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THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT: A NEW APPLICATION IN THE PRIVATE PROPERTY CONTEXT

Archaeological¹ looting and trafficking is a lucrative and thriving business in the United States with a growing international market for Native American² artifacts.³ Commercial looters and “pothunt-

1. For purposes of this Comment, archaeology refers to “techniques for recovering the physical evidence of past human societies” and relates to “a body of theory which guides the interpretation of this evidence.” Paul R. Fish, *Federal Policy and Legislation for Archaeological Conservation*, 22 ARIZ. L. REV. 681, 681 (1980).

2. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa-470mm (1988)), refers to Native Americans as “Indians” throughout the text of the Act; therefore, Native Americans may be referred to as “Indians” in the context of the statute.

3. Native American artifacts may be characterized as archaeological resources. An archaeological resource is “any material remains of past human life or activities which are of archaeological interest.” 16 U.S.C. § 470bb(1) (1988). More specifically, the Archaeological Resources Protection Act lists archaeological resources as including, but not limited to, “pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items.” *Id.*

The value of archaeological resources in the United States is immense. For example, in each instance when a Native American artifact is excavated from a site without initially being scrutinized by an anthropologist or archaeologist in its original environment, the historical and scientific value of a piece may be ruined. See Jonathan S. Moore, Note, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 466 (1988). The examination of artifacts in the “[c]ontext” in which they are found is equally important as the examination of artifacts in isolation. See Fish, *supra* note 1, at 683.

Archaeologists study artifacts to gain information concerning past human life and in some instances to see how the natives of North America lived. Lorrie D. Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future*, 6 HARV. ENVTL. L. REV. 61, 62 (1982); see Fish, *supra* note 1, at 681. An archaeological site may be extremely relevant to Native Americans who have both cultural and ancestral ties to a place, particularly to Native American human remains found within the area. See generally Margaret B. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147 (1989) (discussing the debate between Native Americans and scientists with respect to the reburial of Native American remains). In many instances, the looting of a religious site potentially can threaten an entire way of life for a Native American tribe. Derek V. Goodwin, *Raiders of the Sacred Sites*, N.Y. TIMES MAG., Dec. 7, 1986, at 65, 86. For instance, in 1979 when Hopi spiritual leaders discovered that their sacred masks had been stolen, their method of worshipping was threatened. *Id.* As one tribal leader put it, “[w]ithout our religion, we die.” *Id.*

ers"⁴ are renowned for unearthing burial grounds and bulldozing ruins with large-scale, mechanical equipment⁵ to supply an extraordinarily lucrative black market with aboriginal artifacts.⁶ By 1979, archaeological looters had pillaged successfully nearly 3,000 recorded ancient sites on national forest lands in Arizona.⁷ Between 1980 and 1987, looting on private and Native American lands "skyrocketed."⁸ In 1989, vandals and thieves stole from at least ninety percent of the Native American sites in the Southwest, including all of the classic Mimbres sites.⁹ Motivation to continue archaeological looting remains strong due to the activity's reputation as "a relatively low-risk activity with a high-profit potential."¹⁰

As early as 1879, Congress exhibited both an awareness of and a legislative commitment to protecting archaeological resources.¹¹ A century

4. Individuals who dig for artifacts are called "relic collectors, pothunters, treasure seekers, even 'para-archaeologists.'" Harvey Arden, *Who Owns Our Past?*, 175 NAT'L GEOGRAPHIC, 376, 378 (1989). Others may classify "them as looters, desecrators, even commercial grave robbers." *Id.*

5. Archaeological looting operations are extremely sophisticated. When a site of known commercial value is discovered, "[p]rofessional looters employ portable generators, prefabricated huts, earthmoving and excavation equipment, power tools and metal detectors" to remove objects from an archaeological site successfully. Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW. 627, 635 (1992); see Moore, *supra* note 3, at 469.

6. See Fish, *supra* note 1, at 685; see also Goodwin, *supra* note 3, at 65. To illustrate the potential profit to an archaeological looter, the artifacts from a single cliff dwelling of the Anasazi, or the "Ancient Ones," located at the south-eastern tip of Utah, may be worth nearly \$1 million. Goodwin, *supra* note 3, at 65. The artifacts may be "sold to museums, galleries and private collectors" who rarely question the origin of the objects. *Id.* at 66.

7. Grace Glueck, *Someone is Stealing the Great Pots of America*, N.Y. TIMES, June 17, 1979, at E20 (anticipating the passage of the Archaeological Resources Protection Act). By 1979, looting reached such exorbitant proportions that one senator indicated that the thievery of American artifacts was "a major industry in crime." 125 CONG. REC. 21,240 (1979) (statement of Sen. Domenici).

8. John Neary, *A Legacy of Wanton Thievery*, ARCHAEOLOGY, Sept.-Oct. 1993, at 57, 58 (detailing an undercover agent's plight in trying to capture archaeological looters). Looting during the 1980s was so devastating that one commentator stated that archaeological resources were "an endangered species." Northey, *supra* note 3, at 61.

9. Neary, *supra* note 8, at 58. "Mimbres" refers to one of the many Native American ancient cultures. Goodwin, *supra* note 3, at 65. Commercial looters frequently bring to the market artifacts derived from the Anasazi, Hopi, Hohokam, Caddo, Salado, and Hopewell cultures. *Id.*

10. Neary, *supra* note 8, at 58.

11. See Kristine O. Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. ENVTL. L. & LITIG. 47, 48-51 (1987) (outlining the historical background for archaeological resource protection prior to the Antiquities Act of 1906). Events such as the establishment of the Smithsonian's Bureau of Ethnology, the founding of the Anthropological Society of Washington, and the organization of the Archaeological Institute of America also symbolized a public interest in

later, Congress enacted the Archaeological Resources Protection Act of 1979 (ARPA)¹² as an aggressive attempt to preserve the Nation's archaeological treasures.¹³ Congress enacted ARPA because its predecessor, the Antiquities Act of 1906,¹⁴ contained unconstitutionally vague terms and therefore no longer was effective in combating archaeological looting.¹⁵ To prevent another archaeological criminal statute from being rendered unconstitutionally vague, the promoters of ARPA worked diligently to ensure that the legislative history and the statutory language of ARPA were "abundantly clear."¹⁶ Despite congressional efforts to create unambiguous statutory language, ARPA's provisions were challenged in *United States v. Gerber*,¹⁷ a case of first impression.

Gerber was convicted under the interstate trafficking provision¹⁸ of ARPA, which prohibits the sale of artifacts taken in violation of state or local law and sold through interstate commerce.¹⁹ Gerber's conviction was unique in that he excavated the artifacts from private lands and later transported them through interstate commerce.²⁰ Gerber argued that ARPA was applicable only to public and Indian lands²¹ by citing the stat-

archaeological protection. *Id.* at 48-49. The public, showing a concern for archaeological protection, began to lobby Congress for legislation to ensure the protection of archaeological resources. *Id.* at 49. Archaeological protection soon became an important congressional objective upon Congress' recognition that our Nation's lands contained a plethora of rich and diverse cultural resources. Northey, *supra* note 3, at 64.

12. Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa—470mm (1988)).

13. Fish, *supra* note 1, at 694. ARPA "was particularly directed toward unauthorized excavations motivated by the high prices paid for prehistoric North American art." *Id.* Congress enacted ARPA as a response to commercial looters enjoying "virtual immunity" from prosecution as they plundered vast and valuable archaeological sites. *Id.*

14. 16 U.S.C. §§ 431-433 (1988); *see infra* notes 42—63 and accompanying text (discussing the Antiquities Act).

15. *See* 16 U.S.C. § 470aa(a)(3) (1988). Congress specifically addressed vagueness concerns by stating that "existing Federal laws [did] not provide adequate protection to prevent the loss and destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage." *Id.*

16. 125 CONG. REC. 17,395 (1979) (statement of Rep. Rhodes); *see infra* notes 133-43 and accompanying text (discussing ARPA's legislative history).

17. 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

18. 16 U.S.C. § 470ee(c) (1988). This provision provides that "[n]o person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange, in interstate or foreign commerce, any archaeological resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law." *Id.*

19. *Gerber*, 999 F.2d at 1113.

20. *Id.*

21. *Id.*

ute's legislative history²² and the preamble of the Act itself.²³ While the Act withstood Gerber's challenge in the United States Court of Appeals for the Seventh Circuit,²⁴ the arguments raised in *Gerber* with respect to ARPA's enforcement provisions are disturbing, particularly in light of the deliberate efforts by ARPA's sponsors to create unambiguous statutory language.²⁵ Gerber's proposed narrow interpretation of ARPA, which would limit the Act's application solely to public and Indian lands, serves as both a potential loophole for the archaeological looter in avoiding criminal prosecution²⁶ and a likely danger to as yet undetected archaeological resources located on private lands throughout the United States.²⁷

Gerber's secondary argument regarding ARPA's interstate trafficking provision concerns the statute's reference to "any" state or local law.²⁸ Gerber asserted that the reference to "any" encompasses solely state archaeological protection laws and not necessarily "any" law.²⁹ In making such an argument, Gerber distinguished between those laws expressly protecting archaeological objects or sites and more general laws such as those regarding trespass and theft.³⁰ A court's use of this construction would hinder the government's ability to prosecute certain archaeological looters under ARPA. Looters could move resources through interstate commerce from a state lacking very specific or sophisticated archaeological protection laws.³¹

In addition to attacking specifically the language of ARPA's interstate trafficking provision, Gerber also asserted that the entire provision was void for vagueness³² and thus violated his Fifth Amendment due process

22. *Id.* at 1115. Gerber focused particularly on congressional debate surrounding the enactment of ARPA. *Id.* An example of a statement supporting Gerber's argument is set forth by Congressman Udall who stated that ARPA "does not affect any lands other than the public lands of the United States and lands held in trust by the United States for Indian tribes or individual Indian allottees." 125 CONG. REC. 17,394 (1979)

23. *Gerber*, 999 F.2d at 1115. The preamble to ARPA explains that "[t]he purpose of this chapter is to secure . . . the protection of archaeological resources and sites which are on public lands and Indian lands." 16 U.S.C. § 470aa(b) (1988).

24. *Gerber*, 999 F.2d at 1116-17.

25. See *supra* text accompanying note 16 (noting attempts by ARPA's drafters to create unambiguous statutory language).

26. *Gerber*, 999 F.2d at 1117.

27. See *supra* notes 1-10 and accompanying text (discussing the dangers posed to archaeological resources).

28. *Gerber*, 999 F.2d at 1113; see *supra* note 18 (providing the text of ARPA's interstate trafficking provision).

29. *Gerber*, 999 F.2d at 1113.

30. *Id.*

31. See *infra* notes 86-100 and accompanying text (discussing various state laws protecting archaeological resources and Native American burials).

32. See Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (providing an extensive overview of the void for vagueness doctrine); see

rights.³³ In particular, Gerber challenged that the statutory language did not provide adequate notice as to ARPA's application to private lands.³⁴ Without adequate notice, Gerber argued that he had no way of knowing that his activity was prohibited.³⁵

Traditionally, in construing a statute in a case of first impression, statutory construction begins with the language of the statute itself.³⁶ The inquiry then may proceed to ensuring that the plain meaning of the statute will not produce a result precisely at odds with Congress' intent.³⁷ In the event that the plain meaning of the statute is not entirely clear, an examination of the intent of the legislature is the most frequently followed principle of statutory construction.³⁸ Courts turn to legislative history to determine congressional intent.³⁹ A literal and cursory interpretation of the legislative history of ARPA bolstered Gerber's arguments, making his

also infra notes 225-48 and accompanying text (discussing the void for vagueness doctrine and its applicability to ARPA).

