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The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)

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The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)

Rajika L. Shah*

In 2015, the Western Prelacy of the Armenian Apostolic Church of America reached an historic, amicable settlement with the J. Paul Getty Museum regarding ownership and possession of eight valuable illuminated manuscript pages that had been secretly cut out of a medieval Armenian Gospel book during the Armenian genocide in 1915–1923. The pages resurfaced decades later in the Getty museum's collection in Southern California. The Church's suit was brought under a novel California statute, Code of Civil Procedure section 338(c)(3), that extended the statute of limitations for certain claims to fine art stolen or unlawfully taken. This statute of neutral applicability was the product of many years of attempts by the California legislature to provide a forum for certain categories of plaintiff victim residents, most notably Holocaust and Armenian genocide survivors and their heirs. After federal courts struck down a series of special statutes on foreign affairs preemption grounds, section 338(c)(3) was finally deemed to pass constitutional muster. It has now served as the template for Congressional legislation in the 2016 Holocaust Expropriated Art Recovery Act, a statute explicitly designed to further U.S. policy with respect to Nazi-looted art. This article explores the long road to section 338(c)(3) and how it may point the way forward for future action.

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I. INTRODUCTION

In September 2015, the Western Prelacy of the Armenian Apostolic Church of America reached an historic, amicable settlement with the J. Paul Getty Museum, in which the Getty acknowledged the church's ownership of eight thirteenth century illustrated manuscript pages (called Canon Tables) from the Zeyt'un Gospels, by Toros Roslin (Armenian, active 1256–1268), which were allegedly stolen in the early twentieth century during the Armenian genocide and have been in the Getty's collection since the mid-1990s.¹ Separately, in recognition of the Getty's decades-long stewardship of the Canon Tables and its deep understanding and appreciation of Armenian art, the Church donated the pages to the Getty Museum in order to ensure their preservation and widespread exhibition.² This remarkable settlement, in the first successful Armenian genocide-related art recovery case, followed years of legal battle between the parties.

One of the most interesting features of the Getty case is that it was litigated under California Code of Civil Procedure section 338(c)(3), a 2010 statute that extends the limitations period on claims for the recovery of stolen or unlawfully taken art. Under the statute, the limitations period on such claims does not begin to run until the date of *actual discovery* of (i) the identity and whereabouts of the artwork, and (ii) facts sufficient to establish that the claimant has a claim for a possessory interest in the artwork.³

The Getty case illustrates well how section 338(c)(3), although neutral in its applicability, empowers in particular human rights plaintiffs, who often need years of research in order to establish the facts required to start the limitations clock ticking on their recovery claims. It also puts museums, art dealers, and auction houses on notice that they may face valid claims for the recovery of stolen art long after their initial acquisition.

That section 338(c)(3) can be used to recover art taken during mass atrocities, such as genocide, is no coincidence. In fact, it follows a long line of attempts by the California legislature to provide redress and a forum for its citizens and residents to bring claims for the recovery of property taken

¹ See Press Release, J. Paul Getty Museum, J. Paul Getty Museum and the Western Prelacy of the Armenian Apostolic Church of America Announce Agreement in Armenian Art Restitution Case (Sept. 21, 2015), http://news.getty.edu/images/9036/manuscript2015_release.pdf [hereinafter Getty Press Release] [<http://perma.cc/BJ2A-42G5>].

² See *id.*

³ See CAL. CIV. PROC. CODE § 338(c)(3) (West 2010).

during mass atrocities, by passing a variety of state statutes designed to assist particular victim groups whose claims would otherwise have been time-barred. Those statutes were consistently struck down by federal courts on various constitutional grounds. Section 338(c)(3) is the first one that passed constitutional muster, and is thus both a milestone and a blueprint for future statutes.

This article will examine the long road to section 338(c)(3) and the Getty case in light of other, less successful, Holocaust and mass atrocities cases and statutes. Section II will discuss the context in which the Getty case and section 338(c)(3) arose, including the Holocaust restitution movement and how it gave birth to Armenian genocide restitution litigation. Section III will explore the back-and-forth conversation between the California legislature and the judiciary regarding the constitutional limits of state action as it played out in Holocaust art recovery and Armenian genocide litigation. Section IV will focus on the Getty case and section 338(c)(3) in detail, while section V will explore possibilities for future art recovery litigation, including the newly enacted federal Holocaust Expropriated Art Recovery Act (“HEAR Act”).

II. THE RISE OF MODERN HOLOCAUST AND MASS ATROCITIES RESTITUTION EFFORTS

A. Why Property Restitution Matters

Victims of genocide and other mass atrocities indisputably have individual claims under both international law and domestic law for their own personal injuries and for the loss of the lives of their loved ones. However, they also have claims for the property losses that typically accompany the atrocities.

These property losses can run from the mundane, such as household items, to valuable assets including insurance policies, bank accounts, or safe deposit boxes. Real estate losses can also be devastating, and may be the most difficult on which to recover if there are subsequent inhabitants or the state has taken over the property. Whatever they consist of, such property losses deprive the victims of not only their physical assets, but also an essential sense of identity and self.⁴

There are strong arguments that even the destruction of a group’s culture—for example, the suppression of a minority

⁴ See MICHAEL J. BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 153–55 (2016) [hereinafter HOLOCAUST, GENOCIDE, AND THE LAW].

group's language, religion, and social habits—constitutes a form of genocide.⁵ For example, a plausible argument can be made that a cultural genocide occurred in the case of China's decades-long suppression of Tibetan culture and religion; Turkey's suppression of Kurdish culture, including a ban on the use of the Kurdish language; and the forced assimilation of Aboriginal indigenous people in Australia and Native Americans in North America.⁶

Art, and other cultural or religious property that can be viewed as art, sits at the intersection of these two ideas. Objects that are explicitly created as artworks (such as paintings), and those that can be seen as an artistic expression of religious, philosophical, historical, or other significance (such as objects found at places of worship) are valuable not only because of the high prices they can command, but because they help to define the character of a people and their traditions. It is no surprise, then, that many of the recent lawsuits brought by victims of mass atrocities seek compensation for the loss of stolen art. The most famous of these cases is *Altmann v. Republic of Austria*,⁷ a case that went all the way to the United States Supreme Court and was dramatized in the 2015 feature film, "Woman in Gold," but there have been several others.⁸

In 2016, the U.S. Court of Appeals for the District of Columbia recognized the centrality of property takings in the commission of genocide when it explicitly held that property takings themselves—apart from any murders—constitute a form of genocide.⁹ In *Simon v. Hungary*, fourteen elderly Holocaust survivors originally from Hungary sued the Republic of Hungary and its state-owned Hungarian railway for having collaborated with the German Nazis in 1944–45, during the waning months of World War II, to perpetuate the deportation and extermination of nearly half a million Hungarian Jews.¹⁰

Because the plaintiffs sued Hungary and a Hungarian state agency, jurisdiction over the defendants was governed exclusively

⁵ *See id.* at 47–48.

⁶ *See id.* at 48.

⁷ *Altmann v. Republic of Austria*, 541 U.S. 677 (2004).

⁸ *See, e.g.*, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010); *Konowaloff v. Metropolitan Museum of Art*, 702 F.3d (2d Cir. 2012); *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006).

⁹ *Simon v. Republic of Hungary*, 812 F.3d 127, 142 (D.C. Cir. 2016).

¹⁰ *Id.* at 134. The *Simon* plaintiffs brought causes of action for property loss, including conversion and unjust enrichment, as well as personal injury and international law claims.

by the Foreign Sovereign Immunities Act (“FSIA”).¹¹ Unless one of the enumerated exceptions was met, the general rule applied and the foreign sovereign and the state railway would be immune from suit in U.S. courts.¹² The relevant exception in *Simon*, commonly known as the “takings” or “expropriation exception,” holds that a foreign sovereign and its related entities are not immune from suit in U.S. courts if “[1] rights in property [2] taken in violation of international law are in issue and [3] that property or any property exchanged for such property is present in the United States” in connection with a specified commercial activity with a U.S. nexus.¹³

The *Simon* plaintiffs’ property-related claims for conversion and unjust enrichment satisfied the first element of the exception, and the state-owned railway did not dispute that it engaged in the requisite U.S.-based commercial activity.¹⁴ Thus, the key issue in *Simon* was whether plaintiffs’ property had been “taken in violation of international law.” Because there was no dispute that genocide itself violated international law, the court began its analysis by determining whether the alleged property takings “[bore] a sufficient connection to genocide that they amount to takings in violation of international law.”¹⁵

The *Simon* plaintiffs alleged a three-step governmental policy designed to inflict maximum destruction, carried out in the space of just three months. First, Hungarian Jews were targeted in a persecution campaign that included travel and certain clothing bans, bans from eating in restaurants or using public pools, and the requirement that every Jew wear the yellow Star of David.¹⁶ Second, Jews were forced into cramped, unsanitary ghettos, and had their clothing removed. All of their property was systematically inventoried and confiscated by Hungarian officials going door to door.¹⁷ Third and finally, Jews were rounded up and marched to the railways, all their remaining belongings confiscated, and they were transported to Nazi death camps (primarily Auschwitz-Birkenau in German-occupied Poland) under the direction of Nazi mastermind Adolf Eichmann, where they were virtually all murdered upon arrival.¹⁸ As this

¹¹ See *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989) (stating that the FSIA is “the sole basis for obtaining jurisdiction over a foreign state in our courts”).

¹² See 28 U.S.C. § 1604 (2012).

¹³ 28 U.S.C. § 1605(a)(3) (2012).

¹⁴ *Simon*, 812 F.3d at 142, 147.

¹⁵ *Id.* at 142–43.

¹⁶ *Id.* at 133.

¹⁷ *Id.*

¹⁸ *Id.* at 133–34.

description makes clear, widespread property confiscation was not merely incidental to the extermination of Hungarian Jews, it was part and parcel of an integrated plan to destroy the group, its way of life, and its culture.¹⁹

As the D.C. Circuit saw it, “the pivotal acts constituting genocide” that occurred in *Simon* “are those set out in subsection (c) of the definition” of genocide as found in the Convention for the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), adopted by the United Nations in 1948 and entered into force in 1951.²⁰ In other words, the property takings alleged by plaintiffs were intended to “deliberately inflict [] on the group conditions of life calculated to bring about its physical destruction in whole or in part,” which was the very reason such language was included in the definition of genocide.²¹

The court’s view on this point was unambiguous: the property taken from Hungary’s Jews did more than “finance Hungary’s war effort” and was not merely incident to the ghettoization of the Hungarian Jews.²² Rather, the “systematic, wholesale plunder of Jewish property” by Hungarian and German authorities was intended to deprive Jews of the resources they needed to survive as a people; the property was taken for the very purpose of ensuring the destruction of Hungary’s Jews.²³ As a result, the international law violation required to establish the court’s jurisdiction under the FSIA’s takings exception was not the uncompensated expropriations themselves, but rather genocide.²⁴

In agreeing with the plaintiffs, the *Simon* court confirmed and further articulated the conclusion reached by the Seventh Circuit Court of Appeals four years earlier in another case

¹⁹ *Id.* at 134.

²⁰ *Id.* at 143. The Genocide Convention set forth for the first time a legal definition of genocide and criminalized genocidal activity, whether committed in peacetime or during war. Article II of the Convention defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, C.P.P.C.G. No. 1021, 78 U.N.T.S. 277.

²¹ *Simon*, 812 F.3d at 143.

²² *Id.*

²³ *Id.* (some internal formatting omitted).

