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Property, War Objectives, And Slave Labor Claims: The Ninth Circuit's Political Question Analysis in *Alperin v. Vatican Bank*

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NOTE

PROPERTY, WAR OBJECTIVES, AND SLAVE LABOR CLAIMS:

THE NINTH CIRCUIT'S POLITICAL QUESTION ANALYSIS IN *ALPERIN v.* *VATICAN BANK*

INTRODUCTION

Igor Najfeld was born in Yugoslavia on June 28, 1944, the same day his mother and father escaped from three years of slave labor at the hands of the Nazi-controlled government in Croatia, (“the Ustasha”).¹ Najfeld’s grandparents were murdered by the Ustahsa, along with at least fifty-six members of his mother’s relatives.² All of Najfeld’s relatives lost their property, which included a department store and other assets, to the Ustasha regime.³

Five decades later, Najfeld, along with twenty-three other survivors of the Ustasha regime and four organizations (“Holocaust Survivors”) brought a suit in the United States District Court for the Northern District of California against the *Istituto per le Opere di Religione*, also known as the Vatican Bank, for crimes allegedly committed in connection with the Ustasha regime during and after World War II.⁴ The suit also named the

¹ Third Amended Complaint by Plaintiff at ¶ 15, *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686 (N.D. Cal. 2003) (No. C99-4941 MMC), (available at <http://www.vaticanbankclaims.com/vatcom.htm>) (last visited 2/20/06).

² *Id.*

³ *Id.*

⁴ *Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1141 (2006), *cert. denied*, 126 S. Ct. 1160 (2006).

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Order of Friars Minor and the Croatian Liberation Movement as defendants.⁵ The Order of Friars Minor is more generally recognized as the organization of Franciscan Monks, and includes Franciscans from around the world.⁶ The Croatian Liberation Movement is allegedly the successor organization to the Ustasha, and allegedly has been involved in terrorism in the United States and other places.⁷ The Holocaust Survivors claim that the Vatican Bank, the Order of Friars Minor, and the Croatian Liberation Movement were complicit in and profited from crimes committed during World War II by the Ustasha.⁸ The Holocaust Survivors' claims included conversion, unjust enrichment (including profit from slave labor), restitution, the right to an accounting, human rights violations and violations of international law, including war crimes, crimes against peace, torture, rape, and genocide.⁹

The parties agreed to limit initial district court arguments to the application of the political question doctrine to the controversy, and District Court Judge Maxine Chesney dismissed all claims as nonjusticiable political questions.¹⁰ The Court of Appeals for the Ninth Circuit, in a majority opinion written by Judge M. Margaret McKeown, addressed the defendants' contention that the claims were nonjusticiable political questions.¹¹ The majority founded its decision on a demarcation between – what the court labeled as – property claims (conversion, unjust enrichment, restitution, and the right to an accounting) and war objectives claims (violations of human rights and international law).¹² The court permitted the property claims to proceed and dismissed the war objectives claims as political questions.¹³

This Note will analyze the Ninth Circuit's decision in *Alperin v. Vatican Bank*,¹⁴ and propose that while the court's demarcation between property claims and war objectives claims may be a sound analytical method for addressing political question doctrine issues, the slave labor claims should not have been excluded from the scope of the property claims.

Part I of this Note will provide a background of the political

⁵ *Id.*

⁶ *Id.* at 542.

⁷ *Id.*

⁸ *Id.* at 538.

⁹ *Id.*

¹⁰ *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 689 (N.D. Cal. 2003).

¹¹ *Alperin*, 410 F.3d at 537-538.

¹² *See Id.* at 547-562.

¹³ *Id.* at 562.

¹⁴ *Id.* at 538, *cert. denied*, 126 S. Ct. 1141 (2006), *cert. denied*, 126 S. Ct. 1160 (2006).

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question doctrine, its case law and history, with a focus on political questions involving foreign relations.¹⁵ Part II will provide a background and analysis of the majority opinion in *Alperin v. Vatican Bank*,¹⁶ particularly the court's distinction between property and war objectives claims.¹⁷ Part III will show that the court's demarcation between property and war objectives claims is a useful tool in resolving political question issues.¹⁸ Finally, Part IV will argue that, given the distinction between property and war objectives claims, the Ninth Circuit should have included the slave labor claims within the scope of the property claims and not within the war objectives claims.¹⁹ This Note ultimately concludes that the slave labor claims are not political questions and are therefore justiciable.²⁰

I. BACKGROUND AND HISTORY OF THE POLITICAL QUESTION DOCTRINE

The political question doctrine is one of the justiciability doctrines that limit the cases and controversies the Federal Judiciary will decide.²¹ The political question doctrine originates from comments made by Chief Justice John Marshall in *Marbury v. Madison*.²² Chief Justice Marshall wrote that “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”²³ The primary purpose of the political question doctrine is to support the separation of powers between the three branches of the federal government.²⁴ The political branches of government – the Congress and the Executive – have roles distinct from the Judiciary, and the Judiciary must respect those distinctions.²⁵ Still, the courts must determine whether a political question exists because the United States

¹⁵ See *infra* notes 21-102 and accompanying text.

¹⁶ *Alperin*, 410 F.3d at 538, *cert. denied*, 126 S. Ct. 1141 (2006), *cert. denied*, 126 S. Ct. 1160 (2006).

¹⁷ See *infra* notes 103-205 and accompanying text.

¹⁸ See *infra* notes 206-221 and accompanying text.

¹⁹ See *infra* notes 222-233 and accompanying text.

²⁰ See *infra* notes 234-235 and accompanying text.

²¹ See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 28 (Aspen 2001). “There are five major justiciability doctrines: the prohibition against advisory opinions, standing, ripeness, mootness, and the political question doctrine. All must be met for any federal court, at any level, to hear a case.”

²² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); see also *Alperin*, 410 F.3d at 544.

²³ *Marbury*, 5 U.S. (1 Cranch) at 170; see also *Alperin*, 410 F.3d at 544.

²⁴ *Baker v. Carr*, 369 U.S. 186, 210 (1962).

²⁵ *Id.* at 210-211.

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Supreme Court is the “ultimate interpreter of the Constitution.”²⁶

A. MODERN POLITICAL QUESTION ANALYSIS UNDER *BAKER V. CARR*

Modern political question analysis originates in the landmark case of *Baker v. Carr*.²⁷ In *Baker*, a case in which the plaintiffs alleged malapportionment of Tennessee Assembly seats, the Supreme Court described six situations in which a nonjusticiable political question exists.²⁸ The six situations are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²⁹

Only if one or more of these “formulations is inextricable from the case at bar” should a court find a nonjusticiable political question.³⁰

The Court in *Baker* limited the political question doctrine to ensure that courts do not improperly find a case nonjusticiable.³¹ For example, the “doctrine . . . is one of ‘political questions,’ not one of ‘political cases.’”³² Thus, even though a decision in a case might implicate one of the political branches, the political question doctrine will not bar the case unless it implicates one of the six formulations.³³ Moreover, whether the political question doctrine bars a particular case must be decided individually, on a case by case basis, because it is impossible to resolve these issues “by any semantic cataloguing.”³⁴

²⁶ *Id.* at 211.

