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 KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

This is an important decision for interpreting the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U. S. C. §1602 *et seq*. As the Court's careful opinion illustrates, the case is difficult. In my respectful view, however, its decision is incorrect.

At the outset, here is a summary of my primary concerns with the majority opinion: To reach its conclusion the Court must weaken the reasoning and diminish the force of the rule against the retroactivity of statutes, a rule of fairness based on respect for expectations; the Court abruptly tells foreign nations this important principle of American law is unavailable to them in our courts; this is so despite the fact that treaties and agreements on the subject of expropriation have been reached against a background of the immunity principles the Court now rejects; as if to mitigate its harsh result, the Court adds that the Executive Branch has inherent power to intervene in cases like this; this, however, is inconsistent with the congressional purpose and design of the FSIA; the suggestion reintroduces, to an even greater degree than before, the same influences the FSIA sought to eliminate from sovereign immunity determinations; the Court's reasoning also implies a problematic answer to a separa-

tion-of-powers question that the case does not present and that should be avoided; the ultimate effect of the Court's inviting foreign nations to pressure the Executive is to risk inconsistent results for private citizens who sue, based on changes and nuances in foreign affairs, and to add prospective instability to the most sensitive area of foreign relations.

The majority's treatment of our retroactivity principles, its rejection of the considered congressional and Executive judgment behind the FSIA, and its questionable constitutional implications require this respectful dissent.

I

The FSIA's passage followed 10 years of academic and legislative effort to establish a consistent framework for the determination of sovereign immunity when foreign nations are haled into our courts. See H. R. Rep. No. 94–1487, p. 9 (1976) (hereinafter H. R. Rep.). As we explained in *Verlinden B. V.* v. *Central Bank of Nigeria,* 461 U. S. 480 (1983), the preceding 30 years had been marked by an emerging or common-law regime in which courts followed the principles set out in the letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting U. S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–985 (1952) (hereinafter Tate Letter or Letter). See *ante*, at 11. Even after the Tate Letter, however, courts continued to defer to the Executive's case-specific views on whether immunity was due. See *Verlinden*, *supra*, at 487–488. This regime created "considerable uncertainty," H. R. Rep., at 9, and a "troublesome" inconsistency in immunity determinations, 461 U. S., at 487. The inconsistency was the predictable result of changes in administrations and shifting political pressures. Congress acted to bring order to this legal uncertainty: "[U]niformity in decision . . . is desirable since a disparate treatment of cases involving foreign governments may have adverse

foreign relations consequences." H. R. Rep., at 13. See also *id.,* at 7 (The "[FSIA] is urgently needed legislation"). Congress placed even greater emphasis on the implications that inconsistency had for our citizens, concluding that the Act was needed to "reduc[e] the foreign policy implications of immunity determinations and assur[e] litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." *Ibid.*

There is no dispute that Congress enacted the FSIA to answer these problems, for the Act's purpose is codified along with its governing provisions. See 28 U. S. C. §1602. To this end, the Act provides specific principles by which courts are to decide claims for foreign sovereign immunity. See *ibid.* So structured, the Act sought to implement its objectives by removing the Executive influence from the standard determination of sovereign immunity questions. See H. R. Rep., at 7 (under the FSIA "U. S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency").

II

A

The question is whether the courts, by applying the statutory principles the FSIA announced, will impose a retroactive effect in a case involving conduct that occurred over 50 years ago, and nearly 30 years before the FSIA's enactment. It is our general rule not to apply a statute if its application will impose a retroactive effect on the litigants. See *Landgraf* v. *USI Film Products,* 511 U. S. 244 (1994). This is not a rule announced for the first time in *Landgraf;* it is an old and well-established principle. "It is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect." *Dash* v. *Van*

Kleeck, 7 Johns. 477, 503 (N. Y. 1811) (Kent, C. J.); see also *Landgraf*, 511 U. S., at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"). The principle stems from fundamental fairness concerns. See *ibid.* ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted" (footnote omitted)).

The single acknowledged exception to the rule against retroactivity is when the statute itself, by a clear statement, requires it. See *id.,* at 264 ("'Congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result'" (quoting *Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204, 208 (1988))).

