actor* to Käte Perls and Paul Rosenberg, Paris art dealers, for $12,000 in 1938 after turning down another offer for the same amount.[172] The Leffmanns needed the money to fund their escape through Switzerland and on to Brazil, which would require payment of both substantial taxes and bribes to ensure their safety.[173] After the war ended, the Leffmanns were successful in some of their claims for property looted by the Nazis before they fled Germany, but they did not seek return of *The Actor*.[174] In 1939, the painting was insured for $18,000 by Rosenberg.[175] Then, just three years after the Leffmanns sold it, Chrysler heiress and art collector Thelma Chrysler Foy purchased the painting from a New York gallery for $22,500.[176] Foy donated the painting to The Metropolitan Museum of Art in 1952.[177]

168 *Id.*
169 *Id.*
170 Zuckerman Pet. Rehrg. En Banc, Case no. 18-634 Doc. 173 at 30 (July 10, 2019).
171 *Zuckerman*, 928 F.3d.
172 *Id.* at 191.
173 *Id.*
174 *Id.* at 191-192.
175 *Id.* at 192.
176 *Id.*
177 *Id.*

In accordance with New York's demand and refusal rule, Ms. Zuckerman made a demand for the return of the painting in 2010, but The Met refused to return it.[178] Zuckerman then filed suit alleging conversion and seeking replevin due to duress based on the Leffmanns' forced sale of the painting in 1938 to fund their escape from the growing Nazi threat in Europe.[179] The District Court dismissed her claims on the defendant's motion to dismiss finding "failure to allege duress under New York law."[180] Zuckerman appealed to the Second Circuit, but in its *de novo* review, the court focused on the defendant museum's defense of laches not addressed by the District Court.[181] Finding unreasonable delay by Zuckerman and prejudice to the museum, the court affirmed the judgment of the lower court.[182] The Second Circuit based its determination of unreasonable delay on the fact that over seventy years had passed between the sale of the painting and Zuckerman's demand with no prior attempts to recover the painting made by the Leffmanns or anyone acting on their behalf.[183] Further, the Second Circuit deemed the Leffmanns to be a "financially sophisticated couple" because they successfully recovered other Nazi-looted property after the war, and thus determined it was highly implausible that they or their heirs had not sought return of the painting earlier.[184] Rejecting Zuckerman's claim that the painting was sold under duress during the period of Nazi power, the court noted that "[t]his is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate. Indeed, the Painting was a "masterwork" of Picasso, not an obscure piece of art. Nor is this a case where the plaintiff alleges that the buyers themselves exerted any undue or improper pressure on the seller."[185]

178 *Id.*
179 *Id.*
180 *Id.*
181 Zuckerman Pet. Rehrg. En Banc, Case 18-634 Doc. 173 at 2 (July 10, 2019).
182 *Zuckerman v. The Metropolitan Museum of Art*, 928 F.3d at 193-195.
183 *Id.* at 193-194.
184 *Id.* at 194.
185 *Id.*

The court also held that The Met was prejudiced due to Zuckerman's delay, but pointed to no specific evidence of prejudice other than the delay was unreasonable since the painting had been in the museum's collection since 1952.[186]

Most surprisingly, the Second Circuit held that the Supreme Court precedents of *Petrella* and *SCA Hygiene* did not apply to the HEAR Act, because the text of the HEAR Act only prohibits defenses at law and "allowing defendants to assert a laches defense…comports with the legislative scheme advanced by the HEAR Act."[187] The court noted that "[u]nlike a mechanical application of a statute of limitations, a laches defense requires a careful analysis of the respective positions of the parties in search of a just and fair solution."[188] But, in its search for this "just and fair solution," the court focused solely on the plaintiff's delay in bringing her claim and overlooked evidence of the museum's unclean hands.[189] After being denied rehearing *en banc*, Zuckerman

[186] *Id.* at 190. The Met was gifted the painting so there were no expenditures for purchase, only costs for insurance and maintenance from 1952 to the present. It is possible the painting may have lost some value in 2010 when a visitor tripped and fell into it causing an almost six inch tear. The museum repaired the painting in-house. *See* https://www.nytimes.com/2010/04/21/arts/design/21picasso.html

[187] *Id.* at 196. The Second Circuit relied heavily upon Frankel and Sharoni's article in its analysis of HEAR, quoting their interpretation that Congress' removal of language precluding the laches defense from the final bill "may be presumed that the limitation was not intended." *Zuckerman*, 928 F.3d at 197 (internal citations omitted).

[188] *Id.*

[189] *Id. See generally* Zuckerman Pet. Rehrg. En Banc Case 18-634 Doc. 173 at 2 (July 10, 2019) (museum's published provenance showing Leffmann did not own the painting at the time of the sale in 1938 was "manifestly erroneous for 45 years" and was not corrected until Zuckerman made inquiries in 2011). It is important to note here that The Met had several former Monuments Men, including Capt. James Joseph Rorimer, on staff when the museum received the painting. At the time of Foy's gift in 1952, Capt. Rorimer was the Director of the Cloisters for the museum. He later became Director of The Met in 1955, a position he remained in until his death in 1966. As a former Monuments Man and an art historian, Capt. Rorimer certainly knew the importance of keeping

filed her petition for writ of certiorari to the United States Supreme Court on January 24, 2020.[190]

Less than two weeks after the Second Circuit's ruling in *Zuckerman*, New York's highest state court held that the laches defense did not bar the plaintiff's claims of replevin and conversion and affirmed the lower court's judgment in favor of the plaintiffs in *Reif v. Nagy.*[191] Timothy Reif and David Frankel, heirs of Jewish art collector and Holocaust victim Fritz Grunbaum,[192] filed a lawsuit alleging conversion and replevin in New York state court in 2016 against Richard Nagy and his gallery, seeking the return of two works by Egon Schiele stolen from Grunbaum by the Nazis in 1938.[193] The Nazis used a power of attorney signed by Grunbaum

accurate provenance records, possessed specialized knowledge and training in U.S. foreign policy regarding Nazi-looted art, and had first-hand experience returning Nazi-looted art to its rightful owners. *See* https://www.monumentsmenfoundation.org/rorimer-capt-james-j and https://www.metmuseum.org/blogs/now-at-the-met/2014/in-the-footsteps-of-the-monuments-men.

190 The questions presented in Zuckerman's petition for writ of certiorari are: "1. Whether the nonstatutory defense of laches may bar an action to recover artwork lost because of Nazi persecution, where that action has been brought within the statute of limitations prescribed by Congress in the Holocaust Expropriated Art Recovery Act of 2016? 2. Whether an action may be dismissed for laches at the Rule 12(b)(6) stage without discovery or exploration of factual disputes about the laches defense?" Zuckerman Pet. Cert. at i (January 24, 2020).

191 *Reif v. Nagy*, 175 A.D.3d 107, 109 (N.Y. App. Div. 2019).

192 Fritz Grunbaum was a Jewish cabaret star and well-known art collector who was arrested by the Nazis while attempting to escape Austria in the weeks following the *Anschluss*. He was imprisoned at the Buchenwald and Dachau concentration camps, where he was murdered in 1941. While Grunbaum was imprisoned, the Nazis inventoried the couple's property, appointed an Aryan trustee to oversee their assets (and to whom Elisabeth was required to pay a substantial fee), and evicted Elisabeth from her apartment. Elisabeth survived Fritz, but was murdered in a Nazi death camp in 1942. Elisabeth's sister, Mathilde Lukacses, escaped Austria with her husband and survived the war. *See Reif*, 175 A.D.3d at 109-112.

