Native American Graves Protection and Repatriation Act: Does It Subject Museums to an Unconstitutional "Taking"

Daniel J. Hurtado

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hplj
Part of the Property Law and Real Estate Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hplj/vol6/iss1/3
ARTICLES

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: DOES IT SUBJECT MUSEUMS TO AN UNCONSTITUTIONAL "TAKING"?

Daniel J. Hurtado*

For nearly a century, Native Americans have struggled to reclaim from American museums the ancestral remains and cultural

* Associate, Jenner & Block, Chicago, Illinois; J.D., 1993, Northwestern University School of Law; M.A., 1981, Northwestern University; B.A., 1980, University of Michigan. I am grateful to Willard L. Boyd and Richard F. Koontz for their guidance in the preparation of this article. I also appreciate helpful comments offered by Professor Thomas W. Merrill regarding an earlier draft of the article.
objects of which they have been dispossessed. For the most part, American courts have been unresponsive to such claims, and American museums, while cooperative in some instances, have generally been reluctant to repatriate Native American remains and cultural objects. The struggle was ultimately brought before Congress, which has attempted to resolve the issue by enacting the Native American Graves Protection and Repatriation Act (NAGPRA).

NAGPRA is designed to, among other things, facilitate the repatriation of Native American remains and cultural objects. The Act requires a museum that receives federal funds to conduct an inven-


2. See, e.g., Onondaga Nation v. Thacher, 61 N.Y.S. 1027 (Sup. Ct. 1899), aff'd, 65 N.Y.S.2d 1014 (App. Div. 1900), reh'g denied, 62 N.E. 1098 (N.Y. 1902), appeal dismissed on other grounds, 189 U.S. 306 (1903); see also Platzman, supra note 1, at 522 n.17 (stating that museums have not faced "sanctions from the federal government or the judiciary"); Trope & Echo-Hawk, supra note 1, at 43 n.30 (observing that Native Americans have "experienced inordinate difficulty" in securing the return of artifacts from museums, and noting that it took 75 years to effect the return of the sacred wampum belts to the Six Nations Confederacy).

3. See, e.g., Boyd, supra note 1, at 884 (noting that Stanford University and the University of Minnesota have recently agreed to repatriate Native American human remains).

4. See, e.g., Blair, supra note 1, at 125, 128-33; Platzman, supra note 1, at 522 n.17; Trope & Echo-Hawk, supra note 1, at 59.


6. The same requirements are made of "Federal agencies," which are defined under NAGPRA as "any department, agency, or instrumentality of the United States [not including] the Smithsonian Institution." 25 U.S.C. § 3001(4). This article will focus on the requirements of museums. Since the artifacts in question with respect to federal agencies would be the property of the United States, Congress' decision to repatriate that property presumably would not implicate the Takings Clause. See U.S. CONST., art. IV, § 3, cl. 2 (conferring on
tory\textsuperscript{7} of the human remains\textsuperscript{8} and associated funerary objects\textsuperscript{9} in its possession, and to "summarize"\textsuperscript{10} the unassociated funerary objects, sacred objects, or objects of cultural patrimony that it has in its possession.\textsuperscript{11} The museum must notify the respective tribes of any

Congress the power "to dispose of and make all needful [r]ules and [r]egulations respecting ... [p]roperty belonging to the United States ... ."

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.

8. Under the proposed regulations that will implement NAGPRA, human remains are defined broadly as "including but not limited to bones, teeth, hair, ashes, or mummified or otherwise soft tissues of a person of Native American ancestry. The term does not include remains or portions of remains freely given by the individual from whose body they were obtained." 58 Fed. Reg. 31, 126 (1993) (to be codified at 43 C.F.R. pt. 10) (proposed May 28, 1993).

9. "Associated funerary objects" is defined as:
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.


10. Under section 3004(a),
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 readily ascertainable.

11. Section 3001(3) provides the following definitions:
(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
human remains or associated funerary objects that can be identified with particular Native American tribes. Also, the museum is required to give Native Americans access to the results of the summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony. Upon request by an affiliated tribe, the museum is required to expeditiously return the human remains or associated funerary objects, provided that these are not indispensable for certain scientific purposes and that there are no competing claims. If an affiliated tribe requests the return of unassociated funerary objects, sacred objects, or objects of cultural patrimony, the museum is required to return the items under the same conditions that apply to the return of human remains and associated funerary objects. The requirement that the museum return the objects is

---

12. Under section 3003(d)(1), "[i]f 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 six months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations."

13. Section 3004(b)(2) provides that: 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.

14. Section 3005(a)(1) provides: If, pursuant to section 3003 of this title, 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.

15. Section 3005(b) provides: [i]f 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.

16. Section 3005(e) provides: Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this chapter, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.

17. Section 3005(a)(2) provides:
also subject to the condition that the tribe can establish that the museum does not have the "right of possession." However, the tribe is only required to make a prima facie case that the museum does not have the "right of possession." The burden of proof then shifts to the museum to rebut the prima facie case by demonstrating that it obtained the object in question "with the voluntary consent of an individual or group that had authority of alienation." On the other hand, even if the museum is unable to demonstrate that it has the "right of possession," it may not be required to repatriate the object if such repatriation would constitute a "Fifth Amendment taking by the United States as determined by the United States Claims Court." In that case, the "right of possession" would be defined "as provided under otherwise applicable property law," and the right of possession would be conferred upon the museum.

If, pursuant to section 3004 of this title, 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.

18. Under section 3005(c), if a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this chapter and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

19. Right of possession is defined as possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 3005(c) of this title, result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to 28 U.S.C. § 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

20. See id.
21. Id.
22. Id.
This latter provision regarding the Takings Clause is problematic. Its apparent meaning is that if an object is in fact the property of a museum such that the expropriation of the object would constitute a taking under the Fifth Amendment, NAGPRA does not require the museum to repatriate the object, even if the museum cannot show that it obtained the object "with the voluntary consent of an individual or group that had authority of alienation." Consequently, NAGPRA provides that a museum may challenge any particular claim on the grounds that repatriation of the object in question would violate the Takings Clause. The Act further provides that its own definition of "right of possession" cannot be construed to override a Takings Clause challenge. The addition of the Fifth Amendment proviso to NAGPRA's definition of "right of possession" is apparently a response to a concern that an earlier version of the bill would have been found facially invalid under the Takings Clause. While the new language apparently saves NAGPRA from invalidation, it also appears to render the Act relatively toothless. The new language is also exceedingly unclear as to the precise circumstances under which "applicable property law" might vest title to a claimed object in the museum such that the Takings Clause would bar its repatriation.

This Article explores the various property regimes under which NAGPRA claims might be decided, and analyzes how the Takings Clause, in conjunction with those property regimes, will affect the obligations of museums under the Act. In other words, what is the likelihood, under the various applicable doctrines, that title to an object will have vested in the museum such that repatriation will not be required? Further, this Article examines some policy issues that may be more important than a rigorous application of property law and the Takings Clause.

This Article begins with an overview of Takings Clause juris-

23. Id.
25. Jack Trope and Walter Echo-Hawk believe that the instances would be rare in which the application of NAGPRA's definition of "right of possession" could be construed to result in a Fifth Amendment taking absent the "takings" proviso. See Trope & Echo-Hawk, supra note 1, at 68. However, that seems to be an open question, and is the primary issue addressed by this article. If applicable statutes of limitations, for example, will have run in most instances, thereby conferring title to an object upon the museum, then requiring the museum to prove that it has the "right of possession" within the meaning of NAGPRA would plausibly constitute a Fifth Amendment taking in a majority of instances. See infra notes 150-281 and accompanying text.
NAGPRA AND UNCONSTITUTIONAL TAKINGS

prudence. Part II applies Takings Clause doctrine to NAGPRA and focuses on the circumstances under which a museum might be deemed to have a property interest in an object cognizable under the Takings Clause, even where it is presumed that the object was initially transferred by a person without authority to do so. Part III of the Article discusses the appropriateness of applying the Takings Clause and traditional property analysis to the issue of repatriating Native American cultural property. Given the unique historical relationship between Indian Nations and the federal government, as well as the historical abuse of Native American culture by the United States as a nation, the repatriation of Native American human remains and cultural objects is an issue that may transcend the property interests protected by the Takings Clause.26

I. OVERVIEW OF TAKINGS CLAUSE JURISPRUDENCE

The Takings Clause of the Fifth Amendment provides that “private property” shall not “be taken for public use, without just compensation.”27 The Takings Clause traditionally has been associated with the government’s power of eminent domain, which authorizes the government to condemn private property and, upon the payment of adequate compensation, to appropriate that property for the purpose of some public project.28 However, the Takings Clause has also functioning as a restriction on the government’s power to regulate the use of private property, by either invalidating certain regulations altogether, or by requiring compensation where the government would not otherwise be inclined to pay.29

In determining whether a government action that affects the property interests of private citizens is a “taking” within the meaning of the Fifth Amendment, there are three basic inquiries. First, is it the kind of government regulation that constitutes a “taking”? Certainly, it cannot be the case that any regulation affecting the value of private property is a “taking,” or else government would

26. It may strike some as a rather extreme proposition that any particular social issue could transcend the requirements of a provision of the United States Constitution. The proposition is nothing more, however, than an alternative articulation of the principle embodied in the “compelling interest test,” under which the government may abridge freedom of speech, for example, if it has a sufficiently compelling reason. See infra notes 376-80 and accompanying text.

27. U.S. CONST. amend. V.


grind to a halt. Second, can the purpose of the regulation be defined as a "public" purpose? If not, the regulation may simply be invalid, with or without the payment of compensation. Third, does the "value" which the regulation affects constitute "property" within the meaning of the Fifth Amendment?

A. What Constitutes a "Taking"?

Assuming that a property interest is involved, there are three types of government actions or regulations that the Supreme Court has deemed to constitute a "taking" within the meaning of the Fifth Amendment. The quintessential form of "taking" is the direct invasion or appropriation of physical property, as would be exemplified by the use of eminent domain to acquire land for a public highway. In addition, the Court has found there to be a "taking" where a government regulation which does not effect a direct invasion, nevertheless, either destroys all economic use of the property, or significantly reduces its economic value.

1. Direct Invasion

Direct invasion or appropriation of real estate is the quintessential "taking." Such physical dispossession of private property is a "taking" whether or not it effects a diminution of the property's value. Aside from the actual appropriation of property, a physical invasion can be effected by traversing the air-space above a parcel of land, or by requiring a landowner to accept third parties or foreign objects onto the property. In any case, the "physical invasion" theory has been criticized as being overly formalistic and as frequently being inconsistent with any principle conceivably underlying

30. Id. at 592, 599-604.
31. Id. at 593-99.
32. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (holding that a statute which required landlords to permit installation of CATV facilities on their property violated the takings clause even though it involved minimal economic impact on landlords); see also Tribe, supra note 29, at 599; Alan E. Brownstein, The Takings Clause and the Iranian Claims Settlement, 29 U.C.L.A. L. Rev. 984, 1018-23 (1982).
34. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979) (stating that when the government imposed a servitude "inviting" third parties onto a lagoon, invasion was a taking because the ability to keep the lagoon private was one of the sticks in the owner's bundle of property rights).
35. See, e.g., Loretto, 458 U.S. at 436.
the Takings Clause.\textsuperscript{36}

2. Total Destruction of Value

Even if a government regulation affecting the use of private property cannot be characterized as a "physical invasion," it may nevertheless be a "taking" if it effects a total destruction of value; in other words, if it causes a denial of all economic use. Prior to 1872, compensation was not due under the Takings Clause "unless there was a physical 'taking.'"\textsuperscript{37} In \textit{Pumpelly v. Green Bay Co.},\textsuperscript{38} however, the Supreme Court held that the Wisconsin Takings Clause was implicated by the construction of a dam which had caused the flooding of 640 acres of the petitioner's land.\textsuperscript{39} The Court reasoned that it would be a perversion of the "takeings" provision to say that the government can destroy property value entirely so long as it refrains from absolute conversion.\textsuperscript{40}

Recently, in \textit{Lucas v. South Carolina Coastal Council},\textsuperscript{41} Justice Scalia extrapolated on the reasoning in \textit{Pumpelly} in announcing a \textit{per se} rule that regulations denying a property owner of "all economically viable use" require compensation under the Takings Clause.\textsuperscript{42} The \textit{Lucas} case is significant because of its apparently sweeping ruling that the Takings Clause is implicated wherever the government effects a total destruction of value, and because it has been taken by some as a harbinger of a Takings Clause renaissance.\textsuperscript{43} However, the decision left open the question of just when

\textsuperscript{36} See, e.g., Lawrence Berger, \textit{A Policy Analysis of the Takings Problem}, 49 N.Y.U. L. Rev. 165, 170-72 (1974) (criticizing the "physical invasion" test as overly formalistic); Frank J. Michelman, \textit{Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law}, 80 Harv. L. Rev. 1165 (1967) (criticizing the "physical invasion" test as incapable of distinguishing even crudely between significant and insignificant losses and suggesting the adoption of the "fairness" approach); Joseph L. Sax, \textit{Takings and the Police Power}, 74 Yale L.J. 36, 46-48 (1964) (stating that the formalism of the "invasion" theory has the potential of allowing "takeings" to slip by through zoning and similar tactics).

\textsuperscript{37} Allison Dunham, \textit{30 Years of Supreme Court Expropriation Law}, 1962 Sup. Ct. Rev. 63, 82.

\textsuperscript{38} 80 U.S. 166 (1872).

\textsuperscript{39} Id. at 180-81.

\textsuperscript{40} Id. at 177-78.

\textsuperscript{41} 112 S. Ct. 2886 (1992). Under challenge in \textit{Lucas} was a regulation barring the petitioner from erecting any permanent habitable structures on beachfront property. The case was remanded for a determination of whether background nuisance and property law may have already prohibited the uses in question. Id. at 2902.

\textsuperscript{42} Id. at 2901.

\textsuperscript{43} See, e.g., Andrew R. Mylott, Comment, \textit{Is There a Doctrine in the House?: The Nuisance Exception to the Takings Clause Has Been Mortally Wounded By Lucas}, 1992 Wis. L. Rev. 1299; Note, \textit{Taking Back Takings: A Coasean Approach to Regulation}, 106 Harv. L.
does a private party have a property interest in a given use of property. *Lucas* also left unresolved an issue that has for over a century vexed the Court in its Takings Clause jurisprudence: namely, under what circumstances does a government regulation that *reduces* the value of a property interest constitute a "taking"?

3. Diminution of Value

A "taking" within the meaning of the Fifth Amendment may have occurred when a government regulation effects a substantial diminution of the economic value of a property interest.\(^{44}\) The diminution-of-value analysis is an arcane one that involves such considerations as the substantiality of the government's interest in regulating the particular use, the legitimate expectations of the property owner, and the practicality of requiring compensation.\(^{45}\) For at least the past 100 years, the Supreme Court has wrestled with the question of when a diminution of value becomes sufficient to constitute a "taking."\(^{46}\)

Perhaps the most well-known treatment of the "regulatory takings" issue is that of Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*,\(^{47}\) in which the Court sustained a Takings Clause challenge to a statute prohibiting any coal mining that caused damage to surrounding subterranean soil.\(^{48}\) The "test" articulated by Justice Holmes for identifying a "regulatory taking" has provided a point of departure for subsequent analysis:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the [C]ontract and [D]ue [P]rocess [C]lauses are gone. One fact for consideration in determining such limits is the extent of the

---

\(^{44}\) See Berger, supra note 36, at 175-77; Michelman, supra note 36, at 1190-93; Sax, supra note 36, at 50-60.


\(^{46}\) Berger, supra note 36, at 175-77 & n.35 (stating that the line where diminution of value becomes sufficient to constitute a taking has never been clearly established).

\(^{47}\) 260 U.S. 393 (1922).

\(^{48}\) Id. at 413.
diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act.\footnote{49} Justice Holmes’ formulation has developed into a “balancing test,” measuring the importance of the public benefit against the extent of devaluation. As it now stands, the “diminution of value” test appears to be a sliding scale with which alleged “regulatory takings” are examined on an ad hoc basis.

B. What Constitutes a “Public Use”?

Whether or not the government is willing to pay compensation if a regulation it enacts effects a “taking,” the regulation will nevertheless be invalidated if it does not serve a “public” purpose.\footnote{50} However, the determination of whether property is being appropriated for a “public use” has become a perfunctory one. Generally, courts defer to almost any legislative determination of public purpose, as long as some such purpose is articulated.\footnote{51}

Although, historically, the transfer of property from private citizen A to private citizen B was not a “public use,”\footnote{52} the Supreme Court has recently deferred to what is arguably just such a transfer

\footnote{49. \textit{Id.} As if to illustrate the indeterminacy of the “regulatory takings” analysis, the Supreme Court, 65 years later, in Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987), did not sustain a challenge to Pennsylvania legislation very similar to the legislation invalidated in \textit{Pennsylvania Coal}. The Court invoked the balancing test promulgated by Justice Holmes in \textit{Pennsylvania Coal}, but came to a different result. \textit{Id.} at 481-506. There have been criticisms of the “diminution of value” test. \textit{See} Michelman, \textit{supra} note 36, at 1190-96 (arguing that the “diminution of value” test does not explain physical invasion cases, on the one hand, which often direct compensation where economic harm is negligible, and “nuisance-like” cases, on the other hand, which often do not direct compensation even where the economic harm is devastating); Sax, \textit{supra} note 36, at 50-60 (challenging the underlying premise of the diminution-of-value theory, namely, that legally acquired existing value is property).

\footnote{50. The Fifth Amendment provides in part: “nor shall private property be taken for public use, without just compensation.” U.S. \textit{CONST.} amend. V (emphasis added); \textit{see} \textit{TRIBE, supra} note 29, at 588-92.

\footnote{51. \textit{See, e.g.,} Berman v. Parker, 348 U.S. 26, 32 (1954) (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”); \textit{see also} Dunham, \textit{supra} note 37, at 65-71 (arguing that there are no “specific constitutional limitations” and that there is virtually no articulated public purpose to which the Court would not defer); Rubenfeld, \textit{supra} note 43, at 1080, 1081-1163 (suggesting that the “public use” phrase is “only an appendix to takings jurisprudence, a vestigial, duplicative organ better off excised” from the Fifth Amendment, and proposing an alternative approach).

\footnote{52. \textit{See, e.g.,} Calder v. Bull, 3 U.S. 386, 388 (1798) (embracing the “social compact” theory and suggesting that any law violating such social compact is no law, e.g., law punishing citizens for innocent acts, law destroying private contracts and “law that takes property from A. and gives it to B.” cannot be considered law).}
from one private party to another. In *Hawaii Housing Authority v. Midkiff,* the Court upheld a Hawaii statute that required the transfer of title in real property from lessors to lessees in order to reduce the concentration of land ownership. If the redistribution of wealth can be characterized as a public benefit, it is difficult to imagine any appropriation of property that could not be so characterized. Thus, it appears that as long as the legislature articulates what purports to be a public purpose, the "public use" element of the Takings Clause will be satisfied.

C. What is "Property" Within the Meaning of the Takings Clause?

Perhaps the most intractable problem in Takings Clause jurisprudence, one that vexes even the bright-line "destruction of value" rule promulgated in *Lucas,* is the determination of what constitutes a property interest such that it should be protected by the Fifth Amendment. It is easy to conceive of real estate and chattels as "property," but that leaves at least two questions unanswered. First, to what extent do the economic interests that may or may not inhere in whatever one physically possesses constitute "property"? Second, what criteria should be employed in determining whether the interest a party has in a particular entity or value rises to the level of a constitutionally protected property interest?

While the protection of property is a constitutional concept, the "nature" of property itself is not. Generally, the meaning of property is derived by reference to local law. Obviously, this presents a problem of some circularity in defining property for purposes of the Takings Clause, particularly when it is a state action that is under examination. Where a state action is challenged, the court's task is to protect property from constitutionally prohibited state action, and yet, property is to be defined by the state itself. Consequently, the Supreme Court has devised a doctrine of "legitimate expectations." When a state creates certain expectations in a particular thing, it creates property, and the state is thereafter constrained with respect

54. Id. at 245.
55. See supra note 41 and accompanying text.
56. United States ex rel. TVA v. Powelson, 319 U.S. 266, 279 (1943); see also Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (stating that property is not created by the Constitution, but stems from independent sources such as state law) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).
to that property by the Fifth Amendment. Of course, the concept of legitimate expectations is also manipulable, and a property owner can be charged with being at least on constructive notice that his or her property interest is subject to future regulation that might reduce its value.

Despite the confusion about what constitutes a property interest, there are three basic types of property which can be identified as falling under the purview of the Fifth Amendment. First, all of the "physical invasion" cases involve real property, which is the form of property traditionally thought to be protected by the Takings Clause. Second, although personal property has only rarely been implicated in Takings Clause cases, the existing case law clearly protects personal property. Third, the Supreme Court has recognized "economic value" as property. Economic value may constitute a property interest where such value was bargained for at the time of acquisition, or the owner was not on at least constructive notice at the time of acquisition that value-diminishing regulation might occur, or value-producing use was not already precluded by, for example, existing nuisance law.

As has been noted, this latter category of non-physical "property," is controversial and has been the subject of a host of commentary. Nevertheless, at issue in the context of NAGPRA is not the regulation of use, but rather, the dispossession of material remains and objects. Consequently, this rather thorny area of Takings Clause jurisprudence may not be applicable to this discussion. What is applicable to this discussion, and what turns out to be problematic, is the underlying question of when a possessory (as opposed to an economic) interest in a physical object becomes a property interest.

