

COMMENT

OUT OF THE NIGHT AND FOG: PERMITTING LITIGATION TO PROMPT AN INTERNATIONAL RESOLUTION TO NAZI-LOOTED ART CLAIMS*

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I. INTRODUCTION

Countless works of art looted by the Nazis disappeared into the night and fog of World War II;¹ thousands yet remain in the hands of public museums and private owners both at home and abroad.² Although many efforts have been undertaken to restore these pieces of cultural heritage to their prewar owners, over six decades later the task remains unfinished. Numerous international agreements and conferences have acknowledged restitution of stolen cultural property as an important issue, yet nonbinding principles of morality have not established a mechanism for identifying looted art or resolving ownership claims.³ Furthermore, the American legal system has provided few successes to Holocaust plaintiffs. Various legal barriers guide courts to dismiss ownership claims, especially when brought against foreign nations or their instrumentalities, as sovereign immunity is repeatedly utilized to bar suit.⁴

In June of 2004, however, the Supreme Court decided *Republic of Austria v. Altmann*,⁵ ruling that the Foreign Sovereign Immunities Act (FSIA)⁶ applies retroactively to events that occurred before the FSIA's enactment in 1976. The Court even extended the Act's retroactivity to events that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952.⁷ While the FSIA's presumption of

1. Hitler issued the "Night and Fog Decree" in late 1941, ordering underground resistance activity against the Third Reich severely punished, such that activists and dissidents would vanish without a trace into the fog of the night. WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 957 (1960).

2. Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?*, 51 *DEPAUL L. REV.* 1103, 1103 (2002).

3. Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 *U. PA. J. INT'L ECON. L.* 383, 396 (2000); Daniel Range, Comment, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 *TEX. INT'L L.J.* 655, 668 (2004).

4. See *infra* Part III.D (exploring the obstacles to Holocaust-related litigation in America).

5. *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004).

6. 28 U.S.C. §§ 1602–1611 (2000 & Supp. II 2002).

7. *Altmann*, 124 S. Ct. at 2254.

immunity applies in claims that spring from the Nazi era, federal courts may now obtain jurisdiction over foreign nations, provided that one of the Act's exceptions to immunity is met.⁸ *Altmann* therefore represents a potential sea change in the ability of Holocaust plaintiffs to sue foreign governments that allegedly possess their property.

This Comment begins in Part II with a historical background of the Nazi policy and practice of expropriation, as well as an examination of the Allied efforts to return those stolen works of art to their original prewar owners. Part III provides an overview of the various endeavors to resolve Holocaust-era claims over the last half century. Part IV argues that claims concerning Nazi-looted art should be heard in U.S. courts: the political question doctrine, the principles of international comity, and the act of state doctrine should not be employed to preclude adjudication on the merits, especially when violations of international law are alleged. Litigation, however, is not the best method for resolving this ongoing problem. Part V analyzes the advantages and drawbacks of litigation and argues that an effective and fair solution for all interested parties can only be reached by establishing a binding, international agreement by which nonlitigious mechanisms can both quiet title and settle disputes.

II. THE NIGHT AND FOG

Before and during World War II, the Nazi government looted and confiscated innumerable works of art throughout Germany and occupied Europe.⁹ Despite admirable efforts by the Allies in the immediate postwar period and a modern-day awareness of the issue, much of the art looted over half a century ago has not been returned to its prewar owners.¹⁰

8. Foreign powers are not immune from suit if their immunity is waived. § 1605(a)(1). Additionally, subject to specific nexus requirements, foreign states are not immune from suit if a claim arises from commercial activity or if rights in property taken in violation of international law are at issue. § 1605(a)(2)–(3).

9. Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 27, 33–36 (1999). Approximately one-fifth of all art in the Western world was either taken or forced to be sold. *Id.* at 36. The Nazi-looted art was worth more than all artwork located in the United States in 1945. Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 161 (2000).

10. Ralph Blumenthal, *New Efforts to Recover Nazi Plunder: But Pessimism Grows for Recoveries*, N.Y. TIMES, Feb. 27, 2003, at E1 (noting recent estimates of missing or destroyed art to be as high as 100,000 pieces).

A. Looted Art and the Holocaust

The Nazi confiscation of property was meticulously planned and carried out with ruthless efficiency on an unprecedented scale.¹¹ By the end of World War II, an estimated 150,000 pieces of art had been looted in Western Europe and nearly half a million in Eastern Europe.¹² Many of these works found their way into the private collections of Nazi officials,¹³ while others were “used . . . as a sort of war currency.”¹⁴

Yet these takings were not solely in conjunction with the war effort, as racial and cultural purity were also primary goals of Nazi ideology.¹⁵ During the prewar years, “degenerate art” was deemed unacceptable and taken from its owners;¹⁶ German and Austrian Jews were subjected to laws that enabled their collections and other property to be officially confiscated.¹⁷ Once the war began, repatriating German works held in foreign countries became a high priority, and Hitler’s childhood home of Linz, Austria, was selected to affirm German cultural dominance by displaying significant European works.¹⁸

11. See HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* 23 (Tim Bent & Hector Feliciano trans., BasicBooks 1997) (1995) (“In twelve years . . . as many works of art were displaced, transported, and stolen as during the entire Thirty Years War or all the Napoleonic Wars.”).

12. Pell, *supra* note 9, at 36.

13. *Id.* at 35. For a discussion of Reichsmarschall Hermann Goering’s efforts to add stolen art to his personal collection, see LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* 145–48 (1994).

14. David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 *DEPAUL-LCA J. ART & ENT. L. & POL’Y* 39, 40–41 (2004).

15. See Falconer, *supra* note 3, at 394 (stating Hitler’s goal of purifying all that he deemed tainted was an objective aimed at both artwork and humans); see also NICHOLAS, *supra* note 13, at 97 (“Undesirable thoughts, sounds, images, and beings would be eliminated.”).

16. Henson, *supra* note 2, at 1105. “Degenerate art” included modern and abstract art, works by Jews or that depicted Jewish subjects, or any piece critical of Germany. *Id.*

17. See Falconer, *supra* note 3, at 394 (exploring Hitler’s plan to “amass[] a vast collection of pure Germanic art, ironically financed by seizing and selling the assets of Jewish art collectors”); see also Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 *YALE J. INT’L L.* 503, 522–23 (1998) (“The progressive escalation of the victimization of the Jews was made possible, from the legalistic standpoint of the Nazis, by the Nuremberg Decrees, which ensured the . . . confiscation of their property.”).

18. FELICIANO, *supra* note 11, at 21. The proposed museum in Linz was envisioned as “one of the Reich’s crowning glories, a showpiece of Nazism.” *Id.* In preparation, the Kummel Report was drawn up as a comprehensive list of German art held in other countries. *Id.* at 24–25.

In this vein, the link between the looted art and the Holocaust cannot be overlooked: eradicating an entire people and their cultural heritage went hand in hand.¹⁹ Indeed, the taking of victims' property extended all the way to the suitcases, eyeglasses, and jewelry confiscated upon arrival at the concentration camps, and even to the subsequent extraction of gold teeth or other valuables in their possession.²⁰ Even today, the art can be regarded as "a tangible connection to those who perished in the Holocaust and to the suffering they endured."²¹ As one commentator stated, "The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice."²²

B. Restitution: A Job Unfinished

Faced with the approach of the Allies, Nazi troops tried to hide their vast collections of stolen art by moving them "into hundreds of bunkers, castles, churches, sheds, and mines."²³ After the war, the Western nations worked feverishly to return the art they could locate and process, establishing the Monuments, Fine Arts and Archives and other organizations.²⁴ Through their efforts, countless cultural items were returned either to their owners or to their country of origin.²⁵

The Allies encountered many problems at the collection points, however, including misclassification, haphazard storage, and false claims.²⁶ In addition, unclaimed property was taken into guardianship by the postwar European governments, much of which remains there today.²⁷ The widespread dispersal of art

19. See, e.g., Pell, *supra* note 9, at 29–30 ("The expropriation of property . . . formed an essential aspect of the program of the Holocaust.")

20. One of the prominent Holocaust reparations cases of the 1990s involved a plaintiffs' group seeking damages from a German company not only for forcing their family members to perform slave labor but also for confiscating their gold and precious metals at the death camps. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 250–54 (D.N.J. 1999).

21. Pell, *supra* note 9, at 45.

22. Bazylar, *supra* note 9, at 165 (quoting Eric Gibson, *De Gustibus: The Delicate Art of Deciding Whose Art It Is*, WALL ST. J., July 16, 1999, at W11).

23. Henson, *supra* note 2, at 1108.

24. See FELICIANO, *supra* note 11, at 172–74 (tracing efforts to return Nazi-looted art).

25. See Pell, *supra* note 9, at 37 (estimating the number of items processed and returned by 1951 to be in the millions). Works originating in Germany, however, were not always accorded such deference; over 200 German paintings were brought to America and displayed in twelve cities before gradually being returned from 1948 to 1955. NICHOLAS, *supra* note 13, at 401–05.

26. Henson, *supra* note 2, at 1109.

27. In the mid-1990s, the Louvre and other French national museums still held an estimated 2000 works of art. FELICIANO, *supra* note 11, at 214–15 (classifying displayed

was further exacerbated by the fact that not all of it was recovered by the Allies²⁸ and the existing Soviet policy to keep what they discovered.²⁹ All told, thousands of works slipped through Allied hands and were integrated into the international art market.³⁰

In the modern era, the end of the Cold War opened Eastern bloc borders and permitted the release of many previously classified documents.³¹ Additionally, it is projected that more art will resurface in the near future as the generation who lived through World War II passes on.³² Despite numerous attempts to resolve Holocaust-era claims,³³ however, the problem of looted art remains.³⁴ In fact, even after sixty years of restitution efforts, the inventories created by the Nazis are often the “best points of departure for tracking down . . . confiscated art.”³⁵

III. SUCCESSES AND FAILURES IN RESOLVING HOLOCAUST-ERA CLAIMS

Several international agreements at the governmental level have successfully resolved some World War II-era issues and provided reparations for certain slave labor, looted bank assets, and other claims. However, these agreements—in addition to various U.S. legislative and art community efforts—have not provided a solution to the problem of looted art. Despite the facts that several international conventions have been held to discuss

items still unclaimed by original owners as works on “provisional” stay). Further complicating the tracing process, some museums used internal classification systems to inventory art in their possession, making information gathering about the work’s name and origin that much more difficult. *Id.* at 215–16.

28. Not every hidden German repository may have been located, and the full extent of the black art market may never be known. Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 657–59 (1998).

29. See FELICIANO, *supra* note 11, at 173–74 (describing the Soviet approach of providing “reparation in kind” to restore what the Germans took or destroyed).

30. See Henson, *supra* note 2, at 1109 (noting that many of these works simply disappeared).

31. *Id.* (observing that these developments have spurred many owners and heirs to renew their searches for lost art).

32. See Pell, *supra* note 9, at 46 (predicting that a considerable amount of art is likely to be donated or disposed of soon by aging survivors and their heirs).

33. Alan Riding, *Foot Dragging on the Return of Art Stolen by the Nazis*, N.Y. TIMES, May 18, 2004, at E1 (“Many European countries have formed commissions to study restitution claims . . .”); see *infra* Part III (examining both international and U.S. efforts at claim resolution).

34. See Riding, *supra* note 33 (speculating that much of this art could soon be lost forever).

35. FELICIANO, *supra* note 11, at 201. For an examination of Nazi agency Einsatzstab Reichsleiter Rosenberg’s (ERR) sorting, selecting, and cataloging of confiscated French art, see *id.* at 105–21.

issues concerning stolen cultural property and such acts are widely thought to violate international law, no mechanism has been established to resolve most stolen art claims.³⁶

A. *International Agreements and Reparations Settlements*

Reparations were first paid by West Germany in the 1950s, compensating many who lost their life, health, or freedom by the design of Nazi policy.³⁷ Although an estimated DM 100 billion was paid out in accordance with compensation laws and several bilateral treaties, these agreements did not provide a final, comprehensive settlement.³⁸ For example, only survivors who remained in Germany were eligible to receive payment under West Germany's Federal Compensation Law of 1956, and none of these measures directly addressed the issues of forced or slave labor.³⁹ Along with many other war-related issues, slave labor claims laid dormant until the 1990s.⁴⁰

In 1998, diplomatic efforts between the United States and Switzerland culminated in a massive \$1.25 billion fund, resolving class-action suits alleging that funds deposited in several Swiss banks by Holocaust victims had never been returned.⁴¹ This fund allocated \$800 million to pay bank deposit claims, between \$200 and \$300 million for slave labor claims, and \$100 million for looted assets claims.⁴² The looted assets portion of the settlement is available to those whose property was "stolen by the Nazis and knowingly fenced through a Swiss bank."⁴³ However, the agreement stipulated that the funds for looted assets are "to be administered *cy pres* to aid the poorest survivors";⁴⁴ survivors of even average means may find their claims ineligible. Furthermore, establishing a valid claim has proved difficult, as a

36. See Falconer, *supra* note 3, at 385, 396 ("[A] finite resolution . . . requires more than a moral obligation . . .").

37. Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503, 507 (2002).

38. *Id.* at 507–08.

39. *Id.*

40. See Bazzyler, *supra* note 9, at 7 ("[O]nly ten suits were filed in American courts from 1945 to 1995 stemming from damages suffered during the Holocaust-era.").

41. See Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 805–13 (2002) (tracing the history of the Swiss bank litigation and resulting settlement).

42. *Id.* at 812.

43. *Id.* at 808.

44. *Id.* at 812.

sizeable portion of the bank records have been damaged, destroyed, or lost over time.⁴⁵

The Swiss agreement was followed swiftly by the establishment of the German Foundation “Remembrance, Responsibility and the Future” (the “German Foundation”) in response to numerous slave labor claims brought in the United States against German industry.⁴⁶ Brought about by similar diplomatic efforts, the German Foundation was initiated with a sum of DM 10 billion, paid “in equal shares by the German government and German Industry.”⁴⁷ Surviving slave laborers are entitled up to DM 15,000 each; however, the compensation is only available to living survivors—not their heirs.⁴⁸ The agreement was a response “to the moral responsibility” arising from past persecutions and established bilateral provisions for a “legal peace.”⁴⁹ Accordingly, the fund was predicated upon the dismissal of all then-pending American lawsuits against German industry, as well as a commitment by the U.S. government to file a statement of interest in all future litigation, urging courts to consider the German Foundation the exclusive forum for Holocaust claims against German companies.⁵⁰

While the German Foundation does cover some property claims, eligibility is limited to losses “directly caused by German companies.”⁵¹ Significantly, lawsuits against any German entity involving works of art are neither covered nor precluded by the agreement; however, the return of the work is expressed as the only available remedy, and the legal action must be filed either in “Germany or in the country in which the art was taken.”⁵² Suits to recover art from German governmental entities thus appear to be preempted in U.S. courts, but no decision has yet expounded on these restrictions.⁵³ Indeed, it remains to be seen whether an

45. *Id.* at 802.

46. *See id.* at 799, 813–16, 819–27 (detailing the history of slave labor litigation against Germany and the resulting creation of the German Foundation).

47. *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 379 (D.N.J. 2001). This fund included an allotment of DM 8.1 billion for slave labor claims, DM 1 billion for banking and insurance claims, and DM 700,000 “for a ‘Future Fund’ . . . to foster tolerance in Europe.” Neuborne, *supra* note 41, at 822.

48. *Frumkin*, 129 F. Supp. 2d at 379, 386.

49. Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298, 1298–99 [hereinafter U.S.-Germany Agreement].

50. Neuborne, *supra* note 41, at 824.

51. U.S.-Germany Agreement, *supra* note 49, at 1301–02 annex A, para. 6 (illustrating the limitations of the U.S.-Germany Agreement).

52. *Id.* at 1302–03 annex A, para. 14.

53. A lawyer intimately involved in both the Swiss and German agreements argued

agreement designed to resolve claims against German companies will preclude suits to reclaim art held by the German government.⁵⁴

The Austrian government and industry followed suit in late 2000, creating the \$400 million Austrian Fund “Reconciliation, Peace and Cooperation” to compensate former slave laborers.⁵⁵ In a subsequent agreement, the General Settlement Fund (GSF) was established to provide approximately \$360 million to those who suffered property loss or damage.⁵⁶ Attempting to take into account several previous laws and attempts at compensation or restitution,⁵⁷ the negotiations addressed the “gaps and deficiencies” of the prior efforts.⁵⁸ Under the GSF, payments are made through either a claims-based or equity-based procedure; additionally, an arbitration proceeding was established to handle in rem restitutions of publicly owned real estate.⁵⁹ Like the German Foundation, the GSF was undertaken to serve as a “final global resolution” and obtain an “all-embracing and enduring legal peace” that would provide for the Fund to be the exclusive forum for World War II-era claims against Austria.⁶⁰

that the United States is the appropriate forum for Holocaust-era cases, as the courts of foreign nations have offered little chance for justice in this area. Neuborne, *supra* note 41, at 830–32.

54. Significantly, Germany was rebuffed in its efforts during the negotiation process to receive “a definitive commitment by the United States to support some legal ground for the dismissal of future suits.” *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 80 (2d Cir. 2005) (quoting STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 269 (2003)). The chief U.S. negotiator, Eizenstat further recounts that Germany was warned against portraying the agreement as preventing future litigation. *Id.*

55. Eric Rosand, *Confronting the Nazi Past at the End of the 20th Century: The Austrian Model*, 20 BERKELEY J. INT’L L. 202, 202–05 (2002) (observing that the Austrian Fund mainly adopted the German Foundation’s reparation approach).

56. *Id.* at 202; see also Joint Statement Concerning the Establishment of the General Settlement Fund for Nazi-Era and World War II Claims, U.S.-Austria, Jan. 17, 2001, 40 I.L.M. 565 [hereinafter U.S.-Austria Agreement].

57. Under the 1955 State Treaty for the Reestablishment of an Independent and Democratic Austria, Austria agreed to provide restitution or compensation to those who had their property confiscated or otherwise taken. Rosand, *supra* note 55, at 210. Four years later, Austria approved a Compensation Fund to “make payments for confiscated bank accounts, securities, mortgages, money, and payment of discriminatory taxes.” *Id.* In the mid-1990s, legislation gave ownership of “heirless treasures” to the Austrian Jewish Community, and major auction houses sold many of these works to benefit Holocaust survivors and their heirs. Falconer, *supra* note 3, at 416 (internal quotation marks omitted).

58. U.S.-Austria Agreement, *supra* note 56, at 565. For an in-depth examination of the negotiation process, see Rosand, *supra* note 55, at 205–10.

59. U.S.-Austria Agreement, *supra* note 56, at 570–76 annex A, paras. 1–3.

60. *Id.* at 566. When a class action for property reparations was filed in response, the court cited the General Settlement Fund and other agreements in dismissing the case as a nonjusticiable political question. *Anderman v. Fed. Republic of Austria*, 256 F. Supp.

While certain property claims are designated for compensation by the GSF,⁶¹ works of art are excluded expressly from its scope.⁶² Instead, the 1998 Restitution Law continues to cover art held by the Austrian government or its entities.⁶³ Enacted to facilitate the return of art acquired by duress, the 1998 law sought to remedy the Austrian postwar policy of forcing emigrating Jews to donate works of art in exchange for licenses to export other property.⁶⁴ Accordingly, the Austrian restitution commission was formed, and the committee, comprised of government officials and art historians, recommended that hundreds of works be returned to their original owners.⁶⁵

In addition to these major agreements, a settlement was reached in late 2004 between the U.S. government and elderly Hungarian Jews, resulting from the confiscation of property discovered by American soldiers at the end of the war on what became known as the “Gold Train.”⁶⁶ Approved by a federal judge in late 2005, the United States will pay a \$25.5 million settlement over five years to help needy Hungarian survivors with emergency relief.⁶⁷ Additionally, the Department of Justice issued a statement that the government “regrets the improper conduct of certain of its military personnel.”⁶⁸

These settlement negotiations have been largely successful with respect to reparations claims: as of 2003, the Swiss Bank

2d 1098, 1117–18 (C.D. Cal. 2003).

61. Claimants may receive payment for liquidated businesses, real property, bank accounts, moveable property, and insurance policies. U.S.-Austria Agreement, *supra* note 56, at 572 annex A, para. 2(f).

62. *Id.* at 570 annex A, para. 1.

63. *Id.* at 577 annex A, para. 5.

64. *Altmann v. Republic of Austria (Altmann I)*, 142 F. Supp. 2d 1187, 1193–95 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *aff'd on other grounds*, 124 S. Ct. 2240 (2004).

65. *Id.* at 1195–96 (noting that the commission’s denial of Maria Altmann’s restitution request for the six Klimts prompted the ensuing litigation).

66. See John Files, *U.S. Settles Suit in 1945 Looting of Jews by G.I.’s*, N.Y. TIMES, Dec. 21, 2004, at A8; see also Michael J. Bazylar & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT’L L. 683, 759–71 (2003) (providing a history of the “Gold Train” and the related litigation).

67. *In Settlement, U.S. ‘Regrets’ WWII Thefts by Army*, L.A. TIMES, Oct. 12, 2005, at A26 (quoting Statement of the U.S. Concerning Approval of the Settlement of *Rosner v. United States* Lawsuit (Oct. 11, 2005), reprinted in Press Release, U.S. Dep’t of State, Int’l Info. Programs, U.S. Apologizes to Hungarian Jews in Nazi “Gold Train” Case (Oct. 12, 2005), available at <http://usinfo.state.gov/eur/Archive/2005/Oct/12-957888.html>). As of January 2006, approximately \$4 million had been distributed. *1st Payouts Issued in “Gold Train” Case*, CHI. TRIB., Jan. 31, 2006, at C5.

68. *In Settlement, U.S. ‘Regrets’ WWII Thefts by Army*, *supra* note 67.

fund had paid out \$154 million to bank depositors,⁶⁹ and the German Foundation distributed \$1.3 billion between 2001 and 2004.⁷⁰ With the possible exception of certain works of art fenced through Switzerland or possessed by German entities,⁷¹ looted art claims are not addressed by these successful settlements.⁷² Indeed, most of these agreements were reached with World War II adversaries, and numerous countries likely in possession of looted art have no such pact.⁷³ Thus, claims against these nations are not precluded by existing agreements, and suits may be brought to recoup art held “provisionally” by former Allies.⁷⁴

B. *International Conventions on Stolen Property*

Property and art theft has been held to violate international law on numerous occasions, but the international community has not established a mechanism for dispute resolution or effective restitution.⁷⁵ The 1907 Hague Convention forbids seizure or destruction of cultural property during wartime; accordingly, the Nazi looting was illegal at the time it was committed.⁷⁶ In the immediate postwar period, the international community made it clear that those acts of plunder were war crimes, and any country reserved the right to declare invalid any transfers of property that resulted from Nazi pillage.⁷⁷ International law mandates that to be legal, a taking of property must serve a public purpose, may not discriminate or single out alien residents of that nation,

69. William Glaberson, *U.S. Victims of Nazism Lose Round in Court on Bank Claims*, N.Y. TIMES, Apr. 20, 2004, at B2. Ironically, Maria Altmann and her extended family were awarded the largest amount for a single claim—\$21.9 million. Ryan Pearson, *12 Heirs of Nazi Victims Win Swiss Bank Claim*, WASH. POST, Apr. 15, 2005, at A5.

70. Melissa Radler, *\$401m. Distributed to Holocaust Survivors*, JERUSALEM POST, Aug. 3, 2004, at 8 (reporting that the final installment of \$401 million, “the largest single-day distribution of Holocaust restitution funds,” was made in August 2004).

71. See *supra* notes 41–45, 51–54 and accompanying text.

72. Maria Altmann’s claim, for example, is not covered by any reparations plan currently in existence. Svetlana Shirinova, Comment, *Challenges to Establishing Jurisdiction over Holocaust Era Claims in Federal Court*, 34 GOLDEN GATE U. L. REV. 159, 168 (2004).

73. See *supra* notes 26–30 and accompanying text (discussing art currently held by other foreign nations).

74. See *Alperin v. Vatican Bank*, 410 F.3d 532, 549–52 (9th Cir. 2005), cert. denied, 126 S. Ct. 1141 (2006), and cert. denied, 126 S. Ct. 1160 (2006) (permitting a looted assets claim against the Vatican in the absence of a governing treaty or executive agreement).

75. See Pell, *supra* note 9, at 28 (observing that although international law supports the return of looted art, there is no forum or clear remedy).