193 Reif and Frankel are the legal heirs of the claimants in *Bakalar v. Vavra*. An

while he was imprisoned at Dachau to force his wife Elisabeth to allow inventory of Grunbaum's prolific art collection which included 81 works by Schiele and other well-known artists such as Rodin, Rembrandt, and Degas.[194] The Nazis valued the collection to be worth 5791 Reichsmarks and seized it under the Reich's laws declaring Jewish assets to be property of the state.[195] When Nagy acquired the paintings in 2011 and 2013, he was aware that there were issues with the provenance of the works, including that the Grunbaum heirs made a claim to at least one of the paintings.[196]

Nagy and his gallery, through their experts, argued that Elisabeth's sister, Mathilde Lukacses, was the owner based on the provenance, most likely through an intervivos gift made by one of the Grunbaums.[197] The court rejected this argument as speculative given the evidence that the provenance was altered by a former gallery owner and the paintings never left Austria.[198] Finding prima facie evidence that the paintings were never in the possession of Mathilde, the court determined that the paintings belonged to the Grunbaums.[199] In response to the defendants' bold assertion that Grunbaum's power of attorney was voluntary, the court stated that "[w]e reject the notion that a person who signs a power of attorney in a death camp can be said to have executed the document voluntarily."[200] Thus, the court held that all subsequent transfers of

Austrian court declared in 2002 that Vavra (Fritz's heir) and Fischer (Elisabeth's heir) were the legal heirs to Grunbaum's estate. See *Reif*, 175 A.D.3d at 113-114. In that *Bakalar*, Vavra and Fischer sought return of another Schiele work in Grunbaum's collection, *Seated Woman with a Bent Leg*, but the Second Circuit affirmed the District Court's dismissal on the basis of laches. *See Bakalar v. Vavra*, 619 F.3d 136 (2d. Cir. 2010).

194 *Reif*, 175 A.D.3d at 110.

195 *Id.*

196 *Id.* at 118.

197 *Id.* at 129. One of the defense experts, Lillie, admitted there was no evidence of such a gift to Mathilde. *Id.* at 122, note 24.

198 *Id.*

199 *Id.* at 126-127.

200 *Id.* at 129 (internal citations omitted).

the artworks were invalid because Grunbaum had executed his power of attorney under duress.[201]

The court also rejected the defendants' laches defense, because there was no evidence of prejudice to the defendants.[202] Specifically, the court determined that there was "no change in position" since the defendants purchased the paintings in 2013; the defendants had notice of the Grunbaum heirs' claims before the paintings were purchased; the defendants purchased the paintings at a discount; and the defendants bought title insurance to protect against challenges.[203] Concluding its opinion, the court noted that the HEAR Act and New York's public policy to prevent art theft informed its findings.[204] The court was careful to note that it was not making "a declaration…that plaintiffs established the estate's absolute title," but that it was "adjudicating the parties' respective superior ownership and possessory interests. We find that plaintiffs have met their burden of proving superior title to the Artworks. Defendants raise no triable issue of fact."[205]

In sum, the Second Circuit found the HEAR Act did not apply in *Zuckerman* and affirmed dismissal based on evidence of laches, while the New York state court relied on the evidence of duress and the purpose of the HEAR Act to inform its findings and rejection of the defendants' laches defense. Thus, the New York state court decided *Reif* solely on the merits as the HEAR Act recommends, while the Second Circuit rejected the HEAR Act and dismissed *Zuckerman* due to a procedural defense with no consideration of the merits of Zuckerman's claim.

## III. CONSTITUTIONAL AUTHORITY

201 *Id.* at 129.
202 *Id.* at 130-131.
203 *Id.*
204 *Id.* at 131-132.
205 *Id.* at 132.

In *Von Saher I*, the Ninth Circuit held that California's statute extending the statute of limitations for claims of Holocaust-expropriated art was unconstitutional because it infringed upon the Federal Government's exclusive foreign affairs powers.[206] Congress passed the HEAR Act to remedy the effect of the ruling in *Von Saher*.[207] Although other scholarly articles have questioned the constitutionality of the HEAR Act,[208] Congress was vested with the constitutional authority to pass legislation in response to the ruling in *Von Saher I*. The U.S. Constitution clearly and unambiguously provides authority to both Congress and the Executive branch for the enactment of the HEAR Act, and United States Supreme Court precedent supports this authority.

### *A. Article I and Article II-Foreign Affairs and War Powers, the Commerce Clause, and the Necessary and Proper Clause*

Article I, Section 8, of the U.S. Constitution vests the Congress with multiple powers, including regulation of interstate and foreign commerce, war powers, and "to make any laws which shall be necessary and proper for carrying into Execution the foregoing powers…."[209] Article II vests in the Executive branch foreign affairs power to make treaties with foreign nations with the concurrence of the Senate, to appoint ambassadors to foreign

206 *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010).
207 *See* S. Rep. *supra* note 125.
208 *See* William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act*, 2018 Pepp. L. Rev. 19 (2018) (HEAR preempts state property laws on a purely procedural basis and therefore violates the Tenth Amendment of the U.S. Constitution and the principles of federalism); Jason Barnes, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, Colum. J. Transnational Law (2018) (HEAR act violates the Tenth Amendment of the U.S. Constitution); and Herbert L. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, 51 Int'l Law 195 (2018) (application of HEAR Act would be an unconstitutional taking under the Fifth Amendment of the U.S. Constitution in cases where state statute of limitations has expired before enactment of HEAR).
209 U.S. Constit. Art. I, § 8.

nations, and to receive foreign heads of state.[210] The Constitution explicitly states that "no State shall enter into any Treaty, Alliance, or Confederation [and] no State shall, without the Consent of Congress…enter into any agreement or Compact with another State, or with a foreign Power, or engage in War…."[211] Thus, Articles I and II vest in both the Congress and the Executive branch the exclusive authority over war and foreign affairs powers, and Article I also vests in Congress the power to regulate interstate and international commerce.

i. War and Foreign Affairs Powers

The war and foreign affairs powers are the most obvious Constitutional authority supporting the HEAR Act.[212] The Senate Judiciary Committee noted in its summary report on the HEAR Act that the "states have been unable to remedy this injustice [of Holocaust-expropriated art] because the regulation of war-related disputes is within the powers of the Federal Government."[213] To support this conclusion, the Senate Judiciary Committee referenced the Supreme Court's opinion in *American Insurance Association v. Garamendi* where the Court held that foreign policy is the exclusive purview of the federal government.[214] In *Garamendi*, the Supreme Court reversed the Ninth Circuit's ruling in favor of California, finding that the state's Holocaust Victims Insurance Relief Act "("HVIRA") was unconstitutional because it interfered with the Federal Government's foreign affairs powers, specifically the President's foreign policy powers.[215] Not surprisingly, the Ninth

210 U.S. Constit. Art. II, § 2 and 3.
211 U.S. Constit. Art. I, § 10.
212 *See* U.S. Constit. Art. I, § 8 and Art. II, § 2 and 3.
213 S. Rep. No. 114-394, at 5 (2016).
214 *See* S. Rep. No. 114-394, at 5-6, note 24 (2016) (citing *Amer. Insur. Assoc. v. Garamendi*, 539 U.S. 396, 421 (2003) ("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.").
215 *See generally Amer. Insur. Assoc. v. Garamendi*, 539 U.S. 396 (2003).