58. Tribe, supra note 29, at 607 n.1 (citing Dames & Moore v. Regan, 453 U.S. 654, 674 n.4 (1981) (no taking occurred when the United States nullified attachments of Iranian assets because such attachments were "contingent"); and citing H.F.H., Ltd. v. Superior Court, 542 P.2d 237, 247 (Cal. 1975), cert. denied, 425 U.S. 904 (1976) (stating that every land investor is on notice that environmental regulations might be imposed at any time)).
59. See supra notes 32-34 and accompanying text.
60. See Sax, supra note 36, at 36.
61. Andrus v. Allard, 444 U.S. 51 (1979) (headdress made of eagle feathers); Halde-
II. APPLICATION OF TAKINGS CLAUSE DOCTRINE TO NAGPRA

Is it possible, then, that by requiring the transfer of valuable objects from museums to private parties, NAGPRA implicates the Takings Clause? The answer to that question requires three inquiries. First, does the transfer of Native American remains and cultural objects, as required under NAGPRA, constitute the kind of government action that would result in a "taking"? Second, does the repatriation of such remains and objects to the tribes with which they are affiliated constitute a "public use"? Third, do museums, in fact, have a property interest in what is being repatriated? The first two inquiries are relatively straightforward. The latter inquiry is more complicated, and its answer will determine how the Takings Clause affects the obligations of museums under NAGPRA.

A. Would the "Taking" Element be Satisfied?

The government's act of taking objects from museums and placing them with Native American tribes would presumptively constitute a "taking" within the meaning of the Fifth Amendment. Certainly the removal of physical objects constitutes a physical expropriation, and, just as certainly, dispossession of such objects would eliminate their value to the prior possessor. The "physical invasion" and "destruction of value" theories apply both to real property and to personal property. For example, in Andrus v. Allard, although the Supreme Court upheld a law prohibiting the sale of legally acquired Indian artifacts, it also implied that the law would be a "taking" if it compelled the surrender of the artifacts or placed a physical invasion or constraint upon them. Thus, the coerced repatriation of Native American artifacts is the type of government action that would be a "taking."

The question that might be raised under NAGPRA, however, is whether the terms of the repatriation requirements are sufficiently coercive to constitute a "taking." Although NAGPRA does provide for civil penalties for noncompliance, it applies only to museums

---

64. 444 U.S. 51 (1979).
65. Id. at 65-66; see also Haldeman v. Freeman, 558 F. Supp. 514, 518 n.11 (1983) (the court held that the plaintiff had abandoned journals and audio tapes comprising his personal diary, and therefore the plaintiff had no Takings claim against the government who retained property in archives; but the court noted that the Takings Clause does cover personal as well as real property) (citing 29A C.J.S. Eminent Domain § 108 (1965)).
66. 25 U.S.C. § 3007(a) provides:
Any museum that fails to comply with the requirements of this chapter may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures es-
NAGPRA AND UNCONSTITUTIONAL TAKINGS

that receive federal funding.\textsuperscript{67} Thus, it could be said that the United States government is merely conditioning federal funding on compliance with NAGPRA's repatriation requirements, and is not compelling a transfer of property at all.

However, case law does not support that argument. Generally, the federal government may use its spending power to accomplish what the Constitution does not otherwise authorize it to do (e.g., regulating the drinking age).\textsuperscript{68} It may not use the spending power, however, to accomplish what the Constitution otherwise forbids it to do\textsuperscript{69} (e.g., regulating the content of newspapers).\textsuperscript{70} Consequently, it appears that the United States could not use the spending power to accomplish what would otherwise be an unconstitutional "taking."\textsuperscript{71}

B. Would the "Public Use" Element be Satisfied?

Although it is not intuitively clear that the transfer of objects held by museums into the hands of private parties serves a public purpose, it is likely that courts would find that NAGPRA satisfies the "public use" element of the Takings Clause. As discussed above, courts generally defer to legislative determinations of public purpose, even when such purposes include the apparent transfer of property between private citizens or entities.\textsuperscript{72} NAGPRA, nevertheless, may be subject to challenge because, as pointed out by the Justice De-

\begin{itemize}
    \item \textsuperscript{67} Id. § 3001(8) defines "museum" for the purposes of the Act: "museum 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."
    \item \textsuperscript{68} See South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding a federal statute directing the Secretary of Transportation to withhold federal highway funds from states that do not enact a minimum drinking age of 21 years).
    \item \textsuperscript{69} Id. at 210 (spending power may not be used to accomplish "activities that would themselves be unconstitutional"); cf. Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) (striking down under the Takings Clause an ordinance conditioning the issuance of a building permit on the granting of an easement over beachfront property).
    \item \textsuperscript{70} Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue, 460 U.S. 575 (1983) (striking down under the First Amendment a discriminatory use-tax on paper and ink products used in the printing of newspapers).
    \item \textsuperscript{71} It is not clear, however, that the Court is adhering to this dichotomy. See Rust v. Sullivan, 500 U.S. 173 (1991) (in effect using spending power to accomplish what would otherwise be a violation of the First Amendment’s Free Speech Clause, i.e., prohibiting federally funded clinics from dispensing information about obtaining abortions).
    \item \textsuperscript{72} See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); see also supra note 50 and accompanying text.
\end{itemize}
partment, the Act does not articulate a public purpose. If the Act were invalidated on that ground, it presumably could not be imple-
mented at all, with or without compensation. It seems unlikely that a
court would invalidate the Act on those grounds because the failure to articulate a public purpose is an easily remediable infirmity.

To summarize the latter two sections of this discussion, it is likely that NAGPRA will be found to have a public purpose, but it is also likely that an unconstitutional “taking” will result if NAGPRA requires the repatriation of objects in which a museum has a property interest.

C. Would NAGPRA Effect a “Taking” of Artifacts in Which Museums Have a Property Interest?

As NAGPRA initially was worded, there was concern that it would have raised problems under the “Takings Clause of the Con-
stitution.” Even though a museum would not have been required to return an object that it had acquired with the consent of a person or entity with the authority to transfer ownership of that object, “[t]here may . . . [have been] other means by which a private mu-
seum might have acquired a property interest in a protected ob-
ject.” For example, a museum may have acquired a property inter-
est in an object pursuant to a federal permit issued under the Antiquities Act of 1906, which provides for the excavation of archaeological sites on the condition that the excavator must afford discovered objects of antiquity “permanent preservation in public museums.” A museum might also have acquired an object as a re-
sult of the excavation of private land to which the owner of the land consented. In such circumstances, state law, perhaps under provi-
sions dealing with the disposition of abandoned property, may have conferred a property interest in those objects in favor of the museum.

In addition, the museum may be in the position of a “good faith purchaser” of lost or stolen property. If the museum cannot

74. Id. at 4384.
75. Id. at 4386.
76. 16 U.S.C. § 432 (1906).
77. Letter from the Dep’t of Justice, supra note 73, at 4386 (citing 16 U.S.C. § 432).
78. Id.
79. See id.
80. Platzman, supra note 1, at 525-36.
demonstrate that the object in question originally was alienated by someone with authority to do so, it is presumed under NAGPRA that good title to the object never was passed and, therefore, that it constitutes lost or stolen property. However, as long as the museum ultimately acquired an object in a manner that would otherwise be considered a legitimate purchase, the museum would be in the position of a good faith purchaser of that property.\footnote{Presumably, if the museum could show that the first individual in the chain of possession acquired good title pursuant to a Federal statute, or pursuant to a state law regarding abandoned property, it would not be required to repatriate the object.} In that case, if the applicable state limitation period for an action in replevin has expired, a property interest in the object may have vested in the museum.\footnote{In most jurisdictions, statutes of limitations that relate to property interests not only bar a legal remedy, but also transfer title to the present possessor. \textit{Ray A. Brown, The Law of Personal Property} § 4.1, at 33 (3d ed. 1975).} As initially worded, however, NAGPRA appeared to require the repatriation of certain objects regardless of whether such objects would constitute private property according to one of the above scenarios. The Act "thus may \[have\] affect[ed] private property and thereby call[ed] into play the Takings Clause."\footnote{Letter from the Dep't of Justice, \textit{supra} note 73, at 4386.}

In the final version of NAGPRA, an attempt was made to preclude the possibility that the Act would be invalidated under the Takings Clause.\footnote{\textit{See} Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 1990 U.S.C.C.A.N. (104 Stat.) 4367, 4373-74; \textit{see also} Trope \& Echo-Hawk, \textit{supra} note 1, at 68.} In other words, an attempt was made to preclude the possibility that the Act would require the repatriation of what would otherwise be deemed the private property of a museum. In the first place, repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony is not required if the museum can demonstrate that it acquired good title when it acquired the object (e.g., the object was initially alienated by someone authorized to do so), and, therefore, that the museum has the "right of possession" within the meaning of NAGPRA.\footnote{25 U.S.C. §§ 3001(13), 3005(c); \textit{see supra} notes 18-19 for full text of provisions.} However, language was added to the Act's definition of "right of possession" that has the effect of providing that even if the museum cannot demonstrate that it has the "right of possession" as defined by NAGPRA, repatriation is not required if title to the artifact would nevertheless have vested in the museum according to local property law. Section 3001(13) of the United States Code provides, in part, that if the
museum’s inability to demonstrate “right of possession,” as defined in the Act, would “result in a Fifth Amendment taking by the United States, . . . right of possession” shall be [defined] as provided under otherwise applicable property law."

A museum is required to repatriate human remains and associated funerary objects with which a cultural affiliation has been established, irrespective of whether it would be able to demonstrate that it has the “right of possession” within the meaning of the Act. Apparently, Congress believed that no takings issue would be raised in this context because traditionally the common law has not permitted outright ownership of human remains. Human remains and, presumably, associated funerary objects are “quasi-property” and are rightfully possessed by the descendants of whomever furnished the grave “for the limited purpose of reinterment.” In other words, it may be a legal impossibility for the museum to have acquired a property interest in human remains or associated funerary objects. Consequently, commentators have taken for granted that no Takings Clause problem is presented in this context. Nonetheless, upon closer examination, it is not entirely clear that there could be no property interest in ancient skeletal remains, and it is even less clear that there could be no property interest in associated funerary objects.

Commentators probably are correct in claiming that a Federal Claims Court would not seriously entertain a Takings Clause challenge to the repatriation of human remains. At common law there is no property right, in the strict sense of the term, in a dead body. A quasi-property right is recognized for the purpose of burial or other appropriate disposition of the body. This right normally vests in the nearest relatives of the deceased. Absent a statute to the contrary, no other right in the body may be had, and, although this quasi-property right may be relinquished, any rightful possessor of the body

86. 25 U.S.C. § 3001(13); see supra note 19 for full text of provision. This is consistent with historical deference to states' definitions of property. See supra notes 52-54 and accompanying text.
90. Boyd, supra note 1, at 888 n.25, 889 n.29; Johnson & Haensly, supra note 89, at 155-57.
would not be its "owner," but would be the "trustee" of the body for the decedent’s family or friends. Consequently, it appears, on first blush, that a museum could not have a property interest in human remains that would be protected by the Takings Clause.

There are three issues, however, which should be noted with respect to this assumption. First, NAGPRA clearly contemplates that persons other than Native Americans may have a "right of possession" in human remains. Second, it is not clear that decomposed or "ancient" human remains fall under the rubric of "dead body" or "corpse" for the purpose of the common law doctrine. Third, with the development of organ transplantation and the use of fetal and other human tissue for medical research, societal attitudes regarding the proprietary nature of human tissue may be changing.

NAGPRA itself prescribes criminal penalties for the trafficking of human remains to which the trafficker does not have the right of possession. The right of possession, particularly with respect to dead bodies, does not necessarily imply an "ownership" or property interest. But NAGPRA does provide that the "ownership or control" of human remains may vest in, among others, individual lineal descendants. If "ownership or control" includes the right to alienate those human remains, then the question is raised as to whether a museum should be given the opportunity to show that it acquired "ownership," or a property interest, in human remains which were purchased or legitimately obtained from a Native American who once had "ownership" of those items. Moreover, the NAGPRA provision regarding illegal trafficking implies that a person who has the right of possession in human remains may sell, use, or transport those remains for profit. Such discretion sounds much like the attributes of a property interest, the deprivation of which would give rise to at least a due process claim, if not a takings claim.

A second question may be raised as to whether skeletal or other decomposed remains constitute a "dead body" for the purpose of the common law "non-property" doctrine. It has been argued that the

94. See, e.g., Fuentes v. Shevin, 407 U.S. 67, reh'g denied, 409 U.S. 902 (1972) (even a limited right to possession constitutes a property interest worthy of protection under due process).
common law doctrine ensures burial for the purpose of protecting the public health. Where such health risks are not a concern, as in the case of "old bones," there arguably can be a right of possession for non-burial, commercial purposes. Although there is no support in the American common law for the proposition that, in the absence of health risks, there can be a property interest in an intact human corpse, there is some authority for the proposition that, once decomposed, skeletons or body parts do not fall under the common law doctrine foreclosing property rights in a dead body.

Third, there are rumblings within the scholarly literature which, in light of the technological advances in organ transplantation and in other uses of human tissue, advocate recognizing property rights in the human body, even to the extent of protecting those rights under the Constitution. Although this view is concerned mainly with ownership of one's own body parts, if the recognition of a property right in one's own body parts ultimately prevails, there presumably would

---

95. Jenn Swensen Bregman, Conceiving to Abort and Donate Fetal Tissue: New Ethical Strains in the Transplantation Field - A Survey of Existing Law and A Proposal for Change, 36 U.C.L.A. L. REV. 1167, 1173-75 (1989). Bregman acknowledges that under the common law there is no right of property in a dead body, except for the limited right of possession for the purpose of burial—usually in the next of kin. She argues, however, that fetal tissue falls beyond the scope of the common law doctrine because that doctrine did not contemplate experimentation with fetal tissue. Id. (citing Nicolas P. Terry, "Alas Poor Yorick," 39 VAND. L. REV. 419, 426, 433-35 (1986)). She also cites a 1908 Australian case in which a two-headed fetus was awarded to a showman for commercial display. Id. (citing Doodeward v. Spence, 6 C.L.R. 406 (Austl. 1908)). The court held that one could own dead bodies for non-burial purposes as long as health or public decency are not endangered or offended. Id. Bregman infers that this is the state of the law regarding fetuses. Id. That inference seems purely speculative, but it has interesting implications for skeletons that are possessed by museums for public display.

96. See, e.g., State v. Glass, 273 N.E.2d 893, 897-98 (Ohio 1971) (citing Carter v. Zanesville, 52 N.E. 126 (Ohio 1898)). It should be noted, however, that the issue in Glass was whether the remains constituted "dead bodies" for the purpose of a grave robbing statute, rather than for the purpose of the common law doctrine precluding a property interest in dead bodies. Id. at 895-96. It should also be noted that the language in this case referred to a body that was "completely decomposed," "not remotely identifiable" as the body of a human being. Id. at 895. Skeletal remains probably cannot be so characterized. See T. Stueve, Mortuary Law 9-10 (7th rev. ed. 1984). Margaret B. Bowman notes the contrary interpretation that skeletal remains can be subject to a property interest which has impeded claims by Native Americans to "archaeological materials." Margaret B. Bowman, The Reburial of Native American Skeletal Remains: Approaches to the Resolution of A Conflict, 13 HARV. ENVTL. L. REV. 147, 169 (1989). She also notes that the common law doctrine was justified not only by health concerns, but also by respect for the dead and notions of common decency, and therein she questions the propriety of making a distinction between "archaeological" human remains and "fresh" corpses. Id.

be a right of transfer. Therefore, there would be a property right on behalf of the person to which such human tissue might be transferred. Because the new “scientific” trade in human tissue arguably does not offend the “dignity” of the dead as would, for example, some gratuitous commercial display, the common law doctrine regarding dead bodies may become increasingly anachronistic, particularly when applied to human remains used for purposes of medical advancement or cultural education. Moreover, the increasing economic value that attaches to human tissue when used for such purposes is arguably the kind of value which is protected by the Due Process Clause and Takings Clause of the Fifth Amendment. In any case, although Native American skeletal remains were most assuredly never “donated” by their original “owners,” there is a plausible argument that courts should recognize a property interest in ancient skeletal remains that are used for scientific research.

An even stronger argument can be made that courts should recognize a property interest in burial objects. Again, commentators have presumed that burial objects fall within the common law rule recognizing only a quasi-property interest in dead bodies for the limited purpose of reinterment. However, neither the principles underlying the common law rule—namely, public health and respect for the dead—nor the concededly limited amount of case law dealing with the subject support that proposition. First, the issue of public health would not be implicated in the case of inorganic burial objects. Second, although the disinterment of funerary objects may indeed deeply offend the religious sensibilities of Native Americans, the display or use of previously interred objects—jewelry, for example—would not normally be regarded as evincing disrespect for the dead as would similar use of a human corpse.

Case law, as it is, supports the inference that there can be a property interest in burial objects. In Tennant v. Boudreau, the defendant, who had removed some jewelry from the grave of the plaintiff’s decedent, raised the theory that no one had a property interest in the interred items as a defense to larceny. The court rejected that argument in holding that even though the plaintiff had

100. 6 Rob. 488 (La. 1844).
101. Id. at 492.
intended to relinquish possession of the items of jewelry by interring them with the deceased, they were corporeal things within the domain of ownership, and, once disinterred, were subject to possession or to be sold or alienated by the heir of the deceased.\textsuperscript{102}

In \textit{State v. Doepke},\textsuperscript{103} the defendant had been convicted of larceny for removing a coffin from a recent grave.\textsuperscript{104} As in \textit{Tennant}, the defendant contended that when the plaintiff interred the body he had parted with any property interest in the coffin.\textsuperscript{108} The court responded, based on several legal authorities, that, as with shrouds and ornaments buried with the dead, the coffin remains the "property of the person who buried the deceased."\textsuperscript{108} These cases imply that the next of kin, or the person responsible for interring the deceased, has a true property interest in burial objects once disinterred.\textsuperscript{107}

\textit{Charrier v. Bell},\textsuperscript{108} a more recent case, implies that there is a true property interest in burial objects. The defendant in \textit{Charrier} attempted to justify retaining some Tunican funerary objects, claiming that they had been abandoned.\textsuperscript{109} That argument was rejected by the court which noted that the intent to bury an object forever with a deceased does not constitute abandonment.\textsuperscript{110} The interest that the Indian relatives had in the objects was clearly something more than

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{102} Id. at 492-93; cf. Grill v. Abele Funeral Home, Inc., 42 N.E.2d 788 (Ohio Ct. App. 1940) (undertaker's removal of jewelry from corpse before burial may have been basis for breach of contract claim, but was not a profanation of the body).
\item \textsuperscript{103} 68 Mo. 208 (1878).
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id. at 211; see Tennant, 6 Rob. at 492.
\item \textsuperscript{106} Doepke, 60 Mo. at 211; see also Maddox v. State, 121 S.E. 251 (Ga. Ct. App. 1924) (removal of coffin from grave was larceny; court rejected contention that no one had property interest in coffin).
\item \textsuperscript{107} Thomas H. Boyd, \textit{The Native American Graves Protection and Repatriation Act: Reinstatement of Human Remains and Funerary Objects to their Former State of Repose}, 27 Gonz. L. Rev. 423, 436 (1992), suggests otherwise. This interpretation of the common law is that burial objects should be treated as human remains are treated; trustees would have a quasi-property interest in such objects for the limited purpose of securing repose. \textit{Id}. In support of this inference, he cites Wright v. Harned, 163 S.W. 685 (Tex. Ct. App. 1914), wherein an undertaker had sued the wife of a deceased for the cost of an expensive casket in which he had placed the deceased against the wife's wishes. The court concluded that the widow (or next of kin) had the right to control the disposition of the remains, including the selection of the casket in which they would be interred. \textit{Wright}, 163 S.W. at 687. While it is certainly true that a casket constitutes a funerary object, the issue in the case was whether the next of kin had the authority to select the casket of her choice, not whether she had a possessor interest in the casket once chosen. \textit{Id}. at 686. \textit{Wright}, therefore, provides weak authority for the proposition that only the next of kin has a possessory interest in burial objects.
\item \textsuperscript{108} 496 So. 2d 601 (La. Ct. App. 1986), \textit{cert. denied}, 498 So. 2d 753 (La. 1986).
\item \textsuperscript{109} Id. at 604.
\item \textsuperscript{110} Id. at 605.
\end{enumerate}
\end{footnotesize}
a limited possessory interest for the purpose of burial. The court did not indicate that the objects were the equivalent of human remains in the eyes of the law, or that the Indians themselves were bound by their intent to permanently bury the objects. The court ultimately recognized that the Indians had a fee ownership in the objects,\footnote{111} thus, strongly implying the ability to alienate or transfer a property interest in burial objects.

Finally, the language of NAGPRA seems to assume that it is possible for a Native American to have transferred title to a funerary object. Section 3002(e) of the United States Code provides that “[n]othing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.”\footnote{112} Thus, notwithstanding the religious and cultural significance that funerary objects may have in various Native American cultures, it does not appear safe to assume that museums could not have acquired a property interest in such objects if they were transferred in accordance with section 3002(e).