76. Falconer, *supra* note 3, at 386.

77. Kaye, *supra* note 28, at 664–65. The destruction or appropriation of property was later deemed a “grave breach” of the Geneva Convention of 1949. *Id.* at 665 (quoting Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287).

and must be accompanied by just compensation.⁷⁸ Because many takings were inherently discriminatory and lacked compensation, international principles should be broad enough to encompass many claims that originate from the postwar actions of currently existing nations, as well as those of the Nazis.⁷⁹

Since World War II, several conventions addressed the protection of cultural property; however, none provided a solution for the type of claims that typically arise from the Holocaust.⁸⁰ The representatives at the 1954 Hague Convention concerned themselves largely with works of great significance to cultural heritage, not private property.⁸¹ The UNESCO Convention in 1970⁸² manifested “an obligation to preserve and safeguard cultural resources” but did “not address . . . property looted from or in the possession of a private individual.”⁸³ The UNIDROIT Convention of 1995⁸⁴ made provisions for individual claims but was limited to those within fifty years of the act, rendering much Holocaust-era litigation outside its scope.⁸⁵

In 1998, the United States hosted the Washington Conference, in which forty-five nations and thirteen nongovernmental organizations specifically addressed the issue of art stolen by the Nazis.⁸⁶ Together, they drew up eleven principles, declaring that confiscated art should be identified and “steps should be taken expeditiously to achieve a just and fair solution.”⁸⁷ These principles were mere guidelines, however, and

78. *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 831–32 (9th Cir. 1987) (analyzing a takings claim against the background of international law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1987) (delineating the standard for wrongful takings of property).

79. *See Pell, supra* note 9, at 41 (“[I]nternational law can no longer . . . tolerate the free movement in international commerce of stolen art or cultural objects.”). *But see Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 62 (2d Cir. 2005) (considering the U.S. government’s view that international law does not prohibit or regulate takings of property in which the claimant was a national of the taking state).

80. *See Vanessa A. Wernicke, The “Retroactive” Application of the Foreign Sovereign Immunities Act in Recovering Nazi Looted Art*, 72 U. CIN. L. REV. 1103, 1120 (2004) (observing that the agreements have focused more on national treasures than individual property claims).

81. Falconer, *supra* note 3, at 387–88.

82. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

83. Falconer, *supra* note 3, at 388–89.

84. Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322.

85. Falconer, *supra* note 3, at 389–90.

86. Pell, *supra* note 9, at 47.

87. *Id.* at 48–49 (quoting WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS app. G, at 972 (J.D. Bindenagel ed., 1998), available at <http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf>).

had no legal effect.⁸⁸ The subsequent Vilnius International Forum on Holocaust Era Looted Cultural Assets in 2000 emphasized the need “to develop ‘national processes to implement [the Washington Conference] principles,’” but created nothing that was legally binding.⁸⁹ In the absence of a legal mechanism or enforceable consequences, the independent actions by foreign nations have been inconsistent, with no uniform answer or consensus in sight.⁹⁰

C. Legislation and the Art Community in the United States

The U.S. Congress has taken or proposed action on several occasions, as has the American art community, but together they too have failed to create a comprehensive solution to the problem of Nazi-looted art.⁹¹ The 106th Congress proposed several bills related to Holocaust claims including: a grant of jurisdiction to federal district courts over civil actions resulting from Nazi deprivation of property;⁹² an amendment to the FSIA to cover genocide cases;⁹³ and an amendment to the tax code to preclude taxation on income received from settlements.⁹⁴ Congress enacted none of these bills.⁹⁵

Perhaps the most promising attempts came in 1998. The Holocaust Victims Redress Act⁹⁶ called upon all governments to make good-faith efforts to return assets and “authorize[d] the President to commit \$5 million for archival research and translation services.”⁹⁷ Additionally, the U.S. Holocaust Assets Commission Act⁹⁸ established the Presidential Advisory Commission on Holocaust Assets in the United States.⁹⁹ The

88. See Bazylar, *supra* note 9, at 163 n.661 (“[T]he guidelines . . . have made little impact in the art world . . .”).

89. Range, *supra* note 3, at 668–69 (quoting WASHINGTON CONFERENCE ON HOLOCAUST-ERA ASSETS, *supra* note 87, at app. G, at 972).

90. See Falconer, *supra* note 3, at 416–23 (detailing both the positive strides and backwards steps made by Austria, France, and Switzerland).

91. See Wernicke, *supra* note 80, at 1120–21 (concluding that “efforts have proved ineffectual”).

92. S. 1856, 106th Cong. (1999).

93. H.R. 271, 106th Cong. (1999).

94. H.R. 1292, 106th Cong. (1999); S. 779, 106th Cong. (1999).

95. Falconer, *supra* note 3, at 401–04 (reviewing eight Holocaust-related bills proposed by the 106th Congress but noting that only one of these became law).

96. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).

97. See Falconer, *supra* note 3, at 400 (commending Congress but warning that little can be accomplished unilaterally).

98. U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611.

99. The United States established a commission to examine its own history and

Final Report of this Presidential Advisory Commission, released in 2000, made six general recommendations including: the establishment of a foundation to promote research and education; a requirement that federal institutions search their records; and the adoption of legislation to remove impediments to restitution.¹⁰⁰ Unfortunately, none of these recommendations have been adopted.¹⁰¹

The art trade faces an uphill battle in any attempt at regulation, as art is highly mobile, easy to conceal, and difficult to trace.¹⁰² Furthermore, the industry does not have a positive track record; in the postwar period, much of the art world “turn[ed] a blind eye towards art that suddenly appeared in the marketplace with a suspicious provenance.”¹⁰³ The situation since has grown so dire that the black market in art exceeds all other areas of international crime, except weapons and drug trafficking.¹⁰⁴ Art crime in 1993 cost between \$3 billion and \$6 billion, and art looted during World War II has a current estimated value of over \$200 billion.¹⁰⁵

Two books published in the mid-1990s caused a stir with their detailed documentation of the Nazis’ systematic looting, providing a body of research to potential claimants.¹⁰⁶ In 1998, the Association of Art Museum Directors (AAMD) responded. Addressing the issue of Holocaust claims, the AAMD adopted guidelines that urged museums to investigate works with suspicious gaps in their provenance.¹⁰⁷ Some success followed in recent years, as several pieces have been identified and returned to their prewar owners.¹⁰⁸ The websites of numerous leading

investigate works that fell into American hands. Bazyler & Fitzgerald, *supra* note 66, at 748 & n.291, 750.

100. *Id.* at 754–55.

101. *Id.* at 755. The Commission has been criticized further for failing to assemble a database of looted assets still in the United States. *Id.* at 757.

102. *See* Henson, *supra* note 2, at 1148. Moreover, Holocaust-era plaintiffs must contend with searching a global market and dealing with art traders who were willfully ignorant. *Id.*

103. Bazyler, *supra* note 9, at 184; *see also* Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 465–68 (1999) (exploring “overwhelming evidence” of the art industry’s negligence in checking validity of title).

104. Pell, *supra* note 9, at 50.

105. *Id.* at 51.

106. *See* Wissbroecker, *supra* note 14, at 44 (noting that the books by Hector Feliciano and Lynn Nicholas made it impossible for “dealers and collectors [to] ignore gaps in provenance”).

107. *See* Range, *supra* note 3, at 667 (stating the guidelines were meant to reconcile the interests of museums with those of individuals).

108. *See infra* Part V.B (recounting recent restitution successes).

museums now include detailed descriptions of hundreds of paintings with uncertain provenances.¹⁰⁹ The Nazi-Era Provenance Internet Portal recently came online; it identifies over 16,000 objects of questionable origin submitted by 144 participating museums.¹¹⁰ Additionally, there are now at least four organizations that work specifically to identify and locate Nazi-stolen art, as well as to register claims.¹¹¹

The AAMD principles are not legally binding on either private or governmental entities, however, and the response by American museums has been mixed.¹¹² Unlike other reparation agreements, the art community of museums, galleries, and dealers has not established a fund to cover losses or litigation collectively.¹¹³ In sum, the art industry has been accused of moving sluggishly toward changing its peculiarly secretive ways.¹¹⁴

Despite admirable intentions and efforts, neither the U.S. government nor the American art community has created a comprehensive solution to the problem of Nazi-looted art. Yet the United States cannot accomplish these goals alone in a global economy and an international art trade.¹¹⁵ European museums and nations also have been accused of refusing to participate in research efforts or proceeding only reluctantly.¹¹⁶ As a result, potential claimants are left with nowhere to go but court.

109. See Blumenthal, *supra* note 10. However, some museums have been faulted for merely listing the works and not researching their history. *Id.*

110. Nazi-Era Provenance Internet Portal, <http://www.nepip.org> (last visited Mar. 4, 2006).

111. See Bazylar, *supra* note 9, at 163 n.661 (describing the Commission for Art Recovery in New York, the Holocaust Art Restitution Project in Washington, D.C., the European Commission on Looted Art founded in London, and the Holocaust Educational Trust).

112. See Falconer, *supra* note 3, at 413 (“Museums have shown varying degrees of commitment to the principles set forth by the [Association of Art Museum Directors].”). A former member of the Presidential Advisory Commission on Holocaust Assets in the United States implored museums to “impose the rigorous self-policing they pledged at [the Washington Conference].” Blumenthal, *supra* note 10.

113. See Bazylar & Fitzgerald, *supra* note 66, at 711 (commenting that when sued, each defendant is left “to fend for itself”).

114. See Pell, *supra* note 9, at 51 (“The present art market condones . . . incomplete information and an absence of certainty regarding title . . .”); see also Henson, *supra* note 2, at 1149 (“[T]hose involved in the art trade are notoriously negligent in checking the provenance and title of artworks.” (footnote omitted)).

115. See Pell, *supra* note 9, at 28 (stating that the problem of Nazi-looted art is a “peculiarly international one”).

116. Riding, *supra* note 33.

D. Litigation in the United States

Historically, the legal system has not offered Holocaust plaintiffs a successful method of seeking redress. “[O]nly ten [Holocaust-related] suits were filed in American courts from 1945 to 1995,” and less than a handful of cases concerning looted art have been brought since World War II.¹¹⁷ In these cases, a variety of obstacles and doctrines prevented Holocaust survivors and their heirs from prevailing.¹¹⁸

A lack of subject-matter jurisdiction doomed a number of cases brought against foreign nations when the acts and instrumentalities of these countries were accorded sovereign immunity.¹¹⁹ The act of state doctrine is also responsible for a number of dismissals, as courts are often reluctant to review the acts of foreign governments even when jurisdiction exists.¹²⁰

The initial cases brought against German industry in the 1990s were dismissed because of the political question doctrine;¹²¹ however, diplomatic negotiations between the United States and Germany were occurring at the time.¹²² In accordance with the establishment of the German Foundation and the “legal peace,” forty-nine of fifty-three actions against German industry were dismissed voluntarily.¹²³ The political question doctrine quashed the remaining cases—this time because courts deemed that an independent review of issues already addressed by the political branches would show a lack of respect and potentially embarrass the government.¹²⁴ Subsequent disputes concerning Foundation matters have been rendered similarly nonjusticiable.¹²⁵

117. Bazylar, *supra* note 9, at 7, 165.

118. *Id.* at 19.

119. *See, e.g.*, *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1994) (dismissing a slave labor claim against Germany for lack of subject-matter jurisdiction because it did not fit within the Foreign Sovereign Immunities Act’s (FSIA) immunity exceptions).

120. *See, e.g.*, *Wolf v. Fed. Republic of Germany*, No. 93 C 7499, 1995 WL 263471, at *10–11 (N.D. Ill. May 1, 1995) (concluding that any judicial assessment of Germany’s decisions regarding reparations was forbidden by the act of state doctrine).

121. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 489 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284–85 (D.N.J. 1999).

122. The consortium of German corporations announced its willingness to negotiate “on the eve of oral argument in *Iwanowa*.” Neuborne, *supra* note 41, at 819.

123. *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 430 (D.N.J. 2000).

124. *See, e.g.*, *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 382–84 (D.N.J. 2001) (dismissing plaintiff’s slave labor claim against German industry on justiciability grounds).

125. *See, e.g.*, *In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp. 2d 439, 447 n.11 (D.N.J. 2002) (deeming an interest payment dispute, as well as other “matters pertaining to the operation of the Foundation . . . beyond the purview of

Property cases have proceeded along similar lines when brought as reparations claims.¹²⁶ However, several courts have found the various defense doctrines inapplicable and reached the merits when the issues were framed as title or ownership determinations.¹²⁷ Nevertheless, cases against foreign nations have been rare; until recently, all have been turned away in accordance with the FSIA and various immunity defenses.¹²⁸

IV. LOOTED ART CLAIMS SHOULD BE HEARD IN U.S. COURTS

The Supreme Court's recent decision in *Republic of Austria v. Altmann* could open the door to Holocaust-era litigation, as the FSIA and its immunity exceptions may now grant jurisdiction over foreign nations to U.S. courts in claims arising from that time period. However, several defense doctrines are potentially available to preclude a hearing on the merits. Despite its potential availability, the act of state doctrine should not be utilized by courts to dismiss looted art claims against foreign nations. Furthermore, claims not already covered by an international agreement or diplomatic negotiations should be heard by U.S. courts, and neither the political question doctrine nor principles of international comity should render them nonjusticiable.

