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Turnabout Is Foul Play: Sovereign Immunity and Cultural Property Claims

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*Nicholas M. O'Donnell**

In 1976, Congress enacted the Foreign Sovereign Immunities Act, 28 U.S.C. § 1601, et seq., to establish the circumstances under which foreign states and their instrumentalities are subject to suit in United States courts. Under the Act, a foreign state is immune from suit unless an enumerated exception applies. Of these exceptions, the "expropriation exception" of section 1605(a)(3) was invoked for various claims to looted or dispossessed cultural property. Most frequent of all were claims arising out of Nazi-era transfers and thefts, a dispossession of art in particular that Congress (unanimously) in 2016 labeled the "greatest displacement of art in human history." Claims were evaluated without regard to the nationality of the Nazis' victims, consistent with a 2016 amendment to the FSIA that confirmed its applicability to "Nazi-era claims" defined as those dating from January 30, 1933 to May 8, 1945, as well as with the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.

In 2021 the Supreme Court abruptly changed course. The expropriation exception, the Court held, incorporates the so-called "domestic takings rule," under which international law is indifferent to crimes by a government against its own nationals. By inserting this additional element into the expropriation exception at odds with the Genocide Convention and § 1605(h), the Court sent a clear message of hostility to cultural property claims that sovereign litigants and the lower courts have followed. What has ensued is a demeaning race to the bottom in which heirs of the Nazis' victims are forced to explain why international law should protect those whom Germany cast out of the protection of its laws.

Ironically, the Court's increasing reliance on an unrelated law that addressed the Act of State Doctrine provides the solution. After the Supreme Court declared Cuba's expropriations non-justiciable under the Act of State Doctrine, Congress asserted its co-equal power to restore access to U.S. Courts with the Second Hickenlooper Amendment. Without irony, the Supreme Court has increasingly cited the Second Hickenlooper Amendment to interpret the Foreign Sovereign Immunities Act more narrowly. Congress must take the cue, and act to remind the Court that Congress meant what it said, not the policy that the Court has inserted into the law.

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I. INTRODUCTION

When and whether foreign state museums and collections can be subject to the jurisdiction of U.S. courts over cultural property ownership-related claims has followed a curious arc in the last quarter century. After Maria Altmann successfully obtained jurisdiction over the Republic of Austria for that nation's wrongful possession of her family's artworks taken from them in the Nazi Era, courts initially accepted an increasingly expanded amount of expropriation claims, such that by 2016 the courts, and Congress, had reached what appeared to be a consensus.

Since 2020, however, the Supreme Court has rejected its own recent guidance and built a jurisprudence of immunity with startling speed. Notwithstanding the clear directives of the Foreign Sovereign Immunities Act (FSIA) and its legislative history—that policy and politics have no place in determining sovereign immunity—courts have effectively reversed the presumption of jurisdiction where a statute confers it. Increasingly, they have held that the very *purpose* of the FSIA is to deny immunity, rather than set forth exceptions to it. Arguably, the courts have disproportionately used cultural property cases to push a separate agenda: the abolition of human rights claims from U.S. courts. Whether that agenda should or should not succeed has nothing to do with the enumerated exceptions to sovereign immunity about property that Congress has set for the courts to apply. The Court's approach is at odds with the history and text of the FSIA.

As it has done before, Congress must exert its power as a co-equal branch to rebuke this era of impunity, which has encouraged the very worst behavior by sovereign defendants.

II. SOVEREIGN IMMUNITY BEFORE 1976

For much of U.S. history, foreign sovereigns were seldom amenable to suit in the courts of the United States.[1] Although immunity was not required by the Constitution, Justice Marshall's opinion in *The Schooner Exchange* was broadly interpreted to confer virtually absolute immunity on foreign sovereigns.[2]

Sovereign immunity was "a matter of grace and comity" by the United States to other nations, in that courts would defer to the

1 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812).

2 *See, e.g.*, Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562, 571, 574 (1926) (holding that an Italian merchant ship was immune from a damages claim in federal court).

decisions of the political branches of the government—the Executive in particular—in determining whether a foreign state was immune from suit.[3] In practice, until 1952, the Executive Branch granted immunity in every case in which it was sought, rendering foreign states effectively immune from any suit.[4]

That changed when the State Department announced the so-called "restrictive" theory of immunity in a letter from Acting Legal Adviser Jack Tate.[5] The restrictive theory holds that a sovereign retains absolute immunity for its public acts—*jure imperii*—but not its commercial or private ones—*jure gestionis*.[6] If sued, the foreign state would ask the State Department for a "suggestion[] of immunity," leading to political considerations not necessarily bound by the restrictive theory.[7] To make matters worse, foreign states did not always approach the State Department, leaving the court without clear instruction and often forcing it to rely on prior decisions of the State Department which were themselves inconsistent.[8]

As the Supreme Court noted, this case-by-case analysis was "neither clear nor uniformly applied."[9] Indeed, the approach "thr[ew] immunity determinations into some disarray" because "political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'"[10] These nearly three decades have been described as an "executive-driven, factor-intensive, loosely common-law-based immunity regime."[11]

III. CONGRESS CONFERS IMMUNITY DETERMINATIONS EXCLUSIVELY TO THE JUDICIARY

By the 1970s, this arrangement had satisfied no one. The State Department, in particular, had to take on duties it had not

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3 Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983); *see also Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943).

4 *Verlinden*, 461 U.S. at 486.

5 *See* Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Acting Att'y Gen., Dep't of Justice (May 19, 1952), *in* 26 DEP'T ST. BULL. 984, 984 (1952) [hereinafter Tate Letter].

6 *Id.*; *Verlinden*, 461 U.S. at 487.

7 *Verlinden*, 461 U.S. at 487.

8 *See* Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 909–12 (1969).

9 *Verlinden*, 461 U.S. at 488; *see also* Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 11–13, 15–17 (1976).

10 Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004) (quoting *Verlinden*, 461 U.S. at 487–88).

11 Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014).

requested. This resulted in it making decisions that inevitably left either the plaintiff or their foreign diplomatic counterparts displeased with the outcome. As later Deputy and Acting Legal Adviser Mark B. Feldman has noted:

> This practice became a serious problem for the State Department. There were tensions with foreign governments and mounting criticism from the private sector. In many cases, the Department was not competent to make immunity determinations on legal grounds, and foreign governments often would pressure the Department to grant immunity in cases where immunity was not legally justified.[12]

Congress drafted a bill much like what the FSIA later became, but which did not pass in its first form—H.R. 3493—in 1973.[13] In transmitting the first bill that Congress considered in 1973, Secretary of State William P. Rogers and Attorney General Richard G. Kleindienst spoke forcefully:

> The central principle of the draft bill is to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts, *without participation by the Department of State.*
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> . . . [T]ransfer of this function to the courts will also free the Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity.[14]

That bill was referred to the House Committee on the Judiciary, but no further action was taken before the end of the 93rd Congress.[15] Among the reasons the bill did not advance was that Congress expressed concerns about a lack of broad consensus given the scope and complexity of the bill.[16]

Congress was determined to address the subject, however, and took up the matter two years later.[17] The legislative history of

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12 Brief of Former State Dep't Att'y Mark B. Feldman as Amicus Curiae in Support of Respondents at 6, Republic of Hungary v. Simon, 592 U.S. 207 (2021) (No. 18-1447). Mr. Feldman was principally engaged in the State Department's approval of the later bill that eventually became law in 1976. *Id.* at 1.

13 *See* Dep't Justice and Dep't State Letter of Transmittal (Jan. 22, 1973) *in* 15 I.L.M. 88, 88 (1973).

14 *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Rels. of the H. Comm. on the Judiciary*, 93d Cong. 34 (1973) (emphasis added).

15 *H.R.3493 - A Bill to Define the Circumstances in Which Foreign States Are Immune from the Jurisdiction of U.S. Courts and in Which Execution May Not Be Levied on Their Assets, and for Other Purposes*, CONGRESS.GOV (Jan. 31, 1973), https://www.congress.gov/bill/93rd-congress/house-bill/3493 [https://perma.cc/QBT3-S2LM].

16 Brief of Amicus Curiae Mark B. Feldman, Former U.S. Dep't of State Acting Legal Adviser in Support of Petitioners at 4–5, Cassirer v. Thyssen-Bornemisza Collection Found., 596 U.S. 107 (2022) (No. 20-1566), 2021 WL 9219017, at *4–5.

17 *See* Foreign Sovereign Immunities Act of 1976, H.R. 11315, 94th Cong. (1976).

this bill, which eventually became the FSIA, is extensively and frequently cited in interpreting the statute.[18] The House Report discusses the history of immunity and states repeatedly that the purpose of the bill is to codify the restrictive theory of sovereign immunity: a "foreign state is entitled to immunity only with respect to its public acts, not with respect to commercial or private acts."[19] The House Report explains why the Tate Letter and suggestions of immunity had been unsatisfactory to all involved:

> The Tate letter, however, has not been a satisfactory answer. From a legal standpoint, it poses a devil's choice. If the [State] Department follows the Tate letter in a given case, it is in the incongruous position of a political institution trying to apply a legal standard to a litigation already before the courts.
>
> On the other hand, if forced to disregard the Tate letter in a given case, the Department is in the self-defeating position of abandoning the very international law it elsewhere espouses.[20]

Addressing the House Judiciary Committee, State Department Legal Adviser Monroe Leigh was unequivocal that this approach was an "outdated practice of having a political institution, namely, the State Department, decide many of these questions of law."[21] Mr. Leigh drew a line under the era defined by *Schooner McFaddon*, rejecting the State Department-centered, absolute immunity framework because:

> The purpose of sovereign immunity in modern international law is not to protect the sensitivities of 19th-century monarchs or the prerogatives of the 20th-century state. Rather, it is to promote the functioning of all governments by protecting a state from the burden of defending law suits abroad which are based on public acts.[22]

This expression was not academic. While the bill was under discussion, the Supreme Court decided *Alfred Dunhill*, in which the Court was narrowly divided on the restrictive theory's vitality pre-FSIA.[23] Nevertheless, the House Report is clear:

> [T]he bill is designed to depoliticize the area of sovereign immunity by placing the responsibility for determining questions of immunity in the courts. Our litigation experience abroad teaches that questions of sovereign immunity are almost universally passed upon by foreign

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18 *See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 94th Cong. (1976) [hereinafter House Report].

19 *Id.* at 25.

20 *Id.* at 26.

21 *Id.* at 25.

22 *Id.* at 27.

23 Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976).

> courts as a matter of law, and not by the political branches of foreign governments as a foreign policy matter.[24]

The House Report confirms that the FSIA was *not* intended to affect the Act of State Doctrine, which generally precludes review of a government's official act.[25]

Notably, European law was already coalescing around the restrictive theory.[26] The House Report cites at length to the then-recent European Convention on State Immunity, which contains similar articles to those in the original FSIA for torts, real property, counterclaims, and commercial activity.[27] Interestingly, discussion about recent interpretations of the FSIA was driven by concerns that other countries might try to assert expansive jurisdiction.[28] Yet the practice of the Justice Department was actually the inverse at the time, *declining* "to plead sovereign immunity abroad in instances where, under the policies announced by the Department of State, that Department would not recognize a foreign state's immunity in the converse situation in this country."[29]

The expropriation exception of section 1605(a)(3) is the outlier to this harmony between the European Convention and the FSIA. Section 1605(a)(3) states:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . .
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned

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24 House Report, *supra* note 18, at 31.