In summary, it is not at all clear that a Federal Claims Court, or the Supreme Court, for that matter, would recognize the common law doctrine regarding dead bodies as applying to “archaeological” human remains of the type housed in museums or as applying to burial objects. If not, it seems inescapable that the absence in NAGPRA of any provision giving museums an opportunity to demonstrate a right of possession in human remains or associated funerary objects would subject those provisions of NAGPRA to a very colorable Takings Clause challenge.\footnote{113}

Even if the provisions regarding the repatriation of human remains and associated funerary objects would survive a Takings Clause challenge, it appears that the modified definition of “right of possession” has the potential of greatly reducing the number of unassociated funerary objects, sacred objects, and objects of cultural pat-

\footnote{111}{Boyd, \textit{supra} note 107, at 437.}
\footnote{112}{25 U.S.C. § 3002(e) (emphasis added).}
\footnote{113}{It should be noted that the proposed regulations pursuant to NAGPRA do contemplate that a Fifth Amendment problem may arise in the context of human remains in providing a “safety-valve” similar to that provided in the Act with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony. \textit{See} 58 Fed. Reg. 31122-01 (1993) (to be codified at 43 C.F.R. pt. 10.10(c)(3) (proposed May 28, 1993)). If the rules are adopted as such, the above analysis would be altered only in that, rather than NAGPRA being deemed facially invalid, the number of human remains actually repatriated will be greatly reduced.}
rimony that will be repatriated to Native American tribes. The new language alters the relevant question. Instead of asking whether NAGPRA or its application may violate the Takings Clause, we now must ask how deference to the Takings Clause will affect the obligations of museums under the various property regimes under which a claim may be brought. In addressing this question, I will first briefly examine whether a property interest derived from a federal law, such as the Antiquities Act of 1906, would protect a museum from having to repatriate a given object. Second, I will examine whether the fact that certain Native American artifacts can be characterized as having been "abandoned" will allow a property interest in those artifacts to be vested in a museum if those items have been "discovered" on federal or private land. Finally, I will explore the extent to which statutes of limitations will protect the museum from the repatriation requirement where a museum assumes the stance of a "good faith purchaser" of lost or stolen goods.114

1. Vestiture of Title Under the Antiquities Act of 1906

The Antiquities Act of 1906115 was an attempt by Congress "to prohibit the [indiscriminate] removal of Native American cultural objects from federal property."116 It provides for a $500 fine and/or a prison term of ninety days for anyone who appropriates an "object of antiquity" from federal land without a permit.117 While the An-

114. There is, of course, a wide variety of ways in which a museum may have acquired a Native American artifact. It may, for example, have purchased it from a Native American tribe, or from an individual Native American who had authority to alienate the object on behalf of the tribe. In that case the museum would have "right of possession" within the meaning of NAGPRA. Or, the museum may have purchased the object from either a Native American or non-Native American individual who at least purported to have good title to the object. But in any such case, once members of an affiliated tribe have established a prima facie case that an object was not initially alienated so as to transfer the right of possession to the museum, NAGPRA evidently requires the museum to go back through the chain of possession and attempt to establish that the original procurer obtained the object with the consent of the affiliated tribe, or with the consent of an individual authorized to act on behalf of the tribe. If the museum is unable to do that, as is often likely to be the case, it will be presumed that good title to the object was never passed, thus placing the museum in the position of a good-faith purchaser of lost or stolen property.


116. Platzman, supra note 1, at 537; see also Blair, supra note 1, at 133.

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of
NAGPRA AND UNCONSTITUTIONAL TAKINGS

Antiquities Act has turned out to be relatively toothless as a protection against the unauthorized removal of Native American artifacts from federal lands, ironically, it may turn out to be a protection against the repatriation of such artifacts by museums. The Antiquities Act encourages the excavation of "objects of antiquity" by or for museums, and provides for the issuance of permits for such excavations, provided that they "are undertaken for the benefit of reputable museums, . . . [and] with a view to increasing the knowledge of such objects, and that [they] shall be made for permanent preservation in public museums." It can be argued that Native American artifacts acquired pursuant to such permits constitute museum property.

However, even if a museum could show that it acquired an object in this manner, it still may not satisfy NAGPRA's definition of "right-of-possession." Consequently, unless the "otherwise applicable property law" language in the Takings Clause proviso of section 3001(13) encompasses such statutory vestiture, a takings problem could arise in this context. If "applicable property law" does encompass statutory vestiture of property rights, then a museum may not be required under NAGPRA to repatriate Native American artifacts obtained pursuant to such a statute.

2. Abandoned Property

Historically, under American common law, found property has been divided into as many as four categories: lost, mislaid, treasure trove, or abandoned. "Lost" property is that with which the owner has involuntarily parted through inadvertence. Typically, the right

not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

118. In United States v. Diaz, 499 F.2d 114 (9th Cir. 1974), the court held that the Antiquities Act's failure to adequately define "ruin," "monument" or "object of antiquity" rendered the Act unconstitutionally vague. Id. at 115. Although the Ninth Circuit's holding is not binding on other federal circuits, the Act has since then proven ineffective for its intended purpose. See Blair, supra note 1, at 136-38; Platzman, supra note 1, at 538-39 n.128.

119. 16 U.S.C. § 432 (1988); see also Blair, supra note 1, at 134.

120. Letter from the Dep't. of Justice, supra note 73, at 4386. Of course, it could also be argued that the museum is merely a fiduciary for what is public property, and that a representative body such as Congress has the discretion to dispose of such property as it wills, and, moreover, that public property does not fall under the purview of the Fifth Amendment. See infra notes 340-57.

121. J.E. Keefe, Jr., Annotation, Rights in Respect of Lost, Mislaid, or Abandoned Property as Between Finder and Person Upon Whose Property it is Found, 170 A.L.R. 706 (1947).

122. See, e.g., Favorite v. Miller, 407 A.2d 974, 976 (Conn. 1978); see also 1 Am. Jur.
of possession of lost property is vested in the "finder," as opposed to
the owner of the premises or tract of land on which it was found.\textsuperscript{128}
The finder usually enjoys the right of possession against all the world except the "true owner."\textsuperscript{124}

"Mislaid" property is that which the owner intentionally laid in a specific place and then forgot.\textsuperscript{125} Mislaid property is said to rightfully remain in the possession of the owner of the premises or tract of land on which it was found.\textsuperscript{126} The apparent rationale for so vesting the right of possession is that the owner of the premises upon which mislaid property is found is, in effect, the bailee of the property, holding it for the benefit of the "true owner."\textsuperscript{127}

"Treasure trove" is gold or silver, in the form of coins, plate, bullion, or its paper representatives, which is buried in the earth or concealed in some edifice.\textsuperscript{128} In England a found "treasure trove" was vested in the state.\textsuperscript{129} In the United States, authorities have been divided as to whether "treasure trove" should be vested in the finder or in the owner of the property in which it was found.\textsuperscript{130} Recently, "treasure trove" has been subsumed into the "lost" category of which the finder is usually held to have right of possession.\textsuperscript{131}

"Abandoned" property is that which the prior owner has intentionally relinquished ownership.\textsuperscript{132} As with "lost" property, the right of possession of "abandoned" property vests with the finder, not the owner of the premises on which it was found.\textsuperscript{133} Unlike "lost" or "mislaid" property, however, "abandoned" property is not theoretically held in bailment for the "true owner,"\textsuperscript{134} and because the origi-
nal owner, by definition, has intentionally relinquished title, such title vests in the finder.\textsuperscript{135} The \textit{intent} to relinquish ownership, though, must be clearly manifested,\textsuperscript{136} and the burden of proving such intent typically lies with the party asserting that the property has been abandoned.\textsuperscript{137} To the extent that museums or their agents have obtained Native American artifacts by means of excavations of federal land, or of private land to which entry has been consented by the landowner, it may be argued that those artifacts are museum property because they have been "abandoned" by the original owners.\textsuperscript{138}

may put the "true owner" on constructive notice that the property has been found, and whereby, after a specified period of time has elapsed, title will vest in the finder or "bailee" of the property. See, e.g., ILL. COMP. STAT. ANN. ch. 765, § 1020/27 (Smith-Hurd 1993) (prescribing a procedure whereby a finder of lost goods may place a newspaper advertisement regarding the found goods, and providing that ownership of such property will vest in the finder if the original owner does not claim the goods within one year of such advertisement); \textit{id.} at §§ 1020/28, 1020/134.

\textsuperscript{135} \textit{Brown, supra} note 82, § 3.2, at 25-26; \textit{see also} Boyd, \textit{supra} note 1, at 919-20, n.219 (citing \textit{Brown}, and concluding that Native American non-funerary objects found on federal or private land can reasonably be construed as having been abandoned).

\textsuperscript{136} \textit{See, e.g., International News Serv. v. Associated Press}, 248 U.S. 215 (1918) (finding of abandonment requires showing of intent); \textit{Baglin v. Cusenier Co.}, 221 U.S. 580 (1911) (facts must be adequate to support inference of intent; acts which, unexplained, would support inference of abandonment can be rebutted by a showing of no intent to relinquish); \textit{United States v. Sylvester}, 848 F.2d 520 (5th Cir. 1988) (requirement of intent); \textit{Chemical Sales Co. v. Diamond Chemical Co.}, 766 F.2d 364 (8th Cir. 1985) (strong evidence of intent required for finding of abandonment); \textit{Linscomb v. Goodyear Tire & Rubber Co.}, 199 F.2d 431 (8th Cir. 1952) (intent to abandon not presumed, particularly where owner's conduct giving rise to an inference of intent can be explained); \textit{Ellis v. Brown}, 177 F.2d 677 (6th Cir. 1950) (mere absence and nonuse is insufficient to establish abandonment; intent is required); \textit{Helvering v. Jones}, 120 F.2d 828 (8th Cir. 1941), \textit{cert. denied}, 314 U.S. 661 (1941) (finding of abandonment requires clear and unmistakable affirmative act indicating repudiation of ownership); \textit{In re Stilwell}, 120 F.2d 194 (2d Cir. 1940) (proof of intent must be unequivocal); \textit{Slatin's Properties, Inc. v. Hassler}, 291 N.E.2d 641 (Ill. 1971) (owner does not lose ownership by mere non-use or absence); \textit{Hendle v. Stevens}, 586 N.E.2d 826 (Ill. App. Ct. 1992) (ambiguity as to whether money was lost, mislaid, or abandoned would be resolved, as matter of public policy, in favor of presumption that it was lost); \textit{Michael v. First Chicago Corp.}, 487 N.E.2d 403 (Ill. App. Ct. 1985) (abandonment is not generally presumed and mere relinquishment of possession without showing of intent to relinquish permanently is not sufficient to rebut presumption of non-abandonment). \textit{But see In re People of New York}, 138 F. Supp. 661 (S.D.N.Y. 1956) (property unclaimed over large number of years is presumed to have been abandoned); \textit{Pieszchalski v. Osager}, 470 N.E.2d 1083 (Ill. App. Ct. 1984) (while burden of proving abandonment lies with the party so claiming, abandonment of a lease may be inferred from cessation of operations for an unreasonable length of time).

\textsuperscript{137} \textit{See, e.g., Hoelzer v. City of Stamford}, 933 F.2d 1131 (2d Cir. 1991) (burden of proof lies with the party claiming abandonment); \textit{Linscomb v. Goodyear Tire & Rubber Co.}, 199 F.2d at 431; \textit{Rosenbloom v. New York Life Ins. Co.}, 163 F.2d 1 (8th Cir. 1947) (burden of proving intent to abandon is on the party so asserting); \textit{see also} \textit{Brown, supra} note 82, § 1.6, at 8-9; \textit{Boyd, supra} note 1, at 920.

\textsuperscript{138} \textit{Boyd, supra} note 1, at 921.
Nonetheless, in Charrier v. Bell,\textsuperscript{139} the Louisiana Court of Appeals affirmed the trial court's conclusion that excavated Tunican funerary objects had not been legally abandoned.\textsuperscript{140} The court focused on the fact that the objects had been buried in a human grave: "Objects may be buried with a decedent for a number of reasons. The relinquishment of possession normally serves some spiritual, moral, or religious purpose of the descendent/owner, but is not intended as a means of relinquishing ownership to a stranger."\textsuperscript{141} Thus, it appears that the burial of an object, particularly a funerary object, is a strong indicator that ownership of the object has not been relinquished, and, therefore, that the object has not been "abandoned."

On the other hand, it could be argued that the circumstances regarding the discovery of non-funerary objects are more conducive to a finding of abandonment than those regarding funerary objects.\textsuperscript{142} Non-funerary objects may frequently appear not to have been buried in a specific location, if buried at all, or may not appear to have been placed in a particular location for a specific religious or cultural purpose. The problem for a museum attempting to establish abandonment, however, is that it would have the burden of demonstrating by a fairly high standard of proof that a Native American tribe intended to abandon a particular object.\textsuperscript{143} Instead of demonstrating intentional abandonment, the historical record may indicate that many Native American artifacts were abandoned under duress; that the objects were left behind when the affiliated tribes were forcefully or extortively displaced from their land.\textsuperscript{144} Such factual circumstances would not support an inference that there was intent to abandon.\textsuperscript{145} Although it may be true that many years will have

\begin{itemize}
  \item 139. 496 So. 2d 601 (La. Ct. App. 1986), cert. denied, 498 So. 2d 753 (La. 1986).
  \item 140. Id. at 605.
  \item 141. Id.; Boyd, supra note 1, at 920 (quoting the above passage and discussing Charrier as it relates to the issue of abandonment of Native American artifacts).
  \item 142. Boyd, supra note 1, at 921.
  \item 143. See supra notes 135-41 and accompanying text.
  \item 144. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 74-92 (1982) (recounting removal of Native Americans and observing that many of the Cherokee, in particular, were forcefully removed); GEORGIANA C. NAMMACK, FRAUD, POLITICS, AND THE DISPOSSESSION OF THE INDIANS (1969); FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 227-49 (1962) (discussing the forcible removal of the Cherokee from Georgia); S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 54-69 (1973) (recounting the coercive removal of Native Americans from Georgia, Alabama, and Mississippi to lands west of the Mississippi River).
  \item 145. See, e.g., The Mary, 15 U.S. 123 (1817) (vessel dispossessed by force or terror was not abandoned); Katsaris v. United States, 684 F.2d 758, 762 (11th Cir. 1982) (abandonment must be voluntary, without duress of any necessity, duty, or utility to oneself).
\end{itemize}
passed since an object was separated from an affiliated Native American tribe, and that under those circumstances there may be a presumption of abandonment, such a presumption may be rebutted if the long period of nonuse or absence can be adequately explained. A court might consider it an adequate explanation that Native American tribes were displaced from their respective lands, and that their culture has subsequently been suppressed and diluted.

In any event, it appears that if a museum could persuade a federal court that an item claimed by a Native American tribe was, in fact, "abandoned" by them under "otherwise applicable property law," the Takings Clause would protect the museum from having to repatriate the item. However, just as the paucity and obscurity of historical information about the acquisition of an object would often make it difficult for a museum to prove it has the "right of possession" within the meaning of NAGPRA, it may also make it difficult to demonstrate that the circumstances surrounding the initial discovery of an object clearly manifest an intent to abandon it. It would probably be a more fruitful approach for a museum to assume the stance of a "good faith purchaser" of lost or stolen property, and to assert that they now have title to the object because the relevant period of limitations has expired. Presumably, the various doctrines relating to the replevin of lost or stolen property would constitute "otherwise applicable property law" within the meaning of NAGPRA, and, if successfully invoked, would protect the museum from the repatriation requirement.

3. Statutes of Limitations

It may be the case that, in many instances, a Native American artifact will be assumed to have been stolen from the affiliated tribe. It is undoubtedly a valid assumption that a number of artifacts now resting in museums were, in fact, stolen from their original owners. If a museum cannot show that an unassociated funerary object, sacred object, or object of cultural patrimony was initially

149. Conversation with Janice Klein, Anthropology Registrar, The Field Museum of Natural History.
150. Echo-Hawk, supra note 1, at 438, 444-45 (delineating a history of dispossession, including outright theft); Platzman, supra note 1, at 525 & n.33.
alienated by a person or persons with authority to do so,151 or that the museum otherwise obtained good title at the time of acquisition,152 then, under NAGPRA, it will be presumed that the object was initially stolen or otherwise illicitly alienated from the affiliated tribe. Except in the undoubtedly rare instances in which a museum is a knowing party to the illegitimate acquisition of Native American artifacts, or has knowledge at the time it receives an object that the object has been illegally acquired, this would place the museum in the position of a good faith purchaser of stolen property.153 The question is then raised whether, under one of the various doctrines relating to statutes of limitations for bringing an action in replevin, the Takings Clause would protect a museum so positioned from the repatriation requirement. Assuming that such statutes of limitations would be encompassed under the rubric of "otherwise applicable property law,"154 and that therefore the statutes of limitations would be brought into play by the Takings Clause, it can also be assumed that, under NAGPRA's procedural scheme,155 the affiliated Native American tribes will have satisfied the common law's requirement in an action in replevin that the claimant demonstrate a prior possessory interest in the claimed item.156 Then, it must be determined when, if at all, an applicable period of limitations should have accrued, and whether that period will have expired, thus vesting ownership of the claimed item in the museum.157

The three most frequently invoked doctrines relating to limitation periods are those pertaining to the recovery of lost or stolen art, which seems appropriately analogous to the recovery of lost or stolen cultural items. They are: a) the "adverse possession" rule, under which the period of limitation accrues when the present possessor takes possession; b) the "demand and refusal" rule, under which the period of limitation accrues when the present possessor refuses to return the property to the original owner upon demand; and c) the

151. See supra notes 19-23 and accompanying text.
152. See supra notes 138-49 and accompanying text.
153. Echo-Hawk, supra note 1, at 444 (citing American Indian Religious Freedom Act Report 81 (Aug. 1979)).
154. 25 U.S.C. § 3001(13); see supra note 19 for full text of provision.
155. Even after a museum has established an affiliation between an artifact and a Native American tribe pursuant to 25 U.S.C. §§ 3003-3004, the tribe is then required to make an initial showing that the museum does not have the right of possession. 25 U.S.C. § 3005(c); see supra note 18 for full text of provision.
156. Platzman, supra note 1, at 525-28.
157. Brown, supra note 82, at § 4.1, at 33 (stating that in the context of property, the expiration of the statute of limitations has the effect of transferring title).
“discovery” rule, under which the period of limitation accrues when the original owner discovers, or should have discovered, the location of the lost or stolen property. It is not entirely clear that any of these rules would apply to claims brought for the recovery of Native American cultural artifacts. Moreover, it can be argued that no statute of limitations, state or federal, applies to Native American claims brought under federal law. It would, nevertheless, be useful to examine what the obligations of a museum might be under each of these property regimes.

a. The Adverse Possession Rule

In jurisdictions that apply the “adverse possession” rule, the applicable period of limitation begins from the time the present possessor took possession of the claimed property, with the requirement that the nature of the possession be “hostile, actual, open and notorious, exclusive, and continuous.” The expiration of the limitation period has not only the effect of barring legal action by the original owner, but also of transferring title to the present possessor. The burden of proving the existence of the various elements of “adverse possession,” however, rests upon the adverse possessor. Although the doctrine of adverse possession traditionally has been applied to real property, its application has been extended to chattels as well.

The rationale underlying the “adverse possession” rule is to encourage responsible ownership and productive use of land, as well as to provide a mechanism for resolving ownership disputes where evidence regarding the original title has become lost or inaccessible because of the passage of time. In the interest of fairness to the original owner, the character of the “adverse” possession typically must

159. Echo-Hawk, supra note 1, at 444 n.35; see also infra part II.C.3.d.
160. Petrovich, supra note 158, at 1140-48; DeAngelis, supra note 158, at 12.
162. Rabinof v. United States, 329 F. Supp. 830, 841-42 (S.D.N.Y. 1971) (invoking Illinois’ requirement of “strict, clear and unequivocal proof,” and implying that the law in New York is equivalent); see also Petrovich, supra note 158, at 1142.
163. Isham, 179 N.E.2d at 33; Redmond v. New Jersey Historical Soc’y, 28 A.2d 189 (N.J. 1942) (applying the doctrine of adverse possession to a portrait); see also Petrovich, supra note 158, at 1141, 1142 n.79.
be such as to put the original owner on reasonable and sufficient notice that preventive action must be taken expeditiously. 165

The element of "hostility," along with the element of "exclusivity," is merely the requirement that the possession not be understood as being shared or permissive on the part of the original owner, but as being against the "whole world," and implying ownership. 166 The element of "continuity" is the requirement that the possession be uninterrupted for the prescribed limitation period.

The requirement that the adverse possession be "open and notorious" gives the original owner reasonable notice that his or her ownership is in danger and that appropriate legal action to evict the adverse possessor is needed. 167 As applied to real property, to which the doctrine of adverse possession was originally associated, the "open and notorious" requirement would usually be satisfied if the adverse possessor uses or occupies the property in a manner normally associated with ownership of that particular type of property. 168 As applied to chattels, however, it is not clear that "normal" use of the property would be sufficient to provide reasonable notice of the adverse possession to the original owner, particularly where an item of personal property has been relocated. 169 If the original owner is to be given reasonable notice, it would seem reasonable to expect that the "open and notorious" possession of chattels would require something more than "normal" use of the property. 170

165. Petrovich, supra note 158, at 1143 (citing R. Powell & P. Rohan, Powell on Real Property ¶ 1013 (abr. ed. 1968)).
166. Id. at 1142 n.78 (citing C. Smith & R. Boyer, Survey of the Law of Property 158 (1971)).
167. Id. at 1143.
168. Id. at 1144 n.85 (citing R. Powell & P. Rohan, Powell on Real Property ¶ 1096 (abr. ed. 1968); C. Smith & R. Boyer, Survey of the Law of Property 163 (1971)).
169. Id. at 1144.
170. In O'Keeffe v. Snyder, 405 A.2d 840 (N.J. Super. Ct. App. Div. 1979), the court made the following remarks about applying the doctrine of adverse possession to chattels:

Clearly, . . . title to jewelry stolen in California and subjected to country club display on the person of an innocent purchaser in New Jersey cannot vest title by adverse possession in the latter because the true owner in California was denied a fair opportunity of regaining title. To hold otherwise would reject reality in favor of the fiction that the character of the possession has been such as to place the true owner on notice of the need for prompt legal action. . . . Many chattels are, of course, small and even when openly held may not give notice of claimant's adverse possession to the true owner.

