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SHORING UP THE HEAR ACT: PROPOSED AMENDMENTS TO FEDERAL LEGISLATION DESIGNED TO ASSIST HEIRS AND CLAIMANTS OF NAZI-LOOTED ART

*Alexander Hull**

"You ask, did they kill? Yes, they killed. They killed for art, when it suited them. So killing Jews and confiscating art somehow went together."[1]

INTRODUCTION

From 1933 to 1945, Nazi German forces executed a mass campaign of property confiscation, stealing as many as 600,000 pieces of art, including paintings, tapestries, and sculptures from museums and private collections across Europe.[2] Scholar Michael J. Bazyler referred to this campaign as the "greatest displacement of art in human history."[3] It is estimated that some 300,000 pieces of art are still missing or are currently in the possession of someone other than the so-called "true" owner, based on reviews of Nazi documentation conducted by the Jewish Restitution Organization.[4]

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* J.D. Candidate, Brooklyn Law School, 2020; B.A., Kenyon College, 2011. Thank you first and foremost to my parents for their unfailing love and support. To Fritz, we did this together; you're my best friend, I love you and I can't thank you enough. Lastly, my gratitude to the *JLP* staff for their hard work and thoughtful edits.

[1] Gaby Wood, *Arts*: *Profits and Loss*, GUARDIAN, Feb. 14, 1998, at 6.

[2] MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 202 (2003).

[3] *Id.*

[4] Khorri Atkinson, *Cornyn, Cruz Push for Recovery of Nazi-Stolen Artwork*, TEX. TRIBUNE (June 7, 2016, 4:00 PM), https://www.texastribune.org/2016/06/07/cornyn-cruzs-bill-seeks-recover-nazi-stolen-art/.

While Nazi art looting has been regarded as "dehumanizing,"[5] "self-advancing"[6] and concomitant with the Nazi regime's larger genocidal crusade,[7] restitution in this context has been framed as a means of rehumanization.[8] Through this lens, restitution "re-establish[es] an almost unbelievable historical lineage"[9] between heirs and victims, though the process of unearthing these lineages may reify past horrors and privilege "capitalistic, property-based understandings of rights"[10] over questions of cultural identity or more holistic reconciliatory processes, like truth-finding commissions or healing processes.[11] Nevertheless, restitution retains an almost visceral significance and allure. Its relevance in the American cultural milieu has only grown in recent years with the release of popular movies like *The Monuments Men*[12] and *Woman*

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[5] Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT'L L. 49, 53 (2011).

[6] *Id.*

[7] *See* BAZYLER, *supra* note 2 ("You ask, did they kill? Yes, they killed. They killed for art, when it suited them. So killing Jews and confiscating art somehow went together." (quoting an heir of a murdered Holocaust victim whose art was stolen)).

[8] Israel Singer, *Why Now?*, 20 CARDOZO L. REV. 421, 426 (1998).

[9] *See* O'Donnell, *supra* note 5, at 49, 56.

[10] *Id.* at 53.

[11] *Id.* at 50. Professor O'Donnell compellingly notes that "court-bound adversarialism" may limit the laudable goals of restitution in the Nazi-looted art context. Oftentimes, the heirs of an unknowing, good-faith purchaser of stolen art find themselves pitted against heirs of Holocaust victims, making it so that both sides have a plausible stake to victimhood, albeit of different varieties. In making the case for a more central role for alternative dispute resolution mechanisms like the New York Holocaust Claims Processing Office and the UK Spoliation Advisory Panel, Professor O'Donnell identifies mediation's "untapped potential to be a more effective handmaiden of reconciliation." *Id.* Nothing in this Note seeks to abnegate or limit any of O'Donnell's suggestions, which are important and persuasive.

[12] *See* Press Release, Studio Babelsberg, THE MONUMENTS MEN, Directed by and Starring George Clooney, Begins Production in Germany, Studio Babelsburg (Mar. 6, 2013) (on file with author) (describing the plot of *The Monuments Men,* a film based on the true story of a World War II platoon comprised of museum directors and art historians tasked with rescuing artworks from Nazi looters and returning them to their rightful owners).

in Gold,[13] the latter of which told the story of Maria Altmann, a Jewish refugee.[14] As a young woman, Altmann was forced to flee Vienna to avoid Nazi persecution[15] and eventually used a judgment from the United States Supreme Court[16] to regain five of her uncle's paintings in an Austrian arbitration proceeding some sixty years later.[17]

Woman in Gold highlights a particularly stunning win for heirs of Holocaust victims seeking restitution,[18] but the reality is that successes like Altmann's are rare.[19] Many claimants seeking restitution face significant legal hurdles in litigating their claims, both in the United States and elsewhere around the world.[20] These challenges are myriad: statutes of limitations[21]—which vary state to

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[13] *See* Michael Hoenig, *Litigating the Return of Nazi-Looted Art*, N.Y. L.J. (Oct. 5, 2018, 2:40 PM), https://www.law.com/newyorklawjournal/2018/10/05/litigating-the-return-of-nazi-looted-art/.

[14] Pete Hammond, *'Woman in Gold' Review: Helen Mirren, Ryan Reynolds A Great Pair in Remarkable Story*, DEADLINE (Mar. 30, 2015, 3:59 PM), https://deadline.com/2015/03/woman-in-gold-movie-review-helen-mirren-ryan-reynolds-pete-hammond-1201401297/.

[15] *Id.*

[16] *See generally* Republic of Austria v. Altmann, 541 U.S. 677 (2004) (discussing how an heiress of valuable art sued the Republic of Austria and its national art gallery for return of certain paintings allegedly expropriated by Austria following World War II; heiress was successful in reclaiming the paintings after the Supreme Court denied Austria's motion to dismiss suit under the Foreign Sovereign Immunities Act, permitting heiress to continue her action).

[17] *The Recovery of Nazi-Looted Art: The Bloch-Bauer Klimt Paintings*, U. CAL. TELEVISION (June 16, 2016), https://www.uctv.tv/shows/The-Recovery-of-Nazi-Looted-Art-The-Bloch-Bauer-Klimt-Paintings-28044 ("Los Angeles attorney E. Randol Schoenberg presents an illustrated talk" discussing how a Supreme Court judgment permitted Maria Altmann to regain her uncle's painting in a later arbitration proceeding.).

[18] *See* Hoenig, *supra* note 13 (citing the *Woman in Gold* saga as a pointed example of some challenges claimants face in reclaiming looted art).

[19] *HEAR Act Signed into Law*, COMMISSION FOR ART RECOVERY (Mar. 7, 2018), http://www.commartrecovery.org/hear-act.

[20] Hoenig, *supra* note 13.

[21] By its language, the HEAR Act supplants both state *and federal* statutes of limitations. The legislature's decision to include within its ambit federal statutes of limitations is more likely an act of cautious over-inclusiveness than anything else; states typically dominate in areas of property, statutes of limitations

state—might have already expired, thereby dealing a fatal procedural blow to a claimant's recovery;[22] equitable defenses such as laches (too long a delay in bringing a restitution claim) block recovery;[23] jurisdictional issues may complicate proceedings, as many of the preceding changes in possession (theft, illicit sales, transfers under duress, good-faith purchases)[24] may have occurred outside the United States;[25]

> or choice-of-law principles that favor application of the law of a foreign state [hinder] one's ability to recover; [as may], perhaps, a defense in the Act of State doctrine when a foreign government agency or commission would deny the claim[; o]r, maybe, the claimant's recollection of events is fuzzy or proof of an ancestor[']s[] ownership or entitlement is hard to come by for practical reasons caused by the passage of time.[26]

The Altmann saga highlighted and laid bare many of these challenges into one case.[27] But Altmann's role as a sympathetic

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governing property disputes, replevin, laches, and the like. For these reasons, this Note focuses on state involvement in property disputes (and related preemption concerns), but it is necessary to point out that the HEAR Act seeks to be all-encompassing and always applicable for Nazi-looted art, regardless of whether the statute of limitations relevant to a particular case flows from state or federal law. Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524–25 (2016).

[22] *See, e.g.*, Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010).

[23] *See generally* Bakalar v. Vavra, 500 F. App'x 6 (2d Cir. 2012) (holding that the defendants' laches defense was sufficient because plaintiffs' ancestors were aware of—or should have been aware of—their potential claim to the contested drawing but had not been diligent in pursuing that claim).

[24] Hoenig, *supra* note 13.

[25] *Id.*

[26] *Id.*

[27] [S]ixty years after fleeing Vienna, Maria Altmann (Helen Mirren), an elderly Jewish woman, attempts to reclaim family possessions that were seized by the Nazis. Among them is a famous portrait of Maria's beloved Aunt Adele: Gustave Klimt's "Portrait of Adele Bloch-Bauer I." With the help of young lawyer Randy Schoenberg (Ryan Reynolds), Maria embarks upon a lengthy legal battle to recover this painting and

plaintiff in an easily-understood narrative; the stunning value of the works of art in question;[28] along with the vocal support[29] of Helen Mirren[30] and Ambassador Ronald S. Lauder, Chairman of the Commission for Art Recovery ("CAR"), all fomented enough interest and political will in Congress to pass the Holocaust Expropriated Art Recovery Act (the "HEAR Act" or "Act") with unanimous support in the Senate in December 2016.[31] President Obama signed the bill into law on December 16, 2016.[32]

The HEAR Act seeks to "ensure that claims to artwork and other property[33] stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner."[34] The Act temporarily replaces state statutes of limitations

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> several others, but it will not be easy, for Austria considers them national treasures.

