

500 YEARS AFTER COLUMBUS: PROTECTING NATIVE AMERICAN CULTURE

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Coinciding with the events surrounding the 500th anniversary of Columbus's voyages to the New World, a renewed interest in and a new sensitivity toward the history and culture of Native Americans has reached new heights. This interest has been manifested in many forms. For instance, numerous magazines and newspapers have published articles reassessing the role of Columbus in history evaluating the impact his "discovery" had on the indigenous people.¹ Indeed, the commercial success of Kevin Costner's Academy Award winning film *Dances with Wolves*,² which portrayed the lives of Plains Indians different from that which Hollywood has traditionally portrayed, further reflects the public's interest in Native American culture.³ Even major sporting events have not been immune from changes in views regarding Native Americans. For example, as a result of the participation of the Washington Redskins and the Atlanta Braves, the most recent Superbowl and World Series drew protests from Native Americans over the allegedly demeaning depiction of Native Americans caused by the continued use of "Indians" as team mascots.⁴ After a long history of insensitivity toward Native American culture, even the United States Congress has displayed a more enlightened view toward Native American culture when it passed a statute mandating the repatriation of Native American remains and cultural antiquities⁵ and a

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¹ See Marc Silver, *Discovering Columbus*, U.S. NEWS & WORLD REPORT, Oct. 7, 1991, at 90 (Columbus "exploited the daylights out of the friendly natives he met."); Charles Krauthammer, *Hail Columbus, Dead White Male*, TIME, May 27, 1991, at 74 ("The National Council of Churches (NCC) condemns the 'discovery' as 'an invasion and colonization with legalized occupation, genocide, economic exploitation and a deep level of institutional racism and moral decadence.'").

² Orion 1990.

³ *Dances With Wolves* earned over \$100 million in domestic box office receipts. Orion's "*Dances With Wolves*" Passes \$100 Million Mark, Business Wire, Feb. 8, 1991, available in LEXIS, Nexis Library, Entert File; Bob Fenster, "*Dances*," *Dark Horses Reign at Oscars*, ARIZONA REPUBLIC, Mar. 27, 1991, at E4.

⁴ Steve Rushin, *From Bottom to Tops*, SPORTS ILLUSTRATED, Oct. 28, 1991, at 20, 22. Perhaps in reaction to such protests, one major daily newspaper, *The Oregonian*, recently decided to discontinue the use of team names that are offensive to members of racial, religious or ethnic groups such as Redskins, Indians, Redmen and Braves. William A. Hilliard, THE OREGONIAN, Feb. 14, 1992, at D1.

⁵ The Native American Graves Protection and Repatriation Act, Pub. L. No. 101-

second statute trying to enhance the marketability of Native American works of art.⁶ These two laws represent dramatic improvements on previous acts by Congress which have often treated the concerns of Native Americans with callous disregard.⁷

The history of the legislative treatment of Native American artifacts and remains has been marked by two distinct and opposite approaches. Rather than recognizing Native American culture and values by protecting Native American burial sites, early legislation permitted responsible excavation for the purpose of placing remains and antiquities in institutions for display and scientific study because Congress pursued a policy that favored institutionalization of remains and artifacts.⁸ In contrast, recent legislation reflects a greater sensitivity to Native American culture and values; this represents a fundamental change in the political view toward Native American culture, as well as the increased effectiveness of Native Americans in the political realm.⁹ Indeed, legislation at both the federal and state levels over the past twenty-five years has become more protective of Native American interests by increasingly limiting access to historical sites and limiting the alienability of artifacts already on the antiquities market.¹⁰ Moreover, Congress has passed other legislation

601, § 2, 104 Stat. 3048 (codified at 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170 (Supp. II 1991)). For a discussion of the Act, its history and related state legislation, see *Symposium: The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation-Related Legislation*, 24 ARIZ. ST. L.J. 1-562 (1992).

⁶ The Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, title I, § 101, 104 Stat. 4662 (codified at 25 U.S.C. §§ 305a, 305d-305e, 18 U.S.C. §§ 1158-1159 (Supp. II 1991)).

⁷ See Thomas H. Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of Applicable Law and Proposed Legislation*, 55 Mo. L. REV. 883, 883 (1990) ("Until just three decades ago the federal government actively pursued a policy of cultural destruction through the assimilation of Native American tribes into mainstream American culture.").

⁸ See, e.g., Antiquities Act, ch. 3060, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-433 (1988) (permitting only reputable scientific or educational institutions or reputable museums access to archeological sites)). See also Boyd, *supra* note 7, at 893-900 (discussing federal government's legislative efforts during this century to pursue policy of preserving Native American cultural patrimony by limiting access to archeological sites and institutionalizing found artifacts). Indeed, the Surgeon General early this century ordered the collection of Indian remains for scientific study. This order was responsible for many of the skeletal remains still in the government's possession. See H.R. REP. NO. 877, 101st Cong., 2d Sess. 10 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4369.