²⁷ *Id.* at 186.

²⁸ *Id.* at 187-188, 217.

²⁹ *Id.* at 217.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

2006] *PROPERTY, WAR OBJECTIVES, AND SLAVE LABOR* 23B. A DESCRIPTION OF THE SIX-PRONG TEST IN *BAKER*

Baker set forth six independent tests to determine whether dismissal is required under the political question doctrine.³⁵ These tests, however, “are more discrete in theory than in practice,” and tend to overlap.³⁶ The Supreme Court has indicated that the six prongs are “probably listed in descending order of both importance and certainty.”³⁷ Because any of the six *Baker* tests can be dispositive, it is worthwhile to examine the meaning of each prong separately.³⁸

1. *Textually Demonstrable Constitutional Commitment*

The first prong requires dismissal if a decision is entrusted to a nonjudicial branch of government and the court can demonstrate this entrustment in the text and structure of the constitution.³⁹ The text of the Constitution explicitly commits certain powers to a nonjudicial branch, including Congress’s power to declare war and to raise an army⁴⁰ and the President’s power, with the advice and consent of the Senate, to make treaties.⁴¹ The Judiciary lacks the power to decide cases which improperly intrude on these powers.⁴² However, many textually demonstrable commitments are not explicit, and must be inferred from the text and structure of the Constitution.⁴³

The power to try impeachments is an example of a textual Constitutional commitment to a nonjudicial branch, and the Supreme Court has inferred a prohibition on judicial review of the Senate’s impeachment trials.⁴⁴ In *Nixon v. United States*, the Supreme Court addressed the question of whether federal courts can review the procedures used by the Senate in its impeachment trials.⁴⁵ In that case, Federal District Court Judge Walter Nixon, Jr. was accused of making

³⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004); *Baker*, 369 U.S. at 217; see *Alperin*, 410 F.3d at 544.

³⁶ *Alperin*, 410 F.3d at 544; see *Nixon v. United States*, 506 U.S. 224, 228-229 (1993).

³⁷ *Vieth*, 541 U.S. at 278.

³⁸ *Alperin*, 410 F.3d at 547.

³⁹ *Baker*, 369 U.S. at 217.

⁴⁰ U.S. CONST. art. I, § 8, cl. 11, 12 (Clause 11 grants Congress the power to “To declare War . . .”; Clause 12 grants Congress the power “To raise and support Armies . . .”).

⁴¹ U.S. CONST. art. II, § 2, cl. 2.

⁴² See e.g. *Goldwater v. Carter*, 444 U.S. 997, 1002-1006 (1979) (plurality opinion discussing the power to terminate treaties).

⁴³ *Nixon*, 506 U.S. at 240 (White, J. concurring); see *Alperin*, 410 F.3d at 549.

⁴⁴ *Nixon*, 506 U.S. at 226.

⁴⁵ *Id.*

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false statements to a grand jury in a case investigating bribery.⁴⁶ Judge Nixon was convicted and sentenced to prison.⁴⁷ Because he refused to resign from the Federal Judiciary, Judge Nixon continued to collect his salary and benefits while in prison.⁴⁸ The House of Representatives adopted three articles of impeachment for high crimes and misdemeanors, and the Senate convicted Judge Nixon on two of the articles.⁴⁹ Judge Nixon claimed that the Constitution prohibited the procedures adopted by the Senate, which permitted a committee to take evidence and testimony, rather than the full Senate.⁵⁰

The Supreme Court interpreted the Constitution's Impeachment Clause to reach its decision that the case was a political question.⁵¹ The word "sole" in the Constitution indicates that the Senate is the only governmental branch with the power to conduct impeachment trials.⁵² Thus, even though the courts are not explicitly barred from exercising judicial review of impeachments, the Court in *Nixon* held that the Judiciary does not have the power to review impeachment trials because the text of the Constitution commits the power to try impeachments to the Senate.⁵³

2. *Judicially Discoverable and Manageable Standards*

Courts must also dismiss a case if no judicially discoverable or manageable standard exists by which a court can resolve a case.⁵⁴ The Supreme Court recently addressed this prong of the *Baker* test in *Vieth v. Jubiliter*.⁵⁵ The plaintiffs in *Vieth* alleged that the Pennsylvania Congressional districts were unconstitutional because of political gerrymandering.⁵⁶ Justice Antonin Scalia, writing for a plurality, concluded that no judicially discoverable or manageable standard existed

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 226-228.

⁵⁰ *Id.* at 227-228.

⁵¹ *Id.* at 229-233; U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.").

⁵² *Nixon*, 506 U.S. at 229.

⁵³ *Id.* at 238.

⁵⁴ *Baker*, 369 U.S. at 217; *see also Vieth*, 541 U.S. at 277-278.

⁵⁵ *Vieth*, 541 U.S. at 267.

⁵⁶ *Id.* at 271-273.

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for deciding political gerrymandering cases.⁵⁷ Justice Anthony Kennedy agreed that no standards currently exist, but refused to foreclose the possibility that workable standards might be discovered in the future.⁵⁸

The plurality held that “judicial action must be governed by *standard, by rule.*”⁵⁹ While Congress can be “inconsistent, illogical, and ad hoc” in its laws, “[the] law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”⁶⁰ The courts simply cannot provide a reasoned distinction as to why a particular district should be drawn in a particular place and not in another.⁶¹ According to the plurality, even if political gerrymandering exists, the courts are not equipped to resolve these cases based on reasoned distinctions.⁶²

3. *Initial Policy Determination*

If a court cannot decide a case without making a policy judgment which must first be determined by a nonjudicial branch, the case must be dismissed as a political question.⁶³ In *Gilligan v. Morgan*, the Supreme Court analyzed a case brought by victims of National Guard violence at Kent State University in 1970.⁶⁴ The plaintiffs sought an injunction to prevent premature deployment of National Guard troops to civil disorders and an injunction against future violations of students’ Constitutional rights.⁶⁵ The plaintiffs were not requesting damages for past injury resulting from unlawful action, and were not attempting to prevent imminent unlawful action, but brought the action to establish continuing judicial control over the Ohio National Guard.⁶⁶

The Judiciary could not resolve the case in favor of the plaintiffs without making a policy determination of a kind clearly for nonjudicial determination.⁶⁷ Resolution in favor of the students would require “continuing surveillance by a federal court over the training, weaponry and orders of the [National] Guard,” which would require an inquiry into

⁵⁷ *Id.* at 281.

⁵⁸ *Id.* at 306 (Kennedy, J. concurring).

⁵⁹ *Id.* at 278.

⁶⁰ *Id.*

⁶¹ *Id.* at 280-281.

⁶² *Id.*

⁶³ *Baker*, 369 U.S. at 217.

⁶⁴ *Gilligan v. Morgan*, 413 U.S. 1, 3 (1973).

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 7-8.

