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A Portrait of Justice Deferred: Retroactive Application of the FSIA and Its Implications for Holocaust Era Art Restitution. Republic of Austria v. Altmann, 124 S. CT. 2240(2004)

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A PORTRAIT OF JUSTICE DEFERRED: RETROACTIVE APPLICATION OF THE FSIA AND ITS IMPLICATIONS FOR HOLOCAUST ERA ART RESTITUTION. *REPUBLIC OF AUSTRIA V. ALTMANN*, 124 S. CT. 2240 (2004).

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I. INTRODUCTION

More than half a century since the fall of the Third Reich, the legacy of suffering and loss wrought by the Holocaust continues to plague its victims. Although the lives and families shattered by Nazi aggression can never be regained, family treasures and heirlooms — those repositories of memory, love, and peace — are all that remain for many of the surviving victims to recover. Their absence is a constant and painful reminder of the violence and hate that ended six million lives and tragically changed millions more. Works of art, Nazi war loot, comprise a large portion of these objects of restitution. In such cases, the Diaspora implicates doctrines of international law in many Holocaust era claims. Thus, perhaps most problematic are the ways in which individuals and the diplomatic and legal efforts of their nations confront the process of restitution. Works now in state collections, many of which are considered part of a national cultural heritage, form the basis for some of the most contentious cases. One such example involves litigation arising from the restitution attempts of a Viennese Jew, Maria Altmann, who fled the city with her family during the Nazi annexation of Austria (*Anschluss*).[1] Today, as an American citizen and the sole surviving heir of her family, Altmann seeks the return of six paintings by Gustav Klimt which she claims were expropriated in 1938 by the Nazis from her family's collection in violation of international law.[2] The works, valued at over $150 million, are currently in the possession of the Österreichische Galerie Belvedere (Vienna), an instrumentality of the

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[1] *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004).

[2] *Id*. at 2245.

Austrian state.[3]

On June 7, 2004, the Supreme Court held that Maria Altmann could sue the Republic of Austria for restitution under the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "the Act").[4] The Act is a codification of the "restrictive theory of sovereign immunity" asserted in *The Tate Letter* providing limitations to the traditional doctrine of absolute foreign sovereign immunity.[5] The Act establishes that "a foreign state shall be immune from the jurisdiction of the courts of the United States," unless a suit is brought under one of the exceptions enumerated in the Act.[6] While there are cases holding the Act does not apply retroactively to claims arising prior to the Tate Letter,[7] the Act has been applied to claims arising subsequent to the Tate Letter, but prior to FSIA enactment.[8] Thus, the Court's holding in *Republic of Austria v. Altmann*, sets the precedent that the Act applies to claims arising prior to 1952 and the introduction of the restrictive theory of sovereign immunity.[9]

In *Altmann*, the Supreme Court affirmed the Ninth Circuit Court of Appeals decision,[10] but on different grounds.[11] At first glance, the narrow holding appears to further a just cause for Maria Altmann and those with similar claims; however, this note seeks to show that the reasoning behind the opinion is flawed and confuses the issue of retroactive application of the FSIA. In this context, the note asserts the holding's implications for foreign relations between the United States and foreign sovereigns are both uncertain and daunting, making the decision ultimately detrimental to claims of restitution of Nazi war loot (arising prior to enactment of the FSIA). The Court's opinion fails to take into full account the link between the presumption against retroactivity and the theory of foreign sovereign immunity. A likely consequence of the Court's holding is that the restitution of expropriated works may now be farther away than ever before.

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[3] Hugh Eakin, *Unfinished Business*, Vol. 103, No. 7 ARTnews 152 (Summer, 2004).
[4] *Altmann*, 124 S. Ct. at 2240.
[5] "[T]he immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." Ltr. from Jack B. Tate, U.S. Dep of State Acting Leg. Advisor, to Acting Atty. Gen. Philip B. Perlman (May 19, 1952) [hereinafter *The Tate Letter*], reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976).
[6] 28 U.S.C. § 1604 (2000).
[7] *See Carl Marks & Co., v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986); *Slade v. U.S. of Mexico*, 617 F. Supp. 351 (D.D.C. 1985).
[8] *See Natl. City Bank of N.Y. v. Republic of China*, 348 U.S. 356 (1955); *Schmidt v. Polish People's Republic*, 579 F. Supp. 23 (S.D.N.Y. 1984), *aff'd*, 742 F.2d 67 (2d Cir. 1984); *Yessenin-Volpin v. Novosti Press Agency*, 433 F. Supp. 849 (S.D.N.Y. 1978).
[9] 124 S. Ct. 2240.
[10] *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002) [hereinafter *Altmann II*], *amended by, rehrg. denied, rehrg. en banc denied by Altmann v. Republic of Austria*, 327 F.3d 1246 (9th Cir. 2003) [hereinafter *Altmann III*].
[11] *Altmann*, 124 S. Ct. at 2247.

Following an overview of the facts in *Altmann*, this Note will provide background to the doctrine of Foreign Sovereign Immunity and the FSIA. The subsequent analysis of the Court's opinion will show that concluding the FSIA applies retroactively is an erroneous holding inconsistent with pertinent judicial history and in contradiction to the relevant scheme of statutory interpretation and the Act's purpose. Subsequently, a brief account of the role of international treaties in Holocaust era claims for reparations will show application of the Act is not an appropriate solution to the problem in *Altmann*. The Note's conclusion asserts that the holding damages actions for restitution involving foreign sovereigns and proposes an alternative approach to the exercise of jurisdiction as a means to restitution.

II. BACKGROUND

This background section begins with an account of the facts concerning Maria Altmann's claim for restitution followed by an outline of the evolution of foreign sovereign immunity in the United States. The development of the doctrine progresses from its beginnings in early American jurisprudence to the emergence of the restrictive theory of foreign sovereign immunity, enactment of the FSIA, and the courts' retroactive application of the Act.

A. *The Facts of* Republic of Austria v. Altmann

Maria V. Altmann is an American citizen who fled Vienna in 1938 during the *Anschluss*.[12] Altmann immigrated to California in 1942 and became a citizen of the United States in 1945.[13] She is the niece and sole heir of the Czech sugar magnate, Ferdinand Bloch who also fled Vienna with his family during the *Anschluss*.[14] Earlier, at the turn of the century, Bloch had commissioned Gustav Klimt[15] to paint his wife, Adele Bloch-Bauer, and he owned a number of other works by the famous Art Nouveau artist.[16] His wife's will, drafted prior to the *Anschluss*, requested that her husband donate the works by Klimt (now valued at over $150 million)[17] to the Austrian National Gallery.[18] The Nazis took possession of Bloch's estate when he fled the country during the war.[19] When Bloch died in

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[12] *Altmann*, 124 S. Ct. at 2243.
[13] *Id.*
[14] *Id.*
[15] Gustav Klimt (1862-1918) was the most important Austrian Art Nouveau (*Jugendstil*) painter and founder of the Vienna Sezession (1898). Linda Murray & Peter Murray, *Dictionary of Art and Artists* 220 (7th ed., Penguin Books 1991).
[16] *Altmann*, 124 S. Ct. at 2243. Bloch-Bauer's wife mentioned six Klimt paintings in her will: 1) Adele Bloch-Bauer I, 2) Adele Bloch-Bauer II, 3) Apple Tree I, 4) Beechwood, 5) Houses in Unterach am Attersee, and 6) Schloss Kammer am Attersee III (not at issue in *Altmann* because of Ferdinand Bloch-Bauer's prior gift of the painting to the Österreichische Galerie Belvedere (Vienna)). *Id*.
[17] *See* Eakin, *supra* n. 3.
[18] *Altmann*, 124 S. Ct. at 2243-44.
[19] *Id*. at 2244.