33. Brief for Appellant at 38-43, *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (No. EV 91-19-CR) [hereinafter Brief for Appellant]; *see also infra* notes 225-48 and accompanying text (discussing the void for vagueness doctrine and its due process implications).

34. *Gerber*, 999 F.2d at 1115.

35. *See* Brief for Appellant, *supra* note 33, at 38.

36. *See, e.g.*, *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 99 (1991) (stating that where a statute's language is plain, the court's function is to enforce it in conformity with its terms); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (stating that the task of resolving the dispute over the meaning of statutes begins with the language of the statute itself), *superseded by statute as stated in Landgraf v. USI Film Prods.*, 114 S. Ct. 1483 (1994); *Mallard v. United States Dist. Court.*, 490 U.S. 296, 300 (1989) (stating that the "[i]nterpretation of a statute must begin with the statute's language").

37. *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993) (stating that a statute's plain meaning will not be conclusive if a clearly expressed legislative intent to the contrary exists); *Ron Pair*, 489 U.S. at 242 (stating that the plain meaning of the statute governs unless a situation exists in which the literal application of the statute "will produce a result demonstrably at odds with the intentions of its drafters" (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (stating that when the plain language of a statute is clear courts examine legislative history to see only whether there is an expressed legislative intent at odds with the plain meaning).

38. *Blum v. Stenson*, 465 U.S. 886, 896-97 (1984) (stating that when a question of federal law is predicated upon interpretation of a statute that is unclear, the first inquiry looks to the statutory language and the second inquiry looks to the legislative history); *see also* NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 45.05, at 22 (5th ed. 1992) (stating that intent of the legislature most frequently is used to interpret statutes). The principle of examining legislative history is based upon the assumption "that an obligation to construe statutes so that they carry out the will, real or attributed, of the lawmaking branch of the government is mandated by principles of separation of powers." *Id.*

39. *See Blum*, 465 U.S. at 896; *United States v. Fairman*, 947 F.2d 1479, 1482 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1503 (1992); *Funbus Sys., Inc. v. California Public Utilities Comm.*, 801 F.2d 1120, 1125-26 (9th Cir. 1986).

challenge unique.⁴⁰ The Seventh Circuit, however, went beyond the Act's legislative history and concluded that Congress intended the interstate trafficking provision to protect archaeological resources, notwithstanding the type of land from which a resource is derived.⁴¹

This Comment outlines the evolution of the United States archaeological resource protection laws, up to and beyond ARPA. Next, this Comment focuses on *United States v. Gerber* and its impact on ARPA and archaeological preservation law. This Comment articulates the appropriate statutory construction of ARPA, focusing on ARPA's applicability to private lands and the incorporation of state law under ARPA. This Comment also dispels the validity of void for vagueness challenges under ARPA and asserts that ARPA's interstate trafficking provision is unambiguous on its face. This Comment argues that to ensure complete protection of the United States' archaeological resources, ARPA should be amended or its regulations should be revised to provide more specific language that would clarify to which lands ARPA is applicable and under what incorporated state law a violator can be prosecuted. This Comment concludes that without proper construction of the statute, ARPA's efficacy and the future of the United States archaeological resources may be endangered.

I. THE EVOLUTION OF ARCHAEOLOGICAL AND HISTORIC PRESERVATION LAWS: PROCEDURAL AND BACKGROUND INFORMATION

A. *Federal Legislation Prior to ARPA: Inadequate Provisions for Protecting Archaeological Resources*

1. *The Antiquities Act of 1906*

Prior to the enactment of ARPA in 1979, the Antiquities Act of 1906⁴² served as the primary protection for archaeological resources on federal and Native American lands.⁴³ The Act declares a general commitment to

40. See *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). The Seventh Circuit aligned with *Gerber* by pointing out that the Act itself, the legislative history of the Act, and most scholarly commentators do not mention ARPA's application to private lands. *Id.* The court, however, further stated that the non-existence of any reference to private lands merely could be attributed to the fact that most of the Nation's archaeological sites are located on Indian reservations or federal public lands. *Id.*

41. *Id.* The Seventh Circuit found that the interstate trafficking provision functions as a "catch-all provision." *Id.* Despite legislative history implying ARPA's applicability solely to public and Native American lands, the court believed that the purposes of the Act would not be undermined by interpreting ARPA as being applicable to private lands. *Id.*

42. 16 U.S.C. §§ 431-433 (1988).

43. *Id.* § 433. The Antiquities Act provides:

preservation policy,⁴⁴ provides for the issuance of permits for excavation purposes,⁴⁵ and institutes enforcement provisions and penalties for anyone who attempts to “appropriate, excavate, injure, or destroy” any potential “object of antiquity.”⁴⁶

Despite its commitment to preservation, the Antiquities Act’s penalties were clearly insufficient to deter potential archaeological traffickers and looters.⁴⁷ For instance, an individual convicted under the statute could be fined no more than \$500 or be imprisoned for no more than ninety days.⁴⁸ With archaeological objects selling for vast amounts of money,⁴⁹ traffickers and looters began to treat these fines as mere business expenses.⁵⁰ For instance, during the 1970s, when the Antiquities Act was the only statutory protection for archaeological resources, a single Southwestern piece of pottery could garner \$8,000-\$10,000 on the market.⁵¹ With this type of profit at stake, archaeological looters viewed a \$500 fine or a few days in jail as a cost of doing business.⁵²

The most serious deficiency of the Antiquities Act resulted from its language: “any object of antiquity.”⁵³ A looter challenged this language in *United States v. Diaz*,⁵⁴ in which the United States Court of Appeals for the Ninth Circuit found the penalty provisions of the Antiquities Act

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than \$500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

Id.

44. *See id.* § 431.

45. *See id.* § 432.

46. *See id.* § 433; *see supra* note 43 (providing the full text of section 433).

47. *See* Northey, *supra* note 3, at 71.

48. 16 U.S.C. § 433.

49. *See supra* notes 1—10 and accompanying text (discussing the profitability of archaeological looting).

50. Fish, *supra* note 1, at 688; *see* Northey, *supra* note 3, at 71. A \$500 fine may have seemed like an exorbitant amount of money immediately following the enactment of the Antiquities Act in 1906. Fish, *supra* note 1, at 688. More recently, as the commercial vandal becomes highly motivated by the profitable black market for artifacts, \$500 represents a minor business expense. *Id.*

51. Glueck, *supra* note 7, at E20.

52. *Id.*

53. 16 U.S.C. § 433 (1988); *see also supra* note 43 (providing the text of the prohibited acts provision for the Antiquities Act).

54. 499 F.2d 113, 114-15 (9th Cir. 1974) (finding the term “objects of antiquity” to be “fatally vague” and in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution).

to be unconstitutionally vague.⁵⁵ In *Diaz*, the appellant was charged with appropriating a face mask found in a cave on the San Carlos Indian Reservation.⁵⁶ At trial, an expert on religious systems of the Western Apache in the State of Arizona testified that an object of antiquity could include virtually anything, even something that was made yesterday if it pertained "to religious or social traditions of long standing."⁵⁷ Based on this testimony, the court indicated that, absent definitional guidance in the statute, one reasonably would not know which articles constitute objects of antiquity⁵⁸ and, therefore, held that the statute's provisions were void for vagueness.⁵⁹

The *Diaz* decision created serious doubts as to whether the Act could protect objects of antiquity.⁶⁰ Subsequent to *Diaz*, prosecutors continued to face constitutional challenges to the Act.⁶¹ It became apparent, though, that the primary problem with the Antiquities Act was the difficulty in finding a balance between providing adequate notice and ensuring expansive archaeological resource protection.⁶² With the state of archaeological protection law in flux, ARPA was needed to reconcile and respect each of these countervailing interests.⁶³

55. *Id.* The court addressed vague laws as generally offending "several important values . . . [because they] may trap the innocent by not providing fair warning." *Id.* at 114 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

56. *Id.*

57. *Id.*

58. *Id.* at 115.

59. *Id.*

60. The unconstitutionality of the Antiquities Act directly affected the states located within the Ninth Circuit where a vast majority of the archaeological resources are located. SHERRY HUTT ET AL., ARCHEOLOGICAL RESOURCE PROTECTION 24 (1992). The states within this jurisdiction include Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. *Id.*

61. See Northey, *supra* note 3, at 72 n.75. Prosecutors were somewhat successful in convicting archaeological looters even with the demise of the Antiquities Act. For example, despite the *Diaz* decision, the Tenth Circuit upheld the constitutionality of the Antiquities Act in *United States v. Smyer*, 596 F.2d 939, 941 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979). Furthermore, some prosecutors charged archaeological looters under federal theft and malicious mischief statutes. See, e.g., *United States v. Jones*, 607 F.2d 269, 270-271 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). The penalties under these statutes were far more severe than under the Antiquities Act, with fines up to \$10,000 and/or imprisonment up to 10 years. HUTT, *supra* note 60, at 26.

62. Northey, *supra* note 3, at 73.

63. Until the enactment of ARPA in 1979, the Antiquities Act served as the primary federal law committed to protecting archaeological objects located on federal lands. HUTT, *supra* note 60, at 23. Other federal laws pertaining generally to historic preservation include the Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1988 & Supp. 1992); National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1988 & Supp. 1992); Reservoir Salvage Act of 1960, *as amended* by the Archaeological and Historical Preservation Act of 1974, 16 U.S.C. §§ 469-469c (1988 & Supp. 1992). The inherent

2. *The Archaeological Resources Protection Act of 1979*

Congress recognized the imminent threat to our Nation's valuable archaeological heritage and the inadequacy of existing federal and state preservation law. As a result, Congress enacted ARPA in 1979.⁶⁴ ARPA's stated purpose is to ensure that the archaeological resources of our Nation will be protected and secured for both the present and future.⁶⁵ ARPA defines an archaeological resource as "any material remains of past human life or activities which are of archaeological interest."⁶⁶ ARPA exempts, however, arrowheads from the ground surface⁶⁷ and paleontological objects⁶⁸ from the definition of an archaeological resource. Furthermore, ARPA only will treat an item as an archaeological resource if the item is at least 100 years old.⁶⁹ ARPA allows any person to apply to the Federal Land Manager for an excavation permit,⁷⁰ which attaches certain terms and conditions to the excavation

deficiencies of the Antiquities Act and the failure of the subsequent federal preservation laws to address the problem of archaeological looting dictated the need for new archaeological resource protection legislation. HURT, *supra* note 60, at 27. Documented enforcement totals under the Antiquities Act—18 convictions, \$4,000 in fines, and two 90-day jail sentences—exhibited that the Act's provisions were ineffective. *Id.* at 25. Further, attempts by Native Americans to exert criminal jurisdiction over non-Indians have failed; therefore, Native Americans lack the power to prosecute archaeological looters and traffickers. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195-212 (1978) (holding that Indian tribal courts do not have criminal jurisdiction over non-Indians).

64. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa—470mm (1988)). Despite the existence of the Antiquities Act and other laws of general application, looters continually pillaged archaeological sites on public and Native American lands, thus requiring legislation that would safeguard these endangered sites effectively. HURT, *supra* note 60, at 29.

65. 16 U.S.C. § 470aa(b) (1988). ARPA is designed "to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands." *Id.*

66. *Id.* § 470bb(1); see also *supra* note 3 and accompanying text (providing a more specific definition of what constitutes an archaeological resource).

67. 16 U.S.C. § 470ee(g) (1988). Even though these arrowheads are undoubtedly archaeological resources, Congress, nevertheless, chose to exempt these items under ARPA. *Id.*; see also Northey, *supra* note 3, at 78. Some archaeologists find this exemption objectionable. Fish, *supra* note 1, at 695. What is ironic about the exemption is that it actually does not protect the arrowhead collector, who still remains subject to general federal theft and malicious mischief statutes. Northey, *supra* note 3, at 79.

68. 43 C.F.R. § 7.3(a)(4)(i) (1993). Paleontological objects found in an archaeological context, however, are subject to ARPA. 16 U.S.C. § 470bb(2) (1988).

69. 16 U.S.C. § 470bb(1) (1988). This time limit helps to distinguish ARPA's definition of archaeological resource from the definition of object of antiquity under the Antiquities Act. See *supra* notes 42—63 and accompanying text (discussing the vagueness of the term object of antiquity under the Antiquities Act). The 100-year limit provides an available cutoff in determining what constitutes an archaeological resource. Northey, *supra* note 3, at 77.

70. 16 U.S.C. § 470cc (1988).

activities.⁷¹ ARPA exhibits a commitment to criminally prosecuting archaeological looters while also emphasizing education and the preservation and protection of archaeological resources.⁷² ARPA also recognizes the importance of preserving Native American culture, both out of concern for history and in deference to American Indian Tribal self-government.⁷³ To implement ARPA, various federal agencies have adopted uniform regulations.⁷⁴

The most significant, as well as recently controversial and problematic,⁷⁵ components of ARPA are the prohibited acts and penalties provisions, particularly the interstate trafficking provision.⁷⁶ Under the first of ARPA's prohibited acts, the statute forbids the excavation and removal of objects located on public and Indian lands without an authorized permit.⁷⁷ Furthermore, in the second prohibited act, ARPA aggressively pursues the archaeological trafficker by prohibiting the sale, purchase, or

71. *Id.* More particularly, a permit may be issued if several requirements are satisfied. Initially, the applicant must be qualified to investigate the archaeological site. *Id.* § 470cc(b)(1). Next, the activity must be undertaken to further archaeological knowledge in the public interest. *Id.* § 470cc(b)(2). Furthermore, the United States remains the rightful owner to any resource removed from public lands. *Id.* § 470cc(b)(3). Moreover, the activity must be consistent with management plan for the affected lands. *Id.* § 470cc(b)(4). Finally, for any archaeological excavation on Indian lands, tribal approval must be obtained. *Id.* § 470cc(g)(2).

72. HUTT, *supra* note 60, at 31. ARPA's dual commitment to prohibiting criminal activity and promoting education and preservation explains its unique position within the United States Code. *See id.* Not only is ARPA a federal criminal statute, it also serves as "a catalyst for education and the interaction of interest groups to preserve and protect archaeological resources." *Id.*

73. *Id.*; *see* 16 U.S.C. § 470cc(g) (1988). Although ARPA may require notification to Native American tribes affected by an ARPA excavation permit, 43 C.F.R. § 7.7 (1993), commentators have argued that ARPA does not address Native American concerns successfully. *See* Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L.J. 135, 136-37 (1992). Native Americans find ARPA's characterization of Native American human remains as an "archaeological resource" to be offensive. *Id.* at 136. In response to Native American concerns for the reburial of their human remains, Congress has enacted more specific criminal legislation. *See* Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 4(a), 104 Stat. 3048, 3052 (1990) (codified at 18 U.S.C. § 1170 (Supp. V 1993)) (creating a felony offense for illegal trafficking in Native American human remains and cultural items).

74. Federal agencies have promulgated the following uniform regulations to ARPA pursuant to 16 U.S.C. § 470ii (1988): (1) Department of the Interior, 43 C.F.R. § 7 (1993); (2) Department of Agriculture, 36 C.F.R. § 296 (1993); (3) Department of Defense, 32 C.F.R. § 229 (1993); (4) Tennessee Valley Authority, 18 C.F.R. § 1312 (1992); (5) Army Corps of Engineers, ER 405-1-71.

75. *See infra* notes 144-204 and accompanying text (discussing controversial and problematic issues relating to ARPA's interstate trafficking provision).

76. 16 U.S.C. § 470ee(c) (1988); *see also supra* note 18 (providing the text of ARPA's interstate trafficking provision).

77. 16 U.S.C. § 470ee(a). ARPA's first prohibited act provision provides: "No person

exchange of an archaeological resource⁷⁸ if the resource was removed in violation of the first prohibited act or of any other federal law.⁷⁹ Finally ARPA, in its interstate trafficking provision, incorporates state law by pronouncing that the statute will be violated when any person moves an artifact through interstate or foreign commerce in conjunction with a violation of "any" state or local law.⁸⁰

The penalties under ARPA are stringent, with fines reaching \$10,000 and imprisonment for one year for an initial violation.⁸¹ Moreover, ARPA provides a maximum fine of \$20,000 and imprisonment for two years⁸² when the value of the archaeological resource involved and the cost of restoration to the object exceeds \$500.⁸³ A violator can be fined up to \$100,000 or imprisoned for up to five years for repeated ARPA violations.⁸⁴ ARPA also provides for civil penalties to be assessed by a Federal Land Manager based upon the value of the archaeological object and on the restoration and repair costs.⁸⁵

B. State Archaeological Protection Law: Lack of Uniformity Among the States

In response to increasing incidences of archaeological looting,⁸⁶ most states have enacted legislation designed to preserve and protect archaeological resources.⁸⁷ In accordance with protecting the burial sites of Na-

may excavate, remove, damage, or otherwise alter or deface . . . any archaeological resource located on public lands or Indian lands." *Id.*

78. *See supra* note 3 (defining the term archaeological resource).

79. 16 U.S.C. § 470ee(b). ARPA's second prohibited act provision provides: "No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource" if the resource is removed in violation of "any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law." *Id.*

80. *Id.* § 470ee(c); *see supra* note 18 (providing the text of the interstate trafficking provision).

81. 16 U.S.C. § 470ee(d).

82. *Id.*

83. *Id.*

84. *Id.* The fines and imprisonment terms for subsequent offenders are more stringent than the fines under the Antiquities Act which were more like mere business expenses. *See supra* notes 47—52 and accompanying text (discussing the penalties under the Antiquities Act).

85. 16 U.S.C. § 470ff.

86. *See supra* notes 1—10 and accompanying text (discussing the devastation to archaeological resources).

87. *See, e.g.,* ALA. CODE §§ 41-3-1 to -3-6 (1991); ALASKA STAT. §§ 41.35.010 to .240 (1993); ARIZ. REV. STAT. ANN. §§ 41-841 to -847 (1992); ARK. CODE ANN. §§ 13-6-301 to -308 (Michie 1987); COLO. REV. STAT. §§ 24-80-401 to -410 (1988 & Supp. 1994); CONN. GEN. STAT. §§ 10-381 to -391 (1993); DEL. CODE ANN. tit. 7, §§ 5301—5806 (1991); FLA. STAT. ANN. §§ 267.12 to .14 (West 1991 & Supp. 1995); GA. CODE ANN. §§ 12-3-52 to -54 (1992 & Supp. 1994); IDAHO CODE §§ 67-4113 to -4122 (1989); ILL. REV. STAT. ch. 20,

tive Americans, numerous states have enacted repatriation, burial, and grave protection laws.⁸⁸ States approach the problem of archaeological looters in divergent manners. A number of states reserve the right to conduct field investigations on state-owned property.⁸⁹ This approach parallels ARPA's prevalence over federal lands.⁹⁰ In addition to exerting control over archaeological excavations located on state-owned lands, some states impose duties upon those excavating on privately owned

para. 3435/.01 to 3435/11 (1992); IND. CODE §§ 14-3-3.4-1 to .4-20 (1993); KAN. STAT. ANN. §§ 74-5401 to -5408 (1992); KY. REV. STAT. ANN. §§ 164.705 to .735 (Michie/Bobbs-Merrill 1987); LA. REV. STAT. ANN. §§ 41:1601 to :1614 (West 1990); ME. REV. STAT. ANN. tit. 27, §§ 371—378 (West 1988 & Supp. 1994); MD. CODE ANN. NAT. RES., §§ 2-101 to -407 (1989 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 9, §§ 26A—27C (West 1986); MICH. COMP. LAWS ANN. §§ 299.51 to .55 (West 1984 & Supp. 1994); MINN. STAT. ANN. §§ 138.31 to .42 (West 1994 & Supp. 1995); MISS. CODE ANN. § 39-7-1 to -41 (1990); NEV. REV. STAT. §§ 381.195 to .227 (1991); N.H. REV. STAT. ANN. §§ 227-C:1 to C:12 (1989 & Supp. 1993); N.J. STAT. ANN. § 13:1L-10 (West 1991) (only applicable to state parks); N.M. STAT. ANN. §§ 18-6-1 to -17 (Michie 1991); N.Y. PARKS REC. & HIST. PRESERV. LAW §§ 14.01 to .09 (McKinney 1984); N.C. GEN. STAT. §§ 70-10 to -20 (1991); N.D. CENT. CODE §§ 55-03-00.1 to -03-07 (1993); OHIO REV. CODE ANN. §§ 149.51 to .56 (Anderson 1990); OKLA. STAT. tit. 53, § 361 (1991); OR. REV. STAT. §§ 358.905 to .955 (1993); 37 PA. CONS. STAT. ANN. §§ 506, 511 (Supp. 1994); R.I. GEN. LAWS §§ 42-45.1-2 to -45.1-13 (1993); S.C. CODE ANN. § 54-7-680 (Law. Co-op. 1992) (protecting underwater antiquities); S.D. CODIFIED LAWS ANN. §§ 1-20-17 to -37 (1992); TENN. CODE ANN. §§ 11-6-101 to -119 (1992); TEX. NAT. RES. CODE ANN. §§ 191.001 to .174 (West 1993); UTAH CODE ANN. §§ 9-8-301 to -308 (1992 & Supp. 1994); VT. STAT. ANN. tit. 22, §§ 701 to 791 (1987 & Supp. 1994); VA. CODE ANN. §§ 10.1-2300 to -2306 (Michie 1993); WASH. REV. CODE §§ 27.53.010 to .901 (1992); W. VA. CODE § 29-1-8b (1992); WIS. STAT. ANN. §§ 44.30 to .48 (West Supp. 1994); WYO. STAT. §§ 36-1-114 to -116 (1977 & Supp. 1994).