²⁴ *Id.* at 145.

involving the theft of property of Hungarian Jews during the Second World War.²⁵ In *Abelesz v. Magyar Nemzeti Bank*, the federal appellate court explained that acts of thievery such as “the freezing of bank accounts, the [establishment of] straw-man control of corporations, the looting of safe deposit boxes and suitcases brought . . . to the train stations, and even charging third-class train fares to victims being sent to death camps” is both a “ghoulishly efficient” means of financing the rounding up and deportation or incarceration of the targeted group, and an “integral part” of the genocide itself.²⁶

These conclusions comport with victims’ sense of why property takings are at the core of genocidal activity, and place property claims at the heart of any effort to restore victims to wholeness.

B. U.S. Courts as the Modern Forum for Victims’ Property Restitution Litigation

Victims of mass atrocities are often unable, for a variety of reasons, to make claims for stolen property until long after the events occurred. They typically suffer from extreme psychological distress, displacement, loss of multiple family members, and loss of supporting documentation. They may not wish to think or talk about the stolen property because it reminds them of the horrors they witnessed, and they may not be aware of a forum in which to assert their claims. When all of these factors combine, it may be decades or generations later before they and their heirs realize a claim may be made.

In addition, a variety of defendants may be liable for property losses, depending on what was taken and the circumstances. The claims may be directed at both state and non-state actors, including: (1) those who directly perpetrated the genocide or mass atrocity; (2) those who aided and abetted, or facilitated the

²⁵ See *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012).

²⁶ *Id.* at 675. As fully stated by the court:

Genocide, the complaints here clearly imply, can be an expensive proposition. Expropriating property from the targets of genocide has the ghoulishly efficient result of both paying for the costs associated with a systematic attempt to murder an entire people and leaving destitute any who manage to survive. The expropriations alleged by plaintiffs in these cases -- the freezing of bank accounts, the straw-man control of corporations, the looting of safe deposit boxes and suitcases brought by Jews to the train stations, and even charging third-class train fares to victims being sent to death camps -- should be viewed, at least on the pleadings, as an integral part of the genocidal plan to depopulate Hungary of its Jews. The expropriations thus effectuated genocide in two ways. They funded the transport and murder of Hungarian Jews, and they impoverished those who survived, depriving them of the financial means to reconstitute their lives and former communities.

Id.

genocide or atrocity in some way; and (3) those who took no direct or indirect participation in the genocide or atrocity, but nevertheless benefited from it by virtue of having received, purchased, or come into possession of property taken during the genocide or atrocity.²⁷

Beginning in the 1990s, momentum built for a wave of litigation in U.S. courts in order to tackle the “unfinished business” of the Holocaust by seeking to hold accountable private actors and state agencies for the benefits they received as a result of Nazi persecution.²⁸ This included suits seeking restitution of unreturned bank deposits, unpaid insurance policies taken out by Holocaust victims, and looted art,²⁹ as well as suits seeking compensation from banks that had traded in looted assets and industrial companies that had benefited from Nazi victim slave labor.³⁰

Several factors made United States courts the most attractive forum for these suits, including the ability of U.S. courts to recognize jurisdiction over defendants that do business in the United States, even over claims that occurred abroad; the ability of lawyers to take cases on a contingency basis, thereby giving Holocaust claimants top-notch legal representation when filing suits against European and American corporate giants; and a legal culture in which lawyers are willing to take high-risk cases with a low probability of success in order to test the limits of the law.³¹ Equally important to the positive outcome of the modern push for Holocaust restitution were the commitment and willingness of American public officials to shine a spotlight on the mass theft of Jewish property and broker settlement agreements, the effective advocacy of U.S.-based Jewish community organizations, and American media interest in Nazi reparations.³²

²⁷ See themes discussed in Michael J. Bazyler, *From “Lamentation and Liturgy to Litigation”: The Holocaust-Era Restitution Movement as a Model for Bringing Armenian Genocide-Era Restitution Suits, in American Courts*, 95 MARQ. L. REV. 245 (2011) [hereinafter *Lamentation and Liturgy*].

²⁸ See HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 161. This has been called the “third period” of Holocaust restitution efforts. *Id.* at 155. In the first period, immediately following the Second World War, the Allied countries focused on recovering and returning assets stolen by the Nazis throughout Europe, including but not limited to Jewish property. *Id.* at 155–57. These efforts were only partly successful, and were complicated by the later communist property takings in countries of the Soviet eastern bloc. *Id.* The second period was marked by a 1952 agreement between Germany and Israel in which Germany agreed to make payments to the new state of Israel over the following decade, and to individual Holocaust survivors for the duration of their lives. *Id.* at 158–61.

²⁹ See *supra* note 8 and accompanying text.

³⁰ See HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4 at 161.

³¹ *Id.* at 161–62.

³² *Id.* at 162; see also *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 403–06 (2003)

These remarkable efforts led to compensation totaling more than \$8 billion in individual and community-based payments, with significant European and American government cooperation.³³ Many suits ended in outright dismissal on technical grounds including statute of limitations, political question, lack of subject matter jurisdiction, and *forum non conveniens*. No case ever went to trial. And yet, Germany and its corporations realized that, even if they succeeded in getting a particular lawsuit (most filed as class actions) dismissed, they would still face a political and public relations problem that would not go away. Victims' advocates were able to exert settlement pressure on them by reminding the American public "that the German products they were buying—whether cars, computers, aspirin, or insurance—were from the same companies that were implicated in some of the most horrific crimes committed in human history."³⁴

Moreover, the lawsuits spurred many companies—both European and American—to review their archives and official histories in light of allegations of Nazi complicity, and in some cases even issue apologies.³⁵

The success of the modern Holocaust restitution movement led other victim groups to follow a similar model. For example, suits were filed against Germany and German companies for their role in the Herero genocide in southwestern Africa (sometimes called the "first" genocide of the twentieth century); against Japan and Japanese industry arising out of the Second World War for slave labor; against multinationals arising out of their business activities in apartheid South Africa; and by African-Americans for reparations against the U.S. government and American companies involved in slavery arising from the American slave era.³⁶

The Getty case, which sought the return of valuable Canon Tables that had been removed from an early medieval Armenian illuminated book of gospels during the Armenian genocide, was another such suit.

(discussing the history of Holocaust reparations efforts, and of U.S. government involvement in brokering settlements).

³³ *America's Role in Addressing Outstanding Holocaust Issues: Hearing Before the Subcomm. on Europe of the Comm. on Foreign Affairs*, 110th Cong. 8 (2007) (statement of J. Christian Kennedy, Special Envoy for Holocaust Issues, Bureau of European and Eurasian Affairs, U.S. Department of Justice); see also HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 163.

³⁴ HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 163.

³⁵ *Id.* at 164.

³⁶ For a more thorough discussion of the cases, their background, and success or lack thereof, see *id.* at 169–77.

Events that occurred in Ottoman Turkey targeting ethnic Armenians between 1915 and approximately 1923 are often referred to as the “Armenian genocide.” During this period, between 1 million and 1.5 million Armenians were rounded up with little to no notice and forcibly deported, primarily into the eastern deserts now in the territories of Syria, Iraq, and Kuwait.³⁷ According to one account, “the great bulk of the Armenian population was forcibly removed from Armenia and Anatolia to Syria, where the vast majority was sent into the desert to die of thirst and hunger. Large numbers of Armenians were methodically massacred throughout the Ottoman Empire. Women and children were abducted and horribly abused. The entire wealth of the Armenian people was expropriated.”³⁸

Turkey has long refused to recognize the massacres of the Armenians as a genocide.³⁹ At most, Turkey offers a grudging recognition, with Turkish Prime Minister Ahmet Davutoğlu stating in 2015, the hundred-year anniversary of the start of the Armenian genocide, that “[w]e once again respectfully remember Ottoman Armenians who lost their lives during the deportation of 1915 and share the pain of their children and grandchildren.”⁴⁰ According to Turkey, the forced dislocation was “a war-related dislocation and security measure” with unfortunate consequences.⁴¹ As Turkey sees it, Armenian nationalists agitating for independence presented a “security risk.”⁴² Because Armenians took up arms against the Ottoman government, their relocation was constructed to be a result of their political goals, not their

³⁷ For a thorough discussion of whether the *actus reus* and *mens rea* of the legal definition of genocide are met with respect to the Armenians, see *id.* at 61–63; see also Complaint at 13, *Bakalian v. Republic of Turkey*, No. CV10-09596, 2010 WL 5390152 (C.D. Cal. Dec. 15, 2010) (describing the circumstances leading up to the genocide, and the genocide itself).

³⁸ *Frequently Asked Questions About the Armenian Genocide*, ARM. NAT'L INST., <http://www.armenian-genocide.org/genocidfaq.html> [<http://perma/H28G-MGMX>].

³⁹ HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 63; see also Carol J. Williams, *As Centenary of Armenian Massacre Nears, 'Genocide' Dispute Sharpens*, L.A. TIMES (Apr. 20, 2015, 7:16 PM), <http://www.latimes.com/world/europe/la-fg-armenia-genocide-anniversary-20150420-story.html> (quoting Turkish Prime Minister Ahmet Davutoğlu as stating that “to reduce everything to a single word, to load all of the responsibility on the Turkish nation . . . and to combine this with a discourse of hatred is legally and morally problematic”) [<http://perma.cc/4BT7-2QNC>].

⁴⁰ Williams, *supra* note 39.

⁴¹ According to Turkey's Ministry of Foreign Affairs website, the Armenian deaths were due to the effects of “inter-communal conflict” and a world war when 2.5 million Muslims also perished. See *The Armenian Allegation of Genocide: The Issue and the Facts*, REP. OF TURK. MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.tr/the-armenian-allegation-of-genocide-the-issue-and-the-facts.en.mfa> [<http://perma.cc/Z2V4-8B7X>].

⁴² See Complaint, *supra* note 37, at 13 (noting that Armenians were one of the most prosperous groups living in the Ottoman Empire in the late nineteenth and early twentieth centuries); HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 63.

ethnicity or religion.⁴³ However, British historian Donald Bloxham has written that “nowhere else during the First World War was the separatist nationalism of the few answered with the total destruction of the wider ethnic community from which the nationalists hailed.”⁴⁴

Turkey’s resistance to recognition means that no political or diplomatic solution has yet been found for the question of compensation to Armenians for their injuries incurred during the genocide, including property restitution. Thus, beginning in the early 2000s, Armenian genocide victims, led by attorney Vartkes Yeghiayan, himself a child of survivors of the Armenian genocide, also began filing suits in U.S. courts seeking restitution for the property takings that occurred during the Armenian genocide.⁴⁵ As Yeghiayan explained in an article in the *Los Angeles Times*: “For the first time [the Armenian community] has gone beyond lamentation and liturgy to litigation, from picketing and going to church every April 24 [the Armenian Day of Remembrance] and mourning to taking legal action. . . . Holocaust victims’ heirs showed me the way.”⁴⁶

III. CALIFORNIA’S ATTEMPTS TO PROVIDE A FORUM FOR VICTIMS

When property is taken in the context of mass human rights abuses, violence, or genocide, courts often approach cases with caution out of concern they are intruding into political and/or foreign affairs realms, whether such concerns are warranted or not. A number of doctrines provide ammunition to defendants to put the case out of reach of the courts.

Motivated by these concerns, and by the large numbers of potential plaintiff claimants living in California, the California legislature began in the late 1990s to enact special statutes designed to aid particular classes of victim groups in bringing their claims in court. Thus began a years-long conversation between the California legislature and the federal judiciary regarding the

⁴³ HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 4, at 63.

