Missouri Law Review

Volume 55
Issue 4 *Fall 1990*

Article 2

Fall 1990

Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation

Thomas H. Boyd

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Thomas H. Boyd, *Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation*, 55 Mo. L. Rev. (1990)
Available at: https://scholarship.law.missouri.edu/mlr/vol55/iss4/2

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Disputes Regarding the Possession of Native American Religious and Cultural Objects and Human Remains: A Discussion of the Applicable Law and Proposed Legislation

*Thomas H. Boyd**

I. INTRODUCTION

The United States' policy concerning Native Americans has fluctuated and changed a great deal. During the evolution of this policy, there has been great unfairness and inequity in the negotiation and enforcement of treaties and in the application of federal legislation. Until just three decades ago the federal government actively pursued a policy of cultural destruction through the assimilation of Native American tribes into mainstream American culture.[1] We, as a nation and as individual states, have begun only recently to chart a course that respects Native American culture and heritage.

Throughout the many chapters in the United States' policy concerning Native Americans, museums have played a vital role in preserving tribal antiquities.[2] Museums have also served as the medium through which Americans have learned, studied, and celebrated Native American cultures. There is presently a movement by Native Americans, individuals, and tribal organizations, however, to regain posession of human skeletal remains and religious and cultural objects[3] that are presently in the possession and under the control of public museums. Direct lineal descendants seek to recover their

---

* Associate, Winthrop & Weinstine, St. Paul, Minnesota. B.A., M.A., and J.D., University of Iowa. Member of the Illinois, Iowa, Minnesota, and Missouri Bars.

1. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 152-80 (1982). *See also* C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY ix (1987) (discusses "assimilationist policies").

2. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 REV. L. & SOC. CHANGE 437, 438 (1986).

3. These items are often collectively referred to as "artifacts." This unfortunate term fails to reflect the great contemporary value these cultural and religious objects hold for Native Americans. Furthermore, the term is highly disrespectful when applied to describe human skeletal remains.

ancestors' remains for reburial. Tribes have requested the return of certain sacred objects that are essential to ongoing religious practices. Native Americans have also made requests to obtain possession of objects of general cultural significance. This situation creates a conflict between the museum's objectives of preservation, research, and education, and the Native Americans' interests in the reburial of human remains and the possession and use of important religious and other cultural objects.[4] This dilemma was recently highlighted on a national level when Stanford University announced that it would return the remains of approximately 550 Ohlone Indians for reburial by their descendants in northern California.[5]

Stanford's decision was the culmination of more than two years of negotiation with Native American leaders.[6] The chair of Stanford's anthropology department described the University's evaluation of the competing interests involved in this situation:

> One is the religious beliefs and sensitivities of a population of living Native Americans, some of whom are our fellow staff members and students. The other is our obligation to the future scientific community. We decided to give more weight to the first than the second, though other anthropologists may decide otherwise.[7]

Soon after Stanford agreed to return these remains, the University of Minnesota announced that it too would return approximately 1,000 Native American bones and skulls for reburial at the request of the Minnesota Indian Affairs Council.[8] In a "debate that pit[ted] Indian concerns about the sacredness of their ancestors' remains against scientists' reluctance to lose access to material that some day might provide insights to human history or lead to breakthroughs in health and medicine," state officials apparently bowed to what they perceived to be the popular consensus to return the remains.[9]

---

4. To the scientist, reburial of human remains and active "consumption" of religious and cultural objects means the deterioration and eventual destruction of these objects. At the same time, many Native Americans feel that possession and use of these objects is essential to their own or their ancestors' spiritual fulfillment. Correspondingly, the inability to possess and/or use these items may result in the inability to achieve spiritual satisfaction and inner peace.

5. N.Y. Times, June 24, 1989, at 1, col. 2.

6. *Id.*

7. *Id.*

8. St. Paul Pioneer Press Dispatch, July 16, 1989, at 1B, col. 2.

9. *Id.* at 1B, 4B. The Stanford and Minnesota decisions involve just two examples of the many requests made by Native Americans and Native American Groups for the return of religious and cultural objects and human remains, and the corresponding balance made with respect to the museums' interest in retaining

There have also been significant examples in which museums have worked with Native American groups with respect to transferring possession of extremely important cultural treasures and religious objects. For instance, the New York State Museum returned Wampum belts to the Onondaga Nation[10] and the Zuni have obtained the return of their War Gods.[11] The Smithsonian has moved toward returning some of its vast inventory of human remains, as well as religious and cultural objects, "that can be linked with 'reasonable certainty' to present-day tribes."[12] Congress has contributed to this policy through the enactment of the National Museum of the American Indian Act[13] that contains a process through which Native Americans may obtain the return of human remains and funerary objects.[14]

These examples reflect a spirit of compromise and a growing sensitivity and understanding of Native American concerns by public institutions. There is nonetheless much work to be done, particularly with regard to religious and cultural objects, before this conflict between scientific and cultural or spiritual interests is resolved. In the years to come, many institutions will be compelled to make their own evaluation of these same interests. This article reviews a number of the arguments that are made by Native Americans and museums, respectively, and discusses the applicable law.

An examination of federal and state statutes reveals an extensive network of protection of both scientific and Native American interests with regard to human remains and objects that have been discovered in recent times and that will be discovered in the future.[15] Objects and human remains that have been discovered in the past few decades and that will be discovered in the future are subject to the regulation of federal and state legislation. Objects that were acquired before this legislation was enacted, however, present unique problems that require case-by-case evaluation. The challenge,

---

possession of the objects. *See* Blair, *Indian Rights: Native Americans Versus American Museums—A Battle for Artifacts*, 7 AM. IND. L. REV. 125, 125-28 (1979); Wilson & Zingg, *What Is America's Heritage? Historic Preservation and American Indian Culture*, 22 U. KAN. L. REV. 413, 418-20 (1974); Testimony of Dr. Raymond H. Thompson on behalf of the American Association of Museums before the Interior and Insular Affairs Committee of the U.S. House of Representatives at 1-5 (July 17, 1990).

10. Statement of Martin E. Sullivan, Director, The Heard Museum, Phoenix, Arizona, Before the Committee on Interior and Insular Affairs, U.S. House of Representatives at Exhibit B (July 17, 1990).

11. N.Y. Times, Aug. 13, 1990, at 1A, col. 1.

12. N.Y. Times, Aug. 20, 1989, at 22, col. 1; St. Paul Pioneer Press Dispatch, Sept. 13, 1989, at 7A, col. 4.

13. 20 U.S.C. §§ 80q-1 to -15 (Supp. 1990).

14. *Id.* §§ 80q-9 to -12.

15. *See infra* text accompanying notes 39-125.

therefore, is to formulate a process through which the interests of both scientists and Native Americans can be fairly evaluated in determining the proper disposition of those objects and human remains that are not presently regulated by existing federal and state legislation. Litigation is, of course, an option. There is very little law, however, directly relating to these issues, and principles of property and contract law could be argued to favor either side of this question.[16] Thus, litigation promises only unpredictability while requiring the extensive expenditure of resources by parties whose resources are already very limited. This article also reviews proposed legislation offering methods through which disputes over the rights of ownership and possession of these objects and remains might be resolved without the need, yet also without the waiver of the parties' rights, to pursue these issues before a court of law.

II. TERMS

For purposes of discussing the ownership of human remains and objects identified as Native American or associated with Native American culture, it is important to highlight a number of fundamental concepts. The discussion in this section is admittedly very abstract. It is simply intended to provide a framework through which to consider relevant issues.

A. Categories of Objects

The law of ownership and the corresponding right to possession and control differs depending upon the type of object at issue. Consequently, the recognition of the different object-types is important.

1. Human Remains. Some parties have asserted that federal agencies and museums in the United States have gathered hundreds of thousands of human skeletal remains.[17] The overwhelming majority of these human remains have Native American association or origin.[18] The most notable example of such a collection involves the Smithsonian Institution's accumulation of over 18,000 Native American skeletal remains.[19]

---

16. *See infra* text accompanying notes 126-208.

17. Bowman, *The Reburial of Native American Skeletal Remains: Approaches to the Resolution of a Conflict*, 13 HARV. ENVTL. L. REV. 147, 149 (1989) (estimates the number of human remains contained in American museum collections to exceed 300,000).

18. *Id.* (estimates 99% of human remains in collections are Native American).

19. H. REP. NO. 340(I), 101st Cong., 1st Sess. 10, *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 776, 778.

Many individual Native Americans and Native American groups have sought to take possession of these remains for reburial. While emphasizing a willingness to consider each request on a case-by-case basis, museums have generally resisted these efforts for a number of reasons.[20] First and foremost, these remains have inestimatable scientific value:

> Mortuary evidence is an integral part of the archaeological record of past culture and behavior in that it informs directly upon social structure and organization and, less directly, upon aspects of religion and ideology. Human remains, as an integral part of the mortuary record, provide unique information about demography, diet, disease, and genetic relationships among human groups. Research in archaeology, bioarchaeology, biological anthropology, and medicine depends upon responsible scholars having collections of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques.[21]

Moreover, a museum that indiscriminately disposes of its collection undermines its own scientific mission and seriously damages its credibility as an institution.[22] These types of transfers may also constitute a breach of the

---

20. Blair, *supra* note 9, at 128. One commentator argues that museums generally rely on four basic arguments to support their refusal to transfer possession of Native American religious and cultural objects and human remains: "(1) their public responsibility to preserve and exhibit the artifacts for the benefit of all Americans; (2) their doubt as to specific Indian ownership; (3) their unwillingness to establish precedent of returning a part of their collections to original owners; and (4) their legal claims to the artifacts." *Id.*

21. Executive Committee, The Society for American Archaeology, Statement Concerning the Treatment of Human Remains 1 (May 1986). *See also* Palacios & Johnson, *An Overview of Archaeology and the Law: Seventy Years of Unexploited Protection for Prehistoric Resources*, 51 NOTRE DAME LAW. 706, 706 (1976).

22. In relation to pressure on institutions to transfer possession of religious and cultural objects and human remains to Native Americans, there is also significant pressure by members of the archaeological, anthropological, and other related fields who consider the return of these objects to be a breach of professional responsibility.

> In the delicate area of acquisition and disposal of museum objects, the museum must weigh carefully the interest of the public for which it holds the collection in trust, the donors intent in the broadest sense, the interest of the scholarly and the cultural community, and the institution's own financial wellbeing.

AMERICAN ASSOCIATION OF MUSEUMS, MUSEUM ETHICS 11-12 (1978). In particular, the study and display of human remains is acknowledged as a necessary and responsible scientific exercise. *Id.* at 15.

institutions' legal duties as fiduciaries with respect to the maintenance of collections for the benefit of the general public.[23]

At the same time, many Native Americans assert serious concerns relating to the effect that disinterment has on the decedent's spirituality:

> Although the concept of Indian spirituality is pervasive throughout Indian culture, each tribe's spiritual views vary. For example, the Kumeyaay Indians believe that when a body is buried, the spirit is sent to the afterworld. If the body is disturbed, however, the spirit is brought back. This returned spirit is in pain and will disturb its descendants until the body is reinterred with the proper ceremonies. Some Native Americans have even testified that they can personally feel the unrest of their ancestors when their bodies have been removed from the earth. Other Native American religious beliefs, however, do not attest to a wandering of the spirit. For example, the Mesquakie Tribe (Iowa) believes that four days after death the spirit leaves forever, and what happens to the body after that is inconsequential. They, however, still believe that reburial is the only proper and respectful treatment for the remains of a human being.[24]

Under the common law, no person may own a dead body.[25] Instead, persons immediately related to or specifically designated by the decedent are deemed trustees who may have a quasi-property right for the exclusive

---

23. M. MALARO, A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS 15-18 (1985); M. MALARO, THE MUSEUM'S PERSPECTIVE, IN PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES: ART LAW A.2.(a)-(g) (1988). *See* Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries, 381 F. Supp. 1003 (D.D.C. 1974); Rowan v. Pasedena Art Museum, No. C-322817, slip op. at 6 (Cal. App. Dep't Super. Ct. Sept. 22, 1981); Illinois v. Silverstein, 86 Ill. App. 3d. 605, 408 N.E.2d 243 (1980). "An ethical duty of museums is to transfer to our successors, when possible in enhanced form, the material record of human culture in the natural world." AMERICAN ASSOCIATION OF MUSEUMS, *supra* note 22, at 11. "The governing body of a museum, usually a board of trustees, serves the public interest as it relates to the museum . . . the governing board holds the ultimate fiduciary responsibility for the museum and for the protection and nurturing of its various assets." *Id.* at 27. *See also* INTERNATIONAL COUNCIL OF MUSEUMS, STATUTES/CODE OF PROFESSIONAL ETHICS (1987).

24. Bowman, *supra* note 13, at 149.

25. *Cadaver nullius in bonis* ("no one may have a right of property in a corpse"). BLACK'S LAW DICTIONARY 183 (5th ed. 1979). It must be noted that all skeletal remanins do not necessarily constitute a dead body. Common law and statutory definitions for a dead body hinge on the level of decomposition and dismemberment. T. STUEVE, MORTUARY LAW 9-10 (7th rev. ed. 1984).

purpose of proper interment.[26] While museums are not legally obligated to provide for the reinterment of human remains, common law prohibits the institution from transferring possession and control to parties who are not trustees obligated to reinter.[27]

Two important distinctions have been made with regard to the issue of returning human remains. First, it has been argued that return of remains should only take place where the parties seeking return for reburial are able to demonstrate a biological or cultural relationship with the decedent sufficient to establish authority to take possession of the decedent's remains.[28] Although there is no property right as such in a dead body, as previously stated the right to possession for the purpose of reinterment has been recognized as a quasi-property right.[29] One must have a sufficiently close legal relationship, either as a blood relative or as an appointed trustee, to be able to assert a claim to take possession of a deceased person's remains.[30] Second, the date or period from which the remains originate has been considered important. It is, of course, more difficult for an individual to prove a relationship with older remains. However, even where that would be possible, the older remains have greater scientific value and, therefore, are a more significant part of a museum's collection.[31] Consequently, the relevant policy considerations vary in relative strength depending upon the identification of the objects with present day lineal descendants and the age of the human remains at issue.

---

26. T. STUEVE, *supra* note 25, at 10-15.

27. Statement by the American Association of Museums to the Senate Select Committee on Indian Affairs on the Legal Issues Relating to Proposed Substitute Legislation S. 1980, at 11 (June 4, 1990).

28. Blair, *supra* note 9, at 130. Indeed, this standard is embodied in a policy the Smithsonian Institution had adopted prior to the enactment of the National Museum of the American Indian Act. Adams, 18 SMITHSONIAN 12, 12 (May 1987) ("Stolen or not, we at the Smithsonian recognize an obligation to return all remains that are individually identifiable from accompanying records.").

29. Fuller v. Marx, 724 F.2d 717 (8th Cir. 1984); Strachan v. John F. Kennedy Memorial Hosp., 209 N.J. Super. 300, 507 A.2d 718 (N.J. Super. App. Div. 1986); McCoy v. Georgia Baptist Hosp., 167 Ga. App. 495, 306 S.E.2d 746 (1983); Sullivan v. Catholic Cemeteries, Inc., 113 R.I. 65, 317 A.2d 430 (1974); Parker v. Quinn-McGowen Co., 262 N.C. 560, 138 S.E.2d 214 (1964); Barela v. Frank A. Hubbell Co., 67 N.M. 319, 355 P.2d 133 (1960).

30. The determination of who these parties are may very well be an issue of tribal law to be determined by a tribal court. *See* Mexican v. Circle Bear, 370 N.W.2d 737, 741-42 (S.D. 1985).