Circuit relied heavily upon *Garamendi* in support of its decision in *Von Saher*.[216]

But, *Garamendi* is not the only Supreme Court precedent that supports the Federal Government's foreign affairs and war powers. In 1942, Congress passed the Emergency Price Control Act which capped rents for housing in "defense rental" areas.[217] Landlords challenged the constitutionality of the Act on several grounds, including due process and delegation of power to the Administrator of Office of Price Administration, in the case of *Bowles v. Willingham*.[218] The Supreme Court held that while Congress' war powers were not unlimited,[219] Congress was well within its authority in this instance because it had "done all that due process under the war emergency requires."[220] The Court frequently referenced Congress' war powers throughout its opinion and made a particularly cogent statement:

We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort. A nation which can demand the lives of its men and women in the waging of that war *is under no constitutional necessity* of providing a system of price control on the domestic front which will assure each landlord a 'fair return' on his property.[221]

In the wake of the war, Congress passed the Housing and Rent Act in 1947 to control rising rents and prevent a housing shortage due to returning servicemen.[222] The constitutionality of

216 *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010).
217 Emergency Price Control Act of 1942, Pub. L. no. 77-421 (1942).
218 *Bowles v. Willingham*, 321 U.S. 503 (1944).
219 *Id. (citing Home Bldg. & Loan Association v. Blaisdell*, 290 U.S. 398, 426 (1934), ('even the war power does not remove constitutional limitations safeguarding essential liberties.')).
220 *Id.* at 521.
221 *Id.* at 519 (internal citations omitted) (emphasis added).
222 Housing and Rent Act of 1947, Pub. L. no. 31 (1947).

Congress' action was challenged yet again by a landlord in *Woods v. Cloyd-Miller*.[223] The Supreme Court held in *Woods* that Congress could use its war powers after a war had ended to remedy the effects of the war.[224] The legislative history of the Act revealed that Congress invoked its war powers to remedy a situation "of which the war was a direct and immediate cause."[225] The Court relied heavily on its precedent in *Hamilton v. Kentucky Distilleries,* where it previously held "that the war power includes the power to remedy the evils which have arisen from its rise and progress and continues for the duration of that emergency."[226] More importantly, the Court noted in *Woods* that "the war power does not necessarily end with the cessation of hostilities."[227] Finally, the Court was careful to point out that the line of war powers cases follows its precedent in *Stewart v. Kahn*, "which held that Congress had the power to toll the statute of limitations of the States during the period when the process of their courts was not available to litigants due to the conditions obtaining in the Civil War."[228]

The case of *Missouri v. Holland* involved a constitutional challenge to Congress' power to pass laws to effectuate treaties.[229] The Supreme Court held that the treaty power and the Necessary and Proper Clause conferred upon Congress the authority to pass legislation to effectuate a treaty between the United States and Great Britain to protect migratory birds.[230] According to the Court, Congress had this authority as long as the treaty was valid and did not infringe upon the Constitution.[231] Justice Holmes noted that "[n]o doubt the great body of private relations usually fall within the

223 *Woods v. Cloyd-Miller*, 333 U.S. 138 (1948).
224 *Id.*
225 *Id.* at 144.
226 *Id.* (*citing Hamilton v. KY,* 251 U.S. 146, 161 (1919)(internal quotations omitted)).
227 *Id.* at 141.
228 *Id.* at 142 (*citing Stewart v. Kahn,* 78 U.S. 493 (1870)).
229 *See Missouri v. Holland,* 252 U.S. 416 (1920).
230 *Id.*
231 *Id.*

control of the State, but a treaty may override its power."[232] The Court held that "a national interest of very nearly the first magnitude…can be protected only by a national action in concert with that of another power" and "it is not sufficient to rely upon the States," reasoning that there may not be any birds left to protect without Congressional action to uphold the treaty.[233]

Upholding the Roosevelt-Litivinov Agreement[234] as supreme over state law, the Supreme Court ruled in *U.S. v. Belmont* that the "external powers of the United States are to be exercised without regard to state laws or policies."[235] The Court held that this rule applies not only to treaties requiring concurrence of the Senate pursuant to Article II, Section 2, but to "all 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."[236] The case involved a property dispute over funds transferred to a U.S. bank from a Russian company prior to the Russian Revolution, which were assigned to the U.S. by the U.S.S.R. pursuant to the terms of the Roosevelt-Litivinov Agreement. Belmont's estate argued that New York state's property laws were supreme over the President's agreement with the U.S.S.R. because the agreement had not been ratified by the Senate and therefore was non-binding.[237] The Court concluded that because the Executive branch had constitutional authority to negotiate and enter

[232] *Id.* at 434. *See also Hopkirk v. Bell*, 3 Cranch 454 (Virginia statute of limitations on debt collection overridden by peace treaty with U.S. and Great Britain after Revolutionary War).
[233] *Missouri v. Holland*, 252 U.S. at 435.
[234] The Roosevelt-Litivinov Agreement established diplomatic relations with the Soviet Union, thereby formally recognizing the government of the U.S.S.R. *See* https://nsarchive2.gwu.edu/coldwar/documents/episode-1/fdr-ml.htm.
[235] *See U.S. v. Belmont*, 301 U.S. 324, 330 (1937).
[236] *Id.* at 331.
[237] *Id.*

into these agreements, the agreements were essentially binding treaties that did not require ratification.[238]

Thus, Congress has the constitutional authority to remedy the effects of war and to pass laws to effectuate U.S. treaties and agreements entered into by the Executive branch in support of U.S. foreign policy.

ii. The Commerce Clause

The Constitution also vests Congress with the power "to regulate Commerce with foreign nations, and among the several states…."[239] In *Wickard v. Filburn,* a farmer was penalized pursuant to the Agricultural Adjustment Act of 1938 for exceeding the wheat quota he was allotted under the Act.[240] The farmer argued that the extra wheat was strictly for his personal use only, so it was never in the stream of interstate commerce and thus not subject to regulation by Congress.[241] The Supreme Court disagreed, holding that Congress can regulate non-commercial intrastate activity, such as wheat grown for personal consumption, if, in the aggregate, it may have a substantial effect on interstate commerce as a whole.[242]

Over a half a century later, the Supreme Court was presented with a similar claim of home grown marijuana used for personal medicinal purposes in *Gonzales v. Raich*.[243] While California's state law allowed the petitioners to grow and use their own medicinal marijuana, marijuana possession was illegal under

238 *Id.* at 330 ("Government power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.").
239 U.S. Constit. Art. I, § 8.
240 *See Wickard v. Filburn,* 317 U.S. 111 (1942).
241 *Id.*
242 *Id.*
243 *See Gonzales v. Raich*, 545 U.S. 1 (2005).

Congress' Controlled Substances Act.[244] The Supreme Court reversed the Ninth Circuit's ruling that the petitioners' cultivation, use, and possession of medical marijuana did not substantially affect interstate commerce and therefore was beyond Congress' power to regulate under the Commerce Clause.[245] The Court relied heavily upon *Wickard*, noting the strong similarity between the cases and stating that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA."[246]

The Supreme Court interpreted Congress' Commerce Clause powers more narrowly in the cases of *U.S. v. Morrison* and *U.S. v. Lopez*.[247] In *Morrison*, the Court held that in order for Congress to regulate activity under its Commerce Clause power, the activity must be a preexisting activity that is both interstate and economic (i.e. commercial) in nature.[248] *Lopez* narrowed the power even further by clarifying that Congress must have a rational basis for any substantial effect it claims an activity or instrumentality may have on interstate commerce, and instrumentalities must be used for economic purposes in interstate commerce to fall within Congress' regulatory powers.[249]

Thus, Congress has the power to regulate any preexisting economic instrumentality or activity, including those that are illegal, that have a substantial effect on interstate commerce as long as Congress has a rational basis to support such regulation.