The FSIA does not meet this exception because it contains no clear statement requiring retroactive effect. The majority concedes this at the outset of its analysis, saying the text of the FSIA "falls short of an 'expres[s] prescri[ption of] the statute's proper reach.'" *Ante*, at 16 (alterations in original) (quoting *Landgraf*, *supra*, at 280).

In an awkward twist, however, the Court also maintains that the "[Act's] language is unambiguous," *ante*, at 19, and that it "suggests Congress intended courts to resolve *all* [foreign sovereign immunity] claims 'in conformity with the principles set forth' in the Act, regardless of when the underlying conduct occurred." *Ibid.* If the statute were in fact this clear, the exception would apply. Nothing in our cases suggests that statutory language might be "unambiguous," yet still "not sufficient to satisfy *Landgraf*'s 'express command.'" *Ibid.* If the Court really thinks the statute is unambiguous, it should rest on that premise.

In any event, the Court's suggestion that the FSIA does command retroactive application unambiguously is not

right. The Court's interpretation of §1602 takes the pertinent "henceforth" language in isolation. See *ante*, at 18–19. When that language instead is read in the context of the full section, it is quite clear that it does not speak to retroactivity. The section is as follows:

> "Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this [statute]."

The first two sentences in §1602 describe the Act's intention to replace the former framework for sovereign immunity determinations with a new court-controlled regime. The third sentence, which contains the "henceforth" phrase, serves to make clear that the new regime replaces the old regime from that point on. Compare §1602 ("immunity [claims] should henceforth be decided by [American] courts . . . in conformity with the [Act's] principles"), with Webster's Third New International Dictionary 1056 (1976) (defining "henceforth" as "from this point on"). That does not address the topic of retroactivity.

If one of the Act's principles were that "the Act shall govern all claims, whenever filed, and involving conduct that occurred whenever in time," the provision would command retroactive application. A statement like this, however, cannot be found in the FSIA. The statute says

only that it must be applied "henceforth." That says no more than that the principles immediately apply from the point of the Act's effective date on, the same type of command that *Landgraf* rejected as grounds for an express command of retroactive application. Cf. 511 U. S., at 257 (analyzing a statutory provision that provided it was to "'take effect upon enactment'"). As JUSTICE STEVENS noted for the Court in that case: "A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Ibid.*

In order for the term "henceforth" to command retroactivity, it would have to be accompanied by reference to specific proceedings or claims (*i.e.*, specific as to when they were commenced, if they are pending, or when they were determined). To confirm this one need only compare the FSIA's isolated use of the term "henceforth" to those statutory provisions that have been interpreted to require retroactive effect. See, *e.g., Carpenter* v. *Wabash R. Co.,* 309 U. S. 23, 27 (1940) ("The statute applies to 'equity receiverships of railroad corporations now . . . pending in any court of the United States'"); *Freeborn* v. *Smith,* 2 Wall. 160, 162 (1865) ("'all cases of appeal . . . heretofore prosecuted and now pending in the Supreme Court of the United States . . . may be heard and determined by the Supreme Court of the United States'"). See also *Landgraf*, 511 U. S., at 255–256 (explaining that before the FSIA was enacted, another bill was passed by Congress but vetoed by the President with "language expressly calling for [retroactive] application of many of its provisions"); *id.,* at 255, n. 8 (citing the following example of a provision containing an express command for retroactive applications: "'[These] sections . . . shall apply to all proceedings pending on or commenced after the date of the enactment of this Act'"). On its own, "henceforth" does not speak with the precision and clarity necessary to command

retroactivity.

JUSTICE BREYER's suggestion that Congress' intention as to retroactivity can be measured by the fact that the FSIA does not bear the same language as some other statutes and conventions Congress has authored does not change the analysis. See *ante*, at 5 (concurring opinion). To accept that interpretive approach is to abandon our usual insistence on a clear statement.

B

Because the FSIA does not exempt itself from the usual rule against retroactivity with a clear statement, our cases require that we consider the character of the statute, and of the rights and liabilities it creates, to determine if its application will impose retroactive effect on the parties. See *Landgraf*, 511 U. S., at 280 ("When . . . the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"). If it does, we must refuse to apply it in that manner. *Ibid.*

The essential character of the FSIA is jurisdictional. The conclusion that it allows (or denies) jurisdiction follows from the language of the statute. See §1602 (the Act involves "the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts"). By denying immunity in certain classes of cases—those in the Act's succeeding provisions—the FSIA, in effect, grants jurisdiction over those disputes. The Court as much as admits all this, saying that "the FSIA . . . opens United States courts to plaintiffs with preexisting claims against foreign states." *Ante,* at 16.