25 *Id.* at 34; *see also* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) ("In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question."). That "supervening expression"—Press Release No. 296—was issued by Acting Legal Advisor Jack B. Tate, the very man who authored the Tate Letter of 1952, under which the State Department later made (or did not make) an individualized "suggestion of immunity" prior to the FSIA. *Id.*; *see also Alfred Dunhill*, 425 U.S. at 699–715.

26 *Alfred Dunhill*, 425 U.S. at 712–13.

27 House Report, *supra* note 18, at 37–40.

28 Federal Republic of Germany v. Philipp, 592 U.S. 169, 187 (2021) ("As a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States Government years ago.").

29 *Id.* at 32.

> or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.][30]

Despite being an outlier in addressing government takings at all, the Supreme Court suggested that this is fact "emphasizes conformity with international law" because of the commercial nexus component of the provision.[31] Having made that pronouncement, the Court has since cited itself repeatedly for the conclusion that "[n]othing in the FSIA's history suggests that Congress intended a radical departure from these principles in codifying the mid-twentieth-century doctrine of 'restrictive' sovereign immunity."[32]

For the first three decades, the FSIA was regularly interpreted at face value. Justice Scalia later referred to this interpretation as having "abated the bedlam" of the Tate Letter era by "replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime" with the law's "'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.' The key word there—which goes a long way toward deciding this case—is *comprehensive*."[33] Under Justice Scalia's interpretive methodology, the focus is entirely on what the law says: "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[34] Of equal importance, he left no room for extraneous consideration of the wisdom of foreign policy:

> Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause "a substantial invasion of [foreign states'] sovereignty," and will "[u]ndermin[e] international comity." Worse, such orders might provoke "reciprocal adverse treatment of the United States in foreign courts," and will "threaten harm to the United States' foreign relations more generally." These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our

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30 Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3).

31 Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 581 U.S. 170, 181 (2017).

32 *Id.* at 171; *see also Philipp*, 592 U.S. at 183.

33 Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134, 141 (2014) (citation omitted).

34 *Id.* at 141–42; Jonathan R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy*, SCOTUSBLOG (Nov. 14, 2017, 10:48 AM), https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/ [https://perma.cc/TU2Y-SWMZ].

> retirement from the immunity-by-factor-balancing business nearly 40 years ago.[35]

IV. SOVEREIGN IMMUNITY AND CULTURAL PROPERTY

The Court decided *NML Capital* in the midst of a two-decade period in which the FSIA was put to use in service of cultural property claims with considerable success. Maria Altmann filed suit in 2000 against the Republic of Austria, seeking the restitution of several paintings that had belonged to her uncle Ferdinand Bloch-Bauer.[36] Bloch-Bauer was a scion of a sugar-producing family in the Austro-Hungarian empire, who lived in Austria until he "fled the country ahead of the Nazis, ultimately settling in Zurich. In his absence . . . the Nazis 'Aryanized' the sugar company he had directed, took over his Vienna home, and divided up his artworks, which included the Klimts at issue."[37] Ferdinand was married to Adele Bloch, the sitter of multiple portraits by Gustav Klimt.[38] Adele died in 1925, leaving her Klimts to Ferdinand, with the expressed desire "that Ferdinand bequeath the paintings that she left to him to the Austrian national collections."[39]

After the *Anschluss*,[40] Bloch-Bauer was accused on April 28, 1938, "charged with a variety of trumped-up offenses and fined RM 700,000 (Reichsmark). On May 14, 1938, a judicial seizure order deprived Bloch-Bauer of the legal authority to dispose of his own property. Local attorney Erich Führer was appointed administrator of the Bloch-Bauer estate."[41] Ferdinand fled to Switzerland, leaving his niece Maria Altmann (née Bloch) in custody of his collection.[42] However,

> Führer began to liquidate Bloch-Bauer's assets in January 1939, and strong-armed Altmann out of her property as well. *Adele Bloch-Bauer I*

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35 *NML Cap.*, 573 U.S. at 146 (citations omitted).

36 Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1192 (C.D. Cal. 2001).

37 Republic of Austria v. Altmann, 541 U.S. 677, 682 (2004). Aryanization was a policy of the Nazi regime whereby Jewish-owned property would be transferred to non-Jews, or "Aryans." *See "Aryanization,"* HOLOCAUST ENCYC., https://encyclopedia.ushmm.org/content/en/article/aryanization [https://perma.cc/UL4D-FJ8Q] (last visited May 19, 2025).

38 NICHOLAS M. O'DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART 85 (2017).

39 *Id.* at 87.

40 The *Anschluss*, which is a German word for "connection" or "joining," refers to Nazi Germany's annexation of Austria in March 1938. *See Nazi Territorial Aggression: The Anschluss*, HOLOCAUST ENCYC., https://encyclopedia.ushmm.org/content/en/article/nazi-territorial-aggression-the-anschluss [https://perma.cc/5H47-U62M] (last visited May 19, 2025).

41 O'DONNELL, *supra* note 38, at 87.

42 *Id.* at 87–88; Republic of Austria v. Altmann, 541 U.S. 677, 704–05 (2004).

> and *Apple Tree I* were traded in 1941 to the Austrian Gallery for *Schloss Kammer am Attersee III*. *Adele Bloch-Bauer II* was sold in March 1943 to the Austrian Gallery. *Houses in Unterach am Attersee* was kept by Dr. Führer for his personal collection.[43]

After the war, Altmann pursued the return of the paintings, which had been returned to the National Gallery by the Monuments, Fine Arts and Archives Division (MFAA, better known as the Monuments Men).[44] The National Gallery rebuffed her by claiming (falsely) that Adele's will dictated a bequest to the gallery.[45] Altmann settled in Los Angeles.[46]

Altmann sued Austria, invoking the expropriation exception of the FSIA.[47] The district court held that the exception applied to the forced sale by Altmann to Führer: "The taking was not for public purpose; instead, some of the art was distributed to the collections of Hitler, Göring, and Dr. Fürher."[48] Moreover, "the Nazis' aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population."[49] The court also rejected Austria's exhaustion argument.[50]

Because Altmann sued Austria—rather than the Belvedere Gallery, where the painting hung—the court also had to analyze the commercial nexus requirement of section 1605(a)(3).[51] There too, Altmann prevailed. The court looked at the statute as a whole and held that the gallery's (an instrumentality's) commercial activity in the United States rendered the state defendant, Austria, amenable to jurisdiction.[52]

The Ninth Circuit affirmed, holding squarely that the expropriation exception applies where the taking of property is (1) discriminatory, (2) not for a public purpose, and (3) lacks adequate compensation (a taking).[53] Furthermore, the

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43 O'DONNELL, *supra* note 38, at 87–88.

44 *Art Restitution Cases*, MONUMENTS MEN & WOMEN FOUND., https://www.monumentsmenandwomenfnd.org/resources/art-restitution-cases [https://perma.cc/X9BS-PZCG] (last visited Mar. 27, 2025).

45 O'DONNELL, *supra* note 38, at 88.

46 *Id.* at 90.

47 *Id.* at 91.

48 Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1203 (2001).

49 *Id.*

50 *Id.* ("[T]his exhaustion requirement is excused when the domestic remedies are a sham, are inadequate, or would be unreasonably prolonged.") (citing RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 713 cmt. f (1986)).

51 Nina Totenberg, *After Nazi Plunder, A Quest to Bring Home the 'Woman in Gold,'* NPR (Apr. 2, 2015, 4:03 AM), https://www.npr.org/2015/04/02/396688350/after-nazi-plunder-a-quest-to-bring-the-woman-in-gold-home [https://perma.cc/76VE-PKUK].

52 *See Altmann*, 142 F. Supp. 2d at 1204–06.

53 *See* Altmann v. Republic of Austria, 317 F.3d 954, 968 (9th Cir. 2002).

instrumentality's activity must satisfy the commercial nexus test.[54] The Ninth Circuit also addressed whether the FSIA applies retroactively to events that occurred before either the statute's passage or the doctrine of restrictive immunity announced in the Tate Letter. It held that "the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of 'grace and comity' for the wrongful appropriation of Jewish property."[55]

The Supreme Court granted certiorari only on the retroactivity question and affirmed.[56] In hindsight, it is surprising that the Court granted review at all, given the simplicity of the retroactivity question—and even more perplexing how it managed to make that question so difficult. The FSIA is a status-based query: whether the present-day defendant is immune from suit as a foreign sovereign. It is the exclusive avenue through which people can sue (present tense) a foreign state or instrumentality. Congress's emphatic expression of that question leaves no doubt that its provisions applied because the question is only whether Austria was a foreign state *at the time it was sued*. Otherwise, how would a court in 2004 possibly have determined immunity? The FSIA had ended the suggestions of immunity.

With the *Altmann* theory of jurisdiction undisturbed (if not squarely affirmed by the Supreme Court), other claimants followed suit, with similar success—and with substantial encouragement from Congress and even the Supreme Court itself. Indeed, for several years, *every* case to consider the question since the FSIA's enactment has held that the organized plunder of art—including forced "sales"—by Nazis, their puppets, and their allies meets the threshold takings requirement.[57] This was

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54 *See id.* at 968–69.

55 *Id.* at 965.

56 *See* Republic of Austria v. Altmann, 541 U.S. 677, 681, 702 (2004).

57 *See, e.g.*, Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1023, 1027 (9th Cir. 2010) (holding that a painting sold for paltry sum by Lilly Cassirer to finance flight of German Jew constituted a taking in violation of international law); de Csepel v. Republic of Hungary, 808 F. Supp. 2d 113, 129–30 (D.D.C. 2011) (discussing an illegitimate acquisition of the Herzog collection by Hungary); de Csepel v. Republic of Hungary, 169 F. Supp. 3d 143, 164 (D.D.C. 2016); Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 301, 308 (D.D.C. 2005) (holding that the paintings left for safekeeping by Kazimir Malevich with custodian later persecuted by Nazis warranted later jurisdiction against current sovereign possessor of artworks); Berg v. Kingdom of the Netherlands, No. 18-cv-3123, 2020 U.S. Dist. LEXIS 84489, at *32 (D.S.C. Mar. 6, 2020) ("These allegations, considered in the grim context of the Nazis' persecution of Jews during World War II, suffice to show at this juncture that the coerced sale of the Artworks was consistent with the Nazis' pursuit of the Final Solution.").

sufficiently self-evident that one of Germany's own federal states (Bavaria) acknowledged:

> "[G]enocidal takings *committed by a state* against its nationals" constitute takings in violation of international law under § 1605(a)(3), and the usual "domestic takings rule" whereby "a foreign sovereign's expropriation of its own national's property does not violate international law" does not apply where the foreign state is engaged in genocide.[58]

In 2005, the heirs of Kazimir Malevich invoked the expropriation exception to sue the City of Amsterdam to recover a group of paintings that had been loaned to the Menil Collection in Houston from the Stedelijk Collection.[59] The claim concerned certain works that Malevich had entrusted to friends in Germany in the 1920s.[60] The U.S. District Court for the District of Columbia held that the temporary loan qualified as commercial use in the United States sufficient to satisfy the commercial nexus element, and that the taking elements of the expropriation exception otherwise applied.[61] The court reached this conclusion even though the loan was immune from seizure pursuant to the Immunity from Seizure Act (IFSA). The IFSA prohibits "any judicial process, or [the entry of] any judgment . . . for the purpose . . . of depriving such institution . . . of custody or control of such object," if it has been granted immunity from seizure pursuant to IFSA prior to the exhibition loan (as this loan had).[62] The court also rejected the views expressed by the State Department in a statement of interest, concluding that the loan was equivalent to a transaction that could have been undertaken by a private lender.[63] After the parties engaged in discovery, the court ratified its conclusions.[64] Not long after, the parties settled the dispute.[65]

This commercial nexus analysis displeased Congress enough to overrule the decision with respect to objects that have immunity from seizure pursuant to IFSA, but to *bolster* Nazi-era claims as

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58 Defendant's Memorandum of L. in Support of Their Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction Under the FSIA at 22, Hulton v. Bayerische Staatsgemälde-Sammlungen, 346 F. Supp. 546 (S.D.N.Y. 2018) (No. 16-cv-9360) (citation omitted).