⁹ See S. REP. NO. 473, 101st Cong., 2d Sess. 4-6 (1990) (Native American testimony recounting past instances of cultural insensitivity toward Native Americans reflected in Senate Select Committee on Indian Affairs recommendation of bill passage and congressional findings).

¹⁰ See, e.g., Antiquities Act of 1906 §§ 431-433 (access to archeological sites limited to reputable scientific or educational institutions or reputable museums); The Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa-470mm (1988) (excavation on Indian lands requires consent of Indian tribe); The Native American Graves

that is meant, not only to protect the economic welfare of Native American artists and craftspersons, but also to provide buyers with a means to assure the provenance of artifacts and newly created works by Native Americans.¹¹ Thus, while museums and individual collectors may bemoan the loss of access to many archaeological sites, they should celebrate the new sensitivity which attempts to assure the authenticity of those Native American items still available on the market.

Legislative treatment of Native American artifacts began with the Antiquities Act of 1906 ("Antiquities Act").¹² This law was enacted as a response to the growing problem of burial site raiding by treasure hunters and amateur archaeologists who seriously damaged historical sites and removed important artifacts.¹³ While Congress acknowledged that uncontrolled excavation needed to be curbed, its response was not to stop the removal of artifacts, but rather to regulate it.¹⁴ In truth, the Antiquities Act merely sought to promote investigation of historic sites by the scientific community rather than by amateurs. In passing this Act, Congress increased the role of universities and museums in the removal of artifacts by permitting them primary access to sites. The intended result was that the artifacts and remains would end up in public museums for display or in research laboratories, rather than in private collections.¹⁵

The Antiquities Act established a screening process for access to sites by requiring permission from the Secretary of the Interior before excavation of any site located on federal land.¹⁶ Although anyone convicted of taking artifacts or damaging a site without the requisite permission was subject to sanctions, the punishment was limited to a \$500 fine or ninety days imprisonment or both.¹⁷ Given the tremendous value of authentic Native American artifacts, these punishments were little more than a

Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (Supp. II 1991) (Native Americans granted right to reclaim Native American cultural patrimony).

¹¹ See The Indian Arts and Crafts Act, 25 U.S.C. §§ 305-305c (1988), amended by The Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 305a, 305d-305e (Supp. II 1991) (substantially increased penalties for selling counterfeit Indian arts and crafts).

¹² Antiquities Act, ch. 3060, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-433 (1988)).

¹³ See John E. Peterson II, *Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains*, 15 AM. INDIAN L. REV. 115, 135 (1989-90) ("In general, this area of law represents a response to activities perceived to be threatening or endangering the nation's cultural heritage.").

¹⁴ 16 U.S.C. § 433 (1988).

¹⁵ *Id.* § 432.

¹⁶ *Id.*

¹⁷ *Id.* § 433.

slap on the wrist.¹⁸ Eventually, even this limited protection for historic sites was undermined: in 1974, the United States Court of Appeals for the Ninth Circuit ruled in *United States v. Diaz*¹⁹ that the Antiquities Act was unconstitutionally vague.²⁰

In 1935, Congress again addressed the question of preserving the nation's heritage when it passed the Historic Sites Act.²¹ This Act was dedicated to the goal of preserving "for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States."²² To further that goal, Congress, in 1949, established the National Trust for Historic Preservation to maintain and administer any property given to the United States "for the purpose of carrying out the preservation program" of the Historic Sites Act.²³

The National Historic Preservation Act of 1966²⁴ ("1966 Act") continued the congressional goal of making Native American cultural sites, remains, and artifacts available to the public. The 1966 Act heightened the emphasis that Congress had placed on the involvement of the scientific community in uncovering, studying, and ultimately displaying artifacts.²⁵ Moreover, the 1966 Act authorized the Secretary of the Interior to develop a National Register of structures, areas, or districts of historical, archaeological, or cultural significance,²⁶ and also to grant funds to states involved in similar efforts to protect historic sites.²⁷

Although the 1966 Act was consistent with previous congressional efforts to regulate the excavation of artifacts by perpetuating the process of study and display, the 1966 Act had, for the first time, a provision calling for the participation of Native Americans in the process. The Act called for the preservation of sites to be done in partnership with Indian tribes, state and local

¹⁸ Reportedly, a war shirt containing scalp locks in very good condition can fetch \$200,000 in the open market. H.R. REP. NO. 877, 101st Cong., 2d Sess. 13 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4372. See Boyd, *supra* note 7, at 893-94 (discussing the inadequacy and ineffectiveness of the Antiquities Act).

¹⁹ 499 F.2d 113 (9th Cir. 1974).

²⁰ Subsequent legislation corrected the vagueness problem. Peterson, *supra* note 13, at 138. For a brief discussion of the vagueness issue in *Diaz*, see *id.* at 138.