⁴⁴ DONALD BLOXHAM, THE GREAT GAME OF GENOCIDE 92 (2007); *see also* RONALD GRIGOR SUNY, “THEY CAN LIVE IN THE DESERT BUT NOWHERE ELSE”: A HISTORY OF THE ARMENIAN GENOCIDE (2015); ARA SARAFIAN, TALAAT PASHA’S REPORT ON THE ARMENIAN GENOCIDE 5–8 (Ara Sarafian ed., Gomidas Inst. 2011).

⁴⁵ For a description of the early years of Armenian restitution litigation efforts, *see Lamentation and Liturgy*, *supra* note 27. The outcome of those early cases, as well as later-filed cases, is discussed more thoroughly in Michael J. Bazylar & Rajika L. Shah, *The Unfinished Business of the Armenian Genocide: Armenian Property Restitution in American Courts*, 23 SW. J. INT’L L. 101 (2017).

⁴⁶ Beverly Beyette, *He Stands Up in the Name of Armenians*, L.A. TIMES (Apr. 27, 2001), <http://articles.latimes.com/2001/apr/27/news/cl-56190> (quoting Armenian-American attorney Vartkes Yeghiayan, who represented plaintiffs in Armenian genocide-era restitution suits) (internal quotation marks omitted) [<http://perma.cc/L6MZ-JCK4>].

scope of valid state action in light of the Constitution's allocation of the foreign affairs power to the federal government.

A. *Garamendi* and the Contours of Foreign Affairs Preemption

The first of these cases involved unpaid insurance policies issued to Holocaust victims. In 1998, California enacted amendments to its Insurance Code, requiring insurance companies doing business in the state to publish lists of any insurance policies issued to Europeans that were in effect between 1920 and 1945.⁴⁷ The disclosure requirements were codified as the Holocaust Victim Insurance Relief Act ("HVIRA"). The statute applied only to "Holocaust victims," and, according to the legislative history, was designed to "ensure the rapid resolution" of unpaid insurance claims, "eliminating the further victimization of these policyholders and their families."⁴⁸ It was also explicitly passed as a tool to promote "the development of a resolution to these issues."⁴⁹

The question of the constitutionality of the state statute eventually made its way to the Supreme Court. In a 5–4 split decision issued on June 23, 2003, Justice David Souter authored what has become the definitive case describing the modern doctrine of foreign affairs preemption, *American Insurance Association v. Garamendi*.⁵⁰

In *Garamendi*, the Court laid out the analytical framework for conducting foreign affairs preemption analysis. Clarifying its prior decision in *Zschernig v. Miller*⁵¹—the only prior precedent that invalidated a state law under the foreign affairs doctrine—the *Garamendi* Court explained that *Zschernig* embodied two "contrasting theories of field and conflict preemption."⁵² As *Garamendi* explained, the *Zschernig* majority employed the doctrine of field preemption to invalidate a state law whose implementation impermissibly "intru[ded] into the field of foreign affairs."⁵³ By contrast, Justice Harlan, who concurred in the result, declined to embrace the notion of field preemption in

⁴⁷ See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 408–09 (2003) (describing CAL. INS. CODE § 13800 *et seq.* (West 1999)). California also amended its Code of Civil Procedure to extend the statute of limitations on any such claims until December 31, 2010, see CAL. CIV. PROC. CODE § 354.5 (West 2006), but the district court's ruling dismissing the challenge to that statute for lack of standing was not on appeal. *Garamendi*, 539 U.S. at 409 n.4.

⁴⁸ *Garamendi*, 539 U.S. at 410 (quoting a California Senate Committee on Insurance report).

⁴⁹ *Id.* at 410–11 (quoting CAL. INS. CODE § 13801(f) (West 1999)).

⁵⁰ See generally *id.*

⁵¹ See generally *Zschernig v. Miller*, 389 U.S. 429 (1968).

⁵² *Garamendi*, 539 U.S. at 419.

⁵³ *Id.* at 417 (quoting *Zschernig*, 389 U.S. at 432).

foreign affairs, but agreed that the state law could be preempted on a narrower rationale, due to “conflicting federal policy.”⁵⁴ As the *Garamendi* Court emphasized, this narrower reading of the foreign affairs preemption doctrine stemmed from a desire to avoid conflict with precedent “suggesting that in the absence of positive federal action ‘the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.’”⁵⁵

The *Garamendi* Court noted that there was “a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions.”⁵⁶ *Garamendi*, however, “require[d] no answer” to that question, for the state statute before the Court—California’s HVIRA—involved “a sufficiently clear conflict to require finding preemption” even on the narrower view of foreign affairs preemption espoused by Justice Harlan in *Zschernig*.⁵⁷ Having found that HVIRA conflicted with federal policy to settle Holocaust insurance claims exclusively through the German Foundation “Remembrance, Responsibility and the Future” negotiated by President Bill Clinton and funded by the German government,⁵⁸ the Court found no need to consider whether, in the absence of either an express federal preemption or a conflict with federal foreign policy, a state law such as HVIRA could be held invalid because it intruded into the “field” of foreign policy occupied by the federal government.⁵⁹

In dicta, the *Garamendi* Court indicated that the foreign affairs doctrine retained the concept of implied field preemption, which could be deployed in a narrow set of circumstances:

If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict . . . Where, however, a State has acted within what Justice Harlan called its “traditional competence,” but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity and substantiality that would vary with the strength or the traditional importance of the state concern asserted.⁶⁰

⁵⁴ *Id.* at 418–19 (Harlan, J., concurring in the result) (quoting *Zschernig*, 389 U.S. at 458–59).

⁵⁵ *Id.* at 418 (Harlan, J., concurring in the result) (quoting *Zschernig*, 389 U.S. at 459).

⁵⁶ *Id.* at 419 (footnote omitted).

⁵⁷ *Id.* at 419–20.

⁵⁸ *Id.* at 405.

⁵⁹ *Id.* at 419–20.

⁶⁰ *Id.* at 419 n.11 (citations omitted).

Moreover, “congressional occupation of the field is not to be presumed ‘in a field which the States have traditionally occupied.’”⁶¹

Thus, *Garamendi* struck down HVIRA as being in conflict with the federal policy establishing a forum and mechanism to resolve unpaid Holocaust insurance claims, and set the stage for successive litigation.⁶²

B. The Wartime Claims Statute

Also in 1999, California passed a statute extending the limitations period for certain claims arising out of World War II. Section 354.6 of the California Code of Civil Procedure provided a right of action in state courts for Second World War “slave labor” and “forced labor” victims or their heirs, and established that such claims would be timely if brought prior to December 31, 2010.⁶³ The statute defined “slave labor victims” as those taken from a concentration camp or ghetto between 1929 and 1945 by the Nazis or their allies or business enterprises in Nazi-controlled territories, to perform unpaid labor, while “forced labor victims” were civilians and prisoners of war who labored under the same conditions.⁶⁴ The value of the compensation that the statute entitled them to seek was to be calculated without regard to any wartime or post-war currency devaluations⁶⁵—a significant requirement given that many eastern bloc communist countries devalued their currencies one or more times in the post-war period.

Plaintiffs filed twenty-nine suits in California for compensation from German and Japanese companies who benefitted from their labor during the war. The cases were consolidated and removed to federal court. The named plaintiff in the individual lead case, *Deutsch v. Turner*, was a Hungarian Jew sent to Auschwitz with his brothers, where they were forced to work fourteen-hour days, seven days a week, for a German construction company.⁶⁶ The other cases involved claims against Japanese companies.

⁶¹ *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁶² Ironically, the U.S. Court of Appeals for the Ninth Circuit had not found HVIRA to be unconstitutional for precisely the opposite reasons, holding that it did not violate the dormant commerce clause and was unlikely to intrude on the federal foreign affairs power because Congress acquiesced in its passage. *See Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 745–48 (9th Cir. 2001).

⁶³ *See Deutsch v. Turner Corp.*, 324 F.3d 692, 706–07 (9th Cir. 2003) (discussing CAL. CIV. PROC. CODE § 354.6 (1999)).

⁶⁴ *Id.* at 706 (quoting CIV. PROC. § 354.6(a)(1),(2)).

⁶⁵ *Id.* at 706–07 (quoting CIV. PROC. § 354.6(a)(3)).

⁶⁶ *Id.* at 704.

Although *Deutsch* predated *Garamendi* by a few months, it was resolved on the same basis—foreign affairs preemption. The Ninth Circuit Court of Appeals, with Judge Stephen Reinhardt writing the opinion, first declined to find that section 354.6 was merely procedural, as urged by California, because it explicitly created a cause of action for the defined victim groups.⁶⁷ This mattered because “the California legislature created—or at least resurrected—a special class of tort actions, with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies’ protection.”⁶⁸ More importantly, the statute implicated the federal government’s foreign affairs power to “make and resolve war, including the power to establish the procedure for resolving war claims.”⁶⁹ According to the court, this was part of the “inner core” of the otherwise somewhat vaguely defined foreign affairs power, and was thus reserved exclusively to the federal government.⁷⁰

Relying on *Zschernig*, the court struck down section 354.6 as unconstitutional.⁷¹ Plaintiffs’ claims were thus subject to California’s existing statutes of limitation of general applicability, under which they were all time-barred.⁷²

C. The Holocaust Art Statute

In 2002, before the opinions in either *Deutsch* or *Garamendi* had been issued, California acted again. This time the legislature amended the Code of Civil Procedure to add section 354.3, which allowed “any owner, or heir or beneficiary of an owner, of Holocaust-era artwork” to bring an action in California courts against “any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance,” and extended the statute of limitations until December 31, 2010.⁷³

Marei von Saher was the surviving heir of a prominent Jewish art dealer living in the Netherlands before World War II.⁷⁴ The family fled when war broke out and left all their assets behind, including art dealer Jacques Goudstikker’s collection of over 1000 artworks, which was looted by the Nazis.⁷⁵ However,

⁶⁷ *Id.* at 707.

⁶⁸ *Id.* at 708.

⁶⁹ *Id.* at 711.

⁷⁰ *Id.*

⁷¹ *Id.* at 716.

⁷² *Id.* at 716–17.

⁷³ See *Von Saher v. Norton Simon Museum of Art at Pasadena (Von Saher I)*, 592 F.3d 954, 958–59 (9th Cir. 2010) (amended opinion) (discussing CAL. CIV. PROC. CODE § 354.3).

⁷⁴ *Id.* at 959.

⁷⁵ *Id.*

Jacques did bring his notebook containing a list of each of the paintings; it noted that Goudstikker's collection included the "Adam and Eve" diptych by Cranach the Elder.⁷⁶

Shortly after the war ended, the United States adopted a policy of "external restitution," whereby Nazi-looted artworks found by U.S. forces would be returned to the country of origin so that each country could establish its own means of restituting artworks to the original owners.⁷⁷ Thus, after Allied forces discovered the Cranachs at Hermann Göring's country estate outside Berlin, they returned the paintings to the Netherlands.⁷⁸ The Netherlands awarded the Cranachs to another claimant, who traced the paintings to his family from takings effected by the Soviet Union prior to the war, and who sold them to the Norton Simon Museum in Pasadena, California, in the 1970s.⁷⁹

After the passage of section 354.3, in 2007, von Saher brought suit against the Norton Simon to recover the Cranachs. By the time the case reached the Ninth Circuit on the question of the constitutionality of section 354.3, the court had the benefit of the opinions in both *Garamendi* and *Deutsch*. The court did not fail to notice that this was another instance of California taking action to assist Holocaust-era claimants.⁸⁰

In an opinion authored by Judge Thompson and joined by Judge Nelson, to which Judge Pregerson dissented, the court reviewed the principles set forth in *Garamendi* regarding foreign affairs conflict and field preemption ("*Von Saher I*"). The court held that section 354.3 did not conflict with any existing federal policy; moreover, the 1943 London Declaration (in which the Allies reserved the right to invalidate any wartime transfers of property) did not expressly address restitution or reparations, and a policy statement issued by President Truman immediately following the war (setting forth the operating procedures under which the policy of "external restitution" would take place) ceased to have effect in 1948, when the U.S. stopped accepting external restitution claims.⁸¹

The court went on to find, however, that section 354.3 was invalid under the doctrine of field preemption. Although regulation of property was traditionally an area of state responsibility, section 354.3 "[could not] be fairly categorized as a

⁷⁶ *Id.*

⁷⁷ *Id.* at 957–58.