88. See, e.g., ARIZ. REV. STAT. ANN. §§ 41-844 & -865 (1992); CAL. PUB. RES. CODE § 5097.9 to .991 (Deering 1993); CONN. GEN. STAT. §§ 10-381 to -391 (1993); DEL. CODE ANN. tit. 7, §§ 5403 to 5411 (1991); FLA. STAT. ANN. §§ 872.01 to .05 (West 1994); IDAHO CODE §§ 27-501 to -504 (1989); ILL. REV. STAT. ch. 20, para. 3440/1 to 3440/16 (1992); IND. CODE §§ 14-3-3.4-16 to .4-18 (1993); IOWA CODE §§ 566.31 to .34 (1993); KAN. STAT. ANN. §§ 75-2741 to -2754 (1989 & Supp. 1993); LA. REV. STAT. ANN. §§ 8:671 to :681 (West Supp. 1995); ME. REV. STAT. ANN. tit. 22, § 2842-B (West Supp. 1994); MASS. GEN. LAWS ANN. ch. 7, § 38A (West Supp. 1994); MINN. STAT. ANN. § 307.08 (West 1985 & Supp. 1995); MISS. CODE ANN. § 39-7-31 (1990); MO. REV. STAT. §§ 194.400 to .410 (Supp. 1995); MONT. CODE ANN. §§ 22-3-801 to -811 (1993); NEB. REV. STAT. §§ 12-1201 to -1212 (1991); NEV. REV. STAT. §§ 383.150 to .190 (1991); N.H. REV. STAT. ANN. §§ 227-C:8 to :8-j (1989); N.M. STAT. ANN. §§ 18-6-11.2, 30-12-12, 58-17-1 (Michie 1991); N.C. GEN. STAT. §§ 70-26 to -40 (1991); N.D. CENT. CODE §§ 55-03-00.1 to -03-07 (1993); OKLA. STAT. tit. 21, §§ 1161 to 1163 (1991); OR. REV. STAT. §§ 97.740 to .760 (1993); S.D. CODIFIED LAWS ANN. §§ 34-27-19 to -32 (1994); UTAH CODE ANN. §§ 9-9-401 to -406 (1992); VA. CODE ANN. §§ 10.1-2300 to -2306 (Michie 1993); WASH. REV. CODE § 27.44.020 (1992); W. VA. CODE § 29-1-8a (1992 & Supp. 1994); WIS. STAT. ANN. § 157.70 (West 1989 & Supp. 1994).

89. See, e.g., ARK. CODE ANN. § 13-6-301 (Michie 1987); COLO. REV. STAT. § 24-80-401 (1988 & Supp. 1994); MINN. STAT. ANN. § 138.32 (West 1994); 37 PA. CONS. STAT. ANN. § 506 (Supp. 1994); VT. STAT. ANN. tit. 22, § 762 (1987); WIS. STAT. ANN. § 44.47 (West Supp. 1994).

90. See 16 U.S.C. § 470bb(2) (1988) (indicating that the Federal Land Manager shall have "primary management authority" over public lands).

lands.⁹¹ Despite a state's reservation of exclusive archaeological survey rights, archaeologists not employed by the state usually can survey state sites upon obtaining a permit.⁹² Penalties are imposed upon those who violate state archaeological and burial protection laws.⁹³

Some states are concerned with protecting particular archaeological sites and the objects found within those sites. For instance, some state laws focus on protecting caves,⁹⁴ submerged resources,⁹⁵ or burial sites.⁹⁶ In discussing state archaeological protection laws, it is critical to note that ARPA applies only to public,⁹⁷ Native American,⁹⁸ and, in certain instances, private lands.⁹⁹ In light of this, if a state fails to protect archaeological resources on state lands, a potential loophole exists for the archaeological looter.¹⁰⁰

II. CHALLENGES TO ARPA AND ARPA'S LEGISLATIVE HISTORY

A. Challenges Under ARPA

The National Park Service reported 1,720 violations of archaeological protection laws from 1985 to 1987.¹⁰¹ Of these reported violations, only

91. See, e.g., ARK. CODE ANN. § 13-6-301 (Michie 1987); MD. ANN. CODE art. 83B, § 5-621 (1992); N.M. STAT. ANN. § 18-6-11 (Michie 1991); N.C. GEN. STAT. § 70-1 (1991); see also *Whitacre v. Indiana*, 619 N.E.2d 605, 607 (Ind. Ct. App. 1993) (stating that the Indiana Historic Preservation and Archaeology Act applies to privately owned land and, therefore, requires permits for excavation on private lands), *transfer granted, op. adopted*, 629 N.E.2d 1236 (Ind. 1994).

92. See, e.g., CONN. GEN. STAT. § 10-386 (1993) (stating the policy for administering permits for archaeological investigation on state lands); FLA. STAT. § 267.12 (1993) (regarding the issuance of research permits); ILL. REV. STAT. ch. 20, para. 3435/6 (1992) (regarding the issuance of permits); N.M. STAT. ANN. § 18-6-11 (Michie 1991) (stating that a permit is required for excavation of archaeological sites).

93. See *supra* notes 87—88 (discussing and listing various state penalty provisions).

94. See, e.g., ARK. CODE ANN. § 15-20-601 (Michie 1992); MD. ANN. CODE art. 83B, § 5-628 (1992); VA. CODE ANN. § 10.1-1002 (Michie 1993).

95. See, e.g., CAL. PUB. RES. CODE § 6314 (Deering 1993); GA. CODE ANN. § 12-3-81 (1992); LA. REV. STAT. ANN. § 41:1605 (West 1990); MD. ANN. CODE art. 83B, § 5-611.1 (1992); S.C. CODE ANN. § 54-7-620 (Law. Co-op. 1992).

96. See *supra* note 88 (discussing human remains, repatriation, and reburial protection laws).

97. 16 U.S.C. § 470aa—470mm (1988).

98. *Id.*

99. See *infra* notes 144-204 and accompanying text (discussing ARPA's applicability to private lands).

100. A state, however, often can utilize general laws of trespass to protect against looting. *United States v. Gerber*, 999 F.2d 1112, 1113 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

101. See HUTT, *supra* note 60, at 13. The National Park Service's figure of 1,720 reported violations only represents documented violations and is most likely representative of 25% or less of actual violations of archaeological protection laws. *Id.*

eleven percent resulted in arrests or citations.¹⁰² Although very few decisions involving ARPA violations are published, the few that do exist pose a potential threat to ARPA's effectiveness.¹⁰³

In 1989, the defendant in *United States v. Austin*¹⁰⁴ challenged ARPA's provisions as unconstitutionally overbroad. *Austin* concerned the recovery of approximately 2,800 Native American artifacts excavated by Austin through archaeological looting.¹⁰⁵ Austin based his challenge on the argument that ARPA infringed upon his First Amendment freedom of academic curiosity.¹⁰⁶ Austin also challenged ARPA as vague, asserting that he did not receive fair notice that his conduct was prohibited.¹⁰⁷ Austin argued that the terms "weapons" and "tools"¹⁰⁸ were ambiguous and did not put him on notice that he was prohibited from excavating "scrapers" and "arrow points."¹⁰⁹ The Ninth Circuit rejected both of Austin's claims and held that there can be no doubt that scrapers and arrow points are weapons and tools.¹¹⁰

In the three published cases involving ARPA subsequent to *Austin*, the constitutionality of the statute was not challenged.¹¹¹ Since then, cases decided under ARPA are sparse,¹¹² with the exception of *United States v. Gerber*.¹¹³

102. *Id.* at 14.

103. See *infra* note 104 and accompanying text (discussing a vagueness challenge under ARPA).

104. 902 F.2d 743 (9th Cir. 1990), *cert. denied*, 498 U.S. 874 (1990).

105. *Id.* at 743.

106. *Id.* at 744. Austin argued that because he was motivated by curiosity, his activity was academic and, therefore, warranted protection as academic freedom. *Id.* The court characterized Austin's argument as "creative," but nevertheless rejected his assertion. *Id.*

107. *Id.* at 745.

108. Under ARPA's definitions, the terms weapons and tools are encompassed within the definition of archaeological resource. 16 U.S.C. § 470bb(1) (1988).

109. *Austin*, 902 F.2d at 745.

110. *Id.*

111. See *United States v. Charlton*, No. 90-6454/91-5091, 1992 U.S. App. LEXIS 9456, at *11 (6th Cir. Apr. 28, 1992) (per curiam) (affirming a conviction under ARPA for the excavation of a Cherokee Indian burial cave located on public lands in the Cherokee National Forest); *United States v. Preston*, No. 91-6165/91-6166, 1992 U.S. App. LEXIS 826, at *2 (6th Cir. Apr. 21, 1992) (per curiam) (affirming defendants conviction under ARPA for excavating civil war artifacts located on the Shiloh National Military Park), *cert. denied*, 113 S. Ct. 244 (1992); *United States v. Potter*, No. 91-5457/91-5459, 1992 U.S. App. LEXIS 3778, at *1 (6th Cir. Mar. 4, 1992) (per curiam) (concerning a sentencing appeal of an individual convicted of damaging an archaeological resource under 16 U.S.C. § 470ee(a)—(d) (1988)).

112. See *United States v. Sherman*, No. 92-2197, 1993 U.S. App. LEXIS 21627, at *8 (10th Cir. Aug. 20, 1993) (affirming appellant's conviction under ARPA for the removal of artifacts from an Indian ruin site within the Gila National Forest); see also *supra* note 111.

113. 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

The challenges to ARPA raised in *Gerber*¹¹⁴ are reminiscent of the constitutional challenges that rendered the provisions of the Antiquities Act powerless to stop archaeological looters.¹¹⁵ Gerber's challenge to ARPA is most significant because he was the first defendant to force a federal court to pass upon ARPA's applicability to private lands. In the United States District Court for the Southern District of Indiana, Arthur Gerber pleaded guilty to misdemeanor violations of ARPA,¹¹⁶ yet reserved his right to appeal to the United States Court of Appeals for the Seventh Circuit on the ground that the Act was inapplicable to his offense.¹¹⁷ Gerber was accused of transporting in interstate commerce Indian artifacts stolen from a burial mound¹¹⁸ located on privately owned land¹¹⁹ in violation of Indiana's criminal laws of trespass and conversion.¹²⁰ This violation of state law in conjunction with the artifacts' subsequent movement through interstate commerce triggered ARPA.¹²¹ This case represents the first prosecution and conviction under ARPA for the looting of archaeological objects removed from private lands.¹²²

Gerber's appeal to the Seventh Circuit challenged that ARPA applied only to archaeological objects removed from public or Indian lands, despite the interstate trafficking provision's reference to state and local law.¹²³ Based on ARPA's legislative history and the Act itself, Gerber asserted that ARPA was inapplicable to non public and non-Indian lands.¹²⁴ Gerber also focused on the fact that because ARPA provided inadequate notice that it applied to private lands, ARPA was void for

114. See *United States v. Diaz*, 499 F.2d 113, 114-15 (9th Cir. 1974).

115. See *supra* notes 42-63 and accompanying text (discussing the Antiquities Act and its deficiencies).

116. See Guilty Plea Agreement at 5-6, *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (No. EV 91-19-CR).

117. *Gerber*, 999 F.2d at 1113.

118. The mound from which Gerber looted is a representation of the Hopewell phenomenon. *Id.* at 1114. The phenomenon consists of a series of large mounds prepared by American Midwest Indians over 1,500 years ago that contained "human remains plus numerous ceremonial artifacts and grave goods made of silver, copper, wood, cloth, leather, obsidian, flint, mica, quartz, pearl, shells, and drilled, carved, or inlaid human and bear teeth." *Id.*

119. The mound was located on private property owned by General Electric (GE). *Id.* GE's actual knowledge of the existence of the mound is controverted. See Jack Gifford, *Smoke and Mirrors or G.E. Gate*, INDIAN-ARTIFACT MAG., Jan.-Mar. 1994, at 5, 5.

