
Notes

Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform to State Statutes of Limitations for Art Restitution Claims

This Note provides a scholarly engagement with the Holocaust Expropriated Art Recovery (HEAR) Act of 2016—new U.S. legislation that has important implications for the art market—including a detailed examination of the legislative history and its text. The Note describes how international public law commitments, political developments, and recent judicial decisions motivated the passage of the HEAR Act in a mere matter of months with overwhelming bipartisan support, including unanimous passage in the Senate with a voice vote. In order to understand the import of the HEAR Act, the Note offers a comprehensive description of the preexisting legal landscape for restitution of art in the United States, including international public law, past federal legislation, and state common-law writ of replevin. The Note also identifies the important and unique factual circumstances relating to the expropriation of art in the Nazi era that may justify treating claims for the return of art lost in the Nazi era differently from other restitution claims. The HEAR Act will bring dramatic and claimant-friendly changes to the existing legal landscape. But despite the widespread support for the new legislation, the Note highlights some unvoiced concerns. The HEAR Act represents a departure from previous balance struck between States and Federal government and that between bona fide purchasers (museums) and true owners. And, ultimately, the HEAR Act introduces a cloud of uncertainty as to its scope that will be left to judges and litigants to attempt to unravel.

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INTRODUCTION

Litigating to recover art lost during the Nazi era¹ became a little easier with the passage of the Holocaust Expropriated Art Recovery (HEAR) Act of 2016. Such lawsuits were never easy: simply to establish title to an artwork, a claimant must detail the provenance² of the artwork by marshalling evidence of original ownership and unlawful dispossession, and know of the current location and possession of the artwork. But even when these elements could be established, a claimant would face an additional—oftentimes fatal—procedural barrier to recovery of his or her artwork: state statutes of limitations.³ After passage of the HEAR Act, no longer will this be the case.

Passed unanimously by a Republican-controlled Congress and signed into law by President Obama on December 16, 2016, the HEAR Act⁴ temporarily replaces these state statutes of limitations with a uniform national six-year statute of limitations. For most⁵ claims covered by the HEAR Act, the national statute of limitations will begin to run on December 16, 2016 and will expire on December 16, 2022.

The HEAR Act will have a number of important implications for art restitution in the United States. The HEAR Act makes the U.S. litigation system more claimant-friendly, honors an international commitment⁶ to provide for a hearing on the merits,⁷ and harmonizes statutes of limitations across the United States. However, the HEAR

1. I use the term “Nazi era” to refer to the period between 1933 and 1945. It is unfortunate that the title of the HEAR Act makes reference to the Holocaust since the scope of the HEAR Act is not limited to art expropriated due to the Holocaust.

2. Provenance is defined as “the history of the ownership of a work of art.” *Provenance*, OXFORD ENGLISH DICTIONARY (3d ed. 2007), <http://www.oed.com/view/Entry/153408?redirectedFrom=provenance#eid> [<https://perma.cc/5LUP-CA73>].

3. Statute of Limitation is defined by Black’s Dictionary as “[s]tatutes of the federal government and various states setting maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.” *Statute of Limitation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

4. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Public Law No: 114-308 (2016) [hereinafter HEAR Act].

5. There is an exception provision in the HEAR Act, *see infra* notes 175–188 and 232–240 and accompanying text.

6. *See infra*, Part I.B.0.

7. *See infra* notes 30–33 and accompanying text.

Act displaces state law in only a narrow range of cases, creating a two-track structure for dealing with the return of lost art. The uncertainty of the two-track structure will impose a burden on all litigants, especially good-faith purchasers and judges who must determine the scope of the HEAR Act.

Regardless of whether the HEAR Act will ultimately prove beneficial, it has already proven consequential. Because of the outsized role that statutes of limitations play in litigation for the return of art lost in the Holocaust era, the HEAR Act has in the short-time since its passage already been regularly invoked in restitution litigations in the United States. The risk of litigation on clear title will impact good-faith acquirers of art, including museums, galleries, and private collectors. The impact on these important players in the art world will have repercussions for the international market for art.

This Note proceeds in three parts. Part I details the important factual and legal background necessary to understand the restitution process for art lost during the Nazi era. Part II summarizes the HEAR Act, analyzing both the legislative history and text of the HEAR Act. Finally, Part III discusses potential implications of the HEAR Act and how the HEAR Act has already affected litigation in the year since its passage.

I. BACKGROUND

This section provides an overview of the systematic expropriation of art and cultural property in the Nazi era that has made relocating and returning art and property lost during that period uniquely difficult. The section then surveys the legal backdrop against which the HEAR Act was passed.

A. Nazi Era Art Theft and Relocation

Because of the unique context in which art was lost during the Nazi era, U.S. law may need to treat restitution claims for art lost during the Nazi era differently from other restitution claims, even restitution claims for art lost during wartime or under other oppressive regimes. Nazi era art theft is different from other wartime art plunder due both to its magnitude and the provenance issues it created. The systematic looting and displacement of art across Europe, the destruction of evidence and witnesses, and the Iron Curtain made relocating lost art and establishing provenance very difficult. In many cases, only recently has artwork been able to be relocated and

good title established—making the recovery of art lost during the Holocaust salient even today, seventy-five years after the art was first lost.

1. Systematic Looting

During the Nazi era, art and other cultural property was systematically looted. Adolf Hitler had a background in art⁸ and imbued his peculiar views of art into Nazi ideology.⁹ Nazi-controlled Germany then employed the military and the power of the State¹⁰ to lead a systematic effort to seize artwork with the two-fold goal of creating “the largest private art collection in Europe”¹¹ and purging the world of art labeled, by him, as “degenerate.”¹² This State-run effort was extremely effective, leading some to label the “Nazi art confiscation program . . . the greatest displacement of art in human history.”¹³ By some estimates, the Nazis looted one-in-five pieces of Western art then in existence¹⁴ and that over 2.5 billion dollars of art was in-

8. Steven Kasher, *The Art of Hitler*, 59 OCTOBER 48, 51 (1992) (“Between the ages of nineteen and twenty-five Adolf Hitler worked as an artist. He painted and sold watercolors of views of Vienna and Munich. He produced several commercial advertisement and poster designs.”).

9. “No other modern person has exercised the same degree of personal control over the visual culture of his nation as did Hitler.” *Id.* at 51; *see generally*, HENRY GROSSHANS, *HITLER AND THE ARTISTS* (1983).

10. For example, Nazi Germany used Germany’s central bank to finance the art acquisition. Jessica Mullery, *Fulfilling the Washington Principles: A Proposal for Arbitration Panels to Resolve Holocaust-Era Art Claims*, 11 CARDOZO J. CONFLICT RESOL. 643, 646 (2010) (citing Hector Feliciano, *The Great Culture Robbery: The Plunder of Jewish-Owned Art*, in *THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST: CONFRONTING EUROPEAN HISTORY* 164, 169 (Avi Becker ed., 2001)) (“Germany’s central bank used approximately 40 million francs to buy art and antiques in France alone.”).

11. The “official Nazi confiscation service” was “known as the Einatzstab Reichsleiters Rosenberg” and “formed with the goal of creating the ‘largest private art collection in Europe.’” Mullery, note *supra* 10, at 645 (quoting Feliciano, *supra* note 10, at 166).

12. Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. REV. 473, 473 (2010) (arguing Nazis “collected” “worthy” European art to put in Hitler’s planned museum in Linz, Austria and “degenerate” art to be used to trade for more “worthy” art); *see generally* “DEGENERATE ART:” *THE FATE OF THE AVANT-GARDE IN NAZI GERMANY* (Barron, Stephanie ed., 1991).

13. Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT’L L. & DIS. RES. 243, 243 (2006); MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS* 202 (2003).

14. *See* Kaye, *supra* note 13, at 244; Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership*

involved in Nazi-looting schemes in 1945 dollars,¹⁵ the equivalent of about 33.2 billion in 2016 dollars.¹⁶

2. Relocating Stolen Artwork

Relocating and establishing title to artwork lost during the Nazi era has been difficult; in many cases, it is only recent technological advances, scholarship, and unsealing of records that made discovery of lost artwork even possible.

Because of the widespread and systematic way art was looted, for a long time it was difficult to account for, let alone establish title to, lost artwork.¹⁷ Even after Nazi Germany had surrendered, actions by other States and individuals made identifying and returning lost art difficult.¹⁸ As a consequence, even as late as 2006, it was estimated that over 100,000 works of art were still unaccounted for.¹⁹ And even for relocated art, weak provenance resulted in continued dispute over ownership.²⁰

But recent developments have made establishing title much easier. New books tracing provenance were written, such as *The Lost Museum*.²¹ New records and documents were unsealed and made publicly available for the first time.²² For instance, U.S. governmental records were finally declassified after the fall of the Iron Curtain.²³ Advances in technology made provenance research much eas-

of Nazi-Looted Art, 21 U. PA. J. INT'L ECON. L. 383, 383–84 (2000); see also Graefe, *supra* note 12, at 473 (“It is estimated that between 1938 and 1945, the Nazis looted between one-fourth and one-third of Europe’s art.”).

15. See Kaye, *supra* note 13, at 244.

16. DOLLARTIMES, <http://www.dollartimes.com/inflation/inflation.php?amount=1&year=1945> [https://perma.cc/JH5J-TRPA] (assuming standard inflation over the intervening period; rather than the estimated increase in the value of art, which may in some cases have outpaced inflation).

17. See Kaye, *supra* note 13, at 244.

18. For instance, the Soviet Union had an “official policy” of keeping what it discovered, increasing dispossession and unaccounted for art. See Graefe, *supra* note 12, at 474.

19. See Kaye, *supra* note 13, at 244.

20. *Id.* at 244.

21. *Id.* at 253–54; Thérèse O’Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 THE EUR. J. INT’L L. 65–66 (2011).

22. See Kaye, *supra* note 13, at 255; see also O’Donnell, *supra* note 21, at 65.

23. Bert Demarsin, *Let’s Not Talk about Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT’L L. 117, 121–23 (2011);

ier. Prior to the internet, provenance research was nearly impossible because records existed in various languages and were located in libraries, offices, and homes throughout Europe;²⁴ now the Nazi-Era Provenance Internet Portal assists claimants in their effort to establish title to lost art.²⁵

More and better evidence, increased scholarship, and new technology allowed claimants, sometimes for the first time, to establish title and bring claims for art restitution.²⁶ The growth of these claims exposed inadequacies in the current restitution schemes—in particular, the outsized role that the procedural time-barrier of statute of limitations plays in the outcome of these cases. The increased salience prompted the federal government to participate in a series of international gatherings and enact federal legislation, including, ultimately, passage of the HEAR Act.²⁷

B. Legal Landscape

Recovery of Holocaust expropriated artwork lies at an intersection of public international law, federal law, and state law. Understanding how these different sources of law interact in the context of the restitution of artwork lost during Nazi Germany is critical to understanding the need for, and the impact of, the HEAR Act. This section provides a general overview of the role of public international law, federal law, and state law in the restitution of art expropriated during the Nazi era.

Mullery, *supra* note 10, at 648–49 & n.35 (citing scholars who view the end of the Cold War as central to renewed efforts to restitution of art and cultural property expropriated during the Holocaust).

24. See O'Donnell, *supra* note 21, at 65.

25. American Alliance of Museums, NAZI-ERA PROVENANCE INTERNET PORTAL, <http://www.nepip.org/> [<https://perma.cc/SG7C-S7FW>]. In 1997, the state of New York established a specific unit of the NYS Department of Financial Services, the Holocaust Claims Processing Office, that aids claimants in their attempt to recover lost art, see *About the HCPO*, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, <http://www.dfs.ny.gov/consumer/holocaust/hcpindex.htm> [<https://perma.cc/YG2G-4STC>].