Switzerland in 1945, he bequeathed title of the paintings to his heirs, including Maria Altman.[20] Dr. Erich Führer, the Nazi lawyer who helped "aryanize" Bloch's company and liquidate his estate, kept a number of paintings.[21] Claiming he was fulfilling the terms of Adele Bloch-Bauer's will, Führer donated two works to the Austrian National Museum.[22] Subsequently, donation of the other works also followed, except one which remained in the lawyer's private collection.[23]

After the war, the Second Republic of Austria declared transactions motivated by the Nazi party to be void.[24] A series of negotiations between the family and the City of Vienna, the Austrian Monument Agency, and the Austrian National Gallery followed over the course of the next half century, none of which resulted in the return of the works to their rightful heir(s).[25] Attempts at return were revived after the decision in *United States v. Portrait of Wally, A Painting by Egon Schiele*, where the Southern District Court of New York upheld a subpoena allowing seizure of two works on loan from the Austrian National Gallery at the Museum of Modern Art in New York.[26] In 1998, the same year the *Portrait of Wally* controversy surfaced, an Austrian journalist found that "at all relevant times Gallery officials knew that neither Adele nor Ferdinand, had in fact donated the six Klimts to the Gallery."[27]

Maria Altmann filed a claim in the Central District Court of California for the return of the six Klimt paintings in the possession of the Österreichische Galerie Belvedere (Vienna) claiming they had been expropriated from her family by Nazis in violation of international law.[28] The Republic of Austria moved to dismiss and the motion was denied.[29] The district court held that the FSIA applied retroactively and that the Act's expropriation exception applied to Altmann's claims.[30] Austria appealed and the Ninth Circuit Court of Appeals affirmed and remanded the district court's decision.[31] A petition for rehearing was filed and denied by the

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[20] *Id.*
[21] *Id.* The paintings were expropriated prior to 1941. *Id.*
[22] *Id.* The two paintings, Adele Bloch-Bauer I and Apple Tree I, were traded for another Klimt painting, Schloss Kammer am Attersee III. *Id.* at 2244 n. 2.
[23] *Id.* at 2244.
[24] *Id.* "This did not result in the immediate return of looted artwork to exiled Austrians, however, because a different provision of Austrian law proscribed export of 'artworks . . . deemed to be important to [the country's] cultural heritage.'" *Id.*
[25] *Id.* at 2244-45.
[26] 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002). The paintings were eventually returned to Austria when the New York Court of Appeals reversed the district court's decision pursuant to New York's anti-seizure law protecting artwork from non-resident lenders from seizure. *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 719 N.E.2d 897 (N.Y. 1999).
[27] *Altmann*, 124 S. Ct. at 2245.
[28] *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2000) [hereinafter *Altman I*].
[29] *Id.* at 1192.
[30] *Id.*
[31] *Altmann II*, 317 F.3d 954.

Court of Appeals;[32] subsequently certiorari was granted.[33] On June 7, 2004, in a 6-3 decision, the Supreme Court held the FSIA applies to conduct occurring prior to its enactment and prior to the United States' adoption of the restrictive theory of sovereign immunity.[34]

B. *The Evolution of Foreign Sovereign Immunity Doctrine*

An established principal of international law,[35] foreign sovereign immunity has been applied by the United States as early as 1781 when the Admiralty Court of Pennsylvania precluded exercise of jurisdiction over a French warship.[36] For over a century, the practice of foreign sovereign immunity issued a grant of absolute protection to foreign sovereigns and their agents from the jurisdictional reach of U.S. courts.[37] Emerging complexities in foreign relations during the twentieth century resulted in a gradual shift away from this grant of total immunity,[38] to a more restrictive one ultimately codified in the FSIA of 1976.[39]

The classic theory of absolute sovereign immunity was first articulated by Chief Justice Marshall in *Schooner Exchange v. McFadden*.[40] Marshall defined the principle of sovereign immunity as one in which nations exempted each other from the jurisdiction of their national courts and where the

> [f]ull and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another . .

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[32] *Altmann III*, 327 F.3d 1246.
[33] *Republic of Austria v. Altmann*, 540 U.S. 987 (2003).
[34] *Altmann*, 124 S. Ct. at 2254.
[35] "The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law." *Restatement (Third) of Foreign Relations Law of the United States: Introductory Note to Part IV(5)(A)* (1987).
[36] *Moitez v. The South Carolina*, Bee 422, 17 F. Cas. 574, No. 9,697 (Admiralty Court of Pa., 1781) (holding that "mariners enlisting on board a ship of war, or vessel belonging to a sovereign independent state, cannot libel against a ship for wages due"). *See generally e.g. U.S. v. Peters*, 3 U.S. 121 (1795) (holding that a neutral ship captured by a French warship and held in a French port as a prize of war was immune from suit).
[37] Absolute immunity was adopted as a matter of policy despite the Constitutional provision allowing jurisdictional exercise over foreign sovereigns: "The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and *foreign States*, Citizens or Subjects." U.S. Const. art. III, § 2 (emphasis added).
[38] "Public opinion as to the peculiar rights and preferences due to the sovereign has changed." *Davis v. Pringle*, 268 U.S. 315, 318 (1925).
[39] *Altmann*, 124 S. Ct. at 2249.
[40] 11 U.S. 116, 146 (1812) (holding that a French warship sheltering in the Port of Philadelphia, though allegedly an American merchant vessel seized on the high seas, was "to be considered as exempted by the consent of that power from its jurisdiction").

..[41]

This notion of sovereign immunity was founded on the need for comity between nations,[42] the protection of the United States from foreign suits,[43] and the difficulty experienced by U.S. courts attempting to enforce judgments upon foreign sovereigns.[44]

Chief Justice Marshall decided *Schooner Exchange* according to prevailing customs of international law (sovereign immunity)[45] and jurisdictional grounds (the relaxation of territorial jurisdiction).[46] Although granting absolute immunity, Justice Marshall qualified the theory stating that a sovereign enjoys the privilege "in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."[47] Moreover, Marshall's opinion introduced the notion of deferment to the executive branch of the federal government for "the suggestion of the attorney for the United States,"[48] an issue that complicates application of sovereign immunity to this day. Thus, sovereign immunity represents an implied license rather than a right. The notion of license informs subsequent changes in foreign sovereign immunity doctrine through the consideration of private and public conduct as influencing the exercise of jurisdiction.[49]

As a result of the growing number of disputes between commercial enterprises and foreign sovereigns, the early twentieth century saw a shift in judicial policy towards the application of a "restrictive theory" of sovereign immunity.[50] In *Berizzi Brothers v. The Pesaro*, the Supreme Court recognized that immunity is "applicable alike to all ships held and used by a

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[41] *Id.*
[42] *Id.* at 136 (stating that "[t]he world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers").
[43] *Id.* at 146.
[44] *Id.*
[45] *Id.* at 136.
[46] *Id.* at 146.
[47] *Id.* at 137.
[48] *Id.* at 147.
[49] The distinction between the public and private acts of a foreign sovereign appears as early as 1822 when the Supreme Court held immunity may be withheld "[i]f . . . he comes *personally* within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation." *The Santissima Trinidad and the St. An De*, 20 U.S. 283, 353 (1822) (emphasis added).
[50] *See e.g. U.S. v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929) (holding that a French agency operating mines in Europe and marketing their product in America was not immune from suit because of their commercial activity and liability in French courts as a business entity despite being an agent of the French government).

government for a public purpose."[51] The distinction between the "public purpose . . . of advancing the trade of its people, or providing revenue for its treasury"[52] and "private" conduct of a foreign sovereign became increasingly influential in the application of the immunity principle.[53]

1. The Restrictive Theory of Foreign Sovereign Immunity and the Tate Letter

The limited application of immunity to agents of a foreign sovereign engaged in commercial activity (private purpose), articulated by the District Court in *Pesaro I*, involves factors of ownership, possession, and use of the ship to determine the nature of its activity and its immunity status.[54] The State Department's communiqué to Justice Mack in *Pesaro I*, that such vessels "should not be regarded as entitled to the immunities accorded public vessels of war,"[55] represents a policy shift toward a restrictive theory of foreign sovereign immunity. From 1926 to 1938, absolute immunity was applied by the Supreme Court without deference to the State Department;[56] however, during World War II, suggestions from the executive branch again began to inform application of the doctrine.[57]

The formal adoption of the restrictive theory is expressed in a recommendation by Jack B. Tate, Acting Legal Advisor to Acting Attorney General Philip B. Perlman ("Tate Letter"), dated May 19, 1952.[58] A trend toward the restrictive theory among a number of nations[59] and sovereign participation in commercial activities forms the basis for a policy asserting "immunity should no longer be granted in certain types of cases" (exceptions for private or commercial conduct).[60] Although the Tate Letter sets forth a definite policy supported by a clear rationale, judicial application of the restrictive theory after 1952 is confused and marked by