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proper law enforcement policy and procedures.⁶⁸ The power to set National Guard policy is not entrusted to the Judiciary, but to the Executive and Congress.⁶⁹ As well as violating the first *Baker* prong, the case would require improper determinations of policy which belong to a nonjudicial branch.⁷⁰

4. *Lack of Respect Due the Coordinate Branches of Government*

If adjudication of a case would show a lack of respect owed to a coordinate branch of government, the case is a nonjusticiable political question.⁷¹ However, simply interpreting the Constitution does not, by itself, show a lack of respect for a coordinate branch.⁷² Nor does a court's exercise of judicial review of a Congressional statute show a lack of respect for a coordinate branch.⁷³ In *Ungaro-Benages v. Dresdner Bank AG*, the Court of Appeals for the Eleventh Circuit analyzed a case against two German banks alleging theft of the plaintiff's interest in a manufacturing company during World War II.⁷⁴ The court found that the claims were not political questions, but upheld dismissal of the claims on other grounds.⁷⁵

The court in *Ungaro* interpreted the Foundation Agreement, which is an agreement created by the United States and Germany to resolve World War II-era claims against German companies.⁷⁶ The United States, in compliance with requirements in the Foundation Agreement, filed a statement of interest urging that the Foundation Agreement should be the exclusive forum for resolution of these claims.⁷⁷ The Eleventh Circuit decided that judicial resolution of the claims would not show lack of respect due the coordinate branches of government solely because of the Executive's statement of interest.⁷⁸ Although such statements are entitled to respect and deference, they are not decisive.⁷⁹ Resolution of the claims would not place demands on foreign governments, thereby

⁶⁸ *Id.* at 7.

⁶⁹ *Id.*

⁷⁰ *Id.* at 8.

⁷¹ *Baker*, 369 U.S. at 217.

⁷² *Goldwater*, 444 U.S. at 1001.

⁷³ *United States v. Munoz-Flores*, 495 U.S. 385, 390, 391 (1990).

⁷⁴ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1229 (11th Cir. 2004).

⁷⁵ *Id.* at 1232, 1235.

⁷⁶ *Id.* at 1234.

⁷⁷ *Id.* at 1236.

⁷⁸ *Id.*

⁷⁹ *Id.*

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showing disrespect for the Executive's foreign policy decisions.⁸⁰ The Foundation Agreement itself contemplated judicial involvement in similar cases.⁸¹

5. *Unquestioning Adherence to a Policy Decision Already Made*

If resolution of a claim would interfere with the need to adhere to a policy decision made by another branch, a court should dismiss the claim as a political question.⁸² If a claim does not implicate a nonjudicial policy decision, then no need exists to adhere to a policy determination.⁸³ In *Klinghoffer v. S.N.C. Achille Lauro*, the Palestine Liberation Organization challenged the justiciability of a tort suit filed against it for the death of a passenger which occurred during the highjacking of a cruise ship.⁸⁴ Although the specific grounds of the political question defense were not entirely clear, the Palestine Liberation Organization claimed that the case "raise[d] foreign policy questions and political questions in a volatile context lacking satisfactory criteria for judicial determination."⁸⁵ The Court of Appeals for the Second Circuit rejected the Palestinian Liberation Organization's argument that the claims were political questions.⁸⁶ Regarding the fifth prong of the *Baker* test, the Second Circuit stated that no adherence was required because "no prior political decisions are questioned—or even implicated—by the matter before us."⁸⁷

6. *Multifarious Pronouncements*⁸⁸

If resolution of a claim could cause embarrassment as a result of multifarious pronouncements from different branches, a court should dismiss the claim as a political question.⁸⁹ In a case brought by conservation groups to enforce an international anti-whaling agreement

⁸⁰ *Id.* at 1236 n.12.

⁸¹ *Id.* at 1235.

⁸² *Baker*, 369 U.S. at 217.

⁸³ *Alperin*, 410 F.3d at 557-558 (citing *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 (2d Cir. 1999), and *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir. 1983)).

⁸⁴ *Klinghoffer*, 937 F.2d at 45.

⁸⁵ *Id.* at 49.

⁸⁶ *Id.* at 50.

⁸⁷ *Id.*

⁸⁸ Multifarious is "having a great variety and diversity." Concise Oxford Dictionary 936 (Judy Pearsall, ed., 10th ed. 1999).

⁸⁹ *Baker*, 369 U.S. at 217.

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against Japan, the Supreme Court addressed the sixth *Baker* prong.⁹⁰ The Japanese argued that resolution of the claim would cause embarrassment because it would require the Judiciary to order the Secretary of Commerce to repudiate an international agreement.⁹¹ The Supreme Court disagreed, and held that the interpretation of statutes, treaties, and executive agreements was the business of the courts, even if contrary to the opinion of another branch.⁹²

C. CATEGORIES OF POLITICAL QUESTION DOCTRINE CASES

Political question cases have, despite the impossibility of “resolution by any semantic cataloguing,” fallen into several broad categories.⁹³ For example, cases invoking the Guaranty Clause of the Constitution have been found to involve the political question doctrine.⁹⁴ “Under this article of the Constitution it rests with Congress to decide what government is the established one in a State.”⁹⁵ Other categories of political question have included, for example, the duration of hostilities during war⁹⁶ and the status of Indian tribes,⁹⁷ although again, these categories are not absolute.⁹⁸

Many political question doctrine cases involve foreign relations.⁹⁹ The Supreme Court has stated, “[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.”¹⁰⁰ The Court in *Baker* carefully limited this idea, however: “[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”¹⁰¹ Rather, each question must be analyzed individually for

⁹⁰ *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 224, 228-230 (1986).

⁹¹ *Id.* at 229.

⁹² *Id.* at 230. The Court decided against the conservation groups on other grounds. *Id.* at 240-241.

⁹³ *Baker*, 369 U.S. at 217.

⁹⁴ U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”); *Baker*, 369 U.S. at 218-229; *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (“Under [the Guarantee Clause] article of the Constitution it rests with Congress to decide what government is the established one in a State.”).

⁹⁵ *Baker*, 369 U.S. at 220 (quoting *Luther*, 48 U.S. (1 How.) at 42-44).

⁹⁶ *Id.* at 213-215.

⁹⁷ *Id.* at 215-217.

⁹⁸ *Id.* at 216-217.

⁹⁹ *Id.* at 211-214.

¹⁰⁰ *Id.* at 212 n.31 (quoting *Oetjen v. Central Lether Co.*, 246 U.S. 297, 302 (1918)).

¹⁰¹ *Id.* at 211.

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“its susceptibility to judicial handling . . . “ and the “possible consequences of judicial action.”¹⁰²

II. ANALYSIS OF THE NINTH CIRCUIT OPINION IN *ALPERIN V. VATICAN BANK*

The plaintiffs in *Alperin* claimed that the defendant organizations were complicit in and profited from the crimes committed by the Ustasha during World War II.¹⁰³ At the district court, the parties agreed to limit initial arguments to whether the claims should be dismissed because of the political question doctrine.¹⁰⁴ The Ninth Circuit reversed, in part, the district court decision dismissing claims brought by the Holocaust Survivors against the Vatican Bank and other defendants.¹⁰⁵

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

From 1941 until 1945, the Ustasha controlled the state of Croatia and portions of the former Soviet Union.¹⁰⁶ The victims were subject to systematic extermination by the Ustasha with the help of German forces, and suffered physical, monetary, and property losses, including being used as slave labor.¹⁰⁷ As many as 700,000 people, mostly Serbs, were murdered in Ustasha death camps.¹⁰⁸ According to the plaintiffs, the Vatican and other Catholic institutions supported, or at least turned a blind eye to the atrocities.¹⁰⁹ Following the end of World War II, the Vatican was allegedly complicit in funneling money from the Ustasha to its own coffers.¹¹⁰

The class action was brought on behalf of “[a]ll Serbs, Jews, and former Soviet Union citizens (and their heirs and beneficiaries), who

¹⁰² *Id.* at 211-212.

