CLARITY AND CONFUSION: DID *REPUBLIC OF AUSTRIA V. ALTMANN* REVIVE STATE DEPARTMENT SUGGESTIONS OF FOREIGN SOVEREIGN IMMUNITY?

MARK J. CHORAZAK

INTRODUCTION

For Maria Altmann, a Holocaust survivor in her late eighties, 1938 is not just a year. It marked the beginning of the "Anschluss," the Nazi invasion and annexation of her native Austria, and her family's subsequent flight from Vienna.[1] More than sixty years later, following a discovery by a journalist conducting research in the state archives at the Austrian Gallery,[2] Altmann learned that six Gustav Klimt paintings that she thought had been donated to the Gallery by her uncle had actually been confiscated from him by the Nazis and transferred to the Gallery under a cover letter signed "Heil Hitler."[3] After the Republic of Austria rejected her proposals for private arbitration, and after litigating in Austrian courts proved overly burdensome, Altmann brought suit against Austria in a Los Angeles federal district court.[4] Austria moved to dismiss the suit, claiming that it was entitled to sovereign immunity because the alleged conduct occurred before the United States codified its policy of restrictive

1. Republic of Austria v. Altmann, 541 U.S. 677, 681–82 (2004).

2. *Id.* at 684. The Austrian federal minister opened the Gallery's archives to the journalist, Hubertus Czernin, along with other researchers, following a controversy surrounding two paintings by Egon Schiele. Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1195 (C.D. Cal. 2001). *See generally* United States v. Portrait of Wally, No. 99 Civ. 9940, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. Apr. 11, 2002) (discussing the controversy surrounding the Schiele paintings). The Schiele controversy, which has generated protracted litigation, "has created a bombshell in the art world." MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 226 (2003).

3. *Altmann*, 541 U.S. at 684.

4. Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1196 (C.D. Cal. 2001).

immunity in 1976 and even before it adopted the policy in 1952.[5] In *Republic of Austria v. Altmann*, the Supreme Court disagreed and allowed Altmann's claim to proceed.[6]

Altmann's case is one of many brought by private plaintiffs seeking redress in American courts against foreign states.[7] The Foreign Sovereign Immunities Act of 1976 (FSIA),[8] which provides the "sole basis" for bringing suit against a foreign state in an American court,[9] enumerates several exceptions to foreign states' traditionally recognized immunity as sovereigns. The question before the Court in *Altmann* was whether the FSIA should apply retroactively to conduct that occurred before the United States articulated its policy of restrictive sovereign immunity, by which immunity is limited to those suits involving a foreign sovereign's public, not private or commercial, acts.[10] Several governments, including the United States,[11] Mexico,[12] and Japan,[13] filed amicus briefs warning that retroactive applicability would threaten foreign states' reasonable and settled expectations of immunity from suit for pre-1952 conduct. The Court concluded, however, that the doctrine of

---

5. *Altmann*, 541 U.S. at 686. Austria raised additional defenses, including improper venue and dismissal under the doctrine of *forum non conveniens*, but these were rejected by the Ninth Circuit and not considered in the Supreme Court's opinion, *see id.* at 686 n.6 (noting that Austria raised these defenses); thus, they will not be discussed further in this Note.

6. *Id.* at 700.

7. *See, e.g.*, Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 241 (2d Cir. 1996), *recalled and remanded*, 1997 U.S. App. LEXIS 2338 (2d Cir. Feb. 10, 1997), *cert. denied* 520 U.S. 1204 (1997) (suit against Libya for sponsoring terrorist bombing of Pan Am Flight 103); Garb v. Republic of Poland, 207 F. Supp. 2d 16, 19 (E.D.N.Y. 2002), *vacated and remanded*, 72 Fed. Appx. 850 (2d Cir. 2003) (suit by Polish Jews against a Polish government agency for post–World War II expropriations); Abrams v. Société Nationale des Chemins de Fer Francais, 175 F. Supp. 2d 423, 423 (E.D.N.Y. 2001), *aff'd* 389 F.3d 61 (2004), *cert. denied*, 124 S. Ct. 1841 (2005) (suit against a French national railroad for actions taken in transporting Jews to death camps during the Holocaust); Joo v. Japan, 172 F. Supp. 2d 52, 54–55 (D.D.C. 2001), *aff'd* 332 F.3d 679 (D.C. Cir. 2003), *reaff'd* 413 F.3d 45 (2005) (suit by Asian women against Japan for damages from alleged sexual slavery and torture by Japanese military). Both *Abrams* and *Joo* were reconsidered in light of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

8. 28 U.S.C. §§ 1330–32, 1441, 1602–11 (2005).

9. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).

10. *Altmann*, 541 U.S. at 692.

11. Brief for United States as Amicus Curiae Supporting Petitioners at 10, *Altmann*, 541 U.S. 677 (No. 03-13), 2003 WL 22811828, at *10.

12. Brief for Mexico as Amicus Curiae Supporting Petitioners at 3, *Altmann*, 541 U.S. 677 (No. 03-13), 2003 WL 22766741, at *3.

13. Brief for Japan as Amicus Curiae Supporting Petitioners at 7, *Altmann*, 541 U.S. 677 (No. 03-13), 2003 WL 22753584, at *7.

foreign sovereign immunity "reflects current political realities and relationships" and that retroactivity is consistent with the dual purposes of the FSIA: to "clarify[] the rules that judges should apply in resolving sovereign immunity claims and eliminate[] political participation in the resolution of such claims."[14] The Court also indicated that the State Department, in FSIA cases, could once again file "suggestions of immunity," which are recommendations that a federal court dismiss a suit against a foreign state for lack of jurisdiction.[15]

This Note argues that although the Court in *Altmann* provided lower courts with much-needed clarity in holding that the FSIA is permissibly retroactive, it erred in inviting the State Department to once again file suggestions of immunity. Most importantly, this Note contributes to the literature by arguing that, although applying the FSIA retroactively may bring hope to those plaintiffs who have "nowhere else to go" and headaches to the State Department because it resurrects suggestions of immunity, *Altmann* is unlikely either to dramatically expose foreign states to viable suits or to lead to the dire consequences that have been predicted for the United States' conduct of its foreign relations.[16]

Part I of this Note offers a review of the central tenets of sovereign immunity, from its common law roots to its current statutory construction. Part II briefly reviews the patchwork of conflicting interpretations of the FSIA within the case law before introducing *Altmann*. Part III analyzes how *Altmann*'s reinforcement of the FSIA as a jurisdictional statute resolves the split that was emerging within the circuits by neither violating the legal principles of retroactivity nor contravening the spirit of restrictive sovereign immunity. Finally, Part IV explores *Altmann*'s implications for plaintiffs, foreign states, and the State Department before concluding that the Court should clarify when courts should defer to State Department suggestions of immunity.

I. THE EVOLUTION OF MODERN SOVEREIGN IMMUNITY

The United States' approach to sovereign immunity can be traced by looking at three periods: first, the Nation's founding era,

14. *Altmann*, 541 U.S. at 696, 699.

15. *Id.* at 701.

16. *See infra* Part III.B.

when foreign states enjoyed "absolute" immunity from suit; second, between 1952 and 1976, when the "Tate Letter" set forth a more "restrictive" policy of sovereign immunity; and third, since 1976, when the FSIA was enacted to codify the doctrine of restrictive immunity.

A. From Absolute to Restrictive Sovereignty Immunity

The United States' initial policy of according foreign states absolute immunity from suit has its roots in *The Schooner Exchange v. M'Faddon*.[17] In 1812, Chief Justice Marshall noted that the jurisdiction of the United States within its own territory "is susceptible of no limitation not imposed by itself." As a matter of comity and the need to maintain diplomatic relations, however, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign, who, Marshall observed, were immune from suit when acting "with the knowledge and license of [their] sovereign."[18] Thus, courts almost automatically dismissed suits against foreign states under the doctrine of absolute sovereign immunity.[19]

In 1952, the United States departed from its practice of granting absolute sovereign immunity, granting instead only limited immunity.[20] The shift was motivated, in large measure, by acceptance in the international community of what has become known as the "restrictive theory" of sovereign immunity; the emerging role of nation-states as participants in commercial affairs; and the fact that

---

17. 11 U.S. (7 Cranch) 116 (1812).

18. *Id.* at 136, 137; *see also* Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983) ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country.").

