The Politics of the "Private": Judicialization and Transnational Economic Relations

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Introduction: Transnational, Economic, Geopolitical

Since the 1950s, federal US courts have exercised increasing authority over transnational economic relations involving foreign sovereign governments. This was enabled most importantly by transformations in the act of state doctrine and foreign sovereign immunity law. Both have been extensively documented by legal scholars, including scholars of sovereign debt and transnational commercial law more generally. In contrast, this history has been entirely missing from the literature on judicialization, which studies the process by which political issues have been subjected to judicial procedures or decisions. In this paper, I provide a new account of certain aspects of the history of these doctrines in relation to foreign nationalizations of US property and to sovereign debt crises, in order to argue that these changes should, by that literature's own terms, be included in analyses of judicialization; the mechanism by which US courts have come to exercise increasing authority over transnational economic relations involving foreign sovereigns has been precisely the reclassification of acts that had previously been considered public and political as private and therefore in the judicial domain.

In presenting this argument, I address gaps in both the judicialization literature and the transnational commercial law literature, and bring together two conversations that have remained almost entirely separate. Judicialization is "arguably one of the most significant phenomena of late twentieth- and early twenty-first-century government,"[1] yet work on the subject remains "surprisingly sketchy."[2] Scholars of judicialization generally agree that international and domestic judiciaries around the world have grown more powerful *vis-à-vis* other branches of government in the past few decades. First, many new countries have adopted Western-style constitutions that grant more significant powers of "judicial review" over executive, legislative

[1] Ran Hirschl, "The Judicialization of Politics," *Oxford Handbook of Law and Politics*, August 14, 2008, http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199208425.001.0001/oxfordhb-9780199208425-e-8.

[2] Ran Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide," *Fordham L. Rev.* 75 (2006): 272.

and administrative decisions than is traditional in major Western democracies themselves. Second, many Western democracies have also expanded powers of judicial review. Third, many countries have shown increasing deference to international courts and tribunals. Thornhill[3] argues that the first two processes have directly facilitated the third: "in short, contemporary constitutions are marked, almost generically, by a rise in judicial power, and, closely linked to this, by the intensified penetration of international law into domestic legal systems."

There has been a polarized debate over the pros and cons of judicialization. Many condemn it for transferring properly "political" matters from the sphere of public debate and democratic decision-making to the "legal" and supposedly a-political sphere of the judicial.[4] This is variously decried as the judicialization of politics and/or the politicization of the judiciary. Hirschl, who can be seen as representative of this view, is somewhat concerned about growing powers of what he calls "ordinary" judicial review over administrative law. He is far more critical of the judicialization of what he calls "pure" or "mega" politics, by which he means the growing power of courts in many countries over such questions as the outcome of major elections, the validity of military coups, and definitions of national identity and citizenship. He argues that this trend removes core political issues from democratic debate. Mouline-Doos[5] goes beyond Hirschl in rooting this tendency in liberal democracy itself, arguing that "liberalism is relying on Law in order to limit or bypass politics."

Some scholars, in contrast, are ambivalent about judicialization,[6] while still others applaud it as *strengthening* democracy around the world. Thornhill, for instance, admits that judicialization removes certain decisions from public debate and contestation, yet argues that this actually

[3] Chris Thornhill, "The Mutation of International Law in Contemporary Constitutions: Thinking Sociologically about Political Constitutionalism," *The Modern Law Review* 79, no. 2 (2016): 208.
[4] Bruno Irion Coletto and Pedro da Silva Moreira, "Constitutionalism and Judicialization of Politics: The 'Judicial' Right to Healthcare in Brazil," *Panorama of Brazilian Law* 2, no. 3–4 (2015): 358–393; Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide"; Teresa Kramarz, David Cosolo, and Alejandro Rossi, "Judicialization of Environmental Policy and the Crisis of Democratic Accountability," *Review of Policy Research* 34, no. 1 (2017): 31–49; Claire Moulin-Doos, *CiviC Disobedience: Taking Politics Seriously, a Democratic Theory of Political Disobedience* (Bloomsbury Publishing, 2015).
[5] Moulin-Doos, *CiviC Disobedience*, 68.
[6] Aylin Aydın-Çakır, "Judicialization of Politics by Elected Politicians: The Theory of Strategic Litigation," *Political Research Quarterly* 67, no. 3 (2014): 489–503; Ugochukwu Basil, "The Pathology of Judicialization: Politics, Corruption and the Courts in Nigeria," *The Law and Development Review* 4, no. 3 (2011): 59–87; Bjoern Dressel and Marcus Mietzner, "A Tale of Two Courts: The Judicialization of Electoral Politics in Asia," *Governance* 25, no. 3 (2012): 391–414; C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (NYU Press, 1995); Hakeem O. Yusuf, "Democratic Transition, Judicial Accountability and Judicialisation of Politics in Africa: The Nigerian Experience," *International Journal of Law and Management* 50, no. 5 (2008): 236–261.

promotes political legitimacy. His argument rests on two poles. First, he focuses almost exclusively on the rise of "judicial constitutionalism" in "post-authoritarian" countries and argues that expanded judicial power has been necessary to promote the transition to constitutional democracy and protect the state from capture by powerful interest groups. Second, he believes that by referencing international law, states are able "to acquire and presuppose some element of legitimacy for legislation, which these states are not expected to create for themselves."[7] Who, precisely, does not expect these states to create legitimacy for themselves is unclear, but for Thornhill, it is because an *external* force (international law) allows national judiciaries to avoid domestic struggle that judicialization helps promote a liberal constitutional order. In short, it is precisely by *reducing* political contestation that judicialization promotes a secure and stable "political domain."[8] This is essentially an updated version of a longstanding tradition (including Alexander Hamilton and Alexis de Tocqueville) of seeing strong judiciaries as useful checks on the dangers of majoritarian politics.[9]

Judicialization may have wildly different political consequences. The landmark 1954 case *Brown v Board of Education*[10] is often cited as a prime example of judicialization, as is *Bush v. Gore*.[11] Whatever one's position, the expansion of judicial power over the past half century is a significant social change that demands attention. The question is not whether the results have always been good or bad, or whether every instance of judicialization should be reversed. Rather, the question is *how* and *with what effects* the judicialization of certain practices has systematically restructured global governance and global power relations. Law mediates the distribution of power and resources in society. How the operative categories of political and legal are defined is an important part of this.

In this paper, I extend the analysis of judicialization to focus on a topic that has been largely left out of the judicialization literature: transnational economic relations with foreign sovereign governments. Outside of legal studies, it is often assumed that international law is increasingly *replacing* domestic courts in governing important economic processes around the world. Yet, "In general, the laws that are applied to global markets are not themselves global—or even

[7] Thornhill, "The Mutation of International Law in Contemporary Constitutions," 220.
[8] Thornhill, 225.
[9] See discussion in Tate and Vallinder, *The Global Expansion of Judicial Power*.
[10] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
[11] Bush v. Gore, 531 U.S. 98 (2000).

transnational! Instead, the *laws of individual states* govern *global markets*."[12] The relevant distinction is that between transnational and international law. While international law usually refers to the rules governing relations between or among equal sovereign states (including treaties, conventions, customary rules and so on), transnational law has often been used since the 1950s to refer to the rules governing cross-border relations between private parties or between states and private parties. Nationalization and sovereign debt cases can be classified in this way.