244 *Id.*
245 *Id.*
246 *Id.* at 33.
247 *See U.S. v. Morrison*, 529 U.S. 598 (2000) (holding the Violence Against Women Act was unconstitutional) and *U.S. v. Lopez*, 514 U.S. 549 (1995) (holding Gun-Free School Zones Act was unconstitutional).
248 *See U.S. v. Morrison*, 529 U.S. 598 (2000).
249 *See U.S. v. Lopez*, 514 U.S. 549 (1995).

iii. The Necessary and Proper Clause

The Necessary and Proper Clause states that Congress has the authority "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[250] Thus, the Necessary and Proper Clause allows Congress to pass laws for executing its own enumerated powers and the enumerated powers of another branch of Federal Government.

In *Woods,* discussed *supra*, the Supreme Court held that Congress was well within its constitutional authority to control rising rents because it had the power to remedy the effects of war under both the war powers and the Necessary and Proper clause.[251] The Court was careful to note that by limiting Congress' war powers strictly to wartime, the Necessary and Proper Clause "would be drastically limited in its application to the several war powers," and had previously declined such a narrow interpretation of the Necessary and Proper Clause.[252]

Therefore, Congress may pass not only laws that are necessary and proper for executing its own powers, but also to execute powers vested in the other branches of the U.S. Government. This would include laws supporting U.S. foreign policy determined by the Executive branch pursuant to its Constitutional authority.

*B. Article VI-The Supremacy Clause*

250 U.S. Constit. Article I, § 8.
251 *See Woods v. Cloyd-Miller, supra* note, at 143.
252 *Id.*

Pursuant to the Supremacy Clause, the U.S. Constitution and "the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land…."[253] In *Missouri v. Holland*, discussed *supra*, the Supreme Court held that a valid treaty between the United States and another sovereign nation was the "supreme law of the land" pursuant to the language of Article VI of the U.S. Constitution, and Congress was within its constitutional authority to pass a law to effectuate such a treaty.[254]

Federal preemption of state law derives from the Supremacy Clause, which makes federal law the "law of the land."[255] States cannot adopt laws that are contradictory to federal law. The Supreme Court has identified three types of preemption: express preemption, implied field preemption, and implied conflict preemption.[256] With express preemption, Congress expressly states that it has preempted state law. Implied conflict preemption occurs when a state law conflicts with federal law, making it impossible to comply with both laws, or a state law frustrates the objective of the federal law.[257] Implied field preemption occurs when Congress' regulation of a particular field is so comprehensive that there is no room for the state to regulate in the same field.[258] In *Rice v. Santa Fe Elevator Co.*, Justice Douglas stated that "[t]he scheme of the federal regulation may be so pervasive as to make reasonable the

253 U.S. Constit. Art. VI.
254 *See Missouri v. Holland, supra.*
255 U.S. Constit. Art. VI.
256 *See Von Saher, supra* note at 960.
257 *Id.* at 961. *See also Hines v. Davidowitz*, 312 U.S. 52 (1941) (test for conflict preemption is "whether the [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"); *Amer. Insur. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (conflict preemption occurs only when a federal law intrudes upon a traditional state responsibility); and *Florida Lime Growers and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963) (requiring "actual conflict between the two schemes of regulation that both cannot stand in the same area")
258 *Id.* at 963.

inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[259] The Court has held that "the test of preemption is whether the matter on which the state asserts the right to act is in any way regulated by the federal government."[260]

Congress also may preempt certain defenses when it codifies a statute of limitations. In *Petrella v. MGM*, the Supreme Court considered the issue of whether the doctrine of laches barred a copyright infringement claim that was filed within the three year statute of limitations under the copyright statute.[261] The dispute in *Petrella* centered on a copyright infringement claim for the screenplay of Martin Scorsese's film *Raging Bull*, and the defendant/respondent studio argued that plaintiff/petitioner's claim was barred by laches although her claim was filed timely within the three-year statute of limitations period set forth in the Copyright Act.[262] The Court found the studio's reliance on the doctrine of laches to bar the plaintiff's claim unpersuasive and held that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief."[263] In her opinion for the majority, Justice Ginsburg noted that "both before and after the merger of law and equity in 1938, this Court has cautioned against invoking laches to bar legal relief."[264] Focusing on the distinction between legal and equitable defenses[265] and the separation of powers, the Court

259 *Rice v. Santa Fe Elevator*, 331 U.S. 218, 230 (1947).
260 *Pac. Gas Elec. Co. v. State Energy Res. Conservation Dev. Comm'n.,* 461 U.S. 190 (1983) (*citing Rice v. Santa Fe Elevator*, 331 U.S. 218, 236 (1947) (internal citations omitted).
261 *Petrella v. MGM*, 572 U.S. 663, 667 (2014).
262 *Id.*
263 *Id.* at 679.
264 *Id.* at 678.
265 *Id.* at 681-682 ("Tolling, which lengthens the time for commencing a civil action in appropriate circumstances, applies when there is a statute of limitations; it is, in effect, a rule of interpretation tied to that limit. Laches, in

DePaul Journal of Art, Technology & Intellectual Property Law, Vol. 30, Iss. 1 [2020], Art. 1



determined that laches was a "gap-filling" measure used by the judiciary only when Congress had not designated a statute of limitations.[266] Both the majority and the dissent pointed out that the doctrine of laches applied only in "extraordinary" instances.[267] The Court cautioned that "[i]nviting individual judges to set a time limit other than the one Congress prescribed…would tug against the uniformity Congress sought to achieve when it enacted [the statute]."[268] Most importantly, the Court held that "courts are not at liberty to jettison Congress' judgment on the timeliness of suit."[269]

Shortly after the Supreme Court's holding in *Petrella,* the Federal Circuit Court of Appeals found that the defense of laches was codified in the patent statute at issue in *SCA Hygiene* and therefore applicable even though the claim had been filed within the prescribed statutory of limitations period.[270] The Supreme Court disagreed with the Federal Circuit's analysis in *SCA Hygiene*, finding no language that the laches defense was codified in the statute or applicable to the claim: "Even if we assume for the sake of argument that [the statute] incorporates a laches defense of *some dimension*, it does not necessarily follow that this defense may be invoked to bar a claim for damages incurred within the period set out in the [statute]."[271] The Court applied its holding in *Petrella* to *SCA Hygiene* and reiterated that "[t]he enactment of a statute of

contrast, originally served as a guide when no statute of limitations controlled the claim; it can scarcely be described as a rule for interpreting a statutory prescription.") (internal citations omitted).

[266] *Id*. at 680 ("We have never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period.")

[267] *Id.* at 667-8 ("As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff."). *Id.* at 688 (Breyer, J., dissenting) ("[Laches] applies in those extraordinary cases where the plaintiff 'unreasonably delays in filing a suit.'") (Internal citations omitted).

[268] *Id.* at 681.

[269] *Id.* at 667.

[270] *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.,* 137 S. Ct. 954, 963 (2017).

[271] *Id.*

limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted. Therefore applying laches within a limitations period specified by Congress would give judges a 'legislation-overriding role' that is beyond the Judiciary's power."[272] Given that the Court described its holding in *Petrella* as "broad,"[273] it appears these precedents will apply to any statute of limitations prescribed by Congress.[274]

Though federal law is supreme, there are limits to Congressional power, one of which is that it cannot conflict with the principles of federalism. Supreme Court precedent is clear that Congress cannot utilize its constitutional authority to commandeer, force, or coerce state governments to take action.[275] But, Congress does have the power to establish a uniform statute of limitations for a class of cases, especially if those cases are interfering with federal interests, including international affairs.