Woman in Gold, ROCHESTER CITY NEWSPAPER, https://www.rochestercitynewspaper.com/rochester/woman-in-gold/Film?oid=2511286 (last visited Aug 19, 2019). *See generally* Republic of Austria v. Altmann, 541 U.S. 677 (2004) (discussing how an heiress of valuable art sued the Republic of Austria and its national art gallery for return of certain paintings allegedly expropriated by Austria following World War II; heiress was successful in reclaiming the paintings after the Supreme Court denied Austria's motion to dismiss suit under the Foreign Sovereign Immunities Act).

[28] *See* Eileen Kinsella, *Gold Rush,* ARTNEWS (Jan. 1, 2007, 12:00 AM), http://www.artnews.com/2007/01/01/gold-rush/ ("Collectively the five restituted works reaped more than $327 million.").

[29] Mirren played the role of Maria Altmann in *Woman in Gold*. Hammond, *supra* note 14.

[30] *HEAR Act Signed into Law*, *supra* note 19.

[31] *Id.*

[32] *Id.*

[33] The Act defines "artwork or other property" as:

> (A) pictures, paintings, and drawings; (B) statuary art and sculpture; (C) engravings, prints, lithographs, and works of graphic art; (D) applied art and original artistic assemblages and montages; (E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and (F) sacred and ceremonial objects and Judaica.

Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 4, 130 Stat. 1524, 1526 (2016).

[34] *Id.* § 3.

by creating a uniform six-year statute of limitations for cases involving artwork or other property lost because of persecution during the Nazi era.[35] It includes in its ambit previous cases that were dismissed or barred based on the expiration of state or federal statutes of limitations and where final judgments had not been entered prior to dismissal.[36] The Act applies: (1) to claims that were pending on the day that the HEAR Act was enacted, including all actions for which the time to file an appeal had not yet expired, and (2) to all actions filed after enactment but before the Act sunsets on January 1, 2027.[37] In effect, this extends the time in which claims can be brought; it permits individuals who lost art between 1933 and 1945 because of Nazi persecution to sue within six years of the time they discover the identity and location of the artwork and the claimant's possessory interest.[38] However, the Act by its language does not apply to restitution claims barred on the day before enactment by a federal or state statute of limitations if:

> (1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements [namely, of (a) the identity and location of the artwork or other property, and (b) a possessory interest of the claimant in the artwork or other property] on or after January

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[35] Section 5 of the Holocaust Expropriated Recovery Act of 2016, Statute of Limitations, provides that:

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

Id. § 5.

[36] *HEAR Act Signed into Law*, *supra* note 19.

[37] Any civil claim or cause of action to recover artwork or other property commenced on or after the sunset date will be subject to any applicable federal or state statute of limitations, as well as any other defense relating to the passage of time. *See* Holocaust Expropriated Recovery Act of 2016 § 5(g).

[38] Reif v. Nagy, 80 N.Y.S.3d 629, 635 (N.Y. Sup. Ct. 2018).

> 1, 1999; and (2) not less than [six] years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.[39]

The Congressional Research Service's[40] summary of the HEAR Act explains that the "statutory limitation period of six years after actual discovery [of the identity and location of the artwork and a possessory interest in the artwork] preempts any other statutes of limitation or defenses relating to the passage of time."[41] The operative word here is *preempts*, which signals Congress' intent that the Act expressly preempt each state's particular statute of limitations in the specific area of Nazi-confiscated art, such that under the nationwide statute of limitations, "original owners or their heirs have six years from enactment in which to sue to reclaim artwork after discovery of its origins."[42]

One legal commentator, William Charron, has cast doubt on the law's constitutionality because it "offers purely procedural preemption of the states' . . . statutes of limitations . . . without creating any substantive federal cause of action or form of relief."[43] Other observers have voiced additional concerns about the HEAR Act; they note the law's potential to actually limit the number of claims that are timely in states that already have more claimant-friendly statutes of limitations than what the HEAR Act now offers in preemption.[44] Such critics also point out that the final text of the

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[39] Holocaust Expropriated Recovery Act of 2016 § 5.

[40] "The Congressional Research Service (CRS) of the Library of Congress works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate, regardless of party affiliation." *Glossary*, CONGRESS.GOV, https://www.congress.gov/help/legislative-glossary/#glossary_crs (last visited Aug. 19, 2019).

[41] Holocaust Expropriated Recovery Act of 2016 § 5.

[42] Hoenig, *supra* note 13.

[43] William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal Hear Act*, 2018 PEPP. L. REV. 19, 25 (2018).

[44] *See, e.g.*, Simon Frankel & Sari Sharoni, *More Uncertainty on Nazi-Era Art Restitution Claims*, LAW360 (Oct. 4, 2017), https://www.law360.com/articles/970980/more-uncertainty-on-nazi-era-art-restitution-claims (noting that in New York, which has a unique "demand and

HEAR Act excised earlier drafts' explicit restriction of the use of laches as a defense against plaintiffs,[45] indicating that Congress did not intend to discard laches as a possible defense in cases in this area.[46]

This Note acknowledges these arguments and responds with a slate of proposed amendments to the current language of the HEAR Act, all of which are designed to shore up the Act's constitutionality should it be challenged in court, while ensuring that the law continues to be aligned with its original intent—to resolve these complex suits on their merits in a just and fair manner whenever possible.[47] Specifically, this Note argues for a federal cause of action to be developed in concert with the HEAR Act that would sidestep the aforementioned procedural preemption concerns.[48] This Note further proposes that a version of New York State's more claimant-friendly "demand and refusal" statute of limitations replace the HEAR Act's six-year uniform statute of limitations[49] such that it continue to preempt state statutes of limitations in this area and cement the United States as a preferred forum in which claimants can seek restitution of Nazi-confiscated art for the foreseeable future.

Part I of this Note will explore the HEAR Act's legislative history and intent while providing background information regarding the structure of the HEAR Act. Part II will review recent cases involving Nazi-confiscated art and examine how the passage of the HEAR Act has changed courts' approach to some of the issues that plaintiffs confront when they bring restitution claims concerning Nazi-confiscated art. This will include a discussion of

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refusal" rule under which the statute of limitations clock starts running when a claimant makes a demand for the return of property and the possessor refuses such demand, fewer claims may be considered timely if courts find the HEAR Act to preempt this claimant-friendly state law); *see also infra* Part III.

[45] *See id.*

[46] The Senate Report on the HEAR Act notes that the bill was amended in the Senate to remove "the reference precluding the availability of equitable defenses and the doctrine of laches." S. REP. NO. 114-394, at 6–7 (2016).

[47] *See id.* at 8.

[48] *See* Charron, *supra* note 43, at 25.

[49] *See* N.Y. C.P.L.R. 214 (McKinney 1996).

Reif v. Nagy,[50] the first case to lean heavily on the HEAR Act's legislative intent,[51] allowing a plaintiff-claimant to reclaim stolen art from a defendant's collection.[52] Part II will also survey other cases decided in the wake of the HEAR Act's passage which either make reference to the HEAR Act or draw comment because they do not.

Part III will contrast the HEAR Act's discovery rule for chattels with New York State's demand and refusal rule for similar property claims. It will then put forth a hypothetical case in which the use of the HEAR Act's preempting discovery rule might be less claimant-friendly than New York's demand and refusal rule, thereby demonstrating a need for the HEAR Act to adopt by amendment a version of New York's demand and refusal rule.

Part IV will address concerns about the Act's constitutionality from a procedural standpoint. Specifically, Part IV will acknowledge that nothing in Article I of the Constitution grants Congress the right to change state rules of procedure. Nevertheless, courts have held that state procedure alone cannot defeat a federally

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[50] *See generally* Reif v. Nagy, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019) (holding that heirs of a Jewish art collector who died after imprisonment in a Nazi concentration camp were entitled to summary judgment on their conversion and replevin claims against an art dealer who had possession of two artworks owned by the collector, because the imprisoned collector did not relinquish his property voluntarily when he signed away power of attorney to the collection under duress when he was already under Nazi control, and, therefore, any subsequent transfer of the artworks did not convey legal title; also holding that laches was not a bar to the heirs' claims to the artworks because the dealer acquired both pieces in 2013 and was on notice of the heirs' claims to the collector's artworks prior to the purchase).

[51] *See* Webster D. McBride et al., *Surprise Decision in* Reif v. Nagy *Raises as Many Questions as It Answers*, HUGHES HUBBARD & REED (Apr. 23, 2018), https://www.hhrartlaw.com/2018/04/surprise-decision-in-reif-v-nagy-raises-as-many-questions-as-it-answers/#.

> Justice Ramos used the Act's passage as a blunt instrument to invalidate any precedential value of *Bakalar* [*v. Vavra*, 500 F. App'x 6 (2d Cir. 2012)]: "The [HEAR Act] was only made into law in 2016. To the extent that [D]efendants rely on judicial findings relating to claims or defenses articulated in [*Bakalar*], such discussion is irrelevant."

Id. (quoting Reif v. Nagy, 80 N.Y.S.3d 629, 633 (N.Y. Sup. Ct. 2018)).

[52] *Id.*

created cause of action.[53] In its Conclusion, this Note will propose that the HEAR Act be amended to include a federal cause of action for claimants seeking restitution of art they claim was looted or misappropriated by the Nazis, so as to ward off the potential that the law, if challenged, be found unconstitutional.

I. LEGAL UNDERPINNINGS OF THE HEAR ACT AND THE NEED FOR FEDERAL INTERVENTION: WASHINGTON PRINCIPLES AND *VON SAHER*

The resurgence of restitution's importance in popular culture and the concomitant passage of the HEAR Act were preceded by important governmental recommitments regarding Nazi-confiscated art.[54] Those recommitments came first in the form of the Washington Principles, a list of eleven non-binding principles ratified by forty-five nations in 1998, which outlined those countries' abiding interest in resolving issues relating to Nazi-confiscated art and creating legal environments that encourage the identification and restitution of such art.[55] International

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[53] *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) ("Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts."); Felder v. Casey 487 U.S. 131, 138 (1988) ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts.").