⁷⁸ *Id.* at 959.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 961–63.

garden variety property regulation” because it singled out a particular group of victims and claims (art recovery claims of Holocaust victims and their heirs).⁸² Thus, the statute’s real purpose was to benefit this particular group.⁸³ Moreover, although California had a legitimate interest in regulating museums and galleries operating within the state, section 354.3 applied to “any” museum or gallery, whether located in California or not—an expression of dissatisfaction with the federal government’s resolution of World War II that belied any “serious claim” that it addressed an area of traditional state responsibility.⁸⁴ Further, as in *Deutsch*, the statute impermissibly established a remedy for wartime injuries, as particularly evidenced by the statute’s repeated references to the “Nazi regime,” “Nazi persecution,” and “atrocities” committed by the Nazis.⁸⁵ The statute would have more than an incidental effect on foreign affairs because it would require courts to review the restitution policies and decisions made by foreign countries following the war, i.e. the Netherlands’ internal policies concerning restitution of stolen artworks recovered by the Allies for distribution to the rightful claimants.⁸⁶

Thus, section 354.3 was struck down in its entirety. As in *Deutsch*, von Saher’s claims did not meet California’s general statute of limitations applicable to claims for property theft—the existing version of Code of Civil Procedure section 338—and thus the claims were time-barred.⁸⁷

However, as further discussed *infra*, the California legislature was not ready to give up on its attempts to provide redress and a friendly forum for claimants. Six weeks after the Ninth Circuit issued its 2010 decision in *Von Saher I*, the California legislature amended section 338 to add new section 338(c)(3).⁸⁸ Section 338(c)(3) was made explicitly retroactive so that it could apply to von Saher’s claims.⁸⁹

⁸² *Id.* at 964.

⁸³ *Id.*

⁸⁴ *Id.* at 965 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003)).

⁸⁵ *Id.* at 966.

⁸⁶ *Id.* at 967.

⁸⁷ *Id.* at 968–69.

⁸⁸ See *Von Saher v. Norton Simon Museum of Art at Pasadena (Von Saher II)*, 754 F.3d 712, 718 (9th Cir. 2014).

⁸⁹ *Id.* at 719. Thus, Marie von Saher’s quest to recover the Cranachs continued for several more years, and still continues today—ten years after the case was first brought. By 2014, the question of whether von Saher’s specific claims and remedies, rather than amended section 338(c)(3), conflicted with the federal government’s “external restitution” policy and were therefore preempted was before the Ninth Circuit for the first time. *Id.* The panel (consisting of Judges Nelson, Pregerson, and Wardlaw, Judge Thompson having since passed away) again rejected the museum’s conflict preemption argument, this time “because the Cranachs were never subject to postwar internal restitution

The constitutionality of section 338(c)(3) under foreign affairs field preemption was eventually addressed in another case, *Cassirer v. Thyssen-Bornemisza Foundation Collection*,⁹⁰ as discussed *infra*. In the meantime, California faced continued judicial scrutiny regarding a series of Armenian genocide-related recovery statutes.

D. The Armenian Genocide Insurance Statute

Taking direct inspiration from suits brought by Holocaust survivors and heirs against European insurance companies that failed to pay out on life insurance and other policies purchased by European Jews prior to the Second World War, Armenian claimants brought several suits in federal court in Los Angeles against American and European insurance companies that failed to pay on policies purchased seventy or more years earlier by Armenians in Ottoman Turkey prior to the Armenian genocide.

A specific statute passed by the California legislature in 2000, and codified at California Code of Civil Procedure section 354.4, established California as a forum for “any Armenian Genocide victim” or an heir or beneficiary residing in the state to bring claims “arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923,” despite any forum-selection clause in the contracts, and extended the limitations period for filing the cases.⁹¹ An “Armenian Genocide victim” was defined as “any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.”⁹² Section 354.4 was explicitly modeled after the California statutes at issue in *Garamendi* and *Deutsch*.⁹³

The first two lawsuits, against New York Life Insurance Company and French insurer AXA, closely followed the

proceedings in the Netherlands”: Jacques Goudstikker’s immediate heirs had never made postwar restitution claims for the Cranachs to the Dutch government, because the Netherlands had determined (remarkably, in the court’s view) that Göring had obtained them without duress. *Id.* at 721–22. The museum eventually obtained summary judgment on all of plaintiff’s claims on August 9, 2016, on the basis that the Norton Simon acquired good title to the Cranachs through the Dutch state. Order Granting Defendant’s Motion for Summary Judgment at 10, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866 (C.D. Cal. Aug. 9, 2016). Von Saher appealed the judgment to the Ninth Circuit, with written briefing scheduled for spring 2017. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 16-56308 (9th Cir. 2016).

⁹⁰ *Cassirer v. Thyssen–Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013).

⁹¹ See CAL. CIV. PROC. CODE § 354.4(b), (c) (West 2006).

⁹² See CAL. CIV. PROC. CODE § 354.4(a) (West 2006).

⁹³ *Movsesian v. Victoria Versicherung AG (Movsesian I)*, 578 F.3d 1052, 1054 (9th Cir. 2009).

Holocaust restitution litigation model. In 2004, New York Life settled for \$20 million.⁹⁴ In 2005, AXA likewise settled for \$17 million.⁹⁵ Settlement funds were established in both cases, administered by a three-person settlement board with authority to review and decide on claims, under the supervision of the federal judges hearing the cases, to pay out the valid insurance claims. The remainder of the funds was to be distributed in *cy pres* funds to various American and French Armenian non-profit groups.⁹⁶

In the third insurance case, *Mousesian v. Victoria Versicherung AG*, the Armenian claimants made similar claims against German insurers.⁹⁷ However, that case followed a different and most unusual trajectory. In addition to the technical arguments made in the other suits such as statute of limitations, *forum non conveniens* and the like, the German defendants in *Mousesian* argued that section 354.4 was unconstitutional. As in *Deutsch*, defendants argued that the California statute impermissibly intruded on the federal government's conduct of foreign affairs, and was therefore preempted.⁹⁸ In particular, they argued that the statute was intended to benefit a particular class of victims—"Armenian Genocide victims"—and objected to the statute's definition of "Armenian Genocide victim."⁹⁹ The district court rejected the argument, and defendants appealed to the Ninth Circuit.

The appellate court issued a split 2–1 decision in 2009 reversing the district court and holding for the defendants. In an opinion authored by Judge Thompson and joined by Judge Nelson, from which Judge Pregerson dissented—i.e. the same panel and the same configuration that held section 354.3 to be field preempted in *Von Saher I*—the court held that section 354.4 conflicted with an express federal policy to avoid recognizing an "Armenian Genocide."¹⁰⁰ Although the House of Representatives regularly introduced measures to formally recognize the events targeting Armenians and other ethnic and religious minorities in

⁹⁴ See *Armenian Heirs Settle AXA Class Action Lawsuit*, BUSINESS WIRE (Oct. 12, 2005, 11:00 AM), <http://www.businesswire.com/news/home/20051012005262/en/Armenian-Heirs-Settle-AXA-Class-Action-Lawsuit> [<http://perma.cc/7YPG-GMZV>].

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ See *Mousesian I*, 578 F.3d at 1055. In addition to Victoria Versicherung AG, plaintiffs also named as defendants Victoria's parent owner, Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG ("Munich Re"), and another Munich Re subsidiary, Ergo Versicherungsgruppe AG ("Ergo"). All three defendants are referred to collectively as "Victoria Insurance."

⁹⁸ See *id.* at 1055.

⁹⁹ See *id.* at 1054–55.

¹⁰⁰ *Id.* at 1057.

Ottoman Turkey as a genocide, the court pointed to executive efforts to prevent the measures from coming to a House vote, and letters to Congress from the State Department that such resolutions would “complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation,” as evidence of clear executive policy.¹⁰¹ The court noted that “the heart” of the conflict lay in the two-word phrase “Armenian Genocide”: “The symbolic effect of the words . . . is precisely the problem. The federal government has made a conscious decision not to apply the politically charged label of ‘genocide’ to the deaths of these Armenians during World War I.”¹⁰² The court also found that California’s interest in passing section 354.4 was not, as plaintiffs claimed, in carrying out its traditional role of regulating insurers, but rather the “real desiderata” was to provide a forum for Armenian genocide victims to obtain justice.¹⁰³ Because the federal policy had preemptive force and section 354.4 was in conflict with the policy, the court struck down the statute.¹⁰⁴

Due to the importance of the issues at stake, Plaintiffs sought panel rehearing and rehearing en banc. After more than a year, the same three-judge panel issued a new decision in 2010 granting the petition for rehearing, withdrawing the original 2009 decision, and filing a new opinion and dissent.¹⁰⁵ This time, Judge Pregerson wrote the majority opinion joined by Judge Nelson, and Judge Thompson was in the dissent. Evidently, Judge Pregerson had persuaded Judge Nelson that, in fact, there was no express federal policy against use of the term “Armenian Genocide,” and therefore section 354.4 should be allowed to stand.¹⁰⁶

In the second *Movsesian* decision, the court held that “informal presidential communications” to Congress suggesting that the House decline to formally recognize the Armenian genocide were not sufficient to establish a federal policy against recognition, particularly in light of other executive and legislative statements favoring such recognition.¹⁰⁷ The court pointed to regular congressional remembrance day celebrations in honor of genocide victims, including Armenians; executive statements

¹⁰¹ *Id.* at 1057–59; see also *Lamentation and Liturgy*, *supra* note 27, at 260–61.

¹⁰² *Id.* at 1060–61.

¹⁰³ *Id.* at 1062.

¹⁰⁴ *Id.* at 1062 (quoting *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 425 (2003)).

¹⁰⁵ See *Movsesian v. Victoria Versicherung AG (Movsesian II)*, 629 F.3d 901 (9th Cir. 2010).

¹⁰⁶ *Id.* at 903.

¹⁰⁷ *Id.* at 906.

regarding the events using language “virtually indistinguishable” from “Armenian Genocide”; and statements by then-presidential candidate Barack Obama urging recognition of an Armenian genocide.¹⁰⁸ Nor had the federal government previously expressed any opposition to the large number of states that individually recognized the Armenian genocide.¹⁰⁹ In the absence of a clear federal policy, section 354.4 presented no conflict and was therefore not preempted on that basis.¹¹⁰

The court further held that section 354.4 did not conflict with either the German-American claims agreement signed in 1922 to settle all claims of U.S. nationals against Germany or German nationals arising out of World War I, or the 1928 Settlement of War Claims Act providing for payment of awards made under the claims agreement, because section 354.4 covered private insurance claims and was not an invalid exercise of the federal government’s power to wage and end war.¹¹¹

Moreover, the doctrine of field preemption did not apply, because California was validly acting within its traditional state interest in regulating the insurance field and was not, as the original panel decision had held, simply using the statute as a means of impermissibly taking a position on foreign affairs.¹¹² For these reasons, the court now found that section 354.4 was a valid exercise of state power and was not preempted.¹¹³

The legal saga in *Movsesian*, however, did not end there. In December 2011, the Ninth Circuit reheard the case en banc. In February 2012, the en banc panel, in a decision issued by Judge Susan Graber, found that section 354.4 was preempted because it “intrude[d] on the field of foreign affairs without addressing a traditional state responsibility.”¹¹⁴ In other words, the en banc panel held that the doctrine of field preemption, which it also termed “dormant foreign affairs preemption,” applied to make section 354.4 unconstitutional.¹¹⁵ This was a new direction for the court in *Movsesian*, which in its previous two decisions had focused almost exclusively on conflict preemption and the existence, or not, of an express federal policy with which section 354.4 conflicted.