The history of nationalization and sovereign debt cases has been studied extensively in terms of the development of transnational commercial law, but not in terms of judicialization. That the judicialization literature has ignored transnational economic cases and the transnational commercial law literature has not seen the connections to judicialization is the result of specific conceptual gaps in each. First, both the pro- and con- camps of the judicialization debate have framed judicialization as a *domestic* phenomenon, with almost no attention to the expansion of national judicial power *across* borders. Scholars have focused primarily on how national politicians transfer power to their own courts. Hirschl[13] and Tate[14] argue that this has usually been a response to political weakness. Politicians may shift responsibility to courts in order to avoid political gridlock or blame for unpopular decisions. Even the internalization of international law by national courts through judicialization is often presented as a response to domestic political dynamics.[15] This "methodological nationalism"[16] has prevented most judicialization scholars from seeing the extension of judicial authority *across* national borders (although current attention to judicialization in relation to the War on Terror does consider certain important transnational legal questions). The processes I focus on, in contrast, involve transferring authority over the economic decisions of *non-US* states out of the *inter*-national sphere of interactions between governments to *domestic* US courts, not to avoid criticism from US constituents, but to avoid *geopolitical* contestation from the foreign governments involved.

Just as important for explaining the lack of attention to transnational economic law has been the assumption by judicialization scholars that the economic is by definition not political. Since

[12] David Gerber, *Global Competition: Law, Markets, and Globalization* (OUP Oxford, 2012), 20.
[13] Hirschl, "The New Constitutionalism and the Judicialization of Pure Politics Worldwide."
[14] C. Neal Tate, "Why the Expansion of Judicial Power?," in *The Global Expansion of Judicial Power*, ed. C. Neal Tate and Torbjorn Vallinder (NYU Press, 1995), 27–38.
[15] See, for example, Thornhill, "The Mutation of International Law in Contemporary Constitutions."
[16] Manu Goswami, *Producing India: From Colonial Economy to National Space*, 1st ed. (Chicago: University Of Chicago Press, 2004).

both advocates and critics of judicialization see it as referring to making "political" things "legal," economic relations are excluded by definition.[17] This is even true of an author like Shapiro, whose explanation of the *history* of US judicialization emphasizes the way US courts used judicial review to uphold private property interests. As Progressive reformers pushed for regulations to ameliorate social and economic suffering, the US Supreme Court waded into the fray and "frequently portrayed itself as the protector of individual rights — in this instance property rights — against the occasional aberrations of democratically controlled legislatures."[18] Yet property rights then drop out of Shapiro's story. During the New Deal, he explains, frequent judicial review of legislation continued, with a shift in emphasis from protecting property rights to protecting "civil rights and liberties."[19] In relation to *this* period and the Warren Court's progressive positions on social issues, he concludes that the Burger and Rehnquist courts tended to be "less welcoming of rights initiatives."[20] This enabled him to posit, in 1995, that judicialization in the United States was actually on the *decline*. This characterization of US judicialization is only possible if one excludes both economic and transnational relations.

Work on transnational law has been characterized by the same conceptual dichotomy between the political and the economic. Some scholars have addressed national courts as international *political* actors, but without including economic cases in the analysis.[21] Others have addressed the growing role of national courts in transnational economic matters, without defining this as political. Whytock,[22] for instance, argues that national courts are *increasingly* important in governing transnational economic relations, allocating jurisdictional authority and determining how rights and resources are distributed. Both functions are relevant to the cases discussed here, and Whytock himself lists sovereign debt as an example. Nevertheless, like many scholars of transnational commercial law, his acceptance of a strict economics/politics divide enables him to overlook the geopolitical struggles embodied in today's transnational legal structures. While

[17] A similar lack of attention to the economic characterizes the literature on the demise of the political question doctrine, which can perhaps be seen as a subset of judicialization more broadly focused on constitutional matters.
[18] Martin Shapiro, "The United States," in *The Global Expansion of Judicial Power*, ed. C. Neal Tate and Torbjorn Vallinder (NYU Press, 1995), 46.
[19] Shapiro, 46.
[20] Shapiro, 48.
[21] Osnat Grady Schwartz, "Changing the Rules of the (International) Game: How International Law Is Turning National Courts into International Political Actors," *Wash. Int'l LJ* 24 (2015): 99; David L. Sloss and Michael P. Van Alstine, "International Law in Domestic Courts," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 14, 2015), https://papers.ssrn.com/abstract=2660513.
[22] Christopher A. Whytock, "Domestic Courts and Global Governance," *Tul. L. Rev.* 84 (2009): 67.

many summaries of the shift to a restrictive theory of sovereign immunity note that the change occurred in the context of the Cold War, they tend to do so in passing, and do not give it adequate attention. The large body of legal scholarship on sovereign debt law, in contrast, does recognize that it is highly politicized in terms of the specific constituencies involved at the moment of crisis. Yet, this literature too tends not to consider broader macroeconomic or geopolitical dynamics.[23]

Yet, even within US law, the economic was not always excluded from the political in international affairs. Two parallel dichotomies have long operated in transnational law involving foreign sovereigns: the public/private divide and the political/legal divide. By and large, categorizing something as public has meant that it is seen as belonging in the political (traditionally the executive) domain, while categorizing something as private has opened it up to the judicial domain. As I show in respect to nationalization and sovereign debt cases, many of the commercial relations involving foreign sovereigns over which US judiciaries now exercise authority *used to be* categorized as public and political and thus beyond judicial reach. In order to be brought into the judicial domain, they had to be gradually re-categorized as private and therefore properly legal matters. This process has taken different forms at different moments. In this paper I focus primarily on one of the most important mechanisms: the emergence of a commercial exception to both the act of state doctrine and foreign sovereign immunity.

In short, the successful transfer of authority over nationalization and sovereign debt cases from the executive to the judiciary has involved, first, redefining the commercial as private in relation to government acts in ways it had not previously been, and second, gradually reclassifying certain activities from political to commercial and therefore to private and legal. Furthermore, just as in many cases of domestically bounded judicialization, this was done precisely for *political* reasons: in order to shift responsibility over highly contentious foreign policy matters away from the executive and legislative branches to the courts, in the context of the Cold War and post-colonial economic relations.

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[23] See, for instance, Lee C. Buchheit and Mitu Gulati, "Responsible Sovereign Lending and Borrowing," *Law & Contemp. Probs.* 73 (2010): 63; Lee C. Buchheit and Jeremiah S. Pam, "The Pari Passu Clause in Sovereign Debt Instruments," *Emory LJ* 53 (2004): 869; Mitu Gulati and Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* (University of Chicago Press, 2012); W. M. C. Weidemaier, "Reforming Sovereign Lending Practices: Modern Initiatives in Historical Context," *UNC Legal Studies Research Paper*, no. 1996763 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1996763; W. M. C. Weidemaier, "Sovereign Immunity and Sovereign Debt," *University of Illinois Law Review* 2014, no. 1 (2014): 67–114; W. M. C. Weidemaier and Anna Gelpern, "Injunctions in Sovereign Debt Litigation," *The Yale Journal on Regulation*, 2014.