26. Restitution is the “return or restoration of some specific thing to its rightful owner or status.” *Restitution*, BLACK’S LAW DICTIONARY (10th ed. 2014).

27. See Demarsin, *supra* note 23, at 125; Paulina McCarter Collins, *Has “The Lost Museum” Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to “Do Justice” for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 124 (2002).

1. Public International Law

Beginning in the 1990s, western nations participated in a series of meetings dedicated to addressing the legal institutions that facilitate the recovery and return of art expropriated during the Nazi era. These gatherings resulted in a series of pronouncements that recognized the need to provide an international legal framework for dealing with property lost or stolen during the Nazi era; however, these pronouncements did not provide a transnational commitment as to what the legal framework ought to be.

(i) *The Washington Conference*. The United States hosted the first of these gatherings in Washington, D.C. in 1998,²⁸ later termed the Washington Conference on Holocaust-Era Assets.²⁹ This conference brought together forty-four nations to discuss the recovery of property lost during the Nazi era. The conference ultimately agreed to embrace eleven principles—the Washington Principles—to improve the recovery of lost artwork.³⁰ The principles call for increased

28. See Demarsin, *supra* note 23, at 136–37.

29. *Id.*

30. The Washington Conference produced a document which set forth eleven principles to which every nation subscribed: “In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.

access to information³¹ and the development of “processes” with liberal rules of evidence.³² The end goal being to ensure a “fair and just solution.”³³ But the principles were “non-binding commitments” and explicitly contemplated varied implementation by the “differing legal systems” of the signatory nations.³⁴ Importantly, the principles did not create any uniform transnational legal norms that would be binding on the signatory nations,³⁵ and many nations, including the United States, have arguably failed to abide by the Washington Principles.³⁶ The conference promised future gatherings, creating hope for future development of a concrete transnational structure for dealing with these restitution claims.³⁷ Despite the promises for future refinement, subsequent international gatherings and declarations only reiterated many of the principles of the Washington Conference.

(ii) *Resolution 1205*. On November 4, 1999, the Council of Europe³⁸ adopted a Resolution on Looted Jewish Cultural Property (Resolution 1205).³⁹ Resolution 1205 broadened the Washington Principles to include not only formal “confiscation” but “all possible causes of loss.”⁴⁰ Resolution 1205 spoke in vague and nonbinding terms and explicitly rejected the one-size-fits-all international scheme entertained in the Washington Principles.⁴¹ Instead, it specifically

10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Washington Conference Principles on Nazi-Confiscated Art, COMMISSION FOR LOOTED ARTS IN EUROPE, <http://www.lootedartcommission.com/Washington-principles> [<https://perma.cc/2TK5-8RSA>] [hereinafter Washington Principles].

31. *Id.* princs. 1–3, 5–6.

32. *Id.* princ. 4.

33. *Id.* princ. 11 (“processes”); princ. 4 (liberal rules of evidence); princ. 8, 9 (“just and fair solution”).

34. *See* Kaye, *supra* note 13, at 246.

35. *Id.*

36. *See* Mullery, *supra* note 10, at 655–58.

37. *See* Demarsin, *supra* note 23, at 137.

38. *Who we are*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/about-us/who-we-are> [<https://perma.cc/2J5B-3PX4>].

39. Eur. Parl. Ass., *Looted Jewish Cultural Property*, Res. 1205 (1999), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16726&lang=en> [<https://perma.cc/M7PU-8LWZ>] [hereinafter Resolution 1205].

40. Demarsin, *supra* note 23, at 141.

41. *Id.* at 152 (contrasting the Washington principles hope of a future international

embraced nation-based solutions, emphasizing the diversity of legal systems and procedures.⁴²

(iii) *Vilnius Forum*. Nations gathered in Lithuania for the Vilnius Forum on the weekend of October 3–5, 2000. This gathering resulted in the Vilnius Forum Declaration.⁴³ The declaration rejected the installation of a task force to monitor each individual nation’s respective development of policies to address art and property expropriated during the Nazi era;⁴⁴ instead it called for “international expert meetings” where ideas could be exchanged across nations about the effectiveness and failures of their own domestic procedures.⁴⁵ The Vilnius Forum Declaration did not even contemplate changes to the existing legal norms, opting simply to reaffirm prior international statements. Just as in the Washington Principles, the Declaration merely issued nonbinding “encouragement” to individual nation-states to develop their own systems for returning art lost during the Nazi era.⁴⁶

(iv) *Terezín Declaration*. On June 30, 2009, the international community met in Terezín to once again discuss the return of property lost during the Nazi era. At this meeting, the gathered nations released another statement—the Terezín Declaration.⁴⁷ The Terezín Declaration included only “voluntary commitments” and reaffirmed the need to provide provenance research support and a process for restitution that would result in “just and fair solutions.”⁴⁸

But this time the document also adopted the position that “just and fair solutions” include a determination on the merits.⁴⁹ By doing

framework for solving these problems with Resolution 1205’s explicit rejection).

42. Res. 1205, *supra* note 39, ¶¶ 10–15.

43. Vilnius Forum Declaration, <http://www.lootedartcommission.com/vilnius-forum> [<https://perma.cc/5AAT-RFJK>].

44. *Id.* ¶ 1 (recognizing each nation’s sovereignty in dealing with looted Jewish art).

45. *Id.* ¶ 5.

46. *Id.* ¶¶ 3, 6. (“3. In order further to facilitate the just and fair resolution of the above mentioned issues, the Vilnius Forum asks each government to maintain or establish a central reference and point of inquiry to provide information and help on any query regarding looted cultural assets, archives and claims in each country 6. The Vilnius Forum welcomes the progress being made by countries to take the measures necessary, within the context of their own laws, to assist in the identification and restitution of cultural assets looted during the Holocaust era and the resolution of outstanding issues.”).

47. Terezín Declaration, June 30, 2009, 4–5, <http://www.holocausteraassets.eu/program/conference-proceedings/declarations/> [<https://perma.cc/EH49-4HXX>].

48. *Id.*

49. *Id.* at 4 (“[M]ake certain that claims to recover such art are resolved expeditiously

so, some scholars argue that the Terezín Declaration created an “international obligation” to ensure a determination on the merits.⁵⁰ Notwithstanding this scholarship, there has been a general unwillingness among U.S. courts to adopt public international law arguments in restitution cases for art lost during the Nazi era.⁵¹ But at least one case has used these general international agreements in conjunction with U.S. federal statutes to conclude that the United States has adopted a national policy for dealing with property lost during Nazi Germany, which preempts state laws specific to the restitution of art lost during the Holocaust.⁵²

2. U.S. Congressional Legislation

U.S. policy for dealing with the art and artifacts displaced during the Nazi era has evolved over time. During the immediate aftermath of World War II, the United States issued the Roberts Commission Report, supported the return of such art and artifacts to their countries of origin, and allowed those countries to determine ownership.⁵³ During the late 1980s and 1990s, Congress took a more active approach towards the recovery of art and cultural property lost during the Nazi era. After the Iron Curtain fell and records were released, restoring art and other stolen property to the rightful owners became more politically salient.⁵⁴ The increased salience motivated Congress to pass legislation addressing art and property lost during the Nazi era.

Congress passed the Holocaust Victims Redress Act of

and based on the facts and merits of the claims and all the relevant documents submitted by all parties.”).

50. Jennifer Anglim Kreder, *State Law Holocaust-Era Art Claims and Federal Executive Power*, 105 NW. U. L. REV. COLLOQUY 315, 322 (2011).

51. See Demarsin, *supra* note 23, at 152. The Terezín Declaration is not a treaty, much less a self-executing one, so it does not create formal legal obligations. See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 722–23 (1995).

52. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 961–68 (9th Cir. 2010); *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (holding that the California law related to insurance was preempted by the President's ability to control foreign affairs).

53. THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS, REPORT OF THE AMERICAN COMMISSION FOR THE PROTECTION AND SALVAGE OF ARTISTIC AND HISTORIC MONUMENTS IN WAR AREAS 148 (1946).

54. See Kaye, *supra* note 13, at 258.

1988.⁵⁵ This piece of legislation confirmed U.S. commitment to the return of property, including art, stolen by the Nazis.⁵⁶ It did not provide a cause of action for the return of such property,⁵⁷ but it did appropriate significant funds to research property lost during the Nazi era.⁵⁸

A decade later Congress passed the U.S. Holocaust Assets Commission Act of 1998.⁵⁹ This piece of legislation created the Holocaust Commission, which was charged with conducting research into the property stolen during the Holocaust era.⁶⁰ The Commission, in fulfillment of its mandate, released the report, *Plunder and Restitution: The U.S. and Holocaust Victims' Assets*, which detailed the findings of the Commission as to, among other things, the current practice of restitution of Nazi-looted art in the United States.⁶¹ The commission focused mainly on the "Federal government's handling of Holocaust victims' assets."⁶²

That very same year, Congress also passed the Nazi War Crimes Disclosure Act,⁶³ which created the Nazi War Criminal Records Interagency Working Group. This working group was charged with sifting through classified and other governmental records to make information regarding Nazi War Crimes, including Nazi art

55. Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998), <https://www.congress.gov/105/plaws/publ158/PLAW-105publ158.pdf> [<https://perma.cc/FYL3-EFJB>].

56. *Id.* § 202 ("[A]ll governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.").

57. Christa Roodt, *State Courts or ADR in Nazi-Era Art Dispute: A Choice "More Apparent than Real"?*, 14 CARDOZO J. CONFLICT RESOL. 439 n.106 (2012).

58. Stephanie Cuba, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 449 (1999) (describing the Holocaust Victims Redress Act, *supra* note 55, as providing five million dollars to research WWII looting).

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

60. 22 U.S.C. § 1621 (2011).

61. PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES, *PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS* (2000), http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/Home_Content.html [<https://perma.cc/34T7-ZBB2>].

62. *Id.* at ch. VII.

63. Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, 112 Stat. 1859 (codified at 5 U.S.C. § 552 (2016)).

theft, available to the public.⁶⁴

This series of legislation reflected the increasing national interest in the recovery and return of art lost during the Nazi era. But as with the international conferences, the federal legislation expressed more of an ideological commitment to the restitution of property expropriated during the Nazi era, rather than a willingness to affect significant change to the federal law. As a result, the claims for restitution continued to be based in state law, rooted in the traditional common law action of replevin.⁶⁵

3. State Law

Notwithstanding the many international declarations and federal statutes addressing restitution of art lost during the Nazi era, state law continues to be the most relevant source of law for art restitution in the United States. When the claimant resorts to litigation, the dispute will be resolved through a run-of-the-mill state replevin action.⁶⁶ Replevin is “an action for prepossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.”⁶⁷ In order to recover under an action in replevin, a claimant must establish rightful title to the artwork—*i.e.* “wrongfully taken or detained by the defendant.”⁶⁸

But even if a claimant can demonstrate title to a piece of artwork,⁶⁹ a claimant must also overcome a procedural time-bar: a state statute of limitations. At common law, a thief’s title is void;⁷⁰ therefore, a thief cannot transfer title, even to a good-faith purchaser.⁷¹

64. *Id.*

65. There has also been use of alternative-dispute resolution, such as mediation. *See, e.g.,* Roodt, *supra* note 57, at 439–44 (discussing ADR in the United States).

66. Of course, many claims are resolved through alternative-dispute resolution. *See* Mullery, *supra* note 10, at 644; Roodt, *supra* note 57, at 440–43.

67. *Replevin*, BLACK’S LAW DICTIONARY (9th ed. 2009).