The statute's mechanism of establishing jurisdictional effects (*i.e.*, either allowing jurisdiction or denying it) has

important implications for the retroactivity question. On the one hand, jurisdictional statutes, as a class, tend not to impose retroactive effect. As the Court explained in *Landgraf*, "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" 511 U. S., at 274 (citation omitted).

On the other hand, there is a subclass of statutes that, though jurisdictional, do impose retroactive effect. These are statutes that confer jurisdiction where before there was none. That is, they altogether create jurisdiction. We explained the distinction in a unanimous opinion in *Hughes Aircraft Co.* v. *United States ex rel. Schumer:*

> "Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." 520 U. S. 939, 951 (1997) (citations omitted).

The principles of *Hughes Aircraft* establish that retroactivity analysis of a jurisdictional statute is incomplete unless it asks whether the provision confers jurisdiction where there was none before. Again, this is common

ground between the majority and this dissent. The majority recognizes the import of *Hughes Aircraft*'s holding and affirms that courts may not apply statutes that confer jurisdiction over a cause of action for which no jurisdiction existed when the sued-upon conduct occurred. "Such statutes," the majority acknowledges, "'even though phrased in "jurisdictional" terms, [are] as much subject to our presumption against retroactivity as any other[s].'" *Ante,* at 17 (alterations in original) (quoting *Hughes Aircraft*, *supra*, at 951).

If the FSIA creates new jurisdiction, *Hughes Aircraft* controls and instructs us not to apply it to cases involving preenactment conduct. On the other hand, if the FSIA did not create new jurisdiction—including where it in fact stripped previously existing jurisdiction from the courts—we may apply its statutory terms without fear of working any retroactive effect. See *Lindh* v. *Murphy,* 521 U. S. 320, 342–343, n. 3 (1997) (REHNQUIST, C. J., joined by SCALIA, KENNEDY, and THOMAS, JJ., dissenting) ("Although in *Hughes Aircraft* we recently rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes, nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-*ousting* statutes to pending cases" (citation omitted)).

C

To this point, then, I am in agreement with the Court on certain relevant points—the FSIA does not contain a clear retroactivity command; the statute is jurisdictional in nature; and jurisdictional statutes impose retroactive effect when they confer jurisdiction where none before existed. Now, however, our paths diverge. For though the majority concedes these critical issues, it does not address the question to which they lead: Does the FSIA confer jurisdiction where before there was none? Rather than asking that obvious question, the Court retreats to non

sequitur. After this recitation of the *Hughes Aircraft* rule and with no causal reasoning from it, the Court concludes: "Thus, *Landgraf*'s default rule does not definitively resolve this case." *Ante*, at 17. It requires a few steps to undertake the analysis the Court omits, but in the end the proper conclusion is that, assuming the court on remand found immunity existed under the pre-FSIA regime, the statute does create jurisdiction where there was none before.

The analysis begins with 1948, when the conduct occurred. See *INS* v. *St. Cyr,* 533 U. S. 289, 321 (2001) ("[T]he judgment whether a particular statute acts retroactively 'should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations"'" (quoting *Martin* v. *Hadix,* 527 U. S. 343, 358 (1999) (in turn quoting *Landgraf*, *supra*, at 270))). The parties' expectations were then formed by an emerging or common law framework governing claims of foreign sovereign immunity in American courts.

Parties in 1948 would have expected courts to apply this general law of foreign sovereign immunity in the future, and so also to apply whatever rules the courts "discovered" (if one subscribes to Blackstone's view of common law) or "created" (if one subscribes to Holmes') in the intervening time between the party's conduct and its being subject to suit. Compare 1 W. Blackstone, Commentaries *68 ("[T]he only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it"), with Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 466 (1897) ("Behind the logical form [of common law decision making] lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding"). To conduct the analysis, then, we should ask how the jurisdictional effects the FSIA creates

compare to those that would govern were the prior regime still in force.