59 *Malewicz*, 362 F. Supp. 2d at 303, 306.

60 *Id.* at 301.

61 *See id.* at 306, 308–09, 314.

62 *See id.* at 303, 305.

63 *Id.* at 312–13.

64 Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 325–26 (D.D.C. 2007).

65 *See* Malewicz v. City of Amsterdam, No. 07-5247, 2008 WL 2223219, at *1 (D.C. Cir. May 14, 2008).

covered takings in violation of international law. On December 10, 2016, Congress passed the Foreign Cultural Exchange Jurisdictional Clarification Act (Clarification Act), and President Obama signed it into law on December 16, 2016.[66] With the Clarification Act, Congress amended the FSIA to provide that a loan of art (or another "object of cultural significance") into the United States, without more, would generally not satisfy the commercial nexus test.[67] However, this limitation would *not* apply to cases involving the Nazis' takings of art and other cultural property:

> The bill denies immunity, however, in cases concerning rights in property taken in violation of international law in which the action is based upon a claim that the work was taken: (1) between January 30, 1933, and May 8, 1945, by the government of Germany or any government in Europe occupied, assisted, or allied by the German government . . . .[68]

Congress articulated precise definitions in the codified law. A "covered government" includes "the Government of Germany during the covered period," which is defined as "the period beginning on January 30, 1933, and ending on May 8, 1945."[69] Congress's definition of "covered period" beginning on January 30, 1933, has significance here; at least until it annexed the Sudetenland in 1938, the victims of the Nazis' racially-motivated art looting were German Jews.[70] Indeed, as Hitler tried to rebuild Germany's power to wage war in the 1930s, Jews in Germany were the *only* Jews that the Nazis had the power to oppress, as described in section 1605(h)—and Congress made explicit that such claims lie pursuant to the FSIA.[71] Neither the Takings Clause nor the Clarification Act (which is codified as part of the FSIA) places any limitation on claims where the nationality of the victim is the same as the perpetrator. Congress knew how to, and did, create such limitations elsewhere in the FSIA. The FSIA's terrorism exception, for example, applies only to claimants and victims who, at the time of the relevant act, were United States

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66 *See* Foreign Cultural Exchange Jurisdictional Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016) (codified at 28 U.S.C. § 1605).

67 28 U.S.C. § 1605(h)(2)(A).

68 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, S. 3155, 114th Cong. (2016).

69 28 U.S.C. § 1605(h)(3)(B)–(C).

70 *Early Nazi Rule*, BRANDMAN HOLOCAUST MUSEUM, https://www.brandmanmuseum.com/early-nazi-rule [https://perma.cc/9NB2-69VH] (last visited Feb. 11, 2025).

71 28 U.S.C. § 1605(h)(3)(B)–(C).

nationals, members of the armed services, or had certain connections to the U.S. government.[72]

Indeed, by the end of the decade, this was developing into what could even be called a consensus about the expropriation exception.[73] In *Cassirer v. Kingdom of Spain*, the Ninth Circuit endorsed without reservation the conclusion that Lilly Cassirer's 1939 sale of *Rue St. Honoré, Afternoon, Rain Effect* by Camille Pissarro while preparing to flee Germany was also such a taking.[74] Jakob Scheidwimmer had been appointed to "appraise" Cassirer's collection and entered into similar "negotiations."[75] Cassirer could not take the painting or any money out of Germany without permission, which Scheidwimmer secured after she agreed to sell him the painting for a pittance.[76] Even that token sum was illusory because it was put in a blocked account.[77] The Ninth Circuit recognized this for what it was, a taking in violation of international law.[78]

Similarly, a District Court for the Central District of California concluded that where a complaint alleged "that the Ottoman Empire and later the Republic of Turkey stripped ethnic Armenians of their property and that these expropriations were integrally related to the government-sanctioned genocidal policies," the expropriation exception applied.[79] Claims against Russia proceeded successfully under the expropriation exception with respect to the library of the then-Lubavitcher Rebbe of the Chabad Lubavitch movement.[80]

Notably absent from *any* of these cases or the Clarification Act is any concern with, or inquiry into, the citizenship or nationality of the victims of expropriation—or any challenge by the governments of Spain, the Netherlands, or Austria to its

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72 28 U.S.C. § 1605A(a)(2)(A)(ii).

73 This stood in contrast to other provisions of the FSIA. *See, e.g.*, Rubin v. Islamic Republic of Iran, 583 U.S. 202, 205–06 (2018) (seeking to attach cultural property to satisfy judgment under the terrorism exception of section 1610 of the FSIA).

74 Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1037 (9th Cir. 2010).

75 *Id.* at 1023.

76 *Id.*

77 *Id.*

78 *See id.* at 1037. This conclusion was so obvious, despite the fact that Lilly Cassirer was from Germany, that Spain and its instrumentality never challenged it. The United States sided with the Cassirers on the Thyssen-Bornemisza Collection Foundation's petition for certiorari, urging the Supreme Court to uphold jurisdiction under the expropriation exception of section 1605(a)(3). *See* Brief for the United States as Amicus Curiae at 7–8, Kingdom of Spain v. Estate of Cassirer, 564 U.S. 1037 (2011) (No. 10-786).

79 Davoyan v. Republic of Turkey, 116 F. Supp. 3d 1084, 1102 (C.D. Cal. 2013).

80 *See* Agudas Chasidei Chabad of United States v. Russian Federation, 528 F.3d 934, 942–43 (D.C. Cir. 2008).

relevance. In *Simon v. Republic of Hungary*, the D.C. Circuit emphatically held that citizenship or nationality did not matter.[81] *Simon* involves claims by the victims of takings in Hungary in connection with the horrific roundup and deportation of Jews starting in 1944.[82] The *Simon* court engaged in a detailed analysis about why the targeting of Jews' property under Nazi repression is a taking in violation of international law, as it was carried out as part of a genocidal campaign:

> The Convention on the Prevention of the Crime of Genocide, adopted by the United Nations in the immediate aftermath of World War II and ratified or acceded to by nearly 150 nations (including the United States), defines genocide as follows:
>
> > [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> >
> > (a) Killing members of the group;
> >
> > (b) Causing serious bodily or mental harm to members of the group; [or]
> >
> > (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part* . . . .[83]

Depriving property leads inexorably to conditions that make existence impossible.[84] The *de Csepel* case, also against Hungarian state defendants, was in accord. That case concerns the legacy of the art collection of Baron Mór Lipot Herzog, a Jewish art collector in Budapest.[85] Baron Herzog died in 1934, and the collection stayed with his wife, who passed it to their children.[86] The D.C. Circuit held squarely that the expropriation exception applied:

> Of course, we have no quarrel with the historical underpinnings of the district court's analysis. During World War II, the Hungarian government did indeed enact a series of anti-Semitic laws "designed to exclude Jews from meaningful roles in Hungarian society." This exclusion was both symbolic, through the requirement that Jews "wear distinctive signs identifying themselves as Jewish," and

81 Simon v. Republic of Hungary, 812 F.3d 127, 144 (D.C. Cir. 2016).

82 *Id.* at 132.

83 *Id.* at 143 (citing Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277).

84 *Id.*

85 de Csepel v. Republic of Hungary, 714 F.3d 591, 594 (D.C. Cir. 2013).

86 *Id.* at 598.

> physical, through expulsion "to territories under German control where they were mistreated and massacred."[87]

There was little reason to doubt this trend would continue without regard for the nationality of the victims of cultural property theft in the Holocaust or other genocidal episodes. In *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, the Supreme Court affirmed "there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way."[88] If there was any systemic domestic expropriation that violates international law, and that already led to the United States "to involve itself in the domestic politics of another sovereign," it is the Holocaust.[89] This applies more broadly to genocide as well, courts found.[90] *Helmerich* even made passing reference to *Simon* without criticism, leaving no indication that it would reverse course completely less than four years later.

Finally, in *Berg v. Kingdom of the Netherlands*, a South Carolina district court succinctly distilled the common understanding as of 2020, in which consideration of the victim's nationality played no role whatsoever.[91] The *Berg* plaintiff's predecessors were forced in 1940 to sell the company's inventory to Nazi agents.[92] The *Berg* plaintiffs sued the Netherlands and various agencies and museums in 2018, invoking the expropriation exception.[93] In 2020, the district court quickly disposed of defendant's argument that the expropriation exception

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87 *Id.* at 598 (citations omitted); *see also* de Csepel v. Republic of Hungary, 859 F.3d 1094, 1102 (D.C. Cir. 2017) ("[T]he fundamental fact remains: Hungary's possession of the Herzog collection stems directly from its expropriation of the collection during the Holocaust.").

88 Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 581 U.S. 170, 182 (2017).

89 Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 675 (7th Cir. 2012) ("All U.S. courts to consider the issue recognize genocide as a violation of customary international law.").

90 *Id.* at 676 ("The international norm against genocide is specific, universal, and obligatory. Where international law universally condemns the ends, we do not believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out those ends."); *see also* Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 551 (11th Cir. 2015).

91 The district court found that the FSIA deprived the sovereign defendants of immunity but dismissed the claims for lack of personal jurisdiction over those defendants. Berg v. Kingdom of the Netherlands, 2:18-cv-3123-BHH, 2020 U.S. Dist. LEXIS 84489, at *30 (D.S.C. Mar. 6, 2020).

92 *Id.* at *4.

93 *Id.* at *6.

was simply inapplicable, summarizing: "These allegations, considered in the grim context of the Nazis' persecution of Jews during World War II, suffice to show at this juncture that the coerced sale of the Artworks was consistent with the Nazis' pursuit of the Final Solution."[94] The opinion makes no mention of the nationality or citizenship of the victims at all because it was irrelevant to the analysis under well-expressed standards since *Altmann* at least.