68. *See, e.g.,* Solomon R. Guggenheim Found v. Lubell, 77 N.Y.2d 311, 317–18 (1991) (setting forth the cause of action for replevin in New York State).

69. Kaye, *supra* note 13 at 256 (2006) (“Given the Nazis’ systematic elimination of their victims, and the passage of time since the war, the original owners are rarely available to establish ownership. The claim therefore must be asserted by an heir, perhaps a distant descendant, who is not likely to have direct personal knowledge of the painting’s ownership and provenance.”).

70. Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2440 (1994).

71. Patricia Y. Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between*

But the statute of limitations procedurally bars the true owner from bringing a claim to recover the artwork. Therefore, even though the title has not transferred to the good-faith purchaser, the good-faith purchaser has priority of claim against all but the true owner, who is barred from asserting his or her claim against the good-faith purchaser. Thus, a good faith purchaser of stolen art may acquire effective title if the statute of limitations expires prior to the filing of the lawsuit.

The statute of limitations is often a “central issue,” as it is the primary defense used in art restitution cases.⁷² Its importance is even greater in art restitution cases dealing with art lost during the Holocaust, where widespread destruction of evidence and persons has made establishing a claim to title a lengthy and arduous process.⁷³

There are a variety of rationales for having statutes of limitations. First, statutes of limitations facilitate prompt filing by “punish[ing] the original owner’s delay.”⁷⁴ Second, they protect against bad or stale evidence.⁷⁵ Third, they promote commerce by alleviating concerns regarding provenance.⁷⁶ But these benefits must be balanced against the harsh reality that statutes of limitations bar meritorious claims.

A statute of limitations period begins to run when the cause of action accrues. Each state defines, usually by statute, the length of the time period⁷⁷ and when the cause of action accrues—*i.e.* when the

Original Owners and Good-Faith Purchasers of Stolen Art, 50 DUKE L.J. 955, 978 (2001).

72. Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 211 (2008); Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT’L L. & BUS. 167, 197 (2005).

73. See *supra* notes 17–27 and accompanying text; for an anecdotal tale, see generally SIMON GOODMAN, *THE ORPHEUS CLOCK: THE SEARCH FOR MY FAMILY’S ART TREASURES STOLEN BY THE NAZIS* (2015).

74. Bibas, *supra* note 70, at 2441.

75. Redman, *supra* note 72, at 210.

76. *Id.* at 211.

77. For instance, Pennsylvania had a two-year statute of limitations whereas Maryland had a three-year statute of limitations in the case of *Erisoty v. Rizik*, No. 93-6215, 1995 U.S. Dist. LEXIS 2096 (E.D. Pa. Feb. 23 1995). See Reyhan, *supra* note 71, at 1005–06. See, e.g., THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES*, 219–220 (1st ed. 2007) (describing three options for when the statute of limitations begins to run: (a) time of conversion, (b) discovery—actual or constructive, (b) demand refusal). When a claimant seizes a court, the court must determine which state law to apply, which usually is the law where the art piece is located based on traditional choice-of-law principle *lex situs*. See generally, Michael S. Finch, *Choice-of-Law and Property*, 26 STETSON L. REV. 257, 271–80 (1996).

time begins to run.⁷⁸ In some states, it begins to accrue at the time of the purchase, even if done in good faith, because the “wrongfulness immediately triggers the clock of the statute of limitations.”⁷⁹ However, equitable doctrines rooted in the “fraudulent concealment” of the cause of action will toll the statute of limitations.⁸⁰ In other states, the “wrongfulness is postponed” and the claim does not begin to accrue until after “demand and refusal” or “discovery.”⁸¹ Most states have incorporated a discovery rule for when the statute of limitations begins to run. But the most important state in the art world, New York, uses a demand and refusal rule.⁸² The application of “discovery” and “demand and refusal” rules is often left to the discretion of the court.⁸³

a. Discovery Rule

Today, most jurisdictions use a discovery rule for claims for art restitution.⁸⁴ Under a discovery rule, the statute of limitations begins to run after the original owner discovers or should have discovered through the use of reasonable diligence the possessor or location of a piece of stolen art.⁸⁵ Because of constructive discovery, a claimant may need to undertake an “extensive search” in order to demonstrate the due diligence necessary to prevent the statute of limitations from running.⁸⁶ Due to the highly fact-specific nature of a “due diligence” determination, a discovery rule ultimately places a lot of dis-

78. When a claimant seizes a court, the court must determine which state law to apply, which usually is the law where the art piece is located based on the traditional choice-of-law principle *lex situs*. See generally, Finch, *supra* note 77, at 271–80. When a claimant files suit in his or her home forum, the law to apply will usually be the law of the state where the art is located, usually the domicile of the owner of the art. Since many times the adverse claimant is a museum, the law to apply will be New York law, as many museums are located in New York.

79. Reyhan, *supra* note 71, at 978.

80. *Id.*

81. Kaye, *supra* note 13, at 260.

82. See *infra* Part I.B.3.ii.

83. Kaye, *supra* note 13, at 258.

84. O’Keeffe v. Snyder, 416 A.2d 862, 868–70 (N.J. 1980); Alexandra Minkovich, *The Successful Use of Laches in the World War II-Era Art Theft Disputes: It’s Only a Matter of Time*, 27 COLUM. J.L. & ARTS 349, 355 (2004); see generally O’Keeffe v. Snyder, 416 A.2d at 865; Paula A. Franzese, “Georgia on Mind” — Reflections on O’Keeffe v. Snyder, 19 SETON HALL L. REV. 1, 9–10 (1989) (summarizing the salient facts).

85. Redman, *supra* note 72, at 219.

86. O’Keeffe, 416 A.2d at 868–70 (N.J. 1980); Minkovich, *supra* note 84, at 356–60.

cretion with the judge to determine when the claim accrues.⁸⁷ Additionally, the burden rests with the claimant to demonstrate why the limitation period should be extended.⁸⁸

One recent case out of Michigan, *Detroit Inst. of Arts v. Ullin*,⁸⁹ exemplifies the common procedural obstacles that the discovery rule poses to claimants seeking the restitution of art lost during the Holocaust era. *Ullin* presents the story of a Jewish woman, Martha Nathan, who, upon the death of her husband in 1922, inherited numerous artworks, including *Les Becheurs* (The Diggers) (1889).⁹⁰ In 1937, Mrs. Nathan moved to Paris, France to escape Nazi persecution.⁹¹ When she returned to Germany, she was forced to sell her home below fair market value, turn over six paintings to the Staedel Art Institute, and surrender other household items.⁹² A few months later, back in France, she sold *Les Becheurs* to three art dealers.⁹³ Her descendants, in an effort to recover property losses from the Holocaust era, instituted suit for the restitution of *Les Becheurs*. But the Eastern District Court, applying Michigan state law, held that the suit had been procedurally time-barred since 1941—in the middle of World War II.⁹⁴ In order for Mrs. Nathan to have had her claim heard on the merits, she would have needed to bring this claim while Nazi Germany still occupied much of continental Europe. This case illustrates the mismatch between the traditional statute of limitations doctrine of discovery and restitution for art lost during the Nazi era.

b. New York's Demand and Refusal Rule

The primary alternative to a discovery rule is a demand and refusal rule. New York Courts first articulated a demand and refusal rule to a case of art theft in *Menzel v. List*.⁹⁵ In 1932, the Menzels

87. Redman, *supra* note 72, at 219.

88. *Id.*

89. *The Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at *1–2.

94. *Id.* at *2–3 (holding that the suit accrued on the date of sale, 1938, and therefore the claim was barred by the statute of limitations which had run in 1941).

95. *Menzel v. List*, 253 N.Y.S.2d 43 (N.Y. App. Div. 1964).

purchased a painting by Chagall in Belgium.⁹⁶ But in 1940, as Nazi Germany invaded Belgium, the Menzels left the painting behind.⁹⁷ In 1955, the Perls purchased the same painting in Paris, and later that same year, sold the painting to Mr. List.⁹⁸ In 1962, Ms. Menzel demanded that Mr. List return the painting, and when he refused, she sued in replevin.⁹⁹ Despite the fact that over twenty years had passed since the painting had been lost, the lower court held that Ms. Menzel had right of priority to the title of the painting under the demand and refusal rule. Due diligence was not an issue.¹⁰⁰

A demand and refusal rule has the advantage of clarity and straightforwardness: if the claim was filed within a statutorily-defined number of years¹⁰¹ after demand and refusal, the statute of limitations does not bar the suit.¹⁰² Because it is a rule, demand and refusal eliminates some judicial discretion. Reduced judicial discretion makes the application of the statute-of-limitations procedural bar more predictable and certain. It also alleviates some concern that judges will, with the benefit of hindsight, second-guess decisions made many years prior.¹⁰³ While this rule governs only New York, it has an outsized importance in the art restitution context because New York City is a mecca of the art world.¹⁰⁴

Because a demand and refusal rule would otherwise allow a claimant to sit indefinitely on a claim, New York law permits a laches defense,¹⁰⁵ which allows the current possessor to estop the lawful owner from bringing her suit if the possessor can demonstrate: (1) the plaintiff unreasonably delayed filing suit, and (2) that the defend-

96. *Menzel v. List*, 246 N.E.2d 742, 743 (N.Y. Ct. of Appeals 1969).

97. *Id.* at 744.

98. *Id.*

99. *Id.*

100. *Id.* at 743.

101. Three years is the length of the statute of limitations period in New York Law for personal property. N.Y. PERS. PROP. Law §94 (McKinney) (repealed 1964).

102. *O'Keeffe*, 416 A.2d at 868–70 (N.J. 1980); Minkovich, *supra* note 84, at 361.

103. This is in contrast to the discovery rule, which requires judges to apply a reasonableness standard.

104. Minkovich, *supra* note 84, at 360 (emphasizing the importance of New York for the art world); Linda F. Pinkerton, *Due Diligence in Fine Art Transactions*, 22 CASE W. RES. J. INT'L L. 1, 4 (1990) (“The demand and refusal rule has recently spawned considerable jurisprudence on the recovery of stolen artworks because the location of one of the principal art markets in the world is New York.”).

105. See, e.g., *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44, 46–47 (S.D.N.Y. 1990); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 431 (N.Y. 1991).

ant has suffered a harm as a result of that delay.¹⁰⁶ Laches adds uncertainty to the bright-line demand and refusal rule, especially since the level of diligence required “depends on the circumstances of the case.”¹⁰⁷ Because laches introduces diligence as a defense rather than as part of the pleading, the burden of proof rests with the defendant instead of the claimant.¹⁰⁸ That fact, in conjunction with the high bar that courts have set for a successful laches defense, has made it nearly insurmountable for defendants in cases involving art lost during the Nazi era.¹⁰⁹ Courts have recently entertained arguments that plaintiffs unreasonably delayed filing suit; however, courts have been unwilling to find that the defendant suffered harm as a result of that delay.¹¹⁰

The demand and refusal rule may be unjust to good-faith purchasers who may face suit indefinitely since title is quieted only after a formal demand is made.¹¹¹ The fact that a laches defense is rarely successful coupled with “demand and refusal” effectively allows owners to “eviscerate[] limitations periods” by “postponing . . . demand indefinitely,” thereby “harming innocent buyers.”¹¹²

II. HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016

Congress responded to the problem of the application of state statutes of limitations to claims for restitution of art during the Nazi era by passing the Holocaust Expropriated Art Recovery Act of 2016 (HEAR). This part provides the important background to the HEAR

106. For example, Minkovich, *supra* note 84, at 360 (identifying loss of evidence, *Harley-Davidson, Inc. v. O'Connell*, 13 F. Supp. 2d 271 (N.D.N.Y. 1998) or material change in position that occurred during the delay, *Tri-Star Pictures, Inc. v. Unger*, 14 F. Supp. 2d 339 (S.D.N.Y. 1998); *see also* Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes Over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 28 (1998).