¹⁰⁸ *Id.* at 906–07.

¹⁰⁹ *Id.* at 907.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 908.

¹¹² *Id.* at 907–08.

¹¹³ *Id.* at 909.

¹¹⁴ *Movsesian v. Victoria Versicherung AG (Movsesian III)*, 670 F.3d 1067, 1072 (9th Cir. 2012).

¹¹⁵ *Id.* at 1072 (quoting *Deutsch v. Turner Corp.*, 324 F.3d 692, 709 n.6 (9th Cir. 2003)).

Field preemption is a powerful doctrine, because it may apply regardless of whether the federal government has taken any action at all; or, if it has, regardless of whether the state action at issue was in any conflict.¹¹⁶ Its purpose is to ensure that the states do not engage in foreign affairs policy, even if the federal government has not acted.¹¹⁷

The en banc court relied on *Zschernig* to illustrate its point. *Zschernig* struck down an Oregon probate statute providing that nonresident aliens could not inherit property in Oregon (it would escheat to the state) unless they could prove that the country in which they resided granted reciprocal rights to U.S. citizens.¹¹⁸ Although the statute purported to be a traditional exercise of state power over property and inheritance rights, the Supreme Court determined that it would require Oregon state courts to engage in a detailed inquiry into foreign political systems and the nature of foreign property rights, including whether such rights were granted on an equal basis or based on governmental caprice and whether state confiscation of property was an important feature.¹¹⁹ This being the height of the Cold War, the Supreme Court concluded that the real purpose of the statute was to take a particular foreign policy position and make value judgments regarding certain countries' approaches to property distribution in order to "keep United States money out of the grasp of communist or authoritarian nations."¹²⁰ Thus, even though the federal government had not established any policy that conflicted with Oregon's statute, the statute was nevertheless preempted because it would necessarily require judges to make determinations that would intrude into the field of foreign affairs.¹²¹ The en banc court also examined *Von Saher I*, its most recent field preemption case, decided two years earlier.¹²²

With these precedents in hand, the *Movsesian* en banc court turned to section 354.4. According to the court, the real concern with the California statute was that it did the same thing as the unconstitutional statutes in *Zschernig* and *Von Saher*: it provided a particular remedy for a particular class of people for the purpose of righting what California had determined was a historical wrong, namely, the persecution of Armenians at the hands of the Ottoman Turks.¹²³ Such a goal fell outside the scope

¹¹⁶ *Garamendi*, 539 U.S. at 419 n.11.

¹¹⁷ *Movsesian III*, 670 F.3d at 1072.

¹¹⁸ See *Zschernig v. Miller*, 389 U.S. 429, 430–31 (1968); *Movsesian III*, 670 F.3d at 1072.

¹¹⁹ *Zschernig*, 389 U.S. at 433–34; *Movsesian III*, 670 F.3d at 1072–73.

¹²⁰ *Zschernig*, 389 U.S. at 437–38 n.8; *Movsesian III*, 670 F.3d at 1073.

¹²¹ *Zschernig*, 389 U.S. at 440; *Movsesian III*, 670 F.3d at 1073.

¹²² *Movsesian III*, 670 F.3d at 1071.

¹²³ *Id.* at 1075–76.

of traditional state responsibility.¹²⁴ The statute, according to the en banc panel, also had more than an incidental effect on foreign affairs, because it “expresse[d] a distinct political point of view on a specific matter of foreign policy” by labeling the events at issue a “genocide” and displayed sympathy for “Armenian Genocide victims.”¹²⁵ Finally, the court was concerned that, in order to determine whether a particular claimant qualified as an “Armenian Genocide victim” according to the statute’s definition, a judge would have to make a politicized inquiry into the sensitive question of whether the policyholder had “escaped to avoid persecution” by the Ottoman Turks.¹²⁶ For these reasons, the court held section 354.4 to be unconstitutional under the doctrine of field preemption.¹²⁷

Given the sweeping nature of the court’s decision that any state action promoting use of the term “Armenian genocide” was preempted, the *Mousesian* plaintiffs sought review by the Supreme Court and filed a petition for writ of certiorari. In light of the federal government interests at stake, the Supreme Court invited the Solicitor General to submit the views of the United States government. The government was unequivocal: section 354.4 impermissibly intruded on federal foreign affairs powers, the en banc panel had reached the correct decision, and there

¹²⁴ *Id.* at 1076.

¹²⁵ *Id.* It did not escape the court’s notice that, only a few days after the en banc oral argument was held, France and Turkey became embroiled in a diplomatic row after the French National Assembly passed a bill criminalizing denial of the Armenian genocide, much as Holocaust denial is also a crime in France. Turkey recalled its ambassador, canceled bilateral visits, and refused cooperation in certain areas. *Id.* at 1077 (citing a BBC news article from December 22, 2011, detailing the developments, see *Turkey retaliates over French ‘genocide’ bill*, BBC NEWS (Dec. 22, 2011), <http://www.bbc.com/news/world-europe-16306376> [<http://perma.cc/LX67-JBDN>]). Turkey took similar actions when the German Bundestag voted in June 2016 to declare the killings of Armenians in Ottoman Turkey a genocide. See *German MPs recognise Armenian ‘genocide’ amid Turkish fury*, BBC NEWS (June 2, 2016), <http://www.bbc.com/news/world-europe-36433114> [<http://perma.cc/RQ6N-9TS9>]. Perhaps even more concerning for the court was the fear of angering Turkey, an important NATO ally, at a time of increasing tension in the Middle East. *Mousesian III*, 670 F.3d at 1077 (citing a New York Times article describing President Obama’s reluctance to use the term “Armenian Genocide” during a remembrance day celebration due to Turkey’s fierce opposition, see Peter Baker, *Obama Marks the Genocide Without Saying the Word* (Apr. 24, 2010), <http://www.nytimes.com/2010/04/25/world/europe/25prexy.html>). The “Arab Spring” had already begun by the time of the en banc oral argument, with demonstrations and protests in Tunisia that spread to several surrounding countries and eventually led to the downfall of multiple regimes. One of NATO’s most important strategic airbases is located in Incirlik, Turkey, and continues to play a pivotal role in combating terrorism, providing support to Syrian rebels, and fighting the spread of the Islamic State (“ISIS”). These events lend support to the court’s conclusion that the question of whether a genocide occurred in Ottoman Turkey “continues to be a hotly contested matter of foreign policy” and that “Turkey expresses great concern over the issue.” *Id.*

¹²⁶ *Mousesian III*, 670 F.3d at 1076–77.

¹²⁷ *Id.* at 1077.

was no need for further review by the Supreme Court.¹²⁸ The government also suggested that, while there was no express conflict between section 354.4 and certain treaties and settlement agreements concluded between the United States and Turkey after World War I to settle claims of U.S. nationals, the existence of such documents demonstrated that the U.S. adopted a particular approach to the settlement of wartime claims—an approach with which California expressed dissatisfaction in the passage of section 354.4.¹²⁹ Indeed, the government indicated that its consistent policy response when faced with questions such as those presented by the *Movsesian* plaintiffs' claims was to encourage Turkey and Armenia together to reach a mutually agreeable solution.¹³⁰

The petition for certiorari was denied, and thus the en banc decision stands as the final word on the *Movsesian* plaintiffs' claims.¹³¹

E. The Armenian Genocide Bank Deposit Statute

In 2006, Armenian claimants filed a new suit against two German banks, Deutsche Bank and Dresdner Bank, seeking to recover money and property allegedly withheld by these defendants during the Armenian genocide from their Armenian depositors.¹³² The German banks were accused of trading in assets stolen from the Armenian victims by the Ottoman Turkish state perpetrators.¹³³ The complaint in the action recited the historical facts of the murder and deportation of the Armenian

¹²⁸ Brief for the United States as Amicus Curiae at 5–6, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, 133 S.Ct. 2795 (2013) [hereinafter Solicitor General's Brief]. The case name changed on petition for writ of certiorari as only certain plaintiffs elected to proceed with claims against certain defendants.

¹²⁹ *Id.* at 15.

¹³⁰ *Id.* at 17.

¹³¹ It appears that *Movsesian III* is likely to remain limited to clarifying the circumstances in which a state steps too far over the line reserving foreign affairs powers to the federal government. See *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. Aug. 4, 2016) (declining to extend *Movsesian III*'s preemption holding to action by the city of Glendale in erecting a monument to Korean "comfort women" who served as sexual partners to Japanese soldiers during World War II). Unlike *Movsesian*, in *Gingery* the local government had appropriately addressed its views "through expressive displays or events, rather than through remedies or regulations." *Id.* at 1229. The court confirmed that "Glendale's establishment of a public monument to advocate against 'violations of human rights' is well within the traditional responsibilities of state and local governments." *Id.* Further, even if the city was acting outside an area of traditional state responsibility, its action of erecting a monument memorializing victims and expressing the hope that others would not experience similar harms would not have more than an incidental or indirect effect on foreign affairs, and thus was not preempted. *Id.* at 1231.

¹³² See *Deirmenjian v. Deutsche Bank, A.G. (Deirmenjian I)*, No. 06-cv-00774 MMM (CWx), 2006 U.S. Dist. Lexis 96772 at *2 (C.D. Cal. Sept. 25, 2006).

¹³³ See *id.* at *2–3. *Deirmenjian v. Deutsche Bank (Deirmenjian III)*, A.G., No. 06-cv-00774 MMM (CWx), 2010 U.S. Dist. LEXIS 86957, at *2, *21–23 (C.D. Cal. July 30, 2010).

population of Ottoman Turkey, including the death of 1.5 million to 2 million Armenians between 1915 and 1923, and sought recovery for the theft of the victims' property.¹³⁴

Deirmenjian involved two plaintiff subclasses. Class A consisted of those whose ancestors had deposited assets directly with the defendant banks.¹³⁵ The complaint alleged that the Armenian minority in Ottoman Turkey relied on the stability of the European banks and, therefore, deposited assets in such banks for their protection.¹³⁶ The two German banks, operating in Ottoman Turkey under the name of Deutsche Orient Bank, allegedly had over a dozen branches throughout the Ottoman Empire and targeted affluent Armenians as their customers.¹³⁷ Class B consisted of those victims whose assets were looted pursuant to Turkish government action and later deposited with the defendant banks.¹³⁸ With the onset of the killings and deportations of Armenians, the German banks allegedly accepted gold deposits from the Ottoman Turkish government with full knowledge that such deposits were taken from the Armenian victims.¹³⁹ Moreover, the German banks allegedly transferred to their own books assets belonging to their deceased Armenian customers rather than returning those assets to the customers' heirs, and they deliberately concealed the existence of the assets from such heirs.¹⁴⁰

The Class A plaintiffs relied on California Code of Civil Procedure section 348, a general purpose statute on the books since the late 1800s, which provides that there is no limitations period on actions to recover money or other property deposited with a bank.¹⁴¹ The Class B looted asset plaintiffs, however, could not rely on section 348, and in her initial decision issued in

¹³⁴ See *id.* at *5–11.

