INTERNATIONAL LAW — ACT OF STATE DOCTRINE — D.C. CIRCUIT DECLINES TO APPLY ACT OF STATE DOCTRINE TO CLAIM OF RUSSIAN SEIZURE OF RELIGIOUS PROPERTY. — *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).

In *Underhill v. Hernandez*,[1] the Supreme Court recognized the act of state doctrine, a judicial principle with centuries-old roots.[2] Chief Justice Fuller stated the doctrine at the outset of the Court's opinion: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[3] The Court has adhered to the doctrine on numerous occasions, including in the seminal case *Banco Nacional de Cuba v. Sabbatino*.[4] In *Sabbatino*, the Court invoked the doctrine and also articulated its rationale.[5] Specifically, Justice Harlan explained that although the Constitution's text does not compel the doctrine, the doctrine does have a constitutional foundation, as "[i]t arises out of the basic relationships between branches of government in a system of separation of powers."[6] Recently, in *Agudas Chasidei Chabad of United States v. Russian Federation*,[7] the D.C. Circuit declined to apply the act of state doctrine in a case in which a religious organization sued Russia to recover items the country had allegedly seized.[8] In doing so, the court limited the act of state doctrine in a way that is inconsistent with the doctrine's constitutional underpinnings — underpinnings that counsel courts to yield to the political branches when confronted with property seizure cases that require courts to judge the actions of foreign nations.

Incorporated in New York since 1940, Agudas Chasidei Chabad ("Chabad") serves as the umbrella organization for the Jewish "Chasidic spiritual movement, philosophy, and organization founded in Rus-

---

[1] 168 U.S. 250 (1897).

[2] *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 751 & n.4, 752 (4th ed. 2007).

[3] *Underhill*, 168 U.S. at 252. Chief Justice Fuller continued: "Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Id.*

[4] 376 U.S. 398 (1964).

[5] *See id.* at 423.

[6] *Id.*; *see also* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 405 (1990). For examples of the doctrine's other potential rationales, see BORN & RUTLEDGE, *supra* note 2, at 763–66.

[7] 528 F.3d 934 (D.C. Cir. 2008).

[8] *Id.* at 938, 955.

sia in the late 18th Century."[9] In 2004, Chabad sued the Russian Federation, "alleg[ing] that [Russia] violated international law by illegally taking and continuing to hold an invaluable collection of Jewish religious books and manuscripts, a collection that Chabad claims to rightfully own."[10] One portion of the collection — known as the Library — was the subject of the suit.[11] Chabad alleged that the Bolshevik government seized the Library from a warehouse in Moscow during the October Revolution of 1917.[12] Chabad attempted to recover the Library during the dissolution of the Soviet Union in 1991, and this effort led to a complicated procedural history[13] that is potentially relevant in an act of state doctrine analysis. By early 1992, there was a Soviet judicial decision and a Russian executive decree in favor of transferring the Library to Chabad, but these orders were soon reversed by officials in the Russian government, and Russia continues to possess the Library.[14] Chabad argued that these events constituted a transfer of the Library to Chabad and then a retaking by Russia.[15] As a part of its effort to have Chabad's suit dismissed, Russia argued that the act of state doctrine precluded adjudication of Chabad's claim.[16] The district court accepted this argument,[17] explaining that the doctrine forestalled Chabad's claim whether the original taking or the 1991–1992 retaking governed.[18]

---

[9] *Id.* at 938; *see also* Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 466 F. Supp. 2d 6, 10–11 (D.D.C. 2006). For a thumbnail sketch of Chabad's history, see *Agudas Chasidei Chabad of U.S. v. Gourary*, 650 F. Supp. 1463 (E.D.N.Y. 1987).

[10] *Agudas Chasidei Chabad*, 466 F. Supp. 2d at 10.

[11] *Agudas Chasidei Chabad*, 528 F.3d at 938. "The Library, the origins of which date back to 1772, consists of more than 12,000 books and 381 manuscripts." *Agudas Chasidei Chabad*, 466 F. Supp. 2d at 11–12. Another portion of the collection, referred to as the Archive, was also at issue; however, since it was seized outside of Russian territory, the district court and the D.C. Circuit were able to conclude easily that the doctrine did not bar Chabad's claim with respect to it. *See Agudas Chasidei Chabad*, 528 F.3d at 951–52; *cf.* Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

[12] *Agudas Chasidei Chabad*, 528 F.3d at 938.