107. *DeWeerth*, 836 F.2d at 110; *Lubell*, 569 N.E.2d at 429–30 (N.Y. 1991).

108. This can be contrasted with the discovery rule; *see* note 88 and accompanying text.

109. Minkovich, *supra* note 84, at 374.

110. *Id.*

111. A good-faith purchaser could bring a declaratory judgment action to quiet title. Simon J. Frankel & Ethan Forrest, *Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims – A Defense*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 279 (2013). But that would require the good faith purchaser to identify the rightful owner of the artwork and to have a desire to alert him or her of a claim for ownership of the artwork.

112. Bibas, *supra* note 70, at 2445–46 (1994)

Act, including the legislative history and textual structure of the HEAR Act.

A. Legislative History

On April 7, 2016, Senators Ted Cruz (R-Texas), John Cornyn (R-Texas), Chuck Schumer (D-N.Y.), and Richard Blumenthal (D-N.Y.) introduced the Holocaust Expropriated Art Recovery Act of 2016.¹¹³ In justifying the need for the legislation, Senator Cruz identified international commitments to providing Nazi victims and their descendants a right to have their disputes resolved in a fair and just manner on the merits.¹¹⁴ The Senators also emphasized the bipartisan support for the bill.¹¹⁵

Two months later, the Senate Judiciary Subcommittee on the Constitution and the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights, and Federal Courts held a hearing on the HEAR Act.¹¹⁶ The hearing included testimony from: author Simon Goodman,¹¹⁷ director Minca Dugot of Christie's, Ambassador Ronald S. Lauder, actress Helen Mirren, and the President for the

113. Press Release, Senator Ted Cruz, Cruz, Senators Introduce Bill to Help Return Art Stolen by Nazis (April 7, 2016), https://www.cruz.senate.gov/?p=press_release&id=2624 [<https://perma.cc/B86Y-JJ3T>] [hereinafter Cruz Press Release]. Ultimately, many Senate leaders co-sponsored the legislation: Sen. Mike Rounds (R-SD), Sen. Orrin Hatch (R-UT), Sen. Al Franken (D-MN), Sen. Dianne Feinstein (D-CA), Sen. Richard Durbin (D-IL), Sen. Thom Tillis (R-NC), Sen. Amy Klobuchar (D-MN), Sen. Cory Booker (D-NJ), Sen. Chuck Grassley (R-IA), Sen. Patrick Leahy (D-VT), Sen. Rob Portman (R-OH), Sen. Kirsten Gillibrand (D-NY). *S. 2763 – Holocaust Expropriated Art Recovery Act of 2016 – Cosponsors*, CONGRESS.GOV (Dec. 6, 2016), <https://www.congress.gov/bill/114th-congress/senate-bill/2763/cosponsors> [<https://perma.cc/5YP5-HNRX>].

114. “[They] are resolved in a fair and just manner on the merits, and are not barred by state statutes of limitations and other procedural defenses.” Press Release, *supra* note 113.

115. “I am proud to have worked closely with my colleagues from both sides of the aisle to introduce this bill.” *Id.*

116. Senate Hearing Concerning HEAR Act, Senate Judiciary Subcomm. on Constitution & Oversight, Agency Action, Fed. Rights, and Fed. Cts., C-SPAN (June 7, 2016), <https://www.c-span.org/video/?410737-1/actress-helen-mirren-testifies-recovery-art-confiscated-holocaust> [<https://perma.cc/7DD7-QB6M>]; *Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the Senate Judiciary Subcomms. on Constitution & Oversight, Agency Action, Fed. Rts., and Fed. Cts.*, 114th Cong. 1 (2016), <http://www.judiciary.senate.gov/meetings/s-2763-the-holocaust-expropriated-art-recovery-act-reuniting-victims-with-their-lost-heritage> [<https://perma.cc/5MPT-MCZE>] [hereinafter Subcommittee Hearing].

117. In addition, he was a past claimant for recovery of his family's artwork, the famous Guttman collection, expropriated during the Holocaust.

Commission for Art Recovery, Agnes Peresztegi.¹¹⁸

Ms. Peresztegi argued for legislation even more claimant-friendly than the HEAR Act. First, citing *Simon v. Republic of Hungary*¹¹⁹ for the proposition that “expropriation” itself constitutes genocide, she argued that a claim for the recovery of art lost during the Nazi era should *never* be procedurally barred by an application of the statute of limitations.¹²⁰ She therefore criticized the HEAR Act for implying that a good faith acquirer of expropriated art and cultural property could ever acquire rightful title, which in her view, represented a shift in U.S. policy.¹²¹ Second, Ms. Peresztegi argued that the HEAR Act should not extinguish claims that would otherwise be available under certain state laws that have “statute of limitation rules more favorable to claimants,” such as New York’s demand and refusal rule.¹²² She wanted any legislation to be a one-way ratchet to aid all claimants in all instances.

Ms. Dugot explained that restitution issues still exist in the market because much of the art—especially pieces of less historical or financial significance—circulated from dealer to dealer and was absorbed into private collections, causing the art to become “unshackled” from its history.¹²³ She also mentioned that this problem was not in particular a Jewish problem but rather a problem that extended to anyone “persecuted” by the Nazis.¹²⁴ She described how

118. Subcommittee Hearing, *supra* note 116.

119. Illicit taking of art during the Holocaust “did more than effectuate genocide or serve as a means of carrying out genocide. Rather, we see the expropriation as themselves genocide.” *Simon v. Republic of Hung.*, 812 F.3d 127, 142 (D.C. Cir. 2016).

120. Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the Subcomms. on the Constitution, Subcommittee on Oversight, Agency Action, Fed. Rts. and Fed. Courts, 114th Cong. 1 (2017) (testimony of Agnes Persztegi, President, Commission for Art Recovery), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Peresztegi%20Testimony.pdf> [<https://perma.cc/7AQY-LRU5>] [hereinafter Testimony of Agnes Peresztegi].

121. Testimony of Agnes Peresztegi, *supra* note 120, at 2 n.2 (quoting “Restitution of Identifiable Property,” Military Government Law 59 (MGL No. 59) (“[I]nterests of other persons who had no knowledge of the wrongful taking must be subordinated” and “protection of purchasers in good faith . . . shall be disregarded.”)).

122. *Id.* at 3.

123. Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the Subcomm. on the Constitution, Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts., 114th Cong. 1 (2017) (testimony of Monica Dugot, International Director of Restitution, Senior Vice President, Christie’s), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Dugot%20Testimony1.pdf> [<https://perma.cc/B387-LNJ4>] [hereinafter Testimony of Monica Dugot].

124. Testimony of Monica Dugot, *supra* note 123, at 1–2. The language was changed

technology and databases greatly advanced the field of provenance research.¹²⁵ Lastly, she explained that the best practice in auction houses, such as Christie's, is to avoid "costly and time-consuming litigation" by resolving disputes through informal negotiated settlements.¹²⁶ The implication here being that the HEAR Act may not have an important impact on the practice of auction houses.

Mr. Goodman, whose grandfather and grandmother had been murdered in concentration camps, testified about his own personal attempt to recover his grandfather's art in foreign jurisdictions.¹²⁷ He offered his opinion that, according to his personal experience, U.S. legal procedures governing art restitution had proven to be more claimant-friendly than foreign legal procedures.¹²⁸ But he also testified that in his experience the procedural defenses in the United States are still hard to overcome, given the difficulty of provenance research. He expressed that the HEAR Act would be desirable insofar as it removes these unfair defenses.¹²⁹

In his testimony, Ambassador Lauder placed the HEAR Act in context with U.S. international commitments. Ambassador Lauder argued that the HEAR Act is a step to reaffirm commitment to the Washington Principles.¹³⁰ He condemned museums that used procedural devices to bar claims, believing these tactics contravene the spirit of the Washington Principles.¹³¹ As a countermeasure, he advocated the shaming of museums that continue to hold Nazi-looted

from a limited definition of what constituted Nazi persecution to one that was much broader perhaps in part because of this testimony, see *infra* notes 171–174 and accompanying text.

125. Testimony of Monica Dugot, *supra* note 123, at 3.

126. *Id.* at 4; see generally Mullery, *supra* note 10; Roodt, *supra* note 57, at 440–43.

127. See generally Simon Goodman, *The Orpheus Clock: The Search for My Family's Art Treasures Stolen by the Nazis* (2015).

128. Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the Subcomm. on the Constitution, Subcomm. on Oversight, Agency Action, Fed.Rts. and Fed. Cts., 114th Cong. 1 (2017) (testimony of Simon Goodman), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Goodman%20Testimony.pdf> [<https://perma.cc/633R-GG8Y>] [hereinafter Testimony of Simon Goodman].

129. *Id.* at 2.

130. Holocaust Expropriated Art Recovery Act Heritage: Hearing on S. 2763 Before the Subcomm. on the Constitution, Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts., 114th Cong. 2 (2017) (testimony of Ambassador Ronald S. Lauder, Chairman of the Council, World Jewish Restitution Organization), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Lauder%20Testimony.pdf> [<https://perma.cc/MAB7-U4MY>] [hereinafter Testimony of Ambassador Lauder].

131. *Id.* at 2; but see, Frankel & Forrest, *supra* note 111; Graefe, *supra* note 12.

art.¹³² He also emphasized that the HEAR Act does nothing to affect the underlying merits of the claims but simply provides an opportunity for a hearing on the merits.¹³³

Dame Helen Mirren merely testified about the movie *Woman in Gold* and the difficulty that Maria Altmann (whom she played in the movie) faced in attempting to recover her family's Gustave Klimt, *Portrait of Adele Bloch Bauer I*, a painting of her aunt.¹³⁴ She also emphasized her goal to continue to bring to the public's attention legal issues relating to restitution of lost art and property, as *Woman in Gold* continues to do.¹³⁵

The Senators on the committee highlighted varied concerns during the hearing. Senator John Cornyn emphasized the international commitment that the United States made at the Washington Conference and Terezín Conference.¹³⁶ Senator Schumer emphasized the moral atrocities of the Nazis and that the HEAR Act provides a little justice.¹³⁷ Senator Cruz highlighted the lack of resources that victims have to trace the provenance of lost artwork and the need to temporarily remove time-based defenses such as laches and statute of limitations.¹³⁸ He also emphasized the benefit of national uniformity in processing these claims.¹³⁹ Senator Blumenthal focused on how "arbitrary" the statute of limitations applied in the context of art lost during the Nazi era.¹⁴⁰ Only Senator Mike Lee seemed to offer up some possible concerns over federal legislation.

132. "The question is no museum wants to be looked on as keeping Nazi-looted art. And I think that the more we can expose the various museums who are holding it, I think we win the battle." Subcommittee Hearing, *supra* note 116, at 1:07:32.

133. Testimony of Ambassador Lauder, *supra* note 130, at 3. Of course, this ignores the practical consequence that avoiding dismissal will incentivize museums to settle even where the claim may not be meritorious because they will want to avoid the costs of discovery.

134. Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the Subcomm. on the Constitution, Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts., 114th Cong. 1 (2017) (testimony of Dame Helen Mirren, actress), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Mirren%20Testimony.pdf> [<https://perma.cc/FF4D-F5TT>] [hereinafter Testimony of Helen Mirren].

135. *Id.* at 1.

136. "The HEAR Act will ensure that the U.S. government meets its commitment to these international pledges." Subcommittee Hearing, *supra* note 116, at 00:2:49–00:3:27.