[54] The Holocaust Expropriated Recovery Act ("HEAR Act") surveys a brief history of Nazi art confiscation during World War II and then proceeds to describe the United States' participation in various legislative and international efforts focused on creating legal avenues for restituting Nazi-confiscated art to rightful heirs and owners, including its convening of the Washington Conference, passage of the Holocaust Victims Redress Act and its participation in the Holocaust Era Assets Conference in Prague in 2009, which concluded by issuing the Terezin Declaration—a landmark international statement that calls for nations to facilitate fair solutions with regard to Nazi-confiscated art and ensure that claims are resolved on their merits whenever possible. *See* Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524–25 (2016).

[55] Bureau of European and Eurasian Affairs, *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T STATE (Dec. 3, 1998), http://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ [hereinafter Bureau of European and Eurasian Affairs, *Washington Conference*].

recommitments were reaffirmed with the Terezin Declaration, a document jointly issued by forty-six nations in 2009 that urged the signatories "to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art . . . [and] make certain that claims to recover such art are resolved expeditiously . . . based on the facts and merits of the claims."[56]

The Washington Principles stressed the importance of identifying Nazi-confiscated art by opening records and archives to researchers; of directing resources and personnel to facilitate such identification and publicizing discoveries of art found to have been looted; and of giving special consideration to "unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era" in the context of legal fights over disputed works.[57] While the Principles are non-binding, they align closely with the values by which organizations like the World Jewish Restitution Organization ("WJRO")[58] measure countries' progress in seeking "restitution of movable artwork and cultural and religious property plundered from Jews" during the Nazi era.[59] The Principles are also cited in the Purposes sections of the HEAR Act itself, as the Act seeks "[t]o ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-

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[56] Holocaust Expropriated Recovery Act of 2016 § 2; Bureau of European and Eurasian Affairs, *Prague Holocaust Era Assets Conference: Terezin Declaration*, U.S. DEP'T STATE, https://2009-2017.state.gov/p/eur/rls/or/126162.htm (last visited Aug. 19, 2019) [hereinafter Bureau of European and Eurasian Affairs, *Terezin Declaration*].

[57] *E.g.*, Bureau of European and Eurasian Affairs, *Washington Conference*, *supra* note 55.

[58] WJRO represents "world Jewry in pursuing claims for the recovery of Jewish properties in Europe" (outside of Germany and Austria). WJRO was established by leading world Jewish organizations "to address the restitution of Jewish property and to remind the world that the time has come to redress the enormous material wrongs caused to European Jewry during the Holocaust." *See About Us*, WORLD JEWISH RESTITUTION ORG., https://wjro.org.il/about-wjro/about-us-our-mission/ (last visited Aug. 19, 2019).

[59] WORLD JEWISH RESTITUTION ORG., HOLOCAUST-ERA LOOTED ART: A WORLD-WIDE PRELIMINARY OVERVIEW 1 (2009), http://www.claimscon.org/forms/prague/looted-art.pdf.

Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration."[60]

Indeed, at the June 2009 Prague Conference on Holocaust Era Looted Assets, the Conference on Jewish Material Claims Against Germany and the WJRO presented a "World-Wide Preliminary Overview" on the implementation of the Washington Conference Principles.[61] Their overview discussed findings that, while Austria, the Czech Republic, Germany, and the Netherlands had made "major progress" towards implementing the Washington Principles, the United States made only "substantial progress," alongside Belgium, France, Luxembourg, Norway, Slovakia, Canada, Israel, Liechtenstein, Switzerland, and the United Kingdom.[62] The Prague Conference, according to proponents of the HEAR Act, underscored the necessity of the HEAR Act's passage because it was clear that the United States was not creating a legal environment sufficiently conducive to plaintiff-claimants seeking restitution of Nazi-confiscated art.[63]

President and Legal Counsel of the Commission Art Recovery Agnes Peresztegi noted the Prague Conference's findings in her testimony before the Senate in support of the HEAR Act.[64] She also mentioned a need for a bill that would ease or eliminate procedural obstacles to merit-based adjudication of restitution claims (like statutes of limitations and laches in the area of Nazi-confiscated art); prevent (further) judicial narrowing of what qualifies as Nazi-looted art; stop the "unnecessary"[65] shifting of burdens of proof to plaintiff-claimants; and codify into binding law the non-binding principles

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[60] Holocaust Expropriated Recovery Act of 2016, § 3.

[61] WORLD JEWISH RESTITUTION ORG., *supra* note 59, at 1.

[62] *Id.* at 6.

[63] Holocaust Expropriated Recovery Act of 2016 Act § 2.

[64] U.S. SENATE COMM. ON THE JUDICIARY, TESTIMONY OF AGNES PERESZTEGI COMMISSION FOR ART RECOVERY BEFORE THE SENATE JUDICIARY COMMITTEE SUBCOMMITTEES ON THE CONSTITUTION & OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS 4 (2016), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Peresztegi%20Testimony.pdf.

[65] *Id.* at 2.

outlined in the Washington Principles[66] and the Terezin Declaration.[67]

The HEAR Act was not passed solely in response to the release of *Woman in Gold* or Maria Altmann's legal battle.[68] Indeed, the HEAR Act makes explicit mention not of the Altmann case but of another case, *Von Saher v. Norton Simon Museum of Art*,[69] which invalidated a California state law that "extended the State statute of limitations for claims seeking recovery of" Nazi-confiscated art. [70] In 2002, California enacted its Civil Procedure Code's section 354.3, a provision that effectively eliminated its own statute of limitations for restitutions claims for "Holocaust-era artwork," defined as any "article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945."[71] The Ninth Circuit struck down this law, finding that because the recovery of Nazi-confiscated art "affects the international art market, as well as foreign affairs," it is a field "occupied exclusively by the federal government" that does not "justify California's intrusion."[72] Writing for the majority, Circuit Senior Judge Thompson found that the California legislature effectively created a "world-wide forum for the resolution of Holocaust restitution claims"[73] and thus could assert "no serious claim to be addressing a 'traditional state responsibility,'" thereby making the statute "subject to a field preemption analysis."[74] In effect, the court, in striking down the statute, reserved this legislative field for the federal government,

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[66] Bureau of European and Eurasian Affairs, *Washington Conference*, *supra* note 55.

[67] Bureau of European and Eurasian Affairs, *Terezin Declaration*, *supra* note 56.

[68] *See* Hammond, *supra* note 14.

[69] Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524–25 (2016). *See generally* Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 967–68 (9th Cir. 2010) (holding a California law unconstitutional because it sought to preempt the foreign affairs doctrine in that it applied to museums displaying looted art located outside of the state).

[70] Holocaust Expropriated Recovery Act of 2016 § 2.

[71] CAL. CIV. PROC. CODE § 354.3 (West 2019).

[72] *Von Saher*, 592 F.3d at 967–68.

[73] *Id.* at 965.

[74] *Id.*

even though Congress had not yet expressly acted to alter statutes of limitations with regard to Nazi-confiscated art—deemed by the *Von Saher* court to be a field of foreign affairs—and would not do so until the passage of the HEAR Act.[75]

The *Von Saher* decision has been the subject of heavy criticism.[76] The dissent argued that the statute at issue should have been subject to conflict preemption analysis instead of field preemption analysis[77] because the statute did not implicate foreign affairs or the "federal government's power to make and resolve war."[78] Rather, the dissent argued, California was merely acting within the scope of its traditional competence to regulate property over which it has jurisdiction,"[79] assuming that a "reasonable reading" of the statute "limit[s] the statute to entities subject to the jurisdiction of the State of California."[80] Indeed, in *Von Saher*, Appellee—the Norton Simon Museum of Art at Pasadena—had acquired potentially stolen property in 1971, and Appellant—a private citizen—used the California court system (and a special

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[75] Congress may preempt state power to regulate in three ways: "by express statement [("express preemption")], by implicit occupation of a regulatory field [("field preemption")], or by implied preclusion of conflicting state regulations [("conflict preemption")]." KATHLEEN SULLIVAN ET AL., CONSTITUTIONAL LAW 290 (19th ed. 2016).

[76] *See, e.g.*, Mikka Gee Conway, *Dormant Foreign Affairs Preemption and* Von Saher v. Norton Simon Museum: *Complicating the Just and Fair Solution to Holocaust-Era Art Claims*, 28 L. & INEQ. 373, 374 (2010); Bert Demarsin, *The Third Time Is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer - The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ARTS & ENT. L.J. 255, 287–93 (2010).

[77] In a conflict preemption analysis, courts ask whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). *E.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* SULLIVAN ET AL., *supra* note 75, at 290–91 ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." In a field preemption analysis, a court "requires a clear showing that Congress meant to occupy a field and so displace the states from regulation on that subject matter" for federal regulation to preempt a similar (and potentially conflicting) state regulation.).

[78] *Von Saher*, 592 F.3d at 970–71 (Pregerson, J., dissenting).

[79] *Id.* at 970.