¹³⁵ See *id.* at *2–3 n.2.

¹³⁶ First Amended Class Action Complaint and Demand for Jury Trial at 7, *Deirmenjian v. Deutsche Bank, A.G.*, No. 06-cv-00774 MMM (CWx) (C.D. Cal. Oct. 16, 2006) [hereinafter *Deirmenjian* First Amended Complaint].

¹³⁷ *Id.* at 5. Similar allegations were made by Jews against the Swiss banks. See MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 43, 52 (N.Y.U. Press, 2003).

¹³⁸ See *Deirmenjian I*, 2006 U.S. Dist. Lexis 96772, at *3 n.2.

¹³⁹ *Deirmenjian* First Amended Complaint, *supra* note 136, at 9–10; cf. BAZYLER, *supra* note 137, at 26 (explaining that in the Holocaust restitution litigation, both Swiss banks and German banks were accused of knowingly accepting from the Nazis gold and other assets looted from the Jews).

¹⁴⁰ *Deirmenjian* First Amended Complaint, *supra* note 136, at 10.

¹⁴¹ See *Deirmenjian I*, 2006 U.S. Dist. Lexis 96772, at *121, 133; see also CAL. CIV. PROC. CODE § 348 (West 2006).

September 2006, presiding Judge Margaret Morrow¹⁴² dismissed the Class B claims as time-barred, with leave to amend.¹⁴³

The California legislature acted swiftly, and on January 1, 2007, California Code of Civil Procedure section 354.45 came into effect. Section 354.45 extended the statute of limitations for claims brought by “Armenian Genocide victims” for the return of deposited assets or looted assets later deposited in a bank operating in Ottoman Turkey during the genocide—categories that reflected the two plaintiff subclasses in *Deirmenjian*.¹⁴⁴ The definition of “Armenian Genocide victim” in section 354.45 was identical to that found in section 354.4, the statute struck down in *Mousesian III*.¹⁴⁵

In a lengthy decision issued in December 2007 (prior to the *Mousesian I* and *Von Saher I* rulings, but after *Deutsch* and *Garamendi*), the district court held that section 354.45 was unconstitutional.¹⁴⁶ According to Judge Morrow, the new California law impermissibly intruded on the foreign affairs power of the federal government to settle wartime claims of American citizens against Turkey and Germany arising out of World War I.¹⁴⁷ The court analyzed the Treaty of Berlin and a subsequent executive agreement between the United States and Germany establishing a mixed claims commission to consider war reparations to be paid to U.S. nationals, and determined that section 354.45 conflicted with both.¹⁴⁸ Additionally, the court held that section 354.45 conflicted with the Ankara Agreement, a 1934 agreement between the United States and Turkey memorializing and establishing a \$1.3 million lump-sum payment for all claims of U.S. nationals against Turkey that fell within the scope of a prior agreement between the parties.¹⁴⁹

¹⁴² Judge Morrow has since retired from the federal bench.

¹⁴³ *Deirmenjian I*, 2006 U.S. Dist. Lexis 96772, at *121, 150.

¹⁴⁴ CAL. CIV. PROC. CODE § 354.45; *see also* S.B. 1524, 2006 Leg. (Cal. 2006) (explaining section 354.45's connection with the Armenian genocide). The statute provides as follows:

Any action, including any pending action brought by an Armenian Genocide victim, or the heir or beneficiary of an Armenian Genocide victim, who resides in this state, seeking payment for, or the return of, deposited assets, or the return of looted assets, shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is filed on or before December 31, 2016.

CAL. CIV. PROC. CODE § 354.45(c).

¹⁴⁵ *Compare* CAL. CIV. PROC. CODE § 354.45(a)(1) *with* CAL. CIV. PROC. CODE § 354.4(a)(1).

¹⁴⁶ *Deirmenjian v. Deutsche Bank, A.G. (Deirmenjian II)*, 526 F. Supp. 2d 1068, 1085 (C.D. Cal. 2007). The Class B plaintiffs thus could not rely on section 354.45 either, and their claims were finally dismissed in 2008.

¹⁴⁷ *Id.* at 1079–80.

¹⁴⁸ *Id.* at 1081–85.

¹⁴⁹ *Id.* at 1085.

The question of whether section 354.45 actually conflicts with the Ankara Agreement settlement is controversial, because there is ample evidence that the claims commission established pursuant to the Ankara Agreement did not consider claims of “naturalized” American citizens—i.e. Turkish Armenians—at Turkey’s insistence.¹⁵⁰ Ultimately, however, it did not matter, because in a 2010 decision granting defendants summary judgment over all the Class A claims, the court held that—in contrast to its initial 2006 decision finding the Class A claims timely under section 348—the ten-year Turkish statute of repose applied to bar the claims.¹⁵¹

Shortly thereafter, one of the plaintiffs, Khachik Berian (both on his own behalf and on behalf of the similarly situated class plaintiffs), filed an appeal before the Ninth Circuit Court of Appeals seeking to have the lower court’s ruling that the Turkish limitations period applied to Armenian genocide-era claims overturned and section 354.45 found valid.¹⁵² Written briefing concluded in May 2011, but oral argument was not scheduled until November 2013. During that time, two developments occurred that impacted the issues on appeal in *Deirmenjian*. First, the Ninth Circuit issued its en banc field preemption opinion in *Movsesian III* striking down section 354.4. Second, the United States filed its wide-ranging amicus brief to the Supreme Court regarding the *Movsesian* plaintiffs’ petition for certiorari and setting forth its expansive view of federal policy regarding use of the term “Armenian genocide.” In an unpublished Memorandum Opinion issued December 9, 2013, the Ninth Circuit affirmed the district court’s grant of summary judgment in *Deirmenjian* on statute of limitations grounds.¹⁵³

Thus, by the end of 2013, California’s repeated legislative attempts to provide a forum for its Jewish and Armenian residents seemed to be going nowhere, as the courts consistently deferred to the federal government and struck down every statute.

¹⁵⁰ See Opening Brief of Appellant Khachik Berian, Berian [Deirmenjian] v. Deutsche Bank, A.G., No. 10-56359, at 33–34 and accompanying references (9th Cir. Feb. 7, 2011); see also *Lamentation and Liturgy*, *supra* note 27, at 277–79 (describing correspondence in the treaty’s *travaux préparatoires* between the United States and Turkey in which the United States acquiesced to Turkey’s request to exclude claims of Turkish Armenians).

¹⁵¹ *Deirmenjian III*, 2010 U.S. Dist. LEXIS 86957, at *77.

¹⁵² See Berian [Deirmenjian] v. Deutsche Bank, A.G., No. 10-56359 (9th Cir. Nov. 5, 2013). No Class B plaintiff (representing the looted assets claims) filed an appeal, and Defendant Dresdner Bank was not a party on appeal.

¹⁵³ See Memorandum Opinion, Berian [Deirmenjian] v. Deutsche Bank, A.G., No. 10-56359 (9th Cir. Dec. 9, 2013).

IV. CALIFORNIA'S LEGISLATIVE ATTEMPTS TO PROVIDE REDRESS BEAR FRUIT

A. Section 338(c)(3), the General Purpose Art Recovery Statute

Undaunted by the federal courts' consistent findings that California's special statutes were unconstitutional, and apparently determined to learn from their prior mistakes, in September 2010 California lawmakers signed into law new section 338(c)(3) of the Code of Civil Procedure, adding the provisions to the existing section 338.

Unlike the other statutes that came before it, section 338(c)(3) did not limit itself to a particular class of plaintiffs with claims that arose in particular historical circumstances. Rather, it applied generally to the recovery of fine art taken by theft.¹⁵⁴ The statute provides in relevant part that:

[A]n action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:

(i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.

(ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.¹⁵⁵

According to the legislative history, the purposes of the statute were twofold. First, the legislature wanted to "clarify competing interpretations of California's statute of limitations for the specific recovery of personal property."¹⁵⁶ Second, the bill was designed to "address a vexing problem faced by theft victims": the fact that it is "in the very nature of stolen art that it circulates underground for several years before it appears in museums and galleries, and by that time the SOL has long run its course."¹⁵⁷ The legislature thus recognized, as several courts already had, that

¹⁵⁴ See CAL. CIV. PROC. CODE § 338(c)(3)(A) (West 2010).

¹⁵⁵ *Id.*

¹⁵⁶ *Statute of Limitation: Recovery of Stolen Works of Art, Hearing on A.B. 2765 Before the Assembly Committee on Judiciary*, 3 (Cal. 2010) (Assembly Bill-Bill Analysis), http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_2765&sess=0910&house=A.

¹⁵⁷ *Id.* at 3–4.

a “discovery” rule would be fairer to victims of art theft, even while acknowledging the “potential inequity” to good faith purchasers.¹⁵⁸

Although section 338(c)(3) was thus clearly passed for neutral reasons having nothing to do with the Holocaust, Armenian genocide victims, or any other select victim group, there is some evidence that California legislators remained interested in formulating a pro-victim statute that did not implicate foreign affairs. For example, the legislative history also referred to *Von Saher I*, noting that, in striking down section 354.4, the Ninth Circuit indicated that von Saher potentially could have brought her claims under the general provisions of section 338, but that the court was uncertain as to whether the discovery rule announced in unrelated California case law would apply to the circumstances of von Saher’s case.¹⁵⁹ In addition, E. Randall Schoenberg, the attorney representing Maria Altmann in her quest to recover her family’s Nazi-stolen artwork from Austria,¹⁶⁰ also wrote in support of the amendment.

As with the other statutes, the constitutionality of section 338(c)(3) would soon be tested.

B. The Western Prelacy Files Suit Against the J. Paul Getty Museum

In 2010, a few months prior to the passage of section 338(c)(3), Attorney Vartkes Yeghiayan filed another Armenian genocide-era case, this time on behalf of the Western Prelacy of the Armenian Apostolic Church of America. The lawsuit, originally filed by the Western Prelacy in June 2010 in the Los Angeles Superior Court, named as defendants the J. Paul Getty Museum and the J. Paul Getty Trust—one of the wealthiest and most prominent art institutions in the world.¹⁶¹ The complaint accused the Getty defendants of purchasing art which was stolen from the rightful owner, the Catholicosate of Cilicia, during the gravest days of the Armenian genocide, 1915–1923.¹⁶² The complaint was amended in 2011 to add plaintiff’s reliance on section 338(c)(3).¹⁶³

¹⁵⁸ *Id.* at 4–5.

¹⁵⁹ *Id.* at 7.

¹⁶⁰ See *supra* note 7 and accompanying text.

¹⁶¹ See, e.g., Veronica Rocha, *Armenian Church Sues the Getty*, L.A. TIMES (June 3, 2010), <http://www.latimes.com/gnp-church060310-story.html> [<http://perma.cc/282P-TD6Z>].

¹⁶² See *id.*

¹⁶³ See Second Amended Complaint, *Western Prelacy of the Armenian Apostolic Church of America v. The J. Paul Getty Museum*, Superior Court for the State of California, County of Los Angeles, Case No. BC 438824 (Aug. 1, 2011) [hereinafter *Getty Complaint*].