### *C. The Tenth Amendment*

[272] *Id.* at 960 (internal citations omitted).
[273] *Id.*
[274] The question of whether the Court's holdings in *Petrella* and *SCA Hygiene* apply to the HEAR Act is now before the Supreme Court for consideration on a petition for writ of certiorari filed by Lauren Zuckerman in *Zuckerman v. The Metropolitan Museum of Art*.
[275] *See, generally*, *New York v. U.S.*, 505 U.S. 144 (1992) (holding that Congress' Low-Level Radioactive Waste Management Act Amendments of 1985 punished states that did not comply and regulated a state's regulation of toxic waste, which amounted to commandeering); *Printz v. U.S.*, 521 U.S. 898 (1997) (holding that Congress cannot commandeer state executive branch officials to enforce a Federal law (the Brady Bill) by performing background checks on purchasers of firearms); and *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (holding the PASPA Act unconstitutional because it prohibited states from legalizing sports gambling, thereby commandeering them).

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[276] Traditionally, the regulation of property has been within the purview of the States and would fall under those powers not "prohibited" by the Constitution to the States.[277] As discussed *supra*, there are exceptions to this rule when it conflicts with the Federal Government's exclusive authority to remedy the effects of war, comply with international treaties and agreements, and regulate interstate and international commerce, or when a federal law expressly or impliedly preempts a state law.[278]

Since the war and foreign affairs powers are vested exclusively in the Federal Government pursuant to Articles I and II, the States are prohibited from engaging in the exercise of foreign affairs or war powers, which require federal control. Even though the States were independent sovereigns prior to ratification of the U.S. Constitution, the States relinquished their foreign affairs and war powers in order to become part of the union. Likewise, the States are prohibited from regulating interstate and international commerce because these activities require federal control to maintain the union.

## IV. THE CONSTITUTIONALITY OF THE HEAR ACT

The HEAR Act does not create any cause of action or claim; it merely extends the statute of limitations period to six years from

276 U.S. Constit. amend. X.
277 *See Von Saher*, 592 F.3d at 964.
278 *See generally Stewart v. Kahn*, 78 U.S. 493 (1870) (Congress had power to toll state statute of limitations due to Civil War); *Hopkirk v. Bell*, 3 Cranch 454 (Virginia statute of limitations on debt collection overridden by peace treaty with U.S. and Great Britain after Revolutionary War); and *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010) (Federal foreign policy regarding restitution for Holocaust victims of Nazi looted art preempts California statute of limitations).

the time of actual discovery.[279] Therefore, the key operative provision is Section 5(a), which outlines the uniform statute of limitations applicable to Holocaust expropriated art.[280] Because the provision arguably interferes with the States' rights to regulate property, this provision may be subject to a constitutional challenge.[281] Even if such a challenge makes it to the courts, the Act ultimately will be upheld as constitutional for the reasons outlined *infra*.

### *A. Congress has the authority to remedy the effects of World War II, including the restitution of Holocaust expropriated art to its rightful owners, decades after the war ended.*

There is no dispute that the Nazis' expropriation of art from Jews and other minorities who did not fit the Aryan ideal was a direct and immediate cause of World War II. The Nazis engaged in a systematic plan designed for the sole purpose of stripping Jews and other minorities of their property, identities, and, ultimately, their lives in order to fill the coffers of the economically depressed Nazi state and achieve its goal of Aryanization. The Nazis stole so much art during their reign of terror that their theft has been characterized as "the greatest displacement of art in human history."[282] And, much of that art is still displaced and separated from its rightful owners almost seventy-five years after the war

279 HEAR

280 HEAR

281 *See generally* William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act,* 2018 Pepp. L. Rev. 19 (2018) (HEAR Act preempts state property laws on a purely procedural basis and therefore violates the Tenth Amendment of the U.S. Constitution and the principles of federalism); and Jason Barnes, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims,* Colum. J. Transnational Law (2018) (HEAR act violates the Tenth Amendment of the U.S. Constitution).

282 S. Rep. No. 114-394, at 2 (2016) (quoting Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* 202 (NYU Press 2003)) (footnote omitted).

ended.[283] As discussed *supra*, the rightful owners face many obstacles in pursuing these claims, including the passage of time, the lack of documentation and information, and the existence of legal procedural bars.

The Constitution is clear that war powers are exclusive to the Federal Government, and Supreme Court precedent confirms that Congress has the authority to pass laws that are necessary and proper to facilitate its war powers, including laws to remedy the effects of war even after the war has ended. Because the Constitution expressly grants this authority to Congress and the Executive branch, it prohibits the States from exercising any war powers, including the power to remedy the effects of war. The Ninth Circuit held in *Von Saher I* that California did not have the authority to remedy the effects of the Holocaust, no matter how noble its intentions were, because that power is vested exclusively in the Federal government.[284] Therefore, the responsibility for remedying the effects of the Holocaust, including the restitution of Nazi-looted art, rests solely in the Federal Government.

If Congress had the constitutional power to toll a State's statute of limitations due to the effects of the Civil War, it surely has the power to extend a State's statute of limitations to remedy the horrific consequences of World War II.[285] And, according to *Woods*, it has the authority to remedy the evils of the Nazi regime, which were a direct and immediate cause of the war, decades after the war ended.[286] Congress has acted to remedy other effects of World War II by passing legislation to control rents in certain areas

[283] An estimated 100,000 to 300,000 Nazi-looted artworks are still missing. *See* https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html; and https://www.natlawreview.com/article/can-you-hear-me-now-holocaust-expropriated-art-recovery-hear-act.
[284] *See Von Saher, supra* note
[285] *See Stewart v. Kahn, supra* note
[286] *See Woods supra* note

during the war; to stabilize rents following the return of GIs *en masse* at the end of the war; and paying reparations to the Japanese internment camp survivors over forty years after the war ended.[287] Certainly, Congress can rely on the same war powers to create a nationwide uniform statute of limitations which provides Holocaust victims with additional time in which to bring claims of Holocaust expropriated art.

Even though it does not create a claim or cause of action, the HEAR Act attempts to remedy the effects of the Nazi regime's thievery by creating a uniform window of opportunity for victims to pursue their claims on the merits.[288] The HEAR Act deals with a very unique and disturbing circumstance resulting directly from the machinations and manipulation of the Nazi regime during World War II: the systematic expropriation of art, which sadly has continued to the present day due to governments, museums, collectors, and others who are willing to ignore the facts and look the other way when dealing with this art.

A nation which sacrificed many lives of its citizens in a war to defeat one of the most horrific genocidal and criminal regimes in the history of the world "*is under no constitutional necessity*" to ensure that states' statutes of limitations continue to provide unlawful owners of stolen property with the opportunity to utilize procedural defenses under the guise of equity and states' rights.[289] Both the States and the unlawful owners in these cases are well aware of the basic property premise that one cannot get title from a

[287] *See* Emergency Price Control Act of 1942, Pub. L. no. 77-421 (1942) (Congressional authorization of rent control in designated areas during World War II); Housing and Rent Act of 1947 (Congressional authorization of rent control and preferential treatment in housing sales for returning WWII GIs); and Civil Liberties Act of 1988, Pub. L. no. 100-383 (1988) (Congressional authorization of reparations to World War II Japanese internment camp victims).

[288] *See* HEAR

[289] *See Bowles*, *supra*, note 218.

thief. And, their constitutional rights are in no way violated by the creation of a uniform statute of limitations for these claims.

### *B. Congress has the power to pass legislation to effectuate treaties and agreements in furtherance of U.S. policy as determined by the Executive branch.*

The Constitution also vests the power of foreign affairs exclusively in the Executive and Legislative branches. The Executive branch dictates foreign policy through the State Department, and the Senate, by a two-thirds concurrence, approves any treaties the Executive branch may negotiate. Congress has the power through the Necessary and Proper Clause to pass laws to effectuate valid agreements and treaties negotiated by the Executive branch and approved by the Senate.