[80] *Id.*

statute of limitations because the standard statute of limitations time-barred the suit) to recover lost property, traditionally an area of state competence.[81]

There is a tension here that merits focus: Nazi-confiscated art cases are extremely fact-specific—some disputes involve private individuals,[82] but many involve disputes between private individuals and European state-owned museums,[83] some of whom are seeking to recover property conveyed to state museums by foreign governments.[84] Both of the aforementioned iterations involving state-owned museums run the risk of implicating the act of state doctrine.[85] Indeed, the *Von Saher* majority likely correctly identified a potential for foreign affairs federal conflict preemption should California state courts create special statute of limitations rules for Nazi-confiscated art.[86]

At the same time, property adjudication is traditionally an area of state competence and responsibility.[87] Congress, in passing a

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[81] *Id.* at 957, 964 (majority opinion).

[82] *See, e.g.*, Reif v. Nagy, 80 N.Y.S.3d 629, 631 (N.Y. Sup. Ct. 2018).

[83] *See, e.g.*, Altmann v. Republic of Austria, 317 F.3d 954, 958 (9th Cir. 2002).

[84] *See, e.g.*, *Von Saher v. Norton Simon Museum of Art of Pasadena*, 897 F.3d 1141, 1143 (9th Cir. 2018) (holding that a museum held good title to artwork taken by Nazis in World War II and sold by the Dutch government pursuant to a post-war claims process "[b]ecause the act of state doctrine deem[ed] valid the Dutch government's conveyance to [the purchaser]" who resold the works to the museum).

[85] The U.S. Supreme Court defined the act of state doctrine as providing that "[e]very 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." Underhill v. Hernandez, 168 U.S. 250, 252 (1897); *see also* Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964) (holding that the scope of the act of state doctrine must be determined by federal law).

[86] *See Von Saher*, 897 F.3d at 1155–56.

[87] The concept of "[t]raditional state responsibility," according to *American Insurance Association v. Garamendi*, provides courts guidance in determining whether they should apply a field or conflict preemption analysis to a state statute being challenged in court in the area of foreign affairs:

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate

separate statute of limitations for Nazi-confiscated art,[88] made an explicit choice that the potential for foreign affairs implication—and, therefore, the necessity for federal control—trumped the states' traditional competence in the field of property dispute resolution. This policy choice raises two related questions: did Congress make the right choice? And more crucially, did it make a constitutional choice?

In response to the first question, it would be difficult to argue that Congress did not make the morally "right" choice to try to pass laws designed to make it easier for would-be claimants to reclaim their property, given the atrocities perpetuated by the Nazi regime[89] and the difficulties claimants have experienced in having their claims adjudicated in court on their respective merits.[90] Although Congress arguably made a morally "right" choice by passing such a law, Congress erred by opting not to create a federal cause of action. By instead merely "engrafting" a federal statute of limitations on top of state statutes of limitations specifically for Nazi-looted art, Congress acted unconstitutionally[91] when it preempted a field of traditional state responsibility[92] without a larger accompanying regulatory structure for the adjudication of Nazi-looted art claims.

Congress must, therefore, reform and expand the HEAR Act's regulatory structure. These revisions might include a new federal cause of action, revised elements of proof, or more claimant-friendly statutes of limitations, all created with the goal of the HEAR Act in

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> doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government.

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003).

[88] Katie Gerlach Merrill, *A Proposed Uniform Statute of Limitations for Nazi-Plundered Art and Cultural Property*, HUGHES HUBBARD & REED (July 11, 2016), https://www.hhrartlaw.com/2016/07/a-proposed-uniform-statute-of-limitations-for-nazi-plundered-art-and-cultural-property/.

[89] *See* BAZYLER, *supra* note 2.

[90] *See, e.g.*, Von Saher, 897 F.3d at 1155–56.

[91] *See generally* Charron, *supra* note 43 ("The HEAR Act . . . embraces state causes of action and all of their various substantive provisions and elements of proof, and [it] imposes a federal limitations period for claims brought during the next ten years." (citation omitted)).

[92] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 (2003).

mind—to assist claimants in their quests to adjudicate restitution claims on their merits.[93]

II. RECENT NEW YORK CASES: THE HEAR ACT'S UNCERTAIN AND LIMITED IMPACT IN CASES OF PLAINTIFFS CONFRONTING LEGAL OR PROCEDURAL IMPEDIMENTS BEYOND EXPIRED STATUTES OF LIMITATIONS

The HEAR Act may be starting to play a more impactful role in cases where plaintiffs seek restitution of Nazi-confiscated art, but because it affects statutes of limitations only, its impact is limited in cases where plaintiffs face impediments to recovery beyond running of statutes of limitations.[94] Further, thus far the law has largely failed to provide much-needed certainty in the Nazi-looted art context.[95] Indeed, Thomas Kline, a lawyer who specializes in recovering stolen art and cultural property, noted that the "lack of standards" in this area creates "restitution roulette"—a situation that likely discourages suits and creates confusion and unpredictability for would-be claimants.[96]

Beyond introducing more uncertainty, the HEAR Act falls short of its stated intent by failing to disturb longstanding, near-

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[93] Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016).

[94] *See generally* Hulton v. Bayerische Staatsgemaldesammlungen, 346 F. Supp. 3d 546 (S.D.N.Y. 2018) (making no references to HEAR Act and holding that plaintiff did not sufficiently allege a government "taking" by the German State of Bavaria, as required for plaintiffs to invoke the "takings" exception to the Foreign Sovereign Immunity Act ("FSIA"), which immunizes acts of foreign governments within their own borders from external restitution claims).

[95] Jason Barnes, Note, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims*, 56 COLUM. J. TRANSNAT'L L. 593, 635 (2018).

[96] Patricia Cohen & Graham Bowley, *Dispute Over Nazi Victim's Art*, N.Y. TIMES (Oct. 24, 2014), https://www.nytimes.com/2014/10/25/arts/design/christies-and-sothebys-differ-on-handling-of-2-schieles.html (quoting Monica Dugot, international director of restitution at Christie's: "These issues are extraordinarily complicated because there are no set rules and we don't know definitely what happened in many cases . . . . We have to be in a position where we can be sure we can convey good title to works in our sales.").

unassailable choice of law analyses[97] and foreign immunity and/or act of state doctrines,[98] as demonstrated in recent New York state court cases.[99] That said, the recent case of *Reif v. Nagy* potentially opens a new front in claimants' battle for restitution, provided certain facts are on a plaintiff's side, as judges in *Reif* explicitly sought to recognize and honor the stated intent of the HEAR Act's passage by redefining and expanding the concept of coercive transfers of property in the Nazi era.[100]

A. Reif: Redefining Transfers Under Duress

An examination of *Reif* alongside *Bakalar v. Vavra* is instructive because both cases involve claimants in New York state courts attempting to recover works from the same collection.[101] In theory, since the original moment of potential breakage in the line of good-faith provenance was the same in these two cases, one might expect similar legal outcomes.[102] Indeed, the only clear difference between the two cases is that the HEAR Act was passed between the time

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[97] *See* Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (making no mention of HEAR Act's recent passage while engaging in thorough choice of law analysis between Italian and New York law). *But see* Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 197 (2d Cir. 2019) (affirming the aforementioned *Zuckerman* decision on appeal, but specifically noting that the HEAR Act, by its amended language, left open the option for defendants to assert laches and other equitable defenses: "The HEAR [A]ct does not prevent defendants from asserting a laches defense.").

[98] *See Hulton*, 346 F. Supp. 3d at 551.

[99] *See*, *e.g.*, Bakalar v. Vavra, 500 F. App'x 6 (2d Cir. 2012); *Hulton*, 346 F. Supp. 3d 546; *Zuckerman*, 307 F. Supp. 3d 304; Reif v. Nagy, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019); Reif v. Nagy, 80 N.Y.S.3d 629 (N.Y. Sup. Ct. 2018).

[100] *See* McBride et al., *supra* note 51.

[101] William Cohan, *A Suit Over Schiele Drawings Invokes New Law on Nazi-Looted Art,* N.Y. TIMES (Feb. 27, 2017), https://www.nytimes.com/2017/02/27/arts/design/a-suit-over-schiele-drawings-invokes-new-law-on-nazi-looted-art.html (quoting Defendant Nagy's attorney, who referred to the *Reif* case as "*Bakalar* 2," saying, "It's the same case being brought by these heirs and their counsel over the exact same art collection, so the case shouldn't go forward.").

[102] *Id.*

that *Bakalar* was decided in 2012 and *Reif* was decided in 2019.[103] This single difference proved critical.

In *Reif*, the HEAR Act pivotally cut through the uncertain and difficult issues of provenance that thwarted the same claimants in *Bakalar.*[104] Both cases concerned the rights of heirs to works of art by expressionist artist Egon Schiele,[105] which prior to 1938 were owned by an Austrian cabaret singer and art collector of Jewish descent, Fritz Grünbaum.[106] In 1938, Grünbaum was arrested, and Nazi agents inventoried his art collection.[107] After he was taken to the Dachau concentration camp, he was forced to assign his wife power of attorney over his estate.[108] Grünbaum was murdered at Dachau shortly thereafter.[109] His wife then likely transferred his art collection (which would later surface in a Swiss gallery) to a relative before she too was sent to a concentration camp and subsequently also murdered.[110]

The plaintiff in *Bakalar*, purchaser in good faith of the confiscated artwork, sought a declaratory judgment that he was the rightful owner of a Schiele artwork; defendant heirs of Grünbaum claimed that the Nazis expropriated the artwork from their ancestor in 1938 and that title to the artwork was theirs, counterclaiming for replevin and conversion.[111] The heirs appealed the United States District Court for the Southern District of New York's decision, which found for the purchaser after improperly applying Swiss law to the issue of whether the purchaser acquired title to the artwork.[112] The Court of Appeals for the Second Circuit noted that, under a

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[103] *See, e.g.*, *Bakalar*, 500 F. App'x 6; *Reif*, 106 N.Y.S.3d 5.