¹⁰³ *Alperin*, 410 F.3d at 538.

¹⁰⁴ *Alperin v. Vatican Bank*, 242 F. Supp. 2d at 689.

¹⁰⁵ *Alperin*, 410 F.3d at 538, 562-563, *rev'g in part Alperin*, 242 F. Supp. 2d 686 (N.D. Cal. 2003).

¹⁰⁶ *Alperin*, 242 F. Supp. 2d at 687 (citing Third Amended Complaint by Plaintiff at ¶¶ 1, 43).

¹⁰⁷ Third Amended Complaint by Plaintiff at ¶ 1.

¹⁰⁸ *Alperin*, 410 F.3d at 540 (citing BUREAU OF PUB. AFFAIRS, U.S. DEP'T OF STATE, PUB. NO. 10557, U.S. ALLIED WARTIME AND POSTWAR RELATIONS AND NEGOTIATIONS WITH ARGENTINA, PORTUGAL, SPAIN, SWEDEN, AND TURKEY ON LOOTED GOLD AND GERMAN EXTERNAL ASSETS AND U.S. CONCERNS ABOUT THE FATE OF THE WARTIME USTASHA TREASURY, SUPPLEMENT TO THE PRELIMINARY STUDY ON U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II, 142 (1998) (“Ustasha Treasury Report”).

¹⁰⁹ *Id.* at 540.

¹¹⁰ *Id.* at 540, 543.

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suffered” losses under the Ustasha regime.¹¹¹ Named plaintiffs in this action include victims of personal and property crimes committed by the Ustasha.¹¹² Additionally, four organizations that represent Holocaust Survivors and human rights organizations are named as plaintiffs.¹¹³ The class is potentially massive, and could include “over 300,000 former slave and forced laborers, prisoners, concentration camp, and ghetto survivors.”¹¹⁴ The class could extend geographically from the former Soviet Union to the former Yugoslavia, including Croatia, Bosnia, Ukraine, Belarus, and Russia.¹¹⁵

The defendants in *Alperin* include the Vatican Bank, but not the Vatican.¹¹⁶ The plaintiffs alleged, and the Ninth Circuit accepted for the limited purposes of a motion to dismiss, that the Vatican Bank and the Vatican are distinct institutions.¹¹⁷ The Vatican Bank is headed by a Vatican official, but conducts for-profit banking transactions worldwide, including in the United States.¹¹⁸ Any suit against the Vatican itself might be subject to dismissal for reasons of sovereign immunity.¹¹⁹ Still, the Bank’s dealings, transactions, and holdings are difficult to ascertain.¹²⁰ Other defendants include the Order of Friars Minor and the Croatian Liberation Movement, as well as other unknown Catholic religious organizations and known and unknown banking institutions from a variety of countries.¹²¹

The plaintiffs alleged causes of action for conversion, unjust enrichment, restitution, the right to an accounting, human rights violations and violations of international law.¹²² The plaintiffs claim subject matter jurisdiction under several federal statutes, California state law, international law, and common law.¹²³

¹¹¹ Third Amended Complaint by Plaintiff at ¶ 15; *Alperin*, 410 F.3d at 541.

¹¹² *Alperin*, 242 F. Supp. 2d at 687.

¹¹³ *Id.*

¹¹⁴ *Alperin*, 410 F.3d at 541.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 541-542.

¹¹⁷ *Id.* at 542.

¹¹⁸ *Id.*

¹¹⁹ See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983).

¹²⁰ *Alperin*, 410 F.3d at 542 n.6. A former U.S. Department of Justice Nazi-hunting officer is quoted as saying, “The Vatican Bank is one of the most secretive financial institutions in the world. The exact nature and ownership of the Vatican Bank is difficult to ascertain owing to the secrecy surrounding it.” *Alperin*, 410 F.3d at 542.

¹²¹ *Id.* at 541-542.

¹²² *Id.* at 543.

¹²³ The plaintiffs claim federal subject matter jurisdiction under the “Alien Tort Statute, 28 U.S.C. § 1350 . . . , the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 . . . , 28 U.S.C. § 1331, federal common law to the extent it incorporates customary international law and treaties, diversity

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The Vatican Bank and Order of Friars Minor filed separate motions in the district court to dismiss the plaintiff's Complaint.¹²⁴ The parties agreed to limit discussion to "whether the plaintiffs' claims should be dismissed under the political question doctrine."¹²⁵ The United States District Court for the Northern District of California held that the claims were nonjusticiable political questions and dismissed the case.¹²⁶ In a separate opinion, the district court dismissed the claims against the Croatian Liberation Movement for lack of personal jurisdiction.¹²⁷ The Ninth Circuit upheld the dismissal of claims against the Croatian Liberation Movement because the courts lacked personal jurisdiction.¹²⁸ However, the Ninth Circuit permitted several of the plaintiffs' claims to proceed against the remaining defendants, holding that the claims were not barred by the political question doctrine.¹²⁹

B. THE MAJORITY'S REASONING IN *ALPERIN V. VATICAN BANK*

The majority in *Alperin* held that some of the Holocaust Survivors' claims, dubbed property claims, were not political questions.¹³⁰ The majority also dismissed certain claims, dubbed war objectives claims, as political questions.¹³¹ The foundation of the majority's position is the demarcation between the property and human rights claims. The court classified the claims according to whether they are property claims or war objectives claims rather than addressing the claims as a whole or each claim individually as it appeared in the Complaint.¹³² The Complaint did not list causes of action for war objectives claims and property claims; rather, the plaintiffs alleged causes of action for conversion, unjust enrichment, the right to an accounting, restitution, and human rights violations and violations of international law.¹³³ The court classified the causes of action for conversion, unjust enrichment, restitution, and accounting, as property claims.¹³⁴ The causes of action

jurisdiction, and California state law." *Id.* at 541.

¹²⁴ *Alperin*, 242 F. Supp. 2d at 687.

¹²⁵ *Id.* at 689.

¹²⁶ *Id.* at 695.

¹²⁷ *Alperin v. Vatican Bank*, No. C99-4941 MMC(EDL), 2003 WL 21303209, at *5 (N.D. Cal. May 29, 2003).

¹²⁸ *Alperin*, 410 F.3d at 562.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 548.

¹³³ *Id.* at 543; see Third Amended Complaint by Plaintiff at ¶¶ 76-97.

¹³⁴ *Alperin*, 410 F.3d at 548.