²¹ Act of Aug. 21, 1935, ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461-467 (1988)).

²² 16 U.S.C. § 461 (1988).

²³ *Id.* § 468.

²⁴ Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (current version codified at 16 U.S.C. §§ 470 to 470w-6 (1988)).

²⁵ See, e.g., 25 U.S.C. § 470i (1988) (establishing the Advisory Council of Historic Preservation, which set aside four positions for the participation of the scientific community).

²⁶ *Id.* § 470a.

²⁷ *Id.* §§ 470a-470c.

governments, and private groups and individuals.²⁸ In addition, the Secretary was authorized to make grants to Native American tribes for the preservation of their cultural heritage.²⁹ While the fundamental purpose of preserving the nation's heritage had not been altered, this Act represented a shift in the Congressional approach to achieving that goal by allowing Native Americans to participate in the process of deciding how to treat their artifacts and ancestral remains.

In response to the *Diaz* court's ruling that the Antiquities Act was unconstitutionally vague,³⁰ Congress increased the role of Native Americans when it passed the Archaeological Resources Protection Act of 1979³¹ ("1979 Act"). This law, which largely superceded the Antiquities Act, continued the policy of favoring the institutionalization of remains and artifacts. However, the underlying presumption of the Antiquities Act, that any remains or items of antiquity located on federal lands belong to the United States, was not abandoned in the 1979 Act. The 1979 Act specifically stated that any items removed from public lands remained the property of the United States.³² Although these items remained U.S. property, the 1979 Act permitted their removal as long as the artifacts were to be preserved in a museum or university.³³ Moreover, the 1979 Act imposed stiffer penalties by subjecting convicted violators to fines of up to \$10,000 and/or up to one year of imprisonment.³⁴

Most importantly, the 1979 Act continued to recognize and further promote the Native American's interests found in the 1966 Act. By requiring the consent of Native Americans in the permit process for artifact hunting on their lands and requiring the federal land manager to notify the appropriate tribe when contemplating the issuance of such a permit, Congress recognized the right of Native Americans to have a say in the treatment of the artifacts of their ancestors.³⁵ Furthermore, any tribe or tribal member could excavate without a permit from lands of the tribe where there was a tribal law in place to regulate the removal of such archaeological resources.³⁶ The involvement of Native

²⁸ *Id.* § 470-471.

²⁹ *Id.* § 470a(d)(3)(B).

³⁰ *United States v. Diaz*, 499 F.2d 113 (9th Cir. 1974).

³¹ Pub. L. No. 96-95, § 1, 93 Stat. 721 (1979) (codified as amended at 16 U.S.C. §§ 470aa-470mm (1988)).

³² 16 U.S.C. § 470cc(b)(3) (1988); Peterson, *supra* note 13, at 136.

³³ Peterson, *supra* note 13, at 137.

³⁴ 16 U.S.C. § 470ee(d) (1988).

³⁵ *Id.* § 470cc(c), (g).

³⁶ *Id.* § 470cc(g).

Americans in the decision-making process in both the 1966 and 1979 Acts foreshadowed the turn that subsequent legislation would take. Largely spurred by actions outside the halls of the Capitol, the new law focuses on returning remains and artifacts housed in museums and universities to the appropriate Native American tribes.³⁷

One of the most significant incidents involving a museum's return of an item of Native American cultural importance occurred in 1978 when the Denver Art Museum voluntarily returned a War God to the Zuni people. The museum trustees were concerned about the precedent of returning a piece from their permanent collection and also about the fact that the piece would be placed in an outdoor setting where it faced certain, if gradual, destruction by the elements.³⁸ Despite these concerns, the museum, citing its "interest in strengthening its relations with the Zuni people and other creative cultures," returned the War God.³⁹

Subsequently, other museums emulated the sensitivity shown by the Denver Art Museum. In June 1989, after protracted discussions, Stanford University agreed to return the remains of over 500 Ohlone Indians to their descendants for reburial.⁴⁰ Shortly thereafter, the University of Minnesota agreed to a similar return of remains.⁴¹ These two instances signalled the reversal of over eighty years of precedent and started a nationwide movement toward repatriation. Following the decisions of Stanford University and the University of Minnesota, museums around the country began to honor requests from various Native American tribes and groups to return human remains and cultural artifacts.⁴² Inspired by these events, Native American groups exerted great pressure on the Smithsonian Institu-

³⁷ See *infra* notes 38-43 and accompanying text.

³⁸ The text of the Denver Art Museum's issued release is reprinted in LEONARD D. DUBOFF, *THE DESKBOOK OF ART LAW*, IV-41 (Supp. 1984). See also T.J. Ferguson & Wilfred Eriacho, *Ayayu:da Zuni War Gods Cooperation and Repatriation*, NATIVE PEOPLES, Fall 1990, at 6 (pointing out that a program to repatriate War Gods or *Ahayu:da* as they are known by the Zuni resulted in the reclamation of 38 War Gods from 24 institutions).