Revisiting the expansion of US judicial authority over transnational economic relations with foreign sovereigns in this way, enables me to make two primary contributions to the judicialization and transnational commercial law debates, respectively. Critics of judicialization focus on its implications for democracy within nation-states, while supporters laud its role in promoting legal order at the national scale. By bringing transnational economic relations into the debate, we can begin to consider what judicialization has meant for national sovereignty, democracy and law across borders. At the same time, a tendency to overlook the politics that shaped the development of transnational commercial law has led to a kind of selective forgetfulness among commercial law scholars, feeding into a narrative according to which the expanding role of national courts in global economic governance, and the development of transnational commercial law generally, is explained as a natural and inevitable response to economic globalization, and as reflecting, moreover, a growing international consensus around economic liberalism. Exposing the highly contested processes by which previously political matters were re-classified as commercial, private and legal puts pressure on this dominant narrative and suggests that these changes should not be understood so much as *reflecting* an emerging consensus around globalization, but rather as part of concerted efforts to *produce* that consensus. The politics of these transformations have since been occluded precisely by the success of their judicialization.

Judicialization and the act of state doctrine

In the rest of this paper, I analyze how the judicialization of transnational economic relations previously considered political accelerated from the 1950s on, in response to the Cuban Revolution, broader post-colonial dynamics and the Cold War. This process expanded most dramatically in the mid-1970s, with the formalization of a "commercial exception" to two important legal doctrines (the act of state doctrine and foreign sovereign immunity), and has continued gradually but systematically ever since.

Where foreign sovereign immunity law determines whether a US court has jurisdiction in the United States over a foreign government or government official in a given case, the act of state doctrine helps determine the extent of US judicial reach over the actions of foreign sovereigns carried out in that sovereign's territory. It involves not jurisdiction but justiciability – whether the

matter at hand is properly suited for courts at all, or whether, in contrast, it is a political matter that should be dealt with by the executive. Furthermore, unlike with foreign sovereign immunity, the act of state doctrine applies not only to whether the sovereign himself may be sued, but to assessing the validity of an *act* done by a sovereign, even as it applies to third parties. Both doctrines involve the interlocking, parallel dichotomies of public/private and political/legal.[24] These distinctions both distribute power between the executive and the judiciary and function to de-politicize activity falling on the private, legal side of the division. While these distinctions are fundamental throughout US law, they operate differently in different circumstances. In US law dealing only with individuals and corporations, the commercial has long been associated with the private.[25] In transnational cases involving foreign governments, in contrast, this has not always been the case. In the next few sections, I analyze the history of the act of state doctrine in relation to the process of re-characterizing the political as legal from the late 19th century through the mid-1970s, before turning more briefly to foreign sovereign immunity law, and then to judicialization in the context of sovereign debt.

The transformation of the act of state doctrine in the mid-20th century is usually framed as a shift from a doctrine based on an absolute, "positivist" territorial sovereignty, to a more modern "separation of powers" approach. The classic statement of the doctrine is found in the 1897 decision *Underhill v Hernandez*,[26] in which the Supreme Court famously stated: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[27] This strict expression of territorial sovereignty was considered the definitive expression of the act of state doctrine until 1964, when the Supreme Court upheld the doctrine in *Banco Nacional de Cuba v Sabbatino,*[28] but redefined it in the process. Suggesting that the strict territoriality of *Underhill* was obsolete, the Court in *Sabbatino* instead focused on maintaining "the proper distribution of functions between the judicial and political branches of

[24] These categories have also been intertwined with the third, explicitly spatial category of foreign/domestic, which I analyze elsewhere (Shaina Potts, *Displaced Sovereignty: U.S. Law and the Transformation of International Financial Space (Dissertation)* (University of California at Berkeley, 2017)).
[25] Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992).
[26] Underhill v. Hernandez, 168 U.S. 250 (1897).
[27] Underhill v. Hernandez, 168 U.S. at 252.
[28] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

the Government on matters bearing upon foreign affairs."[29] This "separation of powers" approach is still considered "the most recent, authoritative enunciation" of the act of state doctrine.[30] [31]

The transition is often characterized as one from an old-fashioned territorial understanding of sovereignty to a more modern approach better suited for a flexible, interconnected economy.[32] The articulation, by plurality, of a commercial exception to the act of state doctrine in *Dunhill* in 1976 is presented in similar ways.[33] If one sees *Dunhill* not just as a separate change, but as a continuation of processes begun in *Sabbatino*, however, things look different. The transition from *Underhill* to *Sabbatino* not only required rethinking territory but also redefining the interlocking definitions of public/private and political/legal in the doctrine. Before the commercial exception could be used to transfer activity from the political to the legal domain, the definitions of private and commercial themselves had to change. In act of state cases from the late 19th c. through the early 1960s, private was generally used to mean personal or not-social, in purpose or in motivation. The suggestion that commercial matters should be considered private and thus legal was only raised in these cases beginning in the mid-1960s. Furthermore, for two decades before the commercial exception was fully elaborated, multiple other strategies for shifting nationalization cases to the judiciary were tried. *Sabbatino* only *partially* succeeded in doing this, but heated struggles among all three branches over how to do so more fully continued for another decade. This shows that the primary interest was neither only in the modernization of the act of state doctrine as a focus on *Sabbatino* suggests, nor in the treatment of commercial matters *per se* as a focus on *Dunhill* suggests. Rather, the goal was precisely the judicialization of foreign state seizures of private property in the context of the Cuban Revolution and the Cold War.

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[29] Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 427–28. *Sabbatino*, 376 U.S. at 427–28.
[30] Rosa María Lastra and Lee Buchheit, *Sovereign Debt Management* (Oxford University Press, 2014), 107.
[31] The modern formulation of the political question doctrine is usually dated to Baker v. Carr, 369 U.S. 186 (1962), a decision that uses very similar language as *Sabbatino*. The act of state doctrine and the political question doctrine have sometimes been discussed in relation to one another, explicitly or implicitly (e.g., Jesse H. Choper, "The Political Question Doctrine: Suggested Criteria," *Duke Law Journal* 54, no. 6 (2005): 1457–1523; Robert J. Jr. Pushaw, "Judicial Review and the Political Question Doctrine: Reviving the Federalist Rebuttable Presumption Analysis Baker v. Carr: A Commemorative Symposium: Panel I: Justiciability and the Political Thicket," *North Carolina Law Review* 80 (2002): 1165–1202).
[32] See, for example, Russ Schlossbach, "Arguably Commercial, Ergo Adjudicable: The Validity of a Commercial Activity Exception to the Act of State Doctrine," *BU Int'l LJ* 18 (2000): 139; Andrew D. Patterson, "The Act of State Doctrine Is Alive and Well: Why Critics of the Doctrine Are Wrong," *UC Davis J. Int'l L. & Pol'y* 15 (2008): 111.
[33] Alfred Dunhill of London, Inc. v. Republic of Cuba et al., 425 U.S. 682 (1976).