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[51] 271 U.S. 562, 574 (1926) [hereinafter *Pesaro III*] (holding that immunity applied to a merchant vessel owned and operated by the Italian government).
[52] *Id.*
[53] *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (holding that a government owned vessel from Mexico was subject to the jurisdiction of U.S. courts because it was operated by a private company). "Since the vessel here, although owned by the Mexican Government, was not in its possession and service, we have no occasion to consider the questions presented in the *Berizzi* case. It is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it." *Id.* at 36 n. 1.
[54] *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921) [hereinafter *Pesaro I*].
[55] *Id.* at 480 n. 3.
[56] Michael D. Murray, *Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation*, 7 N.Y.U. J. Legis. & Pub. Policy 223, 242 (2004).
[57] As to application of the doctrine it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Hoffman*, 324 U.S. at 35. *See e.g. Ex Parte Republic of Peru*, 318 U.S. 578, 588-90 (1943).
[58] Ltr. *supra* n. 5.
[59] These nations consist of Austria, Belgium, Egypt, France, Greece, Netherlands, Peru, Romania, Switzerland. 425 U.S. at 712.
[60] *Id.* at 711. *See also* Ltr. *supra* n. 5.

inconsistency.[61] When the State Department was silent on an issue of immunity, courts relied upon the standard set in the Tate Letter.[62] Foreign relations and diplomatic pressure resulted in the State Department's continued influence upon determinations of immunity in the courts.[63] Thus, the aim of the Tate Letter, to change the practice of Government "granting immunity from suit to foreign governments made parties defendant in the courts of the United States," remained unresolved.[64]

A number of procedural problems persisted despite the adoption of the Tate Letter and the restrictive theory of sovereign immunity. Courts continued to struggle with the problem of distinguishing between private and public acts, often resorting to ad hoc tests for their determinations.[65] The problem of securing *in personam* jurisdiction[66] meant that actions against foreign governments relied on *in rem* and *quasi in rem* proceedings by attachment of the sovereign's property within U.S. territory. Finally, in cases where immunity was withheld and the exercise in jurisdiction resulted in a verdict for the American plaintiff, execution of the judgment remained improbable.[67]

2. The Foreign Sovereign Immunity Act of 1976

In response to difficulties courts encountered implementing the restrictive theory of the Tate Letter, Congress passed the FSIA[68] in an effort to clarify application of the doctrine. The FSIA was intended to assure "litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process."[69] The legislative history shows its statutory purpose was also meant to relieve the burden of diplomatic

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[61] *Altmann*, 124 U.S. at 2248.
[62] *See generally e.g. Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359-62 (2d Cir. 1964); *Heany v. Spain*, 445 F.2d 501, 503 (2d Cir. 1971); *Rovin Sales Co. v. Romania*, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975).
[63] *See e.g. Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974) (finding immunity for a vessel following State Department suggestion).
[64] Ltr. *supra* n. 5.
[65] *Heany*, 445 F.2d at 504 (considering the "nature test" where conduct previously considered within the scope of government activity such as purchase of bullets for the military, to be a sovereign not a commercial act). In *Victory Transp., Inc.*, the court created another test based on five categories deduced from the Tate Letter that would bestow immunity upon a sovereign: 1) internal administrative acts; 2) legislative acts; 3) acts concerning the armed forces; 4) acts concerning diplomatic activity; 5) public loans. 336 F.2d at 359-60.
[66] "[B]efore the Foreign Sovereign Immunities Act the federal courts were reluctant to apply the doctrine of the 'Tate Letter' to permit the attachment of a foreign country's assets." Charles Alan Wright & Arthur R. Miller, 4B Fed. Prac. & Proc. Civ.3d § 1111 (West 2004). Thus, the "Tate Letter [had] no effect on the customary rule that the property of a foreign sovereign is free from attachment." *Id.* (citing *N.Y. & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684 (D.C.N.Y. 1955)).
[67] *Weilamann v. Chase Manhattan Bank*, 192 N.Y.S.2d 469, 472 (N.Y. App. Div. 1959) (following the State Department's suggestion that a foreign government's property "be immune from execution or other action analogous to execution").
[68] 28 U.S.C. § 1602 et. seq. (2000). The FSIA became effective on January 19, 1977, 90 days after being passed from a bill into law, which was done on October 21, 1976. *Id.*
[69] H.R. Rept. 94-1487 at 7 (Sept. 9, 1976).

pressure from determining whether the State Department should grant or deny immunity for every arising case.[70] The Act's main provisions establish actions against foreign states,[71] immunity of a foreign state,[72] exceptions to jurisdictional immunity of a foreign state,[73] foreign state liability,[74] a procedure for effecting service upon a foreign state,[75] and exceptions to the immunity from attachment or execution.[76]

In addition to providing the basis for *in personam* jurisdiction, the FSIA establishes exclusive statutory authority to determine foreign sovereign immunity.[77] As a codification of the restrictive theory of foreign sovereign immunity, the Act provides the following three exceptions to immunity: 1) waiver of immunity by a foreign state; 2) actions arising out of a foreign sovereign's commercial activity; and 3) expropriation of property in violation of international law.[78] "If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject-matter jurisdiction under § 1330(a);" otherwise, federal and state courts lack jurisdiction over the foreign state.[79]

3. Retroactive Application of the FSIA

Although courts have held the FSIA applies to claims arising after 1952 and the Tate Letter's directive on the restrictive theory of immunity,[80] there has been considerable confusion as to whether the Act applies to claims arising prior to 1952. The Supreme Court's holding in *Altmann* establishes that the FSIA and the expropriation exception apply to claims

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[70] *Id.* at 32 (leaving the courts to decide questions of immunity because "of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").
[71] 28 U.S.C. § 1330 (2000). Title 28, section 1330(a) provides for "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state."
[72] *Id.* at § 1604.
[73] *Id.* at § 1605.
[74] *Id.* at § 1606.
[75] *Id.* at § 1608.
[76] *Id.* at § 1610.
[77] *Id.* at § 1602. "The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Id.*
[78] *Id.* at § 1605. A "foreign state shall not be immune . . . in any case . . . (3) [1] in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [2] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.* at 1603(d).
[79] *Verlinden B.V. v. C. Bank of Nigeria*, 461 U.S. 480, 489 (1983).
[80] *See Natl. City Bank of N.Y.*, 348 U.S. 356; *Schmidt*, 579 F. Supp. at 23; *Yessenin-Volpin*, 443 F. Supp. at 849. *See also supra* n. 8.

arising prior to 1952.[81] This decision overturns precedent asserting the Act does not apply retroactively to claims arising prior to the Tate Letter.[82] However, it extends the practice of applying the FSIA to claims arising subsequent to the Tate Letter, but prior to the Act's enactment. In *Princz v. Federal Republic of Germany*, the court addressed the issue of FSIA retroactive application to claims arising prior to 1952 and asserted, in dicta, that the Act applies.[83] The court held that no exception in the FSIA applied to Princz's claim for reparations against the German government. Thus, the issue of retroactive application remained outside the scope of the decision.[84]

The *Princz* court suggested that, to overcome the presumption against statutory retroactivity, Congressional intent was established by the language "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States . . . ."[85] Along with the passage of the FSIA, Congress also removed provisions for suits against foreign governments from other statutes.[86] In this context, "the implication is strong that all questions of foreign sovereign immunity, including those that involve an act . . . before 1976, are to be decided under the FSIA."[87]

The *Princz* court followed the analysis of retroactive statutory application in *Landgraf v. USI Film Products*, which established a two-prong test to determine whether a statute applied retroactively.[88] In *Landgraf*, to overcome the presumption against retroactivity, Congress must express clear intent that the statute applies to events prior to its enactment.[89] Without such intent, the court resorts to a default rule in deciding whether the statute has "retroactive effect, *i.e.*, whether it would impair [the] rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[90] Thus, if a statute is "substantive," retroactive application is improper. If it is "procedural," then its application would not result in any retroactive effect. Soon after, the Court applied the *Landgraf* test to a case involving a statute creating jurisdiction where none previously existed, holding that "[s]uch a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against

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[81] 124 S. Ct. at 2240.
[82] *E.g. Carl Marks & Co.*, 841 F.2d at 26; *Jackson*, 794 F.2d at 1490; *Slade*, 617 F. Supp. at 351. *See also supra* n. 7.
[83] 26 F.3d 1166, 1171 (D.C. Cir. 1994). Hugo Princz, the sole member of his family to survive Nazi concentration camps was liberated by American soldiers while working at a chemical plant. Princz was denied reparations because he was Slovak and had neither a German citizenship nor refugee status.
[84] *Id.*
[85] 28 U.S.C. § 1602 (emphasis added).
[86] *Princz*, 26 F.3d at 1170.
[87] *Id.*
[88] 511 U.S. 244, 280 (1994).
[89] "[T]he court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.*
[90] *Id.* (emphasis added).

retroactivity as any other."[91] In *Princz*, the court noted that application of the FSIA "to the pre-1952 events here in suit may not even count as a 'genuinely "retroactive" effect,'"[92] but did not find that it applied to events occurring prior to 1952.