³⁹ DUBOFF, *supra* note 38, at IV-42.

⁴⁰ Jane Gross, *Stanford Agrees to Return Ancient Bones to Indians*, N.Y. TIMES, June 24, 1989, at A1. Stanford University's willingness to return the remains was not an unprecedented gesture of respect to Native Americans by the University. The University had previously changed the mascot of its sports teams from "Indians" to the color "Cardinal."

⁴¹ Patrick Sweeney, *Indians Win Battles to Bury Ancestors*, ST. PAUL PIONEER PRESS DISPATCH, July 16, 1989, at 1B.

⁴² See Boyd, *supra* note 7, at 885 (discussing other significant examples where museums have returned important cultural artifacts and religious objects to Native American groups).

tion, the largest holder of human remains, to similarly repatriate their Native American remains.⁴³

In November 1989, Congress followed the lead of the museum community by passing the National Museum of the American Indian Act.⁴⁴ The Act established the museum as a branch of the Smithsonian Institution.⁴⁵ Furthermore, the Secretary of the Smithsonian was required to inventory Native American remains and return them to the appropriate tribes where the affiliation of the remains with the tribe could be established.⁴⁶

Even more significant was Congress's enactment in 1990 of the Native American Graves Protection and Repatriation Act ("Repatriation Act").⁴⁷ The Repatriation Act continues the dismantling of past policy by extending the repatriation process to publicly-funded museums and universities.⁴⁸ The passage of the Repatriation Act represents a triumph by Native American groups who have lobbied tirelessly for the return of Indian remains to the appropriate tribes, and who have never accepted the presumption of United States ownership of remains and artifacts discovered on public lands.⁴⁹

In addition to furthering the repatriation process started by Stanford University and the National Museum of the American Indian Act of 1989, the Repatriation Act restricts the trade of artifacts excavated from tribal or public lands after the effective date of the law⁵⁰ and limits access to Indian

⁴³ Sweeney, *supra* note 41, at 4B.

⁴⁴ Pub. L. No. 101-185, 103 Stat. 1336 (codified at 20 U.S.C. §§ 80q to 80q-15 (Supp. II 1991)).

⁴⁵ 20 U.S.C. § 80q-1 (Supp. II 1991).

⁴⁶ *Id.* §§ 80q-9 to 80q-10 (Supp. II 1991). See also *The Collections Policy*, National Museum of the American Indian, Smithsonian Institution, Sept. 11, 1992.

⁴⁷ Pub. L. No. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. §§ 3001-3013, 18 U.S.C. § 1170 (Supp. II 1991)). The new federal law has one precursor at the state level. In 1989, Nebraska enacted the Unmarked Human Burial Sites and Skeletal Remains Protection Act, 1989 Neb. Laws 340 (codified at NEB. REV. STAT. §§ 12-1201 to -1212 (1991)), which also requires institutions to return remains from their collections at the request of Native American descendants or tribes.

⁴⁸ 25 U.S.C. § 3001(8) (Supp. II 1991). For a museum director's analysis of the statute's effect on state-operated museums, see Thomas Livesay, *The Impact of the Federal Repatriation Act on State-Operated Museums*, 24 ARIZ. ST. L.J. 293 (1992).

⁴⁹ *Native American Graves Protection and Repatriation Act: Hearings on S. 1980 Before the Senate Select Comm. on Indian Affairs*, 101st Cong., 2d Sess. 188 (1990) [hereinafter *Hearings*] (testimony of Walter Echo-Hawk of the Native American Rights Fund) (citing FEDERAL AGENCIES TASK FORCE, U.S. DEP'T OF THE INTERIOR, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 64 (1979)). For a resource guide containing references to numerous articles, statutes, and policies dealing with the general area of repatriation and reburial, see *American Indian Sacred Objects, Skeletal Remains, Repatriation and Reburial: A Resource Guide*, The American Indian Program, National Museum of American History, Smithsonian Institution (1990 and 1992 update).

⁵⁰ 18 U.S.C. § 1170 (Supp. II 1991).

sites.⁵¹ Thus, while the Act's effect on museums and universities is largely retrospective because it calls for the return of human remains and artifacts already held in collections, its effect on private collectors will be predominantly prospective, since it restricts future artifact hunting and transfer.

Unfortunately, the Repatriation Act contains ambiguities and leaves open many questions that the courts will be left to resolve.⁵² Many of these problems were raised in hearings on the Act by both concerned special interest groups and government representatives.⁵³ In fairness to the drafters, however, the Act attempts to accomplish a great deal and was forged amidst a heated battle between museum associations and Native American groups. Further, although the Act addresses complex areas of law, it needs to establish working definitions to identify exactly which Native American antiquities are subject to either the repatriation provision or the ban on transfer for profit.