The One Holy Universal Apostolic Orthodox Armenian Church is the official name of the Armenian Apostolic Orthodox Church (the “Armenian Church”), and is the oldest organized Christian Church in the world, having its origins in 301 A.D., when Armenia adopted Christianity as its official religion.¹⁶⁴ It remains the central religious authority for the Orthodox Armenian population all over the world.¹⁶⁵ The Catholicosate of the Holy See of the Great House of Cilicia is one of the Church’s two main regional sees.¹⁶⁶

During the Armenian genocide, the Catholicosate of Cilicia, which was located in Sis (a medieval Armenian city in modern-day Kozan, Turkey), was robbed and ruined by the Turks.¹⁶⁷ Catholicos Sahak, having been warned that Sis would be subject to the same kind of massacres experienced in other parts of the Ottoman Empire, retreated with his followers to Aleppo, Syria.¹⁶⁸ In 1929, following the exodus of hundreds of thousands of Armenians from Turkey, the Catholicosate was reestablished in Antelias, Lebanon.¹⁶⁹ This became the new home of the Great House of Cilicia in the Armenian diaspora.¹⁷⁰

Following the genocide and the growth of the Armenian diaspora in the United States, the Catholicosate of Cilicia came to be represented in the United States by independently functioning Eastern and Western Prelacies.¹⁷¹ The Western Prelacy is headquartered in southern California.¹⁷²

The facts of the Western Prelacy’s complaint tell a story that could have come right out of a Hollywood film. It begins 800 years ago with T’oros Roslin (circa 1210–1270), the most prominent Armenian manuscript illuminator in the High Middle Ages.¹⁷³ The works of Roslin occupy the most significant place in the book painting of the Cilician state and Medieval Armenia.¹⁷⁴ His art is discussed in numerous scholarly books and articles in multiple languages, and his name is mentioned in various publications concerning both the history and culture of Armenia

¹⁶⁴ *Id.* at 1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 2–3.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 5.

¹⁷⁴ *Id.*

and art history in general.¹⁷⁵ Roslin's works are preserved in manuscripts held in collections all over the world.¹⁷⁶

The Zeyt'un Gospels were copied and illustrated by Roslin in Hromkla, Cilicia, in 1256 for Catholicos Constantine I of the Holy See of the Great House of Cilicia.¹⁷⁷ Like other religious illuminated manuscripts, they constitute a highly valued national treasure of the Armenian people.¹⁷⁸ According to legend, religious manuscripts like the Zeyt'un Gospels wielded supernatural powers that would protect and save all those associated with its creation and protection.¹⁷⁹ For over six centuries, the Zeyt'un Gospels were venerated by the Armenians of Zeyt'un, Turkey, especially during times of war.¹⁸⁰ During the critical days of the Armenian genocide, the full Church hierarchy in procession paraded the Zeyt'un Gospels through every street in Zeyt'un in order to create a divine firewall of protection around the city.¹⁸¹

By the late nineteenth century, the Gospels were in joint possession of the church and the Sourenian family, a prominent Turkish Armenian family known as "Defenders of the Church."¹⁸² The Gospels were placed in an iron chest in the wall of the Church in Zeyt'un and secured by two locks.¹⁸³ The Church had the key to one of the locks and the Sourenian family had the key to the other.¹⁸⁴ The Gospels could only be "freed" by the insertion of both keys at once.¹⁸⁵

In or about 1915, at the start of the Armenian genocide, the Zeyt'un Gospels were taken from the Church in Zeyt'un and handed to Prince Asadur Agha Sourenian, who, because of his prominent family connections with the Turks, was among the last to leave Zeyt'un when all Armenians were ordered exiled.¹⁸⁶ Prince Asadur and his family were not deported until late 1915.¹⁸⁷ Prior to their deportation, the prince brought the Gospel book to the nearby town of Marash in order to save it from certain destruction, and also to be protected by its divine power.¹⁸⁸ In the spring of 1916, the Sourenian family, which was

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.* at 5–6.

179 *Id.* at 6.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

continuing to safeguard the Zeyt'un Gospels in Marash, was ordered exiled to Der Zor in the Syrian Desert.¹⁸⁹

Also in Marash with the Sourenians was their friend and doctor, Dr. H. Der Ghazarian, who was working at the time in a German hospital.¹⁹⁰ He discovered the Sourenians were going to be deported and asked to borrow the Zeyt'un Gospels the day before they were exiled.¹⁹¹ Dr. Der Ghazarian's ardent requests to borrow the Gospels ultimately saved it.¹⁹² Because of his work at the hospital, the doctor was allowed to stay in Marash longer than most other exiled Armenians.¹⁹³

With the Sourenian family exiled to the desert, the Gospel book remained temporarily with Dr. Der Ghazarian in Marash.¹⁹⁴ It is believed that Dr. Der Ghazarian and his family fled Marash in the spring of 1920 and were forced to leave behind the Gospels.¹⁹⁵ Subsequently, an unknown Turkish individual found the Zeyt'un Gospels and brought the manuscript to Melkon Atamian, an Armenian, in Marash for him to sell.¹⁹⁶ Atamian apparently cut away eight folios (sixteen pages) bearing the eight illuminated Canon Tables—some of the most beautiful pages in the Gospels—and returned the rest of the manuscript to the Turk.¹⁹⁷

The Turkish possessor subsequently took the Gospel manuscript, minus the eight folios, to Khachatur vardapet Der Ghazarian, Prelate of the Armenian Church of Marash, part of the Catholicosate of the Great House of Cilicia.¹⁹⁸ Der Ghazarian, before his own deportation, entrusted the Gospels to Reverend James K. Lyman—an American missionary in Marash.¹⁹⁹ Later, Rev. Lyman sent word from Marash to the "Zeyt'un Compatriotic Union" in Aleppo that he was in possession of the Gospel book and was prepared to transfer it to them for safekeeping.²⁰⁰ With the consent of the Patriarch of Marash, Lyman was told to pass it on to the Patriarchate of the Armenian Church in Istanbul.²⁰¹

In the late 1960s, with the consent of the Catholicosate of the Great House of Cilicia, the Armenian Patriarch of Istanbul, in an

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.* at 7.

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.*

200 *Id.*

201 *Id.* at 7–8.

effort to prevent the Turkish government from sequestering sacred church objects, took the Gospel book to Armenia.²⁰² The Gospel book, minus the eight folios containing the Canon Tables, was then presented to the Matenadaran—the Armenian state museum located in Yerevan, and the main repository for Armenian manuscripts—for preservation.²⁰³ The Zeyt'un Gospels remain at the Matenadaran to the present day.²⁰⁴

Unbeknownst to the Catholicosate of the Great House of Cilicia, the eight stolen folios containing the Canon Tables were maintained in the private collections of the Atamian family for a period of over ninety years, from the time of removal to the time of the Getty's purchase in 1994.²⁰⁵ During this time, the Catholicosate had no knowledge of facts to suggest that the pages had been stolen during the Armenian genocide.²⁰⁶ Armenian Church-related scholars, including those associated with the Catholicosate, who had studied both the Zeyt'un Gospels and the eight folios comprising the Canon Tables during the decades since their separation, could not definitively conclude that the Canon Table pages had been stolen from the Zeyt'un Gospels.²⁰⁷

In 1994, the Atamian family loaned the folios to the Pierpont Morgan Library in New York for an exhibition entitled, "Treasures From Heaven."²⁰⁸ The Atamian family's name remained anonymous at the time of the exhibition.²⁰⁹ The Catholicosate was never informed by the family of either their possession or the initial removal of the eight missing Canon Tables.²¹⁰ The Pierpont Morgan Library also never informed the Catholicosate of Cilicia of their temporary possession of the stolen folios.²¹¹ Sometime after the Pierpont Morgan exhibition, the Getty Museum purchased the eight stolen folios (Canon Tables) from the Atamian family.²¹²

The Catholicosate did not discover that the eight missing folios of the Zeyt'un Gospels had in fact been stolen and were being housed in the Getty Museum in Los Angeles until about July 2006.²¹³ Following this discovery, the Western Prelacy, as

202 *Id.*

203 *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* at 8–9.

213 *Id.* at 9.

the authorized representative and assignee of the Catholicosate of the Great House of Cilicia, brought suit.

C. Section 338(c)(3) Is Upheld

As with so many other lawsuits seeking compensation and restitution for injuries incurred as a result of mass atrocities, the timeliness of the Western Prelacy's claims was a heavily litigated issue from the outset.

In the Getty's 2011 demurrer²¹⁴ to the operative complaint, the Getty argued that the Church's claims were time-barred under either the general limitations period found in section 338 or the newly passed section 338(c)(3).²¹⁵ In November 2011, the court overruled the Getty's demurrer, rejecting the Getty's assertions that early dismissal was appropriate based upon statutes of limitations, including section 338(c)(3).²¹⁶ The court then ordered the parties to participate in mediation.²¹⁷

Developments in the Holocaust looted art cases soon began to have an impact on the litigation against the Getty. In October 2012, the Western Prelacy and the Getty museum asked the court to stay the case in light of the recent federal district court ruling in *Cassirer v. Thyssen-Bornemisza Collection Foundation*—a case against a Spanish state-run art museum brought by the heir to a Holocaust survivor whose valuable artwork had been stolen by the Nazis—declaring section 338(c)(3) to be unconstitutional.²¹⁸ The district court relied in part on the fact that section 338(c)(3) applied to claims to art taken after 1910, as evidence that the legislative intent was—as with the other California statutes previously struck down—to provide a forum for Holocaust-era claims in particular.²¹⁹ The district court's decision was on appeal to the Ninth Circuit, and thus the resolution of the appeal could determine the outcome of the Western Prelacy's case.

²¹⁴ A demurrer is California's procedure for challenging the sufficiency of the complaint, analogous to a 12(b)(6) motion under the Federal Rules of Civil Procedure.

²¹⁵ See Defendants the J. Paul Getty Museum and the J. Paul Getty Trust's (1) Notice of Demurrer to Second Amended Complaint; (2) General Demurrer to Second Amended Complaint; and (3) Memorandum of Points and Authorities at 5–15, Superior Court of the State of California, County of Los Angeles, Case No. BC 438824 (filed Sept. 6, 2011).

²¹⁶ The court ruled from the bench and did not issue a written opinion. For a discussion of the November 3, 2011 demurrer hearing, see Mike Boehm, *The Getty Museum is in a Legal Fight Over Armenian Bible Pages*, L.A. TIMES (Nov. 4, 2011), <http://articles.latimes.com/2011/nov/04/entertainment/la-et-armenian-bible-20111104> [<http://perma.cc/28JL-33GV>].

²¹⁷ See *id.*

²¹⁸ *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013). The *Cassirer* case had originally been brought pursuant to California's section 354.3, the Holocaust art recovery statute that was later struck down in the *Von Saher I* case. *Von Saher I*, 592 F.3d 954 at 616–17.

²¹⁹ *Id.* at 619.

The Ninth Circuit issued its ruling in *Cassirer* in December 2013. In a major victory for plaintiffs' advocates, the court²²⁰ held that—unlike the state statutes at issue in *Garamendi*, *Deutsch*, *Von Saher*, *Movsesian*, and *Deirmenjian*—section 338(c)(3) was *not* preempted under the foreign affairs doctrine.²²¹ According to the Ninth Circuit, section 338(c)(3) “does not create a remedy for wartime injuries by creating a new cause of action for the recovery of artwork”; rather, it “extends the statute of limitations for preexisting claims concerning a class of artwork that is unrelated to foreign affairs on its face.”²²² The court noted that section 338(c)(3) was neutral on its face and said nothing about wartime injuries or claims.²²³ The statute did not limit the class of claimants only to “Holocaust” or “Armenian Genocide” victims, but rather any person could recover any work of fine art as long as the statute's other requirements were met.²²⁴ The panel emphasized the facial neutrality of the statute, a result of what Judge Nelson referred to at oral argument as the desirable and intended interplay between the judicial and legislative branches as separate and co-equal branches of government.²²⁵ Indeed, the facial differences between section 338(c)(3) and its unconstitutional predecessors were signs that the California legislature had taken heed of the court's concerns and taken steps to remedy them. In its decision, the Ninth Circuit specifically cited the Getty case as an example of a non-Holocaust-era case relying on the statute for recovery.²²⁶

Following the Ninth Circuit's February 2014 denial of the Thyssen-Bornemisza Collection Foundation's petition for rehearing en banc in *Cassirer*, the state court lifted the stay in the Getty case so that proceedings and discovery could recommence. Trial was scheduled to begin on November 3, 2015.

