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Objects of Controversy: The Native American Right to Repatriation

Keywords

Indians of North America -- Antiquities, Repatriation of cultural property

OBJECTS OF CONTROVERSY: THE NATIVE AMERICAN RIGHT TO REPATRIATION

STEVEN PLATZMAN

INTRODUCTION

Before the arrival of the European colonists, Native American culture dominated the North American continent.¹ As the dominion of the European settlers expanded westward, friction intensified between the Native American population and the invading foreign peoples.² The settlers wished to cultivate the land and fulfill the manifest destiny of the American nation.³ The Native Americans, on the other hand, wanted to retain the land and develop their cultural heritage.⁴ Inevitably, the increased tension led to armed conflicts.⁵ Throughout the nineteenth century, the European colonists

1. See F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 139-40* (1962) (stating that difficulties faced by United States government in formation of Indian policy grew out of fact that Native Americans were in North America when Europeans arrived and their presence formed an obstacle to advancement of settlers moving westward); see also W. COFFER, *PHOENIX: THE DECLINE AND REBIRTH OF THE INDIAN PEOPLE* iii, iv (1979) (observing that diverse and complex Native American societies existed throughout Americas, with one million Native Americans speaking more than 300 languages inhabiting area that is now United States).

2. See F. PRUCHA, *supra* note 1, at 188-89 (noting that settlers and Native Americans confronted each other on American frontier and committed numerous violations of individual rights including frequent murders and robberies).

3. See F. PRUCHA, *supra* note 1, at 143 (stating that settlers were disinterested in legal theory of preemptive rights, *jus gentium*, rather, settlers saw Indians' rich lands and wanted to claim land as their own). Prucha also highlights a letter from John Sevier to James Ore dated May 12, 1798 that notes the settlers' interest in cultivating the frontier. *Id.*; see also F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 74 (1982 ed.) (noting that rapid growth of nation by 1880 created demand for territorial expansion and extinguishment of native land title).

4. See F. PRUCHA, *supra* note 1, at 139 (commenting that conflict between whites and Native Americans was basically conflict over land and that land outweighed all other considerations in white/Native American Indian relations); see also Abel, *The History of Events Resulting in Indian Consolidation West of the Mississippi*, 1 ANN. REP. AM. HIST. A. 235, 337 (1906) (citing Journal of Proceedings at Broken Arrow on Dec. 7, 1824) (quoting statement of Creek chief rejecting proposed relocation, based on belief that "ruin is the almost inevitable consequence of a removal beyond the Mississippi").

5. See F. PRUCHA, *supra* note 1, at 188 (stating that innumerable violations of personal and property rights occurred when white and red races met on American frontier); H. JACKSON, *A CENTURY OF DISHONOR* 339 (1881 & photo. reprint 1965).

systematically eliminated Native American resistance, uprooted whole nations, and virtually destroyed the indigenous culture.⁶ The turbulence of the time period and the subjugation of the Native American populace resulted in the loss of four distinct types of cultural objects: (1) associated funerary objects: items believed to have been placed with individual human remains as part of death rites or ceremonies; (2) unassociated funerary objects: property related to death rites or ceremonies that can be proven, by a preponderance of the evidence, to have been removed from specific burial sites of a particular Indian tribe; (3) sacred objects: specific ceremonial objects which are required by traditional Native American religious leaders and present day religious adherents for the practice of traditional Native American religions; and (4) objects of cultural patrimony: objects having continuing historical, traditional, and cultural importance central to Native American culture and whose inherent qualities make the items inalienable communal property.⁷ Although

The history of the white man's connection with the Indians is a sickening record of murder, outrage, robbery, and wrongs committed by the former, as a rule, and occasional savage outbreaks and unspeakably barbarous deeds of retaliation by the latter, as the exception.

Id.; see also F. COHEN, *supra* note 3, at 78 (discussing military campaign led by Andrew Jackson against Creek Indians, which ultimately led to defeat of Creeks and forfeiture of one-half of all Creek territory).

6. See F. PRUCHA, *supra* note 1, at 213 (noting that peaceful coexistence of Indian and European cultures was impossible in minds of those who created government policy). Prucha provides a letter dated September 29, 1818 from Secretary of War Calhoun to the Creek agent stating the intention of the United States government to eradicate Native American culture and to force upon Native Americans the ways of "civilized" life. *Id.*; see also F. COHEN, *supra* note 3, at 79 (noting that over thirty years following the War of 1812, Indian treaty making was directed toward removing tribes to western territory in order to create vast areas for white settlement and minimize sovereignty conflicts arising from presence of Indian nations within state boundaries). Over substantial opposition, Congress passed the Indian Removal Act on May 28, 1830, authorizing the President to exchange territory west of the Mississippi River for eastern tribal lands. *Id.* at 81. See generally R. BERKHOFER, JR., *THE WHITE MAN'S INDIAN* 134-45 (1978) (discussing theories and images of American Indians underlying United States Indian policy from its colonial foundations to modern period); G. FOREMAN, *INDIAN REMOVAL* 269 (new ed. 1953) (exploring removal of Choctaw, Creek, Chickasaw, Cherokee, and Seminole tribes); H. JACKSON, *supra* note 5, at 26 (documenting broken promises, inconsistent policies, massacres, and other atrocities by United States in treatment of Native Americans and effect on particular tribes, including Delaware, Cheyenne, Sioux, and Cherokee); S. TYLER, *A HISTORY OF INDIAN POLICY* 32-43 (1973) (tracing history of United States Indian policy from Spanish roots through early 1970s).

7. See Native American Grave Protection and Repatriation Act, Pub. L. No. 101-601, § 2, 104 Stat. 3048, 3049 (1990) (to be codified at 25 U.S.C. § 3001) (defining associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony). The Act provides that:

(3) "cultural items" means human remains and—

(A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other

the twentieth century witnessed a cessation of the armed conflict and an amelioration of the American population's attitude toward Native Americans, the loss of Native American cultural property continues.⁸

The Native American cultural objects exhibited and stored in museums are of vital importance to the Native American community. Many of these artifacts are integral elements of religious ceremonies.⁹ Without these items, adherents of traditional Native Ameri-

items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

- (B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,
- (C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and
- (D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

Id.; see also *Native American Grave and Burial Protection Act (Repatriation)*; *Native American Repatriation of Cultural Patrimony Act*; and *Heard Museum Report: Hearings on S. 1021 and S. 1980 Before the Senate Select Comm. on Indian Affairs, 101st Cong., 2d Sess. 193 (1990)* [hereinafter *Senate Hearings*] (statement of Walter Echo-Hawk, Native American Rights Fund) (citing D. COLE, CAPTURED HERITAGE: THE SCRAMBLE FOR NORTHWEST COAST ARTIFACTS 286-311 (1985)).

During the half-century or so after 1875, a staggering quantity of material, both secular and sacred—from spindle whorls to soul-catchers—left the hands of their native creators and users for the private and public collections of the European world. The scramble . . . was pursued sometimes with respect, occasionally with rapacity, often with avarice. By the time it ended there was more Kwakiutl material in Milwaukee than in Mamalilikulla, more Salish pieces in Cambridge than in Comox. The city of Washington contained more Northwest Coast material than the state of Washington and New York City probably housed more British Columbian material than British Columbia itself.

* * * * *

In retrospect it is clear that the goods flowed irreversibly from native hands to Euro-American ones until little was left in possession of the descendants who had invented, made, and used them.

Id.

8. See *infra* notes 132-33 (discussing activity of pothunters and development of multi-million dollar industry for Native American artifacts).

9. See Note, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 125-27 (1979) (explaining that religion pervades every aspect of Native American life, and cultural items, such as objects of art, can rarely be separated from Native American religion). Chief Oren Lyons of the Onondaga reiterates that religion and Native American cultural objects are intertwined. *Id.* (citing Arts Advoc., Jan. 1975, at 2, col.

can religions find it impossible to exercise their ceremonial rites.¹⁰ The failure to perform these rituals rips at the fabric of Native American culture and inevitably leads to the destruction of the cultural integrity of individual Native American societal groups.¹¹ Fur-

4). "Religion, as it has been and is still practiced today on the reservation, permeates all aspects of tribal society. The language makes no distinction between religion, government, or law. Tribal customs and religious ordinances are synonymous. All aspects of life are tied in to one totality." *Id.* Lee Lyons, a member of the Onondaga Nation, in his testimony before the Senate Select Committee on Indian Affairs, further established the interrelationship of Native American society, cultural items, artifacts, and religion. *American Indian Religious Freedom Act: Hearings on S.J. Res. 102 Before the Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 115-16 (1978) (statement of Lee Lyons, member of the Onondaga Nation). He stated, for example, that the wampum represents the Iroquois' way of life, religion, culture, and language. *Id.*

Tribal members of the Iroquois Nation's Onondaga tribe assembled belts from purple and white clam and conch shells during the late sixteenth century. *See* A. MOLLOY, WAMPUM 18-25 (1977) (observing that metal drills, "muxes," introduced by Dutch traders, allowed expanded production of more decorative beads and that increased quality of beads fostered use of Iroquois wampum as commodity in fur trade); N.Y. Times, Mar. 11, 1971, at 44, col. 5 (commenting that wampum belts are necessary for religious services in honor of planting, harvest, midwinter, and summer festival of green corn). These belts are an integral part of the culture, for symbols woven into the belts constitute the Onondagas' only recorded history. Arts Advoc., Jan. 1975, at 1, col. 1. In addition, Chief Irving Powless has referred to the wampum belts as "our religion and law combined." N.Y. Times, Mar. 11, 1971, at 44, col. 6.

In 1899, the Iroquois Nation lost a court battle against the New York State Museum at Albany for the possession of twenty-six wampum belts. *Onondaga Nation v. Thacher*, 29 Misc. 428, 433-34, 61 N.Y.S. 1027, 1032-33 (Sup. Ct. 1899), *aff'd*, 53 A.D. 561, 65 N.Y.S.2d 1014 (App. Div. 1900), *aff'd*, 169 N.Y. 584, 62 N.E. 1098 (1901), *appeal dismissed on other grounds*, 189 U.S. 306 (1903). The Iroquois continually demanded the return of the wampum. Note, *supra*, at 126. Under pressure from the public, the New York State legislature passed an act providing for the return of five of the wampum belts to the Onondaga. N.Y. INDIAN LAW § 27 (McKinney 1899).

10. *See American Indian Religious Freedom: Hearings on S.J. Res. 102 Before the Select Comm. on Indian Affairs*, 95th Cong., 2d Sess. 3, 4 (1978) (statement of Sen. Abourezk, Chairman of the Senate Select Committee on Indian Affairs). The Senator explained that Native Americans imbue religious significance into objects. *Id.* at 4. Because they are sacred, these objects have powers that are necessary to exercise religious rites. *Id.* Thus, the objects are also necessary for religious survival and the maintenance of the cultural integrity of the Native American peoples. *Id.*

11. *Id.* The Hopi Indians are an excellent example of a Native American society deeply affected by the loss of religious objects. Goodwin, *Raiders of the Sacred Sites*, N.Y. Times, Dec. 7, 1986, at 65, col. 1 (discussing threat to way of life of 9,000 member Hopi tribe resulting from inability to worship due to theft of sacred masks); *A Way of Life Stolen with Hopi Treasures*, Chi. Tribune, Mar. 25, 1985, at 1, Zone C (reporting on lost Hopi religious masks). The article quoted Neilson Honyaketewa, high priest of Soyal religious society, as stating, "Without our religion, we have nothing to live up to. Without our masks, the religion will die." More specifically, the sacred objects alluded to by the high priest are collectively called "talatumsi" or Dawn Woman. McDonald, *The Long Night of Dawn Woman*, Dallas Morning News, June 10, 1990, § F, at 13, col. 1. The talatumsi are made from cottonwood roots with small faces painted on the ends. *Id.* at 13, col. 2. The talatumsi are part of the "Wuwuchim" ceremony, a sixteen day rite of passage that marks the beginning of a young man's education in Hopi customs. *Id.* The ceremony dates back in some form approximately 400 years. *Id.*

Since the disappearance of the talatumsi, young men, discouraged because they cannot fully participate in all religious ceremonies until they are initiated, have drifted away from Hopi tradition. Chi. Tribune, *supra*, at 1, Zone C. Furthermore, a whole generation of men is being passed by, uninitiated in the Hopi religious ceremonies. McDonald, *supra*, at 13, col. 1. The most drastic scenario, but one that is entirely possible, is the end of Hopi ceremonial culture, nothing less than the death of an ancient culture. *Id.*

The destruction of the Hopi ceremonial culture is evidenced by the decline in religious

thermore, many Native Americans believe that an elemental connection exists between these objects and the societal health of the Native American population.¹² Even if the evidence connecting Native American social problems with the repatriation issue were inconclusive, it is clear that the loss of their property inflicts deep distress and anguish on the Native American community.¹³ Finally, Native American leaders argue that until the cultural objects possessed by the museum community are repatriated to the appropriate descendants, the efforts of tribal governments to provide for their people and remedy the afflictions of twentieth-century society are doomed to failure.¹⁴

For decades, individual Native Americans, tribal groups, and their third-party representatives demanded the repatriation¹⁵ of Native American cultural property.¹⁶ For the most part, the United States

observance. Chi. Tribune, *supra*, at 1, Zone C. Each of the 12 Hopi villages should have 7 religious societies, each with its own sacred masks and artifacts. *Id.* Only three villages, however, continue to have religious societies. *Id.*

12. *Native American Grave Protection and Repatriation Act: Hearings on H.R. 5237 Before the House Comm. on Interior and Insular Affairs*, 101st Cong., 2d Sess. 100-04 (1990) [hereinafter *House Hearings*] (statement of Arlouine Gay Kingman, Executive Director, National Congress of American Indians); *id.* at 112-15 (statement of Michael S. Haney, Chairman, Repatriation Committee of the United Indian Nations in Oklahoma). The leaders of the United Indian Nations in Oklahoma link their peoples' high alcoholism rate, soaring suicide rate, poor health rate, low educational achievement rate, and overall bleak economy to the current state of their Native American remains. *Id.* It is their belief that until the situation is remedied, the Native American population will continue to experience acutely the social ills of American society. *Id.*

13. *Senate Hearings, supra* note 7, at 370-72 (statement of Suzan Shown Harjo, President and Executive Director, Morning Star Foundation); *id.* at 53-61 (statement of Norbert Hill, Executive Director, American Indian Science and Engineering Society); *id.* at 47-48 (statement of Thomas R. White, Governor, Gila River Indian Community); *see House Hearings, supra* note 12, at 125 (statement of Councilman Patrick Lefthand, the Confederated Salish and Kootenai Tribes of the Flathead Nation) (stating that commerce in Native American artifacts is abhorrent to Native Americans, and protection of funerary and sacred objects is crucial to well-being of Native American culture).

14. *House Hearings, supra* note 12, at 112-15 (statement of Michael S. Haney, Chairman, Repatriation Committee of the United Indian Nations in Oklahoma).