III. ANALYSIS

This section begins with the assertion that under the *Landgraf* rule, retroactive application of the FSIA would create an impermissible retroactive effect. This assertion is supported by analysis showing the Court's conclusion that *Landgraf* is inapplicable, is erroneous, and that there is no legislative intent for retroactive application. The following examination of cases concerning retroactive FSIA application before and after *Landgraf* shows that it is the proper standard for determinations of statutory retroactivity. This section then argues that the Court's application of the FSIA in *Altmann* produces a retroactive effect because it creates a forum where none existed before, and it upsets a foreign sovereign's expectations. The analysis ends with a brief discussion of International treaties, government initiatives, and Holocaust era expropriation claims and their implications for the decision in *Altmann*.

A. *Under the* Landgraf *Rule, Retroactive Application of the FSIA to Claims Arising Prior to 1952 Results in an Impermissible "Retroactive Effect"*

The Court's rationale for holding that the FSIA expropriation exception could be applied retroactively to the claim in *Altmann* contradicts established canons of statutory interpretation and judicial precedent. This analysis of the Court's opinion will show that the *Landgraf* rule is the established and appropriate standard interpreting statutory retroactivity. Under *Landgraf*, there is no clear legislative intent showing the FSIA applies retroactively. Analysis of inconsistent decisions on the issue of FSIA retroactive application will establish that the issue can only be resolved under the *Landgraf* rule. The next section argues that, under *Landgraf*, FSIA application in *Altmann* will result in an impermissible retroactive effect. This result occurs because the FSIA can create a forum where none exists and application of the Act in this case is unfair as it disturbs the sovereign's settled expectations. The final section asserts that, given the implications of international treaties and government initiatives concerning Holocaust era restitution claims, exercising the FSIA is not the appropriate method to resolve the issue in *Altmann*.

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[91] *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 951 (1997).
[92] 26 F.3d at 1170.

1. The Court's Reasoning that the *Landgraf* Default Rule does not Apply is Erroneous

In an opinion rife with inconsistency, the Court's interpretation of the *Landgraf* analysis concludes that its articulation of the rule supporting a presumption against retroactive application is inapplicable to the FSIA.[93] The Court's rationale is based upon its characterization of the FSIA as a *sui generis* statute that cannot be categorized according to the *Landgraf* default rule.[94] Having summarily done away with any existing interpretive guidelines with which to analyze the issue of retroactivity, the Court looks to the structure and purpose of the FSIA to support its holding. This exercise in statutory interpretation begins by seizing upon the first prong of the *Landgraf* rule:[95] that "retroactive effect" is to be determined in the absence of legislative intent.[96] Indeed, the subsequent rationale supporting the retroactive application of the Act is entirely founded upon the Court's analysis of the statutory language and its search for legislative intent.[97] This section will show that with regard to the FSIA, there is no clear legislative intent supporting retroactivity and that the *Landgraf* rule is the proper standard to determine retroactivity in this case.

a. There is No Clear Legislative Intent Showing the FSIA Applies Retroactively

Following established canons of statutory interpretation, the Supreme Court has established that "retroactivity is not favored in the law" and that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[98] Although the *Altmann* Court cedes that there is no legislative "express command"[99] showing the Act was meant to apply retroactively,[100] it nevertheless constructs its own finding of intent by implication. In its interpretation of the Act as a kind of statutory palimpsest, the Court looks to the language of the preamble and the "overall structure" of the Act as grounds justifying retroactive application.[101]

The Court focuses on the word "henceforth" in the preamble of the Act asserting that while the section is not an "express command" of

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[93] *Altmann*, 124 S.Ct. at 2251.
[94] *Id.* at 2252.
[95] *Id.*
[96] *Landgraf*, 511 U.S. at 280. *See supra* pt. II(B)(3) (discussing retroactive application of the FSIA).
[97] *Altmann*, 124 S. Ct. at 2252-54.
[98] *Landgraf*, 511 U.S. at 264 (quoting *Bowen v. Georgetown U. Hosp.*, 488 U.S. 204, 208 (1988)). Justice Scalia states that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265. "It is a principle of the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect." *Id.* at 266 n. 17.
[99] *Id.* at 280.
[100] *Altmann*, 124 S. Ct. at 2252.
[101] *Id.* at 2253.

retroactivity, the "language is unambiguous."[102] The preamble of the FSIA states:

> Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this [statute].[103]

In this context, the preamble directive means only that the Act's codification of the restrictive theory of immunity will replace prior practice concerning sovereign immunity (marked by Executive intervention). The language in the preamble is unambiguous in that it refers to a new practice of judicial and statutory determination of sovereign immunity. There is no reference to retroactivity, but the preamble simply establishes the new function and purpose of the Act.

In *Landgraf*, the Court considered whether § 102 of the Civil Rights Act of 1991 allowing monetary relief for some forms of workplace discrimination be applied to cases pending during its enactment.[104] Applying its default rule to determine retroactive effect, the Court held that § 102 did not apply to pending cases in the absence of congressional intent.[105] The Court considered the legislative history of the bill, including an earlier version's language explicitly asserting retroactive application that was vetoed by the President, in part, because of its "unfair retroactivity rules."[106] The congressional record concerning the discussion surrounding the 1991 Act cites qualifications from several senators that the Act not be applied retroactively. The Court in *Altmann* makes no mention of any language, apart from its reliance on the word "henceforth" in the preamble (which it admits does not express intent), or of any

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[102] *Id.*
[103] 28 U.S.C. § 1602 (emphasis added).
[104] 511 U.S. at 254 (holding that § 102 expands upon the remedies available in the Civil Rights Act of 1964 (Title VII)).
[105] *Id.* at 286.
[106] *Id.* at 255-56.

indication that Congress intended the Act to apply retroactively. As this Court has unequivocally stated in *Landgraf*, the clear statement standard for retroactive application of statutes cannot be met absent any express command in the statutory language or in the legislative history.[107]

Failing the clear statement standard, the Court substitutes its own constructional method of *finding* intent by turning to the "overall structure" of the Act.[108] Intent resides in the application of certain provisions which the Court cites as having been applied to claims arising out of conduct prior to its enactment.[109] In *Dole Food Co. v. Patrickson*, the Court held that a private corporation could not assert sovereign immunity (pursuant to the FSIA) in a claim arising from conduct when the entity was owned by a foreign sovereign.[110] In *Altmann*, the Court suggests the *Dole* holding, that status of a foreign instrumentality is determined at the time of filing suit and not when the conduct occurred, is representative of the Act's retroactive application.[111] The *Dole* holding is not concerned with the retroactive application of the statute; rather, it defines status as a basis for jurisdiction in the statute. As such, the presumption against retroactivity still applies and would not be abandoned simply because determination of jurisdiction involved the status of an entity.

The *Altmann* Court also presents a case involving a dispute over a contract whose formation predates the FSIA as evidence supporting retroactive application of the Act's provisions.[112] In *Verlinden*, decided over a decade before *Landgraf* and its rule on the retroactive application of statutes, there was no discussion of retroactivity with regard to the FSIA's application concerning suit over the contract. The *Verlinden* Court considered a constitutional challenge to the foreign plaintiff's right to bring suit under the FSIA but did not hold on whether the facts of the case (turning on the contract) fell within the FSIA's scope of exceptions allowing suit. The issue concerned a party's status and foreign sovereign immunity as involving "application of substantive federal law . . . within the meaning of Art. III."[113] As such, the Court's holding addressed a question of common-law interpretation stating "on remand, the Court of Appeals

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[107] *Id.* at 254. "[A] court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules." *Id.* at 244.
[108] *Altmann*, 124 S. Ct. at 2253.
[109] *Id.*
[110] 538 U.S. 468, 480 (2003).
[111] *Altmann*, 124 S. Ct. at 2253.
[112] *Verlinden*, 461 U.S. at 482, 498 (holding a claim by a foreign plaintiff under the FSIA in U.S. district court is not a violation of Article III of the Constitution).
[113] *Id.* at 497.

must consider whether jurisdiction exists under the Act itself."[114]