Indeed, one of the problems with the law involves the definitions used in creating various categories of "cultural items."⁵⁴ The Act defines "cultural items" as "human remains *and*"⁵⁵ (1) "associated funerary objects,"⁵⁶ (2) "unassociated funerary objects,"⁵⁷ (3) "sacred objects,"⁵⁸ and (4) "cultural patri-

⁵¹ 25 U.S.C. § 3002(c) (Supp. II 1991).

⁵² To date, regulations implementing the law have not been adopted. Indeed, no draft regulations have ever been published in the Federal Register for comment. Telephone Interview with Donald Sutherland, Archaeologist, U.S. Dep't of Interior, Bureau of Indian Affairs, Oct. 1, 1992.

⁵³ See *infra* notes 73-92 and accompanying text.

⁵⁴ 25 U.S.C. § 3001(3) (Supp. II 1991).

⁵⁵ *Id.* (emphasis added).

⁵⁶ "[A]ssociated funerary objects" . . . 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 items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

25 U.S.C. § 3001(3)(A) (Supp. II 1991).

⁵⁷ "[U]nassociated funerary objects" . . . 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[.]

25 U.S.C. § 3001(3)(B) (Supp. II 1991).

⁵⁸ "[S]acred objects" . . . 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[.]

25 U.S.C. § 3001(3)(C) (Supp. II 1991).

mony.”⁵⁹ The statute is unclear as to whether the definition of “cultural items” establishes five different categories of artifacts: (1) human remains, (2) associated funerary objects, (3) unassociated funerary objects, (4) sacred objects, and (5) cultural patrimony; or four categories, with human remains required as a part of each category. In other words, query whether the items in the latter four categories have to be traced or linked to human remains for the Act to apply to them. A third possible reading is that the term “human remains” artifacts are within the purview of the Act. The definitions of the four clear categories themselves are workable, but their relationship to human remains causes problems both for a museum asked to repatriate any cultural items and for a dealer in Native American artifacts who is subject to the ban on transfer for profit because of its reliance on the same troublesome definitions.⁶⁰ The difficulty that the third reading of the definition would create is manifest, as many artifacts have long been separated from the remains with which they were originally found, if they were found with remains at all. Cultural items that are sold, or even displayed apart from any human remains with which they were found, would therefore likely fall outside the reach of the law, seriously undermining its effectiveness.

A related area of confusion is that the rest of the Act divides “cultural items” into only two categories, by combining human remains and associated funerary objects into one group and unassociated funerary objects, sacred objects, and cultural patrimony into a second group.⁶¹ These two larger groupings are treated separately; neither the Act’s ownership section⁶² nor its repatriation section⁶³ makes any distinctions within the groups. Moreover, the Act has one distinct section for inventory of

⁵⁹ “[C]ultural patrimony” . . . 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.

25 U.S.C. § 3001(3)(D) (Supp. II 1991).

⁶⁰ 18 U.S.C. § 1170 (Supp. II 1991).

⁶¹ See, e.g., 25 U.S.C. §§ 3003, 3004 (Supp. II 1991) (Section titles are as follows: “Inventory for human remains and associated funerary objects” and “Summary for unassociated funerary objects, sacred objects and cultural patrimony,” respectively.).

⁶² 25 U.S.C. § 3002 (Supp. II 1991).

⁶³ *Id.* § 3005.

human remains and associated funerary objects,⁶⁴ and another for the inventory requirements for unassociated funerary objects, sacred objects, and cultural patrimony.⁶⁵ Why Congress took such deliberate measures to create several categories when only two would actually be used is unclear, but the consistent grouping of human remains only with associated funerary objects lends more credence to the interpretation that the other categories are not required to be linked to human remains under the Act.

Clearly, all items covered by the law and subject to repatriation are to be returned to either an individual lineal descendant or to an appropriate tribe.⁶⁶ The repatriation provisions apply, however, only to those museums and universities which are publicly funded, not to private collectors.⁶⁷ The Act's impact on private collectors is felt instead through the provisions that restrict the acquisition and sale of Indian artifacts.

Specifically, the Act bans the purchase or transfer for profit of human remains or cultural items by anyone without the "right of possession."⁶⁸ The Act defines "right of possession" as possession gained with the voluntary consent of the appropriate authority of a Native American tribe.⁶⁹ The requirement of "right of possession" applies not only to newly-found artifacts, but also to older artifacts, for which the "owner" must show original permission in order to transfer the artifact.⁷⁰ If convicted, violators are subject to penalties of up to one year in prison, which may be supplemented with a fine (or the fine alone may be imposed).⁷¹ This ban works in concert with another provision of the Act that requires any future artifact-hunting on federal or reservation lands to be done with the permission of the federal government, in the case of federal land, or with the permission of the Indian tribe on whose land the hunting is to take place.⁷² Moreover, since the provision vests ownership and the right to control disposition of cultural items in Native Americans, the tribe or a lineal descendant may call for the return of a found artifact, even when the appropriate permission to hunt was given.⁷³ Together, the two provisions limit the potential for new finds and restrict

⁶⁴ *Id.* § 3003.