There is little dispute that in 1948 foreign sovereigns, and all other litigants, understood foreign sovereign immunity law to support three valid expectations. (1) Nations could expect that a baseline rule of sovereign immunity would apply. (2) They could expect that if the Executive made a statement on the issue of sovereign immunity that would be controlling. And (3), they could expect that they would be able to petition the Executive for intervention on their behalf. See *National City Bank of N. Y.* v. *Republic of China*, 348 U. S. 356, 358–361 (1955) (summing up the Court's approach to sovereign immunity questions); *id.,* at 366–368 (Reed, J., dissenting) (summing up the same principles).

These three expectations were little different in 1976, before the FSIA was passed. The Tate Letter did announce the policy of restrictive foreign sovereign immunity, and this was an important doctrinal development. The policy, however, was within the second expectation that the Executive could shape the framework for foreign sovereign immunity. Under the second category, a foreign sovereign would have expected its immunity to be controlled by such a statement.

The Executive's post-Tate Letter practices and a statement by the Court confirm this is the correct way to understand both the operation of the general law of foreign relations and the expectations it built. After the Tate Letter's issuance, the Executive evaluated suits involving pre-Tate Letter conduct under the Letter's new standard when determining whether to submit suggestions of immunity to the courts. The Court, likewise, seems to have understood the Tate Letter to require this sort of application. In *National City Bank of N. Y.*, the Court suggested that the Letter governed in a case involving pre-1952 conduct, though careful consideration of the question was

unnecessary there. 348 U. S., at 361.

The governing weight the Tate Letter had as a statement of Executive policy does not detract from the third expectation foreign sovereigns continued to have—that they could petition the Executive for case-specific statements. Thus, in *National City Bank of N. Y.* the Court took note that the Government had not submitted a case-specific suggestion as to immunity. See *id.,* at 364 ("[O]ur State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with the Republic of China").

Today, to measure a foreign sovereign's expectation of liability for conduct committed in 1948, the Court should apply the three discussed, interlocking principles of law, which the parties then expected. The Court of Appeals did not address the question in this necessary manner. Rather than determining how the jurisdictional result produced by the FSIA differs from the result a court would reach if it applied the legal principles that governed before the enactment of the FSIA, the court instead asked what the Executive would have done in 1948. See 317 F. 3d 954, 965 (CA9 2002) ("Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States"). That is not the appropriate way to measure Austria's expectations. It is an unmanageable inquiry; and it usurps the authority the Executive, as it is constituted today, has under the pre-FSIA regime. In essence, the Court of Appeals wrongly assumed responsibility for the political question, rather than confining its judgment to the legal one.

Answering the legal question, in contrast, requires applying the principles noted above: We assume a baseline of sovereign immunity and then look to see if there is any

Executive statement on the sovereign immunity issue that displaces the presumption of immunity. There is, of course, at least one Executive statement on the issue that displaces the immunity presumption to some degree. It is the Tate Letter itself. By the Tate Letter the Executive established, as a general rule, that the doctrine of restrictive sovereign immunity would be followed. In general, the doctrine provided immunity for suits involving public acts and denied it for suits involving commercial or private acts. 26 Dept. State Bull., at 984. These principles control, as the Executive has taken no case-specific position in the instant matter. If petitioners' conduct would not be subject to suit under the Tate Letter principles, the FSIA cannot alter that result without imposing retroactive effect, creating new jurisdiction in American courts.

Petitioners and the United States, appearing as *amicus curiae*, argue that the Tate Letter doctrine would grant immunity (*i.e.,* deny jurisdiction) for suits involving expropriation. They say the Tate Letter rules contain no principle that parallels §1605(a)(3), the FSIA's expropriation exception on which respondent relies to establish jurisdiction:

> "The expropriation exception . . . was a new development in the doctrine of sovereign immunity when the FSIA was enacted . . . . [I]n *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354 (CA2 1964), cert. denied, 381 U. S. 934 (1965)[,] [t]he court explained that, even under the restrictive theory of sovereign immunity, foreign states continued to enjoy immunity with respect to . . . suits respecting the 'nationalization' of property." Brief for United States as *Amicus Curiae* 12.

This argument may be correct in the end; but, it should be noted, the petitioners' reliance on *Victory Transport, Inc.* v. *Comisaria General*, 336 F. 2d 354 (CA2 1964), is not

conclusive. *Victory Transport* does not say that nationalizations of property are *per se* exempt under the restrictive theory of sovereign immunity. The Court of Appeals for the Second Circuit said:

> "The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts. . . . Such [immune] acts are generally limited to the following categories:
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> . . . . .
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> "(2) legislative acts, such as nationalization." *Id.,* at at 360 (citations omitted).