19. Dismissal was especially common in sensitive cases, such as those involving friendly nations. *See Ex parte* Republic of Peru, 318 U.S. 578, 587–88 (1943) (noting that claims against friendly foreign states are "normally presented and settled in the course of the conduct of foreign affairs by the President and the Department of State" and that "[i]n such cases the judicial department of [the] government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction"). The State Department would file a suggestion of immunity with a federal court and the court would, in turn, dismiss the suit, a procedure that lasted for the next 165 years after *The Schooner Exchange*. Enahoro v. Abubakar, 408 F.3d 877, 880 (7th Cir. 2005).

20. Letter from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1962), *reprinted in* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711–15 (1976).

the United States had already subjected itself to suits in foreign courts in tort, contract, and merchant vessel disputes.[21] In a letter to Acting Attorney General Philip B. Perlman by Acting Legal Adviser to the Secretary of State Jack B. Tate, the State Department observed that there was broadening support within the international community for extending immunity to foreign states only for their sovereign or public acts—*jure imperii*—and not for their commercial or private acts—*jure gestionis*.[22] The "Tate Letter,"[23] as it is known, expressly adopted this "restrictive theory" of sovereign immunity and noted that it "[would] be the [State] Department's practice to advise [the Justice Department] of all requests by foreign governments for the grant of immunity from suit and of the Department's [opinion]."[24] Such an approach for determining whether a foreign state was immune from suit seemed straightforward. In application, however, it proved problematic.[25]

B. From Case-by-Case Political Pressures to Apolitical Determinations under the FSIA

The weaknesses of restrictive immunity under the Tate Letter were twofold. First, it failed to empower courts to make immunity determinations because "[a]s in the past, initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department," which continued issuing suggestions of immunity to courts.[26] Worse still, foreign states, no longer afforded absolute immunity from suit, began placing diplomatic pressure on the State Department to file favorable suggestions with courts.[27] The result was that political considerations sometimes influenced the State Department to intervene "in cases

21. *Alfred Dunhill*, 425 U.S. at 714 (citing the Tate Letter for the proposition that other nation-states "adhering to the [restrictive] theory" was "most persuasive" in convincing the United States to change its policy, and also noting the "widespread and increasing practice on the part of governments [to engage] in commercial activities").

22. *Id.* at 711.

23. *Id.* at 698.

24. *Id.* at 714–15.

25. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487 (1983) (explaining how application of the restrictive theory of sovereign immunity "proved troublesome" because "foreign nations often placed diplomatic pressure on the State Department in seeking immunity").

26. *Id.*

27. *Id.*

where immunity would not have been available under the restrictive theory."[28] Second, the Tate Letter failed to provide any clear standard for courts to follow in making immunity determinations when foreign states did not request immunity from the State Department.[29] Instead, courts had only prior State Department decisions to guide them, and these decisions had applied the restrictive theory inconsistently.[30] The practical effect of these problems was troubling—questions as to a foreign state's sovereign immunity were being determined by two different branches and without a clear standard of when immunity should be recognized.[31]

In 1976, Congress codified the restrictive theory of sovereign immunity in the FSIA.[32] Although adopting the general rule that foreign states are immune from jurisdiction in the federal courts, the FSIA delineates exceptions under which a suit may be brought against a foreign state or one of its agencies or instrumentalities.[33] These exceptions include when a foreign state (1) has waived its immunity either explicitly or by implication, (2) acts in a commercial capacity, (3) expropriates property in violation of international law and in some commercial capacity affecting the United States, (4) is involved in a matter in which rights in real estate acquired by inheritance or gift are at issue, (5) is a party to a personal or property injury action occurring in the United States, (6) has consented to arbitration, (7) is involved in a personal injury action arising from terrorist acts the state has sponsored in the United States, or (8) is subject to suit in admiralty for enforcement of a maritime lien based upon the foreign state's commercial activity.[34] Put simply, if a claim does not fall within one of these exceptions, a federal court must dismiss for lack of jurisdiction over the foreign state.

In enacting the FSIA, Congress envisaged that its "comprehensive set of legal standards" would accomplish the following objectives: free the State Department from "case-by-case diplomatic pressures"; clarify for courts the standards to apply in making immunity determinations; and assure litigants that, by placing

28. *Id.*
29. *Id.* at 487–88.
30. *Id.* at 487.
31. *Id.* at 488.
32. *Id.*
33. *Id.*
34. 28 U.S.C. § 1605(a)(1)–(7), (b) (2000).

primary responsibility with the judiciary and not the executive, immunity determinations would be made on legal, rather than political, grounds.[35] Lower courts have differed, however, as to whether Congress, in codifying the restrictive theory in the FSIA, intended it to apply to acts occurring prior to 1952, when the restrictive theory was adopted.

Until the Supreme Court decided *Altmann*, there was a patchwork of conflicting opinions within the lower courts. For example, district courts in Illinois[36] and California[37] held that the FSIA did apply retroactively, whereas a district court in the District of Columbia[38] ruled that it did not. And among the courts of appeal, the Ninth Circuit's view, that it is permissible to apply the FSIA to pre-1952 conduct,[39] clearly differed from the Eleventh and D.C. Circuits'[40] position that the FSIA should not be so applied. The Second Circuit simply endorsed an approach of having district courts broadly seek "case-by-case recommendations" by the State Department,[41] thereby encouraging a return to the sort of analysis employed before the FSIA was enacted. The Court sought to resolve these differences by granting certiorari in *Altmann*.[42]

II. THE *ALTMANN* CASE

Altmann is one of the most important recent decisions in sovereign immunity jurisprudence. Essentially, *Altmann* attempts to resolve the question of whether a suit, involving a unique and historically significant set of facts arising in the twentieth century, may be brought in the twenty-first century against a foreign state in a federal court.

---

35. *Verlinden*, 461 U.S. at 488 (citing H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606).

36. Haven v. Rzeczpospolita Polska (Republic of Poland), 68 F. Supp. 2d 943, 946 (N.D. Ill. 1999).

37. Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1201 (C.D. Cal. 2001).

38. Yin v. Government of Japan, No. 92-2574, 1994 U.S. Dist. LEXIS 6061, at *6 (D.D.C. May 6, 1994).

39. Altmann v. Republic of Austria, 317 F.3d 954, 967 (9th Cir. 2002).

40. Joo v. Japan, 332 F.3d 679, 681 (D.C. Cir. 2003); Jackson v. People's Republic of China, 794 F.2d 1490, 1497–98 (11th Cir. 1986).

41. Garb v. Republic of Poland, 72 F. App'x 850, 854 (2d Cir. 2003).

42. Republic of Austria v. Altmann, 539 U.S. 987, 987 (2003).

A. Bringing Suit against Austria

Maria Altmann's uncle, Ferdinand Bloch-Bauer, was a wealthy sugar magnate and prominent patron of the arts.[43] Bloch-Bauer fled Austria after it was annexed by the Nazis in 1938. His sugar company was "Aryanized."[44] His palatial Vienna home was taken over and his vast art and porcelain collections were confiscated.[45]

Before the war, Bloch-Bauer and his wife, Adele, were friends of the famous painter Gustav Klimt.[46] Adele was a subject of two of the six Klimt paintings that Bloch-Bauer owned.[47] Considered important symbols of Austrian culture,[48] the six paintings are valued at approximately $150 million.[49] All but one of these paintings have been hanging in the Austrian National Gallery for over fifty years.[50]

Altmann is her uncle's sole surviving heir.[51] Although her aunt, Adele, who died in 1925, executed a will "ask[ing]" that her husband bequeath five of the six paintings at issue to the Austrian National Gallery after his death, he never did so.[52] Bloch-Bauer died soon after the war ended in 1945, the same year that Altmann became an American citizen.[53] In his will, Bloch-Bauer left his entire estate to Altmann and her two siblings.[54]

In 1946, Austria invalidated all Aryanizations of property, but required exiled Austrians to seek "export permits" of "artworks . . . deemed to be important to [Austria's] cultural heritage."[55] These permits, however, were often used by the Austrian government to "forc[e] Jews to donate or trade valuable artworks to the [Gallery] in

---

43. Republic of Austria v. Altmann, 541 U.S. 677, 680–81 (2004).

44. *Id.* at 682. "Aryanization" refers to the process by which "Jews were forced to sell their property to 'Aryans' at artificially low prices." United States v. Portrait of Wally, No. 99-9940, 2002 U.S. Dist. LEXIS 6445, *3–*4 (S.D.N.Y. Apr. 12, 2002) (internal citation omitted); RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 95 (1961).

45. *Altmann*, 541 U.S. at 682.

46. BAZYLER, *supra* note 2, at 240–41.

47. *Altmann*, 541 U.S. at 681.

48. BAZYLER, *supra* note 2, at 241.

49. *Id*. at 240–41.

50. *Id.*

51. *Altmann*, 541 U.S. at 681.