15. *See* 13 OXFORD ENGLISH DICTIONARY 632 (2d ed. 1989) (defining repatriation as return or restoration to one's own country).

16. H.R. REP. NO. 877, 101st Cong., 2d Sess. 10 (1990) (observing that, for many years, Indian Tribes have attempted to have remains and funerary objects of ancestors returned); *see Onondaga Nation v. Thacher*, 29 Misc. 428, 429, 61 N.Y.S. 1027, 1028 (Sup. Ct. 1899) (providing historical example of Native American efforts to recover artifacts within possession of museum). The litigation involved a dispute between the Onondaga Nation and John Thacher, the mayor of Albany, New York. *Id.* In the ensuing court battle the Indians failed to reclaim their wampum. *Id.* at 433, 61 N.Y.S. at 1032. Due to public pressure and continuing demands made by the Onondaga Nation, however, the wampum belts were conditionally returned to the tribe in 1971. Note, *supra* note 9, at 126.

Walter Echo-Hawk, attorney for the Native American Rights Fund, notes that in the area of federal Indian law, courts have traditionally distinguished individual from communal property. Echo-Hawk, *Museum Rights v. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 442-43 (1986). The wampum belts at issue in *Onondaga Nation v. Thacher* are the paradigmatic example of communal property. *Id.* at 443-44. Where tribal law indicates that the individual Native American has

Government and the museum community ignored their pleas and refused to negotiate the repatriation issue.¹⁷ Recently, the debate between the Native Americans and the museums concerning the re-

no title to communal property, the individual Native American has no authority to alienate such property. *Id.* at 444. Accordingly, in such situations where an individual Native American has alienated communal property, tribal groups would have a greater chance of recovering the lost artifacts.

17. See FEDERAL AGENCIES TASK FORCE, UNITED STATES DEP'T OF THE INTERIOR, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 78 (1979) [hereinafter RELIGIOUS FREEDOM REPORT] (noting failure of museums and agencies to respond to Native American claims concerning sacred objects); see also Note, *supra* note 9, at 125 (commenting on reluctance of museums to return Indian artifacts); *Senate Hearings, supra* note 7, at 181 nn.8 & 9 (discussing problems faced by Larsen Bay Villagers and Pawnee tribe in recovering cultural items). As museums did not face sanctions from the Federal Government or the judiciary, they had no motivation to initiate the repatriation process. RELIGIOUS FREEDOM REPORT, *supra*, at 78. The Native Americans depended upon the good will and benevolence of the museums for the return of cultural artifacts, but this good will was seldom exhibited. See *infra* note 32 and accompanying text (noting that Native Americans were subject to whim of museums during nineteenth century).

Generally, Native Americans have had only limited success in negotiating the return of two types of items. First, most attempts to reacquire cultural items have been unsuccessful even though cultural items are considered objects of inalienable cultural patrimony. See Note, *supra* note 9, at 125 (stating that museums have often ignored formal, nonlegal requests for the return of relics, relying on legal and practical grounds); *supra* note 7 (defining cultural patrimony). A leading example of a reacquired object of inalienable cultural patrimony is the Iroquois wampum belts. See *supra* note 16 and accompanying text (discussing wampum belts and their significance to Iroquois Nation); Note, *supra* note 9, at 132 (noting that despite wampum belt's obvious classification as inalienable communal property it took more than seventy-five years to regain possession of item).

A second class of objects that has proved difficult to reacquire are those taken from Indian tribes illegally despite the existence of specific evidence, such as written documentation, of a tribe's ownership and the museum's illegal acquisition. Suro, *Zunis' Effort May Alter Views on Indian Artifacts*, N.Y. Times, Aug. 13, 1990, § A, at 1, col. 1. An example illustrating this scenario is the Zuni war god stored in the Denver Art Museum. *Id.*

The Zuni tribe's efforts to recover its war god is perhaps the most publicized example of fruitful Native American negotiation. See Suro, *supra*, at 1, col. 1 (stating that nationwide campaign by Zunis has been most successful of Native American efforts to regain artifacts and human remains); Ball, *Zuni Indian War Gods Left to Decay At Secret Shrine*, Daily Tel., Aug. 14, 1990, at 10, col. 8 (discussing success of Zuni legal battles and persuasive efforts to obtain return of war gods). Zuni war gods are wooden pole-like carvings, often adorned with eagle feathers. Note, *supra* note 9, at 127. They stand two to three feet tall, austere and cylindrical, with rounded heads and sharp, stark painted faces. Ball, *supra*, at 10, col. 8.

The tradition of creating the war gods, or A'hayuta, is performed by members of the Deer and Bear clans. Note, *supra* note 9, at 126-27 (citing 47 U.S. BUREAU OF ETHNOLOGY ANN. REP. 64, 526 (1932)). The carving occurs at an annual ceremony held at the winter solstice; others are made on rare special occasions. *Id.*; Suro, *supra*, at 1, col. 1. After the ceremonies, the war gods are placed on specific mountain peaks, mesas, and caves on Zuni land. *Id.* The images created represent the twin brothers Masewi and Oyoyewi, the symbols for courage, strength, and virtue. *Id.* Each war god serves as a guardian for the tribe until he is relieved by a new one, and then the old one must remain, contributing its strength until it decays into dust. Suro, *supra*, at 1, col. 1.

In the early nineteenth century, white scholars and museum collectors visiting the Zuni took war god statues for future study and for public display. *Id.* Since that time, and particularly during the 1920s and 1930s when the war gods were popular exotic items in fashionable circles, the Zuni tribe has lost many to unscrupulous collectors. *Id.*

The Zunis began trying to recover their statues in 1978. *Id.* They came across documentary evidence showing that a statue stored in the Denver Art Museum was illegally taken from the tribe by a nineteenth-century surveyor. *Id.* Since 1978, the Zunis have recovered 38 war god statues. *Id.* They are negotiating for the return of every war god known to be in the

patriation issue intensified.¹⁸ The virulent nature of the controversy results from the conflicting positions taken by the parties. Native Americans assert their inherent right to regain control of their cultural objects.¹⁹ The museums, on the other hand, underscore their legal and ethical right to retain possession of their artistic collections.²⁰

Despite the concerns voiced by museum representatives, Congress reacted to Native American demands for repatriation and enacted the Native American Grave Protection and Repatriation Act of 1990 (Repatriation Act).²¹ The legislation directly addresses the repatriation issue and mandates the return of a large number of objects.²² While the Repatriation Act represents a step toward providing Native Americans with the right to control their cultural legacy, repatriation remains an unsettled issue for the Native American community.²³

hands of an American museum or collector. *Id.* at col. 2. This includes more than 50 statues, in 21 museums and 5 private collections. *Id.*

18. See H.R. REP. NO. 877, 101st Cong., 2d Sess. 10 (1990) (observing Native American interest in return of remains and funerary objects of ancestors and that heated debate is often sparked concerning relative rights of Native Americans and museums).

19. See Echo-Hawk, *supra* note 16, at 441-43 (positing inalienability of Native Americans' communal property).

20. See *Senate Hearings, supra* note 7, at 92 (statement of Tom Livesay, American Association of Museums) (propounding that fiduciary duties of museums require preservation and maintenance of collections in way that fulfills museum's purpose of public educational service); *id.* at 85 (outlining museums' general objections to legislation governing repatriation of Native American objects and specific objections to legislation proposed). First, the American Association of Museums believes adequate procedures are already available to facilitate requests for repatriation. *Id.* at 86. These procedures are codified in internal museum policies as well as in state and federal law. *Id.* at 87. Second, procedures already in place permit repatriation on a case-by-case basis and ensure the transfer of control and possession of cultural objects to the proper parties or party. *Id.* at 98-100. Third, a museum's primary mission is to further public education and enlightenment. *Id.* at 85. A museum's duty to the public militates against the depletion of museum collections. *Id.* at 92. Fourth, museums also have a responsibility to perform scientific research. *Id.* at 102-03. Any depletion of the collection would hinder research efforts. *Id.* at 103. Fifth, the museums foresee difficult and complex issues in determining legal title to Native American cultural property. *Id.* at 93. Issues raised may include (1) the type of object in question; (2) the relevant transaction and/or events that led to an object's current disposition; and (3) whether there are any relevant real property rights that may affect title. *Id.* at 94-95. Each of these issues may be answered in favor of the museum's retention of Native American cultural property. *Id.* at 95-100. Sixth, legislation involving repatriation threatens the prohibition against unconstitutional taking of property. *Id.* at 104.

21. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (to be codified at 25 U.S.C. § 3001) [hereinafter Repatriation Act].

22. See *infra* notes 155-90 and accompanying text (explaining Repatriation Act).

23. See Wash. Post, May 18, 1991, at C7 (reporting that in May 1991, Navaho Association of Medicine Men and Hopi Tribal Council took separate actions to halt auction of three ceremonial objects at Sotheby's, Inc.). Neither the tribes' appeals or the threat of criminal sanctions under the Repatriation Act, however, prevented the sale of the objects at the auction. N.Y. Times, June 2, 1991, § 2, at 37, col. 1. Fortunately, Elizabeth Sackler, president of the Arthur M. Sackler Foundation in New York, purchased the items so that they could be returned to the tribes. Chi. Tribune, July 28, 1991, § Woman News, at 4. The Arthur M.

This Comment focuses on the issue of repatriation, specifically the return of Native American cultural objects stored in museum collections. Part I demonstrates that the prior possessory interest requirement of a common law action in replevin effectively bars Native American claimants from recovering their cultural items.²⁴ The first section also discusses the difficulties posed by the statute of limitations for the Native American plaintiff, despite the legal system's attempt to modify the timing mechanism to assist the prior possessor's cause.²⁵ Part II analyzes the development of statutory schemes concerning the disposition of Native American cultural objects and evinces Congress' increasing awareness of the need to repatriate.²⁶ Part III submits a number of proposals aimed at minimizing the controversy surrounding the repatriation of Native American cultural resources.²⁷ These propositions include the expansion of the scope of the legislation,²⁸ the implementation of new management systems for the research and inventory of Native American cultural property,²⁹ and the alteration of the current burden of proof standard.³⁰

Sackler Foundation is a nonprofit organization which catalogues and exhibits various collections. *Id.* Ms. Sackler, however, acted not as an agent of the Foundation but as a private citizen. *Id.* She believed that her action was a step toward acknowledging the losses resulting from the extermination of many Indian tribes. *Id.* The Antique Tribal Arts Dealers Association and the American Association of Museums are the two major forces opposing Native Americans in their fight for repatriation. *See* 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson) (stating that while it is important to satisfy demands of Native American contingent, it is also important that it be done in manner that protects museums and collectors). Because the goals of the conflicting interest groups are diametrically opposed, any significant request granted by Congress to the arts dealers or museums, acts to the detriment of the Native American community. *Id.*

24. *See infra* notes 36-51 and accompanying text (analyzing common law action in replevin within context of specific Native American community, Larsen Bay Village of Kodiak Alaska).

25. *See infra* notes 52-109 and accompanying text (explaining function of statute of limitations, traditional application of statute of limitations, modifications by courts of law to improve plaintiffs' chances of recovery including demand refusal and discovery rule).

26. *See infra* notes 110-18 and accompanying text (clarifying evolution of legislation concerning disposition of Native American artifacts by analyzing four pieces of legislation: Antiquities Act of 1906, Archaeological Resources Protection Act of 1979, Native American Museum Act of 1989, and Native American Graves Protection and Repatriation Act of 1990).

27. *See infra* notes 191-231 and accompanying text (discussing legitimate and feasible options available to Congress to respond more effectively to needs of the Native American community).

28. *See infra* notes 195-98 and accompanying text (discussing possibility of bringing Smithsonian Institution under purview of Repatriation Act).

29. *See infra* note 200 and accompanying text (noting that current wording of scientific study clause is too vague and that modification is required to prevent abuse by museums).

30. *See infra* notes 216-28 and accompanying text (noting that new mechanism should be developed in regard to unassociated funerary objects, sacred objects, and objects of cultural patrimony).

I. REMEDY IN THE COURTS OF LAW

Public and private museums acquired their collections of Native American cultural artifacts from a wide variety of sources and through a number of different means. On occasion, museum accession records reveal the legitimate purchase of these artifacts.³¹ Records, however, also expose the less ethical methods employed by museums to accumulate their vast collections.³² Indeed, on closer inspection, records reveal that a large proportion of sacred artifacts housed in museum collections were stolen from their original Native American owners.³³ Despite the dubious character of

31. See *House Hearings*, *supra* note 12, at 161-63 (statement of Dr. Raymond Thompson, American Association of Museums) (explaining ethical standards of museum collecting practices and stating that all museums are not guilty of transcending ethical standards of collection). According to Dr. Thompson, museum policies are directed by the belief that the Native American culture created valuable artistic achievements as well as pieces of historical significance. *Id.* at 159-60. Furthermore, the expansive nature of the museum's collecting practices is an effort to save the works of art from the policies and practices of the United States government. *Id.* at 160. Government policies, in the opinion of museum curators, are causing the rapid deterioration and outright disappearance of traditional Native American society and culture. *Id.* Museums legitimately collect objects to protect Native American culture from the American public who view this traditional culture as nothing more than a curiosity. *Id.* It is the American Association of Museums' position that only a few museums are guilty of failure to apply appropriate standards to their collecting practices. *Id.*; see *Senate Hearings*, *supra* note 7, at 41-43 (statement of William L. Boyd, President, Field Museum of Natural History) (legitimizing collection practices of American museums).

32. See R. BIEDER, *SCIENCE ENCOUNTERS THE INDIAN, 1820-1880: THE EARLY YEARS OF AMERICAN ETHNOLOGY* 24-47 (1986) (delineating unethical and nefarious means employed by museums to accumulate enormous collections of Native American cultural items during nineteenth century); see also *RELIGIOUS FREEDOM REPORT*, *supra* note 17, at 77 (reporting that documentation of objects within museum collections is hazy).

The Federal Agencies Task Force observed that the difficulties experienced by Native Americans in reacquiring and retaining sacred objects are in large part the result of questionable acquisition methods used by museums. The Task Force stated:

Museum accession records show that some sacred objects were sold by their original Native owner or owners. In many instances, however, the chain of title does not lead to the original owners. Some religious property left original ownership during military confrontations, was included in the spoils of war and eventually fell into the control of museums. Also in times past, sacred objects were lost by Native owners as a result of less violent pressures exerted by federally-sponsored missionaries and Indian agents. . . .

Today in many parts of the country, it is common for "pot hunters" to enter Indian and public lands for the purpose of illegally expropriating sacred objects. Interstate trafficking in and exporting of such property flourishes, with some of these sacred objects eventually entering into the possession of museums.

Id.

