SUPREME COURT OF THE UNITED STATES

No. 03–13

REPUBLIC OF AUSTRIA ET AL., PETITIONERS *v.*
MARIA V. ALTMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 7, 2004]

JUSTICE SCALIA, concurring.

I join the Court's opinion, but add a few thoughts of my own.

In *Landgraf* v. *USI Film Products,* 511 U. S. 244, 292 (1994) (opinion concurring in judgments, joined by KENNEDY and THOMAS, JJ.), I noted our "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction." I explained this on the ground that "the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power" rather than to regulate primary conduct, so that the relevant time for purposes of retroactivity analysis is not when the underlying conduct occurred, but when judicial power was invoked. *Id.*, at 293. Thus, application of a new jurisdictional statute to cases filed after its enactment is not "retroactive" even if the conduct sued upon predates the statute. *Ibid.* I noted that this rule applied even when the *effect* of a jurisdiction-restricting statute in a particular case is to "deny a litigant a forum for his claim entirely, or [to] leave him with an alternate forum that will deny relief for some collateral reason." *Id.*, at 292–293 (citations omitted). The logical corollary of this last statement is that a jurisdiction-expanding statute should be applied to subsequent cases even if it sometimes has the effect of *creating* a forum where none existed.

The dissent rejects this approach and instead undertakes a case-specific inquiry into whether United States courts would have asserted jurisdiction at the time of the underlying conduct. *Post*, at 7–15 (opinion of KENNEDY, J.). It justifies this approach on the basis of *Hughes Aircraft Co.* v. *United States ex rel. Schumer,* 520 U. S. 939 (1997). For reasons noted by the Court, see *ante*, at 17, n. 15, I think reliance on that case is mistaken. The Foreign Sovereign Immunities Act, and the regime that it replaced, do not by their own force create or modify substantive rights; respondent's substantive claims are based primarily on California law, see *ante*, at 6, n. 4. Federal sovereign-immunity law limits the jurisdiction of federal and state courts to entertain those claims, see 28 U. S. C. §§1604–1605, but not respondent's right to seek redress elsewhere. It is true enough that, as to a claim that no foreign court would entertain, the FSIA can have the accidental effect of rendering enforceable what was previously unenforceable. But unlike a *Hughes Aircraft*-type statute, which confers or limits "jurisdiction" in every court where the claim might be brought, the FSIA affects substantive rights only accidentally, and not as a necessary and intended consequence of the law. Statutes like the FSIA do not "*spea[k] . . . to* the substantive rights of the parties," *Hughes Aircraft*, *supra*, at 951 (emphasis added), even if they happen sometimes to affect them.