[13] *See id.* at 944.

[14] *Id.* at 944–46.

[15] *Id.* at 946.

[16] *Id.* at 939. Russia also moved for dismissal under the rubrics of foreign sovereign immunity and forum non conveniens. *Id.* The district court found that the Foreign Sovereign Immunities Act prohibited Chabad from suing to recover the Library, *id.* at 939, and denied Russia's motion to dismiss on grounds of forum non conveniens, *id.* at 950.

[17] Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 466 F. Supp. 2d 6, 31 (D.D.C. 2006).

[18] *See id.* at 26–27. The district court noted that if the original taking scenario applied, "the act of state doctrine would squarely apply." *Id.* at 27. If the 1991–1992 taking scenario applied, the court would be sitting in judgment of the judicial and legislative acts of a foreign sovereign, which would also run counter to the doctrine. *See id.* at 26–27.

Both parties appealed, and the D.C. Circuit affirmed in part and vacated in part the district court's act of state doctrine rulings.[19] Writing for the panel, Judge Williams[20] rejected the district court's conclusion that the act of state doctrine barred the claim.[21] The court held that if the 1991–1992 retaking scenario governed, the doctrine would not bar the claim because the Second Hickenlooper Amendment[22] prohibits courts from applying the act of state doctrine in cases where a seizure occurred after January 1, 1959.[23] Conversely, if the initial seizure of the Library in 1917 was the pertinent taking, the court ruled that it would be required to address Chabad's claim that the doctrine should not apply based on a number of "countervailing factors" that the Supreme Court identified in *Sabbatino* — factors that might allow for relaxation of the doctrine.[24] Such an analysis would require the court to consider "both sensitive foreign policy and jurisprudential issues."[25] Therefore, the court vacated the district court's application of the doctrine to the Library claim and remanded, explaining that if the district court found "that the 1991–1992 actions of Russia . . . constituted an actionable retaking of the property, it [would] be unnecessary to resolve" the difficult issues presented by the circumstances of the original taking.[26]

By choosing not to apply the act of state doctrine, the court did not give appropriate weight to the constitutional foundation of the doctrine, which counseled in favor of applying the doctrine to the Library claim, even if the 1991–1992 actions constituted a retaking. In *Sabbatino*, the Supreme Court recognized the comparative institutional competence of the political branches in the foreign policy realm — a

---

[19] *Agudas Chasidei Chabad*, 528 F.3d at 955. On the question of Russia's foreign sovereign immunity as to the Library claim, the court reversed the district court's finding of immunity. *Id.* The court affirmed the district court's denial of Russia's motion to dismiss on forum non conveniens grounds. *Id.* at 950.

[20] Judge Williams was joined by Judge Edwards. Judge Henderson concurred in the judgment and authored a brief opinion articulating her disagreement with the majority's discussion of the jurisdictional issues involved with the foreign sovereign immunity inquiry. *See id.* at 955–57 (Henderson, J., concurring in the judgment).

[21] *See id.* at 955 (majority opinion).

[22] 22 U.S.C. § 2370(e)(2) (2006). The Amendment was passed in response to *Sabbatino* and applied retroactively to that decision. *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 107–08 (3d ed. 2009).

[23] *Agudas Chasidei Chabad*, 528 F.3d at 953.

[24] *See id.* at 953–54. Chabad, for example, "point[ed] to *Sabbatino*'s suggestion that 'the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.'" *Id.* at 954 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)). Chabad alleged that the seizure of the Library was the result of an oppressive campaign against Judaism, violating a *jus cogens* norm of international law. *See id.*

[25] *Id.* at 953.