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for human rights violations and violations of international law, including the slave labor claims, were classified as war objectives claims.¹³⁵

By classifying the claims into property and war objectives categories, the court attempted to make the determination of justiciability for the property claims predictable while making the finding of nonjusticiability for the war objectives claims inevitable. War is the business of the political branches, not the judiciary.¹³⁶ In contrast, the property claims are “garden-variety legal and equitable claims for the recovery of property,” and do not involve the sticky foreign relations issues which might implicate the political question doctrine.¹³⁷

1. *The Justiciability of the Property Claims*

After distinguishing between the property and war objectives claims, the court spent considerable effort to show why the property claims were justiciable under each *Baker* test.¹³⁸ According to the court, each of the six *Baker* tests must be addressed because “any single test can be dispositive.”¹³⁹

a. Textually Demonstrable Constitutional Commitment

First, the court noted that the U.S. Constitution does not explicitly commit the property claims to a nonjudicial branch.¹⁴⁰ “[T]here are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment”¹⁴¹ Thus, courts must infer whether a textual commitment exists from the text and structure of the Constitution.¹⁴²

The court in *Alperin* recognized that foreign relations are generally managed by the political branches and that courts consistently defer to the other branches of government in matters of foreign relations.¹⁴³ As the Court in *Baker* pointed out, however, courts must also understand that political question analysis must proceed on a case by case basis, and

¹³⁵ *Id.*

¹³⁶ See e.g. U.S. CONST. art. I, § 8, cl. 11, 12 (Clause 11 grants Congress the power to “To declare War”; Clause 12 grants Congress the power “To raise and support Armies”); see also U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy”).

¹³⁷ *Alperin*, 410 F.3d at 548.

¹³⁸ *Id.* at 548-558.

¹³⁹ *Id.* at 547.

¹⁴⁰ *Id.* at 549.

¹⁴¹ *Id.* at 549 (quoting *Nixon*, 506 U.S. at 240-241 (White, J., concurring)).

¹⁴² *Nixon*, 506 U.S. at 240 (White, J. concurring); see *Alperin*, 410 F.3d at 549.

¹⁴³ *Alperin*, 410 F.3d at 549.

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“it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”¹⁴⁴

Perhaps the most important determination in the section analyzing the first *Baker* prong is that no treaty or executive agreement expressly bars the Holocaust Survivors’ claims.¹⁴⁵ The court pointed out that the Executive Branch has not committed the United States to a particular course of action regarding Ustasha-related claims, as it had for example, with the Japanese Peace Treaty, which precluded all claims arising out of Japanese actions during World War II.¹⁴⁶ The majority agreed that the presence or absence of a treaty or executive agreement is not strictly determinative of whether a political question exists.¹⁴⁷ However, the court reiterated that the real question is not whether an agreement or treaty exists, but whether a demonstrable textual commitment of the claims to another branch of government exists under the constitution.¹⁴⁸ According to the court in *Alperin*, “[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution.”¹⁴⁹

The court in *Alperin* pointed out that the property claims are similar to claims in earlier cases that involve looted assets that did not implicate the political question doctrine.¹⁵⁰ According to the majority, the Holocaust Survivors’ claims are analogous to those asserted in *Republic of Austria v. Altmann*,¹⁵¹ which permitted claims against an Austrian State art gallery for recovery of six paintings stolen during World War II.¹⁵² Because the Supreme Court did not address the political question doctrine in *Altmann*, that decision cannot be used as a direct proposition that the claims are not political questions.¹⁵³ However, the *Altmann* claims involved looted assets, which is useful in determining

¹⁴⁴ *Id.* at 550 (citing *Baker*, 369 U.S. at 211).

¹⁴⁵ *See Id.* at 549-550.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 550-551.

¹⁴⁸ *Id.* at 551.

¹⁴⁹ *Id.* at 551. In his dissent, Judge Trott argued that a treaty with Italy should decide the outcome of the case. *Id.* at 567-568 (Trott, J. dissenting). The majority rejected this proposition because the Vatican is a sovereign entity separate from Italy, and was not party to the treaty. *Id.* at 550 n.11. Moreover, the Court “must accept the Complaint’s demarcation between the Vatican Bank, which is named as a defendant, and the Vatican, which is not” *Id.* at 550. Thus, no treaty or executive agreement controls the outcome of the case.

¹⁵⁰ *Id.* at 551 (citing *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) and *United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, 2002 U.S. Dist. LEXIS 6445 (S.D. N.Y. 2002)).

¹⁵¹ *Altmann*, 541 U.S. 677.

¹⁵² *Alperin*, 410 F.3d at 551 (citing *Altmann*, 541 U.S. 677).

¹⁵³ *Id.*

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justiciability because the *Alperin* claims also involve looted assets.¹⁵⁴ The court also discussed *United States v. Portrait of Wally*,¹⁵⁵ in which the United States brought an action involving looted assets.¹⁵⁶ The majority argued that, like *Altmann* and *Portrait of Wally*, the property claims are really allegations that the defendant is wrongfully holding assets.¹⁵⁷

b. Judicially Discoverable and Manageable Standards

The second prong of the *Baker* test requires a court to determine whether the courts can apply “judicially discoverable and manageable standards” to resolve the case, or whether the judiciary is not equipped to adjudicate the claim before the court.¹⁵⁸ The majority pointed to *Vieth v. Jubelirer*, in which a Supreme Court plurality declared political gerrymandering cases nonjusticiable under the second *Baker* prong:¹⁵⁹

Lest there be any doubt, *Vieth* refines and redirects the inquiry [into the second Baker prong]. In light of the Court’s clarification in *Vieth*, we take a slightly different approach to interpreting the phrase “judicially discoverable and manageable standards.” Instead of focusing on the logistical obstacles, we ask whether the courts are capable of granting relief in a reasoned fashion or, on the other hand, whether allowing the Property Claims to go forward would merely provide “hope” without a substantive legal basis for a ruling.¹⁶⁰

Courts have been utterly unable to find workable standards for resolving political gerrymandering cases.¹⁶¹ Conversely, courts routinely resolve common law property claims based on settled legal standards.¹⁶²

That the Holocaust Survivors’ claims face daunting evidentiary hurdles does not mean that courts are unable to apply a judicially

¹⁵⁴ *Id.* at 551.

¹⁵⁵ *Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, 2002 U.S. Dist. LEXIS 6445.

¹⁵⁶ *Alperin*, 410 F.3d at 551 (citing *Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, 2002 U.S. Dist. LEXIS 6445).

¹⁵⁷ *Alperin*, 410 F.3d at 551.

¹⁵⁸ *Id.* at 552 (citing *Baker*, 369 U.S. at 217).

¹⁵⁹ *Id.* at 552-555 (discussing *Vieth*, 541 U.S. at 267). Although Justice Kennedy concurred with the decision in *Vieth*, he declined to join the plurality in holding that all gerrymandering cases are nonjusticiable; courts might discover a plausible system to address gerrymandering in the future, but have not yet done so. *Vieth*, 541 U.S. at 306.

¹⁶⁰ *Alperin*, 410 F.3d at 553 (citing *Vieth*, 541 U.S. at 304).

¹⁶¹ *Vieth*, 541 U.S. at 280.