In 1998, Congress passed (and the President signed) the Holocaust Victims Redress Act ("HVRA") to ensure that the U.S. was fulfilling its obligation for restitution of assets to Holocaust victims pursuant to the Paris Agreement for Reparations of 1946 and the 1907 Hague Convention, both binding and valid treaties entered into by the United States.[290] With this legislation, Congress expressed its sense that all governments should make a good faith effort to return Nazi-looted art to its rightful owners.[291] While the legislative history and text do not reveal its constitutional authority, the treaty powers and the Necessary and Proper Clause are the obvious constitutional authority supporting Congress' passage of the HVRA.[292]

Later that same year, Congress passed (and the President signed) the U.S. Holocaust Assets Commission Act of 1998, which created the Presidential Advisory Commission on Holocaust Assets

290 *See* HVRA *supra* note
291 *Id.*
292 *Id.*

in the United States.[293] Congress authorized this commission to perform specific duties related to the collection and disposition of Holocaust victims' assets, one of which was "to coordinate its activities with private and governmental entities (including the international Washington Conference on Holocaust-era Assets)."[294] Even though the Washington Conference was not a treaty, Congress still had constitutional authority to pass this legislation as a necessary and proper means to execute the power of foreign affairs vested in the Executive branch's State Department, which agreed to the principles set forth in the Washington Conference.[295] The Supreme Court's holdings in *Missouri v. Holland* and *U.S. v. Belmont*, both discussed *supra*, support Congressional action to effectuate valid treaties and agreements in furtherance of U.S. foreign policy.[296]

The legislative history of the HEAR Act does not explicitly state that Congress relied upon its foreign affairs powers in the passage of the Act. However, it is obvious from the findings described therein that Congress relied heavily upon the Federal Government's foreign affairs powers in its passage of the Act.[297] Even though the Washington Conference Principles and the Terezin Declaration are agreements, they were agreed to by the State Department and should be recognized as supreme even though they do not require ratification in accordance with Article 2, Section 2. These agreements were entered into pursuant to the foreign powers authority vested in the Executive branch and do not require concurrence of the Senate to be the supreme law of the land.[298]

293 *See* US Holocaust Assets Commission Act, Pub. L. no. 105-186, 105th Cong. (1998).
294 *See* https://www.congress.gov/bill/105th-congress/senate-bill/1900.
295 *See U.S. v. Belmont, supra* note
296 *See Missouri v. Holland and U.S. v. Belmont, supra* notes
297 S. Rep. No. 114-394, at 5 (2016) ("Yet states have been unable to remedy this injustice because the regulation of war-related disputes is within the powers of the Federal Government.") (footnote omitted).
298 *See U.S. v. Belmont supra*

In the case of Holocaust expropriated art, it would be unconstitutional and insufficient to rely upon the States to deal with an issue of this magnitude involving foreign policy.[299] Most States will not see these claims in their courts, but those States that do should not have to waste time and resources, as California did, revising their statutes if the Federal Government can remedy the situation using its foreign affairs powers.[300] The HEAR Act remedies this problem by creating a uniform statute of limitations, thereby eliminating the choice of law problem that often occurs in these claims. In doing so, the HEAR Act aligns current U.S. foreign policy with the principles it agreed to in the Washington Conference and the Terezin Declaration, assuring that Holocaust expropriated art claims will be adjudicated on the merits only.[301]

### *C. Nazi-looted art is a commodity in both interstate and international commerce, and therefore is subject to regulation by Congress pursuant to its Commerce Clause powers.*

Holocaust-expropriated art, like wheat and marijuana, is a commodity traded in both interstate and international commerce; thus it is subject to federal regulation pursuant to the Constitution.[302] Similar to the market for marijuana, there is also a black market for art.[303] Holocaust expropriated art is sometimes in the stream of

299 *See U.S. v. Belmont, supra*

300 Subsequent to the ruling in *Von Saher*, California revised its statute to include all claims for stolen art work, not just Holocaust-expropriated art. The statute was later upheld as constitutional. *See* S. Rep. No. 114-394, at 5, note 26 (2016).

301 The HEAR Act also dovetails with previous executive policy dating back to World War II, including the Monuments Men, Military Government Law 59, the London Declaration, FBI seizures in the 1950s, and government seizures increasing in frequency since *Portrait of Wally* was seized.

302 U.S. Constit., Art. II, § 8.

303 *See Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding, *inter alia*, that Congress has the power to regulate commerce in both legal and illegal markets); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 958 (9th Cir. 2010) ("Tracking the provenance of Nazi-looted art is nearly impossible, since many

commerce at the time a claim is made by a Holocaust victim or her heir, but oftentimes it is in the possession of private collectors, museums, and the like. Whether artwork is on the auction block or held in a collection, it is still a commodity in interstate and international commerce, and often of tremendous financial value.

If the Nazi-looted art at issue in these cases is kept out of the stream of commerce, demand and prices increase astronomically as each year passes.[304] As a result, unlawful owners may gain an inflated sense of entitlement to the art due to its increased monetary and cultural value stemming from the natural ebb and flow of supply and demand. In turn, unlawful owners may be increasingly unwilling to return the art to its rightful owner, particularly if its value has skyrocketed over the years. Rightful owners of Holocaust expropriated art are often prevented from discovering and recovering their property, which is why the Federal Government enacted the HEAR Act to comply with federal foreign policy on the restitution of Holocaust expropriated art.[305] Therefore, Congress has the authority under the Commerce Clause to regulate Nazi-looted art through the HEAR Act, even if such art is not produced for sale and is utilized merely for personal reasons because, if taken in the aggregate, such art has a substantial effect on both the legal and illegal interstate art market and the international art market.

changes of ownership went undocumented, and most of the transactions took place on the black market.") (internal citation omitted); and *Guggenheim v. Lubbell*, 77 N.Y.2d. 311, 314, 320 (N.Y. 1991) (illicit market for stolen art is "an industry all its own" and placing burden on true owner to locate stolen art encourages illicit trade).

304 *See also* Soffia H. Kuehner Gray, *The Holocaust Expropriated Art Recovery Act of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, U. Ill. Rev. 363, 380 (2019).

305 *See also* Soffia H. Kuehner Gray, *The Holocaust Expropriated Art Recovery Act of 2016: An Ineffective Remedy for Returning Nazi-Looted Art*, U. Ill. Rev. 363, 379-382 (2019).

### *D. The Federal Government has the power to preempt state statute of limitations laws due to the unique and horrific circumstances of World War II and the Holocaust.*

Pursuant to the Supremacy Clause, the Federal Government has the authority to preempt state statute of limitations laws due to the unique and horrific circumstances of World War II in an effort to make the process for pursuing claims of Holocaust expropriated art more just. In *Von Saher I*, the Ninth Circuit conducted a field preemption analysis on California's statute extending the statute of limitations for Holocaust expropriated art claims and determined that the statute was an unconstitutional assumption of the Federal Government's foreign affairs powers to remedy the effects of World War II.[306] The Ninth Circuit held that restitution of Nazi-looted art was within the exclusive purview of the Federal Government under its foreign affairs powers, and there was no room for the state of California to regulate in this area.[307] Presumably taking no issue with the Ninth Circuit's ruling, the Supreme Court denied Von Saher's petition for certiorari in June of 2011.[308]

306 *See Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010).