Lest it be forgotten, this was the policy of the United States since it was enunciated by the very generation who personally defeated the Nazis. On April 27, 1949, the State Department issued Press Release No. 296 on April 27, 1949, titled "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers."[95] It stated, inter alia, that "it's this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property," and "the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."[96]

V. SLAMMING THE COURTHOUSE DOORS CLOSED

During this period following *Altmann*, a group of claimants filed a case consistent with the theory of jurisdiction that had solidified.[97] It would prove to be the vehicle by which the Supreme Court would reverse itself and inject policy into the FSIA that Congress had rejected forty years earlier.

The collection at issue—known as the "Welfenschatz" in German, and the "Guelph Treasure" in English—consists of several dozen medieval reliquary and devotional objects.[98] Originally comprised of eighty-two objects, "the Welfenschatz occupies a unique position in German history and culture, harkening back to the early days of the Holy Roman Empire."[99] It resides today in the Kunst und Gewerbemuseum, managed by the

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94 *Id.* at *31–33.

95 Jack B. Tate, *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers*, 20 DEP'T ST. BULL. 573, 592–93 (1949).

96 *Id.*

97 Philipp v. Fed. Republic of Germany, 253 F. Supp. 3d 84, 86 (D.D.C. 2017).

98 *See* First Amended Complaint at 1, Philipp v. Federal Republic of Germany, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-cv-00266).

99 *Id.* at 17.

state-run Stiftung Preussischer Kulturbesitz (Prussian Cultural Heritage Foundation) in Berlin.[100]

In or around 1929, the consortium of art dealers that owned the Welfenschatz formed, consisting of three art dealer firms in Frankfurt: J.&S. Goldschmidt, I. Rosenbaum, and Z.M. Hackenbroch, owned by Jewish dealers Zacharias Max Hackenbroch, Isaak Rosenbaum, Saemy Rosenberg, Julius Falk, and Arthur Goldschmidt.[101] Even at the time, this acquisition was controversial among the significant nativist forces that would later make Hitler's assumption of the Chancellorship possible.[102] The consortium's members lived in Frankfurt, which had a new mayor after Hitler's ascension to power: former District and Local Leader of the *Kamfbund für deutsche Kultur*—the League of Struggle for German Culture—Friedrich Krebs.[103] Krebs quickly wrote *to Hitler himself*, noting explicitly the opportunity with the Nazis' ascension to acquire the Welfenschatz for only a third of its real value.[104]

The consortium members were soon caught along with millions of others with the rise to power of the Nazi Party.[105] Over the next two years, various high-level Nazis like Wilhelm Stuckart (author of the Nuremberg Race laws, and a participant at the Wannsee Conference) and Paul Körner (served as State Secretary of both Prussian State Ministry and Four Year Plan)—all reporting to Hermann Goering—echoed this focus on getting the collection for a fraction of its market value.[106] Two of the owners (Rosenberg and Rosenbaum) had left and established roots in Amsterdam.[107] After the Nazi cabal quashed the one possible market buyer for the Welfenschatz (in Herrenhausen), the consortium bowed to reality and surrendered the collection for a pittance of its worth, partially paid into blocked accounts or in swaps of art actually worth far less.[108] Goering then presented the collection to Hitler as a gift.[109]

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100 *Restitution Request "Welfenschatz,"* STIFTUNG PREUSSISCHER KULTURBESITZ, https://www.preussischer-kulturbesitz.de/en/news-detail/article/2014/01/13/restitution-request-welfenschatz.html [https://perma.cc/YRH2-N2ZP] (last visited Mar. 27, 2025).

101 First Amended Complaint at 2, *Philipp*, 248 F. Supp. 3d 59 (No. 15-cv-00266).

102 *See id.* at 18–19.

103 *Id.* at 2, 25.

104 *Id.* at 25–26.

105 *Id.* at 44.

106 *Id.* at 33–35.

107 *Id.* at 50.

108 *Id.* at 44.

109 *Id.* at 5.

The consortium's heirs sued Germany and the Prussian Cultural Heritage Foundation in 2015, invoking section 1605(a)(3).[110] The plaintiffs alleged that the "sale" was a taking in violation of international law and that the Prussian Foundation was engaged in commercial activity in the United States.[111] They alleged that as a result of Nazi persecution, "they were officially no longer considered German" (an allegation that appeared verbatim in every pleading thereafter).[112] They alleged that the forced sale was not for a public purpose, did not provide reasonable, prompt, and freely available consideration, and was discriminatory.[113]

Germany and the Prussian Cultural Heritage Foundation moved to dismiss.[114] What was novel was the tack they took against the FSIA. Unlike Austria, the Netherlands, Hungary, or Spain before them, the direct perpetrator of the Holocaust itself sought shelter under the "domestic takings" rule.[115] Germany also argued that (1) the claims did not satisfy section 1605(a)(3)'s commercial nexus requirement over Germany, (2) prudential exhaustion (framed as international comity) compelled dismissal because the Heirs had not first sued in Germany, (3) the non-binding Advisory Commission recommendation was actually a ruling on the merits such that adjudicatory comity compelled dismissal, (4) the policy of the United States forbids individual claims litigation like the Heirs, and (5) the doctrine of *forum non conveniens* compelled dismissal.[116]

The District Court rejected each of these arguments.[117] In particular, the District Court rejected the Defendants' domestic takings argument as irrelevant:

> [I]n *Simon*, the D.C. Circuit expressly rejected the application of the domestic takings rule in the context of intrastate genocidal takings. Rather, the D.C. Circuit, tracing the development of international human rights law, noted that in those circumstances the relevant international law violation for jurisdictional purposes under the expropriation exception is genocide, including genocide perpetuated by a foreign state against its own nationals.[118]

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110 *Id.* at 1.
111 *Id.* at 8.
112 *Id.* at 23.
113 *Id.* at 8–9; *see also* RESTATEMENT (SECOND) OF FOREIGN RELS. L. §§ 185, 187 (1965).
114 Philipp v. Federal Republic of Germany, 248 F. Supp. 3d 59, 63 (D.D.C. 2017).
115 First Amended Complaint at 72, *Philipp*, 248 F. Supp. 3d 59 (No. 15-cv-00266).
116 *Id.* at 63.
117 *Id.* at 87.
118 *Id.* at 72 (emphasis added) (citations omitted).

The D.C. Circuit Court of Appeals affirmed on July 10, 2018, except as to the commercial nexus text over Germany, which had not been met.[119] The D.C. Circuit reiterated its holding in *Simon* that genocidal takings may "subject a foreign sovereign and its instrumentalities to jurisdiction in the United States where the taking 'amounted to the commission of genocide.'. . . This, we explained, is because '[g]enocide perpetrated by a state,' even 'against its own nationals[,] . . . is a violation of international law.'"[120] The Defendants petitioned the D.C. Circuit Court of Appeals for rehearing, which the court denied.[121]

Germany petitioned the Supreme Court for certiorari, which the Court granted on July 2, 2020.[122] The Court denied the plaintiffs' conditional cross-petition to review the commercial nexus ruling.[123] Notably, the United States submitted its views on the petition at the invitation of the court, urging a grant of review and reversal.[124] Endorsed and signed by the State Department, the United States took the position that there could be no circumstance in which a Nazi-forced sale victimizing a German Jew in the 1930s could constitute a violation of international law, such that the FSIA would confer jurisdiction over either Germany or the Stiftung Preußischer Kulturbesitz (SPK), the Prussian Cultural Heritage Foundation in Germany.[125] The United States also agreed with the second question presented by Germany (and which had been granted in *Simon*), namely, that notwithstanding the text of the FSIA, there might be circumstances where the courts should abstain.[126]

The case was argued on December 7, 2020—Pearl Harbor Day, no less. The oral argument was practically a filibuster for policy disagreements with the FSIA itself. Justice Thomas repeated the Court's previous mantra that the expropriation was not intended to be a "radical departure" from international law,[127] even though there is no expropriation exception in the European

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119 Philipp v. Federal Republic of Germany, 894 F.3d 406, 414 (D.C. Cir. 2018) (citing de Csepel v. Republic of Hungary, 859 F.3d 1094, 1102 (D.C. Cir. 2017)).

120 *Id.* at 410–11 (alterations in original) (quoting Simon v. Republic of Hungary, 812 F.3d 127, 142, 145 (D.C. Cir. 2016)).

121 Philipp v. Federal Republic of Germany, 925 F.3d 1349, 1349 (D.C. Cir. 2019).

122 Federal Republic of Germany. v. Philipp 141 S.Ct. 185, 185 (2020).

123 *Id.* at 188.

124 Brief for the United States as Amicus Curiae at 1, 34, Federal Republic of Germany v. Philipp, 141 S. Ct. 185 (2020) (Nos. 19-351 and 19-520).

125 *See id.* at 6.

126 *Id.* at 15–16.

127 Transcript of Oral Argument at 56, Federal Republic of Germany v. Philipp, 141 S. Ct. 185 (2020) (No. 19-351).

Convention or elsewhere. Justice Breyer came armed with one of his famous hypotheticals, which managed to single out two separate ethnic groups *and* an apparent terror at the thought of holding China accountable for genocide or the United States for its own transgressions:

> I mean, what about Japanese internment, which involved 30,000 people in World War II who were not American citizens but were of Japanese origin? And the first time we'd sue China for the Rohingyas or whatever, you know, what do you think they're going to say about the . . . railroad workers who came in in [sic] the 19th century?[128]

The Rohingya, of course, are an oppressed religious and ethnic minority in Myanmar, not China.[129] Justice Breyer apparently meant to be aghast at vindicating the rights of Uyghurs in a manner Congress has forcefully endorsed.[130] Justice Barrett suggested that plaintiffs were "struggling to identify limits" with respect to the Clarification Act, ignoring that the limiting principle *is* the text of the Act (i.e., the FSIA itself) about Nazi era takings.[131]

The decision followed soon after, vacating the D.C. Circuit, holding that the FSIA incorporates the domestic takings rule,[132] and remanding to determine the consortium's nationality and whether the plaintiffs had preserved the question.[133] The opinion contained basic elementary errors, like misquoting the Complaint regarding when Rosenberg and Rosenbaum left Germany.[134] It evoked the Chief Justice's chipper syllogisms—like, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[135]—with tautologies like, "We do not look to the law of genocide . . . . We look to the law of property."[136] The

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128 *Id.* at 59–60.

129 *See Burma*, U.S. HOLOCAUST MEM'L MUSEUM, https://www.ushmm.org/genocide-prevention/countries/burma [https://perma.cc/BN96-MP54] (last visited Feb. 17, 2025).

130 An Act to Ensure that Goods Made with Forced Labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China Do Not Enter the United States Market, and for Other Purposes, Pub. L. No. 117–78, 135 Stat. 1525 (2021) (codified at 19 U.S.C. §§ 1307, 4681); 22 U.S.C. §§ 2656, 6901, 7101, 7107.

131 Transcript of Oral Argument, *supra* note 127, at 83.

132 Without explanation, the Court declined to reach the abstention question presented in both *Philipp* and *Simon*. *See, e.g.*, Federal Republic of Germany v. Philipp, 592 U.S. 169, 187 (2021).