31. Of course, this is not to concede that human remains discovered recently lack scientific significance. *See supra* text accompanying note 14.

Published by University of Missouri School of Law Scholarship Repository, 1990

2. *"Funerary Objects."* Generally speaking, the terms "grave objects" and "funerary objects" include all items that are referred to as mortuary evidence aside from human remains. All grave objects are initially related to a grave or burial site. For a number of reasons, however, these objects are sometimes separated from the total burial composition. Therefore, there is a distinction made between "associated" and "unassociated" grave objects.[32] In any event, there is an argument that if a party is able to prove a relationship to the human remains, the right to the return of those remains would also include the right to the return of any accompanying grave objects.[33] Of course, any transfer of possession and control of grave objects must be conditioned on the reinterment of the objects with the human remains.

3. *Religious Objects.* Religious or ceremonial objects would include any items that relate to the current practices of Native American religions. These objects are unique in that: (1) they may give rise to possible first amendment concerns relating to free exercise of religious practices;[34] and (2) unlike situations involving human remains and funerary objects where it may be argued that only those individuals who demonstrate a lineal or legal relationship may take possession, in the case of ceremonial or sacred objects that are necessary to ongoing religious ceremonies the entire tribe membership may seek their return because it uniformly affects their ability to freely practice their religion.[35] As with human remains, there is an additional ethical concern relating to the possession of religious objects and to their display in public museums:

32.

> Certainly, the non-associated materials were once associated with the individuals or sites but, they are no longer. They have been changed to being material cultural remnants rather than personal attentions. This is unfortunate and often the result of pot-hunting and other illegal or unethical practices—usually by private citizens. However, it is a reality and, it is also reality that these objects (vast in number) constitute much of what is known of many cultures.

Testimony of Phillip M. Thompson, Director, Museum of Northern Arizona to the United States Senate Select Committee on Indian Affairs at 6 (May 14, 1990).

33. It could be argued that a trust exists. The party in possession of the human remains is said to be holding the remains in trust for the those persons who are charged with the duty of interment. P. JACKSON, THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES 142-43 (2d ed. 1950). Because a deceased person's body becomes an object, a reasonable conclusion might be that grave goods buried with the human remains should enjoy the same status.

34. *See infra* text accompanying notes 130-57.

35. *See* Blair, *supra* note 9, at 125-28.

> Do you see a display of the masks of the gods of the Christian, or of the Jew, or of Islam, or of any other culture strong enough to defend its faith and to punish such a desecration? Where is the representation of the Great God Jehovah who led the Jews out of their bondage in Egypt, or the Mask of Michael the Archangel, or the Mother of the Christian God we call Jesus Christ, or a personification of Jesus himself? . . . [Instead] you see the gods of conquered people displayed like exotic animals in the public zoo. Only the overthrown and captured gods are here.[36]

It is important to understand that while anthropologists and archaeologists consider these objects data and specimens that must be preserved for study and for the benefit of the general public and future generations, many Native Americans consider these objects vital to the current practice of their religious beliefs.[37] In other words, many of these objects, while certainly historic, also have substantial meaning and utility in the contemporary lives of Native Americans.[38] Advocacy for active use obviously conflicts with the preservationist's view because it involves consumption and leads to the deterioration and perhaps the eventual destruction of the objects.[39]

4. Cultural Objects. This category simply refers to all additional items that exist in museum collections but cannot be categorized as either mortuary evidence or religious objects. Cultural objects hold particular significance to Native Americans in the preservation of their heritage and their understanding of their ancestors' way of life. "The rudiments of religion, law, social structures, familial relationships, morals and aesthetics—virtually everything which defines man as a unique species—are contained in the annals of prehistory."[40] Additionally, these objects have great monetary value and might be viewed as a financial asset similar to mineral, hunting, and fishing

---

36. T. HILLERMAN, TALKING GOD 205 (1989). Not only are Native Americans deprived of the use of many sacred objects, but often these objects are irreverently displayed by their institutional custodians. *See, e.g.*, St. Paul Pioneer Press Dispatch, Sept. 27, 1989, at 3A, col. 1 (statue returned to Zuni Indians after improperly displayed by University of Maine).

37. Blair, *supra* note 9, at 128-29.

38. For example, New York State Museum recently returned twelve wampum belts to the Council of Chiefs of the Onondaga Nation. These belts record events that relate to the communal affairs of the Iroquois Confederacy, the Onondaga Nation, and within the Nation. Possession of these belts was transferred from the Onondaga at the turn of this century. In seeking repossession, the Onondaga Nation asserted that once returned these belts would be restrung and actively used in their ceremonies. *See supra* note 10.

39. N.Y. Times, Aug. 13, 1990, at 1A, col. 1.

40. Palacios & Johnson, *supra* note 21, at 706-07.

rights.[41] Finally, and perhaps most significantly, the general issue of whether possession of cultural objects, religious objects, and human remains should be transferred yields great political leverage to the Native American movement. There is immense emotional appeal and popular sympathy for Native American requests for the "return" of their ancestors' remains and cultural treasures.[42]

B. Categories of Land Ownership

While it may or may not be possible for an individual or an institution to truly own a deceased person's remains and associated funerary objects, sacred and cultural objects can be viewed through traditional notions of title. The ownership of the land upon which the cultural or religious objects are found, or from which they are excavated, may be the controlling factor in determining the competing interests for rights of control, possession, and legal title.

1. Federal Land. The United States owns enormous tracts of land. Because Native Americans once occupied much of this area, there is doubtlessly a great deal of evidence of their presence contained on this land. When objects are excavated from federally owned property, the United States generally has the strongest claim for ownership.[43] The issue, therefore, becomes a matter of who the government should entrust to possess these objects: a museum or a like institution with similar educational and research objectives or the Native Americans with whom these objects are associated.

2. Native American Land. A great deal of land controlled by the United States is actually held in trust on behalf of certain Native American tribes or individuals. Consequently, this land is not freely alienable by Native Americans. For instance, the Indian Nonintercourse Act provides that no transaction between any Native American tribe and another entity concerning certain restricted lands shall be valid without the consent of the United States.[44] Similarly, the General Allotment Act rendered null and void any conveyance of allotment lands before the expiration of the trust period.[45] Although they have only equitable title, consent from the Native Americans is usually necessary before excavation or removal of human remains and cultural and religious objects from these lands may take place.

---

41. If they so chose, Native Americans could display these objects in tribal museums and thereby generate revenue through tourism. These objects could also be offered for sale in the highly lucrative market for archaeological treasures. *See* Chilkat Indian Village v. Johnson, 870 F.2d 1469 (9th Cir. 1989).

42. *See supra* text accompanying note 8.

43. *See infra* text accompanying notes 39-88.

44. 25 U.S.C. § 177 (1982).

45. *Id.* § 348.

3. Private Land. Generally, ownership of the objects contained on real property passes with the title of that real property. Thus, private owners have a very strong claim for title to religious and cultural objects excavated from their property. This same concept would apply to any land which was owned in fee by Native Americans.[46]

III. STATUTORY PROTECTION OF NATIVE AMERICAN CULTURAL AND RELIGIOUS OBJECTS AND HUMAN REMAINS

A. Federal Statutes

During this century, the federal government has pursued a policy to preserve the historic locations, structures, and objects that make up America's heritage.[47] Preservation of the cultural past of Native Americans has been a substantial part of this policy.

1. Antiquities Act of 1906. The Antiquities Act of 1906 was enacted to punish "[a]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity" that is situated on federal lands without first obtaining permission from the Secretary of the Department that has jurisdiction over that land.[48] The primary goal of the Antiquities Act of 1906 was to preserve sites that contain information about the past through excavation and other types of investigation, and to facilitate the acquisition of objects for permanent preservation as part of the collections contained in public museums.[49]

The Antiquities Act of 1906 has been considered inadequate and ineffective for a number of reasons. The sanction which accompanies any violation of the Act is limited to a $500 fine, ninety days' imprisonment, or both fine and imprisonment.[50] It has been said that this punishment "consti-

46. F. COHEN, *supra* note 1, at 619. *See, e.g.,* Dillon v. Antler Land Co., 507 F.2d 940, 944 (9th Cir. 1974), *cert. denied,* 421 U.S. 992 (1975).

47. Prior to 1906, historic preservation was undertaken through "private financing of excavations and museums, and private legal remedies such as trespass or conversion. There were no federal regulatory or enabling provisions." Palacios & Johnson, *supra* note 21, at 708.

48. 16 U.S.C. § 433 (1982). For example, applications for permits are submitted to the Smithsonian Institution for recommendation to the Secretary of the Interior. 43 C.F.R. § 3.8 (1988).

49. Wilson & Zingg, *supra* note 9, at 424. This objective is clearly reflected in the restrictions on permits which limit applicants to "reputable museums, universities, colleges, or other recognized scientific or educational institutions, or to their duly authorized agents." 43 C.F.R. § 3.3 (1988).

50. 16 U.S.C. § 433 (1982).

tutes little more than a business expense for the modern pothunter receiving up to thousands of dollars for a single pot."[51] In addition, the 1906 Act focuses solely on a limited number of sites of outstanding national interest. "It offers no direct protection for the many cliff dwellings, burial mounds and other Indian grave sites located on private or state owned lands . . . ."[52] More importantly, this statute was rendered virtually useless when the United States Court of Appeals for the Ninth Circuit, whose jurisdiction includes part of the southwest and all of the Pacific coast, declared that its failure to define "ruin," "monument," or "object of antiquity" renders the Antiquities Act unconstitutionally vague.[53]

2. *National Historic Preservation Act of 1966.* Since the enactment of the Antiquities Act of 1906, Congress has firmly established the federal government's role in preserving this nation's heritage.[54] Through the Historic Sites Act of 1935, the United States clearly contemplated the identification, recovery, preservation, and display of archaeological data "for public use."[55] This goal was furthered through the creation of the National Trust for Historic Preservation in the United States.[56] The purpose of this

---

51. Blair, *supra* note 9, at 143 (footnotes omitted). A "pothunter" can be described as an

> individual who removes an archaeological artifact from the site without regard to its contextual provenance and then sells, trades, or collects it as an *objet d'art.* Archaeological resources are nonrenewable. The context in which an archaeological artifact or feature is found is at least as important as the artifact or feature itself, and a site which has been disturbed has permanently lost a considerable amount of its significance.

Palacios & Johnson, *supra* note 21, at 707-08 (footnotes omitted).

52. Wilson & Zingg, *supra* note 9, at 425.

53. United States v. Diaz, 499 F.2d 113, 115 (9th Cir. 1974). While the ruling in *Diaz* made prosecution under other statutes, as well as under the Antiquities Act, very difficult, it must be noted that the Ninth Circuit has subsequently determined that Congress did not intend the Antiquities Act to be the exclusive means for prosecution of antiquity theft and destruction. United States v. Jones, 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). Furthermore, not all jurisdictions have found the Act unconstitutional. *See* United States v. Smyer, 569 F.2d 939 (10th Cir. 1979), *cert. denied*, 444 U.S. 843 (1979).

54. Comment, *Archaeological Preservation on Indian Lands: Conflicts and Dilemmas in Applying the National Historic Preservation Act*, 15 ENVTL. L. 413, 421 (1985). Through the enactment of the Historic Sites Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1982), the federal government commenced a program to identify and evaluate historic properties, both real and personal, of national significance.

55. 16 U.S.C. § 461 (1982).

56. *Id.* §§ 468-468c.

entity was to accept, maintain, and administer properties donated to the United States as a trustee on behalf of the American public.[57]

Subsequently, Congress enacted the National Historic Preservation Act of 1966[58] which proclaimed that "the preservation of [America's] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."[59] To "administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations,"[60] the 1966 Act authorizes the Secretary of the Interior to maintain a National Register[61] of specific structures, as well as general areas or districts, that are significant in American history, architecture, archaeology, engineering, and culture.[62] The 1966 Act further authorizes the Secretary to allocate matching grants-in-aid to the States in support of local efforts to survey and preserve historic structures and districts.[63]

In pursuing the 1966 Act's objective of preserving prehistoric and historic locations and objects, Congress placed a premium on involvement of the scientific community.[64] Congress also formally recognized the vital need for an active partnership between educational institutions, historical societies, and the various scientific associations to ensure the involvement of groups that are capable of providing skilled research and proper preservation techniques.[65] At the same time, Congress attempted to encourage Native American participation in the policy-developing and decision-making process.[66] Indeed, the 1966 Act states that the policy of preservation will be carried out "in partnership with the States, local governments, *Indian tribes*, and private

57. *Id.* § 468.

58. *Id.* §§ 470 to 470w-6.

59. *Id.* § 470(b)(4).

60. *Id.* § 470-471(3).

61. This Register is an expansion of the roll of National Landmarks that was created by the Historic Sites Act of 1935. *Id.* § 462(b). *See* Wilson & Zingg, *supra* note 9, at 429.

62. 16 U.S.C. § 470a (1982). The Act also requires the head of any federal agency, prior to the expenditure of funds on any program or project, to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in, or eligible for inclusion in, the National Register." *Id.* § 470f.

63. *Id.* §§ 470a-470c.

64. *Id.* § 470i (Advisory Council on Historic Preservation). *See also id.* § 463 (National Park System Advisory Board).

65. *Id.* §§ 469a-3(b), 470a(h), 470h-3(a), 470n.

66. *Id.* §§ 463, 470.

organizations and individuals."[67] Furthermore, this statute expressly authorizes the Secretary to make grants and loans to Native American tribes "for the preservation of their cultural heritage."[68]

In the House Report on the Amendments made to the 1966 Act in 1980, the Interior and Insular Affairs Committee observed:

> First and foremost . . . the goal of historic preservation is to provide the citizens of our nation with an understanding and appreciation of their cultural origins and heritage. It is to foster a long-range perspective of our human use of the land and its resources, of the development of our communities and politics, of our technologies and arts. It is directed toward protection and enhancement of modern remnants of our architectural and engineering traditions—for our immediate appreciation and use—and of the heritage information that is inherent in our prehistoric and historic resources—which serve to tie us to the lessons and achievements of the past.[69]

These Amendments were intended to provide even greater federal guidance and support to efforts made on the state and local level to preserve historical sites.[70]

The National Historic Preservation Act of 1966 expressly contemplates the preservation of artifacts discovered through archaeological projects. The Act's emphasis is nonetheless placed on the preservation of structures. As such, this statute does offer some protection to Native American structures such as cliff dwellings and perhaps those religious and cultural objects that are located at the sites of some burial grounds.

Most Native American cultures, however, did not emphasize architecture.[71] In addition, the National Historic Preservation Act of 1966 contains a religious property exclusion that makes protection of some of these sites more difficult.[72] Therefore, the 1966 Act has significant limitations on its protection of Native American heritage.

3. *The Archaeological Resources Protection Act of 1979.* In an effort to respond to the Ninth Circuit's ruling, as well as to correct the infirmities of

---

67. *Id.* § 470-1 (emphasis added).

68. *Id.* § 470a(d)(3)(B).

69. H.R. REP. NO. 1457, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6378, 6384.

70. *Id.* at 22-25, 1980 U.S. CODE CONG. & ADMIN. NEWS at 6385-88.

71. *See* Wilson & Zingg, *supra* note 9, at 417-18.