Neither *Dole* nor *Verlinden* are comparable to the determination of FSIA retroactivity in *Altmann*. The Court's silence on the issue in *Verlinden* is not implicit acquiescence in support of retroactive application. In *Dole*, retroactive application is not at issue. Instead, the status of the parties is resolved so their suit may be considered within the scope of the FSIA. The Court's finding of implicit intent in the "overall structure"[115] of the Act is an admitted deviation from the standard determination of intent articulated under the *Landgraf* rule. The Court's justification for its own substitution of statutory interpretation is less argued than it is simply asserted in its statement that the FSIA exists *sui generis*. In this, the Court contradicts its own reasoning by positing two anomalous holdings that do not directly address retroactive application of the FSIA, while ignoring a majority of appellate court holdings that deny it. After the *Landgraf* decision, most district and appellate courts directly confronting the issue of FSIA retroactivity to events before 1952[116] rely upon the *Landgraf* analysis. In this context, the FSIA is hardly unique or incompatible with analysis under the *Landgraf* rule.

b. Inconsistent Decisions on the Issue of FSIA Retroactive Application Before and After *Landgraf*

As mentioned earlier, some courts have held the FSIA applies to acts prior to its enactment regarding claims based on conduct after the Tate Letter and the adoption of the restrictive theory of foreign sovereign immunity.[117] Courts remain divided on this question, and this inconsistency is further complicated by the dates of their decisions with respect to the *Landgraf* holding. Prior to *Landgraf*, several district courts held that the FSIA applies retroactively while others deny such application to events occurring before 1952.[118] Thus, with regard to the Act, "two degrees of retroactivity are at issue . . . that the FSIA can apply to claims arising before its effective date, so long as those claims did not arise before the publication of the Tate Latter in 1952."[119] After *Landgraf*, although inconsistencies in the determination of retroactive application and the use of *Landgraf* remain, the default rule is the critical standard.

Prior to *Landgraf*, the Second Circuit upheld a district court decision and its rationale denying retroactive application of the FSIA to

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[114] *Id*. at 498.
[115] *Altmann*, 124 S. Ct. at 2253.
[116] Ltr., *supra* n. 5.
[117] *See supra* pt. II(B)(3) (discussing retroactive Application of the FSIA).
[118] *See supra* n. 7.
[119] *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F.Supp. 323, 347 (S.D.N.Y. 1987) [hereinafter *Carl Marks I*].

events occurring before 1952.[120] In its reasoning, the Southern District Court of New York mentioned three cases concerning the FSIA and its application to events occurring before 1952.[121] In *Schmidt*, which allowed a claim against Poland for default on notes it issued prior to 1952, the court did not address the issue of retroactivity.[122] In *Von Dardel*, the court allowed a claim concerning the seizure, detention, and possible murder of the famous Swedish diplomat Raoul Wallenberg by Soviet occupation forces in 1945 Hungary.[123] FSIA application in *Von Dardel* turned on Wallenberg's status as alive or dead, and the *Carl Marks I* court stated:

> [Because of this fact,] under applicable statutes of limitation their [Plaintiffs'] claims have not yet accrued. Thus, whatever the circumstances, the *Von Dardel* plaintiffs have viable post-1952–indeed, post-1977–claims, so that *Von Dardel* does not involve retrospective application of the FSIA.[124]

In *Asociacian de Reclamantes*, the court allowed FSIA application to land claims arising at the end of the Mexican-American War in 1848.[125] The *Carl Marks I* court noted that suit for compensation in *Reclamantes* represented a post-1952 claim because "Mexico had consistently acknowledged its obligation to pay plaintiffs' claims" even after the suit had been filed in 1981.[126] Thus, the facts in the three aforementioned cases all involved foreign sovereign continuing obligations that arose before 1952, but were ongoing and unresolved after 1952. In this context, FSIA retroactive application was not a dispositive issue in these cases.

After *Landgraf*, some courts have followed the dicta in *Princz*, asserting the Act applies to events prior to 1952.[127] In *Creighton Ltd. v. Government of Qatar*, the court held the arbitration provision in the FSIA, part of a 1988 amendment to the Act, applied retroactively to events predating the amendment.[128] In *Haven v. Republic of Poland*, the court found the FSIA applied retroactively to a claim arising out of the seizure and "nationalization" of Plaintiff's property by Poland at the end of World

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[120] *Carl Marks & Co.*, 841 F.2d at 27. "In sum, we agree with the District Court that the FSIA does not apply to confer jurisdiction over the instant actions for substantially the reasons set forth in Chief Judge Brieant's comprehensive and well-reasoned opinion." *Id.* at 27-28.
[121] *Carl Marks I*, 665 F. Supp. at 348 (distinguishing *Schmidt*, 579 F. Supp. 23; *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985), and *Asociacian de Reclamantes v. United Mexican States*, 561 F. Supp. 1190 (D.D.C. 1983), *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984)).
[122] 579 F. Supp. 23.
[123] 623 F. Supp. 246.
[124] *Carl Marks I*, 665 F. Supp. at 349.
[125] 561 F. Supp. 1190.
[126] *Carl Marks I*, 665 F. Supp. at 349.
[127] 28 U.S.C. § 1602; *Princz*, 26 F.3d at 1170.
[128] 181 F.3d 118, 124 (D.C. Cir. 1999) (holding that if one provision applied retroactively then, by implication, the entire Act applied retroactively).

War II.[129] Although the courts in both cases found the Act applied retroactively, neither decision applied the *Landgraf* test properly, basing their decisions instead on the jurisdiction-allocating language in *Landgraf*. The court in *Haven* relied on the reasoning in *Princz* because it articulated a post-*Landgraf* position concerning jurisdictional statutes;[130] however, neither *Haven* nor *Creighton* took into account the qualification in *Hughes Aircraft Co.* on retroactivity regarding statutes that create jurisdiction where none existed before.[131]

The Eastern District Court of New York held that the FSIA could not be applied retroactively to events occurring prior to 1952 in two cases which were subsequently remanded by the Second Circuit Court of Appeals. In *Abrams v. Societe Nationale Des Chemins De Fer Francais* the court denied retroactive application of the FSIA for claims against a French governmental corporate agency during World War II.[132] Subsequently, in *Garb v. Republic of Poland*, the court held that the *Landgraf* decision did not overrule "the Second Circuit's ruling in *Carl Marks* that a foreign state's settled expectation of immunity from the jurisdiction of the United States courts 'rises to the level of an antecedent right.'"[133] In other words, "Carl Marks makes [it] clear that it [FSIA] cannot be applied retroactively."[134] The Second Circuit remanded both rulings determining that application of the second prong of *Landgraf* was necessary to establish "whether plaintiffs could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment."[135] Thus, under the *Landgraf* test, retroactive effect "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'"[136]

Analysis of rationale resolving questions of FSIA retroactive application after *Landgraf* presents two bases concerning the Act's application: 1) The FSIA is a jurisdictional statute (as treated in *Haven*, but also one that affects substantive rights pursuant to the *Hughes* analysis); and 2) Retroactive effect involves consideration of a foreign sovereign's "settled expectations," (as in *Abrams* II and *Garb* II). It is in this context involving the *Landgraf* analysis that the Court in *Altmann* should have considered the issue of FSIA retroactivity. Consideration of the FSIA's two issues raised by the *Landgraf* rule concerning the Act's operation as a

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[129] 68 F. Supp. 2d 943, 945-46 (N.D. Ill. 1999), *aff'd*, *Haven v. Republic of Poland*, 215 F.3d 727 (7th Cir. 2000).
[130] *Id.* at 946.
[131] *Hughes Aircraft Co*., 520 U.S. at 951.
[132] 175 F. Supp. 2d 423, 438 (E.D.N.Y. 2001) [hereinafter *Abrams I*].
[133] 207 F. Supp. 2d 16, 29 (E.D.N.Y. 2002) [hereinafter *Garb I*].
[134] *Id.* at 27.
[135] *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 332 F.3d 173, 186 (2d Cir. 2003) [hereinafter *Abrams II*].
[136] *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (quoting *Martin v. Hadix*, 527 U.S. 343, 358 (1999)).

jurisdictional statute and a foreign sovereign's antecedent rights not only follow an established standard (however inconsistent), it represents the only standard. To abandon the *Landgraf* analysis in determinations of FSIA retroactivity is to depart from *stare decisis* suddenly and with no showing of good cause.

c. The *Landgraf* Rule is the Proper Standard for Determining Statutory Retroactivity