120. *Gerber*, 999 F.2d at 1113; see also *infra* note 128 and accompanying text (discussing Indiana's criminal laws of trespass and conversion).

121. See *infra* notes 154-82 and accompanying text (discussing ARPA's jurisdictional applicability to this type of situation); see also *infra* notes 205-24 and accompanying text (discussing ARPA's incorporation of state law).

122. *Gerber*, 999 F.2d at 1113.

123. *Id.*

124. Brief for Appellant, *supra* note 33, at 14-27; see *infra* notes 133-43 and accompa-

vagueness and therefore unconstitutional.¹²⁵

Under ARPA's current structure, one possible construction of the state and local law intended to be incorporated into the interstate trafficking provision¹²⁶ could be to speculate that only state archaeological protection statutes, and not statutes such as the Indiana criminal trespass and conversion statutes that Gerber violated, are applicable.¹²⁷ Gerber acknowledged that upon entering the private lands and removing Native American artifacts he violated Indiana's criminal trespass and conversion laws.¹²⁸ Gerber also admitted that he transferred the artifacts through interstate commerce.¹²⁹ Nevertheless, Gerber insisted that despite these violations, he did not contravene ARPA's provisions because the artifacts were removed from private lands and he did not violate the applicable state law under the statute.¹³⁰ The Seventh Circuit rejected all of Gerber's arguments as to the inapplicability of ARPA to his offense,¹³¹ and the United States Supreme Court also denied Gerber's writ of certiorari.¹³²

B. *The Legislative History: Deceptively Clear*

ARPA's legislative history¹³³ demonstrates congressional recognition that the Antiquities Act¹³⁴ inadequately combated the illegal and lucrative archaeological artifact market.¹³⁵ In enacting this new legislation, Congress attempted to employ strict penalties corresponding to the value

nying text (discussing ARPA's legislative history and the provisions of ARPA emphasizing ARPA's applicability solely to public and Indian lands).

125. Brief for Appellant, *supra* note 33, at 38.

126. See *supra* note 18 (providing the text of ARPA's interstate trafficking provision).

127. The inapplicability of general criminal trespass and conversion statutes under ARPA's interstate provision incorporating state law is the very argument made by Gerber. *Gerber*, 999 F.2d at 1113; see also Brief for Appellant, *supra* note 33, at 43-46.

128. *Gerber*, 999 F.2d at 1114. Indiana criminal trespass occurs when a person "knowingly or intentionally interferes with the possession or use of the property of another person without the person's consent." IND. CODE ANN. § 35-43-2-2(4) (1993). Criminal conversion is committed when a person "knowingly or intentionally exerts unauthorized control over property of another person." IND. CODE § 35-43-4-3.

129. *Gerber*, 999 F.2d at 1114.

130. *Id.* at 1113.

131. *Id.* at 1115.

132. *United States v. Gerber*, 114 S. Ct. 878 (1994).

133. See, e.g., H.R. REP. NO. 311, 96th Cong., 1st Sess. 2, reprinted in 1979 U.S.C.C.A.N. 1707 (Report of the Committee on Interior and Insular Affairs Committee); 125 CONG. REC. 17,391-96 (1979).

134. See *supra* notes 42-63 and accompanying text (discussing the Antiquities Act).

135. See 125 CONG. REC. 21,240 (statement of Sen. Hatfield) (remarking that "the Antiquities Act of 1906, which has provided the legal basis for protecting America's prehistoric and historic heritage, is no longer adequate").

of the resource damaged or removed.¹³⁶ During congressional debate, Representative Udall attempted to clarify the Act by emphasizing exactly what the Act would not do.¹³⁷ He emphasized that ARPA would not affect any lands other than public and Indian lands.¹³⁸ Furthermore, Representative Clausen clarified the term public land by illustrating that “[s]tate and private lands, including inholdings in conservation units such as parks, are not included within the definition.”¹³⁹ Conversely, a House report¹⁴⁰ relating to the passage of the Act de-emphasized the public/private distinction and commented that ARPA would apply when an archaeological resource was obtained in violation of State or local law and subsequently moved through interstate commerce.¹⁴¹ Representative Clausen believed at the time that Congress had “eliminated to a great extent the potential for controversy” by meticulously explaining the provisions of the Act.¹⁴² On the Senate side, Senator Domenici of New Mexico placed an article into the Senate record indicating the Act would coincide with existing state laws so that offenders could not flee to other states to avoid criminal prosecution.¹⁴³

136. 125 CONG. REC. 21,239 (statement of Sen. Bumpers). Senator Bumpers remarked, “[t]he purpose of S. 490 is to provide greater protection than currently exists for archeological resources located on public lands and Indian lands by providing penalties commensurate with the value of the resources damaged or removed from those lands.” *Id.*

137. 125 CONG. REC. 17,393 (statement of Rep. Udall). Representative Udall remarked, “I want to emphasize in the boldest terms possible what this bill does not do.” *Id.*

138. In emphasizing ARPA’s applicability to public and Indian lands, Representative Udall stated that the Act “does not affect any lands other than the public lands of the United States and lands held in trust by the United States for Indian tribes or individual Indian allottees.” *Id.* at 17,394.

139. *Id.* (statement of Rep. Clausen). Representative Clausen’s words, which seemed to demarcate ARPA’s limitations, encouraged Gerber to challenge the statute and its applicability to artifacts removed from private lands. Brief for Appellant, *supra* note 33, at 26.

140. H.R. REP. NO. 311, 96th Cong., 1st Sess. 11, *reprinted in* 1979 U.S.C.C.A.N. 1709.

141. *See id.* The House report explained that ARPA’s interstate trafficking provision “precludes the sale and transportation in interstate or foreign commerce when the resources are involved in violations of State or local law.” *Id.* at 11, *reprinted in* 1979 U.S.C.C.A.N. at 1713. This language supports the applicability of ARPA to privately owned lands. *See infra* notes 144-204 and accompanying text (discussing ARPA’s application to privately owned lands).

142. 125 CONG. REC. 17,394 (statement of Rep. Clausen).

143. *Id.* at 21,241.

*C. ARPA's Applicability to Private Lands: Moving Beyond the
Legislative History*

1. Statutory Construction of ARPA in Light of the Legislative History

To ensure ARPA's effectiveness, its interstate trafficking provision¹⁴⁴ must extend generally to the protection of archaeological artifacts, regardless of their origin or location.¹⁴⁵ As a matter of statutory construction, an inquiry into the meaning of ARPA should begin by examining the statute on its face.¹⁴⁶ Some commentators persuasively argue that the interstate trafficking provision, on its face, is applicable to private lands.¹⁴⁷ Other groups easily find the very same provision, on its face, inapplicable to private lands.¹⁴⁸ In light of the potential ambiguity arising from these differing interpretations, it is appropriate to consider the statute's legislative history.¹⁴⁹ Even if the provision is found to be completely unambiguous on its face, some cases suggest that a second test, that requires that the plain meaning of the statute should not be at odds with congressional intent must be satisfied.¹⁵⁰

ARPA's applicability to private lands is disturbing for many groups¹⁵¹

144. 16 U.S.C. § 470ee(c) (1988); *see also supra* note 18 (providing the text of ARPA's interstate trafficking provision).

145. Principles of statutory construction are presently in a state of flux. According to the traditional view, statutory construction begins with an examination of the statute on its face. *United States v. Dadanian*, 818 F.2d 1443, 1448 (9th Cir. 1987). In the event of an ambiguity, a court looks to the statute's legislative history. *United States v. Fairman*, 947 F.2d 1479, 1482 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1503 (1992). The more modern trend, as advocated by Justice Scalia, however, looks solely to the law on its face and disregards legislative intent. *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 n.12 (1993).

146. *See SINGER, supra* note 38, § 45.07, at 31. Examining the meaning of a statute is distinct from legislative intention and "expresses concern for giving effect to the way in which the statute is understood by others than the members of the legislature itself." *Id.*

147. *See infra* notes 154—82 and accompanying text (discussing the statute on its face).

148. ARPA's inapplicability to private lands is the very argument espoused by Gerber and numerous others opposed to ARPA. *See* Brief of Amici Curiae in Support of Petitioner at 9, *Gerber v. United States*, 999 F.2d 1112 (7th Cir. 1993), (No. 93-635) [hereinafter Brief of Amici Curiae]; *supra* notes 144-204 and accompanying text (setting forth Gerber's argument).

149. *SINGER, supra* note 38, § 45.05, at 22; *see Blum v. Stenson*, 465 U.S. 886, 895 (1984).

150. *See, e.g., Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12 (1987).

151. Groups traditionally supporting ARPA's inapplicability to private lands include: the American Numismatic Association; American Society for Amateur Archaeology; Antique Tribal Arts Dealer Association, Inc.; Archaeological Society of Ohio, Inc.; Arkansas Treasure Seekers; Black Thunder Marketing; Central States Archaeological Societies, Inc.; Civil War News; Coin World; Conch Coalition, Inc.; Double Eagle Publishing; Federation of Metal Detecting and Archaeological Clubs, Inc.; Fisher Research Lab., Inc.; Garrett

because of the dichotomy between what these groups perceive as being the drafters' intent and the Seventh Circuit's decision.¹⁵² In arguing that ARPA is inapplicable to private lands, Gerber relied heavily upon selected excerpts from the statute's legislative history.¹⁵³ For ARPA to fulfill its stated purpose, however, the statute's interstate trafficking provision must apply to private lands, regardless of the method of statutory interpretation employed.

2. *Examining ARPA and its Interstate Trafficking Provision on its Face*

To determine whether ARPA applies on its face to private lands, it is important to distinguish between the established jurisdictional basis for ARPA's interstate trafficking provision¹⁵⁴ and ARPA's first two categories of prohibited acts.¹⁵⁵ Federal jurisdiction in ARPA's first two categories of prohibited acts is based on a connection to public or Indian

Electronics, Inc.; Gold Prospectors Association of America, Inc.; Horizon Distributing Corporation; Indian-Artifact Magazine, Inc.; Krause Publications; Lost Treasure, Inc.; Mid-Jersey Research & Recovery Club; Minelab Electronics, Pty. Ltd.; Modern Gold Miner's Association, Inc.; Mother Lode Research Center; National Society of Metal Detectorists, Inc.; North Coast Recovery Association of Ohio; People's Publishing Co., Inc.; Publisher's Press, Inc.; Roadrunner Prospectors Club, Inc.; Smith County Metal Detecting Association; Society for Documentation of Prehistoric America; South Mountain Relic and Coin Club; Tesoro Electronics, Inc.; Texas Council of Treasure Clubs; Treasure Coast Coalition, Inc.; Treasure Quest Magazine, Inc.; Tyndall Electronics, Inc.; and White's Electronics, Inc. See Brief of Amici Curiae, *supra* note 152, at 13-14.

152. *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

153. *Id.* at 1115.

154. See *supra* note 18 (providing the text of ARPA's interstate trafficking provision).

155. Under ARPA, an archaeological looter may be convicted under one or more than one of three prohibited act provisions. 16 U.S.C. §§ 470ee(a)-(c) (1988). ARPA's first prohibited act provides that:

No person may excavate, remove, damage, or otherwise alter or deface . . . any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under section 470cc of this title, a permit referred to in section 470cc(h)(2) of this title, or the exemption contained in section 470cc(g)(1) of this title.