133 *Id.*

134 For example, the opinion states that "[t]wo of the consortium members fled the country following the sale," when in fact the Complaint stated that they had left by 1935, the year in which the subsequent transaction took place. *Id.* at 174; *see* First Amended Complaint at 50, Philipp v. Federal Republic of Germany, 248 F. Supp. 3d 59 (D.D.C. 2017) (No. 15-cv-00266).

135 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

136 *Philipp*, 592 U.S. at 180.

international law of property has *included* the law of genocide since 1948 in response to the historical episode at issue.[137] This law had been in place for three decades by the time the FSIA was passed in 1976—the point at which the Court argues international law remains frozen in time forever.[138] The opinion ignores this.

The real agenda was explicitly stated, expressing horror that the decision below would "force courts themselves to violate international law, not only ignoring the domestic takings rule but also derogating international law's preservation of sovereign immunity for violations of human rights law."[139] *Philipp* is a property case, not a human rights case; there was no real risk. The Chief Justice employed a straw man argument, accusing the plaintiffs of trying to "insert modern human rights law into FSIA exceptions," when they had done no such thing.[140] "The heirs concede that at the time of the FSIA's enactment the international law of expropriation retained the domestic takings rule,"[141] wrote the Court, which was odd given that the thrust of the entire brief and argument was the literal opposite. That is, the FSIA incorporated the Genocide Convention to which the domestic takings rule must yield.[142] The D.C. Circuit opinion and the plaintiffs' case were grounded in the taking of specific unique property for discriminatory reasons, yet the opinion states that their position "is not limited to violations of the law of genocide but extends to any human rights abuse."[143] No examples of this were offered because it has never happened in the nearly fifty years the FSIA's expropriation exception has been law.[144]

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137 Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

138 *See Philipp*, 592 U.S. at 180–81.

139 *Id.* at 182.

140 *Id.* at 184.

141 *Id.* at 181.

142 The Court's fixation that international law is static as of 1976 (for instance, that the Second Restatement is for all time the expression of the contours of international law) is further at odds with its own jurisprudence. *See, e.g.*, Jam v. Int'l Fin. Corp., 586 U.S. 199, 210 (2019) (noting the "link [from] the law of international organization immunity to the law of foreign sovereign immunity, so that the one develops in tandem with the other"). Moreover, the current Restatement refutes the *Philipp* opinion: "International law recognizes a state's jurisdiction to prescribe law with respect to certain offenses of universal concern, such as genocide . . . even if no specific connection exists between the state and the persons or conduct being regulated." RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 413 (2018).

143 *Philipp*, 592 U.S. at 182.

144 Sovereign litigants have had no compunction about arguing later formulations of international law when it suits them. Hungary, for example, repeatedly cites the Third and Fourth Restatements of Foreign Relations before the Supreme Court. *See, e.g.*, Petitioners' Opening Brief at 25–26, 36, Republic of Hungary v. Simon, 592 U.S. 207 (2024) (No. 23-867).

Finally, the Court wrote the Clarification Act out of existence. According to the Court, section 1605(h) means that "[c]laims concerning Nazi-era art takings could be brought under the expropriation exception where the claims involve the taking of a *foreign* national's property."[145] For this atextual conclusion (again, ignoring the definition of Nazi Era Claims—inserting "foreign national" where Congress had not—and the undisputed history of *who* the Nazis' victims were in 1933—German Jews), the Court cited *Altmann*.[146] This is extraordinary. No one in that case—including Austria—suggested that the suit against Austria depended on whether Ferdinand or Maria were Austrian. Altmann (as Bloch-Bauer's heir) "claim[ed] that Austria's 1948 actions (falsely asserting ownership of the paintings and extorting export permits in return for acknowledge[ment] of its ownership) violated either customary international law or a 1907 Hague Convention," not a specific law of takings.[147] The Central District of California held that "the Nazi 'aryanization' of Ferdinand's art collection by the Nazis is *undeniably* a taking in violation of international law."[148] On appeal, Austria did not seek review of that holding. The Ninth Circuit noted that the paintings' "taking appears discriminatory . . . [and] Altmann is a Jewish refugee," without discussing citizenship or nationality.[149] Altmann's most recent nationality in 1948 was *Austrian*, the country of her birth, and the same nationality as Erich Führer, who expropriated the paintings.[150] If the domestic takings rule were part of a long and unbroken rule, then *Altmann* would have been a domestic taking. Evidently, it was not—until the Supreme Court's decision in *Philipp*.

Notably, the Court's opinion in *Philipp* essentially pretends that the FSIA never happened. It relies extensively on pre-statute jurisprudence, citing authority that predates both the FSIA and the Genocide Convention.[151] The Court also relied on the statutory

145 *Philipp*, 592 U.S. at 185.

146 *Id.*

147 Republic of Austria v. Altmann, 541 U.S. 677, 707 (2004) (Breyer, J., concurring).

148 Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1203 (C.D. Cal. 2001) (emphasis added).

149 Altmann v. Republic of Austria, 317 F.3d 954, 968 (9th Cir. 2002).

150 O'DONNELL, *supra* note 38, at 83, 87.

151 *Philipp*, 592 U.S. at 177 ("What another country has done in the way of taking over property of its nationals . . . is not a matter for judicial consideration here.") (citing United States v. Belmont, 301 U.S. 324, 332 (1937)). Nations' indifference to the unchecked Jewish persecution led to the Genocide Convention in the 1930s. *See* Brief of Amici Curiae Holocaust and Nuremberg Historians in Support of Neither Party as Amici Curiae Supporting Neither Party at 25–26, Federal Republic Of Germany v. Philipp, 592 U.S. 169 (2021) (No. 19-351).

rebuke by Congress after *Banco Nacional De Cuba v. Sabbatino* for the upside-down conclusion that Congress' expansion of jurisdiction in the 1960s meant a restriction a decade later.[152] Moreover, the court claimed that the Second Hickenlooper Amendment and the expropriation exception use "nearly identical language" to describe statutory provisions that are utterly different on their face, other than the plain language of "international law."[153] Germany argued that the Court's opinion in *Sabbatino* and the subsequent Second Hickenlooper Amendment establish the phrase "property taken in violation of international law" as *limited* to the expropriation from aliens.[154] In *Sabbatino*, the Court found that "the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree" involving American-owned property.[155] The Court had no need to express a view as to which victims of property takings could claim a violation of international law—and did not do so.

In response, Congress passed the Second Hickenlooper Amendment, which specifically addressed other countries that have "nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens."[156] Congress barred the Act of State Doctrine from applying to certain claims of "a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection."[157] That is, Congress recognized that impermissible takings encompass those from U.S. citizens but was silent on what other takings may be illegal.

Nonetheless, Chief Justice Roberts wrote that "nothing in the Amendment purported to alter any rule of international law, including the domestic takings rule,"[158] which merely assumes it applies, and that the Genocide Convention was irrelevant. This interpretation reads an extraordinary amount of meaning into the Second Hickenlooper Amendment and the FSIA that is simply absent from the text itself.

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152 *Philipp*, 592 U.S. at 179.
153 *Id.*
154 *Id.*
155 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964).
156 22 U.S.C. § 2370(e)(1)(A).
157 *Id.* § 2370(e)(2).
158 *Philipp*, 592 U.S. at 179.

It cannot be overstated how dramatic a reversal this was in a short amount of time. *Helmerich* was decided fewer than four years earlier, after the district court followed *Simon* in denying Germany's initial motion to dismiss. In *Helmerich*, the Court wrote: "[T]here are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way."[159] A short while later, the Court could conceive of no instance where that "general principle of immunity for these otherwise public acts should give way," and only then because the perpetrator of the worst art theft and genocide in history—Germany—asked.[160] In four years, "sometimes" became "never."

VI. THE REVENGE OF THE SOVEREIGNS

The Chief Justice's disdain for jurisdiction carried the day on remand, despite the most basic tenets of Nazi philosophy and why that put their victims outside the nationality the Nazis defined themselves as—which the D.C. District Court pretended not to see.[161] As a result, neither court in *Philipp* reached the conclusion of how to provide redress to victims deprived of the rule of law. It should have.

Nationality is the "genuine link"[162] between the individual person and the benefits of international law. The classic definition of nationality (and thus the one Congress would have understood in 1976) is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[163] The Restatement (Second) of the Foreign Relations Law of the United States explains that "[t]he nature of the genuine link requirement has not been determined by decisions since the Nottebohm Case, although it is clear from that case that a variety of factors such as consent, birth, marriage, other family ties,

159 Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 581 U.S. 170, 182 (2017); *see also* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 675 (7th Cir. 2012) ("All U.S. courts to consider the issue recognize genocide as a violation of customary international law."); *id.* at 676 ("The international norm against genocide is specific, universal, and obligatory. Where international law universally condemns the ends, we do not believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out those ends.").

160 *Helmerich*, 581 U.S. at 182.

161 Philipp v. Stiftung Preussischer Kulturbesitz, 628 F. Supp. 3d 10, 30 (D.D.C. 2022).

162 MALCOM N. SHAW, INTERNATIONAL LAW 813 (6th ed. 2008).

163 Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 22–23 (Apr. 6, 1955).

voting, allegiance, and economic interests would be relevant."[164] In other words:

> Nationality is . . . *determined* by one's social ties to the country of one's nationality, and when established, gives rise to rights and duties on the part of the state, as well as on the part of the citizen/national. In turn 'citizenship' is a way to maintain common norms and values of the state as a social and political community.[165]

The Supreme Court has recognized that, for certain purposes, "a national character may be impressed upon a person, different from that which" he has under the formalities of domestic law.[166] The Court has also held a British citizen to be a national of the Confederate States of America where he was a longtime New Orleans resident, "identified with the people of Louisiana," and otherwise worked to serve the Confederate cause.[167]

Consortium members Rosenberg and Rosenbaum "had emigrated by 1935 from Germany. In Amsterdam, the two founded the company Rosenbaum NV."[168] To "emigrate" is a term of art, defined as: "to leave your own country to go and live permanently in another country."[169] Emigration is, by its essence, a circumstance where "the individual has renounced" the former nationality.[170] Under *Philipp*, the legal significance of this should have been to conclude that the Welfenschatz was owned, in part, by Rosenberg and Rosenbaum—Dutch nationals—at the time it was taken by Prussia, one of the constituents of Germany. These Jewish refugees with no "social ties" left the country where they had raised their families because their government denied their very humanity based on their religion.[171] The German government would have answered the question in 1935, and Nazi

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164 RESTATEMENT (SECOND) OF FOREIGN RELS. L. § 26 cmt. d (1965).

165 CAMBRIDGE UNIV. PRESS, NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 12 (Alice Edwards & Laura Van Waas eds., 2014); *see also* RESTATEMENT (SECOND) OF FOREIGN RELS. L. § 26 (1965) ("An individual has the nationality of a state that confers it upon him *provided there exists a genuine link between the state and the individual*.") (emphasis added).

166 The Venus, 12 U.S. (8 Cranch) 253, 277–78 (1814). In *The Venus*, the Supreme Court treated naturalized American citizens who had returned to Britain as British subjects for purposes of the law of prize. *See id.* at 277.

167 The Venice, 69 U.S. (2 Wall.) 258, 274–75 (1864); *see also* Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 197 (1815) (holding that "identification of [a person's] national character" may depend on the "particular transaction" at issue).