A. *Altmann*—A New Opportunity for Plaintiffs?

By holding that the FSIA applies retroactively, *Altmann* may represent a new opportunity for Holocaust plaintiffs. The FSIA is the “sole basis for obtaining jurisdiction over a foreign state.”¹²⁹ Enacted by Congress in 1976, the FSIA grants foreign states a general immunity from jurisdiction¹³⁰ but expressly exempts cases “in which rights in property taken in violation of

American courts”).

126. See, e.g., *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1113–14 (C.D. Cal. 2003) (dismissing plaintiffs' claims for real estate, liquid assets, and household items as reparations issues not subject to judicial review).

127. See *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532, at *11 (S.D.N.Y. Apr. 12, 2002) (“[A]djudication of [ownership] claims is squarely within the parameters of what is entrusted to the judiciary.”); *Menzel v. List*, 267 N.Y.S.2d 804, 819–20 (Sup. Ct. 1966) (reviewing a jury finding that the plaintiff was “the sole and rightful owner of the painting”).

128. *Republic of Austria v. Altmann* was the first Holocaust-related case in which the FSIA was employed “to assert jurisdiction over a foreign nation.” Wernicke, *supra* note 80, at 1103.

129. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989).

130. 28 U.S.C. § 1604 (2000).

international law are in issue.”¹³¹ Prior to this statute, immunity was recognized for sovereign or public acts but not private ones.¹³² A 1952 letter sent by the State Department to the U.S. Attorney General established this limitation.¹³³ However, this restrictive theory “thr[e]w immunity determinations into some disarray,” and the FSIA sought to remedy the role diplomatic pressure played in the granting of immunity.¹³⁴

Until *Altmann*, the case law regarding the retroactivity of the FSIA was mixed. The District of Columbia Circuit made a “strong argument” for applying the FSIA retroactively,¹³⁵ while both the Second and Eleventh Circuits deemed the statute inapplicable to events occurring before 1952.¹³⁶ Muddying the waters further was the notion that retroactivity should be determined on a case-by-case basis.¹³⁷ The Supreme Court’s *Altmann* opinion, however, has settled this issue.

Maria Altmann’s claim sprang from the fate of six Gustave Klimt paintings that were owned by Ferdinand Bloch-Bauer in prewar Austria.¹³⁸ The will of Ferdinand’s wife Adele requested that he consider donating the paintings to the Austrian Gallery; however, he did not do so after her death in 1925.¹³⁹ Ferdinand later fled when the Nazis annexed Austria in 1938.¹⁴⁰ At least five of the paintings were taken by Dr. Erich Fuhrer, the Nazi lawyer appointed to liquidate Ferdinand’s estate.¹⁴¹ Fuhrer traded or sold four to Austrian museums and kept one for his private collection, but all six eventually landed in the Austrian Gallery.¹⁴² One of Ferdinand’s heirs, Maria Altmann, attempted to reclaim the Klimts after the war, but the Austrian Gallery claimed rightful possession through Adele’s will.¹⁴³ The Austrian government acted further, allegedly withholding export permits

131. *Id.* § 1605(a)(3).

132. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2248–49 (2004).

133. *Id.*

134. *Id.*

135. *Prinz v. Fed. Republic of Germany*, 26 F.3d 1166, 1170 (D.C. Cir. 1994).

136. *See Wernicke, supra* note 80, at 1107–17 (tracing the history of jurisprudence regarding the FSIA’s retroactivity).

137. *Id.* at 1115.

138. *Altmann v. Republic of Austria (Altmann I)*, 142 F. Supp. 2d 1187, 1192 (C.D. Cal. 2001), *aff’d*, 317 F.3d 954 (9th Cir. 2002), *aff’d on other grounds*, 124 S. Ct. 2240 (2004).

139. *Id.* at 1192–93.

140. *Id.*

141. *Id.* at 1193.

142. *Id.*

143. *Id.* at 1194. In 1948, the Austrian Gallery chose not to reveal that it knew Adele had not bequeathed the paintings. *Id.*

for much of Ferdinand's estate unless the Klimts were donated formally.¹⁴⁴

After formal attempts at restitution through Austrian channels were unsuccessful,¹⁴⁵ Altmann sued the Republic of Austria and the Austrian Gallery in the Central District of California, seeking the Klimts' return under several legal theories.¹⁴⁶ The district court denied the defendants' motion for dismissal, finding the underlying facts constituted a taking of property that violated international law and hence met one of the exceptions of the FSIA.¹⁴⁷ The Ninth Circuit affirmed, upholding the assertion of jurisdiction.¹⁴⁸ In a subsequent opinion, the Supreme Court determined conclusively that the FSIA applies retroactively to events that occurred before the Act's enactment in 1976, including events before the government adopted the "restrictive theory" of sovereign immunity in 1952.¹⁴⁹ Applying this reasoning, the Central District of California maintained subject-matter jurisdiction if an exception to the FSIA could be found, and Maria Altmann's suit against Austria was allowed to proceed.¹⁵⁰

The parties reached a settlement, however, in May of 2005, when they agreed to submit the matter to binding arbitration before a three-member panel in Austria.¹⁵¹ In January of 2006, the Austrian arbitration panel ruled unanimously in Altmann's favor, finding that Adele Bloch-Bauer's will was not binding and the 1998 Restitution Law required Austria to return the paintings.¹⁵² Although Altmann had indicated the Klimts could

144. *Id.* at 1194–95. The heirs' lawyer made the donation agreement for them, apparently without their knowledge. *Id.* at 1195 & n.9.

145. The Austrian restitution committee denied Altmann's formal request, despite an evident connection between the donation of the Klimts and the granting of export permits. *Id.* at 1195–96. Altmann also investigated filing a lawsuit in Austria, but the filing fee—determined by the amount in controversy—alone would have been approximately \$133,000 in 2004 dollars and \$200,000 in 1999 dollars. *Id.* at 1196 & n.12 (explaining that due to a less favorable exchange rate, Altmann would pay almost \$70,000 more to sue in 1999 than in 2004).

146. Altmann's causes of action included, among others, declaratory relief, replevin, unjust enrichment, damages for expropriation, conversion, and violation of international law. *Id.* at 1197.

147. *Id.* at 1202–06.

148. *Altmann v. Republic of Austria (Altmann II)*, 317 F.3d 954, 959 (9th Cir. 2002), *aff'd on other grounds*, 124 S. Ct. 2240 (2004).

149. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2243–47, 2254 (2004).

150. On remand, the Austrian defendants' motion to dismiss was denied. *Altmann v. Republic of Austria*, 335 F. Supp. 2d 1066, 1069–70 (C.D. Cal. 2004).

151. Felicia R. Lee, *Arbitration Set for Case of Looted Art*, N.Y. TIMES, May 19, 2005, at E3.

152. Richard Bernstein, *Austrian Panel Backs Return of Klimt Works*, N.Y. TIMES, Jan. 17, 2006, at B3. The arbitrators ruled on only five of the six contested paintings; the

remain in the Gallery “so long as restitution was made,”¹⁵³ Austria was unable to afford them. Accordingly, the paintings were removed from display in February 2006.¹⁵⁴

It remains to be seen what the ultimate effect of *Altmann* will be, but some observers declare the implications go far beyond the issues of art looted during World War II.¹⁵⁵ The decision should make it easier for Holocaust-era claims against foreign nations to be heard in U.S. courts.¹⁵⁶ Indeed, the Supreme Court remanded several other cases with *Altmann*,¹⁵⁷ and a San Diego man since has sued a Madrid museum to reclaim a painting by French Impressionist Camille Pissarro.¹⁵⁸ Interestingly, however, *Altmann* has affected at least one Holocaust case adversely; there, the French national railroad received immunity because the French government now wholly owns the one-time private entity.¹⁵⁹ Nevertheless, *Altmann* may represent a sea change in the fortunes of Holocaust plaintiffs, as federal courts have now been directed to exercise jurisdiction over claims that meet the FSIA’s immunity exceptions without regard for when the act occurred.

sixth is to remain in Austria pending a separate ownership dispute. Diane Haithman & Christopher Reynolds, *Court Awards Nazi-Looted Artworks to L.A. Woman*, L.A. TIMES, Jan. 17, 2006, at A1.

153. Haithman & Reynolds, *supra* note 152.

154. Lawrence Van Gelder, *Embattled Klimts Are Taken Down*, N.Y. TIMES, Feb. 7, 2006, at B2.

155. Henry Weinstein, *Woman Can Sue Austria Over Art Seized by Nazis*, L.A. TIMES, June 8, 2004, at A1 (conveying the statement of a New York attorney that *Altmann* “will affect anyone or any family who seeks restitution of any property that it alleges has been expropriated . . . and is currently in the hands of a foreign government”).

156. Charles Lane, *Justices Allow Lawsuit on Art Taken by Nazis*, WASH. POST, June 8, 2004, at A8. The decision has rippled through the art world as well: the Metropolitan Museum of Art in New York City and the Italian government have recently cooperated in the repatriation of several pieces of art before litigation could be brought. Richard Willing, *Family to Get Back Art Taken in WWII*, USA TODAY, Feb. 21, 2006, at 3A.

157. See *Republic of Poland v. Garb*, 72 F. App’x 850, 853 (2d Cir. 2003), *cert. vacated*, 542 U.S. 901 (2004) (pertaining to claims by former Jewish citizens of Poland claiming a wrongful confiscation of land); *Whiteman v. Fed. Republic of Austria*, No. 00 Civ 8006(SWK), 2002 WL 31368236 (S.D.N.Y. Oct. 21, 2002), *cert. vacated*, 542 U.S. 901 (2004) (reviewing claims by former Jewish citizens of Austria seeking property taken between 1938 and 1945).

158. David Rosenzweig, *San Diego Man Sues Spain for Return of Art Taken by Nazis*, L.A. TIMES, May 11, 2005, at B4. The plaintiff claims that his family was forced to sell the Pissarro in 1939 to a Nazi-appointed art appraiser in exchange for visas to leave Germany, and he “cites the *Altmann* decision as a reason for bringing” the lawsuit. *Id.*

159. Because *Altmann* “deems irrelevant the way an entity would have been treated at the time of the alleged wrongdoing,” the railroad was entitled to immunity despite the fact that it was owned predominantly by civilians during World War II. *Abrams v. Société Nationale des Chemins de Fer Francais*, 389 F.3d 61, 64–65 (2d Cir. 2004).

B. Defense Doctrines Should Not Bar These Claims

Altmann concluded “by emphasizing the narrowness of [the] holding.”¹⁶⁰ Perhaps worried about opening the floodgates of litigation,¹⁶¹ the majority declared the State Department free to file statements of interest in future cases, noting that these opinions “might well be entitled to deference” as to whether courts should exercise jurisdiction.¹⁶² This assertion seems to suggest that the Executive Branch may wield influence over immunity determinations, which is inconsistent with the majority’s own conclusion that the FSIA transferred “primary responsibility . . . from the Executive to the Judicial Branch.”¹⁶³ Yet the views of the Executive Branch may also lead a court to decide on its own that despite having jurisdiction, a claim is nonjusticiable because it presents a political question.¹⁶⁴ In addition, the *Altmann* Court discussed the act of state doctrine in some detail, raising the issue while maintaining that it did not “have occasion to comment on [its] application.”¹⁶⁵

These defense doctrines have been employed to decline adjudication in previous Holocaust-era cases,¹⁶⁶ and the Supreme Court appears to be encouraging abstention while upholding a grant of jurisdiction. Indeed, at least one court has answered the call: reviewing a Holocaust-related case upon remand in light of *Altmann*, the Second Circuit avoided the jurisdictional issue altogether, taking the U.S. government’s statement of interest to heart in dismissing a property claim against Austria.¹⁶⁷ Even if

160. Republic of Austria v. Altmann, 124 S. Ct. 2240, 2254 (2004).

161. The dissent criticized the majority’s decision to urge Executive Branch input as an attempt “to mitigate [the decision’s] harsh result.” *Id.* at 2263 (Kennedy, J., dissenting).