307 *Id.*

308 *Von Saher v. Norton Simon Museum of Art*, 564 U.S. 1037 (2011). Shortly after the Ninth Circuit's ruling, California amended its statute to extend its statute of limitations on stolen art from three to six years and to require actual discovery of the artwork and its location before the statute began to run. *See Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712, 718-719 (9th Cir. 2014). After the statute was amended, von Saher filed a first amended complaint, which was dismissed by the District Court upon the Museum's motion to dismiss. *Id.* at 719. The District Court agreed with the Museum's argument that Von Saher's "specific claims and the remedies she sought…conflicted with the United States' express federal policy on recovered art." *Id.* On appeal, the Ninth Circuit held that Von Saher's claims "[did] not conflict with any federal policy because the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands, as noted in the complaint, the district court's order and the opinion of the Court of Appeals of The Hague." *Id.* at 721. The Museum's petition for certiorari was denied by the Supreme Court in January 2015. When the District Court granted the Museum's motion for summary judgment, Von Saher appealed to the Ninth

Under a field preemption analysis, the HEAR Act is constitutional because the Federal Government has impliedly regulated the area of Holocaust expropriated art through its constitutional foreign affairs and war powers, leaving no room for the States to take action. Leaving the issue to the States to resolve has resulted in many cases being unjustly decided on purely procedural defenses instead of on the merits of the claims. Thus, the HEAR Act preempts the states' regulation of property in this very narrow field of Holocaust expropriated art in order to remedy this unfortunate result and allow the courts to hear these claims on the merits.[309]

Circuit for a third time. *See Von Saher v. Norton Simon Museum of Art*, 897 F.3d 1141 (9th Cir. 2018). The Ninth Circuit affirmed the District Court's grant of summary judgment, finding that the act of state doctrine applied but no exceptions to the act of state doctrine applied. *Id.* The Supreme Court denied von Saher's second petition for certiorari in 2018.

The Ninth Circuit is known for being the most overturned U.S. Court of Appeals by the United States Supreme Court. Given this fact along with the makeup of the Court, there was a high likelihood that the Supreme Court would have accepted Von Saher's petitions had they thought the Ninth Circuit's analysis was wrong either in 2011 or 2018. Of note, the Supreme Court accepted a petition for certiorari on the issue of state sovereignty submitted in the same term as Von Saher's second petition for certiorari (the third petition for certiorari in the case). *See generally Franchise Tax Board v. Hyatt*, 587 U.S. ___ (2019) (holding that a state cannot be sued in another state's courts). It seems likely the Court would have accepted Von Saher's first petition in 2011 if the Justices thought the Ninth Circuit's opinion was incorrect because Von Saher's first petition focused on the issues of states' rights and federal preemption.

309 This is exactly what Justice Handler suggested in his dissent in *O'Keeffe*: "The better approach, I would suggest, is one that enables the parties to get to the merits of the controversy. It would recognize an artist's or owner's right to assert a claim against a newly-revealed receiver or possessor of stolen art as well as the correlative right of such a possessor to assert all equitable and legal defenses. This would enable the parties to concentrate directly upon entitlement to the artwork rather than entitlement to bring a lawsuit. By dealing with the merits of the claims instead of the right to sue, such an approach would be more conducive to reconciling the demands for individual justice with societal needs to discourage art thievery. In addition, such a rule would comport more closely

DePaul Journal of Art, Technology & Intellectual Property Law, Vol. 30, Iss. 1 [2020], Art. 1



The outcome would be the same under a conflict preemption analysis. Any state statutes that provide a claimant of Holocaust expropriated art with a statute of limitations that is less than six years from the date of actual discovery would be in direct conflict with the HEAR Act. This would include any state statutes that apply constructive and imputed knowledge to the heirs of Holocaust victims, which does not comport with the actual knowledge requirement of the HEAR Act. These types of statutes would directly conflict with the second purpose of the HEAR Act, which is "to ensure that claims are not unfairly barred by statutes of limitations and are resolved in a just and fair manner" and would frustrate Congress' objective in effectuating U.S. foreign policy.[310] Thus, the HEAR Act would preempt these types of state statutes because they frustrate the objectives of Congress in its enactment of the HEAR Act. Alternatively, in most cases, it would be impossible to comply with both the state and federal statute. A shorter state statute of limitation would bar the claim, although it may not be time-barred under the HEAR Act. And a state that allows for constructive and imputed knowledge would conflict with the HEAR Act's definitions of actual discovery and knowledge. Thus, the HEAR Act would preempt a state statute under these scenarios as well.

Another form of preemption may occur when Congress has prescribed a statute of limitations, thereby barring the use of equitable defenses like laches. According to the Supreme Court's holdings in *Petrella* and *SCA Hygiene*, a laches defense is preempted when Congress prescribes a statute of limitations because a court cannot override the legislative authority of Congress, and

with traditional common law values emphasizing the paramountcy of the rights of a true owner of chattels as against others whose possession is derived from theft. Simultaneously, it would acknowledge that the claims of the true owner as against subsequent converters may in appropriate circumstances be counterbalanced by equitable considerations." *O'Keeffe v. Snyder,* 83 N.J. 478, 508 (N.J. 1980) (Handler, J. dissenting).

310 HEAR Act

equitable defenses are not applicable in the context of a statutorily defined statute of limitations.[311] Like the copyright and patent statutes at issue in those cases, the HEAR Act codifies a prescribed statute of limitations for Holocaust expropriated art claims and is silent on whether equitable defenses such as laches may be used to bar claims brought under the statute of limitations.[312] Despite the issue of Congressional intent in removing the bar on the laches defense in the HEAR Act, *SCA Hygiene* confirms that laches still is not an available defense even if the statute contains express or implied language allowing its use.[313] Under the precedents of *Petrella* and *SCA Hygiene*, the HEAR Act may preempt the use of the laches doctrine in defense of Holocaust expropriated art claims.[314]

When federal and state courts uphold the use of the laches doctrine in claims filed under the HEAR Act, they are overriding Congressional authority expressly prohibited by *Petrella*.[315] Such

311 *See Petrella, supra* note; *See SCA Hygiene, supra* note

312 As discussed in Section II, an early version of the Senate bill specifically precluded equitable defenses and laches, but this language was removed by the Senate in an amendment with no explanation as to why it was removed. *See* S. Rep. No. 114-394, at 7 (2016). Herbert Lazerow interprets the language of the HEAR Act to mean that equitable defenses, including laches, are still available because the statute only mentions "defenses at law." Herbert L. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016,* 51 Int'l Law 195 (2018). Frankel and Sharoni, however, rely upon statutory construction principles and argue that if language is removed from the bill, then it "may be presumed that the limitation was not intended." Frankel & Sharoni, *Navigating the HEAR Act of 2016,* 42 Colum. J.L. & Arts 157 (2019). The Second Circuit relied heavily upon Frankel and Sharoni's article in its opinion affirming that the laches defense applied in *Zuckerman v. The Metropolitan Museum of Art*. *See Zuckerman*, 928 F.3d 186 (2d. Cir. 2019). Justice Breyer noted in his dissent in *Petrella* that "silence [in a statute] is consistent, not inconsistent, with the application of equitable doctrines." *Petrella* at 694.

313 *See SCA Hygiene, supra* note

314 *Petrella* and *SCA Hygiene* involved copyright and patent statutes which are under the jurisdiction of the federal courts, unlike the state statute of limitations that are preempted by the HEAR Act.