In act of state cases prior to the mid 20th century, the definition of private as personal or not-social was central to the act of state doctrine. *Underhill* involved a revolutionary Venezuelan general's 1892 detention of US citizen Underhill in Venezuela, and the former's attempt to force the latter to continue operating his waterworks. Underhill later returned to the United States and sued the general in New York federal court for refusing to issue him a passport and for alleged assault. The location of the act in Underhill, as in many later act of state cases, was not in dispute. The bulk of the decision was spent determining whether or not General Hernandez's actions constituted "acts of the government." In considering this, the Court emphasized the military aspect of the case, though without making it a necessary component of being public. The Court also emphasized that the act was carried out on behalf of "the community and the revolutionary forces."[34] They contrasted this with actions that might be "actuated by malice or any personal or private motive."[35] At no point was there a suggestion that the opposite of public was commercial, despite the fact that the case involved the seizure of an American's private property and the attempt to get Underhill to continue operating a business.[36]

Similar definitions of public/private can be seen in other famous act of state cases. In *American Banana*, the Court determined that the seizure by Costa Rican officials of the private property of one American company on behalf of another was a public act of the Costa Rican government. The decision rested on an even stricter territorial sovereignty than in Underhill, in which the public/private character of the act was not separately considered.[37] A lower court decision, however, shed light on the operating definition of private at the time, noting that United Fruit's own alleged motives of "malice, intention, or expected profit" were irrelevant, given that the act was in fact Costa Rica's.[38] Later act of state cases involving confiscations of private property by Mexican military or civil officials put most weight on the simple fact that the act was carried out by a recognized government, though *Oetjen*[39] and *Ricaud*[40] seemed to suggest that the

[34] Underhill v. Hernandez, 168 U.S. at 254.
[35] Underhill v. Hernandez, 168 U.S. at 254.
[36] In another transnational case of the time, cited in later act of state cases on other grounds, a similar definition of private can be seen. In The Paquete Habana, 175 U.S. 677 (1900), small-scale, subsistence fishing vessels were considered personal and thus exempt from wartime seizures. Commercial, large-scale fishing, in contrast, was equated with public and political and thus a valid target.
[37] American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909): "The very meaning of sovereignty is that the decree of the sovereign makes law."
[38] American Banana Co. v. United Fruit Co., 160 F. 184, 188 (S.D.N.Y. 1908).
[39] Oetjen v. Central Leather Co., 246 U.S. 297 (1918).
[40] Ricaud v. American Metal Co., Ltd., 246 U.S. 304 (1918).

military nature of an act made it *especially* public. In a much-cited British case, it was similarly held in regards to a Soviet seizure and continued operation of a private timber company that recognition of the Soviet Union, whether *de facto* or *de jure* by the British Government, meant that a British court could not question the acts of the Soviet government in its own territory.[41] Finally, a German Jew who had been coerced by Nazi officials into signing over his company to a third party, tried to sue to recover those assets in US courts. Despite what it recognized as the exceptional offensiveness of the Nazi seizures, in 1947 the Second Circuit rejected the plaintiff Bernstein's claims on standard act of state grounds, arguing that the acts had clearly been carried out by "officials of the Third Reich."[42] In none of these cases did the courts discuss whether or not the act was commercial in determining its public/private character. The attempt to redefine the public/private and thus the political/legal distinctions in act of state cases took off in the 1950s. The number of only partially successful strategies attempted suggests that the goal was not any particular definition of each term, but rather to transfer authority over these cases to the judiciary.

Incomplete judicialization

The first strategy was direct executive override. In 1954, in a second case involving Bernstein, the Second Circuit continued to characterize the Nazi seizures as public acts.[43] In the meantime, however, the Department of State had formally expressed a desire that cases involving claims against Nazi officials should be decided by the courts. The "Bernstein letter," as it came to be known, did not say the executive no longer considered foreign seizures of private property to be political. Rather, the letter stressed the executive's strong "policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution" as part of the reason for wanting the judiciary to take over.[44] In other words, US policy on Nazi seizures was *so* strong that the executive wished the courts to get involved, despite the fact that this was a political matter. In light of this, the Second Circuit ruled in a very short opinion that the act of state doctrine did not apply.

[41] A. M. Luther v. James Sagor & Co., 3 K.B. 532 (1921).
[42] Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).
[43] Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (1954).
[44] Cited in *Bernstein (1954)*, 210 F.2d at 375.

The next serious challenge to the traditional act of state doctrine came with *Sabbatino* nearly a decade later, in a case involving Cuba's nationalization of American-owned sugar companies in Cuba. Unlike the Supreme Court, the lower courts in that case held that the act of state doctrine did *not* apply, because the nationalization was a violation of international law.[45] This international law strategy rested on redefining the nationalization as private, in ways that resonated with definitions in *Underhill* and *American Banana*. Judge Dimock of the Southern District Court of New York determined, contra prior act of state cases involving seizures of private property, that Cuba's expropriation:

> was not reasonably related to a public purpose involving the use of such property. The taking of the property was not justified by Cuba on the ground that the state required the property for some legitimate purpose or that transfer of ownership of the property was necessary for the security, defense or social good of the state. The taking was avowedly in retaliation for acts by the Government of the United States, and was totally unconnected with the subsequent use of the property being nationalized. This fact alone is sufficient to render the taking violative of international law.[46]

In addition to being "retaliatory," Judge Dimock found the nationalization to be "discriminatory" because it "classifies United States nationals separately from all other nationals, and provides no reasonable basis for such a classification."[47] The terms "discriminatory" and "retaliatory" are reminiscent of the "malice" mentioned in earlier act of state cases, and although these acts are not individual, they are defined as not being properly for a legitimate social purpose. Cuba's counter-arguments that the nationalizations were absolutely public acts, necessary for defending the economic well-being and sovereignty of the nation, were ignored by the lower courts. Interestingly, this classification of the act as private was not seen as enough to undercut the act of state doctrine on US law grounds alone, but rather was routed through the international law claim. The Second Circuit affirmed the decision. Where Bernstein letters could only ever have provided a sporadic way for the courts to intervene nationalization cases, the

[45] Banco Nacional De Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962).
[46] Banco Nacional De Cuba v. Sabbatino, 193 F. Supp. at 384–85.
[47] Banco Nacional De Cuba v. Sabbatino, 193 F. Supp. at 385.

international law strategy would have created a generalizable rule that applied to all similar cases with no need for executive action.

The Supreme Court, however, rejected the lower courts' decisions, upholding the act of state doctrine (partially on the grounds that Cuba did consider the act to be public), but rewriting it in the process to emphasize the "separation of powers" rationale as described above.[48] The shift to a separation of powers approach was itself an important step in the transfer of significant authority over previously political cases to the judiciary, making the act of state doctrine much more flexible than it had been. Since then, the court must consider in every case not only whether the act in question is public from the perspective of the foreign sovereign, but also whether it is sufficiently political from the perspective of the US government, taking into account, for instance, whether ruling on the matter could embarrass the executive branch or otherwise interfere with US foreign policy. By itself, however, the separation of powers approach still left significant wiggle room in this regard, as the fallout from *Sabbatino* illustrates.

Congress was unhappy with the Court's decision to uphold the act of state doctrine, precisely, I suggest, because it did not cement the judiciary's takeover of Cuban nationalization cases – a major issue in the years after the Cuban Revolution. In September 1964, while *Sabbatino* was on remand to the District Court[49] for the calculation of money owed to Cuba, Congress passed the Hickenlooper Amendment declaring that US courts should not decline to review cases involving expropriations of property in violation of international law – which Congress considered the Cuba nationalizations to be.[50] The Hickenlooper Amendment was explicitly targeted at overriding *Sabbatino*[51] and marked a moment of heightened struggle among the branches. Hickenlooper himself explained that "We think it perfectly proper that the Congress of the United States should have the last word on this important policy question."[52] Similarly to the situation in *Bernstein*, Congress asserted that these matters were so political that they had a right to define them as legal.

It was at this point that nationalizations began to be framed in terms of their commercial character in act of state cases for the first time. Up to then, such cases had focused on the proper

[48] *Sabbatino*, 376 U.S.
[49] Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965).
[50] Foreign Assistance Act of 1961 (P.L. 87—195), Sec. 620, p. 301 (relevant line added in 1964).
[51] US Code Cong. and Adm. News 1964, p. 3852, Banco Nacional de Cuba v. Farr, 243 F. Supp. at 963.
[52] 110 Cong.Rec.18936 (daily ed. Aug. 14, 1964), cited in Banco Nacional de Cuba v. Farr, 243 F. Supp. at 969.

distribution of authority between the judiciary and the executive, with little mention of the legislative branch. The executive's stance in 1964, however, was ambivalent.[53] Framing the nationalization as primarily about commerce and the protection of international investment, allowed Congress to claim the right to intervene based on the Commerce Clause of the Constitution, and the District Court cited this rationale in its 1965 decision against Cuba.