52. *Id.* at 681–82.

53. *Id.* at 681.

54. BAZYLER, *supra* note 2, at 241.

55. *Altmann*, 541 U.S. at 682–83.

exchange for export permits for other works."[56] The following year, Altmann and her fellow heirs hired a Viennese lawyer to recover property stolen from their uncle during the war.[57] In exchange for signing a document "acknowledg[ing] and accept[ing]" the validity of Austria's claim to the Klimt paintings, the heirs' lawyer secured an export permit for most of the remainder of Bloch-Bauer's collection.[58] Altmann, however, was never aware of this arrangement and, until 1998, thought that her aunt and uncle had "freely donated" the Klimt paintings to the Gallery.[59]

In 1998, a journalist conducting research in the Austrian Gallery's archives discovered documents showing that the Gallery had known that neither Bloch-Bauer nor his wife had donated the paintings to the Gallery.[60] The journalist also found that one of the most famous paintings in the collection, *Adele Bloch-Bauer I*, had repeatedly been referenced in Gallery publications as having been donated by Altmann's uncle in 1936 when it had actually been transferred to the Gallery by the Nazis.[61]

Once these findings were made public, Austria enacted a new law to return artworks that had been coercively donated to state museums.[62] Under this law, Altmann successfully recovered several Klimt drawings and porcelain settings that had been donated after the war.[63] Altmann failed to recover, however, the six Klimt paintings, which Austria claimed had been properly donated under Adele's will.[64] After Austria declined Altmann's request for private arbitration, she brought suit in Austria.[65] Because pursuing the suit in Austria would have been prohibitively expensive,[66] Altmann instead

56. *Id.* at 683.
57. *Id.*
58. *Id.*
59. *Id.* at 684.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. BAZYLER, *supra* note 2, at 244–45.
66. Under Austrian law, plaintiffs are required to deposit a filing fee proportional to the value sought; Altmann's request for a waiver of the almost two million dollar fee was denied. *Id.* at 245.

sought recovery of the paintings in a federal district court in Los Angeles in 2000.[67]

Austria moved to dismiss the case on the ground of absolute sovereign immunity.[68] In 2001, the district court denied Austria's motion, holding that the FSIA, which contained an exception to sovereign immunity for cases involving expropriations, applied to pre-1952 events.[69] In 2002, the Ninth Circuit affirmed, reasoning that Austria could not have reasonably expected to receive immunity for its World War II–era actions.[70] Austria then appealed to the Supreme Court, which granted certiorari in 2003.[71] In January 2006, more than a year and a half after the Supreme Court's decision in Altmann, an Austrian arbitration court ordered Austria to return five Klimt paintings to Altmann and her family.[72]

B. Shifting Boundaries: The FSIA Can Be Applied Retroactively

In *Altmann*, the Supreme Court affirmed the Ninth Circuit's denial of Austria's motion to dismiss, holding that the FSIA applies to all claims against foreign sovereigns, "regardless of when the underlying conduct occurred."[73] Writing for the majority, Justice Stevens noted that, by requiring courts to apply the FSIA's sovereign immunity rules in all cases, the Court's holding was consistent with the FSIA's central purpose—to clarify the rules judges should apply in immunity determinations and to remove political participation from the process.[74]

The Court first explained[75] why it expressly disagreed with the Ninth Circuit's reliance on *Landgraf v. USI Film Products*.[76] In *Landgraf*, the Court set out the general rule that laws conferring substantive rights or obligations have no retroactive effect absent an

67. *Id.* at 245.

68. *Id.* at 246.

69. Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1201 (C.D. Cal. 2001).

70. Altmann v. Republic of Austria, 317 F.3d 954, 965, 974 (9th Cir. 2002).

71. Republic of Austria v. Altmann, 539 U.S. 987 (2003).

72. Diane Haithman & Christopher Reynolds, *Court Awards Nazi-Looted Artworks to L.A. Woman*, L.A. TIMES, Jan. 17, 2006, at A1.

73. Republic of Austria v. Altmann, 541 U.S. 677, 697–700 (2004).

74. *Id.* at 699.

75. *Id.* at 692 (citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).

76. 511 U.S. 244 (1994).

express statutory command.[77] In those cases in which a law contains no express command, *Landgraf* requires a court to determine whether the new law would have an impermissible retroactive effect in practice.[78] The Court did not criticize the *Landgraf* inquiry into whether a law affects substantive rights or only matters of procedure, but instead noted that the inquiry failed to provide a clear answer because the FSIA "defies such categorization."[79] Even though "the FSIA is not simply a jurisdictional statute . . . but a codification of 'the standards governing foreign sovereign immunity as an aspect of substantive federal law,"[80] the Court held in *Altmann* that the central purpose of foreign sovereign immunity is not to allow foreign states to "shape their conduct in reliance on the promise of future immunity from suit."[81] Instead, sovereign immunity "reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'"[82]

Looking to the FSIA's language and overall structure, the Court found an "unambiguous" statement in the preamble that claims against foreign states were "'henceforth' to be decided . . . 'in conformity with the principles set forth'" in the FSIA and also found that many of the other provisions were "unquestionably" meant to apply retroactively.[83] Thus, the Court reasoned that retroactive application of the FSIA was also consistent with congressional intent.[84]

Finally, the Court stressed the "narrowness" of its holding, noting that several defenses, such as the act-of-state doctrine,[85] would remain available to Austria.[86] Although the Court concluded by emphasizing that the State Department could still file suggestions of

77. *Id.* at 280.

78. *Altmann*, 541 U.S. at 694; *Landgraf*, 511 U.S. at 280.

79. *Altmann*, 541 U.S. at 694.

80. *Id.* at 695 (emphasis omitted) (citing Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 496–97 (1983)).

81. *Id.* at 696.

82. *Id.* (emphasis in original) (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003)).

83. *Id.* at 697–98 (quoting 28 U.S.C § 1602 (2000)).

84. *Id.* at 699.

85. *See infra* Part IV.B.

86. *Altmann*, 541 U.S. at 700.

immunity, it expressed no opinion as to whether courts should defer to such statements.[87]

III. CLARITY IN SOME AREAS, CONCERNS IN OTHERS

Following its decision in *Altmann*, the Supreme Court quickly granted certiorari in four cases, vacating and remanding them to the courts of appeal for consideration in light of its holding.[88] The Court's clarification in *Altmann* of the scope of the FSIA's reach will provide the lower courts with much-needed guidance. Already, the Second Circuit has applied *Altmann* in deciding a suit against a French national railroad company.[89]

What is striking about *Altmann* is that it provokes such heated debate about whether retroactive application of the FSIA is consistent with the legal principles of retroactivity and the spirit of sovereign immunity. This Part argues that the holding in *Altmann* is wholly consistent with both. Unfortunately, for all its clarity, *Altmann*'s reference to the State Department's ability to file suggestions of immunity has raised questions as to whether such involvement by the executive violates separation-of-power principles and contravenes one of the primary purposes of the FSIA—to remove political considerations from the immunity calculus.

A. Altmann *Resolves Interpretative Tensions between Retroactivity Principles and the Purpose of Sovereign Immunity*

At the heart of American law is a presumption against applying statutes retroactively. As the Court stated in *INS v. St. Cyr*,[90] the "presumption against retroactive legislation is deeply rooted in [American] jurisprudence, and embodies a legal doctrine centuries older than our Republic."[91] Whether viewed simply as a presumption or a constitutional requirement, this general rule is supported by

87. *Id.* at 701–02.

88. Abrams v. Société Nationale des Chemins de Fer Francais, 332 F.3d 173 (2d Cir. 2003), *vacated and remanded*, 124 S. Ct. 2834 (2004); Garb v. Republic of Poland, 72 F. App'x 850 (2d Cir. 2003), *vacated and remanded*, 124 S. Ct. 2835 (2004); Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003), *vacated and remanded*, 124 S. Ct. 2835 (2004); Whiteman v. Republic of Austria, 2002 U.S. Dist. LEXIS 19984 (S.D.N.Y. 2002), *vacated and remanded*, 124 S. Ct. 2835 (2004).

89. Abrams v. Société' Nationale des Chemins de Fer Francais, 389 F.3d 61, 63 (2d Cir. 2004).

90. 533 U.S. 289 (2001).

91. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

several rationales.[92] The dominant rationale is a sense of fairness that drives courts to be cautious in applying laws that deprive citizens of the "opportunity to know what the law is and to conform their conduct accordingly."[93] The fear is that a retroactive statute disrupts "settled expectations"[94] when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[95] Another rationale for the rule centers on the Madisonian fear of legislatures using retroactive statutes to benefit the powerful and punish unpopular groups or individuals in society.[96] Not all retroactive applications of statutes are impermissible, however.