72. *See* Comment, *supra* note 54, at 432. *See also* Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. IND. L. REV. 1, 43 (1982); Winter, *Indian Heritage Preservation and Archaeologists*, 45 AM. ANTIQUITY 121, 124 (1980).

the Antiquities Act of 1906, Congress enacted the Archaeological Resources Protection Act of 1979 (ARPA).[73] Although the 1906 Act was never formally repealed, it has been largely superseded by ARPA.[74]

ARPA defines "archaeological resources" as "any material remains of past human life or activities which are of archaeological interest" that are at least one hundred years old.[75] This statute clearly recognizes that

> archaeological resources are diminishing resources in this nation today. Because of this, and because . . . [a]rchaeological resources are finite and non-refinable, the objective should be to manage these resources for their long-term conservation while at the same time allowing the necessary consumption of them in the interests of advancing knowledge about the past or to illustrate or interpret to the public and the human history of this nation.[76]

---

73. 16 U.S.C. §§ 470aa-470ll (1982). The House report stated:

> In a 1974 decision, the United States Court of Appeals for the Ninth Circuit held that the 1906 Act was unconstitutional. The court found that the definitional portion of the Act was unconstitutionally vague; therefore, the Act is legally unenforceable in the Ninth Circuit. The Ninth Circuit includes the states of Arizona, California, Nevada, Oregon, Washington, Montana, Idaho, Alaska, Hawaii and Guam.
>
> That court decision, coupled with the dramatic rise in recent years of illegal excavations on public lands and Indian lands for private gain, prompted Members of the House and Senate to introduce legislation intended to provide adequate protection to archaeological resources located on public lands and Indian lands.
>
> Much has changed since the 1906 Act was passed. The commercial value of illegally obtained artifacts has substantially increased and the existing penalties under the 1906 Act have proven to be an inadequate deterrent to theft of archaeological resources from public lands.

H.R. REP. No. 311, 96th Cong., 1st Sess. 7, *reprinted* in 1978 U.S. CODE CONG. & ADMIN. NEWS 1709, 1710.

74. Echo-Hawk, *supra* note 2, at 449.

75. 16 U.S.C. § 470bb (1982). The Act states that such materials "shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items." *Id.*

76. H.R. REP. No. 311, 96th Cong., 1st Sess. 19, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS at 1722.

For this very reason, only individuals who possess "adequate professional expertise"[77] shall be granted permits for excavation and removal of this type of archaeological data.[78]

Although the archaeological resources remain the property of the United States, ARPA requires that they be preserved in a suitable location such as a museum or university.[79] This statute has nonetheless recognized Native American interests in archaeological sites by requiring consent from Native American landowners before a permit will issue,[80] and providing Native Americans with a more active role in determining who may receive permits[81] and what objects may be excavated and removed.[82] Finally, the statute contains more severe punishments for violators. Any person who knowingly violates this law is subject to a $10,000 fine, up to one year of imprisonment, or both the fine and imprisonment.[83]

---

77. *Id.* at 9, 1979 U.S. CODE CONG. & ADMIN. NEWS at 1782.

78. 16 U.S.C. § 470cc(b)(1) (1982).

79. *Id.* § 470cc(b)(3). The House report states:

> The Committee intends that archaeological specimens removed be adequately evaluated and the knowledge obtained used for scientific and educational purposes. The subsequent storage or display of these artifacts should not, however, be narrowly construed and may include private as well as public museums or institutions which have adequate resources to protect the artifacts and to provide a public, educational, or interpretive service.

H.R. REP. NO. 311, 96th Cong., 1st Sess. 9, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1709, 1712.

80. 16 U.S.C. § 470cc(g) (1982).

81. *Id.* § 470cc(g)(1), (2). This is a shift from previous policy in which the emphasis in control over these matters was placed "upon academic expertise rather than aboriginal ancestry." *See* Wilson & Zingg, *supra* note 9, at 426 (discussing membership of the Advisory Board of the National Parks, Historical Sites, Buildings, and Monuments created under the Historic Sites, Buildings, and Antiquities Act of 1935).

82. In particular, the statute is concerned about the disturbance of religious objects. 16 U.S.C. § 470cc(c) (1982). More generally, although stressing the importance of leadership by experts in this area,

> [t]he Committee is concerned that greater efforts must be undertaken by the Secretary and professional archaeologists to involve to the fullest extent possible non-professional individuals with existing collections or with an interest in archaeology. . . . The Committee is convinced that the key to success of a program of this nature is true cooperation between all parties concerned.

H.R. REP. NO. 311, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 1709, 1715.

83. 16 U.S.C. § 470ee(d) (1982). Recent amendments to ARPA have been made to facilitate easier arrest, prosecution, and conviction of looters. *See generally* S. REP.

4. Reservoir Salvage Act of 1960. The Reservoir Salvage Act of 1960, which is also referred to as the Archaeological and Historical Preservation Act, was enacted to ensure the preservation of archaeological data threatened by the construction of dams and other public works.[84] In 1974, this statute was amended to expand its application to include all federal and federally assisted construction projects.[85] The Secretary of the Interior must consult with interested federal and state agencies, educational and scientific organizations, private institutions, and qualified individuals "with a view to determining the ownership of and the most appropriate repository for any relics and specimens recovered" from projects performed under this statute.[86]

5. National Environmental Policy Act of 1969. While the National Environmental Policy Act is primarily aimed at preventing further damage to our natural environment,[87] the Congressional policy statement takes notice of the fact that an integral part of this objective includes the federal government's responsibility to "preserve important historic, cultural, and natural aspects of our national heritage."[88]

> [The National Environmental Policy Act] is clearly relevant to the preservation of Indian "sites" of cultural significance which are threatened by agencies of the federal government. Indeed, the Act has recently been held applicable to sustain an injunction against a highway project which endangered a "geological Indian lookout," which the court found to be possessed of "outstanding scenic, geological, historical and archaeological features . . . ."[89]

The effect of this statute was to formally introduce the evaluation of historic preservation as a necessary factor for comment during the environmental impact statement process.[90]

6. Department of Transportation Act. The Department of Transportation Act declares as a part of the national policy "that special effort should be

---

No. 566, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 3983, 3983-89.

84. H.R. REP. No. 1392, 86th Cong., 2d Sess., *reprinted in* 1960 U.S. CODE CONG. & ADMIN. NEWS 2403, 2404.

85. H.R. REP. No. 992, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 3168, 3168-69.

86. 16 U.S.C. § 469a-3(b) (1982).

87. 42 U.S.C. § 4321 (1982).

88. *Id.* § 4331(b)(4). *See* Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).

89. Wilson & Zingg, *supra* note 9, at 435 (citing Indian Lookout Alliance v. Volpe, 345 F. Supp. 1167 (S.D. Iowa 1972), *modified*, 484 F.2d 11 (8th Cir. 1973)).

90. Wilson & Zingg, *supra* note 9, at 435-36.

made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."[91] Consequently, the Secretary of Transportation has been prohibited from approving any program or project that would involve the use of any land containing a historic site, as determined by federal, state, or local officials, unless there is no feasible and prudent alternative and everything possible has been done to minimize the harm to the historic site in question.[92] In an attempt to comply with the policy objectives of both this Act and the National Historical Preservation Act,[93] the Department of Transportation has promulgated an "archaeological regulation" which permits the recovery of archaeological material at places designated as historic sites under the meaning of either act.[94] This regulation permits the Department to work with state and local officials to develop a retrieval plan when the archaeological materials are made more valuable through recovery.[95]

Generally, the federal legislation previously discussed has its primary impact on those objects that will be excavated in the future. While encouraging involvement by Native Americans and demonstrating sensitivity to Native American concerns, these statutes, as well as countless others,[96] clearly manifest a Congressional policy that first and foremost seeks to ensure the protection and preservation of the archaeological record that makes up America's heritage.[97]

---

91. 23 U.S.C. § 138; 49 U.S.C. § 303(a) (1982 & Supp. 1985).

92. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). At least one commentator has determined that administrative and judicial interpretation has severely weakened the strength of this requirement. Note, *Road Through Our Ruins: Archaeology and Section 4(f) of the Department of Transportation Act*, 28 WM. & MARY L. REV. 155, 156 (1986).

93. *See supra* text accompanying notes 45-63.

94. 23 C.F.R. § 771.135(e) (1984). *See also* 45 Fed. Reg. 71,976 (1980).

95. Town of Belmont v. Dole, 766 F.2d 28 (1st Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

96. It is worth noting that there have been some well-publicized prosecutions for international theft of cultural objects under the National Stolen Property Act, 18 U.S.C. §§ 2314-2315 (1982). *See* United States v. McClain, 545 F.2d 988 (5th Cir. 1977); United States v. Hollinshead, 495 F.2d 1154 (9th Cir. 1974). The same action could possibly be taken under 18 U.S.C. § 1163 (1982) against individuals alleged to have improperly taken Native American religious and cultural objects and human remains. Cheyenne-Arapaho Tribe v. Beard, 554 F. Supp. 1, 4 (W.D. Okla. 1980) (Native American tribes have implied private cause of action for damages for violation of this statute). *But see* Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1472 (9th Cir. 1989) (statute does not give rise to a private cause of action).

97. *See* Palacios & Johnson, *supra* note 21, at 720.

B. State Statutes

For the purposes of this discussion, state statutes relating to this subject can be divided into three basic categories: (1) statutes generally concerned with cemeteries and dead bodies; (2) archaeological and historic preservation laws; and (3) legislation expressly dealing with Native American skeletal remains and religious and cultural objects.[98]

1. Cemeteries and Dead Bodies. Although burial sites have traditionally enjoyed protection at common law,[99] every state in the nation has nonetheless considered it necessary to enact extensive legislation regulating dead bodies[100] and cemeteries.[101] It has been evident, however, that the protections embodied in the common law and codified by these state statutes

98. Higginbotham, *Native Americans Versus Archaeologists: The Legal Issues*, 10 AM. INDIAN L. REV. 91, 111-13 (1982).

99. P. Jackson, *supra* note 33, at 186.

100. *See, e.g.,* ARIZ. REV. STAT. ANN. §§ 36-803 to -862 (1986); ARK. STAT. ANN. § 5-60-101 (1987); COLO. REV. STAT. §§ 12-34-101 to -209 (1985 & Supp. 1989); DEL. CODE ANN. tit. 16, §§ 3151-3169 (1983 & Supp. 1988); FLA. STAT. §§ 245.06-.16 (1988 & Supp. 1990); GA. CODE ANN. §§ 21-1 to -99 (1989 & Supp. 1989); HA. REV. STAT. §§ 338-23 to -25.6 (1985); MO. REV. STAT. § 194.005 (1979); N.D. CENT. CODE §§ 23-06-01 to -06-30 (1978 & Supp. 1989); S.D. CODIFIED LAWS ANN. §§ 34-25-18 to -25-52 (1986); VA. CODE ANN. §§ 32.1-277 to -1-309 (1985 & Supp. 1990).

101. *See, e.g.,* ALA. CODE §§ 11-17-1 to -17-16 (1989 & Supp. 1990); ALASKA STAT. §§ 10.30.010-.155 (1989); ARIZ. REV. STAT. ANN. § 32-2194 (1986); COLO. REV. STAT. §§ 12-12-101 to -12-115 (1985 & Supp. 1989); CONN. GEN. STAT. ANN. §§ 19a-295 to -315 (West 1986 & Supp. 1990); FLA. STAT. §§ 497.001-.091 (1988 & Supp. 1990); HAW. REV. STAT. §§ 441-1 to -46 (1985 & Supp. 1989); IDAHO CODE §§ 27-101 to -128 (1990); ILL. REV. STAT. ch. 34, paras. 1-66 (1972 & Supp. 1990); IND. CODE §§ 23-14-1-1 to -14-1-29 (1989 & Supp. 1990); IOWA CODE §§ 566.1-.27 (1950 & Supp. 1990); KAN. STAT. ANN. §§ 12-1401 to -1441, 17-1302 to -1370 (1982 & Supp. 1989); LA. REV. STAT. ANN. §§ 8:1-:901 (1986 & Supp. 1990); MNE. REV. STAT. ANN. tit. 13, §§ 901-1341 (1981); MICH. COMP. LAWS §§ 21.820-.936 (1983 & Supp. 1988); MINN. STAT. §§ 306.01-.88, 307.01-.11 (1985 & Supp. 1990); MISS. CODE ANN. §§ 41-43-1 to -43-53 (1981 & Supp. 1990); MO. REV. STAT. §§ 214.010-.410 (1983 & Supp. 1990); NEB. REV. STAT. §§ 12-101 to -1121 (1987); N.J. REV. STAT. §§ 8A:1-1 to 12-6 (1988); PA. STAT. ANN. tit. 9, §§ 1-19 (Purdon 1965 & Supp. 1990); TENN. CODE ANN. §§ 46-1-101 to -6-104 (1987); TEX. REV. CIV. STAT. ANN. arts. 912a-1 to 930a-1 (Vernon 1964 & Supp. 1990); UTAH CODE ANN. §§ 8-1-1 to -1-24 (1986 & Supp. 1990); VT. STAT. ANN. tit. 18, §§ 5301-5579 (1987); VA. CODE ANN. §§ 57-22 to -39.19 (1986 & Supp. 1990); WASH. REV. CODE §§ 68.04.010-.48.090 (1985 & Supp. 1990); W. VA. CODE §§ 35-5-1 to -5-6 (1985 & Supp. 1990); WYO. STAT. ANN. §§ 35-8-101 to -8-407 (1988).

have not always been afforded to Native American burial sites. It has been suggested that this unequal protection may be due to the fact that

> "cemetery" is usually defined in Judeo-Christian terms—i.e., several burials in the same location with visible grave markers. Indian burials are usually not grouped in one well-marked location; rather, they often occur in individual locations which are sometime "marked" by natural formations or preserved in oral tradition, and sometimes not marked or remembered at all. Because Indian burials do not usually conform to the Judeo-Christian model, they are not usually granted statutory protection under the definition of a cemetery. Further, because many tribes have been forced to evacuate their ancestral lands by the United States Government, many burial locations that may have been considered a "cemetery" have been constructively abandoned.[102]

Cultural differences and unduly literal interpretation of these laws may indeed account in part for the absence of protection for Native American graves in the past. It must be recognized, however, that many of these burial sites were disturbed at a time when Native Americans simply were not treated with the same dignity, respect, and consideration as other Americans.[103]

Recently, courts have become more sensitive to the disturbance of Native American burial sites.[104] In addition, many states have enacted laws protecting nontraditional cemeteries.[105] For example, Missouri recently enacted legislation protecting unmarked burial sites.[106] This law applies "[w]hen an unmarked human burial or human burial remains are encountered

---

102. Bowman, *supra* note 17, at 168-69 (footnotes omitted).

103. The most infamous, but by no means the only improper, collection of Native American human remains began in 1896. In that year, the Surgeon General ordered the United States Army to form a collection of Native American craniums. The purpose of the collection was allegedly to aid anthropological science by obtaining the measurements of a large number of skulls of the aboriginal races of North America. Over the next forty years, often through highly unethical and disrespectful means, the Army collected nearly 5,000 Native American skulls and skeletal parts. Much of this collection currently resides in the custody of the Smithsonian Institution. *See supra* text accompanying note 15.

104. *See, e.g.*, State v. Cochran, 69 Ore. App. 132, 683 P.2d 1038 (1984); Indiana State Highway Patrol Comm'n v. Ziliak, 428 N.E.2d 275 (Ind. Ct. App. 1981); State v. Turley, 96 N.M. 592, 633 P.2d 700 (N.M. Ct. App. 1980).

105. *See, e.g.*, FLA. STAT. ANN. § 872.05 (West Supp. 1990); MASS. GEN. LAWS ANN. ch. 7, § 38A; ch. 9, §§ 26A, 27C; ch. 38, § 6B; ch. 114, § 17 (West 1986); MINN. STAT. ANN. § 307.08 (West Supp. 1990); MO. REV. STAT. §§ 194.400-.410 (Supp. 1989); N.C. GEN. STAT. §§ 70-26 to -40 (1985); N.H. REV. STAT. ANN. § 227-C:8 (1989).