⁶⁵ *Id.* § 3004.

⁶⁶ 25 U.S.C. § 3005 (Supp. II 1991).

⁶⁷ *Id.* § 3001(8).

⁶⁸ 18 U.S.C. § 1170 (Supp. II 1991).

⁶⁹ 25 U.S.C. § 3001(13) (Supp. II 1991).

⁷⁰ 18 U.S.C. § 1170 (Supp. II 1991).

⁷¹ *Id.*

⁷² 25 U.S.C. § 3002(c) (Supp. II 1991).

⁷³ *Id.* § 3002(c)(3).

the sale of newly-discovered Indian antiquities. However, the law does not restrict the hunting of artifacts on private land or the transfer of artifacts found on private lands; nor does it affect the artifacts found prior to the effective date of the Act. By implication, the law also does not forbid a donation or gift of Indian antiquities.

During the hearings on the Repatriation Act, numerous collectors and dealers, including Sotheby's, Inc. and the Antique Tribal Art Dealers Association, Inc. ("ATADA"), voiced serious questions about the Act.⁷⁴ As the law is broadly worded, its provisions banning trade and sale will affect dealers as well as private collectors. Collectors and dealers expressed their concern about the "treatment of excavated Native American objects that were legally acquired by *bona fide* purchasers prior to the enactment of [the Repatriation Act]."⁷⁵ The two organizations were understandably worried about the chilling effect the new law would have on the sale and trade in some Indian artifacts by placing a burden on private collectors to seek consent from lineal descendants of Native Americans, and restricting the possession and sale of many such items.⁷⁶ Indeed, the law was probably motivated by Congress's desire to chill the market for Indian artifacts so that illegal artifact hunting would be less inviting, as the absence of a market would likely lower the value of these items.

However, the chilling effect caused by the ban on the sale and trade of even legally acquired Native American artifacts does not necessarily render the law an inappropriate means to protect Native American burial sites. This technique has been successfully used in other situations. For instance, several years ago, the Eagle Protection Act⁷⁷ had a similar impact on works containing eagle feathers and other eagle parts. In *Andrus v. Allard*,⁷⁸ the Supreme Court decided the legality of that law's retroactive application to objects which had eagle parts, but which had been acquired before passage of the law. The Court held that the Act's ban on trade in Indian artifacts containing eagle feathers and other eagle parts was appropriate, regardless of when the artifact was created.⁷⁹ The Court reasoned that the destruction of the market for such items would protect eagles, since the in-

⁷⁴ *Hearings*, *supra* note 49, at 563-64 (statements of Sotheby's and the Antique Tribal Art Dealers Ass'n).

⁷⁵ *Id.* at 564 (emphasis added).

⁷⁶ *Id.*

⁷⁷ 16 U.S.C. §§ 668-668d (1988).

⁷⁸ 444 U.S. 51 (1979).

⁷⁹ *Id.* at 63.

centive for poaching would be removed.⁸⁰ Similarly, the Repatriation Act's restrictions on non-consensual artifact hunting and sale is a method of protecting burial sites, as well as a means of giving Indians a hand in controlling the trade in Indian antiquities.

Sotheby's and ATADA criticized the Repatriation Act for other reasons. The two organizations questioned the constitutionality of the Act with respect to the Fifth Amendment.⁸¹ The takings concern was also raised by the Justice Department in its review of the legislation.⁸² The Justice Department and the two organizations questioned whether the federal government could compel owners of antiquities to give up the antiquities without paying them just compensation. Specifically, the transfer restriction raised Fifth Amendment concerns because it represents a partial taking of a property right for which just compensation may be due.⁸³ Tribal representatives and presumably Congress, however, felt that such concerns were misplaced since the Act does "nothing more than codify long-standing American common law" that does not permit ownership rights in human remains.⁸⁴ Additionally, the ownership of other artifacts is problematic even though only illegally obtained artifacts are subject to the sale restriction provision.⁸⁵ The law, after all, makes allowances for those who can show their artifacts were originally obtained with tribal permission.⁸⁶ The constitutional issues are probably far from resolved and litigation about the takings effect of the new law is very likely.

Sotheby's and ATADA also attacked the bill's ambiguity. They argued that the categories contained in the bill for repatriation were so broad that they encompassed nearly all Indian artifacts, regardless of when they were created and the purpose for

⁸⁰ *Id.* at 58.

⁸¹ See *Hearings*, *supra* note 49, at 563. The Fifth Amendment reads in relevant part that "private property [shall not] be taken for public use without just compensation." U.S. CONST. amend. V, cl. 5.

⁸² H.R. REP. NO. 877, *supra* note 8, at 25-29, *reprinted in* 1990 U.S.C.C.A.N. 4384-88.