33. See *RELIGIOUS FREEDOM REPORT*, *supra* note 17, at 77 (suggesting that individual Native Americans often perpetrated theft against fellow people and then converted stolen objects, which were then sold by others who did not have ownership or title to objects); see also *Note*, *supra* note 9, at 132-33 (explaining that because of continuing prejudice against Indians in parts of United States during time period in which many museums received Indian artifacts, museums' assertions of valid legal title should be treated without suspicion); Nason, *Finders Keepers?*, *Museum News*, Mar. 1973, at 23 (statement of Kenneth Hopkins, Director of State Capitol Museum, Olympia, Washington) (stating that grave robbing is among favorite archaeological games of white men and existence of artifacts legally acquired is questionable). Mr. Hopkins suggests the questionable provenance of museum collections when he states:

museum collections, Native Americans are relatively unsuccessful in their efforts to recover lost cultural heritage.³⁴ The failure of Native American plaintiffs to regain possession of their cultural resources can be attributed to the interplay between the common law action in replevin and the statute of limitations.³⁵

A. Action in Replevin

To recover lost property, a plaintiff must initiate an action in replevin.³⁶ In an action in replevin, the plaintiff must demonstrate a prior possessory interest in the property.³⁷ While it would appear

As for materials that were not "stolen," I doubt their existence. The legalisms that confound the picture of Indian dispersal apply as well to Indian cultural relics. Here in our Northwest, we live on land "legally" acquired from the Indians. Yet as the history of the acquisition falls under scrutiny, we in local history find ourselves in the awkward position of trying to interpret events that we would prefer not to have to interpret.

Id.

34. 136 CONG. REC. S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Inouye). In those instances where Native Americans attempted to recover inappropriately alienated tribal items, they often met stiff resistance from museums who were unwilling to part with the object. *Id.* When faced with this hostility, the Native American community was virtually helpless, for it had neither the legal ability nor the financial resources to pursue the return of its cultural property. *Id.* In fact, Native Americans only had success in retrieving property in those instances where a museum had moral or political motivation to agree to return the property. *Id.*

35. See *infra* notes 36-109 and accompanying text (discussing obstacles to repatriation posed by action in replevin and statute of limitations).

36. D. DOBBS, REMEDIES § 5.13 (1973). The common law action of replevin is the means employed by claimants to regain possession of their property. *Id.* The term used to describe a common law action in replevin can vary from state to state and is known variously as detinue, claim and delivery, or sequestration. *Id.* Replevin, however, is the most common label applied to an action commenced to recover property. *Id.*

37. See *Banque De France v. Chase Nat'l Bank*, 60 F.2d 703, 705 (2d Cir. 1932) (holding, in suit for return of gold ingots, that in replevin action right to possession must be established and suit may be brought for proportionate share of commingled mass); *Wright v. Redding*, 408 F. Supp. 1180, 1182-83 (E.D. Pa. 1975) (ruling, in action in replevin, that "the finder of a jewel . . . has such a property as will enable him to keep it against all but the rightful owner"). The common law rule, known as the doctrine of relative title, was first enunciated in *Armory v. Delamirie*, 93 Eng. Rep. 664 (1722).

In *Armory*, a chimney sweeper's boy found a mounted jewel and brought it to a goldsmith's shop to discover the value of the chattel. *Id.* The goldsmith's apprentice proceeded to remove the stone from its setting and returned only the empty socket. *Id.* In the action commenced, the court held the title of the finder is good as against all the world but the true owner. *Id.*

The leading case espousing the majority interpretation of *Armory* is *Anderson v. Gouldberg*, 51 Minn. 294, 295, 53 N.W. 636, 637 (1892) (citing *Armory* for proposition that bare possessor has "good title against all the world except those having a better title"). Support for the *Anderson* majority interpretation of the doctrine of relative title in American law is extensive. See *Helmholz, Wrongful Possession of Chattels: Hornbook Law and Case Law*, 80 NW. U.L. REV. 1221, 1221 (1986) (stating that *Anderson* is leading case supporting view that title of possessor is good against everyone but true owner). The doctrine also finds weighty authority in such legal scholars as Justice Holmes, Dean Ames, and Sir Frederick Pollack. See O. HOLMES, THE COMMON LAW 190 (M. Howe ed. 1963) (stating that mere possession is sufficient to maintain action in replevin or trover); Ames, *The Disseisin of Chattels*, in LECTURES ON LEGAL HISTORY 172, 179 (1913) (discussing possessor's ability to gain absolute property in chattel through

that proving a prior possessory interest is an easy barrier to hurdle, it represents a major obstacle to the Native American plaintiff seeking to recover cultural property.

The enormity of the barrier results from a combination of two factors. First, in most instances, Native Americans fail to possess concrete proof of prior ownership.³⁸ Documentation of a prior possessory interest can take a number of acceptable forms, including written material, photographs, or references to specific incidents indicating prior possession of the object.³⁹ The second factor contributing to the inability of Native American claimants to satisfy the prior possessory interest requirement is that the chain of possession, linking the item with the Native American party, is usually broken or vague.⁴⁰

The dispute between the Larsen Bay Village of Kodiak Island, Alaska and the Smithsonian Institution clearly reveals the practical effect of the prior possessory interest requirement.⁴¹ Since 1986, the Larsen Bay Village has negotiated in good faith with the Smithsonian Institution for the return of more than one thousand associated burial artifacts.⁴² The contested objects were exhumed, beginning in 1930, from an ancient burial ground identified by a local "white" cannery supervisor.⁴³ Subsequently, experts removed the objects from the site and arranged for their shipment to the Smithsonian Institution's collection.⁴⁴

Recently, negotiations stalled between the representatives of the Larsen Bay Village and the Smithsonian Institution. The issue, creating the deadlock, is whether the existing village and its inhabitants

tort of wrongful taking of chattels); F. POLLACK & R. WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 91-93 (1888) (stating that existing possession establishes rights protected against interference even though wrongdoer can show superior title in third party, and discussing doctrine of trover). Each of these great legal minds concludes that the doctrine of relative title is deeply rooted in common law and that its objective and logical approach is demonstrative of the legal system's bias toward detached objective standards. See Helmholz, *supra*, at 1222 (noting that commentators have viewed majority rule as vindicated by common law's preference for pure objectivity).

38. See *House Hearings*, *supra* note 12, at 241-42 (statement of James Reid, Antique Tribal Art Dealers Association, Inc. & Sotheby's, Inc.) (noting that Native Americans need stronger documentary basis to pursue artifacts).

39. *Id.*

40. RELIGIOUS FREEDOM REPORT, *supra* note 17, at 77.

41. See American Indian Museum Act: Hearing on H.R. 2688 Before the House Comms. on Interior Insular Affairs Administration and Public Works and Transportation, 100th Cong., 2d Sess. 11 (1989) [hereinafter *Museum Act Hearings*] (stating that difficulties have arisen in obtaining artifacts even though there are only 180 villagers who are direct lineal descendants of Alaskan native peoples who have been in continuous habitation of island since time immemorial).

42. *Id.*

43. *Id.*

44. *Id.*

hold a prior possessory interest in the disputed materials.⁴⁵ Witnesses, testifying on behalf of the Larsen Bay Village, postulate that the objects and remains are culturally related to the present day village, and as a result, the villagers enjoy a distinguishable prior possessory interest and a cognizable claim.⁴⁶ Nevertheless, the Smithsonian Institution views the showing by the Native Americans as inadequate.⁴⁷ The museum contends that more evidence manifesting the relationship of the objects to the present day claimants is required before the Larsen Bay Village's interest is properly established.⁴⁸ Consequently, Smithsonian officials feel justified in refusing to repatriate the objects.⁴⁹

Although representatives of the Larsen Bay Village chose to negotiate rather than litigate their claim, the option to initiate an action in replevin exists. At the outset of replevin proceedings, the Native Americans would be required to prove a valid prior possessory interest.⁵⁰ As indicated above, the ability of Larsen Bay Villagers to make the required showing is questionable. As a result, a court of law would be likely to grant a summary judgment for the Smithsonian Institution, citing the Native Americans' failure to satisfy the initial burden of proving prior possession.⁵¹

B. Statute of Limitations

If Native American plaintiffs properly establish prior possession of the lost item, the first barrier to recovery of the item is overcome.⁵² The statute of limitations, however, may bar the action in replevin.⁵³ This judicially created mechanism defines the period in

45. See *House Hearings, supra* note 12, at 66 (statement of Henry Sockbeson, Native American Rights Fund) (discussing difficulty faced by villagers in establishing prior possessory interest to scientific certainty, despite fact that villagers have been direct lineal descendants from original possessors).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 66-67.

50. See *supra* notes 36-37 and accompanying text (discussing common law action in replevin and stating that showing of prior possessory interest is required to successfully satisfy initial burden of proof).

51. See *supra* notes 38-40 and accompanying text (indicating that burden of proving prior possessory interest is often too great for Native American plaintiffs due to unique circumstances surrounding Native American communities).

52. See *supra* note 37 and accompanying text (indicating that proving prior possessory interest is first major obstacle to Native American plaintiff seeking recovery of lost cultural item).

53. See *Saranac Land & Timber Co. v. Comptroller of N.Y.*, 177 U.S. 318, 324 (1900) (recognizing that establishment of statute of limitations is state's prerogative); *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190, 197 (1922) (stating that state legislatures have constitutional power, subject to restrictions of local state constitutions, to set periods within which actions may be brought). Authorities, however, require that a limitation

which the plaintiff possesses a legal right to assert a valid claim in a court of law.⁵⁴ At the completion of the statutory time limit, the claimant's privilege of employing a judicial forum to redress the injury expires.⁵⁵

To provide the prior possessor of personal property with a greater opportunity to recover an item from a subsequent possessor, courts of law modified the existing common law doctrine pertaining to statutes of limitations.⁵⁶ The simplest means to provide the prior possessor of personal property with an opportunity to claim his chattel is to toll the running of the statute of limitations.⁵⁷

statute be reasonable. *Id.* A limitation period is reasonable if it provides enough time for potential plaintiffs to assert their rights. *Id.* While the statute of limitations may bar actions for the recovery of property, an action for damages brought by a Native American party is not subject to the state statute of limitations, and cannot be barred by the expiration of this legal timing device. 28 U.S.C.A. § 2415(a) (West Supp. 1991); see also *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 (permitting Indian tribes' federal common law right of action for violation of property rights to real property despite fact that property had been illegally taken in 1795 and concluding that statute of limitations created no obstacle to litigation of claim).

54. See Comment, *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) [hereinafter Comment, *Developments in the Law*] (noting that provisions for postponement or extension are included for special circumstances); Fischer, *The Limits of Statutes of Limitation*, 16 SW. U.L. REV. 1, 1 (1986) (stating that legal systems have uniformly adopted various time periods within which lawsuits must be commenced); Comment, *The Recovery of Stolen Art of Paintings, Statutes, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1125 (1980) [hereinafter Comment, *Stolen Art*] (stating that action must be filed within statutory period).

55. See *Campbell v. Haverhill*, 155 U.S. 610, 618 (1895) (stating that statute of limitations only directly affects remedy and does not extinguish substantive right); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (noting that statute of limitations cuts off ability to resort to courts for enforcement of claim; it does not destroy right to claim).

Although the result of the statute of limitations is severe, the legal construction is justified. Individuals with valid claims generally do not neglect to act on them. Therefore, when a period of years passes without the original owner attempting to enforce a demand, it creates a presumption against the validity of the claim. *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (7 Wall.) 386, 390 (1868). Additionally, statutes of limitations reflect important public policy concerns, such as encouraging the prompt pursuit of claims and punishing those who fail to diligently enforce their legal rights. *Leake v. Bullock*, 104 N.J. Super. 309, 313, 250 A.2d 27, 29 (App. Div. 1969) (citing *Kyle v. Green Acres at Verona, Inc.*, 44 N.J. 100, 108, 207 A.2d 513, 517 (1965)). Finally, statutes of limitations act to preserve a sense of fairness for the defendant, in terms of stipulating at what point in time he or she will no longer be answerable to a claim. Comment, *Developments in the Law, supra* note 54, at 1185.

56. See *O'Keeffe v. Snyder*, 83 N.J. 478, 494, 416 A.2d 862, 869 (1980) (stating that these modifications are based on principles of equity so that claimants can avoid unfair results caused by rigid application of statute of limitations). For other cases in which courts modify the statute of limitations, see, e.g., *Fernandi v. Strully*, 35 N.J. 434, 450-51, 173 A.2d 277, 286 (1961) (stating that statute of limitations in medical malpractice suits should not begin to run for plaintiff who has foreign object left in abdomen, until she knew or had reason to know of its existence); *New Mkt. Poultry Farms, Inc. v. Fellows*, 51 N.J. 419, 425, 241 A.2d 633, 636-37 (1968) (modifying statute of limitations to instance where negligent installation of underground conduit caused flooding of plaintiff's property and where plaintiff did not know of negligent installation until eleven years later when flooding occurred); *Burd v. New Jersey Tel. Co.*, 76 N.J. 284, 291-92, 386 A.2d 1310, 1314-15 (1978) (explaining that discovery rule postpones running of statute of limitations until plaintiff becomes aware or should have become aware of facts which may give rise to cause of action).

57. See Comment, *Stolen Art, supra* note 54, at 1132 (recognizing court's attempt to avoid harsh result affecting owner of stolen painting). Modifications to the statute of limitations

Consequently, courts graft upon the statute of limitations corollary doctrines such as the demand refusal requirement⁵⁸ or the discovery rule, to delay the accrual of the statutory time period.⁵⁹

1. Demand refusal and the statute of limitations

The *Menzel v. List* decision⁶⁰ articulated the demand refusal requirement, as it pertains to stolen art.⁶¹ The case focused on the ownership of a painting by Marc Chagall, entitled "Le Paysan a L'échelle" or "The Peasant on the Ladder."⁶² The Menzels, in 1932, bought the painting through the Galerie Georges Giroux in Brussels, Belgium.⁶³ With the commencement of the Second World War, the German army invaded Belgium, and the Menzels fled to the United States, leaving behind the Chagall painting.⁶⁴ Subsequently, in 1941, the Nazi occupational forces illegally removed the work from the Menzel's residence.⁶⁵ The whereabouts of "The Peasant on the Ladder" remained unknown between 1941 and 1955.⁶⁶ In 1955, however, a Parisian gallery sold the painting to a New York gallery which, in turn, sold the work to Mr. List.⁶⁷ Since the end of the war, the Menzels actively searched for their painting and, in 1962, Mrs. Menzel discovered it in the possession of Mr. List.⁶⁸ Mrs. Menzel immediately instituted an action in replevin, and List responded by raising a defense which claimed that the three-year statute of limitations barred the action.⁶⁹

The court held that a cause of action for replevin arises, not upon the stealing or taking, but rather upon the plaintiff's request for the

evolved due to unjust results which occurred from the mechanical application of the statute of limitations. *Id.*

58. See *infra* notes 71-74 and accompanying text (detailing demand refusal requirement and its means of extending statute of limitations).

59. See *infra* notes 87-91 and accompanying text (analyzing discovery rule and its ability to extend statutory period in which action in replevin may be brought).

60. 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified as to damages*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd as to modifications*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S.2d 979 (1969).