[26] *Id.*

competence the judiciary lacks for many reasons, including its inability to consider how a single foreign policy decision could affect the United States's broader relationship with a foreign nation.[27] The Court has reaffirmed this separation of powers rationale in subsequent cases.[28]

This separation of powers justification draws further support from federalism principles not explicitly explored by the *Sabbatino* Court. Specifically, the text and structure of the Constitution dictate a limited federal judicial role in the context of foreign affairs because of the branch's disconnect from the states. Prior to the ratification of the Constitution, the individual colonies possessed sovereign authority, which included the exercise of foreign relations.[29] With ratification, the new states ceded power to the federal government, but in return maintained some measure of control over the national government.[30] This control was achieved through the Constitution's structure and power allocation, both of which were designed to "encourage participants in the federal lawmaking process to withhold their consent from proposals objectionable to the states."[31] In the foreign relations context, the Framers placed the bulk of the power in those institutions most closely connected to the states. The Senate represents the most significant protection of state prerogatives, where members, prior to the ratification of the Seventeenth Amendment, were selected by state legislatures.[32] And, the Senate is an important player in the formulation of foreign policy.[33] Furthermore, the President, who has a multi-

---

[27] *See Sabbatino*, 376 U.S. at 423 ("[The doctrine] concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.").

[28] *See, e.g.*, W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990) (describing the doctrine "as a consequence of domestic separation of powers"). *But see* BORN & RUTLEDGE, *supra* note 2, at 754–55 (describing *W.S. Kirkpatrick* as calling into question the separation of powers justification in favor of treating the doctrine as a choice of law rule). For a critique of the separation of powers rationale, see Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 375–76 (1986). Professor Bazyler highlights the paradox of the separation of powers rationale, arguing that the doctrine undesirably "diminishes the independence of the judiciary" and aggrandizes executive power. *Id.* at 375.

[29] *See generally* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 478–90 (1946) (documenting historical evidence in support of the proposition that the several colonies, as opposed to a national organ, possessed external sovereign power prior to 1789).

[30] *See* Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 NOTRE DAME L. REV. 1149, 1162 (2006) (explaining that the Constitution was designed to limit intrusions into the realm of the states).

[31] Bradford R. Clark, *Separation of Powers As a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1329 (2001).

[32] U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

[33] *See, e.g.*, *id.* art. II, § 2, cl. 2 (requiring that the President receive the Senate's advice and consent when making treaties and appointing ambassadors). Additionally, both houses of Congress possess an important foreign policy tool in their joint power to declare war. *See id.* art. I, § 8, cl. 11.

tude of foreign policy powers,[34] was historically — and continues to be theoretically — directly accountable to the states through the institution of the Electoral College.[35] By assessing the validity of the actions of foreign nations, the judiciary, the federal branch farthest removed from the states, circumvents the branches that states can influence most directly. This is especially problematic given that foreign relations is a context in which the states clearly meant to cede sovereignty to the branches that are subject to the greatest measure of state accountability.[36]

Sabbatino implicitly supports this federalism rationale. In addition to recognizing that the federal judiciary should yield to the political branches in matters of foreign policy based on separation of powers principles, the Supreme Court also held that state courts — and federal courts in *both* federal question *and* diversity cases — are obliged to follow the act of state doctrine articulated by the Court, as foreign relations is the province of the federal government and federal law.[37] To be sure, this holding gives greater authority to all three branches of the federal government, including the federal judiciary.[38] However, the reasoning behind the holding — the need for uniform foreign relations policy[39] — mandates a limited role for the federal judiciary, an institution that has the potential to insert the same discontinuity into foreign relations as states. Moreover, if the federal government is going to restrict the ability of states to have a voice within a certain sphere, decisionmaking authority should at least be channeled through

---

[34] *See id.* art. II, §§ 2–3.

[35] *See id.* art. II, § 1, *amended by* U.S. CONST. amend. XII; *see also* Clark, *supra* note 31, at 1329 (quoting THE FEDERALIST NO. 45, at 287 (James Madison) (Clinton Rossiter ed., 1999)). Perhaps the even greater evidence of the President's connection to the states is the back-up procedure used if a candidate fails to receive a majority of electors. In such a situation, the House selects the President, with each state delegation having a single and equal vote. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

[36] *Cf.* Clark, *supra* note 30, at 1161 (arguing that the constitutional structure, "which takes pains to channel federal discretion to displace state law through complicated procedures designed to safeguard federalism, . . . counsel[s] against interpreting the Eighth Amendment to confer substantial policymaking discretion on federal courts").