⁸³ The holding in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), that a law which denies a property owner all use of his property is a taking for which just compensation is due, supports this argument. The case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), however, would make a better foundation for the same argument because the *Penn Central* Court held that the Landmark Law was not a compensable taking, whereas the *Church of Glendale* Court found that the city ordinance was a compensable taking.

⁸⁴ *Hearings*, *supra* note 49, at 195.

⁸⁵ 18 U.S.C. § 1170 (Supp. II 1991).

⁸⁶ *Hearings*, *supra* note 49, at 196.

which they were created.⁸⁷ In particular they noted that, historically, many artifacts were created not for sacred rituals, but for trade.⁸⁸ Thus, the law appears to frustrate the Indians' original objective of placing such goods on the market. Sotheby's and ATADA felt the Act should include allowances for trade in artifacts that had no religious significance.

Finally, they raised the question of the rights of a collector who acquires an artifact without knowing its tribal genesis or whether the person from whom the object was acquired had a legitimate right to transfer it.⁸⁹ There are several legal doctrines which might apply to this issue. Traditionally, no one can obtain legal title from a thief or one who purchased from a thief.⁹⁰ Nonetheless, another doctrine, intended to protect innocent purchasers, states that one who acquires an item in good faith, without knowledge of the seller's defective title, is considered a *bona fide* purchaser and may take "good" title.⁹¹ Even a *bona fide* purchaser, however, cannot acquire "good" title against the true owner; the law will protect the true owner because "he did nothing and evidenced no intent to part with title to his property."⁹² Finally, cutting across these doctrines is the rule for adverse possession of personal property, which permits one with a questionable title to openly claim valid ownership for a statutory period and, thus, acquire valid title.⁹³

Questions also arise about the duty of a collector to inquire into the nature of the seller's title. While the law will often protect a *bona fide* purchaser, it will not stretch to protect one who remains purposefully ignorant in the face of clear evidence that something is amiss.⁹⁴ Further, the more knowledgeable a buyer is about the art world, the more the law expects the buyer to

⁸⁷ *Hearings*, *supra* note 49, at 563-64 (statements of Sotheby's and the Antique Tribal Art Dealers Ass'n).

⁸⁸ *Id.* at 563.

⁸⁹ *Id.* at 564.

⁹⁰ See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3-11, at 173 (3d ed. 1988) ("A thief . . . 'gets' only void title and without more cannot pass any title to a good faith purchaser.").

⁹¹ *Id.*

⁹² *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1399 n.22 (S.D. Ind. 1989) (discussing Indiana law on right to possession of stolen property), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

⁹³ For a case discussing the applicability of the adverse possession doctrine to art works, see *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980). See also *Boyd*, *supra* note 7, at 913-21 (discussing adverse possession and abandoned property principles as applied to art works).

⁹⁴ See, e.g., WHITE & SUMMERS, *supra* note 90, § 3-11, at 173 n.11 (citing cases where title was void because buyer acted in bad faith by remaining ignorant).

make relevant inquiry about the seller's title.⁹⁵ Given the express provisions of the Repatriation Act, which stress the importance of the legality of excavation, courts may hold that all purchasers have notice and buy at their own risk unless proper inquiry regarding the provenance of the artifact is made. If this is the case, purchasers who buy an unlawfully excavated piece may lose the artifact.

Specifically, the Repatriation Act's ban on transfer and its strict requirements for artifact hunting should prompt the wary art collector or dealer, in the interest of self-protection, to ask some probing questions before purchasing. Most importantly, collectors should inquire as to when and where the item was obtained since these two matters trigger the restrictive provisions of the Repatriation Act. Of course, any documentation backing up the seller's representations regarding the provenance of a piece would be helpful to the buyer. Similarly, collectors need to seek permission from the federal government or the appropriate tribe prior to hunting artifacts on tribal or federal land and obtain the necessary individual or tribal permission before selling from existing collections.

While Congress has long been concerned with the treatment of archaeological sites and with the status of artifacts and remains taken from those sites, it has also been involved in protecting and regulating trade in contemporary artwork by Native Americans. In 1935, Congress passed the Indian Arts and Crafts Act ("1935 Act").⁹⁶ As the name implies, the law was intended to promote the development of Indian arts and crafts.⁹⁷ The Act created the Indian Arts and Crafts Board as an agency under the Secretary of the Interior.⁹⁸ The Board was given the authority to certify the authenticity of newly-created work by Indian artists by adopting certification marks and standards for the use of those marks.⁹⁹ Furthermore, the Board was permitted to register the marks with the Patent and Trademark Office.¹⁰⁰ The 1935 Act also provided civil and criminal penalties for counterfeiting the Board's marks and for misrepresenting works of art as created by Indian art-

⁹⁵ See *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1403-04 (discussing defendant art dealer's duty to inquire).