The Court in *Landgraf* set forth a two-prong test by which to determine whether a statute should apply retroactively.[97] Courts should first examine whether the statute includes an express statement that Congress intended the statute to apply retroactively.[98] If such an express statement is present, then the statute may apply retroactively.[99] In the absence of an express statement, courts need to determine whether retroactive application of the statute would affect "vested rights" or impose new obligations.[100] If a statute does either, then it is considered "substantive" in nature and retroactive application of the statute would be impermissible under *Landgraf*.[101] In its *Altmann* decision, the Ninth Circuit assumed, without deciding, that the FSIA does not include an express statement regarding its retroactive application and ultimately held that the FSIA should nonetheless apply retroactively because Austria could not have

92. *Id.* at 266 (noting several constitutional provisions that prohibit retroactive application).

93. *Landgraf*, 511 U.S. at 265.

94. *Id.* at 266.

95. *Id.* at 269 (quoting Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)).

96. *Id.* at 266, 267 n.20.

97. *Id.* at 280.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*; *see also* Republic of Austria v. Altmann, 541 U.S. 677, 694 (2004) ("Under *Landgraf*, therefore, it is appropriate to ask whether the Act affects substantive rights . . . or addresses only matters of procedure . . . .").

legitimately expected to receive immunity for its actions relating to the Klimt paintings.[102]

The Court in *Altmann* did not simply affirm the Ninth Circuit's judgment, but expressly—and properly—disagreed with its rote application of the *Landgraf* test.[103] In deciding not to apply the *Landgraf* test to the FSIA, the Court visited two issues: (1) whether it is even possible to categorize the FSIA as a procedural or substantive statute, and (2) whether foreign states' reliance interests have a place in the immunity calculus.

1. *A Definitional Dilemma: Is the FSIA Procedural or Substantive?* The Court's discussion in *Altmann* regarding whether the FSIA is procedural or substantive will likely have a lasting effect on how lower courts decide other FSIA-related questions. Prior to *Altmann*, lower courts struggled in determining whether the FSIA should be viewed as a procedural statute or a substantive one. For example, the FSIA could be viewed as procedural in the sense that it contains "procedural provisions relating to venue, removal, execution, and attachment apply[ing] to all pending cases"[104] and, as observed by one commentator, the FSIA

> removed the existing federal jurisdictional bases for suits against foreign sovereigns from a number of statutes, including [t]he Alien Tort Statute, Diversity Jurisdiction, Admiralty Jurisdiction, Interpleader, Commerce and Antitrust[,] and Patents, Copyrights and Trademarks, and placed the exclusive basis for federal jurisdiction over suits against foreign sovereigns in the FSIA.[105]

In another sense, however, the FSIA could be viewed as substantive in that it "does not merely concern access to the federal courts," but "governs the types of actions for which foreign sovereigns may be held liable . . . in the United States . . . . [and] codifies the standards

---

102. Altmann v. Republic of Austria, 317 F.3d 954, 964–67 (9th Cir. 2002).

103. *See* Republic of Austria v. Altmann, 541 U.S. 677, 692 (2004) ("[C]ontrary to the assumption of the District Court and Court of Appeals, the default rule announced in our opinion in *Landgraf v. USI Film Products* does not control the outcome in this case." (citations omitted)).

104. *Id.* at 698.

105. Michael D. Murray, *Stolen Art and Sovereign Immunity: The Case of* Altmann v. Austria, 27 COLUM. J.L. & ARTS 301, 308 (2004) (citations omitted).

governing foreign sovereign immunity as an aspect of *substantive* federal law."[106]

Altmann, however, concluded that "the FSIA defies such categorization"[107] and found *Landgraf*'s procedural-substantive distinction too crude an instrument to determine whether the FSIA should apply retroactively. First, as the Court noted, the traditional presumption against retroactivity has its greatest analytical value when applied to private rights, which are rights tethered to reliance interests.[108] The problem, as explained further in Section A.2, is that, although having a "reasonable expectation" of immunity, foreign states never had a "right" to such immunity.[109] Second, *Landgraf*'s retroactivity analysis is inadequate in determining whether the FSIA is impermissibly retroactive because, even if the FSIA creates jurisdiction where there was none before,[110] and thus is substantive, this "characteristic," as the Court noted, "is in some tension with other, less substantive aspects" of the FSIA.[111]

A primary purpose of the FSIA as a jurisdiction-allocating statute was to remove the case-by-case determinations that were being performed by the State Department. These changes did not deprive foreign states of "settled expectations" from suit, and thus affect substantive rights, but rather clarified the terms under which immunity would or would not be granted.[112] The Court declared that

---

106. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 496–97 (1983) (emphasis added).

107. *Altmann*, 541 U.S. at 694.

108. *Id.* at 696.

109. *See infra* Part III.A.2 for an explanation why the Court properly affirmed the principle that sovereign immunity is rooted in comity rather than in the Constitution).

110. This was an argument raised by the Republic of Austria, Reply Brief of Republic of Austria at 5, *Altmann*, 541 U.S. 677 (No. 03-13), 2004 WL 114700, at *5, and endorsed by the dissent, *see Altmann*, 541 U.S. at 723 (Kennedy, J., dissenting) (conceding that the FSIA is jurisdictional in nature, but also arguing that it has an impermissible retroactive effect because it "create[s] jurisdiction where there was none before").

111. *Altmann*, 541 U.S. at 696 n.15.

112. As one commentator has noted, prior to the FSIA's enactment, "[r]ecommendations of the State Department were not consistently made—sometimes a negative recommendation was made . . . [and a] favorable suggestion of immunity depended on the good will and good relations between the United States and the foreign sovereign at the time of the suit." Michael D. Murray, *Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 223, 271 (2004). Thus, the FSIA's codification of restrictive sovereign immunity did not "divest foreign states of settled expectations," but rather "clarified unsettled and uncertain expectations as to whether the state of relations between the foreign state and the United States at the time of suit [was favorable]." *Id.* at 279.

the FSIA was neither solely procedural in nature nor solely substantive, despite a prior pronouncement that statutes, "even [when] phrased in 'jurisdictional' terms, [are] as much subject to our presumption against retroactivity as any other."[113] In highlighting the seemingly procedural and substantive aspects of the FSIA, the Court's opinion offers lowers courts an important explanation as to why the FSIA merits a different inquiry than the one put forth in *Landgraf*.

2. *Foreign Sovereign Immunity: A Right Based in Comity, Not the Constitution*. Both commentators[114] and courts[115] have frequently argued, almost reflexively, that foreign states have expectations of immunity. This is understandable for a number of reasons. First, the Supreme Court, in addition to its general hesitancy to expand federal court jurisdiction, has indicated that prior to 1952 foreign states *did* have an expectation of sovereign immunity. Second, the United States—acting through the State Department—has repeatedly observed that foreign states *do* rely on immunity. There is a general understanding within the international community that provisions of the FSIA should not have retroactive effect, particularly given that the United States has entered into many agreements with foreign nations "against the background assumption that [they will not] be sued in United States courts."[116]

These reasons are, of course, understandable, and *Altmann* certainly did not give them short shrift. The only problem is that, when extended too far, they lead ultimately to a faulty conclusion: that foreign states have a "right" to immunity from suit. No such right

---

113. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 951 (1977) (emphases omitted).

114. *See, e.g.*, Adam K.A. Mortara, *The Case Against Retroactive Application of the Foreign Sovereign Immunities Act of 1976*, 68 U. CHI. L. REV. 253, 267 (2001) ("The FSIA also abridges what is arguably an antecedent right: that of sovereign immunity.").

115. *See, e.g.*, Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988) ("We believe, as did the district court, that '[o]nly after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions.'" (alteration in original) (citation omitted)); Jackson v. People's Republic of China, 794 F.2d 1490, 1497–98 (11th Cir. 1986) ("We agree that to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns . . . .").

116. Brief for the United States as Amicus Curiae Supporting Petitioners at 17–18, *Altmann*, 541 U.S. 677 (No. 03-13); *see also* ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR 152 (2001) (providing an interesting discussion of the State Department's unwavering institutional commitment to preserving the full scope of sovereign immunity).

exists. Foreign sovereign immunity has always been rooted in comity, not in the Constitution.[117] In rejecting the *Landgraf* inquiry, the Court properly clarified for lower courts how the principles of sovereign immunity informed its decision that the FSIA was meant by Congress to be applied retroactively.