As the court's language makes clear, the pertinent category of exempt action is legislative action, of which nationalization was but one example. The expropriation alleged in this case was not a legislative act.

Petitioners can still prevail by showing that there would have been no jurisdiction under the pre-FSIA governing principles. That could be established by showing that the conduct at issue was considered a public act under those principles and that the principles contain no expropriation exception similar to that codified in §1605(a)(3), which would deny otherwise available immunity. We need not, and ought not, resolve the question in the first instance. Neither the District Court nor the Court of Appeals has yet addressed it. The issue is complex and would benefit from more specific briefing, arguments, and consideration of the international law sources bearing upon the scope of immunity the Tate Letter announced. I would vacate the judgment of the Court of Appeals and remand for further

proceedings to consider the question.

D

By declaring that this statute is not subject to the usual presumption against retroactivity, and so avoiding the critical issue in this case, the Court puts the force and the validity of our precedent in *Hughes Aircraft* into serious question. The Court, in rejecting the usual analysis, states three rationales to justify its approach. The arguments neither distinguish this case from *Hughes Aircraft* nor suffice to explain rejecting the rule against retroactivity.

The Court suggests the retroactivity analysis should not apply because the rights at issue are not private rights. See *ante,* at 17 ("[The] antiretroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context"). This is unconvincing. First, the language from *Landgraf* on which the Court relies undercuts its position. It confirms, in clear terms, that retroactivity presumptions work equally in favor of governments. Per JUSTICE STEVENS, the Court said:

> "While the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that fell only on the government." 511 U. S., at 271, n. 25.

Even if *Landgraf*'s reference to private rights could be read to establish that retroactivity analysis does not strictly protect government—and I do not see how that is possible in light of the above-quoted language—the *Landgraf* passage refers to the Federal Government. If the distinction mattered for retroactivity purposes, presumably it would have been on the basis that Congress, by

virtue of authoring the legislation, is itself fully capable of protecting the Federal Government from having its rights degraded by retroactive laws. Private parties, it might be said, do not have the same built-in assurance. Here, of course, the Federal Government is not a party; instead a foreign government is. Foreign governments are as vulnerable as private parties to the disruption caused by retroactive laws. Indeed, foreign sovereigns may have less recourse than private parties to prevent or remedy retroactive legislation, since they cannot hold Congress responsible through the election process. The Court's private-rights argument, therefore, does not sustain its departure from our usual presumption against retroactivity.

The majority tries to justify departing from our usual principles in a second way. It argues that the purposes of foreign sovereign immunity are not concerned with allowing "foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity." *Ante*, at 18. JUSTICE BREYER takes the suggestion further. He argues not that foreign sovereign immunity doctrine is not concerned with reliance interests but, even further, that in fact foreign sovereigns have no reliance interests in receiving immunity in our courts. See *ante*, at 7–9. This reasoning overlooks the plain fact that there are reliance interests of vast importance involved, interests surely as important as those stemming from contract rights between two private parties. As the Executive has made clear to us, these interests span a range of time after the conduct, even up to the present day. See Brief for United States as *Amicus Curiae* 8. For example, at stake may be pertinent treaty rights and international agreements intended to remedy the earlier conduct. These are matters in which the negotiating parties may have acted on a likely assumption of sovereign immunity, as defined and limited by pre-FSIA expectations: "[The] conduct at issue [has been] extensively addressed through treaties,

agreements, and separate legislation that were all adopted against the background assumption [of the pre-FSIA foreign sovereign immunity regime]." *Ibid.* Lurking in the Court's and JUSTICE BREYER's contrary suggestions is the implication that the expectations of foreign powers are minor or infrequent. Surely that is not the case. By today's decision the Court opens foreign nations worldwide to vast and potential liability for expropriation claims in regards to conduct that occurred generations ago, including claims that have been the subject of international negotiation and agreement. There are, then, reliance interests of magnitude, which support the usual presumption against retroactivity.