162. *Id.* at 2255–56 (majority opinion).

163. *Id.* at 2249. The dissent took the majority to task on this issue as well, warning that such a suggestion not only reintroduces the influences the FSIA was designed to eliminate, but it also “undermines the Act’s central purpose and structure.” *Id.* at 2274 (Kennedy, J., dissenting).

164. See, e.g., Anderman v. Fed. Republic of Austria, 256 F. Supp. 2d 1098, 1111, 1115–18 (C.D. Cal. 2003) (canvassing the Executive Branch’s justification for an international reparation agreement and dismissing a Holocaust claim even after finding the FSIA granted jurisdiction).

165. *Altmann*, 124 S. Ct. at 2254–55.

166. See *supra* Part III.D (recounting these cases).

167. See *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 68–73 (2d Cir. 2005) (employing the political question doctrine as grounds for nonjusticiability). The dissent criticized the *Whiteman* majority for relying solely upon the statement of interest and thereby “ced[ing] jurisdiction to the Executive to determine, on an ad hoc basis, when cases can and cannot be brought against a foreign sovereign.” *Id.* at 76 (Straub, J., dissenting). Interestingly, the Ninth Circuit noted the absence of a U.S. statement of interest in declining to employ the political question doctrine to dismiss a Nazi-looted art

Altmann and Austria had not settled, these defenses likely would not have been of legal significance in the case.¹⁶⁸ Nevertheless, these doctrines should not be used to bar most suits involving Nazi-looted art.

1. *The Political Question Doctrine.* The political question doctrine is a policy of abstention utilized by courts to decline adjudication when a dispute presents an issue best left to the political branches of government.¹⁶⁹ In *Baker v. Carr*, the Supreme Court enumerated six potential factors for consideration, directing courts to dismiss a case as nonjusticiable if any one is “inextricable from the case.”¹⁷⁰ Those six factors are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁷¹

Numerous Holocaust-era claims have been dismissed because courts found the underlying issue to involve foreign policy decisions that are constitutionally committed to the political branches.¹⁷² However, these cases frame the issue as that of war reparations,¹⁷³ and many looted art cases do not fall within

case. *Alperin v. Vatican Bank*, 410 F.3d 532, 555–56 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006), and *cert. denied*, 126 S. Ct. 1160 (2006).

168. The government had indicated to Austria that it would not file a statement of interest. *Altmann*, 124 S. Ct. at 2256 n.22. Additionally, the defendants withdrew their motion to dismiss based upon the act of state doctrine at an early stage in the litigation. *Altmann v. Republic of Austria (Altmann I)*, 142 F. Supp. 2d 1187, 1192 n.1 (C.D. Cal. 2001), *aff’d*, 317 F.3d 954 (9th Cir. 2002), *aff’d on other grounds*, 124 S. Ct. 2240 (2004).

169. See *Atlee v. Laird*, 347 F. Supp. 689, 701 (E.D. Pa. 1972) (stating the doctrine “limits the exercise, not the existence, of federal judicial power”).

170. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

171. *Id.*

172. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999) (“[T]he Constitution relegates issues involving foreign policy to the political departments of the government—the executive branch and the legislative branch.”).

173. See, e.g., *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001) (“Claims for war reparations arising out of World War II have always been managed on a governmental level . . .”).

that category.¹⁷⁴ The Supreme Court warned that the doctrine must be cautiously invoked and that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”¹⁷⁵ Simply because the issue may spring from Nazi-looted art or involve foreign affairs does not mean the case is nonjusticiable.¹⁷⁶

Indeed, disputes over title and property ownership are not the same as claims for reparations. Courts should treat them differently—and recently one has. Examining a Holocaust-era claim against the Vatican Bank, the Ninth Circuit acknowledged that the “[r]ecover[er] for lost and looted property . . . stands in stark contrast to . . . slave labor claims.”¹⁷⁷ Analyzing the political question doctrine, the court held that Holocaust survivors’ property claims were not barred and that “to conclude otherwise would be to shirk [its] judicial role.”¹⁷⁸ Arguing that the case was nothing more than a straightforward claim for identifiable personal property, the court stated flatly that “[d]eciding this sort of controversy is exactly what courts do.”¹⁷⁹

Courts also have dismissed Holocaust-era claims for fear that judicial review would show a lack of respect or cause potential embarrassment for the political branches.¹⁸⁰ As discussed, however, nearly all of these cases concerned reparations issues under negotiation or already settled by diplomatic agreements.¹⁸¹ These reparations agreements do not encompass looted art claims like *Altmann’s*,¹⁸² nor do agreements exist with several of the nations in which the art is resurfacing. In short, a treaty with Austria should not render a claim against Spain, France, or the Vatican nonjusticiable. Because the political branches have not resolved many potential claims of

174. See *supra* note 127 and accompanying text (discussing cases in which the legal issue was title resolution).

175. *Baker*, 369 U.S. at 211.

176. See *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1024 n.11 (9th Cir. 2003) (noting that if all foreign issues were nonjusticiable, then every dispute over a treaty would be beyond the courts’ power).

177. *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006), and *cert. denied*, 126 S. Ct. 1160 (2006).

178. *Id.* at 539.

179. *Id.* at 551.

180. See *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 382–84 (D.N.J. 2001) (upholding dismissal because these two *Baker* factors were “prominent on the surface of [the] case”); see also *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72–74 (2d Cir. 2005) (dismissing the case after analyzing *Altmann*, the Austrian General Settlement Fund, and the U.S. government’s submitted statement of interest).

181. See *supra* notes 121–25 and accompanying text (examining previously dismissed lawsuits).

182. *Shirinova*, *supra* note 72, at 168.

looted art,¹⁸³ there is little danger of disrespect or embarrassment if a court were to adjudicate them. Furthermore, the Supreme Court recently de-emphasized the importance of these particular concerns, noting that the *Baker* factors “are probably listed in descending order of both importance and certainty.”¹⁸⁴

The political branches have repeatedly maintained the position that art looted during World War II should be returned to its original owner. In 1949, Jack Tate of the State Department clearly articulated the government’s opposition to the wartime confiscations and “relieve[d] American courts from any restraint upon the exercise of their jurisdiction” in adjudicating claims against the Nazis.¹⁸⁵ Tate further stated that the official U.S. policy was “to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution.”¹⁸⁶ Before and since the Tate letter, the Executive has participated in numerous treaties and conventions concerning the protection and restitution of cultural property.¹⁸⁷ While similarly unable to create a viable solution that would supersede or conflict with judicial resolution, congressional efforts at redress have stated a goal of “facilitat[ing] the return of private and public property, such as works of art, to the rightful owners.”¹⁸⁸

Furthermore, the enactment of the FSIA has been deemed “the most recent such decision” of the political branches.¹⁸⁹ Because the FSIA expressly grants jurisdiction to courts over property rights claims in which violations of international law are at issue, the political branches have specifically prescribed these types of cases for judicial review.¹⁹⁰ The Supreme Court has further declared “that the FSIA is not simply a jurisdictional statute . . . but a codification of ‘the standards governing foreign sovereign immunity as an aspect of *substantive* federal law.’”¹⁹¹ In

183. See *supra* notes 72–74 and accompanying text (arguing that claims against most nations are outside the purview of extant agreements).

184. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1776 (2004).

185. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Attorneys for plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York).

186. *Id.* (quoting Press Release No. 296, State Dep’t, Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers (Apr. 27, 1949)).

187. See *supra* Part III.B (providing an overview of these international agreements).

188. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15, 18 (1998).

189. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2252 (2004).

190. Significantly, the FSIA deems that courts “shall” have jurisdiction if an exception is met. 28 U.S.C. § 1605(a) (2000 & Supp. II 2002).

191. *Altmann*, 124 S. Ct. at 2251 (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461

other words, it is an unmistakable grant of power to the judiciary.¹⁹² A uniform approach to both exercising jurisdiction and hearing the merits of these property cases therefore would be in accord with the policy of the political branches.¹⁹³

Yet the political question doctrine should not even preclude all suits affected by the previous settlements negotiated by the political branches. The Swiss Bank agreement offers compensation only if a survivor fits within its five specific categories;¹⁹⁴ accordingly, those excluded may file their own lawsuits.¹⁹⁵ Additionally, the German Foundation was established in part to be a claim mechanism, but the Executive Agreement providing a “legal peace” accords it status merely as the “exclusive remedy and forum for resolving . . . claims . . . *against German companies*”¹⁹⁶—not all claims arising from World War II.¹⁹⁷ While some courts have since dismissed any suit brought against German industry,¹⁹⁸ others have emphasized that further litigation was anticipated by the German Foundation and that the Executive Branch fully complies merely by filing a statement

U.S. 480, 496–97 (1983)). *But see* Carlos M. Vazquez, *Altmann v. Austria and the Retroactivity of the Foreign Sovereign Immunities Act*, 3 J. INT’L CRIM. JUST. 207, 211–19 (2005) (arguing that the *Altmann* majority’s analysis is unsatisfactory because the FSIA is both substantive and procedural in nature).

192. The FSIA was intended to “assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.” *Altmann*, 124 S. Ct. at 2264 (Kennedy, J., dissenting) (alteration in original) (quoting H.R. Rep. No. 94-1487, at 7 (1976)).

193. The Supreme Court determined that the FSIA should be applied to all pre-1952 cases because such uniformity was consistent with the Act’s purposes of “clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims.” *Id.* at 2253 (majority opinion). This reasoning regarding immunity can be similarly applied to the political question doctrine: to effectively clarify the rules and eliminate political participation, courts should consistently abstain from the political question doctrine when the FSIA has granted subject-matter jurisdiction.

194. The agreement only provides compensation for victims who were Jewish, Sinti-Roma (gypsies), Jehovah’s Witnesses, homosexual, or disabled. *Weisshaus v. Swiss Bankers Ass’n*, 225 F.3d 191, 194 (2d Cir. 2000).

195. *Id.* at 197; *Neuborne*, *supra* note 41, at 832 (identifying those persecuted for national origin or political ideology as being excluded from the Swiss settlement categories).

196. U.S.-Germany Agreement, *supra* note 49, at arts. 2(1), 3(1) (emphasis added).

197. It remains to be seen how a U.S. court would interpret a claim against a German governmental entity with respect to the choice-of-forum clause in the U.S.-Germany Agreement. *See also supra* notes 49–54 and accompanying text.

198. *See Rozenkier v. Schering AG*, 334 F. Supp. 2d 690, 696–97 (D.N.J. 2004) (dismissing a claim seeking disclosure of information and damages resulting from Nazi medical experiments); *Gross v. German Found. Indus. Initiative*, 320 F. Supp. 2d 235, 253–54 (D.N.J. 2004) (dismissing a dispute concerning slave labor settlement interest payments).

of interest.¹⁹⁹ Furthermore, this statement of interest is required to urge dismissal “on any valid legal ground.”²⁰⁰ The U.S.-Germany Agreement makes clear that the statement’s existence does not by itself “provide an independent legal basis for dismissal.”²⁰¹ As most claims are not covered by the various international agreements, a dismissal is far from valid if made on the grounds that all Nazi-looted art claims have been left to the political branches.

The final *Baker* factor cited in the dismissal of Holocaust-era claims is the apprehension that courts lack judicially discoverable and manageable standards for resolving these types of issues.²⁰² This factor may be a valid concern when a court is faced with a class action that proposes to sue on behalf of a large, dispersed group.²⁰³ It is simply not relevant to most looted art cases, however, which are filed as individual claims and concern specific, identifiable works of art.²⁰⁴ Courts therefore may adjudicate these cases on the facts before them, providing a single remedy without concerning themselves with policy decisions best left to the political branches.²⁰⁵

In sum, many of the *Baker* factors have no bearing on looted art cases, and those that do weigh in favor of restoring the property to the original owners. When the claim is not expressly covered by international agreement or other diplomatic efforts to resolve World War II-era issues, the political question doctrine should not preclude adjudication of cases involving Nazi-stolen art.

2. *International Comity.* International comity is an abstention doctrine that prohibits U.S. courts “from examining the legitimacy of actions taken by another government in its

199. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1234–36 (11th Cir. 2004). The *Ungaro-Benages* court dismissed instead on grounds of international comity, deferring to the German Foundation as an adequate alternative forum. *Id.* at 1237–40.

200. U.S.-Germany Agreement, *supra* note 49, at 1303 annex B, para. 3.

201. *Id.* at 1304 annex B, para. 7.

202. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 488–89 (D.N.J. 1999). Another decision quipped that it would be “presumptuous” for one court to supersede the political branches in an attempt to “arrive at a fair allocation of resources among all the deserving groups.” *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284 (D.N.J. 1999).

203. Among other concerns, the *Iwanowa* court was daunted by the task of identifying and notifying a scattered plaintiff group. *Iwanowa*, 67 F. Supp. 2d at 488–89.

204. *See* Bazylar, *supra* note 9, at 165–66 (observing that all previous art lawsuits involved a specific piece of art and thus were individual lawsuits).

205. *See* *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532, at *11–12 (S.D.N.Y. Apr. 12, 2002) (finding that no policy determinations needed to be made in the *in rem* action, in contrast with other slave labor cases).

territory.”²⁰⁶ This policy defers to the official proceedings of foreign countries, and the practice allows foreign acts to be recognized as valid in the United States.²⁰⁷ These principles are not rules of law but serve the interests of “practice, convenience, and expediency”;²⁰⁸ thus, U.S. law and policy may outweigh a comity interest if the two conflict.²⁰⁹

Several courts have employed international comity in tandem with the political question doctrine to abstain from hearing the merits of a Holocaust-era claim.²¹⁰ Indeed, dismissal may be the correct result when a foreign law or proceeding exists that provides a mechanism or ruling pertinent to the case.²¹¹ However, many looted art cases implicate no foreign act to which courts should defer,²¹² and those that do likely will run afoul of U.S. policy.²¹³ Comity does not ban adjudication in these circumstances. For example, an interesting situation would arise if a court were to apply principles of comity to the Austrian restitution committee’s 1998 decision to deny Maria Altmann’s request to return the six Klimt paintings.²¹⁴ On one hand, the decision is an official proceeding to which a court could conceivably defer; however, the alleged facts not only constituted a violation of international law but included evidence that the committee acted despite having knowledge that Austria might be precluded from claiming prescriptive possession under its own law.²¹⁵

206. *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 387 (D.N.J. 2001).

207. *Id.*

208. *Id.* at 386 (quoting *Remington Rand Corp. v. Bus. Sys., Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987)).

209. *Wally*, 2002 WL 553532, at *10.

210. *See, e.g., Frumkin*, 129 F. Supp. 2d at 386–88. The same court used stronger language in a related proceeding a year later, “wish[ing] to make it absolutely clear that it will not entertain any independent actions directed to the conduct of the [German] Foundation.” *In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp. 2d 439, 447 n.11 (D.N.J. 2002).

211. The *Frumkin* court deferred to the highest Civil Court in Germany, which found the German Foundation to be constitutional. *Frumkin*, 129 F. Supp. 2d at 388. The *Ungaro-Benages* court, refusing to find the existence of the Foundation enough of a legal basis to apply the political question doctrine, nevertheless dismissed on comity grounds. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235–40 (11th Cir. 2004). The court held that U.S. and German interests in the Foundation, as well as its adequacy as an alternate forum, outweighed the plaintiff’s choice of litigation forum. *Id.* at 1239.

212. *See, e.g., Wally*, 2002 WL 553532, at *9–10 (stating deference under comity standards was not warranted when there was no pertinent past or pending action, proceeding, or decree in Austria).

213. *See supra* notes 185–93 and accompanying text (outlining the political branches’ restitution objective).

214. *See supra* note 145 and accompanying text (discussing the committee’s decision).

215. *See Altmann v. Republic of Austria (Altmann I)*, 142 F. Supp. 2d 1187, 1192,

In addition, the alleged confiscations in such cases repeatedly have been held to violate international laws and conventions, yet no other dispute resolution or claim mechanism generally exists.²¹⁶ Therefore, international comity principles should not be used to dismiss cases not expressly covered by prior diplomatic negotiations and settlements.

3. *The Act of State Doctrine.* Similar to international comity, the act of state doctrine accords deference to the acts of foreign states, giving effect to the idea that “the courts of one country will not sit in judgment on the acts of the government of another.”²¹⁷ The Supreme Court elaborated this principle in *Banco Nacional de Cuba v. Sabbatino*, stating that “the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit.”²¹⁸ Unlike the previous doctrines discussed, however, the act of state doctrine is “not some vague doctrine of abstention but a ‘principle of decision’”;²¹⁹ it should be understood as “a federal choice-of-law rule,” rather than a question of immunity or justiciability.²²⁰

It is now well settled that the acts of the Nazis do not qualify as acts of state and therefore are not accorded a presumption of validity.²²¹ In 1966, a New York court held that none of the doctrine’s requirements were met in a claim for Nazi-looted art.²²² The takings in question occurred in Belgium, outside of Germany’s sovereign territory, and they were performed by the Einsatzstab Reichsleiter Rosenberg, an arm of the Nazi Party and not the

1193–96 (C.D. Cal. 2001), *aff’d*, 317 F.3d 954 (9th Cir. 2002), *aff’d on other grounds*, 124 S. Ct. 2240 (2004) (recounting the paintings’ history and the committee’s flawed decision); *see also* *Wally*, 2002 WL 553532, at *17–18 (discussing Austrian prescriptive possession).

216. *See supra* Part III.B (examining these international efforts); *see also* *Altmann I*, 142 F. Supp. 2d at 1209 (observing that the international agreements at the time of the FSIA “placed responsibility on Austria to return property that was improperly seized by the Nazis”).

217. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

218. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 (articulating the act of state doctrine).

219. *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990) (quoting *Sabbatino*, 376 U.S. at 427).

220. *See* Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2138 (1995) (explaining that most courts employing “the doctrine choose to apply the foreign state’s law rather than international or United States law”).

221. As early as 1945, courts refused to recognize Nazi decrees as the laws of a sovereign state. *Weiss v. Lustig*, 58 N.Y.S.2d 547, 549 (Sup. Ct. 1945).

222. *Menzel v. List*, 267 N.Y.S.2d 804, 813–16 (Sup. Ct. 1966).

German government.²²³ Furthermore, the court observed that Nazi Germany was neither extant nor recognized by the U.S. government at the time of trial.²²⁴ Reparations decisions made since the end of World War II, however, have been deemed sovereign acts of the current German nation, and suits that sought to challenge them have been dismissed.²²⁵

Although the doctrine relies upon separation of powers principles,²²⁶ its use is not required. Instead, “the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine’s technical availability, it should nonetheless not be invoked.”²²⁷ Holocaust-era claims should not be barred when the sovereign acts in question are “closely associated with the atrocities of the War.”²²⁸ In many cases, the art has come to rest in the hands of the foreign nation as a direct result of Nazi acts.²²⁹ Any presumption of validity would therefore stand in contrast to the myriad national and international calls for justice and restitution.²³⁰

Most looted art cases will allege violations of international law, which should render inapplicable the act of state doctrine.²³¹ In *Altmann*, the Court declared that its analysis of the FSIA did not

223. *Id.* at 813–16; see *supra* note 35 (defining ERR).

224. *Menzel*, 267 N.Y.S.2d at 816.

225. See, e.g., *Wolf v. Fed. Republic of Germany*, No. 93 C 7499, 1995 WL 263471, at *14 (N.D. Ill. May 1, 1995) (refusing to “revisit Germany’s decisions not to pay Wolf reparations”). The doctrine has further protected suits against the Conference on Jewish Material Claims Against Germany, Inc., a coalition of nonprofit organizations established to secure and distribute restitution for Jewish survivors in accordance with official German acts and laws. *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108, 1113, 1121 (N.D. Ill. 1997).

226. *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp.*, 493 U.S. 400, 404 (1990).

227. *Id.* at 409. In fact, one court declined to invoke the doctrine before even determining whether the “act” or “state” elements were met. *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532, at *9 (S.D.N.Y. Apr. 12, 2002).

228. *Altmann v. Republic of Austria (Altmann II)*, 317 F.3d 954, 965 (9th Cir. 2002), *aff'd on other grounds*, 124 S. Ct. 2240 (2004).

229. In *Altmann*’s case, for example, the Klimts were not donated to the Austrian Gallery in 1936 as originally thought but “transferred to the museum in 1941 with a letter from [the Nazi lawyer] Dr. Fuhrer signed ‘Heil Hitler.’” *Altmann v. Republic of Austria (Altmann I)*, 142 F. Supp. 2d 1187, 1195 (C.D. Cal. 2001), *aff'd*, 317 F.3d 954 (9th Cir. 2002), *aff'd on other grounds*, 124 S. Ct. 2240 (2004). Had the case been litigated, Austrian law may have determined that neither the sovereign nor the gallery ever acquired title, as prescriptive possession is not available to one who “had any objective reason to doubt his claim.” *Wally*, 2002 WL 553532, at *17.

230. See *supra* Part III.B (discussing the international conventions concerning cultural property).

231. See Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 659–62 (1997) (arguing that neither immunity nor the act of state doctrine are appropriate with respect to international criminal activity). The *Altmann I* court, for example, found two different illegal takings—one by the Nazis and one by Austria in the postwar period. *Altmann I*, 142 F. Supp. 2d at 1202–03.

affect the applicability of the act of state doctrine.²³² The FSIA's expropriation exception to immunity does not concern the taking act itself; instead it grants jurisdiction to a broader category of cases in which international violations of property rights are at issue.²³³ This grant of power to the judiciary flows from "the general presumption that states abide by international law and, hence, violations . . . are not 'sovereign' acts."²³⁴ Because the political branches have spoken by enacting the FSIA to deny sovereign immunity in precisely these situations,²³⁵ courts should not take it upon themselves to presume the validity of the underlying foreign act.

The political branches have expressed further opinions with regard to the act of state doctrine and violations of international law. The Second Hickenlooper Amendment was enacted by Congress to prevent courts from using the act of state doctrine in takings cases in which the claim was based upon a violation of international law.²³⁶ Enacted in response to *Sabbatino*, which mandated employment of the doctrine even in the face of such a violation,²³⁷ the clear intent of Congress was to afford broad protection and "secur[e] the right of a property holder to a court hearing on the merits."²³⁸ By its terms, however, the Second Hickenlooper Amendment only applies if the taking occurred after January 1, 1959,²³⁹ and it has rarely been used.²⁴⁰ Nevertheless, this clear intent by Congress, combined with two ABA-approved proposals to limit the doctrine in expropriation claims,²⁴¹ should

232. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2255 (2004).

233. *Altmann I*, 142 F. Supp. 2d at 1201 n.16. As further proof of the FSIA's broad scope, the country sued does not necessarily have to be the one that expropriated the property. *Id.* at 1202.

234. *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987).

235. See *supra* notes 185–93 and accompanying text (defining the political branches' statements).

236. 22 U.S.C. § 2370(e)(2) (2000); see also *West*, 807 F.2d at 829–30 (discussing the Second Hickenlooper Amendment).

237. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (directing courts to use the act of state doctrine "even if the complaint alleges that the taking violates customary international law").

238. *West*, 807 F.2d at 830 (quoting *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1542 n.180 (D.C. Cir. 1984)).

239. § 2370(e)(2).

240. Stephen Zamora, *Recognition of Foreign Exchange Controls in International Creditors' Rights Cases: The State of the Art*, 21 INT'L LAW. 1055, 1075 (1987) (noting that the amendment has only been successfully applied once).

241. Stacey P. Nakasian, Note, *Proposed Amendments to the Provisions of the Foreign Sovereign Immunities Act of 1976 Governing Execution of Judgments*, 23 GEO. WASH. J. INT'L L. & ECON. 179, 180 & n.11 (1989).

have great weight in a court's examination of the policies underlying the doctrine.²⁴²

Uniformity concerns weigh in favor of disregarding the act of state doctrine as well. The "*Bernstein* exception" suggests that when the State Department issues a letter to the judiciary indicating that no foreign policy interests conflict with adjudication, courts may ignore the act of state doctrine and proceed to hear the merits.²⁴³ Yet the Supreme Court never fully embraced this exception²⁴⁴ and has seldom applied it. The exception has been criticized as politicizing the judiciary, as well as relegating "the fate of the individual claimant . . . to the political considerations of the Executive Branch."²⁴⁵ The *Altmann* majority seems to be asking for the exact opposite, however, when it invites the State Department to file a statement of interest asking courts to dismiss a particular case.²⁴⁶ If the Executive Branch can wield this type of influence and trigger dismissal of certain cases, the legal landscape would once more resemble the disarray the FSIA was meant to cure.²⁴⁷ Thus, if the *Bernstein* exception permitting adjudication is disfavored, so too should a policy encouraging dismissal.