Id. at 845; see also San Francisco Credit Clearing House v. Wells, 239 P. 319, 321 (Cal. 1925) (holding no adverse possession with respect to a piano and its bench where the original owner had no means of knowing their location and that the would-be adverse-possessor was
Could a museum that is unable to satisfy NAGPRA’s definition of “right of possession” with respect to a particular Native American artifact invoke the adverse possession doctrine to defend against a claim for that artifact? In jurisdictions in which the adverse possession doctrine applies, title to such an artifact would apparently vest in the museum if the museum could show by clear and convincing evidence that it possessed the artifact in the prescribed manner for a period exceeding the prescribed limitation period. Demonstrating “open and notorious” possession of a Native American artifact would be far more problematic than demonstrating open and notorious possession of real property. The location of real property does not change, and the occupancy or use of land in a manner that communicates ownership to the community would be sufficient notice to the original owner that there is a cause of action. Artifacts, on the other hand, are portable and concealable. It would seem obvious that objects held by a museum in storage would not meet the “open and notorious” requirement. Objects that are on display in a museum may arguably meet the requirement, but it is not clear that such display would be fair notice to a Native American tribe that is not in the same geographical area as the museum. It could be argued, for example, that the public display of a Navajo artifact in the Field Museum of Natural History in Chicago is not sufficient notice of its location to a Navajo tribe in the southwest United States. It is only fair that the museum should be required to make an affirmative effort to notify the original owners of an object’s location—as it is required to do under NAGPRA—before any period of limitation may accrue.  

asserting ownership); Gatlin v. Vaut, 91 S.W. 38, 39-40 (Ct. App. Indian Terr. 1905) (the court found for the plaintiff, a member of the Chickasaw nation, and held that the defendant good-faith purchasers could not tack the time during which thief, who had stolen plaintiff’s mules, had possessed the mules where the thief had removed the mules from the court’s jurisdiction. The court added that if the thief “had held the property openly and notoriously in the community where the larceny occurred, he could undoubtedly” have pleaded the statute of limitations in replevin, but was unclear as to whether a good-faith purchaser must possess the property openly and notoriously in the vicinity of the original dispossession, or merely refrain from affirmative concealment); Manka v. Martin Metal Mfg. Co., 113 P.2d 1041, 1044 (Kan. 1941) (“where [a thief] holds the property openly and notoriously, so that the owner has a reasonable opportunity of knowing its whereabouts and of asserting title, the statute begins to run”); Joseph v. Lesnevich, 153 A.2d 349, 357 (N.J. Super. Ct. App. Div. 1959) (“even as to a thief, the period [of limitation] does not begin to run until the thief affords the true owner a reasonable opportunity of knowing the whereabouts of the property and of asserting his title”).

171. This is also consistent with the fact that many states require finders of lost property to take affirmative steps to notify the original owner before any period of limitation will begin to run. See supra note 134.
The application of the "open and notorious" requirement to dispossessed Native American artifacts might profitably be compared to its application to the replevin of stolen art. In O'Keeffe v. Snyder,\textsuperscript{172} the well-known artist Georgia O'Keeffe attempted to recover three of her own paintings which had been stolen from her husband's gallery in 1946.\textsuperscript{173} O'Keeffe brought a replevin action in 1976 upon discovering that the paintings were in the possession of the defendant Snyder, who was an ultimate good faith purchaser of the paintings which had travelled a rather circuitous route during the interim thirty years.\textsuperscript{174} Snyder based his defense on a claim of title through adverse possession, arguing that the applicable six-year limitation period had expired.\textsuperscript{175} The trial court, albeit not finding that the defendant had established the element of "open and notorious" possession, held that the period of limitation had accrued at the time of the theft in 1946.\textsuperscript{176} The court further held that the statute would not be tolled until the time of discovery because O'Keeffe had not been sufficiently diligent in attempting to locate the painting, and that O'Keeffe's action was, therefore, barred.\textsuperscript{177}

The appellate court reversed the decision of the trial court, agreeing with the lower court that the element of "open and notorious" possession had not been established, yet held that the absence of that element was not only fatal to the defendant's claim of title by adverse possession, but that it tolled the running of the applicable limitation period for bringing an action in replevin.\textsuperscript{178} In finding that the element of "open and notorious" possession was not present, the court found that the residential display of the paintings was insufficient to "give unmistakable notice of the nature of the [adverse possessor's] claim."\textsuperscript{179} In other words, in order for the period of limitations to run, the display of the object must give the original owner notice of its location.\textsuperscript{180}

\textsuperscript{173} Id. at 841.
\textsuperscript{174} Interestingly, shortly after her husband's death in 1946, O'Keeffe moved permanently from New York to New Mexico. Meanwhile, the paintings apparently remained in the states of New Jersey and Pennsylvania, appearing briefly at an art sale in a New York gallery, and finally ending up in the hands of the defendant who lived in New Jersey. Petrovich, supra note 158, at 1144 n.88, 1145.
\textsuperscript{175} 405 A.2d at 843.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id. at 847.
\textsuperscript{179} Id. at 844.
\textsuperscript{180} Id. at 845.
In finding that residential display is insufficient to provide such notice, however, the *O'Keeffe* court did not directly address whether public display in a museum or gallery is required, or, if so, whether such public display must be continuous, or may be merely intermittent. Nor is it necessarily clear that display outside of a private residence should be required at all, so long as that display is such as could reasonably place the original owner on notice of the object's location. One commentator has looked to the older decision in *United States v. One Stradivarius Kieserwetter Violin* as perhaps providing the appropriate touchstone for determining "open and notorious" possession, at least as applied to works of art. *Stradivarius* did not involve a replevin action, but concerned whether the owner of a violin had concealed it in order to avoid the payment of customs duties. In finding that the defendant had not concealed the violin, the court noted that, even though the violin was kept in the defendant's private residence, "[i]t was exhibited to many guests, including well-known violinists, at musicales, and was pointed out as the famous 'Kieserwetter Strad.' Short of making a public exhibition of the violin... there was little more that could have been done to publish the presence of the violin." Thus, it might be argued that the "open and notorious" possession of chattels, works of art in particular, ought to require something more than average residential use, but something less than full public display.

However, such a formulation of the "open and notorious" requirement may not adequately serve the purpose of fair notice to an original owner. With respect to *Stradivarius*, it is not obvious that a prior owner of the violin, who was domiciled in, for example, New Mexico, would have been placed on fair notice that the violin was possessed by someone in New York, even by the relatively ostentatious display of the violin in that case. The court, of course, was not concerned with the issue of notice at all, but was concerned with determining whether the defendant had attempted to conceal the vi-

182. 197 F. 157 (2d Cir. 1912).
183. Petrovich, *supra* note 158, at 1147-48 (arguing that a strict requirement of public display of works of art is unrealistic, having the practical effect of rendering statutes of limitations "inoperable in replevin actions," and "ignoring other important statute of limitations policies concerning repose, laches, the quality of evidence and other factors").
184. 197 F. at 159.
185. *Id.*
olin from the government. As to the countervailing interests of fairness to good faith purchasers and quality of evidence, a court could, under its equitable powers, grant the right of possession to the present possessor for any of those countervailing reasons, without employing a relaxed standard of "open and notorious" possession to bar an action in replevin altogether.

Additionally, even if a "display" such as that exemplified in Stradivarius, or, for that matter, full public display in a museum or gallery, should place artists on fair notice as to the location of their lost or stolen works of art, it does not necessarily follow that the full public display of Native American artifacts in a museum should constitute sufficient notice to the affiliated tribes to satisfy the "open and notorious" requirement. Artists should expect that their lost or stolen works will turn up in museums or galleries, or even in the homes of well-known collectors. Artists presumably create their works of art with the purpose that such works will ultimately be displayed in some such fashion. Native Americans, of course, did not create their sacred and cultural objects with the purpose of displaying them in American museums. Although it may now be the case that Native Americans can be charged with knowledge that many of their lost or stolen artifacts can be found in American museums, they arguably could not be charged with such knowledge at the time they were dispossessed of those objects, such that any applicable period of limitation should have accrued at that time. Even if we could determine some historical point at which a Native American tribe would have become aware that they may have ties to lost or stolen cultural objects displayed in an American museum somewhere, any purported analogy between lost or stolen artifacts and lost or stolen art would be rather attenuated. Works of art are usually easily identified with the artists who created them. It is not likely that a representative of a

187. 197 F. at 161.
188. Petrovich, supra note 158, at 1148.
189. It is undoubtedly true that most items that are part of museum collections, other than art, were not "created" with the intent that they be displayed in museums, but the purpose here is to analyze the potential analogy between lost or stolen artifacts and lost or stolen art.
190. An assumption in this context is that it cannot be established that the museum purchased an object directly from the affiliated tribe. Otherwise, the affiliated tribe would either not have a claim at all, or would at least not have a valid argument for tolling a statute of limitations due to lack of notice. Even if a museum purchased an object directly from an individual tribal member who was not authorized to convey the object, it is probable that the conveyance was covert and that the remainder of the tribe, therefore, could not be charged with notice of the object's whereabouts.
Native American tribe could simply contact a museum and inquire whether it is holding any cultural objects with that particular tribe's "signature" affixed. That representative would not likely receive an authoritative answer, at least not without considerably more effort and persistence than would be required in identifying a painting. Unlike artists, Native Americans do not have a national or international network of experts that would recognize displayed artifacts as being affiliated with a particular tribe, and would stand ready to notify the affiliated tribe upon discovery of such artifacts. The logistics of mobilizing an entire tribe or its representatives to seek out the undoubtedly significant number of affiliated cultural objects that may be displayed in museums throughout the United States would be extremely complicated and time-consuming. It is arguable that a requirement that Native Americans should have conducted such searches within a five, six, or ten year period of limitation is unrealistic and unfair.

Even if the public display of Native American artifacts in museums satisfies the notice requirement of adverse possession, one should not overlook the underlying rationale of the requirement of "open and notorious" possession which not only seeks to provide adequate notice to the original owner, but also to provide an adequate opportunity to assert a claim. This rationale appears to require that, even if a Native American tribe or an appropriate representative has actual knowledge of the location of an affiliated cultural object's location, the period of limitation should not begin to run if no legal redress was available, or if the tribe reasonably believed that no legal redress was available. Although in most jurisdictions an action in replevin may have been available to a claimant tribe, in many cases

191. NAGPRA attempts to remedy this problem by requiring that museums conduct an inventory or summary of Native American artifacts in their possession, and attempt to identify the Native American tribes with which they may be affiliated. See 25 U.S.C. §§ 3003(a), 3004(a), quoted in full supra notes 7, 10, respectively.

192. Cf. O'Keeffe v. Snyder, 405 A.2d 840, 842 (N.J. Super. Ct. App. Div. 1979) (Georgia O'Keeffe had made the theft of her painting known to "many persons within her artistic circle" and had also listed the painting "as stolen with the Art Dealers Association which maintained a registry of stolen paintings").

193. Again, NAGPRA's inventory and summary provisions, 25 U.S.C. §§ 3003(a), 3004(a), indicate a recognition by Congress that it is not realistic to expect Native American tribes to have gathered such information on their own.

the tribe would have had difficulty in establishing the requisite prior possessory interest. Moreover, given the historical lack of receptiveness on the part of American courts to Native American claims of any sort, tribes or their representatives may have been justified


196. See Felix S. Cohen, Handbook of Federal Indian Law 170, 563 (1982) ("wardship" relationship between the United States and Indian nations has been used to justify laws which would be considered confiscatory if applied to non-Indians; until 1946, the United States Court of Claims was prohibited from entertaining suits based on treaties with Native Americans); Robert T. Coulter & Steven M. Tullberg, Indian Land Rights, The Aggressions of Civilization 185-210 (Sandra L. Cadwalader & Vine Deloria, Jr., eds. 1984) (Legal theories, such as the "wardship" or "trust doctrine," and legal technicalities have prevented tribes for generations from achieving relief in the courts; even after Congress in 1946 authorized the Court of Claims to hear tribal claims, many tribes were not aware that they had such an opportunity); Robert T. Coulter, The Denial of Legal Remedies to Indian Nations Under United States Law, 3 Am. Indian J. No. 4, 5 (1977) (asserting the general impossibility of Indian people and Indian nations protecting their rights under the United States legal system); Robert S. Michaelson, American Indian Religious Freedom Litigation: Promise and Perils, 3 J. L. & Religion 47, 56 (1985) (delineating the difficulty Native Americans have experienced in pressing Free Exercise claims); Nell J. Newton, At the Whim of the Sovereign: Aboriginal Title Reconsidered, 31 Hastings L.J. 1215 (1980) (criticizing the Supreme Court's decision in Tee-Hit-Ton Indians v. United States that aboriginal title to Native American lands is not a property right that would be protected under the Fifth Amendment's Takings Clause); John E. Peterson II, Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains, 15 Am. Indian L. Rev. 115 (1990) (delineating the obstacles Native Americans have encountered in attempting to protect burial grounds and to recover Native American skeletal remains); James E. Ryan, Note, Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1422 (1992) (observing that, in Free Exercise cases, courts have placed an additional burden on Native Americans to show that the affected religious practice or site was "central" or "indispensable" to religious practices, thus uniformly denying such claims); Samuel D. Brooks, Note, Native Americans' Fruitless Search for First Amendment Protection of their Sacred Religious Sites, 24 Val. U. L. Rev. 521 (1990) (delineating systematic denial of the Free Exercise claims of Native Americans with respect to public lands); Sarah B. Gordon, Note, Indian Religious Freedom and Governmental Development of Public Lands, 94 Yale L.J. 1447 (1985) (same); see also, e.g., Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) (denying First Amendment protection to sacramental use of peyote); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (denying that the development of public lands which were considered sacred by Native Americans implicated the Free Exercise Clause); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (after almost a century of attempts by the Sioux Nation to reclaim lands which had been ceded to them by treaty, the Court awarded them damages, but noted that the taking of "unrecognized" or "aboriginal" Indian title is not compensable under the Fifth Amendment); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (in rejecting a Fifth Amendment challenge to a cession of land which violated the terms of a treaty, the Court held that the "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of government"); Wilson v. Block, 708 F.2d 735, 743 (D.C. Cir. 1983), cert. denied, 464 U.S. 956 (1983), and cert. denied, 464 U.S. 1056 (1985) (in rejecting a First Amendment claim in which Navajo and Hopi Indians sought to enjoin commercial development of Federal land which the tribes considered sacred, the court held that the tribes must show that the sites were
in concluding that they had nothing more than a nominal opportunity to seek redress in the courts. By providing a federal cause of action under NAGPRA, Congress has recognized that heretofore there has been no realistic opportunity for Native Americans to assert claims to artifacts held by museums.

In hearing claims under NAGPRA, of course, federal courts would be constrained to apply the property law of the jurisdiction in which they sit, or of the jurisdiction that would be dictated by the "choice of law" rules of the forum state. As we have seen, there are several factors that may militate against a federal court's construing local adverse possession rules to have conferred title to Native American objects upon a museum. First of all, it is generally true that the requirements of adverse possession are more rigorously applied with respect to chattels than with respect to real property. In particular, as discussed above, it appears that the element of "open and notorious" possession, as it would be applied to lost or stolen works of art, requires something more than use "as an average owner of similar property would use it." If, in the context of lost or stolen art, the underlying objective of putting the original owner on fair notice of the adverse possession requires some extraordinary public display, it is plausible that the same underlying principle, in the context of lost or stolen Native American artifacts, requires something such as an affirmative effort to notify the affiliated tribes.

"indispensable" and that there were no alternative sites for their religious practice); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (rejecting a First Amendment claim by Navajo Indians who sought injunction to lower the level of a reservoir and limit the number of tourists in order to protect what they believed to be a sacred site from desecration); Wana the Bear v. Community Constr., Inc., 180 Cal. Rptr. 423 (Cal. Ct. App. 1982) (rejecting a Miwok Indian's suit to enjoin the excavation of private land which was known to be a burial ground for over 200 Miwok Indians, and holding that the burial ground did not fall within the statutory definition of "cemetery"); Bailey v. Miller, 143 N.Y.S.2d 122 (Sup. Ct. 1955) (in rejecting suit by Tonawanda Seneca Indian to enjoin excavation of burial ground, the court held that only individual Indians who are descendants, and have been directly harmed have standing to sue, and class actions are not available for Indian tribes, string citing a long list of judicial authority). These decisions certainly provide evidence that the perception on the part of Native Americans that they have had no redress in the courts is reasonable.

197. Mucha v. King, 792 F.2d 602, 604 (7th Cir. 1986).
199. Boyd, supra note 1, at 914, recognizes the analogy between lost or stolen art and Native American artifacts held in museums. He contends, however, that the "average use" formulation for satisfying the "open and notorious" requirement may work in favor of museums since the majority of Native American artifacts are now in the hands of museums rather than Native Americans, and, therefore, display, or presumably even storage, in museums may
Second, there are only a few cases applying the doctrine of adverse possession to the recovery of lost or stolen art, and apparently none applying it to claims by Native Americans to recover cultural objects held in museums. As a consequence, federal courts would not be bound by any specific precedent, but would be free to extrapolate from the principles derived from analogous state case law.

Finally, the existence of NAGPRA, and its implications for what can justly be required of Native American tribes in their relationship with the cultural objects from which they have been dispossessed, may dictate that any doubts about what state law would require to satisfy the "open and notorious" element of adverse possession should be resolved in favor of the Native American tribe. After all, a federal court would have the responsibility of implementing the policies of Congress. If a federal court could do that with respect to NAGPRA, while at the same time applying state law in a manner consistent with that law's own underlying principles, it seems unavoidable that it would do so.

Nevertheless, if a museum could convince a court that it has satisfied the elements of adverse possession with respect to a claim under NAGPRA, it is apparent that the Takings Clause would protect the museum from the repatriation requirement. As the foregoing discussion suggests, that possibility may be rather remote. However, there are other doctrines related to statutes of limitations, and which are more applicable to chattels.

b. The Demand and Refusal Rule

Under the "demand and refusal" rule, it is not presumed that the period of limitations began to run at the moment the present possessor takes possession. Rather, the period of limitation does not accrue until the original owner demands the return of the property and the present possessor refuses. Obviously, no demand can be constitute "average use." Id. at n.183. He also contends that, in any case, public display would "most certainly satisfy the requirements of open and notorious." Id. at 914. Both contentions fail to acknowledge one of the underlying purposes of the "open and notorious" requirement, namely, to make the original owner aware, or at least constructively aware, of the adverse possession. See Petrovich, supra note 156, at 1143-44. The "average use" formulation is viable only insofar as it affords fair notice, as it normally would with respect to real property. And while public display in a museum may afford fair notice to a prior owner of lost or stolen art, it may not afford such notice to a Native American tribe affiliated with an artifact held by a museum. See supra notes 189-95 and accompanying text.

200. Platzman, supra note 1, at 530-33; Petrovich, supra note 158, at 1133-40; DeAngelis, supra note 158, at 10-11.
made until the original owner locates and communicates with the present possessor. It necessarily follows that no period of limitation can accrue until a lost object is actually located, regardless of how much time has passed. This rule effectively repeals the adverse possession rule with respect to chattels, except insofar as an original owner, after having demanded the return of a chattel and having such return denied, delays for a period exceeding the relevant period of limitation in bringing a legal action against the present possessor.

The seminal case with respect to the "demand and refusal" rule is *Menzel v. List*, in which the original owner of a Marc Chagall painting sought to recover it twenty years after it had been seized from her by the Nazis, and seven years after it had come into the hands of the ultimate possessor, the defendant. The defendant pleaded the applicable three year period of limitations. Assuming that the defendant was a good faith purchaser of the painting, the court held that "the cause of action against a person who lawfully comes by a chattel arises, not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand." Because Menzel had demanded the painting, and List had refused to honor the demand less than three years before the action was commenced, Menzel prevailed and was able to recover the painting.

The *Menzel* Court derived the "demand and refusal" rule at least in part from an earlier holding in *Gillet v. Roberts*, in which it was held that "demand and refusal" is required before a defendant can be held liable in an action for conversion. There was no issue in the case of a statute of limitations, and the rationale was evidently to protect a defendant from the stigma of liability as a tortfeasor until he had the opportunity of returning the property to the original owner on his own initiative. Thus, it would appear that the "demand and refusal" rule purports to protect the interests of the good faith purchaser.

201. Petrovich, supra note 158, at 1133.
203. 267 N.Y.S.2d at 807.
204. Id.
205. Id. at 809.
206. Id. at 807.
207. 57 N.Y. 28 (1874).
208. Id.
209. Petrovich, supra note 158, at 1135.
Perhaps ironically, it turns out that the “demand and refusal” rule almost unilaterally favors the original owner.\textsuperscript{211} Under this rule, the original owner can sit on the claim indefinitely, even after he or she has become aware of the given property’s location, until he or she actually determines to demand the return of the property.\textsuperscript{212} The rule also places a good faith purchaser in a worse position than a thief or person who otherwise knowingly takes possession of stolen property. Since a bad faith possessor already has the status of a tortfeasor, and is already on notice of possible liability, a cause of action would accrue at the time of the wrongful acquisition.\textsuperscript{213} Any applicable period of limitation would begin running at that time, giving rise to the possibility that the bad faith purchaser would achieve repose in circumstances where a good faith purchaser would not.\textsuperscript{214}

Conceivably the foregoing problems with the “demand and refusal” rule explains why it has not been widely accepted,\textsuperscript{216} and why its vitality even in the state of New York is uncertain.\textsuperscript{215} In those instances where a court would apply the “demand and refusal” rule, it would appear, at first, to favor the repatriation of Native American artifacts under NAGPRA. Unless a tribe has demanded specific items and the museum has refused to return them sufficiently long ago for the limitation period to have expired, title would not have vested in the museum. However, Native Americans have already demanded the return of a significant number of sacred and cultural objects which are housed in museums, and, in most cases, museums have refused to return the objects.\textsuperscript{217} Therefore, even under a strict application of the “demand and refusal” rule, the period of limitation already expired for a significant number of claims that might be brought under NAGPRA, thus vesting the right of possession in the museum. Although in the context of lost or stolen art a strict application of the “demand and refusal” rule may unilaterally favor the
original owner, in the context of lost or stolen Native American artifacts, where the affiliated tribes may have had neither the legal nor the financial resources to file a legal claim, the rule favors museums; the museum can simply continue to refuse to honor the tribes' demands until the applicable limitation period has expired.