The Supreme Court's approach to the question of statutory retroactivity in *Landgraf* is the clearest and most appropriate standard for analysis of the FSIA's reach. In *Landgraf*, the Court considered whether the Civil Rights Act of 1991 and its new provisions for jury trials, and punitive and compensatory relief in sexual harassment claims, should apply to a pending case.[137] In the absence of legislative intent or an express command in the statutory language, the Court looked to the canons of statutory interpretation concerning retroactive application.[138] The Court stated that it must "apply the law in effect at the time it renders its decision,"[139] and that "retroactivity is not favored in the law."[140] In light of these two principles of construction, the Court determined the question of statutory retroactivity as "whether the new provision attaches new legal consequences to events completed before its enactment."[141]

In applying the test for retroactive effect (outlined in the Background section[142]), the *Landgraf* Court asserted a "new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'"[143] As the *Altmann* Court notes, pursuant to its decision in *Verlinden*, the FSIA codifies "the standards governing foreign sovereign immunity as an aspect of *substantive* federal law."[144] The Court also mentions its clarification of the *Landgraf* rule regarding jurisdictional statutes in *Hughes*, stating statutes that create jurisdiction where none exist "spea[k] not just to the power of a particular court but to the substantive rights of the parties as well."[145]

In its attempt to show that *Hughes* is inapplicable, the Court distinguishes the *Hughes* statute because the retroactive jurisdictional amendment in question "attached to the statute that created the cause of

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[137] 511 U.S. at 249-50.
[138] *Id.* at 259-63.
[139] *Id*. at 264 (quoting *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 (1974)).
[140] *Id*. at 264 (quoting *Bowen*, 488 U.S. 208. The Court's assertion of a presumption against retroactivity included Constitutional clauses such as the Ex Post Facto Clause, Due Process in the Fifth and Fourteenth Amendments (regarding fair notice), and the prohibition on bills of attainder). *Id*. at 266.
[141] *Id.* at 270.
[142] *See supra* pt. II(B)(3) (discussing retroactive application of the FSIA).
[143] *Landgraf*, 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)).
[144] *Altmann*, 124 S. Ct. at 2251 (quoting *Verlinden*, 461 U.S. at 496-97) (emphasis in original).
[145] *Id.* (quoting *Hughes*, 520 U.S. at 951).

action," unlike the FSIA where no such limitation exists.[146] As Justice Kennedy notes in his dissent, "[w]hat is of concern in the retroactivity analysis that *Hughes Aircraft* sets out, however, is the internal integrity of American statutes, not of whether an American law allows suit where before none was allowed elsewhere in the world."[147] In other words, the cause of action in *Altmann* based on the FSIA expropriation exception does not trump the presumption against retroactive application of the Act. The issue is not what type of claims can be brought, but whether there is jurisdiction over the claim when it arose.

In *Altmann*, the expropriation claim arose out of events occurring when U.S. courts did not have jurisdiction because they occurred prior to the adoption of restrictive immunity. Thus, while it is clear that the FSIA governs such claims, it does not necessarily follow that the Act applies retroactively.[148] Therefore, the question is whether application of the FSIA in *Altmann* would change the substantive rights and legal obligations of the parties. This question can only be answered by applying the *Landgraf* analysis in the absence of any other standard of statutory interpretation addressing this issue.

2. The Court's Application of the FSIA in *Altmann* Would Produce a "Retroactive Effect"

The *Altmann* Court claims that none of the three examples of "retroactive effect"[149] apply to the "FSIA's clarification of the law of sovereign immunity," but it does not fully consider the potential "effects."[150] Here, the dissent is especially helpful in pointing out that the Court overlooks the question of whether the Act confers jurisdiction "where before there was none"[151] (pursuant to Hughes). Thus, the first inquiry of analysis into retroactive effect involves a determination of the Act's jurisdictional nature. The next question is whether or not the FSIA creates a new forum if applied retroactively. Finally, as mentioned prior, the presumption against retroactivity arises out of a concern for "unfair surprise and upsetting expectations."[152] In stating that the FSIA's purpose is not to

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[146] *Id.*
[147] *Id.* at 2272.
[148] *Id.*
[149] *See supra* nn. 86-88. "Whether it would impair [the] rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.
[150] *Altmann*, 124 S. Ct. at 2251. The court seems to require that the *Landgraf* rule "definitively" resolve the issue. *Id.* Justice Kennedy's dissent ends quoting *Hughes*, stating that the *Landgraf* rule "does not purport to define the outer limit of impermissible retroactivity. Rather our opinion in *Landgraf* . . . merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." *Id.* at 2276 (quoting *Hughes*, 520 U.S. at 947) (emphasis in original).
[151] *Id.* at 2267.
[152] *Landgraf*, 511 U.S. at 282-83. *See Garb I,* 207 F. Supp. 2d at 27; *supra* pt. III(A)(1)(b) (discussing inconsistent decisions on the issue of FSIA retroactive application before and after *Landgraf*).

allow "foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity,"[153] the Court suggests the notion of reliance on immunity from U.S. courts is not a part of a foreign state's conduct. Yet this notion of reliance forms the very basis of the sovereign immunity doctrine in that it seeks to preclude judgment of one sovereign against another's public acts. Thus, the final issue is whether or not a diminished reliance interest is sufficient to rebut the presumption against retroactivity.[154]

a. The FSIA Can Create a Forum Where None Exists

In *Hughes*, the Supreme Court clearly held that when a statute "creates jurisdiction where none previously existed[,] it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well."[155] This view summarizes the Court's holding fourteen years earlier in *Verlinden* where, pursuant to Article III of the Constitution, "a suit against a foreign state under this Act [FSIA] necessarily raises questions of substantive federal law . . . and hence clearly 'arises under' federal law."[156] In raising "sensitive issues concerning the foreign relations of the United States" where the "primacy of federal concerns is evident," application of the FSIA involves substantive federal law.[157] Thus, according to *Verlinden*, although determining jurisdictional exercise, the FSIA is inherently a substantive statute.

In *Verlinden*, the Court concluded that application of the FSIA to a contract dispute between a Dutch corporation and the Central Bank of Nigeria represented the exercise of congressional authority over foreign commerce.[158] In this context, "the jurisdictional provisions of the Act are simply one part of this comprehensive scheme [governing sovereign immunity]."[159] The substantive portions of the Act, those creating exceptions to sovereign immunity, would create a new jurisdictional forum pursuant to the qualification in *Hughes*.

A new forum is created by the Act's application in *Altmann* because the expropriation exception is a clarification of sovereign immunity law that did not exist prior to enactment of the FSIA. In his dissent, Justice Kennedy reiterates the statement of the *amicus curiae*, submitted by the U.S. State Department, that "the Tate Letter rules contain no principle that parallels § 1605(a)(3), the FSIA's expropriation exception."[160] Prior to

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[153] *Altmann*, 124 S. Ct. at 2252.
[154] *Id.* at 2271.
[155] 520 U.S. at 951.
[156] 461 U.S. at 493.
[157] *Id.*
[158] *Id.* at 496.
[159] *Id.*
[160] *Altmann*, 124 S. Ct. at 2269 (Kennedy, J., dissenting).

enactment of the FSIA, "nationalization" was considered conduct the State Department "recognized and allowed" as "one of the categories of strictly political or public acts" defined by the Tate Letter's doctrine of restrictive immunity.[161] Although the expropriation in *Altmann* is clearly less an example of nationalization, it is also not an exception to immunity mentioned in the Tate Letter.[162] As the expropriation exception falls outside the scope of restrictive immunity prior to FSIA enactment, to apply the Act in resolving an expropriation claim arising out of events occurring between 1938 and 1941[163] would create a new forum.

In *Jackson*, the court denied a claim against the Chinese government holding that,

> [F]rom 1911 to the date of maturity of the bonds in 1951 China relied on the expectation that the extant and almost universal doctrine of absolute sovereign immunity governed relations between China and the United States and between the citizens of the two countries.[164]

In *Carl Marks I*, the district court researched cases involving the Russian Government(s) between 1927 and 1952 and found that "before 1952 the United States courts would have treated the Russian Governments as entitled to absolute sovereign immunity" with regard to the claims in that case.[165] If throughout the post-world war era and well into the cold war Russia could expect immunity prior to introduction of the Tate Letter, then it follows that Austria could expect the same up until 1952.