Beginning with *The Schooner Exchange*, the Supreme Court has made clear that sovereign immunity is a privilege extended by one sovereign to another simply in the spirit of comity, and always capable of being withdrawn.[118] Sovereign immunity differs from other status-based rights to immunity. Whereas legislative immunity, judicial immunity, and presidential immunity have been designed to shield legislators, judges, and the executive from the chilling effects that litigation can have on their duties,[119] sovereign immunity is not designed to protect the duties or expectations of foreign states. Rather, its function is only "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns."[120]

*B. Post-*Altmann *Sovereign Immunity Determinations: Revival of Executive Suggestion?*

In holding in *Altmann* that the FSIA was meant to apply in all cases, the Court sought to convey the important message that retroactive application of the FSIA was consistent with and in furtherance of one of its primary goals—to remove political considerations from the immunity calculus. Unfortunately, the Court did not stop there. Although in one breath it expressly rejected the historical inquiry that the Ninth Circuit and other courts had used to determine how a foreign state would have been treated by the State Department at the time of the conduct in question, in the next it

---

117. *See* The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116, 137 (1812) ("[A]ll sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.").

118. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983).

119. *See, e.g.*, Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003) (noting that "[t]he immunities for government officers prevent the threat of suit from 'crippling the proper and effective administration of public affairs'" (citations omitted)).

120. *Id. See also* Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004) ("[T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts.").

invited the State Department to resume its practice of filing suggestions of immunity in FSIA cases. Nothing in the opinion expressly invited the State Department to make such filings; the Court simply noted that "nothing in [its] holding prevents the State Department from filing statements of interest."[121] The implication, however, is that courts may, just as they did prior to the "Tate Letter," defer to the judgment of the State Department regarding foreign states' immunity. Such intervention by the executive branch raises serious separation-of-powers concerns and diminishes the overall clarity that *Altmann* has otherwise provided.[122]

A driving force behind enactment of the FSIA was a need to relieve the executive branch from the obligation to take a position in politically sensitive sovereign immunity determinations.[123] *Altmann*'s announcement that the State Department may file suggestions of immunity represented a departure from the very purpose of the FSIA. It placed courts in a "middle position"[124] between choosing to apply the "neutral principles"[125] set forth in the FSIA and choosing to invite the State Department to file statements of interest in immunity determinations. In so doing, the Court raised a serious separation-of-powers question: can the foreign affairs power of the executive supersede a statutory scheme set forth by Congress?[126] The Court's revival of executive suggestion may also complicate foreign policy.[127] With *Altmann*'s endorsement of executive suggestion, foreign states facing jurisdiction in American courts are likely to resume lobbying the State Department to file suggestions of immunity—precisely the activity Congress sought to eliminate in enacting the FSIA.

---

121. *Id.* at 701.

122. The majority's discussion of the use of the State Department's views in sovereign immunity determinations was also criticized as being extraneous to the only question presented: whether provisions of the FSIA should be applied retroactively. *Id.* at 734 (Kennedy, J. dissenting).

123. *See supra* Part I.B.

124. *See* Leading Case, 118 HARV. L. REV. 466, 474 (2004) (discussing how the Court adopted a "middle position" that raised a "fundamental separation-of-powers question at the root of the tension between sovereign immunity principles and practice").

125. *Altmann*, 541 U.S. at 702 n.23.

126. *Id.* at 734 (Kennedy, J., dissenting).

127. *See id.* at 715 ("[T]he ultimate effect of the Court's inviting foreign nations to pressure the Executive is to risk inconsistent results for private citizens who sue, based on changes and nuances in foreign affairs, and to add prospective instability to the most sensitive area of foreign relations.").

Most disturbingly, as both the dissent in *Altmann* and several commentators have demonstrated, a powerful criticism of the Court's injection of executive suggestions into the immunity calculus is that such suggestions will lead to a patchwork of conflicting approaches in the lower courts as judges struggle to balance the neutral principles of the FSIA with competing political pressures from the State Department. The Court's refusal to explain the extent to which a court should defer to a suggestion of immunity leaves important questions unresolved and may "set in motion the gears to generate a case . . . in which the neutral principles of the FSIA authorized jurisdiction, but the State Department filed a politically based suggestion for immunity 'which, by its insistence, superseded the statute's directive.'"[128]

IV. ASSESSING THE DAMAGE: WHAT DOES RETROACTIVE APPLICATION REALLY MEAN FOR PLAINTIFFS, FOREIGN STATES, AND THE STATE DEPARTMENT?

The Supreme Court's decision in *Altmann* to apply the FSIA to all claims against foreign governments, regardless of when the underlying facts occurred, represents a significant development in sovereign immunity jurisprudence. Besides questions as to how this decision comports with retroactivity principles or the doctrine of sovereign immunity, a more practical question naturally emerges: what does *Altmann* mean for plaintiffs, foreign states, and the State Department?

A. For Plaintiffs, a "Positive," but Measured, Development

When the Court ruled last term that Maria Altmann's suit could proceed, there was a flood of news coverage discussing how the decision would bring other Holocaust-era suits against foreign governments to U.S. courts.[129] Whether many of these claims will prove to be viable is a different question.

---

128. Leading Case, *supra* note 124, at 474 (citations omitted).

129. *See, e.g.*, Linda Greenhouse, *Justices Allow Suit Against Austria to Regain Art*, N.Y. TIMES, June 8, 2004, at A20 ("[T]he decision may open the door to additional World War II-era lawsuits, but the category of cases the decision will actually assist is likely to be small."); Henry Weinstein, *Woman Can Sue Austria Over Art Seized by Nazis: Supreme Court Ruling May Encourage Others to Go After Governments for Disputed Property*, L.A. TIMES, June 8, 2004, at A1 ("Altmann's victory may open courtrooms for other Holocaust survivors and heirs of people who perished.").

The filing of suits against foreign governments for Holocaust-era expropriations and wrongs has been hailed as a "positive development," a testament to the strength of the U.S. legal system and an important, potentially final opportunity for elderly survivors to seek redress when all other options have proved impossible.[130] Some commentators have viewed the issues raised in *Altmann* within the wider context of human rights litigation.[131] For example, one commentator said the Court's decision to uphold federal court jurisdiction over Austria constituted "judicial affirmation" of the principles set forth at the Washington Conference on Holocaust-Era Assets.[132] Another commentator noted that the Ninth Circuit's review of Maria Altmann's case was saturated with moral and emotional overtones,[133] with the court phrasing its central question as "whether Austria would have been entitled to immunity for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life."[134] Indeed, even Maria Altmann argued that the Supreme Court must consider the issue of the FSIA's retroactivity in her case against a "historical backdrop" in which the United States made clear to Austria that Nazi-looted artwork should be returned to its rightful

130. *See, e.g.*, BAZYLER, *supra* note 2, at xii–xiii (discussing the unique aspects of American legal culture that have made it possible for Holocaust-era claims to be heard).

131. *See, e.g.*, Geri J. Yonover, *The 'Last Prisoners of War': Unrestituted Nazi-Looted Art*, 6 U.S.F. J.L. & SOC. CHALLENGES 81, 95 (2004) (arguing that *Altmann* speaks to "the ability of American courts to make a valuable contribution in achieving Holocaust-era justice"); Andrzej R. Niekrasz, Comment, *The Past is Another Country: Against the Retroactive Applicability of the Foreign Immunities Act to Pre-1952 Conduct*, 37 J. MARSHALL L. REV. 1337, 1339 (2004) ("The issue of the retroactive applicability of the FSIA is clearly controversial in this age of importing global human rights litigation to the American civil justice system."); Svetlana Shirinova, Comment, *Challenges to Establishing Jurisdiction Over Holocaust Era Claims in Federal Court*, 34 GOLDEN GATE U. L. REV. 159, 190 (2004) ("Resolving [Altmann's and] the remaining Holocaust Era cases will demonstrate to the world that the United States is still devoted to fighting genocide and will not tolerate injustice.").

132. Yonover, *supra* note 131, at 95. The "Washington Principles," as they are known, were agreed to by forty-five nations and a number of nongovernmental organizations at a conference sponsored by the State Department in 1998. Although the principles are nonbinding, signatory nations (which include Austria) have agreed, among other things, to identify Nazi-confiscated artworks that have not been restituted and to develop alternative dispute-resolution mechanisms for resolving ownership questions. U.S. State Dep't, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm.

133. Shirinova, *supra* note 131, at 183–84.

134. Altmann v. Republic of Austria, 317 F.3d 954, 964 (9th Cir. 2003).

owners.[135] The *Altmann* case and similar cases against foreign states are, understandably, rooted in hopes that elderly Holocaust survivors will finally have their day in court.