While the Hickenlooper Amendment provided a way of transferring authority over nationalization cases to the judiciary via the international law violation claim, the courts were unhappy with what they viewed as Congress stepping on the judiciary's toes. The Amendment was therefore only narrowly construed in later cases. At the same time, some federal judges continued searching for a more suitable way to shift control over Cuban nationalizations from the political to the judicial sphere. In *First National*, for instance, the Second Circuit first *upheld* the act of state doctrine, arguing that the Hickenlooper Amendment was inapplicable.[54] In response, the executive branch, under Nixon, issued another "Bernstein letter" asserting that the "act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."[55] By suggesting that its letter should override the act of state doctrine in an entire class of cases, the State Department was attempting to turn the Bernstein Exception from a technique of direct, but *ad hoc* executive intervention to a broader legal rule. This sparked another struggle within the courts that eventually split the Supreme Court four ways.[56] The plurality (under the newly appointed Justice Rehnquist) ruled that the act of state doctrine was indeed superseded by the executive's letter as in *Bernstein*. Two Justices concurred with the plurality but strongly rejected the Bernstein exception on grounds that it put the judiciary in the service of the executive branch. Four justices (two of whom had been on the *Sabbatino* Court) dissented, holding that *Sabbatino* remained controlling. Although the nationalization was eventually brought under US judicial authority in this case, the lack of consensus made the ruling tenuous and created a host of concerns about the proper distribution of power between the political and legal branches. This second Bernstein strategy had again failed to cement the transfer of nationalization cases to the judiciary. The problem was finally solved in 1976, with the creation, by another plurality, of a commercial exception to the act of

[53] Discussed in Banco Nacional de Cuba v. Farr, 243 F. Supp.
[54] Banco Nacional de Cuba v. First National City bank of New York, 442 F.2d 530 (2d Cir. 1971).
[55] Cited in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) at 764.
[56] *First National*, 406 U.S.

state doctrine and the redefinition of private as commercial in cases involving acts of foreign governments.

The commercial turn in the act of state doctrine

In *Dunhill* – a complicated case involving Cuba's nationalization of cigar companies owned by Cuban nationals – the Court was again split.[57] The relevant aspect of the case for this paper considered whether Cuba's repudiation of a debt owed on confiscated cigars constituted a public act or not. In a fiercely contested decision, the plurality, led by Justice White, first invoked a formal/informal distinction in determining whether or not an act was public, suggesting that the repudiation was not formal enough to constitute a public act. More importantly, White argued that, *even if* the Court granted that the repudiation was an act of state, "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities."[58] This commercial characterization applied not to nationalizations *per se*, but to the fact that Cuba had continued running the cigar factories in the manner of a standard business and to the repudiation of debts related to this running. This was a significant shift from the definition of private as personal, or about malice, discrimination and so on found in earlier act of state cases. The US Solicitor General and the State Department approved of the new definition.[59]

With *Dunhill*, the courts asserted a strict dichotomy between commercial acts and public, sovereign acts, thereby equating the commercial with the private and the legal domain. Most accounts of both the separation of powers approach and the commercial exception to the act of state doctrine frame these changes as responding to a growing international consensus that an increasingly interconnected global economy made old rules of territorial sovereignty obsolete. Yet the fact that the many strategies tried for shifting transnational economic relations to the courts in the 1960s and 1970s were fiercely contested by Cuba, at a moment when many post-

[57] *Dunhill*, 425 U.S.
[58] *Dunhill*, 425 U.S. at 695.
[59] In an amicus brief by the Solicitor General, White explained, the executive agreed that: "such a line should be drawn in defining the outer limits of the act of state concept and that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts" (*Dunhill*, 425 U.S. at 696). In a 1975 letter, the Department of State concurred: "[W]e do not believe that the Dunhill case raises an act of state question because the case involves an act which is commercial, and not public, in nature" (cited in *Dunhill*, 425 U.S. at 697).

colonial states were also nationalizing important industries, suggests that this was not responding to consensus at all – but rather to increasing assertions of territorial, economic sovereignty by states in the Global South. Redefining these acts as properly judicial functioned to remove highly contentious inter-state struggles over economic resources from the explicitly political realm of diplomacy and potential violent conflict to the technocratic, de-politicized realm of the law.

This also meant that the commercial was defined as *not* political precisely at the height of the Cold War, when the question of the proper arrangement of economic relations was arguably *the* key political issue — as evidenced by Cuba and other countries' vigorous counter-arguments that their nationalizations served important public needs. White's redefinition of the private was routed through the political/legal divide and *Sabbatino*'s separation of powers approach: "subjecting foreign governments to the rule of law in their commercial dealings," he reasoned, "presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts," and was "unlikely to touch very sharply on 'national nerves.'"[60] The Court decided not only that commercial actions are irrelevant to the exercise of national sovereignty, but that private commercial concerns actually *outweigh* foreign policy considerations: "The State Department has concluded that in the commercial area the need for merchants 'to have their rights determined in courts' outweighs any injury to foreign policy."[61] This change must of course be contextualized in terms of the rising prominence of neoliberal ideas, the growing power of transnational corporations, and economic globalization — but it was also a geopolitical response to an "anti-imperial", socialist state's seizure of US property at the height of the Cold War. That response took the form of an intentional, if fraught, judicialization of transnational relations with foreign states that would be generalized far beyond Cuba.

That the commercial exception became the eventual solution to the problem of transferring authority to the judiciary was neither inevitable nor pre-determined, but it was very important for future developments. As the incidence of state expropriations of private property decreased from the early 1980s on, the definition of commercial came to focus on other contexts. Due to the plurality but not majority opinion in *Dunhill*, courts have remained split on the question of a commercial exception to the act of state doctrine, but as a rule, "district courts in the Second, Third, Fourth, Fifth, Seventh, and Eleventh Circuits have either explicitly or implicitly endorsed

[60] *Dunhill*, 425 U.S. at 703–4.
[61] *Dunhill*, 425 U.S. at 706, n. 18.

the commercial activity exception."[62] At the circuit court level, only the Second Circuit has basically adopted the commercial exception, favorably citing White's opinion on many occasions. Yet, "because Second Circuit cases account for a disproportionately large percentage of the total number of act of state doctrine decisions," because the Circuit includes New York City, this is enough to ensure that "a surprisingly high percentage of act of state cases, which might not otherwise be adjudicated, would be adjudicated by the Second Circuit on commercial activity grounds."[63] Patterson argues that continued inconsistency in the application of the commercial exception is largely correlated with the political importance of the country involved, a pattern arguably in line with the separation of powers approach.[64] Nevertheless, Schlossbach concludes that "there is a general trend toward acceptance of the commercial activity exception within the federal court system" and that, while there is less consensus about the scope of that exception (as we will see below), "courts seem to have gradually lowered the threshold for finding 'commercial activity.'"[65]

Foreign sovereign immunity and the other commercial exception

The emergence of the commercial exception to foreign sovereign immunity is more straightforward, but points to a similarly important place for geopolitical dynamics that are rarely mentioned in contemporary histories of the doctrine. A few months after *Dunhill*, a more definitive commercial exception, this time in foreign sovereign immunity law, was codified in the Foreign Sovereign Immunities Act (FSIA) of 1976. The FSIA established that foreign sovereigns would no longer be considered absolutely immune from suit in US courts. Most importantly, immunity would no longer apply to suits arising from commercial activity.[66] The

[62] Schlossbach, "Arguably Commercial, Ergo Adjudicable," 155.
[63] Schlossbach, 153.
[64] Patterson, "Act of State Doctrine Is Alive and Well."
[65] Schlossbach, "Arguably Commercial, Ergo Adjudicable," 156, 160.
[66] Specifically, the Act provides, that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case…in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States (28 USC. § 1605(a)2).