61. *Menzel v. List*, 49 Misc. 2d 300, 304, 267 N.Y.S.2d 804, 809 (Sup. Ct. 1966) (citing *Cohen v. M. Keizer, Inc.*, 246 A.D. 277, 278, 285 N.Y.S. 488, 489 (App. Div. 1936)) (holding that cause of action in replevin arises at time defendant refuses, upon demand, to convey property).

62. *Id.* at 304, 267 N.Y.S.2d at 809.

63. *Id.* at 301-03, 267 N.Y.S.2d at 807-08.

64. *Id.* at 303, 267 N.Y.S.2d at 808.

65. See *id.* at 312-13, 267 N.Y.S.2d at 816-17 (discussing confiscation of private property in violation of specific treaty obligations to United States).

66. See *id.* at 303, 267 N.Y.S.2d at 808 (acknowledging that no information was available pertaining to painting's whereabouts during time period).

67. *Id.*

68. *Id.* at 302, 267 N.Y.S.2d at 807.

69. *Id.*; see N.Y. CIV. PRAC. L. & R. 214(3) (McKinney 1990) (stating that actions to recover chattel must be commenced within three years).

object and the defendant's refusal to convey the object.⁷⁰ Thus, the demand refusal doctrine requires that, before the period of accrual begins, the plaintiff must demand the property and the defendant must refuse to return the property.⁷¹ To initiate the exchange resulting in a demand and a refusal, the plaintiff must know the identity of the individual presently possessing the property.⁷² Consequently, until the prior possessor identifies and states a claim of superior title to the present possessor, the statute is effectively tolled⁷³ for an unspecified period of time.⁷⁴

On its face, the *Menzel* demand refusal requirement would appear to facilitate the recovery of cultural objects by Native Americans. In truth, the doctrine provides little relief for the Native American plaintiff. First, it can be argued that the New York trial court, the court initially applying the demand refusal doctrine to stolen art, is itself unsure of the validity of the doctrine, for New York case law appears to undermine the *Menzel* holding.⁷⁵ Thus, demand refusal

70. *Menzel*, 49 Misc. 2d at 304, 267 N.Y.S.2d at 809.

71. See *id.* (stating that, in replevin, cause of action against individual who lawfully possesses chattel begins when defendant refuses to convey property upon demand of plaintiff). *Menzel* continues in its analysis noting that the "demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action in conversion by the owner." *Menzel v. List*, 22 A.D.2d 647, 647, 253 N.Y.S.2d 43, 44 (App. Div. 1964). *Menzel* is based on a previous New York decision, *Gillet v. Roberts. Id.*; see *Gillet v. Roberts*, 57 N.Y. 28, 34 (1874) (stating that, in action to recover converted property, rule requiring owner to prove that purchaser refused to return property upon demand is reasonable rule in that it serves to inform purchaser of defect in title and grants opportunity to deliver property before liability attaches for wrongful conversion); see also *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 846-49 (E.D.N.Y. 1981) (reaffirming use of demand refusal rule), *aff'd*, 678 F.2d 1150 (2d Cir. 1982). The court states "[i]t is not this court's function to improve upon, but only to follow New York law." *Id.* at 848.

Elicofon involved two portraits painted by the fifteenth century German artist Albrecht Durer. *Id.* at 830. The paintings disappeared from a castle where they were being stored to protect them from allied bombardment during the brief occupation of American forces in the summer of 1945. *Id.* In 1946, a former American serviceman purporting to be vested with proper title to the works arrived in Brooklyn and resold the works of art for \$450 to Elicofon. *Id.* at 833. Elicofon, an art collector with an untrained eye, hung the paintings in his living room, unaware that each portrait was a priceless piece of German national history. *Id.* Upon the discovery in 1966, that Albrecht Durer created the pieces, the information was released to the media. *Id.* In 1966, the *Kunstsammlungen zu Weimar*, a museum in what was then East Germany, demanded the immediate return of the items. *Id.* at 830. Subsequently, the defendant refused to comply and the museum instituted an action in replevin. *Id.*

72. See *Menzel*, 49 Misc. 2d at 304-05, 267 N.Y.S.2d at 809 (reasoning that until plaintiff identifies and demands return of property, possessor may not realize wrong doing and thus may miss opportunity to return property to true owner before incurring liability) (relying on *Gillet v. Roberts*, 57 N.Y. 28, 34 (1874)).

73. See *id.* (stating, in finding for *Menzel*, that statute of limitations did not begin to run until true owner could make a demand for property and present owner refused).

74. *Id.*

75. See *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 22 (S.D.N.Y. 1976) (questioning, in dicta, validity of demand refusal requirement). The dispute involved two artistic masterpieces, one a portrait of Antoine Triest, Bishop of Ghent, by Sir Anthony Van Dyck, valued in 1974 at \$50,000 and, the other, a bust of Diderot by Houdon with a property value of \$350,000 at the time of the action. *Id.* at 19. The Soviet government, by official decree,

provides only limited security; the Native American plaintiff must constantly fear the rejection of the doctrine by the court adjudicating the claim. Second, a large number of state courts specifically declined to include demand and refusal as elements necessary in a replevin action.⁷⁶ As a result, the Native American plaintiff derives the benefit of the doctrine in only a limited number of jurisdictions. Finally, even if state courts uniformly accepted demand refusal as a viable legal doctrine, it would fail to provide many Native Americans with an opportunity to be heard in court. Frequently, the objects Native Americans wish to repatriate are housed in accessible public

appropriated both works in 1921 and later transported them to Berlin for sale at an auction house in 1931. *Id.* At auction, a London gallery purchased the Triest portrait. *Id.* at 20. It was later sold to a second gallery and ultimately purchased by the defendant Weldon. *Id.* The record is unclear as to who purchased the Diderot bust at the Berlin auction. *Id.* In 1965, however, a New York art dealer donated the piece to the Metropolitan Museum of Art. *Id.*

The plaintiff, George Stroganoff-Scherbatoff, brought two suits of conversion, one against the possessor of the bust and the other against the possessor of the portrait. *Id.* at 19. He commenced the actions in 1974, fifty-three years after the seizure by the Soviet Government. *Id.* The New York Court presiding over the conversion actions consolidated them by decree in 1975. *Id.* The plaintiff alleged that he was the direct descendant of Count Alexander Sergevitch Stroganoff, the original owner of both works of art. *Id.* at 20. Consequently, he would be the rightful owner by lineal succession of the bust and portrait. *Id.* Defendant rebutted plaintiff's argument concerning the provenance of the pieces and contended that the act of state doctrine, as well as the statute of limitations barred the granting of any relief to the plaintiff. *Id.* The act of state doctrine forbids courts from independently examining the confiscation of property by foreign states who are recognized by the United States and where the taking occurred within the states' territorial borders. *Id.*

The court did not reach the issue of the statute of limitations. It commented, however, in dicta upon the subject in a footnote. *Id.* at 22 n.5. The court cited 206(a) of the New York Civil Practice Law and Rules, which states in pertinent part: "where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete." N.Y. CIV. PRAC. L. & R. 206(a) (McKinney 1972). Relying on this statute the court went on to state that any right plaintiff's mother had to make a demand for the pieces terminated in 1931 when the portrait and bust were sold at the Berlin auction. *Stroganoff-Scherbatoff*, 420 F. Supp. at 22 n.5. Under the New York statute of limitations, it would appear that the time for commencing an action in conversion had already run at the time of Princess Stroganoff-Scherbatoff's death in 1944. *Id.*

Stroganoff-Scherbatoff, when read in tandem with *Federal Ins. Co. v. Fries*, 78 Misc. 2d 805, 355 N.Y.S.2d 741 (Civ. Ct. 1974), undermines the validity of *Menzel*. *Fries* states that the time to make the demand is commenced when the alleged wrong is committed even if the plaintiff is unaware of the facts necessary to expose the potential defendant. *Id.* at 810, 355 N.Y.S.2d at 747. *Fries* involved an action for conversion brought by a bank which acted as executor of a decedent's estate and which mistakenly delivered two rings that were nonestate property to defendant. The court's position is clear when it stated that "[i]n short, the statute of limitations runs, not from the demand, but from the time when the bank was entitled to make the demand. Were the rule otherwise, a plaintiff might extend the statute indefinitely, merely by postponing the making of a demand." *Id.*

Here, the bank was entitled to make a demand on December 12, 1967, the day it mistakenly gave the rings to defendant. The bank, however, was ignorant of the facts which gave it the right to make a demand until August 1969. The court held that "ignorance does not stop the clock, . . . unless the defendant engages in fraudulent or misleading conduct . . ." which this defendant did not. *Id.* at 810, 355 N.Y.S.2d at 747-48.

76. See Comment, *Stolen Art*, *supra* note 54, at 1139 (recognizing that demand requirement may end up favoring bad faith possessor rather than good faith possessor and thereby states may opt not to apply doctrine).

institutions such as museums.⁷⁷ In many instances, the Native American, aware of the location of an object, demanded its return.⁷⁸ In response, the museum rejected the Native American request and refused to return the object. When any form of demand and refusal occurs, the demand refusal doctrine permits the accrual of the statute of limitations. Consequently, a present day Native American relying on the demand refusal doctrine to toll the statute of limitations may find that the time period allotted for the initiation of claims expired and that the statute of limitations bars the action from the courts of law.

2. *Discovery rule and the statute of limitations*

O'Keeffe v. Snyder,⁷⁹ decided by the Supreme Court of New Jersey, is the leading case involving the discovery rule as it relates to personal property.⁸⁰ The renowned American artist, Georgia O'Keeffe, commenced an action to regain possession of the paintings entitled "Cliffs," "Seaweed," and "Fragments."⁸¹ An unknown individual stole the works of art, in 1946, from the gallery owned by her husband, Alfred Steiglitz.⁸² At the time of the theft, O'Keeffe mentioned the loss to various associates, but neglected to energetically pursue her property.⁸³ The artist waited until 1972 to register the paintings as stolen with the Art Dealers Association of America.⁸⁴ In 1976, O'Keeffe learned that Barry Snyder possessed the paintings. She subsequently commenced an action in replevin to recover the works.⁸⁵

The court's decision in *O'Keeffe v. Snyder* outlined the requirements of the discovery rule.⁸⁶ To determine whether a plaintiff is entitled to the benefit of the discovery rule the court required the

77. See *House Hearings*, *supra* note 12, at 56 (statement of Henry Sockbeson, Native American Rights Fund) (explaining that many tribal objects are housed in federal and state museums).

78. See *supra* note 34 and accompanying text (indicating that demand and refusal is common event between Native Americans and museums).

79. 83 N.J. 478, 416 A.2d 862 (1980).

80. See *O'Keeffe v. Snyder*, 83 N.J. 478, 493-94, 416 A.2d 862, 870 (1980) (finding that discovery rule is better suited to obtaining equitable resolutions in personal property cases involving art than is adverse possession rule).

81. *Id.* at 484, 416 A.2d at 865.

82. *Id.*

83. *Id.*

84. See *id.* at 485-86, 416 A.2d at 866 (acknowledging that record did not contain information indicating whether registry existed at time of theft).

85. *Id.* at 486, 416 A.2d at 866. The court held in favor of the plaintiff, Georgia O'Keeffe, reversing the judgment of the Appellate Division, and remanded the matter for a plenary hearing in accordance with its opinion. *Id.* at 505, 416 A.2d at 877.

86. *Id.* at 493-94, 416 A.2d at 870.

satisfaction of a three-prong test.⁸⁷ First, from the time immediately proceeding the alleged theft, the claimant must use "due diligence" to recover the item.⁸⁸ Second, the test requires that the individual "alert the world" as to the theft of the object.⁸⁹ Finally, the plaintiff must put a "reasonably prudent purchaser" of art on constructive notice that someone other than the present possessor may be the true owner.⁹⁰ If the plaintiff satisfactorily proves each of these elements, the court tolls the statute of limitations until the owner knows or reasonably should know the identity of the possessor of his chattel.⁹¹

The discovery rule enforces the bar of the statute of limitations on neglectful individuals who sit on their rights and fail to pursue, with proper diligence, the recovery of their property.⁹² Unlike the traditional common law, the discovery rule recognizes that a person kept ignorant as to the location of his personal property or to the identity of the present possessor should not be barred from initiating a claim in a court of law.⁹³ Furthermore, the rule forces the court to evaluate the conduct of the prior possessor rather than the conduct of the present possessor.⁹⁴ Thus, a court employing discovery rule analysis will not inquire whether a demand and refusal has occurred.⁹⁵ A claim will be barred or permitted solely on the basis of the plaintiff's conduct after the alleged theft of the item.⁹⁶

While the discovery rule provides the courts with a flexible, equitable doctrine that protects the right of the prior possessor, it also satisfies the policy considerations used to justify the original com-

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 493-94, 416 A.2d at 870.

91. *Id.* at 491, 416 A.2d at 869. The court stated that under the discovery rule the burden falls on the owner of the stolen object to establish specific facts that justify tolling the statute of limitations. *Id.* at 497, 416 A.2d at 873. Therefore, the court required O'Keeffe to prove to the trial court that, among other things, she used due diligence at the time of the theft to recover the paintings; that, other than speaking with colleagues, no other effective method existed for alerting the world to the theft; and that registering the painting with the Art Dealers Association of America would put a reasonably prudent purchaser on constructive notice that the piece was stolen from its true owner. *Id.* at 493-94, 416 A.2d at 870. The court noted that "the rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession." *Id.* at 498, 416 A.2d at 872.

92. *Id.* at 502, 416 A.2d at 875.

93. *See id.* (stating that discovery rule is equitable and seeks to avoid unjust results).

94. *See id.* at 497, 416 A.2d at 872 (recognizing this focus to be different than that for adverse possession). Adverse possession requires that possession be actual, open and notorious, hostile, exclusive, and continuous. R. CUNNINGHAM, W. STOCBACK & D. WHITMAN, *THE LAW OF PROPERTY*, § 11.7, at 758 (2d ed. 1988).

95. *O'Keeffe v. Snyder*, 83 N.J. 478, 497, 416 A.2d 862, 873 (1980) (emphasizing that if original owner wants to toll accrual period he must present facts which warrant tolling accrual period).

96. *Id.* at 493-94, 416 A.2d at 870.

mon law application of the statute of limitations.⁹⁷ The doctrine encourages activity by the prior possessor who might otherwise remain inactive.⁹⁸ It punishes the plaintiff who negligently or intentionally fails to utilize, in a timely fashion, rights granted by the law.⁹⁹ Finally, the discovery rule protects the repose of a present possessor from a dilatory prior possessor by freeing him from the threat of litigation.¹⁰⁰

Like demand refusal, the discovery rule doctrine is often an ineffective aid to the Native American who wishes to recover a cultural object from a museum. The discovery rule's inability to provide Native Americans with the relief it grants to other plaintiffs does not result from internal inconsistencies or vague terminology. Rather, it occurs from the inaction of the Native American claimant. Upon the theft of an item, Native American owners often neglected to report the incident.¹⁰¹ Many objects stored in museum collections were acquired in the distant past and claims were not diligently pursued.¹⁰² In some instances, Native Americans were aware of the location of their tribal artifact as well as the identity of its present possessor, but still failed to institute a claim for its recovery.¹⁰³ An inquiring court could construe this inactivity as a failure on the part of the Native American plaintiff, to use "due diligence," to "alert the world" or to place a "reasonably prudent purchaser on notice."¹⁰⁴

97. See Comment, *Stolen Art*, *supra* note 54, at 1127 (recognizing that purposes of statute of limitations are to penalize parties who do not bring claims to court promptly and to prevent unfairness by assuring defendants certain time period after which they can reasonably expect to not have to defend against claim); *supra* note 55 and accompanying text (discussing public policy considerations behind traditional common law application of statute of limitations).