Although *Altmann* does represent a significant development in sovereign immunity jurisprudence and removes a hurdle for plaintiffs bringing suits based on pre-1952 events, it is important to recall the narrowness of the Court's holding.[136] The Court never decided whether the particular exception at issue, expropriation under § 1605(a)(3), was properly raised by the facts.[137] The Court also did not decide whether Austria could successfully invoke substantive defenses to Altmann's claim.[138] And by almost every account, Altmann's case presented a very unusual set of facts, a point recognized even by Altmann herself.[139] No executive agreement or treaty between Austria and the United States discernibly conflicted with federal court jurisdiction.[140] Also, Altmann did try to sue in Austria, but the two million dollar filing fee was prohibitive.[141] Austria also had a thirty-day statute of limitations period, which would have effectively barred her suit.[142] When the suit was brought in the United States, Altmann's attorney expressed willingness to return to an Austrian court if Austria would agree to drop the statute of limitations defense, which Austria refused to do.[143] It was only

135. *See* Brief for Respondent at 6–8, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13) (detailing various pronouncements by the United States that served to put the Republic of Austria on notice that individual claims could be made for Nazi-looted property).

136. *Altmann*, 541 U.S. at 700.

137. *Id.* Indeed, the plaintiffs' biggest hurdle on remand may very well be presenting facts that satisfy one of the enumerated exceptions to the FSIA. *Altmann* addressed only the issue of the FSIA's retroactive application. It did not alter the stringency with which courts would assess whether facts support application of one of the FSIA's exceptions to immunity. Even Judge Wald, whose persuasive dissent in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), argued that the FSIA should be interpreted to include an implied waiver exception for *jus cogens* violations, recognized that the particular exception at issue, § 1605(a)(1), would still have to be interpreted narrowly to avoid judicial interference with matters involving sensitive foreign relations. *Id.* at 1184–85 (Wald, J., dissenting).

138. *Altmann*, 541 U.S. at 700–01.

139. *See* Brief for Respondent, *supra* note 135, at 43 ("This case presents a complex combination of somewhat unique facts and legal issues that is *sui generis* and not likely to be repeated in other cases.").

140. *Id.* at 41.

141. BAZYLER, *supra* note 2, at 245.

142. *Id.* at 247.

143. *Id.* at 247–48.

because of Austria's excessive filing fee and difficult statute of limitations that Altmann brought suit in the United States.[144]

In addition to the narrowness of the *Altmann* decision and the unique factual circumstances involved, the Court's analytical approach is significant because it illustrates the purely jurisdictional nature of the FSIA and the dispassionate analysis that should accompany immunity determinations.[145] By holding that the FSIA's sovereign immunity rules should be applied in all cases, regardless of when the underlying conduct occurred, the Court's primary aim was not to send a social message but rather to offer lower courts clear instructions regarding how such immunity determinations should be made.

The Ninth Circuit's opinion in the *Altmann* case focused on whether Austria could have reasonably *expected* to receive immunity.[146] In so doing, the court precisely endorsed the approach used by the dissent in *Princz v. Federal Republic of Germany*,[147] in which Judge Wald of the D.C. Circuit, after reviewing the outcome of the Nuremberg trial, concluded that "[i]n the mid-1940s, Germany could not, even in its wildest dreams, have expected the executive branch of the United States, as a matter of grace and comity, to suggest immunity for its enslavement and confinement (in three concentration camps) of an American citizen during the Holocaust."[148] This kind of "historical inquiry" into foreign-states' expectations of immunity was expressly rejected by the Supreme Court in *Altmann*.[149]

Altmann, although generally a positive development for plaintiffs, was not intended to encourage human rights litigation in federal courts. Rather, the case is significant for the clear instruction it has provided to lower courts: apply the FSIA's provisions to all

144. *See* Brief for Respondent, *supra* note 135, at 6 ("Indeed, it was only because of an oppressive filing fee requirement ($2 million) and a more difficult (although, according to Austria, not insurmountable) statute of limitations standard that Mrs. Altmann did not bring her suit in Austria." (citation omitted)).

145. Even Altmann's attorney recognized that the question of whether the FSIA could be applied retroactively was one that could be decided "through a dispassionate analysis of the statute in question, [the] Court's retroactivity jurisprudence and the legal relationship between the parties to this case." Brief for Respondent, *supra* note 135, at 2.

146. Altmann v. Republic of Austria, 317 F.3d 954, 967 (9th Cir. 2003).

147. 26 F.3d 1166 (D.C. Cir. 1994).

148. *Id.* at 1179 (Wald, J., dissenting).

149. Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004).

cases regardless of when the underlying conduct occurred. A recent post-*Altmann* case, *Abrams v. Société Nationale des Chemins de Fer Francais*,[150] did exactly this; it exhibits how *Altmann* is not necessarily a windfall for plaintiffs.

Abrams involved a suit by Holocaust survivors and their heirs against a French national railroad company that was alleged to have committed crimes against humanity and violated customary international law by transporting thousands of French Jews to slave labor camps.[151] At the time of these acts, the railroad company was privately owned, but it had been acquired in whole by the French government in 1983.[152] The plaintiffs brought a number of claims and, invoking international law and the Alien Tort Claims Act,[153] sought jurisdiction in a U.S. federal district court.[154] Unlike many other FSIA-related cases, it was the plaintiffs arguing that the FSIA could not be applied retroactively and that the French national railroad company was, thus, not immune because it was privately owned at the time of the Holocaust.[155] The District Court for the Eastern District of New York disagreed, holding that the FSIA does apply to pre-1952 events and that the French national railroad company was immune because it was now a wholly owned instrumentality[156] of the state.[157] Although the Second Circuit agreed with the district court that the railroad was an instrumentality of France, it vacated the dismissal and remanded the case because there was insufficient information as to how the State Department, during World War II, would have assessed the significance of the railroad's corporate form in an immunity determination.[158] This information, the Second Circuit reasoned, was significant in determining whether the State Department would have recognized immunity in such a case as the

150. 389 F.3d 61 (2d Cir. 2004).

151. Abrams v. Société Nationale des Chemins de Fer Francais, 175 F. Supp. 2d 423, 425 (E.D.N.Y. 2001).

152. *Id.*

153. 28 U.S.C. § 1350 (2000).

154. *Abrams*, 175 F. Supp. 2d at 433.

155. *Id.* at 426.

156. The FSIA applies to any "instrumentality" or "agency" of a foreign state that is a separate legal entity and is an organ or political subdivision of a foreign state, or when a majority of its shares or other ownership interest is owned by a foreign state or one of its political subdivisions. 28 U.S.C. § 1603 (2000).

157. *Id.* at 450.

158. Abrams v. Société Nationale des Chemins de Fer Francais, 332 F.3d 173, 188 (2d Cir. 2003).

plaintiffs' and whether the plaintiffs' expectation that they could litigate their claim against the railroad in the United States was legitimate.[159]

The Supreme Court vacated the Second Circuit's decision and remanded the case to be considered in light of its holding in *Altmann*.[160] In late 2004, on remand, the Second Circuit dismissed the plaintiffs' suit.[161] Following the rule articulated by the Court in Dole Food Co. v. Patrickson,[162] which held that an entity's status as an instrumentality of the state is determined at the time the suit is filed and not when the conduct occurred,[163] the Second Circuit ruled that the French national railroad was, indeed, an instrumentality of France at the time the complaint was filed and, thus, was immune from suit.[164] Whether the railroad would have been treated as a corporate entity or government entity during the war, the Second Circuit said that this was now irrelevant under *Altmann* and that it was unnecessary to inquire into the State Department's views.[165]

Interestingly, the Second Circuit concluded its analysis by noting that it was

> bound by [*Altmann*] to defer to comity rather than to approach the situation from the perspective of the injured plaintiffs whose rights have now been altered. Accordingly, the evil actions of the French national railroad's former private masters in knowingly transporting thousands to death camps during World War II are not susceptible to legal redress in federal court today, because defendant has since become a part of the French government and is therefore immunized from suit by the Foreign Sovereign Immunities Act. Nonetheless, the railroad's conduct at the time lives on in infamy.[166]

As this language suggests, *Altmann* advanced dispassion and clarity over redress of past wrongs. Moreover, it effectively addressed critics' arguments that immunity determinations were being made out of a "judicial impulse toward plaintiff-oriented equity," "judicial

159. *Id.*

160. Société Nationale des Chemins de Fer Francais v. Abrams, 124 S. Ct. 2834, 2834 (2004).

161. Abrams v. Société Nationale des Chemins de Fer Francais, 389 F.3d 61, 64–65 (2d Cir. 2004).

162. 538 U.S. 468 (2003).