In addition, the statement that the purposes of foreign sovereign immunity have not much to do with the presumption against retroactivity carries little weight; the presumption against retroactivity has independent justification. The Court has noted this, saying that the purposes of the underlying substantive law are not conclusive of the retroactivity analysis. "It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption." *Landgraf*, 511 U. S., at 285–286 (footnote omitted). As a result, diminished concerns of unfair surprise and upset expectations—even assuming they existed—do not displace the usual presumption. That is why in *Landgraf*, though "concerns of unfair surprise and upsetting expectations [were] attenuated in the case of intentional employment discrimination, which ha[d] been unlawful for more than a generation," the Court concluded, nevertheless, that it could not give the statute retroactive effect. *Id.,* at 282–283, n. 35.

The Court, lastly, adds in a footnote that the "FSIA differs from the statutory amendment at issue in *Hughes Aircraft*" because in *Hughes Aircraft* the jurisdictional limitation attached directly to the cause of action and so

ensured that suit could be brought only in accordance with the jurisdictional provision (and any changes to it). *Ante*, at 17, n. 15. With the FSIA, in contrast, the jurisdictional limitation is not attached to the cause of action. The result, the Court implies, is that even if a pre-FSIA jurisdictional bar applied in American courts, suit on the California cause of action might still have been able to have been brought in foreign courts, and such availability of suit would defeat retroactivity concerns. *Ibid.* ("The Act does not . . . purport to limit *foreign* countries' decisions about what claims against which defendants their courts will entertain"); see also *ante*, at 2 (SCALIA, J., concurring). What is of concern in the retroactivity analysis that *Hughes Aircraft* sets out, however, is the internal integrity of American statutes, not of whether an American law allows suit where before none was allowed elsewhere in the world. This is unsurprising, as the task of canvassing what causes of action foreign countries might have allowed before a new jurisdictional regime made such suits also viable in American courts would be a most difficult task to assign American courts.

In the end, the majority turns away from our usual retroactivity analysis because "this [is a] *sui generis* context." *Ante*, at 18. Having created a new, extra exception that frees it from the usual analysis, it can conclude simply that the usual rule "does not control the outcome in this case." *Ante*, at 13. The implications of this holding are not entirely clear, for the new exception does not rest on any apparent principle.

There is a stark contrast between the Court's analysis and that of the Courts of Appeals that have addressed the question. In this case the Court of Appeals for the Ninth Circuit, like every other Court of Appeals to have considered the question, concluded that the FSIA must be interpreted under the usual retroactivity principles, just like any other statute. See 317 F. 3d 954. Accord, *Hwang*

Geum Joo v. *Japan*, 332 F. 3d 679 (CADC 2003); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F. 2d 26 (CA2 1988); *Jackson* v. *People's Republic of China*, 794 F. 2d 1490 (CA11 1986).

The conclusion to which the *sui generis* rule leads the Court shows the rule lacks a principled basis: "[W]e think it more appropriate, absent contraindications, to defer to the most recent [decision by the political branches on the foreign sovereign immunity question]—namely, the FSIA." *Ante*, at 18. The question, however, is not whether the FSIA governs, but how to interpret the FSIA. The Court seems to think the FSIA implicitly adopts a presumption of retroactivity, though our cases instruct just the opposite. "[I]n *Hughes Aircraft* . . . we . . . rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes." *Lindh,* 521 U. S., at 342, n. 3 (REHNQUIST, C. J., joined by SCALIA, KENNEDY, and THOMAS, JJ., dissenting).

JUSTICE BREYER would supplement the rationale for the Court's deciding the case outside the bounds of our usual mode of retroactivity analysis. He says the Court can take this path because sovereign immunity "is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." *Ante*, at 5. The argument is a variant of that made by respondent. See Brief for Respondent 27 ("*Dole Food* controls the result in this case"). Respondent's argument fails, of course, because in this case the defendants' status at the time of suit is that of the sovereign, not that of private parties. That distinction alone makes misplaced reliance on *Dole Food Co.* v. *Patrickson*, 538 U. S. 468 (2003) (holding that a now-private corporation could not assert sovereign immunity in a suit involving events that occurred when the entity was owned by a foreign sovereign). JUSTICE BREYER's further reasoning, however, is also unacceptable. When jurisdictional rules are at stake, status and conduct factors will at times intersect. Most assuredly, we would not disown the usual

retroactivity principles in a case involving a status-based jurisdictional statute that creates jurisdiction over private litigants where before there was none simply because the creation of jurisdiction turned in part on the status of one of the litigants. JUSTICE BREYER's additional rationale, however, has this very implication.