The legislative history behind the FSIA supports the notion that none of the exceptions to sovereign immunity apply to events occurring prior to 1952 because the Act was intended as the "codification of restrictive theory" introduced in the Tate Letter.[166] As a codification of principles, the Act applies to claims arising out of events occurring when those principles were in effect (i.e., after the Tate Letter's introduction of the principles in 1952). The State Department's adoption of the Tate Letter and its guidelines for restrictive immunity represents the creation of a new forum allowing suits against a foreign sovereign's state or commercial

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[161] *Victory Transp. Inc.*, 336 F. 2d at 360. "Such acts are generally limited to the following categories: (1) internal administrative acts, such as expulsion of an alien. (2) legislative acts, such as nationalization. (3) acts concerning the armed forces. (4) acts concerning diplomatic activity. (5) public loans." *Id.*

[162] Ltr., *supra* n. 5.

[163] *Altmann*, 124 S. Ct. at 2244. The period following the *Anschluss* when Bloch's estate was "aryanized" and his artwork was expropriated. *See supra* n. 21.

[164] *Jackson*, 794 F.2d at 1497.

[165] 665 F. Supp. at 339. Russian courts expected absolute immunity "except insofar as those Governments could have been considered to have waived their immunity or consented to setoffs by appearing as plaintiffs or the assignors of plaintiffs in the United States courts." *Id.* at 339-40.

[166] H.R. Rpt. 94-1487 at 7.

conduct.[167] Application of FSIA exceptions "to pre-1952 transactions and events would affect foreign sovereigns' antecedent rights adversely" because it would create a forum where none existed.[168] Consequently, application of the Act to pre-1952 events results in a "retroactive effect" pursuant to *Landgraf*.

b. Retroactive Application of the FSIA Disturbs "Settled Expectations"

In his dissent, Justice Kennedy asserts that whether Austria could have expected to receive immunity at the time the expropriation occurred remains unresolved.[169] The Court of Appeals incorrectly analyzed this "unmanageable" question by wrongly assuming "responsibility for the political question, rather than confining its judgment to the legal one."[170] In its legal context, immunity under the pre-FSIA regime existed and the only executive statement that "displaces the immunity presumption to some degree" is the Tate Letter.[171] Jurisdiction over claims involving a foreign sovereign's commercial or private acts are allowed under the Tate Letter. As this analysis has shown above, "[i]f petitioners' conduct would not be subject to suit under the Tate Letter principles, the FSIA cannot alter that result without imposing retroactive effect."[172]

Prior to *Landgraf*, decisions such as *Carl Marks* and *Jackson* found that, if applied retroactively, the FSIA would disturb a foreign state's "settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts."[173] A foreign sovereign's settled expectation was the basis denying retroactive application of the FSIA in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne*[174] and *Hwang Geum Joo v. Japan*.[175] The *Joo* court looked beyond *Landgraf* to the 1951 Treaty of Peace with Japan that "manifests the parties' intent to resolve matters arising from World War II without involving the courts of the United States," but are "to be resolved through intergovernmental settlements."[176] Yet the claims of sexual slavery in *Joo* do not fit comfortably within any FSIA exceptions, and the D.C. District Court stated, "even if Japan did not enjoy sovereign immunity, this case must be dismissed because it is

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[167] Ltr., *supra* n. 5.
[168] *Carl Marks I.*, 665 F. Supp. at 339.
[169] *Altmann*, 124 S. Ct. at 2269 (Kennedy, J., dissenting).
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Carl Marks*, 841 F.2d at 27.
[174] 605 F.2d 648, 654 (2d Cir. 1979).
[175] 332 F.3d 679, 684-85 (D.C. Cir. 2003) (denying application of the FSIA commercial activity exception to a suit for damages against Japan for sexual slavery and torture during World War II).
[176] *Id.*

nonjusticiable."[177]

The court in *Joo* asserts that the 1951 Treaty represents Japan's settled expectation of immunity from suits concerning World War II conduct.[178] In this context, the holding in *Joo* represents an exception to rationales relying on the *Landgraf* analysis and interpretations of the FSIA as a jurisdiction-allocating, and therefore procedural statute.[179] Earlier courts prior to *Landgraf*, such as *Pesaro (III)*,[180] also viewed foreign sovereign immunity as more than merely a matter of jurisdiction allocation. *Joo* addresses the Ninth Circuit's reasoning in *Altmann*,[181] distinguishing it on the grounds that the 1951 Treaty did not include Germany (or Austria) as a signatory,[182] and a State Department directive concerning Nazi expropriation dealt with the matter as a legal issue and not one of international treaties.[183] The absence of a treaty on the subject of restitution of Holocaust loot is not dispositive on the issue of a sovereign's expectations and it does not displace the governing principles of the Tate Letter in a pre-FSIA regime.

The question of Austria's expectations during the years after the close of World War II is not addressed by the *Altmann* Court. From 1945 to the signing of the State Treaty of 1955, Austria was occupied by the allied forces[184] and its heartland was under the de facto control of the Soviet Union.[185] Whether Austria could expect immunity from U.S. courts, when its very occupation was, to a great extent, based on demands for restitution by the Soviet Union and the other allies, is of relevance to the analysis of retroactive effect. Nevertheless, geopolitical considerations aside, the legal protocol for exceptions to sovereign immunity regarding an expropriation claim simply did not exist at that time. In this context, the Court's retroactive application of the Act to a pre-FSIA regime of sovereign

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[177] *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 64 (D.D.C. 2001).
[178] 332 F.3d at 685.
[179] *See* text accompanying *supra* nn. 129-133.
[180] *See supra* n. 51.
[181] *Altmann II*, 317 F.3d 954.
[182] *Hwang Geum Joo*, 332 F.3d at 684.
[183] "The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Id.* at 685 (quoting *Altmann II*, 317 F.3d at 966 (quoting Ltr. from Jack B. Tate, Acting Leg. Advisor, Dept. of State to the Attys. for the pl. in Civ. Action No. 31-555 (S.D.N.Y.), *reprinted in Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-76 (2d Cir. 1954)). The directive followed the 1952 Tate Letter and its theory of restrictive immunity. *See supra* n. 57.
[184] *See* Lib. of Cong., *Library of Congress Country Studies: Austria: The 1955 State Treaty and Austrian Neutrality*, http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+at0056) (accessed Nov. 4, 2004). Vienna and its surrounding provinces were occupied by approximately 40,000 Russian troops. *Id.*
[185] *See* Lib. of Cong., *Library of Congress Country Studies: Austria: Foundation of the Second Republic*, http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+at0051) (accessed Nov. 4, 2004).

immunity constitutes unfair surprise.

The *Altmann* Court's assertion that the FSIA's purpose is distinct from a sovereign's expectations[186] is blatantly at odds with the doctrine of foreign sovereign immunity and its preservation of comity. The importance of "grace and comity"[187] is especially relevant to considerations of future reliance on immunity. The reliance interests of a foreign sovereign has formed, and continues to form, the basis for international treaties, executive agreements, and legislative action involving claims arising from pre-FSIA events.

B. *Implications of International Treaties,[188] Government Initiatives, and Holocaust Era Expropriation Claims in* Altmann

Postwar treaties dating from 1945, such as the Potsdam Agreement and the Paris Agreement, dealt with reparations for claims against both the German government and private entities.[189] The Paris Agreement, while addressing some reparations issues, "reserved the final settlement for an eventual [multilateral] peace treaty."[190] The Transition Agreement of 1954 constitutes the final resolution for reparations related claims,[191] stating that "the problem of reparations shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning the matter."[192] Reviewing the relevant treaties and cases concerning reparations actions, the court in *In re Nazi Era Cases* noted that "claims for war reparations arising out of World War II have always been managed on a governmental level, beginning with the Potsdam Agreement."[193]

Of the three international treaties passed after World War II specifically addressing the problem of war loot, two cover cultural property of national importance,[194] and only one addresses claims brought by private

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[186] *Altmann*, 124 S. Ct. at 2254. "Whether or not the date would be significant to a *Landgraf*-type analysis of foreign states' settled expectations at various times prior to the FSIA's enactment, it is of no relevance in this case given our rationale for finding the Act applicable to preenactment conduct." *Id.* at 2254 n. 19.

[187] *Verlinden*, 461 U.S. at 486. *See also Schooner Exchange*, 11 U.S. at 136.

[188] U.S. Const. art. VI, § 2. "This 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; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

[189] "Recognizing that the war had produced a large body of stateless persons who had been victims of Nazi persecution each signatory power agreed to set aside a percentage of their reparations to aid the stateless people." *Burge-Fischer v. DeGussa*, 65 F. Supp. 2d 248, 277 (D.N.J. 1999).

[190] *In re Nazi Era Cases Against German Def.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001).

[191] *Burger-Fischer*, 65 F. Supp. 2d at 279.

[192] *Id.*

[193] 129 F. Supp. 2d at 376.