168 Complaint at 46, Philipp v. Federal Republic of Germany, No. 1:15-cv-00266 (D.D.C. Feb. 23, 2015).

169 *Emigrate*, OXFORD LEARNER'S DICTIONARIES https://www.oxfordlearnersdictionaries.com/us/definition/american_english/emigrate?q=emigrate [https://perma.cc/5CK5-AXYX] (last visited Feb. 10, 2025).

170 *See* RESTATEMENT (SECOND) OF FOREIGN RELS. L. § 26 (1965).

171 *Id.* § 26 cmt. d.

policy about nationality could scarcely have been clearer: Jews were not Germans.

Although the pleadings consistently alleged over eight years that the consortium members were not regarded as German, the district court[172] and the D.C. Circuit[173] claimed to be baffled at how Germany could have known that nationality was in play, concluding the plaintiffs forfeited their argument. The claims were dismissed, and the case ended.[174]

Hungary was ready to step into the fray. It argued that Nazi victims who had become de facto stateless were without remedy because international law only protects the nation insulted by the taking, not the subjects who suffer the taking—similar to how Germany was protected in the 1930s while the Jews remained vulnerable until the world united to enact the Genocide Convention.[175] The D.C. Circuit agreed.[176] Soon after, the vast majority of the *de Csepel* claims were dismissed on the same basis.[177]

In *Ambar v. Federal Republic of Germany*, another case against Germany by the heir to an Austrian man about a property in Berlin, Germany claimed the plaintiff failed the *Philipp* domestic takings test because Nazi Germany declared Austrian Jews to be German after the *Anschluss*.[178] In other words, with the wind of *Philipp* in its sails, the Federal Republic of Germany argued that no international law violation occurred when Nazi Germany annexed Austria, declared Austria's Jews to be subject to its anti-Semitic laws and persecution, and stole their property.[179] This sleight of hand was too much even for the judge who so caustically dismissed *Philipp* on remand.[180]

Against this shifting tide of skepticism toward cultural property jurisdiction, the second prong of the expropriation exception (the "commercial nexus element") came into renewed

172 *See* Philipp v. Stiftung Preussischer Kulturbesitz, 628 F. Supp. 3d 10, 30–31 (D.D.C. 2022).

173 *See* Philipp v. Stiftung Preussischer Kulturbesitz, 77 F.4th 707, 709–10 (D.C. Cir. 2023).

174 *See id.*

175 *See* Simon v. Republic of Hungary, 77 F.4th 1077, 1105 (D.C. Cir. 2023).

176 *Id.* at 1097–98.

177 *See* de Csepel v. Republic of Hungary, 695 F. Supp. 3d 1, 32–34 (D.D.C. 2023).

178 Ambar v. Federal Republic of Germany, 596 F. Supp. 3d 76, 79–80, 82–83 (D.D.C. 2022).

179 *Id.* at 85 ("Germany is asking the Court to apply *some* retroactive laws in a way that allows them to benefit from *some* Nazi-era laws while disclaiming others.").

180 *See id.* at 88.

focus and ended a decade-long case against Russia, which had proceeded under section 1605(a)(3), concerning the library of the then-Lubavitcher Rebbe of the Chabad Lubavitch movement (Library).[181] By the early twentieth century, the Library included thousands of religious books, manuscripts, and other documents. One portion of the Library was seized in 1917 by the emerging Bolshevik government from a warehouse.[182] The Fifth Rebbe had placed it there for safekeeping in the face of the advancing German army during the First World War as the Tsarist regime collapsed.[183] The Russian State Library (where those objects ended up after the dust settled) rejected the Fifth and then the Sixth Rebbe's pleas for their return.[184]

The *Chabad* plaintiffs had successfully invoked the expropriation exception a decade and a half earlier against the Russian state defendants in possession of the Library. The D.C. Circuit held that the Library was taken in violation of international law.[185] Rather than defend the case back in the trial court, however, the Russian defendants filed a "Notice With Respect to Further Participation."[186] In January 2013, the court (over the objections of the United States)[187] fined the Russian Federation, the Russian Ministry of Culture and Mass Communications, the Russian State Library, and the Russian State Military Archive $50,000 per day for their failure to comply with the original judgment.[188] That was reduced to an accumulating judgment, which accrued to more than $175 million.[189] The plaintiffs sought to attach property to satisfy the judgment—property they contended was owned by entities controlled by the Russian Federation.

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181 *See* Agudas Chasidei Chabad of United States v. Russian Federation, 110 F.4th 242, 250–52 (D.C. Cir. 2024).

182 Agudas Chasidei Chabad of United States v. Russian Federation, 528 F.3d 934, 938 (D.C. Cir. 2008).

183 *Id.*

184 *See id.* at 938–39.

185 Particularly, the Court held that international law was violated by executive action that overruled an initial victory in Russian court in 1991. *See id.* at 946.

186 Notice with Respect to Further Participation, Agudas Chasidei Chabad of United States v. Russian Federation, 729 F. Supp. 2d 141 (D.C. Cir. 2011) (No. 05-cv-01548-RCL).

187 Statement of Interest of the United States at 1, Agudas Chasidei Chabad of United States v. Russian Federation, 729 F. Supp. 2d 141 (D.C. Cir. 2011) (No. 05-cv-01548-RCL).

188 *See* Memorandum Opinion on Contempt Sanctions, Agudas Chasidei Chabad of United States v. Russian Federation, 729 F. Supp. 2d 141 (D.C. Cir. 2011) (No. 05-cv-01548-RCL).

189 Interim Judgment, Agudas Chasidei Chabad of United States v. Russian Federation, 729 F. Supp. 2d 141 (D.C. Cir. 2011) (No. 05-cv-01548-RCL).

That litigation focused on the commercial nexus requirement of section 1605(a)(3), which states that "a foreign state shall not be immune from the jurisdiction of courts" when the takings element is satisfied and either of the following two conditions is met:

> [T]hat property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[190]

This is a class disjunctive formulation. The foreign *state* is not immune when one of two conditions are met: (1) the foreign state uses the subject property in the United States in connection with a commercial activity, or (2) a state's agency or instrumentality owns or operates the property and is engaged in a commercial activity in the United States (not necessarily involving the subject property). The text's most plausible reading is that if the property is not physically present, but an agency or instrumentality is engaged in commercial activity, the state itself is not immune.

This question arose in the lower courts leading up to the Supreme Court's *Altmann* decision. In *Altmann*, the Ninth Circuit held that the lawsuit against Austria could proceed because the museum holding the painting met the lower commercial activity requirement, sort of like tagging a parent company with jurisdiction by virtue of its subsidiary activity.[191] The Ninth Circuit has consistently upheld this view which, as noted above, is the correct reading of the statutory text.[192]

The appellate court in *Chabad* reached the same conclusion in 2008. The D.C. Circuit analyzed principally the second scenario of the commercial nexus test as applied to instrumentalities of the Russian Federation, rejected Russia's argument for a more demanding test for instrumentalities, and reversed the district court's finding of Russia's immunity where the property had never

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190 28 U.S.C. § 1605(a)(3); *see Chabad*, 528 F.3d at 940.

191 *See* Altmann v. Republic of Austria, 317 F.3d 954, 969 (9th Cir. 2002).

192 *See* Cassirer v. Kingdom of Spain, 616 F.3d 1028 (9th Cir. 2010) ("Congress meant for jurisdiction to exist over claims against a foreign state whenever property that its instrumentality ends up claiming to own had been taken in violation of international law, so long as the instrumentality engages in a commercial activity in the United States."). Also, in a case against Romania and RADEF România Film, the commercial activities of the latter brought the "claims within the second commercial-activity nexus clause," and costs were taxed against both defendants. Sukyas v. Romania, 765 F. App'x 179, 180 (9th Cir. 2019).

crossed the borders of the foreign state but the instrumentalities in possession of it are engaged in commercial activity.[193]

In 2017, however, the D.C. Circuit had reversed course.[194] Circuit Judge Randolph dissented, sensibly:

> Although § 1605(a)(3) provides that a foreign state shall *not* be immune from suit, the majority crosses out the "not" and holds that the foreign state shall be immune from suit when its agencies or instrumentalities owning or operating the expropriated property engage in commercial activity in the United States.[195]

In 2024, the D.C. Circuit in *Chabad* hewed to *de Csepel* and *Philipp*—not the statute, not its earlier ruling in *Chabad*, and not the Ninth Circuit's analysis—concluding that "there is no jurisdiction over a claim against a foreign state under the FSIA's expropriation exception unless the expropriated property is located in the United States."[196]

While not terribly surprising, it was disappointing. The worst was yet to come, however:

> Finally, there is no indication of gamesmanship . . . . It would be a different case if, for instance, the Russian Federation had appeared and contested jurisdiction, determined that its arguments were unlikely to succeed, withdrawn and defaulted, and then strategically reappeared in an attempt to challenge jurisdiction a second time. Or one could imagine a scenario in which a foreign state relied on its agencies or instrumentalities for the specific purpose of raising or re-raising jurisdictional arguments that otherwise would be precluded.[197]

This extraordinary statement is explained partly by the post-*Philipp* surrender by the courts. That "gamesmanship" is *exactly* what happened in this very case. Not only that, Russia's wider response was conclusive evidence of gamesmanship: the cultural property embargo that continues to this day.[198] The *Chabad* plaintiffs petitioned for a rehearing en banc, which was denied,[199]

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193 *Chabad*, 528 F.3d at 947–48, 955.

194 *See* de Csepel v. Republic of Hungary, 859 F.3d 1094, 1105 (D.C. Cir. 2017); *see also* Schubarth v. Federal Republic of Germany, 891 F.3d 392, 399–401 (D.C. Cir. 2018).

195 *de Csepel*, 859 F.3d at 1111.

196 Agudas Chasidei Chabad of United States v. Russian Federation, 110 F.4th 242, 252 (D.C. Cir. 2024).

197 *Id.* at 255 (emphasis added).

198 *See* Nicholas O'Donnell, *Russia Sanctioned $50,000 per Day for Defiance of* Chabad *Library Judgment that Led to Art and Cultural Loan Embargo*, ART LAW REP. (Jan. 16, 2013) https://blog.sullivanlaw.com/artlawreport/2013/01/16/russia-sanctioned-50000-per-day-for-defiance-of-chabad-library-judgment-that-led-to-russian-art-loan-embargo/ [https://perma.cc/HFF2-RPER].

199 Agudas Chasidei Chabad of United States v. Russian Federation, No. 23-7036, 2024 WL 4291931, at *1 (D.C. Cir. Sept. 23, 2024).

and then successfully petitioned the Supreme Court for an extension of time until early 2025 to file for a writ for certiorari.[200] The plaintiffs submitted their petition on February 20, 2025,[201] and as of this writing, the Court has not decided whether to hear the case.