We should not ignore the statutory retroactivity analysis just because the parties and the Court have failed to consider it before. See *ante*, at 7–8 (BREYER, J., concurring) (relying on the fact that in *Verlinden* the Court applied the FSIA to a contract that predated the Act). "'[T]his Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.' *Hagans* v. *Lavine,* 415 U. S. 528, 535, n. 5 (1974)." *Will* v. *Michigan Dept. of State Police,* 491 U. S. 58, 63, n. 4 (1989) (alteration in original). Reliance on the fact that the immunity principles were applied retroactively in the common-law context of the pre-FSIA regime is also irrelevant. See *ante*, at 7 (BREYER, J., concuring). This case concerns the retroactive effect of enacted statutory law, not of court decisions interpreting the common law.

III

Today's decision contains another proposition difficult to justify and that itself does considerable damage to the FSIA. Abandoning standard retroactivity principles, the Court attempts to compensate for the harsh results it reaches by inviting case by case intervention by the Executive. This does serious harm to the constitutional balance between the political branches.

The Court says that the Executive may make suggestions of immunity regarding FSIA determinations and implies that courts should give such suggestions deference. See *ante*, at 23–24 ("[S]hould the State Department choose to express its opinion on the implications of exer-

cising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive" (footnote omitted)). That invitation would be justified if the Court recognized that the Executive's role was retrospective only, *i.e.*, implicated only in suits involving preenactment conduct and only as a means for resolving the retroactivity analysis. The law that governed before the FSIA's enactment allowed unilateral Executive authority in that regard. The Court's rejection of the *Landgraf* analysis, however, removes the possibility of that being the basis for the invitation.

The Court instead reaches its conclusion about the Executive's role by reliance on the general constitutional principle that the Executive has a "'"vast share of responsibility for the conduct of our foreign relations."'" *Ante*, at 24 (quoting *American Ins. Assn.* v. *Garamendi,* 539 U. S. 396, 414 (2003)). This prospective constitutional conclusion, which the Court offers almost as an aside, has fundamental implications for the future of the statute and raises serious separation-of-powers concerns.

The question the Court seems inclined to resolve—can the foreign affairs power of the Executive supersede a statutory scheme set forth by Congress—is simply not presented by the facts of this case. We would confront the question only if the case involved postenactment conduct and if the Executive had filed a suggestion of immunity, which, by its insistence, superceded the statute's directive. Those circumstances would present a difficult question. Compare U. S. Const., Art. II, §2, with Art. I, §1; *id.*, §8, cls. 3, 9–11, 18; Art. III, §1; *id.*, §2, cl. 1. See also See H. R. Rep., at 12 (setting out the constitutional authority on which Congress relied to enact the FSIA). See generally *Internationl Bancorp, LLC* v. *Societe Des Bains De Mer Et Du Cercle Des Etrangers*, 329 F. 3d 359, 367–368 (CA4 2003) (noting the complicated intersection where the

Executive's and the Legislature's foreign affairs responsibilities overlap, in a case involving foreign trade). The separation-of-powers principles at stake also implicate judicial independence, which is compromised by case by case, selective determinations of jurisdiction by the Executive.

The Court makes a serious mistake, in my view, to address the question when it is not presented. It magnifies this error by proceeding with so little explanation, particularly in light of the strong arguments against its conclusion. The Solicitor General, on behalf of the Executive, agrees that the statute "presents the sole basis for civil litigants to obtain jurisdiction over a foreign state in United States courts." Brief for United States as *Amicus Curiae* 1. This understanding is supported by the lack of textual support for the contrary position in the Act and by the majority's own assessment of the Act's purposes.

The Court's abrupt announcement that the FSIA may well be subject to Executive override undermines the Act's central purpose and structure. As the Court acknowledges, before the Act, "immunity determinations [had been thrown] into some disarray, as 'foreign nations often placed diplomatic pressure on the State Department,' and political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'" *Ante*, at 12 (quoting *Verlinden,* 461 U. S., at 487). See also *supra*, at 2–3. Congress intended the FSIA to replace this old and unsatisfactory methodology of Executive decisionmaking. *Ibid.* The President endorsed the objective in full, recommending the bill upon its introduction in Congress, H. R. Rep., at 6, and signing the bill into law upon its presentment. The majority's surprising constitutional conclusion suggests that the FSIA accomplished none of these aims. The Court states that the statute's directives may well be short-circuited by the sole

directive of the Executive.