It has been opined that the act of state doctrine was at least partially created to reduce fear that a court's interpretation of international law might conflict with U.S. foreign policy.²⁴⁸ However, customary international law should prevail over this common law doctrine,²⁴⁹ and the legal world is moving toward a concept of transnational law.²⁵⁰ Further taking into consideration

242. To make the matter even clearer, however, Congress should take further action by extending the Second Hickenlooper Amendment to encompass the years of World War II or abolish the time restraint altogether.

243. See Zamora, *supra* note 240, at 1074–75 (examining the *Bernstein* exception).

244. It was approved in a plurality opinion written in 1972, before the FSIA was adopted. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 768 (1972) (Rehnquist, J., plurality opinion).

245. *Id.* at 792 (Brennan, J., dissenting) (adding that the policy of the political branch may vary over time as personnel change).

246. See *supra* notes 160–65 and accompanying text (discussing this invitation to the Executive Branch).

247. The *Altmann* majority appears to agree, observing that Congress's purposes in enacting the FSIA "would be frustrated if . . . courts were to continue to follow the same ambiguous and politically charged 'standards' that the FSIA replaced." Republic of Austria v. Altmann, 124 S. Ct. 2240, 2254 (2004) (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487 (1983)).

248. Rabkin, *supra* note 220, at 2137.

249. See Paust, *supra* note 231, at 660 n.11. The act of state doctrine has been deemed federal common law. *Id.*

250. See Neuborne, *supra* note 41, at 829 (observing that actors are now being held "responsible for violations of norms of human decency, regardless of local law," and that the German slave labor and Swiss Bank litigation was "necessary to close a hole in

the numerous international agreements that call for the restitution of cultural property,²⁵¹ courts should not employ the act of state doctrine to bar expropriation claims against foreign nations in which an alleged violation of international law has resulted in jurisdiction under the FSIA.

V. PROPOSING A BINDING, INTERNATIONAL AGREEMENT

The previous arguments notwithstanding, litigation is not the best method for resolving the lingering issues of Nazi-looted art. Lawsuits present extraordinarily difficult and costly challenges for plaintiffs.²⁵² Furthermore, the legal system alone is not able to account appropriately for the unique interests of defendant museums and good-faith purchasers. Litigation, however, has played an integral role in the formation of previous agreements. It is therefore the most likely catalyst for the creation of a binding agreement that will jointly serve the international community, art industry, and Holocaust plaintiffs.

A. *Litigation Is Not the Answer*

Even when plaintiffs can establish jurisdiction and survive the various defense doctrines, there are still numerous hurdles to clear before a court may rule in their favor.²⁵³ Property law varies from state to state, resulting in several different legal schemes by which courts resolve ownership disputes.²⁵⁴ For example, some jurisdictions employ the “discovery rule” to determine when the statute of limitations begins to run,²⁵⁵ while others abide by the

international jurisprudence”). Tellingly, most foreign courts will not use the act of state doctrine in cases of an alleged violation of international law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 440 (1964) (White, J., dissenting) (“No other civilized country has found such a rigid rule necessary . . .”).

251. The act of state doctrine only applies “in the absence of a treaty or other unambiguous agreement regarding controlling legal principles.” *Sabbatino*, 376 U.S. at 428. While international agreements do not provide controlling dispute mechanisms, they unambiguously state that expropriations are illegal acts. *See supra* Part III.B. As such, it may be argued that the reasoning of this “treaty exception” applies, as it is clear the international community favors the resolution of these claims.

252. *See Henson, supra* note 2, at 1146–50 (arguing that the burdens are too high).

253. *See Wissbroecker, supra* note 14, at 60–62 (analyzing the remaining claims and defenses in *Altmann* and concluding the plaintiff faced an uphill battle).

254. *See Henson, supra* note 2, at 1146 (asserting that by not developing clear rules, courts “have largely failed the true owners”).

255. *See, e.g., Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1386 (S.D. Ind. 1989) (holding the statute of limitations begins to run when the injury is first discovered or could have been discovered through due diligence).

“demand and refusal rule.”²⁵⁶ Many courts further impose a requirement of due diligence, ensuring a plaintiff has not unjustly delayed in bringing suit because of a failure to conduct a reasonably diligent search.²⁵⁷ As a result, one commentator observed that the statute of limitations is “often the greatest barrier to Holocaust plaintiffs’ claim of ownership,”²⁵⁸ while another stated that “holders of stolen art treasures often operate under the assumption that, if secrecy is maintained for a long enough time, the statute of limitations will ultimately protect them.”²⁵⁹

Choice of law rules often dictate that the controlling law is determined by the country in which the event took place,²⁶⁰ and foreign nations are deeply divided over the determination of property ownership. In common-law jurisdictions like the United States and England, theft of property—or its subsequent resale—does not transfer legal title.²⁶¹ In Italy, however, good-faith purchasers are protected from the moment of purchase.²⁶² Title may be acquired once the applicable time limit has run in France, Germany, and Switzerland.²⁶³ As such, there is tremendous disparity among the states and nations, and it has been lamented that “looted art cases often turn on the sheer happenstance of where the art has come to rest.”²⁶⁴

Holocaust plaintiffs also face certain unique challenges. As previously discussed, it is extremely difficult to find the dispersed art, and the trails are often cold.²⁶⁵ This situation is exacerbated by the fact that many claimants are elderly or heirs to the original owners, many decades have passed since the art was taken, and family ownership records have often been lost,

256. See, e.g., *DeWeerth v. Baldinger*, 658 F. Supp. 688, 694 (S.D.N.Y. 1987) (“[T]he . . . statute of limitations does not commence running until a demand is made to return the property and the demand is refused.”).

257. *Id.*

258. Falconer, *supra* note 3, at 408.

259. Kaye, *supra* note 28, at 658–59.

260. See, e.g., *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532, at *6–8 (S.D.N.Y. Apr. 12, 2002) (examining Austrian law to determine ownership of a painting stolen from Vienna in 1938).

261. See *Menzel v. List*, 267 N.Y.S.2d 804, 812 (Sup. Ct. 1966) (expounding that under the general principles of the laws of war, Germany did not gain title to property acquired by theft, looting, or pillage); see also U.C.C. § 2-403(1) (2003) (“A purchaser of goods acquires all title which his transferor had or had power to transfer . . .”).

262. Pell, *supra* note 9, at 43.

263. *Id.*

264. *Id.* at 44.

265. See *supra* notes 23–35 and accompanying text (discussing the scattering of the art); see also Kaye, *supra* note 28, at 659 (remarking that some art does not resurface for decades).

destroyed, or forgotten.²⁶⁶ Nevertheless, plaintiffs must locate the art before bringing suit, and nearly all causes of action place the burden of proving ownership solely on the plaintiff.²⁶⁷ The FSIA is a narrow means of obtaining jurisdiction, as immunity may be preserved if the victim was a citizen of the nation performing the taking.²⁶⁸ Plaintiffs thus may be unable to secure jurisdiction even when they locate the art in the hands of a foreign nation. Finally, there is the overwhelming cost of litigation. Because the cost-spreading strategy of a class action is not available to individual claimants,²⁶⁹ only plaintiffs who have tremendous wealth will file suit and only when the work itself has significant value.²⁷⁰

Litigation presents serious drawbacks to the museum, dealer, or private collector who possesses the art as well. Courts may find themselves placed in the unenviable position of allocating rights and burdens between an original owner and a good-faith purchaser.²⁷¹ Additionally, the unique status of museums as charitable trusts with duties running to the public makes the deaccession of an artwork a complex issue.²⁷² While the museum community publicly supports restitution, the costs to museums have been ignored hitherto, and the adversarial system is not likely to take them into account.²⁷³ For example, when a Matisse painting owned by the prominent Jewish art dealer Paul Rosenberg surfaced in its collection, the Seattle Art Museum returned it to Rosenberg's heirs, describing the act as "doing the right thing."²⁷⁴ This moral act was an expensive one: the

266. Henson, *supra* note 2, at 1138.

267. *See id.* at 1136–41 (examining the burdens of proof under the doctrines of adverse possession, replevin, fraudulent concealment, and conversion).

268. Wernicke, *supra* note 80, at 1126 (arguing that the FSIA alone is thus inadequate as a comprehensive solution).

269. *See Bazyler, supra* note 9, at 188–89 ("Each claimant must bear the total amount of expenses . . .").

270. One lawyer quipped, "[I]f the art isn't worth \$3 million, don't go after it." Alexander Kaplan, *The Need for Statutory Protection from Seizure for Art Exhibitions: The Egon Schiele Seizures and the Implications for Major Museum Exhibitions*, 7 J.L. & POL'Y 691, 738 n.215 (1999) (citing Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-Tainted Art?*, ART IN AMERICA, Nov. 1998, at 37).

271. *See Menzel v. List*, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966) ("The resolution of these problems is made the more difficult in view of the fact that one of two innocent parties must bear the loss.").

272. Range, *supra* note 3, at 657. In cases against museums, the cost is thus ultimately borne by the public. *Id.* at 672.

273. *See id.* at 670 (stating that museum directors desire to return Holocaust art but are fearful of "the impact on the museum's financial future that would result").

274. *Id.* at 655 (quoting Press Release, Ass'n of Art Museum Dirs., SAM to Return Matisse Odalisque to Rosenbergs (June 14, 1999), available at <http://www.aamd.org/newsroom/r061499.php>).

Matisse's estimated value is \$2 million, and the museum spent hundreds of thousands more in litigation.²⁷⁵ In Altmann's case, the Austrian Gallery stood to lose an estimated \$300 million of value in the Klimts, plus potential tourist revenue.²⁷⁶

Finally, the adverse effects of litigation upon foreign relations must not be discounted. American lawsuits filed against Austria delayed the distribution of the 2000 General Settlement Fund until the final case was dismissed in late 2005.²⁷⁷ Submitting a statement of interest that urged dismissal, the U.S. government championed the fund over litigation to resolve Holocaust-related claims.²⁷⁸ The Executive Branch argued that not only would such an agreement provide faster and more certain benefits to victims during their lifetime, but diplomatic efforts would strengthen ties between the United States, Austria, and all other nations affected by the Nazi legacy.²⁷⁹ Yet even when previously negotiated settlements are not relevant to a particular case, the long history of diplomatic attempts to resolve Holocaust-era claims makes litigation against foreign nations especially problematic.²⁸⁰ While these concerns should not trigger automatic dismissal under the political question doctrine, a series of lawsuits would undoubtedly have negative ramifications with regard to U.S.-foreign relations.

For proof that litigation can create more trouble than it solves, one need look no further than *United States v. Portrait of Wally*.²⁸¹ In 1997, an Austrian museum lent Egon Schiele's *Portrait of Wally* to the Museum of Modern Art in New York, almost sixty years after it was seized in Vienna through the process of "Aryanization."²⁸² In subsequent proceedings, the United States sought a civil forfeiture of the painting, alleging

275. *Id.* at 656. To recover some of these costs, the museum then sued the art gallery who originally sold the Matisse to the donors in 1954. Bazylar, *supra* note 9, at 173.

276. Van Gelder, *supra* note 154 (noting that 10,000 people stood in line to see the Klimts in their final weekend on display). The removal of the paintings has also been described as "a loss of a piece of [Austria's] national heritage." Haithman & Reynolds, *supra* note 152.

277. *See* Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 62–63 (2d Cir. 2005) (stating that while 20,000 claims had been filed, disbursements awaited the dismissal of all cases covered by the fund).

278. *See id.* at 66–68 (describing the foreign policy interests at stake).

279. *Id.*

280. *See* Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006), and *cert. denied*, 126 S. Ct. 1160 (2006) (describing the context of the Holocaust-related case as "politically charged," even while refusing to dismiss the claim as a political question).

281. *United States v. Portrait of Wally*, No. 99 Civ. 9940 (MBM), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

282. *Id.* at *1, 4.

that exporting *Wally* back to Austria would violate the National Stolen Property Act.²⁸³ The *Wally* court, determining the action was not barred by the act of state or the political question doctrines, allowed the government to proceed with the seizure.²⁸⁴ The painting remains in the custody of the U.S. government,²⁸⁵ despite concerns that the seizure would have repercussions upon future exhibitions.²⁸⁶

In sum, litigation is a poor method for resolving Nazi-looted art claims. It is nearly impossible for a judicial decision to provide a means for recovery and simultaneously be fair to all sides, as the adversarial system cannot take these multifaceted issues into account.

B. Litigation Can Be a Catalyst

There have been instances in which art was returned without the motivation of a lawsuit,²⁸⁷ but litigation is often a necessary incentive to get the different parties to the negotiating table.²⁸⁸ Certainly, litigation joins diplomacy and community insistence on dealing with Holocaust issues as an essential part

283. *Id.* at *1.