FSIA cemented a transition from an "absolute" to a "restrictive" theory of sovereign immunity that had been underway for some time.[67]

In short, the association of the commercial with the private goes back further in foreign sovereign immunity cases than it does in act of state cases. In *Dunhill*, White and the State Department both called on sovereign immunity cases as precedent, although the history is more complicated than either suggested. While some authors cite the *Schooner Exchange* case of 1812 as already marking a distinction between the private and commercial versus the public, that case only considered the distinction between public, military vessels and privately-owned merchant vessels – not the matter of government owned vessels engaged in merchant operations.[68] Other sovereign immunity cases White cited do suggest a commercial versus public distinction within acts of government, but almost all in terms of litigation between the federal government and US states, often involving interstate commerce and working out the proper boundaries of US federalism. A 1924 Supreme Court case did draw a distinction between the public and private uses of a ship owned by foreign (Turkish) government officials.[69] Two years later, however, the Court ruled that there could be no such distinction: "We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace of any less a public purpose than the maintenance and training of a naval force."[70] In 1945, the Court did draw a distinction between a government's mere ownership versus possession of a merchant vessel, while also weighing the executive's interest in the particular case.[71]

Despite some exceptions, then, US courts generally followed an absolute theory of sovereign immunity well into the 20th century, with no consistent exception for commercial activity until 1952. when the State Department issued formal notice of its own support for a more restrictive theory.[72] The Tate Letter informed the US Attorney General that the State Department supported suspending immunity in the case of "private acts" and suggested the equation of private with commercial. The change in policy reflected similar political concerns as would later reshape the

[67] One important reason for this may be the distinct geographies of each. US sovereign immunity cases consider whether to respect the sovereignty of another state within US territory, while act of state cases consider whether to respect another state's sovereignty in that state's *own* territory. It may be that weakening the latter has been seen to require a higher bar.
[68] The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).
[69] The Gul Djemal, 264 U.S. 90 (1924).
[70] Berizzi Brothers Co. v. Steamship Pesaro, 271 U.S. 562, 574 (1926).
[71] Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).
[72] 26 Dept. State Bull. 984-985 (1952), reproduced in *Dunhill*, 425 U.S. at 711–15.

act of state doctrine. Tate wrote that "little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity… The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy."[73] In other words, the Cold War and *increasing* claims to absolute sovereignty by certain states were directly invoked as a justification for the change. Tate went on to say that the new policy was also supported by "the widespread and increasing practice on the part of governments of engaging in commercial activities."[74] This comment, too, may have referred to the increasing use of state-owned enterprises in socialist and many post-colonial states, although could be construed more generally as well.

The Tate Letter, however, did not complete the shift to the restrictive theory of foreign sovereign immunity and the transfer of commercial cases to the judiciary. Rather, from 1952 on, the State Department often recommended to courts whether or not to waive immunity on an *ad hoc* basis. The codification of the restrictive theory of immunity in the FSIA took the State Department out of the equation altogether and cemented the transfer of authority over such cases to the judiciary. Weidemaier observes that this was a "self-serving" move by US politicians: "[it] promised to insulate political actors from pressure by both US citizens and foreign states"[75] – a common motivation for the judicialization of political matters in domestic politics, here working on the transnational level.

Although many academic summaries of the shift to a restricted theory of sovereign immunity mention that this development occurred in the context of the Cold War, this is usually mentioned in passing, without further analysis.[76] When discussed at all, the divide between support for absolute immunity in some states and the shift to a restricted theory in others is typically presented as a result of the ideological differences between socialist and capitalist understandings of the state. US efforts to restrict immunity in this context are sometimes vaguely explained in terms of how the US "disliked the idea"[77] of granting immunity to the Soviet Union or wanted to

[73] *Dunhill*, 425 U.S. at 714.
[74] *Dunhill*, 425 U.S. at 714.
[75] Weidemaier, "Sovereign Immunity and Sovereign Debt," 82.
[76] For example, Federico Sturzenegger and Jeromin Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crises* (MIT press, 2006); Peter Charles Choharis, "US Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract," *S. Cal. L. Rev.* 80 (2006): 1.
[77] Molly Ryan, "Sovereign Bankruptcy: Why Now and Why Not in the IMF," *Fordham L. Rev.* 82 (2013): 2488.

"relieve the pressure"[78] of the Cold War. This framing is partially accurate, but lacks depth. While this narrative presents restricting sovereign immunity via the commercial exception as primarily a defensive move by the United States, the analysis presented in this paper suggests that it was to a large degree a deliberate strategy designed not just to confront the Soviet Union, but perhaps more importantly—in act of state cases at least—to deal with Third World challenges to uneven economic relations in the post-colonial period. (Until 1959, Cuba can be seen as having been a *de facto* colony of the United States). Furthermore, most accounts of this shift do not address the fact that the "commercial" was not simply excluded from immunity all of a sudden – rather, that term came to have new and contested meanings in the course of figuring out a way to address the geopolitical challenges of the time.

Together, the FSIA and Dunhill changed the role of US courts in transnational commercial cases. Yet the story did not end in 1976. Even once commercial acts by sovereign governments were re-characterized as private, many questions remained about how, precisely, to define commercial. This has been a major focus of legal arguments among private investors, the courts and foreign governments since. The general trend has been to expand the category of commercial and private and restrict the category of public and political. Each new step in this direction has meant the further judicialization of transnational economic relations with foreign governments.

The judicialization of sovereign debt relations

In the context of the Third World debt crises of the 1980s, sovereign debt litigation became an especially important site for this redefinition of commercial activity, as well as for other strategies for shifting authority to the judiciary. These cases became important for managing not only the relatively small numbers of holdout creditors suing sovereign governments but for US and International Monetary Fund policy on Third World debt restructurings more generally.[79] A central issue in making this possible was redefining the issuance of sovereign debt from a public to a private act. In 1964, the Second Circuit Court of Appeals considered issuing "public loans" a

[78] John K. Setear, "A Forest with No Trees: The Supreme Court and International Law in the 2003 Term," *Virginia Law Review*, 2005, 590.
[79] Shaina Potts, "Deep Finance: Sovereign Debt Crises and the Secondary Market 'Fix,'" *Economy and Society*, 2017, 1–24.

"strictly political or public act,"[80] but this gradually changed as debt crises and holdout creditor litigation became more common. In a case involving Costa Rica's suspension of foreign debt payments to private creditors, for instance, a New York district court determined that the "execution" (payment) of sovereign debts was clearly a "commercial activity" within the meaning of the FSIA, but that the *prevention of payment* by the Costa Rican government was not: "There is no doubt that the actions of the Costa Rican government here were intended to serve a public, rather than a commercial, purpose. They were clearly an exercise of a governmental function."[81] The judge distinguished the case from *Dunhill* on this point.[82] The Second Circuit initially upheld the ruling on comity, rather than act of state grounds.[83] After the executive branch intervened, however, the court reversed its own ruling, side-stepping the public/private issue by arguing that the debts in question, and thus the act of non-payment, were located in New York, not in Costa Rica. The act of state doctrine, therefore, did not apply.[84] This was a stark reversal of decisions in the 1960s and 1970s holding the *situs* of a debt for act of state purposes to be with the *debtor*.[85] In this case it was changing the foreign/domestic rather than the public/private distinction that transferred authority from the executive to the judiciary.