137. "It is a drop of justice in what was an ocean of injustice." Subcommittee Hearing, *supra* note 116, at 00:8:05.

138. *Id.* at 00:11:00.

139. *Id.*; Cruz also mentioned the HEAR Act as falling within the international commitments.

140. Subcommittee Hearing, *supra* note 116, at 00:18:00.

He pressed the need to justify the intervention of federal law in art restitution claims, traditionally governed by state law.¹⁴¹ He also inquired about how this legislation would apply or affect legislation with respect to other genocides.¹⁴²

After the Committee Hearing, the Senators revised the text of the HEAR Act.¹⁴³ With these changes, on September 15, 2017, the Bill was unanimously approved by the Senate Judiciary Committee.¹⁴⁴ On September 22, 2017, the corresponding Bill¹⁴⁵ was introduced in the House by Bob Goodlatte (R-VA) and Jerrold Nadler (D-NY), both emphasizing the need for justice.¹⁴⁶

The Committee on the Judiciary submitted a Report to the Senate recommending passage of the Holocaust Expropriated Art Recovery Act of 2016.¹⁴⁷ The report identifies two goals. First, the report claims that the HEAR Act “ensure[s] that laws governing claims to Nazi-confiscated art and other property further U.S. policy as set forth in the Washington Conference Principles, Holocaust Victims Redress Act, and the Terezín Declaration.”¹⁴⁸ Second, the HEAR act “ensure[s] 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.”¹⁴⁹ The report explains the operation of the HEAR Act as intended by the Senate¹⁵⁰ and the important textual amendments to the Bill.¹⁵¹ The report also contains analysis from the Congressional Budget Office, which concluded that budget effects of passage would be minimal.¹⁵²

On December 6, 2016, the U.S. House of Representatives

141. *Id.* at 01:15:00.

142. *Id.*

143. *See* Part II.B.

144. *Holocaust Expropriated Art Recovery (HEAR) Act*, COMMISSION FOR ART RECOVERY, <http://www.comartrecovery.org/hear-act> [<https://perma.cc/R5F9-R5BZ>].

145. Holocaust Expropriated Art Recovery Act, H.R. 6130, 114th Congress (2016).

146. Press Release, Goodlatte and Nadler Introduce Legislation to Help Recover Art Confiscated During the Holocaust (Sept. 22, 2016), <https://nadler.house.gov/press-release/goodlatte-and-nadler-introduce-legislation-help-recover-art-confiscated-during> [<https://perma.cc/88KQ-ZYWL>].

147. S. REPT. NO. 114–394 (2016).

148. *Id.* at 6. *See also* Part I.B.1 (Washington Conference and Terezín Declaration) and Part I.B.2 (Holocaust Victims Redress Act).

149. S. REPT. NO. 114–394, at 6.

150. S. REPT. NO. 114–394, at 7–11.

151. *Id.* at 6–7.

152. Possibly increasing revenue from increased filing fees. *Id.* at 12.

passed its version of the Bill. On December 10, 2016, the U.S. Senate unanimously passed its version of the Bill.¹⁵³ On December 16, 2016, President Obama signed the HEAR Act into Law.¹⁵⁴

B. Text

The HEAR Act is a relatively short piece of legislation with only five sections.¹⁵⁵ Section 1 merely provides the title of the Act—Holocaust Expropriated Art Recovery Act of 2016.¹⁵⁶

Section 2 enumerates a series of eight congressional findings. The first seven of these findings provide legal and factual background necessary to understand the HEAR Act's effect on the restitution of art lost during the Nazi era.¹⁵⁷ The last finding, however, offers a Congressional determination that alternative-dispute resolution (“ADR”) is the best vehicle for resolving disputes between owners and good-faith purchasers of art lost during the Nazi era.¹⁵⁸ Thus, even after the HEAR Act, Congress believes that “just and fair resolutions” will be achieved in a “more efficient and predictable manner” with ADR rather than with civil litigation.¹⁵⁹

Section 3 identifies the two purposes for passing the HEAR Act.¹⁶⁰ First, the HEAR Act realigns U.S. law governing the restitution of Nazi-confiscated art with U.S. law and international agree-

153. Commission for Art Recovery, *supra* note 144.

154. HEAR Act.

155. *Id.*

156. *Id.* § 1.

157. See the topics covered *infra* in Part I; HEAR Act § 2, finding (1) (describing the massive displacement of art); findings (2)–(5) (describing national law and international gatherings on the subject of restitution of holocaust expropriated art); finding (6) (describing the difficulties imposed by the statute of limitations, citing *Ullin* as an example); finding (7) (describing the inability for states to craft their own solution, citing *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 961–68 (9th Cir. 2010)).

158. “(8) While Litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.” HEAR Act § 2.

159. A court rejected an attempt by a litigant to argue that this congressional finding reflects a public policy preference for ADR that would preclude a restitution case from proceeding through the judicial system. *Alan Phillip, et. al v. Germany*, 248 F. Supp. 3d 59 (D.D.C. Mar. 31, 2017). See HEAR Act § 2.

160. HEAR Act § 3.

ments.¹⁶¹ Second, the HEAR Act eliminates “unfairness” and allows claims to be resolved in a “just and fair manner.”¹⁶²

Section 4 defines five key terms: (1) “actual discovery,” (2) “artwork or other property,” (3) “covered period,” (4) “knowledge,” and (5) “Nazi persecution.”¹⁶³ Three of these terms—“artwork or other property,” “covered period,” and “Nazi persecution”—affect the scope of the HEAR Act—*i.e.* for which claims the HEAR Act will apply. The “covered period” is between January 1, 1933 and December 31, 1945.¹⁶⁴

The HEAR Act details with specificity the types of objects included as “artwork or other property” for its purposes.¹⁶⁵ The HEAR Act defines “artwork or other property” in the following way:

(2) Artwork or other property – The term “artwork or other property” means

(A) pictures, paintings, and drawings;

(B) statutory 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 sound, photographic, and cinematographic archives and mediums; and

(F) sacred and ceremonial objects and Judaica¹⁶⁶

By contrast, the original definition was an inclusive enumerated list: “artwork and other cultural property *includes* any painting, sculpture, drawing, work of graphic art, print, multiples, book, manuscript, ar-

161. “(1) To 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-Confiscated Art, the Holocaust Victims Redress Act, and the Terezín Declaration.” *Id.* § 3.

162. “(2) 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.” *Id.* § 3.

163. *Id.* § 4.

164. *Id.*

165. Originally, the HEAR Act simply defined the term “artwork and other cultural property” as “any painting, sculpture, drawing, work of graphic art, print, multiples, book, manuscript, archive or sacred or ceremonial object.” Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 4 (as introduced in Senate, Apr. 7, 2016).

166. Hear Act § 4.

chive or sacred or ceremonial object.”¹⁶⁷ The change to the way the HEAR Act is defined suggests that the definition of “art and cultural property” is intended to be an exclusive list.¹⁶⁸ By creating separate subsections, the subcategories are fleshed out in greater detail: so instead of relying upon “painting” to represent a type of object covered by the HEAR Act, the Act now covers under (2)(A), “pictures, paintings, and drawings”—all of which share some similar qualities but are technically different.¹⁶⁹ In this new definition, the HEAR Act defines “artwork or other property” broadly, including “applied art” for instance.¹⁷⁰

The HEAR Act includes a broad definition of “Nazi persecution.”¹⁷¹ Under the language of the HEAR Act, “the term ‘Nazi persecution’ means 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 or associates, during the covered period.”¹⁷² Originally, the HEAR Act focused only on persecution “based on race, ethnicity or religion” but that limiting language was removed and replaced with “Nazi ideology.”¹⁷³ Additionally, the original version of the HEAR Act only covered losses caused by “Nazis or their allies.” But that has been broadened and fleshed out to include any loss caused by “the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates.”¹⁷⁴

The other two definitions provided for under Section 4 reflect the operation of the statute of limitations—“actual discovery” and “knowledge.” The statute of limitations begins to run upon the discovery of the property. For the HEAR Act, “actual discovery” is defined as knowledge,¹⁷⁵ and “knowledge” as “actual knowledge.”¹⁷⁶

167. S. 2763 § 4.

168. Compare HEAR Act § 4 (using “means”), with S. 2763 § 4 (using “includes”).

169. Compare HEAR Act § 4, with S. 2763 § 4.

170. HEAR Act § 4.

171. *Id.*

172. *Id.*

173. Comparing HEAR Act § 4, with Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 4 (as introduced in Senate, Apr. 7, 2016). For a clearer picture, track changes are available here: *HEAR Act Revisions*, SULLIVAN & WORCESTER LLP, [http://cdn2.hubspot.net/hubfs/878449/B2079277.pdf?t=1477510565195\[https://perma.cc/4EHN-RHZ4\]](http://cdn2.hubspot.net/hubfs/878449/B2079277.pdf?t=1477510565195[https://perma.cc/4EHN-RHZ4]) [hereinafter *Hear Act Revisions*].

174. HEAR Act § 4, ¶ 5.

175. *Id.* § 4 (“The term ‘actual discovery’ means knowledge.”).

176. *Id.* (“The term ‘knowledge’ means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to

The HEAR Act requires *actual* discovery; it does not permit *constructive* discovery.¹⁷⁷ Now, the tolling for statute of limitations only begins under the HEAR Act after the claimant knows of an actual claim of right over the “art or property” in question. The requirement of actual discovery eliminates the potential hindsight bias that may infect an inquiry into the due diligence of the claimant.¹⁷⁸

Section 5(a) defines the statute of limitations and how and when it will apply. The HEAR Act creates a uniform, bright-line, six-year statute of limitations that starts after the “actual discovery”¹⁷⁹ by the “claimant”¹⁸⁰ of both “the identity and location of the artwork”¹⁸¹ and “a possessory interest of the claimant in the artwork.”¹⁸² That is, the claimant must know of the object and where it is located and that he or she has claim to title of the object. The statute of limitations displaces any state or federal law, but permits the invocation of equitable doctrines such as laches.

The statute of limitations provided in Section 5(a) of the HEAR Act will govern claims that arise after, and claims that were pending at the time of the date of enactment, December 16, 2016.¹⁸³ It will also resuscitate and then apply to claims that had been previously procedurally time-barred under state or federal law. If, before the date of enactment, the claimant had the requisite knowledge¹⁸⁴

actual knowledge thereof.”).

177. The HEAR Act eliminates the legal fiction of constructive discovery used in a traditional discovery rule, see discussion in *supra* notes 84–88 and accompanying text.

178. *Id.*

179. HEAR Act § 4.

180. HEAR Act § 5(a).

181. The HEAR Act introduces a complication when there is possible misidentification of the stolen artwork, which I ignore for purposes of this Note. HEAR Act § 5(b) (“[I]n a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to occur on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.”).

182. The HEAR act requires knowledge of a “possessory interest of the claimant in the artwork or other property.” HEAR Act § 5(a). The original proposed Bill merely required “information or facts sufficient to indicate that the claimant has a claim for a possessory interest.” Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. (as introduced in Senate, Apr. 7, 2016).