284. *Id.* at *8–12. In accordance with the Immunity from Seizure Act, the State Department may protect imported artworks loaned to American not-for-profit, cultural institutions by making them immune from seizure and other forms of judicial process. 22 U.S.C. § 2459 (2000). To qualify for protection, the President must designate the art as an object of cultural significance, the exhibit must be of national interest, and notice must be published in the Federal Register. *Id.* § 2459(a). New York institutions often shun the cumbersome requirements of the Act and rely upon state law; to its detriment, the Museum of Modern Art in New York (MoMA) followed this strategy for the Schiele painting. Kaplan, *supra* note 270, at 710–11. Furthermore, the Act prevents seizure but does not protect the art from a suit contesting ownership. *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 310–12 (D.D.C. 2005).

285. Tim Rutten, *In NPR Actions, Were All Things Considered?*, L.A. TIMES, Mar. 19, 2005, at E1.

286. The *Wally* court thought MoMA's argument a dubious one and viewed the request for a review of public policy to be both "interesting" and "distasteful." *Wally*, 2002 WL 553532, at *6 n.4. Ironically, reluctance on the part of museums to loan works of art likely would reduce the chances for survivors and heirs to learn the whereabouts of their lost pieces, as these exhibitions are the best opportunity for discovery. Kaplan, *supra* note 270, at 728–29.

287. In 2000, the North Carolina Museum of Art settled a dispute with two elderly sisters from Austria over a painting by Lucas Cranach the Elder worth \$750,000. Bazyler, *supra* note 9, at 183 n.755. In addition, a Monet worth \$7.5 million was returned, without litigation, to the family of Paul Rosenberg by a French museum. *Id.* at 174 n.705. The Monet was on loan to the Boston Museum of Fine Arts, where it was spotted in November 1998. *Id.*

288. Hector Feliciano's criticism has been harsh: "[M]useums and art dealers still have to be sued or threatened with lawsuits in order for them to start doing the right thing." Blumenthal, *supra* note 10; *see also* Kaye, *supra* note 28, at 666 ("[L]eft to their own devices, states and municipalities will likely act in their own self-interest . . .").

of the process.²⁸⁹ Indeed, neither the Swiss nor German reparations agreements would likely have occurred without the lawsuits that spurred them;²⁹⁰ the German government has acknowledged the litigation as “the major incentive for establishing the fund.”²⁹¹

Legal action has instigated two other notable settlements with public entities. Hugo Princz’s suit against Germany seeking slave labor damages was dismissed in 1994 for lack of subject-matter jurisdiction under the FSIA.²⁹² Nevertheless, the German government settled with Princz and ten other Holocaust survivors a year later for \$2.1 million, in part because of negative public opinion but also because Congress was moving toward action that would allow Princz’s claim to be heard.²⁹³ In 1997, *Bodner v. Banque Paribas* was filed as a class action seeking restitution of assets deposited in French banks during or after the Holocaust.²⁹⁴ When the defendants’ motion to dismiss was denied on public policy grounds,²⁹⁵ the settlement talks began in earnest; in the end, the French banks agreed to pay over “\$172.5 million to 64,000 known account holders and other undocumented claimants.”²⁹⁶

Litigation has induced private parties to mutually settle their disputes as well, often in creative ways. In one case, the parties decided to share ownership of the Edward Degas painting at issue; one of the parties subsequently donated his half to the Art Institute of Chicago, and the Art Institute bought the other half.²⁹⁷ As a result, one may see the Degas today in Chicago, next to a plaque that designates the work as purchased from and donated by the former adversaries.²⁹⁸ On at least two other occasions, a museum has compensated the claimant in part and kept the artworks, indicating to the public the claimant’s partial ownership by nearby signage.²⁹⁹ Under another agreement, the claimant kept the painting for ten years, after which time title

289. See Neuborne, *supra* note 41, at 796–97 (analogizing the process to “a three-legged stool”).

290. See Frumkin v. JA Jones, Inc., 129 F. Supp. 2d 370, 389 (D.N.J. 2001) (“It must be noted that but for Plaintiff’s claims, and the claims brought in the other actions . . . the Foundation would not exist.”).

291. Bazyley & Fitzgerald, *supra* note 66, at 696.

292. Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

293. Bazyley, *supra* note 9, at 25.

294. Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 121–22 (E.D.N.Y. 2000).

295. *Id.* at 133.

296. Bazyley & Fitzgerald, *supra* note 66, at 698.

297. Bazyley, *supra* note 9, at 170.

298. *Id.*

299. Range, *supra* note 3, at 672 & n.163.

reverted to the museum.³⁰⁰ These mutual agreements creatively served the best interests of both parties—something beyond the capacity of a judicial decision.

The filing of suit and the exercise of jurisdiction are undoubtedly catalysts to creative and mutually agreeable settlements. However, these arrangements only resolve the claim between the two involved parties and do not take into account the issues of Nazi-looted art as a whole. While litigation is second to none in encouraging negotiated agreement, a series of individual lawsuits will not solve the overall problem.³⁰¹

C. A Binding, International Agreement

The broader set of interests can only be satisfied through diplomatic negotiations that include the international community and the art industry. Therefore, this Comment joins with previous scholars, parties to litigation, courts, and the art community in asserting the need for a binding, international agreement to resolve Nazi-looted art claims.³⁰²

Because an undertaking of this magnitude would affect both the international art market and foreign affairs, government-to-government negotiations are required,³⁰³ as well as the participation of museums, auction houses, and dealers both at home and abroad.³⁰⁴ Compromises must be reached among nations to account for substantial differences in property law.³⁰⁵ However, a nonjudicial mechanism for dispute resolution would

300. *Id.* at 672 & n.165.

301. See Bazylar, *supra* note 9, at 183 (“[T]he adversarial litigation system may not be the best method for resolving the claims involving Nazi-stolen art . . .”).

302. See, e.g., Frumkin v. JA Jones, Inc., 129 F. Supp. 2d 370, 380–81 (D.N.J. 2001) (“[M]atters of Holocaust-era restitution are best resolved through dialogue, negotiation, and cooperation as opposed to prolonged and uncertain litigation . . .”); Falconer, *supra* note 3, at 426 (arguing that the nonbinding principles and efforts of the late 1990s are not enough); Kaplan, *supra* note 270, at 739–40 (recounting that Austria had pushed for mediation in the dispute over the Schiele paintings); Alan G. Artner, *Ethics and Art: Museums Struggle for Correct Response to Stolen Art Claims*, CHI. TRIB., Aug. 16, 1998, § 7, at 6 (discussing the preference of the Association of Art Museum Directors for mediation before experienced arbiters).

303. California attempted to provide a means of redress for its citizens who had performed slave labor for the Nazis, enacting a law that would allow actions in state court and ignore any available statute of limitations if brought before 2010. *Deutsch v. Turner Corp.*, 317 F.3d 1005, 1018–19 (9th Cir. 2003). The Ninth Circuit struck down this statute as unconstitutional and an impermissible intrusion into foreign relations. *Id.* at 1027.

304. See Bazylar, *supra* note 9, at 163–64 (suggesting a mass-scale restitution effort would disrupt the art market, especially for works of French Impressionism).

305. See Falconer, *supra* note 3, at 423 (observing that collaboration would require some nations to alter domestic laws).

enable all parties to avoid costly litigation and settle matters much more quickly than any court system would allow.³⁰⁶

Therefore, a legally binding title registration and clearing system should be established to provide a uniform method for housing and disseminating information concerning Nazi-looted art. In conjunction with this system, an independent, international commission should be created to manage claims and resolve disputes.³⁰⁷ This two-pronged approach would allow both sellers and current possessors to perfect title, as well as avoid future ownership disputes.³⁰⁸ Additionally, the statute of limitations should be tolled for a period of time on these types of claims,³⁰⁹ after which title may be assured.³¹⁰

The combination of a registration system and a commission to settle disputes would provide for all groups with a stake in the fate of Nazi-looted art. It would also avoid the harsh all-or-nothing prospect of litigation and should allay any museum's lingering fear of seizure that fosters reluctance to loan works for exhibitions. While the commission should have the power to enforce binding judgments in intractable disputes, it should also be given the discretion to facilitate creative and mutually agreeable solutions.³¹¹ Furthermore, a cheaper alternative to a lawsuit would make restitution available to all claimants, not simply the wealthy.

This approach should be negotiated by the Executive Branch and implemented by the Legislative Branch—the two branches that are politically accountable. In the formation of such entities, the prior reparations settlements can serve as models of negotiation and archetypes for both the creation of arbitration panels to resolve disputes and the efficient administration of funds. Similarly, funding should be jointly provided by

306. Stolen art lawsuits in the United States take between seven and twelve years to resolve and are generally more costly than the value of the art. Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 36 (1998).

307. See *id.* at 35–41 (advocating the creation of a restitution commission comprised of art historians and experts); Pell, *supra* note 9, at 51–53 (proposing a registry and commission to mediate claims).

308. Pell, *supra* note 9, at 53.

309. See Cuba, *supra* note 103, at 450 (advocating a suspension of the statute of limitations); Falconer, *supra* note 3, at 410 (calling time limits “inappropriate” in the context of Nazi-looted art).

310. Falconer, *supra* note 3, at 424.

311. See *supra* notes 297–300 and accompanying text (discussing previous settlements); see also Lerner, *supra* note 306, at 36–37 (suggesting “the commission’s authority . . . be confined to providing reasonable compensation, not the current fair market value of the stolen artwork”).

governments and the art industry,³¹² thus placing some financial burden on all interested parties yet enabling valuable provenance research to be performed and honored.

While the compilation of such information is a large task, it is by no means impossible. In addition to the Nazi-Era Provenance Internet Portal and nonprofit organizations currently investigating Nazi-stolen art, the International Art & Antique Loss Register, Ltd. (ALR) already maintains a computerized databank that registers over 10,000 lost or stolen art objects each year.³¹³ Established in 1991, the British for-profit organization has devoted full-time staff and resources to Holocaust-related art since 1998, cataloguing thousands of works of Nazi-looted art and securing the return of twenty-one.³¹⁴ The ALR thereby demonstrates not only the feasibility of such a system, but that the work has already begun.

In the face of the unresolved issue of Nazi-stolen art, as well as the prevalent black market, it has been proposed that the art market is ready for reform.³¹⁵ Indeed, “[t]he fine art industry is the only multi-billion dollar international business that is totally unregulated.”³¹⁶ With these problems in mind, a binding international agreement should be undertaken to create both a title registration clearing system and a commission for dispute resolution. In this manner, incentive and value would be available to all participants, and a fair and just resolution to looted art claims may be established as a continuing work in progress.³¹⁷

VI. CONCLUSION

After several decades of legal neglect, the Supreme Court’s ruling in *Altmann* may open the door to Holocaust plaintiffs seeking restitution of their families’ art treasures from foreign nations. Courts should be receptive to these claims, as most are not covered by previous reparations settlements, nor has

312. See Lerner, *supra* note 306, at 37–38 (calling for a contribution of \$25 million by the U.S. government and the imposition of a license fee on all auction houses and dealers).

313. See The Art Loss Register, <http://www.artloss.com> (last visited Mar. 4, 2006) (follow “Our Services” hyperlink).

314. *Id.* (follow “About Us” and “Holocaust” hyperlinks).

315. Pell, *supra* note 9, at 50. It has also been suggested that purchases of art should more closely emulate those of real estate and require proof of good title. Henson, *supra* note 2, at 1151–52.

316. Cuba, *supra* note 103, at 468.

317. See Kaye, *supra* note 28, at 669–70 & nn.73–74 (musing a solution to Nazi-stolen art could serve as a model for the future problem of works taken recently in Kuwait, Afghanistan, and Iraq).

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Congress or the art industry yet created a mechanism for dispute resolution. When the facts allege a violation of international law, the various defenses of the political question doctrine, international comity, and the act of state doctrine should not preclude a hearing on the merits. These cases should be decided—not because litigation is the best solution, but because it is highly doubtful the various communities will come together at the negotiating table without the incentives created by an impending lawsuit.

There will hopefully come a day when the political question doctrine or comity principles appropriately will deny adjudication of Nazi-looted art cases, as the judiciary defers to a binding and comprehensive solution that lies outside the purview of the court system. Until such time, claims concerning art that has reemerged from the night and fog should be heard—and resolved on the merits—in the promise that justice may be done one claim at a time.

Benjamin E. Pollock