[37] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (noting "that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law"); *see also* BORN & RUTLEDGE, *supra* note 2, at 767 (recognizing that state courts have "appl[ied] an act of state rule at least as deferential to foreign governmental acts as the federal act of state doctrine"); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After* Erie, 66 FORDHAM L. REV. 393, 441–45 (1997) ("*Sabbatino* leaves no doubt that issues of international law and foreign affairs are federal questions, requiring uniform federal solutions." *Id.* at 443).

[38] *See* Stephens, *supra* note 37, at 443.

[39] *See Sabbatino*, 376 U.S. at 425.

those federal institutions that allow for the states to have an indirect influence.

The constitutional principles discussed above counsel against narrow application of the act of state doctrine. This is not to say that the Constitution mandates that courts apply the doctrine in all circumstances. Rather, courts can limit the doctrine, but only in ways that are consistent with its constitutional underpinnings. For instance, courts can and should limit the doctrine to the extent that legislation, such as the Second Hickenlooper Amendment, requires them to do so. Legislation, a product of a "set of procedures" that "requires the participation and assent"[40] of the political branches, is a signal to the judiciary that its involvement in a case will not be detrimental to American foreign policy. However, in order to remain consistent with the doctrine's constitutional foundation, courts must ensure that they limit the doctrine only to the extent *expressly* permitted by the legislature.

The D.C. Circuit failed to do so in *Chabad*. In vacating and remanding the case, the court did not consider important limitations on the Second Hickenlooper Amendment, which should have led the court to apply the doctrine even if the 1991–1992 retaking scenario governed. Other courts have noted that the Amendment was meant only to preclude application of the doctrine in cases in which the seized property is within the United States.[41] Indeed, in the years following the Amendment's enactment, the Second Circuit recognized that the Amendment was meant to address congressional "concern[s] about the problem peculiarly related to the facts of the *Sabbatino* case" — in which the expropriated property had entered the United States.[42] The policy underlying the statute was a desire to respond to the concern that in the wake of *Sabbatino* the United States would become a "thieves' market."[43] Thus, the statute "was designed to be invoked by American firms in order to afford them 'a day in court' . . . when some other entity attempted to market the American firms' expropriated property and some aspect of such attempted transaction *took place in this country*."[44] By overlooking this history and the limited scope of

---

[40] Clark, *supra* note 31, at 1339.

[41] *See, e.g.*, Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394, 399–402 (2d Cir. 1970) (documenting the legislative history of the Amendment and concluding that it was designed to cover the isolated situation in which the expropriated property is in the United States), *rev'd on other grounds*, 406 U.S. 759 (1972); *see also* Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322, 327 (5th Cir. 1982).

[42] *First Nat'l City Bank*, 431 F.2d at 400.

[43] *Id.* (internal quotation marks omitted).

[44] *Id.* at 402 (emphasis added); *cf.* Rong v. Liaoning Provincial Gov't, 362 F. Supp. 2d 83, 99 (D.D.C. 2005) (explaining that the Amendment did not apply "because the property at issue [was] not located in the United States").

the Amendment,[45] the court discovered congressional intent to permit court involvement in a potentially sensitive foreign policy matter where it appears that no such intent existed.[46]

Nor can the court justify its actions by pointing to an express statement from the executive branch that the act of state doctrine need not apply. Such a statement might be another reason for a court to avoid applying the doctrine and still remain faithful to the doctrine's constitutional foundation.[47] In recognizing this exception, courts have indicated that such an expression of executive policy substantially ameliorates the fear at the root of the doctrine — that by judging a foreign country's actions the judiciary would disrupt the foreign policy prerogatives of the other branches.[48] In *Chabad*, this exception did not apply, as the State Department refused to issue a letter in support of Chabad's contention that the doctrine should not govern.[49] In refusing to apply the doctrine, even after the executive branch had explicitly declined to support judicial involvement in this case, the D.C. Circuit ran the substantial risk of negatively impacting U.S. foreign policy.[50]

---

[45] Russia made this argument in its brief and cited *Entex*, *see* Appellants' Reply and Cross-Appellees' Brief at 41–42, *Agudas Chasidei Chabad*, 528 F.3d 934 (D.C. Cir. 2008) (No. 07–7002), but the court failed to address this recognized limitation.