98. See Comment, *Stolen Art*, *supra* note 54, at 1127 (citing *Rosenau v. City of New Brunswick*, 51 N.J. 130, 136, 238 A.2d 169, 172 (1968)) (stating that statute of limitations, through its punishment of negligent behavior, stimulates people to act on their claims); see also *Leake v. Bullock*, 104 N.J. Super. 309, 313, 250 A.2d 27, 29 (Sup. Ct. 1969) (discussing fairness as underlying public policy consideration of traditional common law application of statute of limitations).

99. Comment, *Stolen Art*, *supra* note 54, at 1127.

100. See *id.* at 1128 (citing *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)) (recognizing that right to be free from untimely claims prevails over right to take action).

101. See *House Hearings*, *supra* note 12, at 241-42 (statement of James Reid, the Antique Tribal Art Dealers Association, Inc. & Sotheby's, Inc.) (stating that neglecting to keep inventory lists of cultural items, to maintain safe storage areas, and to file police reports of missing items, places Native Americans at disadvantage when trying to pursue legal claims).

102. *Id.*; see R. BIEDER, *SCIENCE ENCOUNTERS THE INDIAN, 1820-1880: THE EARLY YEARS OF AMERICAN ETHNOLOGY* 23-35 (1986) (noting that many museums acquired bulk of their collections by excavating graves during nineteenth century).

103. Conversation with Henry Sockbeson, Vice President, Native American Rights Fund, in Washington, D.C. (Oct. 14, 1990).

104. See *O'Keefe*, 83 N.J. at 493-94, 416 A.2d at 870 (noting that owner is responsible for attempting to alert public that property is stolen).

Under this interpretation, the Native American potentially fails each prong of the discovery rule as articulated in *O'Keeffe v. Snyder*.

Until recently, Native Americans appeared guilty of the inaction that the statute of limitations was designed to punish.¹⁰⁵ A number of legitimate justifications, however, exist for the Native American's failure to pursue claims for the recovery of their cultural heritage. Each justification should be considered before a court mechanically applies the statute of limitations bar. First, Native Americans felt, perhaps rightly so, that the system was inherently biased.¹⁰⁶ As a result, they believed that any claim brought within the system would fail.¹⁰⁷ Furthermore, Native Americans viewed common and statutory law as unresponsive to their plight.¹⁰⁸ Consequently, any effort to bring a claim against a museum would be unsupported by existing law. Finally, in many instances, the Native American plaintiffs were simply unable to financially support the extensive litigation necessary to retrieve cultural objects from America's museums.¹⁰⁹

In summary, the judicial system is incapable of providing an adequate remedy to aggrieved Native American plaintiffs seeking to recover cultural objects. The action in replevin and the statute of limitations combine to effectively preclude the Native American claimant from recovering his or her property. Where the courts of law fail to forge a sufficient remedy for a particular class, it is within the power of the United States Congress to provide a statutory remedy.

II. STATUTES RELATING TO NATIVE AMERICAN CULTURAL PROPERTY

Four legislative endeavors, the Antiquities Act of 1906 (Antiquities Act),¹¹⁰ the Archaeological Resources Protection Act of 1979 (Archeological Resources Protection Act),¹¹¹ the National Museum of the American Indian Act of 1989 (Museum Act),¹¹² and the Native American Graves Protection and Repatriation Act (Repatriation

105. See *supra* notes 101-03 and accompanying text (discussing inactivity resulting from barriers that Native Americans have faced in pursuing return of cultural items); *supra* note 55 (discussing justifications for statutes of limitations, including punishment for inactivity).

106. Note, *supra* note 9, at 125.

107. *Id.*

108. *Id.*

109. See *House Hearing, supra* note 12, at 74 (statement of Henry Sockbeson, Native American Rights Fund) (noting that expense of litigation deters Native Americans from utilizing courts).

110. Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (1988)).

111. 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)).

112. National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989) (codified at 20 U.S.C. §§ 80q-1 to -15 (Supp. I 1989)).

Act)¹¹³ document the development of the legislature's attitudes toward Native American cultural resources. When viewed together, these acts illustrate the growth of America's willingness to recognize the rights of Native Americans to possess their cultural heritage. Congress conceived the Antiquities Act and the Archaeological Resources Protection Act to regulate the flow of Native American cultural items from federal lands and to stifle the illicit commerce of the goods.¹¹⁴ Each, however, neglected to recognize the Native American's right to regain possession of those objects already within the collections of America's museums.¹¹⁵ Although the Museum Act focuses on the establishment of a museum,¹¹⁶ it also represents Congress' initial recognition of the Native American's right to regain possession of a narrowly defined group of objects within the Smithsonian Institution.¹¹⁷ The Repatriation Act, Congress' most recent effort to eliminate the repatriation controversy, expands the scope of the Museum Act and grants Native Americans expansive powers to retrieve cultural objects.¹¹⁸

A. *Antiquities Act of 1906*

As early as 1906, Congress recognized that the indiscriminate excavation and removal of Native American cultural resources from federal lands was a significant problem requiring immediate action.¹¹⁹ In an attempt to prohibit the removal of Native American cultural objects from federal property, Congress enacted the Antiquities

113. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (to be codified at 25 U.S.C. §§ 3001-3013).

114. See H.R. REP. NO. 2224, 59th Cong., 1st Sess. 1 (1906) (setting forth purpose of Antiquities Act as preservation, via creation of small land reservations, of prehistoric relics found on public and private lands in southwest United States); H.R. REP. NO. 311, 96th Cong., 1st Sess. 7, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 1709, 1710 (defining purpose of Archaeological Resources Protection Act as protection of archaeological resources found on public and Indian lands via imposition of civil and criminal penalties for removal or damage of such resources).

115. 16 U.S.C. § 432 (1988) (providing for permanent display in public museums of antiquities gathered for benefit of scientific and educational institutions); 16 U.S.C. §§ 470aa-470gg (1988) (preserving antiquities yet to be found on public and Native American lands but failing to provide for repatriation of museum-held items).

116. See 20 U.S.C. § 80q-1 (Supp. I 1989) (setting forth primary purpose of Act as establishment of Native American museum within Smithsonian Institution).

117. See H.R. REP. NO. 340(I), 101st Cong., 1st Sess. 9, reprinted in 1989 U.S. CODE CONG. & ADMIN. NEWS 776, 777 (stating that "other goal" of Museum Act is orderly transfer of Indian remains and funerary objects to appropriate families and tribes).

118. See Repatriation Act, Pub. L. No. 101-601, §§ 5-7, 104 Stat. 3048, 3052-55 (1990) (to be codified at 25 U.S.C. §§ 3003-3005) (compelling federally-funded museums' inventory of Native American collections, notification of affected families, tribes, or organizations, and expeditious return of items upon request of Native Americans).

119. See H.R. REP. NO. 2224, *supra* note 114, at 2 3 (acknowledging educational value of Native American artifacts and decrying recent extensive traffic in relics from ruin areas; stating that legislation properly securing ruin areas is in interest of science and urgently needed).

uities Act.¹²⁰ Three major sections comprise the body of the Antiquities Act. The first section pertains to the designation of national monuments.¹²¹ The second section requires the issuance of a valid permit to examine ruins, commence excavation, or gather objects of antiquity.¹²² The final section of the Act contains an enforcement mechanism, making violations of the Act a criminal offense punishable by fine or imprisonment.¹²³

Despite Congress' good intentions, the Antiquities Act suffers from technical deficiencies. On its face, the Act fails to provide Native Americans with a mechanism to retrieve items in museum collections.¹²⁴ Furthermore, the number of years required for an ordinary object to become an "object of antiquity" is conspicuously absent.¹²⁵ Finally, the Antiquities Act leaves undefined what actually constitutes an "object of antiquity."¹²⁶ As a result of the imprecise language, in *United States v. Diaz*,¹²⁷ the United States Court of Appeals for the Ninth Circuit held the Antiquities Act unconstitutionally vague.¹²⁸

120. See H.R. REP. No. 2224, *supra* note 114, at 1 (specifying Antiquities Act's purpose as preservation of antiquities in-place; for example, removal of items from specified lands is prohibited); Note, *supra* note 9, at 1333 (suggesting prevention of artifact removal is ideal method to preserve Native American ownership and interpreting Antiquities Act as attempt to so protect Native American property rights).

121. See 16 U.S.C. § 431 (1988) (authorizing President of United States to create national monuments to protect historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on public lands).

122. 16 U.S.C. § 432 (1988). The statute provides:

Permits for the examination of ruins, the excavation of archaeological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secretaries of the Interior, Agriculture, and Army to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: *Provided*, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums.

Id. (emphasis in original).

123. See 16 U.S.C. § 433 (1988) (stating that any action contrary to rules and regulations outlined in Act is criminal offense). The penalty imposed for violating the terms of the Act is a fine of not more than \$500, imprisonment for not more than ninety days, or both fine and imprisonment. *Id.*

124. See 16 U.S.C. §§ 431-433 (1988) (protecting objects of antiquity or private lands but failing to address repatriation method for items held by museums).

125. See *id.* (prohibiting such activities as appropriation, excavation, destruction of objects of antiquity but failing to define time requirement for object to become "object of antiquity").

126. *Id.* (proscribing activities concerning objects of antiquity, but never defining "object of antiquity"). Legislative history also does not clarify the uncertainty as to the definition of "object of antiquity." See H.R. REP. No. 2224, *supra* note 114, at 1-3; S. REP. No. 3797, 59th Cong., 1st Sess. 1 (1906) (failing to clarify definition of object of antiquity).

127. 499 F.2d 113 (9th Cir. 1974).

128. *United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974). The result in *United States v. Diaz* seriously hampered Native American efforts to protect their buried artifacts. Note, *supra* note 9, at 136. In *Diaz*, a United States magistrate convicted defendant Diaz of stealing

Substantive deficiencies also plague the Antiquities Act. The terms of the Act legitimized the removal of artifacts for valid research, permanent preservation, and display,¹²⁹ and thereby unwittingly sanctioned the pillage of Native American cultural objects by academic institutions and museums. As a result of this legislation, museums developed substantial collections of burial objects, sacred objects, and objects of inalienable communal property.¹³⁰ Thus, legislation designed to protect Native American cultural resources served instead to heighten tensions between Native Americans and museums collecting Native American cultural property.

The inadequacies of the Antiquities Act permitted the illicit flow of articles from public land and the destruction of resources resulting from uncontrolled excavations to escalate.¹³¹ In spite of Congress' initial effort, Native American burial objects, sacred objects, and objects of cultural patrimony became increasingly endangered by illicit collectors, "pothunters,"¹³² who sought to capitalize on the

Apache artifacts from a medicine man's cave on the San Carlos reservation. *United States v. Diaz*, 368 F. Supp. 856, 857 (D. Ariz. 1973), *rev'd*, 499 F.2d 113 (9th Cir. 1914). The stolen artifacts included "approximately twenty-two face masks, headdresses, ocotillo sticks, bull-roarers, fetishes, and muddogs." *Id.* The Ninth Circuit reversed the district court's affirmation of the magistrate's conviction of the defendant under the Antiquities Act. *Diaz*, 499 F.2d at 115. The court declared Diaz's criminal conviction invalid because the Antiquities Act failed to define adequately the terms "ruin," "monument," or "object of antiquity," and so, as a result, the Act was unconstitutionally vague. *Id.* at 114-15. In reaction to the *Diaz* decision, several states as well as Indian nations attempted to obviate the failings of the Antiquities Act. Note, *supra* note 9, at 137. These bodies reworked the unconstitutionally vague language, as well as the criminal penalties imposed by the federal Act. *Id.* For example, Colorado now protects "any historical, prehistorical, or archaeological resource," which is defined to include "all deposits, structures, or objects which provide information pertaining to the historical or prehistoric culture of people within the boundaries of the state of Colorado, as well as fossils and other remains of animals, plants, insects, and other objects of natural history within such boundaries." COLO. REV. STAT. ANN. § 24-80-401 (1988).

129. See 16 U.S.C. § 432 (1988) (justifying removal of artifacts by scientific or educational institutions as way to increase social knowledge).

130. See Note, *supra* note 9, at 134 (suggesting that Antiquities Act encouraged museums to gather Native American cultural objects).

131. 16 U.S.C. § 470aa(a)(3) (1988) (noting that "existing federal laws do not provide adequate protection to prevent loss and destruction of Native American resources resulting from uncontrolled excavations and pillage").

132. Pothunters may be individuals searching for interesting souvenirs, or heavily armed and well-equipped individuals that reap high profits from illegally obtained Native American artifacts. Note, *supra* note 9, at 134 n.71. The means employed by professional pothunters to uncover Native American artifacts are extremely sophisticated. *Id.* Pothunters use helicopters and satellite maps to chart remote areas and evaluate the potential of uncovering buried artifacts. *Id.* Once a site is located, pothunters are known to use bulldozers or other destructive means to locate artifacts quickly. *Id.* The results of their work are devastating to both future archaeological study and to the items buried in the ground. *Id.*

Once a site has been worked over by looters in order to remove a few salable objects, [the] fragile fabric of its history is largely destroyed. Changes in soil color, the traces of ancient floors and fires, the imprint of vanished textiles and foodstuffs, the relation between one object and another, and the positions of a skeleton—all of these sources of fugitive information are ignored and obliterated by archaeological looters. Coggins, *Archaeology and the Art Market*, SCIENCE, Jan. 21, 1972, at 263. See *The Plunder of the*

soaring monetary value of Native American artifacts.¹³³ Never formally repealed, the Act remains in force today.¹³⁴ It has been largely superseded, however, by the Archaeological Resources Protection Act.¹³⁵

B. *Archaeological Resources Protection Act of 1979*

The Archaeological Resources Protection Act cures many of the inherent defects of the Antiquities Act. First, it remedies the unconstitutionally vague language of its predecessor by limiting itself to the control and regulation of precisely defined "archaeological resources."¹³⁶ Furthermore, the Act increases the number of actions considered to be illegal and upgrades the criminal sanctions available through the judicial system.¹³⁷ Finally, the Act recognizes the

Past, NEWSWEEK, June 26, 1990, at 58 (describing methods and impact of pothunters); see also *Plundering Our Heritage*, ART NEWS, Summer 1975, at 30-31 (indicating extensive presence of pothunters who plunder Native American artifacts).