¹⁶² *Alperin*, 410 F.3d at 553.

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discoverable or manageable standard.¹⁶³ Rather, claims seeking compensation for stolen property are common types of claims, and include common law tort rules that are settled and easily applied by the district court.¹⁶⁴ Similarly, courts can use such innovations as the Manual for Complex Litigation, special masters, and the innovations of modern class action certification analysis to help overcome the problems of large complex litigation.¹⁶⁵ Although the property claims are complicated and face difficulties, they are the kind of claims which courts regularly decide based on reasoned distinctions.¹⁶⁶ Thus, this prong of the *Baker* test is not a bar.

c. Necessity for an Initial Policy Determination

The third prong of the *Baker* analysis prohibits claims which require an “initial policy determination of a kind clearly for nonjudicial discretion.”¹⁶⁷ The majority argued that the Holocaust Survivors’ property claims do not require any improper pronouncements on United States foreign policy.¹⁶⁸ Therefore, an initial pronouncement from a nonjudicial source need not be obtained.¹⁶⁹ Moreover, the property claims do not require the courts to make pronouncements on foreign policy.¹⁷⁰ Thus, the third *Baker* prong is thus not applicable.

d. Lack of Respect for the Coordinate Branches of Government

The fourth prong of the *Baker* analysis requires dismissal if the Judiciary cannot address a claim without showing a lack of respect for the coordinate branches of government.¹⁷¹ The analysis in this section of the majority’s decision rests on the lack of Executive involvement in the

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 553-554 (citing Klinghoffer, 937 F.2d at 49).

¹⁶⁵ See Fed. R. Civ. P. § 53(b)(ii); see also *Allen-Myland, Inc. v. Int’l Bus. Machs. Corp.*, 770 F. Supp. 1014, 1023 (E.D. Pa. 1991) (“The language of the Rule [53] . . . specifically provides for reference to special master in non-jury trials for ‘matters of account and of difficult computation of damages’”).

¹⁶⁶ *Alperin*, 410 F.3d at 554. The Court disapproves of the “somewhat anachronistic” *Kelberine v. Societe Internationale*, a case dismissing World War II claims as too large to be judicially manageable. *Kelberine* did not involve the Baker tests, and was a motion to dismiss for failure to state a claim upon which relief can be granted. *Alperin*, 410 F.3d at 554 (*discussing Kelberine v. Societe Internationale*, 363 F.2d 989 D.C. Cir. 1966)).

¹⁶⁷ *Alperin*, 410 F.3d at 555 (citing *Baker*, 369 U.S. at 217).

¹⁶⁸ *Id.* at 555.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (citing *Baker*, 369 U.S. at 217).

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Holocaust Survivors' claims. The Holocaust Survivors apprised the State Department of the case and appeal and the State Department did not intervene.¹⁷² The State Department's decision not to intervene may not be used to determine the position of the State Department or Executive Branch.¹⁷³ However, the lack of a response or statement means that the court has no basis for holding that dismissal is required to avoid disrespect to either of the political branches.¹⁷⁴ Perhaps, as the dissent noted, these claims are simply a way to force the Executive Branch to negotiate a settlement.¹⁷⁵ Still, the court allowed for the possibility of barring the claims as political questions should the Executive Branch intervene later by making a pronouncement which would implicate this prong in the *Baker* analysis.¹⁷⁶

e. Unusual Need for Unquestioning Adherence to a Policy Decision Already Made

The fifth *Baker* prong requires dismissal of political questions resulting from "an unusual need for unquestioning adherence to a political decision already made."¹⁷⁷ The court's reasoning for this prong is simple: because no policy decision was previously made by the political branches, there is no need to adhere to such a decision.¹⁷⁸ Thus, this prong is inapplicable to the *Alperin* claims.

f. Potential Embarrassment from Multifarious Pronouncements

The sixth *Baker* prong requires dismissal where the court finds "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."¹⁷⁹ This prong of the *Baker* test is not implicated simply when a court carries out its duty to decide cases and controversies, even though that might embarrass another branch of

¹⁷² *Id.* at 555-556.

¹⁷³ *Id.* at 556.

¹⁷⁴ *Id.* The Supreme Court noted in *Sosa v. Alvarez Machain* the importance of deferring to the Executive Branch in cases where the Executive Branch takes a position on the impact of a case on foreign policy. *Id.* *Sosa* was a case brought by a Mexican national against the United States and the Drug Enforcement Agency for his abduction and rendition to the United States for murder charges of which he was acquitted. Judge McKeown's opinion in the Ninth Circuit permitting the case to proceed was overruled by the Supreme Court. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (rev'g *Alvarez-Machain v. United States*, 331 F.3d 604 (2003)).

¹⁷⁵ *Alperin*, 410 F.3d at 570 (Trott, J. dissenting).

¹⁷⁶ *Id.* at 556, 557.

¹⁷⁷ *Id.* at 557 (citing *Baker*, 369 U.S. at 217).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 558 (citing *Baker*, 369 U.S. at 217).

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government.¹⁸⁰ Rather, the sixth prong prohibits the court from passing judgment on foreign policy decisions.¹⁸¹ Again, the court's reasoning is based on the lack of pronouncements made by the political branches of government.¹⁸² With that, the majority concluded that the property claims are not political questions, and are therefore justiciable.¹⁸³

2. *The Justiciability of the War Objectives Claims*

Included in the war objectives claims are the Holocaust Survivors' allegations that the Vatican Bank and other defendants "aided and abetted . . . war criminals," "committed war crimes, crimes against peace and crimes against humanity . . .," showed "a clear pattern of violat[ing] diplomatic norms . . .," and were involved in or profited from slave labor.¹⁸⁴

The majority stated: "[w]e are not a war crimes tribunal."¹⁸⁵ The Executive Branch pursued and prosecuted war crimes after World War II and the Judicial Branch should not question the decisions made by the Executive during that time.¹⁸⁶ The Nuremberg Tribunals were a project of the Executive Branch, not the Judiciary.¹⁸⁷ The Judiciary should not intrude on any Executive Branch decisions made in the aftermath of World War II, particularly where it would require the Judiciary to condemn foreign entities for international crimes, including crimes against peace and crimes against humanity; those determinations would intrude on Executive decisions about World War II.¹⁸⁸ Making these determinations would require the Judiciary to improperly intrude on the policy choices that are constitutionally committed to the political branches, namely, that the United States and its allies did not prosecute

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* The Vatican Bank argues that because the Executive Branch's stated policy is to resolve World War II claims with diplomacy and negotiations, a judicial decision in this case would interfere with that policy and cause embarrassment for the Executive. *Id.* Judge McKeown responds, however, that courts should not lightly shirk their duty to adjudicate claims, and that because "this lawsuit is the only game in town with respect to claimed looting and profiteering by the Vatican Bank," the Court should let the property claims proceed. *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 559.

¹⁸⁵ *Id.* at 560.

¹⁸⁶ *Id.* at 559-560.

¹⁸⁷ *Id.* at 559.