106. MO. REV. STAT. §§ 194.400 (Supp. 1989).

during archaeological excavation, construction, or other ground disturbing activities, whether found on or in any private lands or waters or on or in any lands or waters owned by the state."[107] Any person who discovers an unmarked burial site or human remains is bound to report the finding to the state historic preservation officer.[108] That state official is then responsible for determining: (1) whether disinterment is necessary and appropriate for the purpose of scientific analysis;[109] and (2) whether there are any descendants or people with an ethnic affinity with whom the official might counsel in determining the proper disposition of the remains.[110] Violation of this statute constitutes a criminal misdemeanor.[111]

2. *Archaeology and Historic Preservation.* Individual states, like the federal government, have demonstrated great concern and commitment to the preservation of America's heritage. Indeed, many of the states have enacted legislation that is very similar to the federal archaeological and historical preservation statutes previously discussed.[112] For instance, many of the archaeological resources protection acts require that a permit be issued prior to excavation and removal of objects from public lands.[113] Many of these

---

107. *Id.* § 194.405.

108. *Id.* § 194.406.

109. *Id.* § 194.407(1).

110. *Id.* § 194.408(1)-(2).

111. *Id.* § 194.410.

112. *See, e.g.,* ALASKA STAT. §§ 41.35.010-.35.240 (1988); ARIZ. REV. STAT. ANN. §§ 41-841 to -847 (1985); COLO. REV. STAT. §§ 24-80-401 to -80-410 (1988); FLA. STAT. ANN. §§ 267.011-.17 (West 1975 & Supp. 1990); HAW. REV. STAT. §§ 6E-1 to -16 (1985 & Supp. 1989); ILL. ANN. STAT. ch. 127, para. 133d1-15 (Smith-Hurd 1981 & Supp. 1989); IND. CODE ANN. §§ 14-3-3.4-1 to .4-12 (Burns 1987); KY. REV. STAT. ANN. §§ 164.705-.735 (Michie 1987); LA. REV. STAT. ANN. §§ 41:1601-1614 (West 1990); MNE. REV. STAT. ANN. tit. 27, §§ 371-378 (1988); MD. NAT. RES. CODE ANN. §§ 2-301 to -310 (1989); MISS. CODE ANN. §§ 39-7-1 to -7-41 (1973 & Supp. 1989); MONT. CODE ANN. §§ 22-3-421 to -3-442 (1989); NEV. REV. STAT. ANN. §§ 383.011-.190 (1986); N.H. REV. STAT. ANN. §§ 227-C:1 to -C:17 (1989); N.M. STAT. ANN. §§ 18-6-1 to -6-21 (1987 & Supp. 1989); N.Y. PUB. BLDGS. LAW §§ 60-64 (McKinney Supp. 1990); OR. REV. STAT. §§ 358.905-.955 (1987); R.I. GEN. LAWS §§ 42-45.1-1 to .1-13 (1988); TENN. CODE ANN. §§ 11-6-101 to -6-115 (1987 & Supp. 1989); TEX. NAT. RES. CODE ANN. §§ 191.001-.174 (Vernon 1978 & Supp. 1990); UTAH CODE ANN. §§ 63-18-18 to -18-35 (1986); VT. STAT. ANN. tit. 22, §§ 761-767 (1987); VA. CODE ANN. §§ 10.1-2300 to -2306 (1989); WASH. REV. CODE ANN. §§ 27.53.010-.53.901 (1982 & Supp. 1990); W.VA. CODE § 29-1-7 (1986); WIS. STAT. ANN. §§ 44.30-.48 (West Supp. 1989); WYO. STAT. ANN. §§ 36-1-114 to -1-116 (1977).

113. *See, e.g.,* ALASKA STAT. § 41.35.080 (1988); ARIZ. REV. STAT. ANN. § 41-842 (1985); COLO. REV. STAT. § 24-80-406 (1988); FLA. STAT. ANN. § 267.12 (West 1975 & Supp. 1990); KY. REV. STAT. § 164-720 (Michie 1987); MNE. REV. STAT.

statutes also provide expressly that all archaeological resources recovered from state land are state property.[114] At the same time, state legislation seems to differ from the federal statutes in the states' heightened sensitivity to the concerns of Native Americans. For example, some states have gone so far as to require the reinterment of all Native American remains uncovered on either public or private lands.[115]

3. Native American Protection Laws. Many states have gone much further than the federal government by enacting statutes specifically aimed at protecting Native American burial sites and objects.[116] In *Wana the Bear v. Community Construction, Inc.*,[117] the California Court of Appeals held that a Native American burial ground did not merit protected status as a public cemetery under the state's existing cemetery statute because the particular Native American group was no longer using the burial site at the time the state law was enacted.[118] In response to this ruling, legislation was enacted for the express purpose of protecting Native American burial sites.[119] This law provides that whenever a property owner discovers what he believes to be Native American skeletal remains on his land, he is required to promptly notify the Native American Heritage Commission. The Commission in turn is obligated to contact the group or tribe it believes to be descendants of the

---

ANN. tit. 27, § 374 (1988); MD. NAT. RES. CODE ANN. § 2-305 (1989); MINN. STAT. ANN. § 138.36 (West 1979); MISS. CODE ANN. § 39-7-19 (Supp. 1989); MONT. CODE ANN. § 22-3-432 (1989); N.H. REV. STAT. ANN. § 227-C:7 (1989); N.C. GEN. STAT. § 70-13(b) (1985); S.D. CODIFIED LAWS ANN. § 1-20-31 to -20-32 (1985); TENN. CODE ANN. § 11-6-105 (1987); UTAH CODE ANN. § 63-18-25 (1986); VT. STAT. ANN. tit. 22, § 764 (1987); VA. CODE ANN. § 10.1-2302 (1989); WIS. STAT. ANN. § 44.47 (4) (West Supp. 1989).

114. *See, e.g.*, ALASKA STAT. § 41.35.020 (1988); COLO. REV. STAT. § 24-80-401 (1988); LA. REV. STAT. ANN. § 41:1605 (West Supp. 1990); MD. NAT. RES. CODE ANN. § 2-309 (1989); MINN. STAT. ANN. § 138.37 (West 1979); N.H. REV. STAT. ANN. § 227-C:8-b (1989); N.M. STAT. §18-6-9 (1987); N.C. GEN. STAT. § 70-13(b)(5) (1985); R.I. GEN. LAWS § 42-45.1-4 (1988); TENN. CODE ANN. § 11-6-104 (1987).

115. *See, e.g.*, IOWA CODE ANN. § 305A.7 (West 1988); MNE. REV. STAT. ANN. tit. 22, § 4720 (1980).

116. *See, e.g.*, ALA. CODE §§ 41-3-1 to -3-6 (1982); DEL. CODE ANN. tit. 7, §§ 5301-5306 (1983); IDAHO CODE §§ 27-501 to -504 (Supp. 1989); ILL. ANN. STAT. ch. 127, para. 133c1-6 (Smith-Hurd 1981); OKLA. STAT. ANN. tit. 21, § 1168-1168.6, tit. 53, § 361 (1990); WASH. REV. CODE ANN. §§ 27.44.010-44.901 (1985 & Supp. 1990).

117. 128 Cal. App. 3d 536, 180 Cal. Rptr. 423 (1982).

118. *Id.* at 541, 180 Cal. Rptr. at 426.

119. CAL. GOV'T CODE § 6254(r) (West 1990); CAL. HEALTH & SAFETY CODE § 7050.5 (West Supp. 1988); CAL. PUB. RES. CODE §§ 5097.94, 5097.98, 5097.99 (West 1984 & Supp. 1990).

deceased individual.[120] Representatives of the appropriate tribe and the property owner may then attempt to negotiate an agreement regarding the disposition of the remains. If agreed to by the parties, the statute does permit nondestructive scientific analysis of the remains.[121] If no agreement can be reached, however, the property owner is required to rebury the human remains and any grave objects associated with the burial site.[122]

Recently, the Nebraska legislature enacted the Unmarked Human Burial Sites and Skeletal Remains Protection Act.[123] This statute was enacted primarily as the result of an unsuccessful request submitted to the Nebraska State Historical Society by Native Americans for the return of their ancestors' skeletal remains. Very similar to the California legislation, this law applies to human remains regardless of whether they are located on public or private lands[124] and permits limited scientific analysis of the remains.[125]

The Nebraska statute goes further, however, and requires all institutions, agencies, organizations, or other entities in the state which receive funding or official recognition from the state or any of its political subdivisions to comply promptly with all requests made by Native American descendants or descendant tribes for the return of human remains and burial objects that are already contained in their collections.[126] All other institutions are required to respond to these requests by providing to the claimant within ninety days "an itemized inventory of any human skeletal remains and burial goods that are subject to return to the requesting relative or Indian tribe."[127] This statute is directed at public istitutions and in no way applies to the private collector.

If a dispute arises concerning the disposition of the human remains or any associated funerary objects, the Nebraska statute provides that the aggrieved party shall formally notify the adverse party of its position and, within sixty days, the parties shall meet and attempt to resolve the dispute.[128] If this attempt is unsuccessful, the parties shall designate a third party to assist in the resolution of the dispute.[129]

---

120. CAL. PUB. RES. CODE §§ 5097.94(a), 5097.98(a) (West 1984).
121. *Id.* § 5097.98(a).
122. *Id.* § 5097.98(b).
123. 1989 NEB. LAWS 340.
124. *Id.* § 340:3(1).
125. *Id.* § 340:8(2).
126. *Id.* § 340:9.
127. *Id.* § 340:10.
128. *Id.* § 340:11.
129. *Id.* If the parties are unable to agree on a third party, the Public Counsel shall automatically be designated to serve in that capacity. *Id.*

> Following the designation of a third party, the aggrieved party may submit a petition, together with supporting documentation, to the third party describing the nature of the grievance. The aggrieved party shall serve a copy of the petition and all supporting documents on the adverse party at the time of filing. The adverse party shall have thirty days to respond to the petition by filing a response and supporting documentation with the third party copies of which shall be served on the aggrieved party by the adverse party at the time of filing the response.
>
> The third party shall review the petition, the response, all supporting documentation submitted by the parties, and other relevant information. Following such review and within ninety days after the filing of the petition, the two original parties and the third party shall, by majority vote, render a decision with regard to the matter in dispute.[130]

This procedure constitutes the aggrieved party's sole remedy.[131] If the parties are not satisfied with the result, either party may appeal the decision to the state district court for *de novo* review of all of the issues.[132] Finally, there is a private civil cause of action against any person alleged to have intentionally violated this statute.[133] Kansas[134] and Arizona[135] have subsequently enacted equally progressive legislation.

C. Impact of Federal and State Legislation

The federal and state legislation in this area demonstrates an evolution of attitudes and enhanced sensitivity in our society regarding the disposition of Native American religious and cultural objects and skeletal remains. Some of these statutes are aimed primarily at the preservation of cultural objects and human remains for the edification of our society as a whole. Indeed, much of the federal legislation currently in place constitutes an acknowledgement of the significance and value of this archaeological data. These statutes provide for the preservation and study of these objects and human remains so that all people may benefit from the information and inspiration they yield. The state legislation also demonstrates an awareness of the importance of preservation and scientific study. Many state statutes reflect a trend that is also very concerned with the protection of the rights of the relevant group or culture. Consequently, both the views of the scientific community and the concerns and interests of Native Americans have been heeded to some extent

130. *Id.*
131. *Id.*
132. *Id. See* NEB. REV. STAT. § 25-1937 (1987).
133. 1989 NEB. LAWS § 12.
134. KAN. STAT. ANN. §§ 75-2741 to -2754 (1989).
135. ARIZ. S. 1412.

by the legislatures of this country. The combined effect of these statutes, and the trend they bespeak for the future, indicates that there exists very real protection of the interests of parties on both sides of this issue concerning future discovery of human remains, funerary objects, and religious and cultural objects. Therefore, the issues that are yet to be addressed involve the right of possession and ownership of objects and skeletal remains that were acquired prior to the creation of these laws and which currently reside in public and private museums.

IV. FREEDOM OF RELIGION

While there are possible constitutional arguments that may be made for the transfer of control and possession of Native American skeletal remains and objects associated with Native American cultures and religions that are currently held in museum collections based on equal protection,[136] due process,[137] the establishment clause,[138] and the ninth amendment,[139] the argument most commonly raised is that retention of religious and ceremonial objects by museums interferes with Native Americans' rights to practice their religion and therefore violates the free exercise clause.[140]

In *Sherbert v. Verner*,[141] a case which involved a Seventh Day Adventist who was denied unemployment benefits because she refused to work on Saturdays for religious reasons, the United States Supreme Court introduced a balancing analysis which weighs the individual's right to free exercise of

136. Bowman, *supra* note 17, at 181-82. This argument would have particular application to Native American skeletal remains which have been excavated from Native American burial sites. Generally, non-Native American cemeteries have been protected by common law and state law from desecration and disturbance. As is apparent from the number of excavated Native American remains, Native American burial sites have not received the same protection. *See* Higginbotham, *supra* note 90, at 99-100.

137. Higginbotham, *supra* note 98, at 99-101 ("[E]qual protection applies to the federal government by way of the due process clause of the fifth amendment."). This argument would apply to the literally millions of Native American objects contained in state and federal collections.

138. Bowman, *supra* note 17, at 180-81; Higginbotham, *supra* note 98, at 94-98. *See also* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). This argument, however, is usually discussed only as an additional reason to deny protection to Native American religious practices. Bowman, *supra* note 17, at 181.

139. Bowman, *supra* note 17, at 182-84; Higginbotham, *supra* note 98, at 102.

140. Blair, *supra* note 9, at 139; Bowman, *supra* note 17, at 174-80; Higginbotham, *supra* note 98, at 98.

141. 374 U.S. 398 (1963).

Published by University of Missouri School of Law Scholarship Repository, 1990

religious practices against the state's interests in regulating these practices.[142] To prevail, the state must demonstrate[143] that the regulation is necessitated by a compelling state interest and that there are no less restrictive alternatives available.[144] The *Sherbert* balancing test has been applied to Native American religious practices.[145] In *People v. Woody*,[146] a case often cited by proponents of the view that Native American religious objects and skeletal remains should be returned based on the constitutional right of free exercise of religious beliefs, the California Supreme Court addressed the use of peyote in the religious ceremonies of the Native American Church.[147] In so doing, the court weighed the state's interest in prohibiting the use of hallucinogenic drugs against the importance of the use of peyote in the practices of the Native American Church.[148] The court ruled in favor of the Native Americans, stating "[a]lthough peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are directed to it much as prayers are devoted to the Holy Ghost."[149]

In discussing this case, one commentator has remarked:

---

142. *Id.* at 406-09.

143. As noted by one commentator:

> Once a plaintiff demonstrates that a statute imposes a burden on his religious practice, this showing brings him within the purview of the first amendment, 'and entitles his religious freedom to a "preferred position" on the scales of the balance. This "preferred position" rebuts the normal presumption in favor of the constitutionality of statutes. Moreover, it erects a contrary presumption in its place—a presumption favoring religious freedom.'

Blair, *supra* note 9, at 140 (quoting Breslin, *Recent Developments: Statute Prohibiting Use of Peyote Unconstitutional as Applied to Religious Users*, 17 STAN. L. REV. 494, 498 (1965) (footnotes omitted)).

144. *Sherbert*, 374 U.S. at 406-09. *See also* Thomas v. Review Bd. of the Indian Employment Sec. Div., 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972).

145. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 739-45 (D.C. Cir. 1983), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172, 176-79 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1163-65 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Crow v. Gullet, 541 F. Supp. 785, 787-88, 794 (D. S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, 464 U.S. 977 (1983); Hopi Indian Tribe v. Block, 8 *Indian L. Rep.* (Am. Indian Law Training Program) 3073, 3075 (D.D.C. 1981).

146. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (en banc).

147. *Id.* at 717, 394 P.2d at 14-15, 40 Cal. Rptr. at 70-71.

148. *Id.* at 719-21, 394 P.2d at 816-17, 40 Cal. Rptr. at 72-73.

149. *Id.* at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.

> If museums were forced to relinquish a few holdings, the effect on the community would be considerably less grave than the potential effects of the *Woody* decision. No possibility of flagrant disregard of drug laws, or a drug overdose epidemic, would exist. Therefore, it seems the state's interests in protecting its citizens are significantly less compelling in the Indian artifacts situation than in a situation such as that in the *Woody* case.[150]

The obvious problem with this argument is, of course, that most American museums and collections are nongovernmental.[151] An action for violation of the first amendment in this context would only lie with the existence of state action.[152]

This same commentator has gone on to argue that the American Indian Religious Freedom Act[153] might be interpreted to require the return of religious objects.[154] Specifically, this Act declares a federal policy to preserve and protect "for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions . . . including but not limited to access to sites, [and] use and possession of sacred objects."[155] Even if this statute does not compel the return of religious objects or human remains, it has been suggested that the federal government can withhold funding and remove tax exemptions from museums that refuse to return sacred objects to which Native Americans have valid claims.[156]

The United States Supreme Court has recently addressed most aspects of the free exercise argument discussed above. In *Lyng v. Northwest Indian Cemetery Protective Association*,[157] Native Americans sought to enjoin the United States Forest Service from building roads through and harvesting lumber in the Chimney Rock section of the Six Rivers National Park in

150. Blair, *supra* note 9, at 140.

151. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1893 (1985).

152. *See, e.g.*, 42 U.S.C. § 1983 (1988).

153. 42 U.S.C. § 1996 (1988).

154. *See* Blair, *supra* note 9, at 146.

155. 42 U.S.C. § 1996 (1988). It is worth noting that the legislative history to this statute focuses primarily on (1) denial of access to Native Americans of certain physical locations, (2) prohibition of use of certain restricted substances, and (3) interference in religious events. H.R. REP. NO. 1308, 99th Cong., 2d Sess. 2-3, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1263-64. This statute basically requires federal agencies to consider, but not necessarily defer to, Native American religious values. Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983).

156. *See* Blair, *supra* note 9, at 146.

157. 485 U.S. 439 (1988).

California.[158] The opposition was generated by the fact that this area had historically been used for religious purposes by Yurok, Karok, and Tolowa Indians.[159] Among other reasons, the district court granted the injunction on the ground that the Forest Service's decisions violated the free exercise clause.[160] On appeal, the Ninth Circuit affirmed the district court's constitutional ruling on the ground that the government had failed to demonstrate a compelling interest in the completion of the road, and that it could have abandoned the road without thereby violating the establishment clause.[161] In considering this case, the Supreme Court acknowledged that the Forest Service's plans would significantly interfere with the Native Americans' ability to pursue spiritual fulfillment according to their own religious beliefs.[162]

The Court, however, found that there was no violation of constitutional rights because "affected individuals [are not] coerced by the Government's action into violating their religious beliefs," nor does the Government's "action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[163] The Court went on

158. *Id.* at 442.

159. *Id.*

160. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591, 594-97 (N.D. Cal. 1983), *aff'd*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

161. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 691-93 (9th Cir. 1986), *rev'd sub nom*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

162. *Lyng*, 485 U.S. at 451. Indeed, the Court stated:

> The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices. Those practices are intimately and inextricably bound up with the unique features of the Chimney Rock area, which is known to the Indians as the "high country." Individual practitioners use this area for personal development; some of their activities are believed to be critically important in advancing the welfare of the tribe, and indeed, of mankind itself. The Indians use this area, as they have used it for a very long time, to conduct a wide variety of specific rituals that aim to accomplish their religious goals. According to their beliefs, the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible. . . . [W]e can assume that the threat to the efficacy of at least some religious practices is extremely grave.

Id.

163. *Id.* at 449. In support of its decision, the Court cites Bowen v. Roy, 476 U.S. 693 (1986), in which two applicants for social security benefits contended that

Boyd: Boyd: Religious and Cultural Objects

to state that "[t]he crucial word in the constitutional text is 'prohibit:' 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[164] It stressed that the right of free exercise of religion is limited by the needs of the government to serve its citizens as a group.[165]

The Court further found that the American Indian Religious Freedom Act did not apply in this case and, in fact, "[n]o where in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."[166] Indeed, the Court quotes from the legislative history of the Act which indicates that the law was simply intended to ensure that traditional Native American religious practices would always be considered in Congressional decision-making.[167]

More recently, the Supreme Court decided *Employment Division, Department of Human Resources v. Smith*,[168] which arose when Native Americans were denied unemployment benefits following their termination for peyote use during religious ceremonies. While

> [i]t would be true, we think (though no case of ours has involved the point), that a state would be 'prohibiting the free exercise [of religion]' if it sought

---

their religious beliefs prevented them from acceding to the use of a Social Security number for their child because the use of a numerical identifier would "rob the spirit" and prevent her from attaining greater spiritual power. *Id.* at 696. The Court ruled that while the "Free Exercise Clause affords an individual protection from certain forms of governmental compulsion, . . . [it does] not demand that the Government join in their chosen practices" by refraining from the institution of certain internal procedures. *Id.* at 700.

164. *Lyng*, 485 U.S. at 450 (quoting *Sherbert*, 374 U.S. at 412).

165. *Id.* at 453 ("Whatever rights the Indians may have to the use of the area . . . [does] not divest the Government of its right to use what is, after all, its land.").

166. *Id.* at 455.

167. *Id.*

> The sponsor of the bill that became [the American Indian Religious Freedom Act], Representative Udall, called it "a sense of Congress joint resolution," aimed at ensuring that "the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration." Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it."

Id. (quoting 124 CONG. REC. 21,444-21,445 (1978)).

168. 110 S. Ct. 1595 (1990).

> to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that was on display,[169]

the Supreme Court found that the state may prohibit peyote use so long as any interference with religious practices are incidental and secondary to the otherwise legitimate purpose of the statute.[170] The Court also refrained from performing the "centrality" analysis that would permit invocation of a compelling interest standard.[171]

The Supreme Court's decisions in *Lyng* and *Smith* demonstrate that an argument for the return of religious objects and human remains that is based on the constitutional or an existing federal statutory right to free exercise of religious beliefs has little or no legal foundation.

V. LOST, STOLEN, AND ABANDONED PROPERTY

A museum or private collector may be able to prove a direct chain of title from the original owner of an object associated with a particular Native American group. This is an ideal situation for persons or institutions that desire to retain possession of such objects. Where the object has been excavated, principles of personal property may be applied to determine ownership. In a substanital number of cases, however, the facts relating to the acquisition of an object are not altogether clear. Furthermore, questions such as whether the original transferring party had the authority or right to transfer title to the object in the first place can be very complicated because the answer may depend entirely on tribal custom and law relating to personal property.[172] A significant amount of personal property, particularly sacred objects, may have been owned or possessed by the tribe as a whole and

---

169. *Id.* at 1599.

170. *Id.* at 1599-1602.

171. *Id.* at 1604.

> It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims.

Id.

172. *See generally* Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 IOWA L. REV. 304 (1934); Knoepfler, *Legal Status of the American Indian and His Property*, 7 IOWA L. REV. 232 (1922).

consequently cannot be transferred in any other manner but collectively.[173] Common law principles of adverse possession, laches, and estoppel may nonetheless apply to determine the right of ownership of these objects.

1. Lost or Stolen Property: Adverse Possession. Arguably, objects that exist in the ground must be considered part of the real property and the owner of the land is the owner of the objects. Once the objects are excavated, however, they must be deemed personal property just as objects that have never been buried. Query whether this distinction is crucial since the doctrine of adverse possession applies to personal, as well as real, property.[174] Of course, the same elements for adverse possession are required where personal property is involved as when the doctrine is applied to real property: "when a party has had hostile, actual, open and notorious, exclusive and continuous possession for the limitations period the true owner's title is extinguished, and title vests in the adverse party."[175] The limitations period does not start to run or, if it has been running, shall not continue to run, if all of these elements are not satisfied.[176] The defendant asserting title by adverse possession has the burden of proving the existence of each element by "clear and convincing evidence."[177] In cases of stolen property, where the possessor is either the thief or has knowingly taken possession from the thief, "secret rather than open holding will be presumed."[178]

The doctrine of adverse possession has had particular application to cases involving lost or stolen art.[179] Generally, individuals who come into possession of lost or stolen art can readily satisfy the elements of actual,

173. *See* F. COHEN, *supra* note 1, at 508-28. *See also* Charrier v. Bell, 496 So. 2d 601, 604 (La. Ct. App. 1986).

174. *See generally* R. BROWN, THE LAW OF PERSONAL PROPERTY 33-39 (2d ed. 1955); F. CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY 393-429 (1914). Virtually all states apply the doctrine of adverse possession to chattel.

175. Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1142 (1980) (footnotes omitted).

176. *Id.* at 1142-43.

177. *Id.* at 1142 & n.80.

178. *See* R. Brown, *supra* note 174, at 38 & n.21. "On the other hand, in the case of the *bona fide* purchaser the presumption would probably be just the reverse. Whether the possession is open or covert will ordinarily be a question of fact for the determination of the jury." *Id.* (footnotes omitted).

179. For example, the laws of some states impose a requirement that there be a formal "demand and refusal" before a claimant's cause of action will accrue. *See, e.g.*, DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987); Menzel v. List, 49 Misc. 2d 300, 267 N.Y.S.2d 804 (Sup. Ct. 1966), *modified*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967); Atlas Assurance Co. v. Gibbs, 121 Conn. 188, 183 A. 690 (Conn. 1936).

hostile, exclusive, and continuous possession.[180] The element of open and notorious possession may be more difficult to prove.[181] In this way, Native American cultural and religious objects existing in public and private collections and lost or stolen art are alike: a key issue in both cases is whether the original owners have had reasonable notice of the adverse possession. Those pieces that are on continuous display most certainly satisfy the requirements of open and notorious.[182] Objects that have been in storage or that have only been used for research purposes, however, may not meet this requirement.[183]

As previously stated, the statute of limitations will only run if and when all of the elements of adverse possession exist. In the much celebrated case of *O'Keeffe v. Snyder*,[184] however, a "discovery rule" was adopted which effectively tolls the statute of limitations even where all of the elements of adverse possession exist. The *O'Keeffe* case stems from attempts by artist Georgia O'Keefe to recover three small oil paintings that had been stolen from her in 1946.[185] Soon after the theft took place, these paintings came into the possession of a private collector, Dr. Ulrich A. Frank, who subsequently gave them to his son.[186] In 1973, the younger Ulrich consigned the paintings to commercial galleries for sale and, in 1974, art dealer Barry Snyder purchased the O'Keeffe paintings.[187] In the meantime, O'Keeffe had listed the paintings with the Art Dealers Association in 1972 as having been stolen.[188]

180. Comment, *supra* note 175, at 1143.

181. *Id.*

182. Ward, *The Georgia Grind: Can the Common Law Accommodate the Problems of Title in the Art World, Observations on a Recent Case*, 8 J. C. & U.L. 533, 548 (1982).

183. An interesting situation exists where the party in possession of an object can satisfy the open and notorious requirement if the object has been used in the same manner "as an average owner of similar property would use it." Comment, *supra* note 175, at 1143-44. This argument stems from the development of the open and notorious element in real property law. *Id.* at 1143. Today, the outcome of this type of analysis would depend on whether the average owner is a Native American or a museum. Ironically, it may very well be that the majority of at least some categories of Native American cultural and religious objects are now in the hands of persons other than Native Americans and therefore the "average use" is not necessarily the traditional use of the object in question.

184. 83 N.J. 478, 416 A.2d 862 (1980).

185. O'Keeffe v. Snyder, 170 N.J. Super. 75, 78, 405 A.2d 840, 841 (Super. Ct. App. Div. 1979), *rev'd*, 83 N.J. 478, 416 A.2d 862 (1980).

186. *Id.* at 80, 405 A.2d at 842.

187. *Id.*

188. *Id.* at 79-80, 405 A.2d at 842.

Boyd: Boyd: Religious and Cultural Objects

She eventually traced the art to Snyder in 1976.[189] Snyder refused to return the paintings and O'Keeffe brought a replevin action in New Jersey state court.[190] Snyder responded by asserting a statute of limitations defense that was sustained by the trial court.[191] On appeal, the Appellate Division of the Superior Court found that the trial court had erred in applying the statute of limitations without first finding that all of the elements of adverse possession had been established.[192]

Ultimately, certification was granted by the Supreme Court of New Jersey which subsequently held "O'Keeffe's cause of action accrued when she first knew or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings."[193] The court explained its ruling as follows:

> We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession. The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession but whether the owner has acted with due diligence in pursuing his or her personal property.
>
> For example, under the discovery rule, if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run. The rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession.[194]

---

189. *Id.* at 80-81, 405 A.2d at 842.

190. *Id.* at 81, 405 A.2d at 842.

191. *Id.* at 81, 405 A.2d at 842-43. Although the trial court determined that the "defendant has simply failed to establish several of the basic requirements of adverse possession," it nonetheless held that O'Keeffe's cause of action accrued in 1946 and was therefore barred by the six year limitations period. *Id.* at 81, 405 A.2d at 843. The court further refused to apply a discovery rule because O'Keeffe "simply did nothing" to secure the return of her art. *Id.*

192. *Id.* at 89, 405 A.2d at 847. "Defendant's failure of proof, according to the trial judge, centered on the requirements of visibility and notoriety of the possession." *Id.* at 84, 405 A.2d at 844. The appellate court agreed that Snyder had failed to establish the open and notorious element necessary for adverse possession:

> Display in one's home provides to the true owner no more notice of the possessor's claim or warning of the need for timely legal action than would its retention in a closet. Neither mode of possession is such as to afford the true owner with a realistic opportunity to regain possession by legal action.

Id.

193. *O'Keeffe*, 83 N.J. at 493, 416 A.2d at 870.

194. *Id.* at 497-98, 416 A.2d at 872.

Published by University of Missouri School of Law Scholarship Repository, 1990

Thus, the court simultaneously adopted a discovery rule while abolishing the doctrine of adverse possession as it applies to chattels.[195]

Although the discovery rule has enjoyed a friendly reception by a number of commentators,[196] this standard has yet to receive widespread acceptance by courts.[197] A notable exception is *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*,[198] in which the United States District Court for the Southern District of Indiana interpreted Indiana law to apply a discovery rule similar to the rule pronounced in *O'Keeffe*.[199]

This suit was brought by church and government officials of Cyprus who sought the return of Byzantine mosaics that had been unlawfully removed from Cyprus during the Turkish military occupation.[200] The court noted that the "[d]etermination of due diligence is fact-sensitive and must be made on a case-by-case basis."[201] In *Autocephalous*, Cyprus officials provided exhaustive notice to international art organizations and worked extensively through diplomatic channels once they became aware the mosaics had been removed.[202] Upon receiving information that the mosaics had been acquired by an art dealer and were in Indianapolis, the officials took immediate steps to recover the art.[203] The court determined that these efforts constituted due diligence sufficient to toll the statute of limitations.[204] The court went on to find that the art dealer who purchased the mosaics should have been alerted by the suspicious circumstances surrounding the transaction and should have made additional inquiry into the background of the art, and therefore determined that the dealer did not qualify as a bona fide or good faith purchaser.[205]

---

195. *Id.* at 499, 416 A.2d at 873.