Id. § 470ee(a).

ARPA's second prohibited act provides that:

No person may sell, purchase, exchange, transport, receive, or offer to sell, purchase, or exchange any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—

(1) the prohibition contained in subsection (a) of this section, or

(2) any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

Id. § 470ee(b); see also *supra* note 18 (providing the text of ARPA's third prohibited act, the interstate trafficking provision).

lands.¹⁵⁶ The interstate trafficking provision¹⁵⁷ establishes federal jurisdiction by requiring two components: a relationship to “interstate or foreign commerce” and a violation of state or local law.¹⁵⁸ The distinction between the jurisdictional basis of the provisions illustrates that the interstate trafficking provision is more relevant to an archaeological artifact obtained in violation of state or local law and its movement through interstate commerce than the location from which the archaeological artifact is removed.¹⁵⁹

Despite the argument that due to its distinct jurisdictional basis¹⁶⁰ ARPA’s interstate trafficking provision differs from the first two categories of prohibited acts,¹⁶¹ Gerber challenged the interstate trafficking provision as being inapplicable to private lands.¹⁶² Although the provision fails to mention public or Indian lands,¹⁶³ Gerber’s interpretation seems credible based upon a review of other provisions within the statute emphasizing ARPA’s application solely to public and Indian lands.¹⁶⁴ Although the language in these provisions supports ARPA’s qualification to public and Indian lands, other language within the statute suggests ARPA’s applicability to private lands.¹⁶⁵

Even in the event that no other statutory language supports ARPA’s applicability to private lands, this omission does not preclude ARPA’s

156. To be under the aegis of ARPA, both provisions require that the archaeological resource be located on public or Indian lands. 16 U.S.C. §§ 470ee(a), (b); *see also supra* note 155 (providing the text of ARPA’s first two categories of prohibited acts).

157. *See supra* note 18 (providing the text of ARPA’s interstate trafficking provision).

158. 16 U.S.C. 470ee(c); *see supra* note 18 (providing the text of ARPA’s interstate trafficking provision).

159. *See* Brief for Appellee at 22-23, *United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (No. 92-2741) [hereinafter Brief for Appellee].

160. *See supra* notes 154—82 and accompanying text (discussing the interstate trafficking provision’s distinct jurisdictional basis).

161. *See supra* note 155 (providing the text of ARPA’s first two categories of prohibited acts).

162. *United States v. Gerber*, 999 F.2d 1112, 1113 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

163. *See supra* note 18 (providing the text of ARPA’s interstate trafficking provision).

164. In ARPA’s Congressional findings and declaration of purpose section, it is stated that ARPA’s purpose “is to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands.” 16 U.S.C. § 470aa(b) (1988). Furthermore, ARPA’s savings provisions provide that “[n]othing in this chapter shall be construed to affect any land other than public land or Indian land.” *Id.* § 470kk(c).

165. In detailing the lands ARPA applies to, ARPA’s savings provisions provide that ARPA will not “affect the lawful recovery, collection, or sale of archaeological resources from land other than public land or Indian land.” *Id.* § 470kk(c). Read in the converse, this provision suggests that ARPA will be applicable if there is an *unlawful* “recovery, collection, or sale of archaeological resources” located somewhere other than public or Indian lands. *See id.*

applicability to private lands.¹⁶⁶ In fact, the omission may have been deliberate.¹⁶⁷ ARPA's interstate trafficking provision differs from the first two prohibited acts sections in that the interstate trafficking provision excludes the words "public and Indian lands."¹⁶⁸ This exclusion makes ARPA's interstate trafficking provision entirely different from the other two prohibited acts¹⁶⁹ and from ARPA as a whole.¹⁷⁰ Congress indicated when public and Indian lands were implicated throughout ARPA.¹⁷¹ By omitting the reference to public or Indian lands, Congress may have intended that the section apply to private as well as public and Indian lands.¹⁷² Such an omission may mean that ARPA's drafters were concerned with the movement of the artifacts, regardless of their origin. Despite this analysis, opponents to ARPA's applicability to private lands find that Congress inadvertently omitted any reference to public and Indian lands in the interstate trafficking provision.¹⁷³

The inclusion of the interstate trafficking provision as an additional prohibited act provision, with an independent jurisdictional basis,¹⁷⁴ indicates that Congress intended to encompass those artifacts taken from private lands. If Congress only intended ARPA's jurisdiction to extend over objects removed from public or Indian lands, the interstate trafficking provision would be superfluous.¹⁷⁵ Without this provision, ARPA would apply to objects removed from public or Indian lands. Consequently, the interstate trafficking provision would be rendered superfluous because

166. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (stating that when " 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' " (quoting *Russello v. United States* 464 U.S. 16, 23 (1983))).

167. The United States Government in its brief in *Gerber* asserted that "the very 'silence' of this provision proclaims forth, in the clearest possible tones, the intended scope of this prohibition, and its applicability to his conduct." Brief for Appellee, *supra* note 159, at 22.

168. See 16 U.S.C. § 470ee(c); *supra* note 18 (providing the text of the interstate trafficking provision).

169. See *supra* note 155 (providing the text of ARPA's first two categories of prohibited acts).

170. Brief for Appellee, *supra* note 159, at 22-23; see also *supra* notes 154-82 (comparing the interstate trafficking provision and other provisions of ARPA).

171. See *supra* note 164 (discussing provisions emphasizing ARPA's applicability to public and Indian lands).

172. Brief for Appellee, *supra* note 159, at 25.

173. *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). More specifically, the opponents of this interpretation find that reading ARPA as applicable to private lands is an "overzealous application of a statute in a manner wholly unintended by Congress." See Brief of Amici Curiae, *supra* note 148, at 8.

174. See *supra* notes 154-82 (discussing ARPA's independent jurisdictional basis).

175. Brief for Appellee, *supra* note 159, at 25.

the second prohibited act would cover an object being sold through interstate commerce by virtue of the objects originally having been removed from public and Indian lands.¹⁷⁶ Accordingly, if the sole purpose of the Act was to protect resources removed from only public and Indian lands, the interstate trafficking provision would have been redundant and unnecessary.¹⁷⁷

The different qualities of the interstate trafficking provision illustrate the very distinct function that it serves. Had the drafters only wanted the reference to interstate commerce to implicate public or Indian lands, the second prohibited act simply could have been integrated into the interstate trafficking provision.¹⁷⁸ The addition of the interstate trafficking provision created a "catch-all provision,"¹⁷⁹ whereby federal criminal penalties were affixed for violations of state and local laws.¹⁸⁰

Considering ARPA's interstate trafficking provision on its face and the uniqueness of this provision with respect to ARPA as a whole, ARPA can be found applicable to private as well as federal and Indian lands. There still exists, however, the overwhelming use of the phrase public and Indian lands throughout the statute.¹⁸¹ If a court interpreting ARPA on its face found that the dichotomy between ARPA's interstate trafficking provision and the use of the phrase public and Indian lands throughout the rest of the statute rises to the level of ambiguity, it would be appropriate to proceed to the next level of statutory interpretation requiring an examination of legislative intent.¹⁸²

3. *Giving Effect to the Legislative History: Deciphering Congress' Intent*

Under general principles of statutory interpretation, when reviewing an

176. *Id.*

177. *Gerber*, 999 F.2d at 1115.

178. The provision could have read:

No person may sell, purchase . . . any archaeological resource if such resource was excavated or removed from public lands or Indian lands in violation of—

- (1) the prohibition contained in subsection (a) of this section, or
- (2) any provision, rule, regulation, ordinance, or permit in effect under *State or local law, or* under any other provision of Federal law.

See Brief for Appellee, *supra* note 159, at 26 (inserting the words "under State or local law, or" into section 470ee(b)(2)); see also 16 U.S.C. § 470ee(b) (1988) (containing subsection (b)(2) in its present version).

179. *Gerber*, 999 F.2d at 1115.

180. *Id.* For other examples of federal statutes affixing penalties to state laws, see Mann Act, 18 U.S.C. §§ 2421-2424 (1988); Lindbergh Law, 18 U.S.C. §§ 10, 1201-1202 (1988 & Supp. 1992); and Hobbs Act, 18 U.S.C. §§ 1951-1957 (1988 & Supp. 1992).

181. Brief of Amici Curiae, *supra* note 148, at 8.

182. *Blum v. Stenson*, 465 U.S. 886, 896-97 (1984).

ambiguous statute, a court will consider the statute's legislative history in hopes of ascertaining the legislature's intent.¹⁸³ An inquiry into legislative intent requires an examination of what the statute meant to the members of Congress who enacted it.¹⁸⁴ Those groups opposed to ARPA's applicability to private lands believe that the Seventh Circuit's interpretation of ARPA in *Gerber* created a result "fundamentally at odds" with Congress' intent when enacting the legislation in 1979.¹⁸⁵

Congress enacted ARPA in 1979 as a response to the inadequacies of the Antiquities Act of 1906.¹⁸⁶ In the United States House of Representatives, ARPA's sponsor, Representative Udall, tried to emphasize in the boldest terms possible what ARPA was not intended to do.¹⁸⁷ Representative Udall's emphasis on ARPA's applicability solely to public and Indian lands is the most detrimental piece of legislative history to advocates of archaeological resource protection.¹⁸⁸ It is this language that Gerber relied upon in construing ARPA's interstate trafficking provision.¹⁸⁹

For ARPA to be found applicable to private lands, there must be evidence in the statute's legislative history of a concern for protecting archaeological resources as a whole, from whatever source derived. ARPA's enactment came amid the growth of the looting industry and in the face of potential extinction of the Nation's archaeological resources.¹⁹⁰ Congress was extremely frustrated by the inadequacies of the Antiquities Act¹⁹¹ as an enforcement tool against archaeological loot-

183. See *id.*; *United States v. Fairman*, 947 F.2d 1479, 1482 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1503 (1992). Today, the weight afforded to legislative history in general is questionable with a growing trend toward downplaying its importance and looking solely to the law on its face. *Conroy v. Aniskoff*, 113 S. Ct. 1562, n.12 (1993) (illustrating the debate among the Supreme Court Justices regarding legislative history); see also *supra* note 145 (stating that principles of statutory construction are in a state of flux). But see *supra* note 37 (discussing when some courts have found it important to consult legislative history).

184. SINGER, *supra* note 38, § 45.08, at 33.

185. Brief of Amici Curiae, *supra* note 148, at 8.

186. As one senator noted, "[t]he drafters of the 1906 act could not have anticipated the lucrative market in these artifacts." 125 CONG. REC. 21,240 (1979) (statement of Sen. Hatfield); see also *supra* notes 133—43 and accompanying text (discussing ARPA's legislative history).

187. 125 CONG. REC. 17,393 (statement of Rep. Udall); see *supra* note 138 and accompanying text (discussing Representative Udall's remarks).

188. See *supra* note 138 and accompanying text (providing Representative Udall's statements).

189. See Brief for Appellant, *supra* note 33, at 26.

190. During the course of ARPA's enactment, Representative Udall stated that one of ARPA's chief objectives is to counter thoughtless entrepreneurs who were "mak[ing] a fast buck with relatively low risk." 125 CONG. REC. 17,393.

191. See *supra* notes 42—63 and accompanying text (discussing the inadequacies of the Antiquities Act).

ers.¹⁹² During congressional debates, the drafters of ARPA indicated a desire to create an act that would remedy ineffective existing law.¹⁹³

Congress was confronted with an archaeological crisis at the time of ARPA's enactment.¹⁹⁴ Despite the fact that ARPA's legislative history repeatedly mentions public and Indian lands,¹⁹⁵ the legislative history also demonstrates that ARPA drafters' general policy objective was to protect all archaeological resources.¹⁹⁶ Hence, the legislative history contains statements supporting both sides of the argument surrounding ARPA. Whether statements by congressional leaders relating to ARPA's more general policy objectives¹⁹⁷ would outweigh the continual repetition of public and Indian lands throughout other congressional statements and committee reports remains unknown. In support of finding ARPA applicable to private lands, Congress' frequent reference to public and Indian lands arguably is not attributed to an intent to restrict ARPA solely to those lands, but merely is illustrative of the fact that the vast majority of archaeological sites are located on public and Indian lands.¹⁹⁸ Another reason that Congress may have repeatedly used public and Indian lands was to dispel any panic among private property owners who mistakenly might find ARPA invasive and infringing on their property rights.¹⁹⁹

192. Senator Hatfield remarked that "[t]he drafters of the 1906 act could not have anticipated . . . the use of bulldozers and backhoes in eliminating a piece of history to get a pot." 125 CONG. REC. 21,240 (statement of Sen. Hatfield).

193. Senator Bumpers stated that "[b]ecause of certain deficiencies in existing law, it has become evident that new authority is critically needed to insure adequate protection of these priceless resources." 125 CONG. REC. 21,239 (statement of Sen. Bumpers).

194. See *supra* notes 42-63, 133-43 and accompanying text (discussing the events leading up to ARPA's enactment).

195. See *supra* note 138 (containing the statement of Representative Udall concerning ARPA's applicability to public and Indian lands).

196. One statement evidencing this policy is that of Representative Pashayan. He remarked that "[t]he intent behind this act is to protect unique or one-of-a-kind items in a true archaeological setting." 125 CONG. REC. 17,395 (statement of Rep. Pashayan).

197. See *supra* note 196 (discussing ARPA's more general policy objectives).

198. This is the conclusion that Judge Posner reached in rejecting Gerber's arguments at the appellate level. *United States v. Gerber*, 999 F.2d 1112, 1115 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). Judge Posner further stated that it would have been "unlikely" and "parochial" for a Congress generally interested in the protection of archaeological artifacts to have confined its interests to artifacts removed solely from public and Indian lands. *Id.* at 1116.

199. The interests of private property owners are protected under ARPA. To violate ARPA's interstate trafficking provision, movement through interstate or foreign commerce in conjunction with a violation of state or local law must occur. See *supra* notes 154-82 and accompanying text (discussing ARPA's interstate trafficking provision). Arguably, if a private property owner finds an archaeological resource on his or her property and sells it in interstate commerce, he or she presumably has not violated ARPA because the requisite violation of state or local law does not occur.

4. Does Enforcement Result in a Conflict with Congress' Intent?

Even a facially unambiguous statute may warrant an examination of the legislative history to determine whether enforcement of the statute would be contrary to Congress' intent.²⁰⁰ Thus, assuming that a court finds ARPA's interstate trafficking provision to be applicable to private lands,²⁰¹ an obligation to consult ARPA's legislative history remains. The only legislative evidence favoring ARPA's applicability to private lands would be the statements that stand for the protection of archaeological resources, in general.²⁰² Furthermore, it is difficult to imagine that the drafters who addressed archaeological looting as "a major industry in crime"²⁰³ would condone the notion of a looter escaping ARPA's severe penalties merely because a looter removed the valuable artifacts from private lands. Were ARPA's interstate trafficking provision construed as applicable only to public and Indian lands, it arguably would produce a result at odds with congressional intent.²⁰⁴

D. Incorporating State Law into ARPA: Defining "Any"

Many states have implemented specific archaeological protection laws.²⁰⁵ In *United States v. Gerber*, Gerber challenged ARPA's reference in its interstate trafficking provision to a violation of "any provision, rule, regulation, ordinance, or permit in effect under State or local law."²⁰⁶ At the time of Gerber's indictment, no specific archaeological resource protection laws were in effect in the state of Indiana.²⁰⁷ Therefore, Gerber's alleged violation of state law fell under Indiana's criminal trespass and conversion statutes.²⁰⁸ Gerber challenged that the reference to any spe-

200. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (stating that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters' " (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))).

201. This is precisely the holding in *Gerber*. 999 F.2d at 1116-17.

202. See *supra* note 196 and accompanying text (discussing ARPA's more general policy objectives).

203. 125 CONG. REC. 21,240 (1979).

204. See *supra* note 196 (providing the statement of Representative Pashayan concerning the general intent behind ARPA).

205. See *supra* notes 86—100 and accompanying text (discussing various state archaeological protection laws).

206. See 16 U.S.C. § 470ee(c) (1988).

207. Indiana, subsequent to the Gerber violation, enacted the Indiana Historic Preservation Act to combat the problem of archaeological looting within the state. IND. CODE §§ 14-3-3.4-1 to .4-20 (1993).

208. *United States v. Gerber*, 999 F.2d 1112, 1113 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994); see *supra* note 128 and accompanying text (providing the text of Indiana's criminal trespass and conversion statutes).

cifically referred to those state laws dealing with archaeological resource protection, thereby placing the trespass and conversion statutes beyond the scope of the federal statute.²⁰⁹ The Seventh Circuit in *Gerber* explained that ARPA "is limited to cases in which the violation of state law is related to the protection of archaeological sites or objects."²¹⁰ Under this standard, Indiana's trespass and conversion laws sufficiently were related to the protection of Indian artifacts and other antiquities.²¹¹ Therefore, violation of these laws fell within the "state and local" law reference in ARPA's interstate trafficking provision.²¹²

Congress has the power to incorporate state laws into federal statutes.²¹³ Furthermore, Congress also can incorporate into state law both the present and future laws of the various states.²¹⁴ When incorporation results from the use of the Commerce Clause, however, a federal statute is not required to achieve national uniformity among the states.²¹⁵ In addition, Congress may refer to state law without incorporating it into the federal statutory scheme because Congress retains the power to exclude particular state laws from the incorporative effect of an act.²¹⁶ *Gerber* argued that the standard of incorporation enunciated by the Seventh Circuit, which requires a state or local law be "related" to the protection of archaeological sites or resources, is unworkable.²¹⁷ Yet, according to the Seventh Circuit, Indiana's laws of trespass and conversion, which include the objective of protecting Indian artifacts and other antiquities, are sufficient to satisfy the "related" standard.²¹⁸

In support of the contention that ARPA incorporates "any" state law and not just state archaeological protection laws, it is helpful to examine similarly designed statutes.²¹⁹ For instance, in the Lacey Act,²²⁰ which

209. *Gerber*, 999 F.2d at 1113.

210. *Id.* at 1116.

211. *Id.*

212. *Id.*; see also *supra* note 18 (providing the text of the interstate trafficking provision).

213. *United States v. Sharpnack*, 355 U.S. 286 (1958). The Court stated that "[w]hether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as are the state laws themselves." *Id.* at 293.

214. *Id.* at 294.

215. See *United States v. Morrison*, 531 F.2d 1089, 1093 (1st Cir.), *cert. denied*, 429 U.S. 837 (1976).

216. *Sharpnack*, 355 U.S. at 294.

217. *Petition for Writ of Certiorari at 8-10, United States v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (No. 93-635).

218. *United States v. Gerber*, 999 F.2d 1112, 1116 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994).

219. See *Brief for Appellee, supra* note 159, at 44.

220. 16 U.S.C. §§ 3371—3378 (1988); see also *infra* note 221 (providing the text of the Lacey Act).

regulates poaching, Congress chose to limit its incorporating language.²²¹ The Lacey Act explains in its definitional section that its use of “law” and “regulation” expressly refer to those laws specifically protecting fish and wildlife.²²² Unlike the Lacey Act, ARPA’s definitional section²²³ does not limit the incorporation of state law solely to archaeological protection laws.²²⁴ The absence of any limiting language supports the proposition that ARPA incorporates state laws extending beyond local archaeological protection laws.

E. *Dispelling the Void for Vagueness Argument*

Gerber also attacked ARPA’s interstate trafficking provision as being void for vagueness²²⁵ and therefore violative of his Fifth Amendment due process rights.²²⁶ When examining a statute as potentially void for vagueness a court may employ three paths of analysis. First, the court may find a statute void for vagueness if it does not provide adequate notice of the prohibited conduct.²²⁷ Second, the court may determine whether the statute permits enforcement that is either arbitrary or discriminatory.²²⁸ Finally, the court may examine whether the statute provides “sufficient breathing space for First Amendment rights.”²²⁹ Both the first and second types of analysis are implicated in raising a void for vagueness chal-

221. The Lacey Act provides, “[i]t is unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State.” 16 U.S.C. § 3372(a)(2) (1988). This language is similar to ARPA’s interstate trafficking provision. See *supra* note 18.

222. The definitional section provides that the terms law and regulation each mean laws and regulations that “regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.” 16 U.S.C. § 3371(d).

223. See 16 U.S.C. § 470bb (1)-(7) (1988). In this section, the terms archaeological resource, Federal land manager, public lands, Indian lands, Indian tribe, person, and State are defined. *Id.* The definition of “State” is more general than the definition under the Lacey Act and does not focus on the reference to state law. *Id.*

224. See *supra* note 223 (stating that a specific type of state law is not specified under ARPA).

225. See Note, *supra* note 32, at 67 (providing an extensive overview of the void for vagueness doctrine).

226. Brief for Appellant, *supra* note 33, at 38. When a statute is challenged as void for vagueness, the challenger is appealing to “the due process clauses of the Fifth Amendment (when a federal statute is involved) and the Fourteenth Amendment (when a state statute is involved).” WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 2.3, at 90 (2d ed. 1986).

227. See LAFAVE & SCOTT, *supra* note 226, § 2.3, at 92; see also David W. Gartenstein & Joseph F. Warganz, Note, *RICO’s “Pattern” Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 504-05 (1990) (examining Justice Scalia’s implication that RICO’s pattern requirement may be subject to constitutional challenges on grounds of vagueness).

228. See LAFAVE & SCOTT, *supra* note 226, § 2.3(a), at 92.

229. *Id.*

lenge under ARPA.²³⁰

One of the principle objectives underlying the void for vagueness doctrine is to determine whether a statute provides adequate notice and fair warning.²³¹ The constitutional standard employed to determine notice is derived from *Connally v. General Construction Co.*²³² In *Connally*, the Supreme Court stated that if "men of common intelligence must necessarily guess at its meaning and differ as to its application," a statute will be declared unconstitutionally vague.²³³ Moreover, if a statute regulates members of a certain trade or business, Congress need only use terms clear enough for people in that specific trade or business.²³⁴

By using the circumstances surrounding Gerber's conviction as an example, an analysis of ARPA on its face²³⁵ seems to indicate that ARPA applies to private lands. Also, an examination of the circumstances surrounding Gerber's looting seems to indicate that Gerber was on notice as to this applicability.²³⁶ Clearly, the precautions taken by archaeological looters, including visiting sites at night and disguising themselves with government uniforms,²³⁷ suggest that archaeological looters are aware of

230. Brief for Appellant, *supra* note 33, at 39.

231. *See id.*

232. 269 U.S. 385 (1926).

233. *Id.* at 391. Other court have adopted this test. *See, e.g.,* *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (finding a California statute, requiring persons who loiter or wander on the streets to identify themselves and account for their presence to peace officers, unconstitutionally vague); *Smith v. Goguen*, 415 U.S. 566, 578 (1974) (finding a Massachusetts flag-misuse statute void for vagueness); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (finding a Jacksonville vagrancy ordinance void for vagueness); *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (finding New Jersey's anti-gang statute vague and indefinite).

234. LAFAVE & SCOTT, *supra* note 226, § 2.3, at 92. If Gerber is considered one in the "trade or business" of archaeological looting, ARPA's terms need only be defined well enough to enable an archaeological looter to be on notice of the statute. *Cf. Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 498, 502 (1925) (finding that where the term "kosher" was defined as "'products sanctioned by the orthodox Hebrew religious requirements,'" the definition was sufficiently clear to those in the relevant trade).

235. *See supra* notes 154-82 and accompanying text (discussing ARPA's interstate trafficking provision on its face).

236. A construction worker on a highway construction site tipped off Gerber as to the location of the site. *United States v. Gerber*, 999 F.2d 1112, 1114 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994). The property on which Gerber discovered the artifacts was owned by General Electric. *Id.* After being notified about the valuable artifacts on the site, Gerber paid the construction worker for revealing the location of the mound. *Id.* During numerous subsequent visits, under cover of darkness, he removed hundreds of artifacts from the site. *Id.* On Gerber's last visit, a General Electric security guard ejected Gerber. *Id.* Gerber's conduct is typical of archaeological looters who "sneak into the ruins, often outfitted with metal detectors and fake government uniforms." Neary, *supra* note 8, at 59.

237. Neary, *supra* note 8, at 59.

the law. Furthermore, Gerber acknowledged that he entered upon private property without the owner's permission and, consequently, violated Indiana's criminal laws of trespass and conversion.²³⁸ The components of ARPA's interstate trafficking provision spell out the requirements of movement through interstate commerce and a requisite violation of state or local law.²³⁹ Gerber's subsequent sale of the artifacts in interstate commerce²⁴⁰ and his acknowledgment of the violation of Indiana law²⁴¹ placed him in violation of ARPA.

The void for vagueness doctrine is intended to protect those who truly are not on notice of a statute.²⁴² It is highly doubtful that when the Supreme Court stated in *Grayned v. City of Rockford*²⁴³ that "[v]ague laws may trap the innocent,"²⁴⁴ the Court meant to protect archaeological looters who likely are well aware of the law and its application. It is difficult to allow Gerber's void for vagueness challenge to stand because he clearly committed trespass and conversion.²⁴⁵ A typical archaeological looter who excavates under the cover of nightfall²⁴⁶ cannot credibly claim to lack sufficient notice of the language of an archaeological statute.²⁴⁷ Furthermore, in considering Gerber's challenge, courts will not treat a void for vagueness challenge favorably when a defendant's conduct is particularly inexcusable or the challenge appears to be merely a pretext for evading a statute.²⁴⁸

238. *Gerber*, 999 F.2d at 1114.

239. *See supra* notes 154—82 and accompanying text (discussing ARPA's jurisdictional basis and its interstate trafficking provision).

240. Shortly after the excavations, Gerber sold the artifacts at his annual "Indian Relic Show of Shows" in Kentucky. *Gerber*, 999 F.2d at 1114.

241. *Id.*

242. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (finding vagrancy ordinance clearly insufficient to provide people with ordinary intelligence fair notice that their contemplated conduct was forbidden by statute).

243. 408 U.S. 104 (1972).

244. *Id.* at 108.

245. Judge Posner emphasized, in the Seventh Circuit's decision, that Gerber's wrongdoing was a basic illegal act not only under ARPA, but under common law principles as well. *Gerber*, 999 F.2d at 1115-16. Judge Posner stated that

there is no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if you find them

Whatever the rightful ownership of the mound and its contents under current American law, no one suggests that . . . Gerber obtained any rights to the artifacts in question.

Id.

246. *See supra* note 236 (describing a typical archaeological looter's excavation).

247. *Cf.* John Neary, *Project Sting*, *ARCHAEOLOGY*, Sept.-Oct. 1993, at 52, 52 (recounting sting operations used to catch traffickers).

248. *LAFAVE & SCOTT, supra* note 226, § 2.3, at 93.

III. THE FUTURE OF ARPA: KEEPING IT ALIVE

Archaeological sites are continually targets of unauthorized removal and excavation, despite efforts by government and tribal agencies.²⁴⁹ Due to the remarkable commercial value of these archaeological artifacts,²⁵⁰ looters are encouraged to circumvent ARPA to receive ever increasing prices for the objects they steal.²⁵¹ Without strong enforcement through ARPA, archaeological resources in the United States may be threatened.

Courts must consistently interpret ARPA as applicable to private lands for it to be effective. By finding that ARPA's language is vague or inapplicable to private lands, a court may sanction archaeological looting only in some situations. With so many archaeological looting incidents remaining undetected,²⁵² a weakened ARPA would be disastrous for the United States' archaeological preservation objectives.²⁵³

The drafters of ARPA sought to clarify the deficiencies of the Antiquities Act and attempted to be painstakingly clear in drafting ARPA.²⁵⁴ While doing so, the drafters did not anticipate every potential problem of the statute. Although ARPA in its present state may be deemed "workable,"²⁵⁵ any discrepancies as to the language of ARPA's interstate trafficking provision could render ARPA powerless in certain instances.²⁵⁶ In fact, commentators predict that further challenges to ARPA will confront the courts.²⁵⁷ To ensure that ARPA remains an effective archaeological resource protection mechanism, Congress should clarify the language of the interstate trafficking provision.

249. HUTT, *supra* note 60, at 13.

250. See *supra* notes 1-10 and accompanying text (discussing archaeological devastation).

251. Prices vary for Native American artifacts based upon the geographical location where they are sold. A Mimbres pot sold near the site may bring anywhere from \$200 to \$1,000. See Neary, *supra* note 8, at 59. If this same pot is sold in Albuquerque, the pot can demand close to \$45,000. *Id.* The same pot may sell for \$95,000 when auctioned off in New York. *Id.* In Europe, prices as high as \$400,000 for these pots have been reported. *Id.*

252. The National Park Service has estimated that reported cases of looting represent only about a quarter of the actual cases in any particular year. *Id.* at 58.

253. In response to increased archaeological looting, one archaeologist remarked that "[t]he really sad thing is that we'll never know what's been taken or how it relates to what remains in the ground." Arden, *supra* note 4, at 383.

254. See *supra* notes 133-43 and accompanying text (discussing ARPA's legislative history).

255. HUTT, *supra* note 60, at 51.

256. See *United States v. Gerber*, 999 F.2d 1112, 1116-17 (7th Cir. 1993) (providing an analysis of the consequences of Mr. Gerber's construction of ARPA), *cert. denied*, 114 S. Ct. 878 (1994).

257. HUTT, *supra* note 60, at 29.

Though a congressional amendment expressly including the term private lands in the interstate trafficking provision would be an ideal solution to the problem,²⁵⁸ the most realistic way to clarify ARPA's terms would be to revise uniform regulations. Currently, federal agencies have enacted a series of uniform regulations to build upon ARPA.²⁵⁹ Revision of the uniform regulations to incorporate the term private lands could remedy any discrepancy as to ARPA's applicability to private lands. Furthermore, any regulation proposed should clarify the type of state and local law that is incorporated into the interstate trafficking provision.

This regulation should be entitled "ARPA Criminal Provisions." The language of the regulation, to be effective, must reiterate ARPA's three prohibited acts provisions.²⁶⁰ To effectively clarify, the objective of ARPA, the regulation would have to specify that ARPA's jurisdiction may be derived from the interstate movement of artifacts taken from any land, including private lands.²⁶¹ Additionally, revised regulations could dispel any confusion over what type of state law may be incorporated.²⁶² As a result of *Gerber*, laws "related" to archaeological resource protection may be incorporated,²⁶³ but this interpretation may not make full use of the broad language of "any" in the statute.²⁶⁴ More specific regulatory language pinpointing where to draw the line as to incorporation of state laws may avoid any disagreement as to the language in the interstate trafficking provision.

With the Supreme Court of the United States denying certiorari to the *Gerber* case and the Seventh Circuit as the only court to scrutinize ARPA's interstate trafficking provision,²⁶⁵ ARPA is safe for now. A regulation addressing the potential deficiencies of ARPA can only serve as a precautionary measure in ensuring its continued effectiveness. With

258. An amendment to ARPA would most likely not be a priority for Congress. This is principally because no court has rendered any provisions of ARPA defective and ARPA was recently amended in 1988.

259. See *supra* note 74 (listing regulations promulgated under ARPA).

260. See *supra* notes 18, 155 (providing the text of ARPA's prohibited acts provisions).

261. See *supra* notes 154—82 and accompanying text (discussing ARPA's interstate trafficking provision and its jurisdictional basis).

262. See *supra* notes 205—24 and accompanying text (discussing the incorporation of state law within ARPA's interstate trafficking provision).

263. *United States v. Gerber*, 114 S. Ct. 878 (1994).

264. See 16 U.S.C. § 470ee(c) (1988). The *Gerber* court rejected the notion that a violation of "any" state law in conjunction with movement through interstate commerce would cause a violation of ARPA. *Gerber*, 999 F.2d at 1116. For instance, the Seventh Circuit reasoned that if an object was obtained lawfully, but its rightful owner failed to pay the applicable sales tax or an overweight vehicle was used in the transport of the object, no violations of ARPA's interstate trafficking provision and state law would have occurred. *Id.* This poses a problem with respect to defining the boundaries of the word "any."

265. *Gerber v. United States*, 114 S. Ct. 878 (1994).

ARPA's statutory language being arguably ambiguous and warranting an examination of legislative intent, it is tempting for archaeological looters to challenge ARPA's applicability to private lands in the circuit courts. As a preventive measure, regulations to ARPA must be revised to better clarify the scope of the statute.

IV. CONCLUSION

Congress enacted ARPA to compensate for the inadequacies of past archaeological protection laws. With the Nation's resources being pilaged at an increasingly disturbing rate the effectiveness of ARPA is imperative. Any detection of ambiguity in the statute only would allow some looters to avoid ARPA's penalties. Although these instances may be infrequent, the resources involved in any of these situations could be priceless to archaeologists, Native Americans, and to the study of our Nation's heritage. To keep ARPA alive, judicial interpretation must follow the precedent of the Seventh Circuit. ARPA's applicability to private lands and its incorporation of any state law should be found to be apparent on its face and in light of the statute's legislative history.

To date, the Seventh Circuit is the only court to ponder the meaning of ARPA's interstate trafficking provision. The Seventh Circuit's decision upholds the spirit of ARPA and preserves its vitality for the future. If Gerber's view that ARPA is not applicable to private lands is ever adopted, the United States will be placing undiscovered, valuable objects located on private lands in danger. To preserve ARPA, the terms of the interstate trafficking provision should be clarified.

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