[46] Had the court recognized the inapplicability of the Amendment, it would have been forced to consider Chabad's argument that the doctrine should not apply based on potential limitations to the doctrine identified in *Sabbatino*. *See Agudas Chasidei Chabad*, 528 F.3d at 953–55. However, the court suggested that the limitations identified in *Sabbatino* likely would not apply in this case, *see id.* at 954–55, and it noted that an examination of the limitations' applicability in this case would have entailed the negative "implications for foreign affairs that the doctrine is designed to avert," *id.* at 954. *See also* Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 474–75 (1993).

[47] This exception to the doctrine is known as the "*Bernstein* exception," named for a Second Circuit decision in which the court "held that the act of state doctrine was inapplicable in the face of an express suggestion that U.S. courts exercise jurisdiction." BORN & RUTLEDGE, *supra* note 2, at 791; *see also* Bernstein v. N.V. Nederlandsche-Amerikaansche Stommvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam).

[48] *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767–68 (1972) (plurality opinion). Although laudable for its recognition of executive power and competency in the foreign policy realm, the *Bernstein* exception does not take full account of the doctrine's constitutional foundation. Specifically, the exception permits court intervention in the absence of congressional approval, a questionable practice in the foreign policy context, where powers are shared between the elected branches. *See* U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, §§ 2–3; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Therefore, even when armed with an executive assurance, a court should not immediately dispense with the doctrine. For an argument in favor of eliminating the exception for this and other reasons, see generally Breana Frankel, *Oy Vey! The* Bernstein *Exception: Rethinking the Doctrine in the Wake of Constitutional Abuses, Corporate Malfeasance and the "War on Terror,"* GEO. WASH. INT'L L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093563.

[49] *See* Appellants' Reply and Cross-Appellees' Brief, *supra* note 45, at 45.

[50] One could argue that this exception to the doctrine might lead to a misinterpretation of executive intent. Specifically, for strategic reasons, the executive branch might wish to remain si-

One might question how complicated and salient the foreign policy issues are in this case. However, there are numerous indications that the case presents difficult and important issues. For instance, the "energetic defense of this lawsuit" by the Russian government, which the court recognized,[51] indicates that the issues at stake are of some importance. These issues provide support for resolving the claims through the diplomatic process managed by the political branches. Moreover, although not addressed by the court, Russia and the United States entered into a Memorandum of Understanding in the early 1990s, pursuant to which Russia agreed to place the Library in a newly created research center.[52] A court ruling that disrupts such an arrangement presents the potential for inconsistency and embarrassment in the conduct of American foreign policy.[53] The prospect of creating distrust and confusion is especially troublesome at a time when the United States is attempting to repair relations with an important foreign power.[54]

The D.C. Circuit's cursory analysis of the act of state doctrine in *Chabad* led the court to overlook important constitutional justifications for the doctrine — justifications that require serious consideration about whether the judiciary is inserting itself improperly into foreign policy issues more appropriately left to the political branches. The oft-stated separation of powers rationale finds strong support in principles of federalism. These principles counsel against judicial circumvention of constitutional processes that were designed to accord states an appropriate measure of representation in the federal decisionmaking process. Courts should only decline to apply the doctrine in ways that are consistent with these constitutional underpinnings. By not giving appropriate weight to these principles, the D.C. Circuit discovered congressional intent in favor of judicial involvement where it may not have existed and failed to consider properly the opinion of the executive branch. In doing so, the D.C. Circuit appropriated the political branches' foreign relations powers and placed itself in the undesirable position of weighing complex foreign policy issues in this case and those to come.

---

lent, but still desire court involvement. Aside from the normative problems associated with leaving the resolution of difficult foreign policy issues to a branch that is comparatively less suited to handle such matters, there is no need to interpret executive silence in this case, as the executive branch stated that it would not support Chabad's act of state doctrine argument.

51 *Agudas Chasidei Chabad*, 528 F.3d at 954.

52 *See* Appellants' Reply and Cross-Appellees' Brief, *supra* note 45, at 6–7.

53 *Cf. First Nat'l City Bank*, 406 U.S. at 765 (plurality opinion) (noting that act of state doctrine cases emphasize that "juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government").

54 *See* Craig Whitlock, *'Reset' Sought on Relations with Russia, Biden Says*, WASH. POST, Feb. 8, 2009, at A18.