163. *Id.* at 478.

164. *Abrams*, 389 F.3d at 64–65.

165. *Id*.

166. *Id.* at 64–65.

activism," and "judicial creativity in refusing to dismiss World War II–related actions."[167] Although *Altmann* may be a significant development for plaintiffs, retroactive application of the FSIA can also cut both ways, as *Abrams* shows.

B. For Foreign States, a Serious Setback?

When the district court denied Austria's motion to dismiss Maria Altmann's suit, the "effect was that for the first time in the United States a foreign country was being forced to go to trial in an American court on a claim alleging failure to return to its proper owners a Nazi-stolen artwork."[168] Naturally, foreign states saw the Supreme Court's decision in *Altmann* as important because it represented a significant shift in American foreign sovereign immunity jurisprudence and, potentially, "open[ed] the floodgates" for more litigation against foreign states relating to Holocaust-era wrongs.[169] Indeed, prior to the Supreme Court's decision, Mexico, in its amicus brief, declared that its "interest in the proper resolution of this case [was] not theoretical," noting that it had been sued in recent years in American courts and that, after the Ninth Circuit's decision in *Altmann*, it had been "forced to relitigate the issue of its immunity for pre-1952 events under the amorphous retroactivity standard that the Ninth Circuit adopted."[170]

Despite this parade of horribles,[171] foreign states' fears should be allayed for several reasons. Specifically, the unique facts underlying Altmann's claims; the Court's explicit rejection of the Ninth Circuit's "unmanageable"[172] case-by-case historical inquiry into whether a foreign state would have been accorded immunity at a particular

---

167. Niekrasz, *supra* note 131, at 1338, 1353–1354. One view is that courts were failing to properly apply the FSIA by keeping World War II–related cases in federal courts because of the morally and politically sensitive nature of such claims. *Id.*

168. BAZYLER, *supra* note 2, at 246.

169. Murray, *supra* note 105, at 319 (citing Brief for Petitioner at 42–46, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13)); Brief for Respondent, *supra* note 135, at 42–43.

170. Brief for Mexico as Amicus Curiae Supporting Petitioner, *supra* note 12, at *1 (citing Cruz v. United States, Nos. C-02-1942-CRB, 2003 U.S. Dist. LEXIS 10948, at *10–11 (N.D. Cal. June 20, 2003).

171. Murray, *supra* note 105, at 319 (citing Brief for Petitioner, *supra* note 169, at 42–46); Brief for Respondent, *supra* note 135, at 44.

172. This is how Austria characterized the outcome for other immunity determinations if the district court's decision to exercise jurisdiction over Austria was affirmed. Brief for Petitioner, *supra* note 169, at 42–46.

time; and the range of defenses under the FSIA that are unaffected by the Court's holding in *Altmann*—including the act-of-state, political question, and *forum non conveniens* doctrines—all indicate that foreign states need not be concerned that *Altmann* will greatly expand their liability. This Section reviews three important defenses, arguing that *Altmann* does not represent as big a setback as some foreign states have argued.

One option, as the Court in *Altmann* explicitly mentioned,[173] is that a foreign state may still invoke a substantive defense that its actions fall under the act-of-state doctrine and, therefore, that the legality of its public domestic acts cannot be questioned in a foreign court. This doctrine reflects a recognition that "juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government."[174] In *Underhill v. Hernandez*,[175] the Court provided the classic formulation of this doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[176]

Like the doctrine of sovereign immunity, the act-of-state doctrine derives "from the thoroughly sound principle that on occasion individual litigants may have to forgo decision on the merits of their claims because the involvement of the courts in such a decision might frustrate the conduct of the Nation's foreign policy."[177] Unlike the

---

173. Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004) ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits. Under that doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts").

174. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972).

175. 168 U.S. 250 (1897).

176. *Id.* at 252.

177. *First Nat'l City Bank*, 406 U.S. at 769. The Ninth Circuit, in *International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981), cogently summarized the separation of powers and judicial economy concerns raised by suits against foreign states:

> The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and

doctrine of sovereign immunity, however, the act-of-state doctrine is a "rule of decision."[178] It is prudential rather than jurisdictional, meaning that federal courts enjoy considerable flexibility in determining whether to defer, for reasons such as comity, to the executive branch's assessment of when application of the doctrine would advance the interests of the United States.[179] Despite this important distinction between the two doctrines, the doctrine of sovereign immunity as codified in the FSIA "in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable"—a point stressed by the Court most recently in *Altmann*.[180] For Austria, this pronouncement means that it likely can assert title to the Klimt paintings because the nationalization or expropriation constituted a public act (*jure imperii*) that U.S. courts may not review, because the act-of-state doctrine "precludes [U.S.] courts . . . from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."[181] For other foreign states, the significance is that the Court

---

> deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

Id. at 1358.

178. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990).

179. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421–23, 438 (1964); *see also First Nat'l City Bank*, 406 U.S. at 768 ("We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act-of-state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts."); Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375, 375–76 (2d Cir. 1954) (noting the State Department's policy of "reliev[ing] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials").

180. Republic of Austria v. Altmann, 541 U.S. 677, 713 (2004) (internal citations omitted); *see also Int'l Ass'n of Machinists*, 649 F.2d at 1359 (rejecting the view that the act-of-state doctrine has been superceded by the FSIA and noting that Congress, in enacting the FSIA, recognized the distinction between that statute and the doctrine and "found it unnecessary to address" how the FSIA affected the act-of-state doctrine) (citing H.R. Rep. No. 94-1487, at 20 n.1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6619 n.1)).

181. *Sabbatino*, 376 U.S. at 41. *But see* Yonover, *supra* note 131, at 92 (arguing that the act-of-state doctrine would not even apply in this case because the doctrine "applies only when the

has left untouched a substantive defense that, despite various restrictions imposed by Congress and the Court,[182] is an effective basis for dismissing suits involving foreign states, particularly when the State Department cautions a court against proceeding.[183]

Additionally, the FSIA does not preclude a foreign state from moving for dismissal on the ground that a case presents a nonjusticiable political question. The purpose of the political question doctrine is to avoid review of cases that are simply too "political" and that are most appropriately resolved by the legislative and executive branches.[184] Like the act-of-state doctrine, its applicability is without clear definition. In the seminal case of *Baker v. Carr*, the Court noted several characteristics of a nonjusticiable political question, with dismissal appropriate when any one of these is "inextricable from the case at bar."[185] On occasion, courts have invoked one or more of the

---

foreign government involved is still 'extant and recognized by' the United States at the time of the lawsuit" and, given that the Nazis annexed Austria in 1938, "a court could conclude that Austria was not the sovereign acting at the time of the taking of the property and, more importantly, the Nazi regime that looted the property no longer exists" (citation omitted)). The success of an act-of-state defense by Austria would of course depend on whether the State Department counsels for application of the doctrine. *See First Nat'l City Bank*, 406 U.S. at 768. Austria's defense under this doctrine would also be precluded if its acts with respect to the Klimt paintings were found to be commercial in nature. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 (1976) (refusing to extend the act-of-state doctrine to a foreign nation's commercial activities).

182. *See Alfred Dunhill of London, Inc.*, 425 U.S. at 706 (emphasizing that the act-of-state doctrine does not apply to the commercial activities of a foreign government); *First Nat'l City Bank*, 406 U.S. at 770 (stating that the act-of-state doctrine should not be applied against the wishes of the executive branch); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 374 (4th ed. 2003) (noting certain circumstances, under 22 U.S.C. § 2370(e), in which courts may not decline judicial review on the basis of the act-of-state doctrine).

183. Although the State Department did not recommend against the district court's adjudication of the dispute in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), the Third Circuit's decision in that case is an illustration of how federal courts, although not bound by the State Department's legal opinions, nonetheless give "substantial respect" to its concerns in determining how a civil suit involving a foreign state should proceed. *Envtl. Tectonics Corp. v. W.S. Kirkpatrick & Co.*, 847 F.2d 1052, 1062 (3d Cir. 1988).

184. Baker v. Carr, 369 U.S. 186, 210 (1962). Not every case that "touches [upon] foreign relations lies beyond judicial cognizance," however, given that the justiciability inquiry is limited to "'political questions,' not . . . 'political cases.'" *Id.* at 211, 217.