[104] *Compare Bakalar*, 500 F. App'x 6, *with Reif*, 106 N.Y.S.3d 5.

[105] Hoenig, *supra* note 13; *see also* Bakalar v. Vavra, 237 F.R.D. 59, 61–62 (S.D.N.Y. 2006) (finding that a Nazi agent inventoried Grünbaum's collection and reported it to contain eighty-one works by Schiele); Reif v. Nagy, 80 N.Y.S.3d 629, 631 (N.Y. Sup. Ct. 2018) (finding the same facts regarding the Nazi agent's inventory of Grünbaum's collection).

[106] McBride et al., *supra* note 51.

[107] *See id.*

[108] *Reif*, 80 N.Y.S.3d at 632.

[109] *Id.*

[110] Bakalar v. Vavra, 237 F.R.D. 59, 62 (S.D.N.Y. 2006).

[111] *See* Bakalar v. Vavra, 819 F. Supp. 2d 293, 294 (S.D.N.Y. 2011).

[112] *Id.*

proper application of New York law, the burden of proof with respect to whether an artwork is stolen lies with the possessor.[113] The Second Circuit vacated the District Court's judgment and remanded the case for further proceedings under New York law because the district judge improperly placed the burden of proof on the Grünbaum heirs; after a threshold showing has been made that the heirs have an arguable claim to the artwork, New York law places the burden on the current possessor to prove that the artwork was not stolen.[114] On remand, the court again awarded judgment to possessor Bakalar and denied the defendant-heirs' counterclaims, ruling that laches barred claims of heirs to title to the artwork because Grünbaum's heirs made but one "aborted" effort to recover the property in 1952.[115] The Second Circuit affirmed this ruling in 2011, again on a laches defense.[116]

Reif followed *Bakalar* and held that the relevant Grünbaum heirs were entitled to summary judgment on their conversion and replevin claims against an art dealer in possession of two artworks owned by the heirs' ancestor.[117] Grünbaum owned the works prior to World War II, did not voluntarily relinquish the artworks, and only signed a power of attorney relinquishing title to his wife under duress by Nazi control.[118] The circumstances were such that no subsequent transfer of the artworks conveyed legal title.[119] Further, the court found that laches was not a bar to the heirs' claims to the artworks because the dealer acquired both pieces in 2013 and was on notice of the heirs' claims to Grünbaum's artworks prior to his purchase.[120]

The *Bakalar* opinion did not focus on the original moment of coercion that *Reif* identified as proof of looting—the moment when Grünbaum was forced to appoint his wife power of attorney while already in a concentration camp, which *Reif* understood to be a prototypical coercive atmosphere giving rise to credible claims of

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[113] Bakalar v. Vavra, 619 F.3d 136, 147 (2d Cir. 2010).

[114] *Id.*

[115] *See Bakalar*, 819 F. Supp. 2d at 306–07.

[116] Bakalar v. Vavra, 500 F. App'x 6, 9 (2d Cir. 2012).

[117] *See* Reif v. Nagy, 80 N.Y.S.3d 629, 637 (N.Y. Sup. Ct. 2018).

[118] *Id.* at 631.

[119] *See id.* at 634.

[120] *See id.* at 635.

contract unenforceability and inability to pass valid title.[121] Instead, *Bakalar* focused on the heirs' lack of diligent efforts to retrieve the works after the war and ruled not to transfer title of the works based on a successful laches defense.[122] In 2011, the Southern District of New York noted that the "only evidence of any effort by any heir to recover Grünbaum property [was one relative's] aborted effort to recover Grünbaum's music royalties"[123] in 1952. The claimants tried to argue that the political situation in Czechoslovakia, where Grünbaum's sister Elise Zozuli lived at the time and made initial efforts to claim her brother's music royalties, would have made such recovery both "dangerous and virtually impossible," but their account of Zozuli's efforts to claim the music royalties, even momentarily, was found to militate against the original assertion that it was too dangerous for Zozuli to make reclamation efforts of any kind.[124]

On the other hand, Justice Ramos writing for the New York Supreme Court, New York County in *Reif* found Grünbaum's transfer of power of attorney to have been made under duress and deemed that fact dispositive, noting that "a signature at gunpoint cannot lead to a valid conveyance,"[125] thereby spoiling the entire line of good-faith provenance.[126] Justice Ramos made much of the

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[121] Bakalar v. Vavra, 819 F. Supp. 2d 293, 300–01 (S.D.N.Y. 2011); *Reif*, 80 N.Y.S.3d at 632.

[122] *See Bakalar*, 819 F. Supp. 2d at 307.

[123] *Id.* at 306. Grünbaum was a cabaret artist, and the implication here is that as author of certain works, he was entitled to royalties on their sales. Bakalar v. Vavra, 619 F.3d 136, 137 (2d. Cir. 2010).

[124] *Bakalar*, 819 F. Supp. 2d at 296, 306.

[125] *Reif*, 80 N.Y.S.3d at 634.

[126] *See also* Menzel v. List, 267 N.Y.S.2d 804, 810 (N.Y. Sup. Ct. 1966) (holding that relinquishment by owner of work of art in order to flee for life from Nazi persecution was not voluntary and did not constitute abandonment, and therefore that no title was conveyed by Nazis who pillaged and plundered painting as against rightful owner).

> Abandonment is defined as a voluntary relinquishment of a known right . . . with no intent to reclaim. . . . In *Collac*, it was held that personal property temporarily abandoned at the approach of the enemy, without the relinquishment of the owner's right of ownership, is neither foreclosed nor forfeited. The relinquishment here by the Menzels in order to flee for their

HEAR Act's passage in the intervening years between the *Bakalar* decision and the case before him, noting that its passage "compels us to help return Nazi-looted art to its heirs."[127] His opinion also noted that the HEAR Act instructs courts "to be mindful of the difficulty of tracing artwork provenance due to the atrocities of the Holocaust era, and to facilitate the return of property where there is reasonable proof that the rightful owner is before us."[128]

Reif was a somewhat surprising decision,[129] and not only because the same plaintiffs had already brought similar claims regarding art by the same artist from the same collection and lost.[130] The decision was viewed as a surprise because it leaned heavily on the HEAR Act's (i.e., Congress') unilateral decision to widen the scope of what could be considered Nazi art confiscation.[131] Yet despite its potential for surprise, *Reif* was also affirmed on appeal,[132] giving life to the idea that Justice Ramos's decision may not have been an outlier, but may instead signal courts' increasing willingness to recognize and honor Congress' intent in empowering plaintiffs to reclaim property that previously may have been out of their reach.[133] Writing for a unanimous bench of judges on the Supreme Court of New York, Appellate Division, Judge Anil Singh quotes directly from the "Purposes" section of the HEAR Act in the conclusion of his decision and then writes, "We are informed by the

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> lives was no more voluntary than the relinquishment of property during a holdup . . . and from the history of their search for the painting, there was obviously a continuing intent to reclaim. The court finds, accordingly, as a matter of law, that there was here no abandonment.

Id.

[127] Bakalar v. Vavra, 237 F.R.D. 59, 61–62 (S.D.N.Y. 2006); *Reif*, 80 N.Y.S.3d at 633.

[128] *Reif*, 80 N.Y.S.3d at 634.

[129] McBride et al., *supra* note 51.

[130] *Id.*

[131] *See id.*

[132] Reif v. Nagy, 106 N.Y.S.3d 5, 14 (N.Y. App. Div. 2019).

[133] Jason Grant, *NY Appeals Court Explains Why Nazi-Stolen Paintings Belong with Jewish Collector's Heirs*, N.Y. L.J. (July 9, 2019), https://www.law.com/newyorklawjournal/2019/07/09/ny-appeals-court-explains-why-nazi-stolen-paintings-belong-with-jewish-collectors-heirs/?slreturn=20190718232901.

intent and provisions of the HEAR Act which highlight[] the context in which plaintiffs, who lost their rightful property during World War II, bear the burden of proving superior title to specific property in an action under the traditional principles of New York law."[134]

The facts of *Reif* are such that the Nazis never actually took possession of any of the art in Grünbaum's collection, though they did force a transfer under coercive conditions.[135] As one legal observer inquired, "Is evidence of Nazi persecution leading to a transfer between family members (neither of whom was aligned with the Nazis) sufficient, or must there be a showing that the Nazis or their collaborators themselves ever took possession of the property in question?"[136]

The language of the HEAR Act provides little guidance,[137] and the accompanying Senate Report confirms that Congress intended the language to be vague and broad so as to cover a wide range of claims:

> Subsection (5) defines the Nazi persecution that may cause the loss of art or other cultural property caused by the bill. It applies to "any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents and associates, during the []covered period." . . . This definition is intended to be broad, to facilitate the restitution of art and other cultural property lost during the covered period.[138]

Moreover, the relevant subsection was amended in the Act to be even broader than the initial language of the bill, replacing an original requirement that property in question be lost due to "Nazi persecution . . . based on race, ethnicity, or religion" with the broader term of "Nazi ideology" during the "covered period."[139] More curiously, the final language of the bill dropped a technical

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[134] *Reif*, 106 N.Y.S.3d at 24 (emphasis added).

[135] Reif v. Nagy, 80 N.Y.S.3d 629, 633–34 (N.Y. Sup. Ct. 2018).

[136] McBride et al., *supra* note 51.

[137] Barnes, *supra* note 95, at 618.

[138] S. REP. NO. 114-394, at 9 (2016).