315 *See Petrella, supra* note

judicial override defeats the intent of Congress to create a uniform statute of limitations for these claims and to align U.S. law with its existing foreign policy on Holocaust expropriated art.[316] Further, allowing individual judges to determine whether laches applies in these cases has resulted in the uneven application of the HEAR Act. As the cases of *Reif* and *Zuckerman* clearly demonstrate, the case by case determination of whether laches applies results in divergent outcomes—some claimants' cases are heard on the merits while others are dismissed before the merits are reached. In fact, the Second Circuit recognized that divergent outcomes would occur when it affirmed the laches defense in *Zuckerman*: "[W]hile the laches defense succeeds here, in other cases it will fail and not impede recovery for claims brought pursuant to the HEAR Act."[317] Allowing judges to dismiss these cases due to laches heavily disadvantages the claimants by depriving them of the opportunity to have their claims heard on the merits, which is the overarching purpose of the HEAR Act.[318] If state and federal courts continue to dismiss these claims based on laches, then the HEAR Act is, for the most part, nullified by judicial override. As Justice Ginsberg indicated in *Petrella*, plaintiffs must "sue now or forever hold your peace" when laches are allowed in the face of a Congressionally designated statute of a limitations.[319] Congress was trying to avoid this very scenario when it enacted the HEAR Act because claimants were losing their right to sue due to discrepancies in statute of limitations and the discovery rule among the states.[320] Thus, the

316 *See Petrella, supra* note at 680-681.

317 *Zuckerman v. The Metropolitan Museum of Art*, 928 F.3d 186, 197 (2d Cir. 2019).

318 HEAR

319 *See Petrella, supra* note at 682.

320 "The HEAR Act thus serves two purposes: first, to ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration; and, second, to ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." S. Rep. No. 114-394, at 6 (2016).

only way to avoid the separation of powers problem inherent in the judicial override of the HEAR Act and to fulfill the intent of Congress to align U.S. law with its long-standing foreign policy and to ensure these claims are heard on the merits is preemption of the laches defense by the statute of limitations set forth in the HEAR Act.[321]

Congress, pursuant to its constitutionally enumerated powers, has impliedly occupied the entire field of Holocaust expropriated art by creating a uniform statute of limitations and strictly defining actual discovery, thereby leaving no room for the States to regulate in this very narrow and specific area. Additionally, most state statutes of limitations, with the exception of New York, would directly conflict with and frustrate the objectives of Congress in its enactment of the HEAR Act. Further, certain equitable defenses may be preempted when Congress prescribes a statute of limitations, as it has in the HEAR Act. Therefore, the HEAR Act must preempt any state statute of limitations and the use of the laches defense.

Finally, Congress has not commandeered the States in the HEAR Act. There is no language in the statute that directs the States to take any action.[322] In fact, the language of the operative provision Section 5 (a) is permissive.[323] The only mandatory language used in the statute pertains to "possible misidentification" under Section 5(b) and the limitations of the Act outlined in subsections (c) through (f).[324] There is no evidence that Congress has attempted to

[321] The preemption issue will be decided by the Supreme Court if it accepts Zuckerman's petition for writ of certiorari in *Zuckerman v. The Metropolitan Museum of Art*. *See* note , *supra.*

[322] *See* HEAR Act.

[323] *See Id.* ("[A] civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution *may be commenced* not later than 6 years….") (emphasis added).

[324] *See Id.*

commandeer the States or their courts by extending the statute of limitations for these very unique and limited claims. And, there is no evidence that the States have objected to the uniform statute of limitations and definition of actual discovery set forth in the HEAR Act.

Nor does the HEAR Act command state courts to hear cases they otherwise would not, i.e. claims of title by adverse possession.[325] Because all states except New Jersey[326] follow the common law discussed *supra*, there was no need for Congress to pass a new federal conversion statute to cover such claims. Simply put, one cannot get title from a thief.[327] Therefore, no state courts

[325] Herbert Lazerow posits that if a current possessor has acquired a Holocaust expropriated artwork by adverse possession upon expiration of a state statute prior to the enactment of HEAR, then the HEAR Act violates the Takings clause of the Fifth Amendment of the U.S. Constitution by extending the state statute of limitations to allow the rightful owner to take action against the adverse possessor. Herbert L. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016,* 51 Int'l Law 195 (2018) at 28. But, the law is clear that one cannot get legal title from a thief even through adverse possession. *See Bakalar v. Vavra,* 619 F.3d 136 (2d. Cir. 2010). Only in New Jersey may a thief or subsequent good-faith purchaser acquire legal title to stolen artwork through adverse possession upon expiration of the statute of limitations. *See O'Keeffe v. Snyder,* 83 N.J. 478 (N.J. 1980). While Lazerow's theory is beyond the scope of this article, Justice Handler identified the inherent problem with granting legal title by adverse possession in his dissent in *O'Keeffe*: "[T]he majority's view, derived from an affidavit, that stability of possession and title is as important in the world of art as it is in the field of commercial sales and, indeed, is so important that it requires a rule that will, more often than not, settle title to stolen art in the hands of an ultimate possessor whether he or she be truly innocent, simply lucky, just plain cunning, or actually larcenous….No persuasive reasons are advanced for the view that this notion of "stability," which would serve in many cases actually to legitimatize art theft, is more important than is the return of stolen unique, artistic creations to their creator or true owner when this is justified by equitable considerations." *Id.* at 512. (Handler, J. dissenting) (internal citations omitted).

[326] *See O'Keeffe v. Snyder*, 83 N.J. 478 (N.J. 1980).

[327] *Bakalar v. Vavra*, 619 F.3d 136, 149 (2d. Cir. 2010) (Korman, J., concurring) ("Under American law and the law of many foreign states there is only one scenario in which a good faith purchaser's claim of title is immediately

other than those in New Jersey would have considered claims to title by adverse possession upon expiration of the statute of limitations prior to, or after, the HEAR Act.

### *E. The Constitution expressly prohibits the States from engaging in foreign affairs.*

The Tenth Amendment expressly prohibits the States from engaging in matters of foreign affairs because those powers are vested exclusively in the Federal Government pursuant to Articles I and II of the Constitution.[328] Foreign policy is a function that was rescinded from the States and vested fully in the Federal Government when the States joined the union upon ratification of the Constitution.[329] As Congress expressed in its findings, the HEAR Act is intended to effectuate U.S. foreign policy with regard to the principles and goals of the Washington Conference and the Terezin Declaration to ensure that Holocaust expropriated art claims are adjudicated on the merits only.[330] By creating a uniform statute of limitations that preempts the States' statute of limitations, Congress is ensuring that all adjudications of these very special claims align with the goals of U.S. foreign policy in restitution of Holocaust expropriated art.

In sum, Congress and the Executive Branch were acting well within the authority of their constitutionally enumerated powers in the enactment of the HEAR Act.

recognized over that of the original owner. This scenario arises when the owner voluntarily parts with possession by the creation of a bailment, the bailee converts the chattel, and the nature of the bailment allows a reasonable buyer to conclude that the bailee is empowered to pass the owner's title.").

328 *See* U.S. Constit., *supra* note

329 *See* U.S. Const. art. I, IV, and VI and U.S. Const. amend. X and XI.

330 S. Rep. No. 114-394, at 6 (2016).

## V. CONCLUSION

The HEAR Act is constitutional and does not violate the principles of federalism. States do not have the authority to remedy the effects of war, enter into treaties or agreements with foreign nations, or regulate interstate and international commerce. While property regulation is traditionally within the purview of the States, there is a wide variance of time periods and knowledge requirements in the state statutes of limitations, making it difficult for the United States to comply with the Washington Conference and the Terezin Declaration that Holocaust expropriated art claims be adjudicated on the merits. By creating a federal uniform statute of limitations for Holocaust-expropriated art claims and defining actual discovery and knowledge, the HEAR Act empowers both state and federal courts to hear these claims on the merits and not dismiss them on procedural defenses. It returns the focus to a more just imperative where the lost heritage of those who were persecuted by the Nazi regime may be restored. The HEAR Act provides Holocaust victims and their heirs with a more expansive window of opportunity to have their stories heard in American courts, instead of rejected under the guise of equity and procedural defenses that unfairly operate in favor of the unlawful owners.