⁹⁶ Act of Aug. 27, 1935, ch. 748, § 1, 49 Stat. 891 (codified as amended at 25 U.S.C. §§ 305-305e (1988 & Supp. II 1991)).

⁹⁷ 25 U.S.C. § 305a (Supp. II 1991).

⁹⁸ *Id.* § 305.

⁹⁹ *Id.* § 305a.

¹⁰⁰ *Id.*

ists.¹⁰¹ Thus, the Board was empowered to act as an overseer and protector of Indian artists by certifying authenticity and guarding against misrepresentation.

In 1990, Congress amended the 1935 Indian Arts and Crafts Act,¹⁰² expanding the Board's authority to assist tribes and individual Indian artists in obtaining registration of their trademarks free of charge. The Act gave the tribes the power to determine who may be considered an "Indian"¹⁰³ for purposes of using the Board's certification marks. It also authorized the Board to assist the Indian tribes in obtaining free registration of individual and tribal marks.¹⁰⁴ The amendments put more bite into the Act by increasing the maximum fine for counterfeiting Board certification marks from \$500 to \$250,000.¹⁰⁵ Additionally, the maximum prison sentence for a violation, which may be in lieu of or in conjunction with a fine, was increased from six months to five years.¹⁰⁶

This expansion of powers and of penalties, however, may be more apparent than real. According to Geoffrey E. Stamm, General Manager of the Board, in the history of the Act there has not been a single prosecution for its violation.¹⁰⁷ Further, the Interior Department has yet to promulgate any regulations implementing the amendments and, worse still, there is no money in the next budget for the Board's expanded duties.¹⁰⁸ Thus, while the amended Act looks formidable on paper, it is, in actuality, only a paper tiger. If properly funded and administered, the registration system could be a boon to collectors, as it would assure purchasers that the Indian art that they are acquiring is, in fact, created by an Indian artist.

Although the Act does not provide defrauded purchasers with any remedy, anyone who is induced to buy a work based on misrepresentation may rescind the transaction and receive back the purchase price.¹⁰⁹ In addition, if the defrauded purchaser can show that the seller intentionally misrepresented the charac-

¹⁰¹ 18 U.S.C. §§ 1158-1159 (1988 & Supp. II 1991).

¹⁰² The Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (codified at 25 U.S.C. §§ 305a, 305d-305e, 18 U.S.C. §§ 1158-1159 (Supp. II 1991)).

¹⁰³ The Board was given the authority.

¹⁰⁴ 25 U.S.C. § 305 (Supp. II 1991).

¹⁰⁵ 18 U.S.C. §§ 1158-1159 (Supp. II 1991).

¹⁰⁶ *Id.*

¹⁰⁷ Telephone Interview with Geoffrey E. Stamm, General Manager, Indian Arts & Crafts Board (Feb. 27, 1992).

¹⁰⁸ *Id.*; Telephone Interview with Robert Hart, Director, Indian Arts & Crafts Board (Oct. 1, 1992).

¹⁰⁹ 25 U.S.C. § 305e (Supp. II 1991).

ter of the work, as when the seller is the counterfeiter, then the defrauded purchaser may also recover monetary damages.¹¹⁰ Some states, such as Michigan¹¹¹ and New York,¹¹² have enacted special legislation which creates a warranty that any work of art sold must, in fact, conform to its description or the seller will be liable for breaching the so-called warranty of authenticity. Other states have enacted statewide Native American authenticity statutes as well.¹¹³

The tremendous shift in congressional attitude regarding the treatment of Native American art and artifacts, and the concurrent allowance of Native Americans to have greater control over them, will have a lasting effect on the trade in Native American art and antiquities. The new laws place a premium on the knowledge of the provenance of Indian art and artifacts. The Indian Arts and Crafts Act of 1990 seeks to assist Indian artists in establishing the authenticity of their works and, in so doing, provides art buyers with a mode of assuring the provenance of contemporary Indian art. The Repatriation Act, dealing with Native American remains and artifacts, restricts the collector's ability to purchase and sell those objects. Collectors may gain confidence in the authenticity of recently-created works by Indian artists, but may lose control over the acquisition and sale of newly-unearthed Indian artifacts. In general, the change in policy reflects a more enlightened approach to the concerns of Native Americans, whose ancestors and culture have historically been misunderstood and, in many cases, abused. Despite the restraints on trade and site access, and the channeling of control to Native American tribes found in the legislation, compassionate collectors will applaud the new approach to Native American art and cultural heritage.

¹¹⁰ *Id.*

¹¹¹ MICH. STAT. ANN. §§ 19.410(11)-19.410(15) (Callaghan Supp. 1991).

¹¹² N.Y. ARTS & CULT. AFF. §§ 13.03-13.07 (McKinney Supp. 1992).

¹¹³ *See, e.g.*, ALASKA STAT. §§ 45.65.010-.070 (1986); N.M. STAT. ANN. §§ 30-33-1 to 30-33-11 (Michie Supp. 1991).