Redefining the issuance of sovereign debt itself as commercial occurred in 1992 in *Republic of Argentina v. Weltover*, in which the Supreme Court held that issuing sovereign debt was a commercial activity for the purposes of foreign sovereign immunity.[86] The decision relied heavily on the FSIA's rule that only the "nature" and not the "purpose" of an act is relevant. Since private companies can issue and trade bonds, the Court reasoned, Argentina's bond issuance was a private, commercial act, no matter what the reason behind it. Although it took time to apply this to the issuance of sovereign debt, the FSIA's nature/purpose distinction further

[80] Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964).
[81] Allied Bank International v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440, 1443 (S.D.N.Y. 1983).
[82] *Allied Bank*, 566 F. Supp. at 1444.
[83] Allied Bank International v. Banco Credito Agricola de Cartago, 733 F.2d 23 (2d Cir. 1984).
[84] Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 512 (2d Cir. 1985).
[85] Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co, 392 F.2d 706 (5th Cir. 1968); Menendez v. Faber, Coe & Gregg, Inc., 345 F. Supp. 527, 538 (S.D.N.Y. 1972): "It is well established that the situs of a debt is located with the debtor."
[86] Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

expanded the scope of the private and thus the range of foreign actions that have been judicialized.[87]

The extension of US judicial authority over sovereign debt relations is ongoing. In the recent case *NML Capital v. Argentina*, the Supreme Court affirmed significant extensions of judicial injunctive and discovery powers.[88] While the reclassification of public and private was less central to these arguments, the changes made in preceding decades remained rhetorically significant, as for instance when Griesa argued that "No less than *any other entity entering into a commercial transaction*, there is a strong public interest in holding the Republic to its contractual obligations."[89] (*id.*, emphases added). This case also brought the US judiciary into direct conflict with the executive in new ways. While the latter was directly involved in efforts to judicialize transnational economic cases from the 1950s through the 1990s, in NML Capital, the courts went further than the Obama administration, at least, was comfortable with. Just as Barkow[90] has noted in regard to the demise of the political question doctrine, the courts showed far less deference to the executive in this case than they had in previous sovereign debt cases. In the Supreme Court hearing and decision regarding NML Capital's request for discovery of Argentina's assets outside the United States, this lack of deference was justified by the courts precisely on the grounds that sovereign debt cases are purely private and commercial.

Both Argentina and the US executive found it especially egregious that NML sought discovery not only about commercial assets — the only sovereign assets open to discovery *within* the United States — but about assets still legally defined as public. During the Supreme Court hearing, Argentina's lawyer urged that *if* the Court allowed discovery abroad at all, it should not extend "under any circumstances to diplomatic property, to military property, to national security assets, to property of a sitting or former head of state of a country, to state

[87] This reliance on the nature rather than purpose of an act also ensures that just as all countries have increasingly been required by changing political and economic realities (and for debtors by neoliberal structural adjustment policies) to use market-*like* tools, all such acts can be reclassified as private rather than public.

[88] See generally *NML Capital Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y.); *NML Capital Ltd. v. Republic of Argentina*, No. 12-105-cv(L) (2d Cir.); *NML Capital Ltd. v. Republic of Argentina*, No. 12-842 (U.S.).

[89] Order, *NML Capital, Ltd. v. Republic of Argentina* at 3, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 09 Civ. 1708 (TPG) (S.D.N.Y. Feb. 23, 2012).

[90] Rachel E. Barkow, "More Supreme than Court - The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," *Columbia Law Review* 102 (2002): 237–336.

officials…"[91] NML Capital's lawyer Theodore Olson[92], however, responded that NML needed discovery of *all* assets in order to tell whether or not something was actually being used for a public purpose. Even "if it's an airline that says Argentine Air Force on the side of it, it still could be commercial property," he argued.[93] This answer seemed to perturb some of the Justices at the time. Even Scalia expressed skepticism,[94] and Chief Justice Roberts observed, "That's pretty intrusive at a sovereign level to say you can find out how many jet fighters Argentina happens to have."[95] Yet despite these reservations, less than two months later, the Court granted NML et al. full rights to discovery of "information about Argentina's worldwide assets generally."[96] Justice Sotomayor took no part in the decision. Only Justice Ginsburg dissented, precisely on this point; she wanted to restrict discovery to property used in connection with commercial activities, whether "here or abroad."[97]

In addition to this explicit rejection of the importance of the public/private distinction with respect to discovery, the hearing itself was shaped by a strong rhetorical push for expanding the category of the private and commercial, perhaps even to the extent of doing away with the category of sovereign altogether. Scalia repeatedly asked Argentina's lawyers why a US court allowing discovery outside the United States was any different from a New York court allowing discovery in Florida. Justice Alito took a different tack: "What if Argentina…were a private, a foreign company? Could you… have discovery of assets in other countries…[?]"[98] And Justice Kagan asked, in relation to the discovery rules governing relations between two private parties: "What in the text would put a foreign government in a different position than… when the suit involved only private parties?"[99] In the end, the Justices were apparently unconcerned about Deputy Solicitor General Kneedler's point that, "What is wrong with that is a foreign sovereign

[91] Transcript of Oral Argument at 13, *Republic of Argentina v. NML Capital, Ltd.*, (U.S. Apr. 21, 2014) (No. 12-842).
[92] The same Theodore Olson who represented George W. Bush in the Supreme Court case that determined the outcome of the 2000 election, which has since been considered a central moment in the judicialization of US politics. He also represented Citizens United in the infamous case of the same name.
[93] Transcript of Oral Argument at 33, *Republic of Argentina* (U.S. Apr. 21, 2014).
[94] "Justice Scalia: Well, that makes it a lot harder for me because I thought you [NML] just looked to the Foreign Sovereign Immunities Act. And anything that is executable in this country under that, you can get information on to try to execute abroad. But you are saying, oh, no, it's more than that, it's stuff that you couldn't execute on in this country, but that some foreign countries will let you execute on" (Transcript of Oral Argument at 38-39, *Republic of Argentina* (U.S. Apr. 21, 2014).).
[95] Transcript of Oral Argument at 34, *Republic of Argentina* (U.S. Apr. 21, 2014).
[96] Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2258 (2014).
[97] Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. at 2259.
[98] Transcript of Oral Argument at 14, *Republic of Argentina* (U.S. Apr. 21, 2014).
[99] Transcript of Oral Argument at 25, *Republic of Argentina* (U.S. Apr. 21, 2014).

is not the same as a foreign private person."[100] Although these rhetorical moves were not explicit in the final decision, they surely influenced it.