196. *See, e.g.*, Franzese, *"Georgia on My Mind"-Reflections on O'Keeffe v. Snyder*, 19 SETON HALL L. REV. 1, 22 (1989); Comment, *supra* note 175, at 1149-57; Ward, *supra* note 182, at 553-54; *but see* Wertheimer, *Implications of the O'Keeffe Case*, 6 ART & L. 44, 47-48 (1981). *See also* Note, *Title Disputes in the Art Market: An Emerging Duty of Care for Art Merchants*, 51 GEO. WASH. L. REV. 443 (1983); Survey, *Personal Property—Adverse Possession—In Action for Replevin of a Chattel, "Discovery Rule," Not Doctrine of Adverse Possession, Determines When Cause of Action Accrued for Purpose of Statute of Limitations*, 11 SETON HALL L. REV. 347 (1980).

197. *See* Franzese, *supra* note 196, at 14-15 & nn. 111-13.

198. 717 F. Supp. 1374 (S.D. Ind. 1989).

199. *Id.* at 1386, 1388-91.

200. *Id.* at 1376-85.

201. *Id.* at 1389.

202. *Id.* at 1379-80.

203. *Id.* at 1383-85.

204. *Id.* at 1389-91.

205. *Id.* at 1400-04 (applying Swiss law).

Boyd: Boyd: Religious and Cultural Objects

If other states were to adopt the discovery rule, particularly if it were accompanied by the separate decision to abolish the doctrine of adverse possession as it applies to chattels as was done in *O'Keeffe*, this would create obvious problems in situations where museum ownership of Native American religious and cultural objects might otherwise be founded on a theory of adverse possession. While even O'Keeffe herself has conceded that "public display should be sufficient to alert the true owner and start the statute running,"[206] it is less clear as to what might constitute due diligence with respect to objects that have not been on display. Furthermore, it may be relevant to consider whether the Native American individual or group should be held to the same level of due diligence as artists and art dealers.

Even where museums are able to satisfy all of the necessary elements, the doctrine of adverse possession may have no application to determine ownership of objects excavated from Indian lands. Under certain circumstances, state statutes of limitations do not apply to Native Americans:

> Most Indian lands are held in trust by the United States for tribes or individual Indians. The United States holds "naked legal title" and the Indian landowners hold beneficial title. Indians have compensable property rights to mineral and timber resources on their trust lands, absent contrary indications in statute or treaty. In the same manner, historic properties, particularly archaeological resources, are attached to the land and belong to the landowner. As a result, Indian landowners hold beneficial title to, and "own," archaeological resources on their lands.[207]

The United States is obviously not barred in protecting its property interests by state limitation periods. Because they are generally viewed as wards of the federal government, this same nonapplication of state statutes of limitations has generally been extended to Native Americans.[208] Thus, it may be argued that the doctrines of estoppel, laches, and adverse possession may never be applied to objects associated with Native American cultures alleged to have been stolen or improperly transferred.

This argument is founded on the fundamental concept of Native American law that these doctrines can never be used to obtain title to restricted Indian land.[209] As stated previously, there is certain land that is held in trust by the

206. *O'Keeffe*, 83 N.J. at 496, 416 A.2d at 871. *See also* O'Keeffe v. Snyder, 170 N.J. Super. 75, 87, 405 A.2d 840, 845-46 (1979).

207. Comment, *supra* note 54, at 433 (footnotes omitted).

208. *See* U.S. Dep't of the Interior, Federal Indian Law 641 & n.7 (1958). *See also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 240 n.13 (1985) ("Under 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.").

209. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985);

Published by University of Missouri School of Law Scholarship Repository, 1990

United States for the benefit of certain Native American tribes, families, or individuals.[210] Alienation of this land is restricted in that the Native American beneficiaries may not transfer the property without the permission of the federal authority. Thus, the doctrines of laches, estoppel, and adverse possession may not apply since: (1) these doctrines simply do not apply to the sovereign federal authority under any circumstances;[211] and (2) these doctrines are precluded by the federal statute which prohibits transfer of these lands without federal consent.[212]

While there are numerous cases which hold that the doctrine of adverse possession does not apply to restricted Indian land, there is no question that this doctrine *does* apply to real property that Native Americans hold in fee.[213] In drawing an analogy, objects previously owned by Native Americans are similar to land that is owned by Native Americans in fee and that is completely alienable. While it may have a responsibility and an interest to protect Native American property rights, the federal government cannot be said to have an independent, or even a joint interest in these religious or cultural objects except in cases where it has statutorily acquired the property. Unlike the property that is subject to the Indian Nonintercourse

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); Ewert v. Bluejacket, 259 U.S. 129 (1922); Heckman v. United States, 224 U.S. 413 (1912); Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980); United States v. Schwarz, 460 F.2d 1365 (7th Cir. 1972), *cert. denied*, 452 U.S. 968 (1981); United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971); Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297 (N.D.N.Y. 1983); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976); Narragansett Tribe of Indians v. Southern R. I. Land Dev. Corp., 418 F. Supp. 798 (D. R.I. 1976); United States v. Russell, 261 F. Supp. 196 (E.D. Okla. 1966).

210. *See supra* text accompanying notes 36-37.

211. *See* United States v. Minnesota, 270 U.S. 181 (1926); United States v. Russell, 261 F. Supp. 196 (E.D. Okla. 1966).

212. *See, e.g.*, 25 U.S.C. § 177 (1982).

213. *See, e.g.*, Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671 (1979); Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 377 (1977); Larkin v. Paugh, 276 U.S. 431, 439 (1928); Dillon v. Antler Land Co., 507 F.2d 940, 944 (9th Cir. 1974); Fife v. Barnard, 186 F.2d 655, 661-62 (10th Cir. 1951); Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F. Supp. 611, 623 (D. Kan. 1981); United States v. Wilson, 523 F. Supp. 874, 897-98 (N.D. Iowa 1981); United States v. Wilcox, 258 F. Supp. 944, 947-48 (N.D. Iowa 1966). Thus, describing Native Americans as "wards" of the federal government is actually a misnomer because they are in fact responsible for their transactions when they are legally able to enter into those transactions. Native Americans are wards only in that they do not enjoy ownership of certain property in fee.

Act or the General Allotment Act,[214] there is no federal statute that expressly prohibits the transfer of these objects without consent from the United States.[215] Thus, there is no restriction on the alienation of this type of property by Native Americans. Because Native Americans would not be considered wards of the Government for these purposes, the common law and state law codification of the doctrine of adverse possession would apply to Native American religious and cultural objects.[216]

2. *Abandoned Property.* American property law generally vests ownership of all objects found on private property in the property owner.[217] Abandoned property can generally be defined as property to which the owner has voluntarily and intentionally relinquished all right, title, claim, and possession without vesting it in any other person.[218] Abandoned property

214. *See supra* text accompanying notes 36-37.

215. Religious and cultural objects are distinguishable from personal property that may be subject to federal restraint such as tribal funds and securities. F. COHEN, *supra* note 1, at 547-62.

216. Even if the doctrine of adverse possession did not apply to Native Americans on a general basis, there might be specific circumstances where the doctrine of adverse possession would nonetheless apply. For instance, any action currently brought on behalf of a recognized "tribe, band or group of American Indians" against the United States must be brought within six years and ninety days after the right of action accrues. 28 U.S.C. § 2415(b) (Supp. 1986). Because all "artifacts" that are excavated under the Archaeological Resources Protection Act are considered the property of the United States, *see supra* text accompanying notes 60-70, a claim for return based on conversion of personal property must be made within the above-stated limitations period. Furthermore, some institutions such as the Smithsonian Institution may have a sufficient link with the federal government to enjoy the protection of this federal statute of limitations. Finally, it must be noted that as a general rule, when no federal statutes of limitations exists for a federal claim, the courts borrow the appropriate state limitations period. Such an action, however, must not conflict with congressional policy. Comment, *South Carolina v. Catawba Indian Tribe: Terminating Federal Protection With "Plain" Statements*, 72 IOWA L. REV. 1117, 1123 (1987). Although there is a general congressional policy to preserve tribal claims, exceptions are made when federal legislation explicitly provides otherwise. *See* Wilson & Zingg, *supra* note 9, at 439. It could be argued that the federal preservation statutes discussed previously constitute an expressly stated congressional policy that would warrant such an exception to this general principle. *See supra* text accompanying notes 39-88.

217. *See* Blair, *supra* note 9, at 131; Echo-Hawk, *supra* note 2, at 445; Zingg & Wilson, *supra* note 9, at 421. Such objects could include skeletal remains, funerary goods, and most other cultural objects located within private property. *See* Echo-Hawk, *supra* note 2, at 445.

218. It will suffice if the abandoning party is not concerned about who gains possession of the property. Katsaris v. United States, 684 F.2d 758, 762 (11th Cir. 1982).

belongs to the finder. Abandoned property is thus distinguishable from lost property in that with lost property the finder is a gratuitous bailor who has title against all others, including the owner of the land upon which the property is found, except the true owner.[219] On the other hand, the owner of the land upon which mislaid property is found has the right of possession superior to all others but the true owner.[220] In both cases, the owner of either the lost or mislaid property retains constructive possession as well as legal title.[221] Once property has been abandoned, however, the owner has completely divested himself of title and cannot reacquire possession. Because the law favors title, the burden is on the finder to prove that the property has been abandoned.[222]

In *Charrier v. Bell*,[223] a self-styled "amateur archeologist" instituted an action in Louisiana state court to quiet title of certain Native American objects—primarily funerary objects—that he had excavated from the site of an ancient Tunica Indian village arguing that the objects had been abandoned.[224] The trial court found that under state law burial objects were not encompassed in the legal concept of abandonment and further determined that plaintiff was not entitled to relief under a theory of unjust enrichment.[225] On review, the court of appeals affirmed the lower court's determination. At the outset, the court held "[d]espite the fact that the Tunicas have not produced a perfect 'chain of title' back to those buried at Trudeau Plantation, the tribe is an accumulation of the descendants of former Tunica Indians and has adequately satisfied the proof of descent."[226] The court then went on to find that the objects had not been abandoned: "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."[227] The court further denied plaintiff's theory for recovery based on unjust enrichment, noting that rather than creating enrichment the excavation of the objects caused substantial upset of the Native Americans' ancestral burial grounds.[228]

219. R. BROWN, *supra* note 174, at 25-26.
220. *Id.* at 26.
221. *Id.* at 24.
222. *Id.* at 8-9.
223. 496 So.2d 601 (La. Ct. App. 1986).
224. *Id.* at 603.
225. *Id.*
226. *Id.* at 604.
227. *Id.* at 605.
228. *Id.* at 606.

In evaluating the precedential value of *Charrier*, it must be recognized that the court was interpreting Louisiana law which is derived from French, rather than English, traditions. Furthermore, there was no discussion of adverse possession.[229] Finally, the court's analysis of abandoned property primarily focused on the funerary objects. Obviously, non-funerary objects are more likely to fit the qualifications for abandoned property. As the court stated in *Charrier*, "[t]he intent in interring objects with the deceased is that they will remain there perpetually, and not that they are available for someone to recover and possess as owner."[230] Abandonment is nonetheless a difficult theory upon which to establish the right of possession of human remains and funerary objects removed from a burial site. It is difficult to argue that burial indicates an intent to abandon. At the same time, there have been instances where state courts have found that burial sites are not protected under the law by virtue of abandonment.[231] In any event, the doctrine of abandonment would be an appropriate foundation upon which to assert title over religious and cultural objects other than funerary objects. It would certainly be more reasonable to argue that the circumstances surrounding the discovery of such objects are more susceptible to indicating the intent of the owner to abandon the property.

VI. THE ARGUMENT FROM CULTURAL NATIONALISM

It might be argued that a recognized Native American tribe is virtually a sovereign nation and therefore should be treated as such when it requests the return of cultural or religious objects associated with its culture. Native American tribes are not, however, sovereign nations in the broad sense of that term. They are instead "domestic dependent nations."[232] As such, they are subject to federal[233] and some state law.[234] Thus, there is a significant distinction between the possession of Native American objects and the

229. *See id.* at 604 n.3.

230. *Id.* at 605.

231. *See, e.g.*, Wana the Bear v. Community Constr., Inc., 128 Cal. App. 3d 536, 541, 180 Cal. Rptr. 423, 426 (1982). Following *Wana*, it was necessary for the California state legislature to enact legislation for the protection of the Native American burial site in question. *See* text accompanying notes 108-13.

232. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831). *See generally* Note, *The American Indian—Tribal Sovereignty and Civil Rights*, 51 IOWA L. REV. 654 (1966).

233. *See generally* F. COHEN, *supra* note 1, at 207-28.

234. *See generally id.* at 259-79. In essence, Native American tribes or nations are subject to the laws of a state to the extent that they have relinquished certain rights through treaty. *Id.*

possession of cultural objects associated with the culture of a foreign nation.[235] The federal government has the authority and, as exemplified by the federal legislation discussed in Part IIIA, federal law has established a clear policy to preserve archaeological resources that makes up America's past.[236] Because the United States is a multicultural nation, the United States' collective past includes Native American cultures. An issue arises, however, regarding whether Native Americans have an exclusive right to determine whether and how objects associated with their cultures should be treated and, indeed, whether those objects should be preserved.

Most broadly stated, the question is: do the people to whose culture the objects are most directly linked or associated have a superior right to possession and ownership of those objects? Those who would respond affirmatively to this question are said to represent "the argument from cultural nationalism."[237] This argument is "more of an assertion than a reason" for the return of cultural treasures:

> It is not self-evident that something made in a place belongs there, or that something produced by artists of an earlier time ought to remain in or be returned to the territory occupied by their cultural descendants, or that the present government of a nation should have the power over artifacts historically associated with its people or territory.[238]

The argument for cultural nationalism is stronger where museums have misrepresented the origin of the objects or have a policy which results in unequal access.[239] Such museums would fail in their mission to perform

235. There are a number of professional ethical standards, federal laws, treaties, and international compacts that protect cultural objects from international theft and ensure the return of cultural objects to the proper country. *See* Malaro, *supra* note 23, at 2-6.

236. *See supra* text accompanying notes 47-97.

237. Merryman, *supra* note 151, at 1911-12.

238. *Id.* at 1912 (footnote omitted).

239. *Id.* at 1913. Professor Merryman continues:

> In its truest sense, cultural nationalism is based on the relation between cultural property and cultural definition. For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. They tell who they are and where they come from. In helping to preserve the identity of specific cultures, they help the world preserve texture and diversity. Works of art civilize and enrich life. They generate art (it is a truism among art historians that art comes from art) and nourishes artists. Cultural property stimulates learning and scholarship. A people deprived of its artifacts is

research and to accurately educate the public about the different cultures of the world. Most museums, however, strive for authenticity. Their purpose in the preservation, maintenance, and exhibition of the objects is to promote appreciation, admiration and respect for the various cultures and peoples represented in their collections. In contrast, the private collector has no mission or professional responsibility to educate the public and raise the level of respect and understanding of other cultures. Furthermore, a public museum generally achieves its mission by making the objects accessible to the members of the culture or nation from whom the objects originated. Cultural deprivation generally does not occur when the object resides in the collections of a responsible public museum.[240] In contrast, the private collector makes the object completely inaccessible.