185. *Id.* at 217. The factors *Baker* listed as characteristics of a political question are the following: (1) a "textually demonstrable constitutional commitment of the issue to a coordinate political department," (2) a "lack of judicially discoverable and manageable standards for resolving it," (3) the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," (4) the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," (5) an "unusual need for unquestioning adherence to a political decision already made," or (6) the

Baker factors in dismissing suits in the area of foreign affairs, with the rationale mostly centering on lack of expertise or fear of interfering with the political branches. When courts are faced with suits brought against foreign states, they frequently dismiss them as nonjusticiable political questions, particularly if the cases involve statements of interest from the executive.[186] In *Altmann*, the State Department filed no such statement; one can only speculate as to whether the district court would have dismissed the case as invoking a political question if it had. For foreign states fearing enhanced exposure to liability in American courts in the wake of *Altmann*, the cases since the Supreme Court's decision that have been dismissed as involving political questions demonstrate that the political question doctrine remains a potent defense for foreign states.[187]

Finally, foreign states may still move to dismiss suits brought under the FSIA on a *forum non conveniens* ground. This doctrine allows federal courts to decline jurisdiction if bringing suit in another forum would be more convenient for the parties and would better advance the interest of justice.[188] Factors relevant to a court's determination whether to dismiss a case under *forum non conveniens* include the availability of an adequate alternative forum; "private interest" factors, such as the litigant's relative ease of access to evidence, availability of process to compel attendance, and the cost of

---

"potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

186. *See, e.g.*, Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo., 218 F.3d 152, 157, 164 (2d Cir. 2000) (agreeing with the executive that a dispute concerning successor states to the Socialist Federal Republic of Yugoslavia involved nonjusticiable political questions); Anderman v. Federal Republic of Austria, 256 F. Supp. 2d 1098, 1113–14 (C.D. Cal. 2003) (finding that a class action suit against Austria was inextricable from at least four of the *Baker* factors and agreeing with the executive that retaining jurisdiction over the suit would interfere with an executive agreement between Austria and the United States); Joo v. Japan, 172 F. Supp. 2d 52, 66–67 (D.D.C. 2001) (finding that "to some extent each of the factors identified in *Baker* [was] inextricable from the present case" and agreeing with the executive that there was a political question in light of treaties and agreements negotiated with Japan after World War II).

187. *See Joo v. Japan*, 413 F.3d 45, 53 (D.C. Cir. 2005) (affirming dismissal of a complaint as presenting a nonjusticiable political question); Alperin v. Vatican Bank, 410 F.3d 532, 562 (9th Cir. 2005) (affirming dismissal under the political question doctrine of certain claims by Holocaust survivors alleging human rights violations based on the Vatican Bank's alleged assistance to the Croatian Ustasha political regime); Gross v. German Found. Indus. Initiative, 320 F. Supp. 2d 235, 235 (D.N.J. 2004) (ruling that the political question doctrine necessitated dismissal of a suit against a German-instrumentality foundation and German corporations for their complicity in exploiting the plaintiffs as slave laborers during the Holocaust). '

188. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

obtaining attendance of witnesses; and "public factors," such as court congestion, the local interest in the litigation, the avoidance of conflict-of-law problems, and the unfairness of burdening a jury in an unrelated forum.[189] Dismissal of suits against foreign states under *forum non conveniens* is common and, as one commentator notes, advisable to avoid risks of jurisdictional and diplomatic friction and to decrease the potential for unenforceable judgments.[190]

These common defenses limit federal jurisdiction over suits against foreign states and suggest that, even with *Altmann*'s endorsement of the FSIA's retroactive applicability, foreign states are unlikely to be exposed to a significantly greater number of suits.

C. For the State Department, Deep Concerns

As Part III.B highlighted, there are serious concerns that *Altmann*'s extension of the FSIA to pre-1952 conduct and, in particular, its implicit invitation to the State Department to file suggestions of immunity, may complicate American foreign policy in three key ways. First, the State Department considers Holocaust-era suits against foreign governments as upsetting the various legislative and diplomatic arrangements that the United States has made with other nations to provide restitution or compensation schemes.[191] Second, the State Department fears that *Altmann* might encourage foreign states to pass "mirror-image laws," subjecting the United States to increased foreign jurisdiction.[192] As explained earlier, there are a number of reasons, including the fact-specific narrowness of the *Altmann* holding and the range of defenses that remain available to foreign states, which suggest that these fears are probably overblown.

The third major concern of the State Department is more troubling. *Altmann*'s apparent reference to the State Department's ability to file suggestions of immunity may lead to a spate of lobbying

189. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6, 255 n.22 (1981); *Gilbert*, 330 U.S. at 508–09.

190. Jennifer M. Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT'L L.J. 239, 277 (2004).

191. Brief for United States as Amicus Curiae Supporting Petitioners at 28, Republic of Austria v. Altmann, 541 U.S. 677 (2004) (No. 03-13), 2003 WL 22811828, at *28.

192. *Id.* at *29; *see also* Weinstein, *supra* note 129, at A1 (reporting the concern of Stuart E. Eizenstat, former U.S. deputy treasury secretary, that *Altmann* "might prompt other countries 'to pass mirror-image laws' that allow their citizens to sue the U.S. government for alleged wrongdoing").

by foreign states seeking dismissal of claims, putting the United States government in an awkward position.[193] As argued earlier, the Court's reference to suggestions of immunity distracts from the clarity that *Altmann* has otherwise provided. Indeed, this reference was "wholly unnecessary" given the other measures available to courts (for example, the act-of-state and political question doctrines) and likely "adds very little (if anything) to the Executive's ability to influence the dismissal of cases involving foreign sovereigns."[194] The State Department, in light of *Altmann*, may very well choose not to file any suggestions of immunity so as to discourage lobbying efforts by foreign states. This would be consistent with the State Department's pre-*Altmann* policy of not filing suggestions of immunity on behalf of foreign states, which has been in effect since the FSIA's enactment in 1976.[195] Thus, although *Altmann* appears to have implicitly resurrected suggestions of immunity, they will probably appear only rarely in practice.

Nonetheless, the Court's reference to suggestions of immunity is unfortunate. Although the Second Circuit did not find it as troubling as many commentators have,[196] the Ninth Circuit did. In *Alperin v. Vatican Bank*,[197] the Ninth Circuit struggled to determine how it should interpret those instances in which the State Department remains silent in a particular dispute since, after *Altmann*, courts are permitted to give deference to the "considered judgment of the Executive on a particular question of foreign policy."[198] The court lamented that

> [i]t is unclear . . . how courts should construe executive silence. We are not mind readers. And, thus, we cannot discern whether the

193. Owen Paul & Karen Asner, *The Long Arm of the Law*, LEGAL WK., July 15, 2004, http://www.legalweek.com/ViewItem.asp?id=20659&Keyword=owen.

194. Leading Case, *supra* note 124, at 475–76.

195. *See* 75 DEP'T ST. BULL. 649, 649 (1976) ("The Department of State will not make any sovereign immunity determinations after the effective date of [the FSIA]. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977.").

196. *See* Abrams v. Société Nationale des Chemins de Fer Francais, 389 F.3d 61, 63–64 (2d. Cir. 2004) (noting that *Altmann*'s sanctioning of State Department involvement is limited to only certain circumstances, such as "when a court has subject matter jurisdiction and yet there is still strong executive interest in granting immunity or there is an ambiguity regarding an FSIA exception").

197. 410 F.3d 532 (9th Cir. 2005).

198. *Id.* at 556 (quoting Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004)).

> State Department's decision not to intervene is an implicit endorsement, an objection, or simple indifference.[199]

The Supreme Court could, and should, resolve the confusion it has created by elaborating further upon the specific—and rare—circumstances in which the State Department may intervene with a suggestion of immunity. The Court should also thoroughly explain the level of deference that courts should afford to such suggestions and offer guidance to lower courts trying to make sense of those situations in which the State Department provides only silence.

CONCLUSION

The Supreme Court's decision in *Republic of Austria v. Altmann* to apply the FSIA to all claims against foreign states, regardless of when the events giving rise to the claim occurred, represents a significant development in sovereign immunity jurisprudence. The Court's thorough treatment of the FSIA, in light of retroactivity and sovereign immunity principles, will likely provide lower courts with much-needed clarity in future immunity determinations. Although *Altmann* may be viewed as a blessing for plaintiffs and a burden for foreign states, this Note has attempted to show how *Altmann*'s interpretation of the FSIA will likely produce less dramatic results than some have expected. Given that the decision brought clarity to the question of the FSIA's retroactive application, however, the Court's invitation to the State Department to issue suggestions of immunity is disappointing. Although in practice these suggestions of immunity are likely to be rare, the Court should consider clarifying the precise circumstances in which these suggestions might be made and the level of deference, if any, that courts should give them.

199. *Id.*