Similarly, the *Berg* case also faltered post-*Philipp* on appeal as a result of the commercial nexus analysis. The *Berg* claimants were heirs to the Dutch art gallery, Firma D. Katz.[202] The paintings at issue in *Berg* followed a complicated trajectory after the war and were returned to the Dutch government by the MFAA, consistent with the policy of external restitution to the country of origin, but not necessarily to the owner.[203] By the time of the lawsuit, the paintings were in the hands of several private and public museums in the Netherlands.[204] Although the district court—tracking the pre-Supreme Court *Philipp* consensus of *Altmann*, *de Csepel*, *Malevich*, *Chabad*, and *Cassirer*—held that the claims against the Dutch state defendants satisfied the takings element of the expropriation exception of section 1605(a)(3) of the FSIA, it ultimately concluded that the defendants' contacts were insufficient to confer personal jurisdiction.[205]

To assess the expropriation exception, the Fourth Circuit considered the commercial nexus element on appeal. The district court had made findings as to which of the various sovereign defendants were instrumentalities and which were political subdivisions of the foreign state.[206] The Fourth Circuit applied the *de Csepel* and *Philipp* view of a disjunctive test requiring the foreign state to have used the property at issue commercially in the United States, which is problematic for the reasons discussed earlier.[207] There was no dispute that the paintings had not entered the United States, so whether the defendants were a foreign state

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200 Application for Extension of Time to File Petition for Writ of Certiorari, Agudas Chasidei Chabad of United States v. Russian Federation, No. 24A551 (U.S. Dec. 3, 2024); *see also No. 24A551*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24a551.html [https://perma.cc/TW8D-F5L5] (last visited Feb. 15, 2025).

201 Petition for a Writ of Certiorari, Agudas Chasidei Chabad of United States v. Russian Federation, No. 24A551 (U.S. Feb. 20, 2025).

202 Berg v. Kingdom of the Netherlands, 24 F.4th 987, 990 (4th Cir. 2022).

203 *Id.*

204 *Id.*

205 Berg v. Kingdom of the Netherlands, No. 2:18-cv-3123-BHH, 2020 WL 2829757, at *13–15 (D.S.C. Mar. 6, 2020).

206 *Id.* at *5–7.

207 *Id.* at *11–12.

or subdivision, or an instrumentality (requiring only commercial activity of any sort) was outcome dispositive.

The Kingdom of the Netherlands was clearly a foreign state, so the court concluded that the state itself remained immune from suit.[208] The Ministry of Education, Culture & Science of the Netherlands (Ministry) and the Cultural Heritage Agency of the Netherlands (RCE) were the subject of the heart of the analysis. As the *Berg* court explained, "the FSIA applies to the component parts of a foreign state, distinguishing those that are legally separate from the foreign state from those that are not," such that "legally separate agencies and instrumentalities may lose their sovereign immunity under the second clause of the expropriation exception, while legally inseparable political subdivisions cannot."[209]

To determine the status of the defendants, the *Berg* court relied on the core functions test, as other circuits have done. The core functions test asks, "if the core functions are governmental, courts treat the entity as a mere political subdivision—not legally separate from the foreign state."[210]

Considering the Dutch defendants, the Fourth Circuit found them all to be political subdivisions and thus immune from suit. The Ministry is one of twelve agencies that report to the Prime Minister.[211] The RCE "implements legislation on heritage management and serves as a centre of expertise on the conservation of the Netherlands' historic buildings, archaeological heritage and cultivated landscapes" and is responsible for cultural policy.[212] The Fourth Circuit distinguished the agencies held to be instrumentalities in *de Csepel* because the Hungarian Ministry's "functions are those that a private entity could engage in as well. Moreover, [its] placement outside of the Hungarian government, as a joint-stock company, further emphasizes its commercial, rather than governmental, nature."[213] Even though the RCE's duties include management of the art collection—the very subject

208 *Id.* at *4–5, 11.

209 *Berg*, 24 F.4th at 992 (quoting Wye Oak Tech., Inc. v. Republic of Iraq, 666 F.3d 205, 214 (4th Cir. 2011)).

210 *Id.* at 993 (quoting *Wye Oak Tech., Inc.*, 666 F.3d at 215 (citing Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151, 153 (D.C. Cir. 1994))); *see also* Garb v. Republic of Poland, 440 F.3d 579, 590–91 (2d Cir. 2006).

211 *Berg*, 24 F.4th at 995.

212 *Id.* at 993 (citation omitted).

213 *Id.* at 995 (quoting de Csepel v. Republic of Hungary, 613 F. Supp. 3d 255, 274 (D.D.C. 2020)).

of the suit—the Fourth Circuit waived this away as "but one part of RCE's functional portfolio."[214]

This turns the public or private analysis at the core of the FSIA on its head. *Every* sovereign defendant has different, sometimes extremely broad, functions. The touchstone is the nature of the action at issue in the lawsuit. RCE manages the country's art museums, where the paintings stolen from Firma D. Katz are located.[215] Excusing those acts because of other official acts frames the question to suit the desired answer.

Even *Cassirer*, the singular case in which the United States has been supportive of a claimant, has been on a knife's edge post-*Philipp*. The Supreme Court ruled for the Cassirers on the question of how to select applicable law under the FSIA after the question of immunity has been resolved.[216] The Ninth Circuit applied a federal common law choice-of-law test.[217] The Supreme Court rejected this interpretation of section 1606 of the FSIA, which expressly provides that a foreign state not entitled to immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances."[218]

On remand, the Ninth Circuit again ruled for the Thyssen-Bornemisza Collection, holding that even under California's choice-of-law test, Spanish law applied, and the museum had acquired prescriptive title.[219] Here, again, the interpretation of greater interests and effects in favor of Spain betrays a *Philipp*-era distaste for claims.[220]

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214 *Id.*

215 *See* Berg v. Kingdom of the Netherlands, No. 2:18-cv-3123-BHH, 2020 WL 2829757, at *1, *6 (D.S.C. Mar. 6, 2020).

216 Cassirer v. Thyssen-Bornemisza Collection Found., 596 U.S. 107, 117 (2022).

217 *Id.* at 112.

218 *Id.* at 108.

219 Cassirer v. Thyssen-Bornemisza Collection Found., 89 F.4th 1226, 1235–37 (9th Cir. 2024); *see also* Nicholas M. O'Donnell, *Pissarro Painting Sold Under Nazi Duress Awarded to Thyssen-Bornemisza Collection Foundation*, INST. OF ART & L. (Jan. 17, 2024), https://ial.uk.com/pissarro-nazi-duress [https://perma.cc/L3WV-ZZ3B].

220 This predilection for immunity has infected the commercial activity exception analysis as well. *See* Barnet v. Ministry of Culture & Sports, 961 F.3d 193, 195–96 (2d Cir. 2020). In *Barnet*, a collector consigned a bronze figure of a horse at auction with Sotheby's. *Id.* at 195. Greece demanded the sculpture's repatriation, and Barnet sued to quiet title. *Id.* Yet despite claiming ownership—a quintessentially private and commercial act—the Second Circuit held the interference with the New York art market to be a sovereign act. *Id.* This was inspired in part by the Chief Justice's opinion a few years earlier in *OBB Personenverkehr AG v. Sachs*, which involved a strained reading of the "based on" element of the commercial activity exception of 28 U.S.C. § 1605(a)(2). OBB Personenverkehr AG v. Sachs, 577 U.S. 27, 29, 32 (2015). The transmission of the letter by Greece could not have been more fundamentally commercial—it sought to, and did, put a stop to a public auction

In their petition for certiorari, the Cassirers note their entitlement to relief was based on a change in California law.[221] In response, and even though the applicability of the expropriation exception was established in the case and the violation of international law was conceded by Spain more than fifteen years ago, the Thyssen-Bornemisza Collection served notice of its intention to argue that *Philipp* renders the case a domestic taking.[222] The Cassirers addressed this new argument in their motion for relief from judgment in reliance on Assembly Bill 2867, which enacted a new provision of the California Code of Civil Procedure, section 338(c)(6), to alter California's choice-of-law test.[223] The Supreme Court vacated the Ninth Circuit ruling, remanding for determination of the applicability of the new California law.[224]

Finally, *Simon*'s second trip to the Supreme Court in 2024 served notice of the Court's intent to inject its policy views in order to narrow the FSIA, this time through the commercial nexus test. After both sides endured and argued an ultimately pointless trip to the Supreme Court in 2020 about possible abstention, the case returned on the question of that part of the commercial nexus that asks if "that property or any property exchanged for such property [taken in violation of international law] is present in the United States in connection with a commercial activity carried on in the United States by the foreign state."[225] The *Simon* plaintiffs are the heirs to victims of the expropriation of property in the course of their deportation by Nazi-allied Hungary.[226] But the case does not claim that Hungary is in possession of specific unique property that was taken from their ancestors, as *Altmann*, *Cassirer*, *de*

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of cultural property. *See Barnet*, 961 F.3d at 198. The fact that Greek law is the basis of ownership would be the same for a private collector.

221 Petition for Writ of Certiorari at 7, Cassirer v. Thyssen-Bornemisza Collection Found., No. 24-652 (U.S. Mar. 10, 2025) (citing A.B. 2867, 2023–2024 Leg., Reg. Sess. (Cal. 2024)).

222 Joint Statement Pursuant to Standing Order Paragraph 5(B) Regarding Local Rule 7-3 Pre-Filing Conference at 5–6, Cassirer v. Thyssen-Bornemisza Collection Found., No. 2:05-cv-03459-JFW-E (C.D. Cal. Jan. 17, 2025).

223 Plaintiffs' Notice of Motion and Motion for Relief from Judgment Pursuant to Fed. Rule of Civ. Proc. 60(b)(6) at ii, *Cassirer*, No. 2:05-cv-03459-JFW-E (C.D. Cal. Jan. 28, 2025).

224 Cassirer v. Thyssen-Bornemisza Collection, No. 24-652, 2025 WL 746324, at *1 (U.S. Mar. 10, 2025) ("Judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of Assem. Bill 2867, 2023–2024 Reg. Sess. (Cal. 2024).").

225 28 U.S.C. § 1605(a)(3).

226 Simon v. Republic of Hungary, 812 F.3d 127, 132–33 (D.C. Cir. 2016).

Csepel, and *Philipp* did.[227] It asserts that Hungary has property exchanged for that expropriated property.

The *Simon* case poses an interesting question about how direct an exchange there must be from the stolen property to the general assets of a nation itself. Yet in probing this question, the Court's now-conclusive bias in favor of immunity was on full display. At oral argument on December 3, 2024, the Court repeatedly referred to the policy concerns about a particular result that the 94th Congress rejected definitively in passing the FSIA. For example, Justice Kavanaugh posed the following softball question to the Assistant to the Solicitor General (who argued the case in favor of Hungary): "One of the important things, I think, with making sure we don't read it too expansively is friction with other countries and, if other countries adopted a similar expropriation and commingling theory, the effects it would have on the United States."[228]

That is what the Roberts Court has deemed important, but it is the antithesis of what the House Report made plain when it condemned the "outdated practice of having a political institution, namely, the State Department, decide many of these questions of law,"[229] and the antithesis of Attorney General Kleindienst's explanation that "[t]he central principle of the [FSIA] . . . is to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts, *without participation by the Department of State*."[230] It perpetuates "the sensitivities of nineteenth-century monarchs or the prerogatives of the twentieth-century state" that the FSIA emphatically rejected.[231]

The government lawyer took it even a step further, arguing that the *Sabbatino* case—overruled by Congress—is actually the "touchstone" of what takings qualify under section 1605(a)(3).[232] "[T]he expropriation exception in particular, intended to be and recognized by this Court as a small departure from the restrictive theory of sovereign immunity, would not cover a lot of cases that

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227 *Id.* at 147.