The economic argument for cultural nationalism—that certain objects "would command an enormous price if offered for sale, and their presence in a public collection nourishes the tourist industry"—generally detracts from the overall moral spirit of this argument by relating fundamentally to the trappings of ownership rights under property law.[241] The political argument offered in support of this position is, of course, nationalism. This argument is also unpersuasive:

> No candid observer can deny its power in world affairs. But if one sees it as at best a dubious good, with large elements of superstition and prejudice, with an unsavory record as the religion of the state, and as a source of international economic, social, political, and armed conflict, then the nationalist argument becomes an uncomfortable one to sustain.[242]

While perhaps not an independent sovereign under law, Native American tribes may argue that they are independent nations in a cultural sense and assert the argument of cultural nationalism in support of their claims for the return of Native American religious and cultural objects and human remains. If there is an instinctive appeal to this argument generally,[243] that appeal is intensified in light of the unfair treatment that Native Americans have received

---

culturally impoverished.

Id. at 1912-13.

240. *Id.* Professor Merryman admits that cultural nationalism has a certain amount of instinctive appeal. In it most radical sense, anything short of actual possession amounts to cultural deprivation. In acknowledging the "mystical element" of cultural nationalism, Merryman states that "[w]e can respect such beliefs, and recognize their self-fulfilling tendencies, without accepting them as a basis for the international allocation of cultural property." *Id.*

241. *Id.* at 1914.

242. *Id.* at 1915.

243. *See supra* note 240.

by this nation and by the questionable manner in which many Native American objects and skeletal remains were collected.[244] This argument is particularly compelling in cases involving objects "actively employed for the religious or ceremonial or communal purposes for which it was made."[245] The removal of these objects from centralized locations where research can be maximized, however, would severely decrease the overall accessibility of these important cultural objects. This would be highly unacceptable for many interested parties because Native American cultures, despite the assimilationist policies of the past, have become very important components of America's heritage. Rather than being paternalistic, the argument against cultural nationalism is as self-serving as the argument for cultural nationalism. Therefore, the solution rests on the fair balancing of the competing scientific and cultural interests of the parties who seek possession of these objects.

VII. NATIVE AMERICAN MUSEUM CLAIMS COMMISSION

At the present time, there are few reported cases that relate to efforts made by Native Americans to secure the return of human remains and cultural and religious objects. Thus, it is difficult to determine where jurisdiction would reside in such actions. There are, however, a few circumstances in which jurisdiction is a settled matter. A quiet title action involving objects recovered from private property would properly be brought in state court.[246] On the other hand, where a tribe's claim of ownership of an object possessed by someone other than a Native American is based on tribal law or custom, federal courts may very well have jurisdiction to hear the claim.[247]

---

244. We must rectify this awful record in the future by pledging, among other things, to provide Native Americans with assistance in the preservation of their heritage. However, it would be inconsistent to argue that this obligation must include the indiscriminate return of Native American objects and human remains. Rather than preservation, this would very likely lead to the destruction of these objects either because the recipient Native American groups do not have the proper facilities and resources necessary to preserve the objects or because the objects will be subjected to ceremonial use which would result in deterioration.

245. Merryman, *The Retention of Cultural Property*, 21 U.C. DAVIS L. REV. 477, 497 (1988).

246. Charrier v. Bell, 496 So. 2d 601 (La. Ct. App. 1986).

247. Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1475 (9th Cir. 1989). It must nonetheless be noted, however, that there is exclusive tribal jurisdiction over actions involving contracts entered into on a reservation between a plaintiff who is not a Native American and an Native American defendant. Williams v. Lee, 358 U.S. 217 (1959).

Recently, legislation has been proposed in the Senate for the creation of a Native American Museum Claims Commission.[248] Although this proposed legislation was not enacted, it is nonetheless a useful example of a method to resolve these issues. This five member body would have had authority to resolve disputes between public museums and Native Americans concerning the ownership of three categories of objects: (1) human remains; (2) ceremonial objects; and (3) funerary objects.[249] The Commission would conduct investigations, hold hearings, and ultimately have the authority to issue orders of repatriation.[250] Review of Commission rulings could be sought in federal district court.[251] The Senate Select Committee on Indian Affairs has stated that this proposed legislation

> is based upon an assumption that there is a compelling need for federal legislation to establish an efficient and fair process to consider Native American claims to human skeletal remains, grave goods and ceremonial religious objects held in museum collections. The purpose of the legislation is to facilitate the repatriation of such items when the facts substantiate that the items were acquired without the consent of affected Native Americans.[252]

In particular, "[t]he Committee believes that the Federal government has an obligation to rectify this past injustice to Native Americans by creating the opportunity for [human] remains to be returned to the tribes and descendants for proper and fitting reburial."[253]

There were a number of problems with this proposed legislation. A significant concern relates to the constitutional issue of whether the legislation constitutes a taking of property that would require the payment of just

248. S. 187, 100th Cong., 1st Sess. (1988).

249. SENATE SELECT COMM. ON INDIAN AFFAIRS, ESTABLISHING THE NATIVE AMERICAN MUSEUM CLAIMS COMMISSION, S. REP. NO. 601, 100th Cong., 2d Sess. 1 (1988) [hereinafter Senate Report on Native American Museum Claims Commission].

250. S. 187, 100th Cong., 1st Sess. §§ 10, 13, 14, 17 (1988). "The proposed Native American [Museum] Claims Commission which would be created by S. 187 is based upon the model of the former Indian Claims Commission which functioned for over 20 years to investigate and resolve land claims between tribes and non-Indians." Senate Report on Native American Museum Claims Commission, *supra* note 249, at 2.

251. S. 187, 100th Cong., 1st Sess. § 24 (1988).

252. Senate Report on American Indian Museum Claims Commission, *supra* note 249, at 2.

253. *Id.* at 4.

compensation. While the proposed legislation may guarantee a degree of due process by requiring the Commission to hold hearings "to provide both parties to a dispute the opportunity to present their views,"[254] a question exists whether Congress can enact such a deprivation of property rights without just compensation.[255] Furthermore, without regard for whether the objects are stolen or otherwise acquired improperly, this proposed legislation would radically alter traditional principles of property law by shifting the burden of proof from the party seeking the return of the personal property to the possessor of the property.[256]

Concerns relating to equal protection also exist due to the unequal treatment of museums, which are compelled to surrender religious and cultural objects and human remains, and private collectors, who are permitted to retain these objects.[257] While museums may not be a protected class entitled to a strict scrutiny analysis, it is difficult to perceive the rational relationship with a legitimate governmental purpose to justify depriving museums but not private collectors of objects associated with Native American cultures and peoples. The absence of a rational relationship is particularly apparent considering the fact that private collectors, who would be beyond the jurisdiction of the Commission, are more likely to deprive Native Americans of all accessibility to their cultural objects. Of course, it would be difficult for public museums, an unprotected class, to prevail on an equal protection argument.

There is substantial confusion, even on the part of the Committee itself, as to what law—American law, common law, or tribal law—should be applied by the Commission in adjudicating these ownership disputes between Native Americans and museums.[258] This confusion is intensified by the fact that

---

254. *Id.* at 1.

255. *See* Andrus v. Allard 444 U.S. 51, 64-68 (1979) (distinction between federal regulation that merely curtails some property uses and that which compels surrender of artifacts).

256. *See generally* R. BROWN, *supra* note 174, at 33-39; F. CHILDS, *supra* note 174, at 393-429.

257. S. 187, 100th Cong., 1st Sess. § 3(5), 9(d) (1988).

258. With respect to human remains and funerary objects, the Committee has stated its belief that

> tribes should be able to claim skeletal remains which are clearly identified as the members or ancestors of the tribe, unless the museum can clearly demonstrate that the remains were acquired with the permission of the tribe, family or individual descendent involved. The Committee does not believe that tribes should be able to claim skeletal remains when identification by tribal affiliation is unclear or when the museum can document that the graves from whence such remains were taken were disturbed with the consent of the tribe or family of the individual which had the authority,

Congress has enacted so much legislation for the primary purpose of preservation of archaeological data for scientific and cultural purposes.[259]

Finally, it must be noted that the proposed Commission was solely empowered to grant orders of repatriation. This is terribly inflexible authority considering the very legitimate competing interests of the scientific and Native American communities. This inflexibility is characteristic of the remedial nature of the proposed legislation. There are situations where these objects may be preserved and studied by archaeologists and anthropologists without depriving Native Americans of meaningful access.[260] If possible, some compromise should be attempted where disputes of this nature arise. The proposed Commission not only fails to encourage compromise between the parties, but it is actually incapable of implementing compromise on its own authority. Its decision must be all or nothing: repatriation or retention.

VIII. NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT

More recently, legislation for the repatriation of human remains, funerary objects, and objects associated with Native American cultures and peoples has been introduced in both the United States House of Representatives[261] and the United States Senate.[262] These proposed bills, which are quite similar, call for a comprehensive inventory of all objects in museum collections.

> *under common law as it pertains to sepulcher*, to authorize the disturbance of graves.
>
> . . . .
>
> Where remains and grave goods are reasonably identifiable in origin as to a present day Indian tribe or other native group, that tribe or group has the paramount right to control the disposition of the remains or grave goods *under American common law* as the nearest of kin.

Senate Report on American Indian Museum Claims Commission, *supra* note 249, at 5-7 (emphasis added). However, the Committee has also stated that

> [a]s an evidentiary matter, appropriate weight must be given to tribal oral traditions, and to traditional Native religious cultural practices or beliefs, regarding relevant ownership, burial and mortuary, and descent and distribution issues, where such body of traditions, laws, customs or practices controlled at the time the sacred object left Native hands or was interred by Native next of kin.

Id. at 7.

259. *See supra* text accompanying notes 47-57.

260. *See, e.g.*, Des Moines Register, July 13, 1989, at 2A (Harvard University returned sacred pole to Omaha Indians with condition that it be preserved and remain in local museum when not involved in ceremonial use).

261. H.R. 5237 (1990).

262. S. 1980 (1990).

There are problems associated with the proposed legislation. As a general rule, museums do not oppose conducting inventories of their collections. On the contrary, such inventories provide a greater data base and yield an enhanced knowledge regarding cultures and peoples. However, institutions lack both the monetary and human resources necessary to complete such inventories within the period of time contemplated by the proposed legislation.

While the requirements relating to the inventory are quite burdensome, the more troubling aspect of the legislation relates to the radical deviation from accepted property law. For example, section 6(c)(1) of the House legislation proposes that "the burden shall be upon the Federal agency or museum that has possession or control of such remains or objects to prove by a preponderance of the evidence that the museum has the right of possession to such remains or objects."[263] "Right of possession" is in turn defined as "possession obtained with the voluntary consent of an individual or group that had authority of alienation."[264]

This provision burdens museums that otherwise hold good legal title with an overwhelming standard of proof. It is a well-settled principle under common law and state law that possession of personal property is *prima facie* evidence of ownership.[265] "Prima facie evidence is deemed sufficient to establish a given fact if not contradicted, rebutted or explained by other evidence."[266] In other words, "[p]osssession carries a presumption of ownership."[267] "One in possession of personal property is presumed to be the owner until the contrary appears, and the burden of rebutting the presumption is upon the party claiming adversely to the one in possession."[268] The parties challenging title "must recover on the strength of his own title, not on the alleged weakness of the [party in possession's title]."[269] In other words, the party claiming adversely to the party in possession of the property bears not only the burden of rebutting the presumption that the party in possession is the owner of the property, but must further demonstrate that

263. H.R. 5237 § 6(c)(1). *See also* S. 1980 § 8(b), (c).

264. H.R. 5237 § 6(d).

265. United States v. Estep, 760 F.2d 1060, 1064 (10th Cir. 1985) (citing Northern Pacific R.R. Co. v. Lewis, 162 U.S. 366 (1896)); Velder v. Crown Exploration Co., 663 S.W.2d 205, 207 (Ark. Ct. App. 1984); Commonwealth of Massachusetts v. Gildea, 456 N.E.2d 1157, 1159-60 (Mass. Ct. App. 1983).

266. *Velder*, 663 S.W.2d at 207.

267. Hammond v. Halsey, 336 S.E.2d 495, 497 (S.C. Ct. App. 1985).

268. Hattaway v. Keefe, 381 S.E.2d 569, 572 (Ga. Ct. App. 1989). *See also* Justice v. Fabey, 541 F. Supp. 1019, 1023 (E.D. Pa. 1982); *In re* Estate of Severns, 352 N.W.2d 865, 870 (Neb. 1984); State v. Patchen, 652 S.W.2d 265, 267 (Mo. Ct. App. 1983).

269. *Hammond*, 336 S.E.2d at 497.

his or her right to possession is superior to that of the party in actual possession.[270]

In contrast to these well-established legal principles, both the House and Senate proposed legislation would shift to museums the burden to demonstrate "right of possession." This requirement effectively shifts the burden of proof relating to whether transfer was voluntary and consensual, and whether transfer was made by the party or parties who were authorized to transfer title to the object in question. The burden to make these proofs has always rested with the party challenging title. The Senate and House proposed legislation would transfer the responsibility for these proofs to the party in possession.

Inspired by the fifth amendment, which states that federal government shall not take private property "for public use, without just compensation," American courts have "protected property interest where a government action might deprive an individual of an interest, derived from common law, in peaceful possession, or freedom of use."[271] It does not matter whether "the property was being taken to meet a need of government or for the benefit of another private individual."[272] "When the government physically takes a person's property or allows someone other than the property owner to have permanent physical occupation of all or part of the definable piece of property, there is virtually a per se rule that such action constitutes a taking."[273] The House and Senate proposal to require public museums to prove "right of possession" radically alters the respective burden that is traditionally placed on parties under accepted state law for the adjudication of private property rights. Regardless of the legitimacy and legality of any given transaction, the property owner may very well be stripped of his property under the proposed legislation because he or she is unable to supply the very difficult proof of voluntary consent and proper authority for alienation. Such a prospective change in state property law constitutes a taking.[274] Consequently, this provision would obligate the federal government to provide museums with just compensation, which would involve the payment of potentially huge sums by

270. Howard v. Brown, 206 A.2d 854, 856 (Me. 1965). *See also* Langston v. Cothran, 58 S.E. 956, 959 (S.C. 1907) (incumbent upon party alleging unlawful possession to prove that he or she has the most superior right to possession).

271. 1 C. KOCH, ADMINISTRATIVE LAW AND PRACTICE, 548-49 (1985).

272. *Id.* at 549.

273. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 404 (3d ed. 1986). *See also* Andrus v. Allard, 444 U.S. 51, 64-68 (1979) (Supreme Court has implied that regulations that "compel the surrender" of objects of personal property constitute taking that requires just compensation).

274. Hughes v. Washington, 389 U.S. 290, 295-97 (1967) (Stewart, J., concurring); Rodic v. Thistledown Racing Club, Inc., 615 F.2d 736, 740 (6th Cir. 1980), *cert. denied*, 449 U.S. 996 (1980).

the federal government to musuems, for many if not all of the objects that would be repatriated under this statute.

There are a number of other significant problems arising from a standard which utilizes the "right of possession" concept. First, the quality of evidence relating to the circumstances surrounding any given transaction involving objects in a museum's collection will generally be poor. Incomplete and inaccurate records of events that occurred many years ago make it extremely difficult to determine how, when, and from whom an object was obtained. Further, acquisition by the museums may have been preceded by multiple transactions, thus heightening the difficulty of documenting the original transaction in which rights to the object were transferred. For these reasons, museums may be unable to meet the burden of demonstrating "right of possession" because of inadequate records rather than because they acted dishonestly or because they have inferior legal title.

Second, ascertaining the authority for original alienation of a given object requires extensive historical and cultural research. Such research requires the expenditure of substantial resources. Moreover, there may in fact be no resolution to an inquiry into who had the authority to alienate certain objects. Thus, the burden of establishing the authority to transfer possession and control would be another instance in which museums could fail to establish "right of possession" even though there is no proof that they obtained possession improperly or because some other party has superior right of legal title.