On September 21, 2015, in the year marking the hundredth anniversary of the start of the Armenian genocide, the Western Prelacy and the Getty museum announced in a joint press release that they had resolved their dispute over the ownership of the eight Canon Tables.²²⁷ In the settlement, the Getty

²²⁰ The *Cassirer* panel consisted of Judges Pregerson, Nelson, and Wardlaw. Judge Pregerson wrote the unanimous opinion. *See id.* at 614.

²²¹ *Id.*

²²² *Id.* at 618–19.

²²³ *Id.*

²²⁴ *Id.* at 619.

²²⁵ The author attended oral argument in *Cassirer* at the Ninth Circuit in Pasadena, California on August 22, 2013.

²²⁶ *Cassirer*, 737 F.3d at 619. The court also cited *Rafaelli v. Getty Images, Inc.*, No. 2:12-cv-00563 (C.D. Cal. Jan. 20, 2012) (suit regarding photographs created in the 1970s).

²²⁷ Press Release, *J. Paul Getty Museum and the Western Prelacy of the Armenian Apostolic Church of America Announce Agreement in Armenian Art Restitution Case*,

“acknowledges the Armenian Apostolic Church’s ownership of the eight thirteenth century manuscript pages. . . . Separately, in recognition of the Getty’s decades-long stewardship of the Canon Tables and its deep understanding and appreciation of Armenian art, the Church will donate the pages to the Getty Museum in order to ensure their preservation and widespread exhibition.”²²⁸ The Canon Tables will continue to be housed at the Getty museum and will be available to museum visitors as well as scholars and researchers.²²⁹

V. THE WAY FORWARD?

As the first successful settlement of an Armenian genocide-era art case, the Western Prelacy’s suit against the Getty may point the way towards the future of Armenian genocide litigation. Dozens of other Armenian manuscripts are known to exist in museum collections across the United States, including the Huntington Library and Art Gallery in San Marino, California; the Walters Art Gallery in Baltimore, Maryland; the Museum of Fine Arts in Boston, Massachusetts; the Pierpont Morgan Library in New York; the Philadelphia Museum of Art in Pennsylvania; and the Freer Gallery of Art at the Smithsonian in Washington.²³⁰

However, whether those states have, or would pass, statutes of limitations similar to section 338(c)(3) is unknown. If they do not, Armenian and other plaintiffs seeking the return of artworks and cultural objects taken in circumstances involving mass atrocities may be more likely to find their claims time-barred outside of California. In crafting a creative and amicable settlement that offered both sides something of what they wanted, the Getty case may offer lessons for others—beneficiaries of section 338(c)(3) or not—to continue moving forward.

Victims of Holocaust-era art theft have additional reason for optimism. On December 16, 2016, President Obama signed into law the Holocaust Expropriated Art Recovery Act of 2016 (the “HEAR Act”).²³¹ In Senate hearings on the proposed bill, actress Helen Mirren—who played successful plaintiff Maria Altmann in

GETTY (Sept. 21, 2015), <http://news.getty.edu/press-materials/press-releases/canon-table-2015.print> [<http://perma.cc/M8DR-9ND9>].

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See, e.g., Melissa Conway & Lisa Fagin Davis, *Directory of Collections in the United States and Canada with Pre-1600 Manuscript Holdings*, 109 PAPERS BIBLIOGRAPHICAL SOC’Y AMERICA 273, 301, 357, 387 (2015).

²³¹ See *President Obama Signs Law to Aid Recovery of Nazi-Looted Art*, PR NEWSWIRE (Dec. 19, 2016), <http://www.prnewswire.com/news-releases/president-obama-signs-law-to-aid-recovery-of-nazi-looted-art-300381587.html> [<http://perma.cc/S6AW-3FBX>]; see also Pub. L. 114-308, 114th Cong., H.R. 6130 (Dec. 16, 2016).

the 2015 movie “Woman in Gold,” about Altmann’s quest to recover several valuable Klimt paintings taken from her Jewish family in Vienna during World War II—testified in favor of the bill, along with Ronald Lauder, the head of the World Jewish Congress and a Holocaust victim’s heir who has been fighting for twenty years to recover art belonging to his grandfather.²³² Introduced with bipartisan support in early 2016, the bill passed both the House and Senate unanimously.²³³

The HEAR Act is “the latest step” in the United States’ efforts, in place since World War II, to “help restore artwork and other cultural property lost in the Holocaust to its rightful owners.”²³⁴ As the accompanying Senate report noted, the first step in those efforts was the immediate postwar policy of “external restitution” discussed in the *Von Saher* case.²³⁵ However, that policy was not always successful in reuniting the true owners with their art.²³⁶

By the early part of the twenty-first century, the United States had taken a number of additional actions in furtherance of its overall policy of restitution, including (i) participation in the 1998 Washington Conference, at which forty-three nations declared Principles encouraging Holocaust victims and their heirs to come forward and make claims for unrestituted art; (ii) passage of the 1998 Holocaust Victims Redress Act and U.S. Holocaust Assets Commission Act of 1998, also encouraging restitution of stolen art; and (iii) signing the 2009 Terezin Declaration, urging forty-eight signatory states to ensure that their legal systems facilitate “just and fair solutions” and resolve claims regarding Nazi-confiscated and looted art in a fair and expeditious manner.²³⁷

In 1999, the Alliance of American Museums also adopted non-binding Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era, which urged members to identify objects in their collections that may have been stolen by the Nazis, make provenance information accessible, and continue their provenance research efforts.²³⁸

²³² See Halimah Abdullah, *Helen Mirren, Lawmakers Push to Recover Art Stolen by Nazis*, NBC NEWS (June 7, 2016), <http://www.nbcnews.com/news/us-news/helen-mirren-lawmakers-push-recover-art-stolen-nazis-n587311> [<http://perma.cc/U6RQ-9Q99>].

²³³ See *President Obama Signs Law to Aid Recovery of Nazi-Looted Art*, *supra* note 231; see also *HEAR Act Signed Into Law*, COMMISSION FOR ART RECOVERY, <http://www.comartrecovery.org/hear-act> [<http://perma.cc/2GRG-ZWVA>].

²³⁴ S. Rep. 114-394, 114th Cong., at 2 (Dec. 6, 2016).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 3–4.

²³⁸ *Id.*; see also *Standards Regarding the Unlawful Appropriation of Objects During*

Against this background, however, Congress recognized that “many obstacles [still] face those who attempt to recover Holocaust-era art through lawsuits,’ including ‘procedural hurdles such as statutes of limitations’ that prevent the merits of claims from being adjudicated.”²³⁹ For this reason, “[a] Federal limitations period . . . is therefore needed to guarantee that the United States fulfills the promises it has made.”²⁴⁰

The purposes of the HEAR Act are twofold: “(1) To ensure that laws governing claims to Nazi-confiscated art further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration”; and “(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.”²⁴¹ Congressional action in passing the HEAR Act is therefore grounded in its power to conduct foreign affairs; this of course avoids the constitutional problems inherent in so many of California’s state statutes and provides the justification for Congress’ regulation of the limitations period on claims to certain private property—action which federal courts have found is a traditional state interest.²⁴²

The main provision of the Act is modeled on the text of section 338(c)(3) and reads as follows:

a) In general.—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant *to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—*

(1) the identity and location of the artwork or other property; and

*(2) a possessory interest of the claimant in the artwork or other property.*²⁴³

The italicized portions of the above text are very similar to the relevant portions of section 338(c)(3).²⁴⁴ The HEAR Act also

the Nazi Era, AMERICAN ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era> [<http://perma.cc/9SUM-QVAL>].

²³⁹ S. Rep. 114-394, 114th Cong., at 5 (Dec. 6, 2016) (quoting *Von Saher I*, 592 F.3d at 958 (some internal formatting omitted)).

²⁴⁰ *Id.*

²⁴¹ S. 2763, 114th Cong. § 3 (Apr. 4, 2016) (as amended Sept. 29, 2016).

²⁴² *See, e.g., Mousesian II*, 629 F.3d at 908.

²⁴³ Pub. L. 114-308 at § 5(a) (emphasis added).

²⁴⁴ Compare Pub. L. 114-308 at § 5(a) (Apr. 4, 2016) (as amended Sept. 29, 2016) *with*

contains similar guidance as to when and how to resolve possible claims of misidentification.²⁴⁵ The Act would apply to any claims pending at the time of enactment or filed from the date of enactment through December 31, 2026.²⁴⁶

The enacted version of the HEAR Act differs in important ways from the bill as originally drafted. The enacted bill contains an expanded and more detailed definition of “artwork or other property,” which now includes not only fine art such as paintings, sculpture, drawings, and the like, but also “musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums.”²⁴⁷ Ceremonial and sacred objects are also included.²⁴⁸ However, the Act also contains an exception for claims already barred on the date of enactment if the claimant or a predecessor-in-interest already had actual knowledge of the relevant facts for at least six years from January 1, 1999 onwards and could have brought a claim.²⁴⁹

VI. CONCLUSION

The Getty case sits at the unique intersection of Armenian genocide property restitution efforts and California’s search for a constitutionally permissible way to provide a forum for its victim residents. Given the previous several years of litigation in which California statutes regarding claims of Holocaust and Armenian genocide survivors were consistently struck down on foreign affairs preemption grounds, it would not have been surprising if section 338(c)(3) had suffered the same fate.

That this did not happen is down to the core constitutional principle of separation of powers between co-equal branches of government. After years of hearing from courts that the California legislature impermissibly infringed on the federal conduct of foreign affairs, the state found a way forward by passing a statute, section 338(c)(3), that is neutral on its face and thus generally applicable to art recovery in atrocities other than the Holocaust—or even to art recovery having nothing to do with any mass abuses. This solution would not exist if California had not persisted in attempting to provide meaningful assistance to hundreds of thousands of its residents.

CAL. CIV. PROC. CODE § 338(c)(3)(A).

²⁴⁵ Compare Pub. L. 114-308 at § 5(b) (Apr. 4, 2016) (as amended Sept. 29, 2016) with CAL. CIV. PROC. CODE § 338(c)(3)(A)(i).

²⁴⁶ See Pub. L. 114-308 at § 5(d) (Apr. 4, 2016) (as amended Sept. 29, 2016).

²⁴⁷ See Pub. L. 114-308 at § 4(2) (Apr. 4, 2016) (as amended Sept. 29, 2016).

²⁴⁸ See *id.*

²⁴⁹ *Id.* at § 5(e).

Section 338(c)(3) strikes a careful balance between the needs of plaintiffs and the concerns of defendants. The value of an “actual discovery” rule to begin the running of the statute of limitations is amply demonstrated by the complicated and confusing history of the Zeyt’un Gospels: the Western Prelacy was not even aware of the existence of the Canon Tables, much less the location and how the pages came to be at their present location, until decades after they were stolen. Museums, galleries, and art dealers cannot acquire good title from a thief, and they have an obligation to look carefully into the provenance of any artworks they purchase and abide by ethical acquisition standards. They are also entitled to uniform application of the laws, and to expect that states will not override foreign policy decisions of the federal government.

Section 338(c)(3) also provided the template for Congress to take action. The HEAR Act is now in place, and can serve as a model for future legislation at the federal level. Though the road to this point was long, the future for human rights plaintiffs remains bright.