Moreover, in an effort to mitigate the rule's tendency to prejudice the interests of good faith purchasers, some courts have held that the cause of action, and thus the period of limitation, accrues when the right to make a demand arises. The limitation period is not tolled by the original owner's ignorance of the lost property's location, or even of the fact that there is a cause of action. Obviously, this modification of the "demand and refusal" rule swings the pendulum back to unilaterally favor the present possessor. It is, in fact, more regressive than the pure adverse possession rule in that it evinces no concern whatsoever for affording the original owner a fair opportunity to know that there is a cause of action and a right to assert a claim. In the case of Native American claims for cultural property, unless a court could be persuaded that Native Americans have not had a legal cause of action prior to the enactment of NAGPRA, any applicable period of limitations would have accrued when the tribes were initially dispossessed of the property. In most cases the cause of action would have accrued sufficiently long ago that the period of limitations would have expired.

Using the strict application of the "demand and refusal" rule, in which the period of limitations does not accrue until actual demand and refusal, courts have attempted to mitigate the perceived harshness against good faith purchasers by allowing a separate defense of "laches." Laches is an equitable doctrine where "unreasonable or inexcusable delay" in bringing the suit warrants a court in denying the claim. The application of the doctrine of "laches" may or may not work in favor of Native American claims against museums. The leading case promulgating the use of the "laches" defense in con-

218. Id.
219. Petrovich, supra note 158, at 1137.
220. See, e.g., Federal Ins. Co. v. Fries, 355 N.Y.S.2d 741 (Civ. Ct. 1974), in which the court held that a three-year statute of limitations had run, barring the plaintiff bank's attempt to recover jewelry that it had mistakenly given to the defendant. The court held that "the statute of limitations runs, not from the demand, but from the time when the bank was entitled to make the demand." Id. at 747. As to the fact that the bank was initially unaware of the mistake, the court said that "ignorance does not stop the clock, unless the defendant engages in fraudulent or misleading conduct." Id. at 748.
juncture with the "demand and refusal" rule is Solomon R. Guggenheim Foundation v. Lubell.\textsuperscript{222} This case involved another work by Marc Chagall which was stolen from the Guggenheim Museum in the mid-1960s.\textsuperscript{223} The defendants had acquired the work as good faith purchasers in 1967.\textsuperscript{224} The New York Court of Appeals, affirming that the "demand and refusal" rule is still the law in New York, held that the applicable period of limitations had not accrued until the museum had demanded the return of the work, and the defendant had refused, irrespective of whether the museum had acted unreasonably in not making a diligent effort to recover the work immediately subsequent to its theft.\textsuperscript{225} The court remanded the case for a consideration of the defendants' separate defense of "laches." To be considered under this inquiry was the reasonableness of the original owner's (in this case, the museum's) delay in locating and demanding the return of the stolen property.\textsuperscript{226} "Reasonableness" would be determined by comparing the museum's conduct in following-up on the theft with standard museum practices during that time period and in similar circumstances.\textsuperscript{227} In addition to demonstrating the unreasonableness of the original owner's delay, the good faith purchasers (in this case the individual buyers of the art) must demonstrate that they have been prejudiced by the delay.\textsuperscript{228} Obviously, the mere loss of the work of art cannot of itself constitute such prejudice because a more expeditious demand on the part of the original owner would, nevertheless, have resulted in a loss of the property for the good faith purchaser. Rather, the defendant would be required to show that it is in a worse position as a result of the delay than it would be if the original owner had acted more expeditiously. For example, a good faith purchaser may, as a result of the delay, have lost its opportunity to file a cross-claim against the party from whom he had purchased the property.\textsuperscript{229} Additionally, a good faith purchaser may have in some way acted in detrimental reliance upon the belief that she was the legitimate owner of the property, a detrimental reliance which could have been averted by expeditious

\textsuperscript{222} 569 N.E.2d 426 (N.Y. 1991).
\textsuperscript{223} Id. at 427.
\textsuperscript{224} Id. at 428.
\textsuperscript{225} Id. at 429.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} DeAngelis, supra note 158, at 14.
\textsuperscript{229} Id.
conduct on the part of the original owner.\textsuperscript{230}

Could a museum invoke the defense of "laches" to avoid the repatriation requirement under NAGPRA where the "demand and refusal" rule applies and the claim is not otherwise time-barred? Probably not. First of all, the doctrine of "laches" is a rule of equity, not necessarily of property law. Consequently, when a court awards the right of possession to a good faith purchaser for reasons of equity, it is not necessarily asserting that title to the object in question has already vested in the good faith purchaser. If anything, the transfer of title is coextensive with the court's ruling.\textsuperscript{231} Thus, in the case of a museum as good faith purchaser, an unreasonable delay on the part of Native American tribes should not create a pre-existing property interest for the museum which would be protected by the Takings Clause.

Second, whether or not the delay on the part of Native Americans in bringing their claims is, \textit{a priori}, unreasonable or inexcusable, depends upon what one would construe as "standard practices." If the Guggenheim Museum, as an original owner, is held to the standard practices of other museums, then it seems appropriately symmetrical that Native Americans should be held only to the standard practices of other Native American claimants. This is especially true in view of the unique relationship that has existed between museums and Native Americans. For the same reasons that the adverse possession rule may not be fairly applied to Native American claims against museums,\textsuperscript{232} it may be unfair to regard the "delay" in the bringing of Native American claims as being unreasonable or inexcusable. Moreover, it is difficult to see how museums, or the public for whom they may be fiduciaries, have been prejudiced by any such delay. If anything, scientists and the public have gained additional knowledge and enjoyment from the various artifacts as a result of the delay in the bringing of Native American claims. It is

\textsuperscript{230} See, e.g., Tower v. Moskowitz, 262 So. 2d 276 (Fla. Dist. Ct. App. 1972). In Tower, an 80 year old woman waited until 17 years after her husband's death, and four years after her son and daughter-in-law were divorced to sue them for rent due under the arrangement of her husband's will. \textit{Id.} The court held that the suit could not be barred by the doctrine of laches "solely because of the passage of time." \textit{Id.} at 279. In affirming the lower court's decision to allow the suit to go forward, the court noted that "the record did not reveal [any] intervening interests of third parties, nor . . . any detrimental reliance on the part of the defendants." \textit{Id.}

\textsuperscript{231} Alternatively, it might be argued that, as with statutes of limitations not relating to property, it is the opportunity for a remedy, rather than the substantive right, i.e., title, that has been extinguished.

\textsuperscript{232} See supra part II.C.3.a.
true that museums may have incurred expenses in restoring and preparing the artifacts for display, but it seems arguable that the museums (and the public) have already been compensated for those expenditures by the use of the objects they have heretofore enjoyed.233

Finally, even in the unlikely event that a federal court would entertain a defense of "laches," the inquiry would involve a "balancing of the equities." To accomplish this, the court would examine not only the reasonableness of the original owner's (Native American's) conduct, but "the reasonableness of the possessor's basis for believing it was entitled to obtain and to keep the property. Such a broad inquiry will permit a sensitive resolution of difficult disputes in which there is often much to be said for each of the contending sides."234 Given that the federal court would be deciding the claim under NAGPRA, which itself reflects a long history of Native American struggle for repatriation, and of recalcitrance on the part of many museums,235 it seems unlikely that federal courts would often determine that equitable considerations favor the museum.

c. The Discovery Rule

An emerging doctrine which appears to strike a more reasonable balance than either the adverse possession rule, or the "demand and refusal" rule, is the "discovery rule." Under the discovery rule the period of limitation accrues when the true owner discovers or

233. A long delay in bringing a claim would, of course, pose evidentiary problems for a museum wishing to defend against such a claim. But, presumably, the rule which a court adopts and applies for tolling a statute of limitations already embodies the balance the court has struck between the interests of original owners in regaining their property, and the interests of present possessors in achieving repose; a balance which would arguably already account for the concomitant evidentiary problems. Consequently, in order to justify a deviation from the "demand and refusal" rule, for example, the "prejudice" required by the laches defense must comprise something more than making the adjudicative process more difficult for the defendant. The prejudice must manifest itself in the result of that process. The loss of the property in question, then, must place the defendant in a worse position than it would have been had the plaintiff brought a more timely claim.


should have discovered the location of the lost property. As applied to stolen or lost art, the “discovery rule” was first adopted by the New Jersey Supreme Court, in O'Keeffe v. Snyder, from its use in medical malpractice claims. The O'Keeffe Court had in essence ruled that the defendant had not satisfied the “open and notorious” requirement of adverse possession. In so doing it applied the “discovery rule,” which is in a sense the flip-side of the “open and notorious” requirement, differing in that it focuses on the conduct of the prior possessor, rather than on the conduct of the present possessor. The O'Keeffe Court promulgated three requirements to determine whether a plaintiff would receive the benefit of the discovery rule. First, the plaintiff must have exercised “due diligence” in attempting to recover the stolen item from the time immediately after the alleged theft took place. Second, the plaintiff must have “alerted the world” about the alleged theft. Third, the plaintiff must have placed a “reasonably prudent” purchaser on constructive notice that someone other than the seller may be the true owner. If these requirements are not fulfilled, the period of limitations would begin to run, not at the point of discovery, but at whatever point the plaintiff should have discovered the location of the stolen property.

It is not clear what constitutes “due diligence,” “alerting the world,” or “constructive notice.” Nor is it clear that these three formulations are actually distinguishable, i.e., that whatever pattern of behavior would constitute “due diligence,” for example, would not also have the effect of “alerting the world” and/or of placing a buyer on “constructive notice” that there may be a problem with title. However, the basic principle seems to be a sound one. If equita-

236. DeAngelis, supra note 158, at 11-12; see also Platzman, supra note 1, at 533-36; Petrovich, supra note 158, at 1149-57.
237. 416 A.2d 862 (N.J. 1980). For a description of the facts of the case, see supra notes 172-77 and accompanying text.
238. DeAngelis, supra note 158, at 11 n.15 (observing that it came to be recognized in medical malpractice cases that it would be unfair to deem the statute of limitations to have accrued at the time the injury was committed because the patient would frequently be unaware of the injury until it subsequently manifested itself).
239. See supra notes 172-80 and accompanying text.
240. See supra notes 172-80 and accompanying text.
241. Platzman, supra note 1, at 533-34.
242. O'Keeffe, 416 A.2d at 870.
243. Id.
244. Id.
245. Id. at 874.
ble considerations dictate that it would be unfair to bar a claim before an original owner has had a fair opportunity to locate the alienated property, the "discovery rule" seems to require that the running of the period of limitations should be suspended until the original owner has had such an opportunity. And yet, by requiring the original owner to react in a responsible manner, the "discovery rule" protects the interests of good faith purchasers by not leaving them at the mercy of unreasonable delays, and by affording them the opportunity to learn that an item does not have good title and thereby to take corrective action.

Although the "discovery rule" has been widely accepted in the areas of medical malpractice and general tort law,\(^{246}\) it is far from obvious that a majority of state courts would be inclined to extend the rule to actions in replevin of lost or stolen goods.\(^{247}\) In extending the rule to claims for lost or stolen art, for example, the fairness principle underlying the rule would seemingly require that any applicable period of limitation be suspended, not merely until the injury has been discovered, but until the location of the lost or stolen property has been discovered. Although some courts are reluctant to extend the "discovery rule" beyond what is statutorily prescribed,\(^{248}\) courts have extended the rule to claims for lost or stolen works of art under the laws of New Jersey\(^{249}\) and Indiana.\(^{250}\)

An interesting case involving lost art arose recently in Illinois, where the use of the "discovery rule" is otherwise well established.\(^{251}\) In *Mucha v. King*,\(^{252}\) the son of well-known artist Alphonse Mucha brought an action to recover one of Mucha's paintings from a collector in Chicago.\(^{253}\) The defendant collector was a good faith purchaser who was the ultimate possessor of the painting after it had apparently been converted by a gallery-bailee.\(^{254}\) One of the issues in

\(^{246}\) Petrovich, *supra* note 158, at 1150-53.

\(^{247}\) *Id.* at 1153.

\(^{248}\) *Id.* n.128.

\(^{249}\) O'Keeffe v. Snyder, 416 A.2d 862 (N.J. 1980).

\(^{250}\) Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990) (invoking the "discovery rule" in finding that a suit was timely filed by the original owner of mosaics which had been stolen from a church in Cyprus).

\(^{251}\) ILL. COMP. STAT. ANN. ch. 735, §§ 5/13-205 (Smith-Hurd 1993); *see also* Hagney v. Lopeman, 590 N.E.2d 466 (Ill. 1992); Mega v. Holy Cross Hosp., 490 N.E.2d 665 (Ill. 1986) (upholding the constitutionality of the discovery rule).

\(^{252}\) 792 F.2d 602 (7th Cir. 1986).

\(^{253}\) *Id.* at 603.

\(^{254}\) *Id.*
dispute was whether the period of limitations had run, i.e., whether Mucha's son had discovered or should have discovered the conversion more than five years before the action was filed. The circuit court affirmed the district court's finding that neither Mucha nor his heirs should have discovered the conversion of the painting more than five years before the action was filed, and, hence, that the action was not barred by the statute of limitations. The district court had apparently applied the "discovery rule" in a much less rigorous fashion than had been suggested by the court in O'Keeffe v. Snyder. There is no record of Mucha's son having made a diligent effort to locate or recover the painting more than five years before the action was filed, even though there was reason to believe that the painting may have been converted. Moreover, there is no indication that Mucha's son did anything that might have placed the defendant on at least constructive notice that he may not have been receiving clear title when he acquired the painting. Nonetheless, applying the "clearly erroneous" standard of review, the circuit court affirmed the lower court's finding that Mucha's son should not be charged with having knowledge of the painting's conversion more than five years before the action was filed.

The defendant had conceded that the "discovery rule" applied, but Judge Posner noted in passing that the defendant may have been mistaken in so doing. The applicable statute does not mention the discovery rule, and, although Illinois courts frequently apply the "discovery rule" where it is not specifically authorized by statute, they have also said that the rule will not be applied where problems of proof resulting from the passage of time predominate. Thus, it remained "a matter of speculation whether an Illinois court would apply [the discovery rule] in a case such as this, given the antiquity of the bailment and the fact that many of the principals are dead."

The preceding discussion illustrates some of the uncertainty in

255. The prescribed period of limitation in Illinois is five years. ILL. COMP. STAT. ANN. ch. 735, §§ 5/13-205 (Smith-Hurd 1993).
256. Mucha, 792 F.2d at 611-12.
257. 416 A.2d 86 (N.J. 1980); see supra notes 172-80 and accompanying text.
258. Mucha, 792 F.2d at 612.
259. Id.
260. Id. at 611.
262. Mucha, 792 F.2d at 611.
263. Id.
applying the "discovery rule" to the recovery of chattels. The uncertainty would most likely be aggravated in attempting to apply the "discovery rule" to the recovery of Native American artifacts. In many instances, Native Americans will have known the location of an affiliated artifact for a period of time exceeding any applicable period of limitation, and will, in fact, have made a number of unsuccessful attempts to recover the items through non-litigious means. However, as has been queried above, would it be fair to run a statute of limitations when there was no apparent legal cause of action? In those cases in which Native Americans did not know the location of an object sufficiently long ago for the period of limitation to have expired, the question would remain as to the point at which they should have discovered the location of the affiliated artifact. Should the O'Keeffe standard of applying the "discovery rule" to the recovery of stolen art apply to the recovery of Native American artifacts? It is likely that many years or even decades will have passed subsequent to the initial dispossession of a Native American object without the Native Americans having engaged in anything that might be characterized as "due diligence" in an attempt to recover the object. Nor are they likely to have done anything that might be characterized as "alerting the world," or as placing any prospective good faith purchasers on "constructive notice" that the object had been illegitimately alienated. Fairly obviously, the historical alienation of the Native American cultures from the white American culture makes a requirement that Native Americans satisfy the "three-pronged test" of O'Keeffe v. Snyder seem, to say the least, inappropriate. In any case, it could be argued that anyone through whose hands a Native American cultural object passed should have been on at least "constructive notice" of the object's origins, and, in many instances, of the likelihood that it was not legitimately acquired. This is particularly true of museums, which can reasonably be expected to have knowledge of Native American history.

Of course, the O'Keeffe Court's formulation of the "discovery rule" does not purport to be applicable to Native American claims for lost or stolen cultural objects. If the rule is to be applied in this context at all, it would, perhaps, be more reasonable to apply the "gestalt" analysis apparently implied in Mucha v. King: given the totality of the circumstances, at what point in time should the origi-

264. See Platzman, supra note 1, at 526 n.34, 533.
265. Id. at 535.
266. Id. at 535-36.
nal owner have become aware of the location of the lost or stolen property? Again, though, it is not clear in whose favor this type of analysis would fall. A museum could certainly argue that, at the very least, when an object is placed on public display in a museum, Native Americans can be charged with knowledge of its location, and applicable limitation periods should accrue at that time. Compared to the O'Keeffe standard, under which the period of limitations arguably would have accrued at the point of the original dispossession of Native American artifacts, this formulation is favorable to Native American claims. From the perspective, however, of present-day Native Americans, who only recently became aware of the location of their cultural objects in a particular museum, and/or who only recently became aware that they may have a legal avenue for pursuing their claims, running the period of limitations from the point of public display in a museum would be extremely unfavorable. It is plausible, in fact, that a court would not, and should not, regard public display of an object in a museum as sufficient to charge the affiliated tribe with knowledge of that object’s location. As discussed above, Native American claimants are not in a position analogous to that of claimants of lost or stolen art. Many Native Americans live in communities that are largely separated from the dominant culture, and, in any case, unlike artists and art collectors, are outsiders to the milieu of museums, archaeologists and collectors.

It may very well be that Native Americans should only be charged with having “discovered” the location of alienated objects after museums have taken affirmative steps of notification, such as those prescribed under NAGPRA. In fact, there is a strong argument that, absent any directly relevant precedent, a court applying the “discovery rule” to a claim brought under NAGPRA should embrace NAGPRA’s provisions as a determination that Native American claimants should not be charged with “discovery” until the required “inventory” and “summary” procedures have been executed. Additionally, if any statutes of limitations apply at all, the limitations period should begin from the date NAGPRA went into effect, or the time of actual discovery, whichever is later.

It is possible, of course, that a court predisposed to denying a

267. Mucha, 792 F.2d at 605-07.
268. See supra notes 160-71 and accompanying text, discussing the “open and notorious” element of adverse possession.
269. See supra notes 194-218 and accompanying text.
270. 25 U.S.C. §§ 3003(a), 3004(a), quoted in full supra notes 7, 10, respectively.
Native American claim would decline to apply the discovery rule at all given the antiquity of the supposed "conversion," and would simply dismiss the claim as being time-barred. However, that would raise all the problems associated with applying the doctrine of adverse possession to Native American claims. Furthermore, the justification for dispensing with the "discovery rule" would be weak because any problems of proof for a museum would be counterbalanced by the fact that NAGPRA's burden of proof scheme places the initial burden on an affiliated tribe to make a prima facie showing that the museum does not have the right of possession. Finally, and most importantly, barring a Native American claim in a jurisdiction in which the "discovery rule" applies simply because of the antiquity of the dispossession would be a direct repudiation of the congressional policies embodied in NAGPRA. Those policies should not be undermined unless there is a clear property interest at stake that should be protected by the Constitution. Where a court is considering whether to apply the discovery rule, it would not be clear that a pre-existing property interest is at stake. The running of the statute of limitations under the adverse possession doctrine traditionally has the effect of transferring title even in the absence of a judicial determination. In contrast, it is not clear that a decision by a court not to apply the "discovery rule" in exceptional cases should mean that, in those cases, title has transferred at some earlier point. It might only mean that the judge is actually conferring title on the present possessor by dismissing the claim. Given that there are no cases applying the "discovery rule" to Native American claims against museums in jurisdictions generally adopting the rule, any pre-existing expectations purporting to rise to the level of a property interest would be extremely attenuated, and would not warrant protection by the Takings Clause.

The pivotal issue with respect to all doctrines pertaining to statutes of limitations is to determine the circumstances under which it is fairest to all parties to keep the clock ticking. With respect to Native American claims for cultural objects housed in museums,
that issue devolves to the question of when a Native American tribe or its representative should have known the location of such an object and that it had the right to make a claim. As we have seen, there is no precedential authority that provides a conclusive answer to that question. The enactment of NAGPRA should mean that doubts about that question will be resolved in favor of Native American claims. However, in theory, if a museum could demonstrate that an applicable period of limitations, under any of the three doctrines discussed above, should have accrued sufficiently long ago that the period would have expired prior to the filing of a Native American claim under NAGPRA, then title to the claimed property will have vested in the museum, and the Takings Clause would protect the museum from the repatriation requirement. Moreover, an analysis of how statutes of limitations might apply may be completely obviated if it turns out that, in the first place, there are no “applicable” statutes of limitations with respect to claims brought under NAGPRA.

d. Do Statutes of Limitations Apply at All to Native American Claims for Recovery of Cultural Property Under NAGPRA?