The Justices' conviction that all aspects of sovereign debt cases should be considered private aligns with their corresponding insistence on seeing this as a legal and not a political issue. The US executive argued in the case that upholding such broad discovery rights would damage US foreign policy interests and "strongly increase the possibility that US courts would issue orders that constitute an affront to foreign states' coequal sovereignty."[101] When Mr. Kneedler reiterated these points during the hearing, Scalia interrupted him mid-sentence: "Wait, wait, wait, wait, wait, wait, wait. I thought that the whole purpose of the Foreign Sovereign Immunities Act was to protect us from you, from the State Department and the government coming in and saying, Oh, you know, in this case, grant this one, deny that one."[102] Scalia concluded the published decision on a similarly scornful note:

> Nonetheless, Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. Discovery orders as sweeping as this one, the Government warns, will cause "a substantial invasion of [foreign states'] sovereignty,"… and will "[u]ndermin[e] international comity"… Worse, such orders might provoke "reciprocal adverse treatment of the United States in foreign courts,"… and will "threaten harm to the United States' foreign relations more generally,"… These apprehensions are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by factor-balancing business nearly 40 years ago [*i.e.,* with the passage of the FSIA].[103]

This is the extent of the discussion of the United States' political concerns in that decision. In other words, the Supreme Court has definitively declared a case involving debt collection against a foreign sovereign to be absolutely *non*-political — unless Congress decides to get involved.

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[100] Transcript of Oral Argument at 21, *Republic of Argentina* (U.S. Apr. 21, 2014).
[101] Brief for the United States as Amicus Curiae in Support of Petitioner at 20, *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (U.S. Mar. 3, 2014).
[102] Transcript of Oral Argument at 17, *Republic of Argentina* (U.S. Apr. 21, 2014).
[103] Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. at 2258.

This is a major shift from the 1980s and 1990s when courts continued to cite US policy on debt restructurings years after the FSIA was passed.

Conclusion

There is an extensive literature in legal studies, legal geography and legal anthropology on the public/private and political/legal divides in law.[104] There is likewise a robust literature on the separation of politics and economics in the liberal tradition since Locke. Yet these distinctions have operated in different ways in different areas of law, and their relative importance has waxed and waned. The public/private distinction in domestic US law became central in the 19th century alongside the emergence of the market as a "central legitimating institution,"[105] and "A picture of a decentralized, competitive, and self-regulating market lay at the core of all efforts to define the public-private distinction."[106] One implication of the evidence presented in this paper is that the equation of the private with commercial or "market" only came to play a similar role in transnational cases involving sovereigns much later. I have argued here that how and why it did so is consequential.

In short, while most accounts of the subject today characterize the transition to more restrictive theories of foreign sovereign immunity and the act of state doctrine in terms of the expansion of global capitalism and an international liberal legal order, this framing fails to capture important political dimensions of these changes. The adoption of a commercial exception to each doctrine earlier in capitalist and/or "developed" than in socialist and/or "developing" states was not simply a reflection of differing understandings of the state in these countries, though this was important too. It was just as crucially a *strategic* decision made precisely in the context of the Cold War and of postcolonial economic relations, and it reflected intense struggles not only over ideology but over resources and global influence. The continued expansion of the commercial and private category in the context of sovereign debt crises since has also been tied

[104] For example, N. K. Blomley, *Law, Space, and the Geographies of Power*, Mappings (New York: Guilford Press, 1994); Ruth Gavison, "Feminism and the Public/Private Distinction," *Stanford Law Review* 45, no. 1 (1992): 1–45; Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36, no. 1/2 (1984): 57–125; Morton J. Horwitz, "The History of the Public/Private Distinction," *University of Pennsylvania Law Review* 130, no. 6 (June 1, 1982): 1423–28.
[105] Horwitz, "The History of the Public/Private Distinction," 1424.
[106] Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press, 1992), 206.Horwitz, *The Transformation of American Law, 1870-1960*, 206.

up in both macroeconomic and geopolitical calculations in the context of financialization and maintaining New York's own financial status. What I have highlighted in this paper is that these changes should be analyzed not only from the perspective of restricting absolute sovereignty, but more specifically of *extending* US judicial authority – i.e. of judicialization. The act of state history, in which multiple strategies for shifting authority to the judiciary were tried before the commercial exception was articulated, makes this especially clear. While the legal developments outlined here can of course be understood as part of the development of transnational law in the 20th century, I have argued that the judicialization of transnational economic relations should be seen as a cause of this, not simply an effect.

It is not surprising that much of this geopolitical history has remained absent from later analyses of both judicialization and transnational commercial law. In the context of these highly contested struggles over material resources and legal definitions, a major purpose of transferring both expropriation and sovereign debt cases from the executive to the judiciary has been to recast these matters as apolitical, neutral and objective – an effort that has by and large been successful, inasmuch as other countries have, after fierce initial contestation, generally accepted each new round of US judicial expansion in transnational law. In the first decade after 1976, many legal commentators discussed the newly solidified commercial exceptions to foreign sovereign immunity and the act of state doctrine in political terms, opining both on the implications for the proper separation of powers within the US and for other geopolitical conditions.[107] By the mid-1990s, however, most articles on these topics treated the equation of the commercial with private and non-political as settled.

In addition to their direct geopolitical significance, these changes must of course also be contextualized in terms of the sharpening political/legal divide in US law since World War II rooted in the reaction to totalitarianism, as well as to the New Deal administrative state, all

[107] Brian S. Fraser, "Adjudicating Acts of State in Suits against Foreign Sovereigns: A Political Question Analysis Notes," *Fordham Law Review* 51 (1983 1982): 722–46; Margaret A. Niles, "Judicial Balancing of Foreign Policy Considerations: Comity and Errors under the Act of State Doctrine," *Stanford Law Review* 35, no. 2 (1983): 327–61, https://doi.org/10.2307/1228666; Antonia Dolar, "Act of State and Sovereign Immunities Doctrines: The Need to Establish Congruity Comment," *University of San Francisco Law Review* 17 (1983 1982): 91–116; Todd Connors, "The Foreign Sovereign Immunities Act: Using Separation of Powers Analysis to Guide Judicial Decision-Making Note," *Law and Policy in International Business* 26 (1995 1994): 203–30; Kathleen Karelis, "The Act of State Doctrine: Reconciling Justice and Diplomacy on a Case-by-Case Basis Comment," *University of Miami Law Review* 43 (1989 1988): 1169–1202; Steven C. Krane, "Rehabilitation and Exoneration of the Act of State Doctrine," *NYUJ Int'l L. & Pol.* 12 (1979): 599.

understood as forms of excessive state intervention.[108] This framework offered in this paper might also usefully be applied to other transnational dimensions of US law, as well as to nationalization cases between European countries and their former colonies.[109]

And finally, the critical contextualization I offer here can make an important contribution to the judicialization debate more broadly. The call to move beyond methodological nationalism applies not only to work on economic relations but to all areas, and might add nuance to current discussions of the relationship between national-scale judicialization and international law. It suggests looking not only to the role of US and UN politicians in supporting judicialization elsewhere, but also to the potential role of US courts in facilitating judicialization through their governance of many cases that cross national borders. Similarly, while the adoption of US-style commercial law in many countries has been well documented,[110] the role of US-based litigation, directly and through the transnational "shadow of the law" has received less attention. Bringing these analyses together, and considering not only the content of legal developments but their political histories, will enable a richer understanding of how and why transnational law looks the way it does today.

[108] Horwitz, *The Transformation of American Law, 1870-1960*, 247.
[109] Many cited in *Sabbatino*, 307 F.2d.
[110] Yves Dezalay and Bryant G Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002); Yves Dezalay and Bryant Garth, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes," *Law & Society Review* 29, no. 1 (January 1, 1995): 27–64; Symeon C. Symeonides, *Codifying Choice of Law around the World: An International Comparative Analysis* (Oxford University Press, 2014); Gerber, *Global Competition*; Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011); David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press, 2008).