Third, it must be pointed out that this requirement burdens museums with making these very difficult proofs under the stringent standard in all cases, even where the adverse party has not challenged the museum's legal title, and even when established principles of property law would support a determination of the museum's legal title as superior to that of the adverse party's claim for legal title.

Finally, in the event that museums are unable to demonstrate "right of possession" in a given circumstance, right of possession and control of the object will be expeditiously transferred to the requesting party. However, there is no prerequisite to said transfer of proof by the adverse party of superior legal title to the museum or to any other party.[275] Thus, rather than

275. For example, the Senate bill permits return upon request to any party able to demonstrate by "a preponderance of the evidence" that either the human remains or funerary objects are those of an "ancestor" or of one "culturally affiliated" with the Native American group, or that the Native American group once "owned or possessed" the object or objects in question. S. 1980 § 5(c)(2). If the requesting Native American group or individual satisfies this minimal burden, then "the museum shall expeditiously return the remains or objects." *Id.* § 3(c)(3). The problem with this structure of proofs is that the Native American's burden is slight and only focuses on

insuring that these objects are entrusted to proper parties, both the House and Senate legislative proposals have the potential for transferring control and possession to parties who have no legitimate interest in the objects.[276]

For these reasons, the most recent proposed legislation actually represents a step backward. Burdening museums with the obligation to prove "right of possession" to all objects is fundamentally unfair. Such a burden constitutes a taking and will require the federal government to compensate museums for the deprivation of these objects. However, and much more significantly, the most recent proposed legislation could very well result in the total deprivation of the general public, including Native Americans, of access to these objects and the ability to appreciate, admire, and celebrate native cultures and peoples of our country.

IX. PROPOSAL FOR DISPUTE RESOLVING FORUM

As previously stated, each of the parties concerned with requests for the proposed transfer of possession of Native American skeletal remains, funerary objects, and cultural and religious objects assert very strong interests. Native Americans wish to reinter their ancestors and utilize sacred objects in ceremonies.[277] On the other hand, archaeologists, physical anthropologists, and other professionals in related fields properly point out that retention of these

---

the individual's or group's interest. Thus, this exercise fails to ascertain the relative rights of control, possession or ownership of the requesting party as against all other interested parties.

276. Both the House and Senate bills provide that "any museum that fails to comply with the provisions of this section shall be ineligible for Federal grants or other assistance during any period of noncompliance." The vast majority of public museums are extremely dependant on public, in this case federal, funding to support their programs. Ineligibility for such funding would present public museums with a Hobson's choice: comply with the extremely expensive inventory process or lose all federal funding.

There is no question that Congress may, pursuant to its spending power, condition funding of programs upon certain actions. However, the United States Supreme Court has acknowledged "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" South Dakota v. Dole, 483 U.S. 203, 211 (1987) (citing Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). *See also* Clarke v. United States, 705 F. Supp. 605, 609 (D.D.C. 1988). The proposed legislation goes well beyond "mild encouragement" to reach the level of "compulsion." As previously stated, museums shall be faced with the situation in which they must comply with the legislation even though they are without the elaborate resources necessary to properly perform the requisite comprehensive inventory.

277. *See supra* text accompanying notes 20, 37, 38, 40.

objects and remains is imperative to future study and the development of knowledge for the benefit of all mankind.[278] Without a doubt, the most important action or measure that museums and Native Americans can take toward effectively resolving this dilemma is to cultivate a dialogue with interested Native American groups and individuals through which to exchange their respective concerns and attempt to develop compromises which will accommodate each set of interests. Indeed, such a process has been or is in the process of being implemented by a growing number of institutions that have adopted policies expressly aimed at resolving these matters.[279]

While resolution of requests for the transfer of possession of human remains, funerary objects, and cultural and religious objects in an amicable fashion between the concerned Native American individual or group and the institution is ideal, such a resolution will not always be possible. Both parties, of course, have the alternative of seeking resolution by filing an action in court. Native Americans, of course, may file replevin claims and museums may pursue quiet title actions.

Judicial recourse has the advantages of finality and legal sanction or approval of the eventual resolution.[280] Litigation, however, requires great expenditures of resources which neither the museums nor the Native Americans may be financially capable of making. It would be sadly ironic if museums were compelled to finance litigation costs at the sacrifice of funding the inventory and study of these religious and cultural objects, funerary objects, and human remains. It is the absence of funding of this sort that poses a great barrier to the return of these objects and remains. It would be similarly ironic if Native American groups were forced to use their scarce resources on litigation so that, even if successful in litigation, they would be unable to afford to properly care for the objects or reinter the human remains.[281] Litigation also has a tendency to either create or aggravate hostility and antagonism between the opposing parties. This is a particularly

---

278. *See supra* text accompanying notes 20-22, 37, 39.

279. See, for example, Field Museum of Natural History, Denver Museum of Natural History, Cleveland Museum of Natural History, Florida Museum of Natural History, Bishop Museum, Colorado Historical Society, Santa Barbara Museum of Natural History, Museum of New Mexico, Illinois State Museum, Oklahoma Museum of Natural History, and Rochester Museum and Science Center.

280. This element is particularly appealing to the institution in possession. Improper return of an object could leave the institution or its officers open to liability for unlawful conversion or breach of fiduciary duty.

281. Of course, in the case of actions to recover human remains, Native Americans contend that the party in possession or the government should fund the expense of reburial. Even if they were able to prevail on this point, however, the fact remains that most Native American groups have much more urgent needs for their resources than the financing of repatriation litigation.

unattractive prospect in these situations where so much could be gained by both sides through the development of a positive relationship, cooperation, and good faith negotiation.[282] Finally, litigation is an unattractive proposition for both sides in that it is very difficult to evaluate prospects for success. While generally the legal arguments that could be made on behalf of each side in this matter are meritorious, very few cases of this sort have been reported. Thus, it is difficult to predict how one may fare before a court of law. For all of these reasons, it is important to consider what sort of alternative dispute resolution mechanism might be useful in assisting the parties in reaching solutions to these issues.

In actions involving state claims, the parties may decide to engage in arbitration under a codified version of the Uniform Arbitration Act.[283] This forum, although far from being ideal, may provide an adequate alternative through which to resolve these disputes when they involve private parties.

---

282. Indeed, it has been to a large extent the absence of such a relationship that has created the problem with possession of cultural objects by museums. These institutions, as well as the scientists associated with these institutions, must strive to explain and share the fruits of the research performed on these objects. Moreover, Native American partnership and participation must be sought so as to better understand these cultural and religious objects.

283. UNIFORM ARBITRATION ACT § 1-25 (1955 & Supp. 1990). At this time, thirty-three states have adopted some form of this uniform act. *See* ALASKA STAT. §§ 9.43.010-.43.180 (1983 & Supp. 1988); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1518 (1982 & Supp. 1988); ARK. STAT. ANN. §§ 16-108-201 to -108-224 (1987); COLO. REV. STAT. §§ 13-22-201 to -22-223 (1987); DEL. CODE ANN. tit. 10, §§ 5701-5725 (1974 & Supp. 1988); D.C. CODE ANN. §§ 16-4301 to -4319 (1981); IDAHO CODE §§ 7-901 to -922 (1979 & Supp. 1989); ILL. ANN. STAT. ch. 10, paras. 101-123 (Smith-Hurd 1975 & Supp. 1989); IND. CODE §§ 34-4-2-1 to -4-2-22 (1986); IOWA CODE §§ 679A.1-.19 (1987); KAN. STAT. ANN. §§ 5-401 to -422 (1982); MNE. REV. STAT. ANN. tit. 14, §§ 5927-5949 (1980 & Supp. 1988); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1984 & Supp. 1988); MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (1988); MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (West 1987); MINN. STAT. §§ 572.08-572.30 (1988); MO. REV. STAT. §§ 435.350-.470 (1989); MONT. CODE ANN. §§ 27-5-111 to -5-324 (1988); NEB. REV. STAT. §§ 25-2601 to -2622 (Supp. 1988); NEV. REV. STAT. §§ 38.015-.205 (1987); N.M. STAT. ANN. §§ 44-7-1 to -7-22 (1978 & Supp. 1987); N.C. GEN. STAT. §§ 1-567.1 to -567.20 (1983 & Supp. 1988); N.D. CENT. CODE §§ 32-29.2-01 to .2-20 (1976 & Supp. 1989); OKLA. STAT. tit. 15, §§ 801-818 (Supp. 1989); 42 PA. CONS. STAT. ANN. §§ 7301-7320 (1982 & Supp. 1989); S.C. CODE ANN. §§ 15-48-10 to -48-240 (1976 & Supp. 1989); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to -25A-38 (1987); TENN. CODE ANN. §§ 29-5-301 to -5-320 (Supp. 1988); TEX. REV. CIV. STAT. ANN. arts. 224 to 238-6 (Vernon 1973 & Supp. 1989); UTAH CODE ANN. §§ 78-31a-1 to -31a-18 (1987); VT. STAT. ANN. tit. 12, §§ 5651-5681 (Supp. 1988); VA. CODE ANN. §§ 8.01-581.01 to -581.016 (1984 & Supp. 1988); WYO. STAT. §§ 1-36-101 to -36-119 (1977 & Supp. 1988).

There remains, however, a need to implement a similar type of dispute resolving process on the federal level.

Despite the shortcomings of the Native American Museum Claims Commission,[284] such a commission or decision-making forum has great potential for conflict resolution as an intermediary step between initial attempts by Native Americans and museums, as well as private collectors, to resolve requests for the transfer of possession of objects and the actual filing of lawsuits. This forum should be available to resolve disputes regarding all Native American cultural and religious objects, funerary objects, and human remains. To ensure that good faith attempts at negotiation are made, there must be a period of time between when a request is formally made and when the parties will be permitted to come before this alternative dispute resolving forum. A reasonable period of time may be six months to a year. While it is important to promote some movement on the part of the museums to address these requests by imposing the potential of third-party review, it is more important to permit sufficient time in which fruitful discussions and negotiations may take place between the parties. The parties should only turn to the forum when their attempts at negotiation have completely stalled.

The forum could be implemented on an institutional level[285] or as an administrative body. An administrative or agency forum would be preferable because it would provide greater perceived, if not actual, impartiality. Consequently, all interested parties would be more amenable to participation in the forum's hearing of the issues. Correspondingly, the parties would be more willing to accept the forum's decision as a final resolution of the dispute. The forum's decision would also receive greater deference from the parties and, if necessary, by the district court on review.

Rules for standing, or the right to invoke this process, should be interpreted liberally.[286] Just as in most administrative hearings or proceedings, everyone who has a legitimate or genuine interest in the object or human remain in question should be permitted to participate. The important aspect of this proceeding is not so much to ensure that only truly interested parties be permitted to participate, but rather to ensure that all of the relevant interests and concerns be fully and accurately represented and fairly considered. The

284. *See supra* text accompanying notes 254-60.

285. For instance, a museum might attempt to organize a dispute resolving forum within the institution to resolve these types of requests. While this would demonstrate good faith, Native American parties may be reluctant to avail themselves of such a forum as they may view it as less than fully objective or impartial. Another alternative might be for the parties to enter into a private, nonbinding arbitration process.

286. Any party who is able to demonstrate a reasonable biological, cultural, or scientific interest in the object(s) or human remains in question should have standing to participate in the proceedings.

Boyd: Boyd: Religious and Cultural Objects

crucial issue is not who may participate, but rather who should be permitted to exercise the right of possession and control. Thus, an emphasis must be placed on good faith attempts to notify all interested parties of the hearing.[287]

In adjudicating each request, the forum must expressly consider all of the interests raised by the parties and provide an explanation as to the significance of each concern in reaching the ultimate decision. Each request must be dealt with on a case-by-case basis. Thus, standards will arise from precedent rather than out of some arbitrarily drawn set of substantive guidelines. For this reason, it is best to have a single forum so as to ensure continuity in decisionmaking. Standards of law—tribal, state, and federal—shall also be considered. The forum would be required to fully explain and document with authority its conclusions of law.[288] Where possible, the forum must attempt to devise a compromise in the adjudication of possessory rights so as to best serve the interests of all parties involved.

It is important for several reasons that this forum go to the disputes rather than that the parties be compelled to go to the forum.[289] In other words, the forum should travel to the place most convenient to the parties rather than sitting in the place most convenient to itself. First, it must be recognized that different geographic regions contain different parties with different values and concerns. It is imperative that the forum be aware and responsive to these regional differences. Genuine understanding and sensitivity can best be attained by requiring the forum to sit in the region. Second, the forum must be made as accessible as possible. Neither the museums nor the Native Americans should be expected to expend great resources traveling to

---

287. For instance, at the time the petition is filed, the claimant shall provide the forum with a complete list of the names and addresses of all parties the claimant is aware of who may have an interest in the disposition of the object(s) or human remains in question. At the time the reply is filed, the adverse party shall similarly provide the forum with a complete list of the names and addresses of all parties the adverse party is aware of who may have an interest in the object or human remains in question. The forum shall promptly attempt to notify by mail all of these parties, as well as all parties that the forum is aware of who may have an interest in the particular claim. The notice shall indicate that (1) the matter has been filed, (2) the time and date that has been set for a hearing on the matter, (3) their right to file a written statement with the forum, and (4) their right to address the forum at the hearing.

288. In its decision, the forum should expressly address the significant interests raised by the parties relative to its decision, provide citations to relevant legal principles and authority, and explain any professional standards it may have considered.

289. To the extent possible, the forum shall hold its hearings in the general geographic region associated with the object(s) or human remains at a location which is reasonably accessible to the parties formally engaged in the dispute, as well as all other interested parties.

Published by University of Missouri School of Law Scholarship Repository, 1990

adjudicate their claims to these objects and human remains. It is very possible that such a circumstance would have a chilling effect on the raising of many of these claims.

Finally, the factual findings made by the forum should receive substantial deference by any reviewing court. The members who would make up the forum should have backgrounds that will give the forum collective expertise in the applicable law, related sciences, and relevant Native American custom, culture, and religion. This expertise is essential for the forum's factual determinations to receive the respect of the parties and the deference of the courts. Conclusions on matters of law, of course, must receive *de novo* review. Participation in this alternative dispute resolution process must in no way deprive any of the parties of their legal rights of access to the courts.

X. CONCLUSION

The frequency of requests made by Native Americans and Native American groups for the possession and control of human remains, funerary objects, religious objects, and objects associated with their cultures that are currently contained in public and private collections is rising. Native Americans desire possession and control of sacred objects for ceremonial use, cultural objects to better identify with their heritage, and human remains of their ancestors for reinterment. Institutions and scientists have been reluctant to grant these requests because of the great scientific value of these remains and objects.

While there is extensive federal and state statutory law currently in place that provides prospective protection of the interests raised by both the Native American and scientific communities, the law is completely undeveloped as to the ownership rights to objects already collected. Litigation is, of course, an alternative to both parties. Besides the unpredictability of the outcome due to the undeveloped nature of the law in this area, this alternative is unattractive because of the great expense and hostility that litigation would create. There is a need for an alternative manner in which to resolve these disputes.

A solution may involve the creation of a forum in which the concerns of all interested parties could be voiced, and, where possible, a constructive compromise could be crafted. This is the most sensible manner in which to regulate the finite number of Native American religious and cultural objects that are currently in the collections of America's public museums. Such a forum would also provide a vehicle for responsible and respectful disposition of Native American funerary objects and human remains that have been disintered. We must proceed slowly and with care so as to resolve these vital issues properly and thereby avoid the unnecessary loss of this very important body of archaeological data. We must also make significant progress in order to promote good will and develop a constructive partnership between Native Americans and public museums.