[139] HEAR ACT REVISIONS, SULLIVAN & WORCESTER LLP 3 (2016), https://cdn2.hubspot.net/hubfs/878449/B2079277.pdf.

definition of the term "unlawfully lost," which was originally defined as "any theft, seizure, forced sale, sale under duress, or any other loss of an artwork or cultural property that would not have occurred absent persecution during the Nazi era."[140] By electing not to precisely define the ways in which property might have been lost in order to access the privilege of the HEAR Act's statute of limitations extension, Congress effectively sacrificed a baseline level of fact-pattern certainty about which cases qualify for HEAR Act extension in exchange for claimants' ability to bring a wider array of cases to court.[141]

Agnes Peresztegi's Senate testimony is also instructive on this point: in a footnote to her testimony before the Subcommittee considering the bill, she declared her hope that the bill cover "any and all types of dispossession"[142]:

> [It] should not matter whether the loss occurred (i) by a Nazi soldier taking the art from a Jewish family's apartment, (ii) by . . . the Nazi art looting unit . . . (iii) whether the art was sold to pay the so-called flight-tax, or (iv) was forcefully auctioned off, or (v) whether a Jewish persecutee has sold the art below market value while fleeing for his life.[143]

Peresztegi even sought to include "cases where the owner sold the work for consideration during the period of Nazi persecutions,"[144] arguing that a court "should have to determine whether such a sale was truly voluntary and not coerced in any way, and that a market price was offered and the consideration was received in a freely disposable way."[145]

Her last fact pattern is not a mere hypothetical; *Zuckerman v. Metropolitan Museum of Art* is a case whose facts track closely to a situation that might require Peresztegi's vision of a holistic coercion analysis for a claimant to successfully reclaim purportedly looted

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[140] *Id.*

[141] Barnes, *supra* note 95, at 633.

[142] U.S. SENATE COMM. ON THE JUDICIARY, *supra* note 64, at 2 n.3.

[143] *Id.*

[144] *Id.*

[145] *Id.*

art.[146] Alice and Paul Leffmann were wealthy German Jews who owned a large collection of art that included an important work by Pablo Picasso entitled *The Actor*, which they had purchased in 1912.[147] In 1937, they fled from Germany "after losing their business, livelihood, home and most of their possessions due to Nazi persecution."[148] In 1938, while in Italy, the Leffmanns sold the painting "well below its actual value in an effort to gather enough money to pay for [their] passage out of Italy," which by then had also become a dangerous place for Jews to remain.[149] *The Actor* was then donated to the Metropolitan Museum of Art in 1952, where it remains to this day.[150]

The *Zuckerman* court engaged in a protracted choice of law analysis between Italian and New York law in response to the Museum's motion to dismiss on grounds that the plaintiff had failed to allege duress of the 1938 sale.[151] The court chose to adjudicate the case under New York law, which requires that the defendant have caused the duress in the original sale in order to lose good-title claim to the property in question.[152] Critically, the Museum was not a party to the 1938 sale, so the duress allegation failed,[153]and the Museum won its motion to dismiss.[154]

Zuckerman illustrates one of the outer limits on the HEAR Act's effectiveness in restituting art to heirs of those who sold art under duress.[155] The HEAR Act is a statute of limitations law; it cannot disturb courts' choice of law analyses.[156] But a side-by-side comparison of *Zuckerman* and *Reif*—both cases analyzed under

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[146] *See* Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 307 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 186 (2d Cir. 2019).

[147] *See id.* at 307–08.

[148] *Id.* at 307.

[149] *Id.*

[150] *Id.*

[151] *See id.* at 315–16.

[152] *See id.* at 319.

[153] *Id.* at 319–20.

[154] *Id.* at 325.

[155] *See id.*

[156] *See* Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 964 (9th Cir. 2017) (stating that the HEAR Act "does not alter the choice of law analysis" used to decide which state's law will govern claims of title to the artwork in question).

New York law—suggests that the HEAR Act has not yet been successful in articulating a workable, justiciable standard for when the HEAR Act should apply and how much help it might provide to claimants seeking restitution beyond the pure mathematics of the changed statute of limitations.[157] As cases filter through state and federal courts in the years before the HEAR Act sunsets, judges will be left to determine how much (or how little) weight must be given to the HEAR Act's stated goal of helping plaintiffs resolve their restitution claims on the merits.

B. The HEAR Act is Circumscribed By FSIA

Hulton v. Staatsgemaldesammlungen demonstrates another impediment to successful restitution, even after the HEAR Act's passage.[158] That obstacle comes in the form of the Foreign Sovereign Immunities Act ("FSIA"), "which provides foreign states and their agents with a broad grant of immunity,"[159] even in disputes over property, because courts defer to "the foreign policy of the political branches" in the FSIA context.[160] In the Nazi restitution context, when the current owner of the property in question is a state entity that would normally be afforded FSIA immunity, the burden is on the plaintiff to show that a so-called takings exception provides an avenue for restitution in the face of FSIA immunity.[161] The takings exception to FSIA immunity applies when the plaintiff is able to show that (a) property was taken in violation of international law, and (b) that the individual(s) who originally deprived the owner of the property in question were sufficiently aligned with the Nazi

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[157] *Compare Zuckerman*, 307 F. Supp. 3d 304, *with* Reif v. Nagy, 80 N.Y.S.3d 629 (N.Y. Sup. Ct. 2018).

[158] Hulton v. Bayerische Staatsgemaldesammlungen, 346 F. Supp. 3d 546 (S.D.N.Y. 2018) (dismissing restitution claim made by heirs of German Jewish art dealer against instrumentality of the German State of Bavaria because heirs had failed to sufficiently allege any government taking, as required to invoke the "takings" exception to the Foreign Sovereign Immunities Act).

[159] *Id.* at 551 (quoting McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1075 (D.C. Cir. 2012)).

[160] *Id.* (quoting Sampson v. Fed. Republic of Ger., 250 F.3d 1145, 1155–56 (7th Cir. 2001)).

[161] *Id.* at 549–50.

regime so as to be considered an agent of that state and were not acting in their own private capacity; a U.S court can exercise jurisdiction if the takings exception to FSIA immunity is met.[162] Therefore, private profiteers do not implicate FSIA immunity, as they are non-state actors.[163]

In *Hulton*, the heirs of Jewish art dealer Alfred Flechtheim brought suit against the Bavarian State Paintings Collection—a government institution.[164] In 1933, Flechtheim "was forced to place his property 'at the disposal of' Alfred Schulte, whom plaintiffs described as a 'Nazi tax advisor' who 'officially took possession of all of Flechtheim's belongings and subsequently sold a good deal of [them] to the benefit of Flechtheim's German creditors and the Nazi state's authorities.'"[165] The court then analyzed the plaintiffs' characterization of Schulte as a "Nazi tax advisor" who was "well connected to . . . the Nazi state and its authorities," but ultimately found that plaintiffs did not sufficiently allege facts indicating a takings exception (i.e., that Schulte acted "on behalf of, or at the direction of, the German government" in order for him to be considered an agent of the German state when he stole the property); the court found that FSIA sovereign immunity applied.[166]

In holding that plaintiffs failed to show that "Schulte participated in the government's campaign against Flechtheim,"[167] the court distinguished the facts in *Hulton* from two other cases in which courts allowed similar restitution claims to proceed against state actors under the FSIA's takings exception.[168] In *Philipp v. Federal Republic of Germany*, the D.C. Circuit permitted a similar suit to proceed because the plaintiffs successfully proved forced sales of art to the German State of Prussia engineered and directed by Hermann Goering, then the Prime Minister of Prussia and a notorious plunderer of art who preferred "the bizarre pretense of

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[162] *Id.*

[163] *See id.* at 549–50; *see also* Williams v. Nat'l Gallery of Art, London, 16-CV-6978 (VEC), 2017 WL 4221084, at *4 (S.D.N.Y. Sept. 21, 2017) (stating that "conversion by a private individual is not a FSIA taking").

[164] *See Hulton*, 346 F. Supp. 3d at 547.

[165] *Id.* at 548.

[166] *Id.* at 550.

[167] *Id.* at 551.

[168] *Id.* at 550.

'negotiations' with and 'purchase' from counterparties with little or no ability to push back without risking their property or their lives."[169] Similarly, in *Cassirer v. Kingdom of Spain*,[170] the Ninth Circuit allowed a suit to proceed under the takings exception because the court found that the plaintiff-heir's grandmother was forced to sell a painting to "an agent of the Nazi government" in 1939[171] under considerable duress.[172]

The burden of proof in a Nazi restitution case affected by the FSIA is high in that it requires plaintiffs to show that the individual(s) who originally deprived the Jewish owner of the property were sufficiently aligned with the Nazi regime so as to be considered an agent of the state, no easy evidentiary task.[173] As a result of this high burden of proof, plaintiffs may be hard-pressed to hurdle procedural barriers and get their cases adjudicated on the underlying merits of their claims. Indeed, many courts have recognized the high bar that the FSIA poses to claimants.[174] The *Hulton* court, in dismissing the complaint, registered its sympathy to the plaintiffs' "moral claim" to the paintings by noting that "[t]here is no doubt that the economic opportunism of men

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[169] Philipp v. Fed. Republic of Ger., 894 F.3d 406, 407, 409–12 (D.C. Cir. 2018).

[170] *See generally* Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010) (In a suit where the plaintiff brought action to recover a Nazi-confiscated painting from a museum owned by the Spanish crown, the expropriation exception to the FSIA was applicable even though neither the Kingdom of Spain nor the foundation currently in possession of the painting took the painting from plaintiff's grandmother, the original owner.).

[171] *Id.* at 1022; *see* Isaac Kaplan, *3 Cases That Explain Why Restituting Nazi-Looted Art Is So Difficult*, ARTSY (July 5, 2017, 4:30 AM), https://www.artsy.net/article/artsy-editorial-3-cases-explain-restituting-nazi-looted-art-difficult.