133. See *The Plunder of the Past*, *supra* note 132, at 58 (indicating that skyrocketing value of Native American artifacts has contributed to increase in illegal collecting). The article notes that "what was once a rural hobby has lately blossomed into a multimillion-dollar industry . . . [s]purred [onward] by the five-figure prices the most prized artifacts can fetch." *Id.*

134. Antiquities Act of 1906, ch. 3060, 34 Stat. 225 (codified as amended at 16 U.S.C. §§ 431-433 (1988)).

135. Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 17 (1982).

136. 16 U.S.C. § 470bb(1) (1988). The text provides:

The term "archaeological resource" means any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter. Such regulations containing such determination shall include, but not be 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. Nonfossilized and fossilized paleontological specimens, or any portion or piece thereof, shall not be considered archaeological resources, under the regulations under this paragraph, unless found in archaeological context. No item shall be treated as an archaeological resource under regulations under this paragraph unless such item is at least 100 years of age.

Id.

The precise language in this section demonstrates Congress' intent to obviate a void for vagueness holding similar to the one in *Diaz*. See *supra* note 128 (discussing failure of Antiquities Act to prevent looting because terms defined too loosely).

137. Compare 16 U.S.C. § 433 (1988) (prohibiting appropriation and destruction of historic or prehistoric ruins and monuments and objects of antiquity situated on public lands; punishing violations with fine of not more than \$500 and/or imprisonment of not more than 90 days) with 16 U.S.C. §§ 470ee-470ff (1988) (prohibiting appropriation, destruction, and trafficking of broadly defined "archaeological resources"; punishing criminal violations with fine of not more than \$10,000 and/or imprisonment of not more than one year; delineating higher penalties for repeat offenses and especially egregious damage; providing for civil penalties as well as criminal sanctions).

Like the Antiquities Act, the Archaeological Resource Protection Act prohibits the unauthorized removal, damage, alteration, or defacement of archaeological resources. 16 U.S.C. § 470ee(a) (1988). Unlike its predecessor, the Act expressly prohibits trafficking of wrongfully-obtained archaeological resources in interstate or foreign commerce. 16 U.S.C. § 470ee(c) (1988). The criminal penalties, under ordinary circumstances, include a fine of not more than \$10,000 and/or imprisonment of not more than one year. 16 U.S.C. § 470ee(d)

Native Americans' right to maintain possession and control of culturally important objects.¹³⁸ Despite this marked improvement in American societal awareness regarding Native Americans' right to control their cultural heritage, the Archaeological Resources Protection Act, like the Antiquities Act before it, fails to address the need for the repatriation of those Native American cultural resources already in the collections of museums.¹³⁹

C. *National Museum of the American Indian Act*

As the title of the Museum Act suggests, the legislation mandates the establishment of a museum dedicated to Native American culture.¹⁴⁰ More importantly, the Act permits repatriation of a narrowly defined group of cultural items in the collection of the

(1988). As the seriousness of the offense increases, however, so does the authority of the court to grant a more weighty penalty. *Id.* Although these penalties are considerably more potent than those authorized by the Antiquities Act, enforcement is inadequate. See Goodwin, *Raiders of the Sacred Sites*, N.Y. Times, Dec. 7, 1986, § 6 (Magazine), at 66 (suggesting lack of funds and manpower as reasons for inadequate enforcement). See also Kane, *The Big—And Illegal—Business of Indian Artifacts*, N.Y. Times, Sept. 7, 1986, at F13, col. 1 (emphasizing that only handful of agents are responsible for patrolling millions of acres of land). For example, in New Mexico there are two agents responsible for eleven million acres of federally managed land, while six agents are responsible for the combined twenty-two million acres of Forest Service land in Arizona and New Mexico. *Id.* at F13, col. 3. The Forest Service has made only forty arrests in Arizona and New Mexico since 1979, and only one has resulted in a jail sentence. *Id.* at F13, col. 4. Consequently, the Archaeological Resources Protection Act has failed to halt the looting and trafficking of Indian archaeological resources and, consequently, a multi-million dollar industry is thriving. See *id.* at F13, col. 1 (reporting that theft of antiquities is lucrative business).

138. 16 U.S.C. § 470dd (1988). The 1979 Act embodied a developing recognition of the needs of Native Americans, specifying that if there is a possibility that an excavation or scholarly study located on public land and commenced pursuant to a valid permit might result in the harm or destruction of a cultural or religious site, the appropriate Indian tribe must be notified. 16 U.S.C. § 470cc(c) (1988). In addition, an individual or organization wishing to excavate or to remove objects from Indian land must first obtain the consent of the Indian or Indian tribe possessing legal authority over the land. 16 U.S.C. § 470cc(g)(2) (1988). The conditions and restrictions imposed upon the party by the appropriate Indian authority must be strictly followed. *Id.* Finally, the Act recognizes that the Indian or Indian tribe with jurisdiction over the lands upon which the excavation occurs, maintains the final authority concerning the ultimate disposition of removed objects. 16 U.S.C. § 470dd (1988).

139. *Cf.* 16 U.S.C. §§ 470aa-470gg (1988) (containing no provision for repatriation of Native American cultural artifacts held by museums and scientific institutions).

140. 20 U.S.C. § 80q-1(a) (Supp. I 1989). The museum is established within the Smithsonian Institution. *Id.* It will be supervised by a 25-member board of trustees. 20 U.S.C. § 80q-3(e)(1) (Supp. I 1989). Initially, 7 trustees must be Native Americans. 20 U.S.C. § 80q-3(e)(2) (Supp. I 1989). Eventually 12 of the 25 trustees must be Native Americans. 20 U.S.C. § 80q-3(f)(2) (Supp. I 1989).

The Museum Act also authorizes transfer of the assets of the Heye Foundation to the new museum. 20 U.S.C. § 80q-2 (Supp. I 1989). The Heye Foundation's Museum of the American Indian in New York City has "an unequalled assemblage of more than 1,000,000 Indian art objects and artifacts and is one of the largest . . . collections in the world." S. REP. NO. 143, 101st Cong., 1st Sess. 14 (1989). The merger of the Heye Foundation collection with the collection of the Smithsonian Institution creates "an institution whose capabilities for exhibition and research [are] unrivaled in scope." *Id.*

Smithsonian Institution.¹⁴¹ Although the scope of the Act is limited,¹⁴² Congress' mere recognition of a Native American repatriation right is a significant advancement toward the ultimate goal of complete repatriation.

The Museum Act defines a two-stage repatriation process. The first stage requires the Smithsonian Institution to create an inventory of those items deemed to be funerary objects, including objects associated with the burial of an individual or those removed from a specific burial site.¹⁴³ The second stage requires that a "preponderance of the evidence" point to a specific cultural affiliation before Native American parties may recover their desired cultural property.¹⁴⁴

The creation of a museum inventory is an integral element of the repatriation process. The inventory defines the cultural origin of the museum-held property, and as a result identifies the class of persons who may request repatriation of those items.¹⁴⁵ Because of the importance of the inventory process, the Act creates a complex mechanism to ensure its efficient completion and impartial management. The Act encourages efficiency by requiring museums to employ the most accurate tools available to discover the correct cultural affiliation of objects.¹⁴⁶ It also promotes impartiality by creating a supervisory committee in which Native American interests are adequately represented.¹⁴⁷

141. See 20 U.S.C. § 80q-9 (Supp. I 1989) (requiring Smithsonian Institution to inventory, notify, and expeditiously return Indian artifacts traceable to specific persons or tribes). The Smithsonian Institution is chartered under the executive branch and the Chief Justice of the Supreme Court. 20 U.S.C. § 41 (Supp. I 1989). The Smithsonian is governed by a 17-person Board of Regents, composed of the Vice President, the Chief Justice, three members of the Senate, three members of the House of Representatives, and nine other persons. 20 U.S.C. § 42 (Supp. I 1989). The Smithsonian's authority to obtain and keep cultural remains comes from its general charter to "increase" and "diffus[e]" knowledge, 20 U.S.C. § 41 (Supp. I 1989), and specifically from its broad authorization to continue "the excavation and preservation of archaeological remains." 20 U.S.C. § 69 (Supp. I 1989). Section 69 of the Museum Act was passed April 10, 1928 and amended August 22, 1949 "to give permanent statutory authorization to activities of the Smithsonian Institution which have been carried on with continuous congressional approval for upwards of 70 years." H. REP. NO. 1055, 81st Cong., 1st Sess. 1, reprinted in 1949 U.S. CODE CONG. & ADMIN. NEWS 1841, 1841.

142. See 20 U.S.C. § 80q-9(a) (Supp. I 1989) (allowing inventory of human remains and funerary objects but not of sacred objects of cultural patrimony).

143. 20 U.S.C. § 80q-9 (Supp. I 1989).

144. 20 U.S.C. § 80q-9(b)-(d) (Supp. I 1989).

145. 20 U.S.C. § 80q-9(a) (Supp. I 1989).

146. 20 U.S.C. § 80q-9(a)(2) (Supp. I 1989).

147. 20 U.S.C. § 80q-10(b) (Supp. I 1989). The inventory is to be completed in consultation and cooperation with Indian representatives. *Id.* This is to be accomplished by the establishment of a special committee to monitor the inventory process and resolve disputes between competing interest groups. 20 U.S.C. § 80q-10(a) (Supp. I 1989). The committee consists of five members; three members are appointed from a list of individuals submitted by Native American tribes and organizations. 20 U.S.C. § 80q-10(b) (Supp. I 1989). To avoid

The second stage of the repatriation process prescribes the level of proof needed for repatriation as well as the compulsory procedures for any exchange of cultural artifacts.¹⁴⁸ If the inventory process permits experts to conclude, by a preponderance of the evidence, that an item has a specific cultural affiliation, then the secretary of the supervisory committee notifies the associated Native American tribe, association, or individual of the finding.¹⁴⁹ At this point, the affiliated Native American party may request the return of the item in question.¹⁵⁰ If the individual or group asserts its right to the object, the Smithsonian Institution must expeditiously facilitate the object's return.¹⁵¹

D. *Native American Graves Protection and Repatriation Act*

The Museum Act established precedent for the return of Native American funerary objects and remains from the Smithsonian Institution to the Native American community.¹⁵² The Repatriation Act logically continues the repatriation policy initiated by the Museum Act.¹⁵³ The Repatriation Act, however, represents Congress' most prodigious effort to return Native American cultural property. While the Museum Act reaches only the Smithsonian Institution,¹⁵⁴ the Repatriation Act affects all museums¹⁵⁵ that receive federal funding, except for the Smithsonian.¹⁵⁶ Furthermore, the terms of the Act expand the categories of objects available for repatriation.

The Repatriation Act defines four categories of "returnable" objects: associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.¹⁵⁷ The precision of the categories, as well as the clear language composing their defini-

conflicts of interest, none of those appointed to the committee can be a government employee or affiliated in any way with the Smithsonian Institution. *Id.*

148. 20 U.S.C. § 80q-9(b)-(d) (Supp. I 1989).

149. 20 U.S.C. § 80q-9(b) (Supp. I 1989).

150. 20 U.S.C. § 80q-9(c)-(d) (Supp. I 1989).

151. *Id.*

152. *See supra* note 141 (explaining limited repossession rights awarded Native Americans in Museum Act).

153. *See* 136 CONG. REC. S17,175 (daily ed. Oct. 26, 1990) (statement of Sen. Akaka) (stating that Repatriation Act is "next step" in returning museum-held artifacts to native homelands).

154. *See* 20 U.S.C. § 80q-9 (Supp. I 1989) (limiting applicability of law to Smithsonian Institution only).

155. Repatriation Act, § 2(8), 104 Stat. 3048, 3049 (1990) (to be codified at 25 U.S.C. § 3001). "'[M]useum' means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency." *Id.*

156. *Id.*

157. *See supra* note 7 (defining categories of returnable objects).

tions, is intended to eliminate grey areas that could cause the problems of vagueness experienced by the Antiquities Act.¹⁵⁸ Despite the detailed wording of the Repatriation Act, the definitions are surprisingly inclusive, granting wide latitude to what is covered under the Act.¹⁵⁹

Although the repatriation mechanism is similar in form to the one contained in the Museum Act,¹⁶⁰ the extension of the types of items available for repatriation requires the Repatriation Act to vary its procedure. The Act dictates that each museum conduct an inventory of those objects classified as associated funerary objects.¹⁶¹

158. See *supra* note 128 (addressing treatment of Antiquities Act in *United States v. Diaz* which held Antiquities Act to be "unconstitutionally vague").

159. See Repatriation Act, § 2(3), 104 Stat. 3048, 3048-49 (1990) (to be codified at 25 U.S.C. § 3001) (articulating broad definitions of associated funerary object, unassociated funerary object, sacred object, and object of cultural patrimony). The Repatriation Act, like the Museum Act, includes human remains as items which may be repatriated under this legislation. *Id.* The issues surrounding the repatriation of human remains, however, are not the focus of this comment, and therefore are not included in the textual discussion.

160. See *supra* notes 143-51 and accompanying text (detailing Museum Act's repatriation process).

161. Repatriation Act, § 5, 104 Stat. 3048, 3052-53 (1990) (to be codified at 25 U.S.C. § 3003). The text of section 5 (Inventory for Human Remains and Associated Funerary objects) provides:

(a) IN GENERAL.—Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) REQUIREMENTS.—(1) The inventories and identifications required under subsection (a) shall be—

- (A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;
- (B) completed by not later than the date that is 5 years after the date of enactment of this Act, and
- (C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) EXTENSION OF TIME FOR INVENTORY.—Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

During the inventory process, the museum must identify the geographic origin as well as the cultural affiliation of the objects.¹⁶² It does not require museums to inventory unassociated funerary objects, sacred objects, or objects of cultural patrimony. Rather, for these objects, the museum is obliged to provide only a written summary based on available information.¹⁶³

Once the cultural affiliation of an associated burial object is determined, the museum notifies the appropriate Indian tribe or Native Hawaiian organization of the existence of the object.¹⁶⁴ When unassociated burial objects, sacred objects and objects of cultural patri-

Id.

162. Repatriation Act, § 5(a), 104 Stat. 3048, 3052 (1990) (to be codified at 25 U.S.C. § 3003). Cultural affiliation in the context of the Repatriation Act "means that there is a relationship of a shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." Repatriation Act, § 2(2), 104 Stat. 3048, 3048 (1990) (to be codified at 25 U.S.C. § 3001).

163. Repatriation Act, § 6, 104 Stat. 3048, 3053-54 (1990) (to be codified at 25 U.S.C. § 3004). The text of section 6 (Summary for Unassociated Funerary Objects, Sacred Objects, and Cultural Patrimony) provides:

(a) IN GENERAL.—Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where really ascertainable.

- (b) REQUIREMENTS.—(1) The summary required under subsection (a) shall be—
- (A) in lieu of an object-by-object inventory;
 - (B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and
 - (C) completed by not later than the date that is 3 years after the date of enactment of this Act.

Id.