[194] The Hague Convention and the UNESCO Convention on Cultural Property consider "nationally owned" or "public" art only. Kelly Ann Falconer, *When Honor Will Not Suffice: The Need For A Legally Binding International Agreement Regarding the Ownership of Nazi-Looted Art*, 21 U. Pa. J. Intl. Econ. L. 383, 387 (2000).

individuals (within fifty years from the time of expropriation).[195] None of the international treaties successfully presents a solution to the problems of restitution, reparations, and compensation for Holocaust survivors and their heirs.[196] The 1998 Washington Conference on Holocaust-Era Assets sought to resolve some of the issues surrounding Holocaust-era claims including those concerning looted art.[197] Although a consensus was reached establishing eleven principles to help resolve claims concerning Nazi loot, because the results of the conference were not legally binding, little progress has been made in returning stolen works to their rightful owners.[198] Efforts by the American Association of Museum Directors ("AAMD") have provided guidelines for resolving art restitution claims as well as ethical principles for museum acquisitions and returns.[199] Because AAMD's suggestions have not been adopted internationally and are not legally binding, they have had mixed results.[200]

In the late 1990s, Congress attempted to fill the void in legal resolutions addressing claims for restitution involving Nazi war loot. Congress has established government funded research aimed at furthering successful restitution of works to their rightful owners (Holocaust Victims Redress Act).[201] The U.S. Holocaust Assets Commission Act of 1998 creates an independent presidential commission to "examine the role of the United States in the collection and disposition of Holocaust-era assets."[202] In 2000, a cooperative effort between the U.S. and Germany resulted in the creation of the German Foundation to resolve claims of Holocaust survivors; however, no compensation has yet been paid.[203]

In January of 2001, a General Settlement Fund agreement was signed by the State Department and Austria in an attempt to resolve litigation arising from Holocaust era claims.[204] Under the General Settlement Fund provisions, Austria has allocated approximately $210 million for compensation and restitution purposes.[205] Thus, the General Settlement Fund, following a pattern of attempts at resolving the problem of

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[195] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995) (of the UNIDROIT Convention). Article 2 addresses "cultural objects . . . which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science." Falconer *supra* n. 194 at 387-90.
[196] *Id.* at 390.
[197] *Id.*
[198] *Id.* at 390-91.
[199] *Id.* at 412-14.
[200] *Id.* at 414.
[201] Holocaust Victims Redress Act, Pub. L. No. 105-158, § 103(b), 112 Stat. 15 (1998).
[202] Falconer, *supra* n. 194 at 403-04 (quoting Justice for Holocaust Survivors Act, H.R. 271, 106th Cong. (1999)).
[203] 147 Cong. Rec. H2224-01, H2232 (2001) (state. of Rep. Slaughter).
[204] *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1113 (C.D. Cal. 2003).
[205] *Id.* at 1113, n. 7. *State. of Interest of the U.S. of Am.*, *Anderman v. Fed. Republic of Austria* Civ. A. No. 01-01769-FMC (AIJx)., 256 F. Supp. 2d 1098. The fund was created in response to increasing litigation against Austria involving Holocaust era property claims. *Id.*

Nazi expropriation, represents a diplomatic attempt at a solution. The fund developed in response to increased litigation over Holocaust era claims after the reunification of Germany in 1990 when a number of suits were filed to recover Nazi gold held in Swiss banks.[206] The State Department has maintained its insistence on diplomatic efforts as a means of resolving Holocaust era claims.[207]

Prior treaties aside, the German Foundation ("Foundation") of 2000 represents an important executive agreement aimed at resolving Holocaust era restitution claims.[208] The court in *In re Nazi Era Cases* relied upon Deputy Secretary of the Treasury Stuart E. Eizenstat's declaration regarding the establishment of the Foundation to define the State Department's purpose regarding such claims.[209] The court quotes Eizenstat's position that claims, "including but not limited to . . . slave and/or forced labor, aryanization, medical experimentation . . . damage to or loss of property[,] . . . should be pursued through the Foundation instead of the courts."[210] In the context of *In re Nazi Era Cases*, the State Department "argues for dismissal on any valid legal ground."[211] "Aryanization" is the basis of Maria Altmann's complaint claiming wrongful expropriation of the Klimt paintings.[212] Here, the valid legal ground for dismissal is that application of the FSIA would result in an impermissible retroactive effect. Given the Court in *Altmann* admits its holding does nothing to interfere with State Department statements of interest regarding the exercise of jurisdiction in such cases,[213] it is clear that resolution of such claims be settled out of court.

The *Altmann* Court is ambivalent in light of executive agreements and State Department guidance including the *amicus curae* submitted by the government in *Altmann* stating, "[w]hile the United States' views on such an issue are of considerable interest to the Court, they merit no special deference."[214] Considering the Court's own recognition that the Act's purpose is to limit executive influence, its ambivalence on the issue is especially problematic. As there is no distinction between private and public acts in the FSIA, allowing executive intervention where it was

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[206] *See Burge-Fischer*, 65 F. Supp. 2d 248, at 277 (discussing "2+4 Treaty"); Treaty on the Final Settle with Respect to Germany, S. Treaty Doc. No. 101-120 (1990).
[207] *See* U.S. Dept. of St., *German Compensation for National Socialist Crimes*, http://www.ushmm.org/assets/frg.htm (accessed Sept. 21, 2004).
[208] The Foundation arose when "the German government asked Deputy Secretary of the Treasury Stuart E. Eizenstat to help facilitate a resolution of the numerous class action lawsuits pending in United States courts." *In re Nazi Era Cases*, 129 F. Supp. 2d at 378.
[209] *Id.*
[210] *Id.* at 380 (quoting Decl. of Stuart E. Eizenstat attached as Exh. 1 to the Statement of Interest of the United States).
[211] *Id.*
[212] *Altmann*, 124 S. Ct. at 2244. *See supra* pt. II(A) (discussing the facts of *Altmann*).
[213] *Id.* at 2255.
[214] *Id.*

previously limited to private acts under the Tate Letter invites further confusion.

The court in *In re Nazi Era Cases* finds the government's recommendation for dismissal of such claims persuasive because it "is motivated by the twin concerns of justice and urgency," due to "prolonged and uncertain litigation . . . and compensation to aged victims in their lifetimes."[215] This rationale, coupled with the fact that a foreign sovereign could expect the question of immunity concerning litigation over pre-1952 events be determined by the U.S. State Department, has important diplomatic implications. The potential for incurring retribution in foreign policy for judicial determinations of the sort in *Altmann* is a very real possibility. Hence, it would seem appropriate that claims of expropriation and the restitution of art (especially art currently considered part of a nation's cultural heritage or patrimony) continue to be resolved through diplomatic efforts.

IV. CONCLUSION

Today, it appears the Court's decision in *Altmann* is less grounded upon legal principles than it is on a sense of moral justice. The question is not whether Maria Altmann should have her day in court; rather it is whether justice is best served for her and for other victims through litigation in American courts. In its effort to achieve a noble end, the Court summarily dismisses established canons and precedent while also ignoring the implications its holding might have for American foreign relations. This result is particularly troubling given the United States' current position as the sole superpower and as an increasingly unilateral actor on the world's stage. Although a case by case approach to the issue of FSIA retroactivity in Holocaust era expropriation claims remains problematic, the *Landgraf* rule is a critical factor in such determinations. In this context, the problem of retroactivity is poorly addressed in *Altmann*. Ultimately, claims concerning a foreign sovereign's acts prior to 1952 cannot and should not be determined by retroactive application of the FSIA.[216] The Act not only creates an impermissible retroactive effect, but it also does not cover every potential legitimate claim, and its continued use in such instances interferes with Executive authority in foreign affairs. Given the history of treaties and initiatives addressing expropriation and restitution, it is clear that litigation is neither the appropriate nor encouraged course of action. A more fitting result would be if Maria Altmann and the last survivors seeking redress for these crimes of the past were spared the emotional and financial costs of

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[215] *In re Nazi Era Cases*, 129 F. Supp. 2d at 380-81.

[216] *See e.g.* Yonatan Lupu & Clay Risen, *Retroactive Application of the Foreign Sovereign Immunities Act: Landgraf Analysis and the Political Question Doctrine*, 8 U.C.L.A. J. Intl L. & For. Aff. 239, 266 (2003) (asserting that the issue of pre-1952 should not be resolved in courts, but by the State Department under the Political Question Doctrine).

litigation through government efforts at securing a diplomatic resolution.