NAGPRA contains no provision respecting a time limit for commencing actions under its purview. Because NAGPRA is a federal statute, it might be queried whether any state statute of limitations pertains to Native American claims brought under NAGPRA. One commentator has asserted that Indian tribes are not subject to state statutes of limitations.275 The basis for that assertion is unclear, and it is most certainly an overly sweeping statement. It would seem self-evident that Native American claims brought under state substantive law would be subject to the appropriate state statutes of limitations. On the other hand, a persuasive argument can be raised that Native American claims brought pursuant to federal statutes are, at least presumptively, not subject to state statutes of limitations.

First, under the Supremacy Clause276 of the United States Constitution, state statutes of limitations would not apply of their own

---

275. Echo-Hawk, supra note 1, at 444 n.35.
276. U.S. CONST. art. VI, § 2 (emphasis added):
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
force to claims brought under federal law.\textsuperscript{277} The Supremacy Clause requires that where federal law enacted pursuant to the federal Constitution conflicts with otherwise valid state law, the federal law shall prevail.\textsuperscript{278} Congress derives its constitutional authority to enact legislation regulating Native American affairs from Article I, Section 8, clause 3, of the Constitution, which confers upon Congress the power "[t]o regulate Commerce . . . with the Indian Tribes."\textsuperscript{279} The power thus conferred upon Congress has been construed by the Supreme Court to be exclusive.\textsuperscript{280} Consequently, a state law which comes into direct conflict with federal legislation regulating Native American affairs would be subordinated to the federal law.

Obviously, if a federal law regulating Native American affairs explicitly prescribes a limitations period for commencing actions under it, no conceivably applicable state statute of limitations could apply. If a federal law does not prescribe a limitations period, as is the case with NAGPRA, it might reasonably be inferred that Congress did not intend to incorporate a time-bar, and that no state statute of limitations should apply, at least not of its own force. The general rule is, in fact, that "[i]n the absence of a controlling federal limitations period, . . . a state limitations period . . . is borrowed and applied to the federal claim, \textit{provided} that the application of the state statute would not be inconsistent with underlying federal

\textsuperscript{277} See Oneida County v. Oneida Indian Nation, 470 U.S. 226, 240 n.13 (1985) (noting in passing that "[u]nder the Supremacy Clause, state-law time bars, e.g., adverse possession and laches, do not apply of their own force to Indian land title claims").

\textsuperscript{278} Gibbons v. Ogden, 22 U.S. 1, 210 (1824) (holding invalid under the Supremacy Clause a state law that directly conflicted with a federal law enacted pursuant to the Commerce Clause of the Constitution).

\textsuperscript{279} The full text of U.S. \textit{Const.}, art. I, § 8, cls. 1 & 3, reads:

\begin{center}
\textit{The Congress shall have the Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . . .}
\end{center}

\begin{center}
To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.
\end{center}

\textsuperscript{280} See, e.g., \textit{Oneida}, 470 U.S. at 234 ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."). The congressional power to regulate Indian affairs has also been construed to be plenary, such that it is less constrained by other constitutional provisions than are other congressional powers. \textit{Id.}; see, e.g., United States v. Antelope, 430 U.S. 641, 646 (1977) (holding that the Equal Protection Clause does not apply to federal legislation dealing specifically with Indians, irrespective of whether such legislation is preferential or disadvantageous with respect to Indians, because "such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions . . . . [I]t is not to be viewed as legislation of a "'racial" group consisting of "Indians.' ")

To illustrate, in *Oneida County v. Oneida Indian Nation*, the Supreme Court declined to apply a statute of limitations, state or federal, to a 190-year old Indian land claim, holding that to do so would be inconsistent with the congressional policy of not applying time-bars to such claims. In 1795, representatives of the Oneida Indian Nation had conveyed nearly 300,000 acres of their land to the State of New York in return for annual cash payments. The conveyance violated a federal law which prohibited the conveyance of Indian land unless made pursuant to a treaty and in the presence of a United States commissioner. The State of New York had entered the transaction despite explicit warnings from the United States Secretary of War that the conveyance was illegal. Now claiming that the initial transaction was, therefore, void, three Oneida tribes brought a claim against the defendant counties that now occupied the disputed land, seeking damages in the form of the fair rental value of the land for a specified two-year period.

There was no dispute about the facts of the case. The defendants presented a number of legal defenses, including an argument that the action would be barred by any applicable statute of limitations. In finding that there was no applicable statute of limitations, the Court deduced from existing federal legislation regarding Native American affairs that "[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." In reaching the conclusion that adopting a state statute of limitations would be inconsistent with congressional policy, the Court first examined a federal statute which gave New York courts jurisdiction over civil actions involving Native Americans.

---

282. Id. at 226.
283. Id. at 241-44.
284. Id. at 232.
285. Id. at 231-32 (referring to the Indian Trade and Intercourse Act, ch. 33, 1 Stat. 331 § 8 (1793)).
286. Id. at 232.
287. Id. at 229.
288. Id. at 233.
289. Id. at 240, 242. The Court referred to the legislative history of the amendments to 28 U.S.C. § 2415 (1988), a federal statute that prescribed a period of limitation for contract and tort actions brought by the United States on behalf of Indians. Id. at 271. That history demonstrated that Congress had assumed that there was no federal statute of limitations applicable to claims brought by the Indians themselves. Id.
290. Id. at 241.
The statute had excluded from that jurisdiction any Indian land claims arising out of events "transpiring prior to September 13, 1952."\textsuperscript{292} The legislative history of the statute revealed that the purpose of this proviso was to ensure that New York's statute of limitations would not apply to causes of action regarding Indian lands that accrued before 1952. The Court inferred from this proviso a "congressional policy against the application of state statutes of limitations in the context of Indian land claims."\textsuperscript{293} In further support of this inference, the Court looked to a federal statute, initially enacted in 1966, which imposed a statute of limitations on actions brought by the United States \textit{on behalf} of Native Americans.\textsuperscript{294} In the absence of any federal statute of limitation applicable to claims brought by Native Americans themselves, Congress excluded from the federal act's statute of limitation any action brought by the United States "to establish title to, or right of possession of, real or personal property."\textsuperscript{295} Thus, the Court held that, consistent with the congressional policy of not applying a statute of limitation in the context of Native American property claims, no statute of limitation would bar an Indian property claim that had accrued in 1795.\textsuperscript{296}

The enactment of NAGPRA, which contains no provision prescribing a period of limitations for Native American property claims against museums, further confirms the existence of a congressional policy against applying statutes of limitations in the context of Indian property claims. The majority of claims that will be brought under NAGPRA will have arisen out of transactions or events that occurred many decades ago, and yet there is no indication in NAGPRA that only causes of action that have accrued relatively recently will be cognizable. This not only reflects a general policy against applying statutes of limitations in the context of Native American property claims, but a specific policy under NAGPRA against applying statutes of limitations to Native American actions

\textsuperscript{292} Id.
\textsuperscript{293} Oneida, 470 U.S. at 241. The Court's inference here may not be completely justified. The proviso does imply that New York's statute of limitations would apply to Indian land relating to transactions that transpired \textit{subsequent} to September 13, 1952. Id. Perhaps, what can be reasonably inferred is Congress' determination that there was no cause of action available to Indians in the New York courts prior to the enactment of the federal statute, and that, therefore, no applicable period of limitations should have accrued prior to the date of the statute's enactment.
\textsuperscript{295} Id. § 2415(c).
\textsuperscript{296} Id. § 2415.
to recover sacred and cultural property from museums.

Assuming that the Court's holding in *Oneida* would be controlling in a claim brought under NAGPRA, it is apparent that a federal court should not recognize any state statute of limitations as being applicable. Because there is no federal statute of limitations that governs, the question would be whether borrowing a state statute of limitations would be consistent with the congressional policies underlying NAGPRA. We have already seen that there is apparently a general congressional policy against applying any statute of limitations to Native American claims for property. Furthermore, applying state statutes of limitations to claims under NAGPRA would also be inconsistent with Congress' *affirmative* policy of restoring Native American sacred and cultural objects to their original owners, and of removing the barriers that have heretofore prevented Native Americans from recovering such property. If it were Congress' intent and belief that the traditional application of state property law would be sufficient to implement these objectives, it would be difficult to determine Congress' motive for enacting NAGPRA, except possibly as merely a politically palliative gesture. Presumably a federal court, in construing the purpose of the legislation, would take it at face value, and would rule that the adoption of a state statute of limitations is inconsistent with that purpose.

There is language in NAGPRA, however, from which it could be argued that Congress specifically intended *not* to pre-empt state statutes of limitations. It is clear that Congress did not intend that NAGPRA would pre-empt state property law in general. The "otherwise applicable property law," to which the Act's definition of

---


298. It has been suggested to the author that this would not be the first time that Congress has passed legislation which was intended to be merely a symbolic gesture, and that it is perhaps begging the question to assume that a pro-repatriation policy underlies the Act. Yet, there is nothing in the legislative history to indicate that Congress anticipated that the Takings Clause proviso would gut the Act, see infra notes 299-305 and accompanying text. In fact there is much rhetoric about redressing both past and present injustices that have been perpetrated upon Native Americans. 136 CONG. REC. H10985 (daily ed. Oct. 22, 1990); 149 CONG. REC. S17174 (daily ed. Oct. 26, 1990). It may be true that individual members of Congress are subjectively more interested in acquiring political capital than they are in actually repatriating Native American artifacts, but it is not the role of the federal courts to make that determination in interpreting federal legislation. If a pro-repatriation policy is clearly inferable from both the statutory text and the Congressional Record, it is the responsibility of the judiciary to enforce that policy, or at least to assume a pro-repatriation policy in determining the proper application of "otherwise applicable property law."
“right of possession” refers, includes a minimum state property law. The legislative history of NAGPRA reveals that earlier drafts of the definition of “right of possession” explicitly required deference to “relevant state law,” and that the definition of “right of possession” was intended to supplement, rather than detract from, applicable “Federal, state, or tribal” law. In congressional “debates,” Congressman Richardson indicated that the “act shall not supersede right of possession properly established under state property laws,” and Senator McCain stated that the definition of “right of possession” is intended to operate consistently with general property law.

The question, however, is whether “applicable property law” includes state statutes of limitations such that it cannot be said that adopting a state statute of limitations would be inconsistent with congressional policy. It is not clear that Congress actually gave this issue any thought. There is no indication in the Congressional Record of its having done so. On the one hand, the view was expressed that the “applicable property law” language was added to satisfy “concerns of the Justice Department about the possibility of a Fifth Amendment taking,” and that it was not believed that the terms of the Act prior to the addition of the new language would have effected such a taking. In other words, the drafters of NAGPRA did not believe that the new language would significantly alter the scope of the required repatriation. However, if the new language is construed to incorporate state statutes of limitations, it is arguable that it would virtually gut the scope of the Act. Moreover, in the various discussions leading up to the enactment of NAGPRA, much concern was expressed about the return of human remains and cul-

301. Id. at 4373-74.
The Act also contains a “savings provision” which provides that “[n]othing in this chapter shall be construed to . . . (5) limit the application of any State or Federal law pertaining to theft and stolen property.” 25 U.S.C. § 3009(5). This passage is somewhat enigmatic. There is no explanation of it in the legislative history. It could reflect an intent to preserve state statutes of limitations which would pertain to actions in replevin for stolen artifacts. However, since all of the other provisions in the same section are designed to protect the interests of Native Americans, it is more likely that the provision is intended to preserve the rights of Native Americans in the reclamation of stolen property.
tural objects of which Native Americans were dispossessed as far back as the last century. 306 It seems indisputable, in any case, that the majority of contested cultural objects will have been alienated from the respective affiliated tribes at least a decade before the enactment of NAGPRA or any claim that might be brought under it. If state statutes of limitations, most of which prescribe a period of considerably less than ten years, would bar most claims for these objects, then NAGPRA would, in effect, be emasculated. Thus, from this perspective, it seems inconceivable that Congress, had it contemplated the issue, would have intended to incorporate state statutes of limitations, or that it could be deemed consistent with congressional policy to do so.

On the other hand, there was also concern expressed during the legislative discussions that the Act should not result in a “wholesale raid on museum collections.” 306 Furthermore, the “applicable property law” proviso itself clearly reflects a congressional intent to avoid Takings Clause problems, regardless of how remote such a Takings Clause problem may have appeared at the time of enactment. Therefore, if a state statute of limitations would, indeed, have conferred upon a museum a property interest in a disputed object, thus creating a Takings Clause issue, there is arguably an implied congressional intent to defer to such a statute. Consequently, there is ultimately some uncertainty as to whether deferring to state statutes of limitations would be consistent with federal policy underlying NAGPRA.

It should also be noted, with respect to the “Supremacy Clause” argument promulgated in Oneida, that the decision in that case was rejoined by Justice Stevens in a lengthy dissent, in which Chief Justice Burger, Justice White, and Justice Rehnquist joined. 307 Only two of the justices who comprised the majority are still on the Court. 308 Thus, it cannot be assumed that the present Court would rule the same way if it were presented with a similar scenario. Justice Stevens would have applied the equitable doctrine of “laches” as a time-bar to the Oneida tribes’ claim, 309 reasoning that the tribes

308. These Justices are Justice Blackmun and Justice O'Connor.
309. See supra notes 221-30 and accompanying text (explaining that the doctrine of “laches” empowers a court in equity to dismiss a claim as being too old, even in the absence of a statute of limitations defense, if the plaintiff has engaged in unreasonable and inexcusable
had not satisfactorily explained why they waited nearly 190 years to file their claim, that their ancestors had freely conveyed the property and received a valuable consideration for it, and that it was unjust, after so much had been invested in the development of the land, to punish the defendants for the sins of their forefathers.\footnote{310} Justice Stevens agreed with the majority that no federal statute of limitations governed the action, and that no state statute of limitations should be borrowed that is inconsistent with the implementation of federal policies. However, he insisted that some limiting principle should always be applied to a federal cause of action, whether that be an analogous federal statute of limitations, or a limiting principle fashioned by the Court itself.\footnote{311} In essence, Justice Stevens’ concluded that, under any conceivable limiting rule, the Oneida tribes’ claim would have been barred long before they finally filed it.

In dealing with the argument that it has been Congress’ intent that no statute of limitations should apply to Indian land claims, Justice Stevens reasoned that neither the federal statute invoked by the majority,\footnote{312} nor its legislative history indicated an intent by Congress “to revive already barred claims.”\footnote{313} Rather, they merely indicate an intent “to preserve the status quo with respect to ancient claims that might already be barred, and to establish a procedure for making sure that the claims would not survive eternally.”\footnote{314} Moreover, the defendants in Oneida had not raised the “laches” defense on appeal, and the majority, therefore, did not consider it. Oneida, 470 U.S. at 244.

\footnote{310} Oneida, 470 U.S. at 273. Justice Stevens proffered no explanation as to why the Oneida tribes should be punished for the victimization of their forefathers.\footnote{311} Id. at 257. It is difficult to see how the principle that Justice Stevens articulates would be adequate if the federal policy dictates that there should be no time-bar, or if the imposition of a time-bar would seriously frustrate the purposes of federal legislation.\footnote{312} See supra note 285 and accompanying text for a discussion of those federal statutes.\footnote{313} Oneida, 470 U.S. at 272 (emphasis in original). Here, Justice Stevens’ reasoning seems circular. If the present action has never been governed by a federal statute of limitations, and it is federal policy that no statute of limitations should be applied, it seems odd to say that the claims have already been barred. It is as if the New York statute of limitations in effect in 1795 (if there was one) barred the claim of its own accord, without being enforced by a court, and even though New York courts did not have jurisdiction over Indian land claims; or, as if the doctrine of “laches” barred the claim, without a court determining that the elements necessary to sustain a defense of “laches” were present. If it is Congress’ intent that no limiting principle should be applied, then, necessarily, the claims have not already been barred.\footnote{314} Id. Again, Justice Stevens’ reasoning seems to be self-contradictory and at odds with what was actually said during the legislative discussions. If claims can automatically be barred without the operation of statutes or judicial decisions, then there is no need for a procedure that will prevent claims from being eternally actionable. In any case, why would Congress
NAGPRA AND UNCONSTITUTIONAL TAKINGS

over, Justice Stevens observed that, in the past, Congress had been explicit when it intended to “deny any time limitation for a private cause of action,” and that the Court should not cavalierly infer a congressional intent to reward “those whom ‘Abraham Lincoln once described with scorn [as sitting] in the basements of courthouses combing property records to upset established titles.’”

Justice Stevens’ dissenting opinion warrants examination because he and two other dissenters in Oneida, including the present Chief Justice, will likely be on the Court that will hear a similar challenge brought under NAGPRA. While Justice Stevens’ reasoning regarding federal policy is somewhat difficult to follow and less than persuasive, his idea that an equitable defense of “laches” ought to be available even in actions at law is not without merit. Even if the general federal policy is not to apply periods of limitation to Native American property claims, and even if the general application of statutes of limitations would frustrate affirmative congressional objectives regarding the restoration of Native American property, it is arguable that federal courts should not be precluded from applying some limiting principle where one is clearly dictated by principles of fairness. However, even if Justice Stevens could persuade a majority of the present Court to apply the doctrine of “laches” to a claim brought under NAGPRA, it is likely that the facts underlying

want to prevent the application of the New York statute of limitations to claims arising before the passage of the federal act if it intended that older claims should be barred? Id. at 241 n.14 (referring to 25 U.S.C. § 233, which conferred jurisdiction on New York courts over civil actions involving Indians). Or why would Congress, knowing that there is no federal statute of limitations that applies to property claims brought by Indians, exempt from the federal statute of limitations actions brought by the United States to establish Indian property claims? Id. at 241-42. Justice Stevens also makes note of the fact that the federal statute in question applied only “to claims brought by the United States on behalf of Indians or Indian tribes.” Id. at 270 (emphasis in original) (referring to 28 U.S.C. § 2415(b)). Of course, that is precisely the point. In the context of a regime in which no federal common law statute of limitations applies to Indian land claims, Congress exempted land claims from a federal statute of limitations applying to claims brought by the United States on behalf of Indians. What stronger statement could there be that Congress intended that no period of limitation should apply to Indian land claims, irrespective of who brings the claim?

315. Id. at 272. Of course, at issue was whether a period of limitation should be applied to an action at federal common law, for which there could not possibly be an explicit statement of congressional intent. The majority was attempting to extrapolate a general federal policy concerning statutes of limitations in the context of Indian land claims.

316. Id. at 273 (quoting Arizona v. California, 460 U.S. 605, 620 (1983)). By so characterizing the actions of the Oneida tribes, Justice Stevens betrayed an insensitivity to the relatively common knowledge that Native Americans were forcefully and extortively disposessed of their lands. It also leads one to suspect that Justice Stevens’ attempt at “balancing the equities” is somewhat distorted.
the claim would be distinguishable from those in Oneida, at least as Justice Stevens perceived them. In the first place, under NAGPRA, if it can be demonstrated that a Native American with authority to do so freely conveyed a sacred or cultural object, the affiliated tribe will not have a valid claim. For any claim that would reach the Supreme Court on the issue of a “laches” defense, therefore, it would be presumed that the conveyance was not “freely made, for a valuable consideration.”

Secondly, it would not be apparent that the “conveyance” was made in violation of a federal statute; thus, it could not not be said that the tribe was on notice prior to the enactment of NAGPRA that it had a legal claim cognizable in the federal courts. Moreover, lack of legal and financial resources on the part of Native American tribes for pursuing claims, the historical lack of receptivity on the part of state and federal courts toward Native American claims against museums, and the dispersion of many relatively small cultural objects throughout the country (as opposed to land and its fixed locus), all, at least arguably, explain what might otherwise be an “inexplicable” delay in filing a claim.

Finally, the repatriation of Native American artifacts now held in museums is not likely to cause the extent of economic disruption that Justice Stevens envisioned in Oneida. The enforcement of NAGPRA will, of course, impose some financial costs on museums, some of which may indirectly be absorbed by the American taxpaying public, and may deprive much of the American public of the cultural and scientific benefit which might otherwise have been derived from the repatriated objects. This burden, however, would not be comparable to the burden imposed on the defendants in Oneida, as it was characterized by Justice Stevens. The wild land which had been conveyed by the Oneida nation in 1795 had been developed into “cities, towns, villages, and farms.” The defendant counties, and the private property owners that would have been affected by the Court’s decision, had, apparently without notice of the defect in title, “erected costly improvements on the property in reliance on the validity of their title.” Consequently, the defendants in Oneida might have been intolerably prejudiced by the fact that the Oneida tribes had not brought their claim much sooner. They may have incurred tremendous losses which they otherwise would not have in-

317. Id. at 255.
318. Id. at 265-66.
319. Id. at 266.
urred had the tribes filed their claims when the land was still undeveloped. In contrast, it is arguable that the losses that will now be incurred by museums under NAGPRA are not appreciably larger than if claims had been brought at the time of acquisition of the Native American objects by the museums. Whatever additional costs may have been incurred by museums in reliance upon the validity of their right of possession has likely been compensated by the benefit that has been derived from the objects during the interim period. Moreover, unlike the individual landowners that might have been affected in Oneida, museums should have been aware that many of the Native American artifacts in their possession were not conveyed in legally valid transactions.

Thus, on the side of Native American claimants, there is a presumption of a nonconsensual transfer of cultural property, and an explainable delay in bringing a claim. On the side of museums defending against claims under NAGPRA, a relatively insignificant burden is imposed by the repatriation requirement. It is, therefore, arguable that even under Justice Stevens' "laches" analysis, the balance of equities ought to tip in favor of not applying a time-bar to most claims brought against museums under NAGPRA.