¹⁸⁸ *Id.* at 559-560. The property claims would simply require a determination of whether stolen assets are currently held by the defendants, the war objectives claims require a determination that the behavior of the Vatican Bank and Ustasha constituted, for example, war crimes or genocide. *Id.* at 559.

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the Vatican Bank or Ustasha.¹⁸⁹ The court's analysis in this regard is fundamentally consistent with the very reasons for the political question doctrine: respect for the separation of powers inherent in the structure of the federal government.

The court acknowledged difficulty addressing the justiciability of the slave labor claims.¹⁹⁰ The court's central reasoning regarding the slave labor claims was that, "[d]etermining whether the Vatican Bank was unjustly enriched by profits derived from slave labor would . . . necessitate that we look behind the Vatican Bank and indict the Ustasha regime for its wartime conduct."¹⁹¹ The plaintiffs essentially alleged that the Ustasha enslaved the plaintiffs, that some of the profit from this slave labor flowed to the Vatican Bank, and that this profit should be disgorged.¹⁹² The court thus determined that the slave labor claims were derivative claims.¹⁹³ Because this determination would question the actions of the Executive Branch following World War II, the court concluded slave labor claims were political questions.¹⁹⁴

The court also disavowed any suggestion that its decision in *Alperin* might create a split with the Second Circuit's decision in *Kadic v. Karadzic*.¹⁹⁵ The *Kadic* decision involved slave labor and forced labor claims resulting from the actions of the Bosnian-Serb military forces in the former Yugoslavia.¹⁹⁶ The Second Circuit held the claims were not political questions.¹⁹⁷ According to Judge McKeown, one important factor in *Kadic* that distinguishes the case from *Alperin* is that the State Department expressly disavowed any use of the political question doctrine as a defense against the plaintiffs in that case.¹⁹⁸

3. *The Concurring and Dissenting Opinion by Judge Trott*

Judge Stephen Trott concurred with the finding that the war objectives claims should be dismissed as political questions, but dissented from the majority's holding that the property claims should

¹⁸⁹ *Id.* at 560 (citing *Koochi v. United States*, 976 F.2d 1328, 1331 (1992)).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 561.

¹⁹² *Id.*

¹⁹³ *Id.* at 560-561.

¹⁹⁴ *Id.* at 561.

¹⁹⁵ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

¹⁹⁶ *Kadic*, 70 F.3d at 236-237.

¹⁹⁷ *Id.* at 236.

¹⁹⁸ *Alperin*, 410 F.3d at 562 (citing *Kadic*, 70 F.3d at 249). Also, the *Kadic* claims involved a single person, rather than an entire regime during a world war. *Kadic*, 70 F.3d at 249-251.

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proceed.¹⁹⁹ Judge Trott found the division between property claims and war objectives claims untenable.²⁰⁰ In response to the majority's claim that, because there is no other process underway to address the Holocaust Survivors' claims, "this lawsuit is the only game in town"²⁰¹ the dissent stated, "[t]his is *not* our 'game,' period."²⁰² According to Judge Trott, the silence of the other branches of government should not have any bearing on whether the Judiciary has jurisdiction over the Holocaust Survivors' claims, and furthermore, the lack of any relevant executive agreement is "meaningless."²⁰³

The dissent also found the claims to be simply too overwhelming for judicial scrutiny, requiring dismissal for lack of judicially manageable standards under the second prong of the *Baker* analysis.²⁰⁴ According to the dissent, the decision in *Alperin* will overwhelm the Judiciary with claims resulting from the horrors across the world.²⁰⁵ For these reasons, Judge Trott agreed with the district court's finding that all of the Holocaust Survivors' claims were political questions.

III. THE DEMARCATION BETWEEN PROPERTY AND WAR OBJECTIVES CLAIMS IS A SOUND ANALYTICAL FRAMEWORK

Judge Trott, in his dissent to the *Alperin* majority, recognized that "[i]t is unlikely that a better case could be made for the majority's view that some of these matters are justiciable."²⁰⁶ Judge McKeown, writing for the majority, correctly saw a distinction between the more typical claims involving stolen assets and those claims requiring a determination of human rights violations.²⁰⁷ Although the United States has an obligation to render justice for the Holocaust Survivors, Judge McKeown correctly recognized the difficulties involved in such determinations.²⁰⁸ The Judicial Branch must, like the other branches of the federal

¹⁹⁹ *Alperin*, 410 F.3d at 563 (Trott, J. concurring and dissenting).

²⁰⁰ *Id.* (Trott, J. concurring and dissenting).

²⁰¹ *Id.* at 558.

²⁰² *Id.* at 565 (Trott, J. concurring and dissenting) (emphasis in original).

²⁰³ *Id.* (Trott, J. concurring and dissenting).

²⁰⁴ *Id.* at 570 (Trott, J. concurring and dissenting). The majority read *Vieth* differently than Judge Trott, who found the Holocaust Survivor's claims overwhelming. According to the majority, the inquiry is whether there are standards based on reasoned distinctions, not whether the claims are overwhelming. See Part II discussion above of the majority's analysis of *Vieth* and Judicially discoverable standards.

²⁰⁵ *Id.* (Trott, J. concurring and dissenting).

²⁰⁶ *Id.* at 563 (Trott, J. concurring and dissenting).

²⁰⁷ *Id.* at 548.

²⁰⁸ *Id.* at 562.

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government, permit each branch its proper role.²⁰⁹

The court in *Alperin* found a creative solution to the political question issues with its distinction between war objectives claims and property claims. The Complaint in this case referred to human rights violations and violations of international law, not war objectives claims.²¹⁰ Nevertheless, the Majority used the phrase “war objectives claims” to address all of these claims.²¹¹ Nevertheless, the majority correctly understood that certain claims would require an extensive analysis of the choices made by the Executive Branch during World War II and would therefore be nonjusticiable.²¹²

Adjudication of the property claims does not require an improper inquiry into the decisions made by the Executive Branch during and after World War II.²¹³ The same is not true of the war objectives claims.²¹⁴ Determining whether genocide, war crimes, crimes against peace, or crimes against humanity have occurred requires a qualitatively different analysis; whether the Vatican Bank is liable for such crimes would require an in depth analysis of the Vatican’s political decisions.

More problematic, determining war objectives claims would require review of the U.S. President’s decision not to pursue such claims after the termination of World War II. In light of the fledgling Cold War, those decisions involved the most delicate and subtle political calculations.²¹⁵ For example, Judge McKeown recognized that claims that the Vatican was involved in ferrying Nazi and Croatian war criminals to the Western Hemisphere could also easily be alleged against the United States after World War II.²¹⁶ Permitting such claims would question or show disrespect for decisions made by the Executive Branch.²¹⁷ The political question doctrine prohibits claims which embroil courts in analysis of issues where the dispositive factor would be the soundness of the Executives’ political decisions during and following World War II.²¹⁸

²⁰⁹ See e.g. *Luther*, 48 U.S. (7 How.) at 46-47.

²¹⁰ Third Amended Complaint by Plaintiff at ¶¶ 76-97. The cause of action for human rights violations and violations of international law in the Holocaust Survivor’s Complaint states, among other things, that “the actions and conduct of Defendants, in addition to being profitable, actively assisted the *war objectives* of the Ustasha Regime.” Third Amended Complaint by Plaintiff at ¶ 93.