164. Repatriation Act, § 5(d), 104 Stat. 3048, 3053 (1990) (to be codified at 25 U.S.C. § 3003). The text provides:

(d) NOTIFICATION.—(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

- (2) The notice required by paragraph (1) shall include information -
- (A) which identifies each Native American human remains or associated funerary object and the circumstances surrounding its acquisition;
 - (B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and
 - (C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

Id.

mony are the subjects of summary investigation, notification is not compulsory.¹⁶⁵ In such cases, interested parties must gain information concerning the object from the summaries completed by the museums.¹⁶⁶ If an interested Native American group or individual requests the repatriation of a culturally affiliated object, the object must be expeditiously returned.¹⁶⁷

After completion of the inventory process by the museum, associated funerary objects and unassociated funerary objects, whose cultural affiliation has not been satisfactorily determined, may be subject to repatriation.¹⁶⁸ In these situations, the Act obliges interested Native American tribes or individuals to proffer evidence es-

165. *See id.* (requiring notice for human remains and associated funerary objects only). For other items, a consultation with the tribal government is held after the summarization is completed. Repatriation Act, § 6(b)(1)(B), 104 Stat. 3048, 3053 (1990) (to be codified at 25 U.S.C. § 3004).

166. Repatriation Act, § 6(b)(2), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3004). The text provides:

Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

Id.
167. Repatriation Act, § 7(a)(1)-(3), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005). The text of section 7 (Repatriation) provides:

(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS.—

(1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c), and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

Id.
168. Repatriation Act, § 7(a)(4), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005). The text provides in part:

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5, or the summary pursuant to section 6, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation. . . .

Id.

establishing cultural affiliation.¹⁶⁹ Parties must prove cultural affiliation by a preponderance of the evidence.¹⁷⁰ The evidence presented to satisfy the burden of persuasion may be based on "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, other relevant information, or expert opinion."¹⁷¹ Once the burden of persuasion is satisfied, the Native American claimant must produce evidence which "standing alone before the introduction of evidence to the contrary, would support a finding that the . . . museum did not have a right to possession."¹⁷² The museum is then given an opportunity to rebut the Native American presentation.¹⁷³ If the rebuttal overcomes the evidence given by the Native American claimant, by proving the museum has a right of possession to the object, the museum retains the object.¹⁷⁴

When sacred objects and objects of cultural patrimony are not identified as culturally-affiliated items, the burden of proving affiliation also rests on the interested Native American party.¹⁷⁵ The Native American party must establish one of three elements.¹⁷⁶ The Native American party requesting the object may prove "direct lineal descent."¹⁷⁷ In other words, the party claiming the object must be a descendant of the individual who previously owned the sacred object or object of cultural patrimony.¹⁷⁸ The tribe, organization, or individual may also prove that it previously owned or controlled

169. *Id.*

170. *Id.*

171. *Id.*

172. Repatriation Act, § 7(c), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005).

173. *Id.*

174. *Id.*

175. Repatriation Act, § 7(a)(5)(B), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005).

176. *See* Repatriation Act, § 7(a)(5), 104 Stat. 3048, 3054-55 (1990) (to be codified at 25 U.S.C. § 3005) (enumerating requirements Native Americans must meet to prove cultural affiliation to unassociated items). The text provides:

(5) Upon request and pursuant to subsections (b), (c), and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where -

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

Id.

177. *Id.*

178. *Id.*

the item.¹⁷⁹ Finally, the requesting Indian tribe or Hawaiian organization may show that the object was owned by a member thereof, and that no lineal descendant survives or desires to make a claim.¹⁸⁰ Unlike the procedure outlined for the return of culturally unaffiliated funerary objects, the quantity of evidence required to satisfy the initial burden of persuasion for unaffiliated sacred objects and objects of cultural patrimony is conspicuously absent.¹⁸¹ If, however, the Native American party provides adequate evidence in the initial showing, he or she bears the burden of producing evidence that the museum does not have a right to possession.¹⁸² Just as with culturally unaffiliated funerary objects, the museum is given the opportunity to rebut and prove a valid right of possession to the object.¹⁸³ A successful rebuttal results in the continuing possession of the object by the museum.¹⁸⁴

Generally, the establishment of cultural affiliation through the inventory process, the summary investigation, or the presentation of evidence by the Native American party, results in the expeditious transfer of the affiliated object.¹⁸⁵ Repatriation of the object, however, may still be stopped. If the item is considered indispensable for the completion of a specific scientific study whose outcome would significantly benefit the United States, the museum retains possession of the object.¹⁸⁶

The Repatriation Act, like the Museum Act, establishes a review committee.¹⁸⁷ The duty of the committee is to monitor and review the inventory and repatriation processes, ensuring fair and efficient

179. *Id.*

180. *Id.*

181. *Id.*

182. Repatriation Act, § 7(c), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005).

183. *Id.*

184. *Id.*

185. *See supra* note 167 (setting forth "expeditious return" language of Repatriation Act).

186. Repatriation Act, § 7(b), 104 Stat. 3048, 3055 (1990) (to be codified at 25 U.S.C. § 3005). Such items, however, "shall be returned by no later than 90 days after the date on which the scientific study is completed." *Id.*

187. *See* Repatriation Act, § 8(a), 104 Stat. 3048, 3055 (1990) (to be codified at 25 U.S.C. § 3006) (requiring Secretary of Interior to establish committee within 120 days of enactment of Repatriation Act). The committee will be composed of seven members. *Id.* § 8(b). The text provides as follows:

- (A) 3 [members] shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;
- (B) 3 [members] shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and
- (C) 1 [member] shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

application of the Act.¹⁸⁸ Unlike its predecessor, however, the Repatriation Act contains an effective enforcement mechanism. The enforcement mechanism provides federal courts with jurisdiction over disputes arising under the Act.¹⁸⁹ It also grants federal courts the power to issue orders deemed necessary to enforce the terms of the legislation.¹⁹⁰

III. ANALYSIS AND RECOMMENDATIONS

The extensive treatment given to the repatriation issue in the Repatriation Act increases the rights of Native Americans to recover cultural items held by museums.¹⁹¹ The Act may be viewed as the culmination of years of effort by Native Americans to initiate a process facilitating the return of Native American cultural resources.¹⁹² The Repatriation Act, however, is a compromise that strikes a balance between the competing interests of Native Americans, museums, and interested private parties.¹⁹³ When Native American negotiators confronted the staunch resistance of the American Asso-

(2) The secretary may not appoint Federal officers or employees to the committee.

Id.

188. Repatriation Act, § 8(c), 104 Stat. 3048, 3056 (1990) (to be codified at 25 U.S.C. § 3006). The text provides:

(c) RESPONSIBILITIES.—The committee established under section (a) shall be responsible for—

....

(2) monitoring the inventory process and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to -

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable. . . .

Id.

189. Repatriation Act, § 15, 104 Stat. 3048, 3058 (1990) (to be codified at 25 U.S.C. § 3013).

190. *Id.*

191. *See supra* notes 168-90 and accompanying text (analyzing repatriation mechanism of Repatriation Act).

192. *See supra* notes 110-51 and accompanying text (discussing development of laws governing disposition of Native American cultural items prior to enactment of Repatriation Act).

193. *See* 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson) (noting that numerous suggestions by Antique Tribal Arts Dealers Association, Inc. (ATADA) were incorporated into final draft of Repatriation Act).

First, ATADA recommended that the Act include a definition of "cultural affiliation" that incorporated anthropological and archaeological criteria. *Id.* The Repatriation Act defines "cultural affiliation" as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." Repatriation Act, § 2(2), 104 Stat. 3048, 3048 (1990) (to be codified at 25 U.S.C. § 3001). The Act thus attempts to correlate the cultural or

ciation of Museums and the Antique Tribal Art Dealers Association,

anthropological characteristics of a present day group with the archaeological past as suggested by ATADA.

ATADA also requested the modification of the definition of "inalienable communal property." See 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson); *House Hearings, supra* note 12, at 3 (statement of James Reid, Antique Tribal Art Dealers Association, Inc., and Sotheby's, Inc.). The interest group suggested two changes that were incorporated into the final version of the Act. 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson). First, "that the object be of 'ongoing' cultural importance," and second, "that the object must be deemed inalienable at the time [of] it[s] expatriation." *Id.*

In addition, ATADA asked the definition of "museum" be narrowed to prevent the definition as in earlier versions of the Act, from including private individuals who receive grants or payments such as social security. *Id.* The expansive language would have potentially included many other collectors and dealers within the scope of the bill. *Id.* Consequently, the definition of "museum" was narrowed to include only institutions or state or local agencies that receive federal funds. Repatriation Act, § 2(8), 104 Stat. 3048, 3049 (1990) (to be codified at 25 U.S.C. § 3001) (defining meaning of term).

Furthermore, ATADA was concerned that the definition of "sacred object" was so broad as to be unworkable. 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson); *House Hearings, supra* note 12, at 240-43 (statement of James Reid, Antique and Tribal Art Dealers Association, Inc. and Sotheby's, Inc.). The organization suggested, as an alternative, that the definition "stipulate that the object need be 'irreplaceable' and 'necessary for the continued practice' of tribal religions." 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson). The final draft of the Repatriation Act adopted only the latter suggestion. Repatriation Act, § 2(3)(C), 104 Stat. 3048, 3048 (1990) (to be codified at 25 U.S.C. § 3001). The term "irreplaceable" was not added to the definition because of continued Native American protest that the courts not determine what is essential or "irreplaceable" for the practice of a Native American religion. 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson).

Congress also modified the definition of "funerary object" in response to ATADA's demands. *Id.* at H10,991. The term was divided into two categories, associated funerary objects and unassociated funerary objects. Repatriation Act, § 2(3)(A)-(B), 104 Stat. 3048, 3048 (1990) (to be codified at 25 U.S.C. § 3001). This was to "provide greater specificity to the objects covered by the bill." 136 CONG. REC. H10,991 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson). Further, as a result of ATADA pressure, the Act contains a clause stipulating that the legislation shall not supersede the right of possession established under property law. 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson).

ATADA expressed concern that the bill's original inventory requirements would pose overly-burdensome financial and bureaucratic burdens on museums. *Id.* at H10,990. Consequently, the Repatriation Act includes "specific simplified inventory requirements and authorizes a Federal grant program to assist museums in their inventory activities." *Id.* ATADA and the museum community supported the simplified inventory. *Id.*

In the Repatriation Act debate, ATADA aligned itself with the American Association of Museums (AAM). *Id.* This is an unusual circumstance because, generally, the divergent goals of museums and private collectors result in conflict between the two groups. ATADA supports private collection and private viewing of artistic objects. *House Hearings, supra* note 12, at 238 (statement of James Reid, Antique Tribal Art Dealers Association, Inc. and Sotheby's, Inc.). Museums, on the other hand, stand for public viewing and public education; their philosophy is that art should be available for all to see. See *id.* (statement of Dr. Raymond Thompson, American Association of Museums) (discussing unique role of museums in furthering public education and research).

Congress also modified the burden of proof requirement of the Repatriation Act to accommodate the strong objections of ATADA and the AAM. 136 CONG. REC. H10,990-91 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson). The original provisions of the bill placed the burden of proving ownership of objects on the museum or agency in possession. H.R. 5237, 101st Cong., 2d Sess. § 6(c)(1) (1990). The revised and subsequently enacted version shifts the burden of proof of ownership to the Native American or Hawaiian organizations on all cultural items except associated funerary objects. Repatriation Act, § 7, 104 Stat. 3048, 3054-55 (1990) (to be codified at 25 U.S.C. § 3005). The composition of the review commit-

they dropped important demands and accepted the political reality of their situation. As a result, additional legislation is needed to fully address Native American concerns regarding the disposition of their cultural legacy.¹⁹⁴

While the Repatriation Act reaches federally-funded museums as well as federal agencies, the Smithsonian Institution remains un-governed by the Act.¹⁹⁵ Presently, the Smithsonian Institution possesses the largest Native American collection in the world.¹⁹⁶ To purposefully exempt the Smithsonian from the comprehensive requirements of the Repatriation Act and subject it only to the more permissive requirements of the Museum Act,¹⁹⁷ decreases the effectiveness of the legislation. Furthermore, it weakens the bonds of the "unique relationship"¹⁹⁸ existing between the Federal Government and the Native Americans. Finally, the failure to include the Smithsonian Institution within the scope of the Repatriation Act brings into question the United States government's commitment to redressing the historical wrong committed against the Native American population.

tee was also modified at the request of ATADA and the AAM. 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Richardson). The two interest groups "raised concerns that the representation of the review committee established by the Act was weighted in favor of Native American groups." *Id.* The present version of the Repatriation Act strikes a more favorable balance. The seven member board, appointed by the Secretary, is composed of three members nominated by the Native American community and three members nominated by the museum and scientific community. Repatriation Act, § 8(b)(1)(A)-(C), 104 Stat. 3048, 3055 (1990) (to be codified at 25 U.S.C. § 3006). The final member is appointed from a list developed and approved by the six existing committee members. *Id.*

194. See *infra* notes 195-231 (discussing potential loopholes in Repatriation Act and problems with burden of proof standard imposed on Native American claimants).

195. See Repatriation Act, § 2(4), (8), 104 Stat. 3048, 3049 (1990) (excluding Smithsonian Institution from definitions of "federal agency" and "museum"); 136 CONG. REC. S17,174 (daily ed. Oct. 26, 1990) (statement of Sen. Breaux) (amending Act to specifically exclude Smithsonian Institution).

196. 20 U.S.C. § 80q(5)(A) (Supp. I 1989) (asserting that merger of Smithsonian collection with Heye collection would "create a national institution with unrivaled capability for exhibition and research").

197. See 20 U.S.C. § 80q-9(c)-(d) (Supp. I 1989) (providing for repatriation of only Native American human remains, associated funerary objects, and unassociated funerary objects). The Museum Act is silent regarding sacred objects and objects of cultural patrimony and therefore, at least with respect to these items, the Repatriation Act may effectuate repatriation of greater numbers of artifacts. *Id.*

On March 4, 1991, the National Museum of the American Indian announced a new policy on repatriation. Smithsonian Institution, Press Release No. SI-121-91 (Mar. 5, 1991). The policy expands the repatriation principles of the Museum Act to include "ceremonial and religious materials and communally owned Native Property," and creates six categories of items. *Id.* at A1. This expansion is an improvement over the Museum and Repatriation Acts, but the policy still falls short. Repatriation decisions will be made by the museum's board of trustees "on advice" of the collection committee. *Id.* at A2. Furthermore, the party requesting the return of an item bears the initial burden of establishing a connection or cultural affiliation to the object. *Id.*

198. Repatriation Act, § 12, 104 Stat. 3048, 3058 (1990) (to be codified at 25 U.S.C. § 3010).

A second difficulty with the Repatriation Act can be found in the provision concerning scientific study. The provision requires that a federal agency or museum promptly return a requested item, unless the item is needed for the completion of a scientific study that significantly benefits the United States.¹⁹⁹ The wording of the provision is vague, and thus invites abuse by those institutions receiving Native American requests for repatriation. The language neither clearly specifies what should be classified as indispensable to scientific research nor indicates exactly what research results in a major benefit to the United States.²⁰⁰ Under the terms of the Act, any agency or museum receiving a request for repatriation could initiate a scientific study that it defines as vital to the United States and then schedule the study's completion date in the distant future. This unethical course of action would comply with the terms of the Act, and at the same time, eliminate a valid claim for repatriation.