Justice Stevens also found it significant that the claim in Oneida was not brought pursuant to any specific federal legislation,320 asserting that "[t]he remedy for the ancient wrong established at trial should be provided by Congress, not by judges seeking to rewrite history at this late date."321 Claims brought under NAGPRA obviously do not have that deficiency. In this case, Congress has provided a remedy for the "ancient wrongs" which were in many instances perpetrated when Native Americans were dispossessed of their religious and cultural objects. It should be clear that Congress intends that the antiquity of the injury out of which a claim arises under NAGPRA should not by itself be sufficient to bar the claim.

The possibility should not be discounted, however, that the present Court is capable of characterizing the "equities" such that the balance will tip in favor of applying a time-bar to claims under NAGPRA, and of thereby protecting museums from the repatriation requirement. In fact, Justice Stevens may himself have engaged in what is arguably a distorted characterization of the "equities" in Oneida. There is nothing in either the majority or dissenting opinions

320. Id. at 262.
321. Id. at 270.
in *Oneida* that indicates the precise terms of the 1795 transaction between the Oneida nation and the State of New York. It is very likely that the terms were exploitive and that the agreement was made by the Oneida nation under some type of duress.\(^3\) The evident purpose of the Nonintercourse Act, which was violated by the original sale, was to prevent such exploitive transactions. Therefore, Justice Stevens' characterization of the original conveyance as "freely made, for valuable consideration,"\(^3\) may be more than a little superficial. Additionally, given the historical alienation and oppression of Native Americans by the European-American culture,\(^3\) and the historical lack of access to the courts,\(^3\) Justice Stevens' characterization of the Oneida tribes' delay in bringing a claim as "inexplicable[\(e\)]"\(^3\) is in itself inexplicable.\(^3\)

Perhaps most puzzling is Justice Stevens characterization of the burden that would be imposed on the defendant counties by a judgment in favor of the Oneida tribes. The implication is that such a judgment would require the evacuation of the "cities, towns, villages, and farms,"\(^3\) which now exist on Oneida land, and a re-routing of the "principal transportation arteries"\(^3\) which now traverse the region. At the very least, one would be led to believe that the decision would require an award of monetary damages sufficient to compensate the Oneida tribes for the land's present value. Nonetheless, the tribes were only asking for damages equal to the fair rental value of

---

322. Although the Supreme Court opinion is silent on this issue, the District Court noted a number of irregularities surrounding the transaction. See Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977). First, the papers of transfer were signed in Albany, an area outside the Oneida territory, in which the Oneida had never before executed a treaty or land transaction. *Id.* at 535. Second, treaties were normally entered by a *unanimous* decision of the tribe. *Id.* In this case, a few individuals, none of them chiefs, a few of them women (who were not normally allowed to speak at a tribal counsel), were given power of attorney to negotiate the transaction. *Id.* Finally, the signatures on the September 15, 1795 document were not the signatures of Oneida chiefs. *Id.* The district court also noted that the Oneida were in a vulnerable condition. *Id.* After fighting alongside the Colonists during the Revolution, the Oneida nation was disorganized, and was suffering from famine and alcoholism. *Id.* at 536. Compounded by poverty and illiteracy, this made the Oneida prime targets for exploitation. *Id.*

323. *Oneida*, 470 U.S. at 259.

324. See *supra* notes 144, 148 and accompanying text.

325. See *supra* note 196 and accompanying text.

326. *Oneida*, 470 U.S. at 269.

327. The Justice's criticisms are misplaced. The Oneida, between 1840 and 1875, had made numerous efforts to regain the land by petitioning the federal government and consulting lawyers. See *Oneida*, 434 F. Supp. at 536. These efforts, however, were to no avail. *Id.*


329. *Id.* at 266.
872 acres of land for a stipulated two-year period. The District Court determined the amount of those damages to be $16,694 plus interest. Even on remand to the Court of Appeals, the remedy proposed was very modest. It is difficult to resist the conclusion that Justice Stevens’ talk about upsetting “established expectations in the ownership of real property” and about condemning the defendants for their “forefathers’ misdeeds” is, at best, gross hyperbole, and, at worst, disingenuous.

It becomes apparent, therefore, that the present-day Court might possibly be able to impose some form of a time-bar on claims brought under NAGPRA through such manipulation of the facts. Arguably, under the present law, state statutes of limitations should not be applied to claims brought under NAGPRA, as such an application would be inconsistent with underlying federal policies. At the risk of flirting with circularity, however, a constitutional conflict remains unresolved. The “Indian Commerce Clause” and the Supremacy Clause dictate that Congress has exclusive authority over Native American affairs, and that state laws should be subordinated to federal legislation enacted pursuant to that authority. On the other hand, if otherwise applicable statutes of limitations might have vested title to Native American artifacts in museums, thus, creating legitimate expectations of ownership, those expectations arguably should be protected by the Takings Clause. Resolving this circular conflict may best be approached by transcending constitutional and common law doctrines and focusing on whether the application of such doctrines to Native American claims for cultural property is, after all, a good fit.

330. id. at 230, 260.
331. id. at 230.
332. Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 540 (2d Cir. 1983).
333. It should be noted that many similar claims could have been filed, thus enlarging the potential burden that might be placed on the economy of the community. Oneida, 434 F. Supp. at 530-31. Nonetheless, even an enlarged burden would have been limited to the payment of damages, and, thus, would not effect the kind of disruption to which Justice Stevens alluded.
334. Oneida, 470 U.S. at 273.
335. It is conceivable that the Court could infer a legislative intent to apply state statutes of limitations from the addition in 25 U.S.C. § 3001(13) of the language invoking “otherwise applicable property law” where the Takings Clause may be implicated. The overarching objective of repatriating Native American artifacts, though, renders such an inference problematic, and it is likely that Congress was merely attempting to save the legislation from a facial challenge, in the hope that a court would only rarely find a Takings Clause problem in NAGPRA’s application. See supra notes 297-305 and accompanying text.
III. IS REPATRIATION AN ISSUE THAT TRANSCENDS THE TAKINGS CLAUSE?

If a straightforward application of Takings Clause jurisprudence and traditional property law does not dispositively resolve the issue as to if and when a museum should be protected from NAGPRA's repatriation requirement, it may be fruitful to take a step back and ask whether such straightforward analysis is appropriate to the issue of repatriation of Native American artifacts. Several arguments support the proposition that the Takings Clause is simply inapplicable to the repatriation issue. First, the Fifth Amendment, by its own terms, applies only to private property. In contrast, to the extent that anyone other than Native Americans has a property interest in Native American artifacts, museums may merely be fiduciaries for what is the communal property of the American public. Under this approach, the Takings Clause would be inapplicable, and Congress, as the representative of the American public, could legitimately dispose of the property in any way it sees fit.

Second, the United States Supreme Court has held that Congress' plenary power over Native American affairs is only attenuatedly subject to the constraints of other constitutional provisions. For example, Congress' power to enact special legislation dealing with Native Americans has been held not to be constrained by the Equal Protection Clause of the Fourteenth Amendment. It may also be the case that such power is not constrained by the Takings Clause.

Finally, if it is in fact appropriate for the Supreme Court to sometimes act as a court of equity, then it may indeed be inappropriately "activist" for the Court to invoke the Takings Clause in order to frustrate the concededly moral and just purposes of Congress. If Native Americans have not been protected by the Constitution in the past, is it not disingenuous to presently invoke the "letter" of the Constitution to protect museums from what appear to be morally and culturally legitimate claims by Native Americans? Let us consider these arguments in turn.

A. PRIVATE VERSUS COMMUNAL PROPERTY

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." Therefore, the government's use or disposition of "communal" or "public" property would not implicate the Takings
Clause at all. It could be argued, and, in fact, has been argued in a somewhat different context that Native American religious and cultural artifacts housed in museums are the communal property of the entire American public, held by museums as fiduciaries for that public. While that argument has been proffered as a rationale for the retention of Native American artifacts in museums, it could mean, paradoxically, that the Takings Clause could not prevent the repatriation of Native American artifacts, because the Takings Clause does not reach public property. The fiduciary relationship between museums and the American public may be something that Congress ought to consider in determining the appropriate disposition of Native American artifacts, but Congress would not be prevented by the Takings Clause from deciding that the interests of Native American tribes should prevail.

In the context of federal Indian law, courts traditionally have made a distinction between individual and communal property. Courts would not recognize the validity of a sale by an individual Native American of property that belonged to a Native American tribe or nation as a whole. In Journey Cake v. Cherokee Nation, a federal claims court characterized tribal communal property as being owned by every member of the community, with no individual possessing testamentary rights, or rights of alienation, but each having the right of use and ownership equal to that of all other members.

337. It appears evident from the face of the Takings Clause itself that it applies solely to private property. Thorough research has produced no authority to contradict this. Additionally, this proposition is supported by the underlying principle of limiting the government's power to sacrifice the few for the benefit of the many. If property is communally owned by the American public, then a voluntary divestiture of that property by the American public would not implicate the problem of selective or unequal sacrifice.

338. See, e.g., Boyd, supra note 1, at 887-88 nn.20 & 22-23 (arguing that the repatriation of Native American objects may be a breach of a museum's fiduciary duty to maintain the objects for the "benefit of the general public").

339. Id.; see also Blair, supra note 1, at 128 n.31; Platzman, supra note 1, at 523 n.20; Letter from Willard L. Boyd, President, Field Museum of Natural History, to Members of the Panel For National Dialogue On Museum-Native American Relations (Feb. 15, 1990) (on file with author) (expressing concern that the Panel had not focused "on the basic and pervasive fiduciary responsibility of museums with respect to collections," and that "changes in the law applicable to stewardship of existing museum collections would . . . bring results far beyond the intention of all concerned").

340. Echo-Hawk, supra note 1, at 441-42 n.21.

341. Id. at 441 (citing Seneca Nation of Indians v. Hammond, 3 Thompson & Cook 347 (N.Y. 1874) (holding that non-Indian purchasers of Hemlock bark had not acquired title because the conveyance of the bark was not authorized by the Seneca nation as a whole)).

342. 28 Ct. Cl. 281 (1893), aff'd, 155 U.S. 196 (1894).
of the community.343 This concept of tribal communal property has led to the presumption under NAGPRA that even cultural objects that museums or their agents purchased in good faith from individual Native Americans were not validly conveyed.344

The question under Takings Clause analysis has been whether federal or state property law has, nevertheless, vested title to an object in a museum in which it is housed. To the extent that anyone other than a Native American tribe has a property interest in an affiliated cultural object, however, there is an argument that it is the American public that has a communal interest in such property, and not museums as private owners. Those who represent the interests of museums, and who are hesitant about the wholesale repatriation of Native American objects, have expressed concern that even the voluntary repatriation of such objects may be a breach of the museum's fiduciary duty to the American public.345 In discussing museum ethics, the American Association of Museums has indicated that, among the other things that should be considered in disposing of museum objects, museums "must weigh carefully the interest of the public for which it holds the collection in trust."346 Among the arguments that museums have put forward for retaining Native American cultural objects is the museums' "public responsibility to preserve and exhibit the artifacts for the benefit of all Americans."347

Such statements by the representatives of museums, of course, do not amount to a legal determination that Native American objects held in museums constitute public property. It is significant that museums themselves do not appear to regard such artifacts as their private property, and it provides a persuasive argument that the artifacts should not be so considered in the eyes of the law. Moreover, there is federal legislation that implies that much of the Native American cultural objects held by museums should be regarded as public property. The Antiquities Act of 1906 prohibits the excavation or removal from federal land of, among other "objects of antiquity," Native American artifacts. This statute provides for the issu-

343. Id. at 302.
344. Trope & Echo-Hawk, supra note 1, at 67-68.
347. Blair, supra note 1, at 128 (emphasis added). Blair regards this as the foremost reason put forward by museums for retaining Native American artifacts. Id. (citing MUSEUM NEWS, Mar. 1973, at 22).
ance of permits to excavate or remove such objects so long as it is done for the purpose of permanent preservation in reputable public museums, and not for personal profit.\(^{349}\) The Archaeological Resources Protection Act of 1979 (ARPA)\(^ {350}\) largely supersedes the Antiquities Act, but it "reinforces the policy that archaeological resources which are removed from public lands remain the property of the United States and will be preserved by a suitable museum."\(^ {351}\) NAGPRA provides for the removal of Native American cultural items from federal or tribal lands pursuant to the terms of ARPA.\(^ {352}\) Concededly, this legislation deals only with Native American cultural items that are removed from federal or tribal land. However, it does not require a significant leap of logic to conclude that cultural items which are presumed to have been illegitimately alienated from the affiliated tribe, and which end up in the hands of public museums, should be regarded as public property, as opposed to being regarded as the private property of the museums. Such an extrapolation from the policies underlying the Antiquities Act, ARPA, and NAGPRA is reinforced by the museums' perception of themselves as trustees for the American public, holding their entire collections in trust for that public.

Legal commentators also have distinguished cultural property from private property, implying that it is communally owned by a national, or even international, community.\(^ {353}\) In the context of international trade in cultural objects, there is a divergence of opinion as to how cultural property should be viewed. One view is that it is part of a "common human culture," regardless of where it may have originated, and "independent of property rights or national jurisdiction."\(^ {354}\) Another view is that cultural property is "part of a national cultural heritage."\(^ {355}\) This latter view serves as a rationale for "export controls and demands for the 'repatriation' of cultural prop-

\(^{349}\) Blair, supra note 1, at 133-34; Echo-Hawk, supra note 1, at 448-49.


\(^{351}\) Echo-Hawk, supra note 1, at 450.

\(^{352}\) 25 U.S.C. § 3002(c)(1):

The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if -

(1) such items are excavated or removed pursuant to a permit issued under section 470cc of Title 16 which shall be consistent with this Chapter.


\(^{354}\) Id. at 831.

\(^{355}\) Id. at 832.
property." Significantly, under neither view is cultural property, which at a minimum is defined as "[w]orks of art and archaeological and ethnological objects," regarded as the property of private individuals. That is not to say that works of art and archaeological objects cannot be privately owned. This view of cultural property, however, does support the proposition that cultural property which was not rightfully taken from Native American tribes is, if not the exclusive property of the tribes themselves, the communal property of society at large, and, therefore, immune from the operation of the Takings Clause.

B. Congress' Constitutional Authority Over Native American Affairs

The United States Constitution confers upon Congress the power to regulate commerce with the Indian tribes. The Supreme Court has interpreted the so-called "Indian Commerce Clause" as granting Congress exclusive jurisdiction over Native American affairs. Coupled with the Native Americans' historical status as quasi-sovereign entities, this has led to the conclusion that Congress' constitutionally conferred authority over Native American affairs is not constrained by other provisions of the Constitution, at least not any more than Congress' authority over aliens and foreign affairs is so constrained. The doctrine of plenary power over Indian affairs originated at least as early as 1886, when the Supreme Court, 356. Id. 357. Id. at 831 n.1. 358. U.S. CONST. art. I, § 8, cl. 3. 359. See, e.g., Oneida County v. Oneida Indian Nation, 470 U.S. 226, 234 (1985). While such exclusive and plenary authority over all Native American affairs is not necessarily inferable from the text of the "Indian Commerce Clause," see, e.g., Coulter, supra note 196, at 9 ("Indian Commerce Clause," by its own terms, only gives Congress power over Indian commerce; drafters specifically rejected proposal to make Indian powers broader (citing PAO- VEN, TO SECURE THESE BLESSINGS 219 (1970))), such an expansion of the Clause's reach is not inconsistent with the manner in which the Court has expanded the scope of Congress' constitutional power to regulate commerce "among the several States." U.S. CONST. art. I, § 8, cl. 3. 360. See United States v. Antelope, 430 U.S. 641, 646 (1977) ("Federal regulation of Indian tribes . . . is governance of once-sovereign political communities."); Fisher v. County of Rosebud, 424 U.S. 382, 390 (1976) (noting the "quasi-sovereign status" of Native American tribes under federal law); United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."); Morton v. Mancari, 417 U.S. 535, 554 (1974) (preferential legislation regarding Indians stems from their status "as members of quasi-sovereign tribal entities").
United States v. Kagama,\textsuperscript{361} upheld the power of the Federal government to prescribe criminal laws for Indian reservations. Conceding that the "Indian Commerce Clause" does not authorize federal control over the internal affairs of Indian tribes, the Court found that power by analogizing Indian reservations to United States territories.\textsuperscript{362} Since the reservations were within the geographic domain of the United States, and since no state sovereignty had jurisdiction over them, jurisdiction over Indian reservations was left to the federal government.\textsuperscript{363} Kagama was one of the primary sources of what developed into the "plenary power" doctrine, which "means that Congress has the power to do virtually as it pleases with the Indian tribes," and has, thus, subjected "Indians to national powers outside ordinary constitutional limits."\textsuperscript{364}

In Lone Wolf v. Hitchcock,\textsuperscript{365} for example, the Supreme Court held that the plenary power of Congress over Indian affairs cannot be limited by the Fifth Amendment.\textsuperscript{366} Congress had negotiated a cession of land from the Kiowa and Comanche in violation of a treaty.\textsuperscript{367} The plaintiff argued that the treaty had created property rights which should be protected by the Fifth Amendment.\textsuperscript{368} The Court rejected this argument, holding that the "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."\textsuperscript{369}

In United States v. Antelope,\textsuperscript{370} two of three Coeur d'Alene Indians who were indicted for the burglary, robbery, and murder of a non-Indian within their reservation, were convicted of first-degree murder under a federal felony-murder rule which applied only to actions perpetrated by Coeur d'Alene Indians on their reservation and not to similar actions perpetrated by non-Indians in the surrounding

\begin{thebibliography}{99}
\item{361.} 118 U.S. 375 (1886).
\item{362.} \textit{Id.} at 377.
\item{363.} \textit{Id.}
\item{364.} Alvin J. Ziontz, \textit{Indian Litigation}, in \textit{The Aggression of Civilization, Federal Indian Policy since the 1880's}, 149, 156-57 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984).
\item{365.} \textit{Id.}
\item{366.} 187 U.S. 553 (1903).
\item{367.} \textit{Id.}
\item{368.} \textit{Id.} at 558.
\item{369.} \textit{Id.}
\item{370.} \textit{Id.} at 565.
\item{371.} 430 U.S. 641 (1977).
\end{thebibliography}
state of Idaho.\(^{372}\) The two convicted Indians appealed their convictions, claiming that they were denied the equal protection of the laws under the Fifth Amendment’s Due Process Clause, because other residents of the state of Idaho were not subject to the federal felony-murder rule, and, thus, would not have been convicted of first degree murder on the same facts.\(^{373}\) The Court disagreed that there was any disparate treatment that would be cognizable under the Equal Protection Clause. The disparity between federal law and Idaho state law was of no consequence, because the Equal Protection Clause only requires that the law be evenhanded within any given jurisdiction, and not across jurisdictions.\(^{374}\) Moreover, the federal law under which the defendants were convicted applied to any similar crime committed within a federal “enclave,” whether committed by an Indian or non-Indian.\(^{375}\)

Even if the federal law in question does single-out Native Americans for different treatment, the Court held that the Equal Protection Clause was not violated. First, it noted that the “Indian Commerce Clause” provided for legislation specifically applying to Indian tribes.\(^{376}\) Second, it observed that the United States government and the federal courts have traditionally dealt with Native American tribes as “quasi-sovereign” political entities.\(^{377}\) Consequently, even legislation that specifically disadvantages Indians is not to be viewed as an impermissible racial classification, or even as “legislation of a ‘racial’ group consisting of ‘Indians’ . . . ,’”\(^{378}\) but, rather, “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.”\(^{379}\) The functional distinction between being a member of a “racial group consisting of Indians,” on the one hand, and being members of a “separate people with their own political institutions,” on the other hand, is somewhat opaque. It certainly would not make a difference from the perspective of Native Americans for different treatment, the Court held that the Equal Protection Clause was not violated. First, it noted that the “Indian Commerce Clause” provided for legislation specifically applying to Indian tribes.\(^{376}\) Second, it observed that the United States government and the federal courts have traditionally dealt with Native American tribes as “quasi-sovereign” political entities.\(^{377}\) Consequently, even legislation that specifically disadvantages Indians is not to be viewed as an impermissible racial classification, or even as “legislation of a ‘racial’ group consisting of ‘Indians’ . . . ,’”\(^{378}\) but, rather, “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.”\(^{379}\) The functional distinction between being a member of a “racial group consisting of Indians,” on the one hand, and being members of a “separate people with their own political institutions,” on the other hand, is somewhat opaque. It certainly would not make a difference from the perspective of Native Americans for different treatment, the Court held that the Equal Protection Clause was not violated. First, it noted that the “Indian Commerce Clause” provided for legislation specifically applying to Indian tribes.\(^{376}\) Second, it observed that the United States government and the federal courts have traditionally dealt with Native American tribes as “quasi-sovereign” political entities.\(^{377}\) Consequently, even legislation that specifically disadvantages Indians is not to be viewed as an impermissible racial classification, or even as “legislation of a ‘racial’ group consisting of ‘Indians’ . . . ,’”\(^{378}\) but, rather, “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.”\(^{379}\) The functional distinction between being a member of a “racial group consisting of Indians,” on the one hand, and being members of a “separate people with their own political institutions,” on the other hand, is somewhat opaque. It certainly would not make a difference from the perspective of Native Americans for different treatment, the Court held that the Equal Protection Clause was not violated. First, it noted that the “Indian Commerce Clause” provided for legislation specifically applying to Indian tribes.\(^{376}\) Second, it observed that the United States government and the federal courts have traditionally dealt with Native American tribes as “quasi-sovereign” political entities.\(^{377}\) Consequently, even legislation that specifically disadvantages Indians is not to be viewed as an impermissible racial classification, or even as “legislation of a ‘racial’ group consisting of ‘Indians’ . . . ,’”\(^{378}\) but, rather, “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.”\(^{379}\) The functional distinction between being a member of a “racial group consisting of Indians,” on the one hand, and being members of a “separate people with their own political institutions,” on the other hand, is somewhat opaque. It certainly would not make a difference from the perspective of Native

372. Id. at 644.
373. Id.
374. Id. at 648-49.
375. Id. at 648. Incredibly, the Court did not seem to believe that this assertion was undermined by its own note that the statute in question had been construed as not applying to crimes committed on the reservation by non-Indians. Id. n.9 (citing United States v. McBratney, 104 U.S. 621 (1882)). The point is academic, however, as the Court ultimately held that Congress’ special constitutional relationship with Native Americans empowers it to do in that context what otherwise may be impermissible under the Equal Protection Clause. Id.
376. Id. at 649.
377. Id.
378. Id. at 646 (quoting Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974)).
379. Id.
Americans who might be disadvantaged by a particular piece of legislation. Additionally, it is far from clear that the fact that a disadvantaged group has its own "political institutions" would negate any inference of underlying racism. In this case, the federal law in question prescribes a harsher penalty for Indians than for non-Indians, even though the crimes may be physically identical, and even though both crimes may be committed within the reservation, that is, within federal jurisdiction. That scenario is the quintessential denial of equal protection of the law, reminiscent of the Black Codes which the Fourteenth Amendment was, in part, aimed at eradicating. 380

Thus, it simply will not do to say that the principles embodied in the Equal Protection Clause were not implicated in United States v. Antelope simply because the legislation involved Indians. What the Court appears to be saying is that Native American tribes are the functional equivalent of separate nations, and that, as such, they may be dealt with by Congress in a manner unfettered by the usual constitutional constraints. This more straightforward statement of the Court's rationale is supported by the cases cited in its opinion. In supporting its statement that federal legislation specifically relating to Indians "has repeatedly been sustained by this Court against claims of unlawful racial discrimination," 381 the Court first quoted from Morton v. Mancari, 382 in which it had upheld a hiring preference for Indians in the Bureau of Indian Affairs: "'Literally every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidi-

380. See Raoul Berger, Government by Judiciary 176 (1977) (referring to the statement of Thaddeus Stevens during the congressional debates prior to the enactment of the Fourteenth Amendment to the effect that the proposed Amendment was aimed at the Black Codes, and that it would, thus, require that "[w]hatever law punishes a white man for a crime shall punish the black man in precisely the same way"); Samuel R. Gross & Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27, 111 (1984) (observing that one "purpose of the equal protection clause was to undo the Black Codes" which, among other things, "provided different punishments for black and white defendants"). The Civil Rights Act of 1866, which the Fourteenth Amendment constitutionalized, specifically provided that "inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall be subject to like punishment, pains and penalties, and no other." Id. (citing Ch. 31, 14 Stat. 27 (1866)).