[172] *Cassirer*, 616 F.3d at 1023.

[173] Hulton v. Bayerische Staatsgemaldesammlungen, 346 F. Supp. 3d 546, 551 (S.D.N.Y. 2018).

[174] *See* Sampson v. Fed. Republic of Ger., 250 F.3d 1145, 1155–56 (7th Cir. 2001) ("In interpreting the FSIA, we are mindful that judicial resolution of cases bearing significantly on sensitive foreign policy matters, like the case before us, might have serious foreign policy implications which courts are ill-equipped to anticipate or handle." (internal quotation marks and citation omitted)); *see also* McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1075 (D.C. Cir. 2012) (characterizing the FSIA exceptions as "narrowly drawn").

like . . . Schulte would not have been possible without the Nazi government's promulgation of racist laws and genocidal practices that deprived Jews of the most basic economic and human rights."[175] But the court went on to note that, although "morally unsatisfying," it was forced to rule for defendants based on the broad grant of immunity provided to foreign states under the FSIA.[176] In doing so, however, the court went out of its way to suggest that:

> [i]t would not be hard to justify and articulate an exception to the FSIA that created a carve-out for victims like Flechtheim and his heirs to take action against the downstream beneficiaries of such policies. Nevertheless, Congress has chosen not to enact such an exception, and it is not the [c]ourt's proper place to create one, particularly in light of the "[d]eference to the foreign policy of the political branches" required in the FSIA context.[177]

The HEAR Act, circumscribed by its procedural language addressing statutes of limitations in relation to Nazi-era confiscated art, does not—and cannot—disturb choice of law[178] or foreign sovereign immunity legal doctrines, as *Zuckerman* and *Hulton* make clear.[179] Thus, while *Reif* demonstrates the outer limits of the HEAR Act's power to assist claimants, other recent cases like *Zuckerman* and *Hulton* demonstrate that the HEAR Act in its current form may not be living up to its stated purpose of "ensur[ing] that claims to artwork and other property stolen or misappropriated by the Nazis

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[175] *Hulton*, 346 F. Supp. 3d at 551.

[176] *Id.*

[177] *Id.* (citing *Sampson*, 250 F.3d at 1156).

[178] *See* Judith Wallace et al., *Enactment of Federal Holocaust Expropriated Art Recovery (HEAR) Act Expands Opportunities for Claims to Nazi-Confiscated Art*, CARTER LEDYARD & MILLBURN LLP (Jan. 12, 2017), https://www.clm.com/publication.cfm?ID=5577#_ftnref2 ("Although Congress'[] stated intention is for these disputes to be decided on the merits, because of an exception set forth in the law, the new law will not end quarrels about which state's law applies.").

[179] *Hulton* was decided two years after the HEAR Act's enactment, but the court does not even mention it once. *See id.*; *see also* Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 304 (S.D.N.Y. 2018) (failing, like *Hulton*, to make mention of HEAR Act).

are . . . resolved in a just and fair manner"[180] in concert with policy as set forth in the Washington Principles[181] and the Terezin Declaration.[182]

III. CONTRASTING THE HEAR ACT'S DISCOVERY RULE WITH NEW YORK'S DEMAND AND REFUSAL RULE

By its plain, stated language, the HEAR Act procedurally preempts state statutes of limitations for restitution claims of Nazi-era misappropriated "artwork or other property," defined as:

> (A) pictures, paintings, and drawings;
> (B) statuary art and sculpture;
> (C) engravings, prints, lithographs, and works of graphic art;
> (D) applied art and original artistic assemblages and montages;
> (E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and
> (F) sacred and ceremonial objects and Judaica.[183]

New York State has a unique, claimant-friendly "demand and refusal" rule for stolen chattels, as articulated in New York's replevin statute, which provides for a three-year statute of limitations for recovery of a chattel.[184] As applied to good-faith purchasers, *Guggenheim v. Lubell* established that in New York, "a cause of action for replevin . . . of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it."[185] Compared to other

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[180] Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 4, 130 Stat. 1524, 1526 (2016).

[181] *See* Bureau of European and Eurasian Affairs, *Washington Conference*, *supra* note 55.

[182] Bureau of European and Eurasian Affairs, *Terezin Declaration*, *supra* note 56.

[183] *Id.*

[184] N.Y. C.P.L.R. 214 (McKinney 1996).

[185] Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 429 (N.Y. Ct. App. 1991).

states, where deadlines run only a few years from the time of the original theft,[186] the New York demand and refusal rule is alluring for self-evident reasons in the Nazi art context, where original thefts may have occurred upwards of seventy years ago.

In contrast, the HEAR Act's discovery rule establishes a uniform, preemptive, and national statute of limitations that provides original owners of Nazi-looted art (or their heirs) an opportunity to bring claims after discovering its (potentially stolen) origins,[187] but it excludes claims that were not barred by an applicable state statute of limitations during a six-year period from 1999 to 2016.[188] Presumably, Congress' intent here was to honor the legal concept of laches, which defeats claims brought in a dilatory and unreasonable manner.[189] However, Congress may have unwittingly created a situation in which the HEAR Act's passage could ironically be *disadvantageous* to claimants seeking restitution in a court governed by New York law,[190] as it may have miscalculated the level of difficulty in choice of law analyses in cases where artwork is bought and sold multiple times, in all kinds of fraught conditions, breeding multiple plausible choice of law options for courts.[191]

The fact pattern, easily imagined, would be such that a claim governed by New York law[192] and found not to have been time barred for a six-year period between 1999 and 2016 might fall within

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[186] Wallace et al., *supra* note 178.

[187] Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 3, 130 Stat. 1524, 1525–26 (2016).

[188] *See* Frankel & Sharoni, *supra* note 44 (stating that the HEAR Act's legislative history "indicate[s] both that the [A]ct was intended to significantly limit claims discovered after 1999 but before the [A]ct's 2016 enactment, and that the [A]ct was intended to give an opportunity for victims to resuscitate post-1999 claims that would have been barred by statutory limitations in the past.").

[189] *Laches*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "laches" as the "equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought.").

[190] *See* Frankel & Sharoni, *supra* note 44.

[191] Wallace et al., *supra* note 178.

[192] For example, if the last sale or transfer of ownership of the property in question occurred in New York, and the property has remained in New York ever since. *See* Bakalar v. Vavra, 237 F.R.D. 59, 61–62 (S.D.N.Y. 2006).

the aforementioned exception and therefore outside the rescue "discovery rule" of the HEAR Act.[193] This might happen if the claimant possessed actual knowledge[194] of the location of the artwork and the potential claim during the 1999 to 2016 period and failed to demand its return from the current owner.[195] In effect, the HEAR Act could *bar* more claims than might have otherwise been barred in courts applying New York law without the preempting HEAR Act operating in the background *because* the Act preempts New York's demand and refusal rule.[196] This is a result that is plainly contrary to the very purpose of the Act's passage, which was to extend statutes of limitations and allow more claims to be heard on their merits.[197]

Currently, no case tests this hypothetical fact pattern, so we do not know how a New York court applying the HEAR Act statute of limitations may choose to adjudicate this curious quirk that sows even more doubt into cases in the restitution context. However, laches has been preserved as a valid defense in the HEAR Act.[198] Thus, defendants may affirmatively defend a claim of this nature by arguing that claimants who failed to make demand before the passage of the HEAR Act (but had knowledge of a potential claim) cannot bring such claim because they delayed too long, depending on how long the would-be claimant waited to bring the claim and whether the delay was reasonable.[199] However, claimants that

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[193] Wallace et al., *supra* note 178.

[194] Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016).

[195] Wallace et al., *supra* note 178.

[196] *See* Frankel & Sharoni, *supra* note 44.

[197] Emerie Huetteman, *Senate Bill Would Help Recover Art Stolen by Nazis*, N.Y. TIMES (June 7, 2016), https://www.nytimes.com/2016/06/08/arts/design/senate-bill-would-help-recover-art-stolen-by-nazis.html.

[198] S. REP. NO. 114-394, at 7 (2016).

[199] *See*, *e.g.*, Greek Orthodox Patriarchate of Jerusalem v. Christies, Inc., No. 98 Civ. 7664 (KMW), 1999 WL 673347 (S.D.N.Y. Aug. 30, 1999) (holding that a delay of almost seventy years in bringing a claim prejudiced a family that possessed a manuscript by making it almost impossible to prove ownership); Wertheimer v. Cirker's Hayes Storage Warehouse, 752 N.Y.S.2d 295 (1st Dep't 2002) (dismissing the complaint on grounds of laches because the "uncontradicted

suspect that art was stolen from them can defeat a laches defense by showing that they or their family members took affirmative steps after the war to locate the missing property, including using "diplomatic channels and other post-war procedures," "list[ing] missing or stolen works with appropriate registries, such as Holocaust related databases and making other efforts to publicize ownership"[200] and by "continuing to make significant efforts over time to locate the missing works and expending personal finances to do so."[201]

The HEAR Act sunsets on January 1, 2027, except that the Act continues to apply to claims or causes of action pending on that date.[202] On that date, state statutes of limitations become effective again in the Nazi-looted art context.[203] In effect, a claimant who did not or could not bring a claim under the HEAR Act would again be able to bring a claim under New York State's demand and refusal rule.[204] Therefore, the sunset provision preserves New York's demand and refusal rule, but delays its potential invocation until January 1, 2027.[205] This, in the context of cases often beset by laches defenses,[206] is a nonsensical result that rewards or at least allows claimants to wait before bringing claims. This runs contrary to the sensible policy rationale at the heart of laches, which is to avoid prejudice and unreasonable delay in bringing claims.[207]

To avoid this, Congress should amend the HEAR Act by either carving out New York's demand and refusal rule, making it so that

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evidence establishes that for nearly half a century prior to the commencement of this action" the plaintiffs did not take any action to recover the paintings).

[200] DAVID J. EISEMAN, ART LITIGATION DISPUTE RESOLUTION INSTITUTE NEW YORK COUNTY LAWYERS' ASSOCIATION, PANEL II: COMMENCING AN ACTION, PART 3: LACHES: THE LATEST TRENDS 4 (2008) https://www.golenbock.com/wp-content/uploads/2013/09/Outline_for_Panel_on_Art_Litigation_v2.pdf.

[201] *Id.*

[202] Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016).

[203] *Id.*

[204] *See* Barnes, *supra* note 95, at 633.

[205] *See id.*

[206] *See, e.g.*, Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 197 (2d Cir. 2019).

[207] *See* Eiseman, *supra* note 200, at 2.

claimants in courts applying New York law can choose to apply either the HEAR Act's discovery rule or New York's demand and refusal rule.[208] Alternatively, Congress could simplify the process even further by immediately replacing the discovery rule with New York's demand and refusal rule, thereby making it so that this claimant-friendly rule preempts each state's statute of limitations in the Nazi-looted art context, without a sunset provision. Doing so better preserves Congress' stated goals of ensuring that claimants have a chance to adjudicate Nazi-looted art cases on their merits whenever possible.

IV. PURELY PROCEDURAL PREEMPTION: IS THE HEAR ACT UNCONSTITUTIONAL?

There is a relatively new argument,[209] based primarily on non-commandeering principles laid out in *New York v. United States*[210] and *Printz v. United States*,[211] that the HEAR Act is unconstitutional because it violates Tenth Amendment principles of federalism by preempting a state cause of action on a purely procedural basis without a sufficiently larger "overall regulatory scheme that enables plaintiffs to vindicate their substantive rights."[212] Indeed, the language of the HEAR Act expressly does not create a federal cause of action,[213] does not provide any binding or clarifying language on choice of law analyses, and establishes no separate elements of proof or any other semblance of a larger regulatory structure

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[208] *E.g.*, Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311 (N.Y. Ct. App. 1991); *see* N.Y. C.P.L.R. 214 (McKinney 1996).

[209] *See* Charron, *supra* note 43.

[210] New York v. United States, 505 U.S. 144, 161 (1992) (finding that Congress is forbidden from directly compelling states to "enact and enforce a federal regulatory program").

[211] Printz v. United States, 521 U.S. 898, 935 (1997) (holding that certain provisions of the Brady Handgun Violence Prevention Act violated the Tenth Amendment).

[212] Charron, *supra* note 43, at 51.

[213] "Rule of Construction—Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law." Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016).

regarding restitution of Nazi-looted art.[214] Instead, it purely preempts state statutes of limitations in a narrow area of property disputes.[215] Without more regulatory structure, it is, at the very least, unclear as to whether the HEAR Act[216] is constitutional in its current form.[217] Accordingly, a defendant seeking to maintain possession of property falling under the purview of the HEAR Act may seek to have a judge find the HEAR Act unconstitutional.[218] That said, however,

> [i]t is equally settled that Congress can mandate certain procedural rules to implement substantive federal rights and causes of action that Congress has created, and Congress may likewise preempt any conflicting state procedural rules that could frustrate the federal right. The question in such cases is whether the procedural rule is "part and parcel of the remedy afforded" by the federal cause of action itself.[219]

In other words, Congress would have to amend the HEAR Act to first create a federal cause of action (say, restitution for Nazi-looted art, as defined in the HEAR Act statute); then Congress might be able to mandate certain procedural rights to implement the substantive cause of action that the HEAR Act created by its language.[220]

CONCLUSION

The HEAR Act passed the Senate with unanimous bipartisan support.[221] It seeks to gives claimants an opportunity to regain

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[214] Charron, *supra* note 43, at 26.

[215] Holocaust Expropriated Recovery Act of 2016 §§ 2-5.

[216] *Id.*

[217] *Id.*; Charron, *supra* note 43, at 67.

[218] Charron, *supra* note 43, at 67.

[219] Charron, *supra* note 43, at 26–27; *see* Bailey v. Cent. Vt. Ry., 319 U.S. 350, 354 (1943).

[220] Charron, *supra* note 43, at 67.

[221] JTA, *U.S. Senate Passes Bill to Help Recover Nazi-Looted Art*, N.Y. JEWISH WK. (Dec. 11, 2016, 6:09 PM), http://jewishweek.timesofisrael.com/u-s-senate-passes-bill-to-help-recover-nazi-looted-art/#KcV8qFRc800Vk25i.99.

certain property stolen during the Nazi era by imposing a national regime of statutes of limitations which revives claims that were previously barred by restrictive state statutes of limitations that do not account for the particular facts of a genocide, sowing uncertainty into the restitution process in unprecedented ways.[222] Almost three years to the day since the HEAR Act's passage, its effect on suits—many of which are still pending[223]—is still unclear, though it played a central and surprising role in *Reif v. Nagy*,[224] which may bode well for future claimants. Moreover, even if the HEAR Act itself does not provide a boost in litigation, it may well bring defendants to the negotiating table outside of court, now that previously time-barred claims have been resuscitated in certain instances and claimants can use the threat of litigation as leverage in dealing with especially obstinate defendants.[225]

If one thing is clear, however, it is that restitution in the Nazi-looted art context is incredibly complex and fact-specific. The law has certainly struggled to provide justiciable standards to provide certainty and predictability in this field. Indeed, one observer recently wrote that "[f]ew issues appear as ethically clear-cut and yet persistently intractable as the restitution of art looted during World War II."[226] Would-be claimants face significant obstacles, procedural and otherwise, when they seek restitution of property in this context.[227] The HEAR Act is borne of laudable goals,[228] but as

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[222] *See* Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (2016); Hoenig, *supra* note 13.

[223] *See, e.g.*, Philipp v. Fed. Republic of Ger., 894 F.3d 406, 418 (D.C. Cir. 2018); Gowen v. Helly Nahmad Gallery, Inc., 77 N.Y.S.3d 605, 632 (N.Y. Sup. Ct. 2018).

[224] Reif v. Nagy, 80 N.Y.S.3d 629, 633 (N.Y. Sup. Ct. 2018) (holding that plaintiffs brought timely action under the HEAR Act and that defendants' statute of limitations defense was insufficient).

[225] Barnes, *supra* note 95, at 634.

[226] Kaplan, *supra* note 171.

[227] *See* Hoenig, *supra* note 13.

[228] *See* Holocaust Expropriated Recovery Act of 2016, Pub. L. No. 114-308, § 3, 130 Stat. 1524, 1525–26 (2016) (stating that the purpose of the HEAR Act is to "ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner").

a review of even the recent cases in New York shows,[229] the Act is more often sidelined or not even mentioned in cases where some of its proponents might have foreseen it taking a more central role.[230] *Reif* provides hope,[231] but it is unclear whether it is an outlier or a real harbinger of changes to come.

One way the HEAR Act[232] might assume a more central role is by actually creating a federal cause of action and expanding the regulatory structure by which it controls the adjudication of Nazi-looted art claims, given the states' proven inability to adjudicate these claims on their merits in any uniform way.[233] These amendments should involve an immediate change to the statute of limitations in the HEAR Act[234] from the current discovery rule to a New York-style demand and refusal rule. This would also mean that the limitations would not sunset after an arbitrary number of years. Legislators might also consider the *Hulton v. Staatsgemaldesammlungen* court's suggestion that an exception be created to the FSIA that implements "[a] carve-out for victims . . . to take action against the downstream beneficiaries of . . . policies" that provide immunity to state actors, even where sales under duress could be proven,[235] though that would likely require an amendment to the FSIA, not the HEAR Act in its current (or even expanded) form.

If Congress did indeed seek to create more uniformity and certainty around Nazi-era art restitution cases, the HEAR Act,[236] almost three years in, is not living up to its billing. By interfering

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[229] *Cf.* Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 197 (2d Cir. 2019) (affirming lower court decision, but specifically noting that the HEAR Act, by its amended language, leaves open the option for defendants to assert laches and other equitable defenses). *See generally* Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304 (S.D.N.Y. 2018) (making no mention of the HEAR Act's recent passage while engaging in thorough choice of law analysis between Italian and New York law).

[230] Kaplan, *supra* note 171.

[231] *See* McBride et al., *supra* note 51.

[232] Holocaust Expropriated Recovery Act of 2016 §§ 2-5.

[233] Barnes, *supra* note 95, at 621.

[234] Holocaust Expropriated Recovery Act of 2016 §§ 2-5.

[235] Hulton v. Bayerische Staatsgemaldesammlungen, 346 F. Supp. 3d 546, 551 (S.D.N.Y. 2018).

[236] Holocaust Expropriated Recovery Act of 2016 §§ 2-5.

with state statutes of limitations in an uncertain way for a short, arbitrary period of time, the Act may end up creating more problems than it solves. But the solution is not to repeal the law and return these issues to the states. Instead, Congress should seek to build out the HEAR Act's regulatory structure even further,[237] in a way that accounts for particular facts of history's most extraordinary displacement of works of art[238] and honors the original goals of the HEAR Act's passage—to adjudicate claims in the Nazi-looted art context on the merits of those claims.[239]

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[237] *Id.*

[238] BAZYLER, *supra* note 2.

[239] Holocaust Expropriated Art Recovery Act of 2016 § 5.