183. HEAR Act § 5(d).

184. By requisite knowledge, I am referring to the knowledge required in § 5(a), which includes: (1) the identity of object, (2) its location, (3) claimant has a possessory interest. HEAR Act § 5(a).

and the claim was time barred on the date of enactment, the HEAR Act will revive the claim with Section 5(a) governing the statute of limitations and “actual discovery” deemed the date of enactment.¹⁸⁵ Additionally, if the claimant had requisite knowledge prior to the enactment of the Act and the claim was not barred, then § 5(a) will govern the statute of limitations, with “actual discovery” deemed the date of enactment.¹⁸⁶ Thus, claimants in both of these classes of claims will have six years from the date of enactment—until December 16, 2022—to file a claim for restitution.¹⁸⁷

However, the HEAR Act also includes an exception. The HEAR Act will not resuscitate a claim if: (1) the claim was procedurally time-barred on the date of enactment, (2) the claimant or a predecessor-in-interest had the requisite knowledge on or after January 1, 1999, and (3) for six-years after January 1, 1999, the claim was not procedurally time-barred.¹⁸⁸ Thus, the HEAR Act will not resuscitate recently ripe claims where the claimant had the requisite knowledge but opted not to bring the claim. This exclusion reflects equitable considerations—where much of the impetus for the passage of the HEAR Act is not applicable and the prejudice would seem to be great.

Lastly, the revised HEAR Act clarifies that the Act will sunset on January 1, 2027.¹⁸⁹ After January 1, 2027, the legal landscape would revert back to the preexisting state law claims with the potential for procedural bars to a hearing on the merits. Thus, the HEAR Act only operates for a short period of time.

185. HEAR Act § 5(c)(1).

186. HEAR Act, § 5(c)(2). The effect of this is to displace the demand and refusal rule of New York and to extend the statute of limitations for states that operate under the discovery rule—most states are 3–4 years.

187. But, because of the sunset provision of the HEAR Act and the nature of the demand and discovery rule, it is possible that a claimant could delay demand until after the HEAR Act sunsets, and then be permitted to bring it under the demand & refusal rule. But, perhaps, in this situation, the equitable doctrine of laches would come in and preclude such a claim from being brought.

188. HEAR Act § 5(e).

189. HEAR Act § 5(g). “This Act shall cease to have effect on January 1, 2027, except that this Act shall continue to apply to any civil claim or cause of action described in subsection (a) that is pending on January 1, 2027. Any civil claim or cause of action commenced on or after that date to recover artwork or other property described in this Act shall be subject to any applicable Federal or State statute of limitations or any other Federal or State defense at law relating to the passage of time.”

III. IMPLICATIONS

Part III seeks to identify the import of the HEAR Act. First, I look at the justification and need for the HEAR Act's federal intervention in a traditional state domain. Second, I look at how the HEAR Act may affect the incentives of good faith purchasers, such as museums. Third, I explore how the threshold determinations required to trigger the HEAR Act may undermine the goal of the HEAR Act to provide clarity, predictability, and uniformity to art restitution cases. In the process, I note the recent cases where the HEAR Act has already been invoked in litigation.

A. Federal Intervention in a Traditional State Domain

One of the main justifications for the passage of the HEAR Act was a view that federal action was needed because (a) current state law was inadequate to fulfill the commitments made by the Washington Conference and that (b) states themselves were incapable of remedying such inadequacies.

1. Inadequacy of State Law

State law was deemed inadequate for a number of reasons. First, the discovery rule is viewed as an inappropriate application of the statute of limitations in the context of the restitution of Holocaust era expropriated art. Because of the difficulty in tracing and establishing provenance for art lost during the Nazi era,¹⁹⁰ the discovery rule oftentimes procedurally time-barred claimants from bringing claims for restitution. This procedural barrier was seen by many to violate international commitments and notions of fairness and justice.

Second, states provide different rules governing the timing of when and how a claim for the restitution of stolen art becomes stale.¹⁹¹ Because of this lack of uniformity, claimants' ability to seek a hearing on the merits of their claim for art restitution depended on the choice-of-law governing the restitution action. Having likelihood of success determined by arbitrary factors like the location of the artwork or residency of the claimant is unfair.¹⁹² Additionally, because of the different state rules for the statute of limitations and the

190. See generally Part I.B.

191. See generally Part I.C.

192. Of course, geographic variation is inherent to the U.S. system of federalism.

importance of statutes of limitations in these cases, replevin actions involved heavy choice-of-law litigation, adding uncertainty and expense.¹⁹³

2. *Von Saher* & The Need for Federal Intervention

Assuming that state law on statute of limitations was inadequate for the aforementioned reasons, the federal government still may not have needed to interfere. In general, states themselves could have remedied any potential shortfall in their respective systems by amending their rules with respect to the tolling of statute of limitations for claims for the restitution of Nazi era art.¹⁹⁴ But the Ninth Circuit struck down California's attempt to ease the statute of limitations barrier for replevin claims for art lost during Nazi Germany.

Congress cited this Ninth Circuit court case, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954,¹⁹⁵ as justification for the HEAR Act. *Von Saher* involved an attempt by California to ease the procedural barriers through the passage of legislation. In 2002, California, recognizing a need to address the application of California's statute of limitations in litigation for the restitution of art and property lost during the Nazi era, passed California Civil Procedure Code § 354.3,¹⁹⁶ which eliminated its statute of limitations rule for claims to recover lost art. Because California already had a specific statute that created the cause of action for theft of personal property that has "artistic significance,"¹⁹⁷ the new legislation merely eliminated the statute of limitation bar for any suit commenced before 2010 that was brought under the cause of action provided under the section.¹⁹⁸ The Ninth Circuit struck down the legislation, deeming the legislation preempted by federal law.¹⁹⁹ The

193. See generally Reyhan, *supra* note 71.

194. HEAR Act § 2 (citing *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010)).

195. *Von Saher*, 592 F.3d at 954.

196. Art and Artists—Holocaust-Era—Limitation of Actions, 2002 Cal. Legis. Serv. Ch. 332 (A.B. 1758) (WEST); Ca. Legis. 332 (2002).

197. CAL. CIV. PROC. CODE § 338(2) (West 2016) ("The cause of action in the case of theft, as described in Section 484 of the Penal Code, of an article of . . . artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft."). Pinkerton, *supra* note 104, at 3 (describing California as unique).

198. CAL. CIV. PROC. CODE §§ 354.3 (b) (cause of action), (c) (removing statute of limitation bar).

199. The passionate dissent took issue with the characterization of the conflict between

court held that the federal policy as expressed through its legislation preempted any state legislation on the subject of the return of property lost during the Nazi era.²⁰⁰ Thus, assuming the Ninth Circuit was correct,²⁰¹ the *federal* government may need to respond to address the application of traditional statute of limitations rules to claims for restitution of art lost during the Nazi era.

But it is not clear that *Von Saher* is correct. Many scholars have criticized the decision.²⁰² Judge Pregerson, in dissent, argued powerfully that § 354.3 did not attempt to target wartime actions or war reparations, but rather dealt with restitution of stolen property, an area traditionally reserved to the state.²⁰³ Even though § 354.3 may have an incidental effect on foreign relations, it clearly concerns “the statute of limitations on common law property claims, certainly an area of traditional state competence.”²⁰⁴ Moreover, it does not seem to comport with traditional field preemption, which has been described as “not easily established” and when “recognized, the field is

state and federal policy. Instead, it viewed the amendment of California Code of Civil Procedure as a means to communicate from the legislature to the state courts the way it should apply the discovery rule in Holocaust era restitution cases. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (Pregerson, J., dissenting).

200. See Part I.C.2.iii; *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009) (held that field preemption precluded a state from altering its traditional bases of statute of limitations for holocaust era art, citing *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003)). Tsoilik Kazandjian, *The War of Art, Not the Art of War: Von Saher v. Norton Simon Museum of Art at Pasadena and the Continuing Fight to Retrieve Nazi-Looted Art in California*, 43 LOY. L.A. L. REV. 1477, 1482 (2010).

201. *Von Saher*, 592 F.3d at 957. The Supreme Court denied certiorari and let stand a decision that invalidated California’s attempt to amend statute of limitations in Nazi-related art restitution cases on the ground of field preemption. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 564 U.S. 1037 (2011).

202. Many scholars have criticized the decision as doctrinally incorrect. 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. 375 n.10 (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); Kreder, *supra* note 50, at 325 (“The State Department has never had any intention of shutting down courts as an avenue of restitution. Nor did the California legislature open courts up for the first time. The legislation simply tried to prevent courts from misapplying discovery rule doctrines to dismiss cases that should not be dismissed. In other words, § 354.3 seeks to make California’s plaintiff time-bar policy clearer. This is proper because there has never been a federal effort to preempt state authority on the matter.”); Kazandjian, *supra* note 200, at 1485–89 (2010).

203. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1032 (9th Cir. 2009) (Pregerson, J., dissenting); Kazandjian, *supra* note 200, at 1485.

204. See Kreder, *supra* note 50, at 326.

often narrowly defined.”²⁰⁵

More importantly, it is far from clear that a single Court of Appeals decision should dispose of any debate. Congress is clearly not bound by a judicial determination as to Congressional intent so it is peculiar that Congress would cite to a Court of Appeals decision as somehow forcing congressional action. Even if Congress had intended to preempt state legislation as *Von Saher* suggests, the more logical approach would be for Congress to affirm the panel’s understanding of congressional intent. Instead Congress offers the case as the final word and mandating congressional action, as if to blame the HEAR Act, and its erosion of state sovereignty, on the Judiciary.

3. Alternative Federal Responses

Even if states’ statutes of limitations as applied to replevin claims for art lost during the Holocaust were inadequate and states themselves were prevented from solving this problem,²⁰⁶ Congress could have responded in an alternative fashion that achieved similar ends without interfering as much with state interests.

Congress could have passed legislation that would have allowed or encouraged states to establish alternative procedures for restitution claims for art lost during the Nazi era. For instance, if Congress believed *Von Saher* was incorrect, Congress could just clarify by passing legislation specifying that states are permitted to tinker with their own accrual and tolling rules for restitution claims for art lost during the Nazi era. This alternate solution would allow states to continue to serve as laboratories and adjust their own rules regarding accrual and tolling to the context of the restitution of art lost during the Nazi era.

If Congress wanted uniformity—to end the laboratory-testing in the states—it is not clear that the HEAR Act best accomplishes that. The HEAR Act’s temporary displacement of state law for the aforementioned narrow category of claims for a small window of time introduces immense uncertainty. From one view, this interference appears *de minimus*; but, in many ways, this more granular interference is more disruptive since state courts must be able to identify the cases that fall under the HEAR Act and understand the rules that govern that exception. Congress could have provided a cause of

205. Richard H. Fallon, Jr. et. al, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 679 (7th ed. 2015).

206. This was due to *Von Saher* (individual state solutions) and coordination problems (uniformity).

action in federal courts for the HEAR Act. This would withdraw a series of cases from state courts, but in doing so, would permit state courts and state law to continue to apply a uniform standard for all art recovery that would fall within their jurisdiction. Even if federal legislation was needed after *Von Saher*, it is unclear as to whether the HEAR Act achieved these ends in the best way.

B. Impact on Good Faith Purchasers

The HEAR Act also rebalances the relationship between true owners and good faith purchasers. From the perspective of a potential claimant, the HEAR Act removes an unjust time-based procedural barrier; from the perspective of a good faith purchaser, it precludes the invocation of an important defense.

Because of this rebalancing, the HEAR Act may have an important effect on how one paradigmatic good faith purchaser, a museum, operates.²⁰⁷ Museums function as charitable trusts and therefore owe fiduciary duties to the general public.²⁰⁸ The trustees have a duty of care to investigate the provenance of works where there is risk that the work had been ill-gotten.²⁰⁹ But once an artwork has been acquired, the duty of loyalty to the public would militate against deaccessioning a work of art unless legally required. Because the deaccessioning would remove the artwork from the public domain, a trustee would be acting contrary to the public interest to have the work deaccessioned.²¹⁰ Thus, if a claim is clearly time-barred then a museum trustees' fiduciary duty to the general public likely would require the museum trustees to bring a declaratory judgment or at the very least not to enter into negotiation with the true owner.²¹¹

But with the passage of the HEAR Act, for claims where the procedural time-bar has been lifted, a museum trustee's fiduciary duties of loyalty and care may demand that the museum trustee enter in-

207. Subcommittee Hearing, *supra* note 116, at 1:09:30 ("So I think if the HEAR Act would remove that obstacle and would allow the leaders of the museum to hear a legal advice which would be, yes, this is a valid claim and you may lose it in court, then they would be much more willing to sit down and reach a fair and reasonable resolution.").

208. Graefe, *supra* note 12, at 493 (citing Patty Gerstenbligh, *The Fiduciary Duties of Museum Trustees*, 8 COLUM. J.L. & ARTS 175, 176 (1983)).

209. Graefe, *supra* note 12, at 493–95; *see, e.g., In re Estate of Dwight* 681 P.2d 563, 567 (1984) (breached duty of care for failing to investigate).

210. Graefe, *supra* note 12, at 497–98 (duty of loyalty and duty of care could be violated in the deaccession of artwork).

211. *See Frankel & Forrest, supra* note 111, at 279.

to discussion and negotiation with the true owner. Due to political pressure or simply the cost of litigation, it may simply not be in the best interest of the good faith purchaser to continue to litigate the issue once the case moves to the merits. In such instances, the HEAR Act may reorient a museum trustee's fiduciary duties of loyalty and care away from invocation of statutes of limitations and declaratory judgments and in favor of negotiation.²¹² By permitting all claims to be heard on the merits in conjunction with the attendant public pressure, the HEAR Act will undeniably lead museums to negotiate and settle cases, especially where the settlement involves only recognition.²¹³

However, this outcome is desirable only if the additional claims are meritorious. Many scholars in this area have raised concerns over the invocation of time-based procedural defenses by good-faith purchasers to defeat restitution claims for Holocaust expropriated art.²¹⁴ But others have defended the use of such time-based procedural defenses as a means of separating meritorious claims from unmeritorious claims,²¹⁵ without which false or unmeritorious claims may receive settlements from good faith purchasers who want to simply avoid costs of litigation or public shaming.²¹⁶

Whether this consequence of the HEAR Act is desirable or undesirable is ultimately empirical. It depends upon whether one believes that the current use of statute of limitation defenses is more often employed by museums as a sword to defeat meritorious claims from true owners who unfortunately failed to meet the statute of limitations requirement or as a shield to defend itself against unmeritori-

212. Graefe, *supra* note 12, at 493–500.

213. See, e.g., Judith H. Dobrzynski, *Settlement in Dispute Over a Painting Looted by Nazis*, N.Y. TIMES (Aug. 14, 1998), <http://www.nytimes.com/1998/08/14/us/settlement-in-dispute-over-a-painting-looted-by-nazis.html> [<https://perma.cc/25BG-MNXX>].

214. Testimony of Agnes Peresztegi, *supra* note 120, at 1. See, e.g., Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37 (2009) (arguing against museum invocation of technical defenses to defeat claimant recovery); see also, Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 691 (2011) (arguing the same).

215. But see a critique of Kreder and Demarsin's failure to recognize the valid role for procedural defenses for good faith purchasers. Frankel & Forrest, *supra* note 111, at 279 (offering up a defense of using statute of limitations and declaratory judgments on the basis of (1) a fiduciary duty of museum directors to the public and (2) the reality that not all claims are equally meritorious—some claims brought by descendants were arguably deemed to be unmeritorious by predecessors-in-interest).

216. Testimony of Ambassador Lauder, *supra* note 130 (advocating public shaming of museums).

ous claims early in the stage of litigation and at minimal cost.

C. Burden on Judiciary: Determining the Scope of the HEAR Act

In four ways, the HEAR Act undermines the certainty of providing a hearing on the merits for claims in replevin of Holocaust expropriated art. First, the HEAR Act only applies to Holocaust expropriated art—(a) specific objects (b) that were expropriated for a certain reason by (c) certain individuals, during (d) a defined time-period. Second, the HEAR Act includes an “exception”—it does not revive claims where (a) the claim was procedurally time-barred on December 16, 2016, (b) the claimant or a predecessor-in-interest had the requisite knowledge on or after January 1, 1999, and (c) for six-years after the date of knowledge²¹⁷ the claim was not procedurally time-barred. Third, because of the sunset provision of the HEAR Act, the demand and refusal rule may revive claims that were or could have been deemed procedurally time-barred under the HEAR Act’s statute of limitations. Fourth, the revision of the HEAR Act to permit equitable defenses such as laches, if embraced by courts sympathetic to the good-faith purchasers, may minimize the desired benefits of passage of the HEAR Act.

1. Holocaust Expropriated Art

As the title suggests, the HEAR Act only applies to Holocaust expropriated art. In order to determine whether or not the HEAR Act applies, a court must first determine whether or not the claim in replevin is for Holocaust expropriated art. Section three of the HEAR Act defines what constitutes Holocaust expropriated art for purposes of the HEAR Act.

First, the HEAR Act only applies to “art or other property.” Unlike the original bill proposed in the Senate, the enacted legislation has a broad and detailed definition that will make it likely that a claimant will be able identify a classification in the definition that an object will fall within.²¹⁸ In addition, the more comprehensive definition will make application easier. As mentioned above, the definition also appears to be an exclusive list of items. The exclusivity of the list suggests that a claimant will need to identify a category that

217. January 1, 1999, if the date when the knowledge was acquired was before January 1, 1999.

218. See Part II.B (describing § 4(2) of HEAR Act enumerating six categories of “art or property” that would fall under the HEAR Act).

its lost property falls under to invoke the HEAR Act.

Second, the HEAR Act only applies to “art or other property” that was lost due to “Nazi persecution.” Unlike the Act’s broad and detailed definition of “art or other property,” the definition of “Nazi persecution” is vaguer and its application less certain. Instead of enumerating specific behavior or events that would constitute “Nazi persecution,” the HEAR Act simply requires demonstration that the loss of the cultural object was the result of “Nazi ideology.”²¹⁹ As proposed, the original bill included an enumerated list,²²⁰ which would have created a bright-line rule for the type of Nazi persecution that would trigger the application of the HEAR Act. While such a rule may add certainty and predictability, such a list would inevitably have been under-inclusive. For instance, a claimant could simply fail to marshal sufficient evidence to prove that the predecessor-in-interest had been subjected to one of those particular forms of persecution, even though a predecessor’s loss had clearly been the result of Nazi persecution. Such a possibility may have simply been unacceptable to Congress. Perhaps this change reflects an unwillingness to leave open the possibility of precluding individuals who had their objects taken from them and would otherwise qualify for the procedural time-bar exception under the HEAR Act but are unable to identify a basis for their persecution under “race, ethnicity, or religion” or some other variate. Alternatively, perhaps it was politically infeasible to enumerate a more comprehensive list analogous to the “art or other property” definition.²²¹ In effect, this makes the HEAR Act take on a more standards-like, equitable track with respect to “Nazi persecution” that will leave it to the court to delimit the contours of “Nazi ideology.”

By contrast, the HEAR Act identifies with specificity the entities that qualify as persecutors under the HEAR Act. For purposes of the HEAR Act, the persecutors include: “the Government of Germa-

219. See notes 172–175 and accompanying text.

220. As in the original proposed act, with religion, ethnicity, and race, see discussion in Part II.B.

221. The HEAR Act ended up passing unanimously. But if, say, a more comprehensive list included “sexual orientation” as a basis for “Nazi persecution,” then, given the legislative fight over inclusion of “sexual orientation” in federal anti-discrimination legislation, a similar divisiveness could have occurred over the HEAR Act. See generally, Erwin J. Haeberle, *Swastika, Pink Triangle and Yellow Star: The Destruction of Sexology and the Persecution of Homosexuals in Nazi Germany*, 17 J. SEX RESEARCH 270, 287 (1981); Simon Pathé, *7 Republicans Flipped Their Vote on LGBT Amendment, Setting Them Up for Attack*, ROLL CALL (May 19, 2016, 3:40 PM), <http://www.rollcall.com/news/politics/democrats-pounce-vulnerable-republicans-suspected-switching-vote-lgbt-protections> [https://perma.cc/Y398-XVCT].

ny, its allies or agents, members of the Nazi Party, or their agents or associates.”²²² The definition of the class of persecutors tracks the changes to the definition of “art or other property” in that it attempts to clarify by specifying, with greater detail, what would fall within the categories. This requires the claimant to demonstrate that the persecution arose out of someone with a direct connection to either the formal Nazi Party or the Government of Germany²²³ in order to have the HEAR Act apply. Because proving such a connection may be difficult in light of the evidentiary problems discussed above, some claims that ought to benefit from the HEAR Act may be precluded from doing so.

Third, the HEAR Act only applies to “art or other property” lost during the period of January 1, 1933 to December 31, 1945.²²⁴ This time period is clear and easy to apply. However, it may be difficult to identify exactly when a work of art was lost. Because of the widespread destruction of evidence and forgery of documents, a claimant may not be able to prove that the “art or property” was irrefutably lost during the covered period.

The HEAR Act does not restrict its scope of application in other dimensions that seem pertinent. For instance, the HEAR Act contains no geographic or jurisdictional restrictions on where the loss occurred to fall under coverage of the HEAR Act. It also does not define “lost” as it had in the original proposed bill.²²⁵ Thus, the HEAR Act could conceivably cover art sold in the United States between 1933 to 1945 by U.S. residents so long as such a sale could be fairly traced back to some Nazi persecution.

Litigation over the scope of the HEAR Act has played out prominently in a recent case, *Zuckerman v. The Metropolitan Museum*.²²⁶ In an opposition to a motion to dismiss, the plaintiff-claimant invoked the HEAR Act arguing that the legislation resuscitated her

222. HEAR Act § 4(5).

223. This may run up against the act of state doctrine. *See generally*, Lucy Dunn Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi-Looted Art*, 11 *UCLA J. INT’L L. & FOREIGN AFF.* 281, 305 (2006).

224. HEAR Act § 4 (defining “covered period”); *see supra* note 166 and accompanying text.

225. “The term ‘unlawfully lost’ includes 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.” Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 4 (as introduced in Senate, Apr. 7, 2016).

226. *Zuckerman v. The Metropolitan Museum*, Case No. 1:16-cv-07665 (S.D.N.Y. 2016).

restitution claim.²²⁷ The plaintiff argued that the HEAR Act covered the artwork at issue because the artwork was sold to a Paris dealer by a resident of Italy under duress from the threat of the fascist Italian government and under clear Nazi influence, as evidenced by visits during that time period by Heinrich Himmler and Adolf Hitler.²²⁸ This threat of future persecution caused the predecessor-in-interest to sell the artwork at less than market value.²²⁹ Defendants responded that Plaintiff's position embraces too capacious a scope for the HEAR Act. The artwork was located "safely in Switzerland" and "sold on the open market through a dealer to private individuals in Paris, without any involvement by the Nazis or Fascists."²³⁰ The brief concluded that "the HEAR Act's reference to art 'lost . . . because of Nazi persecution' cannot be stretched to encompass a voluntary transaction for cash . . . a negotiated sale on the open market through a Paris dealer to two French dealers, and where no Nazis or Fascists took actions to compel or restrict that Sale, or were otherwise involved in it."²³¹ Both litigating positions, though widely divergent, are tenable based on the language of the HEAR Act. Courts will therefore play a pivotal role in determining the scope of the HEAR Act—and thereby its overall import.

Because of the dual-track system that the HEAR Act creates for replevin claims for lost property, understanding the scope of the HEAR Act is crucial to understanding its effect. The HEAR Act in some instances provides very clear guidelines for what it covers; in other instances, the HEAR Act is less clear and its application will be determined by the courts charged with implementing it.

2. Exception Provision

The exception provision²³² dictates that the HEAR Act will

227. *Zuckerman v. The Metropolitan Museum*, Case No. 1:16-cv-07665 (S.D.N.Y.) (Motion for Opposition) (Jan. 27, 2017).

228. *Id.*

229. *Id.*

230. *Zuckerman v. The Metropolitan Museum*, Case No. 1:16-cv-07665 (S.D.N.Y.) (Reply in Further Support of Motion to Dismiss) (Feb. 27, 2017).

231. *Id.*

232. *See* HEAR Act § 5 (e):

EXCEPTION—Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act 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 set forth in subsection (a) on or after January 1, 1999; and (2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during

not revive any claim that had been procedurally time-barred prior to the enactment of the HEAR Act, where the claimant or a predecessor-in-interest had at least a six-year window after January 1, 1999 to bring a claim but did not do so.²³³ The rationales for such an exception are two-fold. First, there is the concern of fairness to good faith purchasers.²³⁴ Second, if the claimant or some predecessor in interest had a six-year window to bring the claim and to be heard on the merits in recent history, then the claimant should not be permitted to have this second bite at the apple.

The exception necessarily introduces additional complications. In determining whether the HEAR Act revives a given claim, a court will need to make an additional threshold determination: whether the claimant or any predecessor-in-interest had requisite knowledge at any point from January 1, 1999 up to the enactment of the act and that would not have been procedurally time-barred.²³⁵ If so, the HEAR Act does not apply.²³⁶

The exception therefore imposes a burden on the court to effectively engage in a statute-of-limitations analysis a second time.²³⁷ But this additional analysis is more difficult because both the substantive law and the antecedent choice-of-law law varies by jurisdiction. Different forums have adopted three different approaches to choice of law for dealing with title disputes between rightful owner and a good faith purchaser and how to determine which law should govern the question of accrual and tolling of the statute of limita-

which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

233. See Part II.B (discussing the text).

234. See discussion of the benefit of statutes of limitations in Part I.C.2; Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49, 96 (1995) (rejecting New York's demand and refusal rule because it "unfairly rewards non-diligent former owners;" "punishes innocent purchasers;" is "legally and logically unsound;" "fails to recognize two innocent parties are involved;" and "premised on a fundamental lack of understanding of the workings of the art world."); Frankel & Forrest, *supra* note 111, at 290 ("It is therefore far from obvious that application of the statute of limitations to bar stale claims will necessarily create unfairness—at least where, as in these cases, many decades have passed since the events at issue, it may in fact avoid unfairness.").

235. See discussion of § 5(e) exception in Part II.B.

236. *Id.*

237. See Demarsin, *supra* note 202, at 285 (discussing how the *Von Saher* court was concerned that a state law (California § 354.3) regarding statute of limitations would affect not only art work owned by museums in California, but art owned by out-of-state museums.); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1026–27 (9th Cir. 2009).

tions.²³⁸ A court, in determining whether the HEAR Act applies, will need to determine first whether under any state law the claimant or a predecessor-in-interest had a non-stale claim for a period of six years. If so, then the court will then need to determine whether under any forum that could have been seized for six years, the choice-of-law rules would identify a state that would have permitted such a claim.²³⁹ The exception provision will force courts to reconstruct a complicated choice-of-law analysis for claims brought under the HEAR Act. Fortunately, the exception is restricted to a narrow and recent timeframe (1999–2016) where the evidence should be more easily ascertainable.²⁴⁰

3. Sunset Provision and Demand and Refusal

With the sunset provision, after January 1, 2027, the HEAR

238. PETER HAY ET AL., *THE CONFLICT OF LAWS* 1255–56 (5th ed. 2010). Some courts have viewed the question as one of procedure and have applied forum law. Reyhan, *supra* note 71, at 1008–12 (citing *O’Keefe v. Snyder*, 416 A.2d 862 (1980) as an example). Others have applied the law of the situs of the passage of title. Reyhan, *supra* note 71, at 1012–18 (citing *Winkworth v. Christie, Mason & Woods, LTD.*, [1980] 1 Ch. 496 as an example).

Validity and Effect of Conveyance of Interest in Chattel

The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are *determined by the local law of the state* which, with respect to the particular issue, has the *most significant relationship to the parties*, the chattel and the conveyance under the principles stated in § 6.

In the absence of an effective choice of law by the parties, *greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance* than to any other contact in determining the state of the applicable law.

Effect of Conveyance on Pre-Existing Interests in Chattel

The effect of a conveyance upon a pre-existing interest in chattel of a person who was not a party to the conveyance will usually be determined by the law that would be applied by the courts of the state where the *chattel was at the time of the conveyance*.

These courts would usually apply their own local law in determining such questions.

Restatement (Second) of Conflict of Laws § 244 (1971) (emphasis added).

Finally, some courts treat such claims as tort claim for conversion, and therefore apply the most-significant-relationship-theory. HAY, *supra* note 238, at 1255–56; Reyhan, *supra* note 71, at 1018–22 (citing *Charash v. Oberlin College*, 14 F.3d 291 (6th Cir. 1994) as an example).

239. Nor is it necessarily clear that it would have to be a single state. Arguably, if the claim could have been brought under the law of one state for the first three years and then for another state for the next 3 years, the exception of § 5(e) would be met, which is a difficult endeavor. *See generally*, Reyhan, *supra* note 71.

240. HEAR Act § 5(e) (setting January 1, 1999 as the earliest date where the requisite knowledge can be demonstrated).

Act will cease to operate.²⁴¹ At that time a claimant, who for whatever reason could not or did not want to bring a claim under the HEAR Act, may still be able to bring a claim under New York's demand and refusal rule. Thus, the sunset provision effectively preserves New York's demand and refusal rule as an alternative—it just delays its invocation until after the HEAR Act expires.

The upshot of this is twofold. First, the HEAR Act is a one-way ratchet in favor of claimants. Some commentators argued that any change preserves New York's demand and refusal rule, believing it be a superior rule.²⁴² The sunset provision does just this, preserving the demand and refusal rule *sub silentio*.

4. Equitable Defenses

The HEAR Act permits equitable defenses. The Bill, as it was introduced, preempted equitable defenses, such as laches.²⁴³ But when the Senate Judiciary Committee amended the Bill, it deleted any reference to laches or equity.²⁴⁴ The Senate Report from the Committee of the Judiciary expressly affirmed the intent of the change to permit equitable doctrine of laches.²⁴⁵ While the acceptance of the defense of laches has been rare in suits for the restitution of lost Holocaust era art,²⁴⁶ it may gain greater acceptance as claims that were previously deemed procedurally time-barred are once-again re-litigated.

This was not the case in an early HEAR Act case. In *Csepel v. Hungary*²⁴⁷ the Defendants argued for a form of equitable estoppel to deny Plaintiff's leave to amend their complaint.²⁴⁸ The Court re-

241. *Id.* § 5(g).

242. Testimony of Agnes Peresztegi, *supra* note 121, at 3 (testifying that the HEAR Act should not displace “statute of limitation rules more favorable to claimants”); Nicholas O'Donnell, *Important Changes to HEAR Act Preserve New York's Demand and Refusal Rule (For Now)*, ART LAW REPORT (Oct. 26, 2016), <http://blog.sandw.com/artlawreport/important-changes-to-hear-act-preserve-new-yorks-demand-and-refusal-rule-for-now> [https://perma.cc/5KWT-5QC8].

243. Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 4 (as introduced in Senate, Apr. 7, 2016) (“including the doctrine of laches”); *but see* HEAR Act Revisions, *supra* note 173, at 3 (striking of the reference to equitable doctrines made in the HEAR Act).

244. *See* HEAR Act Revisions, *supra* note 173, at 3.

245. *See* S. REPT. NO. 114–394, at 7.

246. *See* Part I.C.2.ii (discussing the doctrine of laches).

247. *Csepel v. Hungary*, Case NO. 16-7042 (D.C. Cir. 2017).

248. *Id.* at 26 (citing App. Reply Brief at 25).

jected the defendants' argument that because the claimants offered "no explanation for its failure to bring a straightforward conversion claim from the start" that Plaintiff should be barred from bringing its claim.²⁴⁹ The Court concluded that "[g]iven the fact that Congress enacted the Holocaust Expropriated Art Recovery Act for the very purpose of permitting these claims to continue despite existing statutes of limitations, 'justice' quite obviously requires that the family be given leave to amend their complaint."²⁵⁰ This decision suggests that courts may interpret the HEAR Act to the benefit of the claimant, as that was the rationale for its passage.

Still the inclusion of equitable defenses may have two major consequences: these defenses may counteract how claimant-friendly the HEAR Act will prove to be and make the HEAR Act less certain. Given the HEAR Act's revival of a number of claims, it may be desirable to provide for these equitable defenses to protect good faith purchasers from unfounded claims. But equitable defenses that are discretionary will introduce some additional uncertainty into the HEAR Act. The HEAR Act generally tended to err on the side of bright-line rules, shunning constructive discovery, for instance. But equitable defenses, such as laches, essentially introduces constructive discovery as a defense, only the burden flipped.

CONCLUSION

The Holocaust Expropriated Art Recovery Act of 2016 passed with overwhelming bipartisan support. The HEAR Act strives to give claimants seeking the return of art lost during the Nazi era the opportunity to have their case heard on the merits. To achieve this, the HEAR Act resuscitates numerous previously time-barred claims that will be filed in court in the near-future. But even if the litigation itself does not lead to the return of lost art, simply the threat of litigation may motivate good faith purchasers, especially museums, to negotiate mutually-agreeable settlements.²⁵¹ For instance, the owner

249. *Id.* at 26 (citing App. Reply Brief at 25).

250. *Id.*

251. This broad endorsement of alternative-dispute resolution reflects the position taken by Christie's, see Testimony of Monica Dugot, *supra* note 124 and testimony offered by Ms. Agnes Peresztegi, who testified to one potential benefit of the HEAR Act: the threat of litigation that will not be immediately procedurally time-barred will motivate museums to negotiate through mediation the return of art. Subcommittee Hearing, *supra* note 116, at 1:09:30 ("So I think if the HEAR Act would remove that obstacle and would allow the leaders of the museum to hear a legal advice which would be, yes, this is a valid claim and you may lose it in court, then they would be much more willing to sit down and reach a fair and

could receive recognition and some financial payment and the museum could be able to continue to display the artwork with clear title.²⁵²

But the HEAR Act may not be entirely beneficial or that effectual. The HEAR Act interferes with traditional state law for a temporary period in an uncertain manner. Such uncertainty may place a heavy burden on judges charged with determining whether the HEAR Act applies. And because the HEAR Act preserves New York's demand and refusal rule, the HEAR Act will not be the end of claims for restitution of art lost during the Nazi era. As the numerous artworks currently unaccounted for are discovered and provenance traced, these cases will once again have to deal with state statutes of limitations.

Ultimately, the HEAR Act import will be short, but given its indication of Congress' will to legislate in the area, the HEAR Act may portend a new wave of legislation on the subject.

*Jason Barnes**

reasonable resolution.”).

252. See *Graefe*, *supra* note 12, at 509 n.312 & 510 n.317 (discussing different settlement agreements reached with museums over Nazi-looted art).

*J.D. Candidate, Columbia Law School, 2018; B.A. Amherst College, 2014. I wish to thank Professor Philip Genty for his helpful comments as my Note Advisor and the staff of the *Columbia Journal of Transnational Law* for their editorial suggestions.