²¹¹ *Alperin*, 410 F.3d at 558-562.

²¹² *Id.* at 562.

²¹³ *Id.* at 555-556.

²¹⁴ *Id.* at 559-560.

²¹⁵ See *Id.* at 560.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

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This is not to say that the Holocaust Survivors do not deserve relief for the war objectives claims.²¹⁹ Rather, the Judicial Branch is simply not equipped to make that decision without offending the constitutional separation of powers.²²⁰ Whether the Vatican Bank illegally holds funds or profited from criminal acts may have significant evidentiary hurdles. However, these issues are distinct from the political question problems raised, for example, by the claims that the Vatican assisted in ferrying war criminals out of Europe, which could bring into question the Executive's political decisions.²²¹ The court's holding is narrow and based on sound reasoning.

IV. THE SLAVE LABOR CLAIMS ARE WITHIN THE SCOPE OF THE PROPERTY CLAIMS, AND ARE THEREFORE NOT POLITICAL QUESTIONS

The slave labor claims are more like the property claims than the war objectives claims. The majority recognized that the slave labor claims are difficult to categorize.²²² Allegations regarding slave labor are specifically stated in the unjust enrichment cause of action, although slavery allegations are present throughout the Complaint.²²³ Classifying the slave labor claims as war objectives claims has cursory appeal. Slavery is a *jus cogens* norm under international law, so that no treaty or agreement can vitiate a state's obligation to avoid the use of and punish the use of slave labor.²²⁴ In this way, slavery is very different from property theft; property theft is a serious violation of law, but it is not nearly as great a threat to humanity as slavery.

The slavery claims are, however, in many ways dissimilar to the other war objectives claims. The claims are at least somewhat analogous to false imprisonment, and could be decided under a similar standard.²²⁵

²¹⁹ *Id.* at 562.

²²⁰ *Vieth*, 541 U.S. at 278 (Scalia, J. writing for the plurality) (“ . . . law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”).

²²¹ *Alperin*, 410 F.3d at 560.

²²² *Id.*

²²³ Third Amended Complaint by Plaintiff at ¶ 81.

²²⁴ *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716 (9th Cir. 1992) (“Indeed, the supremacy of *jus cogens* extends over all rules of international law; norms that have attained the status of *jus cogens* ‘prevail over and invalidate international agreements and other rules of international law in conflict with them.’”) (*quoting* Restatement (Third) of Foreign Relations Law of the United States §102 comment k (1987)).

²²⁵ For example, the Restatement (Second) of Torts § 35 (2005) states: “(1) An actor is subject to liability to another for false imprisonment if (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it. (2)

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In this way, the slave labor claims are more similar to the “garden-variety” claims of unjust enrichment, conversion, the right to an accounting, and restitution.²²⁶

Slave labor claims are dissimilar to the other war objectives claims in other ways. Analyzing crimes against peace or crimes against humanity requires a much more extensive analysis of political decisions by governments and institutions than analyzing property claims. Slave labor claims could be resolved using the same kinds of evidence and standards required for resolution of the conversion, unjust enrichment, restitution, and accounting.

Resolution of the slave labor claims is not, unlike the war objectives claims, committed to a political branch of the government. The majority states that “[d]etermining whether the Vatican Bank was unjustly enriched by profits derived from slave labor would . . . necessitate that we look behind the Vatican Bank and indict the Ustasha regime for its wartime conduct. We are not willing to take this leap.”²²⁷ However, the same inquiry is required in deciding the property claims. Without determining whether and how much property was stolen by the Ustasha, the judiciary would be unable to adjudicate the property claims. To determine whether property was stolen, the court must look to the Ustasha’s wartime conduct in relation to the plaintiffs.

The majority further distinguished the property and slave labor claims by suggesting that permitting the slave labor claims would require evaluation of “the Ustasha’s wartime use of slave labor, quantify the monetary value of this labor, and then determine the portion thereof that flowed to the Vatican Bank.”²²⁸ With the property claims, the plaintiffs would only have to show the amount of seized assets which are in the possession of the Vatican Bank.²²⁹ This distinction is not meaningful. Determining the value of stolen property is not markedly different from assigning a monetary value to labor or lost wages.²³⁰ Expert witnesses and historians can testify to the value of labor and to the value of property. Determining the profit from slave labor which flowed from the

An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.”

²²⁶ *Alperin*, 410 F.3d at 548.

²²⁷ *Id.* at 561.

²²⁸ *Id.* at 561 n.18.

²²⁹ *Id.*

²³⁰ Courts often examine damage awards for lost wages or earnings; see e.g. *Strauss v. Continental Airlines, Inc.*, 67 S.W.3d 428, 435 (Tex. App. 2002) (“Loss or impairment of past, as well as future, earning capacity is recoverable as an element of damages in a personal injury case.”).

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Ustasha to the Vatican Bank is not different from determining the percentage of assets which flowed to the Vatican Bank from stolen property. Finally, the plaintiffs must offer evidence sufficient to withstand summary judgment, which is decided at a later stage of the proceedings than justiciability. If the plaintiffs fail to offer sufficient evidence, the district court can still dismiss the claims.

The majority also cited the third *Baker* test, an initial policy determination, as the basis for dismissal of the slave labor claims.²³¹ According to the majority, “[i]t is not our place to speak for the U.S. Government by declaring that a foreign government is at fault for using forced labor during World War II. Any such policy condemning the Ustasha regime must first emanate from the political branches.”²³² Yet, as the majority noted in its opinion, the State Department issued a report detailing many of the Ustasha’s activities in an effort “to confront the largely hidden history of Holocaust-related assets after five decades of neglect.”²³³ This may not be sufficient to qualify as an initial policy determination, but it is at least a condemnation of the Ustasha-related theft of assets.

V. CONCLUSION

The Holocaust Survivors’ allegations that the Vatican Bank and others profited from crimes committed by the Ustasha during and after World War II are, at the least, controversial, and have certainly not yet been proven. Although the Supreme Court denied certiorari in *Alperin v. Vatican Bank*, the Holocaust Survivors’ claims still might face dismissal for reasons other than the political question doctrine.²³⁴ The case is extremely complicated and potentially massive, considering the large class spread across many countries.²³⁵

Nevertheless, the political question doctrine should not be a bar to many of the Holocaust Survivors’ claims. The Ninth Circuit’s distinction between property and war objectives claims was a useful technique in resolving the political question doctrine issues. However, the court should have included the slave labor claims within the umbrella of the property claims, not within the war objectives claims. The plaintiffs face a difficult task in obtaining relief in this litigation, but the

²³¹ *Alperin*, 410 F.3d at 561.

²³² *Id.*

²³³ *Id.* at 540 (citing Ustasha Treasury Report, *iii*).

²³⁴ *Alperin*, 410 F.3d at 538, *cert. denied*, 126 S. Ct. 1141 (2006), *cert. denied*, 126 S. Ct. 1160 (2006).

²³⁵ *Alperin*, 410 F.3d at 541.

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plaintiffs should have a chance to proceed with their case in United States courts.

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