The Court adds a disclaimer that it "express[es] no opinion on the question whether such deference should be granted [to the Executive] in cases covered by the FSIA." *Ante*, at 24. The disclaimer, however, is inadequate to remedy the harm done by the invitation, for it is belied by the Court's own terms: Executive statements "suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity . . . might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Ante*, at 23–24 (citing as an example a case in which Executive foreign policy superceded state law). Taking what the Court says at face value, the Court does express an opinion on the question: Its opinion is that the Executive statement may well be entitled to deference, and so may well supercede federal law that gives courts jurisdiction.

If, as it seems, the Court seeks to free the Executive from the dictates of enacted law because it fears that to do otherwise would consign some litigants to an unfair retroactive application of the law, it adds illogic to the illogic of its own creation. Only application of our traditional analysis guards properly against unfair retroactive effect, "ensur[ing] that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U. S., at 268.

Where postenactment conduct is at stake, the majority's approach promises unfortunate disruption. It promises to reintroduce Executive intervention in foreign sovereign immunity determinations to an even greater degree than existed before the FSIA's enactment. Before the Act, foreign nations only tended to need the Executive's protection from the courts' jurisdiction in instances involving private acts. The Tate Letter ensured their public acts would remain immune from suit, even without Executive intervention. Now, there is a potential for Executive

intervention in a much larger universe of claims. The FSIA has no public act/private act distinction with respect to certain categories of conduct, such as expropriations. Foreign nations now have incentive to seek Executive override of the Act's jurisdictional rules for both public and private acts in those categories of cases.

With the FSIA, Congress tried to settle foreign sovereigns' prospective expectations for being subject to suit in American courts and to ensure fair and evenhanded treatment to our citizens who have claims against foreign sovereigns. See *supra*, at 2–3. This was in keeping with strengthening the Executive's ability to secure negotiated agreements with foreign nations against whom our citizens may have claims. Over time, agreements of this sort have been an important tool for the Executive. See, *e.g.,* Agreement Relating to the Agreement of Oct. 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Jan. 23, 2001, U. S.-Aus., 2001 WL 935261 (settling claims with Austria); Claims of U. S. Nationals, Nov. 5, 1964, U. S.-Yugo., 16 U. S. T. 1, T. I. A. S. No. 5750 (same with Yugoslavia); Settlement of Claims of U. S. Nationals, July 16, 1960, U. S.-Pol., 11 U. S. T. 1953, T. I. A. S. No. 4545 (same with Poland). Uncertain prospective application of our foreign sovereign immunity law may weaken the Executive's ability to secure such agreements by compromising foreign sovereigns' ability to predict the liability they face in our courts and so to assess the ultimate costs and benefits of any agreement. See *supra*, at 16 (citing Brief for United States as *Amicus Curiae*).

* * *

The presumption against retroactivity has comprehended, and always has been intended to comprehend, the wide universe of cases that a court might confront. That includes this one. The Court's departure from precedent should not be overlooked. It has disregarded our "widely

held intuitions about how statutes ordinarily operate," *Landgraf, supra*, at 272, and treated the principles discussed in *Landgraf* as if they describe a limited and precise rule that courts should apply only in particularized contexts. Our unanimous rejection of this approach in *Hughes Aircraft* applies here as well:

> "To the extent [the Court] contends that *only* statutes with one of [*Landgraf*'s particularly stated] effects are subject to our presumption against retroactivity, [it] simply misreads our opinion in *Landgraf*. The language upon which [it] relies does not purport to define the outer limit of impermissible retroactivity. Rather, our opinion in *Landgraf*, like that of Justice Story, merely described that any such effect constituted a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." 520 U. S., at 947.

The Court's approach further leads to the unprecedented conclusion that Congress' Article I power might well be insufficient to accomplish the central objective of the FSIA. The Court, in addition, injects great prospective uncertainty into our relations with foreign sovereigns. Application of our usual presumption against imposing retroactive effect would leave powerful precedent intact and avoid these difficulties.

With respect, I dissent.