381. United States v. Antelope, 430 U.S. 641, 645 (1977); see also Ralph W. Johnson & E. Susan Crystal, Indians and Equal Protection, 54 Wash. L. Rev. 587 (1979) (equal protection challenges to classifications regarding Indians, preferential or otherwise, have generally been rejected in the federal courts).

ous racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased . . . .’” 383 The Mancari Court went on to say that the preference was “‘granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.’” 384

The Antelope Court next referred to a case in which it had held that it was not a violation of equal protection to deny members of the Northern Cheyenne Tribe access to state courts for adoption proceedings: “‘[W]e reject the argument that denying [the Indian plaintiffs] access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.’” 385

Preferential hiring similar to that at issue in Mancari has in other contexts been successfully challenged under the Equal Protection Clause. 386 While there does not appear to have been any recent litigation regarding denial of access to state courts, it is inconceivable that, say, Hasidic Jewish Immigrants could be denied access to state courts simply because they may have their own distinct social institutions which may be capable of dealing with the issue at hand. Denial of access to the courts is another quintessential instance of the denial of equal protection of the law. The inevitable conclusion, then, is that the Equal Protection Clause simply does not constrain Congress when it is exercising its plenary authority over Native American affairs.

Although there are no Supreme Court cases directly on point, it is a logical extrapolation that the entire Bill of Rights provides a more attenuated constraint on congressional action in the context of Native American affairs than it does in other contexts, and that the Takings Clause should provide at most an attenuated constraint on the enforcement of NAGPRA. 387 It might be argued that although

383. Id. (quoting Mancari, 417 U.S. at 552).
384. Id. (quoting Mancari, 417 U.S. at 554).
385. Id. at 646 (quoting Fisher v. County of Rosebud, 424 U.S 382, 390 (1976)).
386. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (striking down a municipal ordinance which required city contractors to subcontract 30% of their work to minority owned enterprises).
387. This argument is somewhat undermined by the acknowledgement in NAGPRA itself that the definition in 25 U.S.C. § 3001(13) of “right of possession” may be circumscribed by the Takings Clause. But it seems fairly clear that this proviso does not require the application of the Takings Clause, but merely operates as a “safety-valve” in the event that the
the Bill of Rights may be a lesser constraint on federal legislation that either benefits or disadvantages Native Americans, it should not be a lesser constraint on legislation that affects the rights of non-Indian citizens of the United States. However, that seems to be an unacceptably ethnocentric perspective which has no real justification other than nationalistic chauvinism. In any case, some of the federal action that has been sustained in the face of equal protection challenges has preferred Native Americans arguably at the expense of non-Native American citizens. So it appears that the Bill of Rights only weakly constrains Congress' authority over Native American affairs, even when the exercise of that authority affects what would otherwise be the constitutional rights of non-Native American citizens. To be sure, such plenary authority has been a double-edged sword, working both to the benefit and to the harm of Native Americans. That is no reason, now, to vigorously constrain Congress' use of that power in its efforts at restorative justice for Native Americans.

Thus, rightly or wrongly, Congress' authority over Native American affairs is perhaps analogous to Congress' plenary authority over immigration issues. In Fiallo v. Bell, the Supreme Court considered a challenge to a section of the Immigration and Nationality Act which arguably prejudiced the constitutional rights of United States citizens by preventing the immigration of the "illegitimate"

Unites States Claims Court would otherwise find there to be a taking in a particular case. In fact, the legislative sponsors of the Act had expressed the opinion that, even in the absence of the Takings Clause proviso, the implementation of the Act would not effect a Fifth Amendment taking. See supra notes 304-05 and accompanying text. Given the earlier drafts' failure to account for the variety of ways in which a museum could have acquired a property interest in an artifact other than by the consent of the affiliated tribe, the basis for that opinion is rather obscure, unless it was the expectation that courts would be particularly deferential to congressional policy in the area of Native American affairs. In any case, there is nothing in the Takings Clause proviso that would preclude a court from deferring to congressional objectives in the face of a Takings Clause challenge.

388. Cf. Kleindienst v. Mandel, 408 U.S. 753 (1972) (implying that Congress' plenary authority over the admission or exclusion of aliens might be constrained by the Constitution if it affects the First Amendment rights of United States citizens).

389. Morton v. Mancari, 417 U.S. 535 (1974) (upholding preferential hiring of Indians in the Bureau of Indian Affairs). Among the reasons for striking down preferential hiring in other contexts, the Court has pointed to the "victimization" of those not in the favored group. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. at 493 (striking down a 30% minority "set-aside" program and describing it as denying "certain citizens the opportunity to compete").


391. Id. at 788 (citing 8 U.S.C. § 1101(b)(1)(D), (b)(2)).
biological children of male citizens. In sustaining the challenged provision, the Court relied upon its traditional deference to Congress in the area of immigration. "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." The fact that the constitutional rights of citizens may have been implicated was not sufficient to overcome Congress' general immunity from judicial review in the area of immigration.

However, the Constitution does not expressly confer upon Congress plenary authority over immigration affairs. That authority has been deduced from, among other things, the commerce power, the naturalization power, the war power, the foreign affairs power, and the argument from "necessity." A fortiori, then, Congress' jurisdiction over Native American affairs, which is expressly conferred by the text of the Constitution, should be virtually immune from judicial review, even when it may adversely affect the constitutional interests of non-Native American citizens.

None of this is to suggest that the Bill of Rights is completely irrelevant in the context of Native American affairs. Just as is the case in other areas over which the Constitution has conferred upon Congress plenary authority—including foreign affairs and the military—the relative latitude over Indian affairs that Congress has under the Constitution is not absolute. It therefore cannot be extrapolated from this argument that Native Americans could, for example, be administered criminal punishment, or have their personal property confiscated, without due process. Nor, for that matter, could the federal government necessarily seize the personal property of individual non-Native American citizens for the purpose of bestowing it upon disadvantaged Native Americans. Even in the area of immigration, over which the Supreme Court has said that the power of Congress is more complete than over any other subject,

392. Id. at 788-89.
393. Id. at 792 (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)).
394. Id. at 794-95.
396. See, e.g., Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 184 (1977) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.") (quoting United States v. Alicea Band of Tillamooks, 329 U.S. 40, 54 (1946)).
immunity from constitutional review is not absolute. Thus, although an alien in exclusion proceedings is not entitled to constitutional due process as to his exclusion,\textsuperscript{398} he would be entitled to due process if brought into a United States court to be tried for a crime.\textsuperscript{399} An otherwise excludable alien would also arguably be entitled to due process if he or she were held in detention for a protracted period of time, or if his or her property were confiscated without compensation.\textsuperscript{400}

Finally, even the power of Congress to raise armies\textsuperscript{401} and to preserve the efficiency of the military is not absolute. In Goldman v. Weinberger,\textsuperscript{402} the Supreme Court upheld an Air Force dress regulation which had the effect of preventing the petitioner, who happened to be an Orthodox Jew and an ordained rabbi, from wearing a yarmulke while in uniform.\textsuperscript{403} The Court declared that its "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."\textsuperscript{404} The Court, though, was careful to note that such deference does not "render entirely nugatory in the military context the guarantees of the First Amendment."\textsuperscript{405} The Court implied that if the military establishment's asserted justification for a policy impinging on First Amendment values were patently unreasonable or irrational, the policy would not be upheld.\textsuperscript{406}

\textsuperscript{399} Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
\textsuperscript{400} See Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (arguing that an excluded alien in detention within the United States may not be punished by deprivation of either liberty or property, without being accorded the protection of the Fifth Amendment) (citing Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931)).
\textsuperscript{401} U.S. Const. art. I, § 8, cls. 1, 11-12, & 14 provide in part: "The Congress shall have Power . . . To declare War, . . . To raise and support Armies, . . . To make Rules for the Government and Regulation of the land and naval Forces." The plenary power over military affairs has been considered so pervasive that, even though military conscription is a flat violation of the Thirteenth Amendment's proscription of "involuntary servitude," federal courts have summarily rejected such claims. See, e.g., United States v. Fallon, 407 F.2d 621 (7th Cir. 1969), cert. denied, 395 U.S. 908 (1969); United States v. Holmes, 387 F.2d 781 (7th Cir. 1967); Badger v. United States, 322 F.2d 902 (9th Cir. 1963), cert. denied, 376 U.S. 914 (1964).
\textsuperscript{402} 475 U.S. 503 (1986).
\textsuperscript{403} Id. at 509-10.
\textsuperscript{404} Id. at 507.
\textsuperscript{405} Id.
\textsuperscript{406} Cf. Ziontz, supra note 364, at 165-67 (arguing that the Court has recently begun to apply an equal protection analysis to federal Indian legislation—which it had theretofore held to be nonjusticiable—in which it will defer to special treatment of Native Americans if
tainly, the military is not immune from judicial review under other provisions of the Bill of Rights; the protection of the Fifth and Sixth Amendments would extend to a criminal trial before a military tribunal.\textsuperscript{407}

The "plenary power" doctrine, then, does not imply complete immunity from judicial review. It certainly does not imply, for example, that Native Americans could be criminally tried in federal courts without being accorded the safeguards of the Fifth and Sixth Amendments. It does imply judicial deference to asserted governmental interests, and the requirement of an especially heavy burden on constitutional values before a congressional or executive action will be invalidated. Under that analysis, it is at least arguable that repatriations under NAGPRA should survive Takings Clause challenges, at least where such repatriations do not affect the property interests of individual possessors of Native American artifacts.

C. What About the Nation's Conscience?

If it is true that courts of law have the equitable discretion not to enforce the letter of the law where the results would be patently unjust,\textsuperscript{408} perhaps the federal courts should not enforce the Takings Clause to the "letter" where the results will frustrate efforts at restorative justice for Native Americans. Given the nebulous and arcane nature of the theories of property law that are inevitably involved, perhaps it would, in fact, be unacceptably "activist" for the federal courts to invoke the Takings Clause in order to frustrate the purposes of Congress which are embodied in NAGPRA. More importantly, perhaps it would be downright unseemly to invoke the Constitution, which has not historically been a source of protection for Native Americans, in order to protect museums from what otherwise appear to be legitimate claims on the part of Native American tribes.

---

\textsuperscript{407} Cf. Reid v. Covert, 354 U.S. 1 (1957) (ordering the issuance of a writ of habeas corpus to a military tribunal where the wives of military personnel had been tried for murder, holding that the Uniform Code of Military Justice could not constitutionally be applied to persons not members of the armed forces); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (two civilians who were tried, convicted and imprisoned by military tribunals during a period of martial law were entitled to writs of habeas corpus).

\textsuperscript{408} See, e.g., Hecht Co. v. Bowles, 321 U.S. 321 (1944) (where the defendant had been found guilty of non-compliance with the Emergency Price Control Act of 1942, the lower court had not abused its discretion in declining to issue an injunction, because the defendant had acted in good faith in attempting to comply with statute).
Those who advocate that the Court should maintain a conservative judicial philosophy would no doubt blanche at the suggestion that principles of equity should be applied to constitutional adjudication. They would no doubt deplore it as a substitution by judges of their own notions of what is fair and just for what is required by the constitutional text, or for the original intent of the drafters. Of course, it could be argued that the employment of the "compelling government interest" test in First Amendment adjudication, the "sliding scale" of Equal Protection analysis and the "reasonableness test" under the Fourth Amendment, are really nothing other than a "balancing of the equities" in applying constitutional provisions. In fact, under the Takings Clause, whether compensation is required is determined by the extent to which a government regulation adversely affects a property interest. Generally speaking, there is nothing novel in the proposition that where a constitutionally protected interest is significantly outweighed by a governmental interest, the governmental interest will prevail. What is perhaps novel is the notion that the interests of a minority should constitute a governmental interest. Usually such interests are characterized in majoritarian terms. But why would it not be a compelling governmental interest to do what is moral, and to attempt restorative justice for the wrongs which a dominant culture has imposed upon a minority culture?

Perhaps the ultimate example of a situation in which most of us would have wanted the Court to eschew the "letter" of the Constitution, and to do what was "equitable" is *Dred Scott v. Sandford.*

---

409. For example, under the Supreme Court's First Amendment jurisprudence, the government may place restrictions on the exercise of religion if there is a compelling governmental reason for doing so, and, so long as the regulation is narrowly tailored to that end. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding no compelling state interest in requiring Amish children to attend public or formal schooling); Braunfeld v. Braun, 366 U.S. 599 (1961) (finding that the government had a compelling interest in requiring merchants to close on Sunday, even though it placed a burden on the exercise of religion by Jewish merchants). *But see* Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872 (1990) (upholding an anti-drug law criminalizing the sacramental use of peyote, and holding that no compelling state interest is required where a statute is generally applicable and only incidentally burdens the exercise of religion).


411. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 13 (1968) (the level of justification required for a search or seizure varies with the level of intrusiveness).

412. *See supra* notes 44-49 and accompanying text.

413. 60 U.S. 393 (1856).
In *Dred Scott*, the Court held, among other things, that the Missouri Compromise was invalid under the Due Process Clause of the Fifth Amendment because, in freeing slaves who were brought by their owners into United States territories, it effected a deprivation of property without due process of law. As notorious as the *Dred Scott* opinion is, its analysis of property law was, legally, quite unassailable. The Constitution expressly recognized a property right in slaves. The Missouri Compromise, which made slavery illegal in United States territories, deprived slaveowners who moved into United States territories of their “property,” and was, thus, invalid under the Due Process Clause of the Fifth Amendment. From our perspective, it could have been argued that a law defining human beings as property would itself be a violation of the “liberty” element of the Due Process Clause. Of course, the Fifth Amendment did not initially operate as a constraint on state laws, and the Thirteenth and Fourteenth Amendments were yet to come. Moreover, the text of the Constitution itself recognized and facilitated the existence of slavery. So, from a purely legal standpoint, what was wrong with Justice Taney’s ruling in *Dred Scott*?

There may be a few judicial conservatives (or political conservatives, for that matter) who admire Justice Taney’s opinion from the standpoint that it adhered relentlessly to the logic of the law, and eschewed amorphous considerations of justice and morality. However, most would have admired a decision which eschewed the letter of the law, which recognized the great wrong that had been done, and which invoked a higher morality to determine that human beings cannot be property and that invocation of the Due Process Clause to frustrate Congress’ purpose of freeing slaves was ludicrously evil.

Can it be said that it is as ludicrous to apply the Takings Clause to the issue of repatriation as it was for Justice Taney to apply the Due Process Clause to the issue of liberating slaves? The Court might analyze a law requiring repatriation similarly. Assuming that State law, to which the Constitution defers regarding definitions of property, defines Native American artifacts in museums as the private property of the museums, a law effecting the dispossession of

---

414. *Id.* at 450-52.
415. *Id.* at 451.
416. *Id.* at 450.
417. U.S. Const. art. I, § 2, cl. 3; U.S. Const. art. I, § 9, cl. 1; U.S. Const. art. IV, § 2, cl. 3.
such property would violate the Due Process Clause, or, if it is for a "public use," would violate of the Takings Clause of the Fifth Amendment, and compensation would be required.

Should such a decision be any more admirable than the one in *Dred Scott v. Sandford*? Is not the historical exploitation of Native Americans by European-Americans analogous to the historical exploitation of African-Americans? Are not laws which would define the human remains and cultural property that were plundered from Native-American nations as the private property of museums nearly as obnoxious as laws that defined human beings as the private property of slaveowners?

Perhaps the analogy is carried too far. After all, the dilution of NAGPRA by the application of the Takings Clause would not be perpetuating the institution of slavery. The withholding from Native Americans of cultural objects of which they have been dispossessed does not literally oppress them, or even perpetuate their economic oppression. There is, nevertheless, something unseemly about using a legal regime as arcane and as arbitrary as property law to perpetuate the deculturalization of a race of people.

Moreover, the Constitution has not been of much avail in the past for the protection of Native Americans; why should it now be used to protect museums against what appear to be morally and culturally legitimate claims by Native Americans? Although another one of the notorious aspects of *Dred Scott v. Sandford* is that it denied citizenship status to blacks, Native Americans also were denied citizenship status. The Fourteenth Amendment, which remedied the decision in *Dred Scott* and expressly conferred citizenship on blacks, excluded Indians from that status. It was not until 1940 that federal legislation clearly conferred citizenship upon Native Americans who were born in the United States. Both before and after 1940, Native Americans were denied what otherwise would have been their Free Exercise rights, their Equal Protection

418. 60 U.S. at 403-27.

419. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. CONST. amend. XIV (emphasis added). In Elk v. Wilkins, 112 U.S. 94, 96 (1884), the Supreme Court interpreted this clause to mean that Indians were not citizens of the United States, even if they had severed their ties to their tribes.

420. ALEINIKOFF & MARTIN, supra note 395, at 945.

421. See Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); supra note 196 and accompanying text; see also H. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILA-
their Due Process Rights, and, yes, even their rights under the Takings Clause. Now that Congress is attempting to restore to Native Americans some of their cultural identity, should the Takings Clause be invoked to deny it?

IV. CONCLUSION

The Native American Graves Protection and Repatriation Act does not present us with a zero-sum game. It is the result of a collaborative effort between representatives of both the Native American and museum communities. Museums have legitimate concerns about their fiduciary duty to the American public, and about the advancement of scientific and historical knowledge, which the provisions of NAGPRA attempt to accommodate. The balance that the accommodation has reached, however, is threatened by NAGPRA's deference to the Takings Clause of the United States Constitution. If courts were to rigorously apply state statutes of limitations, thus vesting title to many Native American objects in museums, the number of items actually repatriated to Native American tribes could be considerably less than what has been anticipated.

On the other hand, if courts were to examine the unique history and situation of Native Americans with respect to museums, they arguably should find that traditional doctrines of property law are simply not applicable. Moreover, it may be the case that state statutes of limitations do not apply of their own force within federal jurisdiction, and would be applied by federal courts only where justice requires it. Finally, Congress has been relatively immune from judicial review in the exercise of its constitutionally conferred authority over Native American affairs.

What this means for the obligations of museums under NAGPRA is, of course, far from clear. Each step of the analysis requires a "balancing of the equities," a process which is infinitely manipulable. However, given the fairly clear congressional policies underlying NAGPRA, and the lack of clarity about how doctrines of

TION 1860-90 (1963) (tracing Native American policy in the U.S. with regard to their rights).
property law and the Takings Clause should apply, it appears that only an extremely "activist" court would frustrate Congress' purposes by a rigorous application of those doctrines.

From a moral and political standpoint, it may be that museums should not entreat the courts to apply such doctrinal constraints on the enforcement of NAGPRA. On the other hand, it might be beneficial if a museum would challenge a claim brought under NAGPRA as a matter of clarification; so that all parties will know where they stand.