228 Transcript of Oral Argument at 30, Republic of Hungary v. Simon, 145 S. Ct. 480 (2025) (No. 23-867).

229 House Report, *supra* note 18, at 25.

230 *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Rels. of the H. Comm. on the Judiciary*, 93d Cong. 34 (1973) (emphasis added).

231 House Report, *supra* note 18, at 27.

232 Transcript of Oral Argument at 30, *Simon*, 145 S. Ct. 480 (2025) (No. 23-867).

are beyond where *Sabbatino* as a touchstone would . . . indicate that it applies."[233]

Hungary's counsel suggested that the Second Hickenlooper Amendment was intended to apply to "a tiny fraction of expropriation claims around the world"—a remarkable statement about Cuba in the 1960s.[234] No member of the Court pushed back on either statement. Worse, the government lawyer suggested, "[T]his Court, I think, has said . . . in *Philipp*, for example, that the expropriation exception really was intended to capture *Sabbatino* and *Sabbatino*-like cases."[235] The Chief Justice seemed to agree, stating, "[W]e know that from *Sabbatino* and the second Hickenlooper amendment that Congress had in mind a much narrower exception than that."[236]

The Court's February 21, 2025 opinion bears this out.[237] Elevating the imagined link between the Second Hickenlooper Amendment and the expropriation exception, the Court cites *Philipp* to interpret the FSIA's immunity based on the rejection of the Act of State Doctrine.[238] The net result is that the Supreme Court has made a statute that is *not* about immunity—the Second Hickenlooper Amendment—paramount to understanding the FSIA, over actual amendments to the FSIA like the Clarification Act.

VII. RESTORING THE STATUS INTENDED BY CONGRESS

What stands out from *Philipp* and the cases since is a solicitude not just for sovereign immunity, but for sovereign impunity. Consider even just the array of parties in that case. Germany had been dismissed, and the Supreme Court

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233 *Id.* (alteration added).

234 *Id.* at 8.

235 *Id.* at 31. (alterations added).

236 *Id.* at 62. (alteration added).

237 *See* Simon v. Republic of Hungary, 145 S.Ct. 480 (2025).

238 *Id.* at 488. *Cf.* 28 U.S.C. § 1605(a)(3) (A state is not immune "in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."); 22 U.S.C. § 2370(e)(2) ("[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law.").

declined the consortium heirs' petition to hear the commercial nexus question. As a result, Germany, the country at once responsible for the Holocaust and, since the D.C. Circuit ruling in 2018, was certain to face no consequence for the taking at issue in *Philipp* regardless of the outcome. And still, the Supreme Court granted certiorari for a case about the Holocaust to make these points (and continued to do so repeatedly thereafter).

The irony of the caution stated about using the FSIA to modify sovereigns' behavior is that it has *incentivized* the very worst behavior. Germany's initial motion to dismiss in *Philipp* made such reprehensible arguments as suggesting that the 1935 transaction "predated the Holocaust by several years."[239] The district court opinion in 2017 did not directly rebuke this, but other organizations did,[240] and the initial outcomes served as a corrective. Since 2021, however, in cases like *Ambar*, Philipp has invited the very worst sort of self-justification.[241]

The implication of these incentives in other scenarios is straightforward. Ethnic Armenian victims in Nagorno-Karabakh would doubtless face the argument that Azerbaijan claims sovereignty, and thus the takings are domestic. Vladimir Putin denies that Ukraine even exists, so Russia's bad faith in *Chabad* would extend to a claim of immunity for the pillage of Ukrainian museums. And to give an example similar to the one Justice Breyer offered dismissively, what about Tibet, a sovereign country when invaded militarily by China?[242]

Notwithstanding the elevation of *Sabbatino* in the *Simon* argument to a place it was never meant to be, that 1960s case does provide a constructive counterexample of Congress refusing the disrespect served to it by the Supreme Court, when "Congress did not applaud the Court's [ruling]."[243]

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239 Defendants' Motion to Dismiss and Incorporated Memorandum of L. at 24, Philipp v. Federal Republic of Germany, 248 F. Supp. 3d 59 (D.C. Cir. 2017) (No. 1:15-cv-00266-CKK).

240 *See* Nicholas O'Donnell, *Widespread Criticism Continues from Historians over Germany's and SPK's Revisionism Concerning Holocaust and Forced Sales of Art*, SULLIVAN: ART L. REP. (Nov. 19, 2015, 12:48 PM) https://blog.sullivanlaw.com/artlawreport/2015/11/19/widespread-criticism-continues-from-historians-over-germanys-and-spks-revisionism-concerning-holocaust-and-forced-sales-of-art/ [https://perma.cc/XG9W-HANN].

241 Ambar v. Federal Republic of Germany, 596 F. Supp. 3d 76, 79–80, 82–83 (D.D.C. 2022).

242 Transcript of Oral Argument at 56, Federal Republic of Germany v. Philipp, 141 S. Ct. 59–60 (2020) (No. 19-351).

243 Federal Republic of Germany v. Philipp, 592 U.S. 169, 179 (2021).

So Congress must again restore the balance it has previously set in 1976 and again in 2016 in the Clarification Act. There is little about which Congress has been as unequivocal and bipartisan than art theft and the Holocaust. From the Holocaust Victims Redress Act of 1998 (HVRA)[244] to the Holocaust Expropriated Art Recovery Act (HEAR Act)[245] and Clarification Act,[246] to the Justice for Uncompensated Survivors Today Act of 2017 (JUST Act),[247] it is hard to imagine how Congress could state more clearly that Nazi art theft, beginning on January 30, 1933, offended international law. The HEAR Act makes specific findings about Nazi property crimes related to art, such as those at issue in this case:

> It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history."[248]

Like the Clarification Act, the HEAR Act defines its "covered period" as "the period beginning on January 1, 1933, and ending on December 31, 1945"—that is, even broader than the strict duration of Hitler's regime.[249] The HEAR Act also references the findings expressed in the HVRA. The HVRA states:

> The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.[250]

For its part, the JUST Act defines "wrongful transfers" to include "forced sales or transfers, and sales or transfers under duress during the Holocaust era."[251]

The Supreme Court treated these laws dismissively, to say nothing of eighty years of American leadership on restitution

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244 *See* Holocaust Victims Redress Act, Pub L. No. 105-158, 112 Stat. 15 (1998) [hereinafter HVRA].

245 Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016) [hereinafter HEAR Act].

246 Foreign Cultural Exchange Jurisdictional Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016).

247 *See* Justice for Uncompensated Survivors Today Act, Pub. L. No. 115-171, 132 Stat. 1288 (2017) [hereinafter JUST Act].

248 HEAR Act, *supra* note 247, § 2(1).

249 *Id.* § 4(3).

250 HVRA, *supra* note 244, § 201(4).

251 JUST Act, *supra* note 247, § 2(3).

stretching from the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control in 1943, to the Genocide Convention, to the Washington Conference. The Court concluded that the HEAR Act, which expands the limitations period on Holocaust-era art claims—and therefore makes litigation possible where it was barred before—actually "encourage[s] redressing those injuries outside of public court systems."[252] This is palpable nonsense, a complete betrayal of any pretense of textual interpretation.

As in *Sabbatino*, the co-equal branches of government must act. So far, Congress' response has been tepid. A handful of Representatives did file an amicus brief in *Philipp*, noting, inter alia, that:

> Congress has explicitly sanctioned claims arising from over a century of wrongs carried out by sovereigns against "targeted and vulnerable" groups, repeatedly sought to facilitate redress for Nazi-era takings, and made clear its intent at the genesis of the FSIA to "encourage" claims against sovereigns in federal courts. The D.C. Circuit's decisions below jibes with and furthers that congressional intent.[253]

The Supreme Court opinion simply ignores the brief. Another group filed a brief in *Simon* in 2024.[254] The effect of that remains to be seen, but given the disrespect to Congress in *Philipp*, there is no reason to believe it will be any different. *Cassirer* is the only case in which the State Department has not spoken in full-throated support of sovereigns like Nazi Germany, Austria, Hungary, or Putin's Russia.

As a result, legislation is clearly necessary. As a start, Congress[255] should cement what it said in 2016 by (1) affirming the common-language interpretation of the commercial nexus test that the Ninth Circuit used in *Altmann* (a disjunctive test, under

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252 Federal Republic of Germany v. Philipp, 592 U.S. 169, 186 (2021).

253 Brief for Members of the U.S. House of Representatives as Amici Curiae in Support of Respondents at 14, Federal Republic of Germany v. Philipp, 592 U.S. 169 (2021) No. 19-351 and No. 18-1447).

254 Brief for Members of the U.S. House of Representatives & Senate as Amici Curiae in Support of Respondents at 1, Republic of Hungary v. Simon, 145 S. Ct. 480 (2025) (No. 23-867).

255 When one speaks of "Congress," of course, the Executive must also be involved to pass a statute absent a veto override. This gives cause for concern. Despite the proscriptions of the House Report, the State Department has resolutely supported the very worst sovereign defendants. With respect to the relevance of genocide, the State Department appears to be overhauling its own condemnation. The webpage titled "Remembering the Rohingya Genocide," for example, is currently inoperable. *See* Antony J. Blinken, *Remembering the Rohingya Genocide*, U.S. DEP'T OF STATE (Aug. 24, 2024), https://www.state.gov/remembering-the-rohingya-genocide/ [https://perma.cc/TF8M-GASL].

either prong of which the foreign state is amenable to suit), and (2) passing the following revision of section 1605(a)(3):

> (i) Exception—Nazi-era claims. Notwithstanding the domestic takings rule (see *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021)), paragraph (a)(3) shall nonetheless apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection where the action is based upon a claim concerning a work of art or other object of cultural significance taken between and including January 30, 1933, and May 8, 1945, by (a) the Government of Germany; (b) any government in any area in Europe that was occupied by Germany or the military forces of the Government of Germany; (c) any government in Europe that was established with the assistance or cooperation of the Government of Germany; or (d) any government in Europe that was an ally or collaborator of the Government of Germany, or any of their allies or agents, members of the Nazi Party, or their agents or associates, regardless of the nationality or citizenship of the alleged victim.

This would not yet provide relief to victims of the Armenian Genocide, or Putin's war against Ukraine (which Russia would, in its own twisted logic, describe as a domestic taking since it does not acknowledge Ukrainian cultural existence), or the Rohingya (in Myanmar). But it would be a start. And perhaps it would bring the Court in line with where it should have been since *N.M.L. Capital*, to say nothing of the House Report: policy is for Congress; application of the FSIA's text is for the courts—no more, and no less.

Further, the odd phrasing of the commercial nexus text could and should be clarified. Is it one test for any sovereign defendant, or two tests depending on the "core functions" of the defendant? Congress could put this to rest.

The Supreme Court took a hatchet to what Congress enshrined in 1976. The question now is whether Congress will tolerate the rebuke.