To be more effective, the Repatriation Act should prohibit the unilateral initiation of new research projects involving disputed material. A bilateral mechanism that fosters negotiation between the museums and the Native Americans must be designed and permitted to operate.²⁰¹ This would allow the interests of all those involved to be taken into consideration.²⁰² For instance, legislation could require the institution to obtain the consent of the culturally affiliated tribe or individual before any scientific project commences. Reservations or objections noted by the Native American party could be discussed and appropriate action to remedy the problems could be guaranteed. Only upon the mutual agreement of the parties could the research project proceed. If the parties are unable to

199. Repatriation Act, § 7(b), 104 Stat. 3048, 3055 (1990) (to be codified at 25 U.S.C. § 3005). The provision on scientific study states in its entirety:

If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

Id.

200. *Id.* The definition section of the Act also fails to illuminate the meanings of "indispensable" and "major benefit." Repatriation Act, § 2, 104 Stat. 3048, 3048-50 (1990) (to be codified at 25 U.S.C. § 3001).

201. See Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 495 (1989) (noting dominance of negotiation as problem solving and dispute resolution device). Negotiation is uniquely suited to resolving all types of issues and it is a key element both in dispute resolution and in consensus building. *Id.* The term "negotiating" refers to "stylized reciprocal dealings, which are initiated, conducted, and monitored by the parties, and are intended to resolve a dispute or to reach an agreement concerning future actions." *Id.* at 494 n.1.

202. See *id.* (highlighting that parties to negotiations directly control agenda and consequently interests to be negotiated).

arrive at a suitable agreement, the complaint could be submitted to an alternative forum for dispute resolution.²⁰³

Future legislation should also place a limitation on the amount of time permitted for the research of a particular question. This deadline should be final except upon a showing, substantiated by direct evidence,²⁰⁴ that research is proceeding at a satisfactory pace and that its completion will lead to a significant benefit to the United States. The institution involved must prove its case with clear and convincing evidence.²⁰⁵ Upon satisfying this burden of proof, an extension period could be granted by the governing committee. If the showing is insufficient, the materials subject to dispute should be immediately returned to the appropriate Native American claimant. The suggested mechanism strikes a balance between Native American rights and the requirements of academic study. While it provides Native Americans with an opportunity to recover their cultural property, it also allows scholars to gain additional time for the accurate and successful completion of legitimate academic research.

The Repatriation Act establishes an inventory system for associated funerary objects and a limited summary requirement for unassociated funerary objects, sacred objects and objects of cultural patrimony.²⁰⁶ The current scheme creates a system in which muse-

203. See Fine & Planger, *ADR Overview*, in *CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT* 7, 7-11 (E. Fine ed. 1988) (stating that increasing interest in alternative dispute resolution has resulted from mounting public dissatisfaction with formal dispute resolution process and institutions, particularly courts, to resolve disputes in timely, efficient, and economic manner); Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676-77 (1986) (arguing that alternative dispute resolution methods may be inappropriate outside realm of purely private disputes and where broader issues involving public law are at stake).

Traditional forms of alternative dispute resolution include adjudication, arbitration, mediation, and negotiation. E. Green, Remarks at the First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 20, 1983), *reprinted in* 100 F.R.D. 499, 518 (1984).

Less traditional forms of alternative dispute resolution include mini-trials, summary trial, rent-a-judge, and neutral expert fact-finding. See *id.* at 515-20 (discussing mini-trial in detail and noting other nontraditional forms of alternative dispute resolution).

204. See C. McCORMICK, *McCORMICK ON EVIDENCE* § 338, at 952 (3d ed. E. Cleary ed. 1984) (stating that direct evidence permits individual making judgment to ascertain truth of fact to be proved by depending only upon truthfulness of evidence provided and not weighing of probabilities).

205. See *id.* § 340, at 959-60 (noting that clear and convincing should be translated to mean highly probable); McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246-47, 253-54 (1944) (arguing that trier of facts can differentiate three levels of persuasion). McBaine suggests that the trier of fact can determine "what (a) *probably* has happened, or (b) what *highly probably* has happened, or (c) what *almost certainly* has happened." *Id.* (emphasis in original). To satisfy the "clear and convincing" standard, the party seeking to establish the fact should induce persuasion "to a relatively high degree." *Id.* at 253. Therefore, the proponent must establish that the facts are highly probable. *Id.* at 254.

206. Repatriation Act, §§ 5-6, 104 Stat. 3048, 3052-54 (1990) (to be codified at 25 U.S.C. §§ 3003-3004); see 136 CONG. REC. H10,990 (daily ed. Oct. 22, 1990) (statement of Rep. Rich-

ums could easily abuse their authority and act to the detriment of the Native American community. It grants museums the discretion to designate which items will receive the attention of the rigorous inventory process and which will receive only summary treatment.²⁰⁷ Items classified for inventory are more likely to be repatriated than those designated for summary identification.²⁰⁸ Consequently, museums could purposefully misdesignate items to retain possession.

One viable solution to the difficulties inherent in the bifurcated system is to create a single inventory process governed by a commission, as suggested in the original version of the Repatriation Act.²⁰⁹ All items would be subject to the same inventory requirements.²¹⁰ This would ensure that all objects, to the extent possible, are correctly identified.²¹¹ Furthermore, it would minimize a museum's ability to manipulate the system in its favor. A single system requiring universal inventory processes would assure Native Americans that their right to regain possession of cultural property is scrupulously respected.

The Repatriation Act provides Native Americans with a greater opportunity to recover cultural objects than if they were to initiate a common law action in replevin in a court of law.²¹² This is particularly true where the Native American party requests the repatriation of a culturally affiliated object. Where the museum establishes cultural affiliation pursuant to the inventory process, associated funerary objects must be expeditiously returned, with no required showing by the Native American.²¹³ Furthermore, culturally affiliated unassociated funerary objects, sacred objects, and objects of cultural patrimony must be expeditiously returned, on the satisfac-

ardson) (stating that inventory process was not required of all items because legislators felt requirements would pose great financial and bureaucratic burdens on museums).

207. Repatriation Act, §§ 5-6, 104 Stat. 3048, 3052-53 (1990) (to be codified at 25 U.S.C. §§ 3003-3004) (providing authority to museums to make crucial decisions concerning categorization of cultural items).

208. See *id.* (discussing burden of proof requirement for items which enter inventory process and those which go through summary process).

209. See H.R. 5237, 101st Cong., 2d Sess. §§ 5(a), 7(b)(1) (1990) (creating single inventory system overseen by committee composed of seven members, four of whom are appointed by Secretary from nominations submitted by Native American tribes).

210. See *id.* at § 5(a) (proposing system that requires inventory of all human remains, funerary objects, sacred objects, or objects of inalienable communal property in collections of publicly funded museums).

211. *Id.* (requiring geographic and cultural identification of all objects, if possible).

212. Compare *supra* notes 153-90 and accompanying text (discussing Repatriation Act) with *supra* notes 36-51 and accompanying text (discussing common law action in replevin).

213. See Repatriation Act, § 7(a)(1), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005) (defining standards for repatriation of culturally affiliated associated funerary objects).

tion of a moderate burden of proof by the Native American.²¹⁴ There is, however, a vast class of objects labelled as culturally unaffiliated.²¹⁵

As previously noted in the section detailing the Repatriation Act's repatriation process, the burden of establishing the cultural affiliation of those funerary objects, sacred objects, and objects of cultural patrimony, deemed culturally unaffiliated by the museum inventory and summary procedures, rests on the Native American claimant.²¹⁶ In regard to funerary objects, the party must prove cultural affiliation by a preponderance of the evidence.²¹⁷ When attempting to prove the cultural affiliation of sacred objects and objects of cultural patrimony, the burden is less clear. The Native American is obliged to go forward with evidence proving either lineal descent or prior ownership to establish cultural affiliation.²¹⁸ The quantity of evidence, however, needed to persuade the review committee is not noted.²¹⁹ From the context, it appears that the showing is equivalent to a burden of persuasion.²²⁰ On the establishment of cultural affiliation, all three types of objects necessitate that the Native American organization, tribe, or individual, produce evidence that would support a finding that the museum does not have a right to possess the object.²²¹

The drafters of the Repatriation Act designed the legislation to provide Native Americans with a process that would result in the repatriation of their cultural heritage, address the needs and obligations of the museum community, and defuse the emotionally-charged issue of repatriation.²²² To accomplish these goals, the above-mentioned process should be altered. Earlier versions of the

214. See Repatriation Act, §§ 7(a)(2), 7(c), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005) (defining standards for repatriation of culturally affiliated unassociated funerary objects, sacred objects, and objects of cultural patrimony).

215. See *id.* § 7(a)(4), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005) (discussing repatriation process for culturally unaffiliated items); see also *supra* notes 31-33 and accompanying text (discussing dubious means through which museums collected Native American materials and resulting lack of information regarding precise origin of these items).

216. See *supra* notes 168-84 and accompanying text (discussing repatriation process of unaffiliated funerary objects, sacred objects, and objects of cultural patrimony).

217. See *supra* note 171 and accompanying text (listing evidence permitted to satisfy burden).

218. See *supra* notes 176-82 and accompanying text (detailing burden on Native Americans wanting to recover specifically sacred objects and objects of cultural patrimony).

219. See *supra* note 181 and accompanying text (noting absence of wording that defines burden of persuasion).

220. Repatriation Act, § 7(a)(1)-(3), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005); see *supra* note 167 (outlining text of § 7(a)(1)-(3)).

221. See Repatriation Act, § 7(a)(b), 104 Stat. 3048, 3054 (1990) (to be codified at 25 U.S.C. § 3005) (requiring satisfaction of section (c) prior to repatriation).

222. See 136 CONG. REC. S17,175 (daily ed. Oct. 26, 1990) (statement of Sen. McCain) (highlighting purposes and outcomes of Repatriation Act).

Repatriation Act shift the burden of going forward and the burden of persuasion to the museum.²²³ It requires the museum to prove by a preponderance of the evidence that it has a right of possession to the object in question.²²⁴ This drastic alteration of the process, however, results in an unfair burden being placed on the museum community. Any time a Native American requests an item stored or displayed in a museum, the museum would be required to defend its right to possession.

To avoid the harsh effects of a reversal of the burdens of production and proof, and, at the same time, address the purposes of the Repatriation Act, a system that places the initial burden on the Native Americans is necessary. Instead of a burden of persuasion,²²⁵ the Native American claimant should be forced to satisfy a burden of production.²²⁶ Thus, the party would be required to show sufficient evidence of cultural affiliation on which a reasonable jury could find in his or her favor.²²⁷ On the satisfaction of this burden by the Native American party, the burden of going forward would be placed on the museum.²²⁸ The museum could proceed in one of two alternative manners. It could disprove by a preponderance of the evidence the cultural affiliation established by the Native American individual, organization, or tribe, negating the party's or parties' right to claim the object. The museum could also attempt to prove, by a preponderance of the evidence, its legal right to maintain possession of the object. This could be established by any type of documentation concerning the method of acquisition of the object. If the museum proves the lack of cultural affiliation of the Native American party to the object or a valid right of possession, the object should remain in the museum's collection. If, on the other hand, the museum fails to meet its required showing, the object in question should be expeditiously repatriated.

Congress might also consider the insertion of a compromise option into the text of the Repatriation Act. Instead of an adversarial

223. See H.R. 5237, 101st Cong., 2d Sess. 14 (1990) (requiring initial showing by museum).

224. See *id.* (detailing museum's burden of going forward and burden of persuasion).

225. See C. McCORMICK, *supra* note 204, § 339, at 956-59 (discussing satisfaction of burden of persuasion). The "preponderance of the evidence" standard is the burden of persuasion generally employed in civil cases. *Id.* at 956.

226. See *id.* § 338, at 952-56 (discussing burden of producing evidence).

227. See *id.* at 953 (noting that "scintilla" of evidence is not enough but rather "the evidence must be such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved . . .").

228. See *id.* at 955 (stating that when party satisfies burden of production, duty of going forward has shifted to adversary); see also *Speas v. Merchant & Bank Trust Co.*, 188 N.C. 524, 530, 125 S.E. 398, 401 (1924) (suggesting burden of going forward shifts to opponent).

hearing, pitting the Native American against the museum, a forum could be designated in which a cooperative discussion process could occur.²²⁹ A panel consisting of representatives of the two interested parties could be appointed to address the controversy surrounding the repatriation of the culturally unaffiliated funerary object, sacred object, or object of cultural patrimony. The individuals involved in this alternative process could consider a multiplicity of actions which would bring partial satisfaction to all involved parties.²³⁰ For instance, a museum could retain physical possession of the object, but the conditions under which the item is exhibited or stored could be controlled by guidelines formed by the Native American party. A situation such as the one posited above might permit the tribe to remove the object from the museum's possession for a specified number of days, weeks, or months to perform necessary religious ceremonies. Similarly, the Native American party could retain physical possession of the object in question. In this case, scholars and scientists might be permitted access to the objects so that research could continue uninhibited. This type of compromise could also include short term loans to the museum, which would permit the museum to exhibit the object and fulfill its duty to the public.²³¹

CONCLUSION

As the United States matured into a nation that respected the rights of minority groups, the Native American community suffered and endured the loss of their lives, land, and property. Cultural objects, representing their heritage and identity, were wrested from their control or stolen. Many of these items found their way into museum collections. Until the passage of the Repatriation Act, the Native Americans were unable to regain possession of many cultural objects housed in our nation's museums. The courts of law, as well as Congressional statutory efforts, failed to respond to Native American requests for repatriation. The Repatriation Act directly confronts the issue and mandates the unprecedented return of numerous Native American cultural items. Yet, the Act makes numerous concessions to the American Museum Association and other interested parties that reduce the effect of the legislation and im-

229. See *supra* notes 201-03 and accompanying text (discussing potential and effectiveness of negotiations in resolving disputes in context of Act's scientific research provision).

230. See *supra* notes 201-02 (noting that negotiation addresses concerns of both parties and, if successful, results in agreement concerning future actions).

231. See Report of the Panel for a National Dialogue on Museum/Native American Relations 13 (Feb. 28, 1990) (indicating important role of museums). Museums are in a fiduciary relationship with public to "advance and disseminate knowledge through the acquisition, preservation, study, and interpretation of collections." *Id.*

pede the repatriation process. As a result, the Repatriation Act fails to eliminate repatriation as an issue of contention.

Upon the successful resolution of the repatriation controversy, the preservation, exhibition, and study of Native American cultural objects will be controlled by the Native American community. With the common identity and the cultural pride derived from the objects, Native Americans will be able to confront, more effectively, the problems